Court File No. DC-24-00000718-00JR

ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

KEVIN ALEXANDER MCLEAN

APPLICANT

- AND -

TD HOME AND AUTO INSURANCE COMPANY, SECURITY NATIONAL INSURANCE COMPANY, TD GENERAL INSURANCE COMPANY, EXECUTIVE DIRECTOR, LICENCE APPEAL TRIBUNAL, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, REPRESENTED BY EXECUTIVE CHAIR OF TRIBUNALS ONTARIO IN MR. SEAN WEIR, THE ATTORNEY GENERAL OF ONTARIO

RESPONDENTS

BOOK OF AUTHORITIES
COMPREHENSIVE: ENTIRETY OF THE JRPA PROCEEDING
SUBJECT: A CHIEF JUSTICE OF THE SCJ OR PRESIDENT OF THE DIVISIONAL COURT'S CASE DUE TO THE CHALLENGES, CONTROVERSIES, ETHICAL CONCERNS AND THE FOCUS BEING ON THE INTEGRITY OF THE DIVISIONAL COURT AS A WHOLE

NOTA BENE: as a courtesy to the President of the Divisional Court for outstanding motions in matters not adjudicated et al

Tab	Heading/Subheading/Salient Headnote/Summary/Rel.	Source Law or Authority	Salience to Motions and Relief Sought
	CHAPTER #1: Source Laws		
	CHAPTER #1(A): Supreme Laws of the Lands (Tabs #1 and #2)		
#1		*The Constitution Act, 1867*, 30 & 31 Vict, c 3 (formerly, the *BNA Act, 1867*) (the "*Constitution Act, 1867*"), section 96 to 101 (the "**Judicature Sections**")	
#2		*The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11 (the "*Constitution Act, 1982*")	
	CHAPTER #1(B): *Judges Act* and Regulation		
#3		*Judges Act*, RSC 1985, c J-1 (the "*Judges Act*")	
#4		*Canadian Judicial Council Inquiries and Investigations By-laws*, 2015, SOR/2015-203, (replaced the previous CJC inquiries and Investigations by-laws of 2002 SOR 2002-371)	
	CHAPTER #1(C): Supreme Court Act and Registrars		
#5		*Supreme Court Act*, RSC 1985, c S-26, with specific reference to section 18 (the "*Supreme Court Act*")	

#6		Rules of the Supreme Court of Canada, SOR/2002-156, sections 12, 13, 73 and 78 ("*SCC Rules*")	
	CHAPTER #1C)(I) Comparison of Registrars between the Supreme Court of Canada Registrar and the Divisional Court Registrar		
		SCJ: must be a called lawyer and have five years experience and can act in the capacity as a judge (near or somewhat member of the judiciary) i.e. a quasi-judicial officer vs. Registrar of the divisional court which is employed by the executive branch	
7		*Sydel v. Canada (Attorney General)*, 2013 FC 1116 ["*Sydel*"]	Applicability Herein: The SCC Registrar has far more duties and powers and can act as a judge in certain situations. The Registrar of the Divisional Court cannot act in such capacity although it can sign orders that represent or reflect an issued order of a judge. The Registrar can also sign consent orders in certain situations. However, as noted in Appendices (see: Appendix #_), the Rules of Civil Procedure have changed drastically in relation to Civil Case Management (see: Rule 77) wherein the Registrar does NOT have power as of late 2000's to assign proceedings to case management.

	CHAPTER #1(D): *PIPEDA* and *Evidence Act* (Canada) and regulations		
		CHAPTER #1(D)(I): *PIPEDA* (statute)	
8		*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 ("*PIPEDA*")	Applicability Herein: (nota bene: Amendments to *PIPEDA* in 2015, becoming effective in November 2018: In 2018, the amendments to the Digital Privacy Act came into force) Applicability Herein: *PIPEDA* works in unison with the Ontario Claim Forms ("OCF") and since 2014, there have been a litany of investigation report that shape the duties of insurance companies and those providing consent to an insurer. Simply put, a general question of central importance to the legal system as a whole is whether insurance companies in a group of insurance companies, although having different insurance company profiles, distinct at law, different FSRA registration numbers et al, are "one and the same" or separate persons.
	CHAPTER #1(D)(I)(a): Regulations under *PIPEDA*		
#9		*Breach of Security Safeguards Regulations*, SOR/2018-64 (the "BSS Regulation")	

#10		*Electronic Commerce Protection Regulations,* SOR/2013-221 (see: pages __ to 374)	
#11		*Regulations Specifying Publicly Available Information,* SOR/2001-7 (see: pages 375 to 376)	
	CHAPTER #1(E): Canada *Evidence Act* and joint regulation of CEA and *PIPEDA*		
#12		*Canada Evidence Act, RSC 1985, c C-5* (the "Federal *Evidence Act*")	
	CHAPTER #1(E)(I)::Joint Regulation of *PIPEDA* and Canada *Evidence Act*		
#13		*Secure Electronic Signature Regulations, SOR/2005-30* ("*SOSR*") (see: page 440 to	Applicability Herein: ▪ False Information Package; ▪ False Criminal Code Form 2 Information ▪ False Intake Court Endorsement [Sic] ▪ Concealing Madam Justice Shore's identity ▪
	Repealed Regulation in 2015 under *PIPEDA*		

#14		*Regulations Specifying Investigative Bodies*, SOR/2001-6[1]	
	CHAPTER #1(F): Judicial Review in Ontario		
#15		*Judicial Review Procedure Act*, RSO 1990, c J.1 (the "*JRPA*")	Applicability Herein:
	CHAPTER #1(G): *Courts of Justice Act*		
#16		*Courts of Justice Act,* RSO 1990, c C.43 (the "*CJA*")	Applicability Herein: Section 18 Part V: Administration of the Courts
	CHAPTER #1(G)(I): Regulations under the CJA		
#17		*Rules of Civil Procedure*, RRO 1990, Reg 194 (the "*Civil Rules*")	
#18		Designation of Regions, RRO 1990, Reg 18 (the "***Region Designation Regulation***")	

	CHAPTER #1(H): *Legislation Act*		
		Passed pursuant to the *Access To Justice Act, 2006* (see: infra, Tab #___)	
#19		*Legislation Act*, 2006, SO 2006, c 21, Sch F (the "Leg. Act")	
	CHAPTER #1(I): *Public Service of Ontario Act*[2] and Regulations		
		Passed in 2006, replacing the former *Public Service Act*	
#20		*Public Service of Ontario Act, 2006*, SO 2006, c 35, Sch A (the "*PSOA*" or "*PSO Act*")	
		CHAPTER #1(I)(i):Regulations under the PSOA	
#21		*Conflict of Interest Commissioner: Powers, Duties and Functions, O Reg 384/07* (see: pages to _	
#22		*Dismissal Without Cause (Part III of the Act), O Reg 380/07* (see: pages 1174 to	
#23		*Ethics Executive: Additional Powers, Duties and Functions Under Part IV of the Act, O Reg 383/07* (see: pages 1176 to 1177)	

#24		*Oaths and Affirmations*, O Reg 373/07 (see pages 1179 to 1181)	Applicability Herein: the swearing of oaths prior to commencing a position with the Ontario government particularly in the capacity of court services including Registrars,
#25		*Provision of Legal Services Under Section 147 of the Act*, O Reg 385/07 (see: pages 1182 to 1184)	
#26		*Public Bodies and Commission Public Bodies - Definitions,* O Reg 146/10 (see: pages 1185 to 1195)	
27		*Suspension Pending Investigation (Part III of the Act)*, O Reg 379/07 (see: pages 1196 to 1197).	
	CHAPTER #1(J): *Administration of Justice Act* and Regulations		
	CHAPTER #1(J)(i): The Statute		
28		*Administration of Justice Act,* RSO 1990, c A.6 (see: 1998 to 1204)	
		CHAPTER #1(J)(ii): the Four Regulations under the Administration of Justice Act	

#29		*Superior Court of Justice and Court of Appeal Fees*, Reg 293/92 (see: pages 1206 to 1213)	
#30		*Fees and Expenses - Sheriff's Officers, Process Servers, Escorts and Municipal Police Forces*, RRO 1990, Reg 6 (see: pages 1214 to 1216)	
#31		*Fees for Court Transcripts*, O Reg 94/14 (see: Pages 1217 to 1220)	
#32		*Sheriffs - Fees*, O Reg 294/92 (see: Pages 1221 to 1224)	
	CHAPTER #1(K): *EVIDENCE ACT* AND REGULATIONS		
	CHAPTER #1(K)(i): the Statute (*Evidence Act*)		

#33		*Evidence Act*, RSO 1990, c E.23 (the "*Evidence Act* Ontario") (see: pages to 1245)	
		CHAPTER #1(K)(ii): The Regulation under the *Evidence Act*	
34		Certification of Recordings and Transcripts, O Reg 158/03 (the "Recordings Certification Regulation") (see: pages 1246 to 1249)	
	CHAPTER #1(L): SPPA		
35		*Statutory Powers Procedure Act*, RSO 1990, c S.22 (the "SPPA") (see: pages 1250 to 1280)	Applicability Herein: Section 20 of the SPPA : section regarding bench warrants through SCJ (Toronto Region)
	CHAPTER #1(M): *LATA*		
#36		Licence Appeal Tribunal Act, 1999, SO 1999, c 12, Sched G ("LAT Act" or "*LATA*") (see: pages 1281 to 1292	Applicability Herein: Changed in 2014 and effective 2016 Statutory appeals on questions of law
	CHAPTER #1(N): THE ACCOUNTABILITY AND GOVERNANCE OF ADJUDICATIVE TRIBUNALS		

#37		*Adjudicative Tribunals Accountability, Governance and Appointments Act, 200*9, SO 2009, c 33, Sch 5 (the "*ATAGAA*") (see: Pages 1294 to 1302)	
		CHAPTER #1(N)(ii): The Regulations under the *Adjudicative Tribunals Accountability Governance Act*	
#38		Adjudicative Tribunals and Clusters, O Reg 126/10 (the "AT Clustering Regulation") (see: pages 1303 to 1306)	
#39		Appointment to Adjudicative Tribunals, O Reg 88/11 (the "AT Appointment Regulation") (see: 1307 to 1310	
#40		Business Plan — Contents, O Reg 89/11 (the "AT Business Plan Regulation") (see: Pages 1311 o 1313)	
#41		Deadlines re Accountability Documents, O Reg 90/11 (the "AT Accountability Document Regulation") (see: pages 1314 to 1316)	

#42		Ethics Plan - Contents, O Reg 91/11 (the "AT Ethic Plan Regulation") (see: pages 1317 to 1319)	Applicability Herein: must be familiar with Part IV (Ethical Conduct) of the PSOA 2006)
	CHAPTER #1(O): THE ADJUDICATIVE RECORDS OF ADJUDICATIVE TRIBUNALS		
	CHAPTER #1(O)(i): The 2019 TARA Statute		
#43		Tribunal Adjudicative Records Act, 2019, SO 2019, c 7, Sch 60 ("TARA") (see: page 1320 to 1324)	Applicability Herein: claims can be advanced against members or employees of tribunal for bad faith and trust)
		CHAPTER #1(O)(ii): The TARA Reg.	
#44		General, O Reg 211/19 ("TARA General Regulation") (see: pages 1325 to	

	CHAPTER #1(P): INSURANCE ACT AND REGULATIONS		
	CHAPTER #1(P)(I): Legislature Passed The Insurance Act (Ontario) 1990.		
#45		Insurance Act, RSO 1990, c I.8 (the "*Insurance Act (Ontario)*"), first page, 101.1, sections 280 to 287 (see: to 1400)	
		With The Passing Of The Insurance Act, A Variety Of Regulations Were Passed Under Said Enabling Legislation. The Ones That Are Still In Force And That Are Relevant Herein Are :	
	CHAPTER #1(P)(II): CURRENT AND VALID REGULATIONS under the Ontario Insurance Act		
		CHAPTER #1(P)(II)(a): Reg 664: Unreasonable Withholding or Delay of Benefits	

#46		Automobile Insurance, Reg 664/90 ("Automobile Insurance Regulation" or "Reg 664"), section 10 (see: pages 1401 to _1404)	
		CHAPTER #1(P)(II)(b):Reg 283: Disputes between Insurers	
#47		Disputes Between Insurers, O Reg 283/95 ("Disputes Between Insurers Regulation" or "Reg 283") [3] [4] [5] (see: page 1405 to 1411)	
	A	PREVIOUS VERSIONS OF REG 283 FROM 1998 TO 2010 (see: pages 1412 TO 1419)	
		CHAPTER #1(P)(II)(c):Reg 347: Agents (relate to the selling of insurance)	
#48		Agents, O Reg 347/04 ("Reg 347") (SEE: pages 1420 to 1431)	

		CHAPTER #1(P)(II)(d):Reg 408: Admin Penalties	
#49		Administrative Penalties, O Reg 408/12 ("Reg 408") (see: pages 1433 to 1447)	
	CHAPTER #1(P)(II)(e): WHAT CONSTITUTES AN "AUTOMOBILE INSURER" IN ONTARIO? (passed in 2006)		
#50		Prescribed Information for the Purposes of Section 101.1 of the Act, O Reg 534/06 ("Reg 534") (see: pages 1448 to 1451)	Applicability Herein: Many different kinds of automobile insurers – sole threshold is that a licensed insurer undertakes or agrees to offer or undertakes a contract of automobile insurance which can be: Private Passenger Commercial Public (Government public) (Non-government public)
			"automobile insurer" means an insurer licensed under the Act to undertake or agree to offer or undertake a contract of automobile insurance in Ontario (NOTA BENE: salient point: the LGIC did not limit the same to private passenger insurance "insured" means an insured as defined in subsection 224 (1) of the Act "personal information" means information that is personal information for the purposes of the *Personal Information Protection and Electronic*

			Documents Act (Canada) and personal health information for the purposes of the *Personal Health Information Protection Act, 2004*. ("renseignements personnels") O. Reg. 534/06, s. 1; O. Reg. 39/10, s. 1.
	CHAPTER #1(P)III): NO FAULT INSURANCE SYSTEM THE NO-FAULT INSURANCE SYSTEM AROSE IN THE EARLY 1990'S UNDER THE THEN NDP GOVERNMENT.		
		CHAPTER #1(P)(III)(a): *SABS* 1990 (to 1993)	
			IN 1993, THE LGIC PASSED THE FIRST ITERATION OF *SABS* (SEE: STATUTORY ACCIDENT BENEFITS SCHEDULE - ACCIDENTS AFTER DECEMBER 31, 1993 AND BEFORE NOVEMBER 1, 1996, O REG 776/93) ("REG 776/93", "REG 776" OR "*SABS* 1993")
51		Statutory Accident Benefits Schedule - Accidents Before January 1, 1994, RRO 1990, Reg 672 ("*SABS* 1990" or "*SABS* Reg 672") (see: pages 1452 to 1465)	
	CHAPTER #1(P)(III)(b): *SABS* 1993 (to 1996)		

52		Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996, O Reg 776/93 ("*SABS* 1993") (see: Pages 1467 to 1516)	
	CHAPTER #1(P)(III)(c): *SABS* 1996 or 1996 *SABS*: 1996 (November 1), the LGIC repealed *SABS* 776, and replaced it with *SABS* 1996		(see: Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996, O Reg 403/96 ("*SABS* 1996", "*SABS* 403").
53		Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996, O Reg 403/96 ("*SABS* 1996") (see: Pages 1517 to 1590)	
	CHAPTER #1(P)(III)(D): *SABS* 2010 :LGIC PASSES THE THIRD ITERATION OF *SABS* ("*SABS* 2010"):		
#54		Statutory Accident Benefits Schedule, O Reg 34/10 ("*SABS* 2010" or "*SABS* Reg 34") (see: pages 1591 to 1673) (nota bene: Statutory Accident Benefits Schedule, O Reg 34/10, amended by Eg 347/13 ("*SABS* 2014 Version")[6] Statutory Accident Benefits Schedule Last amendment: O. Reg. 116/16 ("***SABS* 2016 Version**")[7]	

	CHAPTER #1(Q): AMENDING STATUTES		
55		*An Act to promote access to justice by amending or repealing various Acts and by enacting the Legislation Act, 2006* *Access to Justice Act, 2006,* S.O. 2006, c. 21 - Bill 14 (see: pages 1673 to 1909)	
	CHAPTER #1(R): AMENDING REGULATIONS UNDER THE *RULES OF CIVIL PROCEDURE*		
56	Amending Regulations of the Rules of Civil Procedure (Reg 194) (nota bene: O. Reg. 535/92; O. Reg. 484/94; O. Reg. 69/95; O. Reg. 442/97 are not printed) (see: page 1910 to		
	(see: page 1911 to 2154)		
		1998	

		O. Reg. 570/98 Key amendments introduced by O Reg 570/98 included: Case Management: Amendments were made to Rule 77, which deals with civil case management, including provisions related to class proceedings and the authority of case management judges. Section 53: Extension or Abridgment of Time (4) The time provided for service of a report or supplementary report under this rule may be extended or abridged, (a) by the judge or associate judge at the pre-trial conference or at any conference under Rule 77; (b) by the court, on motion; or (c) on the written consent of the parties, except that the parties may not consent to an extension that would affect the scheduled trial date. O. Reg. 570/98. .[8]	Applicability Herein: as of 1998, the rules for case management
	(see: page 1941)		
		O. Reg. 292/99 altering requirements for surety companies in legal documents, impacting how parties initiated court actions like judicial reviews. Key Aspects of O. Reg. 292/99: Court Structure Updates: It modernized forms by replacing older court names (like "Ontario Court (General Division)") with the current "Superior Court of Justice" designation. Procedural Changes:	Applicability Herein:

		Rule 68: Judicial Review changes: It altered specific rules and forms, such as those related to judicial review applications (Rule 68.01) Surety company requirements: requirements for surety companies acting as guarantors in legal processes. Context: This regulation was part of ongoing updates to Ontario's legal framework, ensuring rules kept pace with changes in the court system.	
	TAB C: NOVEMBER 2001		
		O. Reg. 427/01 (November) Amended Existing Rules: It made specific changes to Regulation 194 (Rules of Civil Procedure), often by adding or revoking clauses and substituting language. Solicitor Authority: It clarified the court's power to stay proceedings or order costs if a solicitor commenced an action without authorization, or if a client hadn't authorized it, notes this legal resource. Data & Information: It updated rule 30.01(1) to include "data and information" rather than just "information," reflecting technological changes. Procedural Updates: It dealt with various procedural aspects, impacting how certain documents are handled and proceedings are managed.	Applicability Herein:

	TAB A: 2001		
		O. Reg. 284/01 Key changes introduced by this regulation included rules for simplified procedures for actions with claims of $200,000 or less, and specific provisions for the costs of motions and abandoned proceedings. Key Aspects of O. Reg. 284/01: Simplified Procedure (Rule 76): Introduced rules to make certain actions faster and less expensive, including limits on jury trials for these cases. Costs of Motions: Clarified when motion costs could be assessed and the consequences for failing to pay them, potentially leading to dismissal or a stay of proceedings. Abandonment of Claims: Prevented parties from abandoning a claim (like a loss of income) to fit under the simplified procedure and then re-filing it later, ensuring finality. Assessment of Costs: Provided guidelines for assessing lawyers' fees and disbursements, ensuring consistency with tariffs. In essence, O. Reg. 284/01 aimed to improve efficiency in Ontario's civil courts by updating rules around smaller claims and procedural costs	
	TAB B: 2004		

		O. Reg. 14/04: Electronic Issuing: Allowed documents to be issued electronically using Ministry-authorized software, streamlining the process. Electronic Document Standards: Revoked old definitions and established new standards for electronic documents, allowing them to meet Ministry-approved software specifications. Amended Rules: Modified various rules (like Rule 4.01 and Rule 4.05) within the main body of the Rules of Civil Procedure (R.R.O. 1990, Reg. 194) to reflect these technological advancements.	
	2004		
	TAB C: 2005 amendments to the Rules of Civil Procedure (second amendment in 2004)		
		Key Aspects of O. Reg. 131/04: Amended Rules of Civil Procedure: It modified existing rules, particularly in Section 1 (General) and Rule 4 (Court Documents) and Rule 17 (Service Outside Ontario). Document Formatting: It established stricter standards for printed documents, requiring double spacing and specific margins (e.g., 40mm left margin) for clarity. Affidavit Standards: It addressed the content and format of affidavits, which are crucial sworn statements in court, with consequences for non-compliance.	

		Service Outside Ontario: It clarified when and how legal documents could be served on parties located outside Ontario, including rules for originating processes like Statements of Claim.	
	2005		
	TAB F: 2005 Amendments to the Rules of Civil Procedure		
		O. Reg. 131/04: Key Aspects of O. Reg. 131/04: Amended Rules of Civil Procedure: It modified existing rules, particularly in Section 1 (General) and Rule 4 (Court Documents) and Rule 17 (Service Outside Ontario). Document Formatting: It established stricter standards for printed documents, requiring double spacing and specific margins (e.g., 40mm left margin) for clarity. Affidavit Standards: It addressed the content and format of affidavits, which are crucial sworn statements in court, with consequences for non-compliance. Service Outside Ontario: It clarified when and how legal documents could be served on parties located outside Ontario, including rules for originating processes like Statements of Claim.	

	TAB G: 2005 (second amendment in 2005 to the Rules of Civil Procedure)		
		Key Aspects of O. Reg. 42/05: Source: It amended the main Rules of Civil Procedure, R.R.O. 1990, Reg. 194. Main Purpose: To provide clearer procedures and expanded judicial discretion for Interpleader applications under Rule 43.04. Interpleader Orders: Allows a stakeholder (like a bank or insurer) facing competing claims to a single asset (money or property) to bring the matter to court. Court Powers: The court can order the stakeholder to deposit the asset, sell it, declare the stakeholder's liability extinguished, and determine who gets the asset, including awarding costs. Forms: **Costs Outline: new form**	Applicability Herein: Focused on interpleader which is not at issue per se Costs outline is relevant as per the Applicant's costs outline for motions #1 to #4 and potentially Motions #4 and #5
	TAB H: 2005 (Third Amendment of the Rules of Civil Procedure in 2005)		
		O. Reg. 260/05 (came into force July 2005) Definitions: Amended the definition of "person" to include a party to a proceeding and clarified the definition of "disability".	Applicability Herein: Form 14F is not applicable for electronically submitted filings for issuance. Only hard copy filed documents : check party versus other person language

		Motions & Applications: Introduced requirements for filing specific forms (like Form 14F) with notices of application. Discovery Process: Changed rules regarding the cost and process for producing documents during discovery. Failure to Answer: Addressed consequences for failing to answer questions or produce documents during discovery. Language Amendments: Corrected minor language issues, such as changing "party or person" to "party or other person" in some instances.	
	POST THE PASSAGE OF THE ACCESS TO JUSTICE ACT, 2006		
	TAB I: 2007 Amendments to the Rules of Civil Procedure		
		O. Reg. 575/07(published and effective on January 2008) Main Change: The most significant change was a linguistic update, striking out "solicitor" and replacing it with "lawyer" in various rules, reflecting modern legal terminology. Service of documents et al: It applied to proceedings in the Court of Appeal and Superior Court of Justice, governing how parties serve documents, conduct examinations, and manage other aspects of civil litigation.	Applicability Herein: consistent changes with the Access to Justice Act 2006 wherein the language of lawyer was more consistent with lawyer licensee under the LSA and LSO By-Laws.

	Tab I: Amendments to the Rules of Civil Procedure in 2008		
		O. Reg. 438/08 Key Changes Introduced by O. Reg. 438/08: Expert Duty (Rule 4.1): Established a strict duty for expert witnesses to provide independent opinions, requiring them to sign a certificate acknowledging this responsibility, significantly impacting expert evidence. Pre-Trial Conferences (Rule 50): Mandated pre-trial conferences for actions set down for trial, requiring parties to discuss simplification, liability, damages, and trial length, with reports placed with the trial record. Status Notices & Hearings (Rule 48.1): Introduced a process where the registrar sends a notice for actions inactive for two years, potentially leading to dismissal for delay if not actively pursued. Discovery Plans: Required parties to create discovery plans, consulting principles for electronic discovery (the principles outlined in Sedona Principles), to manage the discovery process efficiently. Inference from Evidence: Allowed courts to draw reasonable inferences from evidence and better evaluate witness credibility. Simplified Procedure Limits (Rule 76): Restricted certain discovery methods, like written discovery questions, in simplified actions. Impact: These changes aimed to reduce delays, manage costs, and improve	**Applicability Herein:** pre-trial conferences apply to trials. Nota bene: there are some odd language issues in Rule 50 but nonetheless Rule 77 is paramount to other rules in the Rules of Civil Procedure. Rule 50 has a different purpose than Rule 77. Rule 50 is titled "Conferences" and Rule 77 is titled, "Civil Case Management" Rule 50 has its purpose: 50.01 The purpose of this Rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner. O. Reg. 438/08, s. 47. NOTA BENE: both Rule 50.01 and Rule 77.01 were passed under the same regulation. Rule 77: **77.01** (1) The purpose of this Rule is to establish a case management system that provides case management only of those proceedings for which a need for the court's intervention is demonstrated and only to the degree that is appropriate, as determined in

		the fairness and predictability of civil trials in Ontario. They represented a major overhaul of the Rules of Civil Procedure, significantly altering litigation practice from their implementation.	reliance on the criteria set out in this Rule. O. Reg. 438/08, s. 64. Rule 77 only applies to City of Toronto, Ottawa and County of Essex. In effect, only the capital of Ontario and capital of Canada with respect to "Cities". However, Rule 77 is paramount to any other rule in the Rules of Civil Procedure where there is a conflict between a provision in Rule 77 and a provision in any other Rule (see: Rule 77.02(4)). As such, for JRPA Applications, Rule 77 and all of its provisions are paramount particularly between Rule 77 and Rule 50. Rule 50.03 is titled **"Pre-Trial Conferences for Applications"** contains somewhat of a misnomer or internally inconsistent language because only an "Action" is one that can be set for trial. 50.03 In an application, a judge may at any time, on his or her own initiative or at a party's request, direct that a pre-trial conference be held before a judge or associate judge. O. Reg. 170/14, s. 13; O. Reg. 383/21, s. 15. Rule 50.03, being passed by multiple amendments in 2014 and 2021, relates only to a judge, whereas the comparative subrule is that of Rule 77.05. Rule 77.05 is paramount to Rule 50.03. Rule 77.05 states the following: Assignment for Case Management On Consent of Parties 77.05 (1) A regional senior judge or, subject to the direction of a regional senior judge, any judge or associate

			judge may, with the consent of all parties, assign a proceeding to which this Rule may apply for case management under this Rule. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15. No Consent (2) At any time on or after the filing of the first defence in a proceeding to which this Rule may apply, a regional senior judge or, subject to the direction of a regional senior judge, any judge or associate judge may assign the proceeding for case management under this Rule, (a) on his or her own initiative; or (b) on the request of a party or on motion if the court requires it. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15 As there is no multiple proceedings issue, Rule 77.05(4) requires the following to be considered by way of criteria: Criteria (4) In considering whether to assign a proceeding for case management, the regional senior judge, other judge or associate judge shall have regard to all the relevant circumstances, including any or all of the following: 1. The purpose set out in subrule 77.01 (1). 2. The complexity of the issues of fact or law. 3. The importance to the public of the issues of fact or law. 4. The number and type of parties or prospective parties, and whether they are represented.

			5. The number of proceedings involving the same or similar parties or causes of action. 6. The amount of intervention by the court that the proceeding is likely to require. 7. The time required for discovery, if applicable, and for preparation for trial or hearing. 8. In the case of an action, the number of expert witnesses and other witnesses. 9. The time required for the trial or hearing. 10. Whether there has been substantial delay in the conduct of the proceeding. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15. The distinctions between Rule 77.05(1-2,4) and Rule 50.03 are monumental on so many levels leaving aside the paramountcy of Rule 77 to Rule 50. Rue 77.05 is only triggered after the filing of First Defence by a Respondent (nota bene: change from previous language in the Rules of Civil Procedure for Rule 77 for "last defence" et al (see: Appendices). Rule 50.03 allows for a judge on request or initiative at "any time" to direct a pre-trial conference. The distinction between a conference and assigning a case for case management are also distinct in fact and at law. Seminal point: In this JRPA Proceeding, there was no filing of a First Defence and it is a Toronto Region matter. There was also NO assignment of the JRPA Proceeding

			to case management. As such, there was no assignment to a particular individual judge under Rule 77.06 of the Rules of Civil Procedure. Ergo, the Madam Justice Shore purported direction of compelling (purportedly) the parties to attend before her for a case conference was without any legal validity. The purported Madam Justice Shore direction was pursuant to the Ibula Email of January 7, 2025. Ergo, the Madam Justice Shore purported direction was impermissible in law for the following legal grounds: 1. There was no filing of a First Defence by any Respondent at the time of the request by the LAT on December 3, 2024; 2. At the time of the Madam Justice Shore purported direction, there was no filing of a First Deference by any Respondent; 3. There was no exercise of discretion by a judge, regional senior judge or associate judge (although not permitted) under Rule 77.05(4) although none would have been permitted 4. There could not have been any assignment to a particular judge in Shore J by the CJ of the SCJ, ACJ of the SCJ or a LAJ of the Divisional Court, and in fact there was none as no notice to the Applicant and Respondents was provided that Shore J was assigned to hear all steps in the proceeding but for the preclusion on her hearing the JRPA Application but for consent of the parties [sic: in relation to this JRPA Proceeding at the time]

			5. Until the Respondents "Delivered" their NOA's, they were not entitled to any steps in the JRPA Proceeding, to be served with documents in the JRPA proceeding, or to present evidence or submissions in the same (see: Rule 1.065 with reference to Form 68A) 6. Ergo, the purported Madam Justice Shore direction was a nullity, void ab initio, void on its face and of no force and effect. Ergo, all that flowed from the Purported Madam Justice Shore Direction through the Ibula Email was all void b initio. Void of void is void. Void ab initio is void from the time it was made. 7. Moreover, by Madam Justice Shore acting on her own volition to issue the purported Madam Justice Shore direction on January 7, 2025, through Ms. Ibula, who had no phone number with the Divisional Court, and under suspicious circumstances and no active email per se, are all aggravating circumstances but nonetheless void ab initio is void from the time it was made. 8. Further, as there was no power for Madam Justice Shore under Rule 50.03, any attempt to have done so was void ab initio. Madam Justice Shore could not rely and did not rely on any inherent jurisdiction (SCJ Judge only) but nonetheless any such purported attempt, although not de facto, would have been void (see: Baxter); 9. Moreover, as the language of pre-trial conference is

			utilized in relation to an application [sic], Rule 50.05 would have required not only he lawyers for the parties to appear at the pre-trial conference but also the parties themselves. 10. It remains now obvious that the reason that Madam Justice Shore breached the CJA and Rules of Civil Procedure (inter alia) was her prior undisclosed judicial involvement with the Applicant in the "Ex Parte In Camera Hearing" "Undisclosed Criminal Proceeding". This is address in NOM #3. 11. While void ab initio documents, step or orders are setting aside as a matter of right as they are nullities, to the extent that anything was an irregularity, the Applicant moved expeditiously and without knowledge of the same after taking any steps. 12. This issue of nullity and/or irregularity is distinct from that of conflicts of interest and/or fraud through discovery post-facto. 13. Moreover, since the Purported Madam Justice Shore Direction was not an "order", it amounts to a document to be set aside by NOM #3; 14. As such, anything that related to or involved Madam Justice Shore is without question void ab initio and must be set aside. There are other grounds cited with analytical precision from the facts to the law.

	TAB K: AMENDMENTS TO THE Rules of Civil Procedure IN 2013		
		O. Reg. 231/13 (2013) Key Aspects of O. Reg. 231/13: Limited Scope Retainers (Unbundled Legal Services): The regulation clarified how parties represented under these retainers are treated under the rules, essentially treating them as acting in person for many purposes, but with specific rules for their lawyer of record. Procedure Updates: It amended various rules, including those concerning how parties act, service of documents, and processes for transferring actions between courts.	Applicability Herein:
	TAB L: AMENDMENT TO THE Rules of Civil Procedure IN 2017	2017	
		O. Reg. 584/17 Significant amendments: to electronic filing, document management, and confirmation of filing for court documents, including establishing requirements for retaining original signed documents and confirming electronic filings through software. Modernization and digital Key Provisions of O. Reg. 584/17:	Applicability Herein: in 2017, the JSO Portal was the authorized software utilized introduced by the MAG with respect to electronic filings for documents to be issued or filed. SEMINAL DIFFERENCE BETWEEN JSO PORTAL RULES AND OCPP RULES: NOTICE OF ACCEPTED FILING (WITH CONFIRMATION) VS. SUBJECT TO CONFIRMATION

		Electronic Filing Confirmation: Introduced a "notice of accepted filing" via authorized software for electronic document submissions. [nota bene: this was removed in 2025 (October) under the OCPP for Toronto Region matters in the SCJ and the Divisional Court] **Retention of Original Documents:** Required parties to keep original paper documents (signed, certified, or commissioned) until after the appeal period expired and to make them available for inspection upon request. Civil Claims Online Portal: Addressed procedures related to this new online system for filing civil claims. Bilingual Documents: Amended rules regarding bilingual court documents. In essence, O. Reg. 584/17 was a pivotal regulatory update to bring Ontario's civil court procedures into the digital age, streamlining electronic interactions while maintaining safeguards for original records,	
	TAB M: AMENDMENTS TO THE Rules of Civil Procedure IN 2019		
		2019	

		O. Reg. 456/19 (EFFECTIVE MARCH 2020) (SIGNED BY FALGUNI DEBNATH, AS SHE THEN WAS AS THE SENIOR LEGAL OFFICER FOR THE CIVIL RULES COMMITTEE, SINCE THAT TIME CLO OF THE TPS AT MATERIAL TIMES) Key Amendments Introduced by O. Reg. 456/19 Electronic Filing: It permitted the electronic filing of various documents, including statements of defence, notices of discontinuance, defences to counterclaims/crossclaims, third-party claims, jury notices, and certificates of action under the Construction Act. Electronic Issuance: The regulation allowed any document to be issued electronically if the rules permitted electronic issuance. Electronic Signatures: The amendments also permitted the use of electronic signatures on court documents. Form Updates: Several forms were updated to accommodate the electronic filing system (e.g., adding requirements for email addresses on backsheets).	Applicability Herein: Ms. Debnath was the CLO of the TPS and was served on behalf of the TPS in relation to NOM #3 with TPS as Responding Party
	TAB N: Amendments to the Rules of Civil Procedure in 2020		

		O. Reg. 689/20 (came into effect in January 2021) Key Changes Introduced by O. Reg. 689/20: Virtual Proceedings: Parties now specify whether hearings, mediations, and examinations should occur in person, by teleconference, or videoconference, with mechanisms to resolve disagreements. Electronic Processes: The regulation introduced electronic signatures for judges and court staff, **electronic issuance of decisions**, and electronic sharing of documents. Modernization: It updated rules for document service, including allowing email service for many documents, and phased out requirements for fax numbers [nota bene: fax disappeared] <u>Orders: new requirements for orders including the separate document requirements (see: Rule 59.01 to 05)</u> Efficiency: These changes aimed to make the civil litigation process more efficient, cost-effective, and adaptable to modern technology.	Applicability Herein: the amendments to the Rules of Civil Procedure relating to orders are ones with a distinction of importance herein in that
	TAB O: Amendments to the Rules of Civil Procedure in 2020 (second amendment of three)		

		2020	
		O. Reg. 441/20 Primarily to introduce Rule 4.05.2, authorizing the use of the new Civil Submissions Online (CSO) system for electronically filing over 250 types of documents with the Superior Court of Justice. This change, driven by the pandemic, allowed for electronic submission and issuance of court documents, streamlining civil court processes. Key Aspects: Purpose: To modernize civil litigation by enabling electronic filing and issuance of court documents. Effective Date: Filed on August 5, 2020. Mechanism: Introduced **Rule 4.05.2,** allowing electronic filing through the Civil Submissions Online system. Impact: Facilitated electronic certification and issuance of orders, applications, and other documents in civil actions. In essence, O. Reg. 441/20 was a crucial step in digitizing Ontario's civil courts, making it possible to submit and receive documents electronically instead of physically	Applicability Herein: in 2020, the JSO Portal was introduced for the filing of over 250 types documents. However, it remained subject to the two step model: 1. Registrar Acceptance Required; and 2. Confirmation. Under the OCPP model, which was in response to the issues with delays and non-acceptance of submitted for filing documents (see:), it is a one step model of "subject to confirmation".
	Tab P: Amendments to the Rules of Civil Procedure (three of three)		

		O. Reg. 711/20 (in force in 2021) while also clarifying document naming for the CaseLines digital platform. It made administrative changes, such as redefining "court" to include case management masters and updating rules for document submission, with amendments coming into force in early 2021. Key Changes Introduced by O. Reg. 711/20: Abolition of Masters: Adjusted definitions and references to reflect the shift from "masters" to "case management masters" (now Associate Judges) in the Superior Court. **CaseLines Platform:** Amended Rule 4.05.3(6) to specify requirements for document naming when submitting to the CaseLines platform, including adding the party's name and creation date. Jurisdiction: Clarified the jurisdiction of Associate Judges, ensuring motions previously handled by masters were appropriately assigned. In essence, it was a housekeeping regulation to modernize Ontario's civil court rules for the digital age and structural judicial changes.	Applicability Herein: introduction of Case Lines which is now Case Center Case management masters: included in court
	TAB Q: Amendments to the Rules of Civil Procedure in 2021 (middle of the Pandemic)		
		O. Reg. 383/21 Key Changes Introduced by O. Reg. 383/21: Estate Matters: It updated definitions and rules related to estate trustees, certificates of appointment, and small	

		estate applications, making processes simpler and introducing new forms. **Draft Orders**: Expanded who could prepare draft orders (not just parties, but anyone affected). Aligning Rules: Made administrative adjustments to bring the RCP into consistency with other recent rule changes, including those for small claims court filings. Effective Date: Came into force on May 28, 2021.	
	TAB R:		
		2024	
		O. Reg. 300/24 Key Changes Introduced by O. Reg. 300/24 Authenticity Certificates: Parties must now file a signed certificate confirming they are satisfied with the authenticity of all authorities cited in factums or expert reports. Electronic Filing: Mandates uploading documents to the Case Center and requires hyperlinks to authorities published online. Expert Reports: Similar certification of authenticity is required for expert	Applicability Herein: the Divisional Court failed to provide the Applicant and still done so (although only applicable to Compendium under the OCCP rules under the Rules of Civil Procedure after October 2025), NOTA BENE: Case Center is not filing but uploading of filed documents to the same

		reports, with specific exceptions for analyzed documents. Effective Date: The changes came into force on September 1, 2024. Purpose of the Regulation The amendments aim to ensure the integrity of legal documents and evidence, addressing concerns about deepfakes and AI-generated content by making it harder to submit fabricated or misrepresented legal sources.	
	TAB S: amendments to the Rules of Civil Procedure in 2024 (2 of 2 in 2024)		
		O. Reg. 322/24 (August 2024) Key Changes Introduced by New Vexatious Litigant Framework: Establishes a comprehensive system for courts and parties to address vexatious litigation. Streamlined Procedure: Replaces the need for separate applications with motions within existing proceedings, making it easier to address vexatious behavior. Court's Own Initiative: Empowers courts to identify and stay or dismiss frivolous cases without waiting for a party to bring a motion. New Rules & Forms: Amends Rules 2.1 and 2.1.01 and introduces new forms (like Form 2.1A, 2.2A, 2.2B, 2.2C) to guide the new process. Automatic Stay: Proceedings are automatically stayed once a notice for potential dismissal under Rule 2.1 is issued.	

		Coordinated with Courts of Justice Act: Works in tandem with amendments to Section 140 of the Courts of Justice Act (CJA)	
	TAB T:		
		Key Aspects of O. Reg. 226/25: Introduction of Ontario Courts Public Portal: For Toronto Region matters for SCJ and Divisional Court: OCCP was required for the issuance and filing of electronic documents under Rule 4.05.2.1: Permitted Use (subrule 3): the Portal provides for the electronic filing or issuance of the document the person requesting the filing or issuance of the document has agreed to the Portal's terms of use and submitted, through the Portal, an email address at which the person agrees to accept documents electronically. O. Reg. 226/25, s. 4. Removal of the two step model for the filing of electronic documents under the JSO Portal which required the: Registrar's Acceptance Required; and Confirmation, To a model: "Subject To Confirmation" (4) A document submitted for filing or issuance through the Ontario Courts Public Portal is considered to have been filed or issued only if the registrar or sheriff sends confirmation of the filing or issuance by email. O. Reg. 226/25, s. 4. (5) A document submitted for filing or issuance through the Ontario	Applicability Herein: cited to the left

		Courts Public Portal is considered to have been filed or issued on the filing or issuance date indicated in the confirmation. O. Reg. 226/25, s. 4. Non-Application of Certain Subrules (7) Subrules 4.05 (4.2), (7) and (8) do not apply with respect to a document filed or issued electronically by using the Ontario Courts Public Portal. O. Reg. 226/25, s. 4. Confirmation of Filing no longer required through "Notice of Accepted Filing" (see: supra) (see: Rule 4.05(4.2); Date of Electronic Issuance, Filing: (7) A document that is issued or filed electronically is considered to have been issued or filed, as the case may be, on the date indicated on the document by the registrar or the authorized software. O. Reg. 689/20, s. 6 (2). Important change: under the OCCP the date of the filing is based the confirmation of the filing via email Business Hours Filing no longer applicable with the OCCP: Issuance, Filing Outside of Business Hours (8) If a document is issued or filed electronically outside of regular business hours, the registrar or the authorized software shall indicate that the document was issued or filed, as the case may be, on the next day that is not a holiday. O. Reg. 689/20, s. 6 (2). Practical: in effect, the OCCP: No longer requires the Registrar's Acceptance; No longer requires the Registrar to send a Notice of Acceptaed Filing; The date of the filing is the date in the confirmation notice which is tied to the time of filing which may be after business hours or on weekends or holidays which is tied to the time of the "submitted filing" Proportionate Justice: Added a new rule (1.04(1.1)) requiring courts to ensure orders are proportionate to the	

		importance, complexity, and amounts involved in a case. Filing Date: Filed on October 1, 2025, with updates effective around October 14, 2025, for consolidation. In essence, O. Reg. 226/25 brought Ontario's civil court rules into the digital age, emphasizing efficiency, proportionality, and responsible technology use.	
	CHAPTER #2: COMMON LAW AUTHORITIES		
		FROM MOTION RECORD #4 (NOTA BENE: MAIL FILED in [:	
	CHAPTER #2(A)(I): INTERPRETATION OF SOURCE LAW IN ONTARIO		
		(SEE: PAGE 3 OF 192 OF MOTION RECORD #4)	
#57		*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 51[9]	

58		*Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 42[10]	
59		*Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502 at paragraph 20	
	Chapter 2(A)(II): Lack of Independence in administrative tribunals with the SLASTO		
		(nota bene: the employer of Mr. Boyce at the time of the JRPA Application by admission was SLASTO	
		(see: page 5 of 192 of Motion Record #4)	
60		*Mary Shuttleworth v. Licence Appeal Tribunal*, 2018 ONSC 3790 as per **THORBURN, MCKELVEY and MYERS JJ.** ["*Shuttleworth Divisional Court Decision*"] (see: pages 2169 to 2183)	

#61		*Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)*, 2019 ONCA 518 Tulloch, Hourigan and Fairburn JJ.A ["Shuttleworth ONCA Decision"] [11] (see: pages 2185 to 2197) (reasonable apprehension of lack of independence)	
	CHAPTER #2(A)(III): Section 11(D) of the *Charter*		
		Motion Record #4	
	CHAPTER #2(A)(III): Section 11(D) of the *Charter*		(delay in the criminal context – intertwined with the undisclosed prior judicial involvement of MADAM JUSTICE SHORE – less than a few months prior to the bringing of the JRPA Application (see: page 6 of 192)
62		*R. v. Jordan*, 2016 SCC 27 ("*R. v. Jordan*") (see: page 2198 to 2208)	

	CHAPTER #2(A)(IV): Interference by the Executive Branch with the Judicial Branch		
		CHAPTER #2(A)(IV)(a): Reference to Primus Inter Pares (at paragraph 275 of 1997 Judicial Independence Reference or the 1997 Filmon Friday Decision or Reference	
			FEDERALISM VS. RULE OF LAW: IN **1997 Judicial Independence Reference** (INCLUDING THE FILMON FRIDAY REFERENCE)
		LAMER CJ CONCLUDED THAT THE RATIONALE BEHIND SECTION 96 HAD SHIFTED "AWAY FROM THE PROTECTION OF NATIONAL UNITY TO THE MAINTENANCE OF THE RULE OF LAW THROUGH THE PROTECTION OF THE JUDICIAL ROLE. THE DISTINCTIONS HAVE BEEN FOUND TO BE THE DISTINCTION BETWEEN "FEDERALISM" AND "RULE OF LAW". (see: paragraph 88, The rationale for the provision has also shifted, away from the protection of national unity, to the maintenance of the rule of law through the protection of the judicial role	

		UNWRITTEN CONSTITUTIONAL PRINCIPLES: PROVINCIAL INDEPENDENCE 1997 CASE: Notably, subsequent to the Provincial Judges Reference case, both provincial and federal courts benefitted from the safeguard of the unwritten constitutional principle of judicial independence – unwritten in that it is not written in the text – but like TLABC 2014 – ACCESS TO SECTION 96 COURTS (SCJ COURTS) – IS PART OF SECTION 96 OF THE *Constitution Act, 1867* – RULE OF LAW PART OF IT – CORE JURISDICTION OF THE JUDICATURE SECTIONS OF *Constitution Act, 1867* (later cases were: Unwritten Principles of Independence of the Judiciary (see: Mackin v. New Brunswick (Minister of Finance), [2002] 1 S.C.R. 4; and Ell v. Alberta, [2003] 1 S.C.R. 857)	
#63		*Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, 1997 CanLII 317 (SCC) ["*1997 Independence PEI Reference", "**1997 Judicial Independence Reference**", "Filmon Friday Decision"* or the "*Executive Branch Court Closure Decision*") at paragraphs 267 to 276 [12] [13] [14] (see: pages 2209 to 2214)	Applicability Herein: Primus Inter Pares has been referenced in cases since 1875 (see: Fellows v. The Alert Mining Co., 1875 CanLII 15 (NB KB)) but that was only one in that century and in relation to corporation and not again until 1946 (see: Thomson v. Minister of National Revenue, 1946 CanLII 1 (SCC)) but that in relation to an income tax issue including residency status for a Canadian born in NW but potentially living in Penhurst, North Caroline (see: headnote: *Income tax—Liability for—Income War Tax Act (R.S.C. 1927, c. 97, and amendments), s. 9 (1) (a) (b) (before its amendment in 1942)—"Residing or ordinarily resident" in Canada "during" year—"Sojourns")*. Primus inter pares was in 1980 (labour board decision referenced in Ontario Nurses' Association v. Kent-Chatham Board of Health, 1980 CanLII 978 (ON LRB) but that as in relation toa department head with that Nurses Association. A similar usage of primus inter

			pares was used in 1986 in PEI but again in relation to a school board decision (see: Holland v. P.E.I. School Board Regional Administrative Unit #4, 1986 CanLII 178 (PE SCTD), It was not until 1995 in Ruffo in the SCC, a decision two years prior to **1997 Judicial Independence Reference** was "primus inter pares" utilized in the judicial context (see: Ruffo, infra). The 1997 Filmon Friday Decision was the second usage ever by the SCC. While the initial decisions referred to "primus inter pares" as merely a leader among equals, the case law has evolved since that time as seen infra. While this phrase suggests a purely ceremonial seniority, the evolution of Canadian law through landmark cases and ethical controversies has revealed a much more complex reality. The Chief Justice (or Chief Judge in provincial contexts) serves not only as a judicial peer but as the "Master of the Roster," an administrative steward, and the primary guardian of institutional reputation. However, when the administrative power to assign, reassign, or "take over" cases intersects with political pressure or internal ethical failures, the constitutional boundaries of judicial independence are tested
	CHAPTER #2(A)(V): first SCC reference to primus inter pares in relation to chief judge of the SCC or chief judge of provincial courts:		
		1995: First Reference to Primus Inter Pares in relation to Judicial Branch	

		The focus herein is now “Take Over the Case” or a chief’s case Supervisory powers of the CJ of the Divisional Court CJ of any SCJ Court: efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure (guarantee) compliance with judicial ethics. In order to handle ethics, ethical issues must be brought to the attention of the CJ of the SCJ	
			Compliance with ethics: (1) First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention; and (2) because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary Power to lay complaints: the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard (monumental change because this is distinct from the language relating to shutting down the courts in the Filmon Friday Decision) (nota bene: however, this also changed by the 2014 TLABC Decision)

64		*Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC) ["*Ruffo 1995*"] at paragraphs 58 and 59 [15] (see: 2215 to 2225)	It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents. Many aspects of this role derived from judicial tradition without being transferred to legislation (see: paragraph 58) (the "Incremental Change" generally; and the ""primus inter pares Incremental Change" Quebec's "CJA" is distinct int hat section 96 states: **96.** The chief judge has the direction of the Court. The functions of the chief judge shall be, in particular, ….. 2° to coordinate, apportion and supervise the work of the judges and see to their complementary training; the judges must comply with his orders and directives; 3° to ensure that the judicial code of ethics is observed. Paragraph 58 of Ruffo is of great important because of that came the following here cases in: (i) *Baldovi* 2016 (MBQB); (ii) CJC v. Girouard (FCA) (2019) and (iii) Dugre v. Canada (Solicitor General) (2019) Paragraph 59 of Ruffo was cited in: (i) 1997 Fimon Friday (SCC) Decision; (ii) Tobiass v Canada (Citizenship and Immigration) 1997; (iii) Relly v Cachowich, 1999 ABQB; (iv) Reilly v Walter; (v) *Baldovi* (2016); (vi) Dugre v. Canada (SOLGEN) (2019); (vii) Smith v Canada (Attorney General) (*Judges Act* involving removal of judges); and

	CHAPTER #2(A)(V)(i): RUFFO: NOTED UP		
		The salient judicial point is whether a judge is under the supervision of a CJ or in this instance a President of the Divisional Court (see: paragraph 44 of CJC)	
			In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard. [Emphasis added.] (see: paragraph 43 of CJC v Girouard)
#65		*Canadian Judicial Council v. Girouard*, 2019 FCA 148 at paragraph 42, 43, 44, [16]["*CJC v. Girouard*") (see: Pages 2226 to 2241)	The word "colleagues" is key: First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary *see: Ruffo at paragraph 59 cited in CJC v. Girouard at paragraph 43) Applicability herein: with the sudden departure of Former Registrar Gentles it may be that she resigned and was being pressured by the likes of Madam Justice Shore She was employed by the MAG (Crown in Right of Ontario) but NOT part of the judiciary. Certainly, if a Registrar, court clerk or court staff were engaged in embezzlement or theft, or lesser breaches of provincial statutes or duties, he would be required to lay a complaint against he or she for misconduct. It is HIS Court (CJ Morawetz and particularly

			the Divisional Court where he is located by office and Divisional Court President for him to control and ensure the institutional trust and public reputation)
	CHAPTER #2(A)(V)(II): ADMINISTRATIVE INDEPENDENCE OF THE JUDICIARY ATTACHES TO THE COURT AS A WHOLE		
66		*R. v. Siwicki*, 2021 MBQB 42 at paragraph 50[17] ["*Siwicki*"] (see: pages 2243 to 2244)	The MBQB was correct to note that there is a distinction between violation of section 11(d) of the *Charter* rights by unreasonable delay for those facing penal consequences by citing Provincial Court Judges Ass v Manitoba (MOJ) (see: infra) NOTA BENE: a decision (while not an order) like a court closure in Filmon Fridays Reference (1997) would have exceed constitutional authority (Ergo, a non-court decision can be subject to *Charter* breach and remedies under section 24(2) of the *Charter*)
#67		*Smith v. Canada (Attorney General)*, 2020 FC 629 at paragraph 120 ["*Smith v. Canada*"] (see: Page 2245 to 2250)	
	***CHAPTER** #2(A)(V)(III): Ruffo Noted Up:*		

	Implied Power to Relieve a Judge of Certain Judicial Functions *(and explicit power to direct Registrars in matters assigned by law to the judiciary)*[18]*; (see: paragraph 21 of Dugre)*		
		SUPERVISORY POWERS OF CJ OF SECTION 96 COURT REGARDING PROFESSIONAL CONDUCT: INHERENT – NO LEGISLATIVE AUTHORITY REQUIRED The supervisory powers of a chief justice with respect to professional conduct are inherent in the exercise of his judicial functions and do not require any specific legislative authority, whereas, as *primus inter pares* (See: paragraph 21)	
68		*Dugré c. Canada (Attorney General),* 2019 FC 1604 at paragraph 21[19] ["*Dugre*"][20] (see: Pages 2251 to 2262) (Summary: justice Gérard Dugré: The Failure of Diligence While Cosgrove dealt with bad decisions, the case of Justice Gérard Dugré (Quebec Superior Court) dealt with **no decisions or inactivity or failure to act.** This case illustrates that "due execution" encompasses the duty of diligence. Justice Dugré faced a litany of allegations centered on two themes: chronic delays in rendering judgments and an aggressive, undignified temperament in court. Evidence showed he had delayed judgments for years, leaving litigants in limbo The Inquiry Findings: Abdication of Duty	Applicability herein: the removal of Madam Justice Shore should and must have occurred prior but never a wrong time to do the right thing. The Divisional Court President occupies a privilege he therefore occupies a privileged position to ensure compliance with judicial ethics within the Court (*Ruffo v. Conseil de la magistrature* , 1995 CanLII 49 (SCC) , [1995] 4 SCR 267 at paras. 58-59) (see: paragraph 21 of Dugre). Divisional Court President should remove Madam Justice Shore during investigation or investigations into her conduct whether it be CJC or by the Divisional Court President (nota bene: improper for ACJ of the SCJ to conduct the same as she sits on the CJC). NOTA BENE: is it necessary (see: , to the extent that this may appear necessary in the best interests of justice and its administration, and to preserve public confidence in the courts and the judges who are part of them.

		The Inquiry Committee found that the office of a judge imposes a positive duty to decide cases. Delay as Failure: A judge who hears a case but fails to render a judgment within a reasonable time has failed to execute the primary function of the office. The Committee found Dugré's delays were not merely administrative lapses but a "failure in the due execution of judicial office Insight: The "Consumer" Perspective The Dugré report is notable for its focus on the litigant's perspective. A "reasonable, fair-minded observer" expects a decision. When a judge fails to deliver that product, the due execution of the office has ceased. Dugré resigned following the recommendation for removal.	
	CHAPTER #2(A)(VI)(iv): RUFFO NOTED UP: CHIEF'S CASE: TIME TO TIME –		
		PRESENTS A CHIEF'S CASE: ARE THERE: (I) CHALLENGES; (II) CONTROVERSIES; (III) HIGH PROFILE NATURE; AND/OR (IV) CIRCUMSTANCES WHICH PLACE THE FOCUS ON THE INTEGRITY OF THE COURT. IF SO, THEN IT IS CHIEF'S CASE EVEN ON AN INTERIM BASIS	
69		*R. v. Baldovi et al*, 2016 MBQB 90 ["*Baldovi*"] at paragraphs 29 [regarding how judges hearing criminal "Ex Parte In Camera Hearing" are assigned in Manitoba][21] and 72[22] [23]	

		(see: _22643 to 2304)	
	CHAPTER #2(A)(VII): *Baldovi*: Noted up		
		Judges may not waive judicial immunity: is to protect the independence of the judiciary and public confidence in the administration of justice – for the benefit of the public[24] Judicial privilege which is tied to judicial immunity: **Protect the institution of the court but more importantly:**	
			ADMINISTRATION OF JUSTICE – BENEFIT OF THE PUBLIC (see: paragraph 41 of Swaine)
70		*R. v. Swaine*, 2025 ONCA 614 ["Swaine"] at paras. 41, 43 [25]	Applicability herein: what about when judges are not performing judicial duties. There is no duty to self-assign by a puisne judge to a non-assigned JRPA proceeding by a judge of the Divisional Court when no valid request had been made or on her own initiative. That cannot be a judicial duty. **ERGO NO JUDICIAL DUTIES – NO JUDICIAL PRIVILEGE – NO JUDICIAL IMMUNITY – AS SUCH A DECISION (NOT COURT ORDER) CAN BE SUBJECT TO THE *CHARTER* BUT ALWAYS THE NON-INDEPENDENCE, NON-IMPARTIAL CONDUCT OF A SECTION 96 JUDGE OF A SECTION 96 COURT IS MEASURED AGAINST THE *Constitution Act, 1867*,

	CHAPTER #2(A)(VII)(b): The Limit of Taking Over from a Judge who is seized of a proceeding		
		Judges who are not seized of a proceeding can be stripped of a proceeding including reassignment of the proceeding	
71		***High-Crest Enterprises Limited v. Canada***, 2017 FCA 88 (see: pages 2323 to 2327)	Applicability herein: Madam Justice Shore was never seized at all and no assignment to her as a particular judge for all steps in the jrpa proceeding, but for was made because no First Defence was "Filed"; moreover, even if a First Defence was filed, she could not have been seized as per Rule 77.07
	CHAPTER #2(A)(VIII): The Power of "Self-Assignment" and Roster Management[26]		
72		*The Role of a Chief Justice* in Canada Peter W. Hogg Osgoode Hall Law School of York University Source Publication: (1993-94) 19:1 Queen's Law Journal 248-260[27] (se: 2328 to 2342)	Applicability herein: (See also: Administrative Removal During Ethical Inquiries: Justices brown and cos grove[28]

	CHAPTER #2(A)(IX): Interference in another person's affairs (see: page 8 of 192 of Motion Record #4))		
73		*Lepp v Toronto Star Newspapers Limited*, 2022 CanLII 39874 at para. 14[29] (ONSC SM) (nota bene: citing Black's Law Dictionary) (see: pages 2343 to 2346)	
	CHAPTER #2(A)(X): Obstruction of Justice		
		CHAPTER #2(A)(X)(I):"Course of Justice"[30]	
74		*Regina v. Spezzano, 1977 CanLII 1371 (ON CA)* including the ejusdem generis rule[31] under the former section 127 of the Criminal Code which is now section 149 of the Criminal Code and summary[32] and importances of Latin maxims regarding*: nemo tenetur seipsum accusare* and *nemo tenetur prodere seipsum*[33] (see: 2347 to 2352)	
		CHAPTER #2(A)(X)(II):Removal of Documents or Instruments (see: page 9 of 192) Error In Judgment or Mistake of Law – Not Valid Defence – Specific Intent to Obstruct or Attempt to Obstruct is Present	

#75		*R. v. Zeck*, 1980 CanLII 2849 (ONCA)[34] cited with approval by the SCC in R. v. Wijesinha, 1995 CanLII 67 (SCC) at paragraph 40[35] (see: 2353 to 2357)	
	CHAPTER #2(A)(XI): Open Court Principle: Breach of the *Charter*; ss. 2(b)		
76		*Toronto Star v. AG Ontario*, 2018 ONSC 2586 as per E.M. Morgan J. (see: pages 2358 to 2396)	
		***CHAPTER** #2(A)(XI)(a): Toronto Star 2018 Decision: noted up*	
77		*Abara v. Registrar of Motor Vehicles*, 2024 ONSC 7085 at para. 28 LAT case (nota bene: LAT refused, even after the Applicant made a TARA request and was provided with link to SCM portal, to provide the two Undisclosed Final Made Orders of July 24 and August 16, 2024 (see: pages 2397 to 2399)	remove: make a request for them. REMOVE
	CHAPTER #2(A)(XII): Inherent Jurisdiction cannot be utilized to override clear legislative will (see: page 14 of 192 of Motion Record #4)		Applicability Herein: see, supra regarding the distinctions between the Rule 50 and Rule 77

		Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al., 1975 CanLII 164 (SCC) [1976] 2 SCR 475[36] at page 480[37] (see: page 2400 to 22408)	
	CHAPTER #2(A)(XIII): Legislative and Enactment Interpretation: When a May Becomes a Must		
		Julius v. Oxford (Bishop of) (1880), 5 App. Cas. 214 (H.L.) as per Lord Blackburn	
		It was imperative upon him to exercise the jurisdiction when called upon to do so by a party interested and having the right to make the application. Rex v. Havering Atte Bower **[11]** *(see: 5 B. & Ald. 691.); Macdougall v. Paterson* **[12]** *(see: 11 C. B., 755; 2 L. M. & P. 681.); Julius v. The Lord Bishop of Oxford* **[13]**.	
			It is true that, when the decision is given, the remedy is by way of appeal. But until there is a decision there can be no appeal (nota bene: corollary is similar to that of the AAAR Doctrine or the Exhaustion Doctrine; similar to "matters not adjudicated")
79		*Drysdale v. Dominion Coal Co.*, 1904 CanLII 57 (SCC), citing *Julius v. Oxford (Bishop Of); Rex v Havering Atte Bower; and MacDougall v Paterson* (see: page 2409 to 2420)	

	CHAPTER #2(A)(XIII)(a): Drysdale: Noted Up		
		The Deputy Minister, in exercising his powers under s. 48(2), acts in a judicial capacity, that he has no right to refuse to decide, and that mandamus will therefore lie to him if he refuses to perform his duty: The Minister of Finance of British Columbia v. The King, 1935 CanLII 351 (SCC), [1935] S.C.R. 278 at 284, [1935] 3 D.L.R. 316; Drysdale v. The Dominion Coal Company (1903), 1904 CanLII 57 (SCC), 34 S.C.R. 328 at 336 (see:	Applicability Herein: those acting in quasi or actual judicial capacities – no power to NOT decide
80		*Re Superior Separator Company of Canada Limited*, 1953 CanLII 146 (ON CA) as per PICKUP C.J.O. LAIDLAW and ROACH JJ.A.2nd NOVEMBER 1953.[38] [39] (see: pages 2421 to 2435)	
	CHAPTER #2(A)(XIV):Mandamus in Applications (nota bene: also consistent with rule against multiplicity of proceedings) (at paragraphs 42-50)[40]		
81		*Saskatchewan Crop Insurance Corporation v Work Smarter Systems Ltd.*, 2025 SKKB 133 citing at paragraph 43[41] (see: 2436 to 2440)	Applicability Herein: please see Motion #4 and Motion #5 by conditional orders

	CHAPTER #2(A)(XIV)(A): Mandamus: Mailing the Flying IN question:		
		Prerogative writs — Declaration —	
#82		*Steiner v. Canada*, 1981 CanLII 4581 (FC) (see: pages 2441 to 2444)	HELD, THE DEFENDANTS HAVE A PUBLIC DUTY TO ACCEPT FOR DELIVERY ALL MAIL WHICH COMPLIES WITH THE POST OFFICE ACT AND REGULATIONS
	CHAPTER #2(A)(XIV)(B): Discretionary Language:		
		The Board has the discretion under section 131(1) of the Industrial Relations Act to reconsider its decisions if it deems it advisable. The phrase "if it considers it advisable to do so" indicates that the Board is not obligated to hold a hearing before deciding whether to reconsider a decision (nota bene: no such language exists in the Rules of Civil Procedure and the Registrar of	Applicability Herein: no specific language under the Rules of Civil Procedure. Salient point: no longer under the OCPP Rules of Civil Procedure (specific rules) duty to accept or not accept – significant change

		the Divisional Court is required by oath and by law to comply with all laws faithfully, impartially and dutifully)	
83		*Re Union Canadienne de l'Industrie des Peches et des Travailleurs*, Local 140, 1981 CanLII 3556 (NBCA) (see: Pages ___ to 2456)	
84		*Information Commissioner (Canada) v. Canada (Minister of Employment and Immigration)*, 1986 CanLII 6836 (FC) (see: page 2457 to 2463)	
	CHAPTER #2(A)(XV): INTERFERENCE WITH JUDICIAL INDEPENDENCE		
85		*Valente v. The Queen*, [1985] 2 S.C.R. 673[42] (see: page 2465 to 2470)	

	CHAPTER #2(A)(XVI)Vexatious Conduct at the LAT; improper party involved		
86		*Chandrarajah vs. Economical Insurance*, 2024 CanLII 10566 ["*Chandrarajah*"]: (see: pages 2471 to 2478) Adjudicator Jarda. In February 2024, Adj. Jarda released her seminal and precedent-setting decision of what constitutes vexatious conduct by a party in a LAT Proceeding with specific reference to the improper party advancing a proceeding before the Tribunal (AABS). [43]	
	CHAPTER #2(A)(XVII): Tort of Deceit, Civil Fraud		
		CHAPTER #2(A)(XVII)(a): Remaining silent by a non-representor with knowledge is sufficient – fraudulent misrepresentation	
87		*Halton v. Rezaizadeh*, 2004 CanLII 6236 (ON SC)) at paragraph 18[44] as per Murry J. (remains the law in Ontario today) and paragraph 19 citing *Sidhu Estate v. Bains*, 1996 CanLII 3332 (BC CA) (see: page 2479 to 2482)	

88		*TD General Insurance Company v Julian Bennett*, 2024 CanLII 895, paragraph 5). (see: pages 2483 to 2485)	
	CHAPTER #2(A)(XVIII): Return to the WRIT OF Mandamus		
		CHAPTER #2(A)(XVIII)(a): This prerogative writ constitutes an equitable instrument of the judiciary, the fundamental essence of which is to provide a comprehensive remedy where a substantive legal right exists and has suffered impairment, yet for which no alternative adequate legal recourse is available. Mandamus remains a discretionary remedy, primarily invoked when a repository of public power is formally requested to exercise a mandatory authority but perversely declines to do so	Applicability Herein: inherent jurisdiction is distinct from equitable jurisdiction
89		*Mundulai v. Law Society of Ontario*, 2018 ONSC 6965 (CanLII), at para. 26[45] (see: page 2487 to 2490)	
	CHAPTER #2(A)(XVIII)(b): Statutory delegate refuses the exercise of a power which they are legally compelled to **manifest**		

90		*Zaki v. Director*, 2017 ONSC 1324 at para. 45 : include page	Applicability Herein: Former Registrar Gentles and Acting Registrar Parris must act in relation to their exercise of power which is more in the nature of a duty
	CHAPTER #2(A)(XVIII)(c): Jurisdiction is found to grant mandamus in those exceptional circumstances where the remittal of a matter to an administrative adjudicator for reconsideration threatens to bring the administration of justice into disrepute		
			Applicability Herein:
91		*D'Errico v. Canada (Attorney General)*, 2014 FCA 95 at para. 16[46] (see: page 2491 to 2494)	
	CHAPTER *#2(A)(XVIII)(d):A* *writ of mandamus is, by definition, a command issued by a Superior Court judge directing the consummation of a statutory or public obligation to which the Applicant possesses a strict legal right*		

		Eight part test for mandamus[47]	
92		*Apotex Inc. v. Canada (Attorney General) (C.A.),* 1993 CanLII 3004 (FCA), [1994] 1 FC 742["*Apotex*"][48] as per Marceau, MacGuigan, and Desjardins JJ.A. (see: pages 2496 to 2500)	
93		*Bidal v. Ontario (Natural Resources)*, 2015 ONSC 506 (CanLII) ["*Bidal*"] at para. 11.	
	CHAPTER #2(A)(XVIII)(E): Writ of Prohibition versus Writ of Mandamus		
		CHAPTER #2(A)(XVIII)(E)(i):Prohibition: The function of the writ of prohibition is to ensure that courts entrusted with public or legislative duties remain strictly within the delineated parameters of their jurisdiction	
94		*Re McDonald and the Court of General Sessions of the Peace for the County of York*, 1957 CanLII 374 (ON SC) (see: page 2508 to 2514) (approved in Re Petro-Canada and Board of Com'rs of Public Utilities, 1987 CanLII 5289 (NS SC)[49] [50] [51]	

	CHAPTER #2(A)(XVIII)(F): *Sunrise North Senior Living* v. the sheriff[52]		(nota bene: horizontal stare decisis applies because of section 76 of the CJA that requires the cj of the scj to direct: (i) registrars; (ii) court clerks, (III) court reporters; and (iv) other court staff at his direction
#95		*Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York)*, 2020 ONSC 469 (Div. Ct.) as per M.G.J. Quigley, Conway and Favreau JJ. in its "Reasons"[53] (see: 2515 to 2533)	
		CHAPTER #2(A)(XVIII)(F)(i):*Sunrise North Senior Living*: Noted Up	
		CHAPTER #2(A)(XVIII)(F)(i)(a):Election Finances Act case	
96		*New Blue Ontario Fund v. Ontario (Chief Electoral Officer)*, 2024 ONSC 1048 (Div. Ct.) as per Sachs, Backhouse and Lococo JJ. at paragraph 29 citing *Sunrise North Senior Living; Yassin; and 407 ETR* *(see: 2534 to 2536)*	
	CHAPTER #2(A)(XVIII)(F)(i)(b): Where mandamus was ordered to compel the Minister to render a decision on a request for ministerial relief		

97		*Yassin v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 423 ("*Yassin*")[54] (see: pages 2537 to 2547)	
		Where the Registrar of Motor Vehicles: (i) refuse to validate and (ii)refuse to issue vehicle permits, to individuals who failed to pay tolls and administrative fees owed to 407 ETR – Mandamus Issued to Enforce Registrar's Statutory Duty in Toll Collection Dispute	
		Registrar was failing to refuse to validate and refuse to issue and remaining inactive	
98		*407 ETR Concession Company Limited v. Ontario (Registrar of Motor Vehicles)* (2005), 2005 CanLII 49963 (ON SCDC), (Div. Ct.) ("*407 ETR*") (see: page 2548 to 2562)	Nota bene: the exact language of Registrar is utilized which makes the Motion #4 on similar facts to the 407 ETR bringing horizontal stare decisis and judicial comity into play;
	CHAPTER #2(A)(XVIII)(F)(i)(d):Once an appeal is dismissed the Divisional Court does not retain jurisdiction to enforce eviction orders except in rare circumstances, for example, the mandamus application in *Sunrise North Senior Living* Ltd. v. The Sheriff (Regional		

	Municipality of York), **2020 ONSC 469 (CanLII)**		
99		*Chalich v. Alhatam*, 2020 ONSC 2569 (Div. Ct.) as per **Kristjanson j. [in chambers [motion judge]]** at paragraph 14 (se: page 2563)	
	CHAPTER #2(A)(XVIII)(F)(i)(e: Mandamus: "clear legal right to have the thing sought by it done in the manner and by the person sought to be coerced."		
100		*Karavos v. Toronto and Gillies*, 1947 CanLII 326 (ON CA) (see: page 2564 to 2573)	
	CHAPTER #2(A)(XVIII)(F)(i)(f): Has the obligation of the public officer matured? Prima facie, an order of mandamus shall not lie to compel a public officer to act in a specific manner if the obligation to act has not **matured** as of the **date of the hearing**		
101		*1772853 Ontario v. The Corporation of the Town of East Gwillimbury, 2018 ONSC 4094 (CanLII) (Div. Ct.) (Oshawa) at para. 32 as per C. Horkins, Fitzpatrick, King JJ* (see: page 2573 to 2575)	

	CHAPTER #2(A)(XVIX): By analogy: good faith in commercial contracts (see: page 32 of 192)		
102		*Bhasin v. Hrynew*, 2014 SCC 71 (headnotes; summary) (see: page 2576 to 2585)	
	***CHAPTER** #2(A)(XVIX)(a): Silence; Half-Truths; White Lies; Loose with Truth – not good faith – breach of duty of good faith* [55] [56]		
103		*CM Callow Inc. v. Zollinger*, 2020 SCC 45 (headnote and summary) (see: page 2585 to 2596)	
	CHAPTER #2(A)(XX):Bad Faith in Government Officials		
		Validity of Municipal By-law Challenged Due to Allegations of Bad Faith - The appeal was dismissed. The by-law was quashed as it was enacted in bad faith and thus illegal (paras 50-51) – Findings of Bad Faith: The application judge reasonably concluded that the by-law was passed to avoid the municipality's obligations under the Line Fences Act, acting for a collateral purpose rather than legitimate governance needs. Key factors included the	

		rushed process, absence of notice to affected landowners, lack of due diligence, and continued non-compliance with highway usage standards under the Highway Traffic Act (paras 20, 33-34, 47-48).	
#104		*Grosvenor v. East Luther Grand Valley (Township),* 2007 ONCA 55 (summary only) (see: pages 2598 to 2599)	
	CHAPTER #2(A)(XXI): Mandamus:		
		Branch six of eight of the Mandamus Legal Test: practical utility and Doctrine of Futility	
#105		*Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, (headnote and summary) (see: 2601 to 2611)	
	CHAPTER #2(A)(XXII):Section 146 of the Courts of Justice Act ("CJA") (see: page 35 of 192 of Motion Record #4)		

		***CHAPTER** #2(A)(XXII)(a):Section 146 of CJA cannot be invoked to create a new, intrusive power not contemplated by Rule 36.01.*	
			A deliberate legislative omission constitutes a substantive boundary.
106		*TD Insurance Home and Auto v. Sivakumar*, 2006 CanLII 17246 (ON CA)[57] (see: Page 2611 to 2613)	
	CHAPTER #2(A)(XXII)(b):Statutory limitation periods define the substantive jurisdiction of the Court. Section 146 cannot be used to extend a deadline that terminates a cause of action, as this would usurp the legislative function		
#107		*Cheong v. Ontario (Minister of Finance)*, 2004 CanLII 17750 (ON CA) as per McMURTRY C.J.O., GOUDGE and GILLESE JJ.A. (see: page 2614 to 2623)	
	***CHAPTER** #2(A)(XXII)(c):Master (now Associate Judges) cannot use Section 146 to exercise powers beyond their limited statutory mandate.*		

			The provision does not bestow inherent jurisdiction upon statutory officers – ergo Former Registrar Gentles and acting registrar Ms. Parris do not have any inherent jurisdiction Ontario Court Declines Jurisdiction in Marital Property Dispute, Favouring China as the More Appropriate Forum
#108		*Li v. Li*, 2021 ONCA 669 as per Feldman, Paciocco and Coroza JJ.A. (see: 2625 to 2643)	
	CHAPTER *#2(A)(XXII)(d):Where the Family Law Rules were silent on transcript production, Section 146 was properly utilized to operationalize the Court's inherent power to control its records (nota bene:*		
		When Can Family Court Transcripts Be Ordered? The Court acknowledged its inherent jurisdiction to order the production of transcripts in the absence of statutory provisions, provided it is consistent with the due administration of justice (para 11). The Child and Family Services Act provisions regarding transcripts were deemed inapplicable, as the requested transcripts related to case and settlement conferences, not hearings (paras 12-15)	
			Madam Justice Shore's failure to "acknowledge" the request of the ATO for the "tapes and materials required for transcription" on October 10, 2025, as per scj rmo Ms. Amirthalingam's quoted language

#109		*Children's Aid Society of the Niagara Region v. R. N.*, 2004 CanLII 29209 (ON SC) (Family Court) as per J.W. Quinn J.: (see: pages 2644 to 2650)	
	CHAPTER #2(A)(XXII)(e):Adoption of Analogous Safeguards:		
		In the absence of specific protocols for drug testing under Section 105 of the CJA, Section 146 permitted the importation of analogous fair procedures to protect non-parties	
#110		*Tobin v. Collings*, 1996 CanLII 8671 (ON CJ) (see: page 2651 to 2654)	
	CHAPTER *#2(A)(XXIII):Delisting of an Appeal – failure to pay security for costs:*		

			the Court must distinguish between a failure to comply with an order and a failure caused by systemic administrative malfunction nota bene: order must be valid and in compliance with Rule 59
111		*9383859 Canada Ltd. v. The Court of Appeal for Ontario*, 2023 ONSC 5344 (see: page 2655 to 2658)	
	CHAPTER #2(A)(XXIII): Dispense with Compliance under Rule 2.03; Court has the authority to issue such an Order under Rule 59.06 and of the .		
		Additionally, if the Court is willing to waive the need for the moving party to prepare and file motion materials, pursuant to Rule 54.05 Rules. Rule 37.01 and 2.03 of the Rules; simply file a draft Order for the Court's consideration	
#112		*Canadian College of Construction Lawyers Legal Update*, 2025 CanLIIDocs 1181 at page 8 (see: page 2659 to 2687)	
	CHAPTER #2(A)(XXIV):Judiciary is government but not subject to section 32 of the *Charter* on its face		

		The late Professor Emeritus Peter Hogg articulated that the *Charter* shall apply to **court orders** in three distinct circumstances: (i) where an order is issued sua sponte for a public purpose; (ii) in proceedings where the government is a party; and (iii) in private proceedings governed by statutory law –	
			two "governmental respondents"
#113		*RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), (see: page 2688 to 2694)	
#114		*Young v. Young*, [1993] 4 S.C.R. 3 (see: pages 2695 to 2713)	
	CHAPTER #2(A)(XXIV)(a): Common law must be informed and guided by values in the *Charter*		
		Charter Values guiding common law	

#115		*Temoin v. Martin*, 2012 BCCA 250 at paragraph 60 (see: page 2714 to 2716)	
	CHAPTER *#2(A)(XXV):Legislation must be construed in a manner that favours advancement of Charter values;* *no legislation can be construed to breach Charter rights;*		
#116		*Slaight Legal Test: whether a challenge is to the enactment or to the conduct of government*	
			judicial review of legislation is under section 52 of the constitution act 1982; judicial review of government conduct is under section 24(1) of the *Charter*
		*Slaight Communications Inc. v. Davidson, [*1989] 1 S.C.R. 1038 (see: page 2717 to 2724)	
	CHAPTER #2(A)(XXVI): Three Pillars of Judicial Independence		

		CHAPTER #2(A)(XXVI)(a):Focus on Pillar #3: Complete Independence from interference with the administration of courts	
		Judicial independence rests in part on "administrative matters bearing directly on the exercise of judicial function." The administration of the courts by the judiciary is essential to this independence –	
			Applicability Herein: Bearing In this context, bearing refers to the nexus or causal connection between an administrative decision and the judicial process. Definition: To have a relation, connection, or influence upon. **Relation to Judicial Independence:** It implies that not every administrative task (like buying office pens) is protected by judicial independence. Only those matters that "bear" or have a weight-bearing relationship with the court's ability to operate without interference are protected. It filters out trivial "purely" bureaucratic tasks from those that affect the integrity of the court.
			Directly Directly serves as a qualifier of proximity. It limits the scope of judicial independence to ensure it does not become an overreaching shield for every minor clerical preference. **Definition:** Without intervening medium; immediately; in a straight line of influence. Relation to Judicial Independence: For an administrative matter to fall under the umbrella of judicial independence, the impact must be immediate.

			For example, the confirming of filings by the Registrar of the Divisional Court is an executory (ministerial) (required to be carried out) duty. Without confirming of filings, particularly those paid with completed transactions, there can be no adjudications. For example, the assignment of judges to specific cases "directly" affects the outcome and perception of impartiality. If the executive branch (the government) controlled case assignments, they could "steer" sensitive cases toward favorable judges, thereby destroying independence.
			Exercise Exercise refers to the active performance or implementation of authority. Definition: The discharge of an official function or the use of a power or right. Relation to Judicial Independence: Independence is not a static status; it is protected so that the act of judging can occur freely. This term emphasizes that the protection is functional. It ensures that when a judge is in the process of hearing evidence, weighing law, and delivering a verdict, the "machinery" behind them (the staff, the courtroom scheduling, the record-keeping) is functioning in a way that supports, rather than hinders, that active work.
			4Judicial Judicial defines the nature of the power being protected, distinguishing it from legislative or executive power. Definition: Relating to a judgment, the function of a judge, or the administration of justice. Relation to Judicial Independence: This limits the scope to the core mission of the third branch of government. Administrative

			matters are only protected if they are "judicial" in nature—meaning they involve the adjudication of disputes, the interpretation of law, and the upholding of the Rule of Law. It separates the "business" of the court from the "politics" of the state.
			Functions Functions refers to the specific duties and roles assigned to the court. Definition: The activities or purposes natural to or intended for a person or thing. Relation to Judicial Independence: "Judicial functions" include specific tasks such as presiding over trials, determining the admissibility of evidence, sentencing, and managing the court's docket. If the executive branch controls the "functions" (e.g., by refusing to fund a court reporter for a specific type of trial), they effectively control the court's output. Therefore, the judiciary must have administrative control over the essential tools required to perform these functions.
			Synthesis of the Five Definitions from : The "Core of the Core" When combined, these definitions create a protective zone often called Administrative Independence. The theory is that if the government controls the "administrative matters" (money, staff, space, and timing), they can indirectly control the "judicial function" (the decision). By ensuring these matters bear directly on the exercise of the judicial function, the law mandates that the judiciary must have the final say over: Assignment of judges to cases. Sittings of the court (when and where the court meets). Court lists (the order in which cases are heard).

			Allocation of court personnel directly assisting judges (law clerks, registrars). Access to courts: Including: access to confirmed filings : access to justice Without control over these elements, the judiciary would be "independent" in name only, while being functionally subservient to the executive branch
		Administrative failures that frustrate the Judiciary's ability to assign and hear cases—the "adjudicative function"—are an interference (see: page 175 of Motion Record #4)	
		Courts are defenders of the constitution – focus on *Constitution Act, 1867*:	
			A SCJ judge of the Quebec superior court challenge s. 29.1 of the *Judges Act* – court pension salary contribution requirement The principle of judicial independence is fundamental to our Constitution. The role of our courts as resolver of disputes, interpreter of the law and defender of the Constitution, requires that they be completely separate in authority and function from all other participants in the justice system, in particular, from the executive and the legislative branches of government.
#117		*The Queen v. Beauregard*, 1986 CanLII 24 (SCC) (see: page 2725 to 2732)	

	CHAPTER #2(A)(XXVI)(b): Since 1981 (pre-*Charter*):		
#118		*Re Residential Tenancies Act*, 1981 CanLII 24 (SCC), and *Re Residential Tenancies Act*, 1980 CanLII 58 (ON CA) (see: pages 2732 to 2735)	
	CHAPTER #2(A)(XXVI)(c): The Failed Attempt by the New Brunswick Legislature to remove the SCJ for criminal jurisdiction		

#119		*McEvoy v. Attorney General for New Brunswick et al.*, 1983 CanLII 149 (SCC)[58] (see: pages 2736 to 2738)	
	CHAPTER #2(A)(XXVII):Core Jurisdiction Test		
#120		*MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 SCR 725 ["*MacMillan Bloedel*"]; (see: pages 2739 to 2746)	
	CHAPTER #2(A)(XXVII)(a): LAWS OR INFRINGING CONDUCT BY GOVERNMENT (OR AGENTS UNDER A HIGH DEGREE OF CONTROL OF GOVERNMENT) THAT SHIELD STATUTORY TRIBUNALS FROM JUDICIAL REVIEW: UNCONSTITUTIONAL (VIOLATING SECTION 96 OF THE CA ACT 1867[59]		

#121		*Crevier v. A.G. (Québec) et al.*, 1981 CanLII 30 (SCC) ["*Crevier*"]	Applicability Herein: there is similarity in language and decisions involving the requirement to file the record of proceeding (see: NOM #1)
	CHAPTER #2(A)(XXVIII) DISTINCTION BETWEEN FEDERALLY APPOINTED JUDGES AND FEDERAL JUDGES (SCJ Courts, Section 96 Courts remain supreme despite being "provincial courts")		
122		*A.G. Can. v. Law Society of B.C.*, 1982 CanLII 29 (SCC) [60] (see: page 2750 to 2753(	
	CHAPTER #2(A)(XXVIII): POST PASSAGE OF *CHARTER* CASE: 1989 – FOCUS ON CONFEDERATE DEBATES		
#123		*Sobeys Stores Ltd v Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 SCR 238 at 256-61 ["Sobeys Stores Ltd"] (see: pages 2754 to 2761)	
	CHAPTER #2(A)(XXix): RT TEST (1982) VS. CORE JURISDICTION TEST (WHICH WAS, PER CURIAM, OF THE SCC IN DECISIONS SUCH AS CREVIER 1981, MCEVOY 1983, BEAUREGARD 1985, SOBEYS STORE 1989 ET AL ()		

#124		*Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Quebec and to the appellate jurisdiction assigned to the Court of Quebec (Order in Council No. 880-2017),* 2019 QCCA 1492 *["Court of Quebec Reference"].* (see: pages 2762) (: include Tab 124)	
	CHAPTER #2(A)(XXX): NO CONCURRENT JURISDICTION BETWEEN THE SCJ COURTS and LAT		
#125		*Stegenga v. Economical Mutual Insurance Company*, 2019 ONCA 615 (see: page 2766 to 2780)	With no concurrent jurisdiction between LAT and SCJ: stronger inference of review and correctness standard
	CHAPTER #2(A)(XXXI): THE ACT OF COMPLYING WITH THE LAW IS NOT THE SAME AS BEING COMPELLED TO EXPRESS SUPPORT FOR THE LAW		

#126		*Rosen v. Ontario (Attorney General)*, 1996 CanLII 443 (ON CA) (see: pages 2781 to 278)	
	CHAPTER #2(A)(XXXII): "THE PROTECTION OF *CHARTER* GUARANTEES IS A FUNDAMENTAL AND PERVASIVE OBLIGATION, NO MATTER WHICH ADJUDICATIVE FORUM IS APPLYING IT" –		
		Lawyer, Dore, appeared before judge of the superior court of Quebec – the judge – in course of argument and written reasons criticized the lawyer Mr. Dore - d then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks; the Barreau du Quebec – filed complaint against the lawyer – lawyer Dore argued that sections of the code of ethics of advocates breached ss. 2(b) of the *Charter* – QCCA – upheld the reprimand applying s. 2(b) and Oakes test – SCC dismissed appeal	
#127		*Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII) at para. 4 (see: pages 2785 to 2792)	

	CHAPTER #2(B): TAB #4 OF MOTION RECORD #4:		
		LETTER ENCLOSING COMPENDIUM – DECEMBER 7, 2025 – COMPENDIUM FOR NOM #3 (DEC 7 2025) – MAIL FILED ON DECEMBER 7, 2025	
#128		*Labour Relations Board v. The Queen*, 1955 CanLII 82 (SCC)[61] (see: pages 2794 to 2799	
			The rejection of the application was made on grounds which were wholly irrelevant and **amounted to a refusal** on the part of the Board to perform its duties under the Act to deal with the statutory rights of the employees, which were not affected by any disputes between the employer and the union. NOTA BENE: herein, the Registrar of the Divisional Court has failed to engage at all in her duty. It is not a matter of non-confirmation of submitted for and paid filings in certain instances but abdicating the duties altogether.
#129		*McSweeney, Ex parte*, 1935 CanLII 483 (NBCA) (see: 2801 to 2810)	

#130		*International Union of Operating Engineers, Local Union No. 827*, 1952 CanLII 408 (MB KB) (see: 2811 to 2826)	
	CHAPTER #2(D): TAB #5 OF MOTION RECORD #4:		
#131		*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC) (see: page 2827 to 2831)	
			If power discretionary – STILL NOT ABSOLUTE - The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in Sharp v. Wakefield[14]: An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself
	Tab #8 of Motion Record #4: **CHAPTER** #2(E): TAB #8 OF MOTION RECORD #4:		

		Superior Court of Justice COURTS VERY BOOK OF BUSINESS:	
			THEIR VERY BOOK OF BUSINESS [32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.
		CHAPTER #2(E): **CHAPTER** #2(E): CORE JURISDICTION OF THE SUPERIOR COURTS AS OF 2014:	
			SCC FINDS AND ISSUES JUDICIAL PRECEDENT: ROL – PART OF CORE JURISDICTION UNDER INDEPENDENCE OF THE JUDICIARY UNDER *CONSTITUTION ACT, 1867* – ANY BREACH OF ACCESS TO THE COURTS – BREACH OF ROL – BREACH OF *CONSTITUTION ACT, 1867* – BREACH OF INDEPENDENCE OF JUDICIARY

#132		*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 ["*TLA 2014*", "TLABC 2014", "Access To Courts Decision"] at paras. 32 and 41 (see: page 2832 to 2847)	
			Applicability herein: THE PROCEDURAL RECTIFICATION HEREIN CONSTITUTES AN INDISPENSABLE PREREQUISITE TO ENSURE THAT THE APPLICANT'S FUNDAMENTAL CONSTITUTIONAL RIGHT OF ACCESS TO JUSTICE IS NOT UNDULY PREJUDICED BY ADMINISTRATIVE TEMPORAL DELAYS, A PRINCIPLE CONSISTENTLY MAINTAINED IN THE JURISPRUDENCE, INCLUDING ENSURING THAT LITIGANTS ENJOY ACCESS TO PUBLIC COURTS TO RESOLVE THEIR CIVIL LEGAL DISPUTES IS FUNDAMENTAL TO OUR COUNTRY'S CONSTITUTIONAL ARRANGEMENTS
	CHAPTER #2(E)(I): NOTED UP: TLA 2014		
		CHAPTER #2(E)(I): Ensuring that litigants enjoy access to public courts to resolve their civil legal disputes is fundamental to our country's constitutional arrangements:	
#133		*Ontario (Attorney General) v. $25,610 in Canadian Currency*, 2017 ONCA 251 at paragraph 1 (see: page 2849 to 2855)	

		CHAPTER #2(E)(II): Universal Access to Courts – Important – "Rule of Law" which contains procedural and substantive elements – .	
			Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. .
#134		*Uhrik v Terrigno*, 2024 ABCA 383 at paragraph 10[62] (see: page 2856 to 2861)	
	CHAPTER #2(F): Interference with the PURSUIT of a legal remedy		
#135		Timm v. Canada, 2019 FC 238 (see: pages 2862 to 2891)	
	CHAPTER #2(F)(I): The primacy of law invalidates contractual clauses that violate fundamental rights		

#136		*Compagnie de construction et de développement cris ltée v Société de développement de la Baie James*, 2001 CanLII 20643 (QC CA) (see: page 2893 to 2895)	
	CHAPTER #2(F)(II): Access to justice has been recently explained (if not re-positioned) at an **untouchable Constitutional level** [63]		
#137		*Larouche v Court of Queen's Bench of Alberta*, 2015 ABQB 25 (CanLII), at para 25 (see: page 2896 to 2898)	
	CHAPTER #2(F)(III): Supreme Court recognized that the power to "resolve disputes between individuals and decide questions of private [...] law"[199] forms part of the inherent jurisdiction of the superior courts.[64]		
#138		*In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec*, 2019 QCCA 1492 (CanLII)[65], at para 115 and 116 (repeat of above: omitted) (see: pages 2899 to 2900)	

	CHAPTER #2(F)(IV): Affirmation of TLABC 2014 by ABCA Reworking of the Core Jurisdiction of the SCJ Courts		
		Distinction between utilization of section 96 of the Constitution Act, 1867 to strike down impugned legislation or government conduct versus the usage of the open courts under section 2(b) of THE *CHARTER*)	
			Constitution Act, 1867, Section 96 utilized in TLABC 2014 as opposed to section 2(b) of the *Charter* under Constitution Act, 1982. Distinction is important because the latter would involve the application of the Oakes test in the event of a breach. However, the open court principle is more about the courts being open to that which was and is filed. The failure to confirm filings is more about access to justice and access to courts.
#139		*Trisura Guarantee Insurance v Duchnij*, et al, 2021 ABCA 78 (CanLII), at paragraphs 56 to 65[66] (see: page 2091 to 2904)	
	CHAPTER #2(F)(V): Whether or not filing a statement of claim is protected speech, there is no doubt access to a Canadian superior court is protected: Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 , at para **18 to 43** . […]		

#140		*Chisan v Fielding*, 2017 ABQB 233 (see: 2906 to 2933)	
	CHAPTER #2(G): Tab 9 of Motion Record #4		
		CHAPTER #2(G)(I): Judicial acts (like note-taking at a pre-trial) are exempt from the AG's superintendence (s. 72 exemption) because they are matters assigned by law to the judiciary.	
#141		*R. v. Li*, 2008 CanLII 92006 (ON SC) (see: pages 2934 to 2941)	nota bene: The Applicant here is not seeking judicial notes but compliance by the Registrar with administrative duties.
	CHAPTER #2(G)(II): The Required Procedure in Ontario for setting aside steps, documents and/or orders on account of irregularity; The Required Procedure in Ontario for setting aside orders based on facts or fraud discovered or arising after the impugned order (nota bene: no issued order herein; no entered order herein)		
			Ergo, pursuant to a combination of equitable principles, common law and Rules of Civil Procedure (see: Rule 2.02; 59.06(2)(a) et al (see: Long v. Redbranch Investments Ltd, 2018 BCCA decision, articulating the distinctions between BC, Alberta and Ontario courts when facts or fraud have arisen or been discovered post an order), the Divisional Court is required to decide the Applicant's

			NOM #3, made on November 17, 2025, returnable on December 3, 2025 (in writing, without attendance of the Applicant and Responding Parties, and without the public's viewing);
#142		*Long v. Red Branch Investments Limited*, 2018 BCCA 115 at paragraphs 30 to 37 with reference to the correct procedure required in Ontario civil matters (see: page 2942 to 2953)	
		CHAPTER #2(G)(III): Judicial Review Forms Part of Inherent Jurisdiction of the Court evolved from the ancient prerogative writs, theirs is the general superintending jurisdiction over the administrative process.	
			judicial review cannot be ousted by legislative action; some meaningful judicial oversight must be exercisable by the ordinary courts. 21 This is now bolstered by the recent recognition that access to judicial process is constitutionally guarantee (in 2014)(TLABC 2014)
			Ergo, whether by Executive Branch or Legislative Branch, judicial review cannot be ousted. However, there will naturally be tensions between the Legislature and Judicial Branch and the Executive Branch and the Judicial Branch which is expected. However, there must never be any tension between the independence of the judiciary within the judiciary itself with a Section 96 Court.

#143		*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 SCR 31, at paras. 32-33 (repeat of above (omitted) (see: pages 2954 to 2955)	
#144		*SS v Allstate Insurance Company of Canada, 2008* (see: pages 2956 to 2967)	
	CHAPTER #2(H): Further Authorities on Primus Inter Pares		
	CHAPTER #2(H)(I):		
#145		*Smith v. Canada (Attorney General)*, 2020 FC 629 (CanLII) at para 122, (see Page 2968 to	
	CHAPTER #2(H)(III): Chief Judge: **Master of the Roster**		

#146		*Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (see: page 3014 to 3021)	
	CHAPTER #2(H)(IV): Transfer to another judge: initial judge waiving jurisdiction		
#147		Re Ramsey and The Queen, 1972 CanLII 1409 (NB CA), (see: pages 3022 to 3027)	
	CHAPTER #2(H)(V): **Ultimate Jurisdiction and Chief Justice: Steward Constitutional Trust** the Chief Justice is a steward of the "constitutional trust."		
		COMPLETELY IMPERVIOUS TO EXTERNAL INFLUENCES: They are first among equals not because they are superior to their peers, but because they bear the added burden of ensuring that the court as a whole remains "completely impervious to external influences".[23]	

#148		*Faber c. R.*, 2015 QCCS 12[67], at para 111 (see: pages 3028 to 3030)	
	CHAPTER #2(H)(VI):ROLE OF CHIEF JUSTICE HAS EXISTED SINCE 1764:		
		INHERITING PRINCIPLES FROM THE UK LAW (NO FOUNDING CONSTITUTIONAL MOMENT)	
#149		*R. v. Q.H.T.*, 2004 ABQB 526 at endnote 4 (see: page 3031 to 3033)	

	***CHAPTER** #2(H)(VII): The majority found that the inherent jurisdiction of a superior court is traditionally invoked as an adjunct to an existing right and is not intended to create new substantive law.* [68]		
#150		*Gillespie v. Manitoba (Attorney General),* 2000 CanLII 26952 (MB CA), (see: pages 3035 to 3036)	
	CHAPTER #2(H)(IX): *administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole.*		
		CHAPTER #2(H)(IX)(a): "*I cannot emphasize enough that a judge's individual adjudicative independence must not be threatened or be perceived to be threatened. This is for the sake not only of the judge's independence, but for the integrity of the judicial system as a whole.*	Applicability to the impugned judge: this is what Madam Justice Shore did previously by defaming a self-represented litigant in Adan McIntosh. A reasonable person would not feel that any judge of the SCJ Toronto Region could fairly decide his positions when such defamation was circulated to all judges in the Toronto Region

#151		Reilly v. Wachowich, 1999 ABQB 309 (CanLII) (see: pages 3037 to 378)	
	CHAPTER #2(H)(X): Judicial Independence as it relates to security of financial tenure		
#152		*Newfoundland Association of Provincial Court Judges et al. v. Newfoundland*, 1998 CanLII 14092 (NL SC) (see: pages 3079 to 3081)	
	CHAPTER #2(I): Letter enclosing Motion Record #4		
		CHAPTER #2(I)(I): FROM THE	The court emphasized that independence is a protection for the public.
#153		*Manitoba Provincial Judges Association v. Manitoba (Minister of Justice)*, 1994 CanLII 6411 (MBKB (see: 3082 to 3098	

	CHAPTER #2(I)(II): Held that adjudicative tribunals require a high degree of independence.		
		However, this independence is not constitutionally guaranteed as per Ocean Port (2001)	
#154		*Bell Canada v. CTEA*, 1998 3 F.C. 244 (T.D.) (see: Pages 3099 to 3105)	***Applicability herein:***
	CHAPTER #2(I)(III): *Major J. described j**udicial independence** as the freedom "to render decisions based solely on the requirements of the law and justice."* It requires that the judiciary be free, and reasonably seen to be free, to perform its adjudicative role without interference.		
		Administrative interference is "interference" by any other name.	

#155		*British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII) (see: page 3106 to 3151)	
	CHAPTER #2(I)(IV): Unwritten Constitutional Principles"		
		CHAPTER #2(I)(IV): Unwritten Constitutional Principles: unwritten principles possess "full legal force."	They are not mere suggestions; they are the framework within which the written text must be interpreted.
#156		*Toronto (City) v. Ontario (Attorney General)* 2021 SCC 34 (see: pages 3153 to 3207)	Applicability Herein: The "Right to be Heard" AND ACCESS TO THE COURTS, ACCESS TO MOTION HEARINGS, ET AL is an unwritten principle that the Registry is physically violating.
	CHAPTER #2(I)(V): Formalities, legislative must be followed		
		CHAPTER #2(I)(V)(a): Electronic Correspondence from a Judge not an order (even in 2014; more forceful after amendments to Rules of Civil Procedure in 2021)	

#157		*Alfano et al v. Piersanti et al*, 2014 ONSC 60 Held: that electronic correspondence from a judge does not constitute a valid endorsement because it is not made upon the motion record"[69] (see: page 3209 to 3216)	
	CHAPTER #2(I)(VI): *Functus Officio*		
#158		*Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, at para. 33 and 34 ["*CBC v. Manitoba*"] (see: pages 3217 to 3230)	
	CHAPTER #2(I)(VII): Under *Rule 2.01(1)*, the Court is vested with inherent jurisdiction to relieve against non-compliance however, such discretion is not to be construed as a carte blanche for the sanctioning of intentional procedural defiance in the absence of a formal motion to regularize an irregularity, the Court is coram non judice—lacking the requisite authority to sua sponte issue corrective orders for the benefit of a non-compliant party.		

#159		*Leadbetter v. Nor*, 2016 ONSC 5289 (see: pages 3231 to 3242)	
	CHAPTER #2(I)(VIII):the Court of Appeal affirmed that strict adherence to mandatory timing requirements is a prerequisite for procedural validity.		
		DIRECT CONTRAVENTION OF Rules of Civil Procedure – ENTERING REALM OF NULLITY STEP TAKEN IN DIRECT CONTRAVENTION OF RULES: IRREGULARITY OR NULLITY – ENTERING THE REALM OF NULLITY which must be set aside as a matter of right.	
#160		*König v. Hobza*, 2015 ONCA 885 (see: page 3243 to 3250)	
	CHAPTER #2(I)(IX): Separation of Powers		

#161		*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 SCR 319[70] [independence of Legislatures and Judiciaries] [7172] (see: page 3251 to 3262)	
	CHAPTER #2(I)(X): The Necessity of Formal Orders:		
		Establishes that a court cannot function on endorsements alone, let alone on "emails" that are not even endorsements.	The Court needs "Real Paper." "REAL PAPER" (Electronic OR HARD Copy) BECAUSE IT IS PAPER (Digital OR STONE) THAT MAKES UP THE "RECORD OF PROCEEDING". THE Divisional Court IS IMPRIMATUR of the record – without paper – there cannot be an imprimatur
		CHAPTER #2(I)(X)(a): Emphasizes that the process must remain transparent to ensure the maintenance of public confidence.	
		Solicitor's Duty to Approve Draft Orders Despite Client Instructions[73]	
#162		*Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. (Master)*, 1991 CanLII 7311 (ON SC) as per Master Peppiat[74] (see: page 3264 to 3270)	When administrative "directions" are issued by non-judicial staff—specifically the correspondence colloquially identified as the "Ibula Email"—without a corresponding judicial endorsement, the "chain of command" is effectively severed, and the *audi alteram partem* principle is gravely imperilled.

	CHAPTER #2(I)(XI): Abusive Case Management Tactics and importance of hyrniak v. mauldiin –		
		parallel to the LAT's usage of knowingly making a request for case management assignment when it **failed** to **file** a first defence[75] - counsel must act in good faith[76] (non-compliance with procedural timelines enters the realm of nullity. by that premise, the unassailable conclusion is that non-compliance with a intra Rules of Civil Procedure paramount rule like rule 77 civil case management is a nullity – not a mere irregularity	Applicability Herein: no respondent chose to go on the record to appear as a Respondent or through counsel. Serious consequences for the same.
#163		*Mayer v. Rubin,* 2018 ONSC 1826 (CanLII) (see: page 3271 to 3275)	
		(see also: affirmed in Continental Casualty Co v. Symons, 2016 ONSC 4750[77], Vallie Construction Inc. v. Carol Minaker, 2012 ONSC 4577[78]; Gagnon v. Gagnon, 2011 NSSC 486[79]	
	CHAPTER #2(I)(XI): Clarifies that a court can reconsider its decision before an order is entered.		Functus Officio only occurs after a properly reflective of a decision, has been vetted, agreed to, issued, signed and entered (see: Rules of Civil Procedure amendments in 200
#164		*Meridian Credit Union Limited v. Baig*, 2016 ONCA 150 as Strathy C.J.O., LaForme and Huscroft JJ.A. at paragraph 43 to 37 (see: pages 3276 to 3279)	***Applicability to McLean TDHA JRPA Proceeding:*** *Here, there isn't even a decision to reconsider—only "Unmade Orders" to set aside.*

			The "Door is Open" because whatever non-orders or un-made, undisclosed orders et al are void ab initio and unconsummated"
		(also citing *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 87, that a plaintiff asserting a claim for civil fraud must prove the following on a balance of probabilities	
	CHAPTER #2(I)(XII):Fraudulent Misrepresentation in the court process (civil fraud) and *Zollinger* (harmony),		
		Falsity by Omission, Silence or Inaction citing *Halsbury's Laws of England*, 4th ed. reissue (London: Butterworths, 1998), vol. 31 (at para. 748)[80] also pages 749 to 50[81] Paragraph 24 of Nirula: It is clear therefore that silence and half-truths can amount to a fraudulent misrepresentation. As explained in Tapp and Another v. Lee (1803), 3 Bos. & Pul. 367, 127 E.R. 200 at 203: "Fraud may consist as well in the suppression of what is true, as in the representation of what is false," and see Curtis v. Chemical Cleaning and Dyeing Co., Ltd., [1951] 1 All E.R. 631 (C.A.) (at p. 634):… a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid.	In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation (see: See as well *C.R.F. Holdings Ltd. et al. v. Fundy Chemical International Ltd. et al.* (1980), 1980 CanLII 586 (BC SC), 14 C.C.L.T. 87 (B.C.S.C.), aff'd on issue of liability at 1981 CanLII 488 (BC CA), [1982] 2 W.W.R. 385 (C.A.), *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1990), 1990 CanLII 6952 (ON SC), 75 O.R. (2d) 513 (Gen.Div.), appeal allowed in part at (1993), 1993 CanLII 8673 (ON CA), 13 O.R. (3d) 229 (C.A.), and many other cases to like effect.

#165		*Alevizos v. Nirula*, 2003 MBCA 148, 180 Man.R. (2d) 186, at paras. 20-25 (see: paragraph 27, citing As noted by Masten J. in Leeson v. Darlow et al., 1926 CanLII 407 (ON CA), [1926] 4 D.L.R. 415 (Ont.S.C., App. Div.) (at p. 432): Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact from being discovered (see: age 3280 to 3285)	
	CHAPTER #2(I)(XIII): Equitable Fraud		
		Language was not limited by the LGIC in the Rules of Civil Procedure to a certain type of fraud	Applicability Herein: there was no specific language under Rule 59.06(2)(a) relating to common law fraud or otherwise
#166		*Outaouais Synergest Inc. v. Keenan*, 2013 ONCA 526, 116 O.R. (3d) 742, at para. 77.[82] at para 92[83] (see page 3287 to 3291)	
	CHAPTER #2)(J): DISTINCTION BETWEEN "DAMAGE" VERSUS "DAMAGES":		

#167		*Hamilton (City) v. Metcalfe & Mansfield Capital Corporations*, 2012 ONCA 156, 347 D.L.R. (4th) 657, at paras. 55-58. (see page 3292 to 3295)	hat lost opportunity is a sufficient loss to ground a claim for civil fraud
	CHAPTER #2)(K): confirms that an order can be withdrawn until it is drawn up and entered –		
#168		*Holmes Foundry Ltd. v. Village of Point Edward Caposite Insulations Ltd. v. Village of Point Edwar*d, 1963 CanLII 197 (ONCA) (see: 3296 to 3302)	
	***CHAPTER** #2(K)(I): a discretion unfettered – before entry – no functus officio – reopen a case*		Applicability Herein: confirms the judge's "untrammelled discretion" to re-open a case before judgment is entered.
		This discretion is necessary to prevent a miscarriage of justice. "Untrammelled" means "Unlimited. *Nota bene: "The miscarriage of justice is the Void Ab Initio Compulsory Case Conference Requirements by the Ibula Email and "Unmade Order" that has blocked the Applicant's motions.* The "Blockage" must be "removed". [84]	
#169		*Castlerigg Investments Inc. v. Lam*, 1991 CanLII 7355 (ON SC) as per **Dennis Lane J.**[85] **(see: pages 3303 to 3311)**	

	CHAPTER #2(K)(II): Recission of Determinations if: (i) deprived of exhaustive opportunity to be heard (see: "Certificate Of Perfection" and requirements of the Registrar); OR (ii) led into error by incomplete record		
#170		*Smith Bus Lines Ltd. v. Bank of Montreal*, 1987 CanLII 4190 (ON SC)[86] (see: page 3312 to 3323) (see: Jurisdiction of Initial Judge: Hollingworth J. had jurisdiction to withdraw his June 25, 1987, decision before it was entered. The judge acted judicially in reopening the matter to address concerns of natural justice, as the defendant had not completed its submissions during the initial hearing; Jurisdiction of Rosenberg J.: Rosenberg J. had jurisdiction to hear the appeal de novo after the matter was referred to him by Hollingworth J. The additional endorsement by Hollingworth J. on July 24, 1987, did not affect Rosenberg J.'s jurisdiction.	
			NOTA BENE: JRPA APPLICANT DEPRIVED COMPLETELY, MATTERS NOT ADJUDICATED ET AL; AND INCOMPLETE RECORD BY INTENTIONAL NON-COMPLIANCE The Applicant remains unheard in toto as a direct consequence of exclusionary Registry practices that have prevented the proper transmission of materials to the presiding judge (nota bene: still without access to case conference transcripts; still without access to Case Center and without uploaded filed documents to Case Center at first instance or thereafter, no ability to have requisite filed documents before the presiding motions

			judge (nota bene: but now a Chief Justice's Case)
	CHAPTER #2(K)(III): Rule 59.06(2)(a) Motion: Can be heard by Successor Judge		Corroborates the principle that a successor judge possesses the jurisdiction to adjudicate a motion pursuant to Rule 59, particularly when the original adjudicator may have been inadvertently influenced by an incomplete or misrepresented record;
#171		*Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670 as per Cronk, Lauwers and van Rensburg JJ.A. at paragraphs 14 to 22[87] (see: page 3324 to 3333)	
	CHAPTER #2(L): Compendium For NOM #3		
	CHAPTER #2(L)(I): Tab 1 of Compendium For NOM #3		
#172		*Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8 (regarding the constitutionality of judicial review being protected[88] and Divisional Court and ONCA erring in interpretation of *Strickland*[89] (see: pages 3334 to 3364)	Judicial Review cannot be ousted by any Legislature or Parliament and certainly not by the Executive Branch and most certainly by the Registrar, court clerks or court staff and most certainly by the defenders of the Constitution Of Canada

	CHAPTER #2(M): Fraudulent Misrepresentation, misrepresentation to the court, on the court, tort of deceit and fraud on the court (see: *Halton v. Rezaizadeh*, 2004 CanLII 6236 (ONSC))		
		Special Categories of Causes of Nullities (see: *Landreville v. Town of Boucherville*, 1978 CanLII 202 (SCC))	
#173		*Hayward v Mellick*, 1984 CanLII 1975 (ON CA) at 753 ("*Mellick*") (see: pages 3365 to 3377)	
	CHAPTER #2(M)(I): The Equitable jurisdiction is distinct from the inherent jurisdiction		
		CHAPTER #2(M)(I): Materiality: not the sole determining factor but A FACTOR – may have reasonably affected (objective person test)	
#174		*Vale v. Sun Life Assurance Co. of Canada*, 1998 CanLII 14823 (see:3378 to 3397)	

	CHAPTER #2(M)(II):	An "Order", which includes a "Judgment" that has been contaminated and fundamentally affected by fraudulent conduct, is tainted throughout its entire complexion, thereby necessitating the failure of the whole (see: Hip Foong Hong v. H. Neotia & Co., 191 A.C. 888 at p. 894, per Lord Buckmaster	
		The imputation of fraud must be proved upon a balance of probabilities by the moving party. However, while the burden of proof constitutes a prima facie significant evidentiary hurdle, it is incumbent upon the judicial body to ensure that the standard maintains a necessary posture of flexibility, considering that the inherent concealment accompanying fraud, when discovered subsequent to an impugned order or judgment, frequently renders direct documentary proof either wholly unavailable or only available post-facto when the facts arise or are discovered.	
#175		*Brown v. Spagnuolo*, 2012 ONSC 2141 (see: pages 3398 to 3406)	
	CHAPTER *#2(M)(III)Maintaining a deliberate silence can, in specific circumstances, constitute a wilful or fraudulent* misrepresentation, which is critically juxtaposed against an "innocent misrepresentation". When individuals who did not personally originate the misrepresentation are		

	nonetheless cognizant that the underlying statements are mendacious but elect to remain silent, they, too, may be found liable for the tort of fraud		
#176		*Sugar v. Peat Marwick Ltd.* (Ont. H.C.J.), 1988 CanLII 4635 (ONSC)) (see: page 3407 to 3419)	
	CHAPTER #2(M)(IV): Inferential and Circumstantial Evidence allowed on Motions To Set Aside on Grounds of Fraud		
177		*North British & Mercantile Insurance Co. v. Tourville* (1895), 1895 CanLII 68 (SCC), 25 S.C.R. 177, at paras. 7-9, and quoted in *Canada v. Granitile Inc.*, at para. 291) (see: page 3420 to 3423)	
	CHAPTER #2(N): Bribery		
#178		*Enbridge Gas Distribution Inc. v. Marinaccio*, 2012 ONCA 650;[90] (see: 3424 to 3445)	

	CHAPTER #2(O): FIDUCIARY DUTY OF "FIRST PROVISIONAL INSURERS" AND "FIRST PERMANENT INSURERS"[91]		
#179		*Beasley et al v. Barrand*, 2010 ONSC 2095 at paragraph 34 (per The Honourable Justice Moore on April 9, 2010) ["***Beasley***"] at paragraph 34[92] [93] (see: pages 3445 to 3459)	
	CHAPTER #2(O)(I): Beasley noted up[94]		
		In 2012, Ontario courts had found that there was a new tort (tort of inclusion upon seclusion) in Jones v. Tsige	
#180		*Jones v. Tsige*, 2012 ONCA 32 (CanLII) (See: page 3459 to 3461)	
	CHAPTER #2(O)(I): 2015: Dervisholli		
#181		*Dervisholli et al. and Cervenak and State Farm*, 2015 ONSC 2286 Dervisholli (Justice Marlyss Edwards for Ont. Div. Ct.): only way – non-*SABS* insurance department – non-*SABS* insurer – third party insurer – entitled – access – insured's AB file CONTENTS: (i) consent of Insured Person; OR (ii) court order.[95] (see: pages 3462 to 3475)	

	CHAPTER #2(O)(II):Transamerica: affirming legal principles: Beasley, Tsige, and Dervisholli		
#182		*David v TransAmerica, 2016 ONSC 1777* [96] *at paragraph 54 to 57* (see: pages 3476 to 3481)	
	CHAPTER #2(O)(III):Counsel's misuse of information [97] [nota bene: distinction with a difference between counsel's misuse versus two different and distinct insurance companies misusing the same]		
#183		*Raffaella de Rosa v. Wawanesa Mutual Insurance Company*, 2017 ONFSCDRS 161 (see: page 3483 to 3494)	
	CHAPTER #2(O)(IV): Extortion[98]		
#184		*R. v. Davis*, 1999 CanLII 638 *(SCC)*, per Lamer C.J.) (see pages 3495 to 3501)	

	***CHAPTER** #2(O)(IV)(A): Threats – Extortion*		
#185		*R. v. Alexander*, 2005 CanLII 32566 (ON CA), at paragraph *(The court held that Alexander's threat **to send** a letter to M.M.'s employer to compel repayment of a debt constituted extortion.* *The threat was coercive and went beyond what could reasonably be considered a legitimate means of debt collection.* *The defence of "reasonable justification or excuse" was rejected, as the threat to harm M.M.'s employment was disproportionate and unjustified (paras 66-93)* (see: pages 3502 to 3508)	Applicability Herein: extortionary conduct involving the pre-Application and during the JRPA Application conduct was all extortionary conduct because it was designed to and an attempt to deprive the Applicant's of his free will. Veiled Threats like the misconduct involving those that stole from the Applicant by the TDI Karat Theft by reference to the TPL print out involving fraudulently borrowing of books contained threats or attempts to destroy Applicant's free will
	CHAPTER #2(O)(IV)(B): intersectionality and co-occurrence of extortion and obstruction of justice		
186		*R. v. Barros*, 2016 ABQB 243 *(CanLII)*, per Lee J., at paragraph 16 (see: page 3509 to 3512)	
	CHAPTER #2(P): Interim, Interlocutory and Injunctive Relief		

#187		*Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, 2000 CanLII 22697 (ON SC) at paragraphs 13–15 (see page 3513 to 3529)	Nota bene: similar to leave under section 6(2) of the JRPA in that in setting aside the steps, documents, or orders at the time, hear the injunctive, interim and interlocutory relief at the hearing of the same
	CHAPTER #2(P)(I): Rule 45.01: flexible and broadly interpreted to do justice		
#188		*Young v. IAMGOLD Corporation*, 2022 ONSC 3811 (CanLII) at paragraph 76 (see: page 3531 to 3544)	
	CHAPTER #2(P)(III): The Move Away from Taribo: Test for Rule 45.01:[99]		
#189		*BMW Canada Inc. v. Autoport Ltd.*, 2021 ONCA 42[100] at paragraph 38 to 45 (see page 3545 to 3552)	
	CHAPTER #2(Q): The LAT with issues yet again – Round 4 or 5 with a lack of independence?		

#190		**CHAPTER #**2(Q)(I): Derenzis: The LAT and Tribunals Ontario are NOT one and the same If Tribunals Ontario is the records-holder, then the LAT is not	Hence, why in February 2025, the LAT (Ms. Lee) represented it was still trying to determine how to compile the ROP during the ROP Temporal Period
		Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761 (see: 3553 to 3567)	Applicability herein: the LAT first provided a purported index in February 2025, it then claimed
	CHAPTER #3: From Dunsmuir to *Vavilov*: the SCC changes the standard of review legal test for the second time in 11 years		
#191		*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 36, 39, 50[101] at paragraph 36, paragraph 53 and 54[102] [103], paragraph 61, and paragraph 199[104] 3568 To 3672	
	CHAPTER #3(B): The Notice of Motion for NOM #3 MADE ON NOVEMBER 17, 2025 – SERVED ON THE SAME DATE ON RESPONDING PARTIES (returnable date on December 3, 2025)		
		Responding Parties in NOM #3 (see: Affidavit of November 21, 2025)	

		CHAPTER #3(B)(I): Finding of bias, conflict of interest, apprehension of bias or apprehension of lack of independence of apprehension of partiality – merits of any steps, documents or orders (especially when unmade (i.e. not in compliance with the taken are null and void without reference to their merits	
	CHAPTER #3(B)(II): Principal-Agency Relationships		
#192		Newfoundland Telephone Co. (see: pages 3673 to 3666)	
		Hitchcock v Sykes (1914), 1914 CanLII 5 (SCC) at 422, Brodeur J[105] (see: ages 3677 to 3679)	The operative juridical test for the determination of whether a pecuniary transmission, supplementary benefit, or promise constitutes a bribe is entirely contingent upon the creation of a realistic prospect of a conflict of interest as between the appointed agent and the instructing Principal: Otkritie International at para 67; and Eze v Conway & Anor, 2019 EWCA Civ 88 (BAILII) at para 35
	CHAPTER #3(C): Changes in Banking Laws (separation of banks from insurance companies in Canada)		

#194		*Insurance Business (Banks and Bank Holding Companies) Regulations*, SOR 92/330 at section **10**[106] [107] [108] [109] (see: pages 3680 to 3690)	
	CHAPTER #4: Varying or Setting Aside Orders due to Fraudulent or Facts Arising (also: setting aside documents, steps or orders due to irregularities); Special categories of causes of nullities ("Nullity Causes") in fraud, bribery and extortion[110]		
#195		*JV Mechanical v. Steelcase*, 2010 ONSC 1443 [111] Cited in: [112] (see: pages 3691 to 3702)	The court determined that the undisclosed evidence was material, as it could have affected the 2008 decision. Steelcase was found to have exercised due diligence in 2008 and brought the present motion without delay upon discovering the new evidence (paras 30-43).
	CHAPTER #4(B): Errors of Law and Party Status under section 5 of the SPPA		
		Cited in the JRPA Application and Factum (see: Errors of Law: Drewlo Holdings v. MPAC, the ONSCJ (DC); Kawa Arab at paragraph 19[113]; Bassline, VC Lamoreux[114]Lapcevich, the ONSC [115] Sparks [116] Glencore[117])	
#196		*Fatemea Rezaiezadeh v. State Farm Mutual Automobile Insurance Company*, 2016 ONFSCDRS 59 ("*Reza*") (see: page 3706 to 3719(	

	CHAPTER #4(C): First Insurer Litigation: the evolution from pre-2010 to after		
	CHAPTER #4(D): An Actual Precedent for an automobile insurer with two different insurance files and umbers		
#197		*Intact Insurance Company v. Bateman*, 2014 ONFSCDRS 14 (as per Delegate Blackman) [118] (see: page 3719 to 3733)	
	CHAPTER #4(E): Chubb v. Zurich Decisions		
#198		*Chubb Insurance Co. of Canada v. Zurich Insurance Company*, 2014 ONCA 400 ("Zurich 2014") with reference to the Honourable Justice Juriansz of the ONCA (as he then was) dissent (the "Juriansz Dissent") (see: pages 3735 to 3738)	
#199		Zurich Insurance Co. v. Chubb Insurance Co. of Canada, 2015 SCC 19 ["*Zurich 2015*"] (see: page 3738 to 3741)	

#200		*Chubb Insurance Co. of Canada v. Zurich Insurance Company*, 2024 ONSC 2929 (as per The Honourable Justice Akazaki) ["*Zurich 2024*"][119] (see: page 3742 to 3757)	
	CHAPTER #4(F): *Res Judicata*		
#201		*EnerNorth Industries Inc. (Re)*, 2009 ONCA 536 at paragraph 50 to 64[120] ["EnerNorth"] (see: page 3758 to 3761)	
	CHAPTER #5: Compendium For NOM #3 – FACTUM for the JRPA Proceeding (December 12, 2024, served on the Respondents)		
		***CHAPTER** #5(A): Legal Issues Evasive of Appeal (or Judicial Review) and of importance to practice and procedure before the LAT*	
#202		*The Personal Insurance Company v. Jia*, 2020 ONSC 6361 (Divisional Court) ("Jia") (see: page 3761 to 3755)	

	CHAPTER #5(B): Admin proceeding: AARD Doctrine or not?		
		avoid multiplicity of proceedings – judicial review only premature when tribunal process provides adequate remedy (nota bene: none before the lat as per vcm decisions and VC lake recon decision)	
#203		*Harold The Mortgage Closer Inc. v. Chief Executive Officer of the Financial Services Regulatory Authority of Ontario*, 2024 ONSC 2236 (CanLII)[121] and Harold the Mortgage Closer Inc. v. Ontario (Financial Services Regulatory Authority, Chief Executive Officer), 2024 ONSC 4464 (CanLII), (see: pages 3769 to 3774)	
	CHAPTER #5(C): Volocahy: deals with ongoing administrative investigations – not an administrative proceeding where a final decision or order was made		
#204		*Volochay ()* (see: pages 3776)	
	CHAPTER #5(D): *Sanscon*		

#205		*Sanscon Construction Ltd. v. City of Toronto*, 2021 ONSC 6409 as per Vella J. ["*Sanscon*"] (see: page 3777 to 3783(	
	CHAPTER #5(E): JRPA v. LATA, AND RES JUDICATA		
#206		*Said v. Northbridge General Insurance Company*, 2024 ONSC 5248 (Div. Court) as per Backhouse, D.L. Corbett, Stothart, JJ. Res judicata citing Danyluk[122] (see: page 3784 to 3786)	
	CHAPTER #5(F): issue estopppel:		
#207		*Kazen v. Whitten & Lublin Professional Corporation*, 2020 ONCA 325 at paragraph 5 as per Gillese, Brown and Jamal JJ.A.[123] (see: page 3787 to 3790)	
	CHAPTER #5(G): Issue Estoppel: whether there was a change in the law or special circumstances[124]:		

#208		*Victoria University (Board of Regents) v. GE Canada Real*, 2016 ONCA 646 at paragraph 96-99[125] Doherty, Pepall and Benotto JJ.A. (see: page 3791 to 3794)	
	CHAPTER #5(H): Awada: dealing with issue of an appeal before the Divisional Court and an interlocutory ruling (not at issue herein)		
#209		*Awada v. Allstate*, 2021 ONSC 8108 as per The Honourable Justice D.L. Corbett, In Chambers, In Writing[126] (see: page 3795 to 3799	
	CHAPTER #5(I): *Mansuri Decisions*		
#210		*Mansuri v. Dominion of Canada General Insurance Company*, 2023 ONSC 5764 at paragraph 43 [“Mansuri Divisional Court Decision”] [nota bene: with reference to the inapplicability herein][127] [128] as per **R.S.J. Edwards, Backhouse and Lococo JJ. (nota bene: RSJ Edwards if of the Central East Region although it was heard in Toronto Region)** **(see: pages 3800 to 3809)**	

#211		*Mansuri v Dominion of Canada General Insurance Company*, 2022 CanLII 138547 (ON LAT) ["Mansuri LAT Decision"] as per VC McGee[129] (see: page 3810 to 3823)	
	CHAPTER #5(J): Insurance Companies are the sophisticated parties		
#212		*Mosa v BelairDirect Insurance Company*, 2022 CanLII 11164: Vice-Chair Maedel ["Mosa"]). (3824 to 3828)	*In 2022, the Tribunal released its seminal decision in Mosa wherein it found, as per Vice Chair Maedel, that insurance companies were the sophisticated parties, and ADR specialists (along with adjusters) were not separate parties (nota bene: persistent discord)*
		PRE-YATAR DECISIONS	
	CHAPTER #5(K):judicial review final decisions (pre-*Yatar* decision):		
#213		*Sudbury and District Health Unit v Ontario Nurses' Association*, 2023 ONSC 2419 ["*Ontario Nurses Association*"] (see: page 3829 to 3839)	

	CHAPTER #5(L):Lourenco v. TPS i		involved the challenge by the complainant to the appointment of an investigator of the TPS and an investigation admin proceeding against Police Officer Mr. Lourenco – no final decisions at issue (Pre-*Yatar* Decision)
#214		*Lourenco v. Toronto Police Service, Chief of TPS, Hegedus*, 2017 ONSC 3872 as per The Honourable Justice D.L. Corbett of the Divisional Court at paragraph 6 ["*Lourenco*"] (see: 3840 to 3844)	
	CHAPTER #5(M):Concurrent Jurisdiction of HRTO and Labour Board (nota bene: no such concurrent jurisdiction herein; dovetails to the core jurisdiction test for independence of the judiciary (see: cases supra including: (i) RT Test; (ii) 1997 Provincial independence reference; and (III) others		
#215		*London District Catholic School Board v. Weilgosh*, 2024 ONSC 3857 as per Backhouse, King, Krawchenko JJ. of the Divisional Court of Ontario (see: page 3845 to 3849)	
	CHAPTER #5(N):SECTION 56 OF *SABS*: LIMITATION PERIOD –		
		two years from the time period of the decision of the First Provisional Insurer and/or the Fist Permanent Insurer Section 56 of the Schedule provides that an application to dispute a denial of a benefit must be	

		commenced within two years of the insurer's refusal to pay. Section 64 allows the denial notice to be sent by regular mail or faxed to an insured's lawyer. Once a proper denial has been properly sent, if an insured does not appeal within that period, the Tribunal can not hear it as it is "time-barred".	
216		*RM v CAA*, 2020 CanLII 94755 (see: page 3851 to 3858)	
	CHAPTER #5(O):ISSUE ESTOPPEL: INDIVIDUALS AND CORPORATIONS:	ISSUE ESTOPPEL AND ABUSE OF PROCESS: THE COURT AGREED THAT THE APPELLANTS' CONSTITUTIONAL ARGUMENTS WERE BARRED BY ISSUE ESTOPPEL, AS THE SAME ISSUES HAD BEEN CONCLUSIVELY DECIDED BY THE DIVISIONAL COURT. THE THREE PRECONDITIONS FOR ISSUE ESTOPPEL—SAME ISSUE, FINAL DECISION, AND SAME PARTIES—WERE SATISFIED.	
217		*College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association (Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario)*, 2015 ONCA 851 (CanLII) (See: 3859 to 3866)	

	CHAPTER #5(P):Res Judicata Bars Re-Litigation of Zoning By-Law Challenge		
218		*Las Vegas Strip Ltd. v. Toronto (City)*, 1996 CanLII 8037 (ON SC) (see: page 3867 to 3870))	
	CHAPTER #6: COMPENDIUM FOR NOM #3: TAB 10 TO 12		WHICH IS "NOTICE OF MOTION NUMBER ONE" ["NOM #1"] IN THIS JRPA PROCEEDING ALONG WITH WRITTEN SUBMISSIONS FOR NOTICE OF MOTION #1 (SEE: TAB 12 FOR COMPENDIUM FOR NOM #3)
		CHAPTER #6(A): THE RECORD OF PROCEEDING	(EVEN CJ MORAWETZ HELD THAT THE LEGAL PRECEDENT WAS AN APPLICANT MUST TAKE ACTIVE STEPS IF THE RECORD IS INCOMPLETE BY WAY OF FILING BY THE IMPUGNED ADJUDICATIVE BODY)
#219		*Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ONCA) ["*Payne*"], at paragraphs 79 [the record of proceeding when the decision was made], paragraph 160, paragraph 161 (see: pages 3871 to 3875)	

	CHAPTER #6(A)(I)(a): Payne cited with approval by ONSC Divisional Court in 2024		
#220		*Lachance v. Solicitor General of Ontario*, 2024 ONSC 975 (CanLII) as per The Honourable Justices Stewart, Myers, and Leiper JJ of the Divisional Court at paragraph 37 (see: 3876 to 3878)	
	CHAPTER #6(B): General Principles		
#221		Jacko v. McLellan, 2008 CanLII 22921 (ONSCDC) ["Jacko"] as per Ferrir J. in chambers by way of motion and referencing paragraph 18 (see: 3879 to 3883)	
			(see: The applicant brought an application for judicial review of the Chief Coroner's decision not to order an inquest into the death of a child. The respondent took the position that it was not required to file a record of the proceedings as a decision by the Chief Coroner not to order an inquest is not the exercise of a statutory power of decision and as no "proceedings" took place. The applicant brought a motion for an order compelling the respondent to file a record of proceedings. Held, the motion should be granted. As long as there was a pending application for judicial review, a record of the proceedings must be filed. It would be for the panel to determine whether the decision of the Chief Coroner was reviewable and whether there was a "proceeding" below. MOTION for an order compelling the respondent to file a record of proceedings.

#222		*REW v Association of Professional Engineers of Ontario (Discipline Committee)*, 2016 ONSC 4043 (CanLII) ["REW"] as per Dambrot, J. (orally) at paragraph 8; (see: 3884 to 3889)	
#223		*Endicott v. Ontario (Independent Police Review Office)*, 2014 ONCA 363 ["*Endicott ONCA*"] at paragraph 1, paragraph 18 ['upon receipt of a judicial review application] and paragraph 44 (citing *Payne*), (see: pages 3890 to 3893)	
#224		*Endicott v. Independent Police Review Director*, 2013 ONSC 2046 ["*Endicott ONSC*"] at paragraph 20 (see: 3894 to 3897)	
	CHAPTER #6(C): CASES INVOLVING PRIVACY OR MEDICAL (CONTEXTUAL)		
#225		*Batacharya v. The College of Midwives of Ontario*, 2012 ONSC 1072 ["*Batacharya*"] at paragraph 13 to 15; (see: 3898 to 3903)	
#226		*LifeLabs LP v. Information and Privacy Commr. (Ontario)*, 2022 ONSC 5751 ["*Lifelabs LP*"] at paragraph 13 [citing *Payne* and *Endicott*] (see: 3904 to 3912)	

	CHAPTER #6(D):LEGAL PRINCIPLE AND PRECEDENT: ALL MATERIALS IN THE RECORD OF PROCEEDING THAT PREDATE THE VCM DECISION		
#227		*UFCW Canada v. Rol-Land Farms Limited*, 2008 CanLII 6652 (ON SCDC), ("*Rol-Land Farms*") at paragraph 38 **LEITCH R.S.J., GREER and SWINTON JJ.**[130] **(SEE: PAGE 3913 TO 3915)**	
	CHAPTER #6(E):Decision of The Honourable President of the Divisional Court (Chief Justice of the SCJ) in the Divisional Court		
228		*Reflection Productions v. Ontario Media Dev. Corp.*, 2022 ONSC 64 ["*Reflection Productions*"] at paragraph 74 and 75 as per **MORAWETZ C.J., VARPIO, KRISTJANSON JJ.**[131] [132] (see: 3916 to 3920)	
	CHAPTER #7: TAB #13 to #15: notice of motion #2 (made on January 31, 2025)		
		CHAPTER #7(A): Judicial Recusal Principles: Conflicts of interest	

229		*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25 (CanLII) (see: 3920 to 3928)	
	CHAPTER #7(B): Bias if judge involved in ongoing litigation and similarity of the matter before the juge at the time of the recusal requested		
		Crown is Indivisible: *The Crown is indivisible, and the judge's personal claim created an appearance of partiality, as any decision unfavorable to the Crown could be perceived as advancing her own interests (paras 27, 31).*	
#230		*Benedict v. Ontario*, 2000 CanLII 16884 (ON CA), at paras. 18-22.[133] (see: 3929 to 3933)	
	CHAPTER #7(C): Prior Judicial Involvement with litigant		
#231		*Ontario (Director, Family Responsibility Office) v. Samra*, 2008 ONCJ 465 (CanLII) at paras 45-47. (see: 3934 to 3937)	

			(nota bene: distinct when the prior judicial involvement is undisclosed like an "Ex Parte In Camera Hearing", "Ex Parte In Camera Unrecorded Hearings" and/or an "Ex Parte In Camera Unrecorded Hearings Unretained Indictment Process" (see: False Information Package, false Criminal Code Form 2 "Information"; False Intake Court Endorsement [Sic] with on its face is a negative credibility findings against the applicant (albeit more to be known
	CHAPTER #7(D): A client cannot waive a COI where the lawyer may be a witness;		
		Talisman Resort as per Conlan J. of the Central West Region; Wheeler v. Taylor 2024 ONSC 818; Urquhart v Allen Estate,[134]; Yellow Cedar; Bose v. Bangiya Parishad Toronto, 2018 ONSC 7639; R. v. Kang; Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General); Committee for Justice and Liberty v. National Energy Board, supra, at p. 388; Canada (Human Rights Commission) v. Taylor; Ghirardosi v. Minister of Highways for British Columbia; Eckervogt v. British Columbia (Minister of Employment and Investment),	
	CHAPTER #7(E): Tab 14: Factum (see: February 1, 2025) for NOM #2 (see: January 31, 2025) – motion for judgment on the issues as they were at the time (see: page 2888 and onwards of Compendium For NOM #3)		
		CHAPTER #7(E)(I): section 6(2) of the JRPA including Rule 14 of the Rules of Civil Procedure	

#232		Savone v. Law Society of Upper Canada, 2013 ONSC 1015 (see: page 3938 to 3943)	
	CHAPTER #7(E)(II): Written Hearings – non opposition within time – leading to summary ruling - Rule 37.12.1 to 5.		
#233		*Kolten v. Walker*, 2019 ONSC 3210 at para 5 (see: 3944 to 3946)	
	***CHAPTER** #7(E)(III):Having motions heard in writing are most preferrable when the time it will take to have such motion scheduled and heard are at issue, the importance of ensuring that interests are fairly represented, as well as the importance of moving this matter forward expeditiously (nota bene: all about opportunity(ies) to present a person's position; the respondents had opportunities but failed to do so)*		

#234		*Agapi v Munshi*, 2023 ONSC 2053 at para 4. (see: 3947 to 3949)	
	CHAPTER #7(E)(III):Inapplicability of or in the favour of the Applicant: Mansuri, Heegsma and Awada		
#235		*Heegsma v. Hamilton (City)*, 2024 ONCA 865[135] (see: page 3950 to 3960)	
	CHAPTER #7(E)(IV):CONVERTING A MOTION INTO A MOTION FOR JUDGMENT: OPPORTUNITY TO FULLY ARGUE THEIR POSITION; AND NECESSARY EVIDENCE		
#236		*CMLQ Investors Co. v. CIBC Trust Corp.*, 1996 CanLII 905 (ON CA) ["CIBC Trust Corp"] (see: 3961 to 3963)	The law in this province has been since 1996 that a proper case to convert a motion into a motion for judgment involves a two part legal test: (i) where the parties have had the opportunity to fully argue their positions; and (ii) all necessary evidence was before the motions judge.
#237		*Royal Bank of Canada v. Rastogi*, 2011 ONCA 47 (see: 3965 to 3977)	

	CHAPTER #7(E)(V): Procedure for dealing with conflicted case management judge		
			(however, GWL dealt with a proper assignment of that action for case management and assignment to a particular judge which is absent in the case at bar)
#238		*G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, 1992 CanLII 934 (BCCA) ["GWL Properties" or "Bentall Properties"]. (see: page 3978 to 3989)	
	CHAPTER #7(E)(VI): CONVERTING A MOTION TO JUDGMENT:		Rule 37.13(2)(a) has been cited directly or by being a prescribed companion to the inherent jurisdiction of the court
#239		*Stickel v. Unum Provident Corporation*, 2009 CanLII 63588 (ON SC) at paragraph 4. (see: page 3990 to 3992)	
	CHAPTER #7(E)(VII)The general principle converting motions into motions for judgment:		convert the motion before him to a motion for judgment "as the best way to achieve the most just, most expeditious, and least expensive result", in accordance with r. 37.13(2)(a) of the Rules of Civil Procedure:

#240		*Donovan v. Waterloo (Police Services Board),* 2022 ONCA 199 at paragraph 39. (see: 3993 to 3995)	
	CHAPTER #7(E)(VIII): Important of the "Certificate Of Perfection" and filing electronically		
#241		*Hiamey v Toronto Community Housing Corporation,* 2016 ONSC 4372 (Divisional Court) as per Del Frate J. citing Rule 68.04(4) of the Rules of Civil Procedure at paragraph 14 and the issue of whether the application for JR was perfected was at issue (see: paragraph 16) (see : page 3997 to 4001)	
	CHAPTER #8: Compendium For NOM #3:		
		REQUISITIONS: Tabs 15 to 17; AND WRITTEN OUTLINE FOR Compendium For NOM #3 TAB #30[136]:	
	CHAPTER #8(A): Agency relationships[137]		

#242		*Pastoor v. Pastoor*, 2007 CanLII 28331 (ON SC) (see: page 4002 to 4004)	
	CHAPTER #8(B): Law of Admissions		
		CHAPTER #8(B)(I): An admission has been defined as an unambiguous deliberate concession to the opposing party:	
#243		*Canada Permanent Mortgage Corporation v. The City of Toronto*, 1951 CanLII 121 (ON CA), [1951] O.R. 726, paragraph 7[138]. (see: page 4006)	
	CHAPTER #8(B)(II): Formal admissions are important to the integrity of litigation		
#244		*Patterson v Scherloski* (1971), 1971 CanLII 703 (ON SC), 21 DLR (3d) 641 at 645 (Ont H Ct) (see: page 4007 to 4009)	as they improve the efficiency of the administration of justice, advance fairness interests, and promote reliable fact finding and legal reasoning
	CHAPTER #8(B)(III): A formal admission is not like other pieces of evidence led at trial that a judge can weigh at their discretion. A formal admission is conclusive of the matter admitted. The court is bound to act on formal admissions before it, even if other evidence contradicts the admission		The judicial interpretive exercise cannot morph into an analysis of the veracity of the admission.

#245		*Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161, at para. 106." (see: page 4010 to 4012)	
	CHAPTER #8(C): Applicant's Compliance with Rule 37.12.1	[leads to a brief endorsement in favour of the Moving Party or with reasons to follow after the order is made]	
#246		*Agbapu v Dr. Munshi*, 2023 ONSC 3458, Regional Senior Justice Firestone (see: page 4013 to 4015)	
	CHAPTER #8(D): Interlocutory vs. Final Orders		
		CHAPTER #8(D)(I): final decisions and final orders are those decisions and orders that refuse relief to: (i) add parties; (ii) amend pleadings; and/or (ii) causes of action	The Refused Final Orders Sought in NOM #14 and NOM #15 of the Applicant, which were oddly unopposed by the Respondent Insurance Companies, by VCM and then refused again on reconsideration by VC Lake
#247		*ME v. Ontario*, 2021 ONCA 718 (see: page 4017 to 4020)	
	CHAPTER #8(D)(II): Summary Motions Issue Estoppel: Final Decisions		Further, where a motion, that is summary disposition in nature is dismissed, it will be final if it involves a substantive issue like issue estoppel
#248		*Almrei v. Canada (Attorney General)*, 2011 ONCA 779 ["*Almrei*"]). (see: page 4021 to 4025)	
	CHAPTER #8(D)(III):Even motions that were dismissed that sought leave to issue third- and fourth-party claims were final		
#249		*Khalil et al. v. United Investment Services Ltd. et al.*, 1975 CanLII 490 (ONSC) ["Khalil"]. (see: page 4026 to 4030)	

	CHAPTER #8(D)(III)(a): Positive Citing of *Khalil*		
250		*Denison Mines Ltd. v. Ontario Hydro*, 2001 CanLII 5681 (ON CA) at paragraph 21. (see: page 4031 to 4033)	
	CHAPTER #8(D)(IV):		Even further, where a question of law is at issue, even when the ongoing inferior tribunal proceeding is ongoing, is a final order or decision. An order dismissing a motion for summary judgment on a question of law, where the only genuine issue is the question of law should probably be regarded as giving rise to res judicata and, hence, a final order
251		*David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, 2004 CanLII 19916 (ON CA) ["Polowin"] (see: page 4037to 4043)	
	CHAPTER #8(E): Issue Estoppel and Final Decisions (interplay)		
#252		*Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII) at para. 25,[139] and paragraph 54[140] (see: page 4044 to 4050)	
#253		*Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (see: page 4051 to 4058)	

#254		*Smith Estate v National Money Mart Company*, 2008 ONCA 746 (see: page 4059 to 4062)	
	CHAPTER #8(F): Statutory Right of Appeal arises in 2016; .		
		Vavilov in 2019; as such: right of appeal (not an exercised one) – standard of review is correctness (no deference) Changes in 2014 and 2016: Ergo, ss. 11(6) did not become practically effective until the LAT officially replaced the FSCO[141]	
255		*Penney v. The Co-operators General Insurance Company*, 2022 ONSC 3874 ["*Penney*"] at paragraph 18[142] (see: 4062 to 4064)	
	CHAPTER #8(G):It is an error of law to make a finding of fact on a material point where the factual finding is based solely on (a) no evidence, (b) irrelevant evidence, or (c) an irrational inference		
256		*Johannson v. Saskatchewan Government Insurance*, 2019 SKCA 52 at paras. 24-25) (see: 4065 to 4067)	
257		*Elkins v. Van Wissen*, 2023 ONCA 789 [143] at paragraph 69[144] (see: page 4068 to 4071)	

	CHAPTER #8(H): Record of Proceeding and Open Court Principle, and Statutory Tribunals, particularly adjudicative ones are part of the administration of justice		
		CHAPTER #8(H)(I): Record of Proceeding	
#258		*K.D. v. Peel Children's Aid Society*, 2017 ONSC 7392 (Div. Ct.) at paras. 16-17). (see: pages 4072 to 4076)	
		CHAPTER #8(H)(II):Open Court Principle and Section 2(B) of the *Charter*	
#259		*Toronto Star v. AG Ontario, 2018 ONSC 2586* at paragraph 6, 42, 54, 55, 56, 62 (above: omitted) (see: 4077)	
	CHAPTER #8(H)(III):Statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice"		
#260		*Southam Inc. v. Canada (Minister of Employment and Immigration),* 1987 CanLII 9001 (FC), (see: 4079 to 4082)	
	***CHAPTER** #8(H)((III)(a): The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public*		

#261		*Germain v Saskatchewan (Automobile Injury Appeal Commission)*, 2009 SKQB 106 at paragraph 103[145] (see: 4083 to 4084)	
	CHAPTER #8(I): Bottom Line Rulings: Disposition with reasons to follow		
		the Ontario Court of Appeal held that "reasons, even if released long after the decision, are presumed to reflect the reasoning that led him [the trial judge] to his decision: R. v. Cunningham, [2011] O.J. No. 3546,	
#262		*The Queen v. Teskey*, 2007 SCC 25[146] (see: page 4085 to 4090)	
#263		*Law Society of Ontario v. Harrison*, 2024 ONLSTA 1 (CanLII), at para 68 and paragraph 5 (see: 4091 to 4094)	
#264		*Little Start Child Care Inc. v. Director, Child Care and Early Years Act, 2014*, 2021 CanLII 21001 (ON LAT) as per Member Ms. Friedland cited *Tesky* with approval at paragraph 31 (see: 4095 to 4097)	
	CHAPTER #8(J): Pre-*Vavilov* and Pre-*Yatar* Decisions relating to AJ Doctrines and Exceptions to the Same (a non-justiciable issue because the relief sought in the JRPA Application relate to final decisions,		

	determinations, and orders in relation to VCM Decisions and VCL Recon Decision)		
		CHAPTER #8(J)(I):Parties to administrative proceedings (section 5 of the SPPA: Reza and the AJ Doctrines[147] (thing of the past but relevant to Reza)Principles of administrative law have long held that a person *can* be made *a* party to a proceeding only if he or she has a direct or substantial *interest* in the outcome of the case (*Re Hoogendoorn and Greening Metal Products & Screening Equipment* (1967), 1967 CanLII 20 (SCC), 65 D.L.R. (2d) 641 (S.C.C.))." (see: in relation to TDHA (formerly liberty mutual insurance) and Reza case [148]	
#265		*C.B. Powell Ltd. v. Canada (Agence des services frontaliers*), 2010 FCA 61 at paras. 30-33 (see: 4098 to 4101)	
	CHAPTER #8(J)(II):Pre *Yatar* Decision: In 2020, this Divisional Court precisely and appropriately found that the law of prematurity was effectively synonymous with that of the AAAR Doctrine		
#266		*Metro Ontario Real Estate Limited v. Corporation of the City of Orillia*, 2020 ONSC 7002 at paragraph 30 (see: 4101 to 4103)	

	Tabs 267 to 276 omitted (no longer relevant)		
	CHAPTER #8(M)(I): Pre Ontario Energy Board (SCC) decisions relating to the scope of a tribunal standing		
		Put differently, it has been stated that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review":	
#277		*Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner) (2005)*, 2005 CanLII 11786 (ON CA), 75 O.R. (3d) 309 (C.A.) ("Goodis"), at para. 24, para. 42[149] citing *Northwestern Utilities*[150] and citing *Canada (Attorney General) v. Quadrini*, 2010 FCA 246 in Goodis[151] (see: page 4014 to 4107)	
	CHAPTER #8(M)(II): Vigorous arguments are prohibited and tone matters		

#278		*Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paragraph 49, paragraph 61[152] and paragraph 62 (see: page 4108 to 4119)	
	CHAPTER #8(L)(III):Power of the Divisional Court to disregard arguments at any time of a tribunal that has descended too far into merits, adjudicating as a party et al [153]		
#279		*Taylor v. Pivotal Integrated HR Solutions*, 2021 ONSC 7720 at paragraphs 18-20[154] (see: page 4119 to 4127)	Nota bene: a decision of Madam Justice Shore by being a member of a three judge panel
	CHAPTER #8(L)(IV): 3RD PART OF THE LEGAL TEST OF OEB		
		INVESTIGATIVE POLICY BASED TRIBUNALS VS. ADJUDICATIVE/QUASI-JUDICIAL TRIBUNALS	
#280		*Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at para. 42.[155] (see: page 4128 to 4136)	

	CHAPTER #8(L)(V)bootstrapping:		
#281		*United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd.*, 2002 NBCA 27) at paragraphs 26, 32-37 (see: page 4137 to 4136)	
	CHAPTER #8(M):Test Case Unlike Any Other – a Chief's Case:		
			Ad Hoc Data Fiduciaries - Vulnerability of Injured Persons (Data Context) (see: other issues) Duty of Confidentiality: Dervisholli, Transamerica, and Jia
#282		Galambos v. Perez, 2009 SCC 48 (CanLII) (see: 4137 to 4145)	
	CHAPTER #9: KEEPRITE STANDARD		
		Keeprite Standard: Affidavit evidence containing material that was not before the decision-maker is not admissible on judicial review unless it:	a) provides non-argumentative background information; b) demonstrates that the decision-maker decided an essential point without any evidence; or c) demonstrates the decision-maker breached the Rules of natural justice
283		*Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.*, 1980 CanLII 1877 (ON CA) at paragraph 18[156] (see: 4145 to 4153)	

284		*Sticky Nuggz Inc. v. Alcohol and Gaming Commission of Ontario*, 2020 ONSC 5916 as per The Honourable Justices Swinton, Lederer, Penny JJ (see: 4154 to 4165)	
	CHAPTER #10: The Exception to a lawyer's duties to his, her or its own client (duty to opposing litigants)		
#285		*Laiken v. Carey*, 2011 ONSC 5892 (CanLII) at paragraph 54 and 55 (see: 4166 to 4168)	
	CHAPTER #11: Costs		
#286		*Soleil Hospitality Inc. v. Louie*, 2010 BCSC 1183[157] at (see: 4170 to 4195)	
	BY REFERENCE TO Compendium For NOM #3		
	TAB 22: AFFIDAVIT OF THE APPLICANT, MOVING PARTY IN NOM #3 (NOVEMBER 17, 2025) AND AFFIDAVIT OF SERVICE – EXPRESSLY ADOPTS THE STATUTORY DECLARATIONS #1 (OCTOBER 10, 2025 AND NOVEMBER 14, 2025)		
	TAB 23: Divisional Court JRPA GUIDE ISSUED BY THE MAG, EFFECTIVE IN 2024 TO JUNE 2025 (SEE: PAGES 3150 TO		

	TAB 24: Divisional Court JRPA GUIDE ISSUED BY THE MAG, DATED END OF JUNE 2025 (SEE; PAGES 3160 TO)		
	TAB 25: CONFIRMATION OF MOTION FOR NOM #3 (SEE: PAGE 3173 TO __) includes by Appendices: email of Monday, November 24, 2025, wherein the Moving Party gave his COM to the Registrar, as she then was, in now Former Registrar Gentles pursuant to Rule 37.10.1 of the Rules of Civil Procedure; and first updated Motion Record for NOM #3 (the "1st Updated Motion Record #3"); email from November 21, 2025: Provision of the Un-Notarized Affidavit of Service prior to the provision of the Affidavit/Affidavit of Service on said date); Wednesday, November 19, 2025, service of the Motion Record (parts 1 and 2 of 2)); and Factum for NOM #3 on Wednesday, November 19, 2025; and the "Making of NOM #3 on Monday, November 17, 2025) (nota bene: discovery of the professional retainer between Mr. Sinnadurai and the Madam Justice Shore); Sunday, October 26, 2025: request or demand of the Respondents, excluding Attorney General of Ontario, as to whether they had "delivered" or "filed" their Notices of Appearances); October 14, 2025; service of the Applicant's statutory declaration #1 of October 14, 2024 (and the material development involving the Madam Justice Shore		

	representation regarding refusing to "acknowledge" (Judicial Acknowledgement) albeit representing that "we" "cannot" provide 'audio/transcripts[sic]' for case conferences (nota bene: diametrically opposed to the MAG CSD Court Information Access Guide and the Court Transcripts Practices Standards Manual (2024) and the language of the SCJ RMO that only Judicial Acknowledgement was required (meaning that the tapes and materials required for transcription were and are available for copying but Madam Justice Shore stonewalled the same (which would have been permissible by the Court Transcripts Practices Standards Manual issued by the MAG for "family case conferences" but not civil case conferences; to the extent that there is no "legislative" provision, then section 146 applies. Moreover, for purposes of appeal (if applicable), a transcript is required).		
		TAB 27: REQUISITION OF THE APPLICANT OR MOVING PARTY (NOVEMBER 26, 2025): (I) REQUIRE ACCESS TO CASE CENTER; Long v. Redbranch Investments Ltd. (2018, BCCA) cited supra	
	CHAPTER #12: Costs cited in Costs Submissions (see: page 4196 to 4313)		

		Solicitor-Client Costs, When to Be Awarded Against Counsel and Tort of Maintenance	
#287		*Young v. Young*, 1993 CanLII 34 (SCC) including references to the tort of maintenance[158] (omitted (see: supra)	
#288		*Davies v. American Home Assurance Co.*, 2002 CanLII 15469 (ON SCDC),	
#289		*Sagl v. Chubb Insurance Company of Canada*, 2009 ONCA 638; and Sagl v. Chubb (Costs), 2012 ONSC 310	
#290		*McDougald Estate v. Gooderham*, 2005 CanLII 21091 *(ON CA)*	
#291		*Del Giudice v. Thompson*, 2021 ONSC 6974	

#292		*Boucher v. Public Accountants Council for the Province of Ontario,* 2004 CanLII 14579 (ON CA	
#293		*Fletcher v. Manitoba Public Insurance Co.,* 1990 CanLII 59 (SCC),	
#294		*Iannarella v. Corbett et al,* 2012 ONSC 6536 (CanLII)	
#295		*Issa v. Aiello, 2025 ONSC 5173*	
#296		*Pye v. Di Trapani et. el., 2024 ONSC 2265*	
#297		*Laczko v. Alexander,* 2012 ONCA 872	
	CHAPTER #13: Due Execution of Office by Judge (the new legal test since Bill C-9 was passed), Judicial Ethics and CJC articles on		

	document classification, document retention et al (see: pages 4314 to 4507)		
		Quamdiu se bene gesserit—during good behaviour his protection serves as a bulwark against executive interference, ensuring judicial independence. However, this security is not absolute; it is counterbalanced by the necessity of accountability. When a judge's conduct erodes public confidence to a degree that renders the administration of justice in disrepute, the mechanisms of removal are engage	
		"Failure in due execution" not merely as a metric of competence but as a functional abdication of the judicial role—whether through incompetence (*Cosgrove*), sloth (*Dugré*), or defiance of the rule of law (*Ruffo*). Simultaneously, it explores the "incompatible position" test, a relational standard that measures the rupture of the bond of trust between the judge and the public, often triggered by bias (*Camp*), dishonesty (*Girouard*, *Einfeld*), or compromised independence (*Matlow*, *Wilson*).	

		Drawing on inquiry reports, legislative debates (Bill C-9), and comparative case law, this document synthesizes the global judicial understanding of the point at which a judge ceases to be "fit" for office. It argues that while "misconduct" is the broad genus of judicial error, "failure in due execution" and "incompatibility" are the specific species that justify the ultimate sanction of removal.	
		The previous section of the *Judges Act* read as follows: Report and Recommendations **Report of Council** • **65 (1)** After an inquiry or investigation under section 63 has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister. • **Recommendation to Minister** **(2)** Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of o **(a)** age or infirmity, o **(b)** having been guilty of misconduct, o **(c)** having failed in the due execution of that office, or o **(d)** having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.	

		The current section of the *Judges Act* reads as: **Removal from Office** **Justification** **80** For the purposes of this Division, the removal from office of a judge is justified only if, for any of the following reasons, the judge's continuation in office would undermine public confidence in the impartiality, integrity or independence of the judge or of their office to such an extent that it would render the judge incapable of executing the functions of judicial office: • **(a)** infirmity; • **(b)** misconduct; • **(c)** failure in the due execution of judicial office; • **(d)** the judge is in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of judicial office.	
		The change in the statutory legal test is significant to this JRPA Proceeding and that Madam Justice Shore not add other atrocities to her misconduct and that the Divisional Court President engage forthwith to remedy the previous failures in due execution of office	
		Introduction of Bill C-9 The introduction of Bill C-9 was driven by the need to streamline a process that had become bogged down in procedural delays (as seen in the *Girouard* and *Cosgrove* affairs). The Bill replaces the old inquiry committee structure with a new "hearing panel" system but retains the core definitions of removal-worthy conduct.[5] Critically, the legislation explicitly	

		incorporates the "reasonable, fair-minded and informed observer" into the text of subsection (d), cementing the objective standard of public confidence as the touchstone for removal.[3]	
		The "Marshall Test" and Common Law Origins Before these statutory grounds were so explicitly parsed in recent amendments, Canadian jurisprudence relied on the "Marshall Test," derived from the CJC inquiry into the judges involved in the wrongful conviction of Donald Marshall Jr. This common law test asks: "Is the conduct alleged so manifest and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office?" [8] This test serves as the interpretive lens for subsections (c) and (d). It clarifies that "failure in due execution" is not about a single reversible error, but about a "manifest and total" departure from the standards of the office	
	PRE-2023 DECISIONS (AFTER CHANGE OF THE *JUDGES ACT*)		

#298		REPORT OF THE REVIEW PANEL, CONSTITUTED BY THE CANADIAN JUDICIAL COUNCIL, REGARDING THE HONOURABLE D.E. SPIRO (the "Justice Spiro Decision") [159] Subject: Interference by Justice Spiro in the appointment of The referral was based on a number of distinct complaints concerning the alleged conduct of the judge in respect of the potential appointment of Dr. Valentina Azarova to the position of Director of the University of Toronto Faculty of Law's International Human Rights Program ("IHRP This complainant further submitted: The reports further allege that the interference may have been motivated by a judge's disapproval of Dr. Azarova's research on Israeli occupation of Palestinian lands. If that were so, it would be very troubling. It would put the integrity and impartiality of the Court in jeopardy. Any party or lawyer before it who is Palestinian, Arab, or Muslim could reasonably fear bias.	
			Therrien (Re), 2001 SCC 35 at para. 147, is often cited: before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office

	Post 2023 Decisions involving the CJC		
#299		**DECISION OF THE REVIEW PANEL** **IN THE MATTER OF:** **THE HONOURABLE ANDREW J. GOODMAN** **OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO** **CJC Files: 24-0799 and 24-0818** **("Justice Goodman Decision")** Review Panel Members: The Honourable Shane I. Perlmutter The Honourable John S. Little Mr. Curtis Kleisinger (the "Goodman Decision") **Justice Andrew J. Goodman** **File:** 24-0799 / 24-0818 | **Court:** Superior Court of Justice of Ontario | **Date:** June 23, 2025 • **Nature of Complaint:** Inadvertently read the wrong version of a sentencing decision (8 years instead of 6) and failed to disclose or correct the error for **14 months** until the appeal was imminent. • **Key Findings:** The panel found the delay to be a "serious ethical lapse." The judge's belief that he was *functus officio* (lacking jurisdiction to change the decision) was an error in judgment; he should have addressed the matter in open court immediately.	

		• **Outcome:** * **Public Reprimand** (the most severe sanction short of removal). o Order to issue a **formal apology** to the defendant and both sets of counsel.	
#300		CHANG DECISION (Justice) DECISION OF THE REVIEW PANEL IN THE MATTER OF: THE HONOURABLE CHARLES C. **CHANG** OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO CJC File 23-0488 Review Panel Members: The Honourable Associate Chief Justice Kenneth G. Nielsen The Honourable Justice Johanna Price Ms. Julia Pavlenko **File:** 23-0488 | Nature of Complaint: Allegations of verbally abusive, intimidating, and disrespectful behavior during an urgent family law motion. The judge reportedly yelled and frequently interrupted counsel. Key Findings: The panel found the judge was impatient and his tone was "abusive and intimidating at times." While the judge was under stress due to a courthouse closure and ill-prepared counsel, the panel ruled these factors did not justify a breach of civility.	

		Outcome: * Action of a private nature (Expression of concern/warning). Order to engage in mentoring/coaching with a senior judge	
#301		**Justice Doyle Decision** DECISION OF THE REVIEW PANEL IN THE MATTER OF: THE HONOURABLE ARTHUR DOYLE OF THE COURT OF KING'S BENCH OF NEW BRUNSWICK CJC FILE 24-0144 **Justice Arthur Doyle** **File:** 24-0144 | **Court:** Court of King's Bench of New Brunswick | **Date:** Nov 12, 2024 Nature of Complaint: **Undisclosed conflict of interest**. The judge presided over a settlement conference where a former law partner (from 4.5 years prior) was a party to the dispute. **Key Findings:** The judge made an "honest mistake" by assuming the three-year "cooling off" period for former firm lawyers applied to former partners appearing as parties. The panel found a reasonable person would apprehend a lack of impartiality, especially since the opposing party was self-represented. **Outcome:** Private measure (expression of concern/warning). The panel noted mitigating factors, including the judge's lack of intent	Applicability Herein: no honest mistake by Madam Justice Shore.

		to mislead and the difficulty of finding judges in smaller urban centers. See: Ethical Principles of Judges, 5 C10 : appropriate for a judge to make disclosure of potential conflict and invite submission from the parties. However, JUDGES (not the parties or their counsel) bear the burden oof ensuring respect from the principle of judicial impartiality. Impartiality: Even perceived conflicts (past professional ties) must be disclosed to ensure the appearance of justice, particularly when dealing with self-represented litigants	
#302		Justice Marc St-Pierre CJC Decision File: 24-0784 | Court: Superior Court of Québec | Date: May 27, 2025 Nature of Complaint: Inappropriate comments about a former litigant. During a hearing with a different lawyer from the same office, the judge made sarcastic remarks about a previous complainant ("Don't get too close..."). Key Findings: The judge failed in his "duty of reserve." He acknowledged the comments were inappropriate and attended a seminar on cognitive bias and prejudice following the complaint. Outcome: Two private actions under section 102 of the *Judges Act*.	Applicability Herein: Madam Justice Shore would not even acknowledge the requirement of the case conference ATO request. Digital recording paid for by prescribed fees with the RFU

#303		Ethical Principles for Judges by the Canadian Judicial Council	
#304		CJC article, Model Definition of Judicial Information, 2020	
#305		CJC on Classification of Court Information	
#306		CJC Model Policy on Retention of Court Information Model Policy for the Retention of Court Info 2022-09-28 EN For Consultation -v 2	
#307			

APPENDICES

ENDNOTES

[1]

[2]Passed by the: Public Service of Ontario Statute Law Amendment Act, 2006, SO 2006, c 35, which was tied to the PSOA 2006 and the OPP Collective Bargaining Act 2006

[3]***REG 283* AMENDED: CLARIFIES DEFINITIONS OF "COMPLETED APPLICATION; CLARIFICATION OF WHAT A "FIRST INSURER" IS (DISTINCT FROM FIRST PARTY INSURER); FIRST INSURER MUST: (I) RESPOND; AND (II) PAY**

In 2010 (September 1, 2010), the LGIC made substantial amendments in *Reg 283*, effected by was amended by Ontario Regulation 38/10, but primarily due to industry wide consultation including the FCSO (see: **FSCO's A07 interpretative bulletin**), were not passed until September 2010. Therefore, after September 2010, *Reg 283* as it was after September 2010, clarified and particularized the following: (i) First Insurer definition; (ii) the duty to not only pay but to respond to an Applicant where such an insurer had received a **Completed Application**; (iii)

[4]Reg 283 Amended **REG 283 AMENDED: CLARIFIES DEFINITIONS OF "COMPLETED APPLICATION; CLARIFICATION OF WHAT A "FIRST INSURER" IS (DISTINCT FROM FIRST PARTY INSURER); FIRST INSURER MUST: (I) RESPOND; AND (II) PAY BENEFITS EVEN IF NOT THE UNDERWRITER**

[5]Interpretative Bulletin: FSCO's A07 interpretative bulletin, issued by FSCO on May 13, 2010

[6]SABS AMENDED IN 2014 :SABS AMENDMENTS 2014

In 2014, the LGIC amended SABS. On December 17, 2013, and without any fanfare, the government released Ontario Regulation 347/13, amending the Statutory Accident Benefits Schedule. According to the Ministry of Finance, the amendments (which affect the attendant care, medical & rehabilitation and weekly benefits) will help reduce costs and uncertainty in the system by continuing to crack down on abuse and fraud, and clarifying benefits for auto insurance claimants. The amendments came into force on February 1, 2014

[7]On June 1, 2016, the LGIC amended SABS. One of the substantial amendments under the 2016 version of SABS was: The definition of CAT Impairment; The word "essential" with reference to Med/Rehab benefits; Benefit statements (see: 50(3)(d) of SABS); Removal of mediation, arbitration, appeal or variation under section 280 to 284 of the Insurance Act (see: section 55 of SABS)

[8] Cepecawer v. McKevitt, 2023 ONSC 219 (CanLII), at para 11, <https://canlii.ca/t/jttl1#par11>, retrieved on 2026-01-19

[9]51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 1982 CanLII 3238 (ON SCDC), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 1983 CanLII 1879 (ON CA), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, 1977 CanLII 3163 (FCA), [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, 1982 CanLII 5204 (FCA), [1983] 1 F.C. 182 (C.A.), aff'd 1985 CanLII 63 (SCC), [1985] 1 S.C.R. 174).

[10][42] In any event, since the Law Society has the power to create a CPD scheme, it necessarily has the power to enforce the scheme's standards. Given the breadth of the statutory authority, the Act must be construed such that the powers it confers "include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature": *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51. This is consistent with s. 32(1) of *The Interpretation Act*, which provides that "[t]he power to do a thing or to require or enforce the doing of a thing includes all necessary incidental powers."

[11]***"The Decision Review Process***[24] In-house counsel for the LAT swore an affidavit explaining that the executive chair implemented a decision review process at the LAT. The stated reason was to maximize the quality of the tribunal's decisions. The peer review process has not been adopted formally. No written policy was provided but counsel swore that, "generally, the LAT decision review process for final decisions is, and at all material times in this case was" as follows:

First, there is peer review: After drafting a decision, an adjudicator ***is expected to send the decision for peer review by the Duty Vice-Chair***. The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful. Second, there is legal review:

The SLASTO Legal Services Unit reviews the decision to ensure [guarantee] that the **correct legal test** has been applied and to identify any related case law that was not mentioned that might be helpful[11].
Third, there is a second peer review by the executive chair: "In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high-profile issue – ***the Legal Services Unit will send the decision to the Executive chair for her review***. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review."
Fourth, there is a review by the file's case management officer: The case management officer acts as an intake officer and primary point of contact for the parties. This review involves examining the decision's format, correcting grammatical and spelling errors, and ensuring that the template and parties' names are correct." [Emphasis added.]
[12]The record shows that the government effectively shut down the Manitoba Provincial Court by ordering the withdrawal of court staff several days before the Chief Judge announced the closing of the Manitoba Provincial Court. As well, the government also shut down the courts by rescheduling trials involving accused persons who had already been remanded by the court. Paragraphs 269 to 276 of 1997 Judicial Independence Impartiality Case: Manitoba Closing of Provincial Court: Filmon Fridays – the Executive Branch's decision to close the courts two weeks before the order of the Chief Justice of Manitoba ordered the same by imitation in verbatim form (the "Parrot Order") was operating under the power of dictation by the Executive Branch of These acts constituted a violation of the administrative independence of the Manitoba Provincial Court.
[13]Nota bene: also cited at Motion Record #4, pages 22 and 23; page 26;
[14]"These facts clearly demonstrate that the decision to withdraw court staff was taken almost two weeks before the Chief Judge ordered the closure of the Manitoba Provincial Court. As well, the court was closed on the same days as the unpaid days of leave for court staff. Moreover, it is the uncontroverted evidence of Judge Linda Giesbrecht, which was presented at trial, that the Manitoba Provincial Court could not function "without the assistance and presence of Courts' staff including Court clerks, Crown Attorneys, Legal Aid lawyers and Sheriff's officers and other administrative personnel".
[15]As cited in *Baldovi*, the Supreme Court's decision in ***Ruffo*** (1995) is the primary authority for the "preferred position" of the Chief Justice in ethical matters.
The Court held that:
The supervisory powers of Chief Judges over ethics are **inherent** in their functions; The Chief Justice possesses a unique **"moral authority"** naturally associated with their status; and This authority allows them to initiate complaints against colleagues to protect the institution's reputation without compromising the impartiality of the subsequent disciplinary process.
[16] [42] The appellant's argument that its powers are constitutional since they are inherent to the office of chief justice is based on the following passage from *Ruffo* [at paragraphs 57 and 58]:
… It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents. Many aspects of this role derived from judicial tradition without being transferred to legislation. Therefore, the fact that there was no explicit legislation on ethics until quite recently does not mean we can doubt the continuity that marked the development of the chief judge's responsibilities in this regard. It accordingly cannot be argued that the supervisory powers conferred on the chief judge by … s. 96 [of the *Courts of Justice Act*, R.S.Q., c T-16 then in force] were assigned spontaneously by the legislature; in my view, they must rather be seen as the expression of a reality that is consistent with general practice and gradual developments over time. This opinion is shared by the American author … Geyh, who asserts that the chief judge's supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions …. I agree. [Emphasis in original.]
[43] However, to understand its real import, this excerpt from *Ruffo* should be put in its original context. Those comments were made by Justice Gonthier, on behalf of the majority, in response to the argument that the chief judge of the Court of Québec should not be allowed to lay a complaint with the *Conseil de la magistrature* against a judge of his court because it would go against the principles of judicial impartiality and independence. It is in this very specific context that the comments reproduced above were made and should be understood. This is clear from the paragraph that follows [at paragraph 59]:
We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard. [Emphasis added.]
[44] What we understand from this passage is that the only inherent power of a chief justice identified by the Supreme Court in *Ruffo* with respect to judicial discipline is that of *laying a complaint* against one of the judges under his or her supervision. There is nothing to suggest that this power should necessarily include that of holding an inquiry into such a complaint. Moreover, when chief justices act in such a way, they do so by reason of their role as coordinators of the court in their division. In other words, if this power is "inherent," it is so with respect to their functions as chief justices, which are essentially administrative functions (*Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, at paragraph 99), not their functions as judges (if that were the case, every judge would be granted this power). Nor does that decision mention that a chief justice would have such power in respect of judges other than those of his or her court. The Council's powers are not limited in this manner.
[17] [50] In focussing on the practice directive, Crown counsel pointed out that the practice directive was not made pursuant to the rule making power of the court under s. 482(2) of the Criminal Code. Rather, the practice directive was made pursuant to the provincial legislation in s. 8.1 of The Provincial Court Act. Crown counsel also pointed out that administrative independence of the judiciary attaches to the court as a whole and that because the practice directive lacks the collective dimension that a rule would have had (as it is made by the

Chief Judge alone), it is not of the same force as a rule. In support of this position, Crown counsel relies on the following from Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice) (at para. 275):

Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Manitoba Provincial Court throughout, there would nevertheless have been a violation of s. 11(d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. As this Court held in Valente, control over the sittings of the court falls within the administrative independence of the judiciary. And as I indicated above, administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "primus inter pares": Ruffo v. Conseil de la magistrature, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision.

[18]It should be recalled that, according to the teachings of the Supreme Court of Canada, the supervisory powers of a chief justice with respect to professional conduct are inherent in the exercise of his judicial functions and do not require any specific legislative authority, whereas, as primus inter pares , he therefore occupies a privileged position to ensure compliance with judicial ethics within the Court (*Ruffo v. Conseil de la magistrature* , 1995 CanLII 49 (SCC) , [1995] 4 SCR 267 at paras. 58-59). In any event, when a Committee of Inquiry has been established under subsection 63(3) of the Act , the Chief Justice has the implied power to relieve, in whole or in part, a judge of certain judicial functions, pending the outcome of the investigation into a disciplinary complaint, to the extent that this may appear necessary in the best interests of justice and its administration, and to preserve public confidence in the courts and the judges who are part of them.

[19][21] Moreover, the directive to no longer assign cases to Justice Dugré is not subject to review by the Federal Court. It should be recalled that, according to the teachings of the Supreme Court of Canada, the supervisory powers of a chief justice with respect to professional conduct are inherent in the exercise of his judicial functions and do not require any specific legislative authority, whereas, as *primus inter pares* , he therefore occupies a privileged position to ensure compliance with judicial ethics within the Court (*Ruffo v. Conseil de la magistrature* , 1995 CanLII 49 (SCC) , [1995] 4 SCR 267 at paras. 58-59). In any event, when a Committee of Inquiry has been established under subsection 63(3) of the Act , the Chief Justice has the implied power to relieve, in whole or in part, a judge of certain judicial functions, pending the outcome of the investigation into a disciplinary complaint, to the extent that this may appear necessary in the best interests of justice and its administration, and to preserve public confidence in the courts and the judges who are part of them.

[20]Subsequent case involving suspending the CJC proceedings by way of relief sought, which was denied, until the applicant judge's leave application to SCC was heard

[21]Manitoba Procedure: a duty judge receives applications for wiretap "Ex Parte In Camera Hearing": It was explained to counsel that it is the duty judge who typically receives applications for authorizations like the application in the present case. It was also explained to counsel that the "duty judge" is assigned that role by the trial coordinator. That assignment by the trial coordinator of the duty judge is in turn done arbitrarily and randomly based upon the availability of the judge and the general exigencies and vagaries of the Court of Queen's Bench rota. Accordingly, where there is an initial application for something such as a wiretap authorization, the supporting materials are brought to the court after they are prepared and without prior knowledge of the identity of the assigned duty judge

[22]R. v. Baldovi et al, 2016 MBQB 90 (CanLII), at para 72: [72] In addition to the practical reality discussed above, it can also be said that from time to time, a case presents as "a Chief's case". Such a case may be defined by its challenges, its controversy and/or its high profile nature. Such a case may also present as one whose circumstances place the focus on the integrity of the court. Even if an ultimate adjudication (concerning initial questions that touch the integrity of a court's process) proves not to be determinative in a legal sense, there is in most cases – given the stakes – no one more appropriately positioned to conduct such adjudications than the Chief Justice. While not all judicial decisions to recuse or not recuse can or should be reduced to an ethical issue, to the extent that a potential link does exist, the Chief Justice as *primus inter pares* is often in a preferred position to comment. No less so in the context of a formal adjudication. See ***Ruffo v. Conseil de la magistrature***, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267 at paras. 58-59. That is not to say that any Chief Justice can or should consider him or herself in court or in chambers as the final arbiter of ethical questions. Yet, as the face of the court, the Chief Justice is uniquely placed to present for his colleagues, the legal profession and the public generally, a leadership that will address potential legal/ethical issues that require administrative or adjudicative clarification so as to ensure public confidence not only in his or her own court, but the judiciary generally.

[23]Such a case may be defined by its challenges, its controversy and/or its high profile nature. Such a case may also present as one whose circumstances place the focus on the integrity of the court (issue in Request of the Applicant on January 5, 2026: Has the case been defined by (i) challenges; (ii) controversy; (iii) high profile nature; and/or (iv) circumstance place focus on integrity of the court) such that this JRPA Proceeding, particularly NOM #3 and Motion #4 present a chief's case)Even if an ultimate adjudication (concerning initial questions that touch the integrity of a court's process) proves not to be determinative in a legal sense, there is in most cases – given the stakes – no one more appropriately positioned to conduct such adjudications than the Chief Justice. While not all judicial decisions to recuse or not recuse can or should be reduced to an ethical issue, to the extent that a potential link does exist, the Chief Justice as primus inter pares is often in a preferred position to comment. No less so in the context of a formal adjudication. See Ruffo v. Conseil de la magistrature, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267 at paras. 58-59 (nota bene: the issue of Madam Justice Shore's ethics were raised by letter to the CJ of the SCJ (President of the Divisional Court) by letter in January 2025 but without response presumably failure of the since dismissed or resigned Former Registrar Gentles)Yet, as the face of the court, the Chief Justice is uniquely placed to present for his colleagues, the legal profession and the public generally, a leadership that will address potential legal/ethical issues that require administrative or adjudicative clarification so as to ensure public confidence not only in his or her own court, but the judiciary generally.

[24]Also of assistance on this issue is the trial level holding of Glube C.J.T.D. in *MacKeigan* (1988), 1988 CanLII 7124 (NS SC), 43 C.C.C. (3d) 287 (N.S.S.C.), at pp. 336-337, where she held that judges are not competent to testify about judicial matters they were involved in, even if they want to testify. A judge's table of contents at Motion to Quash Divisional Court 24/718/JR: January 30, 2026

judicial capacity, even if the judge would like to respond to one or more of the questions which have been publicly raised. It would be wrong to do so. One question could not be asked in isolation and there is an obligation to preserve the judicial immunity for the benefit of the public. For this immunity, in the performance of judicial duties, is not for a judge personally, it is for the benefit of the public "to protect the judicial system against interference or influence which might pervert the course of justice" (*Morier*, p. 737).

[25] he privilege cannot be waived by an individual judge (see: Ermina v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 8969 (FC), [1998] F.C.J. No. 1785 (FCTD), 160 F.T.R. 317 at ¶10; Kosko v. Bijimine, 2006 QCCA 671 at ¶43; R. v. Baldovi, 2016 MBQB 90 at ¶22)

a. [26] that the administrative mandate includes the exclusive power to assign judges to cases—which specifically includes the **power to assign himself or herself** to any particular matter
    i. Hence, the Applicant's respectful request that the Chief Justice of the SCJ, in his capacity as the President of the Divisional Court,
b. This is the primary mechanism by which a Chief Justice "takes over" a high-profile or controversial case: by ensuring they lead the panel or preside over the trial from its inception.

Hence, the CJ of the SCJ (in capacity as President of the Divisional Court) can lead a panel should that arise.

[27]COMPREHENSIVE SUMMARY: "THE ROLE OF A CHIEF JUSTICE IN CANADA" BY PETER W. HOGG

In this seminal article, Professor Peter W. Hogg—widely regarded as Canada's preeminent constitutional scholar—provides a definitive analysis of the multifaceted and often precarious role of the Chief Justice within the Canadian superior court system. While Chief Justices share the core adjudicative duties of their colleagues (the "puisne" or associate judges), Hogg argues that their office carries a unique, non-shared responsibility: managing the "delicate interface" between the judiciary and the executive branch of government. This relationship is not merely administrative; it is a central pillar in the maintenance of judicial independence and the rule of law in Canada.

1. Appointment, Qualifications, and the "Judge-Administrator"

The appointment of a Chief Justice is a high-level political act, performed by the Governor in Council (the federal Cabinet). Hogg notes a subtle but critical distinction in the selection process: while recommendations for puisne judges typically originate with the Minister of Justice, the recommendation for a Chief Justice usually comes directly from the Prime Minister. This procedural difference underscores the perceived importance of the role as a bridge between the state and the law, marking the Chief Justice as the primary diplomatic representative of the judicial branch to the executive.

Legally, the requirements are identical to those of any superior court judge—ten years of standing at the bar of a province. However, Hogg emphasizes that the practical demands of the office require a specialized skillset that transcends legal scholarship. A Chief Justice must be more than a scholar; they must be a "judge-administrator." This role demands:

- **Leadership and Diplomacy:** The ability to foster consensus among a group of fiercely independent peers. Unlike a corporate CEO, a Chief Justice cannot simply issue orders to other judges; they must lead through persuasion and moral authority. They must maintain court harmony while often making difficult decisions regarding workload distribution and internal policy.
- **Organizational Mastery:** Navigating the complex bureaucracy of the Department of Justice to ensure the court remains functional. This involves understanding public service staffing, procurement cycles, and governmental reporting structures. The Chief Justice must speak the language of "estimates" and "budget cycles" to effectively advocate for the court's operational needs without becoming a "politician."
- **Political Acumen:** Representing the court's interests to the government without compromising the appearance of neutrality. The Chief Justice must advocate for resources—such as more judges, modern facilities, or better technology—while simultaneously presiding over cases where that same government is a party. This requires a sophisticated understanding of how to exert pressure through appropriate channels without appearing partisan or compromised.

In practice, this means Chief Justices are almost exclusively drawn from the existing bench rather than directly from the bar. They require an intimate understanding of the court's internal culture and the daily realities of trial or appellate work before they can effectively manage the institution.

2. Tenure, Discipline, and the Canadian Judicial Council (CJC)

A Chief Justice's tenure is protected by the constitutional standard of "good behaviour" until age 75, shielding them from arbitrary dismissal by the executive. However, their role extends to protecting the tenure of *all* superior court judges through their leadership within the **Canadian Judicial Council (CJC)**.

The CJC, chaired by the Chief Justice of Canada and composed of all provincial and federal Chief Justices, acts as the primary guardian of judicial integrity. Hogg highlights two essential functions that have profound implications for the independence of the bench:

- **Professional Development and Ethical Standards:** The CJC standardizes judicial education and administrative best practices. By controlling the curriculum of judicial training and setting ethical guidelines, the Chief Justices ensure that the standards of the profession are determined by the judiciary itself, rather than by government officials or external political bodies. This prevents the executive from indirectly influencing the law through the "training" of its interpreters.
- **The Disciplinary "Buffer":** This is perhaps the most critical protection for judicial tenure. When a complaint is lodged against a judge, the CJC—a body of the judge's own peers—conducts the investigation. Hogg explains that by ensuring the government cannot initiate the removal of a judge without a prior recommendation from the CJC, the Chief Justices provide a vital institutional buffer. This prevents the executive from using disciplinary threats or "frivolous complaints" as a weapon to influence judicial outcomes. It ensures that no judge is removed for making a decision that is legally sound but politically unpopular, effectively placing the "keys" to judicial tenure in the hands of the judiciary itself.

3. The Administrative Paradox: Authority vs. Resources

The core of Hogg's thesis is the "administrative paradox" that defines the modern Canadian judiciary. This paradox is rooted in the Supreme Court's landmark decision in *Valente v. R.* (1985), which established that "institutional independence" is a constitutional prerequisite for

any court. According to *Valente*, the judiciary must have exclusive control over administrative matters that "bear directly on the exercise of its judicial function."

Hogg identifies three "red line" powers that must remain under the exclusive control of the Chief Justice to prevent executive overreach:

1. **The Assignment of Judges:** The Chief Justice alone decides which judge hears which case. This prevents the government from "forum shopping" or assigning a "pro-government" judge to a sensitive constitutional challenge or a high-profile criminal trial involving state interests.
2. **Sittings and Dockets:** The court, not the government, determines its own schedule and location. This prevents the executive from effectively "shutting down" or delaying the court's work by refusing to schedule sittings in specific regions or on specific dates.
3. **Case Prioritization:** The management of court lists ensures that the executive cannot bury controversial cases or fast-track political priorities to the detriment of ordinary litigants. The Chief Justice ensures that the "queue" is managed according to the interests of justice and the rule of law, not the interests of the state.

The paradox arises because the Chief Justice possesses the *legal authority* to manage these functions but lacks the *financial autonomy* to fund them. They do not have an independent treasury; instead, they must petition the Minister of Justice for every dollar required to pay staff, maintain buildings, and purchase the technology necessary to maintain these lists and assignments.

4. Friction with the Executive: The "Principal Litigant" Problem

Hogg explores the profound tensions created by this financial dependence. The Chief Justice is "inescapably dependent" on the executive for three vital pillars of court operation, each carrying its own structural risks:

- **The Budgetary Approval Process:** The Minister of Justice (the Attorney General) acts as the court's advocate in Cabinet. If the Minister fails to secure adequate funding—either through a lack of political influence or a disagreement over judicial priorities—the court's efficiency and the public's access to justice suffer. The Chief Justice has no direct voice in the Cabinet room where these final resource allocations are made, leaving them reliant on a political intermediary who may have competing priorities.
- **The Staffing Dilemma and "Dual Loyalty":** Court registrars, clerks, and security are typically public servants. Their pay scales, promotions, and job descriptions are dictated by the executive's treasury board. Hogg observes that these employees may feel a "dual loyalty": they serve the judge in the courtroom, but their long-term career prospects, benefits, and workplace rules depend on the government. This can complicate a Chief Justice's ability to implement long-term administrative reforms if those reforms conflict with general government employment policies, union agreements, or budgetary cuts.
- **Logistics, Infrastructure, and Procurement:** Everything from the physical courthouse to case management software is provided through government procurement processes. These processes often prioritize cost-savings or generic government-wide standards over the specific, high-security, and high-efficiency needs of a court of law. A Chief Justice may find themselves with a "one-size-fits-all" computer system that is ill-suited for the complex task of managing a modern judicial docket, yet they lack the independent authority to hire their own specialized vendors.

The most glaring anomaly, Hogg notes, is that the Minister of Justice is the "Principal Litigant" in the country. This creates a theoretical conflict of interest: the person responsible for prosecuting the Crown's cases and defending its laws is the same person providing the judge's pens, paper, support staff, and courtroom security.

5. The Great Debate: Total Independence vs. Accountability

Hogg provides a critical counter-perspective to the 1981 *Masters in their Own House* report by Chief Justice Jules Deschênes. Deschênes argued that the current system was an inherent threat to independence and proposed that courts should submit their budgets directly to the legislature, entirely bypassing the executive branch and the Ministry of Justice.

Hogg **rejects** this radical path, offering a staunch defense of the traditional parliamentary model based on three profound principles:

- **The Principle of Ministerial Accountability:** In a democracy, public funds must be overseen by someone who can be voted out of office. An unelected Chief Justice cannot be held politically accountable for a botched court budget or inefficient spending. Accountability must rest with an elected Minister who can be questioned daily in the House of Commons. To grant the judiciary total financial control would be to create a "state within a state" that is immune to democratic oversight.
- **The Reality of Fiscal Competition:** The judiciary does not exist in a vacuum. Hogg argues they should not be a "privileged class" exempt from the trade-offs that affect healthcare, education, or social services. The government must be able to weigh the court's needs against other societal priorities in a unified budget. If the courts were exempt from treasury constraints, they would be uniquely insulated from the economic realities facing all other citizens, which Hogg views as a violation of democratic norms.
- **The "Shield" of the Minister:** Hogg argues that if Chief Justices were forced to defend their budgets in public legislative committees (as seen in some U.S. jurisdictions), they would inevitably be drawn into partisan politics. They would have to justify their spending against political attacks and perhaps even "lobby" politicians for funds. Having a Minister "champion" the budget in Cabinet actually protects the Chief Justice from political mudslinging, preserving their essential image of impartiality.

6. Case Studies in Institutional Pressure: Askov and Beyond

Hogg illustrates the power dynamics between the branches using the *R. v. Askov* (1990) case as a pivotal example. In *Askov*, the Supreme Court ruled that excessive delays in bringing a case to trial—delays fundamentally caused by a lack of resources, courtrooms, and personnel—violated the Charter right to a trial within a reasonable time. This resulted in the staying or withdrawal of roughly 47,000 criminal charges in Ontario alone.

The consequence was a massive public outcry and a "virtual amnesty" for accused criminals, which created immediate and intense political pressure on the Attorney General. Hogg notes that this judicial decision effectively "forced the hand" of the government, leading to prompt and significant increases in court resources. This demonstrates that while the Chief Justice lacks the "power of the purse," the judiciary possesses a "legal lever" that can compel the executive to act. When underfunding begins to infringe on constitutional rights, the courts can

issue rulings that carry such heavy political costs that the government is forced to provide the necessary resources to restore order and public confidence.

7. The Registrar and the Federal Compromise

Hogg points to federal reforms as a potential "middle path" for provincial courts. In the federal system, officials like the Registrar of the Supreme Court or the Commissioner for Federal Judicial Affairs have the status of "deputy heads." This means they manage the court's administrative staff and budget under the *direction* of the Chief Justice, while still reporting formally to the Minister of Justice for budgetary purposes.

This arrangement seeks to:

- **Insulate court staff** from the broader Department of Justice bureaucracy, fostering a sense of loyalty to the court first.
- **Grant the Chief Justice more direct control** over day-to-day spending and personnel management.
- **Maintain ministerial accountability** by keeping the ultimate budgetary responsibility within the Cabinet and the legislature.

While this does not solve the fundamental paradox of funding, Hogg suggests it goes a long way toward securing the "institutional independence" required by the *Valente* decision without dismantling the foundations of parliamentary government.

Conclusion: The Chief Justice as a Guardian and Negotiator

Hogg concludes by framing the Chief Justice as a "guardian of the judicial function" who must operate within a system of "mutual dependence." While the Chief Justice cannot control the total amount of funding, they must be vigilant in ensuring that the *process* of funding does not "infect" the *substance* of judicial decision-making.

The role is ultimately one of high-stakes diplomacy and constant vigilance. The Chief Justice must maintain a productive, professional relationship with the executive to secure the necessary tools for the court, while remaining fiercely, constitutionally independent in the pursuit of justice. For Hogg, the strength of the Canadian system lies not in total separation, but in this carefully managed tension where the Chief Justice serves as the vital, human point of contact between the law and the state. They ensure that even when the state pays the bills, the law remains the final, independent authority in the courtroom.

[28]When a judge's conduct becomes a matter of public controversy, the Chief Justice often uses their administrative prerogative to “take over” the judge’s entire caseload by removing them from the schedule: (a) **Justice Paul Cosgrove:** Following an Ontario Court of Appeal ruling that his trial conduct brought the administration of justice into disrepute, the Chief Justice of the Ontario Superior Court requested that he **not preside over any matter** until his CJC inquiry was resolved.[3;] **and Justice Russell Brown:** In 2023, Chief Justice Richard Wagner placed SCC Justice Brown on **paid leave**, effectively removing him from the court's hearing schedule while a conduct complaint was investigated regarding his conduct while he was out of office in Arizona and argued with a patron at a resto-bar.

[29][14] Black's Law Dictionary®, Ninth Edition does not have a definition for the word “interfere,” but it does define “interference” as: *“1. The act of meddling in another's affairs. 2. An obstruction or hindrance.”*

[30]Scope of s. 127(2): The Court held that s. 127(2) of the Criminal Code is not limited to judicial proceedings that are existing or proposed. The phrase "the course of justice" includes attempts to obstruct investigations that may lead to prosecution, even if no decision to prosecute has been made. The legislative history and case law support this broad interpretation.

[31]The **ejusdem generis rule** (Latin for "of the same kind") is a principle of legal interpretation where general words following a list of specific words are interpreted to apply only to things of the same class or type as those specifically listed, helping to clarify ambiguous language and prevent overly broad meanings, like interpreting "cars, trucks, and other vehicles" to mean land-based vehicles, not airplanes. It's a tool used to find legislative intent in statutes or contracts, ensuring general words don't expand beyond the specific category established by the preceding term

[32]The expression "the course of justice" in s. 127(2) (rep. & sub. 1972, c. 13, s. 8) of the Criminal Code which provides that everyone who "wilfully attempts in any manner ... to obstruct, pervert or defeat the course of justice is guilty of an indictable offence" includes judicial proceedings existing or proposed but is not limited to such proceedings and includes an attempt to obstruct, pervert or defeat a prosecution which the accused contemplates may take place, notwithstanding that no decision to prosecute has been made. Although s. 127(1), which deals with obstructing justice through indemnifying sureties, and s. 127(3), which deems certain acts to constitute obstructing justice, both use the words "in a judicial proceeding" and s. 127(3) provides that the proceeding may be "existing or proposed" the ejusdem generis rule should not be applied to similarly limit the offence in s. 127(2). Accordingly, where an accused gives a police officer a false name in order to avoid a charge of driving while disqualified and to thus escape a prosecution which he apprehends may ensue, the "course of justice" has commenced and the accused may be convicted of the offence contrary to s. 127(2) of the Criminal Code. The accused's common law right to remain silent cannot protect him in such circumstances. Although not every false statement to the police, such as a false denial of guilt, will be capable of supporting a charge of wilfully attempting to obstruct, pervert or defeat the course of justice, whatever protection is afforded the accused by his right to remain silent cannot shield him from prosecution where he makes false statements to the police and misleads the police by giving a false name in order to protect himself.

[33]In acquitting the accused Judge Waisberg said at p. 169 C.C.C., p. 658 O.R.:

The principle to be gleaned from the cases is that while a third party may commit an offence by lying on behalf of an offender, the offender himself has no obligation to be truthful about his own criminal conduct. The doctrines nemo tenetur seipsum accusare -- no man can be compelled to criminate himself -- and nemo tenetur prodere seipsum -- no one is bound to betray himself -- have been carefully safeguarded and preserved.

[34]The appellant's actions in removing the parking tags interfered with the police's ability to enforce the by-law, thereby obstructing the course of justice. The conviction was therefore upheld.

[35] Similarly, the Ontario Court of Appeal, in *R. v. Zeck* (1980), 1980 CanLII 2849 (ON CA), 53 C.C.C. (2d) 551 (Ont. C.A.), found that s. 139(2) was applicable to proceedings arising from the infraction of a municipal parking by-law. In *R. v. May* (1984), 1984 CanLII 3489 (ON CA), 13 C.C.C. (3d) 257 (Ont. C.A.), it was held that the section was applicable to the Ontario *Highway Traffic Act* provisions pertaining to the issuing of traffic tickets.
[36]Paragraph 15 of the Factum For Motion Record #4
[37]In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

In the Court of Appeal Matas J.A. per curiam said:

In any event, I am of the opinion that sec. 11(1), supra, cannot be interpreted, under the circumstances before us, so as to frustrate the jurisdiction of Court of Queen's Bench to appoint a receiver with effective power to carry out his mandate. (Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited, 1971 CanLII 960 (MB CA), [1971] 4 W.W.R. 542 at p. 546 et seq.) In my view, the order appealed from is not in conflict with The Mechanics' Liens Act, supra, and is in accordance with its intent.

Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited may well be cited as a paradigm of the exercise of judicial discretion but Chief Justice Freedman, speaking for all his colleagues, was careful to state, p. 547:

Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.
[38]The Court rejected the appellant's argument that the word "may" in section 48(2) should be interpreted as "shall," thereby imposing a mandatory duty on the Deputy Minister to review classifications. It found that the Deputy Minister had discretion under the section and was not obligated to act.
[39] The Court held that the 1948 amendment to section 48(2) of The Customs Act was not retroactive. The amendment created a new substantive right of appeal, which could not apply to importations made before its effective date. The Court emphasized that section 54 of the pre-1948 Act did not provide a right of appeal for past importations regarding classification errors, as it only contemplated future declarations by the Board of Customs.

The Court rejected the appellant's argument that the word "may" in section 48(2) should be interpreted as "shall," thereby imposing a mandatory duty on the Deputy Minister to review classifications. It found that the Deputy Minister had discretion under the section and was not obligated to act.

Finally, the Court concluded that mandamus would not lie in this case because the appellant had other remedies available, such as pursuing the matter in the courts. Mandamus is discretionary and is not granted when alternative remedies exist.
[40]The request for mandamus was improperly brought as a counterclaim instead of a judicial review application. Additionally, the counterclaim failed to articulate a discernible cause of action (paras 42-50).
[41](see: *Rich v. Melancthon Board of Health* (1912), 1912 CanLII 573 (ON SCDC), 26 O.L.R. 48 (Ont. Div. Ct.), Middleton, J.,

[42]Nota bene: also cited at Motion Record #4, page 26
[43]The fax number (416-774-3629) could not have been the fax number for SNIC because SNIC's mailing address provided, pursuant to *Reg 283* and in the SNIC Response (January 25, 2024), was in Markham which does not have a right to 416 area codes. Moreover, SNIC provided a singular fax number to the Appellant in September 2022 of **416-774-3120**. The fax number of **416-774-3120** could not have been the fax number of SNIC as SNIC was not a tenant at the **Victoria Park Building** at the Material Time.
[44]n the claim, the plaintiff states that Farnoosh was present at "various meetings" where her mother, the defendant Kobra Fathi declared herself to be the sole support parent and where she (Farnoosh) remained silent and failed to correct the misinformation provided to the Region and to the Halton Housing Authority by the mother. The "failure to correct" is stated to be the equivalent of making a false representation to the plaintiff. I disagree. The plaintiff's counsel relied on the case of *Sidhu Estate v. Bains*, 1996 CanLII 3332 (BC CA), [1996] B.C.J. No. 1246 to establish that silence in the face of a false representation can lead to liability for deceit. In the *Sidhu Estate* case, the B.C. Court of Appeal found that all the elements of a successful claim in deceit were proven against the defendant Bains who had remained silent at the time false information had been communicated to induce an executor to invest estate monies in a company in which the defendant had an interest. Bains was a director, shareholder and president of the company. The directors and shareholders intended the company to be listed on the VSE. The defendant attended a meeting with the estate executor where false statements were made particularly with respect to the extent of Bain's investment in the company. Bains remained silent when these false representations, designed to induce investment by the executor, were made. Liability was found.
[45]The Federal Court, in *Apotex Inc. v. Canada (A.G.)*, 1993 CanLII 3004 (FCA), [1994] 1 F.C. 742 (Fed. C.A.) at para. 45, aff'd 1994 CanLII 47 (SCC), [1994] SCJ No. 113. [1994] 1 F.C. 742, set out mandatory conditions that must be fulfilled before a court will issue an order of *mandamus*. The conditions include:

(1) there must be a public legal duty (as opposed to a mere power) to act;

(2) the duty must be owed to the Applicant;

(3) there must be a clear right to expect performance of the duty and all conditions precedent giving rise to the duty must be satisfied including the demand that the duty be exercised and a refusal to do so;

(4) where the duty sought to be enforced is discretionary, the following rules apply:

(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";

(b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";

(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;

(d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

(e) *mandamus* is only available when the decision-maker's discretion is "spent", i.e., the claimant has a vested right to the performance of the duty.

(5) the applicant must have no other remedy or recourse available to him;

(6) the order sought must be of some practical value or effect;

(7) there must be no equitable bar to the court granting *mandamus*; and

(8) the balance of convenience must favour the granting of *mandamus*.

[46][16] Normally, this Court awards *mandamus* only where the outcome of the case on the merits is a foregone conclusion – in other words the evidence can lead only to one result. However, there are exceptions in the authorities: *LeBon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 and the so-called "directed verdict" cases referred to; see also *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, *Canada (Attorney General) v. Richard*, 2008 FCA 69 and *Canada (Minister of Human Resources Development) v. Tait*, 2006 FCA 380 where this Court has issued directions on particular issues in conjunction with a remittal for re-decision. One recognized exception is where there has been substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute: *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516; *Norgard v. Anmore (Village)*, 2009 BCSC 823 at paragraph 46; *LeBon*, *supra* at paragraph 14. In such circumstances, the Court exceptionally may direct that a certain result be reached.
[47]There must be a public legal duty to act:
The duty must be owed to the applicant:
There is a clear right to performance of that duty, in particular the applicant has satisfied all conditions precedent giving rise to the duty;
there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay;
Where the duty sought to be enforced is discretionary, the following rules apply: in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
mandamus is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
No other adequate remedy is available to the applicant.
The order sought will be of some practical value or effect.
The Court in the exercise of its discretion finds no equitable bar to the relief sought.
On a "balance of convenience" an order in the nature of mandamus should (or should not) issue
[48]NOTA BENE: also cited at Motion Record #4, page 29; page 30
[49] Reference was made to Re McDonald, **1957 CanLII 374 (ON SC)** , [1957] O.W.N. 343, where prohibition was found to be a means whereby a superior court could prevent an inferior court from "proceeding in a manner so vicious as to violate some fundamental principle of justice"; to Bourbonnais v. Perrault and A.-G. Que., 1922 […]
[50] [17] In support of this legal proposition the applicant has referred the court to various authorities. Reference was made to *Re McDonald*, 1957 CanLII 374 (ON SC), [1957] O.W.N. 343, where prohibition was found to be a means whereby a superior court could prevent an inferior court from "proceeding in a manner so vicious as to violate some fundamental principle of justice"; to *Bourbonnais v. Perrault and A.-G. Que.*, 1922 CanLII 650 (QC CS), [1923] 4 D.L.R. 476, 41 C.C.C. 127, 29 Rev. Leg. 247, where prohibition would lie if the inferior court "committed a grave and evident injustice"; and to *R. ex rel. Fraser v. Halpin et al.*, 1933 CanLII 381 (AB CA), [1933] 1

D.L.R. 781, 59 C.C.C. 230, [1933] 1 W.W.R. 255, where prohibition applied when the action of the inferior court was "... in violation of the fundamental principles of justice". Re Petro-Canada and Board of Com'rs of Public Utilities, 1987 CanLII 5289 (NS SC), at para 17, <https://canlii.ca/t/g9d8k#par17>, retrieved on 2026-01-07

[51]In the criminal context: Regina v. Franklin, 1982 CanLII 1974 (ON SC)
Superior Court of Justice
1982-06-02 | 10 pages | cited by 2 documents
AI-generated

A court lost jurisdiction over an indictment after failing to proceed during scheduled sessions without proper adjournment or endorsement. The accused's subsequent appearance did not cure the defect, as a prohibition application had already been filed. The court granted the prohibition, emphasizing procedural compliance for jurisdiction retention.

[52]Sheriffs are municipal in nature

[53]In Sunrise North Sneior Living Ltd. v The Sheriff (York Region)The Court found that the Sheriff had a clear statutory duty to enforce the eviction order under the Residential Tenancies Act and the Courts of Justice Act (paras 61-64). The Applicant met all conditions for mandamus, including demonstrating a clear right to enforcement and the absence of alternative remedies (paras 66-77). The Court rejected the Sheriff's argument that enforcement was impractical, noting that the resident's consent was not a legal prerequisite for eviction and that alternative accommodations were available (paras 78-96).

The balance of convenience favored enforcement, as the Applicant's interests extended beyond economic harm to include deteriorating relations with the resident, while the resident's health and safety concerns were not insurmountable (paras 90-98). The Court emphasized the public interest in upholding the rule of law and ensuring compliance with valid eviction orders (paras 92-97).

The Court declined to provide specific directions on how the Sheriff should carry out the eviction, leaving it to the Sheriff's discretion to determine a temporary location if necessary (paras 102-105). The March 31, 2020 deadline was set to allow the resident time to secure alternative accommodations (paras 106-109).

[54]Nota bene: persuasive authority because the Registrar is required to either confirm or not confirm the electronically submitted filings by the Applicant from November 26, 2025 to present
Nota bene no. 2:

[55]concerned whether a party has a duty to disclose material information relating to the performance of a contract when it knows that *silence* **could** mislead the other party.

C.M. Callow Inc., a property maintenance company owned and operated by Christopher Callow, had winter and summer maintenance contracts with a group of condominium corporations.

The winter contract allowed the condos to terminate for any reason on 10 days' notice (a "**Convenience Termination Clause**"). In early 2013, the condos decided that they would terminate the winter contract, which was set to begin later that year, but *withheld* that decision from Mr. Callow. During that summer, Mr. Callow performed various "freebie work" in the expectation that the condos would renew the winter contract. Upon completion of the summer maintenance work, the condos gave *notice* that they were terminating the winter agreement. Callow Inc. sued, alleging that the condos breached their *duty of good faith*. At trial, the judge found that while the condos had an express right to terminate the contract on notice, they "deliberately" misled and deceived Callow Inc. The trial judge held that the condos acted in *bad faith* (1) by failing to disclose material information to ensure Callow completed the summer maintenance work, and (2) by *leadin*g Callow to believe that the winter contract was not in danger of non-renewal. ONCA REVERSES TRIAL JUDGE

The Ontario Court of Appeal reversed the trial judge's decision, observing that *Bhasin* did not impose on the condos a unilateral duty to disclose *their intention* to terminate apart from the express notice period. The Court of Appeal held that the trial judge improperly expanded the duty of honest performance in a way that altered and conflicted with the express terms of the winter agreement. While recognizing that the condos failed to act 'honorably', the Court of Appeal held that their conduct did not rise to the "high level" of *bad faith*.

[56]n appeal to the SCC, Callow argued that the condos' *silence* coupled with "active statements" breached (i) the duty of honest performance; and (ii) the duty not to abuse discretionary contractual rights. In the alternative, Callow asked the Court to recognize a new duty under the organizing principle that prohibits "active non-disclosure".

Knowing – misleading – believing – one thing would happen – when it would not – breach of duty of good faith

The SCC found, as per Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ., that the duty to act honestly in the *performance* of the contract precluded the **active deception** by Baycrest by which it **knowingly** misled Callow *into believing* that the winter maintenance agreement would not be terminated. By exercising the termination clause **dishonestly**, it breached the *duty of honesty* on a matter directly

linked to the performance of the contract, *even if* the 10-day notice period was satisfied. Accordingly, the Court of Appeal should not have interfered with the conclusions of the trial judge.

Lying: What is performance?

The duty of *honest performance* in contract, formulated in *Bhasin* applies to **all** contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters *directly linked* to the performance of the contract.

Legal test: whether dishonesty – connected – linked to contract

In determining whether dishonesty is connected to a given contract, the relevant question is whether: (i) a right under that contract was exercised; or (ii) an obligation under that contract was performed, dishonestly.

While the duty of honest performance is **not** to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to *correct* a false impression created through that party's own actions.
The duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right since the duty, irrespective of the intention of the parties, applies to the performance of all contracts, and by extension, to all contractual obligations and rights. Instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. This focus on the manner in which the termination right was exercised should not be confused with whether the right could be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

The Requirements of Honesty
Knowingly misleading: (i) half-truths; (ii) omissions; (iii) silence; and (iv) inaction (failing to correct)

The requirements of honesty in performance can go further than prohibiting outright lies. Whether or not a party has knowingly misled its counterparty is a highly fact specific determination, and can include lies, half truths, omissions, and even silence, depending on the circumstances. One can mislead through action, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct.
As *Per* Moldaver, Brown and Rowe JJ, there is, in the context of misrepresentation, a *rich law* accepting that sometimes *silence* or half-truths amount to a statement. Although contracting parties have no duty to disclose material information, a contracting party may not create a misleading picture about its contractual performance by relying on *half-truths* or *partial disclosure*. Representations need not take the form of an express statement. So long as it is *clearly communicated*, it may comprise other acts or conduct on the part of the defendant [respondent[s]].
[57]TD Insurance Home and Auto, formerly Liberty Insurance Company of Canada, formerly Liberty Mutual Insurance Company v. Sivakumar, a Minor by his Litigation Guardian, Sivabalasingam et al.
[58] Constitutional law—Proposal to establish unified criminal court—Transfer of criminal jurisdiction to new court—Judges provincially appointed—Inferior court transformed into a superior court—Whether proposal constitutional—Constitution Act, 1867, R.S.C 1970, Appendix II, ss. 91(2), 92(14), 96.
Appeal—Reference—Abstract questions—Whether the Court should answer referred questions—Judicature Act, R.S.N.B. 1973, c. J-2 as amended, s. 23(1).
[59]The Privy Council accepted this view, describing section 96 as "at the root of the means adopted by the framers of the [Constitution] … to secure the impartiality and independence of the Provincial judiciary."121 This theory is most famously found in Professor William Lederman's extensive piece entitled "The Independence of the Judiciary." Yet, Lederman posited that it was the cumulative effect of sections 96-100 of the Constitution (the "Judicature Provisions"), not just section 96 alone, that safeguards the independence of the superior court judges. As only superior courts provided the qualities of an independent judiciary in Canada, through the guarantee of tenure until age seventy-five122 and a fixed salary,123 those courts possessed an "irreducible core of substantive jurisdiction assured to them."124

[60]Attorney general v. LSBC: was a landmark 1982 supreme court of Canada decision affirming provincial law societies' power to regulate lawyer advertising, even against federal competition law claims, establishing that regulating professional conduct falls under provincial jurisdiction. A lawyer named Jabour was disciplined by the BC law society for advertising his services and prices, challenging their authority under the federal combines investigation act, but the SCC found the society acted within its provincial powers.
[61]See: page 84 of 192 of Motion Record #4 (mail filed on January 2, 2026)
[62] As this Court has said, universal access to the courts is an important component of the rule of law: *Jonsson* at para 10. As the Supreme Court of Canada has said in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 32 and 40:
Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. . .
In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account

— the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. . .

[63]in Trial Lawyers Association of British Columbia v Attorney General of British Columbia, 2014 SCC 59 at paras 24 to 43, (2014) 375 DLR (4th) 599.

[64] That being so, the "doctrine of inherent jurisdiction does not operate without limits"[200] and may be circumscribed.[201] It is "limited by the institutional roles and capacities that emerge out of our constitutional framework and values".[202] One must therefore "take into account the structure of our Constitution, which includes other fundamental principles, such as the rule of law and parliamentary supremacy".[203] In other words, a province may legislate in matters of administration of justice, even if this power affects the core jurisdiction of the superior courts to adjudicate civil disputes. It must, however, do so in a manner that is consistent with that jurisdiction. Trial Lawyers is helpful on this point:

> [36] It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the Constitution Act, 1867. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.[204]

he Supreme Court clearly indicated in *Trial Lawyers* that the power under section 92(14) of the *Constitution Act, 1867* must be exercised "in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there".[232] As explained in *Scowby v. Glendinning* by La Forest, J., who dissented, but not on this issue:[233]

> In examining the matter, it is obvious that one should have an eye on what the Fathers must have had in mind, and this demands that one look to see if the jurisdiction sought to be vested in a tribunal is one that generally conforms to that exercised by a s. 96 court in 1867. But judicial functions, like other parts of the Constitution, cannot be frozen in an 1867 mold. Adaptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns, and to develop new techniques of dispute resolution and the expeditious disposition of relatively minor disputes. At the same time, the s. 96 courts must continue their exclusive function of determining basic judicial questions of public order and public policy, or as Estey J. has put it, those "serious and frequently profound difficulties arising in the community" which the Constitution obviously contemplated should be their responsibility; see *B.C. Family Relations Act, Re, supra*, at p. 107.[234]

[65]Monetary Ceiling (article 35 C.C.P.): The Court applied the three-part test from Re Residential Tenancies Act, 1979 and found that the $85,000 ceiling failed the historical compatibility assessment. Based on updated 1867 values, $85,000 exceeded the constitutional limit that should apply to the Quebec Court's civil jurisdiction. The Court emphasized that the Quebec Superior Court must retain jurisdiction over substantial disputes, a key component of its constitutional role (paras 103-172).

- Judicial Deference: The standards of review applied to appeals of administrative decisions to the Quebec Court respect legislative intent and the constitutional framework. The distinction between appeals and judicial reviews allows for flexibility without infringing on the Superior Court's supervisory powers, as these remain intact. The Court noted that while duplicative reviews may present practical challenges, they do not pose a constitutional issue under section 96 (paras 252-357).
- Legislative Schemes and Precedents: The lack of full privative clauses eliminating the Superior Court's oversight function was decisive. Relying on Supreme Court precedents in Farrah, Crevier, and Grondin, the Court held that the schemes granting appellate jurisdiction to the Quebec Court are compatible with section 96 as long as the supervisory power of Superior Courts remains intact (paras 325-348).

[66] One would have thought the fundamental values undeniably protected by the preamble – open courts – would have been the constitutional tool best suited to evaluate the constitutionality of British Columbia's contested law.

[67] No new element or exceptional circumstance justifies the reopening of the investigations or trials, since the accused voluntarily closed their evidence without reserving their rights despite the legal uncertainties raised by the Supreme Court's decision in St-Onge Lamoureux (paras. 158-160)

[68]

[69]This precedent is directly applicable to the current situation. An email that does not comply with the formal requirements of the Rules is a legal nullity. A judicial suggestion is not a legal command. Furthermore, the OCPP Case View confirms that no appeal book, compendium, or record was filed by the Respondents. The documentary record of the defence is entirely vacant. Consequently, it is submitted that no order was "made." The absence of an upload to Case Center rendered it impossible for any member of the judiciary to execute an endorsement upon the record. A member of the judiciary deprived of a record is a judge deprived of a voice.

[70] A textual and purposive approach to s. 32(1) of the *Charter* does not support the conclusion that a legislative assembly can never be subject to the *Charter*. By the terms of the *Charter* itself, the word "legislature" in s. 32(1) cannot conclusively be narrowly defined to ~~cover only those actions for which the legislative body and the Queen's representative are jointly responsible. Further, the tradition of curial~~

deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities -- the privileges -- of legislative assemblies. Without deciding that the legislative assembly is a government actor for all purposes, as a public body it might be capable of impinging on individual freedoms in areas not protected by privilege. The legislative assembly could, therefore, fall within the rationale for regarding such bodies as government actors subject to the *Charter*. Absent specific *Charter* language to the contrary, however, the long history of curial deference to the independence of the legislative body, and to the rights necessary to the functioning of that body, cannot be lightly set aside, even conceding that our notions of what is permitted to government actors have been significantly altered by the enactment and entrenchment of the *Charter*.

[71] Historically, the courts have been careful to respect the independence of the legislative process just as legislators have been careful to protect the independence of the judiciary. In *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, at p. 72, Dickson C.J. said the following:

The preamble to the *Constitution Act, 1867* states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom". Since judicial independence has been for centuries an important principle of the Constitution of the United Kingdom, it is fair to infer that it was transferred to Canada by the constitutional language of the preamble.

There is a clear parallel between the doctrines of independence of the judiciary and of parliamentary privilege as the latter is the means by which the Houses of Parliament protect their independence. In Canada, it is through the exercise of the privileges inherent in all legislative bodies that the provincial Houses of Assembly are able to control their own proceedings and thereby maintain the independence of the legislative process. To incorporate by way of the preamble the broad principle of the fostering of the independence of the legislative process through the exercise of parliamentary privileges is much more palatable than incorporating a specific article of the *Bill of Rights* of 1689.

[72] (NOTA BENE: HEREIN, THE Divisional Court REGISTRAR (FORMER AND ACTING) ARE ACTING ON THEIR DIRECTIONS AND NOT GIVING DIRECTIONS PER SE BUT ACTING WITHOUT AUTHORITY BY INACTION, LEADING TO BREACHES OF THE FOLLOWING BY DEPRIVING A LITIGANT (DISABLED, INJURED, AND INSURED PERSON) OF ACCESS TO COURTS BUT HAVING BREACHED, BREACHING AND WILL BREACH IF NOT REMEDIED BY THE CJ OF THE SCJ (Divisional Court President):

Constitution Act, 1982, JUDICATURE SECTIONS; (II) CORE JURISDICTION OF SCJ COURTS (THE Executive Branch through the Registrar of the Divisional Court, court staff and court clerks engaged in stripping away the requirement and duties of the very book of business of the Divisional Court, a branch of the SCJ with only Section 96 Judges);

THE RULE OF LAW: access to the courts read in to Constitution Act, 1867, as part of the ROL;

NO SAVING PROVISION:

No saving provision for breaches of the Constitution Act, 1867 in that the challenge to the impugned conduct is not in relation to the Constitution Act, 1982 (Charter), Part I therein); When the alleged breach of the Constitution Act, 1867, is engaged in by the Executive Branch, there is no ability to rely upon, like a Legislature or Parliament could in theory

[73] The court emphasized that the approval of a draft order is an administrative act necessary for the proper functioning of the court system. Approval signifies agreement that the draft reflects the court's decision, not that the decision itself is correct or unappealable (paras 8-9, 12).Solicitors, as officers of the court, have a duty to approve draft orders unless there are legitimate objections. This duty is owed to the court, opposing counsel, and the client, and it is not negated by the solicitor ceasing to act for the client (paras 10-11, 13).The refusal to approve a draft order without valid grounds contravenes the Rules of Professional Conduct of the Law Society of Upper Canada, particularly rules requiring lawyers to act with courtesy, good faith, and respect for the court process (paras 14-15).The court found that the defendants' solicitors acted in good faith and attempted to persuade their client to act reasonably. However, their belief that they were bound to follow the client's instructions was incorrect. Despite this error, their conduct did not amount to outrageous behavior or incompetence warranting personal cost consequences (paras 16-18).

[74] The court emphasized that the approval of a draft order is an administrative act necessary for the proper functioning of the court system. Approval signifies agreement that the draft reflects the court's decision, not that the decision itself is correct or unappealable (paras 8-9, 12). Solicitors, as officers of the court, have a duty to approve draft orders unless there are legitimate objections. This duty is owed to the court, opposing counsel, and the client, and it is not negated by the solicitor ceasing to act for the client (paras 10-11, 13).
The refusal to approve a draft order without valid grounds contravenes the Rules of Professional Conduct of the Law Society of Upper Canada, particularly rules requiring lawyers to act with courtesy, good faith, and respect for the court process (paras 14-15).
The court found that the defendants' solicitors acted in good faith and attempted to persuade their client to act reasonably. However, their belief that they were bound to follow the client's instructions was incorrect. Despite this error, their conduct did not amount to outrageous behavior or incompetence warranting personal cost consequences (paras 16-18).

[75]He criticized the parties for using case management as a means to escalate disputes rather than streamline the process (paras 11-13). Justice Myers highlighted the principles of fairness and justice in civil litigation, referencing the Supreme Court of Canada's decision in Hryniak v Mauldin, 2014 SCC 7, which emphasizes the importance of a fair and efficient process (para 15).
[76] Emphasized that counsel must act in good faith during the order settlement process to avoid unnecessary costs and emotional strain on the parties.

[77] **Continental Casualty Co. v. Symons, 2016 ONSC 4750**

- **Context:** Dispute over the form of a draft order.
- **Outcome:** The Court upheld the draft order and awarded costs against the defendants.
- **Key Legal Point:** Reaffirmed the *Chrysler Credit* principle: counsel has an obligation to the court to approve an order if there is no valid objection to its form.

[78] Reminded counsel of their duty to approve draft orders efficiently

[79] Cites the Chrysler Credit principle as affirmed by the Ontario Court of Appeal in Folkes v. Greensleeves
[80] **When silence constitutes falsity.** There are two main classes of case in which reticence may contribute to establish a misrepresentation: (1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them and
[81] way of elaboration, Halsbury's notes (at paras. 749-50):

The representor must not merely abstain from positive falsehood; he must not knowingly or willingly omit anything which is required to render completely true that which without it is not completely true. … mere incompleteness is not a factor in misrepresentation; it must always be proved clearly that it rendered what was stated fallacious and false.

Where a person has said something to another, a duty may at once arise to say more, and if he fails to discharge this duty his reticence from that point becomes an implied misrepresentation, although complete silence throughout the transaction would not have amounted to, or have afforded any evidence of, misrepresentation, or even of actionable non-disclosur
[82]This court and the Manitoba Court of Appeal have both confirmed that silence and half-truths can amount to fraudulent misrepresentation and that, where a vendor, who has no duty to speak, decides to break that silence, the doctrine of *caveat emptor* falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised: see *Krawchuk v. Scherbak* (2011), 106 O.R. (3d) 598, [2011] O.J. No. 2064, 2011 ONCA 352, at para. 77, citing *Kaufmann v. Gibson*, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293 (S.C.J.); *Alevizos v. Nirula*, [2003] M.J. No. 433, 2003 MBCA 148, 180 Man. R. (2d) 186, at paras. 18-25. These cases involved situations where vendors completed voluntary vendor disclosure statements in residential real estate transactions.
[83]The leading authority on equitable fraud is the English Court of Appeal's decision in Kitchen v. Royal Air Force Assn., [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563 (C.A.), where Lord Evershed M.R. defined equitable fraud as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (at p. 249 All E.R.).
Although not necessarily an exclusive list, there appear to be certain recognized circumstances where the concept of equitable fraud is engaged. First, conduct amounting to equitable [page764] fraud or fraudulent concealment may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability: see *Guerin v. Canada*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, at p. 356 S.C.R. (*per* Wilson J.), and at p. 390 S.C.R. (*per* Estey J.); *First City Capital Ltd. v. British Columbia Building Corp.*, 1989 CanLII 2868 (BC SC), [1989] B.C.J. No. 130, 43 B.L.R. 29 (S.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2008] B.C.J. No. 1298, 2008 BCCA 278, 81 B.C.L.R. (4th) 199, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 416. Second, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake: see *Sylvan Lake*, at paras. 38-39. Finally, equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation: see *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at p. 571 S.C.R.
[84] The trial judge emphasized that a trial judge who has not been rendered functus (i.e., before the formal judgment is taken out) has broad discretion to re-open a trial to prevent a miscarriage of justice. The judge rejected the argument that the same strict rules governing appellate courts, including the requirement of reasonable diligence, should apply to trial judges in such circumstances. The primary consideration is avoiding injustice.
On the issue of new evidence, the judge found that the unsworn statements from two witnesses, if accepted, could have significantly affected the trial's outcome. The evidence suggested that the premises were occupied by a new tenant, Beverly Hills Realty Corporation (a Century 21 office), in late 1989. While the tenant admitted that this evidence could have been obtained before the trial, the judge exercised discretion to re-open the trial, noting the potential for the court to have been misled by the landlord's evidence and the importance of avoiding a miscarriage of justice.
However, the judge declined to re-open the trial to consider the tenant's new legal argument regarding the interest rate. The tenant failed to demonstrate that the argument was prima facie meritorious, and there was no explanation for why this issue was not raised earlier. The judge noted that the claim for interest was not based on an agreement to extend payment but rather on damages for late payment, which is not governed by the Interest Act.
The judge directed that the trial be re-opened to hear the new evidence and any reply evidence from the landlord, with costs reserved for the conclusion of the re-opened trial.

[85]The trial judge emphasized that a trial judge who has not been rendered functus (i.e., before the formal judgment is taken out) has broad discretion to re-open a trial to prevent a miscarriage of justice. The judge rejected the argument that the same strict rules governing appellate courts, including the requirement of reasonable diligence, should apply to trial judges in such circumstances. The primary consideration is avoiding injustice. On the issue of new evidence, the judge found that the unsworn statements from two witnesses, if accepted, could have significantly affected the trial's outcome. The evidence suggested that the premises were occupied by a new tenant, Beverly Hills Realty Corporation (a Century 21 office), in late 1989. While the tenant admitted that this evidence could have been obtained before the trial, the judge exercised discretion to re-open the trial, noting the potential for the court to have been misled by the landlord's evidence and the importance of avoiding a miscarriage of justice.
[86]utherland J.:

- Jurisdiction of Hollingworth J.: Hollingworth J. had jurisdiction to withdraw his June 25, 1987, decision before it was entered. The judge acted judicially in reopening the matter to address concerns of natural justice, as the defendant had not completed its submissions during the initial hearing.
- Jurisdiction of Rosenberg J.: Rosenberg J. had jurisdiction to hear the appeal de novo after the matter was referred to him by Hollingworth J. The additional endorsement by Hollingworth J. on July 24, 1987, did not affect Rosenberg J.'s jurisdiction.
- Leave to Appeal: Leave to appeal was denied as the plaintiff failed to meet the test under Rule 62.02(5). There was no good reason to believe the decisions of Hollingworth J. or Rosenberg J. were wrong, nor were there conflicting decisions relevant to the issues in this case.

[87]The motion judge's reasons for dismissing the motion were inadequate, as they failed to address the proposed new evidence or explain why it would not reasonably affect the outcome. The appellant met the test for re-opening a trial under rule 59.06(2)(a) and relevant case law, including Tsaoussis v. Baetz and Sagaz Industries Canada Inc.. The new evidence was not available at the time of the trial, was cogent, and could undermine the respondents' credibility while supporting the appellant's claims. Additionally, there was no undue delay or prejudice to the respondents in re-opening the trial. The matter was remitted to the trial judge to determine the admissibility and impact of the new evidence (paras 14-22)
[88]*Yatar v. TD Insurance Meloche Monnex*, the SCC found the following in relation to what is applicable herein, wherein the SCC also emphasized that judicial review plays an important role in upholding the rule of law and ensuring that public authorities – including LAT adjudicators – are subject to the supervisory power of the superior courts. In addition, the SCC reiterated the constitutional nature of the right to seek judicial review. Citing Mr. Paul Daly, the SCC held that it cannot be the case that a court has discretion to not hear a judicial review application, as this would allow the court's "perception of the quality and quantity of internal reconsiderations … to trump [a] constitutional principle."
[89]The *Licence Appeal Tribunal Act, 1999* does not contain any privative clause that seeks to bar or otherwise restrict judicial review. The SCC held that both the Divisional Court and Court of Appeal erred in their application of *Strickland* to this case. Properly applied, the *Strickland* framework indicated that the court should exercise its discretion to grant relief. The Court of Appeal was mistaken when it held that the statutory appeal right reflected legislative intent to restrict judicial review. The fact that the legislature provided for a statutory right of appeal on questions of law can only demonstrate legislative intention to subject questions of law arising from an LAT adjudicator's decision to correctness review.
[90]The indispensable juridical standard required for the efficacious establishment of the tort of bribery, which is fundamentally predicated upon the remittance or transmission of a secret commission, was definitively explicatedwithin the confines of the seminal appellate pronouncement issued by the Ontario Court of Appeal, SPECIFICALLY IT has been subsequently posited and maintained as an established and incontrovertible
legal tenet that the subjective *mens rea*, or the unmanifested interior motivations and mental states of the involved transactional parties, are jurisprudentially deemed matters wholly extraneous and materially irrelevant to the objective determination of legal culpability associated with the aforementioned tort
[91] THE EXISTENCE OF A FIDUCIARY DUTY OWED BY THE FIRST INSURER TO THE INJURED OR IMPAIRED INDIVIDUAL IS RECOGNIZED PURSUANT TO THE BINDING ONTARIO JURISPRUDENCE THAT IS GOVERNING THIS COMMON LAW PROVINCE. THE APPELLATE AUTHORITY IN BEASLEY (PARAGRAPH 34) EMPLOYED LANGUAGE THAT WAS UNEQUIVOCAL, FINDING THAT THE FIDUCIARY OBLIGATIONS INCUMBENT UPON AN INSURANCE COMPANY, IRRESPECTIVE OF THEIR PROVISIONAL OR PERMANENT
designation, are immediately triggered by the operative requirement to respond to the submitting insured person upon receipt of a completed ocf-1 application
[92]The Honourable Justice Moore explicitly found that "[34] The relationship between an insured and an insurer in accident benefits matters involves a duty of good faith, a fiduciary obligation; the relationship between plaintiff and defendant in a tort action does not. The obligation, if any, to pay accident benefits is very different from the exposure, if any, that a defendant faces in a tort action."
[93]Beasley was prior to the effective date of the amendments in Reg 283 and SABS
[94] along with seminal privacy and security of personal information and personal health information decisions and the change in the common law relating to duty of good faith, implied, in commercial contracts
[95]In its capacity as the accident benefit insurer, State Farm owes the plaintiff a duty of good faith arising out of its fiduciary obligations, see Beasley and Scott v. Barrand, 2010 ONSC 2095 (CanLII), [2010] O.J. No. 1466 at paragraph 34. Before the plaintiff even commenced her tort action, State Farm would therefore have been in possession of a significant body of highly confidential information to which the plaintiff had a privacy interest, and which State Farm was obliged as a fiduciary to maintain confidential." (paragraph 45 as per Justice Edwards for a three judge unanimous bench); Apart from its fiduciary obligation, the statutory accident benefit insurer also has an obligation to ensure

that the information supplied by its insured is kept private. While decided in the context of a claim arising out of the unauthorized access by a bank employee to the banking records of a customer, the decision of the Court of Appeal in Jones v. Tsige, 2012 ONCA 32 (CanLII), [2012] O.J. No. 148, is a significant advancement in the law insofar as whether this court should follow the decision of the Divisional Court in Klingbeil.

[96]NSC found in Transamerica: The additional SABS Insurers duties to the SABS Insurers Fiduciary Duties – even following incapacity or death - Transamerica citing *Tsige (ONCA: 2012), Dervisholli (2015) – Tsige – tort of breach of privacy – "intrusion upon seclusion": (i) deliberate and significant* ***invasions*** *of personal (not corporate) privacy; (ii) overly sensitive individuals are excluded; (iii)* ***intrusions*** *into matters: (a) financial; (b) health; (c) sexual practices; (d) sexual orientation; (e) employment; (f) private correspondence = highly offensive Dervisholli (Justice Marlyss Edwards for Ont. Div. Ct.): only way – non-SABS insurance department – non-SABS insurer – third party insurer – entitled – access – insured's AB file CONTENTS: (i) consent of Insured Person; OR (ii) court order.If SABS Insurer or SABS insurance department does* ***not*** *seek consent of Insured Person to disclose any - information in AB File of Insured Person to the Non-SABS Insurer or Non-SABS Underwriter – and it is received by unauthorized Non-SABS Insurer – said Non-SABS Insurer – placed – irreconcilable COI – only appropriate remedy remove – Non-SABS Insurer and all so associated from the record*

part from its fiduciary obligation, Transamerica also had an obligation to ensure that the information supplied by its insured was kept private. Justice Marlyss Edwards, speaking for the Divisional Court, made this point in *Dervisholli v. Cervenak*, in 2015, in the context of the duty of an automobile insurer for its insured's tort liability to keep its insured's information confidential, even from defence counsel whom the insurer had retained to represent itself in relation to the plaintiff's claim for accident benefits.[29] The court relied, in this regard, on the decision of the Court of Appeal in *Jones v. Tsige*, in 2012,

[97]In *de Rosa*, the arbitrator found that the insurer's counsel had misused information, but no conflict of interest existed, and no disqualification order was made. The respondent submits that *de Rosa* supports its position that the appropriate remedy for improper information sharing is not removal of counsel, but an order that the parties comply with the prescribed process for the exchange of documents.(*nota bene:* distinction herein is that there have been two insurers (SNIC and TDGIC) publicly in the LAT Proceeding. There is now no dispute that the fax number of 416.774.3120 was NOT TDGIC's fax number and NOT SNIC's fax number. Therefore, there is, at the very least, one other insurer involved. The only thing that would make TD Claim #3 more tragically comical, albeit to the Appellant's prejudice, was if the 905 Fax Number was Primmum's. If that was the case, then the Appellant would have taken on four insurance companies in a two year span in SABS related matter.

> [98]THE OFFENCE OF EXTORTION IS PRINCIPALLY CONSTITUTED BY THE PENALISATION OF SPECIFIC CONDUCT THAT IS DEFINITIVELY CHARACTERIZED BY THE SYSTEMATIC DEPLOYMENT OF INTIMIDATION AND THECONSEQUENT, UNWARRANTED INTERFERENCE WITH THE VOLITIONAL AUTONOMY OF THE AFFLICTED PARTY (A FORTIORI, THE STATUTORY PROVISION WAS METICULOUSLY DEVISED FOR THE EXPRESS ANDSINGULAR PURPOSE OF COUNTERACTING THE STRATEGIC DEPLOYMENT OF COERCION.

[99] The Court rejected a "one-size-fits-all" test like the Taribo test for interim preservation orders. Instead, the focus should be on trial fairness, considering factors such as the relevance of the property, the purpose and duration of preservation, and the potential prejudice to the parties (paras 6, 38-45).instead, the focus should be on trial fairness, considering factors such as the relevance of the property, the purpose and duration of preservation, and the potential prejudice to the parties (paras 6, 38-45).

[100]stipulated that the application of a singular, **monolithic test** is inappropriate, considering the myriad factual circumstances under which the interim preservation of property may be legitimately requested

[101]"When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: Dunsmuir, at para. 50.

[102]e are the categories set out in *Dunsmuir*, ***minus*** true questions of jurisdiction: "respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies" (at para. 53).

[103]These are the categories set out in *Dunsmuir*, ***minus*** true questions of jurisdiction: "respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies" (at para. 53). The majority's conception of the rule of law, which has been somewhat amorphous and difficult to analytically target but in more general terms it is engaged in situations where "consistency" and thus "a final, determinate answer" to a general legal question of a non-trivial nature is necessary (at para. 53; ***SEE:*** **Applicant's Factum**).

[104]was a monumental change. As Abella and Karakatsanis JJ noted in their concurring yet separate reasons for judgment (the "Vavilov Concurring Reasons") , "the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal" (at para. 199).

[105]See also: *Barry v Stoney Point Canning Co* (1917), *1917 CanLII 620 (SCC)*, 55 SCR 51 at 73-77, Anglin J).

[106]A bank shall not carry on business in Canada on premises that are adjacent to the premises of an insurance company, agent or broker unless the bank clearly indicates to its customers that its business and the premises on which its business is carried on are separate and distinct from those of the insurance company, agent or broker.

[107]Canada's Bank Act stipulates that Canadian banks are "authorized" to sell eight types of insurance: credit or charge card-related; creditors' disability; creditors' life; creditors' loss of employment; creditors' vehicle inventory; export credit; mortgage; and travel. Banks may sell other types of insurance (such as home and auto) through subsidiaries but not from their bank branches.

Banks are also not allowed to provide access, from their web pages, to other web pages through which "other" types of insurance are sold.

[108] TD Bank Group: Only "Big 5 bank" that indirectly sells insurance through holding company in Meloche Monnex Inc. which owns Security National Insurance Company (see: https://www.canadianunderwriter.ca/insurance/insurance-revenue-up-7-7-at-td-bank-1004043458/

[109]Canada's Bank Act stipulates that Canadian banks are "authorized" to sell eight types of insurance: credit or charge card-related; creditors' disability; creditors' life; creditors' loss of employment; creditors' vehicle inventory; export credit; mortgage; and travel. Banks may sell other types of insurance (such as home and auto) through subsidiaries but not from their bank branches.
Banks are also not allowed to provide access, from their web pages, to other web pages through which "other" types of insurance are sold.
[110] Applying the test under Rule 59.06(2)(a), the court concluded that JV's failure to disclose material financial information undermined its claim of impecuniosity. JV was ordered to post security for costs in staged amounts for both actions and to pay costs of the 2008 motion to Steelcase (paras 44-50).
[111] **OURT FILE NO.:** 06-CV-304773; **DATE:** March 16, 2010

[112] Maguire v. His Majesty the King et al., 2024 ONSC 2392 at paragraph 16 (see: The court has considered the term "fraud" as used in 59.06 to mean, "a false representation made either knowingly, or without belief in its truth or else recklessly, careless as to whether it is true of false": Lam at para. 24; JV Mechanical v. Steelcase, 2010 ONSC 1443, at para. 24.

2356802 Ontario Corp. v. 285 Spadina SPV Inc., 2022 ONSC 7318 (CanLII) at paragraph 16.

Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited, 2021 MBQB 101 (CanLII) at paragraph 13

Lam v. Chen, 2019 ONSC 2510 (CanLII) at paragraph 6 and 7

RCG Site Servicing & Construction v. Canning Contracting Limited, 2014 ONSC 3228 (

The case law put forward by Canning includes cases in which orders were set aside on the basis of false misrepresentations or fraud: *JV Mechanical Ltd. v. Steelcase Construction Inc.*, 2010 ONSC 1443 (Master); *Computerized Security Systems Inc. v. Eco Tech Cleaning Systems Inc.*, 2005 CarswellOnt 9008 (S.C.J.).

[113]the Divisional Court found an administrative decision of statutory interpretation as a matter of law. At ¶ 19, Tzimas J. found "[19] ..... If an Adj. ignores evidence that the law requires to be considere to arrive at a DECISION, that will amount to an error in law.
[114]"Therefore, I am satisfied that the Tribunal erred by determining that it had no jurisdiction to consider the issues raised in the Notice
[115]"We agree with the appellant, Registrar, that the Licence Appeal Tribunal erred in its approach to the statutory framework and exceeded its jurisdiction; and it did not make the necessary threshold determinations, as required by the statute
[116]Divisional Court found that inconsistent findings of facts as "errors of law."
[117]the FCA considered a second appeal wherein it stated the applicable SOR for extricable legal issues in that no deference is owed to the overall conclusion
[118]"Re: two files with two different file numbers for one claimant (insured person) (although unlawful – not unprecedented
[119]**CHUBB INSURANCE CO. OF CANADA V. ZURICH INSURANCE COMPANY, 2024 ONSC 2929 ("*ZURICH 2024*")**

As described in the prevailing appellate decisions, the purpose of this regulation was to prevent SABS claims, including vital treatments and income benefits, from being delayed while insurers fought over priority under s. 268(2) of the Insurance Act. In adopting para. 34 of Juriansz J.A.'s dissent, the Supreme Court also accepted that there would have been no nexus if Chubb did not provide automobile insurance in Ontario. Because it did write such policies, it qualified as an 'insurer' who first received the OCF-1, albeit mistakenly.
I observe, in passing, that the sanctions described in the case law cited by the arbitrator, including those at the Court of Appeal, are judge-made sanctions. As a matter of principle, there is no difference between an insurer's failure to pay under s. 2 and a failure under any provision of the SABS, which was in this case O. Reg. 403/96. [paragraph 54]

[120]Application of Res Judicata: The doctrine of res judicata applies in bankruptcy proceedings. The court found that the mitigation/set-off issue had been fully argued and decided in the Singapore proceedings. The appellants, as creditors, were considered privies of EnerNorth and were bound by the prior judgment (paras 50-64).

[121]The court found that the application for judicial review of the notice of proposal was premature because the applicants had already initiated a hearing before the FST, which provided a full trial de novo with robust procedural protections. The tribunal was the appropriate forum to address the allegations in the notice of proposal, and judicial intervention was unwarranted under the principles established in Volochay v. College of Massage Therapists of Ontario (paras 7-8, 10-15, 21-22).

The court distinguished the applicants' claims regarding the FSRA's publication decisions, noting that these issues might not fall within the tribunal's jurisdiction. While the FSRA's publication guidelines were not binding, the court left open the possibility that the applicants could challenge the regulator's publication decisions if they impaired legal rights or caused reputational harm. The court emphasized that these claims were not plainly unreviewable and should proceed to a panel for further consideration (paras 23-29)

[122]In my view, the four preconditions for res judicata are satisfied. The parties are the same in both proceedings. The prior claim was within the jurisdiction of the Tribunal. The decision in the first application was based on the merits. The Tribunal reviewed the submissions and evidence and found that the applicant was not entitled to the IRB or found that the applicant was not entitled to IRBs for the period of January 14, 2020 to date and ongoing. Moreover, he was not entitled to payment for the November 9, 2019 accounting report. The first decision was a final decision because he did not file a reconsideration request and nor did he appeal the decision."

See DanKazen citing angle v. Minister of National Revenue 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248,yluk v. Ainsworth Technologies Inc., 2001 SCC 44.
[123]

[124]Issue Estoppel: The court found that issue estoppel applies, as the same issue was decided in Revenue Properties #1. The doctrine promotes finality and fairness, and no change in the law or special circumstances justified relitigation (paras 96-134).
[125] The court found that issue estoppel applies, as the same issue was decided in Revenue Properties #1. The doctrine promotes finality and fairness, and no change in the law or special circumstances justified relitigation (paras 96-134).
[126] During initial triage of the appeal in this court, the court directed that the following inquiry be made of the appellant:

Justice Corbett directs me to advise you as follows:

This court will generally refuse to hear an appeal of an interlocutory ruling of the LAT on the basis of prematurity. While exceptions can be made to this principle, it does not appear that there are any bases for making an exception in this case. The appellant is asked to explain why this appeal should be permitted to proceed in light of the principle of prematurity.
[127]At paragraphs four to six in Mansuri, before the ONSC Divisional Court in 2023, with The Honourable Justice Lococo writing for the unanimous Divisional Court that are of great import in the analysis herein [emphasis is the **Applicant**'s]:

> "[4] The Applicants [Mansuri brothers] argue that the court should exercise its jurisdiction upon judicial review and determine on the merits that the Tribunal erred in law in finding that there was no breach of privacy or confidentiality and no conflict of interest.
>
> [5] DOMINION DISPUTES the merits of the application but, together with the Tribunal, raises the issue of prematurity. The respondents argue that unless there are exceptional circumstances, the Divisional Court should decline to consider an application for judicial review of the Tribunal's **interlocutory decision** until the underlying Tribunal applications are completed. The respondents submit that there are no exceptional circumstances nor is it a "rare case" that would warrant the court's intervention.
>
> [6] Following oral submissions on the issue of prematurity, the parties were advised at the application hearing that the application was being dismissed, *with* written reasons to follow. These Reasons for Judgment explain the court's decision to dismiss the judicial review application as premature, without deciding the merits of the **Applicant**s' challenge to the Initial Decision."

It is trite that the orders made or declined to be decided by VC Morrissette were final orders and final decisions as she refused to add a party, refused to add cause of actions, and refused to allow for the amendments of pleadings. No such relief was sought or dismissed in *Mansuri v Dominion of Canada General Insurance Company*, 2022 CanLII 138547 (ON LAT). Put another way, the Mansuri brothers did not seek to add another insurance company to their tribunal proceeding on the basis that Dominion Insurance Company was not the First Insurer. The Mansuri brothers primary complaint was that which the **Applicant** disagrees with them and their counsel, there was allegedly improper information sharing between *their claims* and not between Dominion Insurance Company of Canada and *other insurance companies*.
[128]at the Divisional Court also stands for the legal precedent that when an interlocutory decision is at issue, the Applicant has the burden to demonstrate why there are exceptional circumstances. However, when a final decision is at issue, the respondent raising prematurity has the burden. Hence, it is the Tribunal's sole burden to overcome.
[129]2022, the Tribunal (AABS) released its seminal decision in *Mansuri v Dominion of Canada General Insurance Company*, 2022 CanLII 138547 ["*Mansuri*"]: per Vice Chair McGee,

LAT – authority to disqualify potentially conflicted licensees, representing insurance companies (whether representation is overt or covert) but not "claims adjusters" (distinct from brokers or agents – and cannot be "barristers and solicitors"; cannot be salaried employees with the insurance company et al; see: Insurance Act, s. 1)

> ***Important distinction in Mansuri***: counsel [Schultz] was truly external and adjuster was internal for Dominion (herein: Karat is the sole representative in filings for SNIC (Address for service for SNIC Markham) and Nieuwland is the sole representative for "TD General Insurance Company" (address for service North York, Ontario)
> **Nieuwland** became counsel to SNIC on June 28, 2024
> SNIC has not taken any steps since January 25, 2024

[130] and "what was not said" ; and Anti-Fragmentation Doctrine relates to preliminary motions and decisions
Right to bring a motion where record of proceeding filed but underinclusive; and importance of bringing a motion to be able to raise the issue

[131][74] Section 10 of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1 provides: Record to be filed in court When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.
[75] Ergo, pursuant to s. 10 of the Judicial Review Procedure Act, it was available to the applicant to bring a motion seeking production of documents it alleges were relied on by the decision-maker but are not contained in the record: see, for example K.D. v. Peel Children's Aid Society, 2017 ONSC 7392 (Div. Ct.) at paras. 16-17). The applicant failed to do so. As a result, it is precluded from raising this issue for the first time on judicial review [nota bene: see "matters not adjudicated"].
[132]

[73] Although not raised in the Notice of Application, the applicant now argues that the record filed by the decision-maker was underinclusive.
[74] Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 provides:
Record to be filed in court
When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

[75] Ergo, pursuant to s. 10 of the *Judicial Review Procedure Act*, it was available to the applicant to bring a motion seeking production of documents it alleges were relied on by the decision-maker but are not contained in the record: see, for example *K.D. v. Peel Children's Aid Society*, 2017 ONSC 7392 (Div. Ct.) at paras. 16-17). The applicant failed to do so. As a result, it is precluded from raising this issue for the first time on judicial review.
[76] The applicant's argument in this regard therefore fails.

[133] Reasonable Apprehension of Bias existed because the motions judge, Molly J was engaged in ongoing litigation against the Crown
[134][31] As stated by Gillese J. (as she then was) in *Urquhart v. Allen Estate*, [1999] O.J. No. 4816 (Ont. S.C.), at para. 27:

> When counsel appears as a witness on a contentious matter, it causes two problems. First, it may result in a conflict of interest between counsel and his client. That conflict may be waived by the client …. The second problem relates to the administration of justice. The dual roles serve to create a conflict between counsel's obligations of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible. This is a conflict that cannot be waived by the client as the conflict is between counsel and the court/justice system.
>
> [32] The Law Society of Ontario *Rules of Professional Conduct* similarly state that a lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless permitted to do so or on a purely formal or uncontroverted matter: s. 5.2-1.
>
> [33] While the courts are not bound by the codes of conduct applicable to lawyers, the Supreme Court of Canada stated in *MacDonald Estate*, at p. 1246, that "an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy."
>
> [34] In *Bose v. Bangiya Parishad Toronto*, 2018 ONSC 7639, at para. 98, Perell J. confirmed that a lawyer who is a material witness should not be permitted to continue acting as counsel, even if they do not intend to testify in the case.

[135]Heegsma, again referenced in the NOM #2 Factum, involved the OHRC appealing the decision of the ONSC to the ONCA that refused it being added as an intervenor in the underlying claim against the City of Hamilton by a variety of plaintiffs who were residing in encampments and removed therefrom pursuant to by-laws passed by the municipality. The OHRC was seeking to be added on its own, without ever having the proverbial litigation finger pointed at it like a **TDHA** in the context of a highly regulated industry of automotive insurance, as a party or friend of the court to provide insight into human rights issues of those living in encampments. It was a noble cause and use of resources by the OHRC but that involved *Rule* 13.02 of the Civil *Rule*s at the court level at first instance. There is no precedent to be taken from Heegsma to be applied to this *JRPA* Proceeding.

[136]

[137] Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business, or which falls within the apparent scope of the agent's authority
[138]https://canlii.ca/t/ggfkq#par165
[139]he Supreme Court outlined the three requirements for issue estoppel: (i) The same question has been decided; (ii) the decision said to give rise to the estoppel is final; and (iii) the parties to the decision and privies were the same persons as the parties to the proceeding in which the estoppel is raised or ***their privies***.
[140]Issue estoppel prevents re-litigation of the material facts that the cause of action in the prior action embraces: *Danyluk*, a"**Cause of action**" means: a set of facts that gives an individual the right to seek a court's help against another.

[141]

[142] It is important to note that these three cases were applications for judicial review from decisions of the Financial Services Commission of Ontario ("FSCO"), not appeals to the Divisional Court. Prior to April 1, 2016, automobile accident benefit disputes were adjudicated at FSCO, where there was no statutory right of appeal, only judicial review. These judicial reviews of FSCO decisions do not address or assist in determining whether an interlocutory decision may be appealed under s. 11(1) of the *LAT Act*. Only Certas discusses the doctrine of prematurity, doing so in the context of judicial review of an interlocutory decision."

[143]Elkins v. Van Wissen, 2023 ONCA 789 (CanLII), <https://canlii.ca/t/k1dgk ["Elkins"]

[144](see: the ONCA found that the Board (LTB) reasons made no mention of the second issue nor the evidence relating to it. Clearly, appellate review was prevented on that issue and, for that reason alone, the Board erred in law. ONCA went further in Elkins finding the following: "[69] In addition, however, the Board reasons on the first issue are so deficient as to constitute legal error".

[145] [103] The interplay between privacy and public access to judicial records is best summed up by The Attorney General of Nova Scotia and Ernest Harold Grainger v. Linden MacIntyre, et al, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175 where Dickson J. stated at pp. 185-187:

Let me deal first with the 'privacy' argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. The following comments of Laurence J. in R. v. Wright, 8 T.R. 293, are apposite and were cited with approval by Duff J. in Gazette Printing Co. v. Shallow (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339 at p. 359:

Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

The leading case is the decision of the House of Lords in Scott v. Scott, [1913] A.C. 417. In the later case of McPherson v. McPherson, 1935 CanLII 276 (UK JCPC), [1936] A.C. 177, at p. 200, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".

... The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. ...

... The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of Halsbury's 4th Edition states the rule in these terms:

In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impractical by the presence of the public, the court may sit in camera [Vol. 10, para. 705, at p. 316].

At every stage the rule should be one of public accessibility and concomitant judicial accountability ...

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. ...

[146]the Supreme Court of Canada provided the following examples (at paragraph 17): ...it is often necessary in the interests of achieving trial efficiency for a trial judge to announce promptly the disposition on an evidentiary ruling or on a motion, with reasons to follow at a later date. In *Teskey*, the Supreme Court held that a trial judge "is not precluded from announcing a verdict with 'reasons to follow'" (at paragraph 16).

[147]**AAAR Doctrine, Prematurity Doctrine, Rule Against Interlocutory Review, and Exhaustion Doctrine (which are effectively the same doctrine because a final decision, determination or order)**. If the potential party that is an **Applicant** avers, with supporting evidence, is subject to a cause of action is not added by decision of an administrative decision maker who becomes *functus officio*[147], and reconsideration fails, then he or she has exhausted any available, alternate and adequate remedies [AAAR] *before the **Tribunal***.

[148]There is no dispute any of the evidence on a general level but also specifically under this sub-heading that **TDHA**, on a balance of probabilities had and has a direct OR substantial interest in the outcome of the LAT Appeal (***SEE:*** COMPENDIUM FEB 11 2025, Tab 6). However, the adding of the party of **TDHA** as the **First Insurer**, along with the concomitant sought orders pursuant to the declaratory relief along the addition of those "causes of action" against "another" were all final orders and decisions that squarely invoke the Constitution of Canada. "**Causes of Action**" is defined as: "a fact or facts that enable a person to bring an action against another". As **SNIC** and TDGIC were not "one and the same", neither are **SNIC** and **TDHA.**

[149]It is not the "can" in relation to participation but the "content" of the participatio

[150]Estey J. articulated the other [competing interest being a fully informed adjudication on the issues] significant consideration, namely the importance of maintaining tribunal impartiality. This obviously matters to the parties to the decision, particularly if the application results in the matter being remitted to the tribunal. Moreover, it is also important to the public's confidence in the administration of justice generally. [151]

where the tribunal serves a defined and specialized community, there may be a risk that full- fledged participation by a tribunal as an adversary in a judicial review proceeding will undermine future confidence in its objectivity (cited in Goodis in paragraph 38)

[151]Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44 (CanLII), [2015] 3 SCR 147, at para 50, <https://canlii.ca/t/glb07#par50>, retrieved on 2024-12-25

[152]If an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the ***tone*** with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary." [para. 61]

[153]This means that lawyers are part of the legal system and have a role in the **administration of justice**. The **Applicant** forcefully notes the overlap between the jurisdiction of this court to remove counsel to the Tribunal (or disregard its arguments pursuant to Taylor v. HR Solutions at paragraph 20) and the role of a lawyer, as an officer of the court in the administration of justice.

[154] [18] Section 9(2) of the *JRPA* does not affect this court's supervisory jurisdiction. It does not shield administrative tribunals such as the Tribunal from curial scrutiny entirely; rather, s. 9(2) permits tribunals to bring relevant matters to the attention of the court.

[19] Allowing an administrative tribunal such as the Tribunal to participate on an application for judicial review does not give rise to "unjust opposition" as Mr. Taylor contends. To the contrary, the presence of the administrative tribunal as a party may help to ensure that the court hears both sides of a dispute where there is no other well-informed party standing in opposition to the party challenging the tribunal decision: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, at para. 54.

[20] Once a tribunal is a party, the court still has discretion as to the scope of participation to be accorded to the tribunal during the hearing. This involves balancing the need for fully informed adjudication against the importance of maintaining tribunal impartiality: *Hydro Ottawa v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2019 ONSC 4898 (Div. Ct.), at para. 6. This court is under no obligation to accept the submissions of a tribunal that appears before it.

[155]LAT represents that is not only adjudicative but "quasi-judicial" so that militates against it participating at all. Impartiality of said Tribunal (like LAT that is quasi-judicial) weights against them in the heaviest of weights in terms of any standing – impartiality is not just actual but perceived. This factor is measured against administrative tribunal impartiality (or lack thereof). For tribunals tasked with this latter responsibility, "the importance of fairness, real and perceived, weighs more heavily" against tribunal standing:

[156]"[18] The ***Keeprite Standard*** for the admission of affidavit evidence on judicial review has been applied in numerous decisions involving labour boards and labour arbitrators. These cases have held that affidavit evidence can be admitted either to show an ***absence of evidence*** on an essential point *or* to disclose a ***breach of natural justice*** that cannot be proven by a mere reference to the record."

[157]In relation to the damages and costs elements along with that of the avoidance of double collection, the case of , aff'd at the BCCA:

[384] As a general rule, the type of misconduct that justifies an award of special costs will relate to the course of the litigation and not to pre-litigation misconduct. This is so because reprehensible pre-litigation misconduct giving rise to a cause of action is typically addressed by an award of punitive damages. In some cases, however, reprehensible misconduct may have originated prior to litigation but continued throughout the litigation process. **In these circumstances, special costs may be ordered in addition to punitive damages without double punishment being imposed**: *Golden Capital Sec. Ltd.* at ¶ 161-176.

[385] Perjury is reprehensible misconduct, as is fraud and conspiracy. Such misconduct cannot be condoned by the court. On the contrary, it should be denounced and deterred, both specifically and generally. For these reasons, acts of perjury, fraud and conspiracy often attract an award of special costs. Such awards may be made on the basis of **full indemnity**: *Fullerton v. Matsqui (District)*, [1992] B.C.J. No. 2969 (C.A.) at ¶ 17; *Insurance Corporation of British Columbia v. Phung*, 2003 BCSC 1619 (CanLII) at ¶ 8 & 11.

[158] Since the Society did not appear as a party, the costs awarded against it must be taken to be the equivalent of an award for the tort of maintenance. A person must intervene "officiously or improperly" to be liable for the tort of maintenance. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife. The society's support was "out of charity and religious sympathy" and so did not constitute maintenance. It did not put forward respondent in an attempt to escape liability for costs. Its interest in the constitutional issue was insufficient to distinguish it from interveners who appear on constitutional cases and who have never been liable for costs.

[159] https://cjc-ccm.ca/en/news/canadian-judicial-council-completes-review-matter-involving-honourable-de-spiro

Tab 1

CanLII

The Constitution Act, 1867, 30 & 31 Vict, c 3

Current version: in force since 2023-09-15

Link to the latest version: https://canlii.ca/t/8q7k

Stable link to this version: https://canlii.ca/t/56g8v

Citation to this version: The Constitution Act, 1867, 30 & 31 Vict, c 3, <https://canlii.ca/t/56g8v> retrieved on 2026-01-06

Currency: Last updated from the Justice Laws Web Site on 2025-12-18

CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America:[1]

I. Preliminary

Short title

1 This Act may be cited as the *Constitution Act, 1867*.[2]

2 Repealed.[3]

II. Union

Declaration of Union

3 It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly.[4]

Construction of subsequent Provisions of Act

4 Unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.[5]

Four Provinces

5 Canada shall be divided into Four Provinces, named Ontario, Quebec, Nova Scotia, and New Brunswick.[6]

Provinces of Ontario and Quebec

6 The Parts of the Province of Canada (as it exists at the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form Two separate Provinces. The Part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the Part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

Provinces of Nova Scotia and New Brunswick

7 The Provinces of Nova Scotia and New Brunswick shall have the same Limits as at the passing of this Act.

Decennial Census

8 In the general Census of the Population of Canada which is hereby required to be taken in the Year One thousand eight hundred and seventy-one, and in every Tenth Year thereafter, the respective Populations of the Four Provinces shall be distinguished.

III. Executive Power

Declaration of Executive Power in the Queen

9 The Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the Queen.

Application of Provisions referring to Governor General

10 The Provisions of this Act referring to the Governor General extend and apply to the Governor General for the Time being of Canada, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of Canada on behalf and in the Name of the Queen, by whatever Title he is designated.

Constitution of Privy Council for Canada

11 There shall be a Council to aid and advise in the Government of Canada, to be styled the Queen’s Privy Council for Canada; and the Persons who are to be Members of that Council shall be from Time to Time chosen and summoned by the Governor General and sworn in as Privy Councillors, and Members thereof may be from Time to Time removed by the Governor General.

All Powers under Acts to be exercised by Governor General with Advice of Privy Council, or alone

12 All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice, or with the Advice and Consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor General, with the Advice or with the Advice and Consent of or in conjunction with the Queen’s Privy Council for Canada, or any Members thereof, or by the Governor General individually, as the Case requires, subject nevertheless (except with respect to

such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.(7)

Application of Provisions referring to Governor General in Council

13 The Provisions of this Act referring to the Governor General in Council shall be construed as referring to the Governor General acting by and with the Advice of the Queen's Privy Council for Canada.

Power to Her Majesty to authorize Governor General to appoint Deputies

14 It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor General from Time to Time to appoint any Person or any Persons jointly or severally to be his Deputy or Deputies within any Part or Parts of Canada, and in that Capacity to exercise during the Pleasure of the Governor General such of the Powers, Authorities, and Functions of the Governor General as the Governor General deems it necessary or expedient to assign to him or them, subject to any Limitations or Directions expressed or given by the Queen; but the Appointment of such a Deputy or Deputies shall not affect the Exercise by the Governor General himself of any Power, Authority, or Function.

Command of Armed Forces to continue to be vested in the Queen

15 The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces, of and in Canada, is hereby declared to continue and be vested in the Queen.

Seat of Government of Canada

16 Until the Queen otherwise directs, the Seat of Government of Canada shall be Ottawa.

IV. Legislative Power

Constitution of Parliament of Canada

17 There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Privileges, etc., of Houses

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers

shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.[8]

First Session of the Parliament of Canada

19 The Parliament of Canada shall be called together not later than Six Months after the Union.[9]

20 Repealed.[10]

The Senate

Number of Senators

21 The Senate shall, subject to the Provisions of this Act, consist of One Hundred and five Members, who shall be styled Senators.[11]

Representation of Provinces in Senate

22 In relation to the Constitution of the Senate Canada shall be deemed to consist of Four Divisions:

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory, the Northwest Territories and Nunavut shall be entitled to be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.[12]

Qualifications of Senator

23 The Qualifications of a Senator shall be as follows:

1. He shall be of the full age of Thirty Years;
2. He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;
3. He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;
4. His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;
5. He shall be resident in the Province for which he is appointed;
6. In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division. (13)

Summons of Senator

24 The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25 Repealed.(14)

Addition of Senators in certain cases

26 If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly.(15)

Reduction of Senate to normal Number

27 In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more.(16)

Maximum Number of Senators

28 The Number of Senators shall not at any Time exceed One Hundred and thirteen.(17)

Tenure of Place in Senate

29 (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Retirement upon attaining age of seventy-five years

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years.(18)

Resignation of Place in Senate

30 A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators

31 The Place of a Senator shall become vacant in any of the following Cases:

1. If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;

2. If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;

3. If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

4. If he is attainted of Treason or convicted of Felony or of any infamous Crime;

5. If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

Summons on Vacancy in Senate

32 When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Questions as to Qualifications and Vacancies in Senate

33 If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate

34 The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead.(19)

Quorum of Senate

35 Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Voting in Senate

36 Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons

Constitution of House of Commons in Canada

37 The House of Commons shall, subject to the Provisions of this Act, consist of three hundred and eight members of whom one hundred and six shall be elected for Ontario, seventy-five for Quebec, eleven for Nova Scotia, ten for New Brunswick, fourteen for Manitoba, thirty-six for British Columbia, four for Prince Edward Island, twenty-eight for Alberta, fourteen for Saskatchewan, seven for Newfoundland, one for the Yukon Territory, two for the Northwest Territories and one for Nunavut.(20)

Summoning of House of Commons

38 The Governor General shall from Time to Time, in the Queen’s Name, by Instrument under the Great Seal of Canada, summon and call together the House of Commons.

Senators not to sit in House of Commons

39 A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Electoral districts of the four Provinces

40 Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the Purposes of the Election of Members to serve in the House of Commons, be divided into Electoral Districts as follows:

1. Ontario

Ontario shall be divided into the Counties, Ridings of Counties, Cities, Parts of Cities, and Towns enumerated in the First Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return One Member.

2. Quebec

Quebec shall be divided into Sixty-five Electoral Districts, composed of the Sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under Chapter Two of the Consolidated Statutes of Canada, Chapter Seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the Twenty-third Year of the Queen, Chapter One, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the Purposes of this Act an Electoral District entitled to return One Member.

3. Nova Scotia

Each of the Eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return Two Members, and each of the other Counties One Member.

4. New Brunswick

Each of the Fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those Fifteen Electoral Districts shall be entitled to return One Member.[21]

Continuance of existing Election Laws until Parliament of Canada otherwise provides

41 Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their

Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution, — shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.(22)

42 Repealed.(23)

43 Repealed.(24)

As to Election of Speaker of House of Commons

44 The House of Commons on its first assembling after a General Election shall proceed with all practicable Speed to elect One of its Members to be Speaker.

As to filling up Vacancy in Office of Speaker

45 In case of a Vacancy happening in the Office of Speaker by Death, Resignation, or otherwise, the House of Commons shall with all practicable Speed proceed to elect another of its Members to be Speaker.

Speaker to preside

46 The Speaker shall preside at all Meetings of the House of Commons.

Provision in case of Absence of Speaker

47 Until the Parliament of Canada otherwise provides, in case of the Absence for any Reason of the Speaker from the Chair of the House of Commons for a Period of Forty-eight consecutive Hours, the House may elect another of its Members to act as Speaker, and the Member so elected shall during the Continuance of such Absence of the Speaker have and execute all the Powers, Privileges, and Duties of Speaker.(25)

Quorum of House of Commons

48 The Presence of at least Twenty Members of the House of Commons shall be necessary to constitute a Meeting of the House for the Exercise of its Powers, and for that Purpose the Speaker shall be reckoned as a Member.

Voting in House of Commons

49 Questions arising in the House of Commons shall be decided by a Majority of Voices other than that of the Speaker, and when the Voices are equal, but not otherwise, the Speaker shall have a Vote.

Duration of House of Commons

50 Every House of Commons shall continue for Five Years from the Day of the Return of the Writs for choosing the House (subject to be sooner dissolved by the Governor General), and no longer.(26)

Readjustment of representation in Commons

51 (1) The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time, subject and according to the following rules:

Rules

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the population of the province by the electoral quotient and rounding up any fractional remainder to one.
2. If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province during the 43rd Parliament, there shall be added to the number of members so assigned the number of members that will result in the province having the same number of members as were assigned during that Parliament.(27)
3. After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if necessary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces.
4. Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the provinces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment.

5. Unless the context indicates otherwise, in these rules, the population of a province is the estimate of its population as at July 1 of the year of the most recent decennial census.

6. In these rules, ***electoral quotient*** means

(a) 111,166, in relation to the readjustment following the completion of the 2011 decennial census, and

(b) in relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one.

Population estimates

(1.1) For the purpose of the rules in subsection (1), there is required to be prepared an estimate of the population of Canada and of each province as at July 1, 2001 and July 1, 2011 — and, in each year following the 2011 decennial census in which a decennial census is taken, as at July 1 of that year — by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time.(27)

Yukon Territory, Northwest Territories and Nunavut

(2) The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1985, shall be entitled to one member, the Northwest Territories as bounded and described in section 2 of chapter N-27 of the Revised Statutes of Canada, 1985, as amended by section 77 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member, and Nunavut as bounded and described in section 3 of chapter 28 of the Statutes of Canada, 1993, shall be entitled to one member.(28)

Constitution of House of Commons

51A Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province.(29)

Increase of Number of House of Commons

52 The Number of Members of the House of Commons may be from Time to Time increased by the Parliament of Canada, provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed.

Money Votes; Royal Assent

Appropriation and Tax Bills

53 Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of Money Votes

54 It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

Royal Assent to Bills, etc.

55 Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

Disallowance by Order in Council of Act assented to by Governor General

56 Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to One of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification.

Signification of Queen's Pleasure on Bill reserved

57 A Bill reserved for the Signification of the Queen's Pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council.

An Entry of every such Speech, Message, or Proclamation shall be made in the Journal of each House, and a Duplicate thereof duly attested shall be delivered to the proper Officer to be kept among the Records of Canada.

V. Provincial Constitutions

Executive Power

Appointment of Lieutenant Governors of Provinces

58 For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

Tenure of Office of Lieutenant Governor

59 A Lieutenant Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant Governor appointed after the Commencement of the First Session of the Parliament of Canada shall not be removeable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week thereafter if the Parliament is then sitting, and if not then within One Week after the Commencement of the next Session of the Parliament.

Salaries of Lieutenant Governors

60 The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.(30)

Oaths, etc., of Lieutenant Governor

61 Every Lieutenant Governor shall, before assuming the Duties of his Office, make and subscribe before the Governor General or some Person authorized by him Oaths of Allegiance and Office similar to those taken by the Governor General.

Application of Provisions referring to Lieutenant Governor

62 The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

Appointment of Executive Officers for Ontario and Quebec

63 The Executive Council of Ontario and of Quebec shall be composed of such Persons as the Lieutenant Governor from Time to Time thinks fit, and in the first instance of the following Officers, namely, — the Attorney General, the Secretary and Registrar of the

Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, with in Quebec the Speaker of the Legislative Council and the Solicitor General.(31)

Executive Government of Nova Scotia and New Brunswick

64 The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.(32)

Powers to be exercised by Lieutenant Governor of Ontario or Quebec with Advice, or alone

65 All Powers, Authorities, and Functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant Governors of those Provinces, with the Advice or with the Advice and Consent of the respective Executive Councils thereof, or in conjunction with those Councils, or with any Number of Members thereof, or by those Governors or Lieutenant Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively, with the Advice or with the Advice and Consent of or in conjunction with the respective Executive Councils, or any Members thereof, or by the Lieutenant Governor individually, as the Case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be abolished or altered by the respective Legislatures of Ontario and Quebec.(33)

Application of Provisions referring to Lieutenant Governor in Council

66 The Provisions of this Act referring to the Lieutenant Governor in Council shall be construed as referring to the Lieutenant Governor of the Province acting by and with the Advice of the Executive Council thereof.

Administration in Absence, etc., of Lieutenant Governor

67 The Governor General in Council may from Time to Time appoint an Administrator to execute the Office and Functions of Lieutenant Governor during his Absence, Illness, or other Inability.

Seats of Provincial Governments

68 Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the Seats of Government of the Provinces shall be as follows, namely, — of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

Legislative Power

1. Ontario

Legislature for Ontario

69 There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

Electoral districts

70 The Legislative Assembly of Ontario shall be composed of Eighty-two Members, to be elected to represent the Eighty-two Electoral Districts set forth in the First Schedule to this Act.(34)

2. Quebec

Legislature for Quebec

71 There shall be a Legislature for Quebec consisting of the Lieutenant Governor and of Two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.(35)

Constitution of Legislative Council

72 The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen’s Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act.

Qualification of Legislative Councillors

73 The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

Resignation, Disqualification, etc.

74 The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant.

Vacancies

75 When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy.

Questions as to Vacancies, etc.

76 If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

Speaker of Legislative Council

77 The Lieutenant Governor may from Time to Time, by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his Stead.

Quorum of Legislative Council

78 Until the Legislature of Quebec otherwise provides, the Presence of at least Ten Members of the Legislative Council, including the Speaker, shall be necessary to constitute a Meeting for the Exercise of its Powers.

Voting in Legislative Council

79 Questions arising in the Legislative Council of Quebec shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

Constitution of Legislative Assembly of Quebec

80 The Legislative Assembly of Quebec shall be composed of Sixty-five Members, to be elected to represent the Sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to Alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent any Bill for altering the Limits of any of the Electoral Divisions or Districts mentioned in the Second Schedule to this Act, unless the Second and Third Readings of such Bill have been passed in the Legislative Assembly with the Concurrence of the Majority of the Members representing all those Electoral Divisions or Districts, and the Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed.(36)

3. Ontario and Quebec

81 Repealed.(37)

Summoning of Legislative Assemblies

82 The Lieutenant Governor of Ontario and of Quebec shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province.

Restriction on election of Holders of offices

83 Until the Legislature of Ontario or of Quebec otherwise provides, a Person accepting or holding in Ontario or in Quebec any Office, Commission, or Employment, permanent or temporary, at the Nomination of the Lieutenant Governor, to which an annual Salary, or any Fee, Allowance, Emolument, or Profit of any Kind or Amount whatever from the Province is attached, shall not be eligible as a Member of the Legislative Assembly of the respective Province, nor shall he sit or vote as such; but nothing in this Section shall make ineligible any Person being a Member of the Executive Council of the respective Province, or holding any of the following Offices, that is to say, the Offices of Attorney General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such Office.(38)

Continuance of existing Election Laws

84 Until the legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force in those Provinces respectively, relative to the following Matters, or any of them, namely, — the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and execution of new Writs in case of Seats vacated otherwise than by Dissolution, — shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that, until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every Male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.(39)

Duration of Legislative Assemblies

85 Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for Four Years from the Day of the Return of the Writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant Governor of the Province), and no longer.(40)

Yearly Session of Legislature

86 There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Legislature in each Province in one Session and its first Sitting in the next Session.(41)

Speaker, Quorum, etc.

87 The following Provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say, — the Provisions relating to the Election of a Speaker originally and on Vacancies, the Duties of the Speaker, the Absence of the Speaker, the Quorum, and the Mode of voting, as if those Provisions were here re-enacted and made applicable in Terms to each such Legislative Assembly.

4. Nova Scotia and New Brunswick

Constitutions of Legislatures of Nova Scotia and New Brunswick

88 The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act.(42)

5. Ontario, Quebec, and Nova Scotia

89 Repealed.(43)

6. The Four Provinces

Application to Legislatures of Provisions respecting Money Votes, etc.

90 The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

Fundamental Characteristics of Quebec

Quebec

90Q.1 *Quebecers form a nation.*

Quebec

90Q.2 *French shall be the only official language of Quebec. It is also the common language of the Quebec nation.*(113)

7. Saskatchewan

Saskatchewan

90S.1 (1) *Saskatchewan has autonomy with respect to all of the matters falling under its exclusive legislative jurisdiction pursuant to this Act.*

(2) *Saskatchewan is and always has been dependent on agriculture, and on the development of its non-renewable natural resources, forestry resources and electrical energy generation and production.*

(3) *Saskatchewan's ability to control the development of its non-renewable natural resources, its forestry resources and its electrical energy generation and production is critical to the future well-being and prosperity of Saskatchewan and its people.*(114)

VI. Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.(44)

1A. The Public Debt and Property.(45)

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance.[46]

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.(47)

Exclusive Powers of Provincial Legislatures

Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.(48)

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Primary production

(5) The expression ***primary production*** has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.
(49)

Education

Legislation respecting Education

93 In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

1. Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union;

2. All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen’s Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen’s Protestant and Roman Catholic Subjects in Quebec;

3. Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education;

4. In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.(50)

Quebec

93A Paragraphs (1) to (4) of section 93 do not apply to Quebec.(51)

Uniformity of Laws in Ontario, Nova Scotia, and New Brunswick

Legislation for Uniformity of Laws in Three Provinces

94 Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions

Legislation respecting old age pensions and supplementary benefits

94A The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.(52)

Agriculture and Immigration

Concurrent Powers of Legislation respecting Agriculture, etc.

95 In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

VII. Judicature

Appointment of Judges

96 The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of Judges in Ontario, etc.

97 Until the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and the Procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor General shall be selected from the respective Bars of those Provinces.

Selection of Judges in Quebec

98 The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of office of Judges

99 (1) Subject to subsection (2) of this section, the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons.

Termination at age 75

(2) A judge of a superior court, whether appointed before or after the coming into force of this section, shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age. (53)

Salaries, etc., of Judges

100 The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.(54)

General Court of Appeal, etc.

101 The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.(55)

VIII. Revenues; Debts; Assets; Taxation

Creation of Consolidated Revenue Fund

102 All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

Expenses of Collection, etc.

103 The Consolidated Revenue Fund of Canada shall be permanently charged with the Costs, Charges, and Expenses incident to the Collection, Management, and Receipt thereof, and the same shall form the First Charge thereon, subject to be reviewed and audited in such Manner as shall be ordered by the Governor General in Council until the Parliament otherwise provides.

Interest of Provincial Public Debts

104 The annual Interest of the Public Debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the Second Charge on the Consolidated Revenue Fund of Canada.

Salary of Governor General

105 Unless altered by the Parliament of Canada, the Salary of the Governor General shall be Ten thousand Pounds Sterling Money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the Third Charge thereon.(56)

Appropriation from Time to Time

106 Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Transfer of Stocks, etc.

107 All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

Transfer of Property in Schedule

108 The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

Property in Lands, Mines, etc.

109 All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.(57)

Assets connected with Provincial Debts

110 All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial Debts

111 Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

Debts of Ontario and Quebec

112 Ontario and Quebec conjointly shall be liable to Canada for the Amount (if any) by which the Debt of the Province of Canada exceeds at the Union Sixty-two million five hundred thousand Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Assets of Ontario and Quebec

113 The Assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the Property of Ontario and Quebec conjointly.

Debt of Nova Scotia

114 Nova Scotia shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Eight million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.(58)

Debt of New Brunswick

115 New Brunswick shall be liable to Canada for the Amount (if any) by which its Public Debt exceeds at the Union Seven million Dollars, and shall be charged with Interest at the Rate of Five per Centum per Annum thereon.

Payment of interest to Nova Scotia and New Brunswick

116 In case the Public Debts of Nova Scotia and New Brunswick do not at the Union amount to Eight million and Seven million Dollars respectively, they shall respectively receive by half-yearly Payments in advance from the Government of Canada Interest at Five per Centum per Annum on the Difference between the actual Amounts of their respective Debts and such stipulated Amounts.

Provincial Public Property

117 The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

118 Repealed.(59)

Further Grant to New Brunswick

119 New Brunswick shall receive by half-yearly Payments in advance from Canada for the Period of Ten Years from the Union an additional Allowance of Sixty-three thousand Dollars per Annum; but as long as the Public Debt of that Province remains under Seven million Dollars, a Deduction equal to the Interest at Five per Centum per Annum on such Deficiency shall be made from that Allowance of Sixty-three thousand Dollars.(60)

Form of Payments

120 All Payments to be made under this Act, or in discharge of Liabilities created under any Act of the Provinces of Canada, Nova Scotia, and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such Form and Manner as may from Time to Time be ordered by the Governor General in Council.

Canadian Manufactures, etc.

121 All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Continuance of Customs and Excise Laws

122 The Customs and Excise Laws of each Province shall, subject to the Provisions of this Act, continue in force until altered by the Parliament of Canada.(61)

Exportation and Importation as between Two Provinces

123 Where Customs Duties are, at the Union, leviable on any Goods, Wares, or Merchandises in any Two Provinces, those Goods, Wares, and Merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on Proof of Payment of the Customs Duty leviable thereon in the Province of Exportation, and on Payment of such further Amount (if any) of Customs Duty as is leviable thereon in the Province of Importation.(62)

Lumber Dues in New Brunswick

124 Nothing in this Act shall affect the Right of New Brunswick to levy the Lumber Dues provided in Chapter Fifteen of Title Three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the Amount of such Dues; but the Lumber of any of the Provinces other than New Brunswick shall not be subject to such Dues.(63)

Exemption of Public Lands, etc.

125 No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

Provincial Consolidated Revenue Fund

126 Such Portions of the Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union Power of Appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all Duties and Revenues raised by them in accordance with the special Powers conferred upon them by this Act, shall in each Province form One Consolidated Revenue Fund to be appropriated for the Public Service of the Province.

IX. Miscellaneous Provisions

127 Repealed.[64]

Oath of Allegiance, etc.

128 Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule.

Quebec

128Q.1 *Section 128 does not apply to Quebec.*[115]

Continuance of existing Laws, Courts, Officers, etc.

129 Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, Administrative, and Ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act.[65]

Transfer of Officers to Canada

130 Until the Parliament of Canada otherwise provides, all Officers of the several Provinces having Duties to discharge in relation to Matters other than those coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be Officers of Canada, and shall continue to discharge the Duties of their respective Offices under the same Liabilities, Responsibilities, and Penalties as if the Union had not been made.[66]

Appointment of new Officers

131 Until the Parliament of Canada otherwise provides, the Governor General in Council may from Time to Time appoint such Officers as the Governor General in Council deems necessary or proper for the effectual Execution of this Act.

Treaty Obligations

132 The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Use of English and French Languages

133 Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[67]

Ontario and Quebec

Appointment of Executive Officers for Ontario and Quebec

134 Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following Officers, to hold Office during Pleasure, that is to say, — the Attorney General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the Case of Quebec the Solicitor General, and may, by Order of the Lieutenant Governor in Council, from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof, and may also appoint other and additional Officers to hold Office during Pleasure, and may from Time to Time prescribe the Duties of those Officers, and of the several Departments over which they shall preside or to which they shall belong, and of the Officers and Clerks thereof. [68]

Powers, Duties, etc. of Executive Officers

135 Until the Legislature of Ontario or Quebec otherwise provides, all Rights, Powers, Duties, Functions, Responsibilities, or Authorities at the passing of this Act vested in or imposed on the Attorney General, Solicitor General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver General, by any Law, Statute, or Ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any Officer to be appointed by the Lieutenant Governor for the Discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the Duties and Functions of the Office of Minister of Agriculture at the passing of this Act imposed by the Law of the Province of Canada, as well as those of the Commissioner of Public Works.(69)

Great Seals

136 Until altered by the Lieutenant Governor in Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same Design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

Construction of temporary Acts

137 The words ***and from thence to the End of the then next ensuing Session of the Legislature***, or Words to the same Effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada if the Subject Matter of the Act is within the Powers of the same as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively if the Subject Matter of the Act is within the Powers of the same as defined by this Act.

As to Errors in Names

138 From and after the Union the Use of the Words ***Upper Canada*** instead of ***Ontario***, or ***Lower Canada*** instead of ***Quebec***, in any Deed, Writ, Process, Pleading, Document, Matter, or Thing shall not invalidate the same.

As to issue of Proclamations before Union, to commence after Union

139 Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a Time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several Matters and Things therein proclaimed, shall be and continue of like Force and Effect as if the Union had not been made.(70)

As to issue of Proclamations after Union

140 Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant Governor of Ontario or of Quebec, as its Subject Matter requires, under the Great Seal thereof; and from and after the Issue of such Proclamation the same and the several Matters and Things therein proclaimed shall be and continue of the like Force and Effect in Ontario or Quebec as if the Union had not been made.(71)

Penitentiary

141 The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.(72)

Arbitration respecting Debts, etc.

142 The Division and Adjustment of the Debts, Credits, Liabilities, Properties, and Assets of Upper Canada and Lower Canada shall be referred to the Arbitrament of Three Arbitrators, One chosen by the Government of Ontario, One by the Government of Quebec, and One by the Government of Canada; and the Selection of the Arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the Arbitrator chosen by the Government of Canada shall not be a Resident either in Ontario or in Quebec.(73)

Division of Records

143 The Governor General in Council may from Time to Time order that such and so many of the Records, Books, and Documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to Ontario or to Quebec, and the same shall thenceforth be the Property of that Province; and any Copy thereof or Extract therefrom, duly certified by the Officer having charge of the Original thereof, shall be admitted as Evidence.(74)

Constitution of Townships in Quebec

144 The Lieutenant Governor of Quebec may from Time to Time, by Proclamation under the Great Seal of the Province, to take effect from a Day to be appointed therein, constitute Townships in those Parts of the Province of Quebec in which Townships are not then already constituted, and fix the Metes and Bounds thereof.

X. Intercolonial Railway

145 Repealed.(75)

XI. Admission of Other Colonies

Power to admit Newfoundland, etc., into the Union

146 It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.(76)

As to Representation of Newfoundland and Prince Edward Island in Senate

147 In case of the Admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a Representation in the Senate of Canada of Four Members, and (notwithstanding anything in this Act) in case of the Admission of Newfoundland the normal Number of Senators shall be Seventy-six and their maximum Number shall be Eighty-two; but Prince Edward Island when admitted shall be deemed to be comprised in the third of the Three Divisions into which Canada is, in relation to the Constitution of the Senate, divided by this Act, and accordingly, after the Admission of Prince Edward Island, whether Newfoundland is admitted or not, the Representation of Nova Scotia and New Brunswick in the Senate shall, as Vacancies occur, be reduced from Twelve to Ten Members respectively, and the Representation of each of those Provinces shall not be increased at any Time beyond Ten, except under the Provisions of this Act for the Appointment of Three or Six additional Senators under the Direction of the Queen.(77)

THE FIRST SCHEDULE(78)

Electoral Districts of Ontario

A. Existing Electoral Divisions.

Counties

1. Prescott.

2. Glengarry.

3. Stormont.

4. Dundas.

5. Russell.

6. Carleton.

7. Prince Edward.

8. Halton.

9. Essex.

Ridings of Counties

10. North Riding of Lanark.

11. South Riding of Lanark.

12. North Riding of Leeds and North Riding of Grenville.

13. South Riding of Leeds.

14. South Riding of Grenville.

15. East Riding of Northumberland.

16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).

17. East Riding of Durham.

18. West Riding of Durham.

19. North Riding of Ontario.

20. South Riding of Ontario.

21. East Riding of York.

22. West Riding of York.

23. North Riding of York.

24. North Riding of Wentworth.

25. South Riding of Wentworth.

26. East Riding of Elgin.

27. West Riding of Elgin.

28. North Riding of Waterloo.

29. South Riding of Waterloo.

30. North Riding of Brant.

31. South Riding of Brant.

32. North Riding of Oxford.

33. South Riding of Oxford.

34. East Riding of Middlesex.

Cities, Parts of Cities, and Towns

35. West Toronto.

36. East Toronto.

37. Hamilton.

38. Ottawa.

39. Kingston.

40. London.

41. Town of Brockville, with the Township of Elizabethtown thereto attached.

42. Town of Niagara, with the Township of Niagara thereto attached.

43. Town of Cornwall, with the Township of Cornwall thereto attached.

B. New Electoral Divisions

44. The Provisional Judicial District of Algoma.

The County of Bruce, divided into Two Ridings, to be called respectively the North and South Ridings:

45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albermarle, Amable, Arran, Bruce, Elderslie, and Saugeen, and the Village of Southampton.

46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.

The County of Huron, divided into Two Ridings, to be called respectively the North and South Ridings:

47. The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne, Hullett, including the Village of Clinton, and McKillop.

48. The South Riding to consist of the Town of Goderich and the Townships of Goderich, Tuckersmith, Stanley, Hay, Usborne, and Stephen.

The County of Middlesex, divided into three Ridings, to be called respectively the North, West, and East Ridings:

49. The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide, and Lobo.

50. The West Riding to consist of the Townships of Delaware, Carradoc, Metcalfe, Mosa and Ekfrid, and the Village of Strathroy.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]

51. The County of LAMBTON to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Enniskillen, and Brooke, and the Town of Sarnia.

52. The County of KENT to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.

53. The County of BOTHWELL to consist of the Townships of Sombra, Dawn, and Euphemia (taken from the County of Lambton), and the Townships of Zone, Camden with the Gore thereof, Orford, and Howard (taken from the County of Kent).

The County of GREY divided into Two Ridings to be called respectively the South and North Ridings:

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.

55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint-Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak and Brooke, and the Town of Owen Sound.

The County of PERTH divided into Two Ridings, to be called respectively the South and North Ridings:

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.

57. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and Ste. Marys.

The County of WELLINGTON divided into Three Ridings to be called respectively North, South and Centre Ridings:

58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.

59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol, and Pilkington, and the Villages of Fergus and Elora.

60. The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.

The County of NORFOLK, divided into Two Ridings, to be called respectively the South and North Ridings:

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham, and Woodhouse, and with the Gore thereof.

62. The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.

63. The County of HALDIMAND to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Raynham, Walpole, and Dunn.

64. The County of MONCK to consist of the Townships of Canborough and Moulton, and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caister and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).

65. The County of LINCOLN to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catherines.

66. The County of WELLAND to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.

67. The County of PEEL to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.

68. The County of CARDWELL to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of SIMCOE, divided into Two Ridings, to be called respectively the South and North Ridings:

69. The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tosorontio, Mulmur, and the Village of Bradford.

70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of VICTORIA, divided into Two Ridings, to be called respectively the South and North Ridings:

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.

72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Sommerville, and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the North of the said North Riding.

The County of PETERBOROUGH, divided into Two Ridings, to be called respectively the West and East Ridings:

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith, and Ennismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee, and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the North of the said East Riding.

The County of HASTINGS, divided into Three Ridings, to be called respectively the West, East, and North Ridings:

75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the Village of Trenton.

76. The East Riding to consist of the Townships of Thurlow, Tyendinaga, and Hungerford.

77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.

78. The County of LENNOX to consist of the Townships of Richmond, Adolphustown, North Fredericksburg, South Fredericksburg, Ernest Town, and Amherst Island, and the Village of Napanee.

79. The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.

80. The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburg and Howe Island, and Storrington.

The County of RENFREW, divided into Two Ridings, to be called respectively the South and North Ridings:

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.

82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona, Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Haggerty, Sherwood, Burns, and Richards, and any other surveyed Townships lying North-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not especially mentioned in this Schedule, is to be taken as Part of the County or Riding within which it is locally situate.

THE SECOND SCHEDULE

Electoral Districts of Quebec specially fixed

COUNTIES OF —

Pontiac.

Ottawa.

Argenteuil.

Huntingdon.

Missisquoi.

Brome.

Shefford.

Stanstead.

Compton.

Wolfe and Richmond.

Megantic.

Town of Sherbrooke.

THE THIRD SCHEDULE

Provincial Public Works and Property to be the Property of Canada

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the Use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Lands set apart for general Public Purposes.

THE FOURTH SCHEDULE

Assets to be the Property of Ontario and Quebec conjointly

Upper Canada Building Fund.

Lunatic Asylums.

Normal School.

Court Houses in Aylmer, Montreal, Kamouraska, } Lower Canada.

Law Society, Upper Canada.

Montreal Turnpike Trust.

University Permanent Fund.

Royal Institution.

Consolidated Municipal Loan Fund, Upper Canada.

Consolidated Municipal Loan Fund, Lower Canada.

Agricultural Society, Upper Canada.

Lower Canada Legislative Grant.

Quebec Fire Loan.

Temiscouata Advance Account.

Quebec Turnpike Trust.

Education — East.

Building and Jury Fund, Lower Canada.

Municipalities Fund.

Lower Canada Superior Education Income Fund.

THE FIFTH SCHEDULE

Oath of Allegiance

I *A.B.* do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

Note. — The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with proper Terms of Reference thereto.

Declaration of Qualification

I *A.B.* do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the Case may be*),] in the Province of Nova Scotia [*or as the Case may be*] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities.

THE SIXTH SCHEDULE[(79)]

Primary Production from Non-Renewable Natural Resources and Forestry Resources

1 For the purposes of section 92A of this Act,

(a) production from a non-renewable natural resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

ENDNOTES

(1) **The enacting clause was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). It read as follows:**

> Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

(2) **As amended by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section originally read as follows:**

> **1** This Act may be cited as *The British North America Act, 1867*.

(3) **Section 2, repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), read as follows:**

> **2** The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

(4) **The first day of July, 1867, was fixed by proclamation dated May 22, 1867.**

(5) **Partially repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section originally read as follows:**

> **4** The subsequent Provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the Day appointed for the Union taking effect in the Queen's Proclamation; and in the same Provisions, unless it is otherwise expressed or implied, the Name Canada shall be taken to mean Canada as constituted under this Act.

(6) **Canada now consists of ten provinces (Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta, Saskatchewan and Newfoundland and Labrador) and three territories (Yukon, the Northwest Territories and Nunavut).**

The first territories added to the Union were Rupert's Land and the North-Western Territory, (subsequently designated the Northwest Territories), which were admitted pursuant to section 146 of the *Constitution Act, 1867* and the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.), by the *Rupert's Land and North-Western Territory Order* of June 23, 1870, effective July 15, 1870. Prior to the admission of those territories, the Parliament of Canada enacted *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada* (32-33 Vict., c. 3), and the *Manitoba Act, 1870*, (33 Vict., c. 3), which provided for the formation of the Province of Manitoba.

British Columbia was admitted into the Union pursuant to section 146 of the *Constitution Act, 1867*, by the *British Columbia Terms of Union*, being Order in Council of May 16, 1871, effective July 20, 1871.

Prince Edward Island was admitted pursuant to section 146 of the *Constitution Act, 1867*, by the *Prince Edward Island Terms of Union*, being Order in Council of June 26, 1873, effective July 1, 1873.

On June 29, 1871, the United Kingdom Parliament enacted the *Constitution Act, 1871* (34-35 Vict., c. 28) authorizing the creation of additional provinces out of territories not included in any province. Pursuant to this statute, the Parliament of Canada enacted the *Alberta Act*, (July 20, 1905, 4-5 Edw. VII, c. 3) and the *Saskatchewan Act*, (July 20, 1905, 4-5 Edw. VII, c. 42), providing for the creation of the provinces of Alberta and Saskatchewan, respectively. Both of these Acts came into force on September 1, 1905.

Meanwhile, all remaining British possessions and territories in North America and the islands adjacent thereto, except the colony of Newfoundland and its dependencies, were admitted into the Canadian Confederation by the *Adjacent Territories Order*, dated July 31, 1880.

The Parliament of Canada added portions of the Northwest Territories to the adjoining provinces in 1912 by *The Ontario Boundaries Extension Act*, S.C. 1912, 2 Geo. V, c. 40, *The Quebec Boundaries Extension Act, 1912*, 2 Geo. V, c. 45 and *The Manitoba Boundaries Extension Act, 1912*, 2 Geo. V, c. 32, and further additions were made to Manitoba by *The Manitoba Boundaries Extension Act, 1930*, 20-21 Geo. V, c. 28.

The Yukon Territory was created out of the Northwest Territories in 1898 by *The Yukon Territory Act*, 61 Vict., c. 6 (Can.).

Newfoundland was added on March 31, 1949, by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), which ratified the Terms of Union of Newfoundland with Canada.

Nunavut was created out of the Northwest Territories in 1999 by the *Nunavut Act*, S.C. 1993, c. 28.

(7) **See endnote (65) to section 129, below.**

(8) **Repealed and re-enacted by the *Parliament of Canada Act, 1875*, 38-39 Vict., c. 38 (U.K.). The original section read as follows:**

> **18** The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.

(9) **Spent. The first session of the first Parliament began on November 6, 1867.**

(10) **Section 20, repealed by the *Constitution Act, 1982*, read as follows:**

> **20** There shall be a Session of the Parliament of Canada once at least in every Year, so that Twelve Months shall not intervene between the last Sitting of the Parliament in one Session and its first sitting in the next Session.

Section 20 has been replaced by section 5 of the *Constitution Act, 1982*, which provides that there shall be a sitting of Parliament at least once every twelve months.

(11) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.) and modified by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53, and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:**

> **21** The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

The *Manitoba Act, 1870*, added two senators for Manitoba; the *British Columbia Terms of Union* added three; upon admission of Prince Edward Island four more were provided by section 147 of the *Constitution Act, 1867*; the *Alberta Act* and the *Saskatchewan Act* each added four. The Senate was reconstituted at 96 by the *Constitution Act, 1915*. Six more senators were added upon union with Newfoundland, and one senator each was added for the Yukon Territory and the Northwest Territories by the *Constitution Act (No. 2), 1975.* One senator was added for Nunavut by the *Constitution Act, 1999 (Nunavut)*.

(12) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53 and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:**

> **22** In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:
>
> **1.** Ontario;
>
> **2.** Quebec;
>
> **3.** The Maritime Provinces, Nova Scotia and New Brunswick;
>
> which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.
>
> In the case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

The reference in section 22 to the Consolidated Statutes of Canada is a reference to the Consolidated Statutes of 1859.

(13) **Section 44 of the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2, provided that, for the purposes of that Part (which added one senator for Nunavut), the word "Province" in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the word "province" by section 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended, which provides that the term "province" means "a province of Canada, and includes Yukon, the Northwest Territories and Nunavut".**

Section 2 of the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53, provided that for the purposes of that Act (which added one senator each for the Yukon Territory and the Northwest Territories) the term "Province" in section 23 of the *Constitution Act, 1867* has the same meaning as is assigned to the term "province" by section 28 of the *Interpretation Act*, R.S.C. 1970, c. I-23, which provides that the term "province" means "a province of Canada, and includes the Yukon Territory and the Northwest Territories".

(14) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

> **25** Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

(15) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:**

26 If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

(16) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:**

27 In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

(17) **As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53, and the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. The original section read as follows:**

28 The Number of Senators shall not at any Time exceed Seventy-eight.

(18) **As enacted by the *Constitution Act, 1965*, S.C. 1965, c. 4, which came into force on June 2, 1965. The original section read as follows:**

29 A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

(19) **Provision for exercising the functions of Speaker during his or her absence is made by Part II of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (formerly the *Speaker of the Senate Act*, R.S.C. 1970, c. S-14). Doubts as to the power of Parliament to enact the *Speaker of the Senate Act* were removed by the *Canadian Speaker (Appointment of Deputy) Act, 1895*, 2nd Sess., 59 Vict., c. 3 (U.K.), which was repealed by the *Constitution Act, 1982*.**

(20) **The figures given here result from the application of section 51, as enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, and amended by the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2, and readjustments made pursuant to the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3. The original section (which was altered from time to time as the result of the addition of new provinces and changes in population) read as follows:**

37 The House of Commons shall, subject to the Provisions of this Act, consist of one hundred and eighty-one members, of whom Eighty-two shall be elected for Ontario, Sixty-five for Quebec, Nineteen for Nova Scotia, and Fifteen for New Brunswick.

(21) **Spent. The electoral districts are now established by proclamations issued from time to time under the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-3, as amended for particular districts by Acts of Parliament (see the most recent *Table of Public Statutes and Responsible Ministers*).**

(22) **Spent. Elections are now provided for by the *Canada Elections Act*, S.C. 2000, c. 9; qualifications and disqualifications of members by the *Parliament of Canada Act*, R.S.C. 1985, c. P-1. The right of citizens to vote and hold office is provided for in section 3 of the *Constitution Act, 1982*.**

(23) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

> **42** For the First Election of Members to serve in the House of Commons the Governor General shall cause Writs to be issued by such Person, in such Form, and addressed to such Returning Officers as he thinks fit.
>
> The Person issuing Writs under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the issuing of Writs for the Election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom Writs are directed under this Section shall have the like Powers as are possessed at the Union by the Officers charged with the returning of Writs for the Election of Members to serve in the same respective House of Assembly or Legislative Assembly.

(24) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

> **43** In case a Vacancy in the Representation in the House of Commons of any Electoral District happens before the Meeting of the Parliament, or after the Meeting of the Parliament before Provision is made by the Parliament in this Behalf, the Provisions of the last foregoing Section of this Act shall extend and apply to the issuing and returning of a Writ in respect of such Vacant District.

(25) **Provision for exercising the functions of Speaker during his or her absence is now made by Part III of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1.**

(26) **The term of the twelfth Parliament was extended by the *British North America Act, 1916*, 6-7 Geo. V., c. 19 (U.K.), which Act was repealed by the *Statute Law Revision Act, 1927*, 17-18 Geo. V, c. 42 (U.K.). See also the *Constitution Act, 1982*, subsection 4(1), which provides that no House of Commons shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members, and subsection 4(2), which provides for continuation of the House of Commons in special circumstances.**

(27) **As enacted by *An Act to amend the Constitution Act, 1867 (electoral representation)*, S.C. 2022, c. 6, which came into force on royal assent on June 23, 2022. This amendment replaces rule 2 of subsection 51(1) of the *Constitution Act, 1867*. Section 1 of the amending Act provides an alternative title, *Preserving Provincial Representation in the House of Commons Act*. The Act provides rules for the readjustment of the number of members and the representation of provinces in the House of Commons. It also sets out transitional measures at sections 4 and 5, providing for the application of the amendment to the readjustment of electoral boundaries under the *Electoral Boundaries Readjustment Act* (R.S.C. 1985, c. E-3).**

Rule 2 of subsection 51(1) of the *Constitution Act, 1867* as amended by s. 2 of the *Fair Representation Act* (S.C. 2011, c. 26) read as follows:

If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province on the date of the coming into force of the *Constitution Act, 1985 (Representation)*, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

The section, as originally enacted, read as follows:

> **51** On the Completion of the Census in the Year One Thousand eight hundred and seventy-one, and of each subsequent decennial Census, the Representation of the Four Provinces shall be readjusted by such Authority, in such Manner, and from such Time, as the Parliament of Canada from Time to Time provides, subject and according to the following Rules:
>
> **1.** Quebec shall have the fixed Number of Sixty-five Members:
>
> **2.** There shall be assigned to each of the other Provinces such a Number of Members as will bear the same Proportion to the Number of its Population (ascertained at such Census) as the Number Sixty-five bears to the Number of the Population of Quebec (so ascertained):
>
> **3.** In the Computation of the Number of Members for a Province a fractional Part not exceeding One Half of the whole Number requisite for entitling the Province to a Member shall be disregarded; but a fractional Part exceeding One Half of that Number shall be equivalent to the whole Number:
>
> **4.** On any such Re-adjustment the Number of Members for a Province shall not be reduced unless the Proportion which the Number of the Population of the Province bore to the Number of the aggregate Population of Canada at the then last preceding Re-adjustment of the Number of Members for the Province is ascertained at the then latest Census to be diminished by One Twentieth Part or upwards:
>
> **5.** Such Re-adjustment shall not take effect until the Termination of the then existing Parliament.

Section 51 was amended by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.) by repealing the words after "of the census" to "seventy-one and" and the word "subsequent".

By the *British North America Act, 1943*, 6-7 Geo. VI, c. 30 (U.K.), which Act was repealed by the *Constitution Act, 1982*, redistribution of seats following the 1941 census was postponed until the first session of Parliament after the war. The section was re-enacted by the *British North America Act, 1946*, 9-10 Geo. VI, c. 63 (U.K.), which Act was also repealed by the *Constitution Act, 1982*, to read as follows:

51(1) The number of members of the House of Commons shall be two hundred and fifty-five and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. Subject as hereinafter provided, there shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and fifty-four and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.

2. If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and fifty-four, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and fifty-four.

3. Notwithstanding anything in this section, if upon completion of a computation under rules one and two, the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.

4. In the event that rules one and two cease to apply in respect of a province then, for the purpose of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and fifty-four shall be reduced by the number of members assigned to such province pursuant to rule three.

5. Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by Chapter forty-one of the Statutes of Canada, 1901, together with any Part of Canada not comprised within a province which may from time to time be included therein by the Parliament of Canada for the purposes of representation in Parliament, shall be entitled to one member.

The section was re-enacted as follows by the *British North America Act, 1952*, S.C. 1952, c. 15 (which Act was also repealed by the *Constitution Act, 1982*):

51(1) Subject as hereinafter provided, the number of members of the House of Commons shall be two hundred and sixty-three and the representation of the provinces therein shall forthwith upon the coming into force of this section and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members computed by dividing the total population of the provinces by two hundred and sixty-one and by dividing the population of each province by the quotient so obtained, disregarding, except as hereinafter in this section provided, the remainder, if any, after the said process of division.

2. If the total number of members assigned to all the provinces pursuant to rule one is less than two hundred and sixty-one, additional members shall be assigned to the provinces (one to a province) having remainders in the computation under rule one commencing with the province having the largest remainder and continuing with the other provinces in the order of the magnitude of their respective remainders until the total number of members assigned is two hundred and sixty-one.

3. Notwithstanding anything in this section, if upon completion of a computation under rules one and two the number of members to be assigned to a province is less than the number of senators representing the said province, rules one and two shall cease to apply in respect of the said province, and there shall be assigned to the said province a number of members equal to the said number of senators.

4. In the event that rules one and two cease to apply in respect of a province then, for the purposes of computing the number of members to be assigned to the provinces in respect of which rules one and two continue to apply, the total population of the provinces shall be reduced by the number of the population of the province in respect of which rules one and two have ceased to apply and the number two hundred and sixty-one shall be reduced by the number of members assigned to such province pursuant to rule three.

5. On any such readjustment the number of members for any province shall not be reduced by more than fifteen per cent below the representation to which such province was entitled under rules one to four of this subsection at the last preceding readjustment of the representation of that province, and there shall be no reduction in the representation of any province as a result of which that province would have a smaller number of members than any other province that according to the results of the then last decennial census did not

have a larger population; but for the purposes of any subsequent readjustment of representation under this section any increase in the number of members of the House of Commons resulting from the application of this rule shall not be included in the divisor mentioned in rules one to four of this subsection.

6. Such readjustment shall not take effect until the termination of the then existing Parliament.

(2) The Yukon Territory as constituted by chapter forty-one of the statutes of Canada, 1901, shall be entitled to one member, and such other part of Canada not comprised within a province as may from time to time be defined by the Parliament of Canada shall be entitled to one member.

Subsection 51(1) was re-enacted by the *Constitution Act, 1974*, S.C. 1974-75-76, c. 13, to read as follows:

51(1) The number of members of the House of Commons and the representation of the provinces therein shall upon the coming into force of this subsection and thereafter on the completion of each decennial census be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following Rules:

1. There shall be assigned to Quebec seventy-five members in the readjustment following the completion of the decennial census taken in the year 1971, and thereafter four additional members in each subsequent readjustment.

2. Subject to Rules 5(2) and (3), there shall be assigned to a large province a number of members equal to the number obtained by dividing the population of the large province by the electoral quotient of Quebec.

3. Subject to Rules 5(2) and (3), there shall be assigned to a small province a number of members equal to the number obtained by dividing

(a) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces (other than Quebec) having populations of less than one and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census; and

(b) the population of the small province by the quotient obtained under paragraph (a).

4. Subject to Rules 5(1)(*a*), (2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained

(a) by dividing the sum of the populations of the provinces (other than Quebec) having populations of less than one and a half million by the sum of the number of members assigned to those provinces under any of Rules 3, 5(1)(*b*), (2) and (3);

(b) by dividing the population of the intermediate province by the quotient obtained under paragraph (a); and

(c) by adding to the number of members assigned to the intermediate province in the readjustment following the completion of the penultimate decennial census one-half of the difference resulting from the subtraction of that number from the quotient obtained under paragraph (b).

5.(1) On any readjustment,

(a) if no province (other than Quebec) has a population of less than one and a half million, Rule 4 shall not be applied and, subject to Rules 5(2) and (3), there shall be assigned to an intermediate province a number of members equal to the number obtained by dividing

(i) the sum of the populations, determined according to the results of the penultimate decennial census, of the provinces, (other than Quebec) having populations of not less than one and a half million and not more than two and a half million, determined according to the results of that census, by the sum of the numbers of members assigned to those provinces in the readjustment following the completion of that census, and

(ii) the population of the intermediate province by the quotient obtained under subparagraph (i);

(b) if a province (other than Quebec) having a population of

(i) less than one and a half million, or

(ii) not less than one and a half million and not more than two and a half million

does not have a population greater than its population determined according to the results of the penultimate decennial census, it shall, subject to Rules 5(2) and (3), be assigned the number of members assigned to it in the readjustment following the completion of that census.

(2) On any readjustment,

(a) if, under any of Rules 2 to 5(1), the number of members to be assigned to a province (in this paragraph referred to as “the first province”) is smaller than the number of members to be assigned to any other province not having a population greater than that of the first province, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the largest number of members to be assigned to any other province not having a population greater than that of the first province;

(b) if, under any of Rules 2 to 5(1)(a), the number of members to be assigned to a province is smaller than the number of members assigned to it in the readjustment following the completion of the penultimate decennial

census, those Rules shall not be applied to it and it shall be assigned the latter number of members;

(c) if both paragraphs (a) and (b) apply to a province, it shall be assigned a number of members equal to the greater of the numbers produced under those paragraphs.

(3) On any readjustment,

(a) if the electoral quotient of a province (in this paragraph referred to as "the first province") obtained by dividing its population by the number of members to be assigned to it under any of Rules 2 to 5(2) is greater than the electoral quotient of Quebec, those Rules shall not be applied to the first province and it shall be assigned a number of members equal to the number obtained by dividing its population by the electoral quotient of Quebec;

(b) if, as a result of the application of Rule 6(2)(a), the number of members assigned to a province under paragraph (a) equals the number of members to be assigned to it under any of Rules 2 to 5(2), it shall be assigned that number of members and paragraph (a) shall cease to apply to that province.

6. (1) In these Rules,

electoral quotient means, in respect of a province, the quotient obtained by dividing its population, determined according to the results of the then most recent decennial census, by the number of members to be assigned to it under any of Rules 1 to 5(3) in the readjustment following the completion of that census;

intermediate province means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census but not more than two and a half million and not less than one and a half million;

large province means a province (other than Quebec) having a population greater than two and a half million;

penultimate decennial census means the decennial census that preceded the then most recent decennial census;

population means, except where otherwise specified, the population determined according to the results of the then most recent decennial census;

small province means a province (other than Quebec) having a population greater than its population determined according to the results of the penultimate decennial census and less than one and half million.

(2) For the purposes of these Rules,

(a) if any fraction less than one remains upon completion of the final calculation that produces the number of members to be assigned to a province, that number of members shall equal the number so produced disregarding the fraction;

(b) if more than one readjustment follows the completion of a decennial census, the most recent of those readjustments shall, upon taking effect, be deemed to be the only readjustment following the completion of that census;

(c) a readjustment shall not take effect until the termination of the then existing Parliament.

Subsection 51(1) was re-enacted by the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I, as follows:

51(1) The number of members of the House of Commons and the representation of the provinces therein shall, on the coming into force of this subsection and thereafter on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the total population of the provinces by two hundred and seventy-nine and by dividing the population of each province by the quotient so obtained, counting any remainder in excess of 0.50 as one after the said process of division.

2. If the total number of members that would be assigned to a province by the application of rule 1 is less than the total number assigned to that province on the date of coming into force of this subsection, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

Subsection 51(1) was re-enacted by the *Fair Representation Act*, S.C. 2011, c. 26, s. 2, as follows:

51(1) The number of members of the House of Commons and the representation of the provinces therein shall, on the completion of each decennial census, be readjusted by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time, subject and according to the following rules:

1. There shall be assigned to each of the provinces a number of members equal to the number obtained by dividing the population of the province by the electoral quotient and rounding up any fractional remainder to one.

2. If the number of members assigned to a province by the application of rule 1 and section 51A is less than the total number assigned to that province on the date of the coming into force of the *Constitution Act, 1985 (Representation)*, there shall be added to the number of members so assigned such number of members as will result in the province having the same number of members as were assigned on that date.

3. After the application of rules 1 and 2 and section 51A, there shall, in respect of each province that meets the condition set out in rule 4, be added, if necessary, a number of members such that, on the completion of the readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces is as close as possible to, without being below, the number obtained by dividing the population of that province by the total population of all the provinces.

4. Rule 3 applies to a province if, on the completion of the preceding readjustment, the number obtained by dividing the number of members assigned to that province by the total number of members assigned to all the provinces was equal to or greater than the number obtained by dividing the population of that province by the total population of all the provinces, the population of each province being its population as at July 1 of the year of the decennial census that preceded that readjustment according to the estimates prepared for the purpose of that readjustment.

5. Unless the context indicates otherwise, in these rules, the population of a province is the estimate of its population as at July 1 of the year of the most recent decennial census.

6. In these rules, ***electoral quotient*** means

(a) 111,166, in relation to the readjustment following the completion of the 2011 decennial census, and

(b) in relation to the readjustment following the completion of any subsequent decennial census, the number obtained by multiplying the electoral quotient that was applied in the preceding readjustment by the number that is the average of the numbers obtained by dividing the population of each province by the population of the province as at July 1 of the year of the preceding decennial census according to the estimates prepared for the purpose of the preceding readjustment, and rounding up any fractional remainder of that multiplication to one.

(1.1) For the purpose of the rules in subsection (1), there is required to be prepared an estimate of the population of Canada and of each province as at July 1, 2001 and July 1, 2011 — and, in each year following the 2011 decennial census in which a decennial census is taken, as at July 1 of that year — by such authority, in such manner, and from such time as the Parliament of Canada provides from time to time.

(28) **As enacted by the *Constitution Act, 1999 (Nunavut)*, S.C. 1998, c. 15, Part 2. Note that the description of the territory of Yukon is now set out in Schedule 1 to the *Yukon Act*, S.C. 2002, c. 7, which replaced R.S.C. 1985, c. Y-2. Subsection 51(2) was previously amended by the *Constitution Act (No. 1), 1975*, S.C. 1974-75-76, c. 28, and read as follows:**

> **(2)** The Yukon Territory as bounded and described in the schedule to chapter Y-2 of the Revised Statutes of Canada, 1970, shall be entitled to one member, and the Northwest Territories as bounded and described in section 2 of chapter N-22 of the Revised Statutes of Canada, 1970, shall be entitled to two members.

(29) **As enacted by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.).**

(30) **Provided for by the *Salaries Act*, R.S.C. 1985, c. S-3.**

(31) **Now provided for in Ontario by the *Executive Council Act*, R.S.O. 1990, c. E.25, and in Quebec by the *Executive Power Act*, R.S.Q. c. E-18.**

(32) **A similar provision was included in each of the instruments admitting British Columbia, Prince Edward Island, and Newfoundland. The Executive Authorities for Manitoba, Alberta and Saskatchewan were established by the statutes creating those provinces. See endnote (6) to section 5, above.**

(33) **See endnote (65) to section 129, below.**

(34) **Spent. Now covered by the *Representation Act, 2005*, S.O. 2005, c. 35, Schedule 1.**

(35) ***An Act respecting the Legislative Council of Quebec,* S.Q. 1968, c. 9, provided that the Legislature for Quebec shall consist of the Lieutenant Governor and the National Assembly of Quebec, and repealed the provisions of the *Legislature Act*, R.S.Q. 1964, c. 6, relating to the Legislative Council of Quebec. Now covered by the *National Assembly Act*, R.S.Q. c. A-23.1. Sections 72 to 79 following are therefore completely spent.**

(36) ***An Act respecting the electoral districts*, S.Q. 1970, c. 7, provides that this section no longer has effect.**

(37) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

> **81** The Legislatures of Ontario and Quebec respectively shall be called together not later than Six Months after the Union.

(38) **Probably spent. The subject-matter of this section is now covered in Ontario by the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, and in Quebec by the *National Assembly Act*, R.S.Q. c. A-23.1.**

(39) **Probably spent. The subject-matter of this section is now covered in Ontario by the *Election Act*, R.S.O. 1990, c. E.6, and the *Legislative Assembly Act*, R.S.O. 1990, c. L.10, and in Quebec by the *Elections Act*, R.S.Q. 1977, c. E-3.3 and the *National Assembly Act*, R.S.Q. 1977, c. A-23.1.**

(40) **The maximum duration of the Legislative Assembly of Quebec has been changed to five years. See the *National Assembly Act*, R.S.Q. 1977, c. A-23.1. See also section 4 of the *Constitution Act, 1982*, which provides a maximum duration for a legislative assembly of five years but also authorizes continuation in special circumstances.**

(41) **See also section 5 of the *Constitution Act, 1982*, which provides that there shall be a sitting of each legislature at least once every twelve months.**

(42) **Partially repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), which deleted the following concluding words of the original enactment:**

> and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the Period for which it was elected.

A similar provision was included in each of the instruments admitting British Columbia, Prince Edward Island and Newfoundland. The Legislatures of Manitoba, Alberta and Saskatchewan were established by the statutes creating those provinces. See endnote (6) to section 5, above.

See also sections 3 to 5 of the *Constitution Act, 1982*, which prescribe democratic rights applicable to all provinces, and subitem 2(2) of the Schedule to that Act, which sets out the repeal of section 20 of the *Manitoba Act, 1870*. Section 20 of the *Manitoba Act, 1870* has been replaced by section 5 of the *Constitution Act, 1982*. Section 20 reads as follows:

> **20** There shall be a Session of the Legislature once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in one Session and its first sitting in the next Session.

(43) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

> **89** Each of the Lieutenant Governors of Ontario, Quebec and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for that Electoral District.

(44) **A new class 1 was added by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.). That Act and class 1 were repealed by the *Constitution Act, 1982*. The matters referred to in class 1 are provided for in subsection 4(2) and Part V of the *Constitution Act, 1982*. As enacted, class 1 read as follows:**

> **1.** The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House.

(45) **The original class 1 was re-numbered by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.), as class 1A.**

(46) **Added by the *Constitution Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.).**

(47) **Legislative authority has been conferred on Parliament by other Acts as follows:**

1. The *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.):

> **2** The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.
>
> **3** The Parliament of Canada may from time to time, with the consent of the Legislature of any province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.
>
> **4** The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.
>
> **5** The following Acts passed by the said Parliament of Canada, and intituled respectively, — "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba", shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.
>
> **6** Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act, 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)) had previously conferred similar authority in relation to Rupert's Land and the North–Western Territory upon admission of those areas.

2. The *Constitution Act, 1886*, 49-50 Vict., c. 35 (U.K.):

> **1** The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of

Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.):

3 It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Under section 44 of the *Constitution Act, 1982*, Parliament has exclusive authority to amend the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons. Sections 38, 41, 42 and 43 of that Act authorize the Senate and House of Commons to give their approval to certain other constitutional amendments by resolution.

(48) **Class 1 was repealed by the *Constitution Act, 1982*. As enacted, it read as follows:**

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.

Section 45 of the *Constitution Act, 1982* now authorizes legislatures to make laws amending the constitution of the province. Sections 38, 41, 42 and 43 of that Act authorize legislative assemblies to give their approval by resolution to certain other amendments to the Constitution of Canada.

(49) **Added by section 50 of the *Constitution Act, 1982*.**

(50) **Alternative provisions have been enacted for four provinces. An alternative was provided for Manitoba by section 22 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)), which section reads as follows:**

> **22** In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:
>
> **(1)** Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:
>
> **(2)** An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:
>
> **(3)** In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

An alternative was provided for Alberta by section 17 of the *Alberta Act*, 1905, 4-5 Edw. VII, c. 3, which section reads as follows:

> **17** Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:
>
> **"(1)** Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."
>
> **(2)** In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.
>
> **(3)** Where the expression ***by law*** is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression ***at the Union*** is employed, in the said

paragraph 3, it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Saskatchewan by section 17 of the *Saskatchewan Act*, 1905, 4-5 Edw. VII, c. 42, which section reads as follows:

17 Section 93 of the *Constitution Act, 1867*, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:

"(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances."

(2) In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

(3) Where the expression ***by law*** is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression ***at the Union*** is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

An alternative was provided for Newfoundland by Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.)). Term 17 of the Terms of Union of Newfoundland with Canada, set out in the penultimate paragraph of this note, was amended by the *Constitution Amendment, 1998 (Newfoundland Act*), (*see* SI/98-25) and the *Constitution Amendment, 2001 (Newfoundland and Labrador)* (*see* SI/2001-117), and now reads as follows:

17 (1) In lieu of section ninety-three of the *Constitution Act, 1867*, this term shall apply in respect of the Province of Newfoundland and Labrador.

(2) In and for the Province of Newfoundland and Labrador, the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for courses in religion that are not specific to a religious denomination.

(3) Religious observances shall be permitted in a school where requested by parents.

Prior to the *Constitution Amendment, 1998 (Newfoundland Act*), Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the*Constitution Amendment, 1997 (Newfoundland Act*) (*see* SI/97-55) to read as follows:

17 In lieu of section ninety-three of the *Constitution Act, 1867,* the following shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland, the Legislature shall have exclusive authority to make laws in relation to education but

(a) except as provided in paragraphs (b) and (c), schools established, maintained and operated with public funds shall be denominational schools, and any class of persons having rights under this Term as it read on January 1, 1995 shall continue to have the right to provide for religious education, activities and observances for the children of that class in those schools, and the group of classes that formed one integrated school system by agreement in 1969 may exercise the same rights under this Term as a single class of persons;

(b) subject to provincial legislation that is uniformly applicable to all schools specifying conditions for the establishment or continued operation of schools,

(i) any class of persons referred to in paragraph (a) shall have the right to have a publicly funded denominational school established, maintained and operated especially for that class, and

(ii) the Legislature may approve the establishment, maintenance and operation of a publicly funded school, whether denominational or non-denominational;

(c) where a school is established, maintained and operated pursuant to subparagraph (b) (i), the class of persons referred to in that subparagraph shall continue to have the right to provide for religious education, activities and observances and to direct the teaching of aspects of curriculum affecting religious beliefs, student admission policy and the assignment and dismissal of teachers in that school;

(d) all schools referred to in paragraphs (a) and (b) shall receive their share of public funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature; and

(e) if the classes of persons having rights under this Term so desire, they shall have the right to elect in total not less than two thirds of the members of a school board, and any class so desiring shall have the right to elect the portion of that total that is proportionate to the population of that class in the area under the board's jurisdiction.

Prior to the *Constitution Amendment, 1997 (Newfoundland Act*), Term 17 of the Terms of Union of Newfoundland with Canada had been amended by the*Constitution Amendment, 1987 (Newfoundland Act*) (*see* SI/88-11) to read as follows:

17(1) In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

(2) For the purposes of paragraph one of this Term, the Pentecostal Assemblies of Newfoundland have in Newfoundland all the same rights and privileges with respect to denominational schools and denominational colleges as any other class or classes of persons had by law in Newfoundland at the date of Union, and the words ***all such schools*** in paragraph (a) of paragraph one of this Term and the words ***all such colleges*** in paragraph (b) of paragraph one of this Term include, respectively, the schools and the colleges of the Pentecostal Assemblies of Newfoundland.

Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *Newfoundland Act,* 12-13 Geo. VI, c. 22 (U.K.)), which Term provided an alternative for Newfoundland, originally read as follows:

17 In lieu of section ninety-three of the *Constitution Act, 1867*, the following term shall apply in respect of the Province of Newfoundland:

In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,

(a) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and

(b) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

See also sections 23, 29 and 59 of the *Constitution Act, 1982*. Section 23 provides for new minority language educational rights and section 59 permits a delay in respect of the coming into force in Quebec of one aspect of those rights. Section 29 provides that nothing in the *Canadian Charter of Rights and Freedoms* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

(51) **Added by the *Constitution Amendment, 1997 (Quebec)* (*see* SI/97-141).**

(52) **Amended by the *Constitution Act, 1964*, 12-13 Eliz. II, c. 73 (U.K.). As originally enacted by the *British North America Act, 1951*, 14-15 Geo. VI, c. 32 (U.K.), which was repealed by the *Constitution Act, 1982*, section 94A read as follows:**

> **94A** It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.

(53) **Amended by the *Constitution Act, 1960,* 9 Eliz. II, c. 2 (U.K.), which came into force on March 1, 1961. The original section read as follows:**

> **99** The Judges of the Superior Courts shall hold Office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons.

(54) **Now provided for in the *Judges Act*, R.S.C. 1985, c. J-1.**

(55) **See the *Supreme Court Act*, R.S.C. 1985, c. S-26, the *Federal Court Act*, R.S.C. 1985, c. F-7 and the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.**

(56) **Now covered by the *Governor General's Act*, R.S.C. 1985, c. G-9.**

(57) **Manitoba, Alberta and Saskatchewan were placed in the same position as the original provinces by the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.).**

These matters were dealt with in respect of British Columbia by the *British Columbia Terms of Union* and also in part by the *Constitution Act, 1930*.

Newfoundland was also placed in the same position by the *Newfoundland Act*, 12-13 Geo. V1, c. 22 (U.K.).

With respect to Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union*.

(58) **The obligations imposed by sections 114, 115 and 116, and similar obligations under the instruments creating or admitting other provinces, are now to be found in the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26.**

(59) **Repealed by the *Statute Law Revision Act, 1950*, 14 Geo. VI, c. 6 (U.K.).**

The section originally read as follows:

118 The following Sums shall be paid yearly by Canada to the several Provinces for the Support of their Governments and Legislatures:

	Dollars.
Ontario	Eighty thousand.
Quebec	Seventy thousand.
Nova Scotia	Sixty thousand.
New Brunswick	Fifty thousand.
	Two hundred and sixty thousand;

and an annual Grant in aid of each Province shall be made, equal to Eighty Cents per Head of the Population as ascertained by the Census of One thousand eight hundred and sixty-one, and in the Case of Nova Scotia and New Brunswick, by each subsequent Decennial Census until the Population of each of those two Provinces amounts to Four hundred thousand Souls, at which Rate such Grant shall thereafter remain. Such Grants shall be in full Settlement of all future Demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such Grants, as against any Province, all Sums chargeable as Interest on the Public Debt of that Province in excess of the several Amounts stipulated in this Act.

The section was made obsolete by the *Constitution Act, 1907*, 7 Edw. VII, c. 11 (U.K.), which provided:

1. (1) The following grants shall be made yearly by Canada to every province, which at the commencement of this Act is a province of the Dominion, for its local purposes and the support of its Government and Legislature:

(a) A fixed grant

where the population of the province is under one hundred and fifty thousand, of one hundred thousand dollars;

where the population of the province is one hundred and fifty thousand, but does not exceed two hundred thousand, of one hundred and fifty thousand dollars;

where the population of the province is two hundred thousand, but does not exceed four hundred thousand, of one hundred and eighty thousand dollars;

where the population of the province is four hundred thousand, but does not exceed eight hundred thousand, of one hundred and ninety thousand dollars;

where the population of the province is eight hundred thousand, but does not exceed one million five hundred thousand, of two hundred and twenty thousand dollars;

where the population of the province exceeds one million five hundred thousand, of two hundred and forty thousand dollars; and

(b) Subject to the special provisions of this Act as to the provinces of British Columbia and Prince Edward Island, a grant at the rate of eighty cents per head of the population of the province up to the number of two million five hundred thousand, and at the rate of sixty cents per head of so much of the population as exceeds that number.

(2) An additional grant of one hundred thousand dollars shall be made yearly to the province of British Columbia for a period of ten years from the commencement of this Act.

(3) The population of a province shall be ascertained from time to time in the case of the provinces of Manitoba, Saskatchewan, and Alberta respectively by the last quinquennial census or statutory estimate of population made under the Acts establishing those provinces or any other Act of the Parliament of Canada making provision for the purpose, and in the case of any other province by the last decennial census for the time being.

(4) The grants payable under this Act shall be paid half-yearly in advance to each province.

(5) The grants payable under this Act shall be substituted for the grants or subsidies (in this Act referred to as existing grants) payable for the like purposes at the commencement of this Act to the several provinces of the Dominion under the provisions of section one hundred and eighteen of the *Constitution Act, 1867*, or of any Order in Council establishing a province, or of any Act of the Parliament of Canada containing directions for the payment of any such grant or subsidy, and those provisions shall cease to have effect.

(6) The Government of Canada shall have the same power of deducting sums charged against a province on account of the interest on public debt in the case of the grant payable under this Act to the province as they have in the case of the existing grant.

(7) Nothing in this Act shall affect the obligation of the Government of Canada to pay to any province any grant which is payable to that province, other than the existing grant for which the grant under this Act is substituted.

(8) In the case of the provinces of British Columbia and Prince Edward Island, the amount paid on account of the grant payable per head of the population to the provinces under this Act shall not at any time be less than the amount of the corresponding grant payable at the commencement of this Act, and if it is found on any decennial census that the population of the province has decreased since the last decennial census, the amount paid on account of the grant shall not be decreased below the amount then payable, notwithstanding the decrease of the population.

See the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26, and the *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

See also Part III of the *Constitution Act, 1982*, which sets out commitments by Parliament and the provincial legislatures respecting equal opportunities, economic development and the provision of essential public services and a commitment by Parliament and the government of Canada to the principle of making equalization payments.

(60) **Spent.**

(61) **Spent. Now covered by the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), the *Customs Tariff*, S.C. 1997, c. 36, the *Excise Act*, R.S.C. 1985, c. E-14, the *Excise Act, 2001*, S.C. 2002, c. 22 and the *Excise Tax Act*, R.S.C. 1985, c. E-15.**

(62) **Spent.**

(63) **These dues were repealed in 1873 by 36 Vict., c. 16 (N.B.). Also, see *An Act respecting the Export Duties imposed on Lumber*, etc. (1873) 36 Vict., c. 41 (Canada), and section 2 of the *Provincial Subsidies Act*, R.S.C. 1985, c. P-26.**

(64) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:**

> **127** If any Person being at the passing of this Act a Member of the Legislative Council of Canada, Nova Scotia, or New Brunswick, to whom a Place in the Senate is offered, does not within Thirty Days thereafter, by Writing under his Hand addressed to the Governor General of the Province of Canada or to the Lieutenant Governor of Nova Scotia or New Brunswick (as the Case may be), accept the same, he shall be deemed to have declined the same; and any Person who, being at the passing of this Act a Member of the Legislative Council of Nova Scotia or New Brunswick, accepts a Place in the Senate shall thereby vacate his Seat in such Legislative Council.

(65) **The restriction against altering or repealing laws enacted by or existing under statutes of the United Kingdom was removed by the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.), except in respect of certain constitutional documents. Comprehensive procedures for amending enactments forming part of the Constitution of Canada were provided by Part V of the *Constitution Act, 1982*.**

(66) **Spent.**

(67) **A similar provision was enacted for Manitoba by section 23 of the *Manitoba Act, 1870*, 33 Vict., c. 3 (confirmed by the *Constitution Act, 1871*, 34-35 Vict., c. 28 (U.K.)). Section 23 read as follows:**

> **23** Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both these languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *British North America Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

Sections 17 to 19 of the *Constitution Act, 1982* restate the language rights set out in section 133 in respect of Parliament and the courts established under the *Constitution Act, 1867*, and also guarantee those rights in respect of the legislature of New Brunswick and the courts of that province.

Sections 16, 20, 21 and 23 of the *Constitution Act, 1982* recognize additional language rights in respect of the English and French languages. Section 22 preserves language rights and privileges of languages other than English and French.

(68) **Spent. Now covered in Ontario by the *Executive Council Act*, R.S.O. 1990, c. E.25 and in Quebec by the *Executive Power Act*, R.S.Q. c. E-18.**

(69) **Probably spent.**

(70) **Probably spent.**

(71) **Probably spent.**

(72) **Spent. Penitentiaries are now provided for by the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.**

(73) **Spent. See pages (xi) and (xii) of the Public Accounts, 1902-1903.**

(74) **Probably spent. Two orders were made under this section on January 24, 1868.**

(75) **Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14, (U.K.). The section read as follows:**

> **145** Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a Declaration that the Construction of the Intercolonial Railway is essential to the Consolidation of the Union of British North America, and to the Assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that Provision should be made for its immediate Construction by the Government of Canada; Therefore, in order to give effect to that Agreement, it shall be the Duty of the Government and Parliament of Canada to provide for the Commencement, within Six Months after the Union, of a Railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the Construction thereof without Intermission, and the Completion thereof with all practicable Speed.

(76)	**All territories mentioned in section 146 are now part of Canada. See endnote (6) to section 5, above.**
(77)	**Spent. See endnotes (11), (12), (15), (16) and (17) to sections 21, 22, 26, 27 and 28, above.**
(78)	**Spent. See *Representation Act*, R.S.O. 1990, c. R.26.**
(79)	**As enacted by section 51 of the *Constitution Act, 1982.***
(113)	**Added by *An Act respecting French, the official and common language of Québec*, S.Q. 2022, c. 14. These provisions aim to amend the constitution of the province under the unilateral amending procedure set out in section 45 of the *Constitution Act, 1982*.**
(114)	**Added by *The Saskatchewan First Act*, S.S. 2023, c. 9. This provision aims to amend the constitution of the province under the unilateral amending procedure set out in section 45 of the *Constitution Act, 1982*.**
(115)	**Added by *An Act to recognize the oath provided in the Act respecting the National Assembly as the sole oath required in order to sit in the Assembly*, S.Q. 2022, c. 30. This provision aims to amend the constitution of the province under the unilateral amending procedure set out in section 45 of the *Constitution Act, 1982*.**

Tab 2

CanLII

The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11

Notice Regarding the French Version: The ***Constitution Act, 1982*** **provides that « A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible [...] ». The French Constitutional Drafting Committee was established in 1984 to assist the Minister in this task. The Committee submitted its final report, which includes forty-two constitutional enactments, to Parliament in December 1990. The English version of the final report is available on the Department of Justice website at https://canada.justice.gc.ca/eng/rp-pr/csj-sjc/constitution/lawreg-loireg/index.html.**

Current version: in force since 1993-03-12

Link to the latest version:	https://canlii.ca/t/8q7l
Stable link to this version:	https://canlii.ca/t/ldsx
Citation to this version:	The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, <https://canlii.ca/t/ldsx> retrieved on 2026-01-06
Currency:	Last updated from the Justice Laws Web Site on 2025-12-18

CANADA ACT 1982(80)

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1 The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2 No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3 So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4 This Act may be cited as the *Canada Act 1982*.

CONSTITUTION ACT, 1982[(81)]

PART I

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

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

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Democratic Rights

Democratic rights of citizens

3 Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4 (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.(82)

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.(83)

Annual sitting of legislative bodies

5 There shall be a sitting of Parliament and of each legislature at least once every twelve months.(84)

Mobility Rights

Mobility of citizens

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(a) to move to and take up residence in any province; and

(b) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

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

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10 Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13 A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14 A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.(85)

Official Languages of Canada

Official languages of Canada

16 (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and French linguistic communities in New Brunswick

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the legislature and government of New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.(86)

Proceedings of Parliament

17 (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.(87)

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.(88)

Parliamentary statutes and records

18 (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.(89)

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.(90)

Proceedings in courts established by Parliament

19 (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.(91)

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.(92)

Communications by public with federal institutions

20 (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21 Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.(93)

Rights and privileges preserved

22 Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23 (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.(94)

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[(95)]

Other rights and freedoms not affected by Charter

26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29 Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(96)

Application to territories and territorial authorities

30 A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31 Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34 This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

Rights of the Aboriginal Peoples of Canada

Recognition of existing aboriginal and treaty rights

35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of *aboriginal peoples of Canada*

(2) In this Act, ***aboriginal peoples of Canada*** includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) ***treaty rights*** includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.[(97)]

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the *Constitution Act, 1867*, to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.[98]

PART III

Equalization and Regional Disparities

Commitment to promote equal opportunities

36 (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.[99]

PART IV

Constitutional Conference

37 Repealed.[100]

PART IV.I

Constitutional Conferences

37.1 Repealed.[101]

PART V

Procedure for Amending Constitution of Canada(102)

General procedure for amending Constitution of Canada

38 (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(a) resolutions of the Senate and House of Commons; and

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39 (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40 Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41 An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(c) subject to section 43, the use of the English or the French language;

(d) the composition of the Supreme Court of Canada; and

(e) an amendment to this Part.

Amendment by general procedure

42 (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(b) the powers of the Senate and the method of selecting Senators;

(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(d) subject to paragraph 41(d), the Supreme Court of Canada;

(e) the extension of existing provinces into the territories; and

(f) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43 An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(a) any alteration to boundaries between provinces, and

(b) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament

44 Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures

45 Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures

46 (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution

47 (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House

of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48 The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49 A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.[103]

PART VI

Amendment to the *Constitution Act, 1867*

50 [104]

51 [105]

PART VII

General

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (a) or (b).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Repeals and new names

53 (1) The enactments referred to in Column I of the schedule are hereby repealed or amended to the extent indicated in Column II thereof and, unless repealed, shall continue as law in Canada under the names set out in Column III thereof.

Consequential amendments

(2) Every enactment, except the *Canada Act 1982*, that refers to an enactment referred to in the schedule by the name in Column I thereof is hereby amended by substituting for that name the corresponding name in Column III thereof, and any British North America Act not referred to in the schedule may be cited as the *Constitution Act* followed by the year and number, if any, of its enactment.

Repeal and consequential amendments

54 Part IV is repealed on the day that is one year after this Part comes into force and this section may be repealed and this Act renumbered, consequentially upon the repeal of Part IV and this section, by proclamation issued by the Governor General under the Great Seal of Canada.(106)

54.1 Repealed.(107)

French version of Constitution of Canada

55 A French version of the portions of the Constitution of Canada referred to in the schedule shall be prepared by the Minister of Justice of Canada as expeditiously as possible and, when any portion thereof sufficient to warrant action being taken has been so prepared, it shall be put forward for enactment by proclamation issued by the Governor General under the Great Seal of Canada pursuant to the procedure then applicable to an amendment of the same provisions of the Constitution of Canada.(108)

English and French versions of certain constitutional texts

56 Where any portion of the Constitution of Canada has been or is enacted in English and French or where a French version of any portion of the Constitution is enacted pursuant to section 55, the English and French versions of that portion of the Constitution are equally authoritative.

English and French versions of this Act

57 The English and French versions of this Act are equally authoritative.

Commencement

58 Subject to section 59, this Act shall come into force on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.(109)

Commencement of paragraph 23(1)(a) in respect of Quebec

59 (1) Paragraph 23(1)(a) shall come into force in respect of Quebec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Authorization of Quebec

(2) A proclamation under subsection (1) shall be issued only where authorized by the legislative assembly or government of Quebec.(110)

Repeal of this section

(3) This section may be repealed on the day paragraph 23(1)(a) comes into force in respect of Quebec and this Act amended and renumbered, consequentially upon the repeal of this section, by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

Short title and citations

60 This Act may be cited as the *Constitution Act, 1982*, and the Constitution Acts 1867 to 1975 (No. 2) and this Act may be cited together as the *Constitution Acts, 1867 to 1982*.

References

61 A reference to the ***Constitution Acts, 1867 to 1982*** shall be deemed to include a reference to the ***Constitution Amendment Proclamation, 1983***.(111)

Schedule to the Constitution Act, 1982

(Section 53)

MODERNIZATION OF THE CONSTITUTION

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
1.	British North America Act, 1867, 30-31 Vict., c. 3 (U.K.)	**(1)** Section 1 is repealed and the following substituted therefor: **"1** This Act may be cited as the *Constitution Act, 1867*." **(2)** Section 20 is repealed. **(3)** Class 1 of section 91 is repealed. **(4)** Class 1 of section 92 is repealed.	Constitution Act, 1867
2.	An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.)	**(1)** The long title is repealed and the following substituted therefor: "*Manitoba Act, 1870*." **(2)** Section 20 is repealed.	Manitoba Act, 1870
3.	Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union, dated the 23rd day of June, 1870		Rupert's Land and North-Western Territory Order
4.	Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871.		British Columbia Terms of Union
5.	British North America Act, 1871, 34-35 Vict., c. 28 (U.K.)	Section 1 is repealed and the following substituted therefor: **"1** This Act may be cited as the *Constitution Act, 1871*."	Constitution Act, 1871

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
6.	Order of Her Majesty in Council admitting Prince Edward Island into the Union, dated the 26th day of June, 1873.		Prince Edward Island Terms of Union
7.	Parliament of Canada Act, 1875, 38-39 Vict., c. 38 (U.K.)		Parliament of Canada Act, 1875
8.	Order of Her Majesty in Council admitting all British possessions and Territories in North America and islands adjacent thereto into the Union, dated the 31st day of July, 1880.		Adjacent Territories Order
9.	British North America Act, 1886, 49-50 Vict., c. 35 (U.K.)	Section 3 is repealed and the following substituted therefor: **"3** This Act may be cited as the *Constitution Act, 1886*."	Constitution Act, 1886
10.	Canada (Ontario Boundary) Act, 1889, 52-53 Vict., c. 28 (U.K.)		Canada (Ontario Boundary) Act, 1889
11.	Canadian Speaker (Appointment of Deputy) Act, 1895, 2nd Sess., 59 Vict., c. 3 (U.K.)	The Act is repealed.	
12.	The Alberta Act, 1905, 4-5 Edw. VII, c. 3 (Can.)		Alberta Act
13.	The Saskatchewan Act, 1905, 4-5 Edw. VII, c. 42 (Can.)		Saskatchewan Act
14.	British North America Act, 1907, 7 Edw. VII, c. 11 (U.K.)	Section 2 is repealed and the following substituted therefor: **"2** This Act may be cited as the *Constitution Act, 1907*."	Constitution Act, 1907

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
15.	British North America Act, 1915, 5-6 Geo. V, c. 45 (U.K.)	Section 3 is repealed and the following substituted therefor: **"3** This Act may be cited as the *Constitution Act, 1915*."	Constitution Act, 1915
16.	British North America Act, 1930, 20-21, Geo. V, c. 26 (U.K.)	Section 3 is repealed and the following substituted therefor: **"3** This Act may be cited as the *Constitution Act, 1930*."	Constitution Act, 1930
17.	Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.)	In so far as they apply to Canada, **(a)** section 4 is repealed; and **(b)** subsection 7(1) is repealed.	Statute of Westminster, 1931
18.	British North America Act, 1940, 3-4 Geo. VI, c. 36 (U.K.)	Section 2 is repealed and the following substituted therefor: **"2** This Act may be cited as the *Constitution Act, 1940*."	Constitution Act, 1940
19.	British North America Act, 1943, 6-7 Geo. VI, c. 30 (U.K.)	The Act is repealed.	
20.	British North America Act, 1946, 9-10 Geo. VI, c. 63 (U.K.)	The Act is repealed.	

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
21.	British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)	Section 3 is repealed and the following substituted therefor: **"3** This Act may be cited as the *Newfoundland Act*."	Newfoundland Act
22.	British North America (No. 2) Act, 1949, 13 Geo. VI, c. 81 (U.K.)	The Act is repealed.	
23.	British North America Act, 1951, 14-15 Geo. VI, c. 32 (U.K.)	The Act is repealed.	
24.	British North America Act, 1952, 1 Eliz. II, c. 15 (Can.)	The Act is repealed.	
25.	British North America Act, 1960, 9 Eliz. II, c. 2 (U.K.)	Section 2 is repealed and the following substituted therefor: **"2** This Act may be cited as the *Constitution Act, 1960*."	Constitution Act, 1960
26.	British North America Act, 1964, 12-13 Eliz. II, c. 73 (U.K.)	Section 2 is repealed and the following substituted therefor: **"2** This Act may be cited as the *Constitution Act, 1964*."	Constitution Act, 1964
27.	British North America Act, 1965, 14 Eliz. II, c. 4, Part I (Can.)	Section 2 is repealed and the following substituted therefor: **"2** This Part may be cited as the *Constitution Act, 1965*."	Constitution Act, 1965

	Column I	Column II	Column III
Item	Act Affected	Amendment	New Name
28.	British North America Act, 1974, 23 Eliz. II, c. 13, Part I (Can.) (112)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 38(1) (Can.), is repealed and the following substituted therefor: **"3** This Part may be cited as the *Constitution Act, 1974*."	Constitution Act, 1974
29.	British North America Act, 1975, 23-24 Eliz. II, c. 28, Part I (Can.)	Section 3, as amended by 25-26 Eliz. II, c. 28, s. 31 (Can.), is repealed and the following substituted therefor: **"3** This Part may be cited as the *Constitution Act (No. 1), 1975*."	Constitution Act (No. 1), 1975
30.	British North America Act (No. 2), 1975, 23-24 Eliz. II, c. 53 (Can.)	Section 3 is repealed and the following substituted therefor: **"3** This Act may be cited as the *Constitution Act (No. 2), 1975*."	Constitution Act (No. 2), 1975

ENDNOTES

(80)	**French version enacted as Schedule A to the *Canada Act 1982*, 1982, c. 11 (U.K.).**
(81)	**Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982.**
(82)	**See section 50, and endnotes (40) and (42) to sections 85 and 88, of the *Constitution Act, 1867*.**
(83)	**Replaces part of Class 1 of section 91 of the *Constitution Act, 1867*, which was repealed as set out in subitem 1(3) of the Schedule to the *Constitution Act, 1982*.**
(84)	**See endnotes (10), (41) and (42) to sections 20, 86 and 88 of the *Constitution Act, 1867*.**

(85) **Subsection 32(2) provides that section 15 shall not have effect until three years after section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, section 15 had effect on April 17, 1985.**

(86) **Section 16.1 was added by the *Constitution Amendment, 1993 (New Brunswick)* (*see* SI/93-54).**

(87) **See section 133 of the *Constitution Act, 1867*, and endnote (67).**

(88) ***Ibid.***

(89) ***Ibid.***

(90) ***Ibid.***

(91) ***Ibid.***

(92) ***Ibid.***

(93) **See, for example, section 133 of the *Constitution Act, 1867* and the reference to the *Manitoba Act, 1870*, in endnote (67) to that section.**

(94) **Paragraph 23(1)(a) is not in force in respect of Quebec. See section 59 of the *Constitution Act, 1982*.**

(95) **Paragraph 25(b) was repealed and re-enacted by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102). Paragraph 25(b) originally read as follows:**

> **(b)** any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

(96) **See section 93 of the *Constitution Act, 1867* and endnote (50).**

(97) **Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

(98) **Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

(99) **See endnotes (58) and (59) to sections 114 and 118 of the *Constitution Act, 1867*.**

(100) **Section 54 of the *Constitution Act, 1982* provided for the repeal of Part IV (section 37) one year after Part VII came into force. Part VII came into force on April 17, 1982 thereby repealing Part IV on April 17, 1983. Section 37 read as follows:**

37 (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.

(2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(101) **Part IV.1 (section 37.1), which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), was repealed on April 18, 1987 by section 54.1 of the *Constitution Act, 1982*. Section 37.1 read as follows:**

37.1 (1) In addition to the conference convened in March 1983, at least two constitutional conferences composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada, the first within three years after April 17, 1982 and the second within five years after that date.

(2) Each conference convened under subsection (1) shall have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on those matters.

(3) The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

(4) Nothing in this section shall be construed so as to derogate from subsection 35(1).

(102) **Prior to the enactment of Part V, certain provisions of the Constitution of Canada and the provincial constitutions could be amended pursuant to the *Constitution Act, 1867*. See endnotes (44) and (48) to section 91, Class 1 and section 92, Class 1 of that Act, respectively. Other amendments to the Constitution could only be made by enactment of the Parliament of the United Kingdom.**

(103) **A First Ministers Meeting was held June 20-21, 1996.**

(104) **The text of this amendment is set out in the *Constitution Act, 1867*, as section 92A.**

(105) **The text of this amendment is set out in the *Constitution Act, 1867*, as the Sixth Schedule.**

(106) **Part VII came into force on April 17, 1982 (*see* SI/82-97).**

(107) **Section 54.1, which was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102), provided for the repeal of Part IV.1 and section 54.1 on April 18, 1987. Section 54.1 read as follows:**

> **54.1** Part IV.1 and this section are repealed on April 18, 1987.

(108) **The French Constitutional Drafting Committee was established in 1984 with a mandate to assist the Minister of Justice in that task. The Committee's Final Report was tabled in Parliament in December 1990.**

(109) **The Act, with the exception of paragraph 23(1)(a) in respect of Quebec, came into force on April 17, 1982 by proclamation issued by the Queen (*see* SI/82-97).**

(110) **No proclamation has been issued under section 59.**

(111) **Section 61 was added by the*Constitution Amendment Proclamation, 1983* (*see* SI/84-102). See also section 3 of the *Constitution Act, 1985 (Representation)*, S.C. 1986, c. 8, Part I and the *Constitution Amendment, 1987 (Newfoundland Act)* (*see* SI/88-11).**

(112) **See subsection 38(1) of the *Miscellaneous Statute Law Amendment Act*, 1977, L.C. 1976-77, c. 28.**

Tab 3

CanLII

Judges Act, RSC 1985, c J-1

Current version: in force since 2024-06-20

Link to the latest version: https://canlii.ca/t/7vhq

Stable link to this version: https://canlii.ca/t/56c08

Citation to this version: Judges Act, RSC 1985, c J-1, <https://canlii.ca/t/56c08> retrieved on 2026-01-06

Currency: This statute is current to 2025-11-27 according to the Justice Laws Web Site

Judges Act

R.S.C., 1985, c. J-1

An Act respecting judges of federal and provincial courts

Short Title

Short title

1 This Act may be cited as the *Judges Act*.

R.S., c. J-1, s. 1.

Interpretation

Definitions

2 In this Act,

age of retirement of a judge or of an associate judge means the age, fixed by law, at which the judge or associate judge ceases to hold office; (*mise à la retraite d'office*)

associate judge means an associate judge of the Federal Court or an associate judge of the Tax Court of Canada and includes a supernumerary associate judge; (*juge adjoint*)

attorney general of the province, except where otherwise defined, means the minister of the Crown of the province who is responsible for judicial affairs; (*procureur général de la province*)

Commissioner means the Commissioner for Federal Judicial Affairs referred to in section 73; (*commissaire*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

Council means the Canadian Judicial Council established by subsection 59(1); (*Conseil*)

county includes district; (*comté*)

judge includes a chief justice, senior associate chief justice, associate chief justice, supernumerary judge and regional senior judge; (*juge*)

Minister means the Minister of Justice of Canada; (*ministre*)

prothonotary [Repealed, 2022, c. 10, s. 333]

survivor, in relation to a judge or to an associate judge, means a person who was married to the judge or associate judge at the time of the judge's or associate judge's death or who establishes that he or she was cohabiting with the judge or associate judge in a conjugal relationship at the time of the judge's or associate judge's death and had so cohabited for a period of at least one year. (*survivant*)

R.S., 1985, c. J-1, s. 2; 1990, c. 17, s. 27; 1992, c. 51, s. 2; 2000, c. 12, s. 159; 2002, c. 8, s. 82(E); 2014, c. 39, s. 316; 2017, c. 33, s. 230; 2022, c. 10, s. 333; 2022, c. 10, s. 371; 2023, c. 18, s. 1.

Application to associate judges

2.1 (1) Subject to subsection (2), sections 26 to 26.3, 34 and 39, paragraphs 40(1)(a) and (b), subsection 40(2), sections 41, 41.2 to 42, 43.1 to 56 and 57, paragraph 60(2)(b) and Part IV also apply to an associate judge.

Associate judge who made election

(2) Sections 41.2, 41.3, 42 and 43.1 to 52.22 do not apply to an associate judge who made an election under the *Economic Action Plan 2014 Act, No. 2* to continue to be deemed to be employed in the public service for the purposes of the *Public Service Superannuation Act*.

2014, c. 39, s. 317; 2022, c. 10, s. 334; 2022, c. 10, s. 371; 2022, c. 10, s. 375; 2023, c. 18, s. 2.

PART I

Judges and Associate Judges

Eligibility

Eligibility for appointment

3 No person is eligible to be appointed a judge of a superior court in any province unless, in addition to any other requirements prescribed by law, that person

(a) is a barrister or advocate of at least 10 years' standing at the bar of any province or has, for an aggregate of at least 10 years,

(i) been a barrister or advocate at the bar of any province, and

(ii) after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties and functions of a judicial nature on a full-time basis in respect of a position held under a law of Canada or a province; and

(b) undertakes to participate in continuing education on matters related to sexual assault law and social context, which includes systemic racism and systemic discrimination, including by attending seminars established under paragraph 60(2)(b).

R.S., 1985, c. J-1, s. 3; 1992, c. 51, s. 3; 1996, c. 22, s. 2; 2021, c. 8, s. 1.

4 to 6 [Repealed, 1990, c. 17, s. 28]

7 [Repealed, 1992, c. 51, s. 4]

Age of Retirement

Retirement age

8 (1) A judge of the Supreme Court of British Columbia who held the office of a judge of the County Courts of British Columbia on March 1, 1987 and on June 30, 1990 may retire at the age of seventy years.

Retirement age

(2) A judge of the Superior Court of Justice in and for the Province of Ontario who held the office of a judge of the District Court of Ontario on March 1, 1987 and on August 31, 1990 may retire at the age of seventy years.

Idem

(3) A judge of the Supreme Court of Nova Scotia who held the office of a judge of the County Court of Nova Scotia on March 1, 1987 and on the coming into force of this subsection may retire at the age of seventy years.

R.S., 1985, c. J-1, s. 8; R.S., 1985, c. 16 (3rd Supp.), s. 1; 1992, c. 51, s. 4; 1998, c. 30, s. 1.

Salaries

Supreme Court of Canada

9 The yearly salaries of the judges of the Supreme Court of Canada are as follows:

(a) the Chief Justice of Canada, $435,600; and

(b) the eight puisne judges, $403,300 each.

R.S., 1985, c. J-1, s. 9; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 1; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 196; 2022, c. 10, s. 336.

Federal Courts

10 The yearly salaries of the judges of the Federal Courts are as follows:

(a) the Chief Justice of the Federal Court of Appeal, $371,400;

(b) the other judges of the Federal Court of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Federal Court, $371,400 each; and

(d) the other judges of the Federal Court, $338,800 each.

R.S., 1985, c. J-1, s. 10; R.S., 1985, c. 41 (1st Supp.), s. 1, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 2; 2002, c. 8, s. 83; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 197; 2018, c. 12, s. 297; 2022, c. 10, s. 337.

Federal Court associate judges

10.1 The yearly salaries of the associate judges of the Federal Court shall be 80% of the yearly salaries, calculated in accordance with section 25, of the judges referred to in paragraph 10(d).

2014, c. 39, s. 318; 2017, c. 20, s. 198; 2022, c. 10, s. 371.

Court Martial Appeal Court

10.2 The yearly salary of the Chief Justice of the Court Martial Appeal Court of Canada shall be $371,400.

2017, c. 20, s. 198; 2022, c. 10, s. 338.

Tax Court of Canada

11 The yearly salaries of the judges of the Tax Court of Canada are as follows:

(a) the Chief Justice, $371,400;

(b) the Associate Chief Justice, $371,400; and

(c) the other judges, $338,800 each.

R.S., 1985, c. J-1, s. 11; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 51 (4th Supp.), s. 13; 2001, c. 7, s. 3; 2002, c. 8, s. 84(E); 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 199; 2022, c. 10, s. 339.

Tax Court of Canada associate judges

11.1 The yearly salaries of the associate judges of the Tax Court of Canada shall be 80% of the yearly salaries, calculated in accordance with section 25, of the judges referred to

in paragraph 11(c).
2022, c. 10, s. 340; 2022, c. 10, s. 371.

Court of Appeal for Ontario and Superior Court of Justice

12 The yearly salaries of the judges of the Court of Appeal for Ontario and of the Superior Court of Justice in and for the Province of Ontario are as follows:

(a) the Chief Justice and the Associate Chief Justice of Ontario, $371,400 each;

(b) the 14 Justices of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice, $371,400 each; and

(d) the 212 other judges of the Superior Court of Justice, $338,800 each.

R.S., 1985, c. J-1, s. 12; R.S., 1985, c. 41 (1st Supp.), s. 2, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1990, c. 17, s. 29; 1998, c. 30, s. 2; 2001, c. 7, s. 4; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 200; 2018, c. 12, s. 298; 2021, c. 23, s. 255; 2022, c. 10, s. 341.

Court of Appeal and Superior Court of Quebec

13 The yearly salaries of the judges of the Court of Appeal and of the Superior Court in and for the Province of Quebec are as follows:

(a) the Chief Justice of Quebec, $371,400;

(b) the 19 puisne judges of the Court of Appeal, $338,800 each;

(c) the Chief Justice, the Senior Associate Chief Justice and the Associate Chief Justice of the Superior Court, $371,400 each; and

(d) the 144 puisne judges of the Superior Court, $338,800 each.

R.S., 1985, c. J-1, s. 13; R.S., 1985, c. 41 (1st Supp.), s. 3, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 1; 2001, c. 7, s. 5; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2014, c. 20, s. 164; 2017, c. 20, s. 201; 2022, c. 10, s. 342.

Court of Appeal and Supreme Court of Nova Scotia

14 The yearly salaries of the judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia are as follows:

(a) the Chief Justice of Nova Scotia, $371,400;

(b) the seven other judges of the Court of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Supreme Court, $371,400 each; and

(d) the 23 other judges of the Supreme Court, $338,800 each.

R.S., 1985, c. J-1, s. 14; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 2; 1992, c. 51, s. 5; 2001, c. 7, s. 6; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 202; 2022, c. 10, s. 343.

Court of Appeal and Court of Queen’s Bench of New Brunswick

15 The yearly salaries of the judges of the Court of Appeal of New Brunswick and of the Court of Queen's Bench of New Brunswick are as follows:

(a) the Chief Justice of New Brunswick, $371,400;

(b) the five other judges of the Court of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, $371,400 each; and

(d) the 20 other judges of the Court of Queen's Bench, $338,800 each.

R.S., 1985, c. J-1, s. 15; R.S., 1985, c. 41 (1st Supp.), s. 4, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 7; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 203; 2022, c. 10, s. 344.

Court of Appeal and Court of Queen's Bench for Manitoba

16 The yearly salaries of the judges of the Court of Appeal for Manitoba and of Her Majesty's Court of Queen's Bench for Manitoba are as follows:

(a) the Chief Justice of Manitoba, $371,400;

(b) the six Judges of Appeal, $338,800 each;

(c) the Chief Justice, the Senior Associate Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, $371,400 each; and

(d) the 31 puisne judges of the Court of Queen's Bench, $338,800 each.

R.S., 1985, c. J-1, s. 16; R.S., 1985, c. 41 (1st Supp.), s. 5, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 3; 2001, c. 7, s. 8; 2006, c. 11, s. 1; 2009, c. 19, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 204; 2022, c. 10, s. 345.

Court of Appeal and Supreme Court of British Columbia

17 The yearly salaries of the judges of the Court of Appeal for British Columbia and of the Supreme Court of British Columbia are as follows:

(a) the Chief Justice of British Columbia, $371,400;

(b) the 12 Justices of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Supreme Court, $371,400 each; and

(d) the 86 other judges of the Supreme Court, $338,800 each.

R.S., 1985, c. J-1, s. 17; R.S., 1985, c. 41 (1st Supp.), s. 6, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 4; 1990, c. 16, s. 15; 2001, c. 7, s. 9; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 205; 2021, c. 23, s. 256; 2022, c. 10, s. 346.

Court of Appeal and Supreme Court of Prince Edward Island

18 The yearly salaries of the judges of the Court of Appeal of Prince Edward Island and of the Supreme Court of Prince Edward Island are as follows:

(a) the Chief Justice of Prince Edward Island, $371,400;

(b) the two other judges of the Court of Appeal, $338,800 each;

(c) the Chief Justice of the Supreme Court, $371,400; and

(d) the three other judges of the Supreme Court, $338,800 each.

R.S., 1985, c. J-1, s. 18; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 1, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 10; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2015, c. 3, s. 125; 2017, c. 20, s. 206; 2022, c. 10, s. 347.

Court of Appeal and Court of Queen's Bench for Saskatchewan

19 The yearly salaries of the judges of the Court of Appeal for Saskatchewan and of Her Majesty's Court of Queen's Bench for Saskatchewan are as follows:

(a) the Chief Justice of Saskatchewan, $371,400;

(b) the seven Judges of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Court of Queen's Bench, $371,400 each; and

(d) the 33 other judges of the Court of Queen's Bench, $338,800 each.

R.S., 1985, c. J-1, s. 19; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 2001, c. 7, s. 11; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20, s. 207; 2018, c. 12, s. 299; 2021, c. 23, s. 257; 2022, c. 10, s. 348.

Court of Appeal and Court of Queen's Bench of Alberta

20 The yearly salaries of the judges of the Court of Appeal of Alberta and of the Court of Queen's Bench of Alberta are as follows:

(a) the Chief Justice of Alberta, $371,400;

(b) the 10 Justices of Appeal, $338,800 each;

(c) the Chief Justice and the two Associate Chief Justices of the Court of Queen's Bench, $371,400 each; and

(d) the 70 other Justices of the Court of Queen's Bench, $338,800 each.

R.S., 1985, c. J-1, s. 20; R.S., 1985, c. 41 (1st Supp.), s. 7, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 5; 2001, c. 7, s. 12; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2014, c. 20, s. 165; 2017, c. 20, s. 208, c. 33, s. 231; 2022, c. 10, s. 349.

Supreme Court of Newfoundland and Labrador

21 The yearly salaries of the judges of the Supreme Court of Newfoundland and Labrador are as follows:

(a) the Chief Justice of Newfoundland and Labrador, $371,400;

(b) the five Judges of Appeal, $338,800 each;

(c) the Chief Justice and the Associate Chief Justice of the Trial Division, $371,400 each; and

(d) the 18 other judges of the Trial Division, $338,800 each.

R.S., 1985, c. J-1, s. 21; R.S., 1985, c. 41 (1st Supp.), s. 8, c. 50 (1st Supp.), s. 4, c. 27 (2nd Supp.), s. 2, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 6; 2001, c. 7, s. 13; 2006, c. 11, s. 1; 2012, c. 31, s. 210; 2017, c. 20,

s. 209; 2021, c. 23, s. 258; 2022, c. 10, s. 350.

Supreme Court of Yukon

22 (1) The yearly salaries of the judges of the Supreme Court of Yukon are as follows:

(a) the Chief Justice, $371,400; and

(b) the two other judges, $338,800 each.

Supreme Court of the Northwest Territories

(2) The yearly salaries of the judges of the Supreme Court of the Northwest Territories are as follows:

(a) the Chief Justice, $371,400; and

(b) the two other judges, $338,800 each.

Nunavut Court of Justice

(2.1) The yearly salaries of the judges of the Nunavut Court of Justice are as follows:

(a) the Chief Justice, $371,400; and

(b) the five other judges, $338,800 each.

(3) [Repealed, 2017, c. 33, s. 232]

R.S., 1985, c. J-1, s. 22; R.S., 1985, c. 50 (1st Supp.), s. 4, c. 39 (3rd Supp.), s. 1; 1989, c. 8, s. 7; 1999, c. 3, s. 72; 2001, c. 7, s. 14; 2002, c. 7, s. 189; 2006, c. 11, s. 2; 2011, c. 24, s. 170; 2012, c. 31, s. 210; 2017, c. 20, s. 210, c. 33, s. 232; 2022, c. 10, s. 351.

Rounding of amounts

23 A salary referred to in any of sections 9 to 22 that is not a multiple of one hundred dollars shall be rounded down to the next lowest multiple of one hundred dollars.

R.S., 1985, c. J-1, s. 23; R.S., 1985, c. 5 (1st Supp.), s. 2, c. 11 (1st Supp.), s. 2, c. 41 (1st Supp.), s. 9, c. 50 (1st Supp.), s. 4; 1989, c. 8, s. 8; 1990, c. 16, s. 16, c. 17, s. 30; 1992, c. 51, s. 6; 2001, c. 7, s. 15.

Additional judges

24 (1) Notwithstanding sections 12 to 22 but subject to subsections (3) and (4), where the number of judges of a superior court in a province has been increased by or pursuant to an Act of the legislature of the province beyond the number of judges of that court whose salaries are provided for by sections 12 to 22, a salary is payable pursuant to this section to each additional judge, appointed to that court in accordance with that Act and in the manner provided by law, from the time that judge's appointment becomes effective and in the same manner and subject to the same terms and conditions as if the salary were payable under sections 12 to 22.

Salaries fixed

(2) The salary of a judge appointed in the circumstances described in subsection (1) is the salary annexed, pursuant to sections 12 to 22, to the office of judge to which the

appointment is made.

Limit

(3) Subject to subsection (4), the number of salaries that may be paid pursuant to this section at any one time shall not be greater than

(a) 16, in the case of judges appointed to appeal courts in the provinces; and

(b) 79, in the case of judges appointed to superior courts in the provinces other than appeal courts.

(c) [Repealed, 1992, c. 51, s. 7]

Unified family courts

(4) For the purposes of assisting the establishment of unified family courts in the provinces, a further number of salaries not greater than 58 at any one time may be paid in the case of judges appointed to courts described in paragraph (3)(b)

(a) where the court has the jurisdiction of a unified family court; or

(b) where a request has been made by a provincial attorney general for the appointment to the court of judges to exercise the jurisdiction of a unified family court.

Salary deemed payable under sections 12 to 22

(5) A salary payable to a judge under this section is deemed, for all purposes of the provisions of this Act, other than this section, and of any other Act of Parliament, to be a salary payable under sections 12 to 22.

Definition of *appeal court*

(6) In this section, ***appeal court*** means, in relation to each of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland and Labrador, the Court of Appeal of the Province.

R.S., 1985, c. J-1, s. 24; R.S., 1985, c. 41 (1st Supp.), s. 10, c. 27 (2nd Supp.), s. 3; 1989, c. 8, s. 9; 1992, c. 51, s. 7; 1996, c. 30, s. 1; 1998, c. 30, s. 3; 2006, c. 11, s. 3; 2008, c. 26, s. 1; 2015, c. 3, s. 126; 2017, c. 20, s. 211; 2018, c. 12, s. 300; 2024, c. 17, s. 320.

Periodic Adjustment and Revision of Salaries

Annual adjustment of salary

25 (1) The yearly salaries referred to in sections 9 to 22 apply in respect of the twelve-month period beginning on April 1, 2020.

Annual adjustment of salary

(2) The salary annexed to an office of judge referred to in sections 9, 10, 10.2, 11 and 12 to 22 for the twelve-month period beginning on April 1, 2021, and for each

subsequent twelve-month period, shall be the amount obtained by multiplying

(a) the salary annexed to that office for the twelve month period immediately preceding the twelve month period in respect of which the salary is to be determined

by

(b) the percentage that the Industrial Aggregate for the first adjustment year is of the Industrial Aggregate for the second adjustment year, or one hundred and seven per cent, whichever is less.

Meaning of certain expressions

(3) For the purposes of this section,

(a) in relation to any twelve month period in respect of which the salary is to be determined, the ***first adjustment year*** is the most recent twelve month period for which the Industrial Aggregate is available on the first day of the period in respect of which the salary is to be determined, and the ***second adjustment year*** is the twelve month period immediately preceding the first adjustment year; and

(b) the ***Industrial Aggregate*** for an adjustment year is the average weekly wages and salaries of the Industrial Aggregate in Canada for that year as published by Statistics Canada under the authority of the *Statistics Act*.

R.S., 1985, c. J-1, s. 25; R.S., 1985, c. 16 (3rd Supp.), s. 2; 1993, c. 13, s. 10; 1994, c. 18, s. 9; 1998, c. 30, s. 4; 2001, c. 7, s. 16; 2006, c. 11, s. 4; 2012, c. 31, s. 211; 2014, c. 39, s. 319; 2017, c. 20, s. 212; 2022, c. 10, s. 352.

Commission

26 (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.

Factors to be considered

(1.1) In conducting its inquiry, the Commission shall consider

(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;

(b) the role of financial security of the judiciary in ensuring judicial independence;

(c) the need to attract outstanding candidates to the judiciary; and

(d) any other objective criteria that the Commission considers relevant.

Quadrennial inquiry

(2) The Commission shall commence an inquiry on June 1, 2020, and on June 1 of every fourth year after 2020, and shall submit a report containing its recommendations to the Minister within nine months after the date of commencement.

Postponement

(3) The Commission may, with the consent of the Minister and the judiciary, postpone the date of commencement of a quadrennial inquiry.

Other reports

(4) In addition to its quadrennial inquiry, the Minister may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.

Extension of time

(5) The Governor in Council may, on the request of the Commission, extend the time for submission of a report under subsection (2) or (4).

Report of Commission

(6) The Minister shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.

Referral to Committee

(6.1) A report that is tabled in each House of Parliament under subsection (6) shall, on the day it is tabled or, if the House is not sitting on that day, on the day that House next sits, be referred by that House to a committee of that House that is designated or established by that House for the purpose of considering matters relating to justice.

Report by Committee

(6.2) A committee referred to in subsection (6.1) may conduct inquiries or public hearings in respect of a report referred to it under that subsection, and if it does so, the committee shall, not later than ninety sitting days after the report is referred to it, report its findings to the House that designated or established the committee.

Definition of *sitting day*

(6.3) For the purpose of subsection (6.2), ***sitting day*** means a day on which the House of Commons or the Senate, as the case may be, sits.

Response to report

(7) The Minister shall respond to a report of the Commission within four months after receiving it. Following that response, if applicable, he or she shall, within a reasonable period, cause to be prepared and introduced a bill to implement the response.
R.S., 1985, c. J-1, s. 26; 1996, c. 2, s. 1; 1998, c. 30, s. 5; 2001, c. 7, s. 17(F); 2012, c. 31, s. 212; 2017, c. 20, s. 213; 2023, c. 18, s. 13.

Nomination

26.1 (1) The Judicial Compensation and Benefits Commission consists of three members appointed by the Governor in Council as follows:

(a) one person nominated by the judiciary;

(b) one person nominated by the Minister; and

(c) one person, who shall act as chairperson, nominated by the members who are nominated under paragraphs (a) and (b).

Tenure and removal

(2) Each member holds office during good behaviour, and may be removed for cause at any time by the Governor in Council.

Term of office

(3) The term of office for the initial members appointed to the Commission ends on August 31, 2003. The members subsequently appointed hold office for a term of four years.

Continuance of duties

(4) Where the term of a member ends, other than in the case of removal for cause, the member may carry out and complete any duties of the members in respect of a matter that was referred to the Commission under subsection 26(4) while he or she was a member.

Reappointment

(5) A member is eligible to be reappointed for one further term if re-nominated in accordance with subsection (1).

Absence or incapacity

(6) In the event of the absence or incapacity of a member, the Governor in Council may appoint as a substitute temporary member a person nominated in accordance with subsection (1) to hold office during the absence or incapacity.

Vacancy

(7) If the office of a member becomes vacant during the term of the member, the Governor in Council shall appoint a person nominated in accordance with subsection (1) to hold office as a member for the remainder of the term.

Quorum

(8) A quorum of the Commission consists of all three members.

Remuneration

(9) The members of the Commission and persons carrying out duties under subsection (4) shall be paid

(a) the fees fixed by the Governor in Council; and

(b) such travel and living expenses incurred in the course of their duties while away from their ordinary place of residence as are fixed by the Governor in Council.

Compensation

(10) The members of the Commission and persons carrying out duties under subsection (4) are deemed to be employed in the federal public administration for the purposes of the *Government Employees Compensation Act* and any regulations made under section 9 of the *Aeronautics Act*.

1998, c. 30, s. 5; 2003, c. 22, s. 224(E); 2023, c. 18, s. 13.

Definition of *judiciary*

26.11 In sections 26 and 26.1, ***judiciary*** includes associate judges.

2017, c. 20, s. 214; 2022, c. 10, s. 353; 2022, c. 10, s. 371.

Personnel

26.2 (1) The Commission may engage the services of any persons necessary for the proper conduct of the Commission.

Presumption

(2) No person engaged under subsection (1) shall, as a result, be considered to be employed in the federal public administration.

1998, c. 30, s. 5; 2003, c. 22, s. 224(E).

Costs payable

26.3 (1) The Commission may identify those representatives of the judiciary participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section.

Entitlement to payment of costs

(2) A representative of the judiciary identified under subsection (1) who participates in an inquiry of the Commission is entitled to be paid, out of the Consolidated Revenue Fund, two thirds of the costs determined under subsection (3) in respect of his or her participation.

Determination of costs

(3) An assessment officer of the Federal Court, other than a judge or an associate judge, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the *Federal Courts Rules*.

Application

(4) This section applies to costs incurred in relation to participation in any inquiry of the Commission conducted after September 1, 1999.

2001, c. 7, s. 18; 2002, c. 8, s. 85; 2006, c. 11, s. 5; 2014, c. 39, s. 320; 2022, c. 10, s. 371.

Costs payable to representative of associate judges

26.4 (1) The Commission may identify one representative of the associate judges of the Federal Court and one representative of the associate judges of the Tax Court of Canada participating in an inquiry of the Commission to whom costs shall be paid in accordance with this section.

Entitlement to payment of costs

(2) The representatives identified under subsection (1) are entitled to be paid, out of the Consolidated Revenue Fund, 95% of the costs determined under subsection (3) in respect of their participation.

Determination of costs

(3) An assessment officer of the Federal Court, other than a judge or an associate judge, shall determine the amount of costs, on a solicitor-and-client basis, in accordance with the *Federal Courts Rules*.

Application

(4) This section applies to costs incurred as of April 1, 2015 in relation to participation in any inquiry of the Commission.

2014, c. 39, s. 321; 2017, c. 20, s. 215; 2022, c. 10, s. 354; 2022, c. 10, s. 371.

Special and Representational Allowances

Allowance for incidental expenditures actually incurred

27 (1) On and after April 1, 2020, every judge in receipt of a salary under this Act is entitled to be paid, up to a maximum of $7,500 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of judge may require, to the extent that the judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Allowance for incidental expenditures by associate judges

(1.1) On and after April 1, 2020, every associate judge is entitled to be paid, up to a maximum of $7,500 for each year, for reasonable incidental expenditures that the fit and proper execution of the office of associate judge may require, to the extent that the associate judge has actually incurred the expenditures and is not entitled to be reimbursed for them under any other provision of this Act.

Additional allowance for northern judges

(2) On and after April 1, 2004, there shall be paid to each judge of the Supreme Court of Newfoundland and Labrador resident in Labrador and each judge of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice who is in receipt of a salary under this Act, in addition to the allowance provided by

subsection (1), a non-accountable yearly allowance of $12,000 as compensation for the higher cost of living in Labrador and in the territories.

Allowance — medical or dental treatment

(2.1) If a judge referred to in subsection (2) is required to travel for the purpose of receiving a non-elective medical or dental treatment that is required without delay and unavailable at or in the immediate vicinity of the place where the judge resides, the judge is entitled to be paid an allowance for reasonable expenses actually incurred while travelling for that purpose, to the extent that the judge may not be reimbursed for them under any other provision of this Act.

Additional allowance — Federal Courts and Tax Court of Canada

(3) There shall be paid to every judge of the Federal Court of Appeal, the Federal Court and the Tax Court of Canada who is in receipt of a salary under this Act, in addition to the allowance provided by subsection (1), a non-accountable yearly allowance of $2,000 as compensation for special incidental expenditures inherent in the exercise of their office as judge.

(3.1) [Repealed, 2002, c. 8, s. 86]

Continuance in force of subsection (3)

(4) Subsection (3) shall continue in force for so long as subsection 57(2) continues in force in relation to judges of superior courts in the provinces.

Idem

(5) The additional allowances described in subsections (2) and (3) are deemed not to be travel or personal or living expense allowances expressly fixed by this Act.

Representational allowance

(6) On and after April 1, 2020, each of the following judges is entitled to be paid, as a representational allowance, reasonable travel and other expenses actually incurred by the judge or the spouse or common-law partner of the judge in discharging the special extra-judicial obligations and responsibilities that devolve on the judge, to the extent that those expenses may not be reimbursed under any other provision of this Act and their aggregate amount does not exceed in any year the maximum amount indicated below in respect of the judge:

(a) the Chief Justice of Canada, $25,000;

(b) each puisne judge of the Supreme Court of Canada, $15,000;

(c) the Chief Justice of the Federal Court of Appeal and each chief justice described in sections 12 to 21 as the chief justice of a province, $17,500;

(d) each other chief justice referred to in sections 10 to 21, $15,000;

(e) the Chief Justices of the Court of Appeal of Yukon, the Court of Appeal of the Northwest Territories, the Court of Appeal of Nunavut, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories and the Nunavut Court of Justice, $15,000 each;

(f) the Chief Justice of the Court Martial Appeal Court of Canada, $15,000; and

(g) the Senior Judge of the Family Court, and each regional senior judge, of the Superior Court of Justice in and for the Province of Ontario, $7,500.

(7) [Repealed, 2006, c. 11, s. 6]

Judge acting in place of recipient

(8) Where any justice or judge mentioned in subsection (6), other than a puisne judge of the Supreme Court of Canada, is unable to discharge the obligations and responsibilities referred to in that subsection or the office of that justice or judge is vacant, the judge who acts in the place of that justice or judge is entitled to be paid the representational allowance provided for that justice or judge.

Definition of *chief justice*

(9) In this section, except in paragraphs (6)(a) and (c), ***chief justice*** includes a senior associate chief justice and an associate chief justice.

R.S., 1985, c. J-1, s. 27; R.S., 1985, c. 50 (1st Supp.), s. 5, c. 27 (2nd Supp.), s. 4, c. 51 (4th Supp.), s. 14; 1989, c. 8, s. 10; 1990, c. 17, s. 31; 1992, c. 51, s. 8; 1993, c. 28, s. 78; 1996, c. 30, s. 2; 1998, c. 15, s. 29; 1999, c. 3, s. 73; 2000, c. 12, s. 168; 2001, c. 7, s. 19; 2002, c. 7, ss. 190, 277(E), c. 8, s. 86; 2006, c. 11, s. 6; 2012, c. 31, s. 213; 2017, c. 20, s. 216, c. 33, s. 233; 2022, c. 10, s. 356; 2022, c. 10, s. 371.

Supernumerary Judges and Associate Judges

Federal Courts and Tax Court

28 (1) If a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada notifies the Minister of his or her election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall hold the office of supernumerary judge of that Court from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the expiry of 10 years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Restriction on election

(2) An election may be made under subsection (1) only by a judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Duties of judge

(3) A judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the judge

(a) by the Chief Justice of the Federal Court of Appeal, if the judge is a judge of that Court;

(b) by the Chief Justice or the Associate Chief Justice of the Federal Court, if the judge is a judge of that Court; or

(c) by the Chief Justice or the Associate Chief Justice of the Tax Court of Canada, if the judge is a judge of that Court.

Salary of supernumerary judge

(4) The salary of each supernumerary judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada is the salary annexed to the office of a judge of that Court, other than the office of a Chief Justice or Associate Chief Justice.
R.S., 1985, c. J-1, s. 28; R.S., 1985, c. 16 (3rd Supp.), s. 3; 2002, c. 8, s. 87; 2006, c. 11, s. 7; 2018, c. 12, s. 301; 2023, c. 18, s. 13.

Provincial superior courts

29 (1) If the legislature of a province has enacted legislation establishing for each office of judge of a superior court of the province the additional office of supernumerary judge of the court, and a judge of that court notifies the Minister and the attorney general of the province of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall hold the office of supernumerary judge from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the expiry of 10 years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Conditions

(2) An election under subsection (1) may only be made by a judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Duties of judge

(3) A judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the judge

(a) by the chief justice, senior associate chief justice or associate chief justice, as the case may be, of the court of which the judge is a member or, where that court is constituted with divisions, of the division of which the judge is a member; or

(b) in the case of a supernumerary judge of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, by the Chief Justice of that Court.

Salary of supernumerary judge

(4) The salary of each supernumerary judge of a superior court is the salary annexed to the office of a judge of that court other than a chief justice, senior associate chief justice or associate chief justice.

Reference to attorney general of a province

(5) In this section, a reference to the attorney general of a province shall be construed in relation to Yukon, the Northwest Territories and Nunavut as a reference to the Commissioner of that territory.

(6) [Repealed, 2017, c. 33, s. 234]

R.S., 1985, c. J-1, s. 29; 1993, c. 28, s. 78; 1999, c. 3, s. 74; 2002, c. 7, s. 191, c. 8, s. 88(E); 2006, c. 11, s. 8; 2012, c. 31, s. 214; 2017, c. 33, s. 234; 2023, c. 18, s. 13.

Supernumerary associate judges

30 (1) If an associate judge notifies the Minister of his or her election to give up regular judicial duties and hold office only as a supernumerary associate judge, the associate judge shall hold the office of supernumerary associate judge from the time notice is given until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office, or until the end of five years from the date of the election, whichever occurs earlier, and shall be paid the salary annexed to that office.

Restriction on election

(2) An election may be made under subsection (1) only by an associate judge

(a) who has continued in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80; or

(b) who has attained the age of 70 years and has continued in judicial office for at least 10 years.

Duties of associate judge

(3) An associate judge who has made the election referred to in subsection (1) shall hold himself or herself available to perform such special judicial duties as may be assigned to the associate judge by the chief justice or the associate chief justice of the court to which he or she is appointed.

Salary of supernumerary associate judge

(4) The salary of each supernumerary associate judge is the salary annexed to the office of an associate judge.

Deemed election and notice

(5) For the purposes of subsection (1), if an associate judge gives notice to the Minister of the associate judge's election to be effective on a future day specified in the notice, being a day on which the associate judge will be eligible to make the election, the associate judge is, effective on that day, deemed to have elected and given notice of the election on that day.

R.S., 1985, c. J-1, s. 30; R.S., 1985, c. 16 (3rd Supp.), s. 4; 1990, c. 17, s. 32; 1992, c. 51, s. 9; 2022, c. 10, s. 358; 2022, c. 10, s. 371; 2022, c. 10, s. 375.

Chief Justice Continuing as Judge

Election of Chief or Associate Chief to change to duties of judge only

31 (1) If the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada has notified the Minister of his or her election to cease to perform the duties of that office and to perform only the duties of a judge, he or she shall then hold only the office of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be, and shall be paid the salary annexed to the office of a judge of that Court, until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Restriction on election

(2) The Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada may make the election referred to in subsection (1) only if he or she has continued in the office for at least five years or has continued in the office and another office referred to in this subsection for a total of at least five years.

Duties of judge

(3) The Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be.

Salary of judge

(4) The salary of the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada who has made the election referred to in subsection (1) is the salary annexed to the office of a judge (other than the Chief Justice) of the Federal Court of Appeal, a judge (other than the Chief Justice or the Associate Chief Justice) of the Federal Court or a judge (other than the Chief Justice or the Associate Chief Justice) of the Tax Court of Canada, as the case may be.

R.S., 1985, c. J-1, s. 31; 2002, c. 8, s. 90; 2017, c. 20, s. 217(F); 2018, c. 12, s. 302; 2023, c. 18, s. 13.

Election of Chief Justice of the Court Martial Appeal Court of Canada

31.1 If the Chief Justice of the Court Martial Appeal Court of Canada notifies the Minister of their election to cease to perform the duties of that office and to perform only the duties of a judge of the court on which they serve, they shall, after giving that notice, hold only the office of a judge and shall be paid the salary annexed to the office of a judge, until they reach the age of retirement, resign or are removed from or otherwise cease to hold office.

2017, c. 20, s. 218; 2023, c. 18, s. 13.

Election to cease to perform duties of chief justice of provincial superior court

32 (1) Where the legislature of a province has enacted legislation establishing for each office of chief justice of a superior court of the province such additional offices of judge of that court as are required for the purposes of this section, and a chief justice of that court has notified the Minister and the attorney general of the province of his or her election to cease to perform the duties of chief justice and to perform only the duties of a judge, the chief justice shall thereupon hold only the office of a judge, other than a chief justice, of that court and shall be paid the salary annexed to the office of a judge, other than a chief justice, of that court until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Restriction on election

(2) A chief justice of a superior court of a province may make the election referred to in subsection (1) only if the chief justice has continued in the office of chief justice, senior associate chief justice or associate chief justice of a superior court of the province or a division thereof, or in two or more such offices, for at least five years.

Duties of judge

(3) A chief justice of a superior court of a province who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge, other than the chief justice, of that court.

Salary of judge

(4) The salary of each chief justice of a superior court of a province who has made the election referred to in subsection (1) is the salary annexed to the office of a judge of that court, other than a chief justice.

Definition of *chief justice* and *chief justice of a superior court of a province*

(5) In this section, ***chief justice*** or ***chief justice of a superior court of a province*** means a chief justice, senior associate chief justice or associate chief justice of such a court or, where the court is constituted with divisions, of a division thereof.

(6) [Repealed, 1992, c. 51, s. 10]

R.S., 1985, c. J-1, s. 32; 1992, c. 51, s. 10; 2002, c. 8, s. 91(E); 2023, c. 18, s. 13.

Chief Justice

32.1 (1) If the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice has notified the Minister and the attorney general of the territory of his or her election to cease to perform the duties of chief justice and to perform only the duties of a judge, he or she shall then hold only the office of a judge, other than the chief justice, of that court and shall be paid the salary annexed to the office of a judge, other than the chief justice, of that court until he or she reaches the age of retirement, resigns or is removed from or otherwise ceases to hold office.

Restriction on election

(2) A chief justice may make the election referred to in subsection (1) only if he or she has continued in that office for at least five years.

Duties

(3) A chief justice who has made the election referred to in subsection (1) shall perform all of the judicial duties normally performed by a judge, other than the chief justice, of the applicable court.

Salary

(4) The salary of a chief justice who has made the election referred to in subsection (1) is the salary annexed to the office of a judge, other than the chief justice, of the applicable court.

2012, c. 31, s. 216; 2017, c. 33, s. 236; 2023, c. 18, s. 13.

Early Notice

Deemed election and notice

33 (1) If a judge gives notice to the Minister and, if appropriate, to the attorney general of the province concerned of the judge's election as provided in section 28, 29, 31, 31.1, 32 or 32.1 to be effective on a future day specified in the notice, being a day on which the judge will be eligible to so elect, the judge is, effective on that day, deemed to have elected and given notice of the election on that day under section 28, 29, 31, 31.1, 32 or 32.1, as the case may be.

Reference to attorney general of a province

(2) In this section, a reference to the attorney general of a province shall be construed in relation to Yukon, the Northwest Territories and Nunavut as a reference to the Commissioner of that territory.

R.S., 1985, c. J-1, s. 33; 1992, c. 51, s. 11; 1993, c. 28, s. 78; 2002, c. 7, s. 192; 2017, c. 20, s. 219; 2023, c. 18, s. 13.

Travel and Other Allowances

Superior courts

34 (1) Subject to this section and sections 36 to 39, a judge of a superior court who, for the purposes of performing any function or duty in that capacity, attends at any place other than that at which or in the immediate vicinity of which the judge is by law obliged to reside is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

Where no allowance

(2) No judge is entitled to be paid a travel allowance for attending at or in the immediate vicinity of the place where the judge resides.

R.S., 1985, c. J-1, s. 34; 1992, c. 51, s. 12; 2002, c. 8, s. 92.

35 [Repealed, 1992, c. 51, s. 13]

Certain superior courts, where no allowance

36 (1) No travel allowance shall be paid

(a) to a judge of the Nova Scotia Court of Appeal or of the Supreme Court of Nova Scotia for attending at the judicial centre at which or in the immediate vicinity of which the judge maintains his or her principal office;

(b) to a judge of the Court of Appeal of Prince Edward Island or the Supreme Court of Prince Edward Island for attending at the city of Charlottetown; or

(c) to a judge of the Court of Appeal for British Columbia for attending at either of the cities of Victoria or Vancouver, unless the judge resides at the other of those cities or in the immediate vicinity thereof.

Where place of residence approved by order in council

(2) Nothing in subsection (1) affects the right of a judge to be paid a travel allowance under subsection 34(1) if the judge resides at a place approved by the Governor in Council.

R.S., 1985, c. J-1, s. 36; 1992, c. 51, s. 14; 2015, c. 3, s. 127.

Judges of Supreme Court of Nova Scotia

37 A judge of the Supreme Court of Nova Scotia who, for the purposes of performing any function or duty in that capacity, attends at any judicial centre within the judicial district for which the judge is designated as a resident judge, other than the judicial centre at which or in the immediate vicinity of which the judge resides or maintains his or her principal office, is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

R.S., 1985, c. J-1, s. 37; 1992, c. 51, s. 15.

Judges of the Superior Court of Justice of Ontario

38 A judge of the Superior Court of Justice in and for the Province of Ontario who, for the purpose of performing any function or duty in that capacity, attends at any judicial centre

within the region for which the judge was appointed or assigned, other than the judicial centre at which or in the immediate vicinity of which the judge resides, is entitled to be paid, as a travel allowance, moving or transportation expenses and the reasonable travel and other expenses incurred by the judge in so attending.

R.S., 1985, c. J-1, s. 38; R.S., 1985, c. 11 (1st Supp.), s. 2; 1990, c. 17, s. 33; 1998, c. 30, s. 6.

Certificate of judge

39 Every application for payment of a travel allowance shall be accompanied by a certificate of the judge applying for it showing the number of days for which a travel allowance is claimed and the amount of the actual expenses incurred.

R.S., c. J-1, s. 21.

Removal allowance

40 (1) A removal allowance shall be paid to

(a) a person who is appointed a judge of a superior court and who, for the purposes of assuming the functions and duties of that office, is required to move from his or her place of residence to a place outside the immediate vicinity of the place where the person resided at the time of the appointment;

(b) a judge of a superior court who, during tenure and for the purposes of performing the functions and duties of that office, is required to change the place of residence of the judge to a place other than that at which or in the immediate vicinity of which the judge was required to reside immediately before being required to change the place of residence of that judge;

(c) a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice who moves to a place of residence in one of the 10 provinces or in another territory during the period of two years

(i) beginning two years before the judge’s date of eligibility to retire, or

(ii) if no removal allowance is paid in respect of a move made during the period described in subparagraph (i), beginning on the judge’s date of retirement or resignation from office;

(d) a survivor or *child*, as defined in subsection 47(1), of a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador, the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice who dies while holding office as such, if the survivor or child lives with the judge at the time of the judge’s death and, within two years after the death, moves to a place of residence in one of the 10 provinces or in another territory;

(e) a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada who moves to a place of residence in Canada outside the area within which the judge was required to reside by the Act establishing that Court, during the period of two years

(i) beginning two years before the judge’s date of eligibility to retire, or

(ii) if no removal allowance is paid in respect of a move made during the period described in subparagraph (i), beginning on the judge's date of retirement or resignation from office; and

(f) a survivor or child, as defined in subsection 47(1), of a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada who dies while holding office as such, if the survivor or child lives with the judge at the time of the judge's death and, within two years after the death, moves to a place of residence in Canada outside the area within which the judge was required to reside by the Act establishing that Court.

Limitation

(1.1) Paragraphs (1)(c) and (d) apply only in respect of

(a) a judge who resided in one of the 10 provinces or in another territory at the time of appointment to the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, as the case may be; or

(b) a judge of the Supreme Court of Newfoundland and Labrador resident in Labrador who at the time of appointment did not reside there.

Limitation

(1.2) Paragraphs (1)(e) and (f) apply only in respect of a judge who, at the time of appointment to the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, as the case may be, resided outside the area within which the judge was required to reside by the Act establishing that Court.

Idem

(2) A removal allowance referred to in subsection (1) shall be paid for moving and other expenses of such kinds as are prescribed by or under the authority of the Governor in Council and on such terms and conditions as are so prescribed.

Expenses of spouse or common-law partner

(2.1) Where a removal allowance is payable to a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada under paragraph (1)(a), an employment assistance allowance shall be paid to the judge's spouse or common-law partner up to a maximum of $5,000 for expenses actually incurred by the spouse or common-law partner in pursuing employment in the judge's new place of residence.

R.S., 1985, c. J-1, s. 40; R.S., 1985, c. 50 (1st Supp.), s. 6; 1989, c. 8, s. 11; 1992, c. 51, s. 16; 1999, c. 3, s. 75; 2000, c. 12, s. 160; 2002, c. 7, s. 193, c. 8, s. 93; 2006, c. 11, s. 9; 2017, c. 20, s. 220.

Meeting, conference and seminar expenses

41 (1) A judge of a superior court who attends a meeting, conference or seminar that is held for a purpose relating to the administration of justice and that the judge in the capacity of a judge is required by law to attend, or who, with the approval of the chief

justice of that court, attends any such meeting, conference or seminar that the judge in that capacity is expressly authorized by law to attend, is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending.

Expenses for other meetings, conferences or seminars

(2) Subject to subsection (3), a judge of a superior court who, with the approval of the chief justice of that court,

(a) attends a meeting, conference or seminar that the judge in the capacity of a judge is not expressly authorized by law or is not required by law to attend but that is certified by the chief justice to be a meeting, conference or seminar having as its object or as one of its objects the promotion of efficiency or uniformity in the superior courts, or the improvement of the quality of judicial service in those courts, or

(b) in lieu of attending a meeting, conference or seminar referred to in paragraph (a) that is certified as provided in that paragraph, acquires written or recorded materials distributed for the purpose of, or written or recorded proceedings of, any such meeting, conference or seminar,

is entitled to be paid, as a conference allowance, reasonable travel and other expenses actually incurred by the judge in so attending or the cost of acquiring the materials or proceedings, as the case may be.

Limitation

(3) Where the aggregate amount of conference allowances that have been paid under subsection (2) in any year

(a) to the judges of the Supreme Court of Canada exceeds the product obtained by multiplying the number of judges of that Court by one thousand dollars, or

(b) to the judges of any other particular superior court exceeds the greater of $5,000 and the product obtained by multiplying the number of judges of that court by $500,

no additional amount may be paid under that subsection in that year as a conference allowance to any judge of that court except with the approval of the Minister.

Definitions

(4) For the purposes of this section,

chief justice of any court of which a particular judge is a member means the chief justice or other person recognized by law as having rank or status senior to all other members of, or having the supervision of, that court, but if that court is constituted with divisions, then it means the person having that rank or status in relation to all other members of the division of which the particular judge is a member; (*juge en chef*)

superior court, in the case of a superior court constituted with divisions, means a division thereof. (*juridiction supérieure*)

R.S., 1985, c. J-1, s. 41; R.S., 1985, c. 50 (1st Supp.), s. 7; 1992, c. 51, s. 17; 2002, c. 8, s. 94; 2023, c. 18, s. 13.

Special Retirement Provision — Supreme Court of Canada Judges

Retired judge may continue to hold office

41.1 (1) A judge of the Supreme Court of Canada who has retired may, with the approval of the Chief Justice of Canada, continue to participate in judgments in which he or she participated before retiring, for a period not greater than six months after the date of the retirement.

Salary, etc.

(2) A retired judge participating in judgments shall receive

(a) the salary annexed to the office during that period less any amount otherwise payable to him or her under this Act in respect of the period, other than those amounts described in paragraphs (b) and (c);

(b) an amount that bears the same ratio to the allowance for incidental expenditures actually incurred referred to in subsection 27(1) that the number of months in the period bears to twelve; and

(c) the representational allowance referred to in subsection 27(6) for the period, as though the appropriate maximum referred to in that subsection were an amount that bears the same ratio to that allowance that the number of months in the period bears to twelve.

No extra remuneration

(3) Section 57 applies with respect to a judge to whom this section applies.

2001, c. 7, s. 20; 2006, c. 11, s. 10.

Benefits

Life insurance

41.2 (1) The Treasury Board shall establish, or enter into a contract to acquire, an insurance program for judges covering the following, on terms and conditions similar to those contained in the Public Service Management Insurance Plan and the public service management insurance directives that apply to executives:

(a) basic life insurance;

(b) supplementary life insurance;

(c) post-retirement life insurance;

(d) dependants' insurance; and

(e) accidental death and dismemberment insurance.

Administration

(2) The Treasury Board may

(a) set terms and conditions in respect of the program, including those respecting premiums or contributions payable, benefits, and management and control of the program;

(b) make contributions and pay premiums or benefits, as required, out of the Consolidated Revenue Fund; and

(c) undertake and do all things it considers appropriate for the purpose of administering or supervising the program.

Non-application of certain regulations

(3) A contract entered into under this section is not subject to any regulation with respect to contracts made by the Treasury Board under the *Financial Administration Act*.

Compulsory participation

(4) Participation in basic life insurance under paragraph (1)(a) is compulsory for all judges.

Transitional

(5) A judge who holds office on the day on which this section comes into force may, despite subsection (4), elect, at any time within ninety days after that day,

(a) to participate in basic life insurance under paragraph (1)(a) but have his or her coverage under it limited to 100 per cent of salary at the time of his or her death; or

(b) not to participate in basic life insurance.

Transitional

(6) Subject to subsection (7), on the coming into force of this section, judges shall no longer be eligible for coverage under any other life insurance program established by the Treasury Board.

Supplementary life insurance

(7) Those judges covered by supplementary life insurance on the coming into force of this section may have their coverage continued under the insurance program for judges, unless they have made an election under paragraph (5)(b).
2001, c. 7, s. 20.

Health and dental care benefits

41.3 (1) Judges shall be eligible to participate in the Public Service Health Care Plan and the Public Service Dental Care Plan established by the Treasury Board, on the same

terms and conditions as apply to employees in the executive group.

Health and dental care benefits for retired judges

(2) Judges who are in receipt of an annuity under this Act shall be eligible to participate in the Public Service Health Care Plan and the Pensioners' Dental Services Plan established by the Treasury Board, on the same terms and conditions as apply to pensioners.

Administration

(3) Subject to subsections (1) and (2), the Treasury Board may

(a) set any terms and conditions in respect of those plans, including those respecting premiums or contributions payable, benefits, and management and control of the plans;

(b) make contributions and pay premiums or benefits, as required, out of the Consolidated Revenue Fund; and

(c) undertake and do all things it considers appropriate for the purpose of administering or supervising the plans.

2001, c. 7, s. 20.

Accidental death in the exercise of duties

41.4 (1) Compensation, within the meaning of the *Government Employees Compensation Act*, shall be paid to the dependants of a judge whose death results from an accident arising out of or in the performance of judicial duties, on the same basis as that paid to dependants eligible for compensation under that Act.

Flying accidents causing death

(2) Regulations made under section 9 of the *Aeronautics Act* apply with respect to a judge whose death results from an accident arising out of or in the performance of judicial duties.

Death resulting from act of violence

(3) Compensation shall be paid to the survivors of a judge whose death results from an act of violence unlawfully committed by another person or persons that occurs while the judge is performing judicial duties, on the same basis as that paid to the survivors of employees slain on duty within the meaning of the Public Service Income Benefit Plan for Survivors of Employees Slain on Duty, with any modifications that the circumstances require.

Application

(4) Subsections (1) to (3) apply to deaths that occur on or after April 1, 2000.

2001, c. 7, s. 20.

Delegation

41.5 (1) The Treasury Board may authorize the President or Secretary of the Treasury Board to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board under sections 41.2 and 41.3 and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.

Subdelegation

(2) The President or Secretary of the Treasury Board may, subject to and in accordance with the authorization, authorize one or more persons under his or her jurisdiction or any other person to exercise or perform any of those powers or functions.

2001, c. 7, s. 20.

Annuities for Judges

Payment of annuities

42 (1) A judge shall be paid an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years, has a combined age and number of years in judicial office that is not less than 80 and resigns from office;

(b) has attained the age of retirement and has held judicial office for at least 10 years; or

(c) has continued in judicial office on the Supreme Court of Canada for at least 10 years and resigns from office.

Grant of annuities

(1.1) The Governor in Council shall grant to a judge an annuity equal to two thirds of the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement, as the case may be, if the judge

(a) has continued in judicial office for at least 15 years and resigns his or her office, if in the opinion of the Governor in Council the resignation is conducive to the better administration of justice or is in the national interest; or

(b) has become afflicted with a permanent infirmity disabling him or her from the due execution of the office of judge and resigns his or her office or by reason of that infirmity is removed from office.

Prorated annuity

(2) If a judge who has attained the age of retirement has held judicial office for less than 10 years, an annuity shall be paid to that judge that bears the same ratio to the annuity described in subsection (1) as the number of years the judge has held judicial office, to the nearest one tenth of a year, bears to 10 years.

Duration of annuities

(3) An annuity granted or paid to a judge under this section shall commence on the day of his or her resignation, removal or attaining the age of retirement and shall continue during the life of the judge.

Definition of *judicial office*

(4) In this section, ***judicial office*** means the office of a judge of a superior or county court or the office of an associate judge.

R.S., 1985, c. J-1, s. 42; 1998, c. 30, s. 7; 2002, c. 8, ss. 95, 111(E); 2006, c. 11, s. 11; 2014, c. 39, s. 322; 2017, c. 33, s. 238; 2022, c. 10, s. 359; 2022, c. 10, s. 371.

Annuity payable to supernumerary judge

43 (1) If a supernumerary judge, before becoming one, held the office of chief justice, senior associate chief justice or associate chief justice, the annuity payable to the judge under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity for former supernumerary judge

(1.1) If a supernumerary judge to whom subsection (1) applies is appointed to a different court to perform only the duties of a judge, the annuity payable to the judge under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, senior associate chief justice or associate chief justice previously held by him or her.

Annuity — election under section 31, 32 or 32.1

(2) If the Chief Justice of the Federal Court of Appeal or the Chief Justice or Associate Chief Justice of the Federal Court or the Tax Court of Canada, in accordance with section 31, or a chief justice of a superior court of a province, in accordance with section 32, or the Chief Justice of the Supreme Court of Yukon, the Supreme Court of the Northwest Territories or the Nunavut Court of Justice, in accordance with section 32.1, has elected to cease to perform his or her duties and to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attainment of the age of retirement, to the office held by him or her immediately before his or her election.

Annuity — election under section 31.1

(2.1) If the Chief Justice of the Court Martial Appeal Court of Canada, in accordance with section 31.1, has elected to cease to perform his or her duties as such and to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office held by him or her immediately

before his or her election, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for a total of at least five years.

Annuity payable to chief justice

(2.2) If a chief justice is appointed to a different court to perform only the duties of a judge, the annuity payable to him or her under section 42 is an annuity equal to two thirds of the salary annexed, at the time of his or her resignation, removal or attaining the age of retirement, to the office of chief justice, if he or she had continued in that office for at least five years or had continued in that office and any other office of chief justice for at least five years.

Definition of *chief justice* and *chief justice of a superior court of a province*

(3) In subsections (2) to (2.2), ***chief justice*** or ***chief justice of a superior court of a province*** means a chief justice, senior associate chief justice or associate chief justice of that court, or, if that court is constituted with divisions, of a division of that court.

Application of subsections (1) and (2)

(4) Subsections (1) and (2) are deemed to have come into force on April 1, 2012.
R.S., 1985, c. J-1, s. 43; 1992, c. 51, s. 19; 2002, c. 8, s. 96; 2012, c. 31, s. 217; 2017, c. 20, s. 221, c. 33, s. 239; 2018, c. 12, ss. 303, 308.

Prorated Annuities — Early Retirement

55 years of age and 10 years in office

43.1 (1) A judge who has attained the age of 55 years, has continued in judicial office for at least 10 years and elects early retirement shall be paid an immediate annuity or a deferred annuity, at the option of the judge, calculated in accordance with this section.

Calculation of amount of deferred annuity

(2) The amount of the deferred annuity shall be two thirds of the amount of the salary annexed to the judge's office at the time of the election multiplied by a fraction of which

(a) the numerator is the number of years, to the nearest one tenth of a year, during which the judge has continued in judicial office, and

(b) the denominator is the number of years, to the nearest one tenth of a year, during which the judge would have been required to continue in judicial office in order to be eligible to be paid an annuity under paragraph 42(1)(a) or (b).

Immediate annuity

(3) If a judge exercises the option to receive an immediate annuity, the amount of that annuity is equal to the amount of the deferred annuity, reduced by the product obtained by multiplying

(a) five per cent of the amount of the deferred annuity

by

(b) the difference between sixty and his or her age in years, to the nearest one-tenth of a year, at the time he or she exercises the option.

Second exercise of option

(4) A judge whose option was to receive a deferred annuity may, between the date of that option and the date on which the deferred annuity would be payable, opt for an immediate annuity. An immediate annuity shall be paid to the judge from the date of the second option.

Survivor's annuity

(5) On the death of a judge who has been paid an immediate annuity or a deferred annuity under subsection (1) or (4), the annuity paid to a survivor under subsection 44(2) shall be determined as if the judge were in receipt of a deferred annuity.

Definitions

(6) The definitions in this subsection apply in this section.

deferred annuity means an annuity that becomes payable to a judge at the time that he or she reaches sixty years of age and that continues to be paid during the life of the judge. (*pension différée*)

immediate annuity means an annuity that becomes payable to a judge at the time that he or she exercises an option to receive the annuity and that continues to be paid during the life of the judge. (*pension immédiate*)

judicial office includes the office of an associate judge. (*magistrature*)
2001, c. 7, s. 21; 2006, c. 11, s. 12; 2014, c. 39, s. 323; 2017, c. 33, s. 240; 2022, c. 10, s. 360; 2022, c. 10, s. 371.

Annuities for Survivors

Annuity for surviving spouse

44 (1) Subject to this section, if a judge of a superior court while holding office died or dies after July 10, 1955, the survivor of the judge shall be paid, commencing on July 18, 1983 or immediately after the death of the judge, whichever is later, and continuing during the life of the survivor, an annuity equal to one third of

(a) the salary of the judge at the date of the death of the judge, or

(b) the salary annexed, at the date of death, to the office previously held by the judge of chief justice, senior associate chief justice or associate chief justice, if one of subsections 43(1), (1.1), (2), (2.1) or (2.2) would have applied to the judge if he or she had resigned, been removed or attained the age of retirement, on the day of death.

Judge receiving annuity

(2) Subject to this section, if a judge who, before, on or after July 11, 1955, was granted or paid a pension or annuity under this Act or any other Act of Parliament providing for pensions or annuities to be granted or paid to judges, died or dies after July 10, 1955, the survivor of the judge shall be paid

(a) an annuity equal to one half of the pension or annuity granted or paid to the judge, commencing on July 18, 1983 or immediately after the death of the judge, whichever is later, and continuing during the life of the survivor; or

(b) if a division of the judge's annuity benefits has been made under section 52.14, an annuity equal to one half of the annuity that would have been granted or paid to the judge had the annuity benefits not been divided, commencing immediately after the death of the judge and continuing during the life of the survivor.

Prothonotaries

(3) No annuity shall be paid under this section to the survivor of a prothonotary of the Federal Court if the prothonotary ceased to hold the office of prothonotary before the day on which this subsection comes into force.

Limitation on annuity for survivor

(4) No annuity shall be paid under this section to the survivor of a judge if the survivor became the spouse or began to cohabit with the judge in a conjugal relationship after the judge ceased to hold office.

(5) and (6) [Repealed, R.S., 1985, c. 39 (3rd Supp.), s. 2]

R.S., 1985, c. J-1, s. 44; R.S., 1985, c. 39 (3rd Supp.), s. 2; 1992, c. 51, s. 20; 1996, c. 30, s. 3; 2000, c. 12, ss. 162, 169; 2001, c. 7, s. 22; 2002, c. 8, s. 97; 2006, c. 11, s. 13; 2014, c. 39, s. 324; 2017, c. 20, s. 222; 2017, c. 33, s. 242.

Election for enhanced annuity for survivor

44.01 (1) Subject to the regulations, a judge may elect to have the annuity to be paid to his or her survivor increased so that it is calculated as if the reference to "one half" in subsection 44(2) were read as a reference to "60%" or "75%".

Reduction of annuity

(2) If a judge makes the election, the amount of the annuity granted or paid to the judge shall be reduced in accordance with the regulations as of the date the election takes effect, but the combined actuarial present value of the reduced annuity and the annuity that would be paid to the survivor must not be less than the combined actuarial present value of the annuity granted or paid to the judge and the annuity that would be paid to the survivor, immediately before the reduction is made.

Election to take effect at time of retirement

(3) Subject to subsection (6), an election under this section takes effect on the date that the judge ceases to hold office.

Death within one year after election

(4) Despite anything in this section, when a judge dies within one year after the election takes effect, the annuity payable to the survivor remains that payable under subsection 44(2) and the amount representing the reduction that was made in the amount of the judge's annuity under subsection (2) shall be repaid to the judge's estate or succession, together with interest at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Regulations

(5) The Governor in Council may make regulations respecting

(a) the time, manner and circumstances in which an election is made, is deemed to have been made or is deemed not to have been made, is revoked or is deemed to have been revoked, or ceases to have effect, and the retroactive application of that making, revocation or cessation;

(b) the reduction to be made in the amount of a judge's annuity when the election is made;

(c) the calculation of the amount of the annuity to be paid to the judge and the survivor under subsection (2);

(d) the time, manner and circumstances in which a reduction of a judge's annuity may be returned and interest may be paid; and

(e) any other matter that the Governor in Council considers necessary for carrying out the purposes and provisions of this section.

Transitional

(6) A judge who is in receipt of an annuity on the day on which this section comes into force may make his or her election in accordance with the regulations, and the election takes effect on the day this section comes into force.

Limitation on annuity to survivor

(7) Despite anything in this section, no election may be made under this section for the benefit of a spouse or common-law partner of a judge unless that person was the spouse or common-law partner at the date the judge ceased to hold office.
2001, c. 7, s. 23; 2017, c. 33, s. 243.

Annuity to be prorated between the two survivors

44.1 (1) Notwithstanding section 44, if there are two persons who are entitled to an annuity under that section, each survivor shall receive a share of the annuity prorated in accordance with subsection (2) for his or her life.

Determination of prorated share

(2) The prorated share of each survivor is equal to the product obtained by multiplying the annuity by a fraction of which the numerator is the number of years that the survivor cohabited with the judge, whether before or after his or her appointment as a judge, and the denominator is the total obtained by adding the number of years that each of the survivors so cohabited with the judge.

Years

(3) In determining a number of years for the purpose of subsection (2), a part of a year shall be counted as a full year if the part is six or more months and shall be ignored if it is less.

Waiver

(4) A survivor is not entitled to receive an annuity under section 44 or this section if the survivor has waived his or her entitlement to the annuity under an agreement entered into in accordance with applicable provincial law.
2000, c. 12, s. 163.

Election for former judges

44.2 (1) Subject to the regulations, a judge to whom an annuity has been granted or paid may elect to reduce his or her annuity so that an annuity may be paid to a person who, at the time of the election, is the spouse or common-law partner of the judge but to whom an annuity under section 44 must not be paid.

Reduction of annuity

(2) If a judge makes the election, the amount of the annuity granted or paid to the judge shall be reduced in accordance with the regulations, but the combined actuarial present value of the reduced annuity and the annuity that would be paid to the spouse or common-law partner under subsection (3) must not be less than the actuarial present value of the annuity granted or paid to the judge immediately before the reduction is made.

Payment to person in respect of whom election is made

(3) When the judge dies, the spouse or common-law partner in respect of whom an election was made shall be paid an annuity in an amount determined in accordance with the election, subsection (2) and the regulations.

Death within one year after election

(3.1) Despite anything in this section, when a judge dies within one year after making the election, the election is deemed not to have been made and the amount representing the reduction that was made in the amount of the judge's annuity under subsection (2) shall be repaid to the judge's estate or succession, together with interest at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

Regulations

(4) The Governor in Council may make regulations respecting

(a) the time, manner and circumstances in which an election is made, is deemed to have been made or is deemed not to have been made, is revoked or is deemed to have been revoked, or ceases to have effect, and the retroactive application of that making, revocation or cessation;

(b) the reduction to be made in the amount of a judge's annuity when an election is made;

(c) the amount of the annuity to be paid under subsection (3);

(d) the time, manner and circumstances in which a reduction of a judge's annuity may be returned and interest may be paid; and

(e) any other matter that the Governor in Council considers necessary for carrying out the purposes and provisions of this section.

2000, c. 12, s. 163; 2001, c. 7, s. 24; 2017, c. 33, s. 244.

45 and 46 [Repealed, 1992, c. 51, s. 21]

Lump Sum Payment

Lump sum payment

46.1 Where a judge dies while holding office, a lump sum equal to one sixth of the yearly salary of the judge at the time of death shall be paid to the survivor of the judge or, if there are two survivors, to the survivor who was cohabiting with the judge at the time of death, and if there is no survivor, to the estate or succession of the judge.

1989, c. 8, s. 12; 2000, c. 12, s. 164.

Annuities for Surviving Children

Definition of *child*

47 (1) For the purposes of this section and sections 48 and 49, ***child*** means a child of a judge, including a child adopted legally or in fact, who

(a) is less than eighteen years of age; or

(b) is eighteen or more years of age but less than twenty-five years of age and is in full-time attendance at a school or university, having been in such attendance substantially without interruption since the child of the judge reached eighteen years of age or the judge died, whichever occurred later.

Regulations respecting school attendance

(2) The Governor in Council may make regulations

(a) defining, for the purposes of this Act, the expression "full-time attendance at a school or university" as applied to a child of a judge; and

(b) specifying, for the purposes of this Act, the circumstances under which attendance at a school or university shall be determined to be substantially without interruption.

Annuity for surviving children

(3) If a judge of a superior or county court dies while holding office, or a judge who was granted or paid an annuity after October 5, 1971 dies, an annuity shall be paid to each surviving child of that judge as provided in subsections (4) and (5).

Annuity for children if survivor

(4) Each child of a judge described in subsection (3) shall be paid

(a) if the judge leaves a survivor, an annuity equal to one-fifth of the annuity that is provided for a survivor under subsection 44(1) or (2); and

(b) if there is no survivor or the survivor dies, an annuity equal to two-fifths of the annuity that is provided for a survivor under subsection 44(1) or (2).

Maximum of annuities to children

(5) The total amount of the annuities paid under subsection (4) shall not exceed four-fifths, in the case described in paragraph (4)(a), and eight-fifths, in the case described in paragraph (4)(b), of the annuity that is provided for a survivor under subsection 44(1) or (2).

(6) [Repealed, 2000, c. 12, s. 165]

R.S., 1985, c. J-1, s. 47; R.S., 1985, c. 39 (3rd Supp.), s. 3; 1998, c. 30, s. 8(F); 2000, c. 12, s. 165; 2002, c. 8, s. 98; 2017, c. 33, s. 246.

Apportionment of annuities among surviving children

48 (1) If, in computing the annuities to be paid under subsection 47(3) to the children of a judge referred to in that subsection, it is determined that there are more than four children of the judge to whom an annuity shall be paid, the total amount of the annuities paid shall be apportioned among the children in the shares that the Minister considers just and proper under the circumstances.

Children's annuities, to whom paid

(2) If an annuity under this Act is paid to a child of a judge, payment shall, if the child is less than 18 years of age, be made to the person having the custody and control of the child or, if there is no person having the custody and control of the child, to any person that the Minister directs and, for the purposes of this subsection, the survivor of the judge, except if the child is living apart from the survivor, shall be presumed, in the absence of evidence to the contrary, to be the person having the custody and control of the child.

R.S., 1985, c. J-1, s. 48; 2000, c. 12, s. 166; 2017, c. 33, s. 247; 2023, c. 18, s. 13.

Regulations concerning Inheritance Taxes

Payment of certain taxes out of C.R.F.

49 The Governor in Council may make regulations providing for the payment out of the Consolidated Revenue Fund, on the payment of an annuity under this Act to the survivor or children of a judge or a retired judge, of the whole or any part of the portion of any estate, legacy, succession or inheritance duties or taxes that are payable by the survivor or children with respect to the annuity, as is determined in accordance with the regulations to be attributable to that annuity, and prescribing the amount by which and the manner in which the annuity in that case shall be reduced.

R.S., 1985, c. J-1, s. 49; 2000, c. 12, s. 169; 2017, c. 33, s. 248(E).

Judges' Contributions toward Annuities

Judges appointed before February 17, 1975

50 (1) Every judge appointed before February 17, 1975 to hold office as a judge of a superior or county court shall, by reservation from the judge's salary under this Act, contribute to the Consolidated Revenue Fund one and one-half per cent of that salary.

Judges appointed after February 16, 1975

(2) Every judge appointed after February 16, 1975 to whom subsection (1) does not apply, shall, by reservation from the judge's salary under this Act, contribute

(a) to the Consolidated Revenue Fund an amount equal to six per cent of that salary; and

(b) to the Supplementary Retirement Benefits Account established in the accounts of Canada pursuant to the *Supplementary Retirement Benefits Act*,

(i) prior to 1977, an amount equal to one-half of one per cent of that salary, and

(ii) commencing with the month of January 1977, an amount equal to one per cent of that salary.

Adjustment of contributions

(2.1) A supernumerary judge, a judge who continues in judicial office after having been in judicial office for at least 15 years and whose combined age and number of years in judicial office is not less than 80, a judge of the Supreme Court of Canada who has continued in judicial office on that Court for at least 10 years, or a judge referred to in section 41.1 is not required to contribute under subsections (1) and (2) but is required to contribute, by reservation from salary, to the Supplementary Retirement Benefits Account at a rate of one per cent of his or her salary.

Interest

(2.2) Interest is payable on all contributions refunded as a result of the application of subsection (2.1) at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act.

(3) For the purposes of the *Income Tax Act*, the amounts contributed by a judge pursuant to subsection (1), (2) or (2.1) are deemed to be contributed to or under a registered pension plan.

Amounts to be credited to S.R.B. Account

(4) Where any amount is paid into the Supplementary Retirement Benefits Account pursuant to paragraph (2)(b), an amount equal to the amount so paid shall be credited to that Account.

Definition of *judicial office*

(5) In this section, ***judicial office*** includes the office of an associate judge.
R.S., 1985, c. J-1, s. 50; 1992, c. 51, s. 23; 1999, c. 31, s. 240; 2001, c. 7, s. 25; 2002, c. 8, s. 99; 2006, c. 11, s. 14; 2014, c. 39, s. 325; 2022, c. 10, s. 361; 2022, c. 10, s. 371.

Return of contributions if no annuity

51 (1) If a judge has ceased to hold office otherwise than by reason of death and, at the time he or she ceased to hold office, no annuity under this Act was granted or could be paid to that judge, there shall be paid to the judge, in respect of his or her having ceased to hold that office, an amount equal to the total contributions made by him or her under subsection 50(1) or paragraph 50(2)(a), together with interest, if any, calculated in accordance with subsection (4).

Return of contributions if annuity

(2) If a judge to whom subsection 50(1) applies has ceased to hold office otherwise than by reason of death and that judge is granted or paid an annuity under this Act, there shall be paid to the judge in respect of his or her having ceased to hold that office an amount equal to the total contributions made by the judge under subsection 50(1), together with interest, if any, calculated in accordance with subsection (4), if,

(a) at the time the judge ceased to hold office, there is no person to whom an annuity under this Act could be paid in respect of the judge on his or her death; or

(b) at any time after the judge ceased to hold office but before his or her death, all persons to whom an annuity under this Act could be paid in respect of the judge on his or her death have died or ceased to be eligible to be paid an annuity.

Death benefit

(3) Where, on or at any time after the death of a judge who died while holding office, or the death of a judge who died after ceasing to hold office but to whom no amount has been paid under subsection (1) or (2), there is no person or there is no longer any person to whom an annuity under this Act may be paid in respect of the judge, any amount by which

(a) the total contributions made by the judge under subsection 50(1) or paragraph 50(2)(a), together with interest, if any, calculated pursuant to subsection (4),

exceeds

(b) the total amount, if any, paid to or in respect of the judge as annuity payments under this Act,

shall thereupon be paid as a death benefit to the estate of the judge or, if less than one thousand dollars, as the Minister may direct.

Interest on payments and amounts of contributions

(4) Where an amount becomes payable under subsection (1), (2) or (3) in respect of contributions made by a judge under subsection 50(1) or paragraph 50(2)(a), the Minister shall

(a) determine the total amount of contributions that have been made under that provision by the judge in respect of each year, in this subsection called a "contribution year", in which contributions were made by the judge; and

(b) calculate interest on the amount determined under paragraph (a) in respect of each contribution year, compounded annually,

(i) in respect of each contribution year before 1997,

(A) at the rate of four per cent from December 31 of the contribution year to December 31, 1996, and

(B) at the rate prescribed under the *Income Tax Act* for amounts payable by the Minister of National Revenue as refunds of overpayments of tax under that Act in effect from time to time, from December 31, 1996 to December 31 of the year immediately before the year in which the amount in respect of contributions made by the judge becomes payable, and

(ii) in respect of the 1997 contribution year and each contribution year after 1997, at the rate mentioned in clause (i)(B) from December 31 of the contribution year to December 31 of the year immediately before the year in which the amount in respect of contributions made by the judge becomes payable.

R.S., 1985, c. J-1, s. 51; 1998, c. 30, s. 9; 2002, c. 8, ss. 100(E), 111(E); 2017, c. 33, s. 249(E); 2023, c. 18, s. 13.

Diversion Under Financial Support Order

Diversion of payments to satisfy financial support order

52 (1) If a court in Canada of competent jurisdiction has made an order requiring a recipient of an annuity or other amount payable under section 42, 43, 43.1, 44, 44.1 or 44.2 or subsection 51(1) to pay financial support, amounts so payable to the recipient are subject to being diverted to the person named in the order in accordance with Part II of the *Garnishment, Attachment and Pension Diversion Act*.

Payment deemed to be to former judge

(2) For the purposes of this Part, any payment made pursuant to subsection (1) shall be deemed to have been made to the former judge in respect of whom the payment was made.

R.S., 1985, c. J-1, s. 52; 2000, c. 12, s. 167; 2017, c. 20, s. 224.

Division of Judge's Annuity Benefits on Conjugal Breakdown

Definitions

52.1 The following definitions apply in this section and in sections 52.11 to 52.22.

agreement means an agreement referred to in subparagraph 52.11(2)(b)(ii). (*accord*)

annuity means an annuity payable under section 42, 43 or 43.1. (*pension*)

annuity benefit means an annuity or a return of contributions payable under section 51, and includes amounts payable to a judge under the *Supplementary Retirement Benefits Act*. (*prestation de pension*)

application means an application made under subsection 52.11(1). (*demande*)

court order means an order referred to in paragraph 52.11(2)(a) or subparagraph 52.11(2)(b)(i). (*ordonnance*)

interested party, in relation to an application for division of a judge's annuity benefits, means the judge or the spouse, former spouse or former common-law partner with whom those benefits would be divided under the application. (*intéressé*)

judge includes a former judge who has been granted or paid an annuity. (*juge*)

Minister [Repealed, 2023, c. 18, s. 3]

prescribed means prescribed by regulation. (*Version anglaise seulement*)

spouse, in relation to a judge, includes a person who is a party to a void marriage with the judge. (*époux*)

2006, c. 11, s. 15; 2017, c. 33, s. 250(E); 2023, c. 18, s. 3.

Application for division

52.11 (1) A judge or a spouse, former spouse or former common-law partner of a judge may, in the circumstances described in subsection (2), apply in accordance with the regulations for the division of the judge's annuity benefits between the judge and the spouse, former spouse or former common-law partner.

When application may be made

(2) An application may be made under the following circumstances:

(a) where a court of competent jurisdiction in Canada, in proceedings in relation to divorce, annulment of marriage or separation, has made an order that provides for the annuity benefits to be divided between the interested parties; or

(b) where the interested parties have been living separate and apart for a period of one year or more and, either before or after they began to live separate and apart,

(i) a court of competent jurisdiction in Canada has made an order that provides for the annuity benefits to be divided between them, or

(ii) the interested parties have entered into a written agreement that provides for the annuity benefits to be divided between them.

Notice to interested parties

(3) The Minister shall send to each interested party in accordance with the regulations a notice of the receipt of an application.

2006, c. 11, s. 15.

Objections by interested parties

52.12 (1) An interested party who objects to the division of annuity benefits on any of the grounds described in subsection (2) may submit a notice of objection in writing in accordance with the regulations within 90 days after the day on which notice of the receipt of the application is sent to the interested party under subsection 52.11(3).

Grounds for objection

(2) The grounds for objection are as follows:

(a) the court order or agreement on which the application is based has been varied or is of no force or effect;

(b) the terms of the court order or agreement have been or are being satisfied by other means; or

(c) proceedings have been commenced in a court of competent jurisdiction in Canada to appeal or review the court order or challenge the terms of the agreement.

Documentary evidence

(3) An interested party who submits a notice of objection shall include with that notice documentary evidence to establish the grounds for objection.

2006, c. 11, s. 15.

Approval of division

52.13 (1) Subject to subsections (2) and (3), the Minister shall, as soon as is practicable after the Minister is satisfied that an application meets the requirements of this Act, approve the division of annuity benefits in respect of which the application is made.

When decision to be deferred

(2) When an interested party submits a notice of objection in accordance with section 52.12, the Minister shall

(a) if the objection is made on the grounds referred to in paragraph 52.12(2)(a) or (b), defer a decision on the application until the Minister is able to ascertain to his or her satisfaction whether those grounds have been established; and

(b) if the objection is made on the grounds referred to in paragraph 52.12(2)(c), defer a decision on the application until the final disposition of the proceedings on which those grounds are based.

Refusal of division

(3) The Minister shall refuse to approve the division of annuity benefits if

(a) the application is withdrawn in accordance with the regulations;

(b) a notice of objection has been submitted on grounds referred to in paragraph 52.12(2)(a) or (b) and the Minister is satisfied that those grounds have been established and constitute sufficient reason to refuse the division;

(c) a notice of objection has been submitted on grounds referred to in paragraph 52.12(2)(c) and the court order or agreement is of no force or effect as a result of the proceedings referred to in that paragraph;

(d) the period of cohabitation of the judge and the spouse, former spouse or former common-law partner cannot be determined under subsection 52.14(6); or

(e) the Minister is satisfied, based on evidence submitted by any person, that it would not be just to approve the division.

Exception

(4) Notwithstanding subsection (3), the Minister may approve the division of annuity benefits on the basis of an order of a court issued pursuant to any proceedings referred to in paragraph 52.12(2)(c).

Transitional

(5) The Minister may approve the division of the annuity benefits even though the court order or agreement on which the application is based was made or entered into before the day on which subsection 52.11(1) comes into force.
2006, c. 11, s. 15.

Division of annuity benefits

52.14 (1) Subject to subsections (3) and (3.1), where the Minister approves the division of the annuity benefits of a judge, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

(a) an amount representing 50% of a proportion, determined in accordance with subsection (2), of the value of the annuity that is attributed, in accordance with the regulations, to the period subject to division; or

(b) if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Proportion of annuity value

(2) The proportion of the value of an annuity referred to in paragraph (1)(a) is

(a) subject to paragraph (b), the period subject to division divided by the judge's number of years of service until the judge's actual date of retirement or, in the case of a judge who has not yet retired, until the judge's expected date of retirement determined in accordance with the regulations; or

(b) in the case of a judge who had resigned or been removed from office by reason of an infirmity, the quotient obtained by dividing

(i) the period, measured to the nearest one tenth of a year, from the beginning of the period subject to division to the earlier of the end of the period of cohabitation and the judge's expected date of retirement if the infirmity had not occurred, determined in accordance with the regulations,

by

(ii) the judge's number of years of service up to the judge's expected date of retirement if the infirmity had not occurred, determined in accordance with the regulations.

Return of contributions

(3) Subject to subsections (3.1) and (4), if the Minister approves the division of the annuity benefits of a judge who was not eligible to be paid an annuity at the end of the period subject to division, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

(a) an amount equal to 50% of the contributions made by the judge under section 50 during the period subject to division plus 50% of any interest payable on those contributions; or

(b) if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Return of contributions — infirm annuitant

(3.1) Subject to subsection (4), if the Minister approves the division of the annuity benefits of a judge who had been granted an annuity by reason of an infirmity but was not otherwise eligible to be paid an annuity at the end of the period subject to division, the spouse, former spouse or former common-law partner shall be accorded a share of the annuity benefits consisting of

(a) an amount equal to 50% of the contributions that would have been made during the period described in subparagraph (2)(b)(i) if the judge had continued in office, on the basis of the salary annexed to the office held by the judge at the time the judge ceased to hold office, plus 50% of any interest payable on those contributions; or

(b) if the terms of the court order or agreement on which the application for division is based provide for the payment to the spouse, former spouse or former common-law partner of a share of annuity benefits that is less than the amount determined under paragraph (a), that lesser share.

Election by spouse

(4) A judge's spouse, former spouse or former common-law partner who is entitled to be accorded a share of the judge's annuity benefits under subsection (3) or (3.1) may elect in the manner prescribed by the regulations, in lieu of receiving that share, to receive — at the time the judge becomes eligible to be granted or paid an annuity, or at the time the judge would have become eligible to be paid an annuity had the judge not resigned or been removed from office by reason of an infirmity — a share of the annuity benefits for which the judge is or would have been eligible, determined as provided in subsection (1).

Death or resignation of judge

(5) If an election has been made under subsection (4) and, before becoming eligible to be paid an annuity, the judge dies, resigns, is removed from office or otherwise ceases to hold office, the spouse, former spouse or former common-law partner shall instead be paid immediately the portion of the judge's contributions to which the spouse was otherwise entitled under subsection (3) or (3.1).

Determination of periods of division and cohabitation

(6) For the purposes of this section and sections 52.15 and 52.16,

(a) a period subject to division is the portion of a period of cohabitation during which a judge held office under this Act, measured in years to the nearest one tenth of a year; and

(b) a period of cohabitation is the period during which interested parties cohabited, as specified by the court order or agreement on which an application for division is based or, if none is specified, as determined in accordance with the regulations on the basis of evidence submitted by either or both of the interested parties.

Death of spouse, former spouse or former common-law partner

(7) A share of annuity benefits that cannot be accorded under subsection (1) by reason only of the death of the spouse, former spouse or former common-law partner shall be paid to that person's estate or succession.

Adjustment of accrued benefits

(8) Where the Minister approves the division of a judge's annuity benefits, the annuity benefits payable to the judge under this Act shall be adjusted in accordance with the regulations.

Notice of division

(9) The Minister shall send a notice of the division of annuity benefits in the prescribed manner to each interested party.

2006, c. 11, s. 15; 2015, c. 3, s. 128(F); 2017, c. 20, s. 225; 2017, c. 33, s. 251(E).

Transfer and payment of share

52.15 (1) The spouse's, former spouse's or former common-law partner's share of a judge's annuity benefits shall be accorded by

(a) the transfer of the specified portion of that share to a retirement savings plan established for the spouse, former spouse or former common-law partner that is of the prescribed kind for the purposes of section 26 of the *Pension Benefits Standards Act, 1985*; and

(b) the payment of the remainder of that share, if any, to the spouse, former spouse or former common-law partner.

Calculation of specified portion

(2) For the purpose of paragraph (1)(a), the specified portion of a spouse's, former spouse's or former common-law partner's share of a judge's annuity benefits is

(a) if that share consists of a portion of the judge's contributions, that portion; or

(b) in any other case, the amount determined by the formula

$$(A \times B \times C) / D$$

where

A is the share of the annuity benefits,
B is the period subject to division,
C is the defined benefit limit, within the meaning of regulations made under the *Income Tax Act*, for the calendar year in which the share is accorded, and
D is the portion of the annuity that is attributed, in accordance with the regulations, to the period subject to division.

Tax treatment

(3) For the purposes of the *Income Tax Act*, an amount transferred to a retirement savings plan in accordance with paragraph (1)(a) is deemed to be an amount transferred from a registered pension plan in accordance with subsection 147.3(5) of that Act.

2006, c. 11, s. 15.

Further divisions precluded

52.16 Where a division of annuity benefits is made in respect of a period subject to division under section 52.14, no further divisions may be made under that section in respect of that period.

2006, c. 11, s. 15.

Amounts transferred in error

52.17 Where the amount transferred or paid in respect of a spouse, former spouse or former common-law partner, or paid to the estate or succession of a deceased spouse, former spouse or former common-law partner, under section 52.14 or 52.15 exceeds the amount that the spouse, former spouse or former common-law partner was entitled to have transferred or paid or the estate or succession was entitled to be paid, the amount in excess constitutes a debt due to Her Majesty in right of Canada by that spouse, former spouse or former common-law partner or that estate or succession.

2006, c. 11, s. 15.

Amounts paid before adjustment

52.18 Where an adjustment is made under subsection 52.14(8) and an amount is or has been paid to a judge that exceeds the amount to which the judge is or would have been entitled under this Act after the effective date of that adjustment, the amount in excess constitutes a debt due to Her Majesty in right of Canada by the judge and may be recovered at any time by set-off against any annuity benefit that is payable to the judge under this Act, without prejudice to any other recourse available to Her Majesty in right of Canada with respect to its recovery.

2006, c. 11, s. 15.

Void transactions

52.19 (1) Amounts that a spouse, former spouse or former common-law partner is or may become entitled to under section 52.14 are not capable of being assigned, charged, anticipated or given as security, and any transaction that purports to assign, charge, anticipate or give as security any such amount is void.

Exemption from attachment, etc.

(2) Amounts that a spouse, former spouse or former common-law partner is or may become entitled to under section 52.14 are exempt from attachment, seizure and execution, either at law or in equity.

2006, c. 11, s. 15.

Access of spouse, etc. to division of benefits

52.2 Notwithstanding any other provision of this Act, a court of competent jurisdiction may order, for any period that the court determines, that no action be taken by the Minister under this Act that may prejudice the ability of the spouse, common-law partner, former spouse or former common-law partner to make an application or obtain the division of the judge’s annuity benefits under this Act.

2006, c. 11, s. 15.

Information for spouse, etc. re benefits

52.21 Subject to the regulations, the Minister shall, at the request of a spouse, common-law partner, former spouse or former common-law partner of a judge, provide that person with information prescribed by the regulations concerning the benefits that are or may become payable to or in respect of that judge under this Act.

2006, c. 11, s. 15.

Regulations

52.22 The Governor in Council may make regulations

(a) respecting the manner of making an application, the information that is to be provided in it and the documents that are to accompany it;

(b) prescribing the circumstances in which interested parties are deemed to have been living separate and apart for the purposes of paragraph 52.11(2)(b);

(c) prescribing circumstances in which a person may make an application or object to an application on behalf of another person, or may act on behalf of another person in proceeding with an application made by that other person;

(d) prescribing circumstances in which, the manner in which and the conditions under which the personal representative or the liquidator of the succession of a deceased judge or of a deceased spouse, former spouse or former common-law partner of a judge may make or object to an application or may proceed with an application that was made by or on behalf of the judge, spouse, former spouse or former common-law partner;

(e) when regulations are made under paragraph (c) or (d), respecting the manner in which and the extent to which any provision of this Act applies to a person referred to in that paragraph or in the circumstances prescribed by those regulations, and adapting any provision of this Act to those persons or circumstances;

(f) prescribing circumstances in which, the manner in which and the conditions under which a spouse, former spouse or former common-law partner of a judge may make an application after the death of the judge;

(g) respecting the notice of receipt of applications to be given to interested parties under subsection 52.11(3);

(h) respecting the withdrawal of applications;

(i) respecting the manner of submitting notices of objection under subsection 52.12(1);

(j) for determining the value of an annuity to be attributed to a period subject to division, for the purposes of subsection 52.14(1);

(k) for determining the expected date of retirement of a judge, for the purposes of subsections 52.14(2) and (3.1);

(l) respecting the actuarial assumptions on which the determinations made under paragraphs (j) and (k) are to be based;

(m) prescribing the manner in which a judge's spouse, former spouse or former common-law partner may make an election under subsection 52.14(4), and respecting the notification of a judge of such an election;

(n) prescribing, for the purposes of paragraph 52.14(6)(b), the manner of determining the period during which interested parties cohabited;

(o) respecting the adjustment of the annuity benefits payable to a judge under subsection 52.14(8), including the determination of the effective date of the adjustment;

(p) generally respecting the division of the annuity benefits of a judge who resigns or is removed from office by reason of an infirmity;

(q) respecting the manner in which and the extent to which any provision of this Act applies, notwithstanding the other provisions of this Act, to a judge, to a spouse, former spouse, common-law partner or former common-law partner of a judge or to any other person when annuity benefits are divided under section 52.14, and adapting any provision of this Act to those persons;

(r) for determining the portion of an annuity to be attributed to a period subject to division, for the purposes of subsection 52.15(2);

(s) for the purposes of section 52.21, respecting the manner in which a request for information is to be made by a spouse, former spouse, common-law partner or former common-law partner of a judge, prescribing the information that is to be provided to that person concerning the benefits that are or may become payable to or in respect of the judge and specifying circumstances in which a request may be refused;

(t) prescribing remedial action that may be taken in prescribed circumstances in response to administrative error or the provision of erroneous information;

(u) prescribing any matter or thing that may be prescribed under sections 52.1 to 52.21; and

(v) generally for carrying out the purposes and provisions of sections 52.1 to 52.21 and this section.

2006, c. 11, s. 15; 2017, c. 20, s. 226(F).

Payment of Salaries, Allowances, Annuities and Other Amounts

Amounts payable out of C.R.F.

53 (1) The salaries, allowances and annuities payable under Parts I to III and the amounts payable under sections 46.1, 51 and 52.15 shall be paid out of the Consolidated Revenue Fund.

Prorating

(2) For any period less than a year, the salaries and annuities payable shall be paid pro rata.

Monthly instalments

(3) The salaries and annuities payable shall be paid by monthly instalments.

First payment

(4) The first payment of salary of any judge shall be made pro rata on the first day of the month that occurs next after the appointment of the judge.

Legal representatives

(5) If a judge resigns the office of judge or dies, the judge or his or her legal representatives are entitled to receive such proportionate part of the judge's salary as has accrued during the time that the judge executed the office since the last payment.
R.S., 1985, c. J-1, s. 53; 1989, c. 8, s. 13; 2002, c. 8, s. 111(E); 2006, c. 11, s. 16; 2023, c. 18, s. 4.

Absence from Judicial Duties

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of the superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

Notification of leave by chief justice

(1.1) Whenever a leave of absence is granted under paragraph (1)(a), the chief justice of the superior court shall, without delay, notify the Minister and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Notification of leave by Minister

(1.2) Whenever a leave of absence is granted under paragraph (1)(b), the Minister shall, without delay, notify the chief justice of the superior court and, in the case of provincial or territorial courts, the minister of justice or the attorney general of the province or territory.

Report by chief justice of absence

(2) If it appears to the chief justice of a superior court that a judge of the court is absent from the judge's judicial duties without the approval required by subsection (1), the chief justice shall report the absence to the Minister.

Absentee judge to report

(3) Whenever a judge of a superior court is absent from the judge's judicial duties for a period of more than 30 days, the judge shall report the absence and the reasons for it to the Minister.

(4) [Repealed, 2017, c. 33, s. 252]

R.S., 1985, c. J-1, s. 54; 1992, c. 51, s. 24; 1996, c. 30, s. 4; 1999, c. 3, s. 76; 2002, c. 7, s. 194, c. 8, s. 101; 2012, c. 31, s. 218; 2017, c. 33, s. 252; 2023, c. 18, s. 13.

Extra-judicial Employment

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

R.S., 1985, c. J-1, s. 55; 2002, c. 8, s. 102(E).

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator on any commission or on any inquiry or other proceeding unless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Council; or

(b) in the case of any matter within the legislative authority of the legislature of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

Acting as statutory assessor or arbitrator

(2) Subsection (1) does not apply to judges acting as arbitrators or assessors of compensation or damages under any public Act, whether of general or local application, of Canada or of a province, whereby a judge is required or authorized without authority from the Governor in Council or lieutenant governor in council to assess or ascertain compensation or damages.

R.S., 1985, c. J-1, s. 56; 1996, c. 10, s. 233.

Authorization

56.1 (1) Notwithstanding section 55, Madam Justice Louise Arbour of the Ontario Court of Appeal is authorized to take a leave from her judicial duties to serve as Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.

Expenses

(2) Madam Justice Louise Arbour may receive moving or transportation expenses and reasonable travel and other expenses, in connection with her service as Prosecutor, from the United Nations.

Leave without pay

(3) Madam Justice Louise Arbour may elect to take a leave of absence without pay for the purpose described in subsection (1), in which case she is not entitled to receive any salary or allowances under this Act for the duration of the leave, but may receive remuneration from the United Nations for her service as Prosecutor.

Ceasing contributions

(4) If Madam Justice Louise Arbour elects to take a leave of absence without pay under subsection (3), she shall not continue the contributions required by section 50 for the duration of the leave and that section does not apply to her for the duration of the leave, which duration shall not be counted as time during which she held judicial office for the purposes of sections 28, 29 and 42.

Deemed salary in event of death

(5) For the purposes of subsections 44(1) and (2), section 46.1 and subsection 47(3), if Madam Justice Louise Arbour dies while on a leave of absence without pay, she is deemed to be in receipt at the time of death of the salary that she would have been receiving if she had not been absent on leave without pay.
1996, c. 30, s. 5.

Extra Remuneration

No extra remuneration

57 (1) Except as provided in subsection (3), no judge shall accept any salary, fee, remuneration or other emolument or any expenses or allowances for acting in any capacity described in subsection 56(1) or as administrator or deputy of the Governor General or for performing any duty or service, whether judicial or executive, that the judge may be required to perform for or on behalf of the Government of Canada or the government of a province.

Exception

(2) The right of a judge to receive remuneration under any Act of the legislature of a province, other than for acting in any capacity described in subsection 56(1), is not affected by subsection (1), but no judge is entitled to receive remuneration under any such Act or Acts in an aggregate amount exceeding $3,000 per annum.

Expenses excepted

(3) In the cases described in subsection (1), a judge may receive his or her moving or transportation expenses and the reasonable travel and other expenses incurred by him or her away from his or her ordinary place of residence while acting in any such capacity or

in the performance of any such duty or service, in the same amount and under the same conditions as if the judge were performing a function or duty as such judge, if those expenses are paid in respect of any matter within the legislative authority of Parliament, by the Government of Canada, and in respect of any matter within the legislative authority of the legislature of a province, by the government of the province.
R.S., 1985, c. J-1, s. 57; 2002, c. 8, s. 103(E).

PART II

Canadian Judicial Council

58 [Repealed, 2023, c. 18, s. 5]

Constitution of the Council

Council established

59 (1) There is hereby established a Council, to be known as the Canadian Judicial Council, consisting of

(a) the Chief Justice of Canada, who shall be the chairperson of the Council;

(b) the chief justice and any senior associate chief justice and associate chief justice of each superior court or branch or division thereof; and

(c) [Repealed, 2017, c. 33, s. 253]

(d) the Chief Justice of the Court Martial Appeal Court of Canada.

(e) [Repealed, 2002, c. 8, s. 104]

(2) and (3) [Repealed, 1999, c. 3, s. 77]

Substitute member

(4) Each member of the Council may appoint a judge of that member's court to be a substitute member of the Council and the substitute member shall act as a member of the Council during any period in which he or she is appointed to act, but the Chief Justice of Canada may, in lieu of appointing a member of the Supreme Court of Canada, appoint any former member of that Court to be a substitute member of the Council.

R.S., 1985, c. J-1, s. 59; 1992, c. 51, s. 25; 1996, c. 30, s. 6; 1999, c. 3, s. 77; 2002, c. 7, s. 195, c. 8, s. 104; 2017, c. 33, s. 253; 2023, c. 18, s. 6(E).

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of Council

(2) In furtherance of its objects, the Council may

(a) establish conferences of chief justices and associate chief justices; and

(b) establish seminars for the continuing education of judges, including seminars on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination.

(c) [Repealed, 2023, c. 18, s. 7]

(d) [Repealed, 2023, c. 18, s. 7]

Seminars related to sexual assault law

(3) The Council should ensure that seminars on matters related to sexual assault law established under paragraph (2)(b)

(a) are developed after consultation with persons, groups or organizations the Council considers appropriate, such as sexual assault survivors and persons, groups and organizations that support them, including Indigenous leaders and representatives of Indigenous communities; and

(b) include, where the Council finds appropriate, instruction in evidentiary prohibitions, principles of consent and the conduct of sexual assault proceedings, as well as education regarding myths and stereotypes associated with sexual assault complainants.

R.S., 1985, c. J-1, s. 60; 1992, c. 51, s. 26; 2002, c. 8, s. 105; 2021, c. 8, s. 2; 2023, c. 7, s. 2; 2023, c. 18, s. 7.

Meetings of Council

61 (1) The Council shall meet at least once a year.

Work of Council

(2) Subject to this Act, the work of the Council shall be carried on in such manner as the Council may direct.

By-laws

(3) The Council may make by-laws

(a) respecting the calling of meetings of the Council;

(b) respecting the conduct of business at meetings of the Council, including the fixing of quorums for such meetings, the establishment of committees of the Council and the delegation of duties to any such committees; and

(c) respecting the processes and proceedings under Part IV.

R.S., 1985, c. J-1, s. 61; 2023, c. 18, s. 8.

Employment of counsel and assistants

62 The Council may engage the services of any persons that it considers necessary for carrying out its objects and duties, and also the services of counsel to assist the Council

in the processes and proceedings under Part IV.
R.S., 1985, c. J-1, s. 62; 2023, c. 18, s. 9.

Report — seminars

62.1 (1) Within 60 days after the end of each calendar year, the Council should submit to the Minister a report on the seminars referred to in paragraph 60(2)(b) on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination, that were offered in the preceding calendar year. The report should include the following information:

(a) the title and a description of the content of each seminar, its duration and the dates on which it was offered; and

(b) the number of judges who attended each seminar.

Tabling of report

(2) The Minister shall cause a copy of any report received to be tabled in each House of Parliament on any of the first 10 days on which that House is sitting after the Minister receives the report.

2021, c. 8, s. 3; 2023, c. 7, s. 3.

63 [Repealed, 2023, c. 18, s. 10]

64 [Repealed, 2023, c. 18, s. 10]

65 [Repealed, 2023, c. 18, s. 10]

65.1 [Repealed, 2023, c. 18, s. 10]

66 [Repealed, 2023, c. 18, s. 10]

67 [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 5]

68 [Repealed, R.S., 1985, c. 16 (3rd Supp.), s. 6]

69 [Repealed, 2023, c. 18, s. 10]

70 [Repealed, 2023, c. 18, s. 10]

71 [Repealed, 2023, c. 18, s. 10]

PART III

Administration of Federal Judicial Affairs

72 [Repealed, 2023, c. 18, s. 11]

Commissioner for Federal Judicial Affairs

Commissioner for Federal Judicial Affairs

73 There shall be an officer, called the Commissioner for Federal Judicial Affairs, who shall have the rank and status of a deputy head of a department and who shall be appointed by the Governor in Council after consultation by the Minister with the Council or such committee thereof as is named for the purpose by the Council.

1976-77, c. 25, s. 17.

Duties and functions of Commissioner

74 (1) It shall be the duty and function of the Commissioner, under the Minister, to

(a) act as the deputy of the Minister in performing all such duties and functions in relation to the administration of Part I as fall, by law, within the responsibility of the Minister;

(b) prepare budgetary submissions for the requirements of the Council;

(c) be responsible for any other administrative arrangements that are necessary to ensure that all reasonable requirements, including those for premises, equipment and other supplies and services and for officers, clerks and employees of the Council for the carrying out of its operations, are provided for in accordance with law; and

(d) do such other things as the Minister may require in connection with any matter or matters falling, by law, within the Minister's responsibilities for the proper functioning of the judicial system in Canada.

Interpretation of subsection (1)

(2) It is hereby declared for greater certainty that such of the duties and functions of the Minister as are, by paragraphs (1)(a) to (d), subject to be performed by the Commissioner do not form part of the duties and functions assigned to the Minister by the *Department of Justice Act*.

R.S., 1985, c. J-1, s. 74; 2002, c. 8, s. 108.

Registrar of the Supreme Court of Canada

Duties and functions

75 (1) The duties and functions described in paragraphs 74(1)(a) to (c) shall, in relation to the Supreme Court of Canada and the judges thereof, be carried out by the Registrar of the Court, who may, for that purpose, utilize the services of other persons on the staff of the Court.

Registrar deemed deputy head

(2) The Registrar of the Supreme Court of Canada shall, for the purposes of the *Public Service Employment Act* and other Acts of Parliament and for purposes relating to the duties and functions of the Registrar under this section, be deemed to be the deputy head of the portion of the federal public administration appointed under subsection 12(2) of the *Supreme Court Act*.

R.S., 1985, c. J-1, s. 75; 2003, c. 22, s. 224(E).

76 [Repealed, 2002, c. 8, s. 109]

Commissioner's Staff

Appointment

77 The officers, clerks and employees who are required by the Commissioner to carry out the Commissioner's duties and functions under section 74 shall be appointed under the *Public Service Employment Act*.

R.S., 1985, c. J-1, s. 77; 2002, c. 8, s. 110.

Commissioner is deputy head

78 The Commissioner and the officers, clerks and employees appointed under section 77 shall be a portion of the federal public administration that is separate from the Department of Justice and of which the Commissioner shall be the deputy head.

R.S., 1985, c. J-1, s. 78; 2002, c. 8, s. 110; 2003, c. 22, s. 224(E).

PART IV

Conduct Review Process

DIVISION 1

Complaints Concerning Judges

Definition

Definition of *judicial office*

79 In this Division, ***judicial office*** includes the office of an associate judge.

2023, c. 18, s. 12; 2022, c. 10, s. 375.

Removal from Office

Justification

80 For the purposes of this Division, the removal from office of a judge is justified only if, for any of the following reasons, the judge's continuation in office would undermine public confidence in the impartiality, integrity or independence of the judge or of their office to such an extent that it would render the judge incapable of executing the functions of judicial office:

(a) infirmity;

(b) misconduct;

(c) failure in the due execution of judicial office;

(d) the judge is in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of judicial office.

2023, c. 18, s. 12.

Rosters

Establishment of roster of judges

81 (1) The Council shall establish a roster of superior court judges who may be designated as members of a panel established under this Division. The judges on the roster must not be members of the Council.

Number

(2) The number of judges on the roster is set at the discretion of the Council.

Recommendation

(3) The naming of a judge to the roster must be made on the recommendation of the Canadian Superior Courts Judges Association.

Term

(4) A judge named to the roster remains on it for four years unless they cease to hold judicial office or request to be removed from the roster. When the four-year term ends, the judge may be renamed to the roster on the recommendation of the Canadian Superior Courts Judges Association.

2023, c. 18, s. 12.

Establishment of lay persons

82 (1) The Council shall establish a roster of lay persons who may be designated as members of a review panel or full hearing panel established under this Division.

Number

(2) The number of persons on the roster is set at the discretion of the Council.

Conditions

(3) To be named to the roster, a person must

(a) never have been admitted to the bar of any province or to the Chambre des notaires du Québec;

(b) never have worked as a paralegal in Canada; and

(c) meet the other selection criteria established by the Council.

Selection criteria made public

(4) The Council shall make public the selection criteria that it has established for the purpose of paragraph (3)(c).

Term

(5) A person named to the roster of lay persons remains on it for four years unless they request to be removed from the roster or, in the opinion of the Council, they cease to meet the conditions set out in subsection (3). When the four-year term ends, the person may be renamed to the roster.

2023, c. 18, s. 12.

Official languages

83 In naming persons to the roster of judges and to the roster of lay persons, the Council shall take into account the fact that the proceedings of panels established under this Division will be in either or both official languages.

2023, c. 18, s. 12.

Diversity

84 The Council shall name persons who reflect the diversity of the Canadian population to the roster of judges and to the roster of lay persons.

2023, c. 18, s. 12.

Rosters available to public

85 The Council shall make the roster of judges and the roster of lay persons available to the public.

2023, c. 18, s. 12.

Complaints

Complaints

86 (1) Complaints may be made to the Council, in the form specified by the Council, in respect of a judge of a superior court for any reason referred to in paragraphs 80(a) to (d).

Complaint by Council

(2) The Council may make a complaint only if two of its members have reasonable grounds to believe that the public's confidence in the impartiality, integrity or independence of the judge or of the judicial office of the judge could be undermined for any reason referred to in paragraphs 80(a) to (d).

Anonymous complaints

(3) A complaint may be made anonymously, but such a complaint may be dealt with only if two members of the Council have reasonable grounds to believe that the public's confidence in the impartiality, integrity or independence of the judge or of the judicial office of the judge could be undermined for any reason referred to in paragraphs 80(a) to (d).

2023, c. 18, s. 12.

Notice to complainant

87 The Council shall establish policies respecting the notifying of complainants of any decisions made under this Division.

2023, c. 18, s. 12.

Screening Officer

Designation

88 The Council may designate as a screening officer one or more persons, including a judge, who meets the criteria specified by the Council.

2023, c. 18, s. 12.

Referral to screening officer

89 The Council shall refer every complaint to a screening officer, other than a complaint made by the Council itself or an anonymous complaint.

2023, c. 18, s. 12.

Dismissal of complaint

90 (1) Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it

(a) is frivolous, vexatious or made for an improper purpose or is an abuse of process;

(b) was not made for a reason referred to in paragraphs 80(a) to (d); or

(c) does not meet the other screening criteria specified by the Council.

Screening criteria to be made public

(2) The Council shall make public the screening criteria that it has established for the purpose of paragraph (1)(c).

Restriction

(3) A screening officer shall not dismiss a complaint that alleges sexual misconduct or sexual harassment or that alleges discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*.

2023, c. 18, s. 12.

Referral to Council

91 If a screening officer does not dismiss a complaint, they shall refer it to the Council for the designation of a reviewing member.

2023, c. 18, s. 12.

Reviewing Member

Designation

92 In the case of a complaint made by the Council itself or an anonymous complaint, or on receipt of a complaint referred to it under section 91, the Council shall designate one of its members to review the complaint.

2023, c. 18, s. 12.

Written submissions

93 The reviewing member shall give the judge who is the subject of the complaint an opportunity to make written submissions about the complaint within the time limit established by the Council for the purpose of this section.

2023, c. 18, s. 12.

Dismissal of complaint

94 (1) The reviewing member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

Communication of dismissal

(2) If the reviewing member dismisses the complaint, they shall inform the complainant in writing of their decision and the reasons for it.

Exclusion

(3) The reasons shall not include information that is confidential or personal, or that is not in the public interest to disclose.

2023, c. 18, s. 12.

Referral to Council

95 If the reviewing member does not dismiss the complaint, they shall refer it to the Council for the establishment of a review panel.

2023, c. 18, s. 12.

Notice of decision

96 The reviewing member shall give notice of their decision to the judge who is the subject of the complaint and to the chief justice of the court of which the judge is a member.

2023, c. 18, s. 12.

Provision of information

97 After the review panel is established, the reviewing member shall provide it with every document in their possession that relates to the complaint. The reviewing member may also provide the review panel with their observations about the complaint and their recommendations about how it should be resolved.

2023, c. 18, s. 12.

Review Panel

Establishment

98 (1) Subject to subsection (2), on receipt of a complaint referred to it under section 95, the Council shall establish a review panel consisting of the following persons designated by the Council to review the complaint:

(a) a member of the Council;

(b) a judge named in the roster of judges; and

(c) a person named in the roster of lay persons.

Direction to review new complaint

(2) If a complaint is referred to the Council under section 95 and a review panel established to review a previous complaint involving the same judge has not yet made a decision in respect of that complaint, the Council may direct the review panel to also review the new complaint.

2023, c. 18, s. 12.

Written submissions

99 The review panel shall give the judge who is the subject of the complaint and chief justice of the court of which the judge is a member an opportunity to provide written submissions within the time limit established by the Council for the purpose of this section.

2023, c. 18, s. 12.

Basis of decisions

100 The review panel shall make its decision only on the basis of the substance of the complaint, any information provided under section 97, any written submissions provided under section 99 and any other document that it considers relevant.

2023, c. 18, s. 12.

Referral to Council

101 The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge’s removal from office could be justified.

2023, c. 18, s. 12.

Dismissal of complaint or action

102 If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances:

(a) issue a private or public expression of concern;

(b) issue a private or public warning;

(c) issue a private or public reprimand;

(d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;

(e) order the judge to take specific measures, including attending counselling or a continuing education course;

(f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);

(g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

2023, c. 18, s. 12.

Notice of decision and reasons

103 (1) The review panel shall give notice of its decision and the reasons for it to

(a) the judge who is the subject of the complaint;

(b) the chief justice of the court of which that judge is a member; and

(c) the Council.

Communication of dismissal

(2) If the review panel dismisses the complaint, it shall inform the complainant in writing of its decision and the reasons for it.

Exclusion

(3) The reasons shall not include information that is confidential or personal, or that is not in the public interest to disclose.

2023, c. 18, s. 12.

Request to establish panel

104 If the review panel takes any action under section 102, the judge who is the subject of the complaint may, within 30 days after the day on which the review panel sends the judge a notice informing the judge of its decision, request that the Council establish a reduced hearing panel to review the complaint.

2023, c. 18, s. 12.

Provision of information

105 If a reduced hearing panel or a full hearing panel is established in respect of a complaint that was before a review panel, the review panel shall provide to the presenting counsel in respect of the hearing panel all the information that was before it and the decision and reasons it provided under section 103.

2023, c. 18, s. 12.

Hearing Panels

Presenting Counsel

Designation

106 (1) When it establishes a reduced hearing panel or a full hearing panel, the Council shall designate one of its members to designate a lawyer of at least 10 years' standing at the bar of any province to act as presenting counsel in respect of the hearing panel.

Restriction

(2) The member of the Council who designates the presenting counsel shall not be designated as any of the following:

(a) a member of the reduced hearing panel or the full hearing panel;

(b) a member of any appeal panel established in respect of any decision of the reduced hearing panel or the full hearing panel.

Replacement

(3) The presenting counsel may at any time be replaced by another presenting counsel designated in accordance with subsection (1).

2023, c. 18, s. 12.

Role

107 The role of the presenting counsel consists of preparing a statement of allegations against a judge who is the subject of a complaint before a reduced hearing panel or full hearing panel, as the case may be, and presenting evidence. The presenting counsel is also responsible for bringing an appeal and presenting arguments in an appeal.

2023, c. 18, s. 12.

Instructions

108 (1) The presenting council shall take instructions from the Council member who designated them.

Absence or incapacity

(2) In the event of the absence or incapacity of the Council member who designated the presenting counsel, the Council may designate another Council member to give instructions to the presenting counsel.

2023, c. 18, s. 12.

Standards of conduct

109 In fulfilling their responsibilities, the presenting counsel shall conduct themselves in accordance with the standards and principles that govern the conduct of Crown prosecutors, with any modifications that may be necessary.

2023, c. 18, s. 12.

Reduced Hearing Panel

Establishment

110 (1) Subject to subsection (2), on receipt of a request made under section 104, the Council shall establish a reduced hearing panel consisting of the following persons designated by it to review the complaint to which the request relates:

(a) a member of the Council;

(b) a judge named in the roster of judges; and

(c) a lawyer of at least 10 years' standing at the bar of any province.

Direction to review new complaint

(2) If a request is made under section 104 by a judge who has previously made a request under that section and the reduced hearing panel established in respect of the previous request has not yet made a decision in respect of the complaint to which the previous request relates, the Council may direct the reduced hearing panel to also review the new complaint.

2023, c. 18, s. 12.

Decision and reasons not considered

111 In considering the complaint, the reduced hearing panel shall not consider the decision of the review panel that caused the judge who is the subject of the complaint to make the request under section 104 or the reasons for that decision.

2023, c. 18, s. 12.

Referral of complaint to Council

112 The reduced hearing panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the removal from office of the judge who is the subject of the complaint could be justified.

2023, c. 18, s. 12.

Dismissal or actions

113 If the reduced hearing panel does not refer the complaint to the Council under section 112, it may dismiss the complaint or take one or more of the actions referred to in paragraphs 102(a) to (g) if it considers it appropriate to do so in the circumstances.

2023, c. 18, s. 12.

Notice of decision and reasons

114 The reduced hearing panel shall give notice of its decision and the reasons for it to

(a) the judge who is the subject of the complaint;

(b) the chief justice of the court of which that judge is a member;

(c) the Council; and

(d) the presenting counsel.

2023, c. 18, s. 12.

Decision and reasons made public

115 The Council shall make public the reduced hearing panel's decision and the reasons for it, as soon as feasible after receiving them, if the reduced hearing panel's hearings were public. If they were not public, the Council shall make public as much of the decision and reasons as possible having regard to the reasons for holding the hearings, or part of them, in private.

2023, c. 18, s. 12.

Right of appeal

116 The judge to whom the complaint relates and the presenting counsel may respectively, within 30 days after the day on which the reduced hearing panel sends them a notice of its decision, file with the Council a notice appealing the decision.

2023, c. 18, s. 12.

Full Hearing Panel

Establishment

117 (1) Subject to subsection (3), on receipt of a referral of a complaint made under section 101 or 112, the Council shall establish a full hearing panel consisting of the following persons to review the complaint:

(a) two members of the Council who are designated by it;

(b) a judge named in the roster of judges who is designated by it;

(c) a person named in the roster of lay persons who is designated by it; and

(d) a lawyer who is a member of the bar of a province and who is designated in accordance with subsection (2).

Designation of lawyer

(2) The lawyer referred to in paragraph (1)(d) is to be designated by the Minister. However, if the full hearing panel is being established as the result of a request by the Minister under section 148 or the Minister does not designate a lawyer within 30 days after the day on which the Minister receives written notice from the Council that a full hearing panel is to be established, the lawyer is to be designated by the Council.

Direction to review new complaint

(3) If a complaint is referred to the Council under section 101 or 112, and a full hearing panel established to review a previous complaint or to consider a request made under

section 148 involving the same judge has not yet made a decision in respect of the previous complaint or the request, the Council may direct the full hearing panel to also review the new complaint.
2023, c. 18, s. 12.

Decision and reasons not considered

118 In considering the complaint, the full hearing panel shall not consider the decision of the review panel or reduced hearing panel, as the case may be, that led to the establishment of the full hearing panel, or the reasons for that decision.

2023, c. 18, s. 12.

Removal justified

119 If the full hearing panel determines, on a balance of probabilities, that the judge's removal from office is justified, it shall make a decision to that effect.

2023, c. 18, s. 12.

Dismissal or action

120 If the full hearing panel determines, on a balance of probabilities, that the judge's removal is not justified, it may dismiss the complaint or take one or more of the actions referred to in paragraphs 102(a) to (g) if the full hearing panel considers that it is appropriate to do so in the circumstances.

2023, c. 18, s. 12.

Notice of decision and reasons

121 The full hearing panel shall give notice of its decision and the reasons for it to

(a) the judge who is the subject of the complaint;

(b) the chief justice of the court of which that judge is a member;

(c) the Council; and

(d) the presenting counsel.

2023, c. 18, s. 12.

Decision and reasons made public

122 The Council shall make public the full hearing panel's decision and the reasons for it, as soon as feasible after receiving the decision, if the full hearing panel's hearings were public. If they were not public, the Council shall make public as much of the decision and reasons as possible having regard to the reasons for holding the hearings, or part of them, in private.

2023, c. 18, s. 12.

Right of appeal

123 The judge who is the subject of the complaint and the presenting counsel may respectively, within 30 days after the day on which the full hearing panel sends them a notice of its decision, file with the Council a notice appealing the decision.

2023, c. 18, s. 12.

Rights of Judge

Rights

124 The judge who is the subject of a complaint that is before a hearing panel has the right to be heard, to cross-examine witnesses and to adduce evidence, in person or by counsel.

2023, c. 18, s. 12.

Statement of allegation and notice

125 The judge who is the subject of a complaint that is before a hearing panel is to be provided with a copy of the statement of allegations prepared by the presenting counsel and given reasonable notice of the subject matter and the date, time and place of the hearings.

2023, c. 18, s. 12.

Salaries and Annuities

Time in judicial office and salary

126 (1) For the purposes of calculating an annuity under Part I, if a full hearing panel decides that the removal from office of a judge who is the subject of a complaint is justified, the day after the day on which the judge is given notice of the full hearing panel's decision is the day to be used to determine the number of years the judge has been in judicial office and the salary annexed to the office held by the judge at the time of his or her resignation, removal or attaining the age of retirement unless

(a) the decision is set aside by a decision of the Supreme Court of Canada, or by the decision of an appeal panel if the appeal panel's decision is final;

(b) the Minister's response under subsection 140(1) provides that no action is to be taken to remove the judge from office; or

(c) the matter of removal of the judge from office is put to one or both Houses of Parliament and is rejected by either of them.

Contributions toward annuities

(2) No reservations are to be made under section 50 from the judge's salary in respect of the period that begins on the day after the day on which the judge is given notice of the full hearing panel's decision, unless one of paragraphs (1)(a) to (c) applies, in which case the judge shall contribute an amount equal to the amount that would have been reserved from the judge's salary had subsection (1) not applied.

Salary increases

(3) For greater certainty, nothing in subsection (1) is to be construed as removing from the judge any entitlement to a salary increase that takes effect on or after the day on which the judge is given notice of the full hearing panel's decision.
2023, c. 18, s. 12.

General

Powers

127 A hearing panel has all the powers vested in a superior court of the province in which the judge who is the subject of the complaint resides, including

(a) the power to summon before it any witness and require them to give evidence on oath, orally or in writing or on solemn affirmation if they are entitled to affirm in civil matters, and to produce any documents and evidence that it considers necessary; and

(b) the power to enforce the attendance of any witness and compel them to give evidence.

2023, c. 18, s. 12.

Rules of evidence

128 A hearing panel is not bound by any legal or technical rules of evidence and may receive and base a decision on evidence presented in its hearings that it considers credible or trustworthy in the circumstances of the case.

2023, c. 18, s. 12.

Hearings public

129 (1) A hearing panel's hearings are to be public, but it may hold all or any part of its hearings in private if it considers doing so to be in the public interest.

Prohibition of publication

(2) A hearing panel may prohibit the publication of any information or documents placed before it, if it is of the opinion that such a publication is not in the public interest.

2023, c. 18, s. 12.

Appeals

Appeal Panel

Establishment

130 On receipt of a notice of appeal filed under section 116 or 123, the Council shall establish an appeal panel consisting of the following persons designated by it:

(a) three members of the Council; and

(b) two judges named in the roster of judges.

2023, c. 18, s. 12.

Power

131 The appeal panel has all the powers vested in the court of appeal of the province in which the judge who is the subject of the complaint resides. It may, among other things, reverse, vary or affirm any decision of the reduced hearing panel or full hearing panel, as the case may be, and make any decision the hearing panel could have made.

2023, c. 18, s. 12.

Hearings public

132 (1) The appeal panel's hearings are to be public, but it may conduct all or any part of its hearings in private if it considers doing so to be in the public interest.

Prohibition of publication

(2) The appeal panel may prohibit the publication of any information or documents placed before it if it is of the opinion that such a publication is not in the public interest.

2023, c. 18, s. 12.

Right to make submissions

133 The judge who is the subject of the appeal and the presenting counsel are each entitled to make oral and written submissions to the appeal panel.

2023, c. 18, s. 12.

Nature of appeal

134 The appeal is to be heard on the basis of the record of the hearing panel whose decision was appealed and on any submissions made by the judge who is the subject of the appeal and the presenting counsel. The appeal panel may, in exceptional circumstances, admit additional evidence or testimony if, in its opinion, it is essential in the interests of justice to do so.

2023, c. 18, s. 12.

Notice of decision and reasons

135 The appeal panel shall give notice of its decision and the reasons for it to

(a) the judge who is the subject of the appeal;

(b) the chief justice of the court of which that judge is a member;

(c) the Council; and

(d) the presenting counsel.

2023, c. 18, s. 12.

Decision and reasons made public

136 The Council shall make public the appeal panel's decision and the reasons for it, as soon as feasible after receiving them, if the appeal panel's hearings were public. If they were not public, the Council shall make public as much of the decision and reasons as possible having regard to the reasons for holding the hearings, or part of them, in private.

2023, c. 18, s. 12.

Supreme Court of Canada

Notice of application for leave to appeal

137 The judge who is the subject of a decision of an appeal panel and the presenting counsel may respectively, within 30 days after the day on which the appeal panel sends them a notice of its decision, file a notice of application for leave to appeal to the Supreme Court of Canada.

2023, c. 18, s. 12.

Right of attorneys general

138 If leave to appeal is granted by the Supreme Court of Canada, the Attorney General of Canada and the attorney general of a province may intervene in the appeal.

2023, c. 18, s. 12.

Report to Minister

Report with recommendation

139 (1) If a full hearing panel is established in respect of a complaint, the full hearing panel shall, as soon as feasible after the earliest of the following, provide to the Minister a report setting out a recommendation, consistent with the final decision in respect of the complaint, as to whether or not the judge who is the subject of the complaint should be removed from office:

(a) the judge and the presenting counsel have both waived their rights under section 123 or 137,

(b) the time limit for exercising those rights has expired, and

(c) the Supreme Court of Canada has not granted leave to appeal or, if it has, it has made a decision in respect of the appeal panel's decision.

Decisions and reasons

(2) The report must also set out the full hearing panel's decision and any decision of the appeal panel and the Supreme Court of Canada, as well as the reasons, if any, for those decisions.

Copy of report

(3) The full hearing panel shall as soon as feasible give a copy of the report to the judge, the presenting counsel and the Council.

Report made public

(4) The Council shall make public as much of the report as it considers appropriate taking into account the extent to which the decisions and reasons set out in the report were made public.

Absence or incapacity

(5) In the event of the absence or incapacity of all three judges of the full hearing panel, the Council shall designate one of its members to assist the other members of the full hearing panel in preparing the report or, if the others are also absent or incapacitated, to provide the report.
2023, c. 18, s. 12.

Minister's response

140 (1) The Minister shall respond publicly to the report.

Information

(2) For the purpose of responding publicly, the Minister may seek information from the full hearing panel on any matter that the Minister considers necessary.

Obligation to provide information

(3) The full hearing panel shall provide the judge who is the subject of the report and the presenting counsel with any information that it provides to the Minister.

Absence or incapacity

(4) In the event of the absence or incapacity of all three judges of the full hearing panel, the Council shall designate one of its members to assist the other members of the full hearing panel in providing the information to the Minister or, if the others are also absent or incapacitated, to provide the information.

2023, c. 18, s. 12.

General

Ineligibility

Ineligibility

141 (1) A member of the Council and a judge named in the roster of judges is not eligible to be designated

(a) as a reviewing member under section 92, or as a member of any panel established under this Division, in respect of any complaint involving a judge of the court of which they are a member; or

(b) more than once under this Division in respect of the same complaint or the same judge.

Subsections 86(2) and (3)

(2) A member of the Council who is referred to in subsection 86(2) or (3) whose belief led to the Council making a complaint in respect of a judge or to an anonymous complaint being dealt with is not eligible to be designated, in their capacity as a member of the Council or in any other capacity, as a reviewing member under section 92 or as a member of any panel established under this Division, in respect of the complaint.
2023, c. 18, s. 12.

Designation

Designation from roster of judges

142 The Council may designate a judge named in the roster of judges to be a member of a panel established under section 98, 110, 117 or 130 instead of designating a member of the Council as the section in question requires.

2023, c. 18, s. 12.

Immunity

Immunity

143 A screening officer, a reviewing member or a member of a panel established under this Division shall have the same immunity as a judge of a superior court.

2023, c. 18, s. 12.

Financial Provisions

Regulations

144 The Governor in Council may make regulations respecting the fees, allowances and expenses to be paid or reimbursed under section 146.

2023, c. 18, s. 12.

Guidelines

145 (1) Subject to the regulations, the Commissioner shall make guidelines respecting the fees, allowances and expenses to be paid or reimbursed under section 146.

Incorporation by reference

(2) The guidelines may incorporate by reference any policy, guideline or directive of the Treasury Board or any federal department regarding fees, allowances or expenses, as it is amended from time to time.

Obligation to justify differences

(3) If an amount provided for in the guidelines made under subsection (1) differs from the amount provided for in Treasury Board directives regarding fees, allowances and

expenses, the Commissioner shall make the reasons for the difference available to the public unless the difference is attributable solely to compliance with the regulations.
2023, c. 18, s. 12.

Amounts payable out of C.R.F.

146 (1) Subject to the regulations made under section 144 and the guidelines made under subsection 145(1), there shall be paid out of the Consolidated Revenue Fund all amounts payable in respect of the following:

(a) the expenses incurred by members of the Council and judges named in the roster of judges in the course of carrying out their duties under this Division or Division 2;

(b) the expenses incurred by and the allowances payable to panel members, other than judges, in the course of carrying out their duties under this Division or Division 2;

(c) the fees of and the expenses incurred by presenting counsel in the course of carrying out their duties under this Division or Division 2;

(d) subject to subsection (2), the fees of and the expenses incurred by lawyers representing judges who are the subject of a complaint under this Division or Division 2;

(e) the fees and expenses of lawyers and experts engaged by panels established under this Division or Division 2; and

(f) the expenses incidental to the conduct of meetings and hearings under this Division or Division 2, including the renting of rooms, the recording and transcription of proceedings, translation services and security.

Restriction

(2) Fees and expenses of lawyers representing judges may be paid only in respect of proceedings under this Division or Division 2 or in respect of appeals to the Supreme Court of Canada relating to those proceedings. For greater certainty, no payments to lawyers representing judges are to be made in respect of any judicial review of any decision made under this Division or Division 2.

2023, c. 18, s. 12.

Independent review of financial provisions

147 (1) Within 18 months after the day on which the first report is submitted under section 160 and on every fifth anniversary of that day, the Council shall cause an independent review of the application of sections 144 to 146 to be conducted. The review is to be conducted by a person or body designated by the Commissioner in consultation with the Council.

Report

(2) The person or body conducting the review shall provide a report of their findings and recommendations to the Minister, the chairperson of the Council and the Commissioner.

The report shall include a finding on whether sections 144 to 146 have been applied in a manner consistent with best practices regarding financial controls.

Report to be made public

(3) The Council shall make the report public with any redactions that the Commissioner and chairperson of the Council jointly consider necessary to protect confidential or personal information.
2023, c. 18, s. 12.

DIVISION 2

Requests Concerning Judges

Request

148 The Minister or the attorney general of a province may request that the Council establish a full hearing panel to determine whether the removal from office of a judge of a superior court is justified.

2023, c. 18, s. 12.

Establishment

149 (1) Subject to subsection (2), on receipt of the request, the Council shall establish a full hearing panel in accordance with section 117 to consider the request.

Direction to consider new request

(2) If a full hearing panel established to consider a previous request made under section 148 or to review a complaint made under section 101 or 112 involving the same judge has not yet made a decision in respect of the previous request or the complaint, the Council may direct the full hearing panel to also consider the new request.

2023, c. 18, s. 12.

Application of sections 119 to 143

150 Sections 119 to 143 apply, with any necessary modifications, in respect of the request and all proceedings arising from it.

2023, c. 18, s. 12.

DIVISION 3

Requests Concerning Office Holders

Removal from office

151 For the purposes of this Division, the removal from office of a person appointed under an Act of Parliament to hold office during good behaviour, other than a judge, is

justified only if, for any of the following reasons, the person's continuation in office would undermine public confidence in the integrity of the person or of their office to such an extent that it would render the person incapable of executing the functions of their office:

(a) infirmity;

(b) misconduct;

(c) failure in the due execution of their office;

(d) the person has been placed in a position that a reasonable, fair-minded and informed observer would consider to be incompatible with the due execution of their office.

2023, c. 18, s. 12.

Request

152 The Minister may request that the Council establish a full hearing panel to determine whether the removal from office of a person referred to in section 151 is justified.

2023, c. 18, s. 12.

Establishment

153 On receipt of the request, the Council shall establish a full hearing panel in accordance with section 117 to consider the request.

2023, c. 18, s. 12.

Application of sections 119 to 125 and 127 to 143

154 Sections 119 to 125 and 127 to 143 apply, with any necessary modifications, in respect of the request and all proceedings arising from it.

2023, c. 18, s. 12.

Removal from office

155 (1) On receipt of a report provided under subsection 139(1) containing a recommendation that a person be removed from office, the Governor in Council, may, on the recommendation of the Minister, by order, remove the person from office if the person is a person who may be removed from office by the Governor in Council other than on address of the Senate or House of Commons or joint address of the Senate and House of Commons.

Orders and reports laid before Parliament

(2) If an order is made under subsection (1), a copy of the order and a copy of the report relating to the order must be laid before each House of Parliament within 15 days after the day on which the order is made or, if either House is not then sitting, on any of the first 15 days on which that House is sitting.

2023, c. 18, s. 12.

Leave of absence with salary

156 The Governor in Council may, for any period that the Governor in Council considers appropriate, grant leave of absence to any person, other than a judge, whose removal from office is recommended because of infirmity in a report provided under subsection 139(1) and, if leave of absence is granted, the person's salary is to continue to be paid during the period of leave of absence.

2023, c. 18, s. 12.

DIVISION 4

General

Powers, rights and duties not affected

157 Nothing in, or done or omitted to be done under the authority of, this Part affects any power, right or duty of the Senate, the House of Commons or the Governor in Council in relation to the removal from office of a judge or any other person.

2023, c. 18, s. 12.

Decision final

158 A decision made by a member of the Council under any of Divisions 1 to 3 or by a member of a panel established under any of those Divisions is final and is not to be questioned or reviewed in any court other than provided for in this Part.

2023, c. 18, s. 12.

Remote appearance

159 For greater certainty, any proceedings or hearings under this Part may take place by remote appearance.

2023, c. 18, s. 12.

Annual report

160 (1) The Council shall, within three months after the end of each calendar year, submit a report to the Minister setting out, in respect of the year, the number of

(a) complaints received;

(b) complaints dismissed by a screening officer;

(c) complaints dismissed by a reviewing member;

(d) complaints reviewed by review panels, hearing panels and appeal panels; and

(e) complaints in respect of which any of the actions referred to in paragraphs 102(a) to (g) were taken.

Report to be made public

(2) After the annual report is submitted to the Minister, the Council shall make it public.

2023, c. 18, s. 12.

Tab 4

CanLII

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203

This regulation replaces SOR/2002-371.

Current version: in force since 2015-07-29

Link to the latest version: https://canlii.ca/t/8v80

Stable link to this version: https://canlii.ca/t/52hcf

Citation to this version: Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, <https://canlii.ca/t/52hcf> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Canadian Judicial Council Inquiries and Investigations By-laws, 2015

SOR/2015-203

JUDGES ACT

Registration 2015-07-29

Canadian Judicial Council Inquiries and Investigations By-laws, 2015

The Canadian Judicial Council, pursuant to subsection 61(3) of the *Judges Act*[a], makes the annexed *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*.

[a]R.S., c. J-1

Ottawa, July 28, 2015

BEVERLEY McLACHLIN
Chief Justice of Canada
Chairman

Interpretation

Definitions

1 The following definitions apply in these By-laws.

Act means the *Judges Act*. (*Loi*)

senior member means, in relation to a complaint or allegation, the longest-serving eligible member of the Judicial Conduct Committee who has not previously considered the matter or, if no Judicial Conduct Committee member is available, the longest-serving member of the Council who has not previously considered the matter. (*doyen*)

Establishment and Powers of a Judicial Conduct Review Panel

Establishment of Judicial Conduct Review Panel

2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.

Designation of members

(2) The senior member designates the members of the Judicial Conduct Review Panel.

Composition of Judicial Conduct Review Panel

(3) The Judicial Conduct Review Panel is to be composed of five persons of which three are members of the Council, one is a puisne judge and one is a person who is neither a judge nor a member of the bar of a province.

Serious matter

(4) The Judicial Conduct Review Panel may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge.

Matter sent back to Chairperson or Vice-Chairperson

(5) If the Judicial Conduct Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Chairperson or Vice-Chairperson of the

Judicial Conduct Committee for them to make a decision on the most appropriate way to resolve it.

Complainant informed

(6) If the Judicial Conduct Review Panel decides that an Inquiry Committee is to be constituted, the Council's Executive Director must inform the complainant, if any, by letter.

Decision, reasons and statement of issues

(7) The Judicial Conduct Review Panel must prepare written reasons and a statement of issues to be considered by the Inquiry Committee. The Council's Executive Director must send a copy of the Judicial Conduct Review Panel's decision, reasons and statement of issues to

(a) the judge and their Chief Justice;

(b) the Minister; and

(c) the Inquiry Committee, once it is constituted.

Notice inviting Minister to designate members

(8) The Council's Executive Director must also send a notice to the Minister inviting that Minister to designate members of the bar of a province to the Inquiry Committee in accordance with subsection 63(3) of the Act.

Designating Members to Inquiry Committee

Designation of members

3 (1) An Inquiry Committee constituted in accordance with subsection 63(3) of the Act is composed of an uneven number of members designated by the senior member, the majority of whom are from the Council.

Additional members

(2) If the Minister does not designate any members within 60 days after the day on which the notice is received under paragraph 2(8), the senior member may designate additional Council members to the Inquiry Committee to complete its composition.

Senior member chooses chair

(3) The senior member also designates one of the members of the Inquiry Committee to chair the Committee.

Persons not eligible to be members

(4) The following persons are not eligible to be members of the Inquiry Committee:

(a) the Chairperson or Vice-Chairperson of the Judicial Conduct Committee who referred the matter to the Judicial Conduct Review Panel;

(b) a member of the same court as that of the judge who is the subject of the inquiry or investigation; and

(c) a member of the Judicial Conduct Review Panel who participated in the deliberations to decide whether an Inquiry Committee must be constituted.

Legal Counsel and Advisors

Persons to advise and assist

4 The Inquiry Committee may engage legal counsel and other persons to provide advice and to assist in the conduct of the inquiry.

Inquiry Committee Proceedings

Complaint or allegation

5 (1) The Inquiry Committee may consider any complaint or allegation pertaining to the judge that is brought to its attention. In so doing, it must take into account the Judicial Conduct Review Panel's written reasons and statement of issues.

Sufficient notice to respond

(2) The Inquiry Committee must inform the judge of all complaints or allegations pertaining to the judge and must give them sufficient time to respond fully to them.

Comments from judge

(3) The Inquiry Committee may set a time limit to receive comments from the judge that is reasonable in the circumstances, it must notify the judge of that time limit, and, if any comments are received within that time limit, it must consider them.

Public or private hearing

6 (1) Subject to subsection 63(6) of the Act, hearings of the Inquiry Committee must be conducted in public unless, the Inquiry Committee determines that the public interest and the due administration of justice require that all or any part of a hearing be conducted in private.

Prohibition of publication if not in public interest

(2) The Inquiry Committee may prohibit the publication of any information or documents placed before it if it determines that publication is not in the public interest and may take any measures that it considers necessary to protect the identity of persons, including

persons who have received assurances of confidentiality as part of the consideration of a complaint or allegation made in respect of the judge.

Principle of fairness

7 The Inquiry Committee must conduct its inquiry or investigation in accordance with the principle of fairness.

Inquiry Committee Report

Report of findings and conclusions

8 (1) The Inquiry Committee must submit a report to the Council setting out its findings and its conclusions about whether to recommend the removal of the judge from office.

Copy of report and notice to complainant

(2) After the report has been submitted to the Council, its Executive Director must provide a copy to the judge and to any other persons or bodies who had standing in the hearing. He or she must also notify the complainant, if any, when the Inquiry Committee has made the report.

Hearing conducted in public

(3) If the hearing was conducted in public, the report must be made available to the public and a copy provided to the complainant, if any.

Judge’s Response to Inquiry Committee Report

Written submission by judge

9 (1) Within 30 days after the day on which the Inquiry Committee’s report is received, the judge may make a written submission to the Council regarding the report.

Extension

(2) On the judge’s request, the Council must grant an extension of time for making the submission if it considers that the extension is in the public interest.

Deliberations of Council Concerning Removal of Judges from office

Senior member chairs meetings

10 (1) The senior member who is available to participate in deliberations concerning the removal from office of a judge is to chair any meetings of Council related to those deliberations.

Quorum

(2) A quorum of 17 members of the Council is required when it meets to deliberate the removal from office of a judge.

Quorum — death, incapacity, resignation or retirement

(3) In the event of the death, incapacity, resignation or retirement of a member during the deliberations, the remaining members constitute a quorum.

Vote in event of tie

(4) During the deliberations of the Council concerning the removal from office of a judge, the member chairing the meeting may vote in respect of a report of the Council's conclusions on the matter only in the event of a tie.

Deliberations

(5) Deliberations of the Council concerning the removal from office of a judge may also be held by audio-conference or by video conference.

Consideration of Inquiry Committee Report by Council

Consideration of report and written submissions

11 (1) The Council must consider the Inquiry Committee's report and any written submission made by the judge.

Who must not participate

(2) Persons referred to in subsection 3(4) and members of the Inquiry Committee must not participate in the Council's consideration of the report or in any other deliberations of the Council related to the matter.

Clarification

12 If the Council is of the opinion that the Inquiry Committee's report requires a clarification or that a supplementary inquiry or investigation is necessary, it may refer all or part of the matter back to the Inquiry Committee with directions.

Council Report

Report of conclusions to Minister

13 The Council's Executive Director must provide the judge with a copy of the report of its conclusions that the Council presented to the Minister in accordance with section 65 of the Act.

Transitional Provision

14 Despite these By-laws, the *Canadian Judicial Council Inquiries and Investigations By-laws*, as they read immediately before the day on which these By-laws come into force, continue to apply in respect of any inquiries or investigations being conducted by a Review Panel or an Inquiry Committee or the Council acting under section 11 or 12, that were commenced under those By-laws.

Repeal

15 [Repeal]

Coming into Force

16 These By-laws come into force on the day on which they are registered.

Tab 5

CanLII

Supreme Court Act, RSC 1985, c S-26

Current version: in force since 2019-12-18

Link to the latest version: https://canlii.ca/t/7vlk

Stable link to this version: https://canlii.ca/t/544lt

Citation to this version: Supreme Court Act, RSC 1985, c S-26, <https://canlii.ca/t/544lt> retrieved on 2026-01-06

Currency: This statute is current to 2025-11-27 according to the Justice Laws Web Site

Supreme Court Act

R.S.C., 1985, c. S-26

An Act respecting the Supreme Court of Canada

Short Title

Short title

1 This Act may be cited as the *Supreme Court Act*.

R.S., c. S-19, s. 1.

Interpretation

Definitions

2 (1) In this Act,

appeal includes any proceeding to set aside or vary any judgment of the court appealed from; (*appel*)

Court means the Supreme Court of Canada continued by section 3; (*Cour suprême* ou *Cour*)

court appealed from means the court from which the appeal is brought directly to the Supreme Court, whether that court is one of original jurisdiction or a court of appeal; (*juridiction inférieure*)

final judgment means any judgment, rule, order or decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding; (*jugement définitif*)

judge means a judge of the Court and includes the Chief Justice; (*juge*)

judgment, when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof, and when used with reference to the Supreme Court, includes any judgment or order of that Court; (*jugement*)

judicial proceeding includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative or executive jurisdiction; (*procédure judiciaire*)

Registrar means the Registrar of the Court; (*registraire*)

Supreme Court has the meaning given in this section to "Court"; (*Cour suprême* ou *Cour*)

witness means any person, whether a party or not, to be examined under this Act. (*témoin*)

Application to the territories

(2) For the purposes of this Act, the expression "highest court of final resort in a province" includes, in Yukon, the Northwest Territories or Nunavut, the Court of Appeal of that territory.

R.S., 1985, c. S-26, s. 2; 1993, c. 28, s. 78; 2002, c. 7, s. 237(E).

The Court

Original Court continued

3 The court of law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

R.S., 1985, c. S-26, s. 3; 1993, c. 34, s. 115(F).

The Judges

Constitution of Court

4 (1) The Court shall consist of a chief justice to be called the Chief Justice of Canada, and eight puisne judges.

Appointment of judges

(2) The judges shall be appointed by the Governor in Council by letters patent under the Great Seal.

R.S., c. S-19, s. 4.

Who may be appointed judges

5 Any person may be appointed a judge who is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province.

R.S., c. S-19, s. 5.

For greater certainty

5.1 For greater certainty, for the purpose of section 5, a person may be appointed a judge if, at any time, they were a barrister or advocate of at least 10 years standing at the bar of a province.

2013, c. 40, s. 471.

Three judges from Quebec

6 At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province.

R.S., c. S-19, s. 6; 1974-75-76, c. 19, s. 2.

For greater certainty

6.1 For greater certainty, for the purpose of section 6, a judge is from among the advocates of the Province of Quebec if, at any time, they were an advocate of at least 10 years standing at the bar of that Province.

2013, c. 40, s. 472.

No other office to be held

7 No judge shall hold any other office of emolument under the Government of Canada or the government of a province.

R.S., c. S-19, s. 7.

Residence

8 The judges shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within forty kilometres thereof.

R.S., c. S-19, s. 8; 1974-75-76, c. 18, s. 1; 1976-77, c. 25, s. 19.

Tenure of office

9 (1) Subject to subsection (2), the judges hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons.

Cessation of office

(2) A judge shall cease to hold office on attaining the age of seventy-five years.

R.S., c. S-19, s. 9.

Oath of office

10 Every judge shall, before entering on the duties of the office of judge, take an oath in the following form:

I, ..., do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Chief Justice (*or*as one of the judges) of the Supreme Court of Canada. So help me God.

R.S., c. S-19, s.10.

How administered

11 The oath referred to in section 10 shall be administered to the Chief Justice before the Governor General in Council, and to the puisne judges by the Chief Justice or, in the case of absence or illness of the Chief Justice, by any other judge present at Ottawa.

R.S., 1985, c. S-26, s. 11; 1993, c. 34, s. 116(F).

The Registrar and Other Officers

Appointment of Registrar and Deputy Registrar

12 (1) The Governor in Council may by instruments under the Great Seal appoint fit and proper persons, being barristers or advocates of at least five years standing, to be Registrar of the Supreme Court and Deputy Registrar of the Supreme Court respectively.

Staff

(2) Such other officers, clerks and employees as are required for the purposes of the Court shall be appointed under the *Public Service Employment Act*.

R.S., c. S-19, s. 12.

Tenure and salary

13 (1) The Registrar and Deputy Registrar shall be appointed to hold office during pleasure and shall each be paid a salary to be fixed by the Governor in Council.

Duties

(2) The Registrar and Deputy Registrar shall devote their full time to their respective positions and shall not receive any pay, fee or allowances in any form in excess of the

amount provided under subsection (1).

R.S., c. S-19, s. 13.

Office and residence

14 The Registrar shall keep an office in the city of Ottawa and the Registrar and Deputy Registrar shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within forty kilometres thereof.

R.S., c. S-19, s. 14; 1974-75-76, c. 18, s. 2; 1976-77, c. 25, s. 20.

Functions of Registrar

15 Subject to the direction of the Chief Justice, the Registrar shall superintend the officers, clerks and employees appointed to the Court.

R.S., c. S-19, s. 15; 1976-77, c. 25, s. 20.

Library

16 The Registrar shall, under the supervision of the Chief Justice, manage and control the library of the Court and the purchase of all books therefor.

R.S., c. S-19, s. 16; 1976-77, c. 25, s. 20.

Reports

17 The Registrar or the Deputy Registrar, as the Chief Justice directs, shall report and publish the judgments of the Court.

R.S., c. S-19, s. 17; 1976-77, c. 25, s. 20.

Jurisdiction as judge in chambers

18 The Registrar has such authority to exercise the jurisdiction of a judge sitting in chambers as may be conferred on the Registrar by general rules or orders made under this Act.

R.S., c. S-19, s. 18.

Duties of Deputy Registrar

19 The Deputy Registrar shall exercise and perform such of the powers and duties of the Registrar as are assigned to the Deputy Registrar by the Registrar, and may exercise and perform all the powers and duties of the Registrar in the event that the Registrar is absent or unable to act or the office of Registrar is vacant.

R.S., c. S-19, s. 19.

Public Service Employment Act and *Public Service Superannuation Act*

20 The *Public Service Employment Act* and the *Public Service Superannuation Act*, in so far as applicable, extend and apply to the Registrar and Deputy Registrar.

R.S., c. S-19, s. 20.

Sheriff

21 The Sheriff of the County of Carleton, in the Province of Ontario, is *ex officio* an officer of the Court and shall perform the duties and functions of a sheriff in connection therewith.

R.S., c. S-19, s. 21.

Barristers, Advocates, Attorneys and Solicitors

Barristers or advocates

22 All persons who are barristers or advocates in a province may practise as barristers, advocates and counsel in the Court.

R.S., c. S-19, s. 22.

Attorneys or solicitors

23 All persons who are attorneys or solicitors of the superior courts in a province may practise as attorneys, solicitors and proctors in the Court.

R.S., c. S-19, s. 23.

Officers of the Court

24 All persons who may practise as barristers, advocates, counsel, attorneys, solicitors or proctors in the Court are officers of the Court.

R.S., c. S-19, s. 24.

Sessions and Quorum

Quorum of judges

25 Any five of the judges of the Court shall constitute a quorum and may lawfully hold the Court.

R.S., c. S-19, s. 25.

Delivery of judgment

26 (1) A judgment of the Supreme Court may be delivered

(a) in open court; or

(b) by depositing with the Registrar, for each judge who has heard the case, a written opinion, a copy, signed by the judge, of the written opinion with which the judge concurs or a statement certifying the judge’s concurrence.

Idem

(2) Where a judgment is delivered pursuant to paragraph (1)(a), a majority of the judges who have heard the case shall be present.

R.S., 1985, c. S-26, s. 26; R.S., 1985, c. 34 (3rd Supp.), s. 1.

Opinion of absent judge

27 (1) A judge who has heard a case for which judgment is delivered pursuant to paragraph 26(1)(a) and who is absent from the delivery of judgment may sign a copy of the opinion with which the judge concurs or, where the judge has written an opinion, give the opinion to a judge present at the delivery of judgment, which concurrence or opinion shall be announced or read in open court and then left with the Registrar or reporter of the Court.

Opinion of judge who is retired or ceases to hold office

(2) A judge who has resigned the office of judge, or who has ceased to hold office under section 9, shall, within six months thereafter, for the purposes of this section, be deemed to be absent at the delivery of judgment in any case heard by that judge in which judgment has not been delivered during his tenure of office.

Concurrence

(3) A judge who has heard a case for which judgment is delivered pursuant to paragraph 26(1)(b) and who has not written an opinion may sign and deposit with the Registrar a copy of the opinion with which the judge concurs or a statement certifying concurrence with an opinion.

Notice of deposit of judgment

(4) Where judgment is delivered in a case pursuant to paragraph 26(1)(b), the Registrar shall send notices of the deposit of judgment to the solicitors of record for the case or their agents.

R.S., 1985, c. S-26, s. 27; R.S., 1985, c. 34 (3rd Supp.), s. 2.

When a judge may not sit

28 (1) No judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in a court below, shall sit or take part in the hearing of or adjudication on the proceedings in the Supreme Court.

Quorum in such case

(2) In any cause or matter in which a judge is unable to sit or take part in consequence of this section, any four of the other judges constitute a quorum and may lawfully hold the Court.

R.S., c. S-19, s. 28.

Four judges a quorum by consent

29 Any four judges constitute a quorum and may lawfully hold the Court in cases where the parties consent to be heard before a court so composed.

R.S., c. S-19, s. 29.

Appointment of *ad hoc* judge

30 (1) Where at any time there is not a quorum of the judges available to hold or continue any session of the Court, owing to a vacancy or vacancies, or to the absence through illness or on leave or in the discharge of other duties assigned by statute or order in council, or to the disqualification of a judge or judges, the Chief Justice of Canada, or in the absence of the Chief Justice, the senior puisne judge, may in writing request the attendance at the sittings of the Court, as an *ad hoc* judge, for such period as may be necessary,

(a) of a judge of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada; or

(b) if the judges of the Federal Court of Appeal, the Federal Court or the Tax Court of Canada are absent from Ottawa or for any reason are unable to sit, of a judge of a provincial superior court to be designated in writing by the chief justice, or in the absence of the chief justice, by any acting chief justice or the senior puisne judge of that provincial court on that request being made to that acting chief justice or that senior puisne judge in writing.

Quebec appeals

(2) Unless two of the judges available fulfil the requirements of section 6, the *ad hoc* judge for the hearing of an appeal from a judgment rendered in the Province of Quebec shall be a judge of the Court of Appeal or a judge of the Superior Court of that Province designated in accordance with subsection (1).

Evidence of appointment

(3) A duplicate of the requisition of the Chief Justice or senior puisne judge and, where a judge of a provincial court is designated to act, the letter designating that judge shall be filed with the Registrar and is conclusive evidence of the authority of the judge named therein to act under this section.

Duties

(4) It is the duty of the judge whose attendance has been so requested or who has been so designated, in priority to other duties of the office of that judge, to attend the sittings of the Court at the time and for the period for which his attendance is required, and while so attending that judge possesses the powers and privileges and shall discharge the duties of a puisne judge of the Court.

Travel allowance

(5) An *ad hoc* judge who attends at sittings of the Court or any conference of the judges called for the consideration of judgments in cases in which that judge sat shall be paid his travel expenses and shall receive an allowance for living expenses for each day that that judge is necessarily absent from his place of residence, as provided by the *Judges Act*.

Delivery of judgment

(6) In any case in which judgment is not delivered while an *ad hoc* judge is attending the sittings of the Court or a conference of the judges, the opinion of that judge shall be delivered as provided by section 27.

R.S., 1985, c. S-26, s. 30; 2002, c. 8, s. 175.

Admiralty appeal

31 (1) The Court may, in any Admiralty appeal, in which it may think it expedient to do so, call in the aid of one or more assessors specially qualified and try and hear that appeal, wholly or partially with the assistance of those assessors.

Remuneration of assessors

(2) The remuneration, if any, to be paid to the assessors referred to in subsection (1) shall be determined by the Court.

R.S., c. S-19, s. 31.

Three sessions

32 (1) The Court, for the purpose of hearing and determining appeals, shall hold, in each year, in the city of Ottawa, three sessions.

Dates of sessions

(2) The first session shall begin on the fourth Tuesday in January, the second on the fourth Tuesday in April and the third on the first Tuesday in October, in each year.

Dates may be varied

(3) The dates in subsection (2), fixed for the beginning of each session, may be varied by the Governor in Council, or by the Court, if notice is given in the *Canada Gazette* not less than four weeks before the date that may be fixed for the beginning of any session.

Length

(4) Each session shall be continued until the business before the Court is disposed of.

R.S., c. S-19, s. 32.

Power to adjourn

33 The Court may adjourn any session from time to time and meet again at the time appointed for the transaction of business.

R.S., c. S-19, s. 33.

Court may be convened at any time

34 The Court may be convened at any time by the Chief Justice or, in the event of the absence or illness of the Chief Justice, by the senior puisne judge, in such manner as is prescribed by the rules of Court.

R.S., c. S-19, s. 34.

Appellate Jurisdiction

Jurisdiction throughout Canada

35 The Court shall have and exercise an appellate, civil and criminal jurisdiction within and throughout Canada.

R.S., c. S-19, s. 35.

Inter-governmental disputes

35.1 An appeal lies to the Court from a decision of the Federal Court of Appeal in the case of a controversy between Canada and a province or between two or more provinces.

1990, c. 8, s. 33.

Appeals from references by lieutenant governor in council

36 An appeal lies to the Court from an opinion pronounced by the highest court of final resort in a province on any matter referred to it for hearing and consideration by the lieutenant governor in council of that province whenever it has been by the statutes of that province declared that such opinion is to be deemed a judgment of the highest court of final resort and that an appeal lies therefrom as from a judgment in an action.

R.S., c. S-19, s. 37.

Appeals with leave of provincial court

37 Subject to sections 39 and 42, an appeal to the Supreme Court lies with leave of the highest court of final resort in a province from a final judgment of that court where, in the opinion of that court, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

R.S., c. S-19, s. 38.

Appeal with leave of Federal Court of Appeal

37.1 Subject to sections 39 and 42, an appeal to the Court lies with leave of the Federal Court of Appeal from a final judgment of the Federal Court of Appeal where, in its opinion, the question involved in the appeal is one that ought to be submitted to the Court for decision.

1990, c. 8, s. 34.

Appeals *per saltum*

38 Subject to sections 39 and 42, an appeal to the Supreme Court lies on a question of law alone with leave of that Court, from a final judgment of the Federal Court or of a court of a province other than the highest court of final resort therein, the judges of which are appointed by the Governor General, pronounced in a judicial proceeding where an appeal lies to the Federal Court of Appeal or to that highest court of final resort, if the consent in writing of the parties or their solicitors, verified by affidavit, is filed with the

Registrar of the Supreme Court and with the registrar, clerk or prothonotary of the court from which the appeal is to be taken.
R.S., 1985, c. S-26, s. 38; 1990, c. 8, s. 35; 2002, c. 8, s. 183.

Exceptions

39 No appeal to the Court lies under section 37, 37.1 or 38 from a judgment in a criminal cause, in proceedings for or on

(a) a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge; or

(b) a writ of *habeas corpus* arising out of a claim for extradition made under a treaty.

R.S., 1985, c. S-26, s. 39; 1990, c. 8, s. 36.

Appeals with leave of Supreme Court

40 (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

Application for leave

(2) An application for leave to appeal under this section shall be brought in accordance with paragraph 58(1)(a).

Appeals in respect of offences

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Extending time for allowing appeal

(4) Whenever the Court has granted leave to appeal, the Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

R.S., 1985, c. S-26, s. 40; R.S., 1985, c. 34 (3rd Supp.), s. 3; 1990, c. 8, s. 37.

Appeals under other Acts

41 Notwithstanding anything in this Act, the Court has jurisdiction as provided in any other Act conferring jurisdiction.

R.S., c. S-19, s. 42.

No appeal from discretionary orders

42 (1) No appeal lies to the Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

Exception

(2) This section does not apply to an appeal under section 40.

R.S., 1985, c. S-26, s. 42; 1993, c. 34, s. 117(F).

Applications for leave to appeal

43 (1) Notwithstanding any other Act of Parliament but subject to subsection (1.2), an application to the Supreme Court for leave to appeal shall be made to the Court in writing and the Court shall

(a) grant the application if it is clear from the written material that it does not warrant an oral hearing and that any question involved is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in the question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it;

(b) dismiss the application if it is clear from the written material that it does not warrant an oral hearing and that there is no question involved as described in paragraph (a); and

(c) order an oral hearing to determine the application, in any other case.

Remand of case

(1.1) Notwithstanding subsection (1), the Court may, in its discretion, remand the whole or any part of the case to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

Mandatory oral hearing

(1.2) On the request of the applicant, an oral hearing shall be ordered to determine an application for leave to appeal to the Court from a judgment of a court of appeal setting aside an acquittal of an indictable offence and ordering a new trial if there is no right of appeal on a question of law on which a judge of the court of appeal dissents.

Time for oral hearing

(2) Where the court makes an order for an oral hearing, the oral hearing shall be held within thirty days after the date of the order or such further time as the Court

determines.

Quorum

(3) Any three judges of the Court constitute a quorum for the consideration and determination of an application for leave to appeal, whether or not an oral hearing is ordered.

Exception

(4) Notwithstanding subsection (3), five judges of the Court constitute a quorum in the case of an application for leave to appeal from a judgment of a court

(a) quashing a conviction of an offence punishable by death; or

(b) dismissing an appeal against an acquittal of an offence punishable by death, including an acquittal in respect of a principal offence where the accused has been convicted of an offence included in the principal offence.

R.S., 1985, c. S-26, s. 43; R.S., 1985, c. 34 (3rd Supp.), s. 4; 1990, c. 8, s. 38; 1994, c. 44, s. 98; 1997, c. 18, s. 138.

Judgments

Quashing proceedings in certain cases

44 The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith.

R.S., c. S-19, s. 46.

Appeal may be dismissed or judgment given

45 The Court may dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded.

R.S., c. S-19, s. 47.

New trial may be ordered

46 On any appeal, the Court may, in its discretion, order a new trial if the ends of justice seem to require it, although a new trial is deemed necessary on the ground that the verdict is against the weight of evidence.

R.S., c. S-19, s. 48.

Appeal may be remanded

46.1 The Court may, in its discretion, remand any appeal or any part of an appeal to the court appealed from or the court of original jurisdiction and order any further proceedings that would be just in the circumstances.

1994, c. 44, s. 99.

Costs

Payment of costs

47 The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.

R.S., c. S-19, s. 49.

Amendments

Necessary amendments

48 (1) At any time during the pendency of an appeal before the Court, the Court may, on the application of any of the parties, or without any such application, make all such amendments as are necessary for the purpose of determining the appeal or the real question or controversy between the parties as disclosed by the pleadings, evidence or proceedings.

At whose instance

(2) An amendment referred to in subsection (1) may be made, whether the necessity for it is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend.

R.S., c. S-19, s. 50.

Conditions

49 Every amendment shall be made on such terms as to payment of costs, postponing the hearing or otherwise as to the Court seem just.

R.S., c. S-19, s. 51.

Interest

Interest

50 Unless otherwise ordered by the Court, a judgment of the Court bears interest at the rate and from the date applicable to the judgment in the same matter of the court of original jurisdiction or at the rate and from the date that would have been applicable to that judgment if it had included a monetary award.

R.S., c. S-19, s. 52; 1974-75-76, c. 18, s. 7.

Certificate of Judgment

Judgment to be carried out by court below

51 The judgment of the Court in appeal shall be certified by the Registrar to the proper officer of the court of original jurisdiction, who shall make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereon as if the judgment had been given or pronounced in the last mentioned court.

R.S., c. S-19, s. 53.

Judgment Final and Conclusive

Exclusive ultimate appellate jurisdiction

52 The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive.

R.S., c. S-19, s. 54.

Special Jurisdiction

References by Governor in Council

Referring certain questions for opinion

53 (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning

(a) the interpretation of the *Constitution Acts*;

(b) the constitutionality or interpretation of any federal or provincial legislation;

(c) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.

Other questions

(2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.

Questions deemed important

(3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

Opinion of Court

(4) Where a reference is made to the Court under subsection (1) or (2), it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons.

Notice to be given to provinces interested

(5) Where the question relates to the constitutional validity of any Act passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney general of the province shall be notified of the hearing in order that the attorney general may be heard if he thinks fit.

Notice to interested persons

(6) The Court has power to direct that any person interested or, where there is a class of persons interested, any one or more persons as representatives of that class shall be notified of the hearing on any reference under this section, and those persons are entitled to be heard thereon.

Appointment of counsel by Court

(7) The Court may, in its discretion, request any counsel to argue the case with respect to any interest that is affected and with respect to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.
R.S., c. S-19, s. 55.

References by Senate or House of Commons

Report on private bill or petition

54 The Court, or any two of the judges, shall examine and report on any private bill or petition for a private bill presented to the Senate or House of Commons and referred to the Court under any rules or orders made by the Senate or House of Commons.

R.S., c. S-19, s. 56.

Certiorari

Writ of *certiorari*

55 A writ of *certiorari* may, by order of the Court or a judge, issue out of the Court to bring up any papers or other proceedings had or taken before any court, judge or justice of the peace, and that are considered necessary with a view to any inquiry, appeal or other proceeding had or to be had before the Court.

R.S., c. S-19, s. 61.

Procedure in Appeals

The Appeal

Proceedings in appeal

56 Proceedings on an appeal shall, when not otherwise provided for by this Act, the Act providing for the appeal or the general rules and orders of the Court, be in conformity with any order made, on application by a party to the appeal, by the Chief Justice or, in the absence of the Chief Justice, by the senior puisne judge present.

R.S., c. S-19, s. 63; R.S., c. 44(1st Supp.), s. 5.

Limited appeal

57 The appellant may appeal from the whole or any part of any judgment or order and, if the appellant intends to limit the appeal, the notice of appeal shall so specify.

R.S., c. S-19, s. 64.

Time periods for appeals

58 (1) Subject to this Act or any other Act of Parliament, the following provisions with respect to time periods apply to proceedings in appeals:

(a) in the case of an appeal for which leave to appeal is required, the notice of application for leave to appeal and all materials necessary for the application shall be served on all other parties to the case and filed with the Registrar of the Court within sixty days after the date of the judgment appealed from; and

(b) in the case of an appeal for which leave to appeal is not required or in the case of an appeal for which leave to appeal is required and has been granted, a notice of appeal shall be served on all other parties to the case and filed with the Registrar of the Court within thirty days after the date of the judgment appealed from or the date of the judgment granting leave, as the case may be.

Computation of time periods

(2) The month of July shall be excluded in the computation of a time period referred to in subsection (1).

R.S., 1985, c. S-26, s. 58; R.S., 1985, c. 34 (3rd Supp.), s. 5; 1997, c. 18, s. 139.

Extension of time for appeal

59 (1) Notwithstanding anything in this Act or any other Act of Parliament, the court proposed to be appealed from or any judge thereof or the Supreme Court or a judge thereof may under special circumstances, either before or after the expiration of a time period prescribed by section 58, extend that time period.

Terms

(2) Where a court or judge grants an extension of time under subsection (1), that court or judge shall impose such terms as to security or otherwise as seem proper under the circumstances.

Non-application to election cases

(3) This section does not apply to appeals under section 532 of the *Canada Elections Act*.

Appeals *in forma pauperis*

(4) Notwithstanding anything in this Act, a judge may, on an application for leave to appeal *in forma pauperis*, allow an appeal by giving the applicant leave to serve notice of appeal although the time prescribed by section 58 has expired.

R.S., 1985, c. S-26, s. 59; R.S., 1985, c. 34 (3rd Supp.), s. 6; 2000, c. 9, s. 572.

Procedure on appeal

60 (1) An appeal shall be brought, within the time prescribed by section 58 or allowed under section 59, by

(a) serving a notice of appeal on all parties directly affected; and

(b) depositing with the Registrar security to the value of five hundred dollars that the appellant will effectually prosecute the appeal and pay such costs and damages as may be awarded against the appellant by the Court.

Approval of security

(2) Where the security deposited is other than money, it shall be to the satisfaction of the court proposed to be appealed from or a judge thereof or to the satisfaction of the Supreme Court or a judge thereof.

Notice of security

(3) Within seven days from the deposit of the security or, where subsection (2) applies, from the later of the deposit of the security and its approval as required by that subsection, the appellant shall notify all parties directly affected.

Service and filing of notice of appeal

(4) The notice of appeal with evidence of service thereof shall be filed with the Registrar and a copy of the notice shall be filed with the clerk or other proper officer of the court appealed from within twenty-one days from the time prescribed by section 58 or allowed under section 59.

R.S., c. S-19, s. 66; R.S., c. 44(1st Supp.), s. 6.

When error in law alleged

61 Whenever error in law is alleged, the proceedings in the Court shall be in the form of an appeal.

R.S., c. 44(1st Supp.), s. 6.

Appeal to be on a stated case

62 (1) An appeal shall be on a case to be stated by the parties or, in the event of difference, to be settled by the court appealed from or a judge thereof.

Elements of case

(2) The case shall set out the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court.

Further evidence

(3) The Court or a judge may, in the discretion of the Court or the judge, on special grounds and by special leave, receive further evidence on any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination, by affidavit or by deposition, as the Court or the judge may direct.

R.S., 1985, c. S-26, s. 62; 1990, c. 8, s. 39.

Transmission of record

63 The clerk or other proper officer of the court appealed from shall, on payment to that clerk or officer of the proper fees and expenses of transmission, transmit the case, as soon as may be after service on the clerk or officer of the notice of appeal, to the Registrar, and further proceedings shall thereupon be had according to the practice of the Supreme Court.

R.S., c. S-19, s. 68.

Exceptions

64 The provisions of this Act requiring the deposit of security for costs do not apply to appeals by or on behalf of the Crown or in election cases, in cases in the Federal Court of Appeal or the Federal Court, in criminal cases or in proceedings for or on a writ of *habeas corpus*.

R.S., 1985, c. S-26, s. 64; 2002, c. 8, s. 176.

Stay of Execution

Stay of execution

65 (1) On filing and serving the notice of appeal and depositing security as required by section 60, execution shall be stayed in the original cause, except that

(a) where the judgment appealed from directs an assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed until the things directed to be assigned or delivered have been brought into court, or placed in the custody of such officer or receiver as the court appoints, or until security has been given to the satisfaction of the court appealed from, or of a judge thereof, in

such sum as that court or judge directs, that the appellant will obey the judgment of the Supreme Court;

(b) where the judgment appealed from directs the execution of a conveyance or any other instrument, the execution of the judgment shall not be stayed until the instrument has been executed and deposited with the proper officer of the court appealed from, to abide the judgment of the Supreme Court;

(c) where the judgment appealed from directs the sale or delivery of possession of real property or chattels real, the execution of the judgment shall not be stayed until security has been given to the satisfaction of the court appealed from, or a judge thereof, in such amount as that court or judge directs, that during the possession of the property by the appellant the appellant will not commit, or suffer to be committed, any waste on the property, and that if the judgment is affirmed, the appellant will pay the value of the use and occupation of the property from the time the appeal is brought until delivery of possession thereof, and also, if the judgment is for the sale of property and the payment of a deficiency arising on the sale, that the appellant will pay the deficiency; and

(d) where the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that, if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof with respect to which the judgment is affirmed, if it is affirmed only with respect to part, and all damages awarded against the appellant on the appeal.

Where court appealed from is a court of appeal

(2) Where the court appealed from is a court of appeal, and the assignment or conveyance, document, instrument, property or thing referred to in subsection (1) has been deposited in the custody of the proper officer of the court in which the cause originated, the consent of the party desiring to appeal to the Supreme Court, that it shall so remain to abide the judgment of the Court, is binding on that party and shall be deemed a compliance with the requirements in that behalf of this section.

As to instrument

(3) In any case in which execution may be stayed on the giving of security under this section, the security may be given by the same instrument whereby the security prescribed in section 60 is given.

Modification of stay of execution

(4) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay of execution imposed by subsection (1).
R.S., 1985, c. S-26, s. 65; 1994, c. 44, s. 100.

Stay of execution — application for leave to appeal

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

Additional power for court appealed from

(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

Modification

(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

1990, c. 8, s. 40; 1994, c. 44, s. 101.

Fiat to sheriff when security deposited

66 (1) When security has been given as required by sections 60 and 65, any judge of the court appealed from may issue his fiat to the sheriff, to whom any execution on the judgment has issued, to stay the execution, and the execution shall be thereby stayed whether a levy has been made under it or not.

Where court appealed from is a court of appeal

(2) Where the court appealed from is a court of appeal and execution has been already stayed in the case, the stay of execution continues without any new fiat until the decision of the appeal by the Supreme Court.

Poundage

(3) Unless a judge of the court appealed from otherwise orders, no poundage shall be allowed against the appellant, on any judgment appealed from, on which any execution is issued before the judge's fiat to stay the execution is obtained.

R.S., c. S-19, s. 71; R.S., c. 44(1st Supp.), s. 7.

Money levied and not paid over before fiat

67 Where at the time of the receipt by the sheriff of a fiat, or of a copy thereof, the money has been made or received by the sheriff, but not paid over to the party who issued the execution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in the sheriff's hands not paid over, and in default of payment by the sheriff, on that demand, the party appealing may recover the money from the sheriff in an action for money had and received or by means of an order or rule of the court appealed from.

R.S., c. S-19, s. 72.

Perishable property

68 Where a judgment appealed from directs the delivery of perishable property, the court appealed from, or a judge thereof, may order the property to be sold and the proceeds to be paid into court, to abide the judgment of the Supreme Court.

R.S., c. S-19, s. 73.

Discontinuance of Proceedings

Notice

69 (1) An appellant may discontinue the proceedings by giving to the Registrar and the respondent a notice entitled in the Court and in the cause, and signed by the appellant or the appellant's attorney or solicitor, stating that the appellant discontinues the proceedings.

Respondent entitled to costs

(2) On the notice referred to in subsection (1) being given, the respondent is at once entitled to the costs of and occasioned by the proceedings in appeal, and may, in the court of original jurisdiction, either sign judgment for those costs or obtain an order from that court or a judge thereof for their payment, and may take all further proceedings in that court as if no appeal had been brought.

R.S., c. S-19, s. 74; R.S., c. 44(1st Supp.), s. 8.

Consent to Reversal of Judgment

Consent to reversal

70 A respondent may consent to the reversal of the judgment appealed against by giving to the appellant a notice entitled in the Court and in the cause, and signed by the respondent or the respondent's attorney or solicitor, stating that the respondent consents to the reversal of the judgment, and thereupon the Court or a judge shall pronounce judgment of reversal as of course.

R.S., c. S-19, s. 75.

Dismissal for Delay

Dismissal for delay to proceed

71 (1) Where an appellant unduly delays to prosecute the appeal, or fails to bring on the appeal to be heard at the first session of the Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant, move the Court, or a judge in chambers, for the dismissal of the appeal.

Order

(2) Such order shall thereupon be made as the Court or judge deems just.

R.S., c. S-19, s. 76.

Death of Parties

Death of one of several appellants

72 In the event of the death of one of several appellants, pending the appeal to the Court, a suggestion may be filed of the death, and the proceedings may thereupon be continued at the suit of and against the surviving appellant as if the surviving appellant were the sole appellant.

R.S., c. S-19, s. 77.

Death of sole appellant or all appellants

73 (1) In the event of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant, may, by leave of the Court or a judge, file a suggestion of the death, and that he is that legal representative, and the proceedings may thereupon be continued at the suit of and against the legal representative as the appellant.

If no suggestion

(2) If the suggestion referred to in subsection (1) is not made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as the respondent is entitled to take.

R.S., c. S-19, s. 78.

Death of one of several respondents

74 In the event of the death of one of several respondents, a suggestion may be filed of the death and the proceedings may be continued against the surviving respondents.

R.S., c. S-19, s. 79.

If suggestion of death untrue

75 A suggestion of the death of one of several appellants, of a sole appellant, of all the appellants or of one of several respondents, if untrue, may on motion be set aside by the Court or a judge.

R.S., c. S-19, s. 80.

Death of sole respondent or all respondents

76 In the event of the death of a sole respondent or of all the respondents, the appellant may proceed, on giving one month’s notice of the appeal and of the appellant’s intention to continue the appeal, to the representative of the deceased party, or, if no such notice can be given, on such notice to the parties interested as a judge of the Court directs.

R.S., c. S-19, s. 81.

Death of party where judgment against deceased

77 In the event of the death of a sole plaintiff or defendant before the judgment of the court in which an action or appeal is pending is delivered, and if the judgment is against the deceased party, the legal representatives of the deceased party, on entering a suggestion of the death, are entitled to proceed with and prosecute an appeal in the Supreme Court in the same manner as if they were the original parties to the suit.

R.S., c. S-19, s. 82.

Death of party where judgment in favour of deceased

78 In the event of the death of a sole plaintiff or sole defendant before the judgment of the court in which an action or appeal is pending is delivered, and if the judgment is in favour of the deceased party, the other party, on entering a suggestion of the death, is entitled to proceed with and prosecute an appeal in the Supreme Court against the legal representatives of the deceased party, but the time limited for appealing shall not run until the legal representatives are appointed.

R.S., c. S-19, s. 83.

Entry of Causes

Entry of appeals and order of hearing

79 Unless otherwise ordered by the Chief Justice or one of the puisne judges at the Chief Justice's direction, the appeals set down for hearing shall be

(a) entered by the Registrar on a list in the order in which they have been inscribed for hearing; and

(b) heard in the order that the Registrar considers appropriate and disposed of.

R.S., 1985, c. S-26, s. 79; 1990, c. 8, s. 41; 1994, c. 44, s. 102.

Evidence

Affidavits

80 All persons authorized to administer affidavits to be used in any of the superior courts of any province may administer oaths and take and receive affidavits, declarations and solemn affirmations in that province to be used in the Court.

R.S., c. S-19, s. 85.

Appointment of commissioners

81 (1) The Governor in Council may, by commission, empower such persons as the Governor in Council thinks necessary, within or outside Canada, to administer oaths and take and receive affidavits, declarations and solemn affirmations in or concerning any proceeding had or to be had in the Court.

Effect of affidavits

(2) Every oath, affidavit, declaration or solemn affirmation taken or made pursuant to subsection (1) is as valid and of the like effect, to all intents, as if it had been administered, taken, sworn, made or affirmed before the Court or before any judge or competent officer thereof in Canada.

Style of commissioners

(3) Every commissioner empowered pursuant to subsection (1) shall be styled "a commissioner for administering oaths in the Supreme Court of Canada".

R.S., c. S-19, s. 86.

How affidavits, declarations or affirmations may be made outside Canada

82 Any oath, affidavit, declaration or solemn affirmation concerning any proceeding had or to be had in the Court administered, taken, sworn, made or affirmed outside Canada is as valid and of the same effect to all intents as if it had been administered, taken, sworn, made or afffirmed before a commissioner appointed under this Act, if it is so administered, taken, sworn, made or affirmed outside Canada before

(a) a commissioner authorized to take and receive affidavits to be used in Her Majesty's High Court of Justice in England;

(b) a notary public and certified under his hand and official seal;

(c) a mayor or chief magistrate of any city, borough or town corporate in any part of the Commonwealth and Dependent Territories other than Canada, or in any foreign country, and certified under the common seal of that city, borough or town corporate;

(d) a judge of any court of superior jurisdiction in any part of the Commonwealth and Dependent Territories other than Canada and certified under the seal of the court of which he is a judge; or

(e) a consul, vice-consul, acting consul, pro-consul or consular agent of Her Majesty exercising his functions in any foreign place and certified under his official seal.

R.S., c. S-19, s. 87.

No proof required of signature or seal of commissioner

83 Every document purporting to have affixed, imprinted or subscribed thereon or thereto the signature of

(a) a commissioner appointed under this Act,

(b) a person authorized to take affidavits to be used in any of the superior courts of any province, or

(c) any one of the persons referred to in paragraphs 82(a) to (e), whose signature is certified in the manner therein provided,

in testimony of any oath, affidavit, declaration or solemn affirmation having been administered, taken, sworn, made or affirmed by or before that person, shall be admitted in evidence without proof of the signature or seal or official character of that person.

R.S., c. S-19, s. 88.

Informality not an objection

84 No informality in the heading or other formal requisites of any affidavit, declaration or solemn affirmation, made or taken before any person under any provision of this Act or any other Act, shall be an objection to its admission in evidence in the Court, if the court or judge before which or whom it is tendered thinks proper to admit it, and if it is actually sworn to, declared or affirmed by the person making it before any person duly authorized thereto and is admitted in evidence, no such informality shall be set up to defeat an indictment for perjury.

R.S., c. S-19, s. 89.

Examination on interrogatories or by commission

85 (1) If a party to any proceeding had or to be had in the Court is desirous of having therein the evidence of any person, whether a party or not or whether resident within or outside Canada, the Court or a judge, if in the opinion of the Court or judge it is, owing to the absence, age or infirmity or the distance of the residence of that person from the place of trial, the expense of taking the evidence otherwise, or for any other reason, convenient to do so, may, on the application of that party, order the examination of that person on oath, by interrogatories or otherwise, before the Registrar, any commissioner for taking affidavits in the Court or any other person or persons to be named in the order, or may order the issue of a commission under the seal of the Court for the examination.

Court may give directions

(2) The Court or a judge may, by the order described in subsection (1) or any subsequent order, give all such directions concerning the time, place and manner of the examination, the attendance of the witnesses and the production of papers at the examination, and all matters connected therewith, as appears reasonable.

R.S., c. S-19, s. 90.

Duty of persons taking such examination

86 Every person authorized to take the examination of any witness pursuant to this Act shall take the examination on the oath of the witness, or on solemn affirmation, in any case in which solemn affirmation instead of oath is allowed by law.

R.S., c. S-19, s. 91.

Further examination

87 The Court or a judge may, if it is considered for the ends of justice expedient to do so, order the further examination, before either the Court or a judge, or other person, of any witness, and if the party on whose behalf the evidence is tendered neglects or refuses to obtain such further examination, the Court or judge, in its or his discretion, may decline to act on the evidence.

R.S., c. S-19, s. 92.

Notice to adverse party

88 Such notice of the time and place of examination as is prescribed in the order made under section 87 shall be given to the adverse party.

R.S., c. S-19, s. 93.

Neglect or refusal to attend

89 (1) Where an order is made for the examination of a witness and a copy of the order, together with a notice of the time and place of attendance, signed by the person or one of the persons to take the examination, has been duly served on the witness within Canada, and the witness has been tendered the legal fees for attendance and travel, the refusal or neglect of the witness to attend for examination or to answer any proper question put on examination, or to produce any paper that the witness has been notified to produce, shall be deemed a contempt of court and may be punished by the same process as other contempts of court.

Where no compulsion

(2) In the course of the examination referred to in subsection (1), the witness shall not be compelled to produce any paper that he would not be compelled to produce or to answer any question that he would not be bound to answer in court.

R.S., c. S-19, s. 94.

Effect of consent of parties to examination of witness

90 Where the parties in any case pending in the Court consent in writing that a witness may be examined within or outside Canada by interrogatories or otherwise, the consent and the proceedings had under it are as valid in all respects as if an order had been made and the proceedings had under the order.

R.S., c. S-19, s. 95.

Examinations taken in Canada

91 (1) All examinations taken in Canada pursuant to this Act shall be returned to the Court.

Depositions to be used in evidence

(2) The depositions taken in the course of an examination referred to in subsection (1), certified under the hands of the person or one of the persons taking them, may, without further proof, be used in evidence, saving all just exceptions.

R.S., c. S-19, s. 96.

Examinations taken outside Canada

92 (1) All examinations taken outside Canada pursuant to this Act shall be proved by affidavit of the due taking of the examinations, sworn before a commissioner or other person authorized under this Act or any other Act to take the affidavit, at the place where the examination has been taken, and shall be returned to the Court.

Depositions to be used in evidence

(2) The depositions returned to the Court under subsection (1), together with the affidavit, and the order or commission, closed under the hand and seal of the person or one of the persons authorized to take the examination, may, without further proof, be used in evidence, saving all just exceptions.

R.S., c. S-19, s. 97.

Reading of examination

93 Where any examination has been returned, any party may give notice of the return, and no objection to the examination being read has effect unless taken within the time and in the manner prescribed by general order.

R.S., c. S-19, s. 98.

General

Process of the Court

94 (1) The process of the Court runs throughout Canada and shall be tested in the name of the Chief Justice or, in case of a vacancy in the office of Chief Justice, in the name of the senior puisne judge, and shall be directed to the sheriff of any county or other judicial division into which any province is divided.

Officers of the Court

(2) The sheriffs of the counties or other judicial divisions of the provinces are *ex officio* officers of the Court and shall perform the duties and functions of sheriffs in connection with the Court.

Coroners

(3) In any case where the sheriff is disqualified, the process shall be directed to any of the coroners of the county or district.

R.S., c. S-19, s. 99.

Further powers of commissioners

95 Every commissioner for administering oaths in the Supreme Court, who resides within Canada, may take and receive acknowledgments and any kind of recognizance in the Court.

R.S., 1985, c. S-26, s. 95; 2019, c. 25, s. 391.

Orders for payment of money

96 (1) An order in the Court for payment of money, whether for costs or otherwise, may be enforced by such writs of execution as the Court prescribes.

No attachment for non-payment only

(2) No attachment as for contempt shall issue in the Court for the non-payment of money only.

R.S., c. S-19, ss. 101, 102.

Judges may make rules and orders

97 (1) The judges, or any five of them, may make general rules and orders

(a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

(b) for allowing appeals *in forma pauperis* by leave, notwithstanding the provisions of this Act or any other Act requiring the giving of security for costs, and for allowing a respondent leave to defend *in forma pauperis*;

(c) for empowering the Registrar to do any such thing and transact any such business as is specified in the rules or orders, and to exercise any authority and jurisdiction in respect of the rules or orders as may be done, transacted or exercised by a judge sitting in chambers by virtue of any statute or custom or by the practice of the Court;

(d) for fixing the fees and costs to be taxed and allowed to, and received and taken by, and the rights and duties of, the officers of the Court;

(e) for awarding and regulating costs in the Court in favour of and against the Crown, as well as the subject; and

(f) with respect to matters coming within the jurisdiction of the Court, with respect to references to the Court by the Governor in Council, and in particular with respect to investigations of questions of fact involved in any such reference.

Extent of rules and orders

(2) The rules and orders may extend to any matter of procedure or otherwise not provided for by this Act, but for which it is found necessary to provide, in order to ensure the proper working of this Act and the better attainment of the objects thereof.

Force of rules and orders

(3) All rules not inconsistent with the express provisions of this Act have force and effect as if herein enacted.

Copies to be laid before Parliament

(4) Copies of all rules and orders made under this section shall be laid before each House of Parliament on any of the first fifteen days after the making thereof on which that House is sitting.

R.S., 1985, c. S-26, s. 97; R.S., 1985, c. 34 (3rd Supp.), s. 7.

Payment of costs due to or by Crown

98 Any moneys or costs awarded to the Crown shall be paid to the Receiver General, and the Minister of Finance shall cause to be paid out of any unappropriated moneys forming part of the Consolidated Revenue Fund any moneys or costs awarded to any person against the Crown.

R.S., c. S-19, s. 104.

Crown entitled to costs notwithstanding solicitor or counsel salaried officer

99 (1) In any proceeding to which Her Majesty is a party, either as represented by the Attorney General of Canada or otherwise, costs adjudged to Her Majesty shall not be disallowed or reduced on taxation merely because the solicitor or the counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of the Crown performing such services in the discharge of his duty and remunerated therefor by his salary, or for that or any other reason not entitled to recover any costs from the Crown in respect of the services so rendered.

Costs paid into C.R.F.

(2) The costs recovered by or on behalf of Her Majesty in any case referred to in subsection (1) shall be paid into the Consolidated Revenue Fund.

R.S., c. S-19, s. 105.

Fees payable

100 All fees payable to the Registrar under this Act shall be paid into the Consolidated Revenue Fund and the Registrar shall regulate the collection of those fees.

R.S., c. S-19, s. 106; R.S., c. 44(1st Supp.), s. 9.

Tab 6

CanLII

Rules of the Supreme Court of Canada, SOR/2002-156

Current version: in force since 2024-06-03

Link to the latest version: https://canlii.ca/t/7xs4

Stable link to this version: https://canlii.ca/t/56b23

Citation to this version: Rules of the Supreme Court of Canada, SOR/2002-156, <https://canlii.ca/t/56b23> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Rules of the Supreme Court of Canada

SOR/2002-156

SUPREME COURT ACT

Registration 2002-04-15

Rules of the Supreme Court of Canada

Pursuant to subsection 97(1)[a] of the *Supreme Court Act*, the undersigned judges of the Supreme Court of Canada hereby make the annexed *Rules of the Supreme Court of Canada*.

[a]R.S., c. 34 (3rd Supp.), s. 7

Ottawa, April 15, 2002

The Right Honourable Beverley McLachlin
The Honourable Mr. Justice John C. Major
The Honourable Mr. Justice Michel Bastarache
The Honourable Mr. Justice William Ian Corneil Binnie
The Honourable Mr. Justice Louis LeBel
Judges of the Supreme Court of Canada

PART 1

Application and Interpretation

Application

1 Except as otherwise provided by the Act or any other Act of Parliament, these Rules apply to all proceedings in the Court.

Interpretation

2 The following definitions apply in these Rules.

Act means the *Supreme Court Act*. (*Loi*)

affidavit includes an affirmation and a statutory declaration. (*affidavit*)

agent means a lawyer practising in the National Capital Region within the meaning of the *National Capital Act*. (*correspondant*)

application for leave to appeal means an application for leave to appeal referred to in Rule 25 and section 40 of the Act. (*demande d'autorisation d'appel*)

attorney general means the Attorney General of Canada, an attorney general of a province or a minister of Justice of a territory. (*procureur général*)

authorities includes legislative enactments, case law, articles and texts, treaties and excerpts from them. (*sources*)

commissioner for oaths includes any person authorized under federal or provincial legislation or rules of practice, as the case may be, to conduct examinations. (*commissaire à l'assermentation*)

counsel means a member of the bar of a province. (*procureur*)

electronic filing portal means the electronic filing portal on the Court's website or on any other website specified in a direction given by the Court. (*portail de dépôt électronique*)

holiday means a holiday as defined in the *Interpretation Act* and includes Saturday. (*jour férié*)

last known address means the address that appears on the most recently filed document, whether it is a document filed in the Court or in the court appealed from, or, if applicable, on the notice of change that was most recently served and filed in accordance with Rule 17.1. (*dernière adresse connue*)

last known email address means the email address that appears on the most recently filed document, whether it is a document filed in the Court or in the court appealed from,

or, if applicable, on the notice of change that was most recently served and filed in accordance with Rule 17.1. (*dernière adresse de courriel connue*)

last known fax number means the fax number that appears on the most recently filed document, whether it is a document filed in the Court or in the court appealed from, or, if applicable, on the notice of change that was most recently served and filed in accordance with Rule 17.1. (*dernier numéro de télécopieur connu*)

party means a person named in the style of cause in accordance with Rule 22 including any person added or substituted as a party under Rule 18, but where referring to the court appealed from, it means a person who was a party in that court. (*partie*)

person includes a body politic or corporate, His Majesty the King and an attorney general. (*personne*)

printing includes reproduction by any means but does not include hand writing. (*impression*)

proceeding means an appeal, application for leave to appeal, motion or reference before the Court, a judge or the Registrar. (*procédure*)

SOR/2011-74, s. 1; SOR/2013-175, s. 1; SOR/2024-73, s. 1.

Where No Provisions

3 (1) Whenever these Rules contain no provision for exercising a right or procedure, the Court, a judge or the Registrar may adopt any procedure that is not inconsistent with these Rules or the Act.

(2) A party may, on motion to a judge or the Registrar, request directions as to the procedure referred to in subrule (1).

Conditions and Proportionality

[SOR/2016-271, s. 1.]

4 (1) Whenever these Rules provide that the Court, a judge or the Registrar may make an order or give a direction, the Court, the judge or the Registrar, as the case may be, may impose any terms and conditions in the order or direction that they consider appropriate.

(2) In applying these Rules, the Court, a judge or the Registrar shall make orders and give directions that are proportionate to the complexity of the proceeding and the importance of the issues in dispute.

SOR/2016-271, s. 2.

Computation of Time

5 (1) The computation of time under these Rules or under an order of the Court, a judge or the Registrar is governed by the *Interpretation Act*.

(1.1) If the filing and serving are to be done within a specified number of weeks after a specified day or event, the period is calculated by

(a) excluding that day or the day of the event; and

(b) including the last day of the last seven-day period.

(2) A day that is a holiday shall not be included in computing a period of less than six days under these Rules.

(3) The month of July shall not be included in the computation of time under these Rules except for the service and filing of a notice of intervention under subrule 33(4), a factum, record or book of authorities on an appeal or a cross-appeal under Rules 35 to 37 and a motion for intervention under paragraph 56(b), including any response or reply.

(4) A day that is a holiday and the month of July shall be included in the computation of time under an order of the Court, a judge or the Registrar.
SOR/2006-203, s. 1; SOR/2011-74, s. 2; SOR/2013-175, s. 2; SOR/2016-271, s. 3.

5.1 Unless otherwise directed by the Court, a judge or the Registrar, and subject to section 58 of the Act, the period beginning on December 23 in a year and ending on January 3 in the following year is not to be included in a computation of time under these Rules for the service and filing of documents, except for the service and filing of a notice of constitutional question under subrule 33(2).

SOR/2006-203, s. 1; SOR/2011-74, s. 3; SOR/2016-271, s. 4; SOR/2019-1, s. 1.

Extension or Abridgment

6 (1) The Court, a judge or unless these Rules provide otherwise, the Registrar may, on motion or on their own initiative, extend or abridge a period provided for by these Rules.

(2) The affidavit in support of a motion for an extension or abridgement of time shall set out the reason for the delay or urgency, as the case may be.

Adjournment

7 (1) The Chief Justice or, in his or her absence or at his or her request, any other judge may, on motion or on the judge’s own initiative, adjourn the hearing of any proceeding.

(2) The affidavit in support of a motion for an adjournment shall set out the facts or reasons for the adjournment.

Dispensing with Compliance

8 (1) The Court, a judge or unless these Rules provide otherwise, the Registrar may, on motion or on their own initiative, excuse a party from complying with any of these Rules.

(2) The Court, a judge or the Registrar may refuse a document that does not comply with these Rules or that has not been served in accordance with these Rules or an order of the Court, a judge or the Registrar.

(3) Documents that do not comply with these Rules may be excluded from costs upon the order of the Court, a judge or the Registrar.

PART 2

Administration of the Court

Business Hours

9 The Registry of the Court shall be open every day except holidays from 8:00 a.m. to 5:00 p.m. local time unless otherwise directed by the Registrar.

SOR/2013-175, s. 3.

Registrar to Keep Records

10 (1) The Registrar shall keep all records necessary for documenting the proceedings of the Court.

(2) For each proceeding, the Registrar shall keep

(a) all documents and correspondence, including emails, that are filed in relation to a proceeding before the Court and all correspondence, judgments and orders of the Court that relate to that proceeding and that are delivered to the parties; and

(b) an electronic register in which all activities in the proceeding are recorded.

(3) If only one version of a document is filed, whether printed or electronic, that version shall be the official version. If both printed and electronic versions are filed the printed version shall be the official version unless the Registrar declares otherwise.

SOR/2011-74, s. 4(F); SOR/2016-271, s. 5.

Official Languages

11 (1) A party may use either English or French in any oral or written communication with the Court.

(2) Subject to subrule (3), the Registrar shall provide to the parties services for simultaneous interpretation in both official languages during the hearing of every proceeding.

(3) In the case of a motion to be heard by a judge or the Registrar, the Registrar shall provide the services referred to in subrule (2) upon request of any party to the motion, made at least two days before the hearing of the motion.

PART 3

Powers of the Registrar

Order of Registrar Binding

12 Subject to Rule 78, every order made by the Registrar shall be binding on all parties concerned as if the order had been made by a judge.

Reference to the Court or a Judge

13 The Registrar may refer any matter before him or her to the Court or a judge.

SOR/2016-271, s. 6.

PART 4

General Rules

Name of Party

14 (1) In the case of an application for leave to appeal, an appeal referred to in paragraph 33(1)(b) or (c) or an originating motion, any party — other than an individual — must file with the Registrar a notice of name in Form 14 to confirm its name in each of the official languages or to certify that it does not have a bilingual name.

(2) A party that has filed a notice of name may request that the Registrar consider the notice as permanent so that it will be applied to all other matters before the Court involving that party. Any changes that affect the notice of name must be submitted in writing to the Registrar.

SOR/2011-74, s. 5; SOR/2013-175, s. 4; SOR/2016-271, s. 7; SOR/2019-1, s. 2; SOR/2024-73, s. 2.

Representation of Parties

15 (1) Subject to Rule 17, counsel for a party in the court appealed from is deemed to be counsel before the Court.

(2) Subject to subrule (3), a party may either act in person or be represented by counsel.

(3) Any party, other than an individual, shall be represented by counsel unless

(a) it was permitted to be represented by a person other than counsel in any of the lower courts and it chooses to continue to be represented by that person in the Court; or

(b) on motion, a judge grants it leave to be represented by a person other than counsel in accordance with the applicable federal or provincial legislative enactment.

SOR/2013-175, s. 5; SOR/2016-271, s. 8.

Agents

16 (1) A party to any proceeding may choose to conduct business with the Registrar through an agent.

(2) [Repealed, SOR/2020-281, s. 1]

(3) No agent shall represent more than one party in any proceeding except with the consent of each party represented by the agent.

(4) An agent who represents two opposing parties shall file with the Registrar a notice in Form 16.

(5) A party may appoint a permanent agent by filing with the Registrar a notice to that effect.

SOR/2013-175, s. 6; SOR/2020-281, s. 1.

Change of Representation or Withdrawal of Counsel or Agent

17 (1) A party may change their counsel or agent by identifying the new counsel or agent on the originating document, or during the course of the proceeding, by serving on all other parties and filing with the Registrar a notice of change setting out the name, address and telephone number, and the fax number and email address, if any, of the new counsel or agent.

(2) A party who was represented by counsel in the court appealed from may elect to act in person by signing the originating document.

(3) A party who was not represented by counsel in the court appealed from may elect to be represented by counsel by serving on all other parties and filing with the Registrar a notice to that effect.

(4) A counsel may choose to cease to represent a party before the Court by

(a) serving on all other parties and filing with the Registrar a notice of withdrawal of counsel accompanied by the consent of the party; or

(b) in the absence of the consent of the party, making a motion to a judge or the Registrar for an order that the counsel no longer represents the party, and serving on that party and all other parties the motion and, if the motion is granted, the order of withdrawal.

(5) An agent may cease to represent a party by serving on that party and all other parties and filing with the Registrar a notice of withdrawal.

SOR/2011-74, s. 6; SOR/2013-175, s. 7(F); SOR/2016-271, s. 52(F).

Change in Contact Information

17.1 A party shall serve on all other parties and file with the Registrar a notice of any change in their contact information without delay.

SOR/2013-175, s. 8.

Adding, Substituting and Removing Parties

[SOR/2013-175, s. 9.]

18 (1) A person may be added or substituted as a party on motion before a judge or the Registrar that sets out the reasons for the addition or substitution.

(2) Subject to subrule (5), no person shall be added or substituted as a party without the person's consent being filed with the Registrar.

(3) The motion referred to in subrule (1) shall also be served on the proposed added or substituted party.

(4) Parties added or substituted shall be served with all documents provided for in these Rules, and any time periods shall begin as provided for in the order unless a judge or the Registrar otherwise orders.

(4.1) A party who is named in the style of cause can be removed on the consent of the applicant or the appellant, as the case may be, or on motion before a judge or the Registrar that sets out the reasons for the removal.

(5) In any proceeding, the Court or a judge may order that a party be added, substituted or removed if, in the opinion of the Court or the judge, the addition, substitution or removal is necessary to enable the Court to adjudicate the questions in issue.

SOR/2013-175, s. 10.

Filing of Documents

19 (1) Subject to subrule (1.1), a document — including a document that these Rules require to be bound — may be filed with the Registrar

(a) through the electronic filing portal;

(b) by fax transmission or email;

(c) by hand delivery; or

(d) by mail or courier.

(1.1) The documents referred to in subrules 19.1(1) and (2) must be filed with the Registrar by hand delivery, mail or courier.

(2) On receipt of a document, the Registrar may

(a) accept or reject the document for filing; or

(b) accept the document for filing subject to the making of any corrections or the fulfilling of any conditions precedent.

(2.1) to (2.3) [Repealed, SOR/2011-74, s. 7]

(3) A document that is filed by hand delivery, mail or courier is deemed to have been filed on the date of the Court's filing stamp on that document, unless the Court, a judge or the Registrar otherwise orders.

(3.1) A document that is filed through the electronic filing portal, by fax transmission or by email is deemed to have been filed on the day on which it is received, unless that day is a holiday, in which case the document is deemed to have been filed on the following day that is not a holiday.

(3.2) In the case of a document that is filed through the electronic filing portal, by fax transmission or by email, the time of its receipt by the Registrar is that time in the Eastern time zone.

(4) A document that is filed by fax transmission or email must include a cover page that meets the requirements of subrule 20(3) or the information referred to in paragraphs 20(3.1)(a), (b), (d) and (e), as the case may be.

(5) Within five business days after the day on which a document, other than correspondence referred to in subrule (7), is filed through the electronic filing portal, by fax transmission or by email, the original and the required copies of the document must be bound, if applicable, and must be filed by hand delivery, mail or courier.

(6) All documents filed, other than correspondence referred to in subrule (7), shall be served in accordance with Rule 20 on all parties unless these Rules provide otherwise or the Court, a judge or the Registrar otherwise orders.

(7) A copy of any correspondence between parties, or between a party and the Registrar, that has been filed shall be sent to all other parties by hand delivery, mail or courier to the last known address or, if the address for service of the recipient party includes a fax number or an email address, by fax transmission to the last known fax number or by email to the last known email address.
SOR/2006-203, s. 2; SOR/2011-74, s. 7; SOR/2013-175, s. 11; SOR/2024-73, s. 3.

Filing of Sealed and Confidential Documents

[SOR/2013-175, s. 12.]

19.1 (1) If it is filed, any document that is subject to a sealing or confidentiality order from a lower court or the Court or that is classified as confidential by legislation shall be sealed in an envelope and be accompanied by a covering letter and a copy of the sealing or confidentiality order or provision of the applicable legislation.

(2) Subject to subrule (3), if any of the following documents is filed, it shall be sealed in an envelope and accompanied by one redacted electronic version, if one is required under these Rules, and two redacted printed versions:

(a) a document containing a document that is subject to a sealing or confidentiality order from a lower court or the Court or that is classified as confidential by legislation;

(b) a document that reveals information that is subject to a sealing or confidentiality order from a lower court or the Court or that is classified as confidential by legislation; or

(c) a document that a party requires to be sealed.

(3) If a redacted version of a document referred to in paragraph (2)(b) cannot be filed, the document shall be accompanied by a motion to seal to the Registrar.

(4) A document referred to in paragraph (2)(c) shall be accompanied by a motion to seal to the Registrar.

SOR/2011-74, s. 8; SOR/2013-175, s. 13; SOR/2016-271, s. 9.

Service of Documents

20 (1) Service of any document on a party shall be made on the party's counsel or agent at that person's last known address, last known fax number or last known email address or, if the party is not represented by counsel, on the party or the party's agent, by

(a) personal service made on any day other than a holiday;

(b) ordinary mail, except for originating documents or documents filed in support;

(c) registered or certified mail or by courier;

(d) fax transmission, except for

(i) originating documents or documents filed in support, and

(ii) documents that are longer than 40 pages unless the party being served consents to service by fax transmission;

(d.1) email; or

(e) leaving a copy with a party's counsel or agent or with an employee in the office of the counsel or agent.

(2) A party served with an electronic version of a document that is required to be bound may also request a printed version that shall be sent no later than one week after receipt of the request.

(3) Every document served by fax transmission shall include a cover page that shows

(a) the title of the document being transmitted;

(b) the sender's name, address and telephone number;

(c) the name of the party being served and of the party's counsel, if any;

(d) the date and approximate time of the transmission;

(e) the number of pages transmitted, including the cover page;

(f) the fax number of the transmitting fax machine; and

(g) the name and telephone number of the person to contact if there are transmission problems.

(3.1) If a document is served by email, the email shall contain

(a) the title of the document being transmitted;

(b) the sender's name, address and telephone number;

(c) the name of the party being served and of the party's counsel, if any;

(d) the date and approximate time of the transmission; and

(e) an indication of the number of attachments to the email or an indication of where the party being served can access the document electronically.

(4) Subject to subrule (5), a document is deemed to have been served on the day on which it is received or is admitted to have been received, unless it is received between 5:00 p.m. and 12:00 a.m. local time or on a day that is a holiday, in which case it is deemed to have been served on the following day that is not a holiday.

(5) A document served by ordinary mail is deemed to have been served on the fifth business day after the document is mailed.

(6) When an attempt by an authorized person to serve a document in accordance with the rules of procedure applicable in the province or territory in which the document is served has failed and was recorded in that person's certificate of service, he or she may serve the document by leaving on the premises a copy of the document intended for the addressee.

(7) Proof of service of the printed version or the electronic version is sufficient.

(8) Proof of service shall be verified by filing, in accordance with Rule 19, one of the following documents within two days after service, unless a judge or the Registrar otherwise orders:

(a) if service is made by ordinary mail, an affidavit of service in Form 20;

(b) if service is made by registered or certified mail or by courier, an affidavit of service in Form 20 annexing a post office receipt, a receipt card bearing the signature of the person served or a copy of the tracking results of the courier service that indicates the status of the delivery of the document;

(c) if service is made by fax transmission, an affidavit of service in Form 20 annexing a copy of the cover page referred to in subrule (3) and a transmission slip that confirms the date and time of transmission;

(d) if service is made by email, an affidavit of service in Form 20 annexing a copy of the email referred to in subrule (3.1) and a copy of the read receipt, the delivery receipt or the confirmation by the party served that the service was effected electronically;

(e) a certificate of service by any authorized person in accordance with the rules of procedure applicable in the province or territory in which the document is served; or

(f) an admission of service endorsed by the party or their counsel or agent.

(9) If service is made by registered or certified mail, courier, fax transmission or email, an affidavit of service in Form 20 is not required for documents that are not originating documents, provided that the information that is required to be annexed under paragraph (8)(b), (c) or (d), as the case may be, is filed.

(10) The Registrar may, on filing of an affidavit by the serving party, make any order for substitutional service that the circumstances require.

SOR/2006-203, s. 3; SOR/2011-74, s. 8; SOR/2013-175, s. 14; SOR/2016-271, ss. 10, 52(F); SOR/2019-1, s. 3; SOR/2024-73, s. 4.

Guidelines for Preparing Documents

21 (1) Every document before the Court shall be prepared in accordance with the *Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic)*, as amended from time to time.

(2) [Repealed, SOR/2016-271, s. 11]

SOR/2006-203, s. 4; SOR/2011-74, s. 8; SOR/2016-271, s. 11.

Style of Cause

22 (1) [Repealed, SOR/2011-74, s. 9]

(2) The style of cause in an application for leave to appeal shall name, followed by their status in the court appealed from,

(a) as an applicant, each party bringing the application for leave to appeal;

(b) as a respondent, each party against whom the applicant brings the application for leave to appeal — including, in Quebec, a mis-en-cause — and who was adverse in interest to the applicant in the court appealed from; and

(c) as an intervener,

(i) any intervener who was given full party status in the court appealed from and, in Quebec, any mis-en-cause in the court appealed from who is not already named in the style of cause,

(ii) each person who has been granted leave to intervene in accordance with Rule 59, and

(iii) each administrative board or tribunal whose jurisdiction is at issue, whether or not the board or tribunal was active in the proceedings in the court appealed from.

(3) The style of cause in an appeal shall name, followed by their status in the court appealed from,

(a) as an appellant, each party bringing the appeal;

(b) as a respondent, each party against whom the appellant brings the appeals — including, in Quebec, a mis-en-cause — and who was adverse in interest to the appellant in the court appealed from; and

(c) as an intervener,

(i) any intervener who was given full party status in the court appealed from and, in Quebec, any mis-en-cause in the court appealed from who is not already named in the style of cause,

(ii) each person who has been granted leave to intervene in accordance with Rule 59,

(iii) each attorney general who has filed a notice of intervention in accordance with subrule 33(4), and

(iv) each administrative board or tribunal whose jurisdiction is at issue, whether or not the board or tribunal was active in the proceedings in the court appealed from.

(3.1) The style of cause in a motion shall follow the style of cause for the application for leave to appeal or the appeal, as the case may be, and may be abbreviated to name only the first applicant and respondent, or the first appellant and respondent, as the case may be.

(4) A motion may be brought under Rule 18 to include in the style of cause as a party any other person who was a party, mis-en-cause or an intervener in the court appealed from and who must be a party to the proceedings to give effect to a judgment of the Court.

SOR/2006-203, s. 5; SOR/2011-74, s. 9; SOR/2016-271, s. 12.

Certificates of Counsel

23 (1) In the case of an application for leave to appeal or an originating motion, counsel for the applicant and the respondent and, in the case of an appeal referred to in paragraph 33(1)(b) or (c), counsel for the appellant and the respondent shall file a certificate in Form 23A certifying whether there is

(a) a sealing or confidentiality order from a lower court or the Court in effect in the file;

(b) a ban on the publication of evidence or the names or identity of a party or witness under an order in effect in the file or under legislation;

(c) information in the file that is classified as confidential under legislation; or

(d) a restriction on public access to information in the file in a lower court.

(2) If counsel for the applicant or the respondent certifies that any of the situations set out in paragraphs (1)(a) to (d) exist, the certificate shall be accompanied by, as the case may be, a copy of any applicable order or, if the order was pronounced orally at a hearing, a copy of the relevant excerpt from the transcript of the hearing, a citation of any applicable legislative provision or an explanation of the restriction.

(3) If there is any order, applicable legislation or restriction referred to in subrule (1), counsel shall file a certificate in Form 23B certifying whether any documents filed by the counsel contain information that is subject to the order, legislation or restriction in the lower court and identifying the relevant documents and information.

(4) If a judge’s previous involvement or connection with the case may result in it being inappropriate for that judge to take part in the adjudication on the proceedings in the Court, counsel shall file a certificate in Form 23C setting out the issues.

(5) The certificates and documents referred to in subrules (1), (2) and (4) shall be filed at the same time as the application for leave to appeal or the response to that application, the originating motion or the response to that motion or, in the case of an appeal referred to in paragraph 33(1)(b) or (c), the notice of appeal or respondent’s factum.

(6) Counsel shall immediately file a revision of the certificate referred to in subrule (1) in the event of any change in respect of the matters referred to in that subrule.

SOR/2013-175, s. 15; SOR/2016-271, s. 13; SOR/2019-1, s. 4.

24 In the case of an appeal, counsel for the appellant and respondent shall file a certificate in Form 24A or 24B at the same time as the record referred to in Rule 38 or 39.

SOR/2013-175, s. 15.

PART 5

Leave to Appeal

Application for Leave to Appeal

25 (1) An application for leave to appeal must be bound and consist of the following:

(a) a notice of application for leave to appeal in Form 25, citing the legislative provision that authorizes the application for leave to appeal and including as a schedule to the notice of application for leave to appeal, beginning with the court of first instance or the administrative tribunal, as the case may be, and ending with the court appealed from,

(i) the reasons for judgment, if any,

(ii) the formal judgments or orders, as signed and entered, and

(iii) if the formal judgments or orders have not been signed and entered, all draft orders, the final versions of which must be filed separately immediately after they are signed and entered;

(b) [Repealed, SOR/2020-281, s. 2]

(c) a memorandum of argument divided as follows:

(i) Part I, a concise overview of the applicant's position with respect to issues of public importance that are raised in the application for leave to appeal and a concise statement of facts,

(ii) Part II, a concise statement of the questions in issue and, if the proposed appeal raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule or the inoperability of a statute or regulation, a concise statement of the issue,

(iii) Part III, a concise statement of argument,

(iv) Part IV, submissions, if any, not exceeding one page in support of the order sought concerning costs,

(v) Part V, the order or orders sought, including the order or orders sought concerning costs,

(vi) Part VI, a table of authorities — including the relevant provisions of any statute, regulation, rule, ordinance or by-law being relied on, in both official languages if the provisions are required by law to be published in both official languages — that is arranged alphabetically, includes, if available, hyperlinks to all authorities and sets out the paragraph numbers where the authorities are cited in the memorandum of argument, and

(vii) Part VII, a photocopy, or a printout from an electronic database, of those provisions of any statute, regulation, rule, ordinance or by-law being relied on for which hyperlinks are not provided in Part VI, in both official languages if they are required by law to be published in both official languages; and

(c.1) [Repealed, SOR/2013-175, s. 16]

(d) if, in support of the application for leave to appeal, the applicant intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits.

(e) to (g) [Repealed, SOR/2013-175, s. 16]

(2) Parts I to V of the memorandum of argument must not exceed 20 pages.

(3) [Repealed, SOR/2020-281, s. 2]

(4) [Repealed, SOR/2020-281, s. 2]

(5) [Repealed, SOR/2013-175, s. 16]

SOR/2006-203, s. 7; SOR/2011-74, s. 11; SOR/2013-175, s. 16; SOR/2016-271, ss. 14, 52(F); SOR/2019-1, s. 5; SOR/2020-281, s. 2.

Service and Filing

26 (1) An applicant must file with the Registrar

(a) a copy of the electronic version of the application for leave to appeal referred to in subrule 25(1), with the reasons for judgment of the lower courts included as hyperlinks, if available, and any motion related to the application for leave to appeal; and

(b) the original and two copies of the printed version of the application for leave to appeal referred to in subrule 25(1).

(2) In addition to the service required under paragraph 58(1)(a) of the Act, an applicant must

(a) send to all other applicants, all respondents and all interveners a copy of the electronic version referred to in paragraph (1)(a) by email and file with the Registrar a read or delivery receipt; and

(b) send to any party in the court appealed from who is not named in the style of cause referred to in subrule 22(2) a copy of the notice of application for leave to appeal and file with the Registrar confirmation that the notice was sent.

SOR/2006-203, s. 8; SOR/2013-175, s. 17; SOR/2020-281, s. 3.

Response

27 (1) Within 30 days after the day on which a file is opened by the Court following the filing of an application for leave to appeal or, if a file has already been opened, within 30 days after the service of an application for leave to appeal, a respondent or an intervener may respond to the application for leave to appeal by

(a) serving a copy of the response on all other parties;

(b) filing with the Registrar the original and two copies of the printed version of the response and a copy of the electronic version of the memorandum of argument referred to in paragraph (2)(a), if any, and any response to any motion related to the application for leave to appeal; and

(c) [Repealed, SOR/2020-281, s. 4]

(d) sending to all other parties a copy of the electronic version of the memorandum of argument referred to in paragraph (2)(a), if any, and any response to any motion related to the application for leave to appeal by email.

(2) The response must be bound and consist of the following:

(a) a memorandum of argument in accordance with paragraph 25(1)(c), with Parts I to V not exceeding 20 pages in the case of a respondent and five pages in the case of an intervener; and

(b) if, in support of the response, the respondent or intervener intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits.

(3) Subrule (2) does not apply if the response is no longer than two pages.

SOR/2006-203, s. 9; SOR/2011-74, s. 12; SOR/2013-175, s. 18; SOR/2016-271, ss. 15, 52(F); SOR/2020-281, s. 4.

Reply

28 (1) Within 10 days after service of the response of the respondent or the intervener to the application for leave to appeal or within the time referred to in subrule 30(1) if paragraph 30(2)(b) applies, the applicant may reply by

(a) serving a copy of the reply on all other parties;

(b) filing with the Registrar the original and two copies of the printed version of the reply and a copy of the electronic version of the memorandum of argument referred to in subrule (2), if any, and any reply to the response to any motion related to the application for leave to appeal; and

(c) [Repealed, SOR/2020-281, s. 5]

(d) sending to all other parties a copy of the electronic version of the memorandum of argument referred to in subrule (2), if any, and any reply to the response to any motion related to the application for leave to appeal by email.

(2) The reply must be bound and consist of a memorandum of argument not exceeding five pages.

(3) Subrule (2) does not apply if the reply is no longer than two pages.
SOR/2011-74, s. 13; SOR/2013-175, s. 19; SOR/2016-271, ss. 16, 52(F); SOR/2020-281, s. 5.

PART 6

Leave to Cross-appeal

Application for Leave to Cross-Appeal

29 (1) Within the deadline for filing a response under subrule 27(1) in the case of an appeal for which leave is required or, in all other cases, within 30 days of service of a notice of appeal, a respondent who seeks to set aside or vary all or any part of the disposition of the judgment appealed from may apply for leave to cross-appeal by

(a) serving a copy of the application for leave to cross-appeal on all parties who are named in the style of cause referred to in subrule 22(2) for the application for leave to cross-appeal;

(a.1) filing with the Registrar the original and two copies of the printed version of the application for leave to cross-appeal and a copy of the electronic version of the notice of application for leave to cross-appeal, the memorandum of argument and any motion related to the application for leave to cross-appeal;

(b) sending to the parties referred to in paragraph (a) a copy of the electronic version of the notice of application for leave to cross-appeal referred to in paragraph (2)(a), a memorandum of argument in accordance with paragraph 25(1)(c) and any motion related to the application for leave to cross-appeal by email, and filing with the Registrar a read or delivery receipt; and

(c) sending to any party in the court appealed from who is not named in the style of cause for the application for leave to cross-appeal a copy of the notice of application for leave to cross-appeal, and filing with the Registrar confirmation that the notice was sent.

(d) [Repealed, SOR/2020-281, s. 6]

(2) The application for leave to cross-appeal

(a) must be bound and consist of a notice of application for leave to cross-appeal in Form 29, and must be otherwise in accordance with Rule 25, with any modifications that the circumstances require; and

(b) may be joined with the response to the application for leave to appeal.

(3) A respondent who seeks to uphold the judgment appealed from on a ground not relied on in the reasons for that judgment may do so in the respondent's factum without applying for leave to cross-appeal.

(4) In the circumstances set out in subrule (3), the appellant may serve and file, in accordance with subrule 35(3), a factum in response that is bound and does not exceed 20 pages.

SOR/2006-203, s. 10; SOR/2011-74, s. 14; SOR/2013-175, s. 20; SOR/2016-271, s. 17; SOR/2020-281, s. 6.

Response

30 (1) Within 30 days after service of the application for leave to cross-appeal, an applicant may respond to the application for leave to cross-appeal by

(a) serving on all other parties to the application for leave to cross-appeal a copy of the response;

(b) filing with the Registrar the original and two copies of the printed version of the response and a copy of the electronic version of the memorandum of argument in accordance with paragraph 25(1)(c), if any, and any response to any motion related to the application for leave to cross-appeal; and

(c) [Repealed, SOR/2020-281, s. 7]

(d) sending to all other parties to the application for leave to cross-appeal a copy of the electronic version of the memorandum of argument, if any, and any response to any motion related to the application for leave to cross-appeal by email.

(2) The response to the application for leave to cross-appeal

(a) must be bound and be otherwise in accordance with subrule 27(2), with any modifications that the circumstances require; and

(b) may be joined with the reply to the response to the application for leave to appeal.

(3) Subrule (2) does not apply if the response to the application for leave to cross-appeal is no longer than two pages.

SOR/2011-74, s. 15; SOR/2013-175, s. 21; SOR/2016-271, ss. 18, 52(F); SOR/2020-281, s. 7.

Reply

31 (1) Within 10 days after the service of the applicant's response to the application for leave to cross-appeal, the respondent may reply by

(a) serving on all other parties to the application for leave to cross-appeal a copy of the reply;

(b) filing with the Registrar the original and two copies of the printed version of the reply and a copy of the electronic version of the memorandum of argument, if any, and any reply to the response to any motion related to the application for leave to cross-appeal; and

(c) [Repealed, SOR/2020-281, s. 8]

(d) sending to all other parties to the application for leave to cross-appeal a copy of the electronic version of the memorandum of argument, if any, and any reply to the response to any motion related to the application for leave to cross-appeal by email.

(2) The reply must be bound and consist of a memorandum of argument not exceeding five pages.

(3) Subrule (2) does not apply if the reply is no longer than two pages.
SOR/2011-74, s. 16; SOR/2013-175, s. 22; SOR/2016-271, s. 19; SOR/2020-281, s. 8.

PART 7

Submission to the Court

Submission of Applications

32 (1) The Registrar shall submit to the Court for consideration

(a) an application for leave to appeal, either

(i) after the reply is filed or at the end of the 10-day period referred to in Rule 28, as the case may be, or

(ii) if no response is filed, at the end of the 30-day period referred to in Rule 27; and

(b) an application for leave to cross-appeal, either

(i) after the reply is filed or at the end of the 10-day period referred to in Rule 31, as the case may be, or

(ii) if no response is filed, at the end of the 30-day period referred to in Rule 30.

(2) Documents shall not be filed after the application for leave to appeal or leave to cross-appeal, as the case may be, has been submitted to the Court unless the Registrar otherwise directs.

(3) The Registrar shall set down for hearing any application for leave to appeal for which an oral hearing has been ordered pursuant to paragraph 43(1)(c) of the Act.

SOR/2016-271, s. 20.

PART 8

Appeals and Cross-appeals

Notice of Appeal

33 (1) A notice of appeal under paragraph 60(1)(a) of the Act must

(a) be in Form 33A;

(b) in the case of an appeal under paragraph 691(1)(a) or (2)(a) or (b), 692(3)(a) or 693(1)(a) of the *Criminal Code*, cite the legislative provision that authorizes the appeal, set out the questions of law, including the question of law on which the dissenting judgment of the court appealed from is, in whole or in part, based, and include as a schedule to the notice of appeal a copy of the information or indictment, the judgment and the reasons for judgment, if any, of the court of first instance or the notation on the indictment or on an equivalent document, and the judgment and the reasons for judgment of the court appealed from; and

(c) in the case of all other appeals for which leave to appeal is not required, cite the legislative provision that authorizes the appeal and include as a schedule to the notice of appeal a copy of the judgment and the reasons for judgment of the court appealed from.

(d) [Repealed, SOR/2019-1, s. 6]

(2) In the case of an appeal that raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule, or the inoperability of a statute or regulation, a notice of constitutional question in Form 33B shall be filed by the appellant, as a schedule to the notice of appeal, or by the respondent, if the issue has been raised by the respondent, within 30 days after leave to appeal has been granted or after the filing of the notice of appeal in respect of an appeal for which leave is not required.

(3) On the same day as the notice of constitutional question is filed, a copy of it shall be served by email on all other parties to the appeal and on any attorney general who is not already a party to the appeal together with hyperlinks to

(a) the judgment granting the application for leave to appeal and the reasons for judgment of the court appealed from;

(b) the legislative provisions at issue; and

(c) if applicable, the relevant provisions of the *Canadian Charter of Rights and Freedoms* and any other legislative provision relied on by the party.

(4) Within four weeks after the service of a notice of constitutional question, an attorney general who intends to participate in the appeal shall serve on all other parties and file with the Registrar a notice of intervention in Form 33C without being required to obtain leave to intervene.

SOR/2006-203, s. 11; SOR/2011-74, s. 17; SOR/2013-175, s. 23; SOR/2016-271, s. 21; SOR/2019-1, s. 6; SOR/2020-281, s. 9.

Service and Filing of Notice of Appeal

34 (1) In addition to the service required under paragraph 58(1)(b) of the Act, the appellant shall send to any party in the court appealed from who is not named in the style of cause referred to in subrule 22(3) a copy of the notice of appeal by ordinary mail, fax or email to the last known address, last known fax number or last known email address.

(2) The appellant shall file with the Registrar the original and one copy of the printed version of the notice of appeal together with an affidavit setting out the names of the parties referred to in subsection (1) and the addresses or fax numbers to which the copies were sent.

(3) The appellant shall file with the Registrar one copy of the electronic version of the notice of appeal.

SOR/2006-203, s. 12; SOR/2011-74, s. 18; SOR/2013-175, s. 24.

Service and Filing of Appellant's Documents

35 (1) Within eight weeks after the notice of appeal is filed, the appellant shall

(a) serve on all other parties one copy of the electronic version of the appellant's notice of appeal, factum, record (except for Part V) and, if any, a book of authorities;

(b) file with the Registrar

(i) one copy of the electronic version of the appellant's factum, record and, if any, a book of authorities,

(ii) the original and 23 copies of the printed version of the factum and 20 copies of the printed version of any volume of the record containing Part I,

(iii) two copies of all other volumes of the printed version of the record, and

(iv) two copies of the printed version of the book of authorities, if any; and

(c) file with the Registrar a redacted copy of the electronic version of the appellant's factum, if the factum contains any of the documents and information identified in the certificate filed in accordance with subrule 23(3).

(2) Within two weeks after being served under paragraph 36(2)(a) with a respondent's factum that includes a factum in a cross-appeal, the appellant may serve and file, in accordance with paragraph (1)(a), subparagraphs (1)(b)(i) and (ii) and paragraph (1)(c), a factum in response to the cross-appeal.

(3) Within two weeks after being served with the factum referred to in subrule 29(3), the appellant may serve and file, in accordance with paragraph (1)(a), subparagraphs (1)(b)(i) and (ii) and paragraph (1)(c), a factum in response.

SOR/2006-203, s. 13; SOR/2011-74, s. 19; SOR/2016-271, s. 22.

Service and Filing of Respondent's Documents

[SOR/2013-175, s. 25(F).]

36 (1) Within eight weeks after the service of the appellant's record, the respondent shall

(a) serve on all other parties one copy of the electronic version of the respondent's record (except for Part IV); and

(b) file with the Registrar one copy of the electronic version and two copies of the printed version of the respondent's record.

(2) Within eight weeks after the service of the appellant's factum, the respondent shall

(a) serve on all other parties one copy of the electronic version of the respondent's factum and, if any, a book of authorities;

(b) file with the Registrar

(i) one copy of the electronic version of the respondent's factum and, if any, a book of authorities,

(ii) the original and 23 copies of the printed version of the respondent's factum, and

(iii) two copies of the printed version of the respondent's book of authorities, if any; and

(c) file with the Registrar a redacted copy of the electronic version of the respondent's factum, if the factum contains any of the documents and information identified in the certificate filed in accordance with subrule 23(3).

(d) [Repealed, SOR/2016-271, s. 23]

SOR/2006-203, s. 14; SOR/2011-74, s. 19; SOR/2016-271, s. 23.

Service and Filing of Intervener's Documents

37 (1) Within the time limit set out in subrule (2), the intervener must

(a) serve on all other parties one copy of the electronic version of the intervener's factum and, if any, a book of authorities;

(b) file with the Registrar

(i) one copy of the electronic version of the intervener's factum and, if any, a book of authorities,

(ii) the original and 23 copies of the printed version of the intervener's factum, and

(iii) two copies of the printed version of the intervener's book of authorities, if any; and

(c) file with the Registrar a redacted copy of the electronic version of the intervener's factum, if the factum contains any of the documents and information identified in the certificate filed in accordance with subrule 23(3).

(2) The documents must be served and filed

(a) in the case of an intervener referred to in subparagraph 22(3)(c)(ii), within six weeks after the making of the order granting an intervention, unless otherwise specified in that order;

(b) in the case of an intervener referred to in subparagraph 22(3)(c)(i) or (iv), within six weeks after the service of the appellant's factum; or

(c) in the case of an intervener referred to in subparagraph 22(3)(c)(iii), within 16 weeks after the filing of a notice of intervention under subrule 33(4).

SOR/2006-203, s. 15; SOR/2011-74, s. 19; SOR/2016-271, s. 24; SOR/2024-73, s. 5.

Documents on Appeal and Cross-Appeal

Appellant's Record

38 (1) An appellant's record shall be bound and consist of the following parts:

(a) Part I, copies of the following documents:

(i) in chronological order, all formal judgments issued by the lower courts in respect of the case in question and the respective reasons for judgment, if any,

(ii) any order from the Court or judgment granting leave to appeal,

(iii) any notice of constitutional question referred to in subrule 33(2), and

(iv) in the case of a criminal matter, any information or indictment and the complete charge to the jury, if this is necessary to raise the question for the decision of the Court;

(b) Part II, any pleadings, orders and entries, in chronological order;

(c) Part III, evidence, including excerpts of transcripts unless the transcripts are reproduced in full in accordance with subrule (2), and affidavits; and

(d) Part IV, exhibits, in the order in which they were filed at trial.

(2) Instead of excerpts of transcripts reproduced in Part III, the record may contain transcripts reproduced in full in a separate document clearly marked as Part V.

(3) Parts II to V of the record shall contain only the documents that are necessary to raise the question for the decision of the Court and, if available, those documents shall be filed in both official languages.

(4) All documents in a record shall be reproduced in full, other than the excerpts of transcripts that are reproduced in Part III.

SOR/2011-74, s. 19; SOR/2013-175, s. 26; SOR/2016-271, s. 25.

38.1 (1) Despite these Rules, instead of including Parts II, III and IV in the appellant's record, the appellant may file the record filed with the court appealed from if that record consists of 10 or more volumes.

(2) An appellant who chooses to file the record filed with the court appealed from shall serve on all other parties one copy of the electronic version and shall file the same with the Registrar.

(3) The appellant shall only file the printed version of the record on demand of the Court.

(4) Despite these Rules, if the appellant chooses to file the record filed with the court appealed from, the respondent is not required to serve or file a respondent's record.

SOR/2016-271, s. 25; SOR/2020-281, s. 10(F).

Respondent's Record

39 (1) A respondent's record shall be bound and consist of the following parts:

(a) Part I, any pleadings, orders and entries, in chronological order;

(b) Part II, evidence, including excerpts of transcripts unless the transcripts are reproduced in full in accordance with subrule (2), and affidavits; and

(c) Part III, exhibits, in the order in which they were filed at trial.

(d) [Repealed, SOR/2013-175, s. 27]

(2) Instead of excerpts of transcripts reproduced in Part II, the record may contain transcripts reproduced in full in a separate document clearly marked as Part IV.

(3) The record shall contain only the documents that are not already included in the appellant's record and are necessary to raise the question for the decision of the Court and, if available, those documents shall be filed in both official languages.

(4) All documents in a record shall be reproduced in full, other than excerpts of transcripts that are reproduced in Part II.

SOR/2011-74, s. 19; SOR/2013-175, s. 27; SOR/2016-271, s. 26.

40 [Repealed, SOR/2011-74, s. 20]

Dispensing with Printing of Record

41 A judge or the Registrar may, on motion, dispense with the printing of documents forming part of a record.

Factum on Appeal

42 (1) [Repealed, SOR/2011-74, s. 21]

(2) The factum shall be bound and consist of the following parts:

(a) Part I consisting of

(i) in the appellant's factum, a concise overview of their position and a concise statement of the facts,

(ii) in the respondent's factum, a concise overview of their position and a concise statement of their position with respect to the appellant's statement of facts, including a concise statement of any other facts that the respondent considers relevant, and

(iii) in the intervener's factum, a concise overview of their position with respect to the questions on which they have intervened, including a concise statement of the facts relevant to the questions on which they have intervened;

(b) Part II consisting of

(i) in the appellant's factum, a concise statement of the questions in issue in the appeal,

(ii) in the respondent's factum, a concise overview of their position with respect to the appellant's questions, and

(iii) in the intervener's factum, a concise overview of their position with respect to the appellant's questions on which they have intervened;

(c) Part III consisting of a statement of argument setting out concisely the questions of law or fact to be discussed, with reference to the page of the record and to the tab, page and paragraph number of the authorities being relied on;

(d) Part IV consisting of submissions, if any, not exceeding one page in support of the order sought concerning costs;

(e) Part V consisting of

(i) in the appellant's factum and the respondent's factum, a concise statement of the order or orders sought, and

(ii) in the intervener's factum, if not yet determined in the order granting the intervention, any request for permission to present oral argument at the hearing of the appeal;

(f) Part VI consisting of, in the appellant's factum and the respondent's factum, submissions on the impact that any sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation or restriction on public access to information in the file could have on the Court's reasons, if any, in the appeal; and

(g) Part VII consisting of a table listing alphabetically the authorities relied on, including the relevant provisions of the legislative enactments, setting out the paragraph numbers where the authority is cited and, if available, hyperlinks to those authorities and, in the case of legislative enactments, hyperlinks to the provisions only.

(2.1) If they are required by law to be published in both official languages, the relevant provisions of any legislative enactments referred to in paragraph (2)(g) must be listed, and hyperlinks provided, if available, in both official languages.

(3) Part V of the intervener's factum shall not consist of any statement with respect to the outcome of the appeal unless otherwise ordered by a judge.

(4) Parts I to V of the factum of any appellant or respondent shall not exceed 40 pages, unless a judge or the Registrar, on motion, otherwise orders.

(5) Unless a judge or the Registrar, on motion, otherwise orders, Parts I to V of the factum of

(a) an attorney general, who has filed a notice of intervention in accordance with subrule 33(4), shall not exceed 20 pages; and

(b) any other intervener shall not exceed 10 pages.

(6) The appellant shall include a copy of any notice of constitutional question filed under subrule 33(2) as an appendix to their factum.

(7) [Repealed, SOR/2016-271, s. 27]

SOR/2006-203, s. 17; SOR/2011-74, s. 21; SOR/2013-175, s. 29; SOR/2016-271, s. 27; SOR/2019-1, s. 7; SOR/2024-73, s. 6.

Factum on Cross-Appeal

43 (1) Where the Court has granted leave to cross-appeal,

(a) the respondent's factum shall consist of two main sections, and each shall be divided into seven parts as described in subrule 42(2), the first section entitled "FACTUM OF RESPONDENT ON APPEAL" and the second section, "FACTUM OF APPELLANT ON CROSS-APPEAL", both in upper-case letters; and

(b) the appellant's factum on cross-appeal shall be divided into seven parts as described in subrule 42(2) and entitled "FACTUM OF THE RESPONDENT ON CROSS-APPEAL" in upper-case letters.

(2) Parts I to V of any factum in a cross-appeal shall not exceed 20 pages unless a judge or the Registrar, on motion, otherwise orders.

(3) [Repealed, SOR/2006-203, s. 18]

SOR/2006-203, s. 18.

Authorities

44 (1) All authorities, if they are not available electronically, shall be filed in a book of authorities, and

(a) the relevant provisions of legislative enactments relied on shall be in both official languages if they are required by law to be published in both official languages; and

(b) the reasons for judgment shall be in full for any case law relied on.

(2) The book of authorities shall be bound with each authority marked with a tab, and shall contain the authorities that,

(a) in the case of a respondent's book, are not contained in the appellant's book; and

(b) in the case of an intervener's book, are not contained in either the appellant's or the respondent's book.

SOR/2006-203, s. 19; SOR/2011-74, s. 22; SOR/2016-271, s. 28.

Condensed Books

45 (1) A party at the hearing of the appeal must provide all other parties with a copy of a bound single condensed book containing the excerpts from the record and book of authorities that that party will refer to in oral argument and must file 14 copies with the Registrar.

(1.1) The condensed book must contain an outline of the oral argument of no longer than two pages that relates to the contents of the condensed book and does not constitute a supplementary factum.

(2) [Repealed, SOR/2011-74, s. 23]

SOR/2006-203, s. 20; SOR/2011-74, s. 23; SOR/2024-73, s. 7.

PART 9

References

Reference to the Court

46 (1) A reference to the Court by the Governor in Council under section 53 of the Act shall be commenced by notice of reference in Form 46 to which shall be attached a copy of the order in council authorizing the reference.

(1.1) An electronic version of the notice of reference and the order in council authorizing the reference shall be filed with the Registrar.

(2) When a reference involves the giving of an opinion as to a case already disposed of by a court of appeal, the Court may, on its own initiative, require further evidence in respect of any question that the Court considers relevant.

(3) Further evidence under subrule (2) shall be taken as authorized by the Act and in the manner directed by the Court.

(4) The Governor in Council shall bring a motion to the Chief Justice or a judge to direct the Registrar to enter a reference on a list of cases to be heard by the Court and to determine any procedural issues.

(5) Within one week after the filing of the notice of reference, the Governor in Council shall serve a copy of the printed and electronic version of the notice of reference and the order in council referred to in subrule (1) on the attorney general of each province and on the minister of Justice of each territory.

(6) Within four weeks after being served with the notice of reference, an attorney general of a province, or a minister of Justice of a territory, with any special interest in the reference shall

(a) serve on the Governor in Council, and any counsel requested to argue a case under subsection 53(7) of the Act, a notice of intervention in Form 33C; and

(b) file with the Registrar the original and two copies of the notice of intervention.

(7) Within 12 weeks after the filing of the notice of reference, the Governor in Council shall

(a) serve on the attorney general of any province or on the minister of Justice of any territory, having served a notice of intervention under paragraph (6)(a), and any counsel requested to argue a case under subsection 53(7) of the Act, a printed and an electronic version of the Governor in Council's factum, record and book of authorities;

(b) file with the Registrar

(i) the electronic version of the factum, record and book of authorities,

(ii) the original version of the factum and 23 copies of its printed version, and

(iii) 11 copies of the printed version of the record and book of authorities.

(8) Any counsel requested to argue a case under subsection 53(7) of the Act shall, within eight weeks after the request or within eight weeks after the filing of the Governor in Council's factum, whichever is later,

(a) serve electronic and printed versions of the counsel's factum, record and book of authorities on the Governor in Council;

(b) file with the Registrar

(i) the electronic version of the factum, record and book of authorities,

(ii) the original version of the factum and 23 copies of its printed version, and

(iii) 11 copies of the printed version of the record and book of authorities.

(9) An attorney general of a province or a minister of Justice of a territory filing a notice of intervention under subrule (6) shall, within 20 weeks after filing the notice,

(a) serve on the Governor in Council and any counsel requested to argue a case under subsection 53(7) of the Act a copy of the attorney general's factum, or the minister's factum, and book of authorities;

(b) file with the Registrar

(i) the electronic version of the factum, record and book of authorities,

(ii) the original version of the factum and 23 copies of its printed version, and

(iii) 11 copies of the printed version of the record and book of authorities.

(10) Within four weeks after the filing of the factum of the Governor in Council, any person interested in intervening in the reference may make a motion for intervention to a judge in accordance with Rules 47 and 57 by

(a) serving on each of the Governor in Council, and any counsel requested by the Court under subsection 53(7) of the Act, a copy of the person's motion; and

(b) filing with the Registrar the original and two copies of the motion.

(11) The motion for intervention shall be dealt with in accordance with Rules 58 and 59, and the service and filing of the intervener's documents shall be in accordance with Rule 37.

(12) A redacted electronic version of any factum in a reference shall be filed, if the factum contains any of the documents and information identified in the certificate filed in accordance with subrule 23(3).

SOR/2006-203, s. 21; SOR/2011-74, s. 24; SOR/2016-271, s. 29.

PART 10

Motions — General Rules

Motion to a Judge or the Registrar

General

47 (1) Unless otherwise provided in these Rules, all motions shall be made before a judge or the Registrar and consist of the following documents, in the following order:

(a) a notice of motion in accordance with Form 47;

(b) any affidavit necessary to substantiate any fact that is not a matter of record in the Court;

(c) if considered necessary by the applicant, a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require; and

(d) if, in support of the motion, the applicant intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits.

(e) [Repealed, SOR/2024-73, s. 8]

(1.1) [Repealed, SOR/2013-175, s. 30]

(2) Parts I to V of the memorandum of argument shall not exceed 10 pages.

(3) There shall be no oral argument on the motion unless a judge or the Registrar otherwise orders or directs.

SOR/2006-203, s. 22; SOR/2011-74, s. 25; SOR/2013-175, s. 30; SOR/2016-271, s. 30; SOR/2020-281, s. 11; SOR/2024-73, s. 8.

Service and Filing

48 (1) An applicant shall

(a) serve on all parties to the motion a copy of the electronic version of the motion;

(b) serve on all other parties a copy of the electronic version of the notice of motion; and

(c) file with the Registrar

(i) a copy of the electronic version of the motion, and

(ii) the original and a copy of the printed version of the motion.

(2) Despite subrule (1), a motion related to an application for leave to appeal or leave to cross-appeal may be served and filed with the application for leave to appeal or leave to cross-appeal in accordance with Rule 26 or 29, as the case may be.

SOR/2006-203, s. 23; SOR/2013-175, s. 31; SOR/2016-271, s. 31.

Response to Motion

49 (1) Within 10 days after service of the motion, a respondent to the motion may respond to the motion by

(a) serving on all moving parties and other respondents to the motion a copy of the electronic version of the response; and

(b) filing with the Registrar

(i) a copy of the electronic version of the response, and

(ii) the original and a copy of the printed version of the response.

(1.1) In the case of a motion for intervention served and filed in accordance with Rule 55, the response shall be served and filed within 10 days after the day on which the last motion to which the response relates was served.

(2) Unless it is served and filed in the form of correspondence of no longer than two pages, the response shall consist of the following, in the following order:

(a) a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require; and

(b) if, in support of the response, the respondent intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits.

(3) Parts I to V of the memorandum of argument shall not exceed 10 pages.

(4) Despite subrule (1), in the case of a motion served and filed with or related to an application for leave to appeal or leave to cross-appeal, with the exception of a motion to expedite, the response to the motion may be served and filed with the response to the application for leave to appeal or leave to cross-appeal in accordance with Rule 27 or 30, as the case may be.

SOR/2006-203, s. 24; SOR/2013-175, s. 32; SOR/2016-271, s. 32; SOR/2019-1, s. 8; SOR/2020-281, s. 12.

Reply

50 (1) Within five days after service of the response to the motion, an applicant may reply by

(a) serving on all parties to the motion a copy of the electronic version of the reply; and

(b) filing with the Registrar

(i) a copy of the electronic version of the reply, and

(ii) the original and a copy of the printed version of the reply.

(1.1) In the case of a response to a motion for intervention served and filed in accordance with Rule 55, the reply shall be served and filed within five days after the day on which the last response to which the reply relates was served.

(2) Unless it is served and filed in the form of correspondence of no longer than two pages, the reply shall consist of a memorandum of argument not exceeding five pages.

(3) Despite subrule (1), in the case of a motion served and filed with an application for leave to appeal or leave to cross-appeal, the reply may be served and filed with the reply

to the response to the application for leave to appeal or leave to cross-appeal in accordance with Rule 28 or 31, as the case may be.
SOR/2006-203, s. 25; SOR/2013-175, s. 33; SOR/2016-271, s. 33; SOR/2019-1, s. 9.

Submission to a Judge or the Registrar

51 (1) The motion shall be submitted to a judge or the Registrar

(a) after the reply is filed or at the end of the five-day period referred to in Rule 50, as the case may be; or

(b) if no response to the motion is filed, at the end of the 10-day period referred to in Rule 49.

(2) The judge or the Registrar may

(a) decide the motion;

(b) order an oral hearing of the motion;

(c) refer the motion for decision to the Court; or

(d) in the case of a motion related to an application for leave to appeal or leave to cross-appeal, refer the motion to the judges to whom the application for leave to appeal or leave to cross-appeal has been submitted.

(3) Despite subrule (1), a motion related to an application for leave to appeal or leave to cross-appeal may be submitted for decision directly to the judges to whom the application for leave to appeal or leave to cross-appeal is submitted.

SOR/2013-175, s. 34.

Motion Before the Court

General

52 (1) When the Act or these Rules require that a motion be heard by the Court, the motion shall be bound and consist of the following, in the following order:

(a) a notice of motion in Form 52;

(b) any affidavit necessary to substantiate any fact that is not a matter of record in the Court;

(c) a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require; and

(d) if, in support of the motion, the applicant intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits.

(1.1) [Repealed, SOR/2013-175, s. 35]

(2) Parts I to V of the memorandum of argument shall not exceed 20 pages.

SOR/2006-203, s. 26; SOR/2011-74, s. 26; SOR/2013-175, s. 35; SOR/2020-281, s. 13.

Service and Filing

53 An applicant shall

(a) serve the motion on all parties to the motion and a copy of the notice of motion on all other parties; and

(b) file with the Registrar the original and 14 copies of the motion.

SOR/2006-203, s. 27.

Response

54 (1) Within 10 days after service of the motion, a respondent to the motion may respond to the motion by

(a) serving a response on all moving parties and other respondents to the motion; and

(b) filing with the Registrar the original and 14 copies of the response.

(2) Unless it is served and filed in the form of correspondence of no longer than two pages, the response shall be bound and consist of the following, in the following order:

(a) a memorandum of argument in accordance with paragraph 25(1)(c), with any modifications that the circumstances require; and

(b) if, in support of the response, the respondent intends to rely on transcripts or evidence from the record filed with the court appealed from, the relevant excerpts of the transcripts or evidence, including exhibits.

(3) Parts I to V of the memorandum of argument shall not exceed 20 pages.

(4) After the response to the motion is filed or at the end of the 10-day period referred to in subrule (1), the Registrar shall send a notice of hearing of the motion in Form 69, with any modifications that the circumstances require, to all parties.

SOR/2006-203, s. 28; SOR/2011-74, s. 27; SOR/2013-175, s. 36; SOR/2020-281, s. 14.

PART 11

Particular Motions

Motion for Intervention

55 Any person interested in an application for leave to appeal, an appeal or a reference may make a motion for intervention to a judge.

56 A motion for intervention shall be made

(a) in the case of an application for leave to appeal, within 30 days after the day on which the application for leave to appeal is filed or within 30 days after the day on which the file is opened;

(b) in the case of an appeal, within four weeks after the filing of the appellant's factum; and

(c) in the case of a reference, within four weeks after the filing of the Governor in Council's factum.

SOR/2006-203, s. 29; SOR/2013-175, s. 37(E); SOR/2019-1, s. 10.

57 (1) The affidavit in support of a motion for intervention shall identify the person interested in the proceeding and describe that person's interest in the proceeding, including any prejudice that the person interested in the proceeding would suffer if the intervention were denied.

(2) A motion for intervention shall

(a) identify the position the person interested in the proceeding intends to take with respect to the questions on which they propose to intervene; and

(b) set out the submissions to be advanced by the person interested in the proceeding with respect to the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties.

SOR/2013-175, s. 38.

58 At the end of the applicable time referred to in Rule 51, the Registrar shall submit to a judge all motions for intervention that have been made within the time required by Rule 56.

SOR/2006-203, s. 30.

59 (1) In an order granting an intervention, the judge may

(a) make provisions as to additional disbursements incurred by the appellant or respondent as a result of the intervention; and

(b) impose any terms and conditions and grant any rights and privileges that the judge may determine, including whether the intervener is entitled to adduce further evidence or otherwise to supplement the record.

(2) In an order granting an intervention or after the time for serving and filing all of the memoranda of argument on an application for leave to appeal or the facta on an appeal or reference has expired, a judge may authorize the intervener to present oral argument at the hearing of the application for leave to appeal, if any, the appeal or the reference, and determine the time to be allotted for oral argument.

(3) An intervener is not permitted to raise new issues unless otherwise ordered by a judge.

SOR/2006-203, s. 31; SOR/2016-271, s. 34.

60 [Repealed, SOR/2016-271, s. 35]

61 [Repealed, SOR/2016-271, s. 35]

Motion to Stay

[SOR/2011-74, s. 30(F).]

62 Any party against whom a judgment has been given, or an order made, by the Court or any other court, may make a motion to the Court for a stay of execution or other relief against such judgment or order, and the Court may give such relief on the terms that may be appropriate.

Motion to Quash

63 (1) Within 30 days after the filing of a proceeding referred to in section 44 of the Act, a respondent may make a motion to the Court to quash the proceeding.

(2) Upon service of the motion to quash, the proceeding shall be stayed until the motion has been disposed of unless the Court or a judge otherwise orders.

(3) If the proceeding is quashed, the party bringing the proceeding may, in the discretion of the Court, be ordered to pay the whole or any part of the costs of the proceeding.

Assignment of Counsel by the Court to Act on Behalf of Accused

63.1 (1) For the purposes of section 694.1 of the *Criminal Code*, the accused who is the appellant, applicant or respondent in a proceeding shall, if the Crown consents, file with the Registrar a letter containing the following information:

(a) an explanation of why legal assistance is necessary;

(b) a statement that the accused has not sufficient means to obtain legal assistance;

(c) a confirmation of the refusal by a provincial legal aid program to grant legal aid to the accused; and

(d) the name of the lawyer willing to act on behalf of the accused.

(2) The consent of the Attorney General who is the appellant, applicant or respondent in the proceeding shall be filed with the letter referred to in subsection (1).

SOR/2011-74, s. 31; SOR/2013-175, s. 40.

PART 12

Dismissals and Vexatious Proceedings

Dismissal for Delay — Application for Leave to Appeal

64 (1) If, after the filing of a notice of application for leave to appeal, an applicant has not served and filed all the documents required under Rule 25 within the time set out in paragraph 58(1)(a) of the Act or the time extended under subsection 59(1) of the Act,

(a) a respondent may make a motion to the Registrar for dismissal of the application for leave to appeal as abandoned; or

(b) the Registrar may send a notice of intention in Form 64 to the applicant and copies of it to all other parties.

(2) The Registrar may dismiss the application for leave to appeal as abandoned if the time for serving and filing the materials is not extended by a judge on motion.

(3) The motion for an extension of time referred to in subrule (2) must be served and filed within 20 days after the service of the respondent's motion for dismissal or the receipt of the Registrar's notice of intention, as the case may be.
SOR/2006-203, s. 33.

Dismissal for Delay — Appeals

65 (1) If, after leave to appeal has been granted, an appellant fails to serve and file a notice of appeal within the time set out in paragraph 58(1)(b) of the Act or the time extended under subsection 59(1) of the Act, the Registrar may send a notice of intention in Form 65 to the appellant and copies of it to all other parties, and a judge may dismiss the appeal as abandoned if the time for serving and filing the notice of appeal is not extended by a judge on motion.

(2) If, after the notice of appeal has been filed, an appellant has not served and filed their record and factum within the time set out in Rule 35, a respondent may make a motion to a judge for the dismissal of the appeal as abandoned or the Registrar may send a notice of intention in Form 65 to the appellant and copies of it to all other parties, and a judge may dismiss the appeal as abandoned if the time for serving and filing the materials is not extended by a judge on motion.

(3) The motion for an extension of time referred to in subrules (1) and (2) must be served and filed within 20 days after the service of the respondent's motion for dismissal or the receipt of the Registrar's notice of intention, as the case may be.

SOR/2006-203, s. 33.

Vexatious Proceedings

66 (1) If a judge is satisfied that a party is conducting a proceeding in a vexatious manner, the judge may, on motion or at the request of the Registrar under Rule 67, order that the proceeding be stayed, on the terms the judge considers appropriate.

(2) A judge may, on motion or at the request of the Registrar under Rule 67, order that no further documents be filed by any party relating to a proceeding if the judge is satisfied that the filing of further documents by a party would be vexatious or made for an improper purpose.

SOR/2006-203, s. 33.

67 (1) The Registrar may, after sending a notice in Form 67 to any party referred to in subrule 66(1) or (2) and copies of it to all other parties, and, on the expiry of the time

referred to in subrule (2) to this rule, request that a judge make an order under subrule 66(1) or (2), as the case may be.

(2) Within 10 days after receipt of the Registrar's notice, any party may serve on all other parties and file with the Registrar a response.

SOR/2006-203, s. 33.

PART 13

Scheduling and Appearances

Scheduling — Motions and Applications for Leave

68 (1) The Chief Justice or, in the absence of the Chief Justice, the senior judge present, shall set the dates on which the Court shall hear motions and applications for leave to appeal for which a hearing has been ordered pursuant to paragraph 43(1)(c) or subsection 43(1.2) of the Act.

(2) The Court may hear motions and applications for leave to appeal on dates other than those set out in subsection 32(3) of the Act.

Scheduling — Appeals

69 (1) After the respondent's factum is filed or at the end of the eight-week period referred to in Rule 36, the Registrar shall enter the appeal on a list of cases to be heard by the Court.

(2) On confirmation of the date of hearing by the Court, and no later than the first day of a session referred to in section 32 of the Act, the Registrar shall issue a list of appeals to be heard in the order in which the cases have been set down for hearing and send a copy of a notice of hearing in Form 69 to all parties.

SOR/2006-203, s. 34.

Appearances — Motions and Applications for Leave

70 Unless the Court or a judge otherwise orders,

(a) no more than one counsel shall present oral argument for each party on motions and applications for leave to appeal;

(b) the applicant or all of the applicants, as the case may be, shall limit their oral argument to 15 minutes in total, and their reply to five minutes in total; and

(c) the respondent or all of the respondents, as the case may be, shall limit their oral argument to 15 minutes in total.

(d) [Repealed, SOR/2006-203, s. 35]

SOR/2006-203, s. 35.

Appearances — Appeals

71 (1) Unless the Court, a judge or the Registrar otherwise orders or directs,

(a) no more than two counsel for each appellant or respondent and one counsel for each intervener shall present oral argument on an appeal; and

(b) no more than one counsel for each appellant shall have the right of a reply.

(2) Respondents and interveners do not have the right of reply unless the Court or a judge otherwise orders.

(3) A respondent or an intervener who fails to serve and file their factum within the time set out in Rule 36 or 37, or in an order of the Court, a judge or the Registrar, as the case may be, shall not present oral argument on the appeal unless a judge, on motion, otherwise orders.

(4) The name of counsel appearing before the Court must be given in writing to the Registrar at least four weeks before the appeal is to be heard.

(5) Unless the Court, a judge or the Registrar otherwise orders or directs,

(a) the appellant or all of the appellants, as the case may be, shall limit their oral argument to one hour in total, and their reply to five minutes, but when the appellant or all of the appellants do not use the entire hour for principal argument, up to a maximum of 15 additional minutes may be taken for reply; and

(b) the respondent or all of the respondents, as the case may be, shall limit their oral argument to one hour in total.

(c) [Repealed, SOR/2016-271, s. 36]

(d) [Repealed, SOR/2006-203, s. 36]

(5.1) Despite paragraphs (5)(a) and (b), the time allotted for oral argument may be reduced to 30 minutes in an appeal referred to in paragraph 33(1)(b) or (c).

(5.2) A judge may authorize any attorney general who has filed a notice of intervention in accordance with subrule 33(4) to present oral argument at the hearing of the appeal and may determine the time to be allotted for the argument.

(6) If a judge or the Registrar directs that a motion related to an appeal must be heard by the Court on the day of the hearing of the appeal, the time allotted under subrule (5) to the party who made the motion shall be reduced accordingly unless the Court, a judge or the Registrar otherwise orders.

(7) All counsel appearing before the Court shall be robed.

SOR/2006-203, s. 36; SOR/2011-74, s. 32; SOR/2016-271, s. 36; SOR/2019-1, s. 11; SOR/2024-73, s. 9.

Failure to Appear

72 If any party fails to appear on the day and at the time fixed for the hearing, the Court may hear the party or parties present and may dispose of the proceeding without hearing

the party so failing to appear, or may postpone the hearing on such terms, including the payment of costs, as the Court considers appropriate.

PART 14

Reconsiderations and Re-hearings

Reconsideration of Application for Leave to Appeal

73 (1) There shall be no reconsideration of an application for leave to appeal unless there are exceedingly rare circumstances in the case that warrant consideration by the Court.

(2) A motion for reconsideration must be served on all parties and the original and two copies of the printed version of the motion filed with the Registrar within 30 days after the judgment on the application for leave to appeal.

(3) The motion for reconsideration must be bound and consist of the following, in the following order:

(a) a notice of motion for reconsideration in Form 47, with any modifications that the circumstances may require;

(b) an affidavit setting out the exceedingly rare circumstances in the case that warrant consideration by the Court and an explanation of why the issue was not previously raised;

(c) any new documents that the party intends to rely on; and

(d) a statement of argument not exceeding 10 pages.

(4) The Registrar shall refuse to accept a motion for reconsideration that includes an affidavit that does not set out exceedingly rare circumstances as required by paragraph (3)(b).

(5) A respondent may respond to a motion for reconsideration within 10 days after its acceptance for filing by serving on all other parties and filing with the Registrar the original and two copies of the printed version of a memorandum of argument not exceeding 10 pages.

(6) Within 10 days after the service of the response, the applicant may reply by serving on all parties and filing with the Registrar the original and two copies of the printed version of a memorandum of argument not exceeding five pages.

SOR/2006-203, s. 37; SOR/2011-74, s. 33; SOR/2016-271, s. 37; SOR/2020-281, s. 15.

Re-hearing of Application for Leave to Appeal

74 There shall be no re-hearing of an application for leave to appeal.

Reconsideration or Re-Hearing of a Motion

75 Subject to Rule 78, there shall be no reconsideration or re-hearing of a motion.

Re-Hearing of Appeal

76 (1) At any time before judgment is rendered or within 30 days after the judgment, a party may make a motion to the Court for a re-hearing of an appeal.

(2) Notwithstanding the time referred to in subrule 54(1), the other parties may respond to the motion for a re-hearing within 15 days after service of the motion.

(3) Within 15 days after service of the response to the motion for a re-hearing, the applicant may reply by serving on all other parties and filing with the Registrar the original and 14 copies of the reply.

(4) Notwithstanding subrule 54(4), there shall be no oral argument on a motion for a re-hearing unless the Court otherwise orders.

(5) If the Court orders a re-hearing, the Court may make any order as to the conduct of the hearing as it considers appropriate.

PART 15

Orders and Judgments

Orders

77 Every order shall be signed either by the judge who made it or by the Registrar and is deemed to be signed if it bears a facsimile of the judge's or Registrar's signature.

SOR/2019-1, s. 12.

Review of Order of Registrar

78 (1) Within 20 days after the Registrar makes an order, any party affected by the order may make a motion to a judge to review the order.

(2) The affidavit in support of the motion shall set out the reasons for the objection to the order.

(3) The Registrar's decision to refuse to accept a document under subrule 8(2) or 73(4) is not an order.

SOR/2016-271, s. 38.

Judgment of the Court

79 A judgment rendered by the Court must be dated, signed by a judge and sealed with the Court seal. A judgment is deemed to be signed if it bears a facsimile of the judge's signature.

SOR/2016-271, s. 39; SOR/2020-281, s. 16.

Effective Date of Judgment

80 Unless the Court otherwise orders, an oral judgment shall take effect from the date on which it is rendered in court, whether or not reasons are to follow, and a judgment taken under reserve shall take effect from the date on which it is deposited with the Registrar.

SOR/2016-271, s. 39.

Amending Judgment

81 (1) Within 30 days after a judgment is delivered or reasons for judgment are deposited, a party may make a motion to a judge requesting an amendment if the judgment or reasons for judgment

(a) contain an error arising from an accidental slip or omission;

(b) do not accord with the judgment or reasons for judgment as delivered by the Court in open court; or

(c) overlooked or accidentally omitted a matter that should have been dealt with.

(2) The judge on a motion under subrule (1) may dismiss the motion, order that the judgment or reasons for judgment be amended or direct that a motion for a re-hearing be made to the Court in accordance with Rule 76.

SOR/2011-74, s. 34; SOR/2020-281, s. 17.

81.1 The Court or a judge may, on the Court's or the judge's own initiative and at any time, make any amendment to the judgment or reasons for judgment that the Court or judge considers necessary.

SOR/2020-281, s. 18.

PART 16

Fees and Costs

Fees Payable to Registrar

82 (1) The fees payable to the Registrar are those set out in Schedule A.

(2) A party may on motion to the Registrar request an exemption from paying any of the fees set out in Schedule A.

Taxation of Costs

83 (1) Costs in a proceeding shall be taxed by the Registrar party and party in accordance with the tariff of fees and disbursements set out in Schedule B unless the Court otherwise orders.

(2) The party awarded costs shall, within six months after the order setting out the final decision on costs, serve on all parties who are liable to pay, and file with the Registrar, a notice of taxation in Form 83A together with a bill of costs in Form 83B.

(3) Within 10 days after service of the notice of taxation and bill of costs, a party who disputes the taxation of the bill of costs or one of its items shall serve on the party requesting the taxation and all other parties who are liable to pay, and file with the Registrar a response in letter form.

(4) Within five days after service of the response, the party requesting the taxation may serve on all parties who are liable to pay and file with the Registrar a reply in letter form.

(5) At the end of the time period referred to in subrule (4) or if a consent to taxation is filed, the Registrar shall issue a certificate of taxation.

(6) The certificate of taxation is final and conclusive as to all matters not objected to.

(7) When, pursuant to an order of the Court, a judge or the Registrar, a party who is entitled to receive costs is liable to pay costs to any other party, the Registrar may adjust the costs accordingly.

(8) The Registrar may direct the production of such books, papers and documents as the Registrar considers necessary to tax costs.
SOR/2006-203, s. 38.

Objection to Taxation of Costs

84 (1) Within 15 days after the date that the certificate of taxation bears, any party may object to the taxation of costs on the ground that the bill of costs contains a clerical or calculation error by serving on all other parties and filing with the Registrar a written objection specifying the errors alleged and the corrections sought to be made.

(2) Any party who objects to the taxation of costs on any other ground not specified in subrule (1) may, within 15 days after the date that the certificate of taxation bears, make a motion to a judge for a review of the taxation, and the judge may make any order with respect to the item in dispute that the judge considers appropriate.

(3) An objection to the taxation shall be determined upon the evidence that had been brought before the Registrar, and no further evidence shall be received in support of the motion unless the judge or the Registrar, as the case may be, otherwise orders.

(4) The costs in a review referred to in subrule (2) shall be in the discretion of the judge.
SOR/2016-271, s. 40.

Costs of Discontinuance or Dismissal

85 Except in the case of a proceeding commenced under a provision of the *Criminal Code*,

(a) if a proceeding is discontinued or dismissed as abandoned, a respondent is entitled to have their costs taxed by the Registrar without a further order, unless the Court or a judge otherwise orders; and

(b) if a motion for an extension of time that is submitted for decision in accordance with subrule 51(3) is denied, a respondent is entitled to have their costs taxed on the application for leave to appeal by the Registrar without a further order, unless the Court or a judge otherwise orders.

SOR/2006-203, s. 39.

PART 17

Security

Payment of Money Out of Court

86 (1) Money deposited as security under paragraph 60(1)(b) of the Act may be paid out of Court on motion to the Registrar or by sending a letter to the Registrar in which all the parties affected have consented.

(2) The Registrar may provide for the payment of all monies to the party who paid the security, their counsel or their agent.

(3) If any other party, their counsel and their agent cannot be found, notice of a motion for payment out may be given by posting a copy of it at the Registry and the Registrar shall refer the motion to a judge no sooner than 28 days after the notice was posted.

SOR/2006-203, s. 40.

Security and Interest

87 Interest in accordance with the *Financial Administration Act* shall be paid on money deposited as security.

Dispensing with Security

88 (1) A party may, on motion to a judge or the Registrar, request an exemption from providing security under paragraph 60(1)(b) of the Act.

(2) The affidavit of a party in support of a motion under subrule (1) shall set out that the party's net assets, exclusive of their family home and the subject-matter of the proceeding, do not exceed $5,000 and that they are unable to provide security.

PART 18

Miscellaneous Provisions

Affidavit

89 (1) An affidavit shall be filed to substantiate any fact that is not a matter of record in the Court.

(2) An affidavit to be used in a proceeding shall be limited to the statement of facts within the knowledge of the deponent, but statements based on information or belief that state the source of the information or the grounds for the belief may be admitted by the Court, a judge or the Registrar.

(3) When the record of the court appealed from or of the trial court is filed with the Registrar, that record is part of the record of the Court.

Examination on Affidavit

90 (1) Any party may, by leave of a judge or the Registrar on motion, cross-examine the deponent of an affidavit filed with the Registrar by serving on the party who filed the affidavit a notice requiring the production of the deponent and documents for cross-examination before a commissioner for oaths designated by the judge or the Registrar.

(2) The notice required by subrule (1) shall be served within the time that the judge or Registrar may order.

(3) Any cross-examination referred to in subrule (1) shall take place before the proceeding is heard unless a judge or the Registrar otherwise orders.

(4) The transcript of a cross-examination may be filed with the Registrar within 10 days after the cross-examination.

(5) A judge or the Registrar may, on his or her own initiative, order the production of documents on a cross-examination.

(6) Where a deponent is not produced for cross-examination, the deponent’s affidavit shall be struck out unless a judge or the Registrar otherwise orders.

Oaths and Witnesses

91 (1) The Registrar and each Registry officer who is certified as a commissioner for oaths may administer oaths.

(2) The Registrar may examine witnesses in any proceeding.

Appointment of Amicus Curiae

92 The Court or a judge may appoint an *amicus curiae* in an appeal.

Changes Affecting the Record

[SOR/2011-74, s. 35(F).]

92.1 Counsel or their agents shall advise the Court in writing of any changes that affect the record in any motion, application for leave to appeal or appeal. When necessary, a party shall bring a motion to adduce new evidence to bring the change to the attention of the Court.

SOR/2006-203, s. 41.

Discontinuance

93 (1) Subject to subrule (2), a party may discontinue any proceeding by serving on all other parties and filing with the Registrar a notice of discontinuance.

(2) An appellant who discontinues an appeal under section 69 of the Act shall also serve on the clerk of the court appealed from a copy of the notice of discontinuance.

Notices to the Profession

94 The Registrar may issue notices to the profession as the Registrar considers necessary to explain or clarify these Rules or the practice before the Court.

SOR/2011-74, s. 36(F).

Notice Convening Court

[SOR/2019-1, s. 13.]

95 The Registrar shall publish, in Form 95, the notice convening the Court under section 34 of the Act.

Notice of Remote Participation by a Judge

95.1 (1) Following the approval of the Chief Justice, a judge may, in any proceeding before the Court, participate by use of any communication technology.

(2) In advance of a proceeding referred to in subrule (1), the Registrar is to, if feasible, send a notice of remote participation by a judge in Form 95.1.

SOR/2019-1, s. 14.

PART 19

[Repealed, SOR/2013-175, s. 41]

96 [Repealed, SOR/2013-175, s. 41]

97 [Repealed, SOR/2013-175, s. 41]

98 [Repealed, SOR/2013-175, s. 41]

FORM 14

Subrule 14(1)

Notice of Name

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be

Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name*), (*party*), confirms its name in each of the official languages:

(*Set out the name of the party in both official languages*)

OR

TAKE NOTICE that (*name*), (*party*), certifies that it does not have a bilingual name.

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel, agent or party filing notice*)

Counsel or party filing notice (*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)	Agent (*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party*)

SOR/2011-74, s. 37; SOR/2013-175, s. 42; SOR/2016-271, s. 52(F); SOR/2019-1, s. 15; SOR/2024-73, s. 10.

FORM 16

Rule 16

Notice of Agent Representing Two Opposing Parties

(Style of cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that I (*name*), agent for (*name parties*), have advised these parties that I am representing two opposing parties before this Court and that these parties consent.

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

Agent

(*Signed*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party*)

SOR/2011-74, s. 38; SOR/2013-175, s. 46.

FORM 20

Rule 20

Affidavit of Service

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

I, (*name of deponent*), (*profession of deponent*), of (*place*), (*province or territory*), MAKE OATH AND SAY AS FOLLOWS:

THAT on the (*date*) day of (*month*), (*year*), I did serve (*name of person(s) served*) with a true copy of the (*identify document(s) served*) by (*list the method or methods of service used*)

(a) personal service;

(b) ordinary mail;

(c) registered or certified mail or courier (*annex a post office receipt, a receipt card bearing the signature of the person served or a copy of the tracking results of the courier service that indicates the status of the delivery of the document*);

(d) fax transmission (*annex a copy of the cover page referred to in subrule 20(3) and a transmission slip that confirms the date and time of transmission*);

(e) email (*annex a copy of the email referred to in subrule 20(3.1) and a copy of the read receipt, the delivery receipt or the confirmation by the party served that service was effected electronically*); or

(f) leaving a copy with the party’s counsel or agent or with an employee in the office of the counsel or agent.

Sworn (*or Affirmed*) before me at

the (*City, Town, etc.*) of (*name*) in the (*Province or Territory*) of (*name*), this _____ day of _____, 20 _____.

_____
A Commissioner of Oaths

_____
(*Signature of deponent*)

SOR/2011-74, s. 39; SOR/2013-175, s. 43; SOR/2024-73, s. 11.

FORMS 22 AND 23

[Repealed, SOR/2011-74, s. 40]

FORM 23A

Rule 23

Certificate (Applicant, Respondent or Appellant)

(*Style of Cause* (*Rule 22*) — *Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada* (*Print and Electronic*))

(*If this certificate or any order attached to the certificate contains or reveals information that is subject to a sealing or confidentiality order from a lower court or the Court or that is classified as confidential under legislation, it shall be sealed in an envelope and accompanied by a redacted version.*)

(1) Is there a sealing or confidentiality order from a lower court or the Court in effect in the file?	□ Yes	□ No
(2) Is there a ban on the publication of evidence or the names or identity of a party or witness under an order in effect in the file or under legislation?	□ Yes	□ No
(3) Is there information in the file that is classified as confidential under legislation?	□ Yes	□ No
(4) Is there a restriction on public access to information in the file in a lower court?	□ Yes	□ No
(5) May the full names of individuals named in the style of cause be published?	□ Yes	□ No

If you have answered "Yes" to any of questions (1) to (4), provide the information indicated below, if applicable, and file a Form 23B in accordance with subrule 23(3).

Court that made the order:

Date of the order:

Applicable legislative provision(s) or explanation of restriction:

Attach a copy of the order. If the order was pronounced orally, attach the relevant excerpt from the transcript of the hearing in which the order was pronounced.

I, (*name*), (*counsel or agent*) for (*name of applicant, respondent or appellant*), certify that the information above is complete and accurate.

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

(*Counsel or Agent*) for (*name of applicant, respondent or appellant*)

Signature

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party*)

SOR/2013-175, s. 43; SOR/2016-271, s. 41.

FORM 23B

Rule 23

Certificate (Applicant, Respondent or Appellant)

(*Style of Cause* (*Rule 22*) — *Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada* (*Print and Electronic*))

(*If either this certificate or any documents to be filed contain information that is subject to a sealing or confidentiality order from a lower court or the Court or that is classified as confidential by legislation, it shall be sealed in an envelope and accompanied by a redacted version of the certificate and of the documents. Refer to Rule 19.1 and the Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada* (*Print and Electronic*).)

I, (*name*), (*counsel or agent*) for (*name of applicant, appellant or respondent*) certify that I am filing

(1) Documents that include information that is subject to a sealing or confidentiality order from a lower court or the Court in effect in the file.	□ Yes	□ No
(2) Documents that include information that is subject to a ban on the publication of evidence or the names or identity of a party or witness under an order in effect in the file or under legislation.	□ Yes	□ No
(3) Documents that include information that is classified as confidential under legislation.	□ Yes	□ No
(4) Documents that contain information to which public access is restricted in the file in a lower court.	□ Yes	□ No

If you have answered "Yes" to any of these questions, provide the information indicated below, if applicable.

(a) The (*identify documents(s) filed*) include(s) information that is subject to a sealing or confidentiality order at (*identify volume(s), section(s) or page(s) in each document*). This information is only accessible to (*identify parties or persons and state whether the information can be made available to court staff*).

(b) The (*identify documents(s) filed*) include(s) information that is subject to a publication ban at (*identify volume(s), section(s) or page(s) in each document*).

(c) The (*identify documents(s) filed*) include(s) information that is classified as confidential under legislation at (*identify volume(s), section(s) or page(s) in each document*).

(d) The (*identify documents(s) filed*) include(s) information to which public access is restricted in the file in a lower court at (*identify volume(s), section(s) or page(s) in each document*).

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

(*Counsel or Agent*) for (*name of applicant, respondent or appellant*)

Signature

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of all other parties*)

SOR/2013-175, s. 43; SOR/2016-271, s. 41.

FORM 23C

Rule 23

Certificate (Applicant, Respondent or Appellant)

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

I (*name*), (*counsel or agent*) for (*name of applicant, respondent or appellant*), certify that (*if a judge's previous involvement or connection with the case may result in it being inappropriate for that judge to take part in the adjudication on the proceedings in the Court, set out the issues*).

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

(*Counsel or Agent*) for the (*applicant, respondent or appellant*)

_____
(*Signature*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party*)

SOR/2016-271, s. 42.

FORM 24A

Rule 24

Certificate (Appellant)

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

I (*name*), (*counsel or agent*) for the appellant, certify that the appellant's record contains all of the reasons for judgment and orders appealed from in full and only so much of the pleadings, evidence, affidavits and other documents as is necessary to raise the question for the decision of the Court.

And I do further certify that I have closely examined the record and verily believe that it is a true and correct reproduction of the originals and that the same has been proofread.

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

(*Counsel or Agent*) for the appellant

_____
(*Signature*)

SOR/2013-175, s. 43; SOR/2016-271, s. 43(F); SOR/2020-281, s. 19.

FORM 24B

Rule 24

Certificate (Respondent)

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

I (*name*), (*counsel or agent*) for the respondent, certify that the respondent's record contains only so much of the pleadings, evidence, affidavits and other documents as is necessary to raise the question for the decision of the Court.

And I do further certify that I have closely examined the record and verily believe that it is a true and correct reproduction of the originals and that the same has been proofread.

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

(*Counsel or Agent*) for the respondent

_____
(*Signature*)

SOR/2013-175, s. 43; SOR/2016-271, s. 43(F).

FORM 25

Rule 25

Notice of Application for Leave To Appeal

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name of applicant*) applies for leave to appeal to the Supreme Court of Canada, under (*cite the legislative provision or provisions that authorize the application for leave to appeal*), from the judgment of the (*name of the court appealed from and file number from that court*) made on (*date*) and for (*insert the nature of order or relief sought*);

AND FURTHER TAKE NOTICE that this application for leave to appeal is made on the following grounds: (*set out concisely and number each ground on which the application is made*).

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party or agent*)

Applicant (*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)	Agent (*if any*) (*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party and all other parties and interveners in the court appealed from*)

NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

(*A certificate in Form 23A and, if applicable, certificates in Forms 23B and 23C must be filed at the same time as this notice of application for leave to appeal. In addition, any reasons for judgment and orders from the courts below must be attached to the notice, as a schedule.*)

SOR/2013-175, s. 43; SOR/2016-271, ss. 44, 52(F); SOR/2019-1, s. 16; SOR/2020-281, s. 20.

FORM 25A

[Repealed, SOR/2013-175, s. 43]

FORM 25B

[Repealed, SOR/2013-175, s. 43]

FORM 25C

[Repealed, SOR/2013-175, s. 43]

FORM 29

Paragraph 29(2)(a)

Notice of Application for Leave To Cross-Appeal

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name of applicant*) applies for leave to cross-appeal to the Supreme Court of Canada, pursuant to (*cite the section of the Act or these Rules under which the application for leave to cross-appeal is made*), from the judgment of the (*name of the court appealed from and file number from that court*) made on (*date*) and for (*insert the nature of order or relief sought*) or any other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave to cross-appeal is made on the following grounds: (*set out concisely and number each ground on which the application is made*).

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party or agent*)

Respondent
(*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)

Agent (*if any*)
(*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party and all other parties and interveners in the court appealed from*)

NOTICE TO THE APPLICANT: An applicant may serve and file a memorandum in response to this application for leave to cross-appeal within 30 days after the day on which the application for leave to cross-appeal is served.

SOR/2006-203, s. 44(F); SOR/2011-74, s. 44; SOR/2013-175, s. 46; SOR/2019-1, s. 17.

FORM 33A

Paragraph 33(1)(a)

Notice of Appeal

(Style of Cause (Rule 22) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that, pursuant to leave granted by the Supreme Court of Canada on (*date*), (*name of appellant*) appeals to the Court from the judgment of the (*name of the court appealed from*) made on (*date*);

OR

TAKE NOTICE that (*name of appellant*) appeals as of right to the Supreme Court of Canada under (*cite the legislative provision or provisions that authorize the appeal*) from the judgment of the (*name of the court appealed from and file number from that court*) made on (*date*);

(*In the case of an appeal under paragraph 691(1)(a) or (2)(a) or (b), 692(3)(a) or 693(1)(a) of the Criminal Code, state the following:*)

AND FURTHER TAKE NOTICE that this appeal raises the following question or questions of law:

AND/OR

AND FURTHER TAKE NOTICE that the dissenting judgment of the court appealed from is, in whole or in part, based on the following questions of law (*as specified in the judgment issued under section 677 of the Criminal Code*):

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party or agent*)

Appellant (*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)	Agent (*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party and all other parties and interveners in the court appealed from*)

(*In the case of an appeal as of right, include a copy of the information or indictment, the judgment and the reasons for judgment, if any, of the court of first instance or the notation on the indictment or on an equivalent document, the judgment and the reasons for judgment of the court appealed from, a certificate in Form 23A and, if applicable, certificates in Forms 23B and 23C.*)

SOR/2006-203, s. 45; SOR/2011-74, s. 45; SOR/2013-175, s. 44; SOR/2016-271, s. 45; SOR/2019-1, s. 18; SOR/2020-281, s. 21.

FORM 33B

Rule 33

Notice of Constitutional Question

(*Style of Cause* (*Rule 22*) — *Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada* (*Print and Electronic*))

TAKE NOTICE that I, (name), (*counsel or agent*) for (*name of appellant or respondent*) assert that the appeal raises the following constitutional question(s):

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party or agent*)

Party serving notice of constitutional question	Agent (*if any*)

(*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)

(*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of all other parties and of attorneys general*)

(*When serving notice, include a hyperlink to the judgment granting leave to appeal and the reasons for the judgment appealed from, the legislative provisions at issue and, if applicable, the relevant provisions of the Canadian Charter of Rights and Freedoms and any other legislative provision relied on, in the email.*)

SOR/2016-271, s. 46.

FORM 33C

Rule 33

Notice of Intervention Respecting Constitutional Question

(*Style of Cause* (*Rule 22*) — *Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada* (*Print and Electronic*))

(*The Attorney General of* _____) intends to intervene, to file a factum and to (not) request to participate in oral argument with respect to the constitutional question(s) identified in the Notice of Constitutional Question filed by the (*appellant/respondent*).

OR

(*The Attorney General of* _____) intends to intervene, to file a factum and to (not) participate in oral argument with respect to the reference to the Court by the Governor in Council under section 53 of the *Supreme Court Act*.

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel for attorney general or agent*)

Counsel for attorney general
(*Counsel's name, address and telephone number, and fax number and email address (if any)*)

Agent
(*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any) of all other parties*)

SOR/2016-271, s. 46.

FORM 38

[Repealed, SOR/2013-175, s. 44]

FORM 39

[Repealed, SOR/2013-175, s. 44]

FORM 46

Rule 46

Notice of Reference

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that the said reference is filed pursuant to (*cite the section of the act or these Rules under which the reference is made*).

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or agent*)

Counsel (*Counsel's name, address and telephone number, and fax number and email address (if any)*)	Agent (*Agent's name, address and telephone number, and fax number and email address (if any)*)

(*Attach Order in Council*)

SOR/2011-74, s. 48; SOR/2013-175, s. 46.

FORM 47

Rule 47

Notice of Motion to a Judge or the Registrar

(Style of Cause (Rule 22); style of cause may be abbreviated in accordance with subrule 22(3.1) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name*) applies to (*a judge or the Registrar, as the case may be*) under (*cite the provision of the Act or these Rules under which the motion is made*), for an order for (*insert nature of the order or relief sought*) or any further or other order that the (*judge or Registrar*) may deem appropriate;

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds: (*set out concisely and number each ground on which the motion is made*).

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party or agent*)

Applicant to the motion (*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)	Agent (*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of all other parties*)

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

If the motion is served and filed with the application for leave to appeal, then the Respondent may serve and file the response to the motion with the response to the application for leave to appeal.

(*In the case of an originating motion, include a copy of the judgment and reasons for judgment of the court appealed from and a copy of the certificate in Form 23A and, if*

applicable, a copy of the certificates in Forms 23B or 23C.)

SOR/2006-203, s. 47; SOR/2011-74, s. 49; SOR/2013-175, s. 45; SOR/2016-271, s. 47.

FORM 52

Rule 52

Notice of Motion to the Court

(Style of Cause (Rule 22); style of cause may be abbreviated in accordance with subrule 22(3.1) — Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name*) applies to the Court, under (*cite the provision of the Act or these Rules under which the motion is made*), for an order for (*insert nature of the order or relief sought*) or any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds: (*set out concisely and number each ground on which the motion is made*).

Dated at (*place*), (*province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party or agent*)

Applicant to the motion (*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)	Agent (*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of all other parties*)

NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion.

(*This motion is required to be bound with a cover — see Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic). In the case of an originating motion, include a copy of the judgment and*

reasons for judgment of the court appealed from and a copy of the certificate in Form 23A and, if applicable, a copy of the certificates in Forms 23B or 23C.)

SOR/2006-203, s. 47; SOR/2011-74, s. 50; SOR/2013-175, s. 45; SOR/2016-271, s. 48.

FORM 61A

[Repealed, SOR/2016-271, s. 49]

FORM 61B

[Repealed, SOR/2016-271, s. 49]

FORM 64

Rule 64

Supreme Court of Canada

Notice of Intention To Dismiss Application for Leave for Delay

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name*) has not served and filed all the documents required under Rule 25 of the *Rules of the Supreme Court of Canada* for this application for leave within the time set out in paragraph 58(1)(a) of the *Supreme Court Act* or as extended under subsection 59(1) of that Act.

AND FURTHER TAKE NOTICE that the Registrar may dismiss the application for leave to appeal as abandoned if the time for serving and filing the materials is not extended by a judge on motion. The applicant must serve and file a motion for an extension of time within 20 days after the receipt of this notice.

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

_____
Registrar

ORIGINAL TO: THE APPLICANT

(*Name, address and telephone number, and fax number and email address (if any)*)

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any) of all other parties*)

SOR/2006-203, s. 48; SOR/2011-74, s. 53; SOR/2013-175, s. 46.

FORM 65

Rule 65

Supreme Court of Canada

Notice of Intent To Dismiss Appeal for Delay

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name*) has not served and filed a notice of appeal within the time set out in paragraph 58(1)(b) of the *Supreme Court Act* or the time extended under subsection 59(1) of that Act;

AND FURTHER TAKE NOTICE that a judge may dismiss the appeal as abandoned if the time for serving and filing the notice of appeal is not extended by a judge on motion. The appellant must serve and file the motion for an extension of time within 20 days after service of this notice.

OR

TAKE NOTICE that (*name*) has not served and filed the appellant's record and factum within the time set out in Rule 35 of the *Rules of the Supreme Court of Canada*;

AND FURTHER TAKE NOTICE that a judge may dismiss the appeal as abandoned if the time for serving and filing the appellant's record and factum is not extended by a judge on motion. The appellant must serve and file the motion for an extension of time within 20 days after the receipt of this notice.

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

_____

Registrar

ORIGINAL TO: THE APPELLANT

(*Name, address and telephone number, and fax number and email address (if any)*)

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of all other parties*)

SOR/2006-203, s. 48; SOR/2011-74, s. 54; SOR/2013-175, s. 46.

FORM 67

Rule 67

Supreme Court of Canada

Notice of Request — Vexatious Proceeding

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that, pursuant to subrule 67(1) of the *Rules of the Supreme Court of Canada*, the Registrar may request a judge to make an order staying the proceedings, and, if the judge is satisfied that (*name*) is conducting a proceeding in a vexatious manner, the judge may order a stay of proceedings.

OR

TAKE NOTICE that, pursuant to subrule 67(1) of the *Rules of the Supreme Court of Canada*, the Registrar may request a judge to make an order that no further document be filed relating to a proceeding, and, if the judge is satisfied that the filing of further documents would be vexatious or made for an improper purpose, the judge may order that no further documents be filed.

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

_____

Registrar

ORIGINAL TO: THE PARTY

(*Name, address and telephone number, and fax number and email address (if any)*)

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of all other parties*)

NOTICE TO THE PARTIES: The parties may serve and file a response to this notice within 10 days after receipt of this notice.

SOR/2006-203, s. 48; SOR/2011-74, s. 55; SOR/2013-175, s. 46.

FORM 69

Rule 69

Supreme Court of Canada

Notice of Hearing

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE THAT the above-noted appeal has been scheduled for hearing on (*hearing date*) at (*hearing time*).

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

_____
Registrar

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party*)

SOR/2011-74, s. 56; SOR/2013-175, s. 46.

FORM 83A

Rule 83

Notice of Taxation

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

TAKE NOTICE that (*name*) hereby requests the Registrar for taxation of the attached bill of costs on the (*name of parties*).

Dated at (*place and province or territory*) this (*date*) day of (*month*), (*year*).

SIGNED BY (*signature of counsel or party requesting taxation or agent*)

Counsel or party, if unrepresented, requesting taxation (*Counsel's (or party's, if unrepresented) name, address and telephone number, and fax number and email address (if any)*)	Agent, if any (*Agent's name, address and telephone number, and fax number and email address (if any)*)

ORIGINAL TO: THE REGISTRAR

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party liable to pay*)

NOTICE TO THE PARTIES: A party who disputes the taxation of the bill of costs or one of its items shall serve and file a response in letter form to this notice within 10 days after the service of this notice.

SOR/2011-74, s. 57; SOR/2013-175, s. 46.

FORM 83B

Rule 83

Bill of Costs

(Style of Cause (Rule 22) – Use Form 1 of Guidelines for Preparing Documents to be Filed with the Supreme Court of Canada (Print and Electronic))

Item	Fees (*see Schedule B, Part 1*)	Disbursements (*see Schedule B, Part 2*)
1 (*Insert each applicable item pursuant to the tariff set out in Schedule B*)	$	$
SUBTOTAL	$	$
TOTAL	$	$

(*The following is to be completed by the Registrar.*)

Taxed and allowed at the sum of $ _____

_____
Registrar

This _____
day of _____
20_____.

(*Attach receipts for disbursements over $50.*)

SOR/2006-203, s. 49; SOR/2011-74, s. 58; SOR/2024-73, s. 12.

FORM 95

Rule 95

Notice Convening the Supreme Court of Canada

The Chief Justice or a Judge convenes the Supreme Court of Canada at _____ on the _____ day of _____ 20 _____, for the purpose of hearing cases and disposing of any other business that may be brought before the Court.

By order of the Chief Justice, or by order of Justice _____.

_____
Registrar

Dated this _____ day of _____ 20 _____.

SOR/2019-1, s. 19.

FORM 95.1

Subrule 95.1(2)

Notice of Remote Participation by a Judge of the Supreme Court of Canada

(Style of Cause)

TAKE NOTICE that a judge of the Supreme Court of Canada will participate remotely in the above-noted hearing on the

_____ day of
_____ 20
_____.

_____
Registrar

Dated this

_____ day of
_____ 20
_____.

COPIES TO: (*Name, address and telephone number, and fax number and email address (if any), of every party*)

SOR/2019-1, s. 19.

SCHEDULE A

(Rule 82)

Tariff of Fees To Be Paid to the Registrar of the Supreme Court of Canada

1 [Repealed, SOR/2024-73, s. 13]

2 For making photocopies or printing copies, per page,

(a) by Court staff

..... $1

(There is no additional fee for ordinary mailing, faxing or otherwise electronically transmitting the photocopies.)

(b) by self-service

..... $0.50

3 For printed copies of documents, per document

..... $10

3.1 For audio and video recordings

..... $35

4 For certification of a copy of a document

..... $20

5 For Registrar's certificate attesting to the state of proceedings in any matter or certifying that there are no such proceedings

..... $20

6 [Repealed, SOR/2019-1, s. 21]

7 For each copy of reasons for judgment

..... $15

8 For the *Canada Supreme Court Reports*,

(a) an individual part

..... $40*

(b) an annual subscription

..... $350*

Any person may be exempted from paying any of the above fees, in special cases, at the Registrar's discretion.

*Plus applicable GST/HST.

SOR/2006-203, s. 50; SOR/2011-74, ss. 59 to 62; SOR/2013-175, s. 47; SOR/2014-96, s. 1; SOR/2019-1, s. 20; SOR/2019-1, s. 21; SOR/2024-73, s. 13.

SCHEDULE B

(Rule 83)

Tariff of Fees and Disbursements To Be Taxed Between Parties in the Supreme Court of Canada

Part 1 — Counsel's fees

1 Application for leave to appeal:

(a) preparation of an application for leave to appeal or application for leave to cross-appeal, or of a response to one of those applications,

(i) if dealt with in writing

..... $800

or

(ii) if oral hearing held

..... $1,000

(b) if no response is filed, for the review of an application for leave or application for leave to cross-appeal, at the Registrar's discretion, up to

..... $300

(c) preparation of the first copy of an application for leave to appeal, an application for leave to cross-appeal, a response or a reply, per page

..... $1.35

(d) preparation of the electronic version of an application for leave to appeal, an application for leave to cross-appeal, a response or a reply, per page

..... $0.30

2 Motion:

(a) preparation of a motion or response to a motion,

(i) if dealt with in writing

..... $300

or

(ii) if oral hearing held

..... $800

(b) if no response is filed, for the review of a motion, at the Registrar's discretion, up to $200

(c) preparation of the first copy of a motion book, a response or a reply, per page

..... $1.35

(d) preparation of the electronic version of a motion book, a response or a reply, per page $0.30

3 Appeal:

(a) notice of appeal

..... $75

(b) preparation of factum

..... $650

(c) preparation of the first copy of factum, record, book of authorities and condensed book, per page

..... $1.35

(c.1) preparation of the electronic version of factum, record or book of authorities, per page

..... $0.30

(d) hearing of the appeal, preparation for and attendance at hearing,

(i) fee for the principal counsel

..... $2,100

(ii) fee for the junior counsel

..... $700

(e) fee for appeals that are discontinued or dismissed as abandoned appeals

..... $500

4 Miscellaneous:

(a) fee to the duly entered agent,

(i) on leave

..... $200

(ii) on appeal

..... $500

(b) cross-examination of a deponent under Rule 90, at the Registrar's discretion, up to $150

All fees are subject to an increase or decrease in exceptional cases, at the Registrar's discretion.

Part 2 — Disbursements

The following disbursements shall be taxed at the Registrar's discretion:

1 Fees paid to the Registrar under Schedule A.

2 A reasonable amount for reproducing documents required to be filed with the Court in accordance with a receipt from the service provider that itemizes the services rendered. The amount must not include counsel's fees already claimed for the preparation of the printed or electronic version of any document referred to in Part 1. Documents reproduced in-house or not supported by an itemized receipt will be taxed at $0.25 per page.

3 Subject to item 4, reasonable amounts incurred to attend proceedings before the Court for up to two counsel, including travel expenses, lodging expenses for a maximum of two nights for one hearing day plus an additional night of lodging for each additional hearing day, meals and any incidental expenses (for example, parking, taxi and telephone calls). Such expenses shall be supported by detailed and itemized receipts.

4 Amounts incurred for the use of privately owned vehicles driven to attend proceedings before the Court. Those amounts shall be calculated using the kilometric rates set out

in Appendix B of the National Joint Council's Travel Directive; no receipts for those expenses are required.

5 All other itemized and detailed disbursements reasonably incurred, except disbursements incurred for electronic legal research. The disbursements must not include fees referred to in Part 1. Detailed and itemized receipts are required for amounts claimed over $50.

6 Any service, sales, use or consumption taxes paid or payable on any disbursements set out in items 2, 3 and 5, unless those taxes have been reimbursed or are reimbursable.

SOR/2006-203, s. 50; SOR/2011-74, s. 63; SOR/2013-175, ss. 48 to 50; SOR/2016-271, ss. 50, 51; SOR/2019-1, s. 22; SOR/2019-1, s. 23; SOR/2024-73, s. 14; SOR/2024-73, s. 15; SOR/2024-73, s. 16; SOR/2024-73, s. 17; SOR/2024-73, s. 18; SOR/2024-73, s. 19(F).

TAB 7

CanLII

Sydel v. Canada (Attorney General), 2013 FC 1116 (CanLII)

Source:	Federal Court
Date:	2013-11-04
File number:	T-676-13
Other citation:	441 FTR 310
Citation:	Sydel v. Canada (Attorney General), 2013 FC 1116 (CanLII), <https://canlii.ca/t/g1rc7>, retrieved on 2026-01-06

Date: 20131104

Docket:
T-676-13

Citation: 2013 FC 1116

Ottawa, Ontario, November 4, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

EVA NOTBURGA MARITA SYDEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks an Order for mandamus to compel the Attorney General of Canada or Minister of Justice (the "Minister") to issue a direction to the Registrar of the Supreme Court of Canada (the "Registrar"). Specifically the applicant requests that the Registrar be ordered to put her motion for reconsideration of an application for leave to appeal to the Supreme Court of Canada (the "SCC"), from a decision of the British Columbia Court of Appeal, before a judge of the SCC.

[2] The application is dismissed for the reasons that follow.

[3] The following background information provides the context for the present application and for the reasons to refuse the relief sought.

Background

[4] In 2007, the applicant was convicted in the Provincial Court of British Columbia for tax evasion. She was sentenced to 18 months in prison and fined $244,447.

[5] The applicant appealed her conviction to the Supreme Court of British Columbia but later abandoned the appeal. Her application to reopen the appeal was refused. She then brought a civil action in the Supreme Court of British Columbia seeking a declaration that the *Income Tax Act* was invalid as were her convictions under that Act.

[6] The applicant sought $300 million in damages for breach of her right to a fair trial pursuant to paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*, based on allegations that her criminal trial was unfair because the Judge was biased and because the Judge and the Canada Revenue Agency investigator had communicated during the trial with non-verbal signals, including those used by Freemasons. In addition, allegations were made that the Judge was likely a Freemason because he refused to indicate whether he was a Freemason, and that judicial independence has been subverted because Freemasons have infiltrated the judiciary and have placed their Freemason oath above their judicial oath.

[7] These same allegations have been made with respect to the other Judges who have dealt with the applicant's various legal proceedings and complaints have been made to the Canadian Judicial Council, all of which have been found to have absolutely no merit.

[8] On August 3, 2011, the applicant applied to the SCC for leave to appeal the Order of the British Columbia Court of Appeal which dismissed her appeal and upheld the decision of the British Columbia Supreme Court which dismissed her civil action.

[9] The applicant submitted all materials on the application for leave to the SCC by November 21, 2011.

[10] In addition, by motion to the SCC dated November 29, 2011, the applicant sought Orders that the Attorney General of Canada, the Canadian Judicial Council and the Attorney General of British Columbia be directed to investigate whether named Judges of the British Columbia Supreme Court and Court of Appeal, the Provincial Court Judge who convicted the applicant, as well as a named employee of the Canada Revenue Agency, were Freemasons. By Order dated December 15, 2011, the Registrar dismissed this motion.

[11] On December 22, 2011, a three member panel of the SCC dismissed the application for leave to appeal the decision of the British Columbia Court of Appeal.

[12] On January 31, 2012, the applicant brought a motion seeking reconsideration of the application for leave to appeal. By letter dated June 19, 2012, the Registrar advised the applicant that her motion was refused as it did not reveal exceedingly rare circumstances to warrant reconsideration as required by Rule 73 of the *Rules of the Supreme Court of Canada* (the "*Supreme Court Rules*")

[13] Counsel for the applicant then wrote to the Minister on September 24, 2012, requesting the Minister to "direct the Registrar to put my client's materials before the court according to the Rules of Court". The Minister did not act as requested.

[14] This brings us to the present application for judicial review of the Minister's decision to take no action. The applicant now seeks mandamus and asks this Court to compel the Attorney General of Canada or the Minister, to order the Registrar to put the motions for disclosure and the motion for reconsideration of the refusal to grant leave to appeal, before a judge of the SCC. The applicant did not make submissions with respect to the motion for disclosure and limited her application for mandamus with respect to the motion for reconsideration.

[15] This relief cannot and should not be granted.

The Applicant's Grounds to Seek Mandamus

[16] The applicant's primary argument is that the Registrar made a decision that should have been decided by a judge of the SCC. The applicant submits that the Registrar acted without authority in refusing her motion for reconsideration. Therefore, the Minister, who is responsible to superintend the administration of justice pursuant to section 4 of the *Department of Justice Act*, should direct the Registrar to put this motion before a judge of the SCC.

[17] The applicant submits that her motion should have been considered by a judge of the SCC in accordance with the *Supreme Court Act* and the *Supreme Court Rules*. She claims she was denied the benefit of having a judge, who is judicially independent, consider the issue of whether her motion for reconsideration raised exceedingly rare circumstances.

[18] The applicant submits that the Registrar is part of the Executive Branch of the Government and is not judicially independent.

[19] The applicant disputes that she is undermining the finality of the determination by the SCC, and argues that she seeks finality but that finality can only result from a decision of a judge of the SCC on her motion for reconsideration of leave to appeal. The applicant also disputes that this judicial review is a collateral attack on the SCC and submits that it is only an attack on the person that refused her motion, namely, the Registrar.

[20] The applicant further submits that she has satisfied all the elements of the test for mandamus as established by the Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1993] FCJ No 1098 at para 45, [1994] 1 FC 742, affd 1994 CanLII 47 (SCC), [1994] 3 SCR 1100, [1994] SCJ No 113 [*Apotex*].

The Respondent's Position

[21] The respondent submits that the principle of judicial independence does not permit this Court to order mandamus to compel the Minister to direct the Registrar to put the applicant's motion for reconsideration before a judge of the SCC.

[22] The Minister or any other Minister of the Crown or member of the Executive Branch of the Government can not interfere with the decision-making process of any court.

[23] The respondent submits that the criteria for mandamus need not be considered because the Minister must refrain from acting, just as he did, in order to fulfill his duties under the *Department of Justice Act* and to comply with the rule of law.

[24] The respondent further submits that the relief is in fact a collateral attack on the SCC decision to dismiss her application for leave as it seeks to undo the decision of the Court.

[25] The respondent also notes that the Registrar is part of the SCC and can not be characterized as part of the Executive Branch of the Government.

The Issue

[26] The key issue is whether this Court has jurisdiction to order the Minister or the Attorney General of Canada to direct the Registrar to put the applicant's motions for disclosure and reconsideration of leave to appeal before a judge of the SCC.

[27] If the Court has such jurisdiction, then the issue of whether the test for mandamus has been met would be considered.

This Court does not have jurisdiction to order mandamus against the Registrar

[28] The relief sought by the applicant offends the principles of judicial independence, the hierarchy of our Court structure and the supremacy of the SCC.

[29] In addition, the applicant's argument that the Registrar had no authority to make the decision refusing her motion for reconsideration is without merit.

[30] I agree with the respondent that by seeking mandamus against the Minister, the applicant seeks indirectly what she can not achieve directly. Regardless of how the applicant has packaged her request, she is indeed asking that the Minister interfere with the SCC.

[31] As noted by the respondent, the Minister's role in ensuring the proper administration of justice or superintendence of the administration of justice, in accordance with section 4 of the *Department of Justice Act*, requires that the Minister ensure judicial independence. This, in turn, requires that the Minister not act as the applicant has requested.

The Registrar's Authority

[32] The applicant repeatedly argued that the Registrar acted without authority in refusing her motion for reconsideration of her leave application because it did not raise exceedingly rare circumstances in accordance with Rule 73 of the *Supreme Court Rules*. The argument has no merit.

[33] The *Supreme Court Act* provides as follows:

18. The Registrar has such auth ority to exercise the jurisdiction of a judge sitting in chambers as may be conferred on the Registr ar by general rules or orders ma de under this Act.	**18.** Le registraire exerce la juri diction d'un juge en chambre se lon les pouvoirs qui lui sont con férés par les ordonnances ou rè gles générales édictées en vertu de la présente loi.

[34] The relevant *Supreme Court Rules* provide:

12. Subject to Rule 78, every or der made by the Registrar shall be binding on all parties concer	**12.** Sous réserve de la règle 7 8, l'ordonnance du registraire l ie toutes les parties intéressées

ned as if the order had been ma de by a judge.	comme si elle émanait d'un jug e.
13. The Registrar may refer any matter before him or her to a jud ge.	**13.** Le registraire peut renvoye r à un juge toute affaire qui lui est soumise.
[…]	[…]
73. (1) There shall be no recons ideration of an application for l eave to appeal unless there are exceedingly rare circumstances in the case that warrant conside ration by the Court.	**73.** (1) Aucune demande d'aut orisation d'appel ne peut faire l'objet d'un réexamen sauf si d es circonstances extrêmement r ares le justifient.
[…]	[…]
78. (1) Within 20 days after the Registrar makes an order, any p arty affected by the order may make a motion to a judge to rev iew the order.	**78.** (1) Toute partie visée par u ne ordonnance du registraire p eut, dans les vingt jours suivant le prononcé de celle-ci, en dem ander la révision à un juge par requête.
(2) The affidavit in support of t he motion shall set out the reas ons for the objection to the orde r.	(2) L'affidavit à l'appui de la re quête en expose les motifs.
(Emphasis added)	[Je souligne]

[35] As I interpret those provisions, the Registrar's authority to refuse the motion for reconsideration is the same as that of a judge in Chambers as that authority has been conferred by Rule 12. The Order made by the Registrar is binding.

[36] The decision of the Registrar clearly indicated that section 78 was not applicable:

> I have reviewed your motion for reconsideration and your affidavit in support. I regret to inform you that, in my opinion, your motion does not reveal the exceedingly rare circumstances which would warrant reconsideration by this Court. Furthermore, please note that Rule 78 of the *Rules of the Supreme Court of Canada* is not applicable to this matter.

[37] The applicant is not entitled to have her motion for reconsideration heard by a judge of the SCC as her motion has been validly considered and determined by the Registrar. Therefore, the

applicant's theory that the Minister is duty-bound to intervene to ensure that the Registrar acts within his authority is baseless.

Judicial independence requires no interference by the Executive Branch of the Government

[38] Judicial independence means and requires that the judiciary is separate and independent from all other participants in the justice system, including the Government

.

[39] The SCC has addressed the importance and hallmarks of judicial independence on many occasions and the principles are clear.

[40] In *Beauregard v Canada,* 1986 CanLII 24 (SCC), [1986] 2 SCR 56, [1986] SCJ No 50 [*Beauregard*], the SCC traced the origins of judicial independence, noting at para 21:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider--be it government, pressure group, individual or even another judge--should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence. Nevertheless, it is not the entire content of the principle.

[41] And at paras 30-31:

> […] Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from *all* other participants in the justice system.
>
> I emphasize the word 'all' in the previous sentence because, although judicial independence is usually considered and discussed in terms of the relationship between the judiciary and the executive branch, in this appeal the relevant relationship is between the judiciary and Parliament. Nothing turns on this contextual difference. Although particular care must be taken to preserve the independence of the judiciary from the executive branch (because the executive is so often a litigant before the courts), the principle of judicial independence must also be maintained against all other potential intrusions, including any from the legislative branch.

[42] In *R v Valente*, 1985 CanLII 25 (SCC), [1985] SCJ No. 77, [1985] 2 SCR 673, the SCC considered the relationship between impartiality and independence, at 685:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial"... connotes absence of bias, actual or perceived. The word "independent" in s. 11(*d*) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.

[43] In *R v Lippé*, 1990 CanLII 18 (SCC), [1990] SCJ No 128, [1991] 2 SCR 114, the SCC noted at 138:

> The content of the principle of judicial independence is to be determined with reference to our constitutional tradition and is therefore limited to independence from the government. Although the language in *Beauregard, supra*, may seem to have expanded the concept, it is to be remembered that the *ratio* of the case extended the requirement beyond the executive to the legislative branch of government. […]
>
> I do not intend, however, to limit this concept of "government" to simply the executive or legislative branches. By "government", in this context, I am referring to <u>any person or body, which can exert pressure on the judiciary through authority under the state</u>.
> [Emphasis in original.]

[44] In the present case, the applicant's request for mandamus is contrary to the separation of powers between the executive and the judiciary and undermines the judicial independence of the SCC. The applicant is really asking the Minister to ensure that her motion for reconsideration is considered for a second time and by a judge of the SCC. This would put the Minister in the role of supervising or interfering with Canada's top court. This clearly infringes the principle of judicial independence.

[45] If the Minister could be compelled to direct the Registrar to put a motion for reconsideration of a leave application – or any other motion – before a judge of the SCC, which basically compels that Judge to consider the motion, what prevents the Minister from directing the Registrar to put a motion to a judge of the SCC to consider or reconsider a matter that any Minister of the Crown is a party to?

There is no doubt that this would violate judicial independence and the rule of law. The relief requested by the applicant of the Minister is no different.

[46] In *Legere v Canada,* 2003 FC 869, [2003] FCJ No 1766 [*Legere*], this Court addressed the principles of judicial independence in circumstances similar to the present case. Mr Legere brought an action in the Federal Court against Her Majesty the Queen, as the Federal Crown, alleging that it had supervisory jurisdiction over the judges and masters of the British Columbia Supreme Court, where he had been unsuccessful in a family law matter.

[47] Prothonotary Hargrave referred to the passages cited above from *Beauregard* and noted that the Federal Crown has no supervisory role over the judiciary, at para 15 of *Legere*:

> The judiciary hold office during good behaviour. While judges and masters are appointed by the Crown they are not Crown servants: they cannot be either controlled by or given directions by the Crown, or by the Crown's ministers, or by Parliament, or by any government department. The members of the judiciary are independent and enjoy total immunity from court action based on anything done or said in the exercise of their judicial functions. There can therefore be no vicarious liability on the part of the Crown.

[48] The same principles are applicable in the present case. Judges of the SCC are not Crown servants; they cannot be controlled by or be given directions by the Crown or by the Crown's ministers. To hold otherwise would undermine the separation of powers between the executive and the judiciary.

[49] In *Legere*, Prothonotary Hargrave also noted that permitting the application to continue would constitute an impermissible collateral attack on the British Columbia Supreme Court. The rule against collateral attack prevents an order made by a decision-maker of competent jurisdiction from being attacked in proceedings other than those whose specific object is the reversal, variation, or nullification of the order.

[50] Although the application in the present case is brought against the Minister, the doctrine of collateral attack nonetheless applies because the effect of the relief sought by the applicant is to

challenge a valid and binding decision of the Registrar in an attempt to undo a decision made by a three member panel of the SCC.

[51] In oral submissions, counsel for the applicant indicated that he agreed with the decision of Prothonotary Hargrave in *Legere* and that "no player in the Executive should ever have any contact with the judiciary or court". However, the applicant holds the view that the Registrar is not part of the Court or judiciary, and that, therefore, this principle is not applicable.

[52] The applicant does not seem to appreciate the effect of what she seeks. Compelling the Minister to direct the Registrar to put the motion for reconsideration before a judge of the SCC is the same as bypassing the Registrar altogether and directing the Minister to demand that a SCC judge consider the applicant's motion for reconsideration of leave to appeal.

The hierarchy of the Court must be respected

[53] In addition to violating the principles of separation of powers and judicial independence, the relief sought by the applicant ignores the hierarchy of Canada's court system. Finality would never be achieved if the Minister could be compelled to direct the Registrar to put motions before judges of the SCC.

[54] In *Scheuneman v Canada (Attorney General)*, 2003 FCA 194, [2003] FCJ No 686 [*Scheuneman*], the Federal Court of Appeal noted the importance of finality and the hierarchy of our courts which places the SCC at the top.

[55] Mr Scheuneman sought judicial review of the SCC's decision to dismiss his application for leave to appeal and motion for reconsideration, arguing that the SCC fell within the definition of "federal board, commission, or other tribunal" in subsection 2(1) of the *Federal Court Act*, thereby giving the Federal Court jurisdiction to judicially review the SCC's decision regarding his leave application.

[56] The Federal Court of Appeal strongly rejected this argument, noting at paras 10 and 11:

> [10] We are all satisfied that this argument must fail. In our view, it would be so absurd to interpret "federal board, commission or other tribunal" as including the Supreme Court of Canada that Parliament did not think it necessary specifically to exclude the Judges of that Court from the definition. The court system in Canada, and elsewhere, is hierarchical in nature. In Canada, the Supreme Court of Canada sits at the apex of our judicial system. Subject to a residual discretion to reconsider its own decisions (*R. v. Hinse*, 1997 CanLII 394 (SCC), [1997] 1 S.C.R. 3), the Supreme Court's judgments (including decisions not to reconsider a leave application) are final and conclusive: *Supreme Court of Canada Act*, section 52. They are not subject to appeal. To interpret "federal board, commission or other tribunal" as including the Supreme Court of Canada, and as thus permitting the Federal Court to review judgments of the Supreme Court of Canada, would undermine the finality of the Supreme Court's decisions and subvert the judicial hierarchy.
>
> [11] If, as Mr. Scheuneman maintains, the Federal Court could review a decision or order of the Supreme Court of Canada, the decision of the Federal Court would itself be subject to appeal to the Supreme Court of Canada. Moreover, if the Supreme Court refused leave to appeal, that refusal could itself potentially be the subject of a further application for judicial review to the Federal Court. It would be absurd to construe the *Federal Court Act* as conferring on the Court jurisdiction to review the decision of a body when the result of the review could then be appealed to the very body that made the decision under review. There would be no finality to litigation.

[57] The principles set out in *Scheuneman* are applicable to the application before me. The applicant seeks an Order of this Court against the Minister. If granted, a decision of the Registrar, which is as binding as a decision of a SCC judge in Chambers, notwithstanding that the SCC is the court of final appeal, would be subject to or undermined by the authority of this Court.

[58] If the SCC considered the motion for reconsideration for a second time as a result of the order by the Minister via the Registrar, and refused the motion for a second time, would the applicant suggest that the Minister could continue to demand reconsideration? Although the applicant's position is that there is no finality until a judge, and not the Registrar, decides the motion for reconsideration, the very relief sought from the Minister of Justice would invite requests for reconsideration over and again, with no finality and no respect for the hierarchy of the SCC.

The test for mandamus cannot be met

[59] The applicant argued that she met the test for mandamus, as established in *Apotex* because: the Minister owed a duty to her to act to prevent the Registrar from exceeding his authority; she had satisfied all the conditions precedent by requesting the Minister to act; there was no other remedy available to her; the order would have practical value because it would place her affidavit outlining the exceedingly rare circumstances before a judge and bring about the finality she seeks; and, the balance of convenience favoured her as she was entitled to have her motion considered by a judge, or at minimum, it would not cause inconvenience or confusion in the SCC.

[60] The applicant has not met any of the elements of the test for mandamus for the reasons set out above. Most importantly, the Minister is not under any duty to act, and is, in fact, under a duty to refrain from acting in order to ensure judicial independence and the separation of powers.

Conclusion

[61] The relief sought by the applicant offends the principles of judicial independence, the hierarchy of our Court structure and the supremacy of the SCC.

[62] I would also note that the applicant cannot assert that she was denied the opportunity to place her affidavit alleging that exceedingly rare circumstances exist to warrant reconsideration before a judge given that her affidavit was considered by the Registrar, who has the same authority as a judge of the SCC in Chambers. Moreover, the exceedingly rare circumstances, i.e., her allegations that Freemasons have infiltrated the justice system and that Freemasons may be a criminal organisation and, as a result, have subverted judicial independence and the rule of law, are the very same allegations set out in her Statement of Claim which was dismissed and for which leave to appeal was denied by a three member panel of the SCC.

[63] The applicant claims that she wants finality and that she will only have finality when her motion is considered by a judge of the SCC. In fact, the applicant has had finality. She has relentlessly pursued all possible legal remedies over several years. Her leave to appeal to the SCC has been denied, as has her motion to reconsider her leave to appeal. These Orders are final and binding. As a result, the decision of the British Columbia Court of Appeal is final in upholding the dismissal of her

cause of action. The applicant must come to terms with that final decision and with the fact that her legal recourse has reached its end.

[64] As noted by the Federal Court of Appeal in *Scheuneman*, *supra* at para 12:

> […] No one has a right to consume scarce public resources indefinitely in the endless pursuit of a dispute, no matter how important the issues may seem to the individual concerned. Finality is an indispensable aspect of any system of justice.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review and mandamus is dismissed; and

2. Costs are awarded to the respondent at the middle of Column 3 in Tariff B.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-676-13
STYLE OF CAUSE:	EVA NOTBURGA MARITA SYDEL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING:

OCTOBER 21, 2013

REASONS FOR JUDGMENT AND JUDGMENT:

KANE J.

DATED:

NOVEMBER 4, 2013

APPEARANCES:

Richard Hendery	FOR THE APPLICANT
Kirat Khalsa Loretta Chun	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Hendery Barrister and Solicitor Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT

TAB 8

CanLII

Personal Information Protection and Electronic Documents Act, SC 2000, c 5

Current version: in force since 2025-03-04

Link to the latest version: https://canlii.ca/t/7vwj

Stable link to this version: https://canlii.ca/t/56gxt

Citation to this version: Personal Information Protection and Electronic Documents Act, SC 2000, c 5, <https://canlii.ca/t/56gxt> retrieved on 2026-01-06

Currency: This statute is current to 2025-11-27 according to the Justice Laws Web Site

Personal Information Protection and Electronic Documents Act

S.C. 2000, c. 5

Assented to 2000-04-13

An Act to support and promote electronic commerce by protecting personal information that is collected, used or disclosed in certain circumstances, by providing for the use of electronic means to communicate or record information or transactions and by amending the Canada Evidence Act, the Statutory Instruments Act and the Statute Revision Act

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the *Personal Information Protection and Electronic Documents Act*.

PART 1

Protection of Personal Information in the Private Sector

Interpretation

Definitions

2 (1) The definitions in this subsection apply in this Part.

alternative format, with respect to personal information, means a format that allows a person with a sensory disability to read or listen to the personal information. (*support de substitution*)

breach of security safeguards means the loss of, unauthorized access to or unauthorized disclosure of personal information resulting from a breach of an organization's security safeguards that are referred to in clause 4.7 of Schedule 1 or from a failure to establish those safeguards. (*atteinte aux mesures de sécurité*)

business contact information means any information that is used for the purpose of communicating or facilitating communication with an individual in relation to their employment, business or profession such as the individual's name, position name or title, work address, work telephone number, work fax number or work electronic address. (*coordonnées d'affaires*)

business transaction includes

(a) the purchase, sale or other acquisition or disposition of an organization or a part of an organization, or any of its assets;

(b) the merger or amalgamation of two or more organizations;

(c) the making of a loan or provision of other financing to an organization or a part of an organization;

(d) the creating of a charge on, or the taking of a security interest in or a security on, any assets or securities of an organization;

(e) the lease or licensing of any of an organization's assets; and

(f) any other prescribed arrangement between two or more organizations to conduct a business activity. (*transaction commerciale*)

commercial activity means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists. (*activité commerciale*)

Commissioner means the Privacy Commissioner appointed under section 53 of the *Privacy Act*. (*commissaire*)

Court means the Federal Court. (*Cour*)

federal work, undertaking or business means any work, undertaking or business that is within the legislative authority of Parliament. It includes

(a) a work, undertaking or business that is operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;

(b) a railway, canal, telegraph or other work or undertaking that connects a province with another province, or that extends beyond the limits of a province;

(c) a line of ships that connects a province with another province, or that extends beyond the limits of a province;

(d) a ferry between a province and another province or between a province and a country other than Canada;

(e) aerodromes, aircraft or a line of air transportation;

(f) a radio broadcasting station;

(g) a bank or an authorized foreign bank as defined in section 2 of the *Bank Act*;

(h) a work that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces;

(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces; and

(j) a work, undertaking or business to which federal laws, within the meaning of section 2 of the *Oceans Act*, apply under section 20 of that Act and any regulations made under paragraph 26(1)(k) of that Act. (*entreprises fédérales*)

organization includes an association, a partnership, a person and a trade union. (*organisation*)

personal health information, with respect to an individual, whether living or deceased, means

(a) information concerning the physical or mental health of the individual;

(b) information concerning any health service provided to the individual;

(c) information concerning the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;

(d) information that is collected in the course of providing health services to the individual; or

(e) information that is collected incidentally to the provision of health services to the individual. (*renseignement personnel sur la santé*)

personal information means information about an identifiable individual. (*renseignement personnel*)

prescribed means prescribed by regulation. (*Version anglaise seulement*)

record includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine-readable record and any other documentary material, regardless of physical form or characteristics, and any copy of any of those things. (*document*)

Notes in Schedule 1

(2) In this Part, a reference to clause 4.3 or 4.9 of Schedule 1 does not include a reference to the note that accompanies that clause.
2000, c. 5, s. 2; 2002, c. 8, s. 183; 2015, c. 32, s. 2.

Purpose

Purpose

3 The purpose of this Part is to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Application

Application

4 (1) This Part applies to every organization in respect of personal information that

(a) the organization collects, uses or discloses in the course of commercial activities; or

(b) is about an employee of, or an applicant for employment with, the organization and that the organization collects, uses or discloses in connection with the operation of a federal work, undertaking or business.

Application

(1.1) This Part applies to an organization set out in column 1 of Schedule 4 in respect of personal information set out in column 2.

Limit

(2) This Part does not apply to

(a) any government institution to which the *Privacy Act* applies;

(b) any individual in respect of personal information that the individual collects, uses or discloses for personal or domestic purposes and does not collect, use or disclose for any other purpose; or

(c) any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose.

Other Acts

*__(3)__ Every provision of this Part applies despite any provision, enacted after this subsection comes into force, of any other Act of Parliament, unless the other Act expressly declares that that provision operates despite the provision of this Part.

*[Note: Subsection 4(3) in force January 1, 2001, *see* SI/2000-29.]
2000, c. 5, s. 4; 2015, c. 32, s. 3, c. 36, s. 164.

Business contact information

4.01 This Part does not apply to an organization in respect of the business contact information of an individual that the organization collects, uses or discloses solely for the purpose of communicating or facilitating communication with the individual in relation to their employment, business or profession.

2015, c. 32, s. 4.

Certificate under *Canada Evidence Act*

4.1 (1) If a certificate under section 38.13 or 38.41 of the *Canada Evidence Act* prohibiting the disclosure of personal information of a specific individual is issued before a complaint is filed by that individual under this Part in respect of a request for access to that information, the provisions of this Part respecting that individual's right of access to their personal information do not apply to the information that is subject to the certificate.

Certificate following filing of complaint

(2) Despite any other provision of this Part, if a certificate under section 38.13 or 38.41 of the *Canada Evidence Act* prohibiting the disclosure of personal information of a specific individual is issued after the filing of a complaint under this Part in relation to a request for access to that information:

(a) all proceedings under this Part in respect of that information, including an investigation, audit, appeal or judicial review, are discontinued;

(b) the Commissioner shall not disclose the information and shall take all necessary precautions to prevent its disclosure; and

(c) the Commissioner shall, within 10 days after the certificate is published in the *Canada Gazette*, return the information to the organization that provided the information.

Information not to be disclosed

(3) The Commissioner and every person acting on behalf or under the direction of the Commissioner, in carrying out their functions under this Part, shall not disclose information subject to a certificate issued under section 38.13 or 38.41 of the *Canada Evidence Act*, and shall take every reasonable precaution to avoid the disclosure of that information.

Power to delegate

(4) The Commissioner may not delegate the investigation of any complaint relating to information subject to a certificate issued under section 38.13 or 38.41 of the *Canada Evidence Act* except to one of a maximum of four officers or employees of the Commissioner specifically designated by the Commissioner for the purpose of conducting that investigation.

2001, c. 41, s. 103; 2024, c. 16, s. 93.

DIVISION 1

Protection of Personal Information

Compliance with obligations

5 (1) Subject to sections 6 to 9, every organization shall comply with the obligations set out in Schedule 1.

Meaning of *should*

(2) The word ***should***, when used in Schedule 1, indicates a recommendation and does not impose an obligation.

Appropriate purposes

(3) An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

Effect of designation of individual

6 The designation of an individual under clause 4.1 of Schedule 1 does not relieve the organization of the obligation to comply with the obligations set out in that Schedule.

Valid consent

6.1 For the purposes of clause 4.3 of Schedule 1, the consent of an individual is only valid if it is reasonable to expect that an individual to whom the organization's activities are directed would understand the nature, purpose and consequences of the collection, use or disclosure of the personal information to which they are consenting.

2015, c. 32, s. 5.

Collection without knowledge or consent

7 (1) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may collect personal information without the knowledge or consent of the individual only if

(a) the collection is clearly in the interests of the individual and consent cannot be obtained in a timely way;

(b) it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province;

(b.01) it was disclosed under paragraph (3)(d.21);

(b.1) it is contained in a witness statement and the collection is necessary to assess, process or settle an insurance claim;

(b.2) it was produced by the individual in the course of their employment, business or profession and the collection is consistent with the purposes for which the information was produced;

(c) the collection is solely for journalistic, artistic or literary purposes;

(d) the information is publicly available and is specified by the regulations; or

(e) the collection is made for the purpose of making a disclosure

(i) under subparagraph (3)(c.1)(i) or (d)(ii), or

(ii) that is required by law.

Use without knowledge or consent

(2) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may, without the knowledge or consent of the individual, use personal information only if

(a) in the course of its activities, the organization becomes aware of information that it has reasonable grounds to believe could be useful in the investigation of a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, and the information is used for the purpose of investigating that contravention;

(b) it is used for the purpose of acting in respect of an emergency that threatens the life, health or security of an individual;

(b.1) the information is contained in a witness statement and the use is necessary to assess, process or settle an insurance claim;

(b.2) the information was produced by the individual in the course of their employment, business or profession and the use is consistent with the purposes for which the information was produced;

(c) it is used for statistical, or scholarly study or research, purposes that cannot be achieved without using the information, the information is used in a manner that will

ensure its confidentiality, it is impracticable to obtain consent and the organization informs the Commissioner of the use before the information is used;

(c.1) it is publicly available and is specified by the regulations; or

(d) it was collected under paragraph (1)(a), (b), (b.01) or (e).

Disclosure without knowledge or consent

(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(a) made to, in the Province of Quebec, an advocate or notary or, in any other province, a barrister or solicitor who is representing the organization;

(b) for the purpose of collecting a debt owed by the individual to the organization;

(c) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law,

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province, or

(iv) the disclosure is requested for the purpose of communicating with the next of kin or authorized representative of an injured, ill or deceased individual;

(c.2) made to the government institution mentioned in section 7 of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* as required by that section;

(d) made on the initiative of the organization to a government institution or a part of a government institution and the organization

(i) has reasonable grounds to believe that the information relates to a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or

(ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;

(d.1) made to another organization and is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a

province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation;

(d.2) made to another organization and is reasonable for the purposes of detecting or suppressing fraud or of preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud;

(d.21) made to another organization under subsection 11.01(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*;

(d.3) made on the initiative of the organization to a government institution, a part of a government institution or the individual's next of kin or authorized representative and

(i) the organization has reasonable grounds to believe that the individual has been, is or may be the victim of financial abuse,

(ii) the disclosure is made solely for purposes related to preventing or investigating the abuse, and

(iii) it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the ability to prevent or investigate the abuse;

(d.4) necessary to identify the individual who is injured, ill or deceased, made to a government institution, a part of a government institution or the individual's next of kin or authorized representative and, if the individual is alive, the organization informs that individual in writing without delay of the disclosure;

(e) made to a person who needs the information because of an emergency that threatens the life, health or security of an individual and, if the individual whom the information is about is alive, the organization informs that individual in writing without delay of the disclosure;

(e.1) of information that is contained in a witness statement and the disclosure is necessary to assess, process or settle an insurance claim;

(e.2) of information that was produced by the individual in the course of their employment, business or profession and the disclosure is consistent with the purposes for which the information was produced;

(f) for statistical, or scholarly study or research, purposes that cannot be achieved without disclosing the information, it is impracticable to obtain consent and the organization informs the Commissioner of the disclosure before the information is disclosed;

(g) made to an institution whose functions include the conservation of records of historic or archival importance, and the disclosure is made for the purpose of such conservation;

(h) made after the earlier of

(i) one hundred years after the record containing the information was created, and

(ii) twenty years after the death of the individual whom the information is about;

(h.1) of information that is publicly available and is specified by the regulations; or

(h.2) [Repealed, 2015, c. 32, s. 6]

(i) required by law.

Use without consent

(4) Despite clause 4.5 of Schedule 1, an organization may use personal information for purposes other than those for which it was collected in any of the circumstances set out in subsection (2).

Disclosure without consent

(5) Despite clause 4.5 of Schedule 1, an organization may disclose personal information for purposes other than those for which it was collected in any of the circumstances set out in paragraphs (3)(a) to (h.1).

2000, c. 5, s. 7, c. 17, s. 97; 2001, c. 41, s. 81; 2004, c. 15, s. 98; 2015, c. 32, s. 6; 2024, c. 17, s. 347.

Definitions

7.1 (1) The following definitions apply in this section.

access means to program, to execute programs on, to communicate with, to store data in, to retrieve data from, or to otherwise make use of any resources, including data or programs on a computer system or a computer network. (*utiliser*)

computer program has the same meaning as in subsection 342.1(2) of the *Criminal Code*. (*programme d'ordinateur*)

computer system has the same meaning as in subsection 342.1(2) of the *Criminal Code*. (*ordinateur*)

electronic address means an address used in connection with

(a) an electronic mail account;

(b) an instant messaging account; or

(c) any similar account. (*adresse électronique*)

Collection of electronic addresses, etc.

(2) Paragraphs 7(1)(a) and (b.1) to (d) and (2)(a) to (c.1) and the exception set out in clause 4.3 of Schedule 1 do not apply in respect of

(a) the collection of an individual's electronic address, if the address is collected by the use of a computer program that is designed or marketed primarily for use in generating or searching for, and collecting, electronic addresses; or

(b) the use of an individual's electronic address, if the address is collected by the use of a computer program described in paragraph (a).

Accessing a computer system to collect personal information, etc.

(3) Paragraphs 7(1)(a) to (d) and (2)(a) to (c.1) and the exception set out in clause 4.3 of Schedule 1 do not apply in respect of

(a) the collection of personal information, through any means of telecommunication, if the collection is made by accessing a computer system or causing a computer system to be accessed in contravention of an Act of Parliament; or

(b) the use of personal information that is collected in a manner described in paragraph (a).

2010, c. 23, s. 82; 2015, c. 32, s. 26.

Prospective business transaction

7.2 (1) In addition to the circumstances set out in subsections 7(2) and (3), for the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, organizations that are parties to a prospective business transaction may use and disclose personal information without the knowledge or consent of the individual if

(a) the organizations have entered into an agreement that requires the organization that receives the personal information

(i) to use and disclose that information solely for purposes related to the transaction,

(ii) to protect that information by security safeguards appropriate to the sensitivity of the information, and

(iii) if the transaction does not proceed, to return that information to the organization that disclosed it, or destroy it, within a reasonable time; and

(b) the personal information is necessary

(i) to determine whether to proceed with the transaction, and

(ii) if the determination is made to proceed with the transaction, to complete it.

Completed business transaction

(2) In addition to the circumstances set out in subsections 7(2) and (3), for the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, if the business transaction is completed, organizations that are parties to the transaction may use and disclose personal information, which was disclosed under subsection (1), without the knowledge or consent of the individual if

(a) the organizations have entered into an agreement that requires each of them

(i) to use and disclose the personal information under its control solely for the purposes for which the personal information was collected, permitted to be used or disclosed before the transaction was completed,

(ii) to protect that information by security safeguards appropriate to the sensitivity of the information, and

(iii) to give effect to any withdrawal of consent made under clause 4.3.8 of Schedule 1;

(b) the personal information is necessary for carrying on the business or activity that was the object of the transaction; and

(c) one of the parties notifies the individual, within a reasonable time after the transaction is completed, that the transaction has been completed and that their personal information has been disclosed under subsection (1).

Agreements binding

(3) An organization shall comply with the terms of any agreement into which it enters under paragraph (1)(a) or (2)(a).

Exception

(4) Subsections (1) and (2) do not apply to a business transaction of which the primary purpose or result is the purchase, sale or other acquisition or disposition, or lease, of personal information.

2015, c. 32, s. 7.

Employment relationship

7.3 In addition to the circumstances set out in section 7, for the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, a federal work, undertaking or business may collect, use and disclose personal information without the consent of the individual if

(a) the collection, use or disclosure is necessary to establish, manage or terminate an employment relationship between the federal work, undertaking or business and the individual; and

(b) the federal work, undertaking or business has informed the individual that the personal information will be or may be collected, used or disclosed for those purposes.

2015, c. 32, s. 7.

Use without consent

7.4 (1) Despite clause 4.5 of Schedule 1, an organization may use personal information for purposes other than those for which it was collected in any of the circumstances set out in subsection 7.2(1) or (2) or section 7.3.

Disclosure without consent

(2) Despite clause 4.5 of Schedule 1, an organization may disclose personal information for purposes other than those for which it was collected in any of the circumstances set out in subsection 7.2(1) or (2) or section 7.3.

2015, c. 32, s. 7.

Written request

8 (1) A request under clause 4.9 of Schedule 1 must be made in writing.

Assistance

(2) An organization shall assist any individual who informs the organization that they need assistance in preparing a request to the organization.

Time limit

(3) An organization shall respond to a request with due diligence and in any case not later than thirty days after receipt of the request.

Extension of time limit

(4) An organization may extend the time limit

(a) for a maximum of thirty days if

(i) meeting the time limit would unreasonably interfere with the activities of the organization, or

(ii) the time required to undertake any consultations necessary to respond to the request would make the time limit impracticable to meet; or

(b) for the period that is necessary in order to be able to convert the personal information into an alternative format.

In either case, the organization shall, no later than thirty days after the date of the request, send a notice of extension to the individual, advising them of the new time limit, the reasons for extending the time limit and of their right to make a complaint to the Commissioner in respect of the extension.

Deemed refusal

(5) If the organization fails to respond within the time limit, the organization is deemed to have refused the request.

Costs for responding

(6) An organization may respond to an individual's request at a cost to the individual only if

(a) the organization has informed the individual of the approximate cost; and

(b) the individual has advised the organization that the request is not being withdrawn.

Reasons

(7) An organization that responds within the time limit and refuses a request shall inform the individual in writing of the refusal, setting out the reasons and any recourse that they may have under this Part.

Retention of information

(8) Despite clause 4.5 of Schedule 1, an organization that has personal information that is the subject of a request shall retain the information for as long as is necessary to allow the individual to exhaust any recourse under this Part that they may have.
2000, c. 5, s. 8; 2015, c. 32, s. 8(F).

When access prohibited

9 (1) Despite clause 4.9 of Schedule 1, an organization shall not give an individual access to personal information if doing so would likely reveal personal information about a third party. However, if the information about the third party is severable from the record containing the information about the individual, the organization shall sever the information about the third party before giving the individual access.

Limit

(2) Subsection (1) does not apply if the third party consents to the access or the individual needs the information because an individual's life, health or security is threatened.

Information related to paragraphs 7(3)(c), (c.1) or (d)

(2.1) An organization shall comply with subsection (2.2) if an individual requests that the organization

(a) inform the individual about

(i) any disclosure of information to a government institution or a part of a government institution under paragraph 7(3)(c), subparagraph 7(3)(c.1)(i) or (ii) or paragraph 7(3)(c.2) or (d), or

(ii) the existence of any information that the organization has relating to a disclosure referred to in subparagraph (i), to a subpoena, warrant or order referred to in paragraph 7(3)(c) or to a request made by a government institution or a part of a government institution under subparagraph 7(3)(c.1)(i) or (ii); or

(b) give the individual access to the information referred to in subparagraph (a)(ii).

Notification and response

(2.2) An organization to which subsection (2.1) applies

(a) shall, in writing and without delay, notify the institution or part concerned of the request made by the individual; and

(b) shall not respond to the request before the earlier of

(i) the day on which it is notified under subsection (2.3), and

(ii) thirty days after the day on which the institution or part was notified.

Objection

(2.3) Within thirty days after the day on which it is notified under subsection (2.2), the institution or part shall notify the organization whether or not the institution or part objects to the organization complying with the request. The institution or part may object only if the institution or part is of the opinion that compliance with the request could reasonably be expected to be injurious to

(a) national security, the defence of Canada or the conduct of international affairs;

(a.1) the detection, prevention or deterrence of money laundering or the financing of terrorist activities; or

(b) the enforcement of any law of Canada, a province or a foreign jurisdiction, an investigation relating to the enforcement of any such law or the gathering of intelligence for the purpose of enforcing any such law.

Prohibition

(2.4) Despite clause 4.9 of Schedule 1, if an organization is notified under subsection (2.3) that the institution or part objects to the organization complying with the request, the organization

(a) shall refuse the request to the extent that it relates to paragraph (2.1)(a) or to information referred to in subparagraph (2.1)(a)(ii);

(b) shall notify the Commissioner, in writing and without delay, of the refusal; and

(c) shall not disclose to the individual

(i) any information that the organization has relating to a disclosure to a government institution or a part of a government institution under paragraph 7(3)(c), subparagraph 7(3)(c.1)(i) or (ii) or paragraph 7(3)(c.2) or (d) or to a request made by a government institution under either of those subparagraphs,

(ii) that the organization notified an institution or part under paragraph (2.2)(a) or the Commissioner under paragraph (b), or

(iii) that the institution or part objects.

When access may be refused

(3) Despite the note that accompanies clause 4.9 of Schedule 1, an organization is not required to give access to personal information only if

(a) the information is protected by solicitor-client privilege or the professional secrecy of advocates and notaries or by litigation privilege;

(b) to do so would reveal confidential commercial information;

(c) to do so could reasonably be expected to threaten the life or security of another individual;

(c.1) the information was collected under paragraph 7(1)(b);

(d) the information was generated in the course of a formal dispute resolution process; or

(e) the information was created for the purpose of making a disclosure under the *Public Servants Disclosure Protection Act* or in the course of an investigation into a disclosure under that Act.

However, in the circumstances described in paragraph (b) or (c), if giving access to the information would reveal confidential commercial information or could reasonably be expected to threaten the life or security of another individual, as the case may be, and that information is severable from the record containing any other information for which access is requested, the organization shall give the individual access after severing.

Limit

(4) Subsection (3) does not apply if the individual needs the information because an individual's life, health or security is threatened.

Notice

(5) If an organization decides not to give access to personal information in the circumstances set out in paragraph (3)(c.1), the organization shall, in writing, so notify the Commissioner, and shall include in the notification any information that the Commissioner may specify.
2000, c. 5, s. 9, c. 17, s. 97; 2001, c. 41, s. 82; 2005, c. 46, s. 57; 2006, c. 9, s. 223; 2015, c. 32, s. 9; 2019, c. 18, s. 61.

Sensory disability

10 An organization shall give access to personal information in an alternative format to an individual with a sensory disability who has a right of access to personal information under this Part and who requests that it be transmitted in the alternative format if

(a) a version of the information already exists in that format; or

(b) its conversion into that format is reasonable and necessary in order for the individual to be able to exercise rights under this Part.

DIVISION 1.1

Breaches of Security Safeguards

Report to Commissioner

10.1 (1) An organization shall report to the Commissioner any breach of security safeguards involving personal information under its control if it is reasonable in the circumstances to believe that the breach creates a real risk of significant harm to an individual.

Report requirements

(2) The report shall contain the prescribed information and shall be made in the prescribed form and manner as soon as feasible after the organization determines that

the breach has occurred.

Notification to individual

(3) Unless otherwise prohibited by law, an organization shall notify an individual of any breach of security safeguards involving the individual's personal information under the organization's control if it is reasonable in the circumstances to believe that the breach creates a real risk of significant harm to the individual.

Contents of notification

(4) The notification shall contain sufficient information to allow the individual to understand the significance to them of the breach and to take steps, if any are possible, to reduce the risk of harm that could result from it or to mitigate that harm. It shall also contain any other prescribed information.

Form and manner

(5) The notification shall be conspicuous and shall be given directly to the individual in the prescribed form and manner, except in prescribed circumstances, in which case it shall be given indirectly in the prescribed form and manner.

Time to give notification

(6) The notification shall be given as soon as feasible after the organization determines that the breach has occurred.

Definition of *significant harm*

(7) For the purpose of this section, ***significant harm*** includes bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property.

Real risk of significant harm — factors

(8) The factors that are relevant to determining whether a breach of security safeguards creates a real risk of significant harm to the individual include

(a) the sensitivity of the personal information involved in the breach;

(b) the probability that the personal information has been, is being or will be misused; and

(c) any other prescribed factor.

2015, c. 32, s. 10.

Notification to organizations

10.2 (1) An organization that notifies an individual of a breach of security safeguards under subsection 10.1(3) shall notify any other organization, a government institution or a part of a government institution of the breach if the notifying organization believes that

the other organization or the government institution or part concerned may be able to reduce the risk of harm that could result from it or mitigate that harm, or if any of the prescribed conditions are satisfied.

Time to give notification

(2) The notification shall be given as soon as feasible after the organization determines that the breach has occurred.

Disclosure of personal information

(3) In addition to the circumstances set out in subsection 7(3), for the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual if

(a) the disclosure is made to the other organization, the government institution or the part of a government institution that was notified of the breach under subsection (1); and

(b) the disclosure is made solely for the purposes of reducing the risk of harm to the individual that could result from the breach or mitigating that harm.

Disclosure without consent

(4) Despite clause 4.5 of Schedule 1, an organization may disclose personal information for purposes other than those for which it was collected in the circumstance set out in subsection (3).
2015, c. 32, s. 10.

Records

10.3 (1) An organization shall, in accordance with any prescribed requirements, keep and maintain a record of every breach of security safeguards involving personal information under its control.

Provision to Commissioner

(2) An organization shall, on request, provide the Commissioner with access to, or a copy of, a record.

2015, c. 32, s. 10.

DIVISION 2

Remedies

Filing of Complaints

Contravention

11 (1) An individual may file with the Commissioner a written complaint against an organization for contravening a provision of Division 1 or 1.1 or for not following a recommendation set out in Schedule 1.

Commissioner may initiate complaint

(2) If the Commissioner is satisfied that there are reasonable grounds to investigate a matter under this Part, the Commissioner may initiate a complaint in respect of the matter.

Time limit

(3) A complaint that results from the refusal to grant a request under section 8 must be filed within six months, or any longer period that the Commissioner allows, after the refusal or after the expiry of the time limit for responding to the request, as the case may be.

Notice

(4) The Commissioner shall give notice of a complaint to the organization against which the complaint was made.

2000, c. 5, s. 11; 2015, c. 32, s. 11.

Investigations of Complaints

Examination of complaint by Commissioner

12 (1) The Commissioner shall conduct an investigation in respect of a complaint, unless the Commissioner is of the opinion that

(a) the complainant ought first to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint could more appropriately be dealt with, initially or completely, by means of a procedure provided for under the laws of Canada, other than this Part, or the laws of a province; or

(c) the complaint was not filed within a reasonable period after the day on which the subject matter of the complaint arose.

Exception

(2) Despite subsection (1), the Commissioner is not required to conduct an investigation in respect of an act alleged in a complaint if the Commissioner is of the opinion that the act, if proved, would constitute a contravention of any of sections 6 to 9 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* or section 52.01 of the *Competition Act* or would constitute conduct that is reviewable under section 74.011 of that Act.

Notification

(3) The Commissioner shall notify the complainant and the organization that the Commissioner will not investigate the complaint or any act alleged in the complaint and give reasons.

Compelling reasons

(4) The Commissioner may reconsider a decision not to investigate under subsection (1), if the Commissioner is satisfied that the complainant has established that there are compelling reasons to investigate.
2000, c. 5, s. 12; 2010, c. 23, s. 83.

Powers of Commissioner

12.1 (1) In the conduct of an investigation of a complaint, the Commissioner may

(a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;

(b) administer oaths;

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

(d) at any reasonable time, enter any premises, other than a dwelling-house, occupied by an organization on satisfying any security requirements of the organization relating to the premises;

(e) converse in private with any person in any premises entered under paragraph (d) and otherwise carry out in those premises any inquiries that the Commissioner sees fit; and

(f) examine or obtain copies of or extracts from records found in any premises entered under paragraph (d) that contain any matter relevant to the investigation.

Dispute resolution mechanisms

(2) The Commissioner may attempt to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation.

Delegation

(3) The Commissioner may delegate any of the powers set out in subsection (1) or (2).

Return of records

(4) The Commissioner or the delegate shall return to a person or an organization any record or thing that they produced under this section within 10 days after they make a

request to the Commissioner or the delegate, but nothing precludes the Commissioner or the delegate from again requiring that the record or thing be produced.

Certificate of delegation

(5) Any person to whom powers set out in subsection (1) are delegated shall be given a certificate of the delegation and the delegate shall produce the certificate, on request, to the person in charge of any premises to be entered under paragraph (1)(d).
2010, c. 23, s. 83.

Discontinuance of Investigation

Reasons

12.2 (1) The Commissioner may discontinue the investigation of a complaint if the Commissioner is of the opinion that

(a) there is insufficient evidence to pursue the investigation;

(b) the complaint is trivial, frivolous or vexatious or is made in bad faith;

(c) the organization has provided a fair and reasonable response to the complaint;

(c.1) the matter is the object of a compliance agreement entered into under subsection 17.1(1);

(d) the matter is already the object of an ongoing investigation under this Part;

(e) the matter has already been the subject of a report by the Commissioner;

(f) any of the circumstances mentioned in paragraph 12(1)(a), (b) or (c) apply; or

(g) the matter is being or has already been addressed under a procedure referred to in paragraph 12(1)(a) or (b).

Other reason

(2) The Commissioner may discontinue an investigation in respect of an act alleged in a complaint if the Commissioner is of the opinion that the act, if proved, would constitute a contravention of any of sections 6 to 9 of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* or section 52.01 of the *Competition Act* or would constitute conduct that is reviewable under section 74.011 of that Act.

Notification

(3) The Commissioner shall notify the complainant and the organization that the investigation has been discontinued and give reasons.

2010, c. 23, s. 83; 2015, c. 32, s. 12.

Commissioner's Report

Contents

13 (1) The Commissioner shall, within one year after the day on which a complaint is filed or is initiated by the Commissioner, prepare a report that contains

(a) the Commissioner's findings and recommendations;

(b) any settlement that was reached by the parties;

(c) if appropriate, a request that the organization give the Commissioner, within a specified time, notice of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken; and

(d) the recourse, if any, that is available under section 14.

(2) [Repealed, 2010, c. 23, s. 84]

Report to parties

(3) The report shall be sent to the complainant and the organization without delay.

2000, c. 5, s. 13; 2010, c. 23, s. 84.

Hearing by Court

Application

14 (1) A complainant may, after receiving the Commissioner's report or being notified under subsection 12.2(3) that the investigation of the complaint has been discontinued, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1 or 1.1, in subsection 5(3) or 8(6) or (7), in section 10 or in Division 1.1.

Time for application

(2) A complainant shall make an application within one year after the report or notification is sent or within any longer period that the Court may, either before or after the expiry of that year, allow.

For greater certainty

(3) For greater certainty, subsections (1) and (2) apply in the same manner to complaints referred to in subsection 11(2) as to complaints referred to in subsection 11(1).

2000, c. 5, s. 14; 2010, c. 23, s. 85; 2015, c. 32, s. 13.

Commissioner may apply or appear

15 The Commissioner may, in respect of a complaint that the Commissioner did not initiate,

(a) apply to the Court, within the time limited by section 14, for a hearing in respect of any matter described in that section, if the Commissioner has the consent of the complainant;

(b) appear before the Court on behalf of any complainant who has applied for a hearing under section 14; or

(c) with leave of the Court, appear as a party to any hearing applied for under section 14.

Remedies

16 The Court may, in addition to any other remedies it may give,

(a) order an organization to correct its practices in order to comply with Divisions 1 and 1.1;

(b) order an organization to publish a notice of any action taken or proposed to be taken to correct its practices, whether or not ordered to correct them under paragraph (a); and

(c) award damages to the complainant, including damages for any humiliation that the complainant has suffered.

2000, c. 5, s. 16; 2015, c. 32, s. 14.

Summary hearings

17 (1) An application made under section 14 or 15 shall be heard and determined without delay and in a summary way unless the Court considers it inappropriate to do so.

Precautions

(2) In any proceedings arising from an application made under section 14 or 15, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of any information or other material that the organization would be authorized to refuse to disclose if it were requested under clause 4.9 of Schedule 1.

Compliance Agreements

Compliance agreement

17.1 (1) If the Commissioner believes on reasonable grounds that an organization has committed, is about to commit or is likely to commit an act or omission that could constitute a contravention of a provision of Division 1 or 1.1 or a failure to follow a recommendation set out in Schedule 1, the Commissioner may enter into a compliance agreement, aimed at ensuring compliance with this Part, with that organization.

Terms

(2) A compliance agreement may contain any terms that the Commissioner considers necessary to ensure compliance with this Part.

Effect of compliance agreement — no application

(3) When a compliance agreement is entered into, the Commissioner, in respect of any matter covered under the agreement,

(a) shall not apply to the Court for a hearing under subsection 14(1) or paragraph 15(a); and

(b) shall apply to the court for the suspension of any pending applications that were made by the Commissioner under those provisions.

For greater certainty

(4) For greater certainty, a compliance agreement does not preclude

(a) an individual from applying for a hearing under section 14; or

(b) the prosecution of an offence under the Act.

2015, c. 32, s. 15.

Agreement complied with

17.2 (1) If the Commissioner is of the opinion that a compliance agreement has been complied with, the Commissioner shall provide written notice to that effect to the organization and withdraw any applications that were made under subsection 14(1) or paragraph 15(a) in respect of any matter covered under the agreement.

Agreement not complied with

(2) If the Commissioner is of the opinion that an organization is not complying with the terms of a compliance agreement, the Commissioner shall notify the organization and may apply to the Court for

(a) an order requiring the organization to comply with the terms of the agreement, in addition to any other remedies it may give; or

(b) a hearing under subsection 14(1) or paragraph 15(a) or to reinstate proceedings that have been suspended as a result of an application made under paragraph 17.1(3)(b).

Time for application

(3) Despite subsection 14(2), the application shall be made within one year after notification is sent or within any longer period that the Court may, either before or after the expiry of that year, allow.

2015, c. 32, s. 15.

DIVISION 3

To ensure compliance

18 (1) The Commissioner may, on reasonable notice and at any reasonable time, audit the personal information management practices of an organization if the Commissioner has reasonable grounds to believe that the organization has contravened a provision of Division 1 or 1.1 or is not following a recommendation set out in Schedule 1, and for that purpose may

(a) summon and enforce the appearance of persons before the Commissioner and compel them to give oral or written evidence on oath and to produce any records and things that the Commissioner considers necessary for the audit, in the same manner and to the same extent as a superior court of record;

(b) administer oaths;

(c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commissioner sees fit, whether or not it is or would be admissible in a court of law;

(d) at any reasonable time, enter any premises, other than a dwelling-house, occupied by the organization on satisfying any security requirements of the organization relating to the premises;

(e) converse in private with any person in any premises entered under paragraph (d) and otherwise carry out in those premises any inquiries that the Commissioner sees fit; and

(f) examine or obtain copies of or extracts from records found in any premises entered under paragraph (d) that contain any matter relevant to the audit.

Delegation

(2) The Commissioner may delegate any of the powers set out in subsection (1).

Return of records

(3) The Commissioner or the delegate shall return to a person or an organization any record or thing they produced under this section within ten days after they make a request to the Commissioner or the delegate, but nothing precludes the Commissioner or the delegate from again requiring that the record or thing be produced.

Certificate of delegation

(4) Any person to whom powers set out in subsection (1) are delegated shall be given a certificate of the delegation and the delegate shall produce the certificate, on request, to the person in charge of any premises to be entered under paragraph (1)(d).

2000, c. 5, s. 18; 2015, c. 32, s. 16.

Report of findings and recommendations

19 (1) After an audit, the Commissioner shall provide the audited organization with a report that contains the findings of the audit and any recommendations that the Commissioner considers appropriate.

Reports may be included in annual reports

(2) The report may be included in a report made under section 25.

DIVISION 4

General

Confidentiality

20 (1) Subject to subsections (2) to (7), 12(3), 12.2(3), 13(3), 19(1), 23(3) and 23.1(1) and section 25, the Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information that comes to their knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part other than those referred to in subsection 10.1(1) or 10.3(2).

Confidentiality — reports and records

(1.1) Subject to subsections (2) to (7), 12(3), 12.2(3), 13(3), 19(1), 23(3) and 23.1(1) and section 25, the Commissioner or any person acting on behalf or under the direction of the Commissioner shall not disclose any information contained in a report made under subsection 10.1(1) or in a record obtained under subsection 10.3(2).

Public interest

(2) The Commissioner may, if the Commissioner considers that it is in the public interest to do so, make public any information that comes to his or her knowledge in the performance or exercise of any of his or her duties or powers under this Part.

Disclosure of necessary information

(3) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information that in the Commissioner's opinion is necessary to

(a) conduct an investigation or audit under this Part; or

(b) establish the grounds for findings and recommendations contained in any report under this Part.

Disclosure in the course of proceedings

(4) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose, information in the course of

(a) a prosecution for an offence under section 28;

(b) a prosecution for an offence under section 132 of the *Criminal Code* (perjury) in respect of a statement made under this Part;

(c) a hearing before the Court under this Part;

(d) an appeal from a decision of the Court; or

(e) a judicial review in relation to the performance or exercise of any of the Commissioner's duties or powers under this Part.

Disclosure of offence authorized

(5) The Commissioner may disclose to the Attorney General of Canada or of a province, as the case may be, information relating to the commission of an offence against any law of Canada or a province on the part of an officer or employee of an organization if, in the Commissioner's opinion, there is evidence of an offence.

Disclosure of breach of security safeguards

(6) The Commissioner may disclose, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose to a government institution or a part of a government institution, any information contained in a report made under subsection 10.1(1) or in a record obtained under subsection 10.3(2) if the Commissioner has reasonable grounds to believe that the information could be useful in the investigation of a contravention of the laws of Canada or a province that has been, is being or is about to be committed.

Disclosure

(7) The Commissioner may disclose information, or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information, in the course of proceedings in which the Commissioner has intervened under paragraph 50(c) of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* or in accordance with subsection 58(3) or 60(1) of that Act.

2000, c. 5, s. 20; 2010, c. 23, s. 86; 2015, c. 32, ss. 17, 26.

Not competent witness

21 The Commissioner or person acting on behalf or under the direction of the Commissioner is not a competent witness in respect of any matter that comes to their knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part in any proceeding other than

(a) a prosecution for an offence under section 28;

(b) a prosecution for an offence under section 132 of the *Criminal Code* (perjury) in respect of a statement made under this Part;

(c) a hearing before the Court under this Part; or

(d) an appeal from a decision of the Court.

Protection of Commissioner

22 (1) No criminal or civil proceedings lie against the Commissioner, or against any person acting on behalf or under the direction of the Commissioner, for anything done, reported or said in good faith as a result of the performance or exercise or purported performance or exercise of any duty or power of the Commissioner under this Part.

Defamation

(2) No action lies in defamation with respect to

(a) anything said, any information supplied or any record or thing produced in good faith in the course of an investigation or audit carried out by or on behalf of the Commissioner under this Part; and

(b) any report made in good faith by the Commissioner under this Part and any fair and accurate account of the report made in good faith for the purpose of news reporting.

2000, c. 5, s. 22; 2015, c. 32, s. 18.

Consultations with provinces

23 (1) If the Commissioner considers it appropriate to do so, or on the request of an interested person, the Commissioner may, in order to ensure that personal information is protected in as consistent a manner as possible, consult with any person who, under provincial legislation, has functions and duties similar to those of the Commissioner with respect to the protection of such information.

Agreements or arrangements with provinces

(2) The Commissioner may enter into agreements or arrangements with any person referred to in subsection (1) in order to

(a) coordinate the activities of their offices and the office of the Commissioner, including to provide for mechanisms for the handling of any complaint in which they are mutually interested;

(b) undertake and publish research or develop and publish guidelines or other instruments related to the protection of personal information;

(c) develop model contracts or other instruments for the protection of personal information that is collected, used or disclosed interprovincially or internationally; and

(d) develop procedures for sharing information referred to in subsection (3).

Sharing of information with provinces

(3) The Commissioner may, in accordance with any procedure established under paragraph (2)(d), share information with any person referred to in subsection (1), if the

information

(a) could be relevant to an ongoing or potential investigation of a complaint or audit under this Part or provincial legislation that has objectives that are similar to this Part; or

(b) could assist the Commissioner or that person in the exercise of their functions and duties with respect to the protection of personal information.

Purpose and confidentiality

(4) The procedures referred to in paragraph (2)(d) shall

(a) restrict the use of the information to the purpose for which it was originally shared; and

(b) stipulate that the information be treated in a confidential manner and not be further disclosed without the express consent of the Commissioner.

2000, c. 5, s. 23; 2010, c. 23, s. 87.

Disclosure of information to foreign state

23.1 (1) Subject to subsection (3), the Commissioner may, in accordance with any procedure established under paragraph (4)(b), disclose information referred to in subsection (2) that has come to the Commissioner's knowledge as a result of the performance or exercise of any of the Commissioner's duties or powers under this Part to any person or body who, under the legislation of a foreign state, has

(a) functions and duties similar to those of the Commissioner with respect to the protection of personal information; or

(b) responsibilities that relate to conduct that is substantially similar to conduct that would be in contravention of this Part.

Information that can be shared

(2) The information that the Commissioner is authorized to disclose under subsection (1) is information that the Commissioner believes

(a) would be relevant to an ongoing or potential investigation or proceeding in respect of a contravention of the laws of a foreign state that address conduct that is substantially similar to conduct that would be in contravention of this Part; or

(b) is necessary to disclose in order to obtain from the person or body information that may be useful to an ongoing or potential investigation or audit under this Part.

Written arrangements

(3) The Commissioner may only disclose information to the person or body referred to in subsection (1) if the Commissioner has entered into a written arrangement with that person or body that

(a) limits the information to be disclosed to that which is necessary for the purpose set out in paragraph (2)(a) or (b);

(b) restricts the use of the information to the purpose for which it was originally shared; and

(c) stipulates that the information be treated in a confidential manner and not be further disclosed without the express consent of the Commissioner.

Arrangements

(4) The Commissioner may enter into arrangements with one or more persons or bodies referred to in subsection (1) in order to

(a) provide for cooperation with respect to the enforcement of laws protecting personal information, including the sharing of information referred to in subsection (2) and the provision of mechanisms for the handling of any complaint in which they are mutually interested;

(b) establish procedures for sharing information referred to in subsection (2);

(c) develop recommendations, resolutions, rules, standards or other instruments with respect to the protection of personal information;

(d) undertake and publish research related to the protection of personal information;

(e) share knowledge and expertise by different means, including through staff exchanges; or

(f) identify issues of mutual interest and determine priorities pertaining to the protection of personal information.

2010, c. 23, s. 87.

Promoting the purposes of the Part

24 The Commissioner shall

(a) develop and conduct information programs to foster public understanding, and recognition of the purposes, of this Part;

(b) undertake and publish research that is related to the protection of personal information, including any such research that is requested by the Minister of Industry;

(c) encourage organizations to develop detailed policies and practices, including organizational codes of practice, to comply with Divisions 1 and 1.1; and

(d) promote, by any means that the Commissioner considers appropriate, the purposes of this Part.

2000, c. 5, s. 24; 2015, c. 32, s. 19.

Annual report

25 (1) The Commissioner shall, within three months after the end of each financial year, submit to Parliament a report concerning the application of this Part, the extent to which

the provinces have enacted legislation that is substantially similar to this Part and the application of any such legislation.

Consultation

(2) Before preparing the report, the Commissioner shall consult with those persons in the provinces who, in the Commissioner's opinion, are in a position to assist the Commissioner in making a report respecting personal information that is collected, used or disclosed interprovincially or internationally.
2000, c. 5, s. 25; 2015, c. 32, s. 20.

Regulations

26 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Part, including regulations

(a) specifying, by name or by class, what is a government institution or part of a government institution for the purposes of any provision of this Part;

(a.01) [Repealed, 2015, c. 32, s. 21]

(a.1) specifying information or classes of information for the purpose of paragraph 7(1)(d), (2)(c.1) or (3)(h.1);

(b) specifying information to be kept and maintained under subsection 10.3(1); and

(c) prescribing anything that by this Part is to be prescribed.

Orders

(2) The Governor in Council may, by order,

(a) provide that this Part is binding on any agent of Her Majesty in right of Canada to which the *Privacy Act* does not apply;

(b) if satisfied that legislation of a province that is substantially similar to this Part applies to an organization, a class of organizations, an activity or a class of activities, exempt the organization, activity or class from the application of this Part in respect of the collection, use or disclosure of personal information that occurs within that province; and

(c) amend Schedule 4.

2000, c. 5, s. 26; 2015, c. 32, s. 21, c. 36, s. 165.

Whistleblowing

27 (1) Any person who has reasonable grounds to believe that a person has contravened or intends to contravene a provision of Division 1 or 1.1 may notify the Commissioner of the particulars of the matter and may request that their identity be kept confidential with respect to the notification.

Confidentiality

(2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by the Commissioner.

2000, c. 5, s. 27; 2015, c. 32, s. 22.

Prohibition

27.1 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has contravened or intends to contravene a provision of Division 1 or 1.1;

(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is a contravention of a provision of Division 1 or 1.1;

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order that a provision of Division 1 or 1.1 not be contravened; or

(d) the employer believes that the employee will do anything referred to in paragraph (a), (b) or (c).

Saving

(2) Nothing in this section impairs any right of an employee either at law or under an employment contract or collective agreement.

Definitions

(3) In this section, ***employee*** includes an independent contractor and ***employer*** has a corresponding meaning.

2000, c. 5, s. 27.1; 2015, c. 32, s. 23.

Offence and punishment

28 Every organization that knowingly contravenes subsection 8(8), section 10.1 or subsection 10.3(1) or 27.1(1) or that obstructs the Commissioner or the Commissioner's delegate in the investigation of a complaint or in conducting an audit is guilty of

(a) an offence punishable on summary conviction and liable to a fine not exceeding $10,000; or

(b) an indictable offence and liable to a fine not exceeding $100,000.

2000, c. 5, s. 28; 2015, c. 32, s. 24.

Review of Part by parliamentary committee

*29 (1) The administration of this Part shall, every five years after this Part comes into force, be reviewed by the committee of the House of Commons, or of both Houses of Parliament, that may be designated or established by Parliament for that purpose.

*[Note: Part 1 in force January 1, 2001, *see* SI/2000-29.]

Review and report

(2) The committee shall undertake a review of the provisions and operation of this Part and shall, within a year after the review is undertaken or within any further period that the House of Commons may authorize, submit a report to Parliament that includes a statement of any changes to this Part or its administration that the committee recommends.

DIVISION 5

Transitional Provisions

Application

30 (1) This Part does not apply to any organization in respect of personal information that it collects, uses or discloses within a province whose legislature has the power to regulate the collection, use or disclosure of the information, unless the organization does it in connection with the operation of a federal work, undertaking or business or the organization discloses the information outside the province for consideration.

Application

(1.1) This Part does not apply to any organization in respect of personal health information that it collects, uses or discloses.

Expiry date

*__(2)__ Subsection (1) ceases to have effect three years after the day on which this section comes into force.

*[Note: Section 30 in force January 1, 2001, *see* SI/2000-29.]

Expiry date

*__(2.1)__ Subsection (1.1) ceases to have effect one year after the day on which this section comes into force.

*[Note: Section 30 in force January 1, 2001, *see* SI/2000-29.]

PART 2

Electronic Documents

Interpretation

Definitions

31 (1) The definitions in this subsection apply in this Part.

data means representations of information or concepts, in any form. (*données*)

electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data. (*document électronique*)

electronic signature means a signature that consists of one or more letters, characters, numbers or other symbols in digital form incorporated in, attached to or associated with an electronic document. (*signature électronique*)

federal law means an Act of Parliament or an instrument, regardless of its name, issued, made or established under an Act of Parliament or a prerogative of the Crown, other than an instrument issued, made or established under the *Yukon Act*, the *Northwest Territories Act* or the *Nunavut Act*. (*texte législatif*)

responsible authority, in respect of a provision of a federal law, means

(a) if the federal law is an Act of Parliament, the minister responsible for that provision;

(b) if the federal law is an instrument issued, made or established under an Act of Parliament or a prerogative of the Crown, the person or body who issued, made or established the instrument; or

(c) despite paragraph (a) or (b), the person or body designated by the Governor in Council under subsection (2). (*autorité responsable*)

secure electronic signature means an electronic signature that results from the application of a technology or process prescribed by regulations made under subsection 48(1). (*signature électronique sécurisée*)

Designation

(2) The Governor in Council may, by order, for the purposes of this Part, designate any person, including any member of the Queen's Privy Council for Canada, or body to be the responsible authority in respect of a provision of a federal law if the Governor in Council is of the opinion that it is appropriate to do so in the circumstances.

Purpose

Purpose

32 The purpose of this Part is to provide for the use of electronic alternatives in the manner provided for in this Part where federal laws contemplate the use of paper to record or communicate information or transactions.

Electronic Alternatives

Collection, storage, etc.

33 A minister of the Crown and any department, branch, office, board, agency, commission, corporation or body for the administration of affairs of which a minister of the Crown is accountable to the Parliament of Canada may use electronic means to create, collect, receive, store, transfer, distribute, publish or otherwise deal with documents or information whenever a federal law does not specify the manner of doing so.

Electronic payment

34 A payment that is required to be made to the Government of Canada may be made in electronic form in any manner specified by the Receiver General.

Electronic version of statutory form

35 (1) If a provision of an Act of Parliament establishes a form, the responsible authority in respect of that provision may make regulations respecting an electronic form that is substantially the same as the form established in the provision, and the electronic form may be used for the same purposes as the form established in the provision.

Statutory manner of filing documents

(2) If a non-electronic manner of filing a document is set out in a provision of an Act of Parliament, the responsible authority in respect of that provision may make regulations respecting the filing of an electronic version of the document, and an electronic version of the document filed in accordance with those regulations is to be considered as a document filed in accordance with the provision.

Statutory manner of submitting information

(3) If a non-electronic manner of submitting information is set out in a provision of an Act of Parliament, the responsible authority in respect of that provision may make regulations respecting the manner of submitting the information using electronic means, and information submitted in accordance with those regulations is to be considered as information submitted in accordance with the provision.

Authority to prescribe form, etc.

(4) The authority under a federal law to issue, prescribe or in any other manner establish a form, or to establish the manner of filing a document or submitting information, includes the authority to issue, prescribe or establish an electronic form, or to establish an electronic manner of filing the document or submitting information, as the case may be.

Meaning of *filing*

(5) In this section, ***filing*** includes all manner of submitting, regardless of how it is designated.

Documents as evidence or proof

36 A provision of a federal law that provides that a certificate or other document signed by a minister or public officer is proof of any matter or thing, or is admissible in evidence, is, subject to the federal law, satisfied by an electronic version of the certificate or other document if the electronic version is signed by the minister or public officer with that person's secure electronic signature.

Retention of documents

37 A requirement under a provision of a federal law to retain a document for a specified period is satisfied, with respect to an electronic document, by the retention of the electronic document if

(a) the electronic document is retained for the specified period in the format in which it was made, sent or received, or in a format that does not change the information contained in the electronic document that was originally made, sent or received;

(b) the information in the electronic document will be readable or perceivable by any person who is entitled to have access to the electronic document or who is authorized to require the production of the electronic document; and

(c) if the electronic document was sent or received, any information that identifies the origin and destination of the electronic document and the date and time when it was sent or received is also retained.

Notarial act

38 A reference in a provision of a federal law to a document recognized as a notarial act in the province of Quebec is deemed to include an electronic version of the document if

(a) the electronic version of the document is recognized as a notarial act under the laws of the province of Quebec; and

(b) the federal law or the provision is listed in Schedule 2 or 3.

Seals

39 A requirement under a provision of a federal law for a person's seal is satisfied by a secure electronic signature that identifies the secure electronic signature as the person's seal if the federal law or the provision is listed in Schedule 2 or 3.

Requirements to provide documents or information

40 A provision of a federal law requiring a person to provide another person with a document or information, other than a provision referred to in any of sections 41 to 47, is satisfied by the provision of the document or information in electronic form if

(a) the federal law or the provision is listed in Schedule 2 or 3;

(b) both persons have agreed to the document or information being provided in electronic form; and

(c) the document or information in electronic form will be under the control of the person to whom it is provided and will be readable or perceivable so as to be usable for subsequent reference.

Writing requirements

41 A requirement under a provision of a federal law for a document to be in writing is satisfied by an electronic document if

(a) the federal law or the provision is listed in Schedule 2 or 3; and

(b) the regulations respecting the application of this section to the provision have been complied with.

Original documents

42 A requirement under a provision of a federal law for a document to be in its original form is satisfied by an electronic document if

(a) the federal law or the provision is listed in Schedule 2 or 3;

(b) the electronic document contains a secure electronic signature that was added when the electronic document was first generated in its final form and that can be used to verify that the electronic document has not been changed since that time; and

(c) the regulations respecting the application of this section to the provision have been complied with.

Signatures

43 Subject to sections 44 to 46, a requirement under a provision of a federal law for a signature is satisfied by an electronic signature if

(a) the federal law or the provision is listed in Schedule 2 or 3; and

(b) the regulations respecting the application of this section to the provision have been complied with.

Statements made under oath

44 A statement required to be made under oath or solemn affirmation under a provision of a federal law may be made in electronic form if

(a) the person who makes the statement signs it with that person’s secure electronic signature;

(b) the person before whom the statement was made, and who is authorized to take statements under oath or solemn affirmation, signs it with that person’s secure electronic signature;

(c) the federal law or the provision is listed in Schedule 2 or 3; and

(d) the regulations respecting the application of this section to the provision have been complied with.

Statements declaring truth, etc.

45 A statement required to be made under a provision of a federal law declaring or certifying that any information given by a person making the statement is true, accurate or complete may be made in electronic form if

(a) the person signs it with that person's secure electronic signature;

(b) the federal law or the provision is listed in Schedule 2 or 3; and

(c) the regulations respecting the application of this section to the provision have been complied with.

Witnessed signatures

46 A requirement under a provision of a federal law for a signature to be witnessed is satisfied with respect to an electronic document if

(a) each signatory and each witness signs the electronic document with their secure electronic signature;

(b) the federal law or the provision is listed in Schedule 2 or 3; and

(c) the regulations respecting the application of this section to the provision have been complied with.

Copies

47 A requirement under a provision of a federal law for one or more copies of a document to be submitted is satisfied by the submission of an electronic document if

(a) the federal law or the provision is listed in Schedule 2 or 3; and

(b) the regulations respecting the application of this section to the provision have been complied with.

Regulations and Orders

Regulations

48 (1) Subject to subsection (2), the Governor in Council may, on the recommendation of the Treasury Board, make regulations prescribing technologies or processes for the purpose of the definition ***secure electronic signature*** in subsection 31(1).

Characteristics

(2) The Governor in Council may prescribe a technology or process only if the Governor in Council is satisfied that it can be proved that

(a) the electronic signature resulting from the use by a person of the technology or process is unique to the person;

(b) the use of the technology or process by a person to incorporate, attach or associate the person's electronic signature to an electronic document is under the sole control of the person;

(c) the technology or process can be used to identify the person using the technology or process; and

(d) the electronic signature can be linked with an electronic document in such a way that it can be used to determine whether the electronic document has been changed since the electronic signature was incorporated in, attached to or associated with the electronic document.

Effect of amendment or repeal

(3) An amendment to or repeal of any provision of a regulation made under subsection (1) that has the effect of removing a prescribed technology or process from the regulation does not, by itself, affect the validity of any electronic signature resulting from the use of that technology or process while it was prescribed.

Amendment of schedules

49 For the purposes of sections 38 to 47, the responsible authority in respect of a provision of a federal law may, by order, amend Schedule 2 or 3 by adding or striking out a reference to that federal law or provision.

Regulations

50 (1) For the purposes of sections 41 to 47, the responsible authority in respect of a provision of a federal law may make regulations respecting the application of those sections to the provision.

Contents

(2) Without restricting the generality of subsection (1), the regulations that may be made may include rules respecting any of the following:

(a) the technology or process that must be used to make or send an electronic document;

(b) the format of an electronic document;

(c) the place where an electronic document is to be made or sent;

(d) the time and circumstances when an electronic document is to be considered to be sent or received and the place where it is considered to have been sent or received;

(e) the technology or process to be used to make or verify an electronic signature and the manner in which it is to be used; and

(f) any matter necessary for the purposes of the application of sections 41 to 47.

Minimum rules

(3) Without restricting the generality of subsection (1), if a provision referred to in any of sections 41 to 47 requires a person to provide another person with a document or information, the rules set out in the regulations respecting the application of that section to the provision may be that

(a) both persons have agreed to the document or information being provided in electronic form; and

(b) the document or information in electronic form will be under the control of the person to whom it is provided and will be readable or perceivable so as to be usable for subsequent reference.

Incorporation by reference

(4) Regulations may incorporate by reference the standards or specifications of any government, person or organization, either as they read at a fixed time or as they are amended from time to time.

Effect of striking out listed provision

51 The striking out of a reference to a federal law or provision in Schedule 2 or 3 does not affect the validity of anything done in compliance with any regulation made under section 50 that relates to that federal law or provision while it was listed in that Schedule.

PART 3

Amendments to the Canada Evidence Act

52 to 57 [Amendments]

PART 4

Amendments to the Statutory Instruments Act

58 and 59 [Amendments]

PART 5

Amendments to the Statute Revision Act

60 to 71 [Amendments]

PART 6

Coming into Force

Coming into force

***72 Parts 1 to 5 or any provision of those Parts come into force on a day or days to be fixed by order of the Governor in Council made on the recommendation of**

(a) in the case of Parts 1 and 2 or any provision of those Parts, the Minister of Industry; and

(b) in the case of Parts 3 to 5 or any provision of those Parts, the Minister of Justice.

*[Note: Parts 2, 3 and 4 in force May 1, 2000; Part 1 in force January 1, 2001, *see* SI/2000-29; Part 5 in force June 1, 2009, *see* SI/2009-42.]

SCHEDULE 1

(Section 5)

Principles Set Out in the National Standard of Canada Entitled Model Code for the Protection of Personal Information, CAN/CSA-Q830-96

4.1 Principle 1 — Accountability

An organization is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the following principles.

4.1.1

Accountability for the organization's compliance with the principles rests with the designated individual(s), even though other individuals within the organization may be responsible for the day-to-day collection and processing of personal information. In addition, other individuals within the organization may be delegated to act on behalf of the designated individual(s).

4.1.2

The identity of the individual(s) designated by the organization to oversee the organization's compliance with the principles shall be made known upon request.

4.1.3

An organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party.

4.1.4

Organizations shall implement policies and practices to give effect to the principles, including

(a) implementing procedures to protect personal information;

(b) establishing procedures to receive and respond to complaints and inquiries;

(c) training staff and communicating to staff information about the organization's policies and practices; and

(d) developing information to explain the organization's policies and procedures.

4.2 Principle 2 — Identifying Purposes

The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.

4.2.1

The organization shall document the purposes for which personal information is collected in order to comply with the Openness principle (Clause 4.8) and the Individual Access principle (Clause 4.9).

4.2.2

Identifying the purposes for which personal information is collected at or before the time of collection allows organizations to determine the information they need to collect to fulfil these purposes. The Limiting Collection principle (Clause 4.4) requires an organization to collect only that information necessary for the purposes that have been identified.

4.2.3

The identified purposes should be specified at or before the time of collection to the individual from whom the personal information is collected. Depending upon the way in which the information is collected, this can be done orally or in writing. An application form, for example, may give notice of the purposes.

4.2.4

When personal information that has been collected is to be used for a purpose not previously identified, the new purpose shall be identified prior to use. Unless the new purpose is required by law, the consent of the individual is required before information

can be used for that purpose. For an elaboration on consent, please refer to the Consent principle (Clause 4.3).

4.2.5

Persons collecting personal information should be able to explain to individuals the purposes for which the information is being collected.

4.2.6

This principle is linked closely to the Limiting Collection principle (Clause 4.4) and the Limiting Use, Disclosure, and Retention principle (Clause 4.5).

4.3 Principle 3 - Consent

The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, except where inappropriate.

Note: In certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information. Seeking consent may be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated. In addition, organizations that do not have a direct relationship with the individual may not always be able to seek consent. For example, seeking consent may be impractical for a charity or a direct-marketing firm that wishes to acquire a mailing list from another organization. In such cases, the organization providing the list would be expected to obtain consent before disclosing personal information.

4.3.1

Consent is required for the collection of personal information and the subsequent use or disclosure of this information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not previously identified).

4.3.2

The principle requires “knowledge and consent”. Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.

4.3.3

An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use, or disclosure of information beyond that required to fulfil the explicitly specified, and legitimate purposes.

4.3.4

The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. Although some information (for example, medical records and income records) is almost always considered to be sensitive, any information can be sensitive, depending on the context. For example, the names and addresses of subscribers to a newsmagazine would generally not be considered sensitive information. However, the names and addresses of subscribers to some special-interest magazines might be considered sensitive.

4.3.5

In obtaining consent, the reasonable expectations of the individual are also relevant. For example, an individual buying a subscription to a magazine should reasonably expect that the organization, in addition to using the individual's name and address for mailing and billing purposes, would also contact the person to solicit the renewal of the subscription. In this case, the organization can assume that the individual's request constitutes consent for specific purposes. On the other hand, an individual would not reasonably expect that personal information given to a health-care professional would be given to a company selling health-care products, unless consent were obtained. Consent shall not be obtained through deception.

4.3.6

The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. Consent can also be given by an authorized representative (such as a legal guardian or a person having power of attorney).

4.3.7

Individuals can give consent in many ways. For example:

(a) an application form may be used to seek consent, collect information, and inform the individual of the use that will be made of the information. By completing and signing the form, the individual is giving consent to the collection and the specified uses;

(b) a checkoff box may be used to allow individuals to request that their names and addresses not be given to other organizations. Individuals who do not check the box are assumed to consent to the transfer of this information to third parties;

(c) consent may be given orally when information is collected over the telephone; or

 (d) consent may be given at the time that individuals use a product or service.

4.3.8

An individual may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice. The organization shall inform the individual of the implications of such withdrawal.

4.4 Principle 4 — Limiting Collection

The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

4.4.1

Organizations shall not collect personal information indiscriminately. Both the amount and the type of information collected shall be limited to that which is necessary to fulfil the purposes identified. Organizations shall specify the type of information collected as part of their information-handling policies and practices, in accordance with the Openness principle (Clause 4.8).

4.4.2

The requirement that personal information be collected by fair and lawful means is intended to prevent organizations from collecting information by misleading or deceiving individuals about the purpose for which information is being collected. This requirement implies that consent with respect to collection must not be obtained through deception.

4.4.3

This principle is linked closely to the Identifying Purposes principle (Clause 4.2) and the Consent principle (Clause 4.3).

4.5 Principle 5 —Limiting Use, Disclosure, and Retention

Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfilment of those purposes.

4.5.1

Organizations using personal information for a new purpose shall document this purpose (see Clause 4.2.1).

4.5.2

Organizations should develop guidelines and implement procedures with respect to the retention of personal information. These guidelines should include minimum and maximum retention periods. Personal information that has been used to make a decision about an individual shall be retained long enough to allow the individual access to the information after the decision has been made. An organization may be subject to legislative requirements with respect to retention periods.

4.5.3

Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information.

4.5.4

This principle is closely linked to the Consent principle (Clause 4.3), the Identifying Purposes principle (Clause 4.2), and the Individual Access principle (Clause 4.9).

4.6 Principle 6 — Accuracy

Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.

4.6.1

The extent to which personal information shall be accurate, complete, and up-to-date will depend upon the use of the information, taking into account the interests of the individual. Information shall be sufficiently accurate, complete, and up-to-date to minimize the possibility that inappropriate information may be used to make a decision about the individual.

4.6.2

An organization shall not routinely update personal information, unless such a process is necessary to fulfil the purposes for which the information was collected.

4.6.3

Personal information that is used on an ongoing basis, including information that is disclosed to third parties, should generally be accurate and up-to-date, unless limits to the requirement for accuracy are clearly set out.

4.7 Principle 7 — Safeguards

Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.

4.7.1

The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the format in which it is held.

4.7.2

The nature of the safeguards will vary depending on the sensitivity of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection. The concept of sensitivity is discussed in Clause 4.3.4.

4.7.3

The methods of protection should include

(a) physical measures, for example, locked filing cabinets and restricted access to offices;

(b) organizational measures, for example, security clearances and limiting access on a "need-to-know" basis; and

(c) technological measures, for example, the use of passwords and encryption.

4.7.4

Organizations shall make their employees aware of the importance of maintaining the confidentiality of personal information.

4.7.5

Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information (see Clause 4.5.3).

4.8 Principle 8 — Openness

An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.

4.8.1

Organizations shall be open about their policies and practices with respect to the management of personal information. Individuals shall be able to acquire information about an organization's policies and practices without unreasonable effort. This information shall be made available in a form that is generally understandable.

4.8.2

The information made available shall include

(a) the name or title, and the address, of the person who is accountable for the organization's policies and practices and to whom complaints or inquiries can be

forwarded;

(b) the means of gaining access to personal information held by the organization;

(c) a description of the type of personal information held by the organization, including a general account of its use;

(d) a copy of any brochures or other information that explain the organization's policies, standards, or codes; and

(e) what personal information is made available to related organizations (e.g., subsidiaries).

4.8.3

An organization may make information on its policies and practices available in a variety of ways. The method chosen depends on the nature of its business and other considerations. For example, an organization may choose to make brochures available in its place of business, mail information to its customers, provide online access, or establish a toll-free telephone number.

4.9 Principle 9 — Individual Access

Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information. An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.

Note: In certain situations, an organization may not be able to provide access to all the personal information it holds about an individual. Exceptions to the access requirement should be limited and specific. The reasons for denying access should be provided to the individual upon request. Exceptions may include information that is prohibitively costly to provide, information that contains references to other individuals, information that cannot be disclosed for legal, security, or commercial proprietary reasons, and information that is subject to solicitor-client or litigation privilege.

4.9.1

Upon request, an organization shall inform an individual whether or not the organization holds personal information about the individual. Organizations are encouraged to indicate the source of this information. The organization shall allow the individual access to this information. However, the organization may choose to make sensitive medical information available through a medical practitioner. In addition, the organization shall provide an account of the use that has been made or is being made of this information and an account of the third parties to which it has been disclosed.

4.9.2

An individual may be required to provide sufficient information to permit an organization to provide an account of the existence, use, and disclosure of personal information. The information provided shall only be used for this purpose.

4.9.3

In providing an account of third parties to which it has disclosed personal information about an individual, an organization should attempt to be as specific as possible. When it is not possible to provide a list of the organizations to which it has actually disclosed information about an individual, the organization shall provide a list of organizations to which it may have disclosed information about the individual.

4.9.4

An organization shall respond to an individual’s request within a reasonable time and at minimal or no cost to the individual. The requested information shall be provided or made available in a form that is generally understandable. For example, if the organization uses abbreviations or codes to record information, an explanation shall be provided.

4.9.5

When an individual successfully demonstrates the inaccuracy or incompleteness of personal information, the organization shall amend the information as required. Depending upon the nature of the information challenged, amendment involves the correction, deletion, or addition of information. Where appropriate, the amended information shall be transmitted to third parties having access to the information in question.

4.9.6

When a challenge is not resolved to the satisfaction of the individual, the substance of the unresolved challenge shall be recorded by the organization. When appropriate, the existence of the unresolved challenge shall be transmitted to third parties having access to the information in question.

4.10 Principle 10 — Challenging Compliance

An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization’s compliance.

4.10.1

The individual accountable for an organization’s compliance is discussed in Clause 4.1.1.

4.10.2

Organizations shall put procedures in place to receive and respond to complaints or inquiries about their policies and practices relating to the handling of personal information. The complaint procedures should be easily accessible and simple to use.

4.10.3

Organizations shall inform individuals who make inquiries or lodge complaints of the existence of relevant complaint procedures. A range of these procedures may exist. For example, some regulatory bodies accept complaints about the personal-information handling practices of the companies they regulate.

4.10.4

An organization shall investigate all complaints. If a complaint is found to be justified, the organization shall take appropriate measures, including, if necessary, amending its policies and practices.

SCHEDULE 2

(Sections 38 to 47, 49 and 51)

Acts of Parliament

Item	Column 1 Act of Parliament	Column 2 Provisions
1	*Federal Real Property and Federal Immovables Act*	Sections 3, 5 to 7, 11 and 16
2	*Canada Labour Code*	Subsection 254(1)
3	*Canada Lands Surveys Act*	Subsection 3(2)

2000, c. 5, Sch. 2; SOR/2004-309, s. 1; SOR/2008-114; SOR/2019-84, s. 1.

SCHEDULE 3

(Sections 38 to 47, 49 and 51)

Regulations and Other Instruments

Item	Column 1 Regulations or Other Instrument	Column 2 Provisions
1	*Federal Real Property Regulations*	Sections 9 and 11 **[SOR/2005-407]**
1	*Federal Real Property Regulations*	Sections 9 and 11 **[SOR/2004-309, s. 2]**

2000, c. 5, Sch. 3; SOR/2004-309, s. 2; SOR/2005-407.

SCHEDULE 4

(Subsection 4(1.1) and paragraph 26(2)(c))

Organizations

Item	Column 1 Organization	Column 2 Personal Information
1	World Anti-Doping Agency *Agence mondiale antidopage*	Personal information that the organization collects, uses or discloses in the course of its interprovincial or international activities

2015, c. 36, s. 166.

TAB 9

CanLII

Breach of Security Safeguards Regulations, SOR/2018-64

Current version: in force since 2018-11-01

Link to the latest version: https://canlii.ca/t/91jc

Stable link to this version: https://canlii.ca/t/534zf

Citation to this version: Breach of Security Safeguards Regulations, SOR/2018-64, <https://canlii.ca/t/534zf> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Breach of Security Safeguards Regulations

SOR/2018-64

PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

Registration 2018-03-27

Breach of Security Safeguards Regulations

P.C. 2018-368 2018-03-26

Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to subsection 26(1)[a] of the *Personal Information Protection and Electronic Documents Act*[b], makes the annexed *Breach of Security Safeguards Regulations*.

[a]S.C. 2015, c. 32, s. 21

[b]S.C. 2000, c. 5

Interpretation

Definition of *Act*

1 In these Regulations, ***Act*** means the *Personal Information Protection and Electronic Documents Act*.

Report to Commissioner

Report — content, form and manner

2 (1) A report of a breach of security safeguards referred to in subsection 10.1(2) of the Act must be in writing and must contain

(a) a description of the circumstances of the breach and, if known, the cause;

(b) the day on which, or the period during which, the breach occurred or, if neither is known, the approximate period;

(c) a description of the personal information that is the subject of the breach to the extent that the information is known;

(d) the number of individuals affected by the breach or, if unknown, the approximate number;

(e) a description of the steps that the organization has taken to reduce the risk of harm to affected individuals that could result from the breach or to mitigate that harm;

(f) a description of the steps that the organization has taken or intends to take to notify affected individuals of the breach in accordance with subsection 10.1(3) of the Act; and

(g) the name and contact information of a person who can answer, on behalf of the organization, the Commissioner's questions about the breach.

New information

(2) An organization may submit to the Commissioner any new information referred to in subsection (1) that the organization becomes aware of after having made the report.

Means of communication

(3) The report may be sent to the Commissioner by any secure means of communication.

Notification to Affected Individual

Contents of notification

3 A notification provided by an organization, in accordance with subsection 10.1(3) of the Act, to an affected individual with respect to a breach of security safeguards must contain

(a) a description of the circumstances of the breach;

(b) the day on which, or period during which, the breach occurred or, if neither is known, the approximate period;

(c) a description of the personal information that is the subject of the breach to the extent that the information is known;

(d) a description of the steps that the organization has taken to reduce the risk of harm that could result from the breach;

(e) a description of the steps that affected individuals could take to reduce the risk of harm that could result from the breach or to mitigate that harm; and

(f) contact information that the affected individual can use to obtain further information about the breach.

Direct notification — form and manner

4 For the purposes of subsection 10.1(5) of the Act, direct notification must be given to the affected individual in person, by telephone, mail, email or any other form of communication that a reasonable person would consider appropriate in the circumstances.

Indirect notification — circumstances

5 (1) For the purposes of subsection 10.1(5) of the Act, indirect notification must be given by an organization in any of the following circumstances:

(a) direct notification would be likely to cause further harm to the affected individual;

(b) direct notification would be likely to cause undue hardship for the organization; or

(c) the organization does not have contact information for the affected individual.

Indirect notification — form and manner

(2) For the purposes of subsection 10.1(5) of the Act, indirect notification must be given by public communication or similar measure that could reasonably be expected to reach the affected individuals.

Record-keeping

Record-keeping requirements

6 (1) For the purposes of subsection 10.3(1) of the Act, an organization must maintain a record of every breach of security safeguards for 24 months after the day on which the organization determines that the breach has occurred.

Compliance

(2) The record referred to in subsection 10.3(1) of the Act must contain any information that enables the Commissioner to verify compliance with subsections 10.1(1) and (3) of the Act.

Coming into Force

S.C. 2015, c. 32

*__7__ These Regulations come into force on the day on which section 10 of the *Digital Privacy Act* comes into force, but if they are registered after that day, they come into force on the day on which they are registered.

*[Note: Regulations in force November 1, 2018, *see* SI/2018-32.]

TAB 10

CanLII

Electronic Commerce Protection Regulations, SOR/2013-221

Current version: in force since 2015-01-15

Link to the latest version: https://canlii.ca/t/8sgx

Stable link to this version: https://canlii.ca/t/52djd

Citation to this version: Electronic Commerce Protection Regulations, SOR/2013-221, <https://canlii.ca/t/52djd> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Electronic Commerce Protection Regulations

SOR/2013-221

AN ACT TO PROMOTE THE EFFICIENCY AND ADAPTABILITY OF THE CANADIAN ECONOMY BY REGULATING CERTAIN ACTIVITIES THAT DISCOURAGE RELIANCE ON ELECTRONIC MEANS OF CARRYING OUT COMMERCIAL ACTIVITIES, AND TO AMEND THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION ACT, THE COMPETITION ACT, THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT AND THE TELECOMMUNICATIONS ACT

AN ACT TO PROMOTE EFFICIENCY AND ADAPTABILITY OF THE CANADIAN ECONOMY BY REGULATING CERTAIN ACTIVITIES THAT DISCOURAGE RELIANCE ON ELECTRONIC MEANS OF CARRYING OUT COMMERCIAL ACTIVITIES, AND TO AMEND THE CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION ACT, THE COMPETITION ACT, THE PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT AND THE TELECOMMUNICATIONS ACT

Registration 2013-12-04

Electronic Commerce Protection Regulations

P.C. 2013-1324 2013-12-03

His Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to subsection 64(1) of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*[a], makes the annexed *Electronic Commerce Protection Regulations*.

[a]S.C. 2010, c. 23

Definition

Definition of *Act*

1 In these Regulations, ***Act*** means *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*.

Family Relationship and Personal Relationship

Family and personal relationships

2 For the purposes of paragraph 6(5)(a) of the Act,

(a) ***family relationship*** means the relationship between an individual who sends a message and the individual to whom the message is sent if those individuals are related to one another through a marriage, common-law partnership or any legal parent-child relationship and those individuals have had direct, voluntary, two-way communication; and

(b) ***personal relationship*** means the relationship between an individual who sends a message and the individual to whom the message is sent, if those individuals have had direct, voluntary, two-way communications and it would be reasonable to conclude that they have a personal relationship, taking into consideration any relevant factors such as the sharing of interests, experiences, opinions and information evidenced in the communications, the frequency of communication, the length of time since the parties communicated or whether the parties have met in person.

Excluded Commercial Electronic Messages

Excluded messages — Section 6 of Act

3 Section 6 of the Act does not apply to a commercial electronic message

(a) that is sent by an employee, representative, consultant or franchisee of an organization

(i) to another employee, representative, consultant or franchisee of the organization and the message concerns the activities of the organization, or

(ii) to an employee, representative, consultant or franchisee of another organization if the organizations have a relationship and the message concerns the activities of the organization to which the message is sent;

(b) that is sent in response to a request, inquiry or complaint or is otherwise solicited by the person to whom the message is sent;

(c) that is sent to a person

(i) to satisfy a legal or juridical obligation,

(ii) to provide notice of an existing or pending right, legal or juridical obligation, court order, judgment or tariff,

(iii) to enforce a right, legal or juridical obligation, court order, judgment or tariff, or

(iv) to enforce a right arising under a law of Canada, of a province or municipality of Canada or of a foreign state;

(d) that is sent and received on an electronic messaging service if the information and unsubscribe mechanism that are required under subsection 6(2) of the Act are conspicuously published and readily available on the user interface through which the message is accessed, and the person to whom the message is sent consents to receive it either expressly or by implication;

(e) that is sent to a limited-access secure and confidential account to which messages can only be sent by the person who provides the account to the person who receives the message;

(f) if the person who sends the message or causes or permits it to be sent reasonably believes the message will be accessed in a foreign state that is listed in the schedule and the message conforms to the law of the foreign state that addresses conduct that is substantially similar to conduct prohibited under section 6 of the Act;

(g) that is sent by or on behalf of a registered charity as defined in subsection 248(1) of the *Income Tax Act* and the message has as its primary purpose raising funds for the charity; or

(h) that is sent by or on behalf of a political party or organization, or a person who is a candidate – as defined in an Act of Parliament or the legislature of a province – for publicly elected office and the message has as its primary purpose soliciting a contribution as defined in subsection 2(1) of the *Canada Elections Act*.

Excluded messages — Paragraph 6(1)(a) of Act

4 (1) Paragraph 6(1)(a) of the Act does not apply to the first commercial electronic message that is sent by a person for the purpose of contacting the individual to whom the message is sent following a referral by any individual who has an existing business relationship, an existing non-business relationship, a family relationship or a personal relationship with the person who sends the message as well as any of those relationships with the individual to whom the message is sent and that discloses the full name of the individual or individuals who made the referral and states that the message is sent as a result of the referral.

Existing business or non-business relationship

(2) An existing business relationship or an existing non-business relationship has the same meaning as in subsection 10(10) or (13) of the Act, respectively.

Conditions for Use of Consent

Person whose identity is unknown

5 (1) For the purposes of paragraph 10(2)(b) of the Act, a person who obtained express consent on behalf of a person whose identity was unknown may authorize any person to use the consent on the condition that the person who obtained it ensures that, in any commercial electronic message sent to the person from whom consent was obtained,

(a) the person who obtained consent is identified; and

(b) the authorized person provides an unsubscribe mechanism that, in addition to meeting the requirements set out in section 11 of the Act, allows the person from whom consent was obtained to withdraw their consent from the person who obtained consent or any other person who is authorized to use it.

Person who obtained consent

(2) The person who obtained consent must ensure that, on receipt of an indication of withdrawal of consent by the authorized person who sent the commercial electronic message, the authorized person notifies the person who obtained consent that consent has been withdrawn from, as the case may be,

(a) the person who obtained consent;

(b) the authorized person who sent the commercial electronic message; or

(c) any other person who is authorized to use the consent.

Notification of other authorized person

(3) The person who obtained consent must without delay inform a person referred to in paragraph (2)(c) of the withdrawal of consent on receipt of a notification of withdrawal of consent from the person referred to in that paragraph.

Give effect to withdrawal of consent

(4) The person who obtained consent must give effect to a withdrawal of consent in accordance with subsection 11(3) of the Act, and, if applicable, ensure that a person referred to in paragraph (2)(c) also gives effect to the withdrawal in accordance with that subsection.

Specified Computer Programs

Specified programs

6 The following programs are specified for the purposes of subparagraph 10(8)(a)(vi) of the Act:

(a) a program that is installed by or on behalf of a telecommunications service provider solely to protect the security of all or part of its network from a current and identifiable threat to the availability, reliability, efficiency or optimal use of its network;

(b) a program that is installed, for the purpose of updating or upgrading the network, by or on behalf of the telecommunications service provider who owns or operates the network on the computer systems that constitute all or part of the network; and

(c) a program that is necessary to correct a failure in the operation of the computer system or a program installed on it and is installed solely for that purpose.

Membership, Club, Association and Voluntary Organization

Membership

7 (1) For the purposes of paragraph 10(13)(c) of the Act, membership is the status of having been accepted as a member of a club, association or voluntary organization in accordance with its membership requirements.

Club, association or voluntary organization

(2) For the purposes of paragraph 10(13)(c) of the Act, a club, association or voluntary organization is a non-profit organization that is organized and operated exclusively for social welfare, civic improvement, pleasure or recreation or for any purpose other than personal profit, if no part of its income is payable to, or otherwise available for the personal benefit of, any proprietor, member or shareholder of that organization unless the proprietor, member or shareholder is an organization whose primary purpose is the promotion of amateur athletics in Canada.

Coming into Force

S.C. 2010, c. 23

*__8 (1)__ These Regulations, except section 6, come into force on the day on which sections 6, 7, 9 to 11 and subsection 64(1) of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* ("the Act"), chapter 23 of the Statutes of Canada, come into force, but if they are registered after that day, they come into force on the day on which they are registered.

Section 6

(2) Section 6 comes into force on the day on which section 8 of the Act, referred to in subsection (1), comes into force.

*[Note: Regulations, except section 6, in force July 1, 2014, section 6 in force January 15, 2015, *see* SI/2013-127.]

SCHEDULE

(Paragraph 3(f))

List of Foreign States

Albania

Antigua and Barbuda

Argentina

Armenia

Australia

Austria

Azerbaijan

Bahamas

Bahrain

Bangladesh

Barbados

Belarus

Belgium

Belize

Bhutan

Bosnia

Botswana

Brazil

British Virgin Islands

Bulgaria

Burkina Faso

Burma (Myanmar)

Cambodia

Cameroon

Cayman Islands

Central African Republic

Chile

China

Colombia

Costa Rica

Croatia

Cyprus

Czech Republic

Denmark

Dominica

Dominican Republic

Ecuador

Estonia

Finland

France

Gambia

Georgia

Germany

Ghana

Greece

Grenada

Guatemala

Hong Kong

Hungary

Iceland

India

Indonesia

Ireland

Israel

Italy

Jamaica

Japan

Jordan

Kazakhstan

Kenya

Latvia

Liechtenstein

Lithuania

Luxembourg

Macedonia

Malaysia

Malta

Mauritius

Moldova

Montenegro

Morocco

Mozambique

Namibia

Nepal

Netherlands

New Zealand

Norway

Pakistan

Peru

Philippines

Poland

Portugal

Puerto Rico

Qatar

Romania

Russia

Saint Lucia

Saint Vincent and the Grenadines

Saudi Arabia
Serbia
Sierra Leone
Singapore
Slovakia
Slovenia
South Africa
South Korea
Spain
Sri Lanka
Sweden
Switzerland
Tanzania
Thailand
Tonga
Trinidad and Tobago
Tunisia
Turkey
Turks and Caicos
Uganda
Ukraine
United Arab Emirates
United Kingdom
United States of America
United States Virgin Islands
Venezuela
Vietnam
Zambia

TAB 11

CanLII

Regulations Specifying Publicly Available Information, SOR/2001-7

Current version: in force since 2006-03-22

Link to the latest version: https://canlii.ca/t/7xrg

Stable link to this version: https://canlii.ca/t/l6l1

Citation to this version: Regulations Specifying Publicly Available Information, SOR/2001-7, <https://canlii.ca/t/l6l1> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Regulations Specifying Publicly Available Information

SOR/2001-7

PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

Registration 2000-12-13

Regulations Specifying Publicly Available Information

P.C. 2000-1777 2000-12-13

Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to paragraph 26(1)(a.1) of the *Personal Information Protection and Electronic Documents Act*[a], hereby makes the annexed *Regulations Specifying Publicly Available Information*.

[a]S.C. 2000, c. 5

Information

1 The following information and classes of information are specified for the purposes of paragraphs 7(1)(d), (2)(c.1) and (3)(h.1) of the *Personal Information Protection and Electronic Documents Act*:

(a) personal information consisting of the name, address and telephone number of a subscriber that appears in a telephone directory that is available to the public, where the subscriber can refuse to have the personal information appear in the directory;

(b) personal information including the name, title, address and telephone number of an individual that appears in a professional or business directory, listing or notice, that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the directory, listing or notice;

(c) personal information that appears in a registry collected under a statutory authority and to which a right of public access is authorized by law, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the registry;

(d) personal information that appears in a record or document of a judicial or quasi-judicial body, that is available to the public, where the collection, use and disclosure of the personal information relate directly to the purpose for which the information appears in the record or document; and

(e) personal information that appears in a publication, including a magazine, book or newspaper, in printed or electronic form, that is available to the public, where the individual has provided the information.

Coming into Force

2 These Regulations come into force on January 1, 2001.

TAB 12

CanLII

Canada Evidence Act, RSC 1985, c C-5

Current version: in force since 2024-08-19

Link to the latest version: https://canlii.ca/t/7vf5

Stable link to this version: https://canlii.ca/t/56cjm

Citation to this version: Canada Evidence Act, RSC 1985, c C-5, <https://canlii.ca/t/56cjm> retrieved on 2026-01-06

Currency: This statute is current to 2025-11-27 according to the Justice Laws Web Site

Canada Evidence Act

R.S.C., 1985, c. C-5

An Act respecting witnesses and evidence

Short Title

Short title

1 This Act may be cited as the *Canada Evidence Act*.

R.S., c. E-10, s. 1.

Part I

Application

Application

2 This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

R.S., c. E-10, s. 2.

Interest or crime

3 A person is not incompetent to give evidence by reason of interest or crime.

R.S., c. E-10, s. 3.

Accused and spouse

4 (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Spouse of accused

(2) No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

Communications during marriage

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(4) and (5) [Repealed, 2015, c. 13, s. 52]

Failure to testify

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

R.S., 1985, c. C-5, s. 4; R.S., 1985, c. 19 (3rd Supp.), s. 17; 2002, c. 1, s. 166; 2014, c. 25, s. 34, c. 31, s. 27; 2015, c. 13, s. 52.

Incriminating questions

5 (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him

thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.
R.S., 1985, c. C-5, s. 5; 1997, c. 18, s. 116.

Evidence of person with physical disability

6 (1) If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Evidence of person with mental disability

(2) If a witness with a mental disability is determined under section 16 to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Inquiry

(3) The court may conduct an inquiry to determine if the means by which a witness may be permitted to give evidence under subsection (1) or (2) is necessary and reliable.

R.S., 1985, c. C-5, s. 6; 1998, c. 9, s. 1.

Identification of accused

6.1 For greater certainty, a witness may give evidence as to the identity of an accused whom the witness is able to identify visually or in any other sensory manner.

1998, c. 9, s. 1.

Expert witnesses

7 Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

R.S., c. E-10, s. 7.

Handwriting comparison

8 Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

R.S., c. E-10, s. 8.

Adverse witnesses

9 (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse,

the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Previous statements by witness not proved adverse

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

R.S., 1985, c. C-5, s. 9; 1994, c. 44, s. 85.

Cross-examination as to previous statements

10 (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

Deposition of witness in criminal investigation

(2) A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.

R.S., 1985, c. C-5, s. 10; 1994, c. 44, s. 86.

Cross-examination as to previous oral statements

11 Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

R.S., c. E-10, s. 11.

Examination as to previous convictions

12 (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of previous convictions

(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

How conviction proved

(2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

R.S., 1985, c. C-5, s. 12; 1992, c. 47, s. 66.

Oaths and Solemn Affirmations

Who may administer oaths

13 Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person.

R.S., c. E-10, s. 13.

Solemn affirmation by witness instead of oath

14 (1) A person may, instead of taking an oath, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

Effect

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

R.S., 1985, c. C-5, s. 14; 1994, c. 44, s. 87.

Solemn affirmation by deponent

15 (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish

to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, "I, ..., do solemnly affirm, etc.", and that solemn affirmation has the same force and effect as if that person had taken an oath.

Effect

(2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn.
R.S., 1985, c. C-5, s. 15; 1994, c. 44, s. 88.

Witness whose capacity is in question

16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

Testimony under oath or solemn affirmation

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

Testimony on promise to tell truth

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

No questions regarding understanding of promise

(3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

Inability to testify

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

Burden as to capacity of witness

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

R.S., 1985, c. C-5, s. 16; R.S., 1985, c. 19 (3rd Supp.), s. 18; 1994, c. 44, s. 89; 2005, c. 32, s. 26; 2015, c. 13, s. 53.

Person under fourteen years of age

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

No oath or solemn affirmation

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

Evidence shall be received

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

Burden as to capacity of witness

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

Court inquiry

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

Promise to tell truth

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

Understanding of promise

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

Effect

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

2005, c. 32, s. 27.

Judicial Notice

Imperial Acts, etc.

17 Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *Constitution Act, 1867*.

R.S., c. E-10, s. 17.

Acts of Canada

18 Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded.

R.S., c. E-10, s. 18.

Documentary Evidence

Copies by Queen's Printer

19 Every copy of any Act of Parliament, public or private, published by the Queen's Printer, is evidence of that Act and of its contents, and every copy purporting to be published by the Queen's Printer shall be deemed to be so published, unless the contrary is shown.

R.S., 1985, c. C-5, s. 19; 2000, c. 5, s. 52.

Imperial proclamations, etc.

20 Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations or other Imperial official records, Acts or documents may be proved

(a) in the same manner as they may from time to time be provable in any court in England;

(b) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of Parliament purporting to contain a copy of the same or a notice thereof; or

(c) by the production of a copy of them purporting to be published by the Queen's Printer.

R.S., 1985, c. C-5, s. 20; 2000, c. 5, s. 53.

Proclamations, etc., of Governor General

21 Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the following ways:

(a) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of Parliament purporting to contain a copy of the treaty, proclamation, order, regulation

or appointment, or a notice thereof;

(b) by the production of a copy of the proclamation, order, regulation or appointment, purporting to be published by the Queen's Printer;

(c) by the production of a copy of the treaty purporting to be published by the Queen's Printer;

(d) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada; and

(e) by the production, in the case of any order, regulation or appointment made or issued by or under the authority of any minister or head of a department of the Government of Canada, of a copy or extract purporting to be certified to be true by the minister, by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

R.S., 1985, c. C-5, s. 21; 2000, c. 5, s. 54.

Proclamations, etc., of lieutenant governor

22 (1) Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of any department of the government of the province, may be given in all or any of the following ways:

(a) by the production of a copy of the official gazette for the province purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice thereof;

(b) by the production of a copy of the proclamation, order, regulation or appointment purporting to be published by the government or Queen's Printer for the province; and

(c) by the production of a copy or extract of the proclamation, order, regulation or appointment purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, by the head of any department of the government of a province, or by his deputy or acting deputy, as the case may be.

Territories

(2) Evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted prior to September 1, 1905, or by the Legislature of Yukon, of the Northwest Territories or for Nunavut, may be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice of it.

R.S., 1985, c. C-5, s. 22; 1993, c. 28, s. 78; 2000, c. 5, s. 55; 2002, c. 7, s. 96; 2014, c. 2, s. 5.

Evidence of judicial proceedings, etc.

23 (1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, any court in a province, any court in a British colony or possession or any court of record of the United States, of a state of the United States or of any other foreign country, or before any justice of the peace or coroner in a province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice, coroner or court stenographer, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice, coroner or court stenographer or other proof whatever.

Certificate where court has no seal

(2) Where any court, justice or coroner or court stenographer referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge or of the justice or coroner or court stenographer, without any proof of the authenticity of the signature or other proof whatever.

R.S., 1985, c. C-5, s. 23; R.S., 1985, c. 27 (1st Supp.), s. 203; 1993, c. 34, s. 15; 1997, c. 18, s. 117; 2002, c. 8, s. 118.

Certified copies

24 In every case in which the original record could be admitted in evidence,

(a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or

(b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof.

R.S., c. E-10, s. 24.

Books and documents

25 Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

R.S., c. E-10, s. 25.

Books kept in offices under Government of Canada

26 (1) A copy of any entry in any book kept in any office or department of the Government of Canada, or in any commission, board or other branch in the federal public administration, shall be admitted as evidence of that entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the office or department, commission, board or other branch in the federal public administration that the book was, at the time of the making of the entry, one of the ordinary books kept in the office, department, commission, board or other branch in the federal public administration, that the entry was made in the usual and ordinary course of business of the office, department, commission, board or other branch in the federal public administration and that the copy is a true copy thereof.

Proof of non-issue of licence or document

(2) Where by any Act of Parliament or regulation made under an Act of Parliament provision is made for the issue by a department, commission, board or other branch in the federal public administration of a licence requisite to the doing or having of any act or thing or for the issue of any other document, an affidavit of an officer of the department, commission, board or other branch in the federal public administration, sworn before any commissioner or other person authorized to take affidavits, setting out that he or she has charge of the appropriate records and that after careful examination and search of those records he or she has been unable to find in any given case that any such licence or other document has been issued, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that in that case no licence or other document has been issued.

Proof of mailing departmental matter

(3) Where by any Act of Parliament or regulation made under an Act of Parliament provision is made for sending by mail any request for information, notice or demand by a department or other branch in the federal public administration, an affidavit of an officer of the department or other branch in the federal public administration, sworn before any commissioner or other person authorized to take affidavits, setting out that he or she has charge of the appropriate records, that he or she has a knowledge of the facts in the particular case, that the request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (indicating that address) and that he or she identifies as exhibits attached to the affidavit the post office certificate of registration of the letter and a true copy of the request, notice or demand, shall, on production and proof of the post office receipt for the delivery of the registered letter to the addressee, be admitted in evidence as proof, in the absence of evidence to the contrary, of the sending and of the request, notice or demand.

Proof of official character

(4) Where proof is offered by affidavit pursuant to this section, it is not necessary to prove the official character of the person making the affidavit if that information is set out in the body of the affidavit.

R.S., 1985, c. C-5, s. 26; 2003, c. 22, s. 104(E).

Notarial acts in Quebec

27 Any document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original in his possession as such notary or prothonotary, shall be admitted in evidence in the place and stead of the original and has the same force and effect as the original would have if produced and proved, but it may be proved in rebuttal that there is no original, that the copy is not a true copy of the original in some material particular or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary or be filed, enrolled or registered by a notary in that Province.

R.S., c. E-10, s. 27.

Notice of production of book or document

28 (1) No copy of any book or other document shall be admitted in evidence, under the authority of section 23, 24, 25, 26 or 27, on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention.

Not less than 7 days

(2) The reasonableness of the notice referred to in subsection (1) shall be determined by the court, judge or other person presiding, but the notice shall not in any case be less than seven days.

R.S., c. E-10, s. 28.

Copies of entries

29 (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.

Admission in evidence

(2) A copy of an entry in the book or record described in subsection (1) shall not be admitted in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that the copy is a true copy of it, and such proof may be given by any person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution, and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

Cheques, proof of “no account”

(3) Where a cheque has been drawn on any financial institution or branch thereof by any person, an affidavit of the manager or accountant of the financial institution or branch, sworn before any commissioner or other person authorized to take affidavits, setting out that he is the manager or accountant, that he has made a careful examination and search of the books and records for the purpose of ascertaining whether or not that person has an account with the financial institution or branch and that he has been unable to find such an account, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that that person has no account in the financial institution or branch.

Proof of official character

(4) Where evidence is offered by affidavit pursuant to this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Compulsion of production or appearance

(5) A financial institution or officer of a financial institution is not in any legal proceedings to which the financial institution is not a party compellable to produce any book or record, the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by order of the court made for special cause.

Order to inspect and copy

(6) On the application of any party to a legal proceeding, the court may order that that party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceeding, and the person whose account is to be inspected shall be notified of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

Warrants to search

(7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of Parliament, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything in it shall, with respect to the books or records of the institution, be construed as limited to the searching of those premises for the purpose of inspecting and taking copies of entries in those books or records, and section 490 of the *Criminal Code* does not apply in respect of the copies of those books or records obtained under a warrant referred to in this section.

Computation of time

(8) Holidays shall be excluded from the computation of time under this section.

Definitions

(9) In this section,

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (*tribunal*)

financial institution means the Bank of Canada, the Business Development Bank of Canada and any institution that accepts in Canada deposits of money from its members or the public, and includes a branch, agency or office of any of those Banks or institutions; (*institution financière*)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration. (*procédure judiciaire*)
R.S., 1985, c. C-5, s. 29; 1994, c. 44, s. 90; 1995, c. 28, s. 47; 1999, c. 28, s. 149.

Business records to be admitted in evidence

30 (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

Inference where information not in business record

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

Copy of records

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Where record kept in form requiring explanation

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

(a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

Court may order other part of record to be produced

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

Court may examine record and hear evidence

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

Notice of intention to produce record or affidavit

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

Not necessary to prove signature and official character

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

Examination on record with leave of court

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

Evidence inadmissible under this section

(10) Nothing in this section renders admissible in evidence in any legal proceeding

(a) such part of any record as is proved to be

(i) a record made in the course of an investigation or inquiry,

(ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,

(iii) a record in respect of the production of which any privilege exists and is claimed, or

(iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;

(b) any record the production of which would be contrary to public policy; or

(c) any transcript or recording of evidence taken in the course of another legal proceeding.

Construction of this section

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

(a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or

(b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

Definitions

(12) In this section,

business means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government; (*affaires*)

copy and ***photographic film***, in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and ***photographic film*** includes

a photographic plate, microphotographic film or photostatic negative; (*copie* et *pellicule photographique*)

court means the court, judge, arbitrator or person before whom a legal proceeding is held or taken; (*tribunal*)

legal proceeding means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration; (*procédure judiciaire*)

record includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4). (*pièce*)
R.S., 1985, c. C-5, s. 30; 1994, c. 44, s. 91.

Definitions

31 (1) In this section,

corporation means any bank, including the Bank of Canada and the Business Development Bank of Canada, any authorized foreign bank within the meaning of section 2 of the *Bank Act* and each of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company; (*personne morale*)

government means the government of Canada or of any province and includes any department, commission, board or branch of any such government; (*gouvernement*)

photographic film includes any photographic plate, microphotographic film and photostatic negative. (*pellicule photographique*)

When print admissible in evidence

(2) A print, whether enlarged or not, from any photographic film of

(a) an entry in any book or record kept by any government or corporation and destroyed, lost or delivered to a customer after the film was taken,

(b) any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost or delivered to a customer after the film was taken, or

(c) any record, document, plan, book or paper belonging to or deposited with any government or corporation,

is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been admitted on proof that

(d) while the book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book or paper was in the custody or control of the

government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof, and

(e) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.

Evidence of compliance with conditions

(3) Evidence of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of the destruction, loss or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.

Proof by notarial copy

(4) Unless the court otherwise orders, a notarial copy of an affidavit under subsection (3) is admissible in evidence in lieu of the original affidavit.

R.S., 1985, c. C-5, s. 31; 1992, c. 1, s. 142; 1995, c. 28, s. 47; 1999, c. 28, s. 150.

Authentication of electronic documents

31.1 Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be.

2000, c. 5, s. 56.

Application of best evidence rule — electronic documents

31.2 (1) The best evidence rule in respect of an electronic document is satisfied

(a) on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored; or

(b) if an evidentiary presumption established under section 31.4 applies.

Printouts

(2) Despite subsection (1), in the absence of evidence to the contrary, an electronic document in the form of a printout satisfies the best evidence rule if the printout has been manifestly or consistently acted on, relied on or used as a record of the information recorded or stored in the printout.

2000, c. 5, s. 56.

Presumption of integrity

31.3 For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven

(a) by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system;

(b) if it is established that the electronic document was recorded or stored by a party who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic document was recorded or stored in the usual and ordinary course of business by a person who is not a party and who did not record or store it under the control of the party seeking to introduce it.

2000, c. 5, s. 56.

Presumptions regarding secure electronic signatures

31.4 The Governor in Council may make regulations establishing evidentiary presumptions in relation to electronic documents signed with secure electronic signatures, including regulations respecting

(a) the association of secure electronic signatures with persons; and

(b) the integrity of information contained in electronic documents signed with secure electronic signatures.

2000, c. 5, s. 56.

Standards may be considered

31.5 For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded or stored, having regard to the type of business, enterprise or endeavour that used, recorded or stored the electronic document and the nature and purpose of the electronic document.

2000, c. 5, s. 56.

Proof by affidavit

31.6 (1) The matters referred to in subsection 31.2(2) and sections 31.3 and 31.5 and in regulations made under section 31.4 may be established by affidavit.

Cross-examination

(2) A party may cross-examine a deponent of an affidavit referred to in subsection (1) that has been introduced in evidence

(a) as of right, if the deponent is an adverse party or is under the control of an adverse party; and

(b) with leave of the court, in the case of any other deponent.

2000, c. 5, s. 56.

Application

31.7 Sections 31.1 to 31.4 do not affect any rule of law relating to the admissibility of evidence, except the rules relating to authentication and best evidence.

2000, c. 5, s. 56.

Definitions

31.8 The definitions in this section apply in sections 31.1 to 31.6.

computer system means a device that, or a group of interconnected or related devices one or more of which,

(a) contains computer programs or other data; and

(b) pursuant to computer programs, performs logic and control, and may perform any other function. (*système informatique*)

data means representations of information or of concepts, in any form. (*données*)

electronic document means data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device. It includes a display, printout or other output of that data. (*document électronique*)

electronic documents system includes a computer system or other similar device by or in which data is recorded or stored and any procedures related to the recording or storage of electronic documents. (*système d'archivage électronique*)

secure electronic signature means a secure electronic signature as defined in subsection 31(1) of the *Personal Information Protection and Electronic Documents Act*. (*signature électronique sécurisée*)

2000, c. 5, s. 56.

Order signed by Secretary of State

32 (1) An order signed by the Secretary of State of Canada and purporting to be written by command of the Governor General shall be admitted in evidence as the order of the Governor General.

Copies published in *Canada Gazette*

(2) All copies of official and other notices, advertisements and documents published in the *Canada Gazette* are admissible in evidence as proof, in the absence of evidence to the contrary, of the originals and of their contents.

R.S., 1985, c. C-5, s. 32; 2000, c. 5, s. 57.

Proof of handwriting of person certifying

33 (1) No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any

proclamation, order, regulation, appointment, book or other document.

Printed or written

(2) Any copy or extract referred to in subsection (1) may be in print or in writing, or partly in print and partly in writing.
R.S., c. E-10, s. 33.

Attesting witness

34 (1) It is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite.

Instrument, how proved

(2) Any instrument referred to in subsection (1) may be proved by admission or otherwise as if there had been no attesting witness thereto.

R.S., c. E-10, s. 34.

Impounding of forged instrument

35 Where any instrument that has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of an officer of the court or other proper person for such period and subject to such conditions as to the court, judge or person admitting the instrument seem meet.

R.S., c. E-10, s. 35.

Construction

36 This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act or existing at law.

R.S., c. E-10, s. 36.

Interpretation

Definition of *official*

36.1 In sections 37 to 38.43, ***official*** has the same meaning as in section 118 of the *Criminal Code*.

2001, c. 41, s. 43; 2024, c. 16, s. 76.

Specified Public Interest

Objection to disclosure of information

37 (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing

to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

Obligation of court, person or body

(1.1) If an objection is made under subsection (1), the court, person or body shall ensure that the information is not disclosed other than in accordance with this Act.

Objection made to superior court

(2) If an objection to the disclosure of information is made before a superior court, that court may determine the objection.

Objection not made to superior court

(3) If an objection to the disclosure of information is made before a court, person or body other than a superior court, the objection may be determined, on application, by

(a) the Federal Court, in the case of a person or body vested with power to compel production by or under an Act of Parliament if the person or body is not a court established under a law of a province; or

(b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Limitation period

(4) An application under subsection (3) shall be made within 10 days after the objection is made or within any further or lesser time that the court having jurisdiction to hear the application considers appropriate in the circumstances.

Disclosure order

(4.1) Unless the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, the court may authorize by order the disclosure of the information.

Disclosure order

(5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorize the disclosure, subject to any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

Prohibition order

(6) If the court does not authorize disclosure under subsection (4.1) or (5), the court shall, by order, prohibit disclosure of the information.

Evidence

(6.1) The court may receive into evidence anything that, in the opinion of the court, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base its decision on that evidence.

When determination takes effect

(7) An order of the court that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Introduction into evidence

(8) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (5), but who may not be able to do so by reason of the rules of admissibility that apply before the court, person or body with jurisdiction to compel the production of information, may request from the court having jurisdiction under subsection (2) or (3) an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that court, as long as that form and those conditions comply with the order made under subsection (5).

Relevant factors

(9) For the purpose of subsection (8), the court having jurisdiction under subsection (2) or (3) shall consider all the factors that would be relevant for a determination of admissibility before the court, person or body.

R.S., 1985, c. C-5, s. 37; 2001, c. 41, ss. 43, 140; 2002, c. 8, s. 183; 2013, c. 9, s. 17(E).

Appeal to court of appeal

37.1 (1) Subject to subsection (1.1), an appeal lies from a determination under any of subsections 37(4.1) to (6)

(a) to the Federal Court of Appeal from a determination of the Federal Court; or

(b) to the court of appeal of a province from a determination of a trial division or trial court of a superior court of the province.

Limitation — person charged with offence

(1.1) A person who is charged with an offence may appeal a determination referred to in subsection (1) that is made in relation to a criminal trial or other criminal proceeding only if they are convicted of the offence.

Limitation period for appeal

(2) An appeal under this section shall be brought

(a) in the case of an appeal permitted under subsection (1.1), after conviction and within the same period in which the accused may appeal from their conviction or any further time that the court referred to in subsection (1) considers appropriate in the circumstances; or

(b) in any other case, within 15 days after the day on which the determination appealed from is made or any further time that the court referred to in subsection (1) considers appropriate in the circumstances.

Exceptional circumstances

(3) Despite subsection (1.1) and paragraph (2)(a), the court referred to in subsection (1) may, on application by the person charged with the offence, permit the appeal to be brought before conviction if the court is satisfied that there are exceptional circumstances that justify doing so.

2001, c. 41, ss. 43, 141; 2024, c. 16, s. 77.

Limitation periods for appeals to Supreme Court of Canada

37.2 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made under subsection 37.1(1) shall be made within 10 days after the date of the judgment appealed from or within any further time that the court having jurisdiction to grant leave to appeal considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the court that grants leave.

2001, c. 41, s. 43.

37.21 [Repealed, 2004, c. 12, s. 18]

Protection of right to a fair trial

37.3 (1) A judge presiding at a criminal trial or other criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 37(4.1) to (6) in relation to that trial or proceeding or any judgment made on appeal of an order made under any of those subsections.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

(a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;

(b) an order effecting a stay of the proceedings; and

(c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

2001, c. 41, s. 43; 2015, c. 3, s. 14(F).

International Relations and National Defence and National Security

Provisions of General Application

Definitions

38 The following definitions apply in this section and in sections 38.01 to 38.15.

judge means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice to conduct hearings under section 38.04. (*juge*)

participant means a person who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information. (*participant*)

potentially injurious information means information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security. (*renseignements potentiellement préjudiciables*)

proceeding means a proceeding before a court, person or body with jurisdiction to compel the production of information, but does not include a *federal proceeding*, as defined in section 38.2. (*instance*)

prosecutor means an agent of the Attorney General of Canada or of the Attorney General of a province, the Director of Military Prosecutions under the *National Defence Act* or an individual who acts as a prosecutor in a proceeding. (*poursuivant*)

sensitive information means information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard. (*renseignements sensibles*)

R.S., 1985, c. C-5, s. 38; 2001, c. 41, ss. 43, 141; 2013, c. 9, s. 18(F); 2024, c. 16, s. 79.

Notice to Attorney General of Canada

38.01 (1) Every participant who, in connection with a proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information shall, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the

course of a proceeding shall raise the matter with the person presiding at the proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the proceeding.

During a proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a proceeding may raise the matter with the person presiding at the proceeding. If the official raises the matter, he or she shall notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the proceeding shall ensure that the information is not disclosed other than in accordance with this Act.

Military proceedings

(5) In the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, notice under any of subsections (1) to (4) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Exception

(6) This section does not apply when

(a) the information is disclosed by a person to their solicitor in connection with a proceeding, if the information is relevant to that proceeding;

(b) the information is disclosed to enable the Attorney General of Canada, the Minister of National Defence, a judge or a court hearing an appeal from, or a review of, an order of the judge to discharge their responsibilities under section 38, this section and sections 38.02 to 38.13, 38.15 and 38.16;

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received; or

(d) the information is disclosed to an entity and, where applicable, for a purpose listed in the schedule.

Exception

(7) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (6)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter with the person presiding under subsection (2).

Schedule

(8) The Governor in Council may, by order, add to or delete from the schedule a reference to any entity or purpose, or amend such a reference.
2001, c. 41, s. 43; 2019, c. 15, s. 48.

Disclosure prohibited

38.02 (1) Subject to subsection 38.01(6), no person shall disclose in connection with a proceeding

(a) information about which notice is given under any of subsections 38.01(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.01(1) to (4), or to the Attorney General of Canada and the Minister of National Defence under subsection 38.01(5);

(c) the fact that an application is made to the Federal Court under section 38.04 or that an appeal or review of an order made under any of subsections 38.06(1) to (3) in connection with the application is instituted; or

(d) the fact that an agreement is entered into under section 38.031 or subsection 38.04(6).

Entities

(1.1) When an entity listed in the schedule, for any purpose listed there in relation to that entity, makes a decision or order that would result in the disclosure of sensitive information or potentially injurious information, the entity shall not disclose the information or cause it to be disclosed until notice of intention to disclose the information has been given to the Attorney General of Canada and a period of 10 days has elapsed after notice was given.

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.03 or by agreement under section 38.031 or subsection 38.04(6); or

(b) a judge authorizes the disclosure under subsection 38.06(1) or (2) or a court hearing an appeal from, or a review of, the order of the judge authorizes the disclosure, and either the time provided to appeal the order or judgment has expired or no further appeal is available.

2001, c. 41, ss. 43, 141.

Authorization by Attorney General of Canada

38.03 (1) The Attorney General of Canada may, at any time and subject to any conditions that he or she considers appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.02(1).

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Attorney General of Canada may authorize disclosure only with the agreement of the Minister of National Defence.

Notice

(3) The Attorney General of Canada shall, within 30 days after the day on which they first receive a notice about information under any of subsections 38.01(1) to (4), notify in writing every person who provided notice under section 38.01 about that information of their decision with respect to disclosure of the information.

2001, c. 41, s. 43; 2019, c. 15, s. 49; 2024, c. 16, s. 80.

Disclosure agreement

38.031 (1) The Attorney General of Canada and a person who has given notice under subsection 38.01(1) or (2) and is not required to disclose information but wishes, in connection with a proceeding, to disclose any facts referred to in paragraphs 38.02(1)(b) to (d) or information about which he or she gave the notice, or to cause that disclosure, may, before the person applies to the Federal Court under paragraph 38.04(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No application to Federal Court

(2) If an agreement is entered into under subsection (1), the person may not apply to the Federal Court under paragraph 38.04(2)(c) with respect to the information about which he or she gave notice to the Attorney General of Canada under subsection 38.01(1) or (2).

2001, c. 41, ss. 43, 141.

Application to Federal Court — Attorney General of Canada

38.04 (1) The Attorney General of Canada may, at any time and in any circumstances, apply to the Federal Court for an order with respect to the disclosure of information about which notice was given under any of subsections 38.01(1) to (4).

Application to Federal Court — general

(2) If, with respect to information about which notice was given under any of subsections 38.01(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.03(3) or, other than by an agreement under section

38.031, does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada shall apply to the Federal Court for an order with respect to disclosure of the information if a person who gave notice under subsection 38.01(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a proceeding shall apply to the Federal Court for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a proceeding but who wishes to disclose it or to cause its disclosure may apply to the Federal Court for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who applies to the Federal Court under paragraph (2)(b) or (c) shall provide notice of the application to the Attorney General of Canada.

Court records

(4) Subject to paragraph (5)(a.1), an application under this section is confidential. During the period when an application is confidential, the Chief Administrator of the Courts Administration Service may, subject to section 38.12, take any measure that he or she considers appropriate to protect the confidentiality of the application and the information to which it relates.

Procedure

(5) As soon as the Federal Court is seized of an application under this section, the judge

(a) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, with respect to making the application public;

(a.1) shall, if he or she decides that the application should be made public, make an order to that effect;

(a.2) shall hear the representations of the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, concerning the identity of all parties or witnesses whose interests may be affected by either the prohibition of disclosure or the conditions to which disclosure is subject, and concerning the persons who should be given notice of any hearing of the matter;

(b) shall decide whether it is necessary to hold any hearing of the matter;

(c) if he or she decides that a hearing should be held, shall

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(d) if he or she considers it appropriate in the circumstances, may give any person the opportunity to make representations.

Disclosure agreement

(6) After the Federal Court is seized of an application made under paragraph (2)(c) or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3) in connection with that application, before the appeal or review is disposed of,

(a) the Attorney General of Canada and the person who made the application may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.02(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and

(b) if an agreement is entered into, the Court's consideration of the application or any hearing, review or appeal shall be terminated.

Termination of Court consideration, hearing, review or appeal

(7) Subject to subsection (6), after the Federal Court is seized of an application made under this section or, in the case of an appeal from, or a review of, an order of the judge made under any of subsections 38.06(1) to (3), before the appeal or review is disposed of, if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the Court's consideration of the application or any hearing, appeal or review shall be terminated in relation to that information, to the extent of the authorization or the withdrawal.
2001, c. 41, ss. 43, 141; 2013, c. 9, s. 19; 2019, c. 15, s. 50.

Report relating to proceedings

38.05 If he or she receives notice of a hearing under paragraph 38.04(5)(c), a person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside may, within 10 days after the day on which he or she receives the notice, provide the judge with a report concerning any matter relating to the proceeding that the person considers may be of assistance to the judge.

2001, c. 41, s. 43.

Disclosure order

38.06 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.02(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge shall, by order, confirm the prohibition of disclosure.

When determination takes effect

(3.01) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(3.1) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

Introduction into evidence

(4) A person who wishes to introduce into evidence material the disclosure of which is authorized under subsection (2) but who may not be able to do so in a proceeding by reason of the rules of admissibility that apply in the proceeding may request from a judge an order permitting the introduction into evidence of the material in a form or subject to any conditions fixed by that judge, as long as that form and those conditions comply with the order made under subsection (2).

Relevant factors

(5) For the purpose of subsection (4), the judge shall consider all the factors that would be relevant for a determination of admissibility in the proceeding.
2001, c. 41, s. 43; 2013, c. 9, s. 20.

Notice of order

38.07 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.06(1) to (3) to any person who, in the opinion of the judge, should be notified.

2001, c. 41, s. 43.

Automatic review

38.08 If the judge determines that a party to the proceeding whose interests are adversely affected by an order made under any of subsections 38.06(1) to (3) was not given the opportunity to make representations under paragraph 38.04(5)(d), the judge shall refer the order to the Federal Court of Appeal for review.

2001, c. 41, s. 43.

Appeal to Federal Court of Appeal

38.09 (1) Subject to subsection (1.1), an order made under any of subsections 38.06(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation — person charged with offence

(1.1) A person who is charged with an offence may appeal an order referred to in subsection (1) that is made in relation to a criminal trial or other criminal proceeding only if they are convicted of the offence.

Limitation period for appeal

(2) An appeal under this section shall be brought

(a) in the case of an appeal permitted under subsection (1.1), after conviction and within the same period in which the accused may appeal from their conviction or any further time that the Court considers appropriate in the circumstances; or

(b) in any other case, within 15 days after the day on which the order is made or any further time that the Court considers appropriate in the circumstances.

Exceptional circumstances

(3) Despite subsection (1.1) and paragraph (2)(a), the Court may, on application by the person charged with the offence, permit the appeal to be brought before conviction if the Court is satisfied that there are exceptional circumstances that justify doing so.

2001, c. 41, s. 43; 2024, c. 16, s. 81.

Limitation periods for appeals to Supreme Court of Canada

38.1 Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made on appeal shall be made within 15 days after the day on which the judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the Supreme Court of Canada.

2001, c. 41, s. 43; 2024, c. 16, s. 82.

Special rules — hearing in private

38.11 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make an order that the hearing be held, or the appeal or review be heard, in private.

Special rules — hearing in National Capital Region

(1.1) A hearing under subsection 38.04(5) or an appeal or review of an order made under any of subsections 38.06(1) to (3) shall, at the request of either the Attorney General of Canada or, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, be held or heard, as the case may be, in the National Capital Region, as described in the schedule to the *National Capital Act*.

***Ex parte* representations**

(2) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may give any person who makes representations under paragraph 38.04(5)(d), and shall give the Attorney General of Canada and, in the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Minister of National Defence, the opportunity to make representations *ex parte*.

***Ex parte* representations — public hearing**

(3) If a hearing under subsection 38.04(5) is held, or an appeal or review of an order made under any of subsections 38.06(1) to (3) is heard, in public, any *ex parte* representations made in that hearing, appeal or review shall be made in private.

2001, c. 41, s. 43; 2013, c. 9, s. 21; 2019, c. 15, s. 51.

Protective order

38.12 (1) The judge conducting a hearing under subsection 38.04(5) or the court hearing an appeal or review of an order made under any of subsections 38.06(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of any information to which the hearing, appeal or review relates.

Court records

(2) The court records relating to a hearing that is held, or an appeal or review that is heard, in private or to any *ex parte* representations are confidential. The judge or the court may order that the court records, or any part of them, relating to a private or public hearing, appeal or review be sealed and kept in a location to which the public has no access.

2001, c. 41, s. 43; 2013, c. 9, s. 22.

Certificate of Attorney General of Canada

38.13 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Military proceedings

(2) In the case of a proceeding under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, the Attorney General of Canada may issue the certificate only with the agreement, given personally, of the Minister of National Defence.

Service of certificate

(3) The Attorney General of Canada shall cause a copy of the certificate to be served on

(a) the person presiding or designated to preside at the proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;

(b) every party to the proceeding;

(c) every person who gives notice under section 38.01 in connection with the proceeding;

(d) every person who, in connection with the proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.01;

(e) every party to a hearing under subsection 38.04(5) or to an appeal of an order made under any of subsections 38.06(1) to (3) in relation to the information;

(f) the judge who conducts a hearing under subsection 38.04(5) and any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3) in relation to the information; and

(g) any other person who, in the opinion of the Attorney General of Canada, should be served.

Filing of certificate

(4) The Attorney General of Canada shall cause a copy of the certificate to be filed

(a) with the person responsible for the records of the proceeding to which the information relates; and

(b) in the Registry of the Federal Court and the registry of any court that hears an appeal from, or review of, an order made under any of subsections 38.06(1) to (3).

Effect of certificate

(5) If the Attorney General of Canada issues a certificate, then, notwithstanding any other provision of this Act, disclosure of the information shall be prohibited in accordance with the terms of the certificate.

***Statutory Instruments Act* does not apply**

(6) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

Publication

(7) The Attorney General of Canada shall, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

Restriction

(8) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.131.

Expiry

(9) The certificate expires 10 years after the day on which it is issued and may be reissued.

2001, c. 41, s. 43; 2013, c. 9, s. 23; 2019, c. 15, s. 52; 2024, c. 16, s. 57.

Application for review of certificate

38.131 (1) A party to the proceeding referred to in section 38.13 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (8) or (9), as the case may be.

Notice to Attorney General of Canada

(2) The applicant shall give notice of the application to the Attorney General of Canada.

Military proceedings

(3) In the case of proceedings under Part III of the *National Defence Act*, other than a *summary hearing* as defined in subsection 2(1) of that Act, notice under subsection (2) shall be given to both the Attorney General of Canada and the Minister of National Defence.

Single judge

(4) Despite section 16 of the *Federal Courts Act*, for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court.

Admissible information

(5) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (8) to (10) on that evidence.

Special rules and protective order

(6) Sections 38.11 and 38.12 apply, with any necessary modifications, to an application made under subsection (1).

Expedited consideration

(7) The judge shall consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

Varying the certificate

(8) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act*, or to national defence or national security, the judge shall make an order varying the certificate accordingly.

Cancelling the certificate

(9) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act*, or to national defence or national security, the judge shall make an order cancelling the certificate.

Confirming the certificate

(10) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act*, or to national defence or national security, the judge shall make an order confirming the certificate.

Determination is final

(11) Notwithstanding any other Act of Parliament, a determination of a judge under any of subsections (8) to (10) is final and is not subject to review or appeal by any court.

Publication

(12) If a certificate is varied or cancelled under this section, the Attorney General of Canada shall, as soon as possible after the decision of the judge and in a manner that

mentions the original publication of the certificate, cause to be published in the *Canada Gazette*

(a) the certificate as varied under subsection (8); or

(b) a notice of the cancellation of the certificate under subsection (9).

2001, c. 41, s. 43; 2004, c. 12, s. 19(E); 2019, c. 15, s. 53; 2024, c. 16, s. 57; 2024, c. 16, s. 83.

Protection of right to a fair trial

38.14 (1) The person presiding at a criminal proceeding may make any order that he or she considers appropriate in the circumstances to protect the right of the accused to a fair trial, as long as that order complies with the terms of any order made under any of subsections 38.06(1) to (3) in relation to that proceeding, any judgment made on appeal from, or review of, the order, or any certificate issued under section 38.13.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following orders:

(a) an order dismissing specified counts of the indictment or information, or permitting the indictment or information to proceed only in respect of a lesser or included offence;

(b) an order effecting a stay of the proceedings; and

(c) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

2001, c. 41, s. 43.

Fiat

38.15 (1) If sensitive information or potentially injurious information may be disclosed in connection with a prosecution that is not instituted by the Attorney General of Canada or on his or her behalf, the Attorney General of Canada may issue a fiat and serve the fiat on the prosecutor.

Effect of fiat

(2) When a fiat is served on a prosecutor, the fiat establishes the exclusive authority of the Attorney General of Canada with respect to the conduct of the prosecution described in the fiat or any related process.

Fiat filed in court

(3) If a prosecution described in the fiat or any related process is conducted by or on behalf of the Attorney General of Canada, the fiat or a copy of the fiat shall be filed with the court in which the prosecution or process is conducted.

Fiat constitutes conclusive proof

(4) The fiat or a copy of the fiat

(a) is conclusive proof that the prosecution described in the fiat or any related process may be conducted by or on behalf of the Attorney General of Canada; and

(b) is admissible in evidence without proof of the signature or official character of the Attorney General of Canada.

Military proceedings

(5) This section does not apply to a proceeding under Part III of the *National Defence Act*.

2001, c. 41, s. 43.

Regulations

38.16 The Governor in Council may make any regulations that the Governor in Council considers necessary to carry into effect the purposes and provisions of sections 38 to 38.15, including regulations respecting the notices, certificates and the fiat.

2001, c. 41, s. 43.

Annual report

38.17 Each year the Attorney General of Canada shall prepare and cause to be laid before each House of Parliament a report for the previous year on the operation of sections 38.13 and 38.15 that includes the number of certificates and fiats issued under sections 38.13 and 38.15, respectively.

2013, c. 9, s. 24.

Secure Administrative Review Proceedings

Definitions

38.2 The following definitions apply in this section and in sections 38.21 to 38.45.

federal proceeding means

(a) an application for judicial review or an appeal in the Federal Court of a decision of a *federal board, commission or other tribunal*, as defined in subsection 2(1) of the *Federal Courts Act*;

(b) an appeal in the Federal Court of Appeal from a decision of the Federal Court in a proceeding referred to in paragraph (a);

(c) an application for judicial review or an appeal in the Federal Court of Appeal of a decision of a federal board, commission or other tribunal referred to in paragraph (a); or

(d) a proceeding referred to in section 6 or 11 of the *Charities Registration (Security Information) Act*.

It does not include any proceeding in the Federal Court or the Federal Court of Appeal that is in respect of a matter under the *Immigration and Refugee Protection Act* and does not include a proceeding in which information may be disclosed to either of those courts for a purpose listed in the schedule. (*instance fédérale*)

judge means

(a) in relation to a federal proceeding in the Federal Court of Appeal, not fewer than three judges of that court, each of whom is either the Chief Justice or a judge designated by the Chief Justice to conduct hearings under section 38.25, sitting together in an uneven number; and

(b) in relation to a federal proceeding in the Federal Court, the Chief Justice of that court or a judge designated by the Chief Justice to conduct hearings under section 38.25. (*juge*)

non-governmental party means a party to a federal proceeding who is neither the Attorney General of Canada nor represented by the Attorney General of Canada. (*partie non gouvernementale*)

participant means a person who, in connection with a federal proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information. (*participant*)

potentially injurious information has the same meaning as in section 38. (*renseignements potentiellement préjudiciables*)

sensitive information has the same meaning as in section 38. (*renseignements sensibles*)

special counsel means a person appointed as a special counsel under section 38.34. (*conseiller juridique spécial*)

2024, c. 16, s. 84.

Notice to Attorney General of Canada

38.21 (1) Every participant who, in connection with a federal proceeding, is required to disclose, or expects to disclose or cause the disclosure of, information that the participant believes is sensitive information or potentially injurious information must, as soon as possible, notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the federal proceeding.

During federal proceeding

(2) Every participant who believes that sensitive information or potentially injurious information is about to be disclosed, whether by the participant or another person, in the course of a federal proceeding must raise the matter with the person presiding at the federal proceeding and notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (1). In such circumstances, the person presiding at the federal proceeding must ensure that the information is not disclosed other than in accordance with this Act.

Notice of disclosure from official

(3) An official, other than a participant, who believes that sensitive information or potentially injurious information may be disclosed in connection with a federal proceeding may notify the Attorney General of Canada in writing of the possibility of the disclosure, and of the nature, date and place of the federal proceeding.

During federal proceeding

(4) An official, other than a participant, who believes that sensitive information or potentially injurious information is about to be disclosed in the course of a federal proceeding may raise the matter with the person presiding at the federal proceeding. If the official raises the matter, they must notify the Attorney General of Canada in writing of the matter as soon as possible, whether or not notice has been given under subsection (3), and the person presiding at the federal proceeding must ensure that the information is not disclosed other than in accordance with this Act.

Exception

(5) This section does not apply when

(a) the information is disclosed by a person to their lawyer in connection with a federal proceeding, if the information is relevant to that proceeding;

(b) the information is disclosed to enable the Attorney General of Canada, special counsel, a judge, or a court hearing an appeal from an order of the judge, to exercise their powers and perform their duties and functions under this section and sections 38.22 to 38.41 and 38.43; or

(c) disclosure of the information is authorized by the government institution in which or for which the information was produced or, if the information was not produced in or for a government institution, the government institution in which it was first received.

Exception

(6) Subsections (1) and (2) do not apply to a participant if a government institution referred to in paragraph (5)(c) advises the participant that it is not necessary, in order to prevent disclosure of the information referred to in that paragraph, to give notice to the Attorney General of Canada under subsection (1) or to raise the matter under subsection (2) with the person presiding at the federal proceeding.
2024, c. 16, s. 84.

Disclosure prohibited

38.22 (1) Subject to subsection 38.21(5), it is prohibited for a person to disclose in connection with a federal proceeding

(a) information about which notice is given under any of subsections 38.21(1) to (4);

(b) the fact that notice is given to the Attorney General of Canada under any of subsections 38.21(1) to (4);

(c) the fact that a motion is made under section 38.25 or that an appeal of an order made under any of subsections 38.26(1) to (3) in connection with the motion is instituted; or

(d) the fact that an agreement is entered into under section 38.24 or subsection 38.25(6).

Exceptions

(2) Disclosure of the information or the facts referred to in subsection (1) is not prohibited if

(a) the Attorney General of Canada authorizes the disclosure in writing under section 38.23 or by agreement under section 38.24 or subsection 38.25(6); or

(b) a judge authorizes the disclosure under subsection 38.26(1) or (2) or a court hearing an appeal from the order of the judge authorizes the disclosure, and either the time provided to appeal the order or the appeal court's judgment has expired or no further appeal is available.

2024, c. 16, s. 84.

Authorization by Attorney General of Canada

38.23 (1) The Attorney General of Canada may, at any time and subject to any conditions that they consider appropriate, authorize the disclosure of all or part of the information and facts the disclosure of which is prohibited under subsection 38.22(1).

Notice

(2) The Attorney General of Canada must, within 30 days after the day on which they first receive a notice about information under any of subsections 38.21(1) to (4), notify in writing every person who provided notice under those subsections about that information of their decision with respect to disclosure of the information.

2024, c. 16, s. 84.

Disclosure agreement

38.24 (1) The Attorney General of Canada and a person who has given notice under subsection 38.21(1) or (2) and is not required to disclose information but wishes, in connection with a federal proceeding, to disclose any facts referred to in paragraphs 38.22(1)(b) to (d) or information about which the person gave the notice, or to cause that disclosure, may, before the person brings a motion under paragraph 38.25(2)(c), enter into an agreement that permits the disclosure of part of the facts or information or disclosure of the facts or information subject to conditions.

No motion

(2) If an agreement is entered into under subsection (1), the person may not bring a motion under paragraph 38.25(2)(c) with respect to the information about which they gave notice to the Attorney General of Canada under subsection 38.21(1) or (2).

2024, c. 16, s. 84.

Motion — Attorney General of Canada

38.25 (1) The Attorney General of Canada may, at any time and under any circumstances during a federal proceeding, bring a motion to a judge for an order with respect to the disclosure of information about which notice was given under any of subsections 38.21(1) to (4).

Motion — general

(2) If, with respect to information about which notice was given under any of subsections 38.21(1) to (4), the Attorney General of Canada does not provide notice of a decision in accordance with subsection 38.23(2) or, other than by an agreement under section 38.24, does not authorize the disclosure of the information or authorizes the disclosure of only part of the information or authorizes the disclosure subject to any conditions,

(a) the Attorney General of Canada must bring a motion to a judge for an order with respect to disclosure of the information if a person who gave notice under subsection 38.21(1) or (2) is a witness;

(b) a person, other than a witness, who is required to disclose information in connection with a federal proceeding must bring a motion to a judge for an order with respect to disclosure of the information; and

(c) a person who is not required to disclose information in connection with a federal proceeding but who wishes to disclose it or to cause its disclosure may bring a motion to a judge for an order with respect to disclosure of the information.

Notice to Attorney General of Canada

(3) A person who makes a motion under paragraph (2)(b) or (c) must provide notice of the motion to the Attorney General of Canada.

Court records

(4) Subject to paragraph (5)(b), a motion under this section is confidential. During the period when a motion is confidential, the Chief Administrator of the Courts Administration Service may, subject to section 38.31, take any measure that they consider appropriate to protect the confidentiality of the motion and the information to which it relates.

Procedure

(5) As soon as they are seized of a motion under this section, the judge

(a) must hear the representations of the Attorney General of Canada with respect to making the motion public;

(b) must, if they decide that the motion should be made public, make an order to that effect;

(c) must hear the representations of the Attorney General of Canada concerning the identity of all parties or witnesses whose interests may be affected by either the

prohibition of disclosure or the conditions to which disclosure is subject and concerning the persons who should be given notice of any hearing of the matter;

(d) must decide whether it is necessary to hold any hearing of the matter;

(e) if they decide that a hearing should be held, must

(i) determine who should be given notice of the hearing,

(ii) order the Attorney General of Canada to notify those persons, and

(iii) determine the content and form of the notice; and

(f) may, if they consider it appropriate in the circumstances, give any person the opportunity to make representations.

Disclosure agreement

(6) After the judge is seized of a motion made under paragraph (2)(c) or, in the case of an appeal from an order of the judge made under any of subsections 38.26(1) to (3) in connection with that motion, before the appeal is disposed of,

(a) the Attorney General of Canada and the person who made the motion may enter into an agreement that permits the disclosure of part of the facts referred to in paragraphs 38.22(1)(b) to (d) or part of the information or disclosure of the facts or information subject to conditions; and

(b) if an agreement is entered into, the judge's consideration of the motion or any hearing or appeal must be terminated.

Termination

(7) Subject to subsection (6), after the judge is seized of a motion made under this section — or, in the case of an appeal from an order of the judge made under any of subsections 38.26(1) to (3), before the appeal is disposed of — and if the Attorney General of Canada authorizes the disclosure of all or part of the information or withdraws conditions to which the disclosure is subject, the judge's consideration of the motion or any hearing or appeal must be terminated in relation to that information, to the extent of the authorization or the withdrawal.
2024, c. 16, s. 84.

Disclosure order

38.26 (1) Unless the judge concludes that the disclosure of the information or facts referred to in subsection 38.22(1) would be injurious to international relations or national defence or national security, the judge may, by order, authorize the disclosure of the information or facts.

Disclosure — conditions

(2) If the judge concludes that the disclosure of the information or facts would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure,

the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all or part of the information or facts, a summary of the information or a written admission of facts relating to the information.

Order confirming prohibition

(3) If the judge does not authorize disclosure under subsection (1) or (2), the judge must, by order, confirm the prohibition of disclosure.

When determination takes effect

(4) An order of the judge that authorizes disclosure does not take effect until the time provided or granted to appeal the order has expired or, if the order is appealed, the time provided or granted to appeal a judgment of an appeal court that confirms the order has expired and no further appeal from a judgment that confirms the order is available.

Evidence

(5) The judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base their decision on that evidence.
2024, c. 16, s. 84.

Notice of order

38.27 The judge may order the Attorney General of Canada to give notice of an order made under any of subsections 38.26(1) to (3) to any person who, in the opinion of the judge, should be notified.

2024, c. 16, s. 84.

Appeal to Federal Court of Appeal

38.28 (1) An order made by a judge of the Federal Court under any of subsections 38.26(1) to (3) may be appealed to the Federal Court of Appeal.

Limitation period for appeal

(2) An appeal must be brought within 15 days after the day on which the order is made or within any further time that the Federal Court of Appeal considers appropriate in the circumstances.

2024, c. 16, s. 84.

Limitation periods for appeals to Supreme Court of Canada

38.29 Despite any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from an order made under any of subsections 38.26(1) to (3) by the Federal Court of Appeal, or

from a judgment of the Federal Court of Appeal in an appeal of such an order made by the Federal Court, must be made within 15 days after the day on which the order or judgment appealed from is made or within any further time that the Supreme Court of Canada considers appropriate in the circumstances; and

(b) if leave to appeal is granted, the appeal must be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within the time specified by the Supreme Court of Canada.

2024, c. 16, s. 84.

Special rules — hearing in private

38.3 (1) The judge conducting a hearing under subsection 38.25(5) or the court hearing an appeal of an order made under any of subsections 38.26(1) to (3) may make an order that the hearing be held, or the appeal be heard, in private.

Special rules — hearing in National Capital Region

(2) A hearing under subsection 38.25(5) or an appeal of an order made under any of subsections 38.26(1) to (3) must, at the request of the Attorney General of Canada, be held or heard, as the case may be, in the National Capital Region, as described in the schedule to the *National Capital Act*.

***Ex parte* representations**

(3) The judge conducting a hearing under subsection 38.25(5) or the court hearing an appeal of an order made under any of subsections 38.26(1) to (3) may give any person who makes representations under paragraph 38.25(5)(f), and must give the Attorney General of Canada, the opportunity to make representations *ex parte*.

***Ex parte* representations — public hearing**

(4) If a hearing under subsection 38.25(5) is held, or an appeal of an order made under any of subsections 38.26(1) to (3) is heard, in public, any *ex parte* representations made in that hearing or appeal must be made in private.

2024, c. 16, s. 84.

Protective order

38.31 (1) The judge conducting a hearing under subsection 38.25(5) or the court hearing an appeal of an order made under any of subsections 38.26(1) to (3) may make any order that the judge or the court considers appropriate in the circumstances to protect the confidentiality of any information to which the hearing or appeal relates.

Court records

(2) The court records relating to a hearing that is held, or an appeal that is heard, in private or to any *ex parte* representations are confidential. The judge or the court may order that the court records, or any part of them, relating to a private or public hearing or appeal be sealed and kept in a location to which the public has no access.

2024, c. 16, s. 84.

Judge seized

38.32 The judge who hears the motion brought under subsection 38.25(1) or (2) becomes seized of all matters in the federal proceeding.

2024, c. 16, s. 84.

Undisclosed information — federal proceeding

38.33 (1) In considering the merits of the federal proceeding, the judge may receive into evidence, and may base their decision on, any information the disclosure of which is prohibited as a result of the application of sections 38.21 to 38.26.

Representations and private hearing

(2) For the purposes of subsection (1), the judge may — or, if the Attorney General of Canada so requests, the judge must —

(a) receive *ex parte* representations; and

(b) conduct a hearing in private and in the absence of the non-governmental party and their counsel.

Procedure

(3) In conducting a hearing under paragraph (2)(b), the judge must

(a) deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit;

(b) without disclosing the information referred to in subsection (1), ensure that the non-governmental party to the federal proceeding is provided with a summary of the information that enables that party to be reasonably informed of the case; and

(c) at the request of the Attorney General of Canada, hold the hearing in the National Capital Region, as described in the schedule to the *National Capital Act*.

Decision

(4) The judge may base any decision on the information referred to in subsection (1) even if a summary of that information has not been provided to the non-governmental party.

2024, c. 16, s. 84.

Special counsel

38.34 (1) The judge, in consideration of the principles of fairness and natural justice, may appoint a special counsel for the purposes of

(a) a motion made under section 38.25 and the federal proceeding as a whole; and

(b) any appeal of the motion or of the federal proceeding.

List

(2) The special counsel may be appointed from the list of persons referred to in subsection 85(1) of the *Immigration and Refugee Protection Act*.

2024, c. 16, s. 84.

Special counsel's role

38.35 (1) A special counsel's role is to protect the interests of the non-governmental party when information and other evidence is presented, or representations are made in private and in the absence of the non-governmental party and their counsel.

Responsibilities

(2) A special counsel may

(a) make oral and written representations with respect to the information or other evidence that has been filed with the court but has not been disclosed to the non-governmental party and their counsel;

(b) participate in, and cross-examine witnesses who testify during, any part of the proceeding that is held in private and in the absence of the non-governmental party and their counsel; and

(c) exercise, with the judge's authorization, any other powers that are necessary to protect the interests of the non-governmental party.

For greater certainty

(3) For greater certainty, the special counsel is not a party to the federal proceeding and the relationship between the special counsel and the non-governmental party is not that of lawyer and client.

Protection of communications with special counsel

(4) However, a communication between the non-governmental party or their counsel and the special counsel that, if the relationship were one of lawyer and client, would be subject to solicitor-client privilege or the professional secrecy of advocates is deemed to be subject to that privilege or professional secrecy. For greater certainty, in respect of that communication, the special counsel is not a compellable witness in any proceeding.

2024, c. 16, s. 84.

Immunity

38.36 A special counsel is not personally liable for anything they do or omit to do in good faith under this Act.

2024, c. 16, s. 84.

Obligation to provide information

38.37 The Attorney General of Canada must, within a period set by the judge, provide the special counsel with a copy of the information or other evidence that has been filed

with the court in relation to the federal proceeding, including any information or other evidence that is not disclosed to the non-governmental party and their counsel.
2024, c. 16, s. 84.

Restrictions on communications — special counsel

38.38 (1) After the information or other evidence is received by the special counsel, the special counsel may, during the remainder of the federal proceeding and any appeal in respect of it, communicate with another person about the federal proceeding or the appeal only with the judge's or appeal court's authorization and subject to any conditions that the judge or appeal court considers appropriate.

Restrictions on communications — other persons

(2) If the special counsel is authorized to communicate with a person, the judge or appeal court may prohibit that person from communicating with anyone else about the federal proceeding or appeal during its remainder or may impose conditions with respect to such a communication during that period.

2024, c. 16, s. 84.

Disclosure and communication prohibited

38.39 With the exception of communications authorized by a judge or disclosures permitted under section 38.22, it is prohibited for a person to

(a) disclose information or other evidence that is disclosed to them under section 38.37 or 38.38 and that is treated as confidential by the judge; or

(b) communicate with another person about the content of any part of a federal proceeding, or an appeal in respect of it, that is heard in private and in the absence of the non-governmental party and their counsel.

2024, c. 16, s. 84.

Fairness

38.4 (1) The judge may, if they are of the opinion that they are unable to conduct a fair hearing because the non-governmental party is not reasonably informed of the case, make an order granting an appropriate remedy to the non-governmental party.

Potential orders

(2) The orders that may be made under subsection (1) include, but are not limited to, the following:

(a) an order allowing or dismissing the federal proceeding; and

(b) an order finding against any party on any issue relating to information the disclosure of which is prohibited.

For greater certainty

(3) For greater certainty, a remedy referred to in subsection (1) must not include the disclosure of information ordered not to be disclosed under subsection 38.26(3) or 38.41(4).

2024, c. 16, s. 84.

Certificate of Attorney General of Canada

38.41 (1) The Attorney General of Canada may personally issue a certificate that prohibits the disclosure of information in connection with a federal proceeding for the purpose of protecting information obtained in confidence from, or in relation to, a *foreign entity* as defined in subsection 2(1) of the *Foreign Interference and Security of Information Act* or for the purpose of protecting national defence or national security. The certificate may only be issued after an order or decision that would result in the disclosure of the information to be subject to the certificate has been made under this or any other Act of Parliament.

Service of certificate

(2) The Attorney General of Canada must cause a copy of the certificate to be served on

(a) the person presiding or designated to preside at the federal proceeding to which the information relates or, if no person is designated, the person who has the authority to designate a person to preside;

(b) every party to the federal proceeding;

(c) every person who gives notice under section 38.21 in connection with the federal proceeding;

(d) every person who, in connection with the federal proceeding, may disclose, is required to disclose or may cause the disclosure of the information about which the Attorney General of Canada has received notice under section 38.21;

(e) every party to a hearing under subsection 38.25(5) or to an appeal of an order made under any of subsections 38.26(1) to (3) in relation to the information;

(f) any court that hears an appeal from an order made under any of subsections 38.26(1) to (3) in relation to the information; and

(g) any other person who, in the opinion of the Attorney General of Canada, should be served.

Filing of certificate

(3) The Attorney General of Canada must cause a copy of the certificate to be filed in the registry of the Federal Court of Appeal or the Federal Court, as the case may be, and the registry of any court that hears an appeal from an order made under any of subsections 38.26(1) to (3).

Effect of certificate

(4) If the Attorney General of Canada issues a certificate, then, despite any other provision of this Act, disclosure of the information is prohibited in accordance with the terms of the certificate.

Statutory Instruments Act does not apply

(5) The *Statutory Instruments Act* does not apply to a certificate issued under subsection (1).

Publication

(6) The Attorney General of Canada must, without delay after a certificate is issued, cause the certificate to be published in the *Canada Gazette*.

Restriction

(7) The certificate and any matters arising out of it are not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with section 38.42.

Expiry

(8) The certificate expires 10 years after the day on which it is issued and may be reissued.

2024, c. 16, s. 84.

Application for review of certificate

38.42 (1) A party to the federal proceeding referred to in section 38.41 may apply to the Federal Court of Appeal for an order varying or cancelling a certificate issued under that section on the grounds referred to in subsection (7) or (8), as the case may be.

Notice to Attorney General of Canada

(2) The applicant must give notice of the application to the Attorney General of Canada.

Single judge

(3) Despite paragraph (a) of the definition *judge* in section 38.2 and section 16 of the *Federal Courts Act*, for the purposes of the application, the Federal Court of Appeal consists of a single judge of that Court.

Admissible information

(4) In considering the application, the judge may receive into evidence anything that, in the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base a determination made under any of subsections (7) to (9) on that evidence.

Special rules and protective order

(5) Sections 38.3 and 38.31 apply, with any necessary modifications, to an application made under subsection (1).

Expedited consideration

(6) The judge must consider the application as soon as reasonably possible, but not later than 10 days after the application is made under subsection (1).

Varying certificate

(7) If the judge determines that some of the information subject to the certificate does not relate either to information obtained in confidence from, or in relation to, a foreign entity, or to national defence or national security, the judge must make an order varying the certificate accordingly.

Cancelling certificate

(8) If the judge determines that none of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity, or to national defence or national security, the judge must make an order cancelling the certificate.

Confirming certificate

(9) If the judge determines that all of the information subject to the certificate relates to information obtained in confidence from, or in relation to, a foreign entity, or to national defence or national security, the judge must make an order confirming the certificate.

Determination is final

(10) Despite any other Act of Parliament, a determination of a judge under any of subsections (7) to (9) is final and is not subject to review or appeal by any court.

Publication

(11) If a certificate is varied or cancelled under this section, the Attorney General of Canada must, as soon as possible after the decision of the judge and in a manner that mentions the original publication of the certificate, cause to be published in the *Canada Gazette*

(a) the certificate as varied under subsection (7); or

(b) a notice of the cancellation of the certificate under subsection (8).

Definition of *foreign entity*

(12) In this section, ***foreign entity*** has the same meaning as in subsection 2(1) of the *Foreign Interference and Security of Information Act*.
2024, c. 16, s. 84.

Regulations

38.43 The Governor in Council may make any regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of sections 38.2 to 38.42, including regulations respecting the notices and certificates.

2024, c. 16, s. 84.

Annual report

38.44 The report referred to in section 38.17 must also set out the operation of section 38.41 for the previous year and include the number of certificates issued under that section.

2024, c. 16, s. 84.

Rules

38.45 (1) The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court may each establish a committee to make rules governing the practice and procedure in relation to the participation of special counsel in federal proceedings before the court over which they preside. The rules are binding despite any rule of practice that would otherwise apply.

Composition of committees

(2) Each committee established is to be composed of the appropriate Chief Justice, the Attorney General of Canada or one or more representatives of the Attorney General of Canada, and one or more members of the bar of any province who have experience in a field of law relevant to federal proceedings. Each Chief Justice may also designate additional members of their committee.

Chief Justice to preside

(3) Each Chief Justice, or a member designated by them, is to preside over their committee.

2024, c. 16, s. 84.

Confidences of the Queen’s Privy Council for Canada

Objection relating to a confidence of the Queen’s Privy Council

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen’s Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), ***a confidence of the Queen’s Privy Council for Canada*** includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Definition of *Council*

(3) For the purposes of subsection (2), ***Council*** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

R.S., 1985, c. C-5, s. 39; 1992, c.1, s. 144(F).

Journalistic Sources

Definitions

39.1 (1) The following definitions apply in this section.

document has the same meaning as in section 487.011 of the *Criminal Code*. (*document*)

journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person. (*journaliste*)

journalistic source means a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source. (*source journalistique*)

Objection

(2) Subject to subsection (7), a journalist may object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source.

Former journalist

(3) For the purposes of subsections (2) and (7), ***journalist*** includes an individual who was a journalist when information that identifies or is likely to identify the journalistic source was transmitted to that individual.

Power of court, person or body

(4) The court, person or body may raise the application of subsection (2) on their own initiative.

Objection of court, person or body

(5) When an objection or the application of subsection (2) is raised, the court, person or body shall ensure that the information or document is not disclosed other than in accordance with this section.

Observations

(6) Before determining the question, the court, person or body must give the parties and interested persons a reasonable opportunity to present observations.

Authorization

(7) The court, person or body may authorize the disclosure of information or a document only if they consider that

(a) the information or document cannot be produced in evidence by any other reasonable means; and

(b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things,

(i) the importance of the information or document to a central issue in the proceeding,

(ii) freedom of the press, and

(iii) the impact of disclosure on the journalistic source and the journalist.

Conditions

(8) An authorization under subsection (7) may contain any conditions that the court, person or body considers appropriate to protect the identity of the journalistic source.

Burden of proof

(9) A person who requests the disclosure has the burden of proving that the conditions set out in subsection (7) are fulfilled.

Appeal

(10) An appeal lies from a determination under subsection (7)

(a) to the Federal Court of Appeal from a determination of the Federal Court;

(b) to the court of appeal of a province from a determination of a superior court of the province;

(c) to the Federal Court from a determination of a court, person or body vested with power to compel production by or under an Act of Parliament if the court, person or body is not established under a law of a province; or

(d) to the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

Limitation period for appeal

(11) An appeal under subsection (10) shall be brought within 10 days after the date of the determination appealed from or within any further time that the court having jurisdiction to hear the appeal considers appropriate in the circumstances.

Hearing in summary way

(12) An appeal under subsection (10) shall be heard and determined without delay and in a summary way.

2017, c. 22, s. 2.

Provincial Laws of Evidence

How applicable

40 In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

R.S., c. E-10, s. 37.

Statutory Declarations

Solemn declaration

41 Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:

I, ..., solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me ..... at ..... this ..... day of ..... 19.....

R.S., 1985, c. C-5, s. 41; R.S., 1985, c. 27 (1st Supp.), s. 203.

Insurance Proofs

Affidavits, etc.

42 Any affidavit, solemn affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, before any justice of the peace or before any notary public for any province, and the commissioner, person, justice of the peace or notary public is required to take the affidavit, solemn affirmation or declaration.

R.S., c. E-10, s. 39.

Part II

Application

Foreign courts

43 This Part applies to the taking of evidence relating to proceedings in courts out of Canada.

R.S., c. E-10, s. 40.

Interpretation

Definitions

44 In this Part,

cause includes a proceeding against a criminal; (*cause*)

court means any superior court in any province; (*tribunal*)

judge means any judge of any superior court in any province; (*juge*)

oath includes a solemn affirmation in cases in which, by the law of Canada, or of a province, as the case may be, a solemn affirmation is allowed instead of an oath. (*serment*)

R.S., c. E-10, s. 41; 1984, c. 40, s. 27.

Construction

45 This Part shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof.

R.S., c. E-10, s. 42.

Procedure

Order for examination of witness in Canada

46 (1) If, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal outside Canada, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or their discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness.

Video links, etc.

(2) For greater certainty, testimony for the purposes of subsection (1) may be given by means of technology that permits the virtual presence of the party or witness before the court or tribunal outside Canada or that permits that court or tribunal, and the parties, to hear and examine the party or witness.

R.S., 1985, c. C-5, s. 46; 1999, c. 18, s. 89.

Enforcement of the order

47 On the service on the party or witness of an order referred to in section 46, and of an appointment of a time and place for the examination of the party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, by one of the persons named, and on payment or tender of the like conduct money as is properly payable on attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a cause pending in that court or before that judge.

R.S., c. E-10, s. 44.

Expenses and conduct money

48 Every person whose attendance is required in the manner described in section 47 is entitled to the like conduct money and payment for expenses and loss of time as on attendance at a trial.

R.S., c. E-10, s. 45.

Administering oath

49 On any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one person is authorized, by one of those persons.

R.S., c. E-10, s. 46.

Right of refusal to answer or produce document

50 (1) Any person examined under any order made under this Part has the like right to refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, the order is made.

Laws about witnesses to apply — video links etc.

(1.1) Despite subsection (1), when a party or witness gives evidence under subsection 46(2), the evidence shall be given as though they were physically before the court or tribunal outside Canada, for the purposes of the laws relating to evidence and procedure but only to the extent that giving the evidence would not disclose information otherwise protected by the Canadian law of non-disclosure of information or privilege.

Contempt of court in Canada

(1.2) When a party or witness gives evidence under subsection 46(2), the Canadian law relating to contempt of court applies with respect to a refusal by the party or witness to answer a question or to produce a writing or document referred to in subsection 46(1), as ordered under that subsection by the court or judge.

Nature of right

(2) No person shall be compelled to produce, under any order referred to in subsection (1), any writing or other document that he could not be compelled to produce at a trial of such a cause.

R.S., 1985, c. C-5, s. 50; 1999, c. 18, s. 90.

Rules of court

51 (1) The court may frame rules and orders in relation to procedure and to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

Letters rogatory

(2) In the absence of any order in relation to the evidence to be produced in support of the application referred to in subsection (1), letters rogatory from a court or tribunal outside Canada in which the civil, commercial or criminal matter is pending, are deemed and taken to be sufficient evidence in support of the application.
R.S., 1985, c. C-5, s. 51; 1999, c. 18, s. 91.

Part III

Application

Application of this Part

52 This Part extends to the following classes of persons:

(a) officers of any of Her Majesty's diplomatic or consular services while performing their functions in any foreign country, including ambassadors, envoys, ministers, charges d'affaires, counsellors, secretaries, attaches, consuls general, consuls, vice-consuls, pro-consuls, consular agents, acting consuls general, acting consuls, acting vice-consuls and acting consular agents;

(b) officers of the Canadian diplomatic, consular and representative services while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (a), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries;

(c) Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

(d) honorary consular officers of Canada while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;

(e) judicial officials in a foreign country in respect of oaths, affidavits, solemn affirmations, declarations or similar documents that the official is authorized to administer, take or receive; and

(f) persons locally engaged and designated by the Deputy Minister of Foreign Affairs or any other person authorized by that Deputy Minister while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada.

R.S., 1985, c. C-5, s. 52; 1994, c. 44, s. 92; 1997, c. 18, s. 118.

Oaths and Solemn Affirmations

Oaths taken abroad

53 Oaths, affidavits, solemn affirmations or declarations administered, taken or received outside Canada by any person mentioned in section 52 are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to administer, take or receive oaths, affidavits, solemn affirmations or declarations therein that are valid and effectual under this Act.

R.S., c. E-10, s. 50.

Documentary Evidence

Documents to be admitted in evidence

54 (1) Any document that purports to have affixed, impressed or subscribed on it or to it the signature of any person authorized by any of paragraphs 52(a) to (d) to administer, take or receive oaths, affidavits, solemn affirmations or declarations, together with their seal or with the seal or stamp of their office, or the office to which the person is attached, in testimony of any oath, affidavit, solemn affirmation or declaration being administered, taken or received by the person, shall be admitted in evidence, without proof of the seal or stamp or of the person's signature or official character.

Status of statements

(2) An affidavit, solemn affirmation, declaration or other similar statement taken or received in a foreign country by an official referred to in paragraph 52(e) shall be admitted in evidence without proof of the signature or official character of the official appearing to have signed the affidavit, solemn affirmation, declaration or other statement.

R.S., 1985, c. C-5, s. 54; 1994, c. 44, s. 93.

SCHEDULE

(Paragraph 38.01(6)(d), subsections 38.01(8) and 38.02(1.1) and section 38.2)

Designated Entities

1 A judge of the Federal Court, for the purposes of section 21 of the *Canadian Security Intelligence Service Act*

2 [Repealed, 2024, c. 16, s. 86]

3 A judge of the Federal Court, the Federal Court of Appeal or the Immigration Division or Immigration Appeal Division of the Immigration and Refugee Board, for the purposes of sections 77 to 87.1 of the *Immigration and Refugee Protection Act*

4 [Repealed, 2024, c. 16, s. 86]

5 to 8 [Repealed, 2001, c. 41, s. 124]

9 A board of inquiry convened under section 45 of the *National Defence Act*

10 A court martial or a military judge for the purposes of Part III of the *National Defence Act*

11 The Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*, for the purposes of a grievance process under the *Federal Public Sector Labour Relations Act* with respect to an employee of the Canadian Security Intelligence Service, with the exception of any information provided to the Board by the employee

12 The Information Commissioner, for the purposes of the *Access to Information Act*

13 The Privacy Commissioner, for the purposes of the *Privacy Act*

14 The Privacy Commissioner, for the purposes of the *Personal Information Protection and Electronic Documents Act*

15 A judge of the Federal Court, for the purposes of section 41 of the *Access to Information Act*

16 A judge of the Federal Court, for the purpose of sections 41 to 43 of the *Privacy Act*

17 A judge of the Federal Court, for the purpose of sections 14 to 17 of the *Personal Information Protection and Electronic Documents Act*

18 The National Security and Intelligence Review Agency, for the purposes of sections 16 to 19 of the *National Security and Intelligence Review Agency Act*, with the exception of any information provided to the Agency by the complainant or an individual who has been denied a security clearance

19 The Public Sector Integrity Commissioner, for the purposes of sections 26 to 35 of the *Public Servants Disclosure Protection Act*

20 [Repealed, 2019, c. 13, s. 61]

21 [Repealed, 2024, c. 16, s. 86]

22 The Civilian Review and Complaints Commission for the Royal Canadian Mounted Police, for the purposes of the *Royal Canadian Mounted Police Act*, but only in relation to information that is under the control, or in the possession, of the Royal Canadian Mounted Police or the Central Authority, as the case may be.

23 The Public Inquiry into Foreign Interference in Federal Electoral Processes and Democratic Institutions, for the purposes of that inquiry, except if the hearing is open to the public

2001, c. 41, ss. 44, 124; 2003, c. 22, s. 105; SOR/2004-19; 2005, c. 46, s. 56; 2006, c. 9, s. 222; SOR/2006-80, 335; 2008, c. 3, s. 11; SOR/2012-220; 2013, c. 18, ss. 45, 85, c. 40, s. 448; 2015, c. 20, s. 13, c. 36, s. 43; 2017, c. 9, s. 41; 2019, c. 13, s. 20; 2019, c. 13, s. 61; 2019, c. 15, s. 54; 2019, c. 18, s. 60; SOR/2023-205, s. 1; 2024, c. 16, s. 85; 2024, c. 16, s. 86.

TAB 13

CanLII

Secure Electronic Signature Regulations, SOR/2005-30

Current version: in force since 2011-03-10

Link to the latest version: https://canlii.ca/t/7z2l

Stable link to this version: https://canlii.ca/t/l75h

Citation to this version: Secure Electronic Signature Regulations, SOR/2005-30, <https://canlii.ca/t/l75h> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Secure Electronic Signature Regulations

SOR/2005-30

CANADA EVIDENCE ACT

PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

Registration 2005-02-01

Secure Electronic Signature Regulations

P.C. 2005-57 2005-02-01

Whereas the Governor in Council is satisfied that the technology or process prescribed in the annexed *Secure Electronic Signature Regulations* can be proved to meet the requirements set out in paragraphs 48(2)(a) to (d) of the *Personal Information Protection and Electronic Documents Act*[a];

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Treasury Board, pursuant to subsection 48(1) of the *Personal Information Protection and Electronic Documents Act*[a] and paragraph 31.4(a)[b] of the *Canada Evidence Act*, hereby makes the annexed *Secure Electronic Signature Regulations*.

[a]S.C. 2000, c. 5

[b]S.C. 2000, c. 5, s. 56

Interpretation

1 The following definitions apply in these Regulations.

Act means the *Personal Information Protection and Electronic Documents Act*. (*Loi*)

asymmetric cryptography means a cryptographic system that relies on key pairs. (*système de chiffrement à clé publique*)

certification authority means a person or entity that issues digital signature certificates and that is listed as such on the website of the Treasury Board Secretariat. (*autorité de certification*)

digital signature certificate, in respect of a person, means an electronic document that

(a) identifies the certification authority that issued it and is digitally signed by that certification authority;

(b) identifies, or can be used to identify, the person; and

(c) contains the person's public key. (*certificat de signature numérique*)

entity includes any federal department, branch, office, board, agency, commission, corporation or body for the administration of the affairs of which a minister of the Crown is accountable to Parliament. (*entité*)

hash function means an electronic one-way mathematical process that converts data contained in an electronic document into a message digest that is unique to that data in a way that, were that data changed, it would, on conversion, result in a changed message digest. (*fonction de hachage*)

key pair means a pair of keys held by or for a person that includes a private key and a public key that are mathematically related to, but different from, each other. (*biclé*)

private key means a string of data that

(a) is used in asymmetric cryptography to encrypt data contained in an electronic document; and

(b) is unique to the person who is identified in, or can be identified through, a digital signature certificate and corresponds only to the public key in that certificate. (*clé privée*)

public key means a string of data contained in a digital signature certificate that

(a) is used in asymmetric cryptography to decrypt data contained in an electronic document that was encrypted through the application of the private key in the key pair; and

(b) corresponds only to the private key in the key pair. (*clé publique*)

SOR/2011-71, s. 1(E).

Technology or Process

2 For the purposes of the definition ***secure electronic signature*** in subsection 31(1) of the Act, a secure electronic signature in respect of data contained in an electronic document is a digital signature that results from completion of the following consecutive operations:

(a) application of the hash function to the data to generate a message digest;

(b) application of a private key to encrypt the message digest;

(c) incorporation in, attachment to, or association with the electronic document of the encrypted message digest;

(d) transmission of the electronic document and encrypted message digest together with either

(i) a digital signature certificate, or

(ii) a means of access to a digital signature certificate; and

(e) after receipt of the electronic document, the encrypted message digest and the digital signature certificate or the means of access to the digital signature certificate,

(i) application of the public key contained in the digital signature certificate to decrypt the encrypted message digest and produce the message digest referred to in paragraph (a),

(ii) application of the hash function to the data contained in the electronic document to generate a new message digest,

(iii) verification that, on comparison, the message digests referred to in paragraph (a) and subparagraph (ii) are identical, and

(iv) verification that the digital signature certificate is valid in accordance with section 3.

3 (1) A digital signature certificate is valid if, at the time when the data contained in an electronic document is digitally signed in accordance with section 2, the certificate

(a) is readable or perceivable by any person or entity who is entitled to have access to the digital signature certificate; and

(b) has not expired or been revoked.

(2) In addition to the requirements for validity set out in subsection (1), when the digital signature certificate is supported by other digital signature certificates, in order for the digital signature certificate to be valid, the supporting certificates must also be valid in accordance with that subsection.

4 (1) Before recognizing a person or entity as a certification authority, the President of the Treasury Board must verify that the person or entity has the capacity to issue digital signature certificates in a secure and reliable manner within the context of these Regulations and paragraphs 48(2)(a) to (d) of the Act.

(2) Every person or entity that is recognized as a certification authority by the President of the Treasury Board shall be listed on the website of the Treasury Board Secretariat.

Presumption

5 When the technology or process set out in section 2 is used in respect of data contained in an electronic document, that data is presumed, in the absence of evidence to the contrary, to have been signed by the person who is identified in, or can be identified through, the digital signature certificate.

Coming into Force

6 These Regulations come into force on the day on which they are registered.

TAB 14

CanLII

Regulations Specifying Investigative Bodies, SOR/2001-6

This regulation is repealed, spent or not in force since 2016-03-29.

Past version: in force between 2008-05-15 and 2016-03-29

Link to the latest version: https://canlii.ca/t/7xrc

Stable link to this version: https://canlii.ca/t/l6kt

Citation to this version: Regulations Specifying Investigative Bodies, SOR/2001-6, <https://canlii.ca/t/l6kt> retrieved on 2026-01-06

Currency: This regulation is current to 2025-11-27 according to the Justice Laws Web Site

Regulations Specifying Investigative Bodies

SOR/2001-6

PERSONAL INFORMATION PROTECTION AND ELECTRONIC DOCUMENTS ACT

Registration 2000-12-13

Regulations Specifying Investigative Bodies

P.C. 2000-1776 2000-12-13

Her Excellency the Governor General in Council, on the recommendation of the Minister of Industry, pursuant to paragraph 26(1)(*a.01*) of the *Personal Information Protection and Electronic Documents Act*[a], hereby makes the annexed *Regulations Specifying Investigative Bodies*.

[a]S.C. 2000, c. 5

INVESTIGATIVE BODIES

1. The following investigative bodies are specified, by name or by class, for the purposes of paragraphs 7(3)(*d*) and (*h.2*) of the *Personal Information Protection and Electronic Documents Act*:

(*a*) Investigative Services, a division of Insurance Bureau of Canada;

(*b*) the Bank Crime Prevention and Investigation Office of the Canadian Bankers Association;

(*c*) the College of Audiologists and Speech-Language Pathologists of Ontario;

(*d*) the College of Chiropodists of Ontario;

(*e*) the College of Chiropractors of Ontario;

(*f*) the College of Dental Hygienists of Ontario;

(*g*) the College of Dental Technologists of Ontario;

(*h*) the College of Denturists of Ontario;

(*i*) the College of Dietitians of Ontario;

(*j*) the College of Massage Therapists of Ontario;

(*k*) the College of Medical Laboratory Technologists of Ontario;

(*l*) the College of Medical Radiation Technologists of Ontario;

(*m*) the College of Midwives of Ontario;

(*n*) the College of Nurses of Ontario;

(*o*) the College of Occupational Therapists of Ontario;

(*p*) the College of Opticians of Ontario;

(*q*) the College of Optometrists of Ontario;

(*r*) the Ontario College of Pharmacists;

(*s*) the College of Physicians and Surgeons of Ontario;

(*t*) the College of Physiotherapists of Ontario;

(*u*) the College of Psychologists of Ontario;

(*v*) the College of Respiratory Therapists of Ontario;

(*w*) a corporation or other body

(i) that is licensed by a province to engage in the business of providing private investigators or detectives and that has a privacy code that is compliant with the Canadian Standards Association Standard CAN/CSA-Q830-96, *Model Code for the Protection of Personal Information*, as amended from time to time, and

(ii) that is a member in good standing of a professional association that represents the interests of private investigators or detectives and that has such a privacy code;

(*x*) a corporation or other body

(i) that is licensed by a province to engage in the business of providing insurance adjusters and that has a privacy code that is compliant with the Canadian Standards Association Standard CAN/CSA-Q830-96, *Model Code for the Protection of Personal Information*, as amended from time to time, or

(ii) that is a member in good standing of a professional association that represents the interests of insurance or claims adjusters and that has such a privacy code;

(*y*) the Certified General Accountants Association of Alberta;

(*z*) the Certified General Accountants Association of British Columbia;

(*z.1*) the Certified General Accountants Association of Manitoba;

(*z.2*) the Certified General Accountants Association of New Brunswick;

(*z.3*) the Certified General Accountants Association of Nova Scotia;

(*z.4*) the Certified General Accountants Association of Newfoundland and Labrador;

(*z.5*) the Certified General Accountants Association of Ontario;

(*z.6*) the Certified General Accountants Association of Prince Edward Island;

(*z.7*) the Certified General Accountants Association of Saskatchewan;

(*z.8*) the Certified General Accountants Association of Northwest Territories-Nunavut;

(*z.9*) the Certified General Accountants Association of Yukon;

(*z.10*) the Credit Union Office of Crime Prevention and Investigation of the Credit Union Central of Canada;

(*z.11*) the Law Society of Alberta;

(*z.12*) the Law Society of Manitoba;

(*z.13*) the Law Society of the Northwest Territories;

(*z.14*) the Law Society of New Brunswick;

(*z.15*) the Law Society of Newfoundland;

(*z.16*) the Law Society of Saskatchewan;

(*z.17*) the Law Society of Upper Canada;

(*z.18*) the Law Society of Yukon;

(*z.19*) l'Ordre des comptables généraux licenciés du Québec;

(*z.20*) the Nova Scotia Barristers' Society;

(*z.21*) the Ontario College of Social Workers and Social Service Workers;

(*z.22*) the Royal College of Dental Surgeons of Ontario;

(*z.23*) Teranet Services Inc.;

(*z.24*) Alberta Dental Association and College;

(*z.25*) Association of Ontario Land Surveyors;

(*z.26*) Board of Funeral Services;

(*z.27*) Canadian Association of Insolvency and Restructuring Professionals;

(*z.28*) College of Physicians and Surgeons of Manitoba;

(*z.29*) College of Veterinarians of Ontario;

(*z.30*) Ontario Association of Architects;

(*z.31*) Ontario College of Teachers;

(*z.32*) Ontario Motor Vehicle Industry Council;

(*z.33*) Ontario Professional Foresters Association;

(*z.34*) Association of Professional Engineers of Yukon;

(*z.35*) Association of Professional Engineers and Geoscientists of the Province of British Columbia;

(*z.36*) Association of Professional Engineers, Geologists and Geophysicists of Alberta;

(*z.37*) Association of Professional Engineers, Geologists and Geophysicists of the Northwest Territories;

(*z.38*) Association of Professional Engineers and Geoscientists of Saskatchewan;

(*z.39*) Association of Professional Engineers and Geoscientists of the Province of Manitoba;

(*z.40*) Association of Professional Engineers of Ontario;

(*z.41*) Ordre des ingénieurs du Québec;

(*z.42*) Association of Professional Engineers and Geoscientists of New Brunswick;

(*z.43*) Association of Professional Engineers of the Province of Nova Scotia;

(*z.44*) Association of Professional Engineers of Prince Edward Island;

(*z.45*) Association of Professional Engineers and Geoscientists of Newfoundland;

(*z.46*) Real Estate Council of Alberta;

(*z.47*) Real Estate Council of Ontario;

(*z.48*) Technical Standards & Safety Authority;

(*z.49*) Travel Industry Council of Ontario;

(*z.50*) College of Registered Nurses of Nova Scotia;

(*z.51*) Association of Professional Geoscientists of Ontario;

(*z.52*) Ordre des géologues du Québec;

(*z.53*) College of Alberta Psychologists;

(*z.54*) College of Physicians and Surgeons of Alberta;

(*z.55*) College of Physicians and Surgeons of Nova Scotia;

(*z.56*) Investment Dealers Association of Canada;

(*z.57*) Mutual Fund Dealers Association of Canada; and

(*z.58*) Registered Insurance Brokers of Ontario.

SOR/2004-60, s. 1; SOR/2005-34, s. 1; SOR/2006-159, s. 1; SOR/2008-155, s. 1.

COMING INTO FORCE

2. These Regulations come into force on January 1, 2001.

TAB 15

CanLII

Judicial Review Procedure Act, RSO 1990, c J.1

Current version: in force since 2020-07-08

Link to the latest version: https://canlii.ca/t/2g8

Stable link to this version: https://canlii.ca/t/54c9h

Citation to this version: Judicial Review Procedure Act, RSO 1990, c J.1, <https://canlii.ca/t/54c9h> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-22

Judicial Review Procedure Act

R.S.O. 1990, CHAPTER J.1

Consolidation Period: From July 8, 2020 to the e-Laws currency date.

Last amendment: 2020, c. 11, Sched. 10.

Definitions

1 In this Act,

"application for judicial review" means an application under subsection 2 (1); ("requête en révision judiciaire")

"court" means the Superior Court of Justice; ("Cour")

"licence" includes any permit, certificate, approval, registration or similar form of permission required by law; ("autorisation")

"municipality" has the same meaning as in the *Municipal Affairs Act*; ("municipalité")

"party" includes a municipality, association of employers, a trade union or council of trade unions which may be a party to any of the proceedings mentioned in subsection 2 (1); ("partie")

"statutory power" means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(b) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party; ("compétence légale")

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court. ("compétence légale de décision") R.S.O. 1990, c. J.1, s. 1; 2002, c. 17, Sched. F, Table; 2006, c. 19, Sched. C, s. 1 (1).

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

Error of law

(2) The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision. R.S.O. 1990, c. J.1, s. 2 (2).

Lack of evidence

(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review. R.S.O. 1990, c. J.1, s. 2 (3).

Power to set aside

(4) Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision. R.S.O. 1990, c. J.1, s. 2 (4).

Power to refuse relief

(5) The court may refuse to grant any relief on an application for judicial review. 2020, c. 11, Sched. 10, s. 1.

(6) Repealed: 2020, c. 11, Sched. 10, s. 1.

Defects in form, technical irregularities

3 On an application for judicial review in relation to a statutory power of decision, where the sole ground for relief established is a defect in form or a technical irregularity, if the court finds that no substantial wrong or miscarriage of justice has occurred, the court may refuse relief and, where the decision has already been made, may make an order validating the decision, despite such defect, to have effect from such time and on such terms as the court considers proper. R.S.O. 1990, c. J.1, s. 3.

Interim order

4 On an application for judicial review, the court may make such interim order as it considers proper pending the final determination of the application. R.S.O. 1990, c. J.1, s. 4.

Time for bringing application

5 (1) Unless another Act provides otherwise, an application for judicial review shall be made no later than 30 days after the date the decision or matter for which judicial review is being sought was made or occurred, subject to subsection (2). 2020, c. 11, Sched. 10, s. 2.

Extension

(2) The court may, on such terms as it considers proper, extend the time for making an application for judicial review if it is satisfied that there are apparent grounds for relief and that no substantial prejudice or hardship will result to any person affected by reason of the delay. 2020, c. 11, Sched. 10, s. 2.

Same, other Acts

(3) Subsection (2) applies with respect to any limitation of time for the bringing of an application for judicial review under any other Act, unless that Act expressly provides otherwise. 2020, c. 11, Sched. 10, s. 2.

Transition

(4) Subsection (1) applies with respect to the judicial review of a decision that is made or of a matter that occurs on or after the day section 2 of Schedule 10 to the *Smarter and Stronger Justice Act, 2020* comes into force. 2020, c. 11, Sched. 10, s. 2.

Application to Divisional Court

6 (1) Subject to subsection (2), an application for judicial review shall be made to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (1).

Application to judge of Superior Court of Justice

(2) An application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, which may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice. R.S.O. 1990, c. J.1, s. 6 (2); 2006, c. 19, Sched. C, s. 1 (1).

Transfer to Divisional Court

(3) Where a judge refuses leave for an application under subsection (2), he or she may order that the application be transferred to the Divisional Court. R.S.O. 1990, c. J.1, s. 6 (3).

Appeal to Court of Appeal

(4) An appeal lies to the Court of Appeal, with leave of the Court of Appeal, from a final order of the Superior Court of Justice disposing of an application for judicial review pursuant to leave granted under subsection (2). R.S.O. 1990, c. J.1, s. 6 (4); 2006, c. 19, Sched. C, s. 1 (1).

Summary disposition of mandamus, etc.

7 An application for an order in the nature of mandamus, prohibition or certiorari shall be deemed to be an application for judicial review and shall be made, treated and disposed of as if it were an application for judicial review. R.S.O. 1990, c. J.1, s. 7.

Summary disposition of actions

8 Where an action for a declaration or injunction, or both, whether with or without a claim for other relief, is brought and the exercise, refusal to exercise or proposed or purported exercise of a statutory power is an issue in the action, a judge of the Superior Court of Justice may on the application of any party to the action, if he or she considers it appropriate, direct that the action be treated and disposed of summarily, in so far as it relates to the exercise, refusal to exercise or proposed or purported exercise of such power, as if it were an application for judicial review and may order that the hearing on such issue be transferred to the Divisional Court or may grant leave for it to be disposed of in accordance with subsection 6 (2). R.S.O. 1990, c. J.1, s. 8; 2006, c. 19, Sched. C, s. 1 (1).

Sufficiency of application

9 (1) It is sufficient in an application for judicial review if the applicant sets out in the notice of application the grounds on which the applicant is seeking relief and the nature of the relief. 2020, c. 11, Sched. 10, s. 3.

Exerciser of power may be a party

(2) For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application. R.S.O. 1990, c. J.1, s. 9 (2).

Idem

(3) For the purposes of subsection (2), any two or more persons who, acting together, may exercise a statutory power, whether styled a board or commission or by any other collective title, shall be deemed to be a person under such collective title. R.S.O. 1990, c. J.1, s. 9 (3).

Notice to Attorney General

(4) Notice of an application for judicial review shall be served upon the Attorney General who is entitled as of right to be heard in person or by counsel on the application. R.S.O. 1990, c. J.1, s. 9 (4).

Record to be filed in court

10 When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made. R.S.O. 1990, c. J.1, s. 10.

References in other Acts, etc.

11 (1) Subject to subsection (2), where reference is made in any other Act or in any regulation, rule or by-law to any of the proceedings enumerated in subsection 2 (1), such reference shall be read and construed to include a reference to an application for judicial review. R.S.O. 1990, c. J.1, s. 11 (1).

Proceedings under *Habeas Corpus Act*

(2) Nothing in this Act affects proceedings under the *Habeas Corpus Act* or the issue of a writ of certiorari thereunder or proceedings pursuant thereto, but an application for judicial review may be brought in aid of an application for a writ of *habeas corpus*. R.S.O. 1990, c. J.1, s. 11 (2).

TAB 16

CanLII

Courts of Justice Act, RSO 1990, c C.43

An amendment made by SO 2021, c 34 and enacted on 2021-12-02 came into force retroactively on 2021-09-01. This may affect one or more past versions of this Act.

Current version: in force since 2025-12-11

Link to the latest version:	https://canlii.ca/t/9m
Stable link to this version:	https://canlii.ca/t/56mjs
Citation to this version:	Courts of Justice Act, RSO 1990, c C.43, <https://canlii.ca/t/56mjs> retrieved on 2026-01-06
Currency:	Last updated from the e-Laws site on 2025-12-22

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From December 11, 2025 to the e-Laws currency date.

Last amendment: 2025, c. 24, Sched. 7.

Definitions

1 (1) In this Act,

"action" means a civil proceeding that is not an application and includes a proceeding commenced by,

(a) claim,

(b) statement of claim,

(c) notice of action,

(d) counterclaim,

(e) crossclaim,

(f) third or subsequent party claim, or

(g) divorce petition or counterpetition; ("action")

"application" means a civil proceeding that is commenced by notice of application or by application; ("requête")

"defendant" means a person against whom an action is commenced; ("défendeur")

"hearing" includes a trial; ("audience")

"motion" means a motion in a proceeding or an intended proceeding; ("motion")

"order" includes a judgment or decree; ("ordonnance")

"plaintiff" means a person who commences an action; ("demandeur")

"region" means a region prescribed under section 79.1. ("région") R.S.O. 1990, c. C.43, s. 1; 1993, c. 27, Sched.; 2006, c. 21, Sched. A, s. 1.

Interpretation, judge not to include associate judge

(1.1) A reference made to a judge under this Act does not include a reference to an associate judge. 2021, c. 4, Sched. 3, s. 1.

Application to other Acts

(2) This section applies to all other Acts affecting or relating to the courts and the administration of justice. 2006, c. 21, Sched. F, s. 106.

References to former names of courts

In English

1.1 (1) A reference in the English version of an Act, rule or regulation to a court or official by the former name of that court or the former title of that official set out in Column 1 of the following table or by a shortened version of that name or title is deemed, unless a contrary intention appears, to be a

reference to the new name of that court or the new title of that official set out in Column 2.

TABLE

Column 1 Former names and titles	Column 2 New names and titles
Ontario Court of Justice	Court of Ontario
Ontario Court (General Division)	Superior Court of Justice
Ontario Court (Provincial Division)	Ontario Court of Justice
Chief Justice of the Ontario Court of Justice	Chief Justice of the Superior Court of Justice
Associate Chief Justice of the Ontario Court of Justice	Associate Chief Justice of the Superior Court of Justice
Associate Chief Justice (Family Court) of the Ontario Court of Justice	Associate Chief Justice (Family Court) of the Superior Court of Justice
Chief Judge of the Ontario Court (Provincial Division)	Chief Justice of the Ontario Court of Justice
Associate Chief Judge of the Ontario Court (Provincial Division)	Associate Chief Justice of the Ontario Court of Justice
Associate Chief Judge-Co-ordinator of Justices of the Peace	Associate Chief Justice Co-ordinator of Justices of the Peace
Accountant of the Ontario Court	Accountant of the Superior Court of Justice

2017, c. 20, Sched. 11, s. 7.

In French

(2) A reference in the French version of an Act, rule or regulation to a court or official by the former name of that court or the former title of that official set out in Column 1 of the following table or by a shortened version of that name or title is deemed, unless a contrary intention appears, to be a reference to the new name of that court or the new title of that official set out in Column 2.

TABLE

Column 1 Former names and titles	Column 2 New names and titles
Cour de justice de l’Ontario	Cour de l’Ontario
Cour de l’Ontario (Division générale)	Cour supérieure de justice
Cour de l’Ontario (Division provinciale)	Cour de justice de l’Ontario
Juge en chef de la Cour de justice de l’Ontario	Juge en chef de la Cour supérieure de justice
Juge en chef adjoint de la Cour de justice de l’Ontario	Juge en chef adjoint de la Cour supérieure de justice
Juge en chef adjoint (Cour de la famille) de la Cour de justice de l’Ontario	Juge en chef adjoint (Cour de la famille) de la Cour supérieure de justice
Juge en chef de la Cour de l’Ontario (Division provinciale)	Juge en chef de la Cour de justice de l’Ontario
Juge en chef adjoint de la Cour de l’Ontario (Division provinciale)	Juge en chef adjoint de la Cour de justice de l’Ontario
Juge en chef adjoint-coordonnateur des juges de paix	Juge en chef adjoint et coordonnateur des juges de paix
Comptable de la Cour de l’Ontario	Comptable de la Cour supérieure de justice

2017, c. 20, Sched. 11, s. 7.

Newer references to Ontario Court of Justice

(3) Subsections (1) and (2) do not apply to references to the Ontario Court of Justice enacted or made on or after April 19, 1999. 2017, c. 20, Sched. 11, s. 7.

PART I
COURT OF APPEAL FOR ONTARIO

Court of Appeal

2 (1) The Court of Appeal for Ontario is continued as a superior court of record under the name Court of Appeal for Ontario in English and Cour d'appel de l'Ontario in French.

Same

(2) The Court of Appeal has the jurisdiction conferred on it by this or any other Act, and in the exercise of its jurisdiction has all the powers historically exercised by the Court of Appeal for Ontario. R.S.O. 1990, c. C.43, s. 2.

Composition of court

3 (1) The Court of Appeal shall consist of,

(a) the Chief Justice of Ontario, who shall be president of the court;

(b) the Associate Chief Justice of Ontario; and

(c) fourteen other judges.

Same

(2) The Lieutenant Governor in Council may by regulation increase the number of judges of the Court of Appeal who are in addition to the Chief Justice and the Associate Chief Justice.

Additional judges

(3) There shall be such additional offices of judge of the Court of Appeal as are from time to time required, to be held by Chief Justices of Ontario and Associate Chief Justices of Ontario who have elected under the *Judges Act* (Canada) to perform only the duties of a judge of the Court of Appeal.

Supernumerary judges

(4) There shall be such additional offices of supernumerary judge of the Court of Appeal as are from time to time required, to be held by judges of the Court of Appeal who have elected under the *Judges Act* (Canada) to hold office only as a supernumerary judge of the court. R.S.O. 1990, c. C.43, s. 3.

Assignment of judges from Superior Court of Justice

4 (1) The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court of Justice, may assign a judge of the Superior Court of Justice to perform the work of a judge of the Court of Appeal. R.S.O. 1990, c. C.43, s. 4 (1); 1996, c. 25, s. 9 (14, 17).

Superior Court of Justice judges

(2) A judge of the Superior Court of Justice is, by virtue of his or her office, a judge of the Court of Appeal and has all the jurisdiction, power and authority of a judge of the Court of Appeal. R.S.O. 1990, c. C.43, s. 4 (2); 1996, c. 25, s. 9 (17).

Powers and duties of Chief Justice

5 (1) The Chief Justice of Ontario has general supervision and direction over the sittings of the Court of Appeal and the assignment of the judicial duties of the court.

Absence of Chief Justice

(2) If the Chief Justice of Ontario is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of Ontario.

Absence of Associate Chief Justice

(3) If the Chief Justice of Ontario and the Associate Chief Justice of Ontario are both absent from Ontario or for any reason unable to act, the powers and duties of the Chief Justice shall be exercised and performed by a judge of the Court of Appeal designated by the Chief Justice or Associate Chief Justice. R.S.O. 1990, c. C.43, s. 5.

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except,

(i) an order referred to in clause 19 (1) (a) or (a.1), or

(ii) an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1; 2020, c. 25, Sched. 2, s. 1 (1).

Leave not required for second appeal

(1.0.1) Despite clause (1) (a), leave of the Court of Appeal is not required in the case of an order of the Divisional Court on an appeal under Part V or VIII of the *Child, Youth and Family Services Act, 2017*. 2020, c. 25, Sched. 2, s. 1 (2); 2021, c. 34, Sched. 4, s. 1.

Leave required for second appeal

(1.1) Despite clause (1) (b), a final order of a judge of the Superior Court of Justice made on a first appeal from an order described in subsection (1.2) may be appealed to the Court of Appeal only with leave from the Court of Appeal, as provided in the rules of court. 2020, c. 25, Sched. 2, s. 1 (3).

Same

(1.2) The orders mentioned in subsection (1.1) are orders of the Ontario Court of Justice under any of the following statutes or statutory provisions:

1. The *Change of Name Act*.
2. The *Children's Law Reform Act*, except sections 59 and 60.
3. Section 6 of the *Marriage Act*. 2020, c. 25, Sched. 2, s. 1 (3).

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Same

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to

the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Transition

(4) This section, as it read immediately before the day subsection 1 (1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

(a) any case in which a notice of appeal was filed before that day; and

(b) any further appeals or proceedings arising from a case described in clause (a). 2020, c. 25, Sched. 2, s. 1 (4).

Composition of court

Hearings

7 (1) A proceeding in the Court of Appeal shall be heard and determined by not fewer than three judges sitting together, and always by an uneven number of judges.

Motions

(2) A motion in the Court of Appeal and an appeal under clause 6 (1) (c) shall be heard and determined by one judge.

Same

(3) Subsection (2) does not apply to a motion for leave to appeal, a motion to quash an appeal or any other motion that is specified by the rules of court.

Same

(4) A judge assigned to hear and determine a motion may adjourn the motion to a panel of the Court of Appeal.

Same

(5) A panel of the Court of Appeal may, on motion, set aside or vary the decision of a judge who hears and determines a motion. R.S.O. 1990, c. C.43, s. 7.

References to Court of Appeal

8 (1) The Lieutenant Governor in Council may refer any question to the Court of Appeal for hearing and consideration. R.S.O. 1990, c. C.43, s. 8 (1).

Opinion of court

(2) The court shall certify its opinion to the Lieutenant Governor in Council, accompanied by a statement of the reasons for it, and any judge who differs from the opinion may certify his or her opinion and reasons in the same manner. R.S.O. 1990, c. C.43, s. 8 (2).

Submissions by Attorney General

(3) On the hearing of the question, the Attorney General of Ontario is entitled to make submissions to the court. R.S.O. 1990, c. C.43, s. 8 (3).

Same

(4) The Attorney General of Canada shall be notified and is entitled to make submissions to the court if the question relates to the constitutional validity or constitutional applicability of an Act, or of a regulation or by-law made under an Act, of the Parliament of Canada or the Legislature. R.S.O. 1990, c. C.43, s. 8 (4).

Notice

(5) The court may direct that any person interested, or any one or more persons as representatives of a class of persons interested, be notified of the hearing and be entitled to make submissions to the court. R.S.O. 1990, c. C.43, s. 8 (5).

Appointment of counsel

(6) If an interest affected is not represented by counsel, the court may request counsel to argue on behalf of the interest and the reasonable expenses of counsel shall be paid by the Minister of Finance. R.S.O. 1990, c. C.43, s. 8 (6); 2006, c. 21, Sched. A, s. 2.

Appeal

(7) The opinion of the court shall be deemed to be a judgment of the court and an appeal lies from it as from a judgment in an action. R.S.O. 1990, c. C.43, s. 8 (7).

Meeting of judges

9 (1) The judges of the Court of Appeal shall meet at least once in each year, on a day fixed by the Chief Justice of Ontario, in order to consider this Act, the rules of court and the administration of justice generally. R.S.O. 1990, c. C.43, s. 9 (1).

(2) Repealed: 2009, c. 33, Sched. 2, s. 20 (1).

PART II
COURT OF ONTARIO

Court of Ontario

10 (1) The Ontario Court of Justice is continued under the name Court of Ontario in English and Cour de l'Ontario in French.

Divisions

(2) The Court of Ontario shall consist of two divisions, the Superior Court of Justice (formerly the Ontario Court (General Division)) and the Ontario Court of Justice (formerly the Ontario Court (Provincial Division)).

President

(3) The person who is the Chief Justice of the Superior Court of Justice shall also be the president of the Court of Ontario. 1996, c. 25, s. 9 (2).

Superior Court of Justice

Superior Court of Justice

11 (1) The Ontario Court (General Division) is continued as a superior court of record under the name Superior Court of Justice in English and Cour supérieure de justice in French. 1996, c. 25, s. 9 (3).

Same

(2) The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario. R.S.O. 1990, c. C.43, s. 11 (2); 1996, c. 25, s. 9 (17).

Composition of Superior Court of Justice

12 (1) The Superior Court of Justice consists of,

(a) the Chief Justice of the Superior Court of Justice, who shall be president of the Superior Court of Justice;

(b) the Associate Chief Justice of the Superior Court of Justice;

(c) a regional senior judge of the Superior Court of Justice for each region;

(d) the Senior Judge of the Family Court; and

(e) such number of judges of the Superior Court of Justice as is fixed under clause 53 (1) (a). 1998, c. 20, Sched. A, s. 22 (2).

(1.1) Repealed: 1998, c. 20, Sched. A, s. 1 (2).

(1.2) Repealed: 1998, c. 20, Sched. A, s. 1 (2).

(1.3) Repealed: 1998, c. 20, Sched. A, s. 1 (2).

Additional judges

(2) There shall be such additional offices of judge of the Superior Court of Justice as are from time to time required, to be held by Chief Justices of the Superior Court of Justice, Associate Chief Justices of the Superior Court of Justice and regional senior judges of the Superior Court of Justice who have elected under the *Judges Act* (Canada) to perform only the duties of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 12 (2); 1996, c. 25, s. 9 (14, 17).

Supernumerary judges

(3) There shall be such additional offices of supernumerary judge of the Superior Court of Justice as are from time to time required, to be held by judges of the Superior Court of Justice who have elected under the *Judges Act* (Canada) to hold office only as a supernumerary judge of that court. R.S.O. 1990, c. C.43, s. 12 (3); 1996, c. 25, s. 9 (15, 17).

Assignment of judges from Court of Appeal

13 (1) The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Superior Court of Justice, may assign a judge of the Court of Appeal to perform the work of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 13 (1); 1996, c. 25, s. 9 (14, 17).

Court of Appeal judges

(2) A judge of the Court of Appeal is, by virtue of his or her office, a judge of the Superior Court of Justice and has all the jurisdiction, power and authority of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 13 (2); 1996, c. 25, s. 9 (17).

Chief Justice, Associate Chief Justice and regional senior judges of Superior Court of Justice; Senior Judge of Family Court

Powers and duties of Chief Justice

14 (1) The Chief Justice of the Superior Court of Justice shall direct and supervise the sittings of the Superior Court of Justice and the assignment of its judicial duties. 1998, c. 20, Sched. A, s. 22 (3).

Regional senior judges

(2) A regional senior judge of the Superior Court of Justice shall, subject to the authority of the Chief Justice of the Superior Court of Justice, exercise the powers and perform the duties of the Chief Justice in respect of the Superior Court of Justice in his or her region. 1998, c. 20, Sched. A, s. 22 (3).

Delegation

(3) A regional senior judge of the Superior Court of Justice may delegate to a judge of the Superior Court of Justice in his or her region the authority to exercise specified functions. 1998, c. 20, Sched. A, s. 22 (3).

Absence of Chief Justice

(4) If the Chief Justice of the Superior Court of Justice is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of the Superior Court of Justice. 1998, c. 20, Sched. A, s. 22 (3).

Senior Judge of Family Court

(5) The Senior Judge of the Family Court shall,

(a) advise the Chief Justice of the Superior Court of Justice with regard to,

(i) the education of judges sitting in the Family Court,

(ii) practice and procedure, including mediation, in the Family Court,

(iii) the expansion of the Family Court, and

(iv) the expenditure of funds budgeted for the Family Court;

(b) meet from time to time with the community liaison committees and community resources committees established under sections 21.13 and

21.14; and

(c) perform other duties relating to the Family Court assigned to the Senior Judge of the Family Court by the Chief Justice. 1998, c. 20, Sched. A, s. 22 (3).

Small Claims Court Administrative Judge

(5.1) The Chief Justice of the Superior Court of Justice may delegate to the Small Claims Court Administrative Judge appointed under section 87.2 his or her powers and duties under subsection (1) in respect of the Small Claims Court, subject to such conditions or restrictions as he or she may specify. 2017, c. 2, Sched. 2, s. 1.

Absence of regional senior judge or Senior Judge of Family Court

(6) The powers and duties of a regional senior judge of the Superior Court of Justice and the Senior Judge of the Family Court when he or she is absent from Ontario or is for any reason unable to act shall be exercised and performed by a judge of the Superior Court of Justice designated by the Chief Justice of the Superior Court of Justice. 1998, c. 20, Sched. A, s. 22 (3).

Meetings with Associate Chief Justice, regional senior judges and Senior Judge of Family Court

(7) The Chief Justice of the Superior Court of Justice may hold meetings with the Associate Chief Justice, the regional senior judges and the Senior Judge of the Family Court in order to consider any matters concerning sittings of the Superior Court of Justice and the assignment of its judicial duties. 1998, c. 20, Sched. A, s. 22 (3); 2015, c. 27, Sched. 1, s. 1 (1).

Judges assigned to regions

15 (1) The Chief Justice of the Superior Court of Justice shall assign every judge of the Superior Court of Justice to a region and may re-assign a judge from one region to another. R.S.O. 1990, c. C.43, s. 15 (1); 1996, c. 25, s. 9 (14, 17).

At least one judge in each county

(2) There shall be at least one judge of the Superior Court of Justice assigned to each county and district. R.S.O. 1990, c. C.43, s. 15 (2); 1996, c. 25,

s. 9 (17).

High Court and District Court judges

(3) No judge of the Superior Court of Justice who was a judge of the High Court of Justice or the District Court of Ontario before the 1st day of September, 1990 shall be assigned without his or her consent to a region other than the region in which he or she resided immediately before that day. R.S.O. 1990, c. C.43, s. 15 (3); 1996, c. 25, s. 9 (17).

Same

(4) Subsections (1) to (3) do not prevent the temporary assignment of a judge to a location anywhere in Ontario. R.S.O. 1990, c. C.43, s. 15 (4).

Composition of court for hearings

16 A proceeding in the Superior Court of Justice shall be heard and determined by one judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 16; 1994, c. 12, s. 4; 1996, c. 25, s. 9 (16, 17).

Appeals to Superior Court of Justice

17 An appeal lies to the Superior Court of Justice from,

(a) an interlocutory order of a master, case management master or associate judge;

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 17 (a) of the Act is amended by striking out "a master, case management master or associate judge" at the end and substituting "an associate judge". (See: 2021, c. 34, Sched. 4, s. 3 (2))

(b) a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 17; 1996, c. 25, ss. 1 (1), 9 (17); 2021, c. 34, Sched. 4, s. 3 (1).

DIVISIONAL COURT

Divisional Court

18 (1) The branch of the Superior Court of Justice known as the Divisional Court is continued under the name Divisional Court in English and Cour divisionnaire in French. R.S.O. 1990, c. C.43, s. 18 (1); 1996, c. 25, s. 9 (17).

Same

(2) The Divisional Court consists of the Chief Justice of the Superior Court of Justice, who is president of the Divisional Court, the associate chief justice and such other judges as the Chief Justice designates from time to time. 1994, c. 12, s. 5; 1996, c. 25, s. 9 (14); 1998, c. 20, Sched. A, s. 3.

Jurisdiction of judges

(3) Every judge of the Superior Court of Justice is also a judge of the Divisional Court. R.S.O. 1990, c. C.43, s. 18 (3); 1996, c. 25, s. 9 (17).

Divisional Court jurisdiction

19 (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(a.1) a final order of a judge of the Family Court made only under a provision of an Act or regulation of Ontario;

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master, case management master or associate judge. 2006, c. 21, Sched. A, s. 3; 2020, c. 25, Sched. 2, s. 2 (1); 2021, c. 4, Sched. 3, s. 2 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, clause 19 (1) (c) of the Act, as amended by subsection (1), is amended by striking out "a master, case management master or associate judge" and substituting "an associate judge". (See: 2021, c. 4, Sched. 3, s. 2 (2))

Same

(1.0.1) Clauses (1) (a) and (b) do not apply to orders made under section 137.1. 2015, c. 23, s. 2.

Same

(1.1) If the notice of appeal is filed before October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $25,000, exclusive of costs;

(b) for periodic payments that amount to not more than $25,000, exclusive of costs, in the 12 months commencing on the date the first

payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b). 2006, c. 21, Sched. A, s. 3; 2009, c. 33, Sched. 2, s. 20 (2).

Same

(1.2) If the notice of appeal is filed on or after October 1, 2007, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $50,000, exclusive of costs;

(b) for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b). 2006, c. 21, Sched. A, s. 3; 2009, c. 33, Sched. 2, s. 20 (3).

Combining of appeals from Superior Court of Justice

(2) The Divisional Court has jurisdiction to hear and determine an appeal that lies to the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Divisional Court. R.S.O. 1990, c. C.43, s. 19 (2); 1996, c. 25, s. 9 (17).

Same

(3) The Divisional Court may, on motion, transfer an appeal that has already been commenced in the Superior Court of Justice to the Divisional Court for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 19 (3); 1996, c. 25, s. 9 (17).

Appeal from interlocutory orders

(4) No appeal lies from an interlocutory order of a judge of the Superior Court of Justice made on an appeal from an interlocutory order of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 19 (4); 1996, c. 25, s. 9 (17, 18).

Transition

(5) This section, as it read immediately before the day subsection 2 (1) of Schedule 2 to the *Moving Ontario Family Law Forward Act, 2020* came into force, continues to apply to,

(a) any case in which a notice of appeal was filed before that day; and

(b) any further appeals or proceedings arising from a case described in clause (a). 2020, c. 25, Sched. 2, s. 2 (2).

Place for hearing

Appeals

20 (1) An appeal to the Divisional Court shall be heard in the region where the hearing or other process that led to the decision appealed from took place, unless the parties agree otherwise or the Chief Justice of the Superior Court of Justice orders otherwise because it is necessary to do so in the interests of justice. 1994, c. 12, s. 7; 1996, c. 25, s. 9 (14).

Other proceedings

(2) Any other proceeding in the Divisional Court may be brought in any region. R.S.O. 1990, c. C.43, s. 20 (2).

Composition of court for hearings

21 (1) A proceeding in the Divisional Court shall be heard and determined by three judges sitting together. R.S.O. 1990, c. C.43, s. 21 (1).

Same

(2) A proceeding in the Divisional Court may be heard and determined by one judge where the proceeding,

(a) is an appeal under clause 19 (1) (c);

(b) is an appeal under section 31 from a person referred to in subsection 24 (2) presiding over the Small Claims Court; or

(c) is in a matter or class of matters that the Chief Justice of the Superior Court of Justice or a judge designated by the Chief Justice is satisfied, from the nature of the issues involved or the necessity for expedition, can and ought to be heard and determined by one judge. R.S.O. 1990, c. C.43, s. 21 (2); 1996, c. 25, s. 9 (14); 2017, c. 2, Sched. 2, s. 2; 2025, c. 24, Sched. 7, s. 1.

Same, motions

(3) A motion in the Divisional Court shall be heard and determined by one judge, unless otherwise provided by the rules of court. R.S.O. 1990, c. C.43, s. 21 (3).

Same

(4) A judge assigned to hear and determine a motion may adjourn it to a panel of the Divisional Court. R.S.O. 1990, c. C.43, s. 21 (4).

Same

(5) A panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion. R.S.O. 1990, c. C.43, s. 21 (5).

FAMILY COURT

Family Court

21.1 (1) There shall be a branch of the Superior Court of Justice known as the Family Court in English and Cour de la famille in French. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17).

Unified Family Court

(2) The Unified Family Court is amalgamated with and continued as part of the Family Court. 1994, c. 12, s. 8.

Same

(3) The Family Court has the jurisdiction conferred on it by this or any other Act. 1994, c. 12, s. 8.

Jurisdiction

(4) The Family Court has jurisdiction in the City of Hamilton and in the additional areas named in accordance with subsection (5). 1994, c. 12, s. 8; 2002, c. 17, Sched. F, Table.

Proclamation

(5) The Lieutenant Governor in Council may, by proclamation, name additional areas in which the Family Court has jurisdiction. 1994, c. 12, s. 8.

Composition of Family Court

21.2 (1) The Family Court consists of,

(a) the Chief Justice of the Superior Court of Justice, who shall be president of the Family Court;

(b) the Associate Chief Justice;

(c) the Senior Judge of the Family Court;

(d) the five judges and one supernumerary judge of the Superior Court of Justice assigned to the Unified Family Court on June 30, 1993;

(e) the judges of the Superior Court of Justice appointed to be members of the Family Court, the number of whom is fixed by regulation under clause 53 (1) (a.1);

(f) the judges of the Superior Court of Justice assigned to the Family Court by the Chief Justice from time to time. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (14, 17); 1998, c. 20, Sched. A, s. 4 (1).

Supernumerary judges

(2) There shall be such additional offices of supernumerary judge of the Superior Court of Justice and member of the Family Court as are from time to time required, to be held by judges referred to in clauses (1) (d) and (e) who have elected under the *Judges Act* (Canada) to hold office only as supernumerary judges. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17).

Jurisdiction of judges

(3) Every judge of the Superior Court of Justice is also a judge of the Family Court. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17).

Temporary assignments

(4) The Chief Justice of the Superior Court of Justice may, from time to time, temporarily assign a judge referred to in clause (1) (d) or (e) to hear matters outside the jurisdiction of the Family Court. 1998, c. 20, Sched. A, s. 22 (4).

(5) Repealed: 1998, c. 20, Sched. A, s. 4 (2).

(6) Repealed: 1998, c. 20, Sched. A, s. 4 (2).

Transitional measure

21.3 (1) All proceedings referred to in the Schedule to section 21.8 or in section 21.12 that are pending in the Superior Court of Justice or the Ontario Court of Justice in an area named under subsection 21.1 (5) as an area in which the Family Court has jurisdiction shall be transferred to and continued in the Family Court.

Same

(2) If a judge sitting in the Ontario Court of Justice is seized of a matter in a proceeding that is the subject of a transfer under subsection (1), the judge may complete that matter. 1998, c. 20, Sched. A, s. 22 (5).

21.4 Repealed: 1998, c. 20, Sched. A, s. 5.

21.5 Repealed: 1998, c. 20, Sched. A, s. 5.

21.6 Repealed: 1998, c. 20, Sched. A, s. 5.

Composition of court for hearings

21.7 A proceeding in the Family Court shall be heard and determined by one judge. 1994, c. 12, s. 8; 2009, c. 33, Sched. 2, s. 20 (4).

Proceedings in Family Court

21.8 (1) In the parts of Ontario where the Family Court has jurisdiction, proceedings referred to in the Schedule to this section, except appeals and prosecutions, shall be commenced, heard and determined in the Family Court. 1994, c. 12, s. 8.

Motions for interlocutory relief

(2) A motion for interim or other interlocutory relief in a proceeding referred to in the Schedule that is required or permitted by the rules or an order of a court to be heard and determined in a part of Ontario where the Family Court has jurisdiction shall be heard and determined in the Family Court. 1994, c. 12, s. 8.

Same

(3) A motion for interim or other interlocutory relief in a proceeding referred to in the Schedule that is required or permitted by the rules or an order of the Family Court to be heard and determined in a part of Ontario where the Family Court does not have jurisdiction shall be heard and determined in the

court that would have had jurisdiction if the proceeding had been commenced in that part of Ontario. 1994, c. 12, s. 8.

SCHEDULE

1. Proceedings under the following statutory provisions:

Change of Name Act

Child, Youth and Family Services Act, 2017, Parts V, VII and VIII

Children's Law Reform Act, except sections 59 and 60

Civil Marriage Act (Canada)

Divorce Act (Canada)

Family Homes on Reserves and Matrimonial Interests or Rights Act (Canada)

Family Law Act, except Part V

Family Responsibility and Support Arrears Enforcement Act, 1996

International Recovery of Child Support and Family Maintenance Convention Act, 2023

Interjurisdictional Support Orders Act, 2002

Marriage Act, section 6.

2. Proceedings for the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement, paternity agreement, family arbitration agreement or family arbitration award.

3. Proceedings for relief by way of constructive or resulting trust or a monetary award as compensation for unjust enrichment between persons who have cohabited.

4. Proceedings for annulment of a marriage or for a declaration of validity or invalidity of a marriage.

5. Appeals of family arbitration awards under the *Arbitration Act, 1991*.

6. Proceedings under First Nation laws made under,

i. the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Canada), or

ii. the *First Nations Land Management Act* (Canada), with respect to the effect of relationship breakdown on matrimonial real property.

7. Any other family law proceedings that may be prescribed by the regulations.

1994, c. 12, s. 8; 1996, c. 31, s. 65; 1999, c. 6, s. 18 (1); 2002, c. 13, s. 56; 2002, c. 14, Sched., s. 9; 2005, c. 5, s. 17 (1); 2006, c. 1, s. 4; 2015, c. 27, Sched. 1, s. 1 (2, 3); 2017, c. 14, Sched. 4, s. 10 (1); 2023, c. 9, Sched. 16, s. 23.

Other jurisdiction

21.9 Where a proceeding referred to in the Schedule to section 21.8 is commenced in the Family Court and is combined with a related matter that is in the judge's jurisdiction but is not referred to in the Schedule, the court may, with leave of the judge, hear and determine the combined matters. 1994, c. 12, s. 8.

21.9.1 REPEALED: 2020, c. 25, Sched. 2, s. 3.

Orders of predecessor court

21.10 (1) The Family Court may hear and determine an application under an Act to discharge, vary or suspend an order made by the Provincial Court (Family Division), the Ontario Court of Justice, the Superior Court of Justice or the Unified Family Court. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17, 18).

Same

(2) The Family Court may enforce orders made by the Provincial Court (Family Division), the Ontario Court of Justice, the Superior Court of Justice or the Unified Family Court. 1994, c. 12, s. 8; 1996, c. 25, s. 9 (17, 18).

Place where proceeding commenced

21.11 (1) Proceedings referred to in the Schedule to section 21.8 may be commenced in the Family Court if the applicant or the respondent resides in a part of Ontario where the Family Court has jurisdiction. 1994, c. 12, s. 8.

Part III, *Children's Law Reform Act* application

(2) An application under Part III of the *Children's Law Reform Act* in respect of a child who habitually resides in a part of Ontario where the Family Court has jurisdiction may be commenced in the Family Court in that part of Ontario. 1994, c. 12, s. 8; 2020, c. 25, Sched. 1, s. 27 (1).

Transfer to other court

(3) A judge presiding over the Family Court may, on motion, order that a proceeding commenced in the Family Court be transferred to the appropriate court in a place where the Family Court does not have jurisdiction if, in the

judge's opinion, the preponderance of convenience favours having the matter dealt with by that court in that place. 1994, c. 12, s. 8.

Transfer from other court

(4) A judge of a court having jurisdiction in a proceeding referred to in the Schedule to section 21.8 in an area where the Family Court does not have jurisdiction may, on motion, order that the proceeding be transferred to the Family Court in a particular place if, in the judge's opinion, the preponderance of convenience favours having the matter dealt with by that court in that place. 1994, c. 12, s. 8.

Directions

(5) A judge making an order under subsection (3) or (4) may give such directions for the transfer as are considered just. 1994, c. 12, s. 8.

Enforcement of orders

21.12 (1) A judge presiding over the Family Court shall be deemed to be a judge of the Ontario Court of Justice for the purpose of prosecutions under Part V (Child Protection) and Part VIII (Adoption and Adoption Licensing) of the *Child, Youth and Family Services Act, 2017*, the *Children's Law Reform Act*, the *Family Law Act* and the *Family Responsibility and Support Arrears Enforcement Act, 1996*. 2017, c. 14, Sched. 4, s. 10 (2).

(2), (3) REPEALED: 2009, c. 33, Sched. 2, s. 20 (5).

Community liaison committee

21.13 (1) There shall be one or more community liaison committees, as determined by the Chief Justice of the Superior Court of Justice, or by a person he or she designates for the purpose, for each area in which the Family Court has jurisdiction. 1998, c. 20, Sched. A, s. 22 (7); 2009, c. 33, Sched. 2, s. 20 (6).

Composition

(2) A community liaison committee consists of judges, lawyers, persons employed in court administration and other residents of the community, appointed by the Chief Justice of the Superior Court of Justice or by a person he or she designates for the purpose. 1998, c. 20, Sched. A, s. 22 (7).

Function

(3) A community liaison committee shall consider matters affecting the general operations of the court in the municipality and make recommendations to the appropriate authorities. 1994, c. 12, s. 8.

Community resources committee

21.14 (1) There shall be one or more community resources committees, as determined by the Chief Justice of the Superior Court of Justice, or by a person he or she designates for the purpose, for each area in which the Family Court has jurisdiction. 1998, c. 20, Sched. A, s. 22 (8); 2009, c. 33, Sched. 2, s. 20 (7).

Composition

(2) A community resources committee consists of judges, lawyers, members of social service agencies, persons employed in court administration and other residents of the community, appointed by the Chief Justice of the Superior Court of Justice or by a person whom he or she designates for the purpose. 1998, c. 20, Sched. A, s. 22 (8).

Function

(3) A community resources committee shall develop links between the court and social service resources available in the community, identify needed resources and develop strategies for putting them in place. 1994, c. 12, s. 8.

Dispute resolution service

21.15 A service for the resolution of disputes by alternatives to litigation may be established, maintained and operated as part of the Family Court. 1994, c. 12, s. 8.

SMALL CLAIMS COURT

Small Claims Court

22 (1) The Small Claims Court is continued as a branch of the Superior Court of Justice under the name Small Claims Court in English and Cour des petites créances in French. R.S.O. 1990, c. C.43, s. 22 (1); 1996, c. 25, s. 9 (17).

Same

(2) The Small Claims Court consists of the Chief Justice of the Superior Court of Justice who shall be president of the court and such other judges of the

Superior Court of Justice as the Chief Justice designates from time to time. R.S.O. 1990, c. C.43, s. 22 (2); 1996, c. 25, s. 9 (14, 17).

Jurisdiction of judges

(3) Every judge of the Superior Court of Justice is also a judge of the Small Claims Court. R.S.O. 1990, c. C.43, s. 22 (3); 1996, c. 25, s. 9 (17).

Jurisdiction

23 (1) The Small Claims Court,

(a) has jurisdiction in any action for the payment of money where the amount claimed does not exceed the prescribed amount exclusive of interest and costs; and

(b) has jurisdiction in any action for the recovery of possession of personal property where the value of the property does not exceed the prescribed amount. R.S.O. 1990, c. C.43, s. 23 (1).

Commencement of actions in Small Claims Court

(1.1) An action that is within the Small Claims Court's jurisdiction shall not, despite subsection 11 (2), be commenced in the Superior Court of Justice except with leave of the Superior Court of Justice as provided in the rules of court. 2023, c. 12, Sched. 3, s. 1.

Same

(1.2) Subsection (1.1) does not apply with respect to a counterclaim, crossclaim or third or subsequent party claim, where the main action was commenced in the Superior Court of Justice. 2023, c. 12, Sched. 3, s. 1.

Transfer from Superior Court of Justice

(2) An action in the Superior Court of Justice may be transferred to the Small Claims Court by the local registrar of the Superior Court of Justice on requisition with the consent of all parties filed before the trial commences if,

(a) the only claim is for the payment of money or the recovery of possession of personal property; and

(b) the claim is within the jurisdiction of the Small Claims Court. R.S.O. 1990, c. C.43, s. 23 (2); 1996, c. 25, s. 9 (17).

Same

(3) An action transferred to the Small Claims Court shall be titled and continued as if it had been commenced in that court. R.S.O. 1990, c. C.43, s. 23 (3).

Composition of court for hearings

24 (1) A proceeding in the Small Claims Court shall be heard and determined by one judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 24 (1); 1996, c. 25, s. 9 (17).

Other judicial officials who may preside

(2) Despite subsection (1), a proceeding in the Small Claims Court may also be heard and determined by,

(a) REPEALED: 2023, c. 2, Sched. 2, s. 1.

(b) a deputy judge appointed under section 32; or

(c) the Small Claims Court Administrative Judge appointed under section 87.2. 2017, c. 2, Sched. 2, s. 3; 2023, c. 2, Sched. 2, s. 1.

Where deputy judge not to preside

(3) A deputy judge shall not hear and determine an action,

(a) for the payment of money in excess of the prescribed amount; or

(b) for the recovery of possession of personal property exceeding the prescribed amount in value. R.S.O. 1990, c. C.43, s. 24 (3).

Summary hearings

25 The Small Claims Court shall hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience. R.S.O. 1990, c. C.43, s. 25.

Representation

26 A party may be represented in a proceeding in the Small Claims Court by a person authorized under the *Law Society Act* to represent the party, but the court may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of the party if it finds that such person is not competent properly to represent the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate. 2006, c. 21, Sched. C, s. 105 (1).

Evidence

27 (1) Subject to subsections (3) and (4), the Small Claims Court may admit as evidence at a hearing and act upon any oral testimony and any document or other thing so long as the evidence is relevant to the subject-matter of the proceeding, but the court may exclude anything unduly repetitious.

Same

(2) Subsection (1) applies whether or not the evidence is given or proven under oath or affirmation or admissible as evidence in any other court.

Same

(3) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible by reason of any privilege under the law of evidence; or

(b) that is inadmissible by any Act.

Conflicts

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(5) A copy of a document or any other thing may be admitted as evidence at a hearing if the presiding judge is satisfied as to its authenticity. R.S.O. 1990, c. C.43, s. 27.

Instalment orders

28 The Small Claims Court may order the times and the proportions in which money payable under an order of the court shall be paid. R.S.O. 1990, c. C.43, s. 28.

Limit on costs

29 An award of costs in the Small Claims Court, other than disbursements, shall not exceed 15 per cent of the amount claimed or the value of the property sought to be recovered unless the court considers it necessary in the interests of justice to penalize a party or a party's representative for unreasonable behaviour in the proceeding. R.S.O. 1990, c. C.43, s. 29; 2006, c. 21, Sched. C, s. 105 (2).

Contempt hearing for failure to attend examination

30 (1) The Small Claims Court may, in accordance with the rules of court, order a debtor or other person who is required to and fails to attend an examination respecting a default by the debtor under an order of the court for the payment or recovery of money, to attend before the court for a contempt hearing. 2009, c. 33, Sched. 2, s. 20 (8).

Finding of contempt

(2) The Small Claims Court may find a person to be in contempt of court at a hearing referred to in subsection (1), if the court is satisfied that,

(a) the person was required to attend the examination;

(b) the person was served, in accordance with the rules of court, with a notice to attend the examination;

(c) the person failed to attend the examination; and

(d) the failure to attend was wilful. 2009, c. 33, Sched. 2, s. 20 (8).

Power conferred

(3) For greater certainty, the power of the Small Claims Court to order, hear and determine a contempt hearing under this section is conferred on and may be exercised by the persons referred to in clauses 24 (2) (a) and (b). 2009, c. 33, Sched. 2, s. 20 (8).

Limit on imprisonment in certain cases

(4) If a contempt hearing under subsection (1) is heard and determined by a person referred to in clause 24 (2) (a) or (b), the court may make such orders respecting the person in contempt as are specified by the rules of court, but the court shall not make an order that the person be imprisoned for a period of more than five days. 2009, c. 33, Sched. 2, s. 20 (8).

Authority unaffected

(5) Nothing in this section affects the authority of the Small Claims Court to order, hear and determine contempt hearings where it is otherwise authorized by law. 2009, c. 33, Sched. 2, s. 20 (8).

Appeals

31 An appeal lies to the Divisional Court from a final order of the Small Claims Court in an action,

(a) for the payment of money in excess of the prescribed amount, excluding costs; or

(b) for the recovery of possession of personal property exceeding the prescribed amount in value. R.S.O. 1990, c. C.43, s. 31; 2009, c. 33, Sched. 2, s. 20 (9, 10).

Deputy judges

32 (1) A regional senior judge of the Superior Court of Justice may, with the approval of the Attorney General, appoint a lawyer to act as a deputy judge of the Small Claims Court. 2009, c. 33, Sched. 2, s. 20 (11).

Term of appointment

(2) The appointment of a deputy judge is for a term of three years, subject to subsections (3) and (7). 2009, c. 33, Sched. 2, s. 20 (11).

Annual appointment if 65 or older

(3) If the deputy judge is 65 years of age or older and under 75 years of age, the appointment shall be for a term of one year, subject to subsection (8). 2009, c. 33, Sched. 2, s. 20 (11).

Renewal before age 65

(4) The appointment of a deputy judge who is under 65 years of age may be renewed by a regional senior judge of the Superior Court of Justice for a term of three years, subject to subsection (7). 2009, c. 33, Sched. 2, s. 20 (11).

Annual renewal if 65 or older

(5) The appointment of a deputy judge who is 65 years of age or older and under 75 years of age may be renewed by a regional senior judge of the Superior Court of Justice for a term of one year, subject to subsection (8). 2009, c. 33, Sched. 2, s. 20 (11).

No limit, renewals

(6) Subject to subsections (7) to (9), there is no limit to the number of times the appointment of a deputy judge can be renewed under subsection (4) or (5). 2009, c. 33, Sched. 2, s. 20 (11).

Expiry of term at age 65

(7) If the deputy judge is 63 years of age or older and under 65 years of age, an appointment under subsection (2) or a renewal under subsection (4) shall provide for a term that expires when he or she reaches 65 years of age. 2009, c. 33, Sched. 2, s. 20 (11).

Expiry of term at age 75

(8) If the deputy judge is 74 years of age, an appointment under subsection (3) or a renewal under subsection (5) shall provide for a term that expires when he or she reaches 75 years of age. 2009, c. 33, Sched. 2, s. 20 (11).

Age limit

(9) No person shall be appointed as a deputy judge, or have an appointment renewed, once he or she reaches 75 years of age. 2009, c. 33, Sched. 2, s. 20 (11).

Current appointments

(10) For greater certainty, nothing in this section shortens or otherwise affects an appointment or renewed appointment that is in effect immediately before December 15, 2009, but any renewals of the appointment on and after that day are subject to this section. 2009, c. 33, Sched. 2, s. 20 (11); 2015, c. 27, Sched. 1, s. 1 (4).

Deputy Judges Council

33 (1) A council known as the Deputy Judges Council in English and as Conseil des juges suppléants in French is established. 1994, c. 12, s. 13.

Composition

(2) The Deputy Judges Council is composed of,

(a) the Chief Justice of the Superior Court of Justice, or another judge of the Superior Court of Justice designated by the Chief Justice;

(b) a regional senior judge of the Superior Court of Justice, appointed by the Chief Justice;

(c) a judge of the Superior Court of Justice, appointed by the Chief Justice;

(d) the Small Claims Court Administrative Judge appointed under section 87.2 or a deputy judge, as appointed by the Chief Justice; and;

(e) three persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (14, 17); 2017, c. 2, Sched. 2, s. 4.

Criteria

(3) In the appointment of members under clause (2) (e), the importance of reflecting, in the composition of the Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized. 1994, c. 12, s. 13.

Chair

(4) The Chief Justice of the Superior Court of Justice, or his or her designate, shall chair the meetings of the Deputy Judges Council. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (14).

Same

(5) The chair is entitled to vote, and may cast a second deciding vote if there is a tie. 1994, c. 12, s. 13.

Functions

(6) The functions of the Deputy Judges Council are,

(a) to review and approve standards of conduct for deputy judges as established by the Chief Justice;

(b) to review and approve a plan for the continuing education of deputy judges as established by the Chief Justice; and

(c) to make recommendations on matters affecting deputy judges. 1994, c. 12, s. 13.

Duty of Chief Justice

(7) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Deputy Judges Council. 2006, c. 21, Sched. A, s. 4.

Complaint

33.1 (1) Any person may make a complaint alleging misconduct by a deputy judge, by writing to the judge of the Superior Court of Justice designated by the regional senior judge in the region where the deputy judge sits. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (17).

Dismissal

(2) The judge shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it falls outside the jurisdiction of the regional senior judge, is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given. 1994, c. 12, s. 13.

Notice of dismissal

(3) The judge shall notify the regional senior judge, the complainant and the deputy judge in writing of a dismissal under subsection (2), giving brief reasons for it. 1994, c. 12, s. 13.

Committee

(4) If the complaint is not dismissed, the judge shall refer it to a committee consisting of three persons chosen by the regional senior judge. 1994, c. 12, s. 13.

Same

(5) The three persons shall be a judge of the Superior Court of Justice, a deputy judge and a person who is neither a judge nor a lawyer, all of whom reside or work in the region where the deputy judge who is the subject of the complaint sits. 1994, c. 12, s. 13; 1996, c. 25, s. 9 (17).

Investigation

(6) The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and deputy judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally. 1994, c. 12, s. 13.

Recommendation

(7) The committee shall make a report to the regional senior judge, recommending a disposition in accordance with subsections (8), (9) and (10). 1994, c. 12, s. 13.

Disposition

(8) The regional senior judge may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the deputy judge's conduct presents grounds for imposing a sanction, may,

(a) warn the deputy judge;

(b) reprimand the deputy judge;

(c) order the deputy judge to apologize to the complainant or to any other person;

(d) order that the deputy judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a deputy judge;

(e) suspend the deputy judge for a period of up to 30 days;

(f) inform the deputy judge that his or her appointment will not be renewed under subsection 32 (2);

(g) direct that no judicial duties or only specified judicial duties be assigned to the deputy judge; or

(h) remove the deputy judge from office. 1994, c. 12, s. 13.

Same

(9) The regional senior judge may adopt any combination of the dispositions set out in clauses (8) (a) to (g). 1994, c. 12, s. 13.

Disability

(10) If the regional senior judge finds that the deputy judge is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her needs were accommodated, the regional senior judge shall order that the deputy judge's needs be accommodated to the extent necessary to enable him or her to perform those duties. 1994, c. 12, s. 13.

Application of subs. (10)

(11) Subsection (10) applies if,

(a) the effect of the disability on the deputy judge's performance of the essential duties of the office was a factor in the complaint; and

(b) the regional senior judge dismisses the complaint or makes a disposition under clauses (8) (a), (b), (c), (d), (e) or (g). 1994, c. 12, s. 13.

Undue hardship

(12) Subsection (10) does not apply if the regional senior judge is satisfied that making an order would impose undue hardship on the person responsible

for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. 1994, c. 12, s. 13.

Opportunity to participate

(13) The regional senior judge shall not make an order under subsection (10) against a person without ensuring that the person has had an opportunity to participate and make submissions. 1994, c. 12, s. 13.

Crown bound

(14) An order made under subsection (10) binds the Crown. 1994, c. 12, s. 13.

Compensation

(15) The regional senior judge shall consider whether the deputy judge should be compensated for all or part of his or her costs for legal services incurred in connection with all the steps taken under this section in relation to the complaint. 1994, c. 12, s. 13.

Recommendation

(16) If the regional senior judge is of the opinion that the deputy judge should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 1994, c. 12, s. 13.

Same

(17) If the complaint is dismissed with a finding that it is unfounded, the regional senior judge shall recommend to the Attorney General that the deputy judge be compensated for his or her costs for legal services and shall indicate the amount of compensation. 1994, c. 12, s. 13.

Exception

(17.1) If the regional senior judge makes a disposition under clause (8) (h) in relation to a complaint made on or after the day section 1 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (15) does not apply and compensation shall not be recommended under subsection (16). 2020, c. 11, Sched. 5, s. 1.

Maximum

(18) The amount of compensation recommended under subsection (16) or (17) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar legal services. 1994, c. 12, s. 13.

Payment

(19) The Attorney General shall pay compensation to the judge in accordance with the recommendation. 1994, c. 12, s. 13.

Non-application of SPPA

(20) The *Statutory Powers Procedure Act* does not apply to a judge, regional senior judge or member of a committee acting under this section. 1994, c. 12, s. 13.

Personal liability

(21) No action or other proceeding for damages shall be instituted against a judge, regional senior judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty. 1994, c. 12, s. 13; 2017, c. 2, Sched. 2, s. 5.

ONTARIO COURT OF JUSTICE

Ontario Court of Justice

34 The Ontario Court (Provincial Division) is continued as a court of record under the name Ontario Court of Justice in English and Cour de justice de l'Ontario in French. 1996, c. 25, s. 9 (5).

Composition of Ontario Court of Justice

35 The Ontario Court of Justice shall consist of,

(a) the Chief Justice of the Ontario Court of Justice appointed under subsection 42 (3), who shall be president of the Ontario Court of Justice;

(a.1) the Associate Chief Justice and the Associate Chief Justice-Co-ordinator of Justices of the Peace of the Ontario Court of Justice appointed under subsections 42 (4) and (5);

(b) a regional senior judge of the Ontario Court of Justice appointed under subsection 42 (6) for each region;

(b.1) the Senior Advisory Family Judge of the Ontario Court of Justice appointed under subsection 42 (6.2);

(c) such provincial judges as are appointed under subsection 42 (1); and

(d) such provincial judges as were assigned to the Provincial Court (Criminal Division) or the Provincial Court (Family Division) on the 31st day of December, 1989. R.S.O. 1990, c. C.43, s. 35; 1994, c. 12, s. 14; 1996, c. 25, s. 9 (18, 20); 2015, c. 27, Sched. 1, s. 1 (5).

Chief Justice, Associate Chief Justice and regional senior judges of Ontario Court of Justice

Powers and duties of Chief Justice

36 (1) The Chief Justice of the Ontario Court of Justice shall direct and supervise the sittings of the Ontario Court of Justice and the assignment of its judicial duties. R.S.O. 1990, c. C.43, s. 36 (1); 1996, c. 25, s. 9 (16, 18, 20).

Regional senior judges

(2) A regional senior judge of the Ontario Court of Justice shall, subject to the authority of the Chief Justice of the Ontario Court of Justice, exercise the powers and perform the duties of the Chief Justice of the Ontario Court of Justice in his or her region. R.S.O. 1990, c. C.43, s. 36 (2); 1993, c. 27, Sched.; 1996, c. 25, s. 9 (18, 20).

Delegation

(3) A regional senior judge of the Ontario Court of Justice may delegate to a judge of the Ontario Court of Justice in his or her region the authority to exercise specified functions. R.S.O. 1990, c. C.43, s. 36 (3); 1996, c. 25, s. 9 (18).

Absence of Chief Justice

(4) If the Chief Justice of the Ontario Court of Justice is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by an associate chief justice of the Ontario Court of Justice designated by the Chief Justice of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 36 (4); 1994, c. 12, s. 15; 1996, c. 25, s. 9 (18, 20).

Senior Advisory Family Judge

(5) The Senior Advisory Family Judge of the Ontario Court of Justice shall,

(a) advise the Chief Justice of the Ontario Court of Justice with regard to,

(i) the education of judges with respect to family law matters, and

(ii) practices, procedures and programs relating to family law matters;

(b) preside over the Ontario Court of Justice Advisory Committee on Family Law;

(c) attend such meetings as the Chief Justice directs; and

(d) perform other duties respecting family law matters assigned to the Senior Advisory Family Judge by the Chief Justice. 2015, c. 27, Sched. 1, s. 1 (6).

Absence of regional senior judge or Senior Advisory Family Judge

(6) The powers and duties of a regional senior judge of the Ontario Court of Justice or of the Senior Advisory Family Judge when he or she is absent from Ontario or is for any reason unable to act shall be exercised and performed by a judge of the Ontario Court of Justice designated by the Chief Justice of the Ontario Court of Justice. 2015, c. 27, Sched. 1, s. 1 (6).

Meetings

(7) The Chief Justice of the Ontario Court of Justice may hold meetings with the associate chief justices, the regional senior judges of the Ontario Court of Justice and the Senior Advisory Family Judge in order to consider any matters concerning sittings of the Ontario Court of Justice and the assignment of its judicial duties. 2015, c. 27, Sched. 1, s. 1 (6).

Judges assigned to regions

37 (1) The Chief Justice of the Ontario Court of Justice shall assign every provincial judge to a region and may re-assign a judge from one region to another. R.S.O. 1990, c. C.43, s. 37 (1); 1996, c. 25, s. 9 (18, 20).

Same

(2) Subsection (1) does not prevent the temporary assignment of a provincial judge to a location anywhere in Ontario. R.S.O. 1990, c. C.43, s. 37 (2).

Jurisdiction of Ontario Court of Justice

Criminal matters

38 (1) A provincial judge has the power and authority of two or more justices of the peace when sitting in the Ontario Court of Justice and shall exercise the powers and perform the duties that any Act of the Parliament of Canada confers on a provincial court judge when sitting in the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 38 (1); 1996, c. 25, s. 9 (18).

Provincial offences and family matters

(2) The Ontario Court of Justice shall perform any function assigned to it by or under the *Provincial Offences Act*, the *Family Law Act*, the *Children's Law Reform Act*, the *Child, Youth and Family Services Act, 2017* or any other Act. R.S.O. 1990, c. C.43, s. 38 (2); 1996, c. 25, s. 9 (18); 2017, c. 14, Sched. 4, s. 10 (3).

Youth court and youth justice court

(3) The Ontario Court of Justice is a youth court for the purposes of the *Young Offenders Act* (Canada) and a youth justice court for the purposes of the *Youth Criminal Justice Act* (Canada). 2006, c. 19, Sched. D, s. 5 (1).

Judge to preside

39 (1) A proceeding in the Ontario Court of Justice shall be heard and determined by one judge of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 39 (1); 1996, c. 25, s. 9 (18).

Justice of the peace may preside

(2) A justice of the peace may preside over the Ontario Court of Justice in a proceeding under the *Provincial Offences Act*. R.S.O. 1990, c. C.43, s. 39 (2); 1996, c. 25, s. 9 (18).

Appeals

40 (1) If no provision is made concerning an appeal from an order of the Ontario Court of Justice, an appeal lies to the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 40 (1); 1993, c. 27, Sched.; 1996, c. 25, s. 9 (17, 18).

Exception

(2) Subsection (1) does not apply to a proceeding under the *Criminal Code* (Canada) or the *Provincial Offences Act*. R.S.O. 1990, c. C.43, s. 40 (2).

Penalty for disturbance outside courtroom

41 Any person who knowingly disturbs or interferes with a proceeding in the Ontario Court of Justice without reasonable justification while outside the courtroom is guilty of an offence and on conviction is liable to a fine of not more than $1,000 or to imprisonment for a term of not more than thirty days, or to both. R.S.O. 1990, c. C.43, s. 41; 1996, c. 25, s. 9 (18).

PROVINCIAL JUDGES

Appointment of provincial judges

42 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such provincial judges as are considered necessary. 1994, c. 12, s. 16.

Qualification

(2) No person shall be appointed as a provincial judge unless the person satisfies the following criteria:

1. The person has,

   i. been a member of the bar of one of the provinces or territories of Canada for at least 10 years, or

   ii. for an aggregate of at least 10 years, been a member of a bar mentioned in subparagraph i and, after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect of a position held under a law of Canada or of one of its provinces or territories.

2. The person undertakes to participate in such courses as may be designated for newly appointed judges by the Chief Justice of the Ontario Court of Justice under subsection 51.10.1 (3).

3. The person undertakes to not request a transfer to a different court location during the first five years following appointment unless extenuating circumstances apply. 2023, c. 12, Sched. 3, s. 2; 2025, c. 6, Sched. 5, s. 1.

Chief Justice

(3) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge as Chief Justice of the Ontario Court of Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20); 2006, c. 21, Sched. A, s. 5 (2).

Associate chief justices

(4) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint two provincial judges as associate chief justices of the Ontario Court of Justice. 2006, c. 21, Sched. A, s. 5 (3).

Same

(5) One of the associate chief justices shall be appointed to the office of Associate Chief Justice-Co-ordinator of Justices of the Peace, which is created for the purposes of the *Justices of the Peace Act*. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Regional senior judges

(6) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge to be the regional senior judge of the Ontario Court of Justice for each region. 2006, c. 21, Sched. A, s. 5 (4).

Same

(6.1) Before making a recommendation referred to in subsection (4) or (6), the Attorney General shall consult with the Chief Justice of the Ontario Court of Justice. 2006, c. 21, Sched. A, s. 5 (4).

Senior Advisory Family Judge

(6.2) The Chief Justice of the Ontario Court of Justice may appoint a provincial judge to be the Senior Advisory Family Judge of the Ontario Court of Justice. 2015, c. 27, Sched. 1, s. 1 (7).

Terms of office

(7) The associate chief justices each hold office for six years, and regional senior judges each hold office for three years. 1994, c. 12, s. 16; 1996, c. 25, ss. 1 (5), 9 (20).

Same

(7.1) The Chief Justice holds office for eight years from the time of his or her appointment. If a successor has not yet been appointed on the day the term expires, the Chief Justice continues in office until a successor is appointed, but shall not hold office for more than nine years in any event. 1996, c. 25, ss. 1 (6), 9 (20).

Same

(7.2) The Senior Advisory Family Judge holds office for three years. 2015, c. 27, Sched. 1, s. 1 (7).

Reappointment

(8) The Chief Justice and associate chief justices shall not be reappointed. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Same

(9) A regional senior judge may be reappointed once, for a further three years, on the Chief Justice's recommendation; if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the regional senior judge. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Same

(9.1) The Senior Advisory Family Judge may be reappointed once, for a term of three years. 2015, c. 27, Sched. 1, s. 1 (7).

Transitional salary

(9.2) Until and subject to the determination of his or her salary by the Provincial Judges Remuneration Commission, the Senior Advisory Family Judge is entitled to receive as an annual salary the annual salary of a regional senior judge appointed on or after November 12, 2013. 2015, c. 27, Sched. 1, s. 1 (7).

Status at end of term

(10) A Chief Justice, associate chief justice, Senior Advisory Family Judge or regional senior judge whose term expires continues to be a provincial judge. 2016, c. 5, Sched. 7, s. 1.

Information to be maintained in confidence

(11) Any records or other information collected, prepared, maintained or used by the Attorney General in relation to the appointment or consideration of an individual as a provincial judge, including any such records or other information provided to the Attorney General by the Judicial Appointments Advisory Committee, shall be maintained in confidence and shall not be disclosed except as authorized by the Attorney General. 2021, c. 4, Sched. 3, s. 3.

Prevails over *FIPPA*

(12) Subsection (11) prevails over the *Freedom of Information and Protection of Privacy Act*. 2021, c. 4, Sched. 3, s. 3.

Judicial Appointments Advisory Committee

43 (1) The committee known as the Judicial Appointments Advisory Committee in English and Comité consultatif sur les nominations à la magistrature in French is continued. 2021, c. 4, Sched. 3, s. 4.

Composition

(2) The Committee is composed of,

(a) two provincial judges, appointed by the Chief Justice of the Ontario Court of Justice;

(b) three lawyers appointed by the Attorney General, one appointed from a list of three names submitted by the Law Society of Ontario, one appointed from a list of three names submitted by the Ontario Bar Association and one appointed from a list of three names submitted by the Federation of Ontario Law Associations;

(c) seven persons who are not judges, appointed by the Attorney General; and

(d) a member of the Judicial Council, appointed by it. 2021, c. 4, Sched. 3, s. 4; 2025, c. 6, Sched. 5, s. 2.

Criteria

(3) In the appointment of members under clauses (2) (b) and (c), the importance of reflecting, in the composition of the Committee as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized. 2021, c. 4, Sched. 3, s. 4.

Term of office

(4) The members hold office for three-year terms and may be reappointed. 2021, c. 4, Sched. 3, s. 4.

Chair

(5) The Attorney General shall designate one of the members to chair the Committee for a term of up to three years. 2021, c. 4, Sched. 3, s. 4.

Term of office

(6) The same person may serve as chair for two or more terms. 2021, c. 4, Sched. 3, s. 4.

Meetings

(7) The Committee may hold its meetings and conduct interviews in person or through electronic means, including telephone conferencing and video conferencing. 2021, c. 4, Sched. 3, s. 4.

Annual report

(8) The Committee shall prepare an annual report, provide it to the Attorney General and make it available to the public. 2021, c. 4, Sched. 3, s. 4.

Same

(9) The annual report must include,

(a) statistics about the sex, gender, gender identity, sexual orientation, race, ethnicity, disability status and ability to speak French of candidates who volunteer that information, including whether the candidates identify as Indigenous or as a member of a Francophone community, at each stage of the process, as specified by the Attorney General; and

(b) such other content as the Attorney General may require. 2021, c. 4, Sched. 3, s. 4; 2024, c. 2, Sched. 6, s. 1.

Tabling of annual report

(10) The Attorney General shall table the Committee's annual report in the Assembly. 2021, c. 4, Sched. 3, s. 4.

Personal liability

(11) No action or other proceeding for damages shall be instituted against any member or former member of the Committee for any act done in good faith in

the execution or intended execution of any power or duty that he or she has or had as a member of the Committee, or for any neglect or default in the exercise or performance in good faith of such power or duty. 2021, c. 4, Sched. 3, s. 4.

Crown liability

(12) Subsection (11) does not, by reason of subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (11) to which it would otherwise be subject. 2021, c. 4, Sched. 3, s. 4.

Transition

(13) Despite subsection (2), the appointment of every person who was a member of the Judicial Appointments Advisory Committee on the day before the day section 4 of Schedule 3 to the *Accelerating Access to Justice Act, 2021* came into force is continued. 2021, c. 4, Sched. 3, s. 4.

Candidate recommendation process

Definition

43.1 (0.1) In this section,

"classification period" means, in respect of a candidate, the period beginning on the day the candidate submits an application for candidacy to be appointed as a provincial judge and ending on the third anniversary of that day. 2025, c. 6, Sched. 5, s. 3 (1).

Committee functions

(1) The functions of the Judicial Appointments Advisory Committee are to,

(a) recommend candidates to the Attorney General for the appointment of provincial judges; and

(b) provide advice to the Attorney General respecting the process for appointing provincial judges in accordance with this Act. 2021, c. 4, Sched. 3, s. 4.

Manner of operating

(2) The Committee shall perform its functions in the following manner:

1. It shall, on the Attorney General's request, advertise for applications for candidacy to be appointed as a provincial judge.

2. It shall review and evaluate all applications received in response to the advertisement.

3. REPEALED: 2025, c. 6, Sched. 5, s. 3 (2).

4. It may interview any of the candidates in conducting its review and evaluation.

5. It shall conduct the advertising, review and evaluation process in accordance with criteria it establishes, which must,

i. provide for an assessment that, at minimum,

A. assesses the candidates' professional excellence, community awareness and personal characteristics, and

B. recognizes the desirability of reflecting the diversity of Ontario society in judicial appointments, and

ii. include any criteria specified to the Committee by the Attorney General for the purposes of this paragraph.

6. It shall make the criteria it established under paragraph 5 available to the public.

7. For each candidate, it shall classify the candidate as "not recommended", "recommended" or "highly recommended".

8. It shall provide a list of the candidates classified as "recommended" or "highly recommended" to the Attorney General, with brief supporting reasons and the following information respecting each candidate:

i. Whether the classification applies to the candidate's qualification to preside over bilingual proceedings.

ii. The court locations in which the candidate is willing to sit. 2021, c. 4, Sched. 3, s. 4; 2025, c. 6, Sched. 5, s. 3 (2-4).

Majority required

(2.1) The Committee shall determine matters under subsection (2) by a majority vote of the members present. 2025, c. 6, Sched. 5, s. 3 (5).

Chair may vote

(2.2) For the purposes of subsection (2.1), the chair is entitled to vote and may cast a second, deciding vote if there is a tie. 2025, c. 6, Sched. 5, s. 3 (5).

Qualifications

(3) The Committee shall not consider an application by a candidate,

(a) who does not meet the qualifications set out in subsection 42 (2);

(b) who is or was a member of the Committee within the previous three years; or

(c) who previously applied for candidacy, if more than six months remain in the candidate's classification period under that application. 2021, c. 4, Sched. 3, s. 4; 2025, c. 6, Sched. 5, s. 3 (6).

Information to be provided to Attorney General on request

(4) The Committee shall provide the Attorney General with any information about the application, review and evaluation process that the Attorney General requests, other than,

(a) the names or identifying information of candidates who are classified as "not recommended";

(b) the names or identifying information of candidates who are being assessed but have not yet been classified; and

(c) information collected or prepared by the Committee through a discreet inquiry. 2021, c. 4, Sched. 3, s. 4; 2025, c. 6, Sched. 5, s. 3 (7).

Same

(5) The Committee shall provide any information requested by the Attorney General under subsection (4) within 30 days of the request unless otherwise directed by the Attorney General. 2021, c. 4, Sched. 3, s. 4.

Meaning of discreet inquiry

(6) For the purposes of clause (4) (c), a discreet inquiry is a confidential inquiry conducted by the Committee into the views or opinions of individuals with knowledge of a candidate's suitability for appointment. 2021, c. 4, Sched. 3, s. 4.

Recommendation by Attorney General

(7) The Attorney General may only recommend a candidate to the Lieutenant Governor in Council for appointment to fill a judicial vacancy if,

(a) the candidate was classified by the Committee as "recommended" or "highly recommended";

(b) the classification applies to the candidate's qualification to preside over bilingual proceedings, if the vacancy is for a bilingual judicial position;

(c) the information provided under subparagraph 8 ii of subsection (2) with respect to the candidate indicates that the candidate is willing to sit in the court location to which the vacancy relates; and

(d) the candidate's classification period has not expired. 2025, c. 6, Sched. 5, s. 3 (8).

Reclassification

(8) If, during the classification period of a candidate who was classified as "not recommended", the Committee receives or becomes aware of information respecting the candidate that the Committee believes may affect the candidate's classification, the Committee may re-evaluate and reclassify the candidate. 2025, c. 6, Sched. 5, s. 3 (8).

Same, notification

(9) The Committee shall promptly notify the Attorney General in writing of the reclassification of a candidate under subsection (8), with brief supporting reasons. 2025, c. 6, Sched. 5, s. 3 (8).

Same, no effect on classification period

(10) The reclassification of a candidate has no effect on the candidate's classification period. 2025, c. 6, Sched. 5, s. 3 (8).

Other information

(11) If, during the classification period of a candidate who was classified as "recommended" or "highly recommended", the Committee receives or becomes aware of information respecting the candidate that the Committee believes may be material to whether the Attorney General recommends the candidate to the Lieutenant Governor in Council, the Committee shall promptly notify the Attorney General in writing respecting the information. 2025, c. 6, Sched. 5, s. 3 (8).

Transition

(12) This section, as it read immediately before the day the *Protect Ontario Through Safer Streets and Stronger Communities Act, 2025* received Royal

Assent, continues to apply with respect to a judicial vacancy that was advertised by the Committee before that day. 2025, c. 6, Sched. 5, s. 3 (8).

Full and part-time service

44 (1) A provincial judge may, at his or her option and with the Chief Justice's consent, change from full-time to part-time service or the reverse, or increase or decrease the amount of part-time service. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Part-time judges

(2) The Chief Justice, with the Attorney General's consent, may designate a former provincial judge who has retired from office to serve as a provincial judge on a part-time basis, not to exceed the limits specified by the regulations made under this Act. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20); 2023, c. 2, Sched. 2, s. 2; 2024, c. 27, Sched. 7, s. 1.

Same

(3) A person designated under subsection (2) is a provincial judge and a member of the Ontario Court of Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18).

Same

(4) A judge who is serving on a part-time basis under subsection (1) or (2) shall not engage in any other remunerative occupation. 1994, c. 12, s. 16.

Application for order that needs be accommodated

45 (1) A provincial judge who believes that he or she is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated may apply to the Judicial Council for an order under subsection (2).

Duty of Judicial Council

(2) If the Judicial Council finds that the judge is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated, it shall order that the judge's needs be accommodated to the extent necessary to enable him or her to perform those duties.

Undue hardship

(3) Subsection (2) does not apply if the Judicial Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Guidelines and rules of procedure

(4) In dealing with applications under this section, the Judicial Council shall follow its guidelines and rules of procedure established under subsection 51.1 (1).

Opportunity to participate

(5) The Judicial Council shall not make an order under subsection (2) against a person without ensuring that the person has had an opportunity to participate and make submissions.

Crown bound

(6) The order binds the Crown. 1994, c. 12, s. 16.

Outside activities

46 (1) A provincial judge may act as commissioner, arbitrator, adjudicator, referee, conciliator or mediator only if expressly authorized by an Act of the Parliament of Canada or the Legislature or appointed or authorized by the Governor in Council or Lieutenant Governor in Council.

Same

(2) A judge who, before January 1, 1985, had the consent of the Attorney General to act as an arbitrator or conciliator may continue to do so.

Remuneration

(3) A judge acting under subsection (1) shall not receive remuneration but shall be reimbursed for reasonable travelling and other expenses incurred while so acting. 1994, c. 12, s. 16.

Retirement

47 (1) Every provincial judge shall retire upon attaining the age of sixty-five years. 1994, c. 12, s. 16.

Same

(2) Despite subsection (1), a judge appointed as a full-time magistrate, judge of a juvenile and family court or master before December 2, 1968 shall retire upon attaining the age of seventy years. 1994, c. 12, s. 16.

Continuation of judges in office

(3) A judge who has attained retirement age may, subject to the annual approval of the Chief Justice of the Ontario Court of Justice, continue in office as a full-time or part-time judge until he or she attains the age of seventy-five years. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Same, regional senior judges

(4) A regional senior judge of the Ontario Court of Justice who is in office at the time of attaining retirement age may, subject to the annual approval of the Chief Justice, continue in that office until his or her term (including any renewal under subsection 42 (9)) expires, or until he or she attains the age of seventy-five years, whichever comes first. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Same, Chief Justice and associate chief justices

(5) A Chief Justice or associate chief justice of the Ontario Court of Justice who is in office at the time of attaining retirement age may, subject to the annual approval of the Judicial Council, continue in that office until his or her term expires, or until he or she attains the age of seventy-five years, whichever comes first. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Same

(6) If the Judicial Council does not approve a Chief Justice's or associate chief justice's continuation in that office under subsection (5), his or her continuation in the office of provincial judge is subject to the approval of the Judicial Council and not as set out in subsection (3). 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Criteria

(7) Decisions under subsections (3), (4), (5) and (6) shall be made in accordance with criteria developed by the Chief Justice and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Appointment after reaching 65 years

(8) This section applies, with necessary modifications, to a person appointed as a provincial judge, or as a Chief Justice, associate chief justice or regional senior judge, after reaching 65 years of age. 2017, c. 20, Sched. 2, s. 3.

Resignation and election

Resignation

48. (1) A provincial judge may at any time resign from his or her office by delivering a signed letter of resignation to the Chief Justice of the Ontario Court of Justice or, in the case of the Chief Justice, to the Attorney General. 2017, c. 2, Sched. 2, s. 8 (1).

Election

(2) A Chief Justice, an associate chief justice or a regional senior judge may, before the expiry of his or her term of office under section 42, elect to hold the office of a provincial judge only, by delivering a signed letter to that effect to the Attorney General in the case of a Chief Justice, or to the Chief Justice of the Ontario Court of Justice in any other case. 2017, c. 2, Sched. 2, s. 8 (1).

(3) Repealed: 2016, c. 5, Sched. 7, s. 2.

Effective date

(4) A resignation or election under this section takes effect on the day the letter is delivered to the Chief Justice or the Attorney General, as the case may be or, if the letter specifies a later day, on that day. 1994, c. 12, s. 16; 2017, c. 2, Sched. 2, s. 8 (2).

(5) Spent: 1994, c. 12, s. 16.

Ontario Judicial Council

Judicial Council

49 (1) The Ontario Judicial Council is continued under the name Ontario Judicial Council in English and Conseil de la magistrature de l'Ontario in French. 1994, c. 12, s. 16.

Composition

(2) The Judicial Council is composed of,

(a) the Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice;

(b) the Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice, and the Associate Chief Justice of the Ontario Court of Justice;

(c) a regional senior judge of the Ontario Court of Justice, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation;

(d) two judges of the Ontario Court of Justice, appointed by the Chief Justice;

(e) the Treasurer of the Law Society of Ontario, or another bencher of the Law Society who is a lawyer, designated by the Treasurer;

(f) a lawyer who is not a bencher of the Law Society of Ontario, appointed by the Law Society;

(g) four persons who are neither judges nor lawyers, appointed by the Lieutenant Governor in Council on the Attorney General's recommendation. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20); 2018, c. 8, Sched. 15, s. 8 (1).

Temporary members

(3) The Chief Justice of the Ontario Court of Justice may appoint a judge of that court to be a temporary member of the Judicial Council in the place of another provincial judge, for the purposes of dealing with a complaint, if the requirements of subsections (13), (15), (17), (19) and (20) cannot otherwise be met. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20).

Criteria

(4) In the appointment of members under clauses (2) (d), (f) and (g), the importance of reflecting, in the composition of the Judicial Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized. 1994, c. 12, s. 16.

Term of office

(5) The regional senior judge who is appointed under clause (2) (c) remains a member of the Judicial Council until he or she ceases to hold office as a regional senior judge. 1994, c. 12, s. 16.

Same

(6) The members who are appointed under clauses (2) (d), (f) and (g) hold office for four-year terms and shall not be reappointed. 1994, c. 12, s. 16.

(7) Repealed: 2017, c. 2, Sched. 2, s. 9 (1).

Chair

(8) The Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice, shall chair the meetings and hearings of the Judicial Council that deal with complaints against particular judges and its meetings held for the purposes of section 45 and subsection 47 (5). 1994, c. 12, s. 16.

Same

(9) The Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice, shall chair all other meetings and hearings of the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20).

Same

(10) The chair is entitled to vote, and may cast a second deciding vote if there is a tie. 1994, c. 12, s. 16.

Open and closed hearings and meetings

(11) The Judicial Council's hearings and meetings under sections 51.6 and 51.7 shall be open to the public, unless subsection 51.6 (7) applies; its other hearings and meetings may be conducted in private, unless this Act provides otherwise. 1994, c. 12, s. 16.

Vacancies

(12) Where a vacancy occurs among the members appointed under clause (2) (d), (f) or (g), a new member similarly qualified may be appointed for the remainder of the term. 1994, c. 12, s. 16.

Quorum

(13) The following quorum rules apply, subject to subsections (15) and (17):

1. Eight members, including the chair, constitute a quorum.

2. At least half the members present must be judges and at least four must be persons who are not judges. 1994, c. 12, s. 16.

Review panels

(14) The Judicial Council may establish a panel for the purpose of dealing with a complaint under subsection 51.4 (17) or (18) or subsection 51.5 (8) or (10)

and considering the question of compensation under section 51.7, and the panel has all the powers of the Judicial Council for that purpose. 1994, c. 12, s. 16.

Same

(15) The following rules apply to a panel established under subsection (14):

1. The panel shall consist of two provincial judges other than the Chief Justice, a lawyer and a person who is neither a judge nor a lawyer.

2. One of the judges, as designated by the Judicial Council, shall chair the panel.

3. Four members constitute a quorum. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Hearing panels

(16) The Judicial Council may establish a panel for the purpose of holding a hearing under section 51.6 and considering the question of compensation under section 51.7, and the panel has all the powers of the Judicial Council for that purpose. 1994, c. 12, s. 16.

Same

(17) The following rules apply to a panel established under subsection (16):

1. Half the members of the panel, including the chair, must be judges, and half must be persons who are not judges.

2. At least one member must be a person who is neither a judge nor a lawyer.

3. The Chief Justice of Ontario, or another judge of the Court of Appeal designated by the Chief Justice, shall chair the panel.

4. Subject to paragraphs 1, 2 and 3, the Judicial Council may determine the size and composition of the panel.

5. All the members of the panel constitute a quorum. 1994, c. 12, s. 16.

Chair

(18) The chair of a panel established under subsection (14) or (16) is entitled to vote, and may cast a second deciding vote if there is a tie. 1994, c. 12, s. 16.

Participation in stages of process

(19) The members of the subcommittee that investigated a complaint shall not,

(a) deal with the complaint under subsection 51.4 (17) or (18) or subsection 51.5 (8) or (10); or

(b) participate in a hearing of the complaint under section 51.6. 1994, c. 12, s. 16.

Same

(20) The members of the Judicial Council who dealt with a complaint under subsection 51.4 (17) or (18) or subsection 51.5 (8) or (10) shall not participate in a hearing of the complaint under section 51.6. 1994, c. 12, s. 16.

Expert assistance

(21) The Judicial Council may engage persons, including counsel, to assist it. 1994, c. 12, s. 16.

Support services

(22) The Judicial Council shall provide support services, including initial orientation and continuing education, to enable its members to participate effectively, devoting particular attention to the needs of the members who are neither judges nor lawyers and administering a part of its budget for support services separately for that purpose. 1994, c. 12, s. 16.

Same

(23) The Judicial Council shall administer a part of its budget for support services separately for the purpose of accommodating the needs of any members who have disabilities. 1994, c. 12, s. 16.

Confidential records

(24) The Judicial Council or a subcommittee may order that any information or documents relating to a mediation or a Council meeting or hearing that was not held in public are confidential and shall not be disclosed or made public. 1994, c. 12, s. 16.

Same

(25) Subsection (24) applies whether the information or documents are in the possession of the Judicial Council, the Attorney General or any other person. 1994, c. 12, s. 16.

Exceptions

(26) Subsection (24) does not apply to information and documents,

(a) that this Act requires the Judicial Council to disclose; or

(b) that have not been treated as confidential and were not prepared exclusively for the purposes of the mediation or Council meeting or hearing. 1994, c. 12, s. 16.

Personal liability

(27) No action or other proceeding for damages shall be instituted against the Judicial Council, any of its members or employees or any person acting under its authority for any act done in good faith in the execution or intended execution of any power or duty of the Council or person, or for any neglect or default in the exercise or performance in good faith of such power or duty. 1994, c. 12, s. 16; 2017, c. 2, Sched. 2, s. 9 (2).

Remuneration

(28) The members who are appointed under clause (2) (g) are entitled to receive the daily remuneration that is fixed by the Lieutenant Governor in Council. 1994, c. 12, s. 16.

Complaint against Chief Justice, Associate Chief Justice or regional senior judge of the Ontario Court of Justice

Complaint against Chief Justice

50 (1) If the Chief Justice of the Ontario Court of Justice is the subject of a complaint,

(a) the Chief Justice of Ontario shall appoint another judge of the Ontario Court of Justice to be a member of the Judicial Council instead of the Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of;

(b) the Associate Chief Justice of the Ontario Court of Justice shall chair meetings and hearings of the Council instead of the Chief Justice of the Ontario Court of Justice, and make appointments under subsection 49 (3) instead of the Chief Justice, until the complaint is finally disposed of; and

(c) any reference of the complaint that would otherwise be made to the Chief Justice of the Ontario Court of Justice under clause 51.4 (13) (b) or 51.4 (18) (c), subclause 51.5 (8) (b) (ii) or clause 51.5 (10) (b) shall be made to the Chief Justice of the Superior Court of Justice instead of to the Chief Justice of the Ontario Court of Justice.

Suspension of Chief Justice

(2) If the Chief Justice of the Ontario Court of Justice is suspended under subsection 51.4 (12),

(a) complaints that would otherwise be referred to the Chief Justice of the Ontario Court of Justice under clauses 51.4 (13) (b) and 51.4 (18) (c), subclause 51.5 (8) (b) (ii) and clause 51.5 (10) (b) shall be referred to the Associate Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of; and

(b) annual approvals that would otherwise be granted or refused by the Chief Justice of the Ontario Court of Justice shall be granted or refused by the Associate Chief Justice of the Ontario Court of Justice, until the complaint is finally disposed of.

Complaint against Associate Chief Justice or regional senior judge

(3) If the Associate Chief Justice of the Ontario Court of Justice or the regional senior judge appointed under clause 49 (2) (c) is the subject of a complaint, the Chief Justice of the Ontario Court of Justice shall appoint another judge of the Ontario Court of Justice to be a member of the Judicial Council instead of the Associate Chief Justice or regional senior judge, as the case may be, until the complaint is finally disposed of. 1996, c. 25, s. 9 (6).

Other duties of Judicial Council

Provision of information to public

51 (1) The Judicial Council shall provide, in courthouses and elsewhere, information about itself and about the justice system, including information about how members of the public may obtain assistance in making complaints.

Same

(2) In providing information, the Judicial Council shall emphasize the elimination of cultural and linguistic barriers and the accommodation of the needs of persons with disabilities.

Assistance to public

(3) Where necessary, the Judicial Council shall arrange for the provision of assistance to members of the public in the preparation of documents for making complaints.

Telephone access

(4) The Judicial Council shall provide province-wide free telephone access, including telephone access for the deaf, to information about itself and its role in the justice system.

Persons with disabilities

(5) To enable persons with disabilities to participate effectively in the complaints process, the Judicial Council shall ensure that their needs are accommodated, at the Council's expense, unless it would impose undue hardship on the Council to do so, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Annual report

(6) After the end of each year, the Judicial Council shall make an annual report to the Attorney General on its affairs, in English and French, including, with respect to all complaints received or dealt with during the year, a summary of the complaint, the findings and a statement of the disposition, but the report shall not include information that might identify the judge or the complainant.

Same, publication

(7) The Judicial Council shall, no earlier than 15 but no later than 30 days after making the report, publish it in English and French on its website. 2019, c. 7, Sched. 15, s. 1.

Rules

51.1 (1) The Judicial Council shall establish and make public rules governing its own procedures, including the following:

1. Guidelines and rules of procedure for the purpose of section 45.

2. Guidelines and rules of procedure for the purpose of subsection 51.4 (21).

3. Guidelines and rules of procedure for the purpose of subsection 51.4 (22).

4. If applicable, criteria for the purpose of subsection 51.5 (2).

5. If applicable, guidelines and rules of procedure for the purpose of subsection 51.5 (13).

6. Rules of procedure for the purpose of subsection 51.6 (3).

7. Criteria for the purpose of subsection 51.6 (7).

8. Criteria for the purpose of subsection 51.6 (8).

9. Criteria for the purpose of subsection 51.6 (10). 1994, c. 12, s. 16.

Legislation Act, 2006, Part III

(2) Part III (Regulations) of the *Legislation Act, 2006* does not apply to rules, guidelines or criteria established by the Judicial Council. 1994, c. 12, s. 16; 2006, c. 21, Sched. F, s. 136 (1).

Sections 28, 29 and 33 of SPPA

(3) Sections 28, 29 and 33 of the *Statutory Powers Procedure Act* do not apply to the Judicial Council. 1994, c. 12, s. 16.

Use of official languages of courts

51.2 (1) The information provided under subsections 51 (1), (3) and (4) and the matters made public under subsection 51.1 (1) shall be made available in English and French.

Same

(2) Complaints against provincial judges may be made in English or French.

Same

(3) A hearing under section 51.6 shall be conducted in English, but a complainant or witness who speaks French or a judge who is the subject of a complaint and who speaks French is entitled, on request,

(a) to be given, before the hearing, French translations of documents that are written in English and are to be considered at the hearing;

(b) to be provided with the assistance of an interpreter at the hearing; and

(c) to be provided with simultaneous interpretation into French of the English portions of the hearing.

Same

(4) Subsection (3) also applies to mediations conducted under section 51.5 and to the Judicial Council's consideration of the question of compensation under section 51.7, if subsection 51.7 (2) applies.

Bilingual hearing or mediation

(5) The Judicial Council may direct that a hearing or mediation to which subsection (3) applies be conducted bilingually, if the Council is of the opinion that it can be properly conducted in that manner.

Part of hearing or mediation

(6) A directive under subsection (5) may apply to a part of the hearing or mediation, and in that case subsections (7) and (8) apply with necessary modifications.

Same

(7) In a bilingual hearing or mediation,

(a) oral evidence and submissions may be given or made in English or French, and shall be recorded in the language in which they are given or made;

(b) documents may be filed in either language;

(c) in the case of a mediation, discussions may take place in either language;

(d) the reasons for a decision or the mediator's report, as the case may be, may be written in either language.

Same

(8) In a bilingual hearing or mediation, if the complainant or the judge who is the subject of the complaint does not speak both languages, he or she is entitled, on request, to have simultaneous interpretation of any evidence, submissions or discussions spoken in the other language and translation of any document filed or reasons or report written in the other language. 1994, c. 12, s. 16.

Complaint re provincial judge

51.3 (1) Any person may make a complaint to the Judicial Council alleging misconduct by a provincial judge.

Same

(2) If an allegation of misconduct against a provincial judge is made to a member of the Judicial Council, it shall be treated as a complaint made to the Judicial Council.

Same

(3) If an allegation of misconduct against a provincial judge is made to any other judge or to the Attorney General, the other judge, or the Attorney General, as the case may be, shall provide the person making the allegation with information about the Judicial Council's role in the justice system and about how a complaint may be made, and shall refer the person to the Judicial Council.

Carriage of matter

(4) Once a complaint has been made to the Judicial Council, the Council has carriage of the matter.

Information re complaint

(5) At any person's request, the Judicial Council may confirm or deny that a particular complaint has been made to it. 1994, c. 12, s. 16.

Role of subcommittee

Review

51.4 (1) A complaint received by the Judicial Council shall be reviewed by a subcommittee of the Council consisting of a provincial judge other than the Chief Justice and a person who is neither a judge nor a lawyer. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Rotation of members

(2) The eligible members of the Judicial Council shall all serve on the subcommittee on a rotating basis.

Dismissal

(3) The subcommittee shall dismiss the complaint without further investigation if, in the subcommittee's opinion, it falls outside the Judicial Council's jurisdiction or is frivolous or an abuse of process.

Investigation

(4) If the complaint is not dismissed under subsection (3), the subcommittee shall conduct such investigation as it considers appropriate.

Expert assistance

(5) The subcommittee may engage persons, including counsel, to assist it in its investigation.

Investigation private

(6) The investigation shall be conducted in private.

Non-application of SPPA

(7) The *Statutory Powers Procedure Act* does not apply to the subcommittee's activities.

Interim recommendations

(8) The subcommittee may recommend to a regional senior judge the suspension, with pay, of the judge who is the subject of the complaint, or the judge's reassignment to a different location, until the complaint is finally disposed of.

Same

(9) The recommendation shall be made to the regional senior judge appointed for the region to which the judge is assigned, unless that regional senior judge is a member of the Judicial Council, in which case the recommendation shall be made to another regional senior judge.

Power of regional senior judge

(10) The regional senior judge may suspend or reassign the judge as the subcommittee recommends. 1994, c. 12, s. 16.

Discretion

(11) The regional senior judge's discretion to accept or reject the subcommittee's recommendation is not subject to the direction and

supervision of the Chief Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Exception: complaints against certain judges

(12) If the complaint is against the Chief Justice of the Ontario Court of Justice, an associate chief justice of the Ontario Court of Justice or the regional senior judge who is a member of the Judicial Council, any recommendation under subsection (8) in connection with the complaint shall be made to the Chief Justice of the Superior Court of Justice, who may suspend or reassign the judge as the subcommittee recommends. 1996, c. 25, s. 9 (7).

Subcommittee's decision

(13) When its investigation is complete, the subcommittee shall,

(a) dismiss the complaint;

(b) refer the complaint to the Chief Justice;

(c) refer the complaint to a mediator in accordance with section 51.5; or

(d) refer the complaint to the Judicial Council, with or without recommending that it hold a hearing under section 51.6. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Same

(14) The subcommittee may dismiss the complaint or refer it to the Chief Justice or to a mediator only if both members agree; otherwise, the complaint shall be referred to the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Conditions, reference to Chief Justice

(15) The subcommittee may, if the judge who is the subject of the complaint agrees, impose conditions on a decision to refer the complaint to the Chief Justice. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Report

(16) The subcommittee shall report to the Judicial Council, without identifying the complainant or the judge who is the subject of the complaint, its disposition of any complaint that is dismissed or referred to the Chief Justice or to a mediator. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Power of Judicial Council

(17) The Judicial Council shall consider the report, in private, and may approve the subcommittee's disposition or may require the subcommittee to refer the complaint to the Council. 1994, c. 12, s. 16.

Same

(18) The Judicial Council shall consider, in private, every complaint referred to it by the subcommittee, and may,

(a) hold a hearing under section 51.6;

(b) dismiss the complaint;

(c) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection (15); or

(d) refer the complaint to a mediator in accordance with section 51.5. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Non-application of SPPA

(19) The *Statutory Powers Procedure Act* does not apply to the Judicial Council's activities under subsections (17) and (18).

Notice to judge and complainant

(20) After making its decision under subsection (17) or (18), the Judicial Council shall communicate it to the judge and the complainant, giving brief reasons in the case of a dismissal.

Guidelines and rules of procedure

(21) In conducting investigations, in making recommendations under subsection (8) and in making decisions under subsections (13) and (15), the subcommittee shall follow the Judicial Council's guidelines and rules of procedure established under subsection 51.1 (1).

Same

(22) In considering reports and complaints and making decisions under subsections (17) and (18), the Judicial Council shall follow its guidelines and rules of procedure established under subsection 51.1 (1). 1994, c. 12, s. 16.

Mediation

51.5 (1) The Judicial Council may establish a mediation process for complainants and for judges who are the subject of complaints.

Criteria

(2) If the Judicial Council establishes a mediation process, it must also establish criteria to exclude from the process complaints that are inappropriate for mediation.

Same

(3) Without limiting the generality of subsection (2), the criteria must ensure that complaints are excluded from the mediation process in the following circumstances:

1. There is a significant power imbalance between the complainant and the judge, or there is such a significant disparity between the complainant's and the judge's accounts of the event with which the complaint is concerned that mediation would be unworkable.

2. The complaint involves an allegation of sexual misconduct or an allegation of discrimination or harassment because of a prohibited ground of discrimination or harassment referred to in any provision of the *Human Rights Code*.

3. The public interest requires a hearing of the complaint.

Legal advice

(4) A complaint may be referred to a mediator only if the complainant and the judge consent to the referral, are able to obtain independent legal advice and have had an opportunity to do so.

Trained mediator

(5) The mediator shall be a person who has been trained in mediation and who is not a judge, and if the mediation is conducted by two or more persons acting together, at least one of them must meet those requirements.

Impartiality

(6) The mediator shall be impartial.

Exclusion

(7) No member of the subcommittee that investigated the complaint and no member of the Judicial Council who dealt with the complaint under subsection 51.4 (17) or (18) shall participate in the mediation. 1994, c. 12, s. 16.

Review by Council

(8) The mediator shall report the results of the mediation, without identifying the complainant or the judge who is the subject of the complaint, to the Judicial Council, which shall review the report, in private, and may,

(a) approve the disposition of the complaint; or

(b) if the mediation does not result in a disposition or if the Council is of the opinion that the disposition is not in the public interest,

(i) dismiss the complaint,

(ii) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection 51.4 (15), or

(iii) hold a hearing under section 51.6. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Report

(9) If the Judicial Council approves the disposition of the complaint, it may make the results of the mediation public, providing a summary of the complaint but not identifying the complainant or the judge. 1994, c. 12, s. 16.

Referral to Council

(10) At any time during or after the mediation, the complainant or the judge may refer the complaint to the Judicial Council, which shall consider the matter, in private, and may,

(a) dismiss the complaint;

(b) refer the complaint to the Chief Justice, with or without imposing conditions as referred to in subsection 51.4 (15); or

(c) hold a hearing under section 51.6. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Non-application of SPPA

(11) The *Statutory Powers Procedure Act* does not apply to the Judicial Council's activities under subsections (8) and (10).

Notice to judge and complainant

(12) After making its decision under subsection (8) or (10), the Judicial Council shall communicate it to the judge and the complainant, giving brief reasons in the case of a dismissal.

Guidelines and rules of procedure

(13) In reviewing reports, considering matters and making decisions under subsections (8) and (10), the Judicial Council shall follow its guidelines and rules of procedure established under subsection 51.1 (1). 1994, c. 12, s. 16.

Adjudication by Council

51.6 (1) When the Judicial Council decides to hold a hearing, it shall do so in accordance with this section. 1994, c. 12, s. 16.

Application of SPPA

(2) The *Statutory Powers Procedure Act*, except section 4 and subsection 9 (1), applies to the hearing. 1994, c. 12, s. 16.

Rules of procedure

(3) The Judicial Council's rules of procedure established under subsection 51.1 (1) apply to the hearing. 1994, c. 12, s. 16.

Communication re subject-matter of hearing

(4) The members of the Judicial Council participating in the hearing shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person, unless all the parties and the persons representing the parties under the authority of the *Law Society Act* receive notice and have an opportunity to participate. 2006, c. 21, Sched. C, s. 105 (3).

Exception

(5) Subsection (4) does not preclude the Judicial Council from engaging counsel to assist it in accordance with subsection 49 (21), and in that case the nature of the advice given by counsel shall be communicated to the parties so that they may make submissions as to the law. 1994, c. 12, s. 16.

Parties

(6) The Judicial Council shall determine who are the parties to the hearing. 1994, c. 12, s. 16.

Exception, closed hearing

(7) In exceptional circumstances, if the Judicial Council determines, in accordance with the criteria established under subsection 51.1 (1), that the desirability of holding open hearings is outweighed by the desirability of maintaining confidentiality, it may hold all or part of the hearing in private. 1994, c. 12, s. 16.

Disclosure in exceptional circumstances

(8) If the hearing was held in private, the Judicial Council shall, unless it determines in accordance with the criteria established under subsection 51.1 (1) that there are exceptional circumstances, order that the judge's name not be disclosed or made public. 1994, c. 12, s. 16.

Orders prohibiting publication

(9) If the complaint involves allegations of sexual misconduct or sexual harassment, the Judicial Council shall, at the request of a complainant or of another witness who testifies to having been the victim of similar conduct by the judge, prohibit the publication of information that might identify the complainant or witness, as the case may be. 1994, c. 12, s. 16.

Publication ban

(10) In exceptional circumstances and in accordance with the criteria established under subsection 51.1 (1), the Judicial Council may make an order prohibiting, pending the disposition of a complaint, the publication of information that might identify the judge who is the subject of the complaint. 1994, c. 12, s. 16.

Dispositions

(11) After completing the hearing, the Judicial Council may dismiss the complaint, with or without a finding that it is unfounded or, if it finds that there has been misconduct by the judge, may,

(a) warn the judge;

(b) reprimand the judge;

(c) order the judge to apologize to the complainant or to any other person;

(d) order that the judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a judge;

(e) suspend the judge with pay, for any period;

(f) suspend the judge without pay, but with benefits, for a period up to thirty days; or

(g) recommend to the Attorney General that the judge be removed from office in accordance with section 51.8. 1994, c. 12, s. 16.

Same

(12) The Judicial Council may adopt any combination of the dispositions set out in clauses (11) (a) to (f). 1994, c. 12, s. 16.

Disability

(13) If the Judicial Council finds that the judge is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her needs were accommodated, the Council shall order that the judge's needs be accommodated to the extent necessary to enable him or her to perform those duties. 1994, c. 12, s. 16.

Application of subs. (13)

(14) Subsection (13) applies if,

(a) the effect of the disability on the judge's performance of the essential duties of the office was a factor in the complaint; and

(b) the Judicial Council dismisses the complaint or makes a disposition under clauses (11) (a) to (f). 1994, c. 12, s. 16.

Undue hardship

(15) Subsection (13) does not apply if the Judicial Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the judge's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. 1994, c. 12, s. 16.

Opportunity to participate

(16) The Judicial Council shall not make an order under subsection (13) against a person without ensuring that the person has had an opportunity to participate and make submissions. 1994, c. 12, s. 16.

Crown bound

(17) An order made under subsection (13) binds the Crown. 1994, c. 12, s. 16.

Report to Attorney General

(18) The Judicial Council may make a report to the Attorney General about the complaint, investigation, hearing and disposition, subject to any order made under subsection 49 (24), and the Attorney General may make the report public if of the opinion that this would be in the public interest. 1994, c. 12, s. 16.

Non-identification of persons

(19) The following persons shall not be identified in the report:

1. A complainant or witness at whose request an order was made under subsection (9).

2. The judge, if the hearing was conducted in private, unless the Judicial Council orders that the judge's name be disclosed. 1994, c. 12, s. 16.

Continuing publication ban

(20) If an order was made under subsection (10) and the Judicial Council dismisses the complaint with a finding that it was unfounded, the judge shall not be identified in the report without his or her consent and the Council shall order that information that relates to the complaint and might identify the judge shall never be made public without his or her consent. 1994, c. 12, s. 16.

Compensation

51.7 (1) When the Judicial Council has dealt with a complaint against a provincial judge, it shall consider whether the judge should be compensated for his or her costs for legal services incurred in connection with all the steps taken under sections 51.4, 51.5 and 51.6 and this section in relation to the complaint. 1994, c. 12, s. 16.

Consideration of question combined with hearing

(2) If the Judicial Council holds a hearing into the complaint, its consideration of the question of compensation shall be combined with the hearing. 1994, c. 12, s. 16.

Public or private consideration of question

(3) The Judicial Council's consideration of the question of compensation shall take place in public if there was a public hearing into the complaint, and otherwise shall take place in private. 1994, c. 12, s. 16.

Recommendation

(4) If the Judicial Council is of the opinion that the judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 1994, c. 12, s. 16.

Same

(5) If the complaint is dismissed after a hearing, the Judicial Council shall recommend to the Attorney General that the judge be compensated for his or her costs for legal services and shall indicate the amount. 1994, c. 12, s. 16.

Exception

(5.1) If the Judicial Council makes a recommendation under clause 51.6 (11) (g) in relation to a complaint made on or after the day section 2 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsections (1) to (3) do not apply and compensation shall not be recommended under subsection (4). 2020, c. 11, Sched. 5, s. 2.

Disclosure of name

(6) The Judicial Council's recommendation to the Attorney General shall name the judge, but the Attorney General shall not disclose the name unless there was a public hearing into the complaint or the Council has otherwise made the judge's name public. 1994, c. 12, s. 16.

Amount of compensation

(7) The amount of compensation recommended under subsection (4) or (5) may relate to all or part of the judge's costs for legal services, and shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services. 1994, c. 12, s. 16.

Payment

(8) The Attorney General shall pay compensation to the judge in accordance with the recommendation. 1994, c. 12, s. 16.

Removal for cause

51.8 (1) A provincial judge may be removed from office only if,

(a) a complaint about the judge has been made to the Judicial Council; and

(b) the Judicial Council, after a hearing under section 51.6, recommends to the Attorney General that the judge be removed on the ground that he or she has become incapacitated or disabled from the due execution of his or her office by reason of,

(i) inability, because of a disability, to perform the essential duties of his or her office (if an order to accommodate the judge's needs would not remedy the inability, or could not be made because it would impose undue hardship on the person responsible for meeting those needs, or was made but did not remedy the inability),

(ii) conduct that is incompatible with the due execution of his or her office, or

(iii) failure to perform the duties of his or her office. 1994, c. 12, s. 16.

Tabling of recommendation

(2) The Attorney General shall table the recommendation in the Assembly if it is in session or, if not, within fifteen days after the commencement of the next session. 1994, c. 12, s. 16.

Order for removal

(3) An order removing a provincial judge from office under this section may be made by the Lieutenant Governor on the address of the Assembly. 1994, c. 12, s. 16.

Application

(4) This section applies to provincial judges who have not yet attained retirement age and to provincial judges whose continuation in office after attaining retirement age has been approved under subsection 47 (3), (4) or (5). 1994, c. 12, s. 16.

(5) Repealed: 2017, c. 2, Sched. 2, s. 10.

Standards of conduct

51.9 (1) The Chief Justice of the Ontario Court of Justice may establish standards of conduct for provincial judges, including a plan for bringing the standards into effect, and may implement the standards and plan when they have been reviewed and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Duty of Chief Justice

(2) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20); 2006, c. 21, Sched. A, s. 6.

Goals

(3) The following are among the goals that the Chief Justice may seek to achieve by implementing standards of conduct for judges:

1. Recognizing the independence of the judiciary.

2. Maintaining the high quality of the justice system and ensuring the efficient administration of justice.

3. Enhancing equality and a sense of inclusiveness in the justice system.

4. Ensuring that judges' conduct is consistent with the respect accorded to them.

5. Emphasizing the need to ensure the professional and personal development of judges and the growth of their social awareness through continuing education. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Continuing education

51.10 (1) The Chief Justice of the Ontario Court of Justice shall establish a plan for the continuing education of provincial judges, and shall implement the plan when it has been reviewed and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Duty of Chief Justice

(2) The Chief Justice shall ensure that the plan for continuing education is made available to the public, in English and French, when it has been approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Goals

(3) Continuing education of judges has the following goals:

1. Maintaining and developing professional competence.

2. Maintaining and developing social awareness.

3. Encouraging personal growth. 1994, c. 12, s. 16.

Establishment of courses

51.10.1 (1) The Chief Justice of the Ontario Court of Justice may establish courses for newly appointed judges and for the continuing education of judges, which may include courses respecting,

(a) sexual assault law;

(b) intimate partner violence;

(c) coercive control in intimate partner and family relationships; and

(d) social context, which includes systemic racism and systemic discrimination. 2023, c. 12, Sched. 3, s. 3.

Courses re sexual assault and intimate partner violence, consultation

(2) The Chief Justice may, in establishing courses respecting matters mentioned in clauses (1) (a) to (d), consult with such persons, groups and organizations as the Chief Justice considers appropriate, which may include survivors of sexual assault, survivors of intimate partner violence and persons, groups and organizations that support these survivors, including Indigenous leaders and representatives of Indigenous communities. 2023, c. 12, Sched. 3, s. 3.

Designated courses

(3) The Chief Justice may designate courses, including courses established under subsection (1), for newly appointed judges. 2023, c. 12, Sched. 3, s. 3.

Report

(4) No later than February 28 in each year, the Chief Justice shall submit to the Attorney General a report setting out the following information:

1. The title, duration and dates of each course established by the Chief Justice respecting matters mentioned in clauses (1) (a) to (d) that was offered to judges during the previous calendar year.

2. A description of the topics covered in each course.

3. The number of judges who attended each course. 2023, c. 12, Sched. 3, s. 3.

Tabling of report

(5) The Attorney General shall cause a copy of a report submitted under subsection (4) to be tabled in the Legislative Assembly on any of the first 10 days on which that House is sitting after the Attorney General receives the report. 2023, c. 12, Sched. 3, s. 3.

Performance evaluation

51.11 (1) The Chief Justice of the Ontario Court of Justice may establish a program of performance evaluation for provincial judges, and may implement the program when it has been reviewed and approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (18, 20).

Duty of Chief Justice

(2) The Chief Justice shall make the existence of the program of performance evaluation public when it has been approved by the Judicial Council. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Goals

(3) The following are among the goals that the Chief Justice may seek to achieve by establishing a program of performance evaluation for judges:

1. Enhancing the performance of individual judges and of judges in general.

2. Identifying continuing education needs.

3. Assisting in the assignment of judges.

4. Identifying potential for professional development. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (20).

Scope of evaluation

(4) In a judge's performance evaluation, a decision made in a particular case shall not be considered.

Confidentiality

(5) A judge's performance evaluation is confidential and shall be disclosed only to the judge, his or her regional senior judge, and the person or persons

conducting the evaluation.

Inadmissibility, exception

(6) A judge's performance evaluation shall not be admitted in evidence before the Judicial Council or any court or other tribunal unless the judge consents.

Application of subss. (5), (6)

(7) Subsections (5) and (6) apply to everything contained in a judge's performance evaluation and to all information collected in connection with the evaluation. 1994, c. 12, s. 16.

Consultation

51.12 In establishing standards of conduct under section 51.9, a plan for continuing education under section 51.10 and a program of performance evaluation under section 51.11, the Chief Justice of the Ontario Court of Justice shall consult with judges of that court and with such other persons as he or she considers appropriate. 1994, c. 12, s. 16; 1996, c. 25, s. 9 (15, 18, 20).

PROVINCIAL JUDGES' REMUNERATION

Remuneration and framework agreement

Provincial Judges Remuneration Commission

51.13 (1) The committee known as the Provincial Judges Remuneration Commission in English and as Commission de rémunération des juges provinciaux in French is continued. 1994, c. 12, s. 16.

Composition and functions

(2) The composition and functions of the Commission are as set out in Appendix A of the framework agreement set out in the Schedule to this Act. 1994, c. 12, s. 16.

Framework agreement

(3) The framework agreement forms part of this Act. 1994, c. 12, s. 16.

Same

(4) The reference in paragraph 11 of the framework agreement to public servants as defined in the *Public Service Act* is deemed to be a reference to

public servants employed under Part III of the *Public Service of Ontario Act, 2006*. 2006, c. 35, Sched. C, s. 20 (1).

MISCELLANEOUS

Meetings of judges

Superior Court of Justice

52 (1) The judges of the Superior Court of Justice shall meet at least once in each year, on a day fixed by the Chief Justice of the Superior Court of Justice, in order to consider this Act, the rules of court and the administration of justice generally. 1994, c. 12, s. 17; 1996, c. 25, s. 9 (14, 17).

Family Court

(2) The judges of the Family Court shall meet at least once in each year, on a day fixed by the Chief Justice of the Superior Court of Justice, in order to consider this Act, the rules of court and the administration of justice generally. 1998, c. 20, Sched. A, s. 22 (9).

(2.1) REPEALED: 2009, c. 33, Sched. 2, s. 20 (12).

Regional senior judges, Superior Court of Justice

(2.2) The regional senior judges of the Superior Court of Justice and the Senior Judge of the Family Court shall meet at least once in each year with the Chief Justice and the Associate Chief Justice of the Superior Court of Justice, on a day fixed by the Chief Justice, in order to consider this Act, the rules of court and the administration of justice generally. 1998, c. 20, Sched. A, s. 22 (10).

(3) REPEALED: 2009, c. 33, Sched. 2, s. 20 (13).

Regional meeting of judges

(4) The judges of the Court of Ontario in each region shall meet at least once in each year in order to consider this Act, the rules of court and the administration of justice in the region generally, on a day fixed jointly by the regional senior judge of the Superior Court of Justice and the regional senior judge of the Ontario Court of Justice. 2006, c. 21, Sched. A, s. 7.

(5) REPEALED: 2009, c. 33, Sched. 2, s. 20 (14).

Regulations

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

(a) fixing the number of judges of the Superior Court of Justice for the purpose of clause 12 (1) (e);

(a.1) fixing the number of judges of the Superior Court of Justice who are members of the Family Court appointed under clause 21.2 (1) (e);

(a.2) fixing the remuneration of provincial judges;

(a.3) providing for the benefits to which provincial judges are entitled, including benefits respecting,

(i) leave of absence and vacations,

(ii) sick leave credits and payments in respect of those credits, and

(iii) pension benefits for provincial judges and their surviving spouses and children;

(a.4) providing for the matters referred to in clauses (a.2) and (a.3) with respect to the Small Claims Court Administrative Judge appointed under section 87.2;

(b) fixing the remuneration of associate judges and providing for the benefits to which they are entitled;

(b.1) fixing the remuneration of deputy judges of the Small Claims Court;

(c) prescribing a period of time for the purposes of subsection 86.1 (2);

(d) prescribing family law proceedings for the purposes of the Schedule to section 21.8;

(e) prescribing the maximum amount of a claim in the Small Claims Court for the purposes of subsection 23 (1);

(f) prescribing the maximum amount of a claim over which a deputy judge may preside for the purposes of subsection 24 (3);

(g) prescribing the minimum amount of a claim that may be appealed to the Divisional Court for the purposes of section 31;

(h) providing for the limits to which service as a provincial judge on a part-time basis is subject for the purposes of subsection 44 (2);

(i) prescribing for each region the minimum number of judges of the Superior Court of Justice and of the Ontario Court of Justice who are to be assigned to that region;

(j) prescribing for each region the minimum number of judges of the Superior Court of Justice who are members of the Family Court and to be assigned to that region. R.S.O. 1990, c. C.43, s. 53 (1); 1994, c. 12, s. 18 (1, 3-5); 1996, c. 25, ss. 1 (8), 9 (17, 18); 1998, c. 20, s. 2 (1); 1998, c. 20, Sched. A, s. 22 (11); 1999, c. 6, s. 18 (2); 2002, c. 18, Sched. A, s. 4 (1); 2005, c. 5, s. 17 (2); 2006, c. 21, Sched. A, s. 8; 2009, c. 33, Sched. 2, s. 20 (15); 2015, c. 27, Sched. 1, s. 1 (8); 2017, c. 2, Sched. 2, s. 11 (1); 2021, c. 4, Sched. 3, s. 5; 2024, c. 27, Sched. 7, s. 2.

Same

(2) A reduction in the number of judges of the Superior Court of Justice under clause (1) (a) does not affect appointments existing at the time of the reduction. R.S.O. 1990, c. C.43, s. 53 (2); 1996, c. 25, s. 9 (17).

Same

(3) If there is a conflict between a regulation made under clause (1) (a.2), (a.3) or (a.4) and the Framework Agreement set out in the Schedule, the Framework Agreement prevails. 1998, c. 20, s. 2 (2); 2017, c. 2, Sched. 2, s. 11 (2).

Application of regulations

(4) A regulation made under subsection (1) may be general or particular in its application. R.S.O. 1990, c. C.43, s. 53 (4).

Definition

(5) In clause (1) (a.3),

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. 1999, c. 6, s. 18 (3); 2005, c. 5, s. 17 (3, 4).

PART III (SS. 54-64, SCHED.) REPEALED: 1994, C. 12, S. 19.

54-64

PART IV
RULES OF COURT

Civil Rules Committee

65 (1) The committee known as the Civil Rules Committee is continued under the name Civil Rules Committee in English and Comité des règles en matière civile in French. R.S.O. 1990, c. C.43, s. 65 (1).

Composition

(2) The Civil Rules Committee shall be composed of,

(a) the Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice;

(a.1) the Associate Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice of Ontario;

(a.2) the Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice;

(a.3) the Associate Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice of that court;

(b) two judges of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(c) eight judges of the Superior Court of Justice, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(d) the Small Claims Court Administrative Judge appointed under section 87.2;

(d.1) one associate judge, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(e) the Attorney General or a person designated by the Attorney General;

(f) one law officer of the Crown, who shall be appointed by the Attorney General;

(g) two persons employed in the administration of the courts, who shall be appointed by the Attorney General;

(h) four lawyers, who shall be appointed by the Law Society of Ontario;

(i) one lawyer, who shall be appointed by the Chief Justice of Ontario;

(j) four lawyers, who shall be appointed by the Chief Justice of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 65 (2); 1994, c. 12, s. 20; 1996, c. 25, s. 9 (14, 17, 18, 20); 1998, c. 20, Sched. A, s. 12;

2006, c. 21, Sched. A, s. 9; 2017, c. 2, Sched. 2, s. 12; 2018, c. 8, Sched. 15, s. 8 (1); 2024, c. 2, Sched. 6, s. 2 (1, 2); 2024, c. 28, Sched. 4, s. 1 (1).

Presiding member

(3) The Civil Rules Committee shall be presided over,

(a) by the Chief Justice of Ontario; or

(b) if the Chief Justice of Ontario is absent or so requests, or is not serving as a member under clause (2) (a), by another member designated by the Chief Justice. 2024, c. 28, Sched. 4, s. 1 (2).

Tenure of office

(4) Each of the members of the Civil Rules Committee appointed under clauses (2) (b), (c), (d.1), (f), (g), (h), (i) and (j) shall hold office for a period of three years and is eligible for reappointment. R.S.O. 1990, c. C.43, s. 65 (4); 2024, c. 2, Sched. 6, s. 2 (3).

Vacancies

(5) Where a vacancy occurs among the members appointed under clause (2) (b), (c), (d.1), (f), (g), (h), (i) or (j), a new member similarly qualified may be appointed for the remainder of the unexpired term. R.S.O. 1990, c. C.43, s. 65 (5); 2024, c. 2, Sched. 6, s. 2 (3).

Quorum

(6) One-third of the members of the Civil Rules Committee constitutes a quorum. R.S.O. 1990, c. C.43, s. 65 (6).

Information to be maintained in confidence

(7) The Ministry of the Attorney General shall maintain in confidence any records or other information collected, prepared, maintained or used by the Ministry in relation to the business of the Civil Rules Committee and shall not disclose any such records or information unless the disclosure has been authorized by the Attorney General and approved by the chair of the Committee. 2024, c. 2, Sched. 6, s. 2 (4).

Prevails over *FIPPA*

(8) Subsection (7) prevails over the *Freedom of Information and Protection of Privacy Act*. 2024, c. 2, Sched. 6, s. 2 (4).

Delegation

(9) The Attorney General may, in writing, delegate the power to authorize disclosures in subsection (7) to the Deputy Attorney General or to any other employee of the Ministry, subject to any limitations, restrictions, conditions and requirements that are set out in the delegation. 2024, c. 2, Sched. 6, s. 2 (4).

Transition

(10) If a request for access to a record described in subsection (7) was made to the Attorney General under the *Freedom of Information and Protection of Privacy Act* on or after the day the *Enhancing Access to Justice Act, 2024* received first reading and a decision about disclosure of the record has not been made by the date on which subsection 2 (4) of Schedule 6 to the *Enhancing Access to Justice Act, 2024* comes into force, subsections (7) to (9) of this section apply to the request. 2024, c. 2, Sched. 6, s. 2 (4).

Civil Rules

66 (1) Subject to the approval of the Attorney General, the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, except for proceedings in relation to which the Family Rules Committee may make rules under section 68. 2006, c. 21, Sched. A, s. 10 (1).

Same

(2) The Civil Rules Committee may make rules under subsection (1), even though they alter or conform to the substantive law, in relation to,

(a) conduct of proceedings in the courts;

(b) joinder of claims and parties, settlement of claims by or against persons under disability, whether or not a proceeding has been commenced in respect of the claim, the binding effect of orders and representation of parties;

(c) commencement of proceedings, representation of parties and service of process in or outside Ontario;

(d) disposition of proceedings without a hearing and its effect and authorizing the Court of Appeal to determine in the first instance a special case arising in a proceeding commenced in the Superior Court of Justice;

(e) pleadings;

(f) discovery and other forms of disclosure before hearing, including their scope and the admissibility and use of that discovery and disclosure in a proceeding;

(g) examination of witnesses in or out of court;

(h) jurisdiction of associate judges, including the conferral on associate judges of any jurisdiction of the Superior Court of Justice, including jurisdiction under an Act, but not including the trial of actions or jurisdiction conferred by an Act on a judge;

(i) jurisdiction and duties of officers;

(j) motions and applications, including the hearing of motions and applications in the absence of the public and prohibiting a party from making motions without leave;

(k) preservation of rights of parties pending the outcome of litigation, including sale, recovery of possession or preservation of property;

(l) interpleader;

(m) preparation for trial and offers to settle and their legal consequences;

(n) the mode and conduct of trials;

(o) the appointment by the court of independent experts, their remuneration and the admissibility and use of their reports;

(p) the discount rate to be used in determining the amount of an award in respect of future pecuniary damages;

(q) references of proceedings or issues in a proceeding and the powers of a person conducting a reference;

(r) costs of proceedings, including security for costs and, in the case of a person representing a party or other person, the representative's liability for, or disentitlement to, costs;

(s) enforcement of orders and process or obligations under the rules;

(t) the time for and procedure on appeals and stays pending appeal;

(u) payment into and out of court;

(v) the method of calculating the amount to be included in an award of damages to offset any liability for income tax on income from investment of the award;

(w) the prejudgment interest rate with respect to the rate of interest on damages for non-pecuniary loss;

(w.1) the issuance, service, filing and storage of documents by electronic means, including methods of completing and signing documents for those purposes;

(x) any matter that is referred to in an Act as provided for by rules of court. R.S.O. 1990, c. C.43, s. 66 (2); 1994, c. 12, s. 21; 1996, c. 25, ss. 1 (9), 9 (17); 1998, c. 18, Sched. B, s. 5 (1); 2006, c. 21, Sched. A, s. 10 (2); 2006, c. 21, Sched. C, s. 105 (4); 2020, c. 11, Sched. 5, s. 3; 2021, c. 4, Sched. 3, s. 6.

Same

(3) Nothing in subsection (1) or (2) authorizes the making of rules that conflict with an Act, but rules may be made under subsection (1) supplementing the provisions of an Act in respect of practice and procedure. 2006, c. 21, Sched. A, s. 10 (3).

Same

(4) Rules made under subsection (1) in relation to the matters described in clauses (2) (p), (v) and (w) shall be reviewed at least once in every four-year period. 2006, c. 21, Sched. A, s. 10 (3).

Application

(5) A rule made under this section may be general or particular in its application. 2006, c. 21, Sched. A, s. 10 (3).

Family Rules Committee

67 (1) The committee known as the Family Rules Committee is continued under the name Family Rules Committee in English and Comité des règles en matière de droit de la famille in French. R.S.O. 1990, c. C.43, s. 67 (1).

Composition

(2) The Family Rules Committee is composed of,

(a) the Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice;

(b) the Associate Chief Justice of Ontario or another judge of the Court of Appeal designated by the Chief Justice of Ontario;

(b.1) the Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice;

(b.2) the Associate Chief Justice of the Superior Court of Justice or another judge of that court designated by the Chief Justice of that court;

(c) the Senior Judge of the Family Court;

(d) the Chief Justice of the Ontario Court of Justice or another judge of that court designated by the Chief Justice;

(e) one judge of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(f) four judges of the Superior Court of Justice appointed by the Chief Justice of the Superior Court of Justice, at least two of whom shall be judges of the Family Court referred to in clause 21.2 (1) (d) or (e);

(g) the Senior Advisory Family Judge of the Ontario Court of Justice, and two other judges of the Ontario Court of Justice who shall be appointed by the Chief Justice of the Ontario Court of Justice;

(h) the Attorney General or a person designated by the Attorney General;

(i) one law officer of the Crown, who shall be appointed by the Attorney General;

(j) two persons employed in the administration of the courts, who shall be appointed by the Attorney General;

(k) four lawyers, who shall be appointed by the Law Society of Ontario;

(l) four lawyers, who shall be appointed by the Chief Justice of the Superior Court of Justice; and

(m) two lawyers, who shall be appointed by the Chief Justice of the Ontario Court of Justice. 1998, c. 20, Sched. A, s. 22 (12); 2006, c. 21, Sched. A, s. 11; 2015, c. 27, Sched. 1, s. 1 (9); 2018, c. 8, Sched. 15, s. 8 (3); 2024, c. 28, Sched. 4, s. 2 (1).

Presiding member

(3) The Family Rules Committee shall be presided over,

(a) by the Chief Justice of Ontario; or

(b) if the Chief Justice of Ontario is absent or so requests, or is not serving as a member under clause (2) (a), by another member designated by the Chief Justice. 2024, c. 28, Sched. 4, s. 2 (2)

Tenure of office

(4) Each of the members of the Family Rules Committee appointed under clauses (2) (e), (f), (g), (i), (j), (k), (l) and (m) shall hold office for a period

of three years and is eligible for reappointment. 1998, c. 20, Sched. A, s. 13 (2).

Vacancies

(5) Where a vacancy occurs among the members appointed under clause (2) (e), (f), (g), (i), (j), (k), (l) or (m), a new member similarly qualified may be appointed for the remainder of the unexpired term. 1998, c. 20, Sched. A, s. 13 (2).

Quorum

(6) One-third of the members of the Family Rules Committee constitutes a quorum. R.S.O. 1990, c. C.43, s. 67 (6).

Information to be maintained in confidence

(7) The Ministry of the Attorney General shall maintain in confidence any records or other information collected, prepared, maintained or used by the Ministry in relation to the business of the Family Rules Committee and shall not disclose any such records or information unless the disclosure has been authorized by the Attorney General and approved by the chair of the Committee. 2024, c. 2, Sched. 6, s. 3.

Prevails over *FIPPA*

(8) Subsection (7) prevails over the *Freedom of Information and Protection of Privacy Act*. 2024, c. 2, Sched. 6, s. 3.

Delegation

(9) The Attorney General may, in writing, delegate the power to authorize disclosures in subsection (7) to the Deputy Attorney General or to any other employee of the Ministry, subject to any limitations, restrictions, conditions and requirements that are set out in the delegation. 2024, c. 2, Sched. 6, s. 3.

Transition

(10) If a request for access to a record described in subsection (7) was made to the Attorney General under the *Freedom of Information and Protection of Privacy Act* on or after the day the *Enhancing Access to Justice Act, 2024* received first reading and a decision about disclosure of the record has not been made by the date on which section 3 of Schedule 6 to the *Enhancing Access to Justice Act, 2024* comes into force, subsections (7) to (9) of this section apply to the request. 2024, c. 2, Sched. 6, s. 3.

Family rules

68 (1) Subject to the approval of the Attorney General, the Family Rules Committee may make rules for the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in relation to the practice and procedure of those courts in the proceedings referred to in the Schedule to section 21.8. 2006, c. 21, Sched. A, s. 12.

Same

(2) Subsections 66 (2), (3) and (5) apply with necessary modifications to the Family Rules Committee making rules under subsection (1). 2006, c. 21, Sched. A, s. 12.

(3) REPEALED: 2006, c. 21, Sched. A, s. 12.

(4) REPEALED: 2006, c. 19, Sched. D, s. 5 (2).

Civil, family rules made by the Attorney General

Civil rules

68.1 (1) Subject to subsection (3), the Attorney General may make rules respecting any matter about which the Civil Rules Committee has authority to make rules under section 66, and may amend or revoke any rule made by the Civil Rules Committee under that section. 2024, c. 28, Sched. 4, s. 3.

Family rules

(2) Subject to subsection (3), the Attorney General may make rules respecting any matter about which the Family Rules Committee has authority to make rules under section 68, and may amend or revoke any rule made by the Family Rules Committee under that section. 2024, c. 28, Sched. 4, s. 3.

Prior consultation

(3) Before a rule may be made under subsection (1) or (2), the Attorney General shall consult with,

(a) one or more of the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice, as the Attorney General considers appropriate given the proceedings to which the rule would apply; and

(b) the presiding member of the Civil Rules Committee or the Family Rules Committee, as the case may be. 2024, c. 28, Sched. 4, s. 3.

(4) Repealed: 2025, c. 24, Sched. 7, s. 2.

Criminal Rules Committee

69 (1) The committee known as the Criminal Rules Committee is continued under the name Criminal Rules Committee in English and Comité des règles en matière criminelle in French. R.S.O. 1990, c. C.43, s. 69 (1).

Same

(2) The Criminal Rules Committee shall be composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Superior Court of Justice and the Chief Justice and associate chief justices of the Ontario Court of Justice;

(b) one judge of the Court of Appeal, who shall be appointed by the Chief Justice of Ontario;

(c) three judges of the Superior Court of Justice, who shall be appointed by the Chief Justice of the Superior Court of Justice;

(d) four judges of the Ontario Court of Justice, who shall be appointed by the Chief Justice of the Ontario Court of Justice;

(e) Repealed: 1994, c. 12, s. 23 (2).

(f) the Attorney General or a person designated by the Attorney General;

(g) one law officer of the Crown, who shall be appointed by the Attorney General;

(h) four Crown attorneys, deputy Crown attorneys or assistant Crown attorneys, who shall be appointed by the Attorney General;

(i) two persons employed in court administration, who shall be appointed by the Attorney General;

(j) two lawyers, who shall be appointed by the Law Society of Ontario;

(k) one lawyer, who shall be appointed by the Chief Justice of Ontario;

(l) one lawyer, who shall be appointed by the Chief Justice of the Superior Court of Justice; and

(m) two lawyers, who shall be appointed by the Chief Justice of the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 69 (2); 1994, c. 12, s. 23; 1996, c. 25, s. 9 (14, 17, 18, 20); 2018, c. 8, Sched. 15, s. 8 (1).

Same

(3) The Chief Justice of Ontario shall preside over the Criminal Rules Committee but, if the Chief Justice of Ontario is absent or so requests, another member designated by the Chief Justice of Ontario shall preside.

Tenure of office

(4) Each of the members of the Criminal Rules Committee appointed under clauses (2) (b), (c), (d), (e), (g), (h), (i), (j), (k), (l) and (m) shall hold office for a period of three years and is eligible for reappointment.

Vacancies

(5) Where a vacancy occurs among the members appointed under clause (2) (b), (c), (d), (e), (g), (h), (i), (j), (k), (l) or (m), a new member similarly qualified may be appointed for the remainder of the unexpired term.

Quorum

(6) One-third of the members of the Criminal Rules Committee constitutes a quorum. R.S.O. 1990, c. C.43, s. 69 (3-6).

Criminal rules

70 (1) At the request of the Court of Appeal, the Superior Court of Justice or the Ontario Court of Justice, the Criminal Rules Committee may prepare rules for the purposes of section 482 of the *Criminal Code* (Canada) for consideration by the relevant court. 1994, c. 12, s. 24; 1996, c. 25, s. 9 (17, 18).

(2), (3) REPEALED: 2017, c. 2, Sched. 2, s. 13.

Provincial offences rules

70.1 (1) Subject to subsection (2), the Attorney General may make rules in relation to the practice and procedure of the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in proceedings under the *Provincial Offences Act*, including rules,

(a) regulating any matters relating to the practice and procedure of proceedings under the *Provincial Offences Act*;

(b) prescribing forms;

(c) regulating the duties of the employees of the courts;

(d) regulating the duties of municipal employees and other persons who act under the authority of agreements made under Part X of the *Provincial Offences Act*;

(e) prescribing and regulating the procedures under any Act that confers jurisdiction under the *Provincial Offences Act* on the Ontario Court of Justice or a judge or justice of the peace sitting in it;

(f) prescribing any matter relating to proceedings under the *Provincial Offences Act* that is referred to in an Act as provided for by the rules of court. 2017, c. 2, Sched. 2, s. 14.

Prior approval of courts

(2) Before a rule may be made under subsection (1), the Attorney General shall obtain the approval of one or more of the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice, as the Attorney General considers appropriate given the proceedings to which the rule would apply. 2017, c. 2, Sched. 2, s. 14

Recommendations, proposals by courts

(3) The Attorney General shall consider any recommendations or proposals given to him or her by the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice or the Chief Justice of the Ontario Court of Justice respecting rules that may be made under subsection (1). 2017, c. 2, Sched. 2, s. 14.

PART V
ADMINISTRATION OF THE COURTS

Goals

71 The administration of the courts shall be carried on so as to,

(a) maintain the independence of the judiciary as a separate branch of government;

(b) recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;

(c) encourage public access to the courts and public confidence in the administration of justice;

(d) further the provision of high-quality services to the public; and

(e) promote the efficient use of public resources. 2006, c. 21, Sched. A, s. 14.

Role of Attorney General

72 The Attorney General shall superintend all matters connected with the administration of the courts, other than the following:

1. Matters that are assigned by law to the judiciary, including authority to direct and supervise the sittings and the assignment of the judicial duties of the court.

2. Matters related to the education, conduct and discipline of judges and justices of the peace, which are governed by other provisions of this Act, the *Justices of the Peace Act* and Acts of the Parliament of Canada.

3. Matters assigned to the judiciary by a memorandum of understanding under section 77. 2006, c. 21, Sched. A, s. 14.

Court officers and staff

Appointment

73 (1) Registrars, sheriffs, court clerks, assessment officers and any other administrative officers and employees that are considered necessary for the administration of the courts in Ontario may be appointed under Part III of the *Public Service of Ontario Act, 2006*. 2006, c. 21, Sched. A, s. 14; 2006, c. 35, Sched. C, s. 20 (3); 2015, c. 27, Sched. 1, s. 1 (10).

Assignment of powers, duties

(2) The Deputy Attorney General or a person designated by the Deputy Attorney General may, in writing, assign to any person or class of persons a power or duty given to a registrar, sheriff, court clerk, bailiff, assessment officer, Small Claims Court referee or official examiner under an Act, regulation or rule of court, subject to any conditions or restrictions set out in the assignment. 2017, c. 2, Sched. 2, s. 15.

Same

(2.1) For greater certainty, a power or duty may be assigned to a person or class of persons under subsection (2) regardless of whether or not the person or persons are appointed under Part III of the *Public Service of Ontario Act, 2006*. 2017, c. 2, Sched. 2, s. 15.

Same

(3) Subsection (2) applies in respect of an Act, regulation or rule of court made under the authority of the Legislature or of the Parliament of Canada.

2006, c. 21, Sched. A, s. 14.

Destruction of documents

74 Documents and other materials that are no longer required in a court office shall be disposed of in accordance with the directions of the Deputy Attorney General, subject to the approval of,

(a) in the Court of Appeal, the Chief Justice of Ontario;

(b) in the Superior Court of Justice, the Chief Justice of the Superior Court of Justice;

(c) in the Ontario Court of Justice, the Chief Justice of the Ontario Court of Justice. 2006, c. 21, Sched. A, s. 14.

Powers re sittings and assignment of judicial duties

75 (1) The powers and duties of a judge who has authority to direct and supervise the sittings and the assignment of the judicial duties of his or her court include the following:

1. Determining the sittings of the court.

2. Assigning judges to the sittings.

3. Assigning cases and other judicial duties to individual judges.

4. Determining the sitting schedules and places of sittings for individual judges.

5. Determining the total annual, monthly and weekly workload of individual judges.

6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases. 2006, c. 21, Sched. A, s. 14.

Powers re associate judges

(2) Subsection (1) applies, with necessary modifications, in respect of directing and supervising the sittings and assigning the judicial duties of associate judges. 2020, c. 11, Sched. 5, s. 4; 2021, c. 4, Sched. 3, s. 7.

Direction of court staff

76 (1) In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff shall act at the

direction of the chief justice of the court. 2006, c. 21, Sched. A, s. 14.

Same

(2) Court personnel referred to in subsection (1) who are assigned to and present in a courtroom shall act at the direction of the presiding judge, justice of the peace or associate judge while the court is in session. 2006, c. 21, Sched. A, s. 14; 2009, c. 33, Sched. 2, s. 20 (16); 2020, c. 11, Sched. 5, s. 5; 2021, c. 4, Sched. 3, s. 8.

Memoranda of understanding between Attorney General and Chief Justices

Court of Appeal

77 (1) The Attorney General and the Chief Justice of Ontario may enter into a memorandum of understanding governing any matter relating to the administration of the Court of Appeal. 2006, c. 21, Sched. A, s. 14.

Superior Court of Justice

(2) The Attorney General and the Chief Justice of the Superior Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court. 2006, c. 21, Sched. A, s. 14.

Ontario Court of Justice

(3) The Attorney General and the Chief Justice of the Ontario Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court. 2006, c. 21, Sched. A, s. 14.

Scope

(4) A memorandum of understanding under this section may deal with the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice, but shall not deal with any matter assigned by law to the judiciary. 2006, c. 21, Sched. A, s. 14.

Publication

(5) The Attorney General shall ensure that each memorandum of understanding entered into under this section is made available to the public, in English and French. 2006, c. 21, Sched. A, s. 14.

Ontario Courts Advisory Council

78 (1) The council known as the Ontario Courts Advisory Council is continued under the name Ontario Courts Advisory Council in English and Conseil consultatif des tribunaux de l'Ontario in French. 2006, c. 21, Sched. A, s. 14.

Same

(2) The Ontario Courts Advisory Council is composed of,

(a) the Chief Justice of Ontario, who shall preside, and the Associate Chief Justice of Ontario;

(b) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice and the Senior Judge of the Family Court;

(c) the Chief Justice and the associate chief justices of the Ontario Court of Justice; and

(d) the regional senior judges of the Superior Court of Justice and of the Ontario Court of Justice. 2006, c. 21, Sched. A, s. 14.

Mandate

(3) The Ontario Courts Advisory Council shall meet to consider any matter relating to the administration of the courts that is referred to it by the Attorney General or that it considers appropriate on its own initiative, and shall make recommendations on the matter to the Attorney General and to its members. 2006, c. 21, Sched. A, s. 14.

79 REPEALED: 2024, c. 28, Sched. 4, s.4.

Regions

79.1 (1) For administrative purposes related to the administration of justice in the province, Ontario is divided into the regions prescribed under subsection (2). 2006, c. 21, Sched. A, s. 14.

Regulations

(2) The Lieutenant Governor in Council may make regulations prescribing regions for the purposes of this Act. 2006, c. 21, Sched. A, s. 14.

79.2 REPEALED: 2024, c. 28, Sched. 4, s.4.

Annual report on administration of courts

79.3 (1) Within six months after the end of every fiscal year, the Attorney General shall cause a report to be prepared on the administration of the

courts during that fiscal year, in consultation with the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice. 2006, c. 21, Sched. A, s. 14.

Same

(2) The annual report shall provide information about progress in meeting the goals set out in section 71 and shall be made available to the public in English and French. 2006, c. 21, Sched. A, s. 14.

Inclusion in Ministry's annual report

(3) The Attorney General may cause all or part of the annual report on the administration of the courts to be incorporated into the corresponding annual report referred to in the *Ministry of the Attorney General Act*. 2006, c. 21, Sched. A, s. 14.

PART VI
JUDGES AND OFFICERS

Oath of office

80 Every judge or officer of a court in Ontario, including a deputy judge of the Small Claims Court, shall, before entering on the duties of office, take and sign the following oath or affirmation in either the English or French language:

I solemnly swear (affirm) that I will faithfully, impartially and to the best of my skill and knowledge execute the duties of .....

So help me God. (*Omit this line in an affirmation*.)

1994, c. 12, s. 30.

Persona designata abolished

81 Where an adjudicative function is given by an Act to a judge or officer of a court in Ontario, the jurisdiction shall be deemed to be given to the court. 1994, c. 12, s. 31.

Liability of judges and other officers

82 The following persons have the same immunity from liability as judges of the Superior Court of Justice:

1. Judges of all courts in Ontario, including judges presiding in the Small Claims Court and deputy judges of that court.

2. Masters.

3. Associate judges. 1996, c. 25, ss. 1 (15), 9 (17); 2021, c. 4, Sched. 3, s. 9.

Attendance at meetings, conferences and seminars

83 For the purposes of subsection 41 (1) of the *Judges Act* (Canada), a judge of the Court of Appeal, the Superior Court of Justice or the Family Court may, in that capacity, attend a meeting, conference or seminar that is held for a purpose relating to the administration of justice, with the approval of,

(a) the Chief Justice of Ontario, in the case of a judge of the Court of Appeal; or

(b) the Chief Justice of the Superior Court of Justice, in any other case. 2024, c. 2, Sched. 6, s. 4.

Extra-judicial services

84 (1) A judge of the Court of Appeal or the Superior Court of Justice may act as a commissioner, arbitrator, adjudicator, referee, conciliator or mediator or on a commission of inquiry under an Act of the Legislature or under an agreement made under any such Act. R.S.O. 1990, c. C.43, s. 84 (1); 1996, c. 25, ss. 1 (17), 9 (17).

Remuneration

(2) A judge acting under subsection (1) shall not receive any remuneration but shall be reimbursed for reasonable travelling and other expenses incurred while so acting. R.S.O. 1990, c. C.43, s. 84 (2).

Judges' gowns

85 The Lieutenant Governor in Council may make regulations respecting the form of the gown to be worn in court by all judges appointed after the 1st day of September, 1990. R.S.O. 1990, c. C.43, s. 85.

How certain judges to be addressed

86 (1) Every judge of the Court of Ontario may be addressed as "Your Honour" or as "(*Mr. or Madam*) Justice (*naming the judge*)" in English or as "Votre Honneur" or "(M. ou M^{me}) le/la Juge (*nom du juge*)" in French. R.S.O. 1990, c. C.43, s. 86 (1); 1996, c. 25, s. 9 (10); 1998, c. 20, Sched. A, s. 19 (1); 2021, c. 34, Sched. 4, s. 4.

Same

(2) A judge appointed to the High Court of Justice before the 1st day of September, 1990 may elect to be addressed according to the practice in existence before that day. R.S.O. 1990, c. C.43, s. 86 (2).

Associate judge

(3) Every associate judge of the Court of Ontario may be addressed as "Your Honour" or "Associate Justice (naming the associate judge)" in English or as "Votre Honneur" or "(M. ou M^{me}) le/la Juge associé(e) (nom du juge associé)" in French. 2021, c. 4, Sched. 3, s. 10.

(4) Repealed: 1998, c. 20, Sched. A, s. 19 (2).

Associate judges

Appointment

86.1 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such associate judges as are considered necessary. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 11 (1).

Qualification

(2) No person shall be appointed as an associate judge unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least the period of time prescribed in the regulations or, for an aggregate of at least that period, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 11 (2).

Retirement

(3) Every associate judge shall retire when he or she reaches the age of 65. 2020, c. 11, Sched. 5, s. 6 (1); 2021, c. 4, Sched. 3, s. 11 (3).

Transition, previous appointments

(4) The appointment of an associate judge who had not reached the age of 65 before the day subsection 6 (1) of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* came into force and whose appointment was in effect immediately before that day is deemed to specify a term of office that expires when the associate judge reaches the age of 65. 2020, c. 11, Sched. 5, s. 6 (1); 2021, c. 4, Sched. 3, s. 11 (4).

(5), (5.1) Repealed: 2020, c. 11, Sched. 5, s. 6 (1).

Annual reappointments

(5.2) Despite subsections (3) and (4), an associate judge who has reached the age of 65 may be reappointed by the Lieutenant Governor in Council, on the recommendation of the Chief Justice, for a one-year term, subject to subsection (5.3); if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the associate judge. 2015, c. 27, Sched. 1, s. 1 (12); 2020, c. 11, Sched. 5, s. 6 (2); 2021, c. 4, Sched. 3, s. 11 (5).

Expiry of term at age of 75

(5.3) If the associate judge is 74 years of age or older, the reappointment under subsection (5.2) shall provide for a term that expires when he or she reaches the age of 75. 2002, c. 18, Sched. A, s. 4 (2); 2021, c. 4, Sched. 3, s. 11 (6).

No limit

(5.4) Subject to subsection (5.3), there is no limit to the number of times an associate judge can be reappointed under subsection (5.2). 2020, c. 11, Sched. 5, s. 6 (3); 2021, c. 4, Sched. 3, s. 11 (7).

Jurisdiction

(6) An associate judge has the jurisdiction conferred by the rules of court. 2020, c. 11, Sched. 5, s. 6 (4); 2021, c. 4, Sched. 3, s. 11 (8).

Application of ss. 46 to 48

(7) Sections 46 to 48 apply to associate judges, with necessary modifications, in the same manner as to provincial judges, with the following exceptions:

1. Section 46 does not apply in circumstances in which the rules of court require participation in alternative dispute resolution.

2. Subsection 47 (3) does not apply.

3. Letters of resignation under section 48 shall be delivered to the Attorney General instead of to the Chief Justice of the Ontario Court of Justice. 2017, c. 2, Sched. 2, s. 16; 2021, c. 4, Sched. 3, s. 11 (9).

(8) Repealed: 2017, c. 2, Sched. 2, s. 16.

Standards of conduct

(9) The Chief Justice may establish standards of conduct for associate judges. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 11 (10).

Duty of Chief Justice

(10) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French. 2006, c. 21, Sched. A, s. 15.

Complaint re associate judge

86.2 (1) Any person may make a complaint alleging misconduct by an associate judge, by writing to the Chief Justice of the Superior Court of Justice. 1996, c. 25, ss. 1 (18), 9 (14); 2021, c. 4, Sched. 3, s. 12 (1).

Dismissal

(2) The Chief Justice shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given. 1996, c. 25, s. 1 (18).

Notice of dismissal

(3) The Chief Justice shall notify the complainant and the associate judge in writing of a dismissal under subsection (2), giving brief reasons for it. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (2).

Committee

(4) If the complaint is not dismissed, the Chief Justice shall refer it to a committee consisting of three persons chosen by him or her. 1996, c. 25, s. 1 (18).

Same

(5) The three persons shall be a judge of the Superior Court of Justice, an associate judge and a person who is neither a judge nor a lawyer. 1996, c. 25, ss. 1 (18), 9 (17); 2021, c. 4, Sched. 3, s. 12 (3).

Investigation

(6) The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the associate judge shall be given an opportunity to make representations to the committee, in writing or, at the

committee's option, orally. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (4).

Recommendation

(7) The committee shall make a report to the Chief Justice, recommending a disposition in accordance with subsections (8), (9) and (10). 1996, c. 25, s. 1 (18).

Disposition

(8) The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the associate judge's conduct presents grounds for imposing a sanction, may,

(a) warn the associate judge;

(b) reprimand the associate judge;

(c) order the associate judge to apologize to the complainant or to any other person;

(d) order that the associate judge take specified measures, such as receiving education or treatment, as a condition of continuing to sit as an associate judge;

(e) suspend the associate judge for a period of up to 30 days;

(f) direct that no judicial duties or only specified judicial duties be assigned to the associate judge; or

(g) remove the associate judge from office. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (5-8).

Same

(9) The Chief Justice may adopt any combination of the dispositions set out in clauses (8) (a) to (f). 1996, c. 25, s. 1 (18).

Appeal

(9.1) The Chief Justice's decision may be appealed to the Court of Appeal,

(a) by the associate judge, as of right; or

(b) by the complainant, with leave of the Court of Appeal. 2002, c. 18, Sched. A, s. 4 (3); 2021, c. 4, Sched. 3, s. 12 (9).

Parties

(9.2) The associate judge and the complainant are parties to any appeal and the Attorney General is the respondent. 2002, c. 18, Sched. A, s. 4 (3); 2021, c. 4, Sched. 3, s. 12 (9).

Power of Court of Appeal

(9.3) The Court of Appeal may substitute its opinion for that of the Chief Justice on all questions of fact and law. 2002, c. 18, Sched. A, s. 4 (3).

Time for appeal

(9.4) The notice of appeal or motion for leave to appeal shall be filed within 30 days after the date of the Chief Justice's decision. 2002, c. 18, Sched. A, s. 4 (3).

Stay

(9.5) On the filing of a notice of appeal, the imposition of any sanction is stayed until the final disposition of the appeal. 2002, c. 18, Sched. A, s. 4 (3).

Compensation

(10) The Chief Justice shall consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (9).

Recommendation

(11) If the Chief Justice is of the opinion that the associate judge should be compensated, he or she shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (9).

Same

(12) If the complaint is dismissed with a finding that it is unfounded, the Chief Justice shall recommend to the Attorney General that the associate judge be compensated for his or her costs for legal services and shall indicate the amount of compensation. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (9).

Exception

(12.0.1) If the Chief Justice makes a disposition under clause (8) (g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (10) does not apply and compensation shall not be recommended under subsection (11). 2020, c. 11, Sched. 5, s. 7.

Compensation

(12.1) When there is an appeal or motion for leave to appeal under subsection (9.1), the Court of Appeal shall consider whether the associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the appeal or motion. 2002, c. 18, Sched. A, s. 4 (4); 2021, c. 4, Sched. 3, s. 12 (9).

Recommendation

(12.2) If the Court of Appeal is of the opinion that the associate judge should be compensated, it shall make a recommendation to the Attorney General to that effect, indicating the amount of compensation. 2002, c. 18, Sched. A, s. 4 (4); 2021, c. 4, Sched. 3, s. 12 (9).

Same

(12.3) If a complainant's motion for leave to appeal is dismissed, the Court of Appeal shall recommend to the Attorney General that the associate judge be compensated for his or her costs for legal services and shall indicate the amount of compensation. 2002, c. 18, Sched. A, s. 4 (4); 2021, c. 4, Sched. 3, s. 12 (9).

Removal from office upheld

(12.4) If the Court of Appeal upholds a disposition of the Chief Justice made under clause (8) (g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, subsection (12.1) does not apply and compensation shall not be recommended under subsection (12.2). 2020, c. 11, Sched. 5, s. 7.

Removal from office not upheld

(12.5) If the Court of Appeal does not uphold a disposition of the Chief Justice made under clause (8) (g) in relation to a complaint made on or after the day section 7 of Schedule 5 to the *Smarter and Stronger Justice Act, 2020* comes into force, the Court shall, under subsection (12.1), also consider whether the

associate judge should be compensated for all or part of his or her costs for legal services incurred in connection with the steps taken under this section in relation to the complaint. 2020, c. 11, Sched. 5, s. 7; 2021, c. 4, Sched. 3, s. 12 (9).

Maximum

(13) The amount of compensation recommended under subsection (11), (12), (12.2) or (12.3) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar legal services. 1996, c. 25, s. 1 (18); 2002, c. 18, Sched. A, s. 4 (5).

Payment

(14) The Attorney General shall pay compensation to the associate judge in accordance with the recommendation. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (9).

Confidential records

(15) The committee may order that any information or documents relating to a complaint that was not dealt with in a manner that was open to the public are confidential and shall not be disclosed or made public. 1996, c. 25, s. 1 (18).

Same

(16) Subsection (15) applies whether the information or documents are in the possession of the committee, the Chief Justice, the Attorney General or any other person. 1996, c. 25, s. 1 (18).

Limitation

(17) Subsection (15) applies only to information and documents that have been treated as confidential or were prepared exclusively for the committee, or for submission to the committee, in relation to its investigation. 1996, c. 25, s. 1 (18).

Non-application of SPPA

(18) The *Statutory Powers Procedure Act* does not apply to a judge, associate judge or member of a committee acting under this section. 1996, c. 25, s. 1 (18); 2021, c. 4, Sched. 3, s. 12 (9).

Personal liability

(19) No action or other proceeding for damages shall be instituted against a judge, associate judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person, or for any neglect or default in the exercise or performance in good faith of such power or duty. 1996, c. 25, s. 1 (18); 2017, c. 2, Sched. 2, s. 17; 2021, c. 4, Sched. 3, s. 12 (9).

87 REPEALED: 2020, c. 11, Sched. 5, s. 8.

87.1 REPEALED: 2023, c. 2, Sched. 2, s. 3.

Small Claims Court Administrative Judge

87.2 (1) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint as Small Claims Court Administrative Judge a person who has,

(a) been a member of the bar of one of the provinces or territories of Canada for at least 10 years; or

(b) for an aggregate of at least 10 years, been a member of a bar mentioned in clause (a) and, after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect of a position held under a law of Canada or of one of its provinces or territories. 2025, c. 6, Sched. 5, s. 4.

Prior consultation

(2) Before making a recommendation under subsection (1), the Attorney General shall consult with the Chief Justice of the Superior Court of Justice. 2017, c. 2, Sched. 2, s. 18.

Term

(3) The appointment of a person as Small Claims Court Administrative Judge is for a term of five years, subject to subsection (5). 2017, c. 2, Sched. 2, s. 18.

Reappointment

(4) The Lieutenant Governor in Council shall reappoint a person as Small Claims Court Administrative Judge for one further term of five years, subject to subsection (5), if the Chief Justice of the Superior Court of Justice recommends the reappointment. 2017, c. 2, Sched. 2, s. 18.

On reaching 65

(5) The completion of any portion of a term during which a person serving as Small Claims Court Administrative Judge is over 64 years of age and under 75 years of age is subject to the annual approval of the Chief Justice of the Superior Court of Justice. 2017, c. 2, Sched. 2, s. 18.

On reaching 75

(6) If a person reaches 75 years of age while serving as Small Claims Court Administrative Judge, his or her term is deemed to expire on that day. 2017, c. 2, Sched. 2, s. 18.

Compensation

(7) The salary, pension benefits, other benefits and allowances of the Small Claims Court Administrative Judge are subject to the recommendations of the Provincial Judges Remuneration Commission and, for the purpose, the Small Claims Court Administrative Judge is deemed to be a provincial judge under the framework agreement set out in the Schedule to this Act. 2017, c. 2, Sched. 2, s. 18.

Same

(8) Until and subject to the first recommendations of the Provincial Judges Remuneration Commission respecting the Small Claims Court Administrative Judge, he or she is entitled to receive the same salary, pension benefits, other benefits and allowances a provincial judge receives under the framework agreement. 2017, c. 2, Sched. 2, s. 18.

Application of ss. 44 to 46

(9) Subsections 44 (1) and (4), and sections 45 and 46, apply with necessary modifications to the Small Claims Court Administrative Judge as if he or she were a provincial judge, subject to the following:

1. For the purposes of subsection 44 (1), the consent of the Chief Justice of the Superior Court of Justice is required.

2. For the purposes of an application under section 45, one of the members of the Judicial Council who is a provincial judge shall be replaced by a judge of the Superior Court of Justice. The Chief Justice of the Ontario Court of Justice shall determine which judge is to be replaced and the Chief Justice of the Superior Court of Justice shall designate the judge who is to replace that judge. 2017, c. 2, Sched. 2, s. 18.

Resignation

(10) The Small Claims Court Administrative Judge may at any time resign from his or her office by delivering a signed letter of resignation to the Attorney General. 2017, c. 2, Sched. 2, s. 18.

(11), (12) REPEALED: 2017, c. 20, Sched. 2, s. 4.

Standards, education, evaluation

(13) Subject to the consent of the Chief Justice of the Superior Court of Justice, sections 51.9, 51.10 and 51.11 apply with necessary modifications to the Small Claims Court Administrative Judge. 2017, c. 2, Sched. 2, s. 18.

Complaint

87.3 (1) Any person may make a complaint alleging misconduct by the Small Claims Court Administrative Judge to the Chief Justice of the Superior Court of Justice. 2017, c. 20, Sched. 2, s. 5.

Dismissal

(2) The Chief Justice shall review the complaint and may dismiss it without further investigation if, in his or her opinion, it is frivolous or an abuse of process, or concerns a minor matter to which an appropriate response has already been given. 2017, c. 20, Sched. 2, s. 5.

Notice of dismissal

(3) The Chief Justice shall notify the Small Claims Court Administrative Judge and the complainant in writing of a dismissal under subsection (2), giving brief reasons for it. 2017, c. 20, Sched. 2, s. 5.

Committee

(4) If the complaint is not dismissed, the Chief Justice shall refer it to a committee consisting of three persons determined in accordance with subsection (5). 2017, c. 20, Sched. 2, s. 5.

Same

(5) The three persons shall be chosen by the Chief Justice, and shall be a judge of the Superior Court of Justice, a deputy judge and a person who is neither a judge nor a lawyer. 2017, c. 20, Sched. 2, s. 5.

Investigation

(6) The committee shall investigate the complaint in the manner it considers appropriate, and the complainant and the Small Claims Court Administrative Judge shall be given an opportunity to make representations to the committee, in writing or, at the committee's option, orally. 2017, c. 20, Sched. 2, s. 5.

Recommendation

(7) The committee shall make a report to the Chief Justice, recommending a disposition in accordance with subsection (8). 2017, c. 20, Sched. 2, s. 5.

Disposition

(8) The Chief Justice may dismiss the complaint, with or without a finding that it is unfounded, or, if he or she concludes that the Small Claims Court Administrative Judge's conduct presents grounds for imposing a sanction, may,

(a) warn the Small Claims Court Administrative Judge;

(b) reprimand the Small Claims Court Administrative Judge;

(c) order the Small Claims Court Administrative Judge to apologize to the complainant or to any other person;

(d) order that the Small Claims Court Administrative Judge take specified measures, such as receiving education or treatment;

(e) suspend the Small Claims Court Administrative Judge for a period of up to 30 days;

(f) direct that no judicial duties or only specified judicial duties be assigned to the Small Claims Court Administrative Judge;

(g) recommend to the Attorney General that the Small Claims Court Administrative Judge be removed from office; or

(h) adopt any combination of the dispositions set out in clauses (a) to (g). 2017, c. 20, Sched. 2, s. 5.

Cause for removal

(9) A recommendation for removal may only be made on the basis of a ground listed in clause 51.8 (1) (b), and any such recommendation shall specify the ground on which it is made. 2017, c. 20, Sched. 2, s. 5.

Recommendation for removal

(10) In making a recommendation for removal to the Attorney General, the Chief Justice shall include with the recommendation,

(a) a copy of the committee's report; and

(b) if the recommendation of the Chief Justice does not accord with the report, reasons for his or her recommendation. 2017, c. 20, Sched. 2, s. 5.

Non-identification

(11) If the complaint involves an allegation of sexual misconduct or sexual harassment, an alleged victim of the misconduct or harassment shall not, on that person's request, be identified in the report provided to the Attorney General under clause (10) (a) or in any reasons provided under clause (10) (b). 2017, c. 20, Sched. 2, s. 5.

Report, reasons may be made public

(12) The Attorney General may make the report and any reasons public if he or she is of the opinion that it is in the public interest. 2017, c. 20, Sched. 2, s. 5.

Tabling

(13) If the Chief Justice makes a recommendation for removal under clause (8) (g), the Attorney General shall table the recommendation, including the ground on which the recommendation is made, in the Assembly. 2017, c. 20, Sched. 2, s. 5.

Order for removal

(14) The Lieutenant Governor may, on the basis of a recommendation for removal, order the removal of the Small Claims Court Administrative Judge from office on the address of the Assembly. 2017, c. 20, Sched. 2, s. 5.

Compensation

(15) Subsections 86.2 (10), (11), (12), (12.0.1), (13) and (14) apply with necessary modifications with respect to the compensation of costs incurred by the Small Claims Court Administrative Judge for legal services in relation to a complaint. 2017, c. 20, Sched. 2, s. 5; 2020, c. 11, Sched. 5, s. 9.

Delegation

(16) The Chief Justice may delegate his or her powers, duties and functions under this section to the Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice, or the Senior Judge of the Family Court. 2017, c. 20, Sched. 2, s. 5.

Same

(17) The Chief Justice may delegate his or her powers, duties and functions under subsections (2), (3) and (4) to a judge of the Superior Court of Justice, but a judge who acts under any of those subsections in relation to a complaint may not be chosen under subsection (5) to be part of a committee to investigate the complaint. 2017, c. 20, Sched. 2, s. 5.

Non-application of SPPA

(18) The *Statutory Powers Procedure Act* does not apply to a judge or member of a committee acting under this section. 2017, c. 20, Sched. 2, s. 5.

Personal liability

(19) No action or other proceeding for damages shall be instituted against a judge or member of a committee for any act done in good faith in the execution or intended execution of any power or duty of the person under this section, or for any neglect or default in the exercise or performance in good faith of such power or duty. 2017, c. 20, Sched. 2, s. 5.

Regulations

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

(a) prescribing the officer or employee to whom money paid into the Superior Court of Justice shall be paid and providing for the vesting of that money and any securities in which that money is invested in that officer or employee;

(b) governing the management and investment of money paid into a court;

(c) providing for the payment of interest on money paid into a court and fixing the rate of interest so paid;

(d) prescribing the officer or employee in whose name mortgages and other securities taken under an order of the Superior Court of Justice and instruments taken as security in respect of a proceeding in the Superior Court of Justice shall be taken;

(e) respecting the deposit of the mortgages, securities and instruments and the duty or obligation, if any, in respect of them of the officer or employee in whose name they are taken. R.S.O. 1990, c. C.43, s. 88; 1994, c. 12, s. 36; 1996, c. 25, s. 9 (17).

Regulations under *Public Guardian and Trustee Act*

(2) With respect to all functions performed by the Public Guardian and Trustee in his or her capacity as Accountant of the Superior Court of Justice, the *Public Guardian and Trustee Act* and the regulations made under that Act prevail over subsection (1) and the regulations made under it. 1997, c. 23, s. 5; 1996, c. 25, s. 9 (12); 2000, c. 26, Sched. A, s. 5.

Children's Lawyer

89 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a Children's Lawyer for Ontario. 1994, c. 27, s. 43 (1).

Qualification

(2) No person shall be appointed as Children's Lawyer unless he or she has been a member of the bar of one of the provinces or territories of Canada for at least ten years or, for an aggregate of at least ten years, has been a member of such a bar or served as a judge anywhere in Canada after being a member of such a bar. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Duties

(3) Where required to do so by an Act or the rules of court, the Children's Lawyer shall act as litigation guardian of a minor or other person who is a party to a proceeding. 1994, c. 12, s. 37; 1994, c. 27, s. 43 (2).

Same

(3.1) At the request of a court, the Children's Lawyer may act as the legal representative of a minor or other person who is not a party to a proceeding. 1994, c. 12, s. 37; 1999, c. 12, Sched. B, s. 4 (1).

Costs

(4) The same costs as are payable to litigation guardians are payable to the Children's Lawyer and costs recovered by the Children's Lawyer shall be paid

into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 89 (4); 1994, c. 27, s. 43 (2).

Security for costs

(5) The Children's Lawyer shall not be required to give security for costs in any proceeding. R.S.O. 1990, c. C.43, s. 89 (5); 1994, c. 27, s. 43 (2).

Mortgages held by Accountant

(6) Where a person for whom the Children's Lawyer has acted is interested in a mortgage held by the Accountant of the Superior Court of Justice, the Children's Lawyer shall take reasonable care to ensure that,

(a) money payable on the mortgage is promptly paid;

(b) the mortgaged property is kept properly insured; and

(c) taxes on the mortgaged property are promptly paid. R.S.O. 1990, c. C.43, s. 89 (6); 1994, c. 27, s. 43 (2); 1996, c. 25, s. 9 (13).

Payment into court

(7) Money received by the Children's Lawyer on behalf of a person for whom he or she acts shall, unless the court orders otherwise, be paid into court to the credit of the person entitled. R.S.O. 1990, c. C.43, s. 89 (7); 1994, c. 27, s. 43 (2).

Assessment of costs

(8) Where the amount payable into court under subsection (7) is to be ascertained by the deduction of unassessed costs from a fund, the Children's Lawyer may require the costs to be assessed forthwith. R.S.O. 1990, c. C.43, s. 89 (8); 1994, c. 27, s. 43 (2).

(9) REPEALED: 2023, c. 9, Sched. 11, s. 1.

Assessment officers

90 (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint assessment officers. R.S.O. 1990, c. C.43, s. 90 (1); 1999, c. 12, Sched. B, s. 4 (2).

(2) REPEALED: 2020, c. 11, Sched. 5, s. 10.

Jurisdiction

(3) Every assessment officer has jurisdiction to assess costs in a proceeding in any court. R.S.O. 1990, c. C.43, s. 90 (3); 1996, c. 25, s. 1 (19).

Appeal from assessment of costs before tribunal

(4) Where costs of a proceeding before a tribunal other than a court are to be assessed by an assessment officer,

(a) the rules of court governing the procedure on an assessment of costs apply with necessary modifications; and

(b) an appeal lies to the Superior Court of Justice from a certificate of assessment of the costs if an objection was served in respect of the issue appealed in accordance with the rules of court. R.S.O. 1990, c. C.43, s. 90 (4); 1996, c. 25, s. 9 (17).

Officers of court

91 Every official examiner and deputy official examiner is an officer of every court in Ontario. R.S.O. 1990, c. C.43, s. 91.

Administration of oaths

92 Every officer of a court has, for the purposes of any matter before him or her, power to administer oaths and affirmations and to examine parties and witnesses. R.S.O. 1990, c. C.43, s. 92.

Money held by officer of court

93 Money or property vested in or held by an officer of a court shall be deemed to be vested in the officer in trust for the Crown in right of Ontario, subject to being disposed of in accordance with any Act, rule of court or order. R.S.O. 1990, c. C.43, s. 93; 2024, c. 2, Sched. 19, s. 3 (1).

Disposition of court fees

94 (1) All fees payable to a salaried officer of a court in respect of a proceeding in the court shall be paid into the Consolidated Revenue Fund. R.S.O. 1990, c. C.43, s. 94 (1).

(2) Repealed: 2024, c. 2, Sched. 6, s. 5.

PART VII
COURT PROCEEDINGS

Application of Part

Civil proceedings

95 (1) This Part applies to civil proceedings in courts of Ontario.

Criminal proceedings

(2) Sections 109 (constitutional questions) and 123 (giving decisions), section 125 and paragraph 2 of subsection 126 (1) (documents that may be written in French) and sections 132 (judge sitting on appeal), 136 (prohibition against photography at court hearing) and 146 (where procedures not provided) also apply to proceedings under the *Criminal Code* (Canada), except in so far as they are inconsistent with that Act. R.S.O. 1990, c. C.43, s. 95 (1, 2); 2021, c. 4, Sched. 3, s. 13.

Provincial offences proceedings

(3) Sections 109 (constitutional questions), 125, 126 (language of proceedings), 132 (judge sitting on appeal), 136 (prohibition against photography at court hearings), 144 (arrest and committal warrants enforceable by police) and 146 (where procedures not provided) also apply to proceedings under the *Provincial Offences Act* and, for the purpose, a reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 95 (3); 1996, c. 25, s. 9 (18).

Common Law and Equity

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law. R.S.O. 1990, c. C.43, s. 96 (1); 1993, c. 27, Sched.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails. R.S.O. 1990, c. C.43, s. 96 (2); 1993, c. 27, Sched.

Jurisdiction for equitable relief

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise

provided. 1994, c. 12, s. 38; 1996, c. 25, s. 9 (17).

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C.43, s. 98; 1993, c. 27, Sched.

Damages in substitution for injunction or specific performance

99 A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance. R.S.O. 1990, c. C.43, s. 99.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Injunction in labour dispute

Definition

102 (1) In this section,

"labour dispute" means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. R.S.O. 1990, c. C.43, s. 102 (1).

Notice

(2) Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice. R.S.O. 1990, c. C.43, s. 102 (2).

Steps before injunction proceeding

(3) In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful. R.S.O. 1990, c. C.43, s. 102 (3).

Evidence

(4) Subject to subsection (8), affidavit evidence in support of a motion for an injunction to restrain a person from an act in connection with a labour dispute shall be confined to statements of facts within the knowledge of the deponent, but any party may by notice to the party filing such affidavit, and payment of the proper attendance money, require the attendance of the deponent to be cross-examined at the hearing. R.S.O. 1990, c. C.43, s. 102 (4).

Interim injunction

(5) An interim injunction to restrain a person from an act in connection with a labour dispute may be granted for a period of not longer than four days. R.S.O. 1990, c. C.43, s. 102 (5).

Notice

(6) Subject to subsection (8), at least two days notice of a motion for an interim injunction to restrain a person from any act in connection with a labour dispute shall be given to the responding party and to any other person affected thereby but not named in the notice of motion. R.S.O. 1990, c. C.43, s. 102 (6).

Same

(7) Notice required by subsection (6) to persons other than the responding party may be given,

(a) where such persons are members of a labour organization, by personal service on an officer or agent of the labour organization; and

(b) where such persons are not members of a labour organization, by posting the notice in a conspicuous place at the location of the activity sought to be restrained where it can be read by any persons affected,

and service and posting under this subsection shall be deemed to be sufficient notice to all such persons. R.S.O. 1990, c. C.43, s. 102 (7).

Interim injunction without notice

(8) Where notice as required by subsection (6) is not given, the court may grant an interim injunction where,

(a) the case is otherwise a proper one for the granting of an interim injunction;

(b) notice as required by subsection (6) could not be given because the delay necessary to do so would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service;

(c) reasonable notification, by telephone or otherwise, has been given to the persons to be affected or, where any of such persons are members of a labour organization, to an officer of that labour organization or to the person authorized under section 94 of the *Labour Relations Act, 1995* to accept service of process under that Act on behalf of that labour organization or trade union, or where it is shown that such notice could not have been given; and

(d) proof of all material facts for the purpose of clauses (a), (b) and (c) is established by oral evidence. R.S.O. 1990, c. C.43 s. 102 (8); 2017, c. 2, Sched. 2, s. 19.

Misrepresentation as contempt of court

(9) The misrepresentation of any fact or the withholding of any qualifying relevant matter, directly or indirectly, in a proceeding for an injunction under this section, constitutes a contempt of court. R.S.O. 1990, c. C.43, s. 102 (9).

Appeal

(10) An appeal from an order under this section lies to the Court of Appeal without leave. R.S.O. 1990, c. C.43, s. 102 (10).

Certificate of pending litigation

103 (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2). R.S.O. 1990, c. C.43, s. 103 (1).

Registration

(2) Where a certificate of pending litigation is issued under subsection (1) it may be registered whether the land is registered under the *Land Titles Act* or the *Registry Act*. R.S.O. 1990, c. C.43, s. 103 (2).

Exception

(3) Subsections (1) and (2) do not apply to a proceeding for foreclosure or sale on a registered mortgage or to enforce a lien under the *Construction Act*. R.S.O. 1990, c. C.43, s. 103 (3); 2017, c. 24, s. 75.

Liability where no reasonable claim

(4) A party who registers a certificate under subsection (2) without a reasonable claim to an interest in the land is liable for any damages sustained by any person as a result of its registration. R.S.O. 1990, c. C.43, s. 103 (4).

Recovery of damages

(5) The liability for damages under subsection (4) and the amount thereof may be determined in the proceeding in respect of which the certificate was registered or in a separate proceeding. R.S.O. 1990, c. C.43, s. 103 (5).

Order discharging certificate

(6) The court may make an order discharging a certificate,

(a) where the party at whose instance it was issued,

(i) claims a sum of money in place of or as an alternative to the interest in the land claimed,

(ii) does not have a reasonable claim to the interest in the land claimed, or

(iii) does not prosecute the proceeding with reasonable diligence;

(b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or

(c) on any other ground that is considered just,

and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just. R.S.O. 1990, c. C.43, s. 103 (6).

Effect

(7) Where a certificate is discharged, any person may deal with the land as fully as if the certificate had not been registered. R.S.O. 1990, c. C.43, s. 103 (7).

Interim order for recovery of personal property

104 (1) In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

Damages

(2) A person who obtains possession of personal property by obtaining or setting aside an interim order under subsection (1) is liable for any loss suffered by the person ultimately found to be entitled to possession of the property. R.S.O. 1990, c. C.43, s. 104.

Physical or mental examination

Definition

105 (1) In this section,

"health practitioner" means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction. R.S.O. 1990, c. C.43, s. 105 (1); 1998, c. 18, Sched. G, s. 48.

Order

(2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.

Same

(3) Where the question of a party's physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.

Further examinations

(4) The court may, on motion, order further physical or mental examinations.

Examiner may ask questions

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence. R.S.O. 1990, c. C.43, s. 105 (2-5).

Stay of proceedings

106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just. R.S.O. 1990, c. C.43, s. 106.

Consolidation of proceedings in different courts

107 (1) Where two or more proceedings are pending in two or more different courts, and the proceedings,

(a) have a question of law or fact in common;

(b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason ought to be the subject of an order under this section,

an order may, on motion, be made,

(d) transferring any of the proceedings to another court and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other; or

(e) requiring any of the proceedings to be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.S.O. 1990, c. C.43, s. 107 (1).

Transfer from Small Claims Court

(2) A proceeding in the Small Claims Court shall not be transferred under clause (1) (d) to the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. R.S.O. 1990, c. C.43, s. 107 (2); 1996, c. 25, s. 9 (17).

Same

(3) A proceeding in the Small Claims Court shall not be required under subclause (1) (e) (ii) to be asserted by way of counterclaim in a proceeding in the Superior Court of Justice without the consent of the plaintiff in the proceeding in the Small Claims Court. R.S.O. 1990, c. C.43, s. 107 (3); 1996, c. 25, s. 9 (17).

Motions

(4) The motion shall be made to a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 107 (4); 1996, c. 25, s. 9 (17).

Directions

(5) An order under subsection (1) may impose such terms and give such directions as are considered just, including dispensing with service of a notice of readiness or listing for trial and abridging the time for placing an action on the trial list.

Transfer

(6) A proceeding that is transferred to another court under clause (1) (d) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court.

Discretion at hearing

(7) Where an order has been made that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise. R.S.O. 1990, c. C.43, s. 107 (5-7).

PROCEDURAL MATTERS

Jury trials

108 (1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided. R.S.O. 1990, c. C.43, s. 108 (1); 1996, c. 25, s. 9 (17).

Trials without jury

(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in the following circumstances:

1. The action involves a claim for any of the following kinds of relief:

   i. Injunction or mandatory order.

   ii. Partition or sale of real property.

   iii. Relief in proceedings referred to in the Schedule to section 21.8.

   iv. Dissolution of a partnership or taking of partnership or other accounts.

   v. Foreclosure or redemption of a mortgage.

   vi. Sale and distribution of the proceeds of property subject to any lien or charge.

   vii. Execution of a trust.

   viii. Rectification, setting aside or cancellation of a deed or other written instrument.

   ix. Specific performance of a contract.

   x. Declaratory relief.

   xi. Other equitable relief.

   xii. Relief against a municipality.

2. The action is proceeding under Rule 76 of the Rules of Civil Procedure. 2019, c. 7, Sched. 15, s. 2.

Same

(2.1) Paragraph 2 of subsection (2) does not apply to an action in respect of which a jury notice has been delivered in accordance with the Rules of Civil Procedure before January 1, 2020. 2019, c. 7, Sched. 15, s. 2.

Same

(3) On motion, the court may order that issues of fact be tried or damages assessed, or both, without a jury. R.S.O. 1990, c. C.43, s. 108 (3).

Composition of jury

(4) Where a proceeding is tried with a jury, the jury shall be composed of six persons selected in accordance with the *Juries Act*. R.S.O. 1990, c. C.43, s. 108 (4).

Verdicts or questions

(5) Where a proceeding is tried with a jury,

(a) the judge may require the jury to give a general verdict or to answer specific questions, subject to section 15 of the *Libel and Slander Act*; and

(b) judgment may be entered in accordance with the verdict or the answers to the questions. R.S.O. 1990, c. C.43, s. 108 (5).

Same

(6) It is sufficient if five of the jurors agree on the verdict or the answer to a question, and where more than one question is submitted, it is not necessary that the same five jurors agree to every answer. R.S.O. 1990, c. C.43, s. 108 (6).

Discharge of juror at trial

(7) The judge presiding at a trial may discharge a juror on the ground of illness, hardship, partiality or other sufficient cause. R.S.O. 1990, c. C.43, s. 108 (7).

Continuation with five jurors

(8) Where a juror dies or is discharged, the judge may direct that the trial proceed with five jurors, in which case the verdict or answers to questions must be unanimous. R.S.O. 1990, c. C.43, s. 108 (8).

Specifying negligent acts

(9) Where a proceeding to which subsection 193 (1) of the *Highway Traffic Act* applies is tried with a jury, the judge may direct the jury to specify negligent acts or omissions that caused the damages or injuries in respect of which the proceeding is brought. R.S.O. 1990, c. C.43, s. 108 (9).

Malicious prosecution

(10) In an action for malicious prosecution, the trier of fact shall determine whether or not there was reasonable and probable cause for instituting the prosecution. R.S.O. 1990, c. C.43, s. 108 (10).

Notice of constitutional question

109 (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.

2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to give notice

(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

Form of notice

(2.1) The notice shall be in the form provided for by the rules of court or, in the case of a proceeding before a board or tribunal, in a substantially similar form.

Time of notice

(2.2) The notice shall be served as soon as the circumstances requiring it become known and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise. 1994, c. 12, s. 42 (1).

Notice of appeal

(3) Where the Attorney General of Canada and the Attorney General of Ontario are entitled to notice under subsection (1), they are entitled to notice of any appeal in respect of the constitutional question.

Right of Attorneys General to be heard

(4) Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

Right of Attorneys General to appeal

(5) Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed to be a party to the proceeding for the purpose of any appeal in respect of the constitutional question. R.S.O. 1990, c. C.43, s. 109 (3-5).

Boards and tribunals

(6) This section applies to proceedings before boards and tribunals as well as to court proceedings. 1994, c. 12, s. 42 (2).

Proceeding in wrong forum

110 (1) Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court, judge or officer.

Continuation of proceeding

(2) A proceeding that is transferred to another court under subsection (1) shall be titled in the court to which it is transferred and shall be continued as if it had been commenced in that court. R.S.O. 1990, c. C.43, s. 110.

Set off

111 (1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.

Same

(2) Mutual debts may be set off against each other even if they are of a different nature.

Judgment for defendant

(3) Where, on a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant is entitled to judgment for the balance. R.S.O. 1990, c. C.43, s. 111.

Report of Children's Lawyer

Investigation

112 (1) In a proceeding under the *Divorce Act* (Canada) or the *Children's Law Reform Act* in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the court, the Children's Lawyer may,

(a) cause an investigation to be made on all matters concerning decision-making responsibility, parenting time or contact with respect to the child;

(b) cause an investigation to be made on matters specified by the court related to decision-making responsibility, parenting time or contact with respect to the child; or

(c) meet with the child to determine the child's views and preferences with respect to matters that may include decision-making responsibility, parenting time or contact. 2021, c. 4, Sched. 3, s. 14.

Report

(2) The Children's Lawyer may report and make recommendations to the court on the results of an investigation or meeting conducted under subsection (1). 2021, c. 4, Sched. 3, s. 14.

Authority to act

(3) The Children's Lawyer may act under subsection (1) or (2) on his or her own initiative, at the request of a court or at the request of any person. 2021, c. 4, Sched. 3, s. 14.

Affidavit

(4) The person who prepares a report under subsection (2) shall execute an affidavit verifying the facts in the report that are within the person's knowledge and setting out the source of the person's information and belief respecting facts that are not within their knowledge. 2021, c. 4, Sched. 3, s. 14.

Service

(5) The person who prepares a report under subsection (2) shall serve the affidavit, along with a copy of the report attached as an exhibit, on the parties and file the affidavit and report with the court. 2021, c. 4, Sched. 3, s. 14.

Evidence

(6) The filed affidavit and report shall form part of the evidence at the hearing of the proceeding. 2021, c. 4, Sched. 3, s. 14.

Attendance on report

(7) Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed, attend the hearing on behalf of the child and cause the person who conducted the investigation or meeting under subsection (1) to attend as a witness. 2021, c. 4, Sched. 3, s. 14.

Agreement preventing third party claim or crossclaim

113 Rules of court permitting a defendant to make a third party claim or crossclaim apply despite any agreement that provides that no action may be brought until after judgment against the defendant. R.S.O. 1990, c. C.43, s. 113.

Agreement as to place of hearing

114 Where a party moves to change the place of hearing in a proceeding, an agreement as to the place of hearing is not binding, but may be taken into account. R.S.O. 1990, c. C.43, s. 114.

Security

115 Where a person is required to give security in respect of a proceeding in a court, a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance is sufficient, unless the court orders otherwise. R.S.O. 1990, c. C.43, s. 115; 1997, c. 19, s. 32.

Periodic payment and review of damages

116 (1) In a proceeding where damages are claimed for personal injuries or under Part V of the *Family Law Act* for loss resulting from the injury to or death of a person, the court,

(a) if all affected parties consent, may order the defendant to pay all or part of the award for damages periodically on such terms as the court considers just; and

(b) if the plaintiff requests that an amount be included in the award to offset any liability for income tax on income from the investment of the award, shall order the defendant to pay all or part of the award periodically on such terms as the court considers just. R.S.O. 1990, c. C.43, s. 116 (1); 1996, c. 25, s. 1 (20).

No order

(2) An order under clause (1) (b) shall not be made if the parties otherwise consent or if the court is of the opinion that the order would not be in the best interests of the plaintiff, having regard to all the circumstances of the case.

Best interests

(3) In considering the best interests of the plaintiff, the court shall take into account,

(a) whether the defendant has sufficient means to fund an adequate scheme of periodic payments;

(b) whether the plaintiff has a plan or a method of payment that is better able to meet the interests of the plaintiff than periodic payments by the defendant; and

(c) whether a scheme of periodic payments is practicable having regard to all the circumstances of the case.

Future review

(4) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

Amount to offset liability for income tax

(5) If the court does not make an order for periodic payment under subsection (1), it shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award. R.S.O. 1990, c. C.43, s. 116 (2-5).

Periodic payment, medical malpractice actions

116.1 (1) Despite section 116, in a medical malpractice action where the court determines that the award for the future care costs of the plaintiff exceeds the prescribed amount, the court shall, on a motion by the plaintiff or a defendant that is liable to pay the plaintiff's future care costs, order that the damages for the future care costs of the plaintiff be satisfied by way of periodic payments. 2006, c. 21, Sched. A, s. 17.

The order

(2) If the court makes an order under subsection (1), the court shall determine the amount and frequency of the periodic payments without regard to inflation and shall order the defendant to provide security for those payments in the form of an annuity contract that satisfies the criteria set out in subsection (3). 2006, c. 21, Sched. A, s. 17.

Form of security

(3) The annuity contract shall satisfy the following criteria:

1. The annuity contract must be issued by a life insurer.

2. The annuity must be designed to generate payments in respect of which the beneficiary is not required to pay income taxes.

3. The annuity must include protection from inflation to a degree reasonably available in the market for such annuities. 2006, c. 21, Sched. A, s. 17.

Directions from the court

(4) If the parties are unable to agree on the terms of the annuity, either party may seek directions from the court about the terms. 2006, c. 21, Sched. A, s. 17.

Filing and approval of plan

(5) Unless the court orders otherwise, a proposed plan to provide security required by an order under subsection (2) shall be filed with the court within 30 days of the judgment or within another period that the court may specify, and the court may approve the proposed plan, with or without modifications. 2006, c. 21, Sched. A, s. 17.

Effect of providing security

(6) If security is provided in accordance with a plan approved by the court, the defendant by whom or on whose behalf the security is provided is discharged from all liability to the plaintiff in respect of damages that are to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid. 2006, c. 21, Sched. A, s. 17.

Effect of not providing security

(7) If a proposed plan is not filed in accordance with subsection (5) or is not approved by the court, the court shall, at the request of any party to the proceeding, vacate the portions of the judgment in which periodic payments are awarded and substitute a lump sum award. 2006, c. 21, Sched. A, s. 17.

Application for lump sum

(8) The court may order that the future care costs be paid in whole or in part by way of a lump sum payment to the extent that the plaintiff satisfies the court that a periodic payment award is unjust, having regard to the capacity of the periodic payment award to meet the needs for which the damages award for future care costs is intended to provide compensation. 2006, c. 21, Sched. A, s. 17.

Amount to offset liability for income tax

(9) If the court does not make an order for periodic payments under subsection (1) or makes an order for a lump sum payment under subsection (7) or (8), the court shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award except to the extent that the evidence shows that the plaintiff will not derive taxable income from investing the award. 2006, c. 21, Sched. A, s. 17.

Periodic payments exempt from garnishment, etc.

(10) Periodic payments of damages for future care costs are exempt from seizure or garnishment to the same extent that wages are exempt under section 7 of the *Wages Act*, unless the seizure or garnishment is made by a provider of care to the plaintiff and the seizure or garnishment is to pay for the costs of products, services or accommodations or any one of them with respect to the plaintiff. 2006, c. 21, Sched. A, s. 17.

Future review

(11) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just. 2006, c. 21, Sched. A, s. 17.

Regulations

(12) The Lieutenant Governor in Council may make regulations prescribing or calculating the amount of future care costs for the purpose of subsection (1). 2006, c. 21, Sched. A, s. 17.

Definitions

(13) In this section,

"future care costs" means the cost of medical care or treatment, rehabilitation services or other care, treatment, services, products or accommodations that is incurred at a time after judgment; ("coûts des soins futurs")

"medical malpractice action" means an action for personal injuries alleged to have arisen from negligence or malpractice in respect of professional services requested of, or rendered by, a health professional who is a member of a health profession as defined in the *Regulated Health Professions Act, 1991* or an employee of the health professional or for which a hospital as defined in the *Public Hospitals Act* is held liable; ("action pour faute professionnelle médicale")

"prescribed amount" means $250,000 or such greater amount as may be prescribed by regulation, calculated as a present value at the time of judgment in accordance with the Rules of Civil Procedure. ("montant prescrit") 2006, c. 21, Sched. A, s. 17.

Transition

(14) This section applies to all proceedings in which a final judgment at trial or final settlement has not been made on the day the *Access to Justice Act, 2006* receives Royal Assent. 2006, c. 21, Sched. A, s. 17.

Assessment of damages

117 Where damages are to be assessed in respect of,

(a) a continuing cause of action;

(b) repeated breaches of a recurring obligation; or

(c) intermittent breaches of a continuing obligation,

the damages, including damages for breaches occurring after the commencement of the proceeding, shall be assessed down to the time of the assessment. R.S.O. 1990, c. C.43, s. 117.

Guidance and submissions

118 In an action for damages for personal injury, the court may give guidance to the jury on the amount of damages and the parties may make submissions to the jury on the amount of damages. R.S.O. 1990, c. C.43, s. 118.

Power of court on appeal

119 On an appeal from an award for damages for personal injury, the court may, if it considers it just, substitute its own assessment of the damages. R.S.O. 1990, c. C.43, s. 119.

Advance payments

120 (1) If a defendant makes a payment to a plaintiff who is or alleges to be entitled to recover from the defendant, the payment constitutes, to the extent of the payment, a release by the plaintiff or the plaintiff's personal representative of any claim that the plaintiff or the plaintiff's personal representative or any person claiming through or under the plaintiff or by virtue of Part V of the *Family Law Act* may have against the defendant.

Same

(2) Nothing in this section precludes the defendant making the payment from demanding, as a condition precedent to such payment, a release from the plaintiff or the plaintiff's personal representative or any other person to the extent of such payment.

Payment to be taken into account

(3) The court shall adjudicate upon the matter first without reference to the payment but, in giving judgment, the payment shall be taken into account and the plaintiff shall only be entitled to judgment for the net amount, if any.

Disclosure

(4) The fact of any payment shall not be disclosed to the judge or jury until after judgment but shall be disclosed before formal entry thereof. R.S.O. 1990, c. C.43, s. 120.

Foreign money obligations

121 (1) Subject to subsections (3) and (4), where a person obtains an order to enforce an obligation in a foreign currency, the order shall require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario listed in Schedule I to the *Bank Act* (Canada) at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of the foreign currency before the day payment of the obligation is received by the creditor.

Multiple payments

(2) Where more than one payment is made under an order referred to in subsection (1), the rate of conversion shall be the rate determined as provided in subsection (1) for each payment.

Discretion of court

(3) Subject to subsection (4), where, in a proceeding to enforce an obligation in a foreign currency, the court is satisfied that conversion of the amount of the obligation to Canadian currency as provided in subsection (1) would be inequitable to any party, the order may require payment of an amount in Canadian currency sufficient to purchase the amount of the obligation in the foreign currency at a bank in Ontario on such other day as the court considers equitable in the circumstances.

Other obligations that include conversion

(4) Where an obligation enforceable in Ontario provides for a manner of conversion to Canadian currency of an amount in a foreign currency, the court shall give effect to the manner of conversion in the obligation.

Enforcement by seizure or garnishment

(5) Where a writ of seizure and sale or notice of garnishment is issued under an order to enforce an obligation in a foreign currency, the day the sheriff, bailiff or clerk of the court receives money under the writ or notice shall be deemed, for the purposes of this section and any obligation referred to in subsection (4), to be the day payment is received by the creditor. R.S.O. 1990, c. C.43, s. 121.

Actions for accounting

122 (1) Where an action for an accounting could have been brought against a person, the action may be brought against the person's personal

representative. R.S.O. 1990, c. C.43, s. 122 (1).

Same

(2) An action for an accounting may be brought by a joint tenant or tenant in common, or his or her personal representative, against a co-tenant for receiving more than the co-tenant's just share. R.S.O. 1990, c. C.43, s. 122 (2); 1993, c. 27, Sched.

Judge's retirement, etc., inability or failure to give decision

Definition

123 (1) In this section,

"chief judge" means a person having authority to assign duties to the judge. ("juge en chef") R.S.O. 1990, c. C.43, s. 123 (1); 1996, c. 25, s. 1 (21); 2015, c. 27, Sched. 1, s. 1 (13).

Application

(1.1) This section also applies, with necessary modifications, in respect of deputy judges and associate judges. 2015, c. 27, Sched. 1, s. 1 (14); 2020, c. 11, Sched. 5, s. 11; 2021, c. 4, Sched. 3, s. 15.

Decision after retirement, etc.

(2) A judge may, within ninety days of,

(a) reaching retirement age;

(b) resigning; or

(c) being appointed to another court,

give a decision or participate in the giving of a decision in any matter previously tried or heard before the judge. R.S.O. 1990, c. C.43, s. 123 (2).

Inability to give decision; panel of judges

(3) Where a judge has commenced a hearing together with other judges and,

(a) dies before the decision is given;

(b) is for any reason unable to participate in the giving of the decision; or

(c) does not participate in the giving of the decision under subsection (2),

the remaining judges may complete the hearing and give the decision of the court but, if the remaining judges are equally divided, a party may make a

motion to the chief judge for an order that the matter be reheard. R.S.O. 1990, c. C.43, s. 123 (3).

Inability to give decision; sitting alone

(4) Where a judge has commenced hearing a matter sitting alone and,

(a) dies without giving a decision;

(b) is for any reason unable to make a decision; or

(c) does not give a decision under subsection (2),

a party may make a motion to the chief judge for an order that the matter be reheard. R.S.O. 1990, c. C.43, s. 123 (4).

Failure to give decision

(5) Where a judge has heard a matter and fails to give a decision,

(a) in the case of a judgment, within six months; or

(b) in any other case, within three months,

the chief judge may extend the time in which the decision may be given and, if necessary, relieve the judge of his or her other duties until the decision is given. R.S.O. 1990, c. C.43, s. 123 (5).

Continued failure

(6) Where time has been extended under subsection (5) but the judge fails to give the decision within that time, unless the chief judge grants a further extension,

(a) the chief judge shall report the failure and the surrounding circumstances to the appropriate judicial council; and

(b) a party may make a motion to the chief judge for an order that the matter be reheard. R.S.O. 1990, c. C.43, s. 123 (6).

Rehearing

(7) Where an order is made under subsection (3), (4) or (6) for the rehearing of a matter, the chief judge may,

(a) dispose of the costs of the original hearing or refer the question of those costs to the judge or judges presiding at the rehearing;

(b) direct that the rehearing be conducted on the transcript of evidence taken at the original hearing, subject to the discretion of the court at the rehearing to recall a witness or require further evidence; and

(c) give such other directions as are considered just. R.S.O. 1990, c. C.43, s. 123 (7).

Certain hearings under the *Child, Youth and Family Services Act, 2017*

(8) If a judge in the Ontario Court of Justice who is presiding over a hearing under Part V, VII or VIII of the *Child, Youth and Family Services Act, 2017* for a final order respecting a matter is appointed to another court, the judge continues to have jurisdiction to complete the hearing and give a decision in the matter. 2024, c. 2, Sched. 6, s. 6.

124 Repealed: 2009, c. 33, Sched. 2, s. 20 (17).

Language

Official languages of the courts

125 (1) The official languages of the courts of Ontario are English and French.

Proceedings in English unless otherwise provided

(2) Except as otherwise provided with respect to the use of the French language,

(a) hearings in courts shall be conducted in the English language and evidence adduced in a language other than English shall be interpreted into the English language; and

(b) documents filed in courts shall be in the English language or shall be accompanied by a translation of the document into the English language certified by affidavit of the translator. R.S.O. 1990, c. C.43, s. 125.

Use of French

Documents that may be written in French

126 (1) The following documents may be written in French:

1. Pleadings or other documents filed by a party.

2. A process issued in or giving rise to the proceeding. 2021, c. 4, Sched. 3, s. 16.

Translation of documents

(2) On a party's request, the court shall provide a translation into English or French of a document described in paragraph 1 or 2 of subsection (1) that is written in the other language. 2021, c. 4, Sched. 3, s. 16.

Interpretation

(3) If a party acting in person makes submissions in French or a witness gives oral evidence in French, the court shall provide interpretation of the submissions or evidence into English. This subsection does not apply to a hearing in a bilingual proceeding to which paragraph 3 of subsection (4) applies. 2021, c. 4, Sched. 3, s. 16.

Bilingual proceedings

(4) A party to a proceeding who speaks French has the right to require that it be conducted as a bilingual proceeding, and the following rules apply if the party does so:

1. The hearings that the party specifies shall be presided over by a judge or officer who speaks English and French.

2. If a hearing that the party has specified is held before a judge and jury in an area described in subsection (5), the jury shall consist of persons who speak English and French.

3. If a hearing that the party has specified is held without a jury, or with a jury in an area described in subsection (5), evidence given and submissions made in English or French shall be received, recorded and transcribed in the language in which they are given.

4. Any other part of the hearing may be conducted in French if, in the opinion of the presiding judge or officer, it can be so conducted.

5. Oral evidence given in English or French at an examination out of court shall be received, recorded and transcribed in the language in which it is given.

6. On the request of a party, if the party or their counsel speaks English or French but not both, the court shall provide interpretation of anything given orally in the other language at hearings referred to in paragraph 3 and at examinations out of court.

7. The reasons for a decision may be written in English or French, but the court shall provide a translation into the other language on the request of a party. 2021, c. 4, Sched. 3, s. 16.

Bilingual juries

(5) The areas referred to in paragraphs 2 and 3 of subsection (4) are the following:

1. Counties:
    i. Essex.
    ii. Middlesex.
    iii. Prescott and Russell.
    iv. Renfrew.
    v. Simcoe.
    vi. Stormont, Dundas and Glengarry.
2. Territorial districts:
    i. Algoma.
    ii. Cochrane.
    iii. Kenora.
    iv. Nipissing.
    v. Sudbury.
    vi. Thunder Bay.
    vii. Timiskaming.
3. The area of the County of Welland as it existed on December 31, 1969.
4. The Municipality of Chatham Kent.
5. The City of Hamilton.
6. The City of Ottawa.
7. The Regional Municipality of Peel.
8. The City of Greater Sudbury.
9. The City of Toronto.
10. Such other areas as are prescribed. 2021, c. 4, Sched. 3, s. 16.

Prosecutions

(6) If a prosecution under the *Provincial Offences Act* is to be conducted as a bilingual proceeding by a prosecutor referred to in paragraph 1 or 2 of the definition of "prosecutor" in subsection 1 (1) of that Act or an agent acting on

behalf of that person, the prosecutor assigned to the case must speak English and French. 2021, c. 4, Sched. 3, s. 16.

Appeals

(7) When an appeal is taken in a proceeding that is being conducted as a bilingual proceeding, a party who speaks French has the right to require that the appeal be heard by a judge or judges who speak English and French; in that case subsection (4) applies to the appeal, with necessary modifications. 2021, c. 4, Sched. 3, s. 16.

Parties who are not natural persons

(8) A corporation, partnership or sole proprietorship may exercise the rights conferred by this section in the same way as a natural person, unless the court orders otherwise. 2021, c. 4, Sched. 3, s. 16.

Regulations

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

(a) prescribing procedures for the purpose of this section;

(b) prescribing areas for the purpose of paragraph 10 of subsection (5). 2021, c. 4, Sched. 3, s. 16.

Transition

(10) This section, as it read immediately before section 17 of Schedule 3 to the *Accelerating Access to Justice Act, 2021* came into force, continues to apply to proceedings commenced before the day that section came into force. 2021, c. 4, Sched. 3, s. 16.

SCHEDULE 1

Bilingual Juries

Paragraphs 2 and 3 of subsection 126 (2)

The following counties:

Essex

Middlesex

Prescott and Russell

Renfrew

Simcoe

Stormont, Dundas and Glengarry

The following territorial districts:

Algoma

Cochrane

Kenora

Nipissing

Sudbury

Thunder Bay

Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Municipality of Chatham Kent.

The City of Hamilton.

The City of Ottawa.

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

1994, c. 12, s. 43 (3); 1997, c. 26, Sched.; O. Reg. 441/97, s. 1; 2002, c. 17, Sched. F, Table.

SCHEDULE 2

Bilingual Documents

Paragraph 6 of subsection 126 (2)

The following counties:

Essex

Middlesex

Prescott and Russell

Renfrew

Simcoe

Stormont, Dundas and Glengarry

The following territorial districts:

Algoma

Cochrane

Kenora

Nipissing

Sudbury

Thunder Bay

Timiskaming

The area of the County of Welland as it existed on December 31, 1969.

The Municipality of Chatham Kent.

The City of Hamilton.

The City of Ottawa.

The Regional Municipality of Peel.

The City of Greater Sudbury.

The City of Toronto.

1994, c. 12, s. 43 (3); 1997, c. 26, Sched.; O. Reg. 441/97, s. 2; 2002, c. 17, Sched. F, Table.

Interest and Costs

Prejudgment and postjudgment interest rates

Definitions

127 (1) In this section and in sections 128 and 129,

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the *Bank Act* (Canada); ("taux d'escompte")

"date of the order" means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed; ("date de l'ordonnance")

"postjudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent; ("taux d'intérêt postérieur au jugement")

"prejudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the

proceeding was commenced, rounded to the nearest tenth of a percentage point; ("taux d'intérêt antérieur au jugement")

"quarter" means the three-month period ending with the 31st day of March, 30th day of June, 30th day of September or 31st day of December. ("trimestre") R.S.O. 1990, c. C.43, s. 127 (1).

Calculation and publication of interest rates

(2) After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

(a) determine the prejudgment and postjudgment interest rate for the next quarter; and

(b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a predecessor of that clause for all the previous quarters during the preceding 10 years. 2006, c. 21, Sched. A, s. 18.

Regulations

(3) The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2) (b) is to be published. 2006, c. 21, Sched. A, s. 18.

Prejudgment interest

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order. R.S.O. 1990, c. C.43, s. 128 (1).

Exception for non-pecuniary loss on personal injury

(2) Despite subsection (1), the rate of interest on damages for non-pecuniary loss in an action for personal injury shall be the rate determined by the rules of court made under clause 66 (2) (w). R.S.O. 1990, c. C.43, s. 128 (2); 1994, c. 12, s. 44.

Special damages

(3) If the order includes an amount for past pecuniary loss, the interest calculated under subsection (1) shall be calculated on the total past pecuniary loss at the end of each six-month period and at the date of the order.

Exclusion

(4) Interest shall not be awarded under subsection (1),

(a) on exemplary or punitive damages;

(b) on interest accruing under this section;

(c) on an award of costs in the proceeding;

(d) on that part of the order that represents pecuniary loss arising after the date of the order and that is identified by a finding of the court;

(e) with respect to the amount of any advance payment that has been made towards settlement of the claim, for the period after the advance payment has been made;

(f) where the order is made on consent, except by consent of the debtor; or

(g) where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 128 (3, 4).

Postjudgment interest

129 (1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order.

Interest on periodic payments

(2) Where an order provides for periodic payments, each payment in default shall bear interest only from the date of default.

Interest on orders originating outside Ontario

(3) Where an order is based on an order given outside Ontario or an order of a court outside Ontario is filed with a court in Ontario for the purpose of enforcement, money owing under the order bears interest at the rate, if any, applicable to the order given outside Ontario by the law of the place where it was given.

Costs assessed without order

(4) Where costs are assessed without an order, the costs bear interest at the postjudgment interest rate in the same manner as if an order were made for the payment of costs on the date the person to whom the costs are payable became entitled to the costs.

Other provision for interest

(5) Interest shall not be awarded under this section where interest is payable by a right other than under this section. R.S.O. 1990, c. C.43, s. 129.

Discretion of court

130 (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,

(a) disallow interest under either section;

(b) allow interest at a rate higher or lower than that provided in either section;

(c) allow interest for a period other than that provided in either section.

Same

(2) For the purpose of subsection (1), the court shall take into account,

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and

(g) any other relevant consideration. R.S.O. 1990, c. C.43, s. 130.

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Crown costs

(2) In a proceeding to which the Crown is a party, costs awarded to the Crown shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of the Crown shall be paid into the Consolidated Revenue Fund. 2024, c. 2, Sched. 19, s. 3 (2).

Same

(3) In subsection (2),

"Crown" means the Crown in right of Ontario. 2024, c. 2, Sched. 19, s. 3 (2)

APPEALS

Judge not to hear appeal from own decision

132 A judge shall not sit as a member of a court hearing an appeal from his or her own decision. R.S.O. 1990, c. C.43, s. 132.

Leave to appeal required

133 No appeal lies without leave of the court to which the appeal is to be taken,

(a) from an order made with the consent of the parties; or

(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs. R.S.O. 1990, c. C.43, s. 133.

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Same

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

PUBLIC ACCESS

Public hearings

135 (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

Exception

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from

the general principle that court hearings should be open to the public.

Disclosure of information

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information. R.S.O. 1990, c. C.43, s. 135.

Prohibition against photography, etc., at court hearing

136 (1) Subject to subsections (2) and (3), no person shall,

(a) take or attempt to take a photograph, motion picture, audio recording or other record capable of producing visual or aural representations by electronic means or otherwise,

(i) at a court hearing,

(ii) of any person entering or leaving the room in which a court hearing is to be or has been convened, or

(iii) of any person in the building in which a court hearing is to be or has been convened where there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, motion picture, audio recording or record taken in contravention of clause (a); or

(c) broadcast or reproduce an audio recording made as described in clause (2) (b). R.S.O. 1990, c. C.43, s. 136 (1).

Exceptions

(2) Nothing in subsection (1),

(a) prohibits a person from unobtrusively making handwritten notes or sketches at a court hearing; or

(b) prohibits a lawyer, a party acting in person or a journalist from unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge, for the sole purpose of supplementing or replacing handwritten notes. R.S.O. 1990, c. C.43, s. 136 (2); 1996, c. 25, s. 1 (22).

Exceptions

(3) Subsection (1) does not apply to a photograph, motion picture, audio recording or record made with authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the court hearing;

(b) in connection with any investitive, naturalization, ceremonial or other similar proceeding; or

(c) with the consent of the parties and witnesses, for such educational or instructional purposes as the judge approves.

Offence

(4) Every person who contravenes this section is guilty of an offence and on conviction is liable to a fine of not more than $25,000 or to imprisonment for a term of not more than six months, or to both. R.S.O. 1990, c. C.43, s. 136 (3, 4).

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

Procedural matters

Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice. 2015, c. 23, s. 3.

Appeal to be heard as soon as practicable

137.3 An appeal of an order under section 137.1 shall be heard as soon as practicable after the appellant perfects the appeal. 2015, c. 23, s. 3.

Stay of related tribunal proceeding

137.4 (1) If the responding party has begun a proceeding before a tribunal, within the meaning of the *Statutory Powers Procedure Act*, and the moving party believes that the proceeding relates to the same matter of public interest that the moving party alleges is the basis of the proceeding that is the subject of his or her motion under section 137.1, the moving party may file with the tribunal a copy of the notice of the motion that was filed with the

court and, on its filing, the tribunal proceeding is deemed to have been stayed by the tribunal. 2015, c. 23, s. 3.

Notice

(2) The tribunal shall give to each party to a tribunal proceeding stayed under subsection (1),

(a) notice of the stay; and

(b) a copy of the notice of motion that was filed with the tribunal. 2015, c. 23, s. 3.

Duration

(3) A stay of a tribunal proceeding under subsection (1) remains in effect until the motion, including any appeal of the motion, has been finally disposed of, subject to subsection (4). 2015, c. 23, s. 3.

Stay may be lifted

(4) A judge may, on motion, order that the stay is lifted at an earlier time if, in his or her opinion,

(a) the stay is causing or would likely cause undue hardship to a party to the tribunal proceeding; or

(b) the proceeding that is the subject of the motion under section 137.1 and the tribunal proceeding that was stayed under subsection (1) are not sufficiently related to warrant the stay. 2015, c. 23, s. 3.

Same

(5) A motion under subsection (4) shall be brought before a judge of the Superior Court of Justice or, if the decision made on the motion under section 137.1 is under appeal, a judge of the Court of Appeal. 2015, c. 23, s. 3.

Statutory Powers Procedure Act

(6) This section applies despite anything to the contrary in the *Statutory Powers Procedure Act*. 2015, c. 23, s. 3.

Application

137.5 Sections 137.1 to 137.4 apply in respect of proceedings commenced on or after the day the *Protection of Public Participation Act, 2015* received first reading. 2015, c. 23, s. 3.

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided. R.S.O. 1990, c. C.43, s. 138.

Joint liability not affected by judgment or release

139 (1) Where two or more persons are jointly liable in respect of the same cause of action, a judgment against or release of one of them does not preclude judgment against any other in the same or a separate proceeding. R.S.O. 1990, c. C.43, s. 139 (1); 1993, c. 27, Sched.

Two proceedings in respect of same damage

(2) Where a person who has suffered damage brings two or more proceedings in respect of the damage, the person is not entitled to costs in any of the proceedings, except the first proceeding in which judgment is obtained, unless the court is of the opinion that there were reasonable grounds for bringing more than one proceeding. R.S.O. 1990, c. C.43, s. 139 (2).

Vexatious litigant orders

140 (1) If a judge of the Superior Court of Justice or of the Court of Appeal is satisfied that a person has persistently and without reasonable grounds instituted vexatious proceedings in any court or conducted a proceeding in any court in a vexatious manner, the judge may make an order that includes any of the following terms:

1. No further proceeding may be instituted by the person in any court, except by leave of a judge of the Superior Court of Justice.

2. No proceeding previously instituted by the person in any court shall be continued, except by leave of a judge of the Superior Court of Justice.

3. Any other term that is just. 2024, c. 2, Sched. 6, s. 7 (1).

Procedure

(2) An order under subsection (1) may be made on a judge's own initiative or on motion or application by any person, as provided in the rules of court. 2024, c. 2, Sched. 6, s. 7 (1); 2024, c. 28, Sched. 4, s. 5.

Notice required

(2.1) An order under subsection (1) may only be made on notice to the person who is the subject of the order, as provided in the rules of court. 2024, c. 2, Sched. 6, s. 7 (1).

Branches of the Superior Court of Justice

(2.2) An order of the Superior Court of Justice under subsection (1) may be made by a judge presiding in any branch of that court. 2024, c. 2, Sched. 6, s. 7 (1).

Appeals and reviews

(2.3) The following rules apply with respect to an order made under subsection (1):

1. If the order was made by a judge of the Superior Court of Justice, an appeal of the order lies to a panel of the Court of Appeal.

2. If the order was made by a judge of the Court of Appeal, a panel of the Court of Appeal may, on motion, set aside or vary the decision.

3. For greater certainty, leave is not required to bring an appeal under paragraph 1 or a motion under paragraph 2, unless the court orders otherwise. 2024, c. 2, Sched. 6, s. 7 (1).

Application for leave to proceed

(3) Where a person against whom an order under subsection (1) has been made seeks leave to institute or continue a proceeding, the person shall do so by way of an application in the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 140 (3); 1996, c. 25, s. 9 (17).

Leave to proceed

(4) Where an application for leave is made under subsection (3),

(a) leave shall be granted only if the court is satisfied that the proceeding sought to be instituted or continued is not an abuse of process and that there are reasonable grounds for the proceeding;

(b) the person making the application for leave may seek the rescission of the order made under subsection (1) but may not seek any other relief on the application;

(c) the court may rescind the order made under subsection (1);

(d) the Attorney General is entitled to be heard on the application; and

(e) no appeal lies from a refusal to grant relief to the applicant. R.S.O. 1990, c. C.43, s. 140 (4).

Abuse of process

(5) Nothing in this section limits the authority of a court to stay or dismiss a proceeding as an abuse of process or on any other ground. R.S.O. 1990, c. C.43, s. 140 (5).

Deputy judges

(6) For greater certainty, a reference to a judge of the Superior Court of Justice in this section does not include a reference to a deputy judge. 2024, c. 2, Sched. 6, s. 7 (2).

Civil orders directed to sheriffs

141 (1) Unless an Act provides otherwise, orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement.

Police to assist sheriff

(2) A sheriff who believes that the execution of an order may give rise to a breach of the peace may require a police officer to accompany the sheriff and assist in the execution of the order. R.S.O. 1990, c. C.43, s. 141.

Protection for acting under court order

142 A person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario. R.S.O. 1990, c. C.43, s. 142.

Enforcement

Bonds and recognizances

143 (1) A bond or recognizance arising out of a civil proceeding may be enforced in the same manner as an order for the payment of money by leave of a judge on motion by the Attorney General or any other person entitled to enforcement.

Fines for contempt

(2) A fine for contempt of court may be enforced by the Attorney General in the same manner as an order for the payment of money or in any other manner permitted by law.

Sheriff

(3) The sheriff to whom a writ obtained under subsection (1) or (2) is directed shall proceed immediately to carry out the writ without a direction to enforce. R.S.O. 1990, c. C.43, s. 143.

143.1 REPEALED: 1999, c. 12, Sched. B, s. 4 (4).

Orders enforceable by police

144 Warrants of committal, warrants for arrest and any other orders requiring persons to be apprehended or taken into custody shall be directed to police officers for enforcement. R.S.O. 1990, c. C.43, s. 144.

Consul as official representative

145 Where a person who is ordinarily resident in a foreign country is entitled to money or property that is in the hands of a court or an executor or administrator, and if the foreign country has a consul in Canada who is authorized to act as the person's official representative, the money or property may be paid or delivered to the consul. R.S.O. 1990, c. C.43, s. 145.

Where procedures not provided

146 Jurisdiction conferred on a court, a judge or a justice of the peace shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice. R.S.O. 1990, c. C.43, s. 146.

Seal of court

147 (1) The courts shall have such seals as are approved by the Attorney General.

Same

(2) Every document issued out of a court in a civil proceeding shall bear the seal of the court. R.S.O. 1990, c. C.43, s. 147.

Jurisdiction of Federal Court

148 The Federal Court of Canada has jurisdiction,

(a) in controversies between Canada and Ontario;

(b) in controversies between Ontario and any other province in which an enactment similar to this section is in force,

in accordance with section 19 of the *Federal Courts Act* (Canada). R.S.O. 1990, c. C.43, s. 148.

PART VII.1
ENFORCEMENT OF CERTAIN TRADE AGREEMENTS

Application

148.1 This Part applies to the following agreements:

1. The Agreement on Internal Trade, signed in 1994 by the governments of Canada, the provinces of Canada, the Northwest Territories and the Yukon Territory, as amended from time to time.

2. The Canadian Free Trade Agreement, signed in 2017 by the governments of Canada and the provinces and territories of Canada, as amended from time to time.

3. Other prescribed domestic trade agreements that the Government of Ontario has entered into with the government of another province or territory of Canada, the Government of Canada or any combination of those governments. 2017, c. 20, Sched. 2, s. 6.

Enforcement of order to pay tariff costs

148.2 (1) An order against a person to pay tariff costs to a party to an agreement listed in section 148.1 may, for the purpose of its enforcement only, be made an order of the Superior Court of Justice if the order is against,

(a) a person who initiated the complaint; or

(b) a person who was added to the complaint as a co-party with a person who initiated the complaint. 2017, c. 20, Sched. 2, s. 6.

Procedure

(2) To enforce an order described in subsection (1), a party in whose favour the order is made shall file a certified copy of the order with the Superior Court of Justice. 2017, c. 20, Sched. 2, s. 6.

Effect

(3) From the date of filing, the order has the same effect as an order of the Superior Court of Justice for the purpose of enforcement to the extent that it is authorized by the applicable agreement. 2017, c. 20, Sched. 2, s. 6.

Date of order

(4) For the purposes of section 129, the date on which the order is filed with the Superior Court of Justice shall be deemed to be the date of the order. 2017, c. 20, Sched. 2, s. 6.

Regulations

148.3 The Lieutenant Governor in Council may make regulations prescribing agreements as domestic trade agreements for the purposes of this Part. 2017, c. 20, Sched. 2, s. 6.

PART VIII
MISCELLANEOUS

Family law mediation and information services

149 (1) In this section,

"agreement" includes a contract or other instrument; ("accord")

"service provider" means a person or entity that has entered into an agreement with the Crown in right of Ontario under subsection (2). ("fournisseur de services") 2018, c. 17, Sched. 10, s. 1.

Agreements with service providers

(2) The Attorney General may, on behalf of the Crown in right of Ontario, enter into agreements with one or more persons or entities for the provision of mediation and information services in relation to family law matters, as specified in the agreements. 2018, c. 17, Sched. 10, s. 1.

Fees

(3) Fees for the provision of the mediation services may be collected by or on behalf of a service provider to the extent permitted and in accordance with the agreement entered into by the service provider under subsection (2). 2018, c. 17, Sched. 10, s. 1.

Same

(4) Fees collected by or on behalf of a service provider in accordance with subsection (3) are not public money within the meaning of the *Financial Administration Act*, but the fees must be used by the service provider only for or in relation to the provision of the mediation and information services, as specified in the agreement, or for any other purpose specified in the agreement. 2018, c. 17, Sched. 10, s. 1.

Same, publication

(5) The Ministry of the Attorney General shall publish the fees payable under subsection (3) on a Government of Ontario website. 2018, c. 17, Sched. 10, s. 1.

Renewal of writs of execution issued before January 1, 1985

150 A writ of execution that was issued before the 1st day of January, 1985 may be renewed in the same manner and with the same effect as a writ of execution issued on or after that day. R.S.O. 1990, c. C.43, s. 150.

References to counties for judicial purposes

151 (1) A reference in this Act or any other Act, rule or regulation to a county or district for judicial purposes is deemed to be a reference to the corresponding area that, for municipal or territorial purposes, comprises the county, district, union of counties or regional, district or metropolitan municipality.

Separated municipalities

(2) For the purpose of subsection (1), every city, town and other municipality is united to and forms part of the county in which it is situate.

Exceptions

(3) Subsection (1) is subject to the following:

1. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Haldimand-Norfolk, deemed to be a reference to the following areas:

   i. All the area of the County of Haldimand as it existed on the 31st day of March, 1974.

   ii. All the area of the County of Norfolk as it existed on the 31st day of March, 1974.

2. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Niagara, deemed to be a reference to the following areas:

   i. All the area of the County of Lincoln as it existed on the 31st day of December, 1969.

ii. All the area of the County of Welland as it existed on the 31st day of December, 1969.

3. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of The Regional Municipality of Sudbury and the Territorial District of Sudbury, deemed to be a reference to all the area in The Regional Municipality of Sudbury and in the Territorial District of Sudbury.

4. A reference in an Act or regulation to a county or district for judicial purposes is, in the case of an area described below, deemed to be a reference to all the area in the areas described below:

i. All the area in the County of Victoria.

ii. All the area in the County of Haliburton.

iii. All the area in any part of the townships of Sherborne, McClintock, Livingstone, Lawrence and Nightingale located in Algonquin Park, so long as the part remains part of Algonquin Park. R.S.O. 1990, c. C.43, s. 151.

Meaning unchanged

151.1 Despite the repeal of the *Municipal Act*, for the purposes of this Act and any provision of another Act or regulation that relates to the operation of the courts or the administration of justice, the terms "county", "district", "union of counties", "regional municipality" and "district municipality" have the same meaning as they did on December 31, 2002, unless the context otherwise requires. 2002, c. 17, Sched. F, Table.

SCHEDULE

APPENDIX A OF FRAMEWORK AGREEMENT

BETWEEN:

Her Majesty the Queen in right of the Province of Ontario represented by the Chair of Management Board

("the Minister")

and

the Judges of the Ontario Court (Provincial Division) and the former Provincial Court (Civil Division) represented by the respective Presidents of The Ontario Judges Association, The Ontario Family Law Judges Association, and the Ontario Provincial Court (Civil Division) Judges' Association

("the Judges")

These are the terms to which the Minister and the Judges agree:

Definitions

1 In this agreement,

"Commission" means the Provincial Judges' Remuneration Commission; ("Commission")

"Crown" means Her Majesty the Queen in right of the Province of Ontario; ("Couronne")

"judges' associations" means the associations representing the Judges of the Ontario Court (Provincial Division) and the former Provincial Court (Civil Division); ("associations de juges")

"parties" means the Crown and the judges' associations. ("parties")

Introduction

2 The purpose of this agreement is to establish a framework for the regulation of certain aspects of the relationship between the executive branch of the government and the Judges, including a binding process for the determination of Judges' compensation. It is intended that both the process of decision-making and the decisions made by the Commission shall contribute to securing and maintaining the independence of the Provincial Judges. Further, the agreement is intended to promote co-operation between the executive branch of the government and the judiciary and the efforts of both to develop a justice system which is both efficient and effective, while ensuring the dispensation of independent and impartial justice.

3 It is the intention of the parties that the binding process created by this document will take effect with respect to the 1995 Provincial Judges Remuneration Commission, and thereafter.

4 The Minister or the Judges may designate one or more persons to act on their behalf under this agreement.

Commission and Appointments

5 The parties agree that the Provincial Judges Remuneration Commission is continued.

6 The parties agree that the Commission shall consist of the following three members:

1. One appointed jointly by the associations representing provincial judges.

2. One appointed by the Lieutenant Governor in Council.

3. One, who shall head the Commission, appointed jointly by the parties referred to in paragraphs 1 and 2.

7 The parties agree that the members of the Commission shall serve for a term of three years beginning on the first day of July in the year their inquiry under paragraph 13 is to be conducted.

8 The parties agree that the term of office of the persons who are members of the Commission on May 1, 1991 shall expire on June 30, 1995.

9 The parties agree that the members of the Commission may be reappointed when their term of office expires.

10 The parties agree that if a vacancy occurs on the Commission, a replacement may be appointed for the unexpired part of the term.

11 The parties agree that judges and public servants, as defined in the *Public Service Act*, shall not be members of the Commission.

12 The parties agree that the members of the Commission shall be paid the remuneration fixed by the Management Board of Cabinet and, subject to Management Board's approval, the reasonable expenses actually incurred in carrying out their duties.

Scope

13 The parties agree that in 1995, and in every third year after 1995, the Commission shall conduct an inquiry respecting:

(a) the appropriate base level of salaries,

(b) the appropriate design and level of pension benefits, and

(c) the appropriate level of and kind of benefits and allowances of provincial judges.

14 The parties agree that in addition to the inquiry referred to in paragraph 13, the Commission may, in its discretion, conduct any further inquiries into any matter relating to salary levels, allowances and benefits of provincial judges that are mutually agreed by the judges and the Government of Ontario.

15 The parties agree that the Commission whose term begins on July 1, 1995 and all subsequent Commissions shall begin their inquiry under paragraph 13 immediately after their term begins and shall, on or before the thirty-first day of December in the year the inquiry began, present recommendations and a report to the Chair of the Management Board of Cabinet.

16 The parties agree that the Commission shall make an annual report of its activities to the Chair of Management Board and the Chair shall table the report in the Legislature.

Powers and Procedures

17 The parties agree that the Commission may retain support services and professional services, including the services of counsel, as it considers necessary, subject to the approval of the Management Board.

18 The parties agree that the representatives of the Judges and the Lieutenant Governor in Council may confer prior to, during or following the conduct of an inquiry and may file such agreements with the Commission as they may be advised.

19 The parties agree that the Commission may participate in joint working committees with the judges and the government on specific items related to the inquiry of the Commission mentioned in paragraphs 13 and 14.

20 The parties agree that in conducting its inquiries, the Commission shall consider written and oral submissions made by provincial judges' associations and by the Government of Ontario.

21 The parties agree that the following rules govern the presentation to the Commission of submissions by provincial judges' associations and by the Government of Ontario, and their consideration by the Commission:

1. Each judges' association is entitled to receive advance disclosure of written submissions by the Government of Ontario and is entitled to make a written submission in reply.

2. The Government of Ontario is likewise entitled to receive advance disclosure of written submissions by provincial judges' associations and is entitled to make a written submission in reply.

3. When a representative of the Government of Ontario or of a judges' association makes an oral submission, the Commission may exclude from the hearing all persons except representatives of the Government of Ontario and of the judges' associations.

4. The representatives of the Government of Ontario and of the judges' associations are entitled to reply to each other's oral submissions.

5. If people have been excluded from the hearing under paragraph 3, the submissions of the Government of Ontario and of the judges' associations shall not be made public except to the extent that they are mentioned in the Commission's report.

22 The parties agree that the Commission may hold hearings, and may consider written and oral submissions from other interested persons and groups.

23 The parties agree that the Government of Ontario and the provincial judges' associations are entitled to be present when other persons make oral submissions to the Commission and are entitled to receive copies of other persons' written submissions.

24 Despite the repeal of the *Public Inquiries Act*, in connection with, and for the purposes of, any inquiry, the Commission or any member thereof has the powers of a commission under that Act.

Criteria

25 The parties agree that the Commission in making its recommendation on provincial judges' compensation shall give every consideration to, but not limited to, the following criteria, recognizing the purposes of this agreement as set out in paragraph 2:

(a) the laws of Ontario,

(b) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in the province and the overall state of the provincial economy,

(c) the growth or decline in real per capita income,

(d) the parameters set by any joint working committees established by the parties,

(e) that the Government may not reduce the salaries, pensions or benefits of Judges, individually or collectively, without infringing the principle of judicial independence,

(f) any other factor which it considers relevant to the matters in issue.

Report

26 The parties agree that they may jointly submit a letter to the Commission requesting that it attempt, in the course of its deliberations under paragraph 13, to produce a unanimous report, but in the event that the Commission cannot deliver a majority report, the Report of the Chair shall be the Report of the Commission for the purpose of paragraphs 13 and 14.

Binding and Implementation

27 The recommendations of the Commission under paragraph 13, except those related to pensions, shall come into effect on the first day of April in the

year following the year the Commission began its inquiry, except in the case of salary recommendations which shall come into effect on the first of April in the year in which the Commission began its inquiry and shall have the same force and effect as if enacted by the Legislature and are in substitution for the provisions of any schedule made pursuant to this Agreement and shall be implemented by the Lieutenant Governor in Council by order-in-council within sixty days of the delivery of the Commission's report pursuant to paragraph 15.

28 The parties agree that the Commission may, within thirty days, upon application by the Crown or the judges' associations made within ten days after the delivery of its recommendations and report pursuant to paragraph 15, subject to affording the Crown and the judges' associations the opportunity to make representations thereupon to the Commission, amend, alter or vary its recommendations and report where it is shown to the satisfaction of the Commission that it has failed to deal with any matter properly arising from the inquiry under paragraph 13 or that an error relating to a matter properly under paragraph 13 is apparent on the report, and such decision is final and binding on the Crown and the judges' associations, except those related to pensions.

29 Where a difference arises between the Crown and the judges' associations relating to the implementation of recommendations properly within the scope of issues set out in paragraph 13, except those related to pensions, the difference shall be referred to the Commission and, subject to affording the Crown and the judges' associations the opportunity to make representation thereupon to the Commission, its decision is final and binding on the Crown and the judges' associations.

30 The parties agree that the recommendations with respect to pensions, or any reconsideration under paragraph 28 of a matter relating to pensions, shall be presented to the Management Board of Cabinet for consideration.

31 The parties agree the recommendations and report of the Commission following a discretionary inquiry pursuant to paragraph 14 shall be presented to the Chair of Management Board of Cabinet.

32 The parties agree that the recommendations of the Commission in consequence of an inquiry pursuant to paragraph 14 shall be given every consideration by Management Board of Cabinet, but shall not have the same force and effect as recommendations referred to in paragraph 13.

33 The parties agree that if the Management Board of Cabinet endorses recommendations referenced in paragraph 30 or 31, or some variation of those recommendations, the Chair of Management Board shall make every

effort to implement them at the earliest possible date, following subsequent approval from Cabinet.

Disputes

34 The parties agree that if disputes arise as to whether a recommendation is properly the subject of an inquiry referenced in paragraph 13, or whether the recommendation falls within the parameters of paragraph 27 or 30, or with respect to the process, either party may require the Commission to consider the matter further.

35 The parties agree that requests by either party, made under paragraph 34, shall be presented to the Commission for consideration within one month of the presentation of the report to the Chair of Management Board.

36 The parties agree that the Commission, upon receiving notice from either party as set out in paragraph 34, shall present to the Chair of Management Board a decision with respect to the said matter, within one month of receiving such notice.

37 The parties may, during the course of the Commission's inquiry set out in paragraph 34, present either written or oral positions to the Commission for consideration on the said matter, which shall be disclosed to either party.

38 The parties agree that the decision of the Commission, as set out in paragraph 36, shall be given every consideration and very great weight by the Management Board of Cabinet.

39 Neither party can utilize the dispute clauses to limit, or to narrow, the scope of the Commission's review as set out under paragraph 13, or the binding effect of recommendations within its scope as set out under paragraphs 27 and 28.

40 The parties agree that in the event that an item(s) is referred to the Commission under paragraph 34, the Minister will proceed to implement the other recommendations of the Commission as set out in paragraphs 27, 28 and 33, except where the matter in dispute under paragraph 34 directly impacts the remaining items.

Review

41 The parties agree that either party may, at any time, request the other party to meet and discuss improvements to the process.

42 The parties agree that any amendments agreed to by the parties in paragraph 41 shall have the same force and effect as if enacted by the

Legislature and are in substitution for the provisions of this Act or any schedule made pursuant to this Act.

Communication

43 The parties agree that all provincial judges should be made aware of any changes to their compensation package as a result of recommendations of the Commission.

44 The parties agree that all provincial judges should receive updated copies of legislation, regulations or schedules as necessary, related to compensation changes.

Salaries and Indexing

45 The parties agree that effective on the first day of April in every year after 1995, the annual salaries for full-time provincial judges shall be adjusted as follows:

1. Determine the Industrial Aggregate for the twelve-month period that most recently precedes the first day of April of the year for which the salaries are to be calculated.

2. Determine the Industrial Aggregate for the twelve-month period immediately preceding the period referred to in paragraph 1.

3. Calculate the percentage that the Industrial Aggregate under paragraph 1 is of the Industrial Aggregate under paragraph 2.

4. If the percentage calculated under paragraph 3 exceeds 100 per cent, the salaries are to be calculated by multiplying the appropriate salaries for the year preceding the year for which the salaries are to be calculated by the lesser of that percentage and 107 per cent.

5. If the percentage calculated under paragraph 3 does not exceed 100 per cent, the salaries shall remain unchanged.

46 In paragraph 45, "Industrial Aggregate" for a twelve-month period is the average for the twelve-month period of the weekly wages and salaries of the Industrial Aggregate in Canada as published by Statistics Canada under the authority of the *Statistics Act* (Canada).

47 The salaries, allowances and benefits of provincial judges shall be paid out of the Consolidated Revenue Fund.

Additional Provisions

48 This agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns.

APPENDIX B OF FRAMEWORK AGREEMENT
JUDICIAL SALARIES

Date	Formula
April 1, 1991	$124,250
April 1, 1992	0%
April 1, 1993	AIW (Note: See paragraph 46 of Appendix "A")
April 1, 1994	AIW (Note: See paragraph 46 of Appendix "A")

1994, c. 12, s. 48; 2009, c. 33, Sched. 6, s. 50.

Note: A reference in a court seal or printed court form to the name of a court or the title of an official changed by the Statutes of Ontario, 1996, chapter 25, section 8 does not prevent the form or seal from being used during the one year period following April 19, 1999. This section applies only to court seals and printed court forms in existence on that date. See: 1996, c. 25, ss. 10, 11 (2).

TAB 17

CanLII

Rules of Civil Procedure, RRO 1990, Reg 194

Current version: in force since 2025-10-14

Link to the latest version: https://canlii.ca/t/t8m

Stable link to this version: https://canlii.ca/t/56lkp

Citation to this version: Rules of Civil Procedure, RRO 1990, Reg 194, <https://canlii.ca/t/56lkp> retrieved on 2026-01-06

Former citation: O Reg 575/07, s 6 (1)

Currency: Last updated from the e-Laws site on 2025-12-22

Courts of Justice Act

R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

Consolidation Period: From October 14, 2025 to the e-Laws currency date.

Last amendment: 226/25.

This is the English version of a bilingual regulation.

GENERAL MATTERS

RULE 1 CITATION, APPLICATION AND INTERPRETATION

Citation

Title

1.01 (1) These rules may be cited as the Rules of Civil Procedure. O. Reg. 575/07, s. 6 (1).

Subdivision

(2) In these rules,

(a) all the provisions identified by the same number to the left of the decimal point comprise a Rule (for example, Rule 1, which consists of rules 1.01 to 1.09);

(b) a provision identified by a number with a decimal point is a rule (for example, rule 1.01); and

(c) a rule may be subdivided into,

(i) subrules (for example, subrule 1.01 (2)),

(ii) clauses (for example, clause 1.01 (2) (c) or 2.02 (a)),

(iii) subclauses (for example, subclause 1.01 (2) (c) (iii) or 7.01 (c) (i)),

(iv) paragraphs (for example, paragraph 1 of subrule 52.07 (1)), and

(v) definitions (for example, the definition of "action" in rule 1.03). R.R.O. 1990, Reg. 194, r. 1.01 (2); O. Reg. 284/01, s. 1; O. Reg. 575/07, s. 6 (2).

Alternative Method of Referring to Rules

(3) In a proceeding in a court, it is sufficient to refer to a rule or subdivision of a rule as "rule" followed by the number of the rule, subrule, clause, subclause or paragraph (for example, rule 1.01, rule 1.01 (2), rule 1.01 (2) (c), rule 1.01 (2) (c) (iii) or rule 52.07 (1) 1). R.R.O. 1990, Reg. 194, r. 1.01 (3).

Application of Rules

Court of Appeal and Superior Court of Justice

1.02 (1) These rules apply to all civil proceedings in the Court of Appeal and in the Superior Court of Justice, subject to the following exceptions:

1. They do not apply to proceedings in the Small Claims Court, which are governed by Ontario Regulation 258/98 (Rules of the Small Claims Court).

2. They do not apply to proceedings governed by Ontario Regulation 114/99 (Family Law Rules), except as provided in those rules.

3. They do not apply if a statute provides for a different procedure. R.R.O. 1990, Reg. 194, r. 1.02 (1); O. Reg. 484/94, s. 1; O. Reg. 288/99,

s. 1 (1, 2); O. Reg. 292/99, s. 1 (1, 2); O. Reg. 131/04, s. 1 (1, 2); O. Reg. 394/09, s. 1.

Combined Proceeding in Family Court of Superior Court of Justice

(1.1) Where a proceeding combines a matter to which the Family Law Rules apply with a matter to which these rules would ordinarily apply, the parties may agree, or the court on motion may order, that the Family Law Rules apply to the combined proceeding or part of it. O. Reg. 131/04, s. 1 (3).

(2)-(4) Revoked: O. Reg. 504/00, s. 1.

Definitions

1.03 (1) In these rules, unless the context requires otherwise,

"action" means a proceeding that is not an application and includes a proceeding commenced by,

(a) statement of claim,

(b) notice of action,

(c) counterclaim,

(d) crossclaim, or

(e) third or subsequent party claim; ("action")

"appellant" means a person who brings an appeal; ("appelant")

"appellate court" means the Court of Appeal or the Divisional Court, as the circumstances require; ("tribunal d'appel")

"applicant" means a person who makes an application; ("requérant")

"application" means a proceeding commenced by notice of application; ("requête")

"certificate of appointment of estate trustee" means letters probate, letters of administration or letters of administration with the will annexed, and includes a small estate certificate or amended small estate certificate (74C, 74.1C or 74.1F); ("certificat de nomination à titre de fiduciaire de la succession")

"county" includes a district, a regional or district municipality, and the City of Toronto; ("comté")

"court" means the court in which a proceeding is pending and, in the case of a proceeding in the Superior Court of Justice, includes an associate judge; ("tribunal")

"defendant" means a person against whom an action is commenced; ("défendeur")

"deliver" means serve and file with proof of service, and "delivery" has a corresponding meaning; ("remettre", "remise")

"disability", where used in respect of a person, means that the person is,

(a) a minor,

(b) mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, whether the person has a guardian or not, or

(c) an absentee within the meaning of the *Absentees Act*; ("incapable", "incapacité")

"discovery" means discovery of documents, examination for discovery, inspection of property and medical examination of a party as provided under Rules 30 to 33; ("enquête préalable")

"document" includes data and information in electronic form; ("document")

"electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means, and "electronically" has a corresponding meaning; ("électronique", "par voie électronique")

"factum" includes a book of authorities, if one is required by rule 4.06.1; ("mémoire")

"hearing" means the hearing of an application, motion, reference, appeal or assessment of costs, or a trial; ("audience")

"holiday" means,

(a) any Saturday or Sunday,

(b) New Year's Day,

(b.1) Family Day,

(c) Good Friday,

(d) Easter Monday,

(e) Victoria Day,

(f) Canada Day,

(g) Civic Holiday,

(h) Labour Day,

(i) Thanksgiving Day,

(j) Remembrance Day,

(k) Christmas Day,

(l) Boxing Day, and

(m) any special holiday proclaimed by the Governor General or the Lieutenant Governor,

and where New Year's Day, Canada Day or Remembrance Day falls on a Saturday or Sunday, the following Monday is a holiday, and where Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday are holidays, and where Christmas Day falls on a Friday, the following Monday is a holiday; ("jour férié")

"judge" means a judge of the court but does not include an associate judge; ("juge")

"judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party; ("jugement")

"lawyer" means a person authorized under the *Law Society Act* to practise law in Ontario; ("avocat")

"lawyer's office" means the office of the lawyer of record as set out in the last document filed by him or her; ("bureau de l'avocat")

"limited scope retainer" means the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client; ("mandat à portée limitée")

"motion" means a motion in a proceeding or an intended proceeding; ("motion")

"moving party" means a person who makes a motion; ("auteur de la motion")

"order" includes a judgment; ("ordonnance")

"originating process" means a document that commences a proceeding under these rules, and includes,

(a) a statement of claim,

(b) a notice of action,

(c) a notice of application,

(d) an application for a certificate of appointment of estate trustee, a small estate certificate or an amended small estate certificate,

(e) a counterclaim against a person who is not already a party to the main action, and

(f) a third or subsequent party claim,

but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion; ("acte introductif d'instance")

"partial indemnity costs" mean costs awarded in accordance with Part I of Tariff A, and "on a partial indemnity basis" has a corresponding meaning; ("dépens d'indemnisation partielle")

"person" includes a party to a proceeding; ("personne")

"plaintiff" means a person who commences an action; ("demandeur")

"proceeding" means an action or application; ("instance")

"referee" means the person to whom a reference in a proceeding is directed; ("arbitre")

"registrar" means the Registrar of the Divisional Court or Court of Appeal, or a local registrar of the Superior Court of Justice, as the circumstances require; ("greffier")

"respondent" means a person against whom an application is made or an appeal is brought, as the circumstances require; ("intimé")

"responding party" means a person against whom a motion is made; ("partie intimée")

"statute" includes a statute passed by the Parliament of Canada; ("loi")

"substantial indemnity costs" mean costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A, and "on a substantial indemnity basis" has a corresponding meaning; ("dépens d'indemnisation substantielle")

"timetable" means a schedule for the completion of one or more steps required to advance the proceeding (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by order of the court or by written agreement of the parties that is not contrary to an order; ("calendrier")

"will" includes any testamentary instrument of which probate or administration may be granted. ("testament")

R.R.O. 1990, Reg. 194, r. 1.03; O. Reg. 535/92, s. 2; O. Reg. 484/94, s. 2; O. Reg. 69/95, s. 1; O. Reg. 442/97, s. 1; O. Reg. 570/98, s. 1; O. Reg. 292/99, s. 1 (2); O. Reg. 427/01, s. 1 (1); O. Reg. 284/01, s. 2; O. Reg.

14/04, s. 1 (1); O. Reg. 131/04, s. 2; O. Reg. 42/05, s. 1; O. Reg. 260/05, s. 1; O. Reg. 575/07, s. 7; O. Reg. 438/08, ss. 1, 66; O. Reg. 231/13, s. 1; O. Reg. 711/20, s. 1; O. Reg. 383/21, s. 1, 15; O. Reg. 709/21, s. 1; O. Reg. 300/24, s. 1.

(2) Revoked: O. Reg. 14/04, s. 1 (2).

Interpretation

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

Matters Not Provided For

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 (2).

(3) Revoked: O. Reg. 231/13, s. 2.

"Party and Party" Costs

(4) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs. O. Reg. 284/01, s. 3.

"Solicitor and Client" Costs

(5) If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs. O. Reg. 284/01, s. 3.

Orders on Terms

1.05 When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

Forms

Use of Forms

1.06 (1) The forms prescribed by these rules shall be used where applicable and with such variations as the circumstances require. O. Reg. 77/06, s. 1.

Table of Forms

(2) In these rules, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of these rules and is available on the Internet through www.ontariocourtforms.on.ca. O. Reg. 77/06, s. 1.

(3) REVOKED: O. Reg. 188/23, s. 1 (2).

Practice Directions

Definition

1.07 (1) In this rule,

"practice direction" means a direction, notice, guide or similar publication for the purpose of governing, subject to these rules, the practice for proceedings. O. Reg. 132/04, s. 1.

Court of Appeal

(2) A practice direction for proceedings in the Court of Appeal shall be signed by the Chief Justice of Ontario. O. Reg. 132/04, s. 1.

Superior Court of Justice

(3) A practice direction for proceedings in the Superior Court of Justice throughout Ontario shall be signed by the Chief Justice of the Superior Court of Justice. O. Reg. 132/04, s. 1.

(4) A practice direction for proceedings in the Superior Court of Justice in a region shall be signed by the regional senior judge and countersigned by the Chief Justice of the Superior Court of Justice. O. Reg. 132/04, s. 1.

Filing and Publication

(5) A practice direction shall be filed with the secretary of the Civil Rules Committee and published on the Ontario Courts website. O. Reg. 537/18, s. 1.

Effective Date

(6) A practice direction does not come into effect before it is filed and published in accordance with subrule (5). O. Reg. 537/18, s. 1.

Method of Attendance at Hearings, etc.

Attendance Before the Court

1.08 (1) A party seeking a hearing or other step in a proceeding that permits or requires the attendance of parties before the court shall, in the forms or other documents required under these rules to be filed in advance of the hearing or step, specify by which of the following methods the party proposes that the parties attend at the hearing or step:

1. In person.

2. By telephone conference.

3. By video conference. O. Reg. 689/20, s. 1; O. Reg. 526/21, s. 1 (1).

Exception, Court of Appeal

(2) This rule does not apply with respect to proceedings in the Court of Appeal, which may be heard as directed by the court. O. Reg. 689/20, s. 1.

Exception, Case Conferences

(3) This rule does not apply with respect to case conferences, which shall be held by telephone conference unless the court specifies a different method of attendance. O. Reg. 689/20, s. 1.

Objection

(4) A party who wishes to oppose the proposed method of attendance shall deliver a notice of objection in Form 1A before the earlier of,

(a) 10 days after the document specifying the proposed method of attendance was served on the party; and

(b) seven days before the hearing or step. O. Reg. 689/20, s. 1.

Objection to be Dealt with at Case Conference

(5) If a notice of objection is delivered, the court shall order a case conference under rule 50.13 to deal with the objection. O. Reg. 689/20, s. 1; O. Reg. 526/21, s. 1 (2).

Method to be Determined by Order

(6) At the case conference referred to in subrule (5), the court shall make an order directing the method of attendance at the hearing or step and, in doing so, the court shall consider, as applicable,

(a) the availability of telephone conference or video conference facilities;

(b) the general principle that evidence and argument should be presented orally in open court;

(c) the importance of the evidence to the determination of the issues in the case;

(d) the effect of a telephone conference or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(e) the importance in the circumstances of the case of observing the demeanour of a witness;

(f) whether a party, witness or lawyer for a party is unable to attend by a method because of infirmity, illness or any other reason;

(g) the balance of convenience between any party wishing the telephone conference or video conference and any party or parties opposing; and

(h) any other relevant matter. O. Reg. 689/20, s. 1; O. Reg. 526/21, s. 1 (3, 4).

No Objection

(7) If no notice of objection is filed, the parties are deemed to have agreed to attendance by the proposed method and, unless the court directs otherwise, the hearing or step shall proceed by that method. O. Reg. 689/20, s. 1.

Attendance at Mediations, Oral Examinations

(8) In the case of a mediation under Rule 24.1, 75.1 or 75.2 or of any step to which Rule 34 applies, the mediation or step shall be held by a method of attendance referred to in subrule (1) determined in accordance with the following rules:

1. If the parties and any other person who is required to attend the mediation or step agree on the method of attendance, the mediation or step shall be held by that method.

2. If the parties and any other person who is required to attend the mediation or step fail to agree on the method of attendance,

i. in the case of a mediation to be held under Rule 24.1 or a step to which Rule 34 applies, one of the parties shall request a case conference under rule 50.13 for an order directing the method of attendance, or

ii. in the case of a mediation to be held under Rule 75.1 or 75.2, the court shall, on the motion for directions under rule 75.1.05 or 75.2.03, as the case may be, make an order directing the method of attendance.

3. In making an order directing the method of attendance, the court shall consider any applicable factors listed in subrule (6). O. Reg. 526/21, s. 1 (5).

Transition, References under the Solicitors Act

(9) Rule 1.08.1, as it read immediately before it was revoked, continues to apply with respect to a reference under the *Solicitors Act* of a lawyer's bill for assessment, if a party to the reference made a request under that rule before

the day section 1 of Ontario Regulation 689/20 came into force. O. Reg. 689/20, s. 1.

1.08.1 REVOKED: O. Reg. 689/20, s. 1.

Communications out of Court

1.09 When a proceeding is pending before the court, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge or associate judge out of court, directly or indirectly, unless,

(a) all the parties consent, in advance, to the out-of-court communication; or

(b) the court directs otherwise. O. Reg. 132/04, s. 2; O. Reg. 438/08, s. 66; O. Reg. 711/20, s. 2; O. Reg. 383/21, s. 15.

RULE 2 NON-COMPLIANCE WITH THE RULES

Effect of Non-Compliance

2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. R.R.O. 1990, Reg. 194, r. 2.01 (1).

(2) The court shall not set aside an originating process on the ground that the proceeding should have been commenced by an originating process other than the one employed. R.R.O. 1990, Reg. 194, r. 2.01 (2).

Attacking Irregularity

2.02 A motion to attack a proceeding or a step, document or order in a proceeding for irregularity shall not be made, except with leave of the court,

(a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity; or

(b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity. R.R.O. 1990, Reg. 194, r. 2.02.

Court May Dispense with Compliance

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time. R.R.O. 1990, Reg. 194,

RULE 2.1 FRIVOLOUS, VEXATIOUS OR ABUSIVE PROCEEDINGS

Stay or Dismissal of Proceedings

Court May Stay, Dismiss

2.1.01 (1) The court may make an order staying or dismissing a proceeding that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court. O. Reg. 322/24, s. 1.

Summary Determination

(2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule. O. Reg. 322/24, s. 1.

On Own Initiative or On Request

(3) An order under subrule (1) may be made by the court on its own initiative or on the request of a party to the proceeding under subrule (4). O. Reg. 322/24, s. 1.

How to Request

(4) A party may seek an order under subrule (1) by serving a request in Form 2.1A on every other party and filing it with proof of service. O. Reg. 322/24, s. 1.

Registrar May Notify Court

(5) If, in the registrar's opinion, there is reason to believe that a proceeding may be frivolous or vexatious or otherwise an abuse of the process of the court, the registrar may, in the absence of a request under subrule (4), notify the court. O. Reg. 322/24, s. 1.

Notice to Parties

(6) If, on review of a request under subrule (4) or on its own initiative, the court determines that it may be appropriate to make an order under subrule (1), the court shall direct the registrar to give notice to the parties in Form 2.1B that the proceeding may be stayed or dismissed. O. Reg. 322/24, s. 1.

Effect of Notice

(7) Once the registrar gives notice to the parties,

(a) the proceeding is automatically stayed until the court either makes an order under subrule (1) or an order declining to stay or dismiss the proceeding; and

(b) no party may take any step in the proceeding other than the steps in this rule, unless the court orders otherwise. O. Reg. 322/24, s. 1.

Procedures

(8) Unless the court orders otherwise, an order under subrule (1) shall be made on the basis of written submissions, if any, in accordance with the following procedures:

1. The plaintiff or applicant may, within 15 days after receiving the notice, file with the court a written submission, no more than 10 pages in length, responding to the notice.

2. If the plaintiff or applicant does not file a written submission that complies with paragraph 1, the court may make the order without any further notice to the plaintiff or applicant or to any other party.

3. If the plaintiff or applicant files a written submission that complies with paragraph 1, the court may direct the registrar to give a copy of the submission to any other party.

4. A party who receives a copy of the plaintiff's or applicant's submission may, within 10 days after receiving the copy, file with the court a written submission, no more than 10 pages in length, responding to the plaintiff's or applicant's submission.

5. A party who files a responding submission shall give a copy of it to the plaintiff or applicant and to any other party who requests a copy. O. Reg. 322/24, s. 1.

(9) A document required to be given to a party under subrule (8),

(a) shall be given to the party's lawyer in a manner listed in rule 16.05; or

(b) if the party is acting in person, shall be mailed to the party in the manner described in subclause 16.01 (4) (b) (i). O. Reg. 322/24, s. 1.

(10) Rule 16 applies with necessary modifications to the determination of when a document given or mailed to a person under subrule (9) is considered to have been received. O. Reg. 322/24, s. 1.

Copy of Order

(11) After the court makes an order under subrule (1) or an order declining to stay or dismiss the proceeding, the registrar shall promptly provide a copy of the order to each of the parties in a manner listed in subrule 59.04 (4). O. Reg. 322/24, s. 1.

Stay or Dismissal of Motions

Court May Stay, Dismiss

2.1.02 (1) The court may make an order staying or dismissing a motion that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court. O. Reg. 322/24, s. 1.

Procedures, etc.

(2) Subrules 2.1.01 (2) to (11), other than subrule (7), apply for the purposes of subrule (1), with the following and any other necessary modifications:

1. A reference to a proceeding shall be read as a reference to the motion.

2. A reference to the plaintiff or applicant shall be read as a reference to the moving party. O. Reg. 322/24, s. 1.

Restriction on Further Motions

(3) In making an order under subrule (1), the court may also make an order under rule 37.16 prohibiting the moving party from making further motions in the proceeding without leave. O. Reg. 322/24, s. 1.

RULE 2.2 VEXATIOUS LITIGANT ORDERS

Interpretation

2.2.01 In this Rule,

"notified person" means a person, other than the potential subject of a vexatious litigant order, who receives a notice under rule 2.2.03 or 2.2.04; ("personne avisée")

"participant" means, as the case may be,

(a) the person who is the potential subject of a vexatious litigant order,

(b) a notified person who serves and files a reply in accordance with subrule 2.2.05 (2), or

(c) the moving party or applicant under rule 2.2.03, if any; ("participant")

"vexatious litigant order" means an order under subsection 140 (1) of the *Courts of Justice Act*. ("ordonnance de déclaration de plaideur quérulent") O. Reg. 322/24, s. 1.

Vexatious Litigant Order

2.2.02 A vexatious litigant order may be made,

(a) on a person's motion or application, commenced in accordance with rule 2.2.03; or

(b) on a judge's initiative, initiated in accordance with rule 2.2.04. O. Reg. 322/24, s. 1.

Order Sought by Person

By Motion or Application

2.2.03 (1) A vexatious litigant order against a person may be sought,

(a) by motion in accordance with subrule (2), if the person is a party to an ongoing proceeding and the order is sought by another party in the proceeding; or

(b) in any other case, by application made in the Superior Court of Justice in accordance with subrule (3). O. Reg. 322/24, s. 1.

If by Motion

(2) For the purposes of clause (1) (a), the moving party shall serve on the persons listed in subrule (5) and file with proof of service a notice of motion for a vexatious litigant order (Form 2.2A). O. Reg. 322/24, s. 1.

If by Application

(3) For the purposes of clause (1) (b), following issuance of a notice of application for a vexatious litigant order (Form 2.2B) as provided by rule 14.07, the applicant shall serve the notice on the persons listed in subrule (5) and file it with proof of service. O. Reg. 322/24, s. 1.

Notice Requirements

(4) A notice in Form 2.2A or 2.2B shall set out,

(a) the grounds on which the vexatious litigant order is sought; and

(b) the following information, to the extent that it can be determined by the moving party or applicant using their best efforts:

(i) The file number, location and title of any ongoing proceeding in any court in Ontario to which the person against whom the vexatious litigant order is sought is a party, and the address for service of every other party to any such proceeding.

(ii) The file number, location and title of any proceeding that was finally disposed of in any court in Ontario to which the person against whom the vexatious litigant order is sought was a party.

(iii) The citation of every reported decision made in the course of a proceeding referred to in subclause (i) or (ii). O. Reg. 322/24, s. 1.

Service

(5) A notice in Form 2.2A or 2.2B shall be served on,

(a) the person against whom the order is sought; and

(b) every party to a proceeding set out in the notice under subclause (4) (b) (i). O. Reg. 322/24, s. 1.

(6) Rule 16.04 applies with respect to service under this rule, except that a judge may not make an order dispensing with service on the person against whom the vexatious litigant order is sought. O. Reg. 322/24, s. 1.

Non-Application of Certain Rules

(7) Unless this Rule or a court order provides otherwise, Rules 37, 38 and 39 do not apply with respect to a motion or application under this rule. O. Reg. 322/24, s. 1.

On Judge's Own Initiative

Registrar's Notice

2.2.04 (1) If it appears to a judge of a court that a vexatious litigant order against a party to an ongoing proceeding in that court may be warranted, the judge may give written direction to the registrar to prepare a registrar's notice proposing consideration of a vexatious litigant order (Form 2.2C). O. Reg. 322/24, s. 1.

(2) The written direction shall,

(a) specify the information the registrar is required to include in the notice, which shall either be the information listed in subrule 2.2.03 (4), with necessary modifications, or such other information as the judge may specify in the direction; and

(b) be attached to the notice. O. Reg. 322/24, s. 1.

No Review

(3) The written direction may not be set aside or varied. O. Reg. 322/24, s. 1.

Registrar to Send, File Notice

(4) The registrar shall,

(a) subject to subrule (5), send the notice by mail or email to the persons referred to in subrule 2.2.03 (5), with necessary modifications; and

(b) file a copy of the notice, and a list of the persons to whom it was sent, in the court file. O. Reg. 322/24, s. 1.

(5) The judge may give directions to the registrar respecting how to send the notice and to whom, but shall not direct the registrar to dispense with sending the notice to the person who is the potential subject of a vexatious litigant order. O. Reg. 322/24, s. 1.

(6) Rule 16 applies with necessary modifications to the determination of whether and when the notice is considered to have been received, unless any directions given under subrule (5) require otherwise. O. Reg. 322/24, s. 1.

Response and Reply

Response

2.2.05 (1) The person who is the potential subject of a vexatious litigant order may, within 20 days after receiving a notice in Form 2.2A, 2.2B or 2.2C,

(a) serve a response in Form 2.2D on every notified person and, if applicable, the moving party or applicant; and

(b) file the response with proof of service. O. Reg. 322/24, s. 1.

Reply

(2) A moving party, applicant or notified person may serve and file with proof of service a reply in Form 2.2E, within,

(a) 20 days after receiving a response; or

(b) if no response is served, 30 days after serving or receiving the notice, as the case may be. O. Reg. 322/24, s. 1.

(3) A reply shall be served on the person who is the potential subject of a vexatious litigant order, on every notified person and, if applicable, on the moving party or applicant. O. Reg. 322/24, s. 1.

Effect of Not Replying

(4) A notified person who does not file a reply is not entitled to be heard at any hearing of the matter under rule 2.2.07 without leave of a judge. O. Reg. 322/24, s. 1.

(5) Subrule (4) does not affect any entitlement under rule 2.2.06 or 2.2.07 of a person to receive or obtain a copy of an order, decision or reasons. O. Reg. 322/24, s. 1.

Initial Review and Order

2.2.06 (1) After the time for filing a response and any replies has passed, a judge shall conduct an initial review of the notice and submissions, following which the judge shall make an order in Form 2.2F,

(a) directing that a hearing of the matter be held under rule 2.2.07; or

(b) dismissing the matter, with reasons. O. Reg. 322/24, s. 1.

(2) Without limiting the generality of rule 1.05, the judge may, in making an order under subrule (1),

(a) direct that a participant serve and file a motion record in accordance with Rule 37 or application record in accordance with Rule 38, with such modifications as the judge may specify;

(b) direct a participant to file supplementary arguments or further evidence;

(c) direct the person who is the potential subject of a vexatious litigant order to confirm every ongoing proceeding to which they are a party, and the name and address for service of every other party to any such proceeding;

(d) direct a participant to conduct a search to confirm every ongoing proceeding to which the person who is the potential subject of a vexatious litigant order is a party, and the name and address for service of every other party to any such proceeding;

(e) direct a participant to prepare a draft order in Form 2.2G;

(f) if notice was given in respect of an ongoing proceeding (Form 2.2A or 2.2C) and the judge is directing a hearing under rule 2.2.07, order a stay of the ongoing proceeding pending the determination of the matter; or

(g) establish a timetable. O. Reg. 322/24, s. 1.

Issuance of Order

(3) The registrar shall issue the order, as signed by the judge, and subrules 59.04 (1) and (2) apply with necessary modifications with respect to the issuance. O. Reg. 322/24, s. 1.

Copy of Order

(4) A copy of the order shall promptly be provided, by a method listed in subrule 59.04 (4), to each of the participants and any other person a judge may order. O. Reg. 322/24, s. 1.

No Review

(5) An order under subrule (1) directing a hearing of the matter or dismissing it may not be set aside or varied. O. Reg. 322/24, s. 1.

Hearing and Disposition

Powers of Judge

2.2.07 (1) The judge presiding at the hearing to determine whether to make a vexatious litigant order may make such orders and give such directions as the judge considers appropriate in the interest of justice. O. Reg. 322/24, s. 1.

Determination Following Hearing

(2) Following the hearing, the judge shall,

(a) make a vexatious litigant order in Form 2.2G, with reasons; or

(b) decline to make a vexatious litigant order, with reasons. O. Reg. 322/24, s. 1.

(3) For greater certainty, rule 1.05 applies with respect to an order made under subrule (2). O. Reg. 322/24, s. 1.

If Vexatious Litigant Order is Made

(4) If making a vexatious litigant order, the judge shall specify the details of any limitations in the order's application. O. Reg. 322/24, s. 1.

(5) A vexatious litigant order shall include reference to the right of appeal or review under subsection 140 (2.3) of the *Courts of Justice Act*. O. Reg. 322/24, s. 1.

Issuance of Order

(6) The registrar shall issue the vexatious litigant order, as signed by the judge, and subrules 59.04 (1) and (2) apply with necessary modifications with respect to the issuance. O. Reg. 322/24, s. 1.

Copy of Order

(7) The issued vexatious litigant order and reasons shall promptly be provided, by a method listed in subrule 59.04 (4), to each of the participants, any other notified person and any other person a judge may order. O. Reg. 322/24, s. 1.

(8) The registrar shall provide a copy of every issued vexatious litigant order and reasons to the Court Services Division of the Ministry of the Attorney General for the purposes of inclusion in the index of vexatious litigant orders administered by the Division. O. Reg. 322/24, s. 1.

If Vexatious Litigant Order is Not Made

(9) If the judge makes an order under clause (2) (b) declining to make a vexatious litigant order, any participant may require the registrar to issue and enter an order reflecting the judge's decision by filing a requisition (Form 4E) and draft order (Form 59A or 59B). O. Reg. 322/24, s. 1.

Leave Despite Order

2.2.08 A person who is the subject of a vexatious litigant order may, in the manner provided for under subrule 38.01 (3), seek leave under subsection

140 (3) of the *Courts of Justice Act* to institute or continue a proceeding. O. Reg. 322/24, s. 1.

Proceeding Instituted, Continued without Leave

Court Shall Order Stay, Dismissal

2.2.09 (1) If a proceeding is instituted or continued without leave by a plaintiff, applicant or appellant who is the subject of a vexatious litigant order, and the court determines that the proceeding is subject to the vexatious litigant order, the court shall make an order staying or dismissing the proceeding. O. Reg. 322/24, s. 1.

Request for Order

(2) A party to the proceeding may file a request with the court for an order under subrule (1). O. Reg. 322/24, s. 1.

Notice Not Required

(3) The order may be made without notice. O. Reg. 322/24, s. 1.

Copy of Order

(4) Once the order has been made, a copy of it shall promptly be provided to every party to the proceeding by a method listed in subrule 59.04 (4). O. Reg. 322/24, s. 1.

Refusal by Registrar

(5) Nothing in this rule prevents a registrar from refusing to issue an originating process or accept a document for filing in a proceeding if the registrar has determined that,

(a) the plaintiff, applicant or appellant is the subject of a vexatious litigant order;

(b) the proceeding is subject to the vexatious litigant order; and

(c) the plaintiff, applicant or appellant has not obtained leave to institute or continue the proceeding. O. Reg. 322/24, s. 1.

RULE 3 TIME

Computation

3.01 (1) In the computation of time under these rules or an order, except where a contrary intention appears,

(a) where there is a reference to a number of days between two events, they shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, even if they are described as clear days or the words “at least” are used;

(b) where a period of seven days or less is prescribed, holidays shall not be counted;

(c) where the time for doing an act expires on a holiday, the act may be done on the next day that is not a holiday; and

(d) service of a document, other than an originating process, made after 4 p.m. or at any time on a holiday shall be deemed to have been made on the next day that is not a holiday. R.R.O. 1990, Reg. 194, r. 3.01 (1); O. Reg. 394/09, s. 3; O. Reg. 438/08, s. 4.

(2) Where a time of day is mentioned in these rules or in any document in a proceeding, the time referred to shall be taken as the time observed locally. R.R.O. 1990, Reg. 194, r. 3.01 (2).

Extension or Abridgment

General Powers of Court

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just. R.R.O. 1990, Reg. 194, r. 3.02 (1).

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed. R.R.O. 1990, Reg. 194, r. 3.02 (2).

Times in Appeals

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court. R.R.O. 1990, Reg. 194, r. 3.02 (3).

Consent in Writing

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent. O. Reg. 555/96, s. 1; O. Reg. 427/01, s. 2; O. Reg. 438/08, s. 5.

When Proceedings May Be Heard

Hearings Throughout the Year

3.03 (1) Proceedings may be heard throughout the year, except that from December 24th to the following January 6th no trial of an action shall be held unless the consent of all parties is filed or the court orders otherwise. O. Reg. 770/92, s. 3; O. Reg. 427/01, s. 3.

In Absence of Opposite Party

(2) No motion, reference, examination, assessment of costs or other matter, except a motion made without notice, shall proceed before a judge, associate

judge or other officer in the absence of the opposite party until fifteen minutes after the time fixed for it. R.R.O. 1990, Reg. 194, r. 3.03 (2); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Timetables

Amendment

3.04 (1) Parties may, by written agreement, amend a timetable established by order of a judge or associate judge, unless the order expressly prohibits amendment by the parties. O. Reg. 438/08, s. 6; O. Reg. 383/21, s. 15.

Same

(2) Parties may, by written agreement, amend a timetable established by written agreement of the parties and amended by the order of a judge or associate judge, unless the order expressly prohibits amendment by the parties. O. Reg. 438/08, s. 6; O. Reg. 383/21, s. 15.

Limitation

(3) Despite subrules (1) and (2), in the case of an action, an agreement to amend a timetable shall not amend the date before which the action shall be set down for trial or restored to a trial list, as the case may be. O. Reg. 438/08, s. 6.

Non-Compliance

(4) If a party fails to comply with a timetable, a judge or associate judge may, on any other party's motion,

(a) stay the party's proceeding;

(b) dismiss the party's proceeding or strike out the party's defence; or

(c) make such other order as is just. O. Reg. 438/08, s. 6; O. Reg. 383/21, s. 15.

RULE 4 COURT DOCUMENTS

Document Standards

4.01 A document in writing in a proceeding shall meet the following standards:

1. In the case of a document in paper format,

   i. the text shall be printed, typed, written or reproduced legibly, with double spaces between the lines and a margin of approximately 40 millimetres on the left-hand side,

   ii. the characters used shall be of at least 12 point or 10 pitch size,

iii. good quality white paper or good quality near white recycled paper 216 millimetres by 279 millimetres shall be used, and

iv. text may appear on one side or on both sides of the paper.

2. In the case of a document that is filed or submitted in electronic format using software authorized by the Ministry of the Attorney General for the purpose, the document must meet,

i. the requirements set out in subparagraph 1 i and ii, and

ii. any requirements specified by the authorized software. O. Reg. 689/20, s. 2.

Electronic Signatures

4.01.1 (1) In this rule,

"electronic signature" means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document. O. Reg. 689/20, s. 3.

Electronic Signatures Permitted

(2) A document that may or must be signed by the court, a registrar, a judge or an officer under these rules may be signed with an electronic signature. O. Reg. 689/20, s. 3.

Contents

General Heading

4.02 (1) Every document in a proceeding shall have a heading in accordance with Form 4A (actions) or 4B (applications) that sets out,

(a) the name of the court and the court file number; and

(b) the title of the proceeding in accordance with rule 14.06 (action or application), but in a document other than an originating process, pleading, record, order or report, where there are more than two parties to the proceeding, a short title showing the names of the first party on each side followed by the words "and others" may be used. R.R.O. 1990, Reg. 194, r. 4.02 (1); O. Reg. 131/04, s. 3.

(1.1) Clause (1) (b) does not apply to documents in a proceeding under Rule 74, 74.1 or 75. O. Reg. 484/94, s. 3; O. Reg. 111/21, s. 1.

Body of Document

(2) Every document in a proceeding shall contain,

(a) the title of the document;

(b) its date;

(c) where the document is filed by a party and not issued by a registrar or is an originating process, the name, address and telephone number of the lawyer filing the document or, where a party acts in person, his or her name, address for service and telephone number; and

(d) where the document is issued by a registrar, the address of the court office in which the proceeding was commenced or, in the case of an application to the Divisional Court, the address of the court office in the place where the application is to be heard. R.R.O. 1990, Reg. 194, r. 4.02 (2); O. Reg. 575/07, s. 1; O. Reg. 248/21, s. 13.

Backsheet

(3) Every document in a proceeding shall have a backsheet in accordance with Form 4C that sets out,

(a) the short title of the proceeding;

(b) the name of the court and the court file number;

(c) in the case of an affidavit, the deponent's name and the date when he or she swore it;

(d) the location of the court office in which the proceeding was commenced;

(e) the title of the document;

(f) if a lawyer is serving or filing the document, the lawyer's name, address, telephone number, email address and law society membership number;

(g) if a party is acting in person, his or her name, address for service, telephone number and email address (if any); and

(h) if the document is to be served, the email address, if known, of the person on whom the document is to be served. R.R.O. 1990, Reg. 194, r. 4.02 (3); O. Reg. 333/96, s. 1 (1); O. Reg. 457/01, s. 1; O. Reg. 575/07, s. 1; O. Reg. 281/16, s. 1; O. Reg. 689/20, s. 4; O. Reg. 248/21, s. 13.

(4) Revoked: O. Reg. 333/96, s. 1 (2).

Bilingual Documents

4.02.1 A pleading or any other document written in French that may be filed under section 126 of the *Courts of Justice Act* may also include a version of all or part of the text written in English. O. Reg. 584/17, s. 1.

Certified Copies of Court Documents

4.03 (1) The registrar shall provide a certified copy of a document that is in the court file to a person who is entitled to see the document under section 137 of the *Courts of Justice Act*, if the person files a requisition (Form 4E) and pays the prescribed fee, if any. O. Reg. 689/20, s. 5.

Certified Copy in Electronic Format

(2) The registrar may provide a certified copy in electronic format of a document that is in the court file. O. Reg. 689/20, s. 5.

Valid Certification

(3) For the purposes of these rules, a copy of a document is validly certified under this rule if,

(a) the copy bears the registrar's signature and the date of certification; and

(b) in the case of a copy that is provided in electronic format, the copy accurately reproduces the information set out in the document, even if the way in which information is displayed in the document and in the copy differs. O. Reg. 689/20, s. 5.

Printed Version of Electronic Certified Copy may be Used

(4) If a certified copy of a document is provided by the registrar in electronic format, a requirement under these rules that a person provide a certified copy of a document to another person in paper format may be satisfied by printing the electronic certified copy by any means that produces the document in paper format and providing the printed version of the certified copy. O. Reg. 689/20, s. 5.

Notice to be Given in Writing or Electronically

4.04 (1) A notice required to be given by these rules shall be given,

(a) in writing; or

(b) electronically, if the use of electronic means is authorized. O. Reg. 427/01, s. 5 (1).

(2), (3) REVOKED: O. Reg. 14/04, s. 3.

Issuing and Filing of Documents

Issuing Documents

4.05 (1) A document may be issued on personal attendance in the court office by the party seeking to issue it or by someone on the party's behalf, unless

these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 4.05 (1); O. Reg. 452/98, s. 3 (1); O. Reg. 43/14, s. 3 (1).

Electronic Issuing

(1.1) Any document to be issued under these rules may be issued electronically,

(a) by the registrar dating, signing and sealing with an electronic version of the seal of the court a copy of the document in electronic format; or

(b) by use of the software authorized by the Ministry of the Attorney General for the purpose. O. Reg. 689/20, s. 6 (1).

Deemed Issuing

(1.2) A document issued under subrule (1.1) shall be deemed to have been issued by the Superior Court of Justice. O. Reg. 14/04, s. 4 (1).

(1.2.1), (1.2.2) REVOKED: O. Reg. 14/04, s. 4 (1).

Notice — Document Issued

(1.3) After a document is issued electronically, notice that it was issued shall be sent to the party that had it issued. O. Reg. 427/01, s. 6 (3).

Place of Filing

(2) The following requirements govern the place of filing of documents in proceedings, unless the documents are filed in the course of a hearing or these rules provide otherwise:

1. All documents required to be filed in a proceeding shall be filed in the court office in which the proceeding was commenced, subject to paragraphs 2, 3 and 4.

2. If the proceeding has been transferred to another county in accordance with rule 13.1.02, the documents shall be filed in the court office in the new county, subject to paragraph 3.

3. An affidavit, transcript, record or factum to be used at a hearing shall be filed in the court office in the county where the hearing is to be held.

4. Documents relating to a motion to transfer a proceeding to another county under rule 13.1.02 shall be filed in the court office of the county to which the transfer is sought, if subrule 13.1.02 (3.1) applies. O. Reg. 14/04, s. 4 (2); O. Reg. 438/08, s. 7.

(3) REVOKED: O. Reg. 14/04, s. 4 (2).

Filing by Leaving in Court Office or by Mail

(4) Any document, other than one that is to be issued, may be filed by leaving it in the proper court office or mailing it to the proper court office, accompanied by the prescribed fee. R.R.O. 1990, Reg. 194, r. 4.05 (4).

Electronic Filing

(4.1) If these rules permit or require a document to be filed electronically, the software authorized by the Ministry of the Attorney General for the purpose shall be used for the filing. O. Reg. 43/14, s. 3 (3).

(4.1.1) Revoked: O. Reg. 487/16, s. 2 (1).

(4.1.2) Revoked: O. Reg. 14/04, s. 4 (3).

Confirmation of Filing

(4.2) The electronic filing of a document in accordance with this rule shall be confirmed by way of a notice of accepted filing given through the authorized software. O. Reg. 584/17, s. 2 (1).

Date of Filing where Filed by Mail

(5) Where a document is filed by mail, the date of the filing stamp of the court office on the document shall be deemed to be the date of its filing, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 4.05 (5).

Where Document Filed by Mail not Received

(6) Where a court office has no record of the receipt of a document alleged to have been filed by mail, the document shall be deemed not to have been filed, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 4.05 (6).

Date of Electronic Issuance, Filing

(7) A document that is issued or filed electronically is considered to have been issued or filed, as the case may be, on the date indicated on the document by the registrar or the authorized software. O. Reg. 689/20, s. 6 (2).

Issuance, Filing Outside of Business Hours

(8) If a document is issued or filed electronically outside of regular business hours, the registrar or the authorized software shall indicate that the document was issued or filed, as the case may be, on the next day that is not a holiday. O. Reg. 689/20, s. 6 (2).

Documents Issued, Filed using Teranet Software

(9) Subrule (8) does not apply with respect to the issuance or filing of a document using the Teranet software, as defined in rule 60.07. O. Reg. 221/25, s. 1.

Requirement to Keep Original

(10) A person who electronically files a document that was originally signed, certified or commissioned in paper format shall,

(a) retain the original document in paper format until the thirtieth day after the expiry of the period for an appeal in the proceeding; and

(b) make the original document in paper format available for inspection and copying no later than five days after a request of the court or of any party to the proceeding to do so. O. Reg. 584/17, s. 2 (2); O. Reg. 248/21, s. 12.

Conversion from Paper Format

(11) In the case of a proceeding that is commenced or continued in the City of Toronto, the registrar may prepare an electronic copy of any document that was filed or issued in the proceeding in paper format and include it in the court file. O. Reg. 226/25, s. 1.

(12) If the registrar prepares an electronic copy of a paper document, the registrar may return the paper document to the person who filed it or to whom it was issued, in which case subrule (10) applies with necessary modifications to the returned document. O. Reg. 226/25, s. 1.

(13) Subrules (11) and (12) apply with necessary modifications with respect to documents filed with the sheriff in the City of Toronto, in which case a reference in those subrules to the registrar shall be read as a reference to the sheriff. O. Reg. 226/25, s. 1.

(14) An electronic copy of a filed or issued document that is prepared under subrule (11) shall be considered to be the document as it was filed or issued in the proceeding. O. Reg. 226/25, s. 1.

Civil Claims Online Portal

4.05.1 (1) In this rule,

"Civil Claims Online Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Civil Claims Online Portal" in English and "Portail en ligne pour les actions civiles" in French. O. Reg. 584/17, s. 3 (1).

Non-Application, City of Toronto

(1.1) This rule does not apply with respect to proceedings commenced or continued in the City of Toronto. O. Reg. 226/25, s. 2.

Documents That May be Filed Through Portal

(2) Subject to subrule (3), the following documents may be filed electronically through the Civil Claims Online Portal:

1. A statement of claim (Form 14A, 14B or 14D).

2. A notice of action (Form 14C).

2.1 A statement of defence (Form 18A), including one that includes a counterclaim against parties to the main action only (Form 27A) or a crossclaim (Form 28A).

2.2 A notice of intent to defend (Form 18B).

2.3 A notice of discontinuance (Form 23A), and a consent to discontinuance filed for the purposes of clause 23.01 (1) (c).

2.4 A defence to counterclaim (Form 27C).

2.5 A defence to crossclaim (Form 28B).

2.6 Form 29A (third party claim), including with respect to a fourth or subsequent party claim or claim by a defendant to a counterclaim or crossclaim.

2.7 Form 29B (third party defence), including with respect to a defence by a fourth or subsequent party.

2.8 A jury notice (Form 47A).

3. An affidavit for the purposes of subrule 7.02 (2) or 7.03 (3).

4. A requisition or written statement under clause 5 (1) (a) of Ontario Regulation 53/01 (Bilingual Proceedings) made under the *Courts of Justice Act*.

5. REVOKED: O. Reg. 12/24, s. 1 (1).

5.1 A certificate of action under section 36 of the *Construction Act* (Form 14 under that Act).

6. Any consent or court order required to be filed together with a document referred to in this subrule.

7. Proof of service under rule 16.09 or in Form 17A, 17B or 17C of a document that is filed electronically under this subrule. O. Reg. 584/17, s. 3 (1-3); O. Reg. 456/19, s. 1 (1, 2); O. Reg. 12/24, s. 1 (1); O. Reg. 173/25, s. 1.

Agreement

(3) Subrule (2) does not apply unless the party filing the document through the Civil Claims Online Portal agrees to its terms of use, including providing an email address at which he or she agrees to accept documents from the court electronically. O. Reg. 584/17, s. 3 (1).

(4) REVOKED: O. Reg. 12/24, s. 1 (2).

Inconsistencies

(5) In the event of an inconsistency between information provided in a document filed electronically by a person through the Civil Claims Online Portal and information provided by the person through the Civil Claims Online Portal that is not in the electronically filed document,

(a) the information in the electronically filed document prevails, except with respect to the county specified by the person for the purposes of Rule 13.1 where the information provided through the Civil Claims Online Portal prevails; and

(b) the registrar may request from the person written clarification, in the manner specified by the registrar, respecting the inconsistency, and the person shall promptly provide it. O. Reg. 584/17, s. 3 (1).

(6) Revoked: O. Reg. 441/20, s. 1.

Documents That May be Issued Through Portal

(7) The following documents may be issued electronically through the Civil Claims Online Portal:

1. A statement of claim in Form 14A or 14B.
2. A notice of action (Form 14C).
3. A third, fourth or subsequent party claim (Form 29A).
4. A certificate of action under section 36 of the *Construction Act* (Form 14 under that Act). O. Reg. 584/17, s. 3 (1); O. Reg. 456/19, s. 1 (3).

Civil Submissions Online Portal

4.05.2 (1) In this rule,

"Civil Submissions Online Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Civil Submissions Online Portal" in English and "Portail en ligne pour soumettre des documents dans les actions civiles" in French. O. Reg. 441/20, s. 2.

Non-Application, City of Toronto

(1.1) This rule does not apply with respect to proceedings commenced or continued in the City of Toronto. O. Reg. 226/25, s. 3.

Documents That May be Filed

(2) Any document that may or must be filed under these rules may be filed electronically by submitting the document through the Civil Submissions

Online Portal if the Civil Submissions Online Portal provides for the electronic filing of the document, other than the following documents:

1. A document listed under subrule 4.05.1 (2).

2. A document that may or must be filed with the sheriff by an authorized Teranet user using the Teranet software, as those terms are defined in rule 60.07. O. Reg. 221/25, s. 2 (1).

Registrar's Acceptance Required

(3) A document submitted for filing through the Civil Submissions Online Portal is filed only if it is accepted by the registrar. O. Reg. 248/21, s. 1 (1).

Confirmation

(4) If the registrar accepts the document for filing, the registrar shall send confirmation of the filing by email. O. Reg. 441/20, s. 2.

Filing Date

(5) A document filed under subrule (3) is considered to have been filed on the day indicated in the confirmation sent by the registrar. O. Reg. 441/20, s. 2.

Documents That May be Issued

(6) Any document that may or must be issued under these rules, other than a document listed under subrule 4.05.1 (7), may be issued electronically by submitting the document through the Civil Submissions Online Portal, if the Civil Submissions Online Portal provides for the electronic issuance of the document. O. Reg. 248/21, s. 1 (1); O. Reg. 221/25, s. 2 (2).

Registrar's Acceptance Required

(7) A document submitted for issuance through the Civil Submissions Online Portal will be issued only if it is accepted by the registrar. O. Reg. 248/21, s. 1 (1).

Confirmation

(8) If the registrar accepts the document for issuance, the registrar shall issue the document and send confirmation of the issuance by email, together with the issued document. O. Reg. 441/20, s. 2.

Issuance Date

(9) A document issued by the registrar under subrule (8) is considered to have been issued on the day indicated in the confirmation sent by the registrar. O. Reg. 441/20, s. 2.

Filing, Issuance of Other Documents

(10) Despite subrules (2) and (6), a document listed under subrule 4.05.1 (2) or (7) may be filed or issued, as the case may be, electronically by using the Civil Submissions Online Portal in accordance with this rule, if a prescribed fee is not required to be paid for the filing or issuance of the document. O. Reg. 441/20, s. 2.

If Clarification Needed

(11) The registrar may request from a person written clarification with respect to a document that is submitted for filing or issuance, and the person shall provide the clarification in the manner specified by the registrar. O. Reg. 441/20, s. 2; O. Reg. 248/21, s. 1 (2).

No Filing or Issuance Without Acceptance

(12) For greater certainty, a document that is not accepted by the registrar for filing or issuance following submission through the Civil Submissions Online Portal is not considered to have been filed or issued, as the case may be. O. Reg. 248/21, s. 1 (3); O. Reg. 221/25, s. 2 (3).

Requirement to Agree to Terms of Use

(13) Despite subrules (2) and (6), a document may not be filed or issued electronically by using the Civil Submissions Online Portal unless the person requesting the filing or issuance agrees to its terms of use, including providing an email address at which the person agrees to accept documents from the court electronically. O. Reg. 441/20, s. 2.

Non-Application of Certain Subrules

(14) Subrules 4.05 (4.2), (7) and (8) do not apply with respect to a document filed or issued electronically by using the Civil Submissions Online Portal. O. Reg. 441/20, s. 2.

Ontario Courts Public Portal

4.05.2.1 (1) In this rule,

"Ontario Courts Public Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Ontario Courts Public Portal" in English and "Portail public des tribunaux de l'Ontario" in French. O. Reg. 226/25, s. 4.

Application, City of Toronto

(2) This rule applies with respect to,

(a) the filing and issuance of documents in proceedings commenced or continued in the City of Toronto; and

(b) the filing of documents with the sheriff in the City of Toronto. O. Reg. 226/25, s. 4.

Permitted Use

(3) Any document that, under these rules, may or must be filed with the registrar or sheriff or issued may be submitted for filing or issuance electronically through the Ontario Courts Public Portal if,

(a) the Portal provides for the electronic filing or issuance of the document; and

(b) the person requesting the filing or issuance of the document has agreed to the Portal's terms of use and submitted, through the Portal, an email address at which the person agrees to accept documents electronically. O. Reg. 226/25, s. 4.

Subject to Confirmation

(4) A document submitted for filing or issuance through the Ontario Courts Public Portal is considered to have been filed or issued only if the registrar or sheriff sends confirmation of the filing or issuance by email. O. Reg. 226/25, s. 4.

Filing or Issuance Date

(5) A document submitted for filing or issuance through the Ontario Courts Public Portal is considered to have been filed or issued on the filing or issuance date indicated in the confirmation. O. Reg. 226/25, s. 4.

Inconsistencies

(6) In the event of an inconsistency between information provided in a document submitted and accepted for filing or issuance electronically through the Ontario Courts Public Portal and information provided through the Portal by the person submitting the document,

(a) the information in the document as accepted for filing or issuance prevails, except with respect to the county specified by the person for the purposes of Rule 13.1, if applicable, where the information provided through the Portal prevails; and

(b) the registrar or sheriff may request from the person written clarification, in the manner specified by the registrar or sheriff, respecting the inconsistency, and the person shall promptly provide it. O. Reg. 226/25, s. 4.

Non-Application of Certain Subrules

(7) Subrules 4.05 (4.2), (7) and (8) do not apply with respect to a document filed or issued electronically by using the Ontario Courts Public Portal. O. Reg. 226/25, s. 4.

Case Center

4.05.3 (1) In this rule,

"Case Center" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Case Center". O. Reg. 689/20, s. 7; O. Reg. 301/24, s. 1.

Application

(2) Unless the court directs otherwise, this rule applies to all or part of any hearing, pre-trial conference or case conference held in the Superior Court of Justice or the Divisional Court. O. Reg. 300/24, s. 2 (1).

Requirement to Use Case Center

(3) Every party participating in the hearing or conference shall provide the following documents to the court by uploading them to Case Center in accordance with this rule:

1. A copy of every document filed with the court by the party in respect of the hearing or conference.

2. Subject to subrule (5), a copy of any other document in the court file on which the party intends to rely at the hearing or conference that has not already been uploaded to Case Center by another party.

3. Unless the court directs otherwise and subject to subrule (3.1), a compendium that meets the requirements of subrule (7). O. Reg. 300/24, s. 2 (1).

Modification, City of Toronto

(3.0.1) In the case of a proceeding that is commenced or continued in the City of Toronto, the documents referred to in paragraphs 1 and 2 of subrule (3) in respect of each party shall be uploaded to Case Center by the registrar and not by the party. O. Reg. 226/25, s. 5 (1).

Compendium

(3.1) A compendium is not required to be provided with respect to a conference or the hearing of an unopposed motion or motion on consent, unless the court directs otherwise. O. Reg. 300/24, s. 2 (1).

Deadline

(4) Subject to subrules (4.1) and (5), the documents listed in subrule (3) must be uploaded to Case Center by the following deadline:

1. In the case of the hearing of a motion or application where the party is required to give the registrar a confirmation of motion (Form 37B) or confirmation of application (Form 38B), the deadline is 2 p.m. three days before the hearing date, unless the court orders otherwise.

2. In any other case, the deadline is five days before the date of the hearing or conference, unless the court orders otherwise. O. Reg. 689/20, s. 7; O. Reg. 224/22, s. 1; O. Reg. 300/24, s. 2 (6); O. Reg. 301/24, s. 1; O. Reg. 226/25, s. 5 (2).

(4.1) Subrule (4) does not apply to the registrar. O. Reg. 226/25, s. 5 (3).

Transcripts

(5) A transcript for use at a trial shall not be uploaded to Case Center until a party refers to the transcript at trial and files a copy of it in accordance with subrule 34.18 (4), and, for greater certainty, that subrule also applies with respect to the copy uploaded to Case Center. O. Reg. 689/20, s. 7; O. Reg. 300/24, s. 2 (6); O. Reg. 301/24, s. 1.

Document Requirements

(6) A document that is uploaded to Case Center must meet the following requirements:

1. The document must be uploaded in the following formats:

   i. A copy of a draft order or factum must be uploaded in both Portable Document Format (PDF) and Word format.

   ii. Any other document must be uploaded only in Portable Document Format (PDF) or, if appropriate, in Excel format, except that an exhibit may be uploaded in any format accepted by Case Center.

2. The document name, as uploaded to Case Center, must indicate,

   i. the document type,

   ii. the type of party uploading the document,

   iii. the name of the party uploading the document, and

   iv. the date on which the document was created or signed, in the format DD-MMM-YYYY (e.g. 12-JAN-2021).

3. A copy of a factum that is uploaded to Case Center must meet the requirements that are specified in subrule 4.06.1 (3) for an electronically filed factum, even if the factum was originally filed in paper format.

4. A copy of a book of authorities that is uploaded to Case Center must meet the requirements that are specified in subrule 4.06.1 (5) for an electronically filed book of authorities, even if the book of authorities was originally filed in paper format. O. Reg. 689/20, s. 7; O. Reg. 711/20, s. 3; O. Reg. 300/24, s. 2 (2-4, 6); O. Reg. 301/24, s. 1.

Compendium Requirements

(7) For the purposes of paragraph 3 of subrule (3), the compendium must meet the following requirements:

1. The compendium must include a table of contents listing only those authorities, transcripts, previous orders and other documents on which the party intends to rely during the hearing or conference, as applicable, hyperlinked in accordance with paragraph 3.

2. The compendium must include the relevant excerpts of every document listed in the table of contents, with a separate section for each document.

3. Each document listed in the table of contents must be hyperlinked,

i. to the section of the compendium containing the excerpt or excerpts of the document, and

ii. if the document is published on a website referred to in subrule (7.1), to the published document or, if possible, the relevant provision or portion of the published document. O. Reg. 300/24, s. 2 (5).

(7.1) Subparagraph 3 ii of subrule (7) applies with respect to the Canadian Legal Information Institute website (CanLII), e-Laws or another Government of Ontario website, the federal Justice Laws website and any other similar website that is accessible without charge or subscription. O. Reg. 300/24, s. 2 (5).

Document Must be Identical to Document in Court File

(8) A party who uploads a document to Case Center or the registrar, as the case may be, shall ensure that the document is identical to that document as contained in the court file, subject to any modifications required by this rule or the court. O. Reg. 689/20, s. 7; O. Reg. 300/24, s. 2 (6); O. Reg. 301/24, s. 1; O. Reg. 226/25, s. 5 (4).

Requirement to Keep Original

(9) If a party uploads a document to Case Center that is not in the court file, the party shall,

(a) retain the original document until the 30th day after the expiry of the period for an appeal in the proceeding; and

(b) on the request of the court, the registrar or another party, make the original document available to the court, registrar or party for inspection no later than five days after the request is made. O. Reg. 689/20, s. 7; O. Reg. 300/24, s. 2 (6); O. Reg. 301/24, s. 1; O. Reg. 226/25, s. 5 (5).

Document in Court File Prevails

(10) In the event of an inconsistency between information provided in a document in the court file and information provided in a document uploaded to Case Center, the information in the document in the court file prevails. O. Reg. 689/20, s. 7; O. Reg. 300/24, s. 2 (6); O. Reg. 301/24, s. 1.

Does Not Amount to Filing or Service

(11) For greater certainty, uploading documents to Case Center does not amount to the filing or service of those documents under these rules. O. Reg. 689/20, s. 7; O. Reg. 300/24, s. 2 (6); O. Reg. 301/24, s. 1.

Affidavits

Format

4.06 (1) An affidavit used in a proceeding shall,

(a) be in Form 4D;

(b) be expressed in the first person;

(c) state the full name of the deponent and, if the deponent is a party or a lawyer, officer, director, member or employee of a party, shall state that fact;

(d) be divided into paragraphs, numbered consecutively, with each paragraph being confined as far as possible to a particular statement of fact; and

(e) be signed by the deponent and sworn or affirmed in accordance with the *Commissioners for Taking Affidavits Act*. R.R.O. 1990, Reg. 194, r. 4.06 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 8.

Contents

(2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 4.06 (2).

Exhibits

(3) An exhibit that is referred to in an affidavit shall be marked as such by the person taking the affidavit and where the exhibit,

(a) is referred to as being attached to the affidavit, it shall be attached to and filed with the affidavit;

(b) is referred to as being produced and shown to the deponent, it shall not be attached to the affidavit or filed with it, but shall be left with the registrar for the use of the court, and on the disposition of the matter in respect of which the affidavit was filed, the exhibit shall be returned to the lawyer or party who filed the affidavit, unless the court orders otherwise; and

(c) is a document, a copy shall be served with the affidavit, unless it is impractical to do so. R.R.O. 1990, Reg. 194, r. 4.06 (3); O. Reg. 575/07, s. 1.

By Two or More Deponents

(4) Where an affidavit is made by two or more deponents, there shall be a separate jurat for each deponent, unless all the deponents make the affidavit before the same person at the same time, in which case one jurat containing the words "Sworn (or affirmed) by the above-named deponents" may be used. R.R.O. 1990, Reg. 194, r. 4.06 (4).

For a Corporation

(5) Where these rules require an affidavit to be made by a party and the party is a corporation, the affidavit may be made for the corporation by an officer, director or employee of the corporation. R.R.O. 1990, Reg. 194, r. 4.06 (5).

For a Partnership

(6) Where these rules require an affidavit to be made by a party and the party is a partnership, the affidavit may be made for the partnership by a member or employee of the partnership. R.R.O. 1990, Reg. 194, r. 4.06 (6).

By an Illiterate or Blind Person

(7) Where it appears to a person taking an affidavit that the deponent is illiterate or blind, the person shall certify in the jurat that the affidavit was read in his or her presence to the deponent, that the deponent appeared to understand it, and that the deponent signed the affidavit or placed his or her mark on it in the presence of the person taking the affidavit. R.R.O. 1990, Reg. 194, r. 4.06 (7).

By a Person who does not Understand the Language

(8) Where it appears to a person taking an affidavit that the deponent does not understand the language used in the affidavit, the person shall certify in the jurat that the affidavit was interpreted to the deponent in the person's presence by a named interpreter who took an oath or made an affirmation before him or her to interpret the affidavit correctly. R.R.O. 1990, Reg. 194, r. 4.06 (8).

Alterations

(9) Any interlineation, erasure or other alteration in an affidavit shall be initialled by the person taking the affidavit and, unless so initialled, the affidavit shall not be used without leave of the presiding judge or officer. R.R.O. 1990, Reg. 194, r. 4.06 (9).

Factums

4.06.1 (1) A factum that is required to be filed by these rules shall consist of a concise argument stating the facts and law relied on by the party filing the factum. O. Reg. 300/24, s. 3.

Citations

(2) Each citation to an authority in a factum must include a reference to the relevant paragraph, provision or page number of the authority. O. Reg. 300/24, s. 3.

(2.1) A factum shall include a statement signed by the party's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, certifying that the person signing the statement is satisfied as to the authenticity of every authority cited in the factum. O. Reg. 384/24, s. 1.

(2.2) An authority that is published on a government website or otherwise by a government printer, on the Canadian Legal Information Institute website (CanLII), on a court's website or by a commercial publisher of court decisions is presumed to be authentic for the purposes of subrule (2.1), absent evidence to the contrary. O. Reg. 384/24, s. 1.

If Filed Electronically

(3) A factum that is filed electronically must meet the following requirements:

1. The factum must include bookmarks, as appropriate, for each section.

2. Each citation to an authority that is published on a website referred to in subrule 4.05.3 (7.1) must be hyperlinked to the published authority or, if possible, to the relevant provision or portion of the published authority. O. Reg. 300/24, s. 3.

When Book of Authorities is Also Required

(4) Except in a proceeding in the Court of Appeal, if a factum is filed electronically and contains one or more cited authorities that cannot be hyperlinked in accordance with subrule (3), or is filed in paper format, a book of authorities that meets the requirements of subrule (5) shall be served and filed together with the factum. O. Reg. 300/24, s. 3.

Contents

(5) Unless the court orders otherwise, a book of authorities shall contain the following information and documents:

1. A table of contents listing each authority cited in the factum.
2. If the book of authorities is being filed in electronic format,

   i. for each cited authority that is published on a website referred to in subrule 4.05.3 (7.1), a hyperlink from the table of contents to that document, and

   ii. for each cited authority that is not published on a website referred to in subrule 4.05.3 (7.1), a copy of that authority with a hyperlink to it from the table of contents.

3. If the book of authorities is being filed in paper format, a copy of each cited authority. O. Reg. 300/24, s. 3.

Other Requirements

(6) Any other requirements in these rules respecting factums or books of authorities apply in addition to the requirements of this rule, unless the rules provide otherwise. O. Reg. 300/24, s. 3.

Binding of Documents

Records

4.07 (1) Records for motions, applications, trials and appeals shall have a light blue backsheet. O. Reg. 219/91, s. 2.

(1.1) Front covers of records for motions shall be,

(a) green, in the case of a responding party's motion record;

(b) orange, in the case of a record for a motion under clause 134 (4) (b) of the *Courts of Justice Act* (motion to receive further evidence); and

(c) white, in any other case. O. Reg. 82/17, s. 1.

Transcripts

(2) Transcripts of evidence for use on a motion or application or at trial shall have a light grey backsheet. O. Reg. 219/91, s. 2.

Appeal Book and Compendium

(3) An appeal book and compendium shall be bound front and back in buff covers. O. Reg. 19/03, s. 1 (1).

Transcripts on Appeal

(4) Transcripts of evidence for use in an appeal shall be bound front and back in red covers, except where the transcript forms part of the appeal book and compendium or record and, where there is more than one volume of transcripts, the volumes shall be clearly numbered. O. Reg. 219/91, s. 2; O. Reg. 19/03, s. 1 (2).

Factums and Books of Authorities

(5) Factums and books of authorities shall be bound front and back,

(a) in white covers, if filed by an applicant, moving party or appellant; or

(b) in green covers, if filed by a respondent or responding party. O. Reg. 300/24, s. 4 (1).

(5.1) Revoked: O. Reg. 19/03, s. 1 (3).

Cover Stock

(6) Backsheets and covers shall be of 176g/m^2 cover stock. O. Reg. 219/91, s. 2.

Electronic Documents

(7) This rule does not apply to a document that is filed electronically in accordance with these rules or uploaded to Case Center under rule 4.05.3; however, if the same document is filed or provided to the court in paper format, this rule applies to the paper version of the document. O. Reg. 689/20, s. 9; O. Reg. 300/24, s. 4 (2); O. Reg. 301/24, s. 1.

Requisition

4.08 Where a party is entitled to require the registrar to carry out a duty under these rules, the party may do so by filing a requisition (Form 4E) and paying the prescribed fee, if any. R.R.O. 1990, Reg. 194, r. 4.08.

Transcripts

Paper Size

4.09 (1) Evidence shall be transcribed on paper 216 millimetres by 279 millimetres in size with a margin 25 millimetres wide on the left side delimited by a vertical line. R.R.O. 1990, Reg. 194, r. 4.09 (1).

Heading

(2) The name of the court or, in the case of an examiner, the examiner's name, title and location shall be stated on a single line no more than 15 millimetres from the top of the first page. R.R.O. 1990, Reg. 194, r. 4.09 (2).

Standards

(3) The text shall be typed on thirty-two lines numbered in the margin at every fifth line. R.R.O. 1990, Reg. 194, r. 4.09 (3); O. Reg. 689/20, s. 10 (1).

(4) Headings, such as swearing of a witness, direct examination and cross-examination, shall be capitalized and separated from the preceding text by the space of a numbered line, and the number of lines of text on the page may be reduced by one for each heading that appears on the page. R.R.O. 1990, Reg. 194, r. 4.09 (4).

(5) Every question shall commence on a new line and shall begin with the designation "Q.", followed, within 10 millimetres, by the question. R.R.O. 1990, Reg. 194, r. 4.09 (5).

(6) Every answer shall commence on a new line and shall begin with the designation "A.", followed, within 10 millimetres, by the answer. R.R.O. 1990, Reg. 194, r. 4.09 (6).

(7) The first line of a question or answer shall be indented 35 millimetres from the margin and shall be 130 millimetres in length. R.R.O. 1990, Reg. 194, r. 4.09 (7).

(8) In a transcript of evidence taken in court, every line of a question or answer, other than the first line, shall begin at the margin and shall be 165 millimetres in length. R.R.O. 1990, Reg. 194, r. 4.09 (8).

(9) In a transcript of evidence taken out of court, every line of a question or answer, other than the first line, shall begin 15 millimetres from the margin and shall be 150 millimetres in length, and questions shall be numbered consecutively by means of a number placed in the 15 millimetres to the right of the margin. R.R.O. 1990, Reg. 194, r. 4.09 (9).

(10) Lines of text other than questions and answers shall be indented 35 millimetres from the margin and shall be 130 millimetres in length. R.R.O. 1990, Reg. 194, r. 4.09 (10).

(11) Every transcript of evidence taken in court or out of court shall have,

(a) a cover page setting out,

(i) the court,

(ii) the title of the proceeding,

(iii) the nature of the hearing or examination,

(iv) the place and date of the hearing or examination,

(v) the name of the presiding judge or officer, and

(vi) the names of the lawyers representing the parties; and

(b) a table of contents setting out,

(i) the name of each witness with the page number at which the examination, cross-examination and re-examination of the witness commence,

(ii) the page number at which the charge to the jury, the objections to the charge and the re-charge commence,

(iii) the page number at which the reasons for judgment commence,

(iv) a list of the exhibits with the page number at which they were made exhibits, and

(v) at the foot of the page, the date the transcript was ordered, the date it was completed and the date the parties were notified of its completion. R.R.O. 1990, Reg. 194, r. 4.09 (11); O. Reg. 575/07, s. 8.

Transcripts to be Provided in Electronic Format

(12) Unless the court orders otherwise, a transcript that is served, filed, sent or otherwise provided under these rules shall be served, filed, sent or provided in electronic format, except in proceedings in the Court of Appeal. O. Reg. 689/20, s. 10 (2).

Same, Transition

(13) Subrule (12) applies to proceedings commenced on or after the day on which subsection 10 (2) of Ontario Regulation 689/20 came into force. O. Reg. 689/20, s. 10 (2).

Transmission of Documents

4.10 (1) Where documents filed with the court or exhibits in the custody of an officer are required for use at another location, the registrar shall send them to the registrar at the other location on a party's requisition, on payment of the prescribed fee. R.R.O. 1990, Reg. 194, r. 4.10 (1).

(2) Documents or exhibits that have been filed at or sent to a location other than where the proceeding was commenced for a hearing at that location shall be sent by the registrar, after the completion of the hearing, to the registrar at the court office where the proceeding was commenced. R.R.O. 1990, Reg. 194, r. 4.10 (2).

Notice of Constitutional Question

4.11 The notice of constitutional question referred to in section 109 of the *Courts of Justice Act* shall be in Form 4F. R.R.O. 1990, Reg. 194, r. 4.11.

Emailing of Documents, Communications by Registrar

Documents

4.12 (1) Any document that the court or registrar may or must send, give or otherwise provide to a person under these rules may be sent to the person in electronic format by email to,

(a) the email address most recently indicated for the person in the applicable court file, if any; or

(b) in the case of a lawyer whose email address is not indicated in the court file, the email address for the lawyer as published on the Law Society of Ontario's website. O. Reg. 689/20, s. 11.

Communications

(2) Any communication that the court or registrar may or must send to a person in connection with a proceeding under these rules may be sent to the person in electronic format by email to,

(a) the email address most recently indicated for the person in the applicable court file, if any; or

(b) in the case of a lawyer whose email address is not indicated in the court file, the email address for the lawyer as published on the Law Society of Ontario's website. O. Reg. 689/20, s. 11.

Application

(3) This rule applies despite anything to the contrary in these rules. O. Reg. 689/20, s. 11.

RULE 4.1 DUTY OF EXPERT

Duty of Expert

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue. O. Reg. 438/08, s. 8.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged. O. Reg. 438/08, s. 8.

PARTIES AND JOINDER

RULE 5 JOINDER OF CLAIMS AND PARTIES

Joinder of Claims

5.01 (1) A plaintiff or applicant may in the same proceeding join any claims the plaintiff or applicant has against an opposite party. R.R.O. 1990, Reg. 194, r. 5.01 (1).

(2) A plaintiff or applicant may sue in different capacities and a defendant or respondent may be sued in different capacities in the same proceeding. R.R.O. 1990, Reg. 194, r. 5.01 (2).

(3) Where there is more than one defendant or respondent, it is not necessary for each to have an interest in all the relief claimed or in each claim included in the proceeding. R.R.O. 1990, Reg. 194, r. 5.01 (3).

Joinder of Parties

Multiple Plaintiffs or Applicants

5.02 (1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,

(a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding; or

(c) it appears that their joining in the same proceeding may promote the convenient administration of justice. R.R.O. 1990, Reg. 194, r. 5.02 (1); O. Reg. 575/07, s. 9.

Multiple Defendants or Respondents

(2) Two or more persons may be joined as defendants or respondents where,

(a) there are asserted against them, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;

(b) a common question of law or fact may arise in the proceeding;

(c) there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief;

(d) damage or loss has been caused to the same plaintiff or applicant by more than one person, whether or not there is any factual connection between the several claims apart from the involvement of the plaintiff or applicant, and there is doubt as to the person or persons from whom the plaintiff or applicant is entitled to relief or the respective amounts for which each may be liable; or

(e) it appears that their being joined in the same proceeding may promote the convenient administration of justice. R.R.O. 1990, Reg. 194, r. 5.02 (2).

Joinder of Necessary Parties

General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding. R.R.O. 1990, Reg. 194, r. 5.03 (1).

Claim by Person Jointly Entitled

(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled. R.R.O. 1990, Reg. 194, r. 5.03 (2).

Claim by Assignee of Chose in Action

(3) In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,

(a) the assignment is absolute and not by way of charge only; and

(b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee. R.R.O. 1990, Reg. 194, r. 5.03 (3).

Power of Court to Add Parties

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party. R.R.O. 1990, Reg. 194, r. 5.03 (4).

Party Added as Defendant or Respondent

(5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent. R.R.O. 1990, Reg. 194, r. 5.03 (5).

Relief Against Joinder of Party

(6) The court may by order relieve against the requirement of joinder under this rule. R.R.O. 1990, Reg. 194, r. 5.03 (6).

Misjoinder, Non-Joinder and Parties Incorrectly Named

Proceeding not to be Defeated

5.04 (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties. R.R.O. 1990, Reg. 194, r. 5.04 (1).

Adding, Deleting or Substituting Parties

(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 5.04 (2).

Adding Plaintiff or Applicant

(3) No person shall be added as a plaintiff or applicant unless the person's consent is filed. R.R.O. 1990, Reg. 194, r. 5.04 (3).

Relief against Joinder

5.05 Where it appears that the joinder of multiple claims or parties in the same proceeding may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may,

(a) order separate hearings;

(b) require one or more of the claims to be asserted, if at all, in another proceeding;

(c) order that a party be compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest;

(d) stay the proceeding against a defendant or respondent, pending the hearing of the proceeding against another defendant or respondent, on condition that the party against whom the proceeding is stayed is bound by the findings made at the hearing against the other defendant or respondent; or

(e) make such other order as is just. R.R.O. 1990, Reg. 194, r. 5.05.

RULE 6 CONSOLIDATION OR HEARING TOGETHER

Where Order May Be Made

6.01 (1) Where two or more proceedings are pending in the court and it appears to the court that,

(a) they have a question of law or fact in common;

(b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or

(c) for any other reason an order ought to be made under this rule,

the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or

(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or

(ii) asserted by way of counterclaim in any other of them. R.R.O. 1990, Reg. 194, r. 6.01 (1).

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list. R.R.O. 1990, Reg. 194, r. 6.01 (2).

Discretion of Presiding Judge

6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise. R.R.O. 1990, Reg. 194, r. 6.02.

RULE 6.1 SEPARATE HEARINGS

Separate Hearings

6.1.01 (1) The court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages,

(a) on a party's motion, with or without the consent of the other parties; or

(b) at a conference under Rule 50, with the consent of the parties. O. Reg. 175/24, s. 1.

(2) In determining whether to order a separate hearing, the court shall consider,

(a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;

(b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;

(c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;

(d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and

(e) any other relevant matter. O. Reg. 175/24, s. 1.

RULE 7 PARTIES UNDER DISABILITY

Representation by Litigation Guardian

Requirement if Party under Disability

7.01 (1) Unless the court orders or a statute provides otherwise, a proceeding shall be commenced, continued or defended on behalf of a party under disability by a litigation guardian. O. Reg. 69/95, s. 2.

Substitute Decisions Act Applications

(2) Despite subrule (1), an application under the *Substitute Decisions Act, 1992* to appoint a guardian of property or a guardian of the person may be commenced, continued and defended without the appointment of a litigation guardian for the respondent in respect of whom the application is made, unless the court orders otherwise. O. Reg. 69/95, s. 2; O. Reg. 281/16, s. 2.

Powers and Duties of Litigation Guardian

(3) Where a person is under disability, anything that a person in a proceeding is required or authorized to do may be done by the person's litigation guardian. O. Reg. 173/25, s. 2.

(4) A litigation guardian shall diligently attend to the interests of the person under disability and take all steps necessary for the protection of those interests. O. Reg. 173/25, s. 2.

(5) A litigation guardian other than the Children's Lawyer or the Public Guardian and Trustee shall be represented by a lawyer and shall instruct the

lawyer in the conduct of the proceeding. O. Reg. 173/25, s. 2.

Title of Proceeding

(6) For the purposes of rule 14.06, the title of a proceeding by or against a party under disability on any document in the proceeding shall identify that party in the following manner, with "A.B." referring to the name of the party under disability, "C.D." referring to the name of the litigation guardian, and "his", "her" or "their" to be used as the case may be:

1. If the party under disability is a minor, as "A.B., a minor, by (his, her, their) litigation guardian, C.D.".

2. If the party under disability is not a minor, as "A.B., a party under disability, by (his, her, their) litigation guardian, C.D.". O. Reg. 173/25, s. 2.

(7) On requisition by a party under subrule 7.02 (4) or 7.03 (3) (Form 4E) or by order of the court, the registrar shall revise the title of a proceeding in the court file in accordance with subrule (6). O. Reg. 173/25, s. 2.

Determining Litigation Guardian for Party Under Disability

General

7.01.1 (1) Subject to subrule (2),

(a) a litigation guardian for a plaintiff or applicant under disability shall be,

(i) the person determined in accordance with rule 7.02, if the conditions set out in that rule are met, or

(ii) if the conditions set out in rule 7.02 are not met, the person appointed by the court in accordance with rule 7.03.1; and

(b) a litigation guardian for a defendant or respondent under disability shall be,

(i) the person determined in accordance with rule 7.03, if the conditions set out in that rule are met, or

(ii) if the conditions set out in rule 7.03 are not met, the person appointed by the court in accordance with rule 7.03.1. O. Reg. 173/25, s. 3.

Previously Appointed Committees, Public Guardian and Trustee

(2) A committee named by order or statute before April 3, 1995 is the litigation guardian of the person in respect of whom the committee was

named, and shall be referred to as the litigation guardian for all purposes. O. Reg. 173/25, s. 3.

(3) Subrule (2) also applies to the Public Guardian and Trustee acting under an order made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995. O. Reg. 173/25, s. 3.

(4) In this Rule, a reference to a person who is a litigation guardian includes reference to a committee that is a litigation guardian, with necessary modifications. O. Reg. 173/25, s. 3.

Litigation Guardian for Plaintiff or Applicant, Without Court Order

Authority to Act

7.02 (1) A person is authorized to act as litigation guardian for a plaintiff or applicant under disability without a court order only in accordance with this rule. O. Reg. 173/25, s. 4.

Certain Persons Must Act

(2) Unless the court orders otherwise, the following person shall act as litigation guardian for a plaintiff or applicant referred to in this subrule, and shall for the purpose meet the requirements of subrule (4):

1. If the plaintiff or applicant is mentally incapable and has a guardian with authority to act as litigation guardian in the proceeding, the guardian.

2. If the plaintiff or applicant is mentally incapable and does not have a guardian with authority to act as litigation guardian in the proceeding but has an attorney under a power of attorney with that authority, the attorney.

3. If the plaintiff or applicant is an absentee and a committee of the absentee's estate has been appointed under the *Absentees Act*, the committee.

4. If the plaintiff or applicant is a person in respect of whom an order was made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee. O. Reg. 173/25, s. 4.

Who May Act Otherwise

(3) If no person is authorized under subrule (2) to act as litigation guardian, then any other person who is not under disability may act as litigation guardian for a plaintiff or applicant under disability without a court order, but

only if the person acts as litigation guardian from the commencement of the proceeding and meets the requirements of subrule (4). O. Reg. 173/25, s. 4.

Requirements

(4) To act as litigation guardian for a plaintiff or applicant under disability without a court order, a person shall meet the following requirements:

1. If the person is to act as litigation guardian starting from the commencement of the proceeding, they shall file an affidavit that meets the requirements of subrule (6) when submitting the originating process for issuance.

2. If the person is to act as litigation guardian under subrule (2) starting at a later time, the person shall, as soon as they assume responsibility for continuing the proceeding on behalf of the plaintiff or applicant,

i. file an affidavit that meets the requirements of subrule (6), and

ii. serve on every other party and file a requisition (Form 4E) requiring the registrar to revise the title of the proceeding in the court file under subrule 7.01 (7). O. Reg. 173/25, s. 4.

Exception

(5) Despite subrule (4), the Children's Lawyer and the Public Guardian and Trustee are not required to file an affidavit. O. Reg. 173/25, s. 4.

Affidavit Contents

(6) In the affidavit, the person filing it shall,

(a) consent to act as litigation guardian in the proceeding;

(b) confirm that they have given written authority to a named lawyer to act in the proceeding, as required by subrules 7.01 (5) and 15.01 (1);

(c) provide evidence concerning the nature and extent of the disability;

(d) in the case of a minor, state the minor's birth date;

(e) state whether they and the person under disability are ordinarily resident in Ontario;

(f) set out their relationship, if any, to the person under disability;

(g) state that they have no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledge having been informed of their liability to pay personally any costs awarded against them or the person under disability. O. Reg. 173/25, s. 4.

Failure to Meet Affidavit Requirement

(7) If the registrar becomes aware that a person has commenced or continued a proceeding on behalf of a plaintiff or applicant under disability without filing the affidavit required by subrule (4), the registrar shall promptly send the person a notice (Form 7A) requiring the affidavit to be filed no later than 15 days after receipt of the notice. O. Reg. 173/25, s. 4.

If Court Order

(8) For greater certainty, subrule (7) does not apply with respect to a person appointed as litigation guardian by the court in accordance with rule 7.03.1. O. Reg. 173/25, s. 4.

Notice to Other Parties

(9) When sending a notice to the person under subrule (7), the registrar shall also send a copy of the notice to every other plaintiff or applicant and every defendant or respondent who has filed a document in the proceeding. O. Reg. 173/25, s. 4.

Effect of Non-Compliance

(10) If a person who receives notice under subrule (7) does not file the affidavit within the 15-day period, the following paragraphs apply:

1. If a defendant or respondent has filed a document in the proceeding, they shall move for directions or request a case conference unless another party has already done so, and no party may take any further step in the proceeding until the motion has been heard or the case conference has been held, unless the court orders otherwise.

2. If no defendant or respondent has filed a document in the proceeding, the proceeding is, despite subrule 2.01 (1), deemed to be a nullity, and the registrar shall notify the litigation guardian and every other plaintiff or applicant, if any, of the deemed nullification. O. Reg. 173/25, s. 4.

(11) If a proceeding is deemed to be a nullity under paragraph 2 of subrule (10), any pleading issued or filed in the proceeding is deemed to have been struck out. O. Reg. 173/25, s. 4.

(12) The deemed nullification of a proceeding under paragraph 2 of subrule (10) is not a bar to a subsequent commencement of the proceeding. O. Reg. 173/25, s. 4.

Litigation Guardian for Defendant or Respondent, Without Court Order

Authority to Act

7.03 (1) A person is authorized to act as litigation guardian for a defendant or respondent under disability without a court order only in accordance with this rule. O. Reg. 173/25, s. 4.

Certain Persons Must Act

(2) Unless the court orders otherwise, the following person shall act as litigation guardian for a defendant or respondent referred to in this subrule, and shall for the purpose meet the requirements of subrule (3):

1. If a plaintiff under disability is a defendant in a counterclaim, the plaintiff's litigation guardian.

2. If the defendant or respondent is a mentally incapable person who has a guardian with authority to act as litigation guardian in the proceeding, the guardian.

3. If the defendant or respondent is a mentally incapable person who does not have a guardian with authority to act as litigation guardian in the proceeding but has an attorney under a power of attorney with that authority, the attorney.

4. If the defendant or respondent is a minor and the proceeding is in respect of the minor's interest in an estate or trust, the Children's Lawyer.

5. If the defendant or respondent is an absentee, and a committee of the absentee's estate has been appointed under the *Absentees Act*, the committee.

6. If the defendant or respondent is a person in respect of whom an order has been made under subsection 72 (1) or (2) of the *Mental Health Act* as it read before April 3, 1995, the Public Guardian and Trustee. O. Reg. 173/25, s. 4.

Requirements

(3) To act as litigation guardian for a defendant or respondent under disability without a court order, a person shall,

(a) file an affidavit that contains,

(i) information about the matters listed in subrule 7.03.1 (9), other than subclause (j) (iv), and

(ii) confirmation that the person has given written authority to a named lawyer to act in the proceeding, as required by subrules 7.01 (5) and 15.01 (1); and

(b) if the title of the proceeding requires revision in order to comply with subrule 7.01 (6), serve on every other party and file a requisition (Form

4E) requiring the registrar to revise the title in the court file under subrule 7.01 (7). O. Reg. 173/25, s. 4.

Exceptions

(4) Despite clause (3) (a), an affidavit need not be filed by,

(a) the Children's Lawyer or the Public Guardian and Trustee; or

(b) a litigation guardian for a plaintiff defending a counterclaim. O. Reg. 173/25, s. 4.

Failure to Meet Affidavit Requirement

(5) If the registrar becomes aware that a person has filed a document on behalf of a defendant or respondent under disability without filing the affidavit required under this rule, the registrar shall promptly send the person a notice (Form 7A) requiring the affidavit to be filed no later than 15 days after receipt of the notice. O. Reg. 173/25, s. 4.

If Court Order

(6) For greater certainty, subrule (5) does not apply with respect to a person appointed as litigation guardian by the court in accordance with rule 7.03.1. O. Reg. 173/25, s. 4.

Notice to Other Parties

(7) When sending a notice to the person under subrule (5), the registrar shall also send a copy of the notice to every other party who has filed a document in the proceeding. O. Reg. 173/25, s. 4.

Effect of Non-Compliance

(8) If a person who receives notice under subrule (5) does not file the affidavit within the 15-day period, a party to the proceeding other than the party under disability shall move for directions or request a case conference, and no party may take any further step in the proceeding until the motion has been heard or the case conference has been held, unless the court orders otherwise. O. Reg. 173/25, s. 4.

Order for Appointment of Litigation Guardian for Party Under Disability

Who May Make Motion

7.03.1 (1) If a party to a proceeding is known or believed to be under disability and it appears that no person is authorized to act as litigation guardian for the party under rule 7.02 or 7.03, a motion to appoint a litigation guardian for the party shall be made in accordance with subrules (6) to (10) by,

(a) another party to the proceeding, subject to the requirements set out in subrules (2) to (5);

(b) a person seeking appointment to act as litigation guardian; or

(c) the lawyer of record for the party known or believed to be under disability, having regard to subrules (15) and (16). O. Reg. 173/25, s. 4.

Other Party Must Request Identification

(2) Before a party referred to in clause (1) (a) may make a motion, the party shall serve on every other party a request for identification of litigation guardian (Form 7B) and file it with proof of service. O. Reg. 173/25, s. 4.

Service

(3) Service of the request for identification of litigation guardian on the party known or believed to be under disability shall be made personally or by an alternative to personal service under rule 16.03. O. Reg. 173/25, s. 4.

Same

(4) The request shall be served separately from any other document in the proceeding unless it is being made by the plaintiff or applicant at the commencement of the proceeding, in which case the plaintiff or applicant may instead serve it together with the originating process. O. Reg. 173/25, s. 4.

Requirement for Party to Make Motion

(5) A party who files a request shall make a motion under subrule (1) if,

(a) at least 10 days have elapsed since the day the request was served on the party known or believed to be under disability;

(b) an affidavit and, if applicable, requisition have not been filed under rule 7.02 or 7.03 by a person authorized under that rule to act as litigation guardian; and

(c) no motion has been made by a person referred to in clause (1) (b) or (c) for an order under this rule appointing a litigation guardian. O. Reg. 173/25, s. 4.

Service of Motion Materials

(6) If a motion is made under subrule (1), the moving party shall, at least 10 days before the hearing of the motion, serve the motion materials as follows:

1. The notice of motion and motion record shall be served on,

   i. the party known or believed to be under disability, unless the party is a minor or an absentee,

ii. the proposed litigation guardian, if the proposed litigation guardian is not the moving party, and

iii. the lawyer of record, if any, for the party known or believed to be under disability, if the lawyer is not the moving party.

2. The notice of motion, modified as required under subrule (7) if applicable, shall also be served on every other party to the proceeding. O. Reg. 173/25, s. 4.

Requirements Respecting Privileged, Prejudicial Information

(7) If any information contained in the notice of motion or in the motion record, including the grounds of the motion, is subject to solicitor-client privilege or could, if it were disclosed to another person, prejudice the party known or believed to be under disability, the moving party shall ensure that the information is redacted or omitted from the notice of motion or motion record before,

(a) filing the notice of motion or motion record with the court; and

(b) in the case of a notice of motion, serving it on a party to the proceeding other than the party known or believed to be under disability. O. Reg. 173/25, s. 4.

Unredacted Motion Materials

(8) The moving party shall provide to the presiding judge or associate judge at the hearing the complete and unredacted versions of the notice of motion and motion record, which shall not form part of the court file. O. Reg. 173/25, s. 4.

Evidence

(9) The moving party shall, subject to subrule (10), provide evidence concerning,

(a) the nature of the proceeding;

(b) the date on which the cause of action arose and the date on which the proceeding was commenced;

(c) service of the notice of motion, motion record and, if applicable, request for identification of litigation guardian on the party known or believed to be under disability;

(d) if the moving party is not the proposed litigation guardian, service of the notice of motion and motion record on the proposed litigation guardian;

(e) the nature and extent of the known or suspected disability;

(f) if the party under disability is a minor, the minor's birth date;

(g) whether the party known or believed to be under disability ordinarily resides in Ontario;

(h) the relationship, if any, of the proposed litigation guardian to the party known or believed to be under disability;

(i) whether the proposed litigation guardian ordinarily resides in Ontario; and

(j) the proposed litigation guardian's,

(i) consent to act as litigation guardian in the proceeding,

(ii) status as a proper person to be appointed,

(iii) absence of interest in the proceeding adverse to that of the party known or believed to be under disability,

(iv) confirmation that, if appointed litigation guardian, they will immediately retain and instruct a lawyer to act in the proceeding, as required by subrules 7.01 (5) and 15.01 (1), and

(v) acknowledgment of having been informed that the proposed litigation guardian may incur costs that may not be recovered from another party. O. Reg. 173/25, s. 4.

Same, Children's Lawyer or Public Guardian and Trustee

(10) If the proposed litigation guardian is the Children's Lawyer or the Public Guardian and Trustee,

(a) clauses (9) (h) to (j) do not apply; and

(b) the moving party shall provide evidence that there is no other proper person willing and able to act as litigation guardian for the party known or believed to be under disability. O. Reg. 173/25, s. 4.

Effect of Motion

(11) If a person moves for an order under subrule (1), no further step may be taken in the proceeding by any party until the motion has been heard, except with leave of the court. O. Reg. 173/25, s. 4.

Directions

(12) On the hearing of the motion, the court may give any directions that are appropriate, which, if the party is found to be under disability, may include,

(a) a direction to the registrar and parties to adopt an amended title of proceeding identifying the party under disability and the litigation guardian in accordance with subrule 7.01 (6); and

(b) a direction extending the time for the service and filing of pleadings or other documents on behalf of the party under disability. O. Reg. 173/25, s. 4.

Order

(13) If the court determines that a party is under disability, it shall appoint as litigation guardian,

(a) the person consenting to act as litigation guardian, if any, if the court finds on the evidence that it is appropriate for that person to be litigation guardian; or

(b) if it finds that there is no proper person able and willing to act as litigation guardian, the Children's Lawyer or the Public Guardian and Trustee, determined as follows, on notice to the one being appointed:

(i) If the party is a minor, the Children's Lawyer.

(ii) If the party is mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding and there is no guardian or attorney under a power of attorney with authority to act as litigation guardian, the Public Guardian and Trustee.

(iii) If subclauses (i) and (ii) both apply to the party, either the Children's Lawyer or the Public Guardian and Trustee. O. Reg. 173/25, s. 4.

Service of Order

(14) The moving party shall serve a copy of an order made under this rule on every party to the proceeding and, if the moving party is not the litigation guardian, on the litigation guardian. O. Reg. 173/25, s. 4.

Lawyer of Record

(15) If a motion is made under subrule (1) in respect of a party who is represented by a lawyer, including where the moving party is the lawyer, the lawyer shall remain the lawyer of record for the party until a litigation guardian is appointed unless the court orders otherwise, and clause 15.05 (a) shall not apply until the motion is disposed of. O. Reg. 173/25, s. 4.

Same, Removal

(16) At or following the hearing of the motion, the court may make an order removing the lawyer of the party known or believed to be under disability from the record without requiring the lawyer to make a motion under rule 15.04. O. Reg. 173/25, s. 4.

Representation of Non-Parties under Disability

7.04 (1) Revoked: O. Reg. 173/25, s. 5.

Legal representative for minor who is not a party

(2) Where, in the opinion of the court, the interests of a minor who is not a party require separate representation in a proceeding, the court may request and may by order authorize the Children's Lawyer, or some other proper person who is willing and able to act, to act as the person's legal representative. O. Reg. 69/95, s. 5.

Litigation guardian for incapable person who is not a party

(3) Where, in the opinion of the court, the interests of a mentally incapable person who is not a minor and not a party require separate representation in a proceeding, the court may appoint as the mentally incapable person's litigation guardian the Public Guardian and Trustee or some other proper person who is willing and able to act. O. Reg. 69/95, s. 5.

7.05 Revoked: O. Reg. 173/25, s. 6.

Removal or Substitution of Litigation Guardian

7.06 (1) Where, in the course of a proceeding,

(a) a minor for whom a litigation guardian has been acting reaches the age of majority, the minor or the litigation guardian may, on filing an affidavit stating that the minor has reached the age of majority, obtain from the registrar an order to continue (Form 7C) authorizing the minor to continue the proceeding without the litigation guardian;

(b) a party under any other disability for whom a litigation guardian has been acting ceases to be under disability, the party or the litigation guardian may move without notice for an order to continue the proceeding without the litigation guardian,

and the order shall be served forthwith on every other party and on the litigation guardian. R.R.O. 1990, Reg. 194, r. 7.06 (1); O. Reg. 69/95, s. 18; O. Reg. 173/25, s. 7 (1).

(2) Where it appears to the court that a litigation guardian is not acting in the best interests of the party under disability, the court may substitute the Children's Lawyer, the Public Guardian and Trustee or any other proper person as litigation guardian. R.R.O. 1990, Reg. 194, r. 7.06 (2); O. Reg. 69/95, ss. 19, 20; O. Reg. 173/25, s. 7 (2).

Directions

(3) In making an order under clause (1) (b) or subrule (2), the court may give any directions that are appropriate in the circumstances, which may include,

(a) a direction to the registrar and parties to adopt an amended title of proceeding identifying the party under disability and the litigation guardian in accordance with subrule 7.01 (6) or removing reference to disability and the litigation guardian, as the case may be; and

(b) a direction extending the time for the service and filing of pleadings or other documents on behalf of the party who is or was under disability. O. Reg. 173/25, s. 7 (3).

Noting Party under Disability in Default

7.07 (1) If a party to an action is under a disability, the party may be noted in default under rule 19.01 only with leave of a judge. O. Reg. 19/03, s. 2.

(2) Notice of a motion for leave under subrule (1) shall be served on the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) on the Children's Lawyer, if the party is a minor; or

(b) on the Public Guardian and Trustee, in any other case. O. Reg. 259/14, s. 1.

Discontinuance by or against Party under Disability

7.07.1 (1) If a party to an action is under a disability, the action may be discontinued by or against the party under rule 23.01 only with leave of a judge. O. Reg. 19/03, s. 3.

(2) Notice of a motion for leave under subrule (1) shall be served on the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) on the Children's Lawyer, if the party is a minor; or

(b) on the Public Guardian and Trustee, in any other case. O. Reg. 259/14, s. 2.

Approval of Settlement

Settlement Requires Judge's Approval

7.08 (1) No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (1).

(2) Judgment may not be obtained on consent in favour of or against a party under disability without the approval of a judge. R.R.O. 1990, Reg. 194, r. 7.08 (2).

Exception

(2.1) This rule does not apply to a settlement respecting the appointment under the *Substitute Decisions Act, 1992* of a guardian of property or guardian of the person. O. Reg. 281/16, s. 3 (1). O. Reg. 50/25, s. 1 (1).

Where no Proceeding Commenced

(3) Where an agreement for the settlement of a claim made by or against a person under disability is reached before a proceeding is commenced in respect of the claim, approval of a judge shall be obtained on an application. R.R.O. 1990, Reg. 194, r. 7.08 (3).

Material Required for Approval

(3.1) Despite any other rule, a motion or application for the approval of a settlement by a judge under this rule may be made by the litigation guardian for a person under disability without notice to any other party, and the materials filed in support of the motion or application need not be served on any other party unless a judge orders otherwise. O. Reg. 50/25, s. 1 (2).

Material Required for Approval

(4) Subject to any redactions or omissions required under subrule (4.2), a party or person seeking the approval of a settlement by a judge under this rule shall file, together with the notice of motion or notice of application, as the case may be, a motion or application record, which shall contain,

(0.a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(a) an affidavit of the litigation guardian setting out the material facts and the reasons supporting the proposed settlement and the position of the litigation guardian in respect of the settlement;

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

(c) where the person under disability is a minor who is over the age of sixteen years, the minor's consent in writing, unless the judge orders otherwise; and

(d) a copy of the proposed minutes of settlement. R.R.O. 1990, Reg. 194, r. 7.08 (4); O. Reg. 69/95, s. 18; O. Reg. 575/07, s. 10; O. Reg.

50/25, s. 1 (3, 4).

(4.1) If there is no litigation guardian and the settlement that is the subject of the motion or application is in respect of a matter under the *Substitute Decisions Act, 1992* to which this rule applies, the affidavit referred to in clause (4) (a) shall be provided by the moving party or applicant (as the case may be), and the affidavit referred to in clause (4) (b) shall be provided by his or her lawyer. O. Reg. 281/16, s. 3 (1).

(4.2) If any information contained in the notice of motion or notice of application or in the motion or application record, including the grounds of the motion or application, is subject to solicitor-client privilege or could, if it were disclosed to another person, prejudice the person under disability, the lawyer acting for the litigation guardian shall ensure that the information is redacted or omitted from the document before filing it. O. Reg. 50/25, s. 1 (5).

(4.3) The lawyer shall provide to the presiding judge at the hearing the complete and unredacted versions of the notice of motion or notice of application and motion or application record, which shall not form part of the court file. O. Reg. 50/25, s. 1 (5).

(4.4) Unless a judge orders otherwise,

(a) the application or motion for approval of a settlement under this rule shall be heard in writing without the attendance of the parties; and

(b) a factum need not be served or filed. O. Reg. 50/25, s. 1 (5).

Children's Lawyer or Public Guardian and Trustee

(5) On a motion or application for the approval of a judge under this rule, the judge may,

(a) direct that complete and unredacted versions of the material filed on the motion or application be served on the Children's Lawyer or on the Public Guardian and Trustee; and

(b) direct the Children's Lawyer or the Public Guardian and Trustee, as the case may be, to make a written report stating any objections he or she has to the proposed settlement and making recommendations, with reasons, in connection with the proposed settlement. O. Reg. 281/16, s. 3 (2); O. Reg. 50/25, s. 1 (6).

Money to be Paid into Court

7.09 (1) Any money payable to a person under disability who is not a minor under an order or a settlement shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (1); O. Reg. 173/25, s. 8 (1).

(1.1) Any money payable to a minor under an order or a settlement shall be paid into court, unless the court orders otherwise having regard to,

(a) section 47, 59 or 60 of the *Children's Law Reform Act*; or

(b) section 51 of that Act, where the total of the amount of money and the value of any personal property do not exceed the amount prescribed for the purposes of subsection (1.1) of that section. O. Reg. 173/25, s. 8 (2).

(2) Any money paid to the Children's Lawyer on behalf of a person under disability shall be paid into court, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 7.09 (2); O. Reg. 69/95, s. 19.

RULE 8 PARTNERSHIPS AND SOLE PROPRIETORSHIPS

Partnerships

8.01 (1) A proceeding by or against two or more persons as partners may be commenced using the firm name of the partnership. R.R.O. 1990, Reg. 194, r. 8.01 (1).

(2) Subrule (1) extends to a proceeding between partnerships having one or more partners in common. O. Reg. 535/92, s. 4.

Defence

8.02 Where a proceeding is commenced against a partnership using the firm name, the partnership's defence shall be delivered in the firm name and no person who admits having been a partner at any material time may defend the proceeding separately, except with leave of the court. R.R.O. 1990, Reg. 194, r. 8.02.

Notice to Alleged Partner Where Enforcement Sought against Partner

8.03 (1) In a proceeding against a partnership using the firm name, where a plaintiff or applicant seeks an order that will be enforceable personally against a person as a partner, the plaintiff or applicant may serve the person with the originating process, together with a notice to alleged partner (Form 8A) stating that the person was a partner at a material time specified in the notice. R.R.O. 1990, Reg. 194, r. 8.03 (1).

(2) A person served as provided in subrule (1) shall be deemed to have been a partner at the material time, unless the person defends the proceeding separately denying that he or she was a partner at the material time. R.R.O. 1990, Reg. 194, r. 8.03 (2).

Person Defending Separately

8.04 A person becomes a party to a proceeding as a defendant or respondent, and the title of the proceeding shall be amended accordingly, if the person defends a proceeding separately,

(a) denying having been a partner at the material time; or

(b) with leave of the court under rule 8.02. R.R.O. 1990, Reg. 194, r. 8.04.

Disclosure of Partners

8.05 (1) Where a proceeding is commenced by or against a partnership using the firm name, any other party may serve a notice requiring the partnership to disclose forthwith in writing the names and addresses of all the partners constituting the partnership at a time specified in the notice and, where the present address of a partner is unknown, the partnership shall disclose the last known address of that partner. R.R.O. 1990, Reg. 194, r. 8.05 (1).

(2) Where a partnership fails to comply with a notice under subrule (1), its claim may be dismissed or the proceeding stayed or its defence may be struck out. R.R.O. 1990, Reg. 194, r. 8.05 (2).

(3) Where the name of a partner is disclosed pursuant to a notice under subrule (1) and the partner has not been served as provided in rule 8.03, the partner may be so served within fifteen days after the name is disclosed. R.R.O. 1990, Reg. 194, r. 8.05 (3).

Enforcement of Order

Against Partnership Property

8.06 (1) An order against a partnership using the firm name may be enforced against the property of the partnership. R.R.O. 1990, Reg. 194, r. 8.06 (1).

Against Person Served as Alleged Partner

(2) An order against a partnership using the firm name may also be enforced, where the order or a subsequent order so provides, against any person who was served as provided in rule 8.03 and who,

(a) under that rule, is deemed to have been a partner;

(b) has admitted having been a partner; or

(c) has been adjudged to have been a partner,

at the material time. R.R.O. 1990, Reg. 194, r. 8.06 (2).

Against Person not Served as Alleged Partner

(3) Where, after an order has been made against a partnership using the firm name, the party obtaining it claims to be entitled to enforce it against any

person alleged to be a partner other than a person who was served as provided in rule 8.03, the party may move before a judge for leave to do so, and the judge may grant leave if the liability of the person as a partner is not disputed or, if disputed, after the liability has been determined in such manner as the judge directs. R.R.O. 1990, Reg. 194, r. 8.06 (3).

Sole Proprietorships

8.07 (1) Where a person carries on business in a business name other than his or her own name, a proceeding may be commenced by or against the person using the business name. R.R.O. 1990, Reg. 194, r. 8.07 (1).

(2) Rules 8.01 to 8.06 apply, with necessary modifications, to a proceeding by or against a sole proprietor using a business name, as though the sole proprietor were a partner and the business name were the firm name of a partnership. R.R.O. 1990, Reg. 194, r. 8.07 (2).

RULE 9 ESTATES AND TRUSTS

Proceedings by or against Executor, Administrator or Trustee

General Rule

9.01 (1) A proceeding may be brought by or against an executor, administrator or trustee as representing an estate or trust and its beneficiaries without joining the beneficiaries as parties. R.R.O. 1990, Reg. 194, r. 9.01 (1).

Exceptions

(2) Subrule (1) does not apply to a proceeding,

(a) to establish or contest the validity of a will;

(b) for the interpretation of a will;

(c) to remove or replace an executor, administrator or trustee;

(d) against an executor, administrator or trustee for fraud or misconduct; or

(e) for the administration of an estate or the execution of a trust by the court. R.R.O. 1990, Reg. 194, r. 9.01 (2).

Executor, Administrator or Trustee Refusing to be Joined

(3) Where a proceeding is commenced by executors, administrators or trustees, any executor, administrator or trustee who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent. R.R.O. 1990, Reg. 194, r. 9.01 (3).

Beneficiaries and Others Added by Order

(4) The court may order that any beneficiary, creditor or other interested person be made a party to a proceeding by or against an executor, administrator or trustee. R.R.O. 1990, Reg. 194, r. 9.01 (4).

Proceeding against Estate that Has No Executor or Administrator

9.02 (1) Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a litigation administrator to represent the estate for the purposes of the proceeding. R.R.O. 1990, Reg. 194, r. 9.02 (1).

(2) An order in a proceeding to which a litigation administrator is a party binds or benefits the estate of the deceased person, but has no effect on the litigation administrator in a personal capacity, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 9.02 (2).

Remedial Provisions

Proceeding Commenced before Probate or Administration

9.03 (1) Where a proceeding is commenced by or against a person as executor or administrator before a grant of probate or administration has been made and the person subsequently receives a grant of probate or administration, the proceeding shall be deemed to have been properly constituted from its commencement. R.R.O. 1990, Reg. 194, r. 9.03 (1).

Proceeding Brought by or against Estate

(2) A proceeding commenced by or against the estate of a deceased person,

(a) by naming "the estate of A.B., deceased", "the personal representative of A.B., deceased" or any similar designation; or

(b) in which the wrong person is named as the personal representative,

shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the proper executor or administrator of the deceased or against a litigation administrator appointed for the purpose of the proceeding, and the title of the proceeding shall be amended accordingly. R.R.O. 1990, Reg. 194, r. 9.03 (2).

Proceeding Commenced in the Name of or Against a Deceased Person

(3) A proceeding commenced in the name of or against a person who has died before its commencement shall not be treated as a nullity, but the court may order that the proceeding be continued by or against the executor or administrator or a litigation administrator appointed for the purpose of the proceeding and the title of the proceeding shall be amended accordingly. R.R.O. 1990, Reg. 194, r. 9.03 (3).

Where There is an Executor or Administrator and a Litigation Administrator has been Appointed

(4) Where it appears that a deceased person for whom a litigation administrator has been appointed had an executor or administrator at the time of the appointment, the proceeding shall not be treated as a nullity, but the court may order that the proceeding be continued against the executor or administrator and the title of the proceeding shall be amended accordingly. R.R.O. 1990, Reg. 194, r. 9.03 (4).

General Power

(5) A proceeding by or against a deceased person or an estate shall not be treated as a nullity because it was not properly constituted, but the court may order that the proceeding be reconstituted by analogy to the provisions of this rule. R.R.O. 1990, Reg. 194, r. 9.03 (5).

Stay of Proceeding until Properly Constituted

(6) No further step in a proceeding referred to in subrule (2), (3), (4) or (5) shall be taken until it is properly constituted and, unless it is properly constituted within a reasonable time, the court may dismiss the proceeding or make such other order as is just. R.R.O. 1990, Reg. 194, r. 9.03 (6).

Terms May be Imposed

(7) On making an order under this rule, the court may impose such terms as are just, including a term that an executor or an administrator shall not be personally liable in respect of any part of the estate of a deceased person that the executor or administrator has distributed or otherwise dealt with in good faith while not aware that a proceeding had been commenced against the deceased person or the estate. R.R.O. 1990, Reg. 194, r. 9.03 (7).

RULE 10 REPRESENTATION ORDER

Representation of an Interested Person Who Cannot Be Ascertained

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the *Variation of Trusts Act*;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (4).

Representation of a Deceased Person

10.02 Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or

administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.

Relief from Binding Effect of Order

10.03 Where a person or an estate is bound by reason of a representation order made under subrule 10.01 (1) or rule 10.02, an approval under subrule 10.01 (3) or an order that the proceeding continue made under rule 10.02, a judge may order in the same or a subsequent proceeding that the person or estate not be bound where the judge is satisfied that,

(a) the order or approval was obtained by fraud or non-disclosure of material facts;

(b) the interests of the person or estate were different from those represented at the hearing; or

(c) for some other sufficient reason the order or approval should be set aside. R.R.O. 1990, Reg. 194, r. 10.03; O. Reg. 259/14, s. 3.

RULE 11 TRANSFER OR TRANSMISSION OF INTEREST

Effect of Transfer or Transmission

11.01 Where at any stage of a proceeding the interest or liability of a party is transferred or transmitted to another person by assignment, bankruptcy, death or other means, the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted until an order to continue the proceeding by or against the other person has been obtained. R.R.O. 1990, Reg. 194, r. 11.01; O. Reg. 14/04, s. 9.

Order to Continue

11.02 (1) Where a transfer or transmission of the interest or liability of a party takes place while a proceeding is pending, any interested person may, on filing an affidavit verifying the transfer or transmission of interest or liability, obtain on requisition from the registrar an order to continue (Form 11A), without notice to any other party. R.R.O. 1990, Reg. 194, r. 11.02 (1).

(2) An order to continue shall be served forthwith on every other party. R.R.O. 1990, Reg. 194, r. 11.02 (2).

Failure to Obtain Order to Continue Action

11.03 Where a transfer or transmission of the interest of a plaintiff takes place while an action is pending and no order to continue is obtained within a reasonable time, a defendant may move to have the action dismissed for delay, and rules 24.02 to 24.05 apply, with necessary modifications. R.R.O. 1990, Reg. 194, r. 11.03.

RULE 12 CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS

Definitions

12.01 In rules 12.02 to 12.08,

"Act" means the *Class Proceedings Act, 1992*; ("Loi")

"Foundation" means The Law Foundation of Ontario; ("Fondation")

"Fund" means the Class Proceedings Fund of the Foundation. ("Fonds") O. Reg. 770/92, s. 5; O. Reg. 465/93, s. 2 (2); O. Reg. 496/20, s. 1.

Title of Proceeding

12.02 (1) In a proceeding commenced under subsection 2 (1) of the Act, the title of the proceeding shall include, after the names of the parties, "Proceeding under the *Class Proceedings Act, 1992*". O. Reg. 770/92, s. 5.

(2) In a proceeding referred to in section 3 or 4 of the Act, the notice of motion for an order certifying the proceeding, the order certifying it and all subsequent documents shall include, after the names of the parties, "Proceeding under the *Class Proceedings Act, 1992*". O. Reg. 770/92, s. 5.

Discovery of Class Members

12.03 (1) For the purpose of subrule 31.11 (1) (reading in examination), a class member who is examined for discovery under subsection 15 (2) of the Act is examined in addition to the party. O. Reg. 770/92, s. 5.

(2) Rule 31.10 (discovery of non-parties) and clause 34.15 (1) (b) (sanctions for default or misconduct) do not apply when a class member is examined for discovery under subsection 15 (2) of the Act. O. Reg. 770/92, s. 5.

Costs

Application of Rule

12.04 (1) This rule applies to proceedings under the Act in which the plaintiff or applicant has received financial support from the Fund. O. Reg. 770/92, s. 5; O. Reg. 496/20, s. 2.

Notice to Foundation, Opportunity to Participate

(2) If the court is of the opinion that the defendant or respondent may be entitled to an award of costs, the court shall direct the plaintiff or applicant to give notice to the Foundation. O. Reg. 113/01, s. 1.

(3) When the court has made a direction under subrule (2),

(a) no order for costs or assessment of costs shall be made unless the Foundation has had an opportunity to present evidence and make

submissions in respect of costs; and

(b) the Foundation is a party for the purpose of an appeal in relation to costs. O. Reg. 113/01, s. 1.

Failure to Accept Defendant's Offer

(4) Subrule 49.10 (2) (costs consequences of offer) does not apply. O. Reg. 113/01, s. 1.

Contents of Judgments and Orders

12.05 (1) A judgment in a proceeding under the Act, or an order approving a settlement under section 27.1 of the Act or approving a discontinuance or abandonment of a proceeding under section 29 of the Act, shall contain directions with respect to,

(a) the distribution of amounts awarded under section 24 or 25 of the Act, and the costs of distribution;

(b) the payment of amounts owing under an enforceable agreement made under section 32 of the Act between a lawyer and a representative party;

(c) the payment of the costs of the proceeding; and

(d) the payment of any levy in favour of the Fund under clause 59.5 (1) (g) of the *Law Society Act*. O. Reg. 770/92, s. 5; O. Reg. 575/07, s. 1; O. Reg. 496/20, s. 3.

(2) An order certifying two or more proceedings as a class proceeding under section 3 of the Act or decertifying a class proceeding under section 10 of the Act shall contain directions with respect to pleadings and other procedural matters. O. Reg. 770/92, s. 5.

Leave to Appeal

Leave to be Obtained from Another Judge

12.06 (1) Leave to appeal to the Divisional Court under subsection 30 (9), (10) or (11) of the Act shall be obtained from a judge other than the judge who made the order. O. Reg. 465/93, s. 2 (3); O. Reg. 496/20, s. 4 (1).

Motion in Writing

(1.1) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 82/17, s. 2 (1).

(2) Revoked: O. Reg. 496/20, s. 4 (2).

Leave to Appeal — Grounds

(3) Leave to appeal from an order under subsection 30 (9), (10) or (11) of the Act shall not be granted unless,

(a) there has been a miscarriage of justice; or

(b) the order may be used as a precedent in determining the rights of other class members or the defendant in the proceeding under section 24 or 25 of the Act and there is good reason to doubt the correctness of the order. O. Reg. 465/93, s. 2 (3).

Procedure

(4) Subrules 61.03.1 (2) to (19) apply, with the following and any other necessary modifications, to the motion for leave to appeal:

1. References in those subrules to the Court of Appeal shall be read as references to the Divisional Court.

2. For the purposes of subrule 61.03.1 (6), only one copy of each of the motion record, factum, any transcripts and any book of authorities is required to be filed.

3. For the purposes of subrule 61.03.1 (10), only one copy of each of the factum, any motion record and any book of authorities is required to be filed. O. Reg. 82/17, s. 2 (3).

Subsequent Procedure if Leave Granted

(5) If leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and from then on Rule 61 applies to the appeal. O. Reg. 82/17, s. 2 (3).

Proceeding against Representative Defendant

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so. O. Reg. 465/93, s. 2 (3).

Proceeding by Unincorporated Association or Trade Union

12.08 Where numerous persons are members of an unincorporated association or trade union and a proceeding under the Act would be an unduly expensive or inconvenient means for determining their claims, one or more of them may be authorized by the court to bring a proceeding on behalf of or for the benefit of all. O. Reg. 288/99, s. 9; O. Reg. 496/20, s. 5.

RULE 13 INTERVENTION

Leave to Intervene as Added Party

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding. R.R.O. 1990, Reg. 194, r. 13.01 (1).

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just. R.R.O. 1990, Reg. 194, r. 13.01 (2).

Leave to Intervene as Friend of the Court

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument. R.R.O. 1990, Reg. 194, r. 13.02; O. Reg. 186/10, s. 1; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Leave to Intervene in Divisional Court or Court of Appeal

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (1); O. Reg. 292/99, s. 4; O. Reg. 186/10, s. 2; O. Reg. 82/17, s. 16.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them. R.R.O. 1990, Reg. 194, r. 13.03 (2); O. Reg. 186/10, s. 2; O. Reg. 55/12, s. 1; O. Reg. 82/17, s. 16.

COMMENCEMENT OF PROCEEDINGS

RULE 13.1 PLACE OF COMMENCEMENT AND HEARING OR TRIAL

Place of Commencement

Statute or Rule Governing Place of Commencement, Trial or Hearing

13.1.01 (1) If a statute or rule requires a proceeding to be commenced, brought, tried or heard in a particular county, the proceeding shall be

commenced at a court office in that county and the county shall be named in the originating process. O. Reg. 14/04, s. 10.

Choice of Place

(2) If subrule (1) does not apply, the proceeding may be commenced at any court office in any county named in the originating process. O. Reg. 14/04, s. 10.

Mortgage Claims

(3) In the case of an originating process, whether it is brought under Rule 64 (Mortgage Actions) or otherwise, that contains a claim relating to a mortgage, including a claim for payment of a mortgage debt or for possession of a mortgaged property, the proceeding shall be commenced in the county that the regional senior judge of a region in which the property is located, in whole or in part, designates within that region for such claims. O. Reg. 259/14, s. 4.

Transfer

Motion to Transfer to Another County

13.1.02 (1) If subrule 13.1.01 (1) applies to a proceeding but a plaintiff or applicant commences it in another place, the court may, on its own initiative or on any party's motion, order that the proceeding be transferred to the county where it should have been commenced. O. Reg. 14/04, s. 10.

(2) If subrule (1) does not apply, the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,

(a) that it is likely that a fair hearing cannot be held in the county where the proceeding was commenced; or

(b) that a transfer is desirable in the interest of justice, having regard to,

(i) where a substantial part of the events or omissions that gave rise to the claim occurred,

(ii) where a substantial part of the damages were sustained,

(iii) where the subject-matter of the proceeding is or was located,

(iv) any local community's interest in the subject-matter of the proceeding,

(v) the convenience of the parties, the witnesses and the court,

(vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,

(vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,

(viii) whether judges and court facilities are available at the other county, and

(ix) any other relevant matter. O. Reg. 14/04, s. 10.

(3) If an order has previously been made under subrule (2), any party may make a further motion, and in that case subrule (2) applies with necessary modifications. O. Reg. 14/04, s. 10.

Where Motion may be Brought

(3.1) Despite rule 37.03 (where motions to be brought) and subrule 76.05 (2) (place of in-person hearings), a motion under subrule (1), (2) or (3) may be brought in the county to which the transfer of the proceeding is sought, in which case, if the motion is to be heard in person, it shall be heard in that county. O. Reg. 689/20, s. 12 (1).

Transfer on Initiative of Regional Senior Judge

(4) If subrule (1) does not apply, the regional senior judge in whose region the proceeding was commenced may, on his or her own initiative and subject to subrules (5) and (6), make an order to transfer the proceeding to another county in the same region. O. Reg. 14/04, s. 10.

(5) Before making an order under subrule (4), the regional senior judge shall direct the parties to appear before him or her, by personal attendance or by telephone conference or video conference, to consider whether the order should be made. O. Reg. 14/04, s. 10; O. Reg. 689/20, s. 12 (2).

(6) An order under subrule (4) may be made only if the regional senior judge is satisfied that the transfer is desirable in the interest of justice, having regard to the factors listed in subclauses (2) (b) (i) to (ix). O. Reg. 14/04, s. 10.

(7) If an order has previously been made under subrule (4), a further order may be made, and in that case subrule (4) applies with necessary modifications. O. Reg. 14/04, s. 10.

Effect of Order

(8) If an order is made under subrule (1), (2) or (4),

(a) the court file shall be transferred to the court office in the county to which the proceeding has been transferred; and

(b) all further documents required to be filed in the proceeding shall be filed there. O. Reg. 14/04, s. 10.

(9)-(11) REVOKED: R.R.O. 1990, Reg. 194, r. 13.1.02 (12).

(12) SPENT: O. Reg. 14/04, s. 10.

RULE 14 ORIGINATING PROCESS

How Proceedings Commenced

By Issuing Originating Process

14.01 (1) A proceeding shall be commenced by the issuing of an originating process. O. Reg. 14/04, s. 11.

Exceptions

(2) A counterclaim that is only against persons who are already parties to the main action, and a crossclaim, shall be commenced by the delivery of the pleading containing the counterclaim or crossclaim, and the pleading need not be issued. O. Reg. 131/04, s. 4.

(2.1) An application for a certificate of appointment of estate trustee under Rule 74 or for a small estate certificate or amended small estate certificate under Rule 74.1 need not be issued. O. Reg. 484/94, s. 4 (2); O. Reg. 111/21, s. 2; O. Reg. 383/21, s. 2.

(3) Revoked: O. Reg. 176/24, s. 1.

New Fact After Commencement

(4) A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence, and, if necessary, may move to amend an originating process or pleading to allege the fact. R.R.O. 1990, Reg. 194, r. 14.01 (4).

Where Leave to Commence is Required

14.01.1 (1) Where leave to commence a proceeding is required, it shall be obtained by motion except where a statute or these rules provide otherwise. O. Reg. 176/24, s. 2; O. Reg. 322/24, s. 2.

Small Claims Action

(2) A motion under subsection 23 (1.1) of the *Courts of Justice Act* for leave to commence an action in the Superior Court of Justice that is within the Small Claims Court's jurisdiction may be made without notice, unless the court orders otherwise. O. Reg. 176/24, s. 2.

Same

(3) The court may grant leave under subsection 23 (1.1) of the *Courts of Justice Act* only if it is in the interest of justice. O. Reg. 176/24, s. 2.

Proceedings by Action as General Rule

14.02 Every proceeding in the court shall be by action, except where a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 14.02.

Actions — By Statement of Claim or Notice of Action

Statement of Claim

14.03 (1) The originating process for the commencement of an action is a statement of claim (Form 14A (general) or 14B (mortgage actions)), except as provided by,

(a) subrule (2) (notice of action);

(b) Revoked: O. Reg. 131/04, s. 5 (1).

(c) rule 27.03 (counterclaim against person not already a party);

(d) subrule 29.02 (1) (third party claim); and

(e) rule 29.11 (fourth and subsequent party claims). R.R.O. 1990, Reg. 194, r. 14.03 (1); O. Reg. 131/04, s. 5 (1).

Notice of Action

(2) Where there is insufficient time to prepare a statement of claim, an action may be commenced by the issuing of a notice of action (Form 14C) that contains a short statement of the nature of the claim. R.R.O. 1990, Reg. 194, r. 14.03 (2); O. Reg. 131/04, s. 5 (2).

(3) Where a notice of action is used, the plaintiff shall file a statement of claim (Form 14D) within thirty days after the notice of action is issued, and no statement of claim shall be filed thereafter except with the written consent of the defendant or with leave of the court obtained on notice to the defendant. R.R.O. 1990, Reg. 194, r. 14.03 (3).

(4) The notice of action shall not be served separately from the statement of claim. R.R.O. 1990, Reg. 194, r. 14.03 (4).

Information for Court Use

(4.1) Form 14F (Information for court use) shall be filed together with a statement of claim in Form 14A or 14B or a notice of action in Form 14C, unless the statement of claim or notice of action is filed electronically through the Civil Claims Online Portal under rule 4.05.1, the Civil Submissions Online Portal under rule 4.05.2 or the Ontario Courts Public Portal under rule 4.05.2.1. O. Reg. 12/24, s. 2; O. Reg. 226/25, s. 6.

Statement of Claim may Alter or Extend Claim

(5) In an action commenced by the issuing of a notice of action, the statement of claim may alter or extend the claim stated in the notice of action. R.R.O. 1990, Reg. 194, r. 14.03 (5).

Ordinary and Simplified Procedure

14.03.1 The simplified procedure set out in Rule 76 shall be used in actions to which subrule 76.02 (1), (2) or (2.1) applies, and may be used in other actions in accordance with subrule 76.02 (3); otherwise, the ordinary procedure set out in these Rules shall be used in all proceedings. O. Reg. 652/00, s. 1; O. Reg. 284/01, s. 4; O. Reg. 132/04, s. 3.

14.04 REVOKED: O. Reg. 584/17, s. 6.

Applications — By Notice of Application or Application for Certificate

14.05 (1) The originating process for the commencement of an application is, as applicable,

(a) a notice of application (Form 2.2B, 14E, 14E.1, 68A or 73A); or

(b) an application for a certificate of appointment of estate trustee (Form 74A or 74J), small estate certificate (Form 74.1A) or amended small estate certificate (Form 74.1E). O. Reg. 383/21, s. 3; O. Reg. 709/21, s. 2; O. Reg. 322/24, s. 3 (1).

Information for Court Use

(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 2.2B, 14E, 14E.1, 68A or 73A unless the notice of application is filed electronically through the Civil Submissions Online Portal under rule 4.05.2 or the Ontario Courts Public Portal under rule 4.05.2.1. O. Reg. 260/05, s. 2; O. Reg. 43/14, s. 5 (2); O. Reg. 12/24, s. 3; O. Reg. 322/24, s. 3 (2); O. Reg. 226/25, s. 7.

Application under Statute

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a

deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.

Title of Proceeding

14.06 (1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity. R.R.O. 1990, Reg. 194, r. 14.06 (1).

(2) In an action, the title of the proceeding shall name the party commencing the action as the plaintiff and the opposite party as the defendant. R.R.O. 1990, Reg. 194, r. 14.06 (2); O. Reg. 131/04. s. 7.

(3) In an application, the title of the proceeding shall name the party commencing the application as the applicant and the opposite party, if any, as the respondent and the notice of application shall state the statutory provision or rule, if any, under which the application is made. R.R.O. 1990, Reg. 194, r. 14.06 (3).

Exception

(4) Subrules (1), (2) and (3) do not apply to a proceeding under Rule 74, 74.1 or 75. O. Reg. 484/94, s. 6; O. Reg. 111/21, s. 3.

How Originating Process Issued

14.07 (1) An originating process is issued by the registrar's act of dating, signing and sealing it with the seal of the court and assigning to it a court file number. R.R.O. 1990, Reg. 194, r. 14.07 (1).

(2) A copy of the originating process shall be filed in the court file when it is issued. R.R.O. 1990, Reg. 194, r. 14.07 (2); O. Reg. 248/21, s. 14.

(3) Revoked: O. Reg. 584/17, s. 7.

Time for Service in Actions

14.08 (1) Where an action is commenced by a statement of claim, the statement of claim shall be served within six months after it is issued. R.R.O. 1990, Reg. 194, r. 14.08 (1).

(2) Where an action is commenced by a notice of action, the notice of action and the statement of claim shall be served together within six months after the notice of action is issued. R.R.O. 1990, Reg. 194, r. 14.08 (2).

(3) Revoked: O. Reg. 170/14, s. 2.

(4) Revoked: R.R.O. 1990, Reg. 194, r. 14.08 (5).

(5) Spent: O. Reg. 198/05, s. 1. (as amended by O. Reg. 438/08, s. 11 (2)).

Striking out or Amending

14.09 An originating process that is not a pleading may be struck out or amended in the same manner as a pleading. R.R.O. 1990, Reg. 194, r. 14.09.

Dismissal of Action Where Defendant Pays Claim

14.10 (1) Where the plaintiff's claim is for money only, a defendant, on paying within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff's claim and the amount claimed for costs, may on motion have the court dismiss the action. R.R.O. 1990, Reg. 194, r. 14.10 (1).

(2) A defendant who considers the amount claimed for costs to be excessive may pay, within the time prescribed for delivery of a defence or at any time before being noted in default, the amount of the plaintiff's claim and the sum of $400 for costs, and the court on motion may dismiss the action and may fix and order payment of the plaintiff's costs or may order payment of the plaintiff's costs as assessed under Rule 58. R.R.O. 1990, Reg. 194, r. 14.10 (2); O. Reg. 653/00, s. 2.

RULE 15 REPRESENTATION BY LAWYER

Where Lawyer Is Required

15.01 (1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a lawyer. R.R.O. 1990, Reg. 194, r. 15.01 (1); O. Reg. 575/07, s. 1.

(2) A party to a proceeding that is a corporation shall be represented by a lawyer, except with leave of the court. R.R.O. 1990, Reg. 194, r. 15.01 (2); O. Reg. 575/07, s. 1.

(3) Any other party to a proceeding may act in person or be represented by a lawyer. R.R.O. 1990, Reg. 194, r. 15.01 (3); O. Reg. 575/07, s. 1.

(4) Subrule (3) permits a party to be represented by a lawyer acting under a limited scope retainer, but a limited scope retainer does not, in itself, make a lawyer the lawyer of record for the party. O. Reg. 231/13, s. 3.

Interpretation

Party Acting in Person

15.01.1 (1) Where a party to a proceeding is not represented by a lawyer but acts in person, anything these rules require or permit a lawyer to do shall be done by the party. O. Reg. 231/13, s. 4.

Exception

(1.1) Subrule (1) does not apply with respect to the following provisions:

1. Subrule 16.09 (1.1).

2. Clause (a) of the definition of "authorized Teranet user" in subrule 60.07 (0.1). O. Reg. 520/22, s. 1; O. Reg. 221/25, s. 3.

Party Represented under Limited Scope Retainer

(2) A party who is represented by a lawyer acting under a limited scope retainer is considered for the purpose of these rules to be acting in person and without a lawyer, and, to that end,

(a) a reference in these rules to a party acting in person includes a reference to a party who is represented in this manner; and

(b) anything these rules require or permit a party to do shall be done by the party. O. Reg. 231/13, s. 4.

Exception, Lawyer of Record

(3) Subrule (2) does not apply if the lawyer acting under the limited scope retainer is the party's lawyer of record. O. Reg. 231/13, s. 4.

Party under Disability

(4) Where a lawyer is acting for a party under disability, a reference in these rules to the lawyer's client shall be read as a reference to the party under disability, represented by the party's litigation guardian, unless the context requires otherwise. O. Reg. 173/25, s. 9.

Notice of Authority to Commence Proceeding

Request for Notice by Lawyer

15.02 (1) A person who is served with an originating process may deliver a request that the lawyer who is named in the originating process as the lawyer for the plaintiff or applicant deliver a notice declaring whether he or she commenced or authorized the commencement of the proceeding or whether his or her client authorized the commencement of the proceeding. O. Reg. 427/01, s. 9; O. Reg. 575/07, s. 1.

Power of Court

(2) If the lawyer fails to deliver a notice in accordance with the request, the court may,

(a) order the lawyer to do so;

(b) stay the proceeding; and

(c) order the lawyer to pay the costs of the proceeding. O. Reg. 427/01, s. 9; O. Reg. 575/07, s. 1.

Proceeding Commenced without Lawyer's Authority

(3) If the lawyer declares that he or she did not commence or authorize the commencement of the proceeding, the court may, on motion without notice, stay or dismiss the proceeding. O. Reg. 427/01, s. 9; O. Reg. 575/07, s. 1.

Proceeding Commenced without Client's Authority

(4) If a lawyer has commenced a proceeding without the authority of his or her client, the court may, on motion, stay or dismiss the proceeding and order the lawyer to pay the costs of the proceeding. O. Reg. 427/01, s. 9; O. Reg. 575/07, s. 1.

Effect of Stay

(5) If a proceeding is stayed under this rule, no further step may be taken without leave of the court. O. Reg. 427/01, s. 9.

Change in Representation by Party

Notice of Change of Lawyer

15.03 (1) A party who has a lawyer of record may change the lawyer of record by serving on the lawyer and every other party and filing, with proof of service, a notice of change of lawyer (Form 15A) giving the name, address and telephone number of the new lawyer. O. Reg. 575/07, s. 12.

Notice of Appointment of Lawyer

(2) A party acting in person may appoint a lawyer of record by serving on every other party and filing, with proof of service, a notice of appointment of lawyer (Form 15B) giving the name, address and telephone number of the lawyer of record. O. Reg. 575/07, s. 12.

Notice of Intention to Act in Person

(3) Subject to subrule 15.01 (1) or (2), a party who has a lawyer of record may elect to act in person by serving on the lawyer and every other party and filing, with proof of service, a notice of intention to act in person (Form 15C) that sets out the party's address for service and telephone number. O. Reg. 575/07, s. 12; O. Reg. 248/21, s. 13.

Claim for Lawyer's Lien

(4) A party may move, on notice to the party's former lawyer of record, for an order determining whether and to what extent the lawyer has a right to a lawyer's lien. O. Reg. 575/07, s. 12.

(5) In the order, the court may impose such terms as are just in connection with the lien and its discharge. O. Reg. 377/95, s. 3.

Motion by Lawyer for Removal as Lawyer of Record

Notice to Client

15.04 (1) A lawyer may, on notice to their client, move for an order removing themselves as lawyer of record. O. Reg. 173/25, s. 10.

Notice to Other Parties

(2) A motion under subrule (1) shall also be on notice to every other party, but a motion record need not be served on those other parties. O. Reg. 173/25, s. 10.

Restriction, Party under Disability

(3) If a lawyer knows or believes that their client is under disability and no one is acting as the client's litigation guardian, subrule (1) does not apply unless the lawyer has made a motion under subrule 7.03.1 (1) to have a litigation guardian appointed for the client. O. Reg. 173/25, s. 10.

Requirements Respecting Privileged, Prejudicial Information

(4) The lawyer making the motion shall ensure that any information contained in the notice of motion or in the motion record that is subject to solicitor-client privilege or that could, if it were disclosed to another person, be prejudicial to the client, including the grounds for the motion, is redacted or omitted from the notice of motion or motion record before the following steps are taken:

1. Serving the notice of motion or, if applicable, motion record on a party other than the client.

2. Filing the notice of motion or motion record. O. Reg. 173/25, s. 10.

Unredacted Motion Materials

(5) The lawyer shall provide to the presiding judge or officer at the hearing the complete and unredacted versions of the notice of motion and motion record, which shall not form part of the court file. O. Reg. 173/25, s. 10.

Service of Motion Materials on Client

(6) The lawyer shall serve the notice of motion and motion record on the client,

(a) personally or by an alternative to personal service under rule 16.03; or

(b) by mailing a copy to the client at,

(i) the client's last known address, and

(ii) another address, if any, where the lawyer believes the copy is likely to come to the client's attention. O. Reg. 173/25, s. 10.

Party under Disability

(7) Where the party for whom the lawyer is acting is under disability, the complete and unredacted notice of motion and motion record, and any order removing the lawyer from the record, shall be served, by a method specified in subrule (6), on,

(a) the party, where practicable;

(b) the party's litigation guardian; and,

(c) if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(i) on the Children's Lawyer, if the party is a minor, or

(ii) on the Public Guardian and Trustee, if the party is not a minor. O. Reg. 173/25, s. 10.

Proof of Service

(8) The lawyer shall file,

(a) proof of service of the notice of motion and motion record on,

(i) the client, and

(ii) if applicable, the persons required to be served under subrule (7); and

(b) proof that notice of the motion was given to every other party. O. Reg. 173/25, s. 10.

Contents of Order

(9) An order removing a lawyer from the record shall include,

(a) the client's last known address, or the address for service if different;

(b) another address, if any, where the lawyer believes a copy of the order is likely to come to the client's attention;

(c) the telephone number and any email address of the client;

(d) if the client is a corporation, the text of subrules (12) and (13);

(e) if the client is a party under disability or a party who acts in a representative capacity, the text of subrules (14), (15) and, if applicable, (17); and

(f) if the client is not a corporation, a party under disability or a party who acts in a representative capacity, the text of subrules (16) and (17). O. Reg. 173/25, s. 10.

Service of Order on Client

(10) The lawyer shall serve an order made on motion under subrule (1) by a method of service specified in subrule (6) on the client and, if applicable, the persons required to be served under subrule (7). O. Reg. 173/25, s. 10.

Requirements Following Service of Order on Client

(11) As soon as possible after the order is served on the client, the lawyer shall,

(a) serve proof of service of the order, together with a copy of the order, on every other party; and

(b) file proof of service under subrule (10) and clause (a). O. Reg. 173/25, s. 10.

Corporations

(12) If an order is made removing from the record a lawyer acting for a corporation, the corporation shall, within 30 days after being served with the

order,

(a) appoint a new lawyer of record by serving a notice in Form 15B under subrule 15.03 (2); or

(b) obtain and serve on every other party an order under subrule 15.01 (2) granting it leave to be represented by a person other than a lawyer. O. Reg. 173/25, s. 10.

Same, Failure to Comply

(13) If the corporation fails to comply with subrule (12),

(a) the court may dismiss its proceeding or strike out its defence; and

(b) in an appeal,

(i) a judge of the appellate court may, on motion, dismiss the corporation's appeal, or

(ii) the court hearing the appeal may deny it the right to be heard. O. Reg. 173/25, s. 10.

Representative Parties and Parties Under Disability

(14) If an order is made removing from the record a lawyer acting for a party who acts in a representative capacity or who is under disability, the party acting in a representative capacity or the litigation guardian of the party under disability shall, within 30 days after being served with the order, appoint a new lawyer of record by serving a notice in Form 15B under subrule 15.03 (2). O. Reg. 173/25, s. 10.

Same, Failure to Comply

(15) If a party or litigation guardian fails to comply with subrule (14),

(a) another party to the proceeding shall move for directions or request a case conference and no party may take any further step in the proceeding until the motion has been heard or the case conference has been held, unless the court orders otherwise; or

(b) if the proceeding is a claim commenced on behalf of a minor under section 61 of the *Family Law Act*, subrule (17) applies with necessary modifications. O. Reg. 173/25, s. 10.

Other Types of Clients

(16) If an order is made removing from the record a lawyer for a client to whom subrules (12) and (14) do not apply, the client shall, within 30 days after being served with the order,

(a) appoint a new lawyer of record by serving a notice in Form 15B under subrule 15.03 (2); or

(b) serve a notice of intention to act in person (Form 15C) under subrule 15.03 (3). O. Reg. 173/25, s. 10.

Same, Failure to Comply

(17) If a client to whom subrule (16) applies fails to comply with that subrule,

(a) the court may dismiss the client's proceeding or strike out the client's defence; and

(b) in an appeal,

(i) a judge of the appellate court may, on motion, dismiss the client's appeal, or

(ii) the court hearing the appeal may deny the client the right to be heard. O. Reg. 173/25, s. 10.

Duty of Lawyer of Record

15.05 A lawyer of record shall act as and remains the lawyer of record for his or her client until,

(a) the client delivers a notice under rule 15.03; or

(b) an order removing the lawyer from the record has been entered and the lawyer has satisfied the service and filing requirements of subrules 15.04 (6), (7) (if applicable), (8), (10) and (11). O. Reg. 575/07, s. 14; O. Reg. 281/16, s. 5; O. Reg. 173/25, s. 11.

Where a Lawyer of Record Has Ceased to Practise

15.06 Where the lawyer of record for a party has ceased to practise law, and the party for whom the lawyer acted has not served a notice under rule 15.03, any other party may serve a document on the party by mailing a copy to the party at the party's last known address, or may move for directions. O. Reg. 575/07, s. 14.

Lawyer from Another Province

15.07 If a lawyer from another province represents a party to a proceeding, any party to the proceeding may move for directions for the conduct of the proceeding. O. Reg. 575/07, s. 14.

SERVICE

RULE 16 SERVICE OF DOCUMENTS

General Rules for Manner of Service

Originating Process

16.01 (1) An originating process shall be served personally as provided in rule 16.02 or by an alternative to personal service as provided in rule 16.03. R.R.O. 1990, Reg. 194, r. 16.01 (1); O. Reg. 131/04, s. 8.

(2) A party who has not been served with the originating process but delivers a defence, notice of intent to defend or notice of appearance shall be deemed to have been served with the originating process as of the date of delivery. O. Reg. 113/01, s. 2.

All Other Documents

(3) No other document need be served personally, or by an alternative to personal service, unless these rules or an order require personal service or an alternative to personal service. R.R.O. 1990, Reg. 194, r. 16.01 (3).

(4) Any document that is not required to be served personally or by an alternative to personal service,

(a) shall be served on a party who has a lawyer of record by serving the lawyer, and service may be made in a manner provided in rule 16.05;

(b) may be served on a party acting in person or on a person who is not a party,

(i) by mailing a copy of the document to the last address for service provided by the party or other person or, if no such address has been provided, to the party's or person's last known address,

(ii) by personal service or by an alternative to personal service,

(iii) by use of an electronic document exchange of which the party or person is a member or subscriber, but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day, or

(iv) by emailing a copy to the last email address for service provided by the party or other person or, if no such email address has been provided, to the party's or person's last known email address in accordance with subrule 16.06.1 (1), but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day. R.R.O. 1990, Reg. 194, r. 16.01 (4); O. Reg. 260/05, s. 3; O. Reg. 575/07, s. 15; O. Reg. 170/14, s. 3; O. Reg. 689/20, s. 14; O. Reg. 248/21, s. 3.

Personal Service

16.02 (1) Where a document is to be served personally, the service shall be made,

Individual

(a) on an individual, other than a person under disability, by leaving a copy of the document with the individual;

Municipality

(b) on a municipal corporation, by leaving a copy of the document with the chair, mayor, warden or reeve of the municipality, with the clerk or deputy clerk of the municipality or with a lawyer for the municipality;

Corporation

(c) on any other corporation, by leaving a copy of the document with an officer, director or agent of the corporation, or with a person at any place of business of the corporation who appears to be in control or management of the place of business;

Board or Commission

(d) on a board or commission, by leaving a copy of the document with a member or officer of the board or commission;

Person outside Ontario Carrying on Business in Ontario

(e) on a person outside Ontario who carries on business in Ontario, by leaving a copy of the document with anyone carrying on business in Ontario for the person;

Crown in Right of Canada

(f) on the Crown in right of Canada, in accordance with subsection 23 (2) of the *Crown Liability and Proceedings Act* (Canada);

Crown in Right of Ontario

(g) on the Crown in right of Ontario, in accordance with section 15 of the *Crown Liability and Proceedings Act, 2019*;

Attorney General

(h) on the Attorney General of Ontario, by leaving a copy of the document with an employee of the Crown at the Crown Law Office (Civil Law) of the Ministry of the Attorney General;

Absentee

(i) on an absentee, by leaving a copy of the document with the absentee's litigation guardian, if there is one or, if not, with the Public

Guardian and Trustee;

Minor

(j) on a minor, by leaving a copy of the document with the litigation guardian if one has been appointed or, if not, with the minor and, where the minor resides with a parent or other person having the care or lawful custody of the minor, by leaving another copy of the document with the parent or other person, but, where the proceeding is in respect of the minor's interest in an estate or trust, the minor shall be served by leaving with the Children's Lawyer a copy of the document bearing the name and address of the minor;

Mentally Incapable Person

(k) on a mentally incapable person,

(i) if there is a guardian or an attorney acting under a power of attorney for personal care with authority to act in the proceeding, by leaving a copy of the document with the guardian or attorney,

(ii) if there is no guardian or attorney acting under a power of attorney for personal care with authority to act in the proceeding but there is an attorney under a power of attorney with authority to act in the proceeding, by leaving a copy of the document with the attorney and leaving an additional copy with the person,

(iii) if there is neither a guardian nor an attorney with authority to act in the proceeding, by leaving a copy of the document bearing the person's name and address with the Public Guardian and Trustee and leaving an additional copy with the person;

(l) REVOKED: O. Reg. 69/95, s. 6 (2).

Partnership

(m) on a partnership, by leaving a copy of the document with any one or more of the partners or with a person at the principal place of business of the partnership who appears to be in control or management of the place of business; and

Sole Proprietorship

(n) on a sole proprietorship, by leaving a copy of the document with the sole proprietor or with a person at the principal place of business of the sole proprietorship who appears to be in control or management of the place of business. R.R.O. 1990, Reg. 194, r. 16.02 (1); O. Reg. 465/93, s. 3; O. Reg. 69/95, ss. 6, 19, 20; O. Reg. 536/96, s. 2; O. Reg. 575/07,

ss. 1, 16; O. Reg. 316/20, s. 1; O. Reg. 107/21, s. 1; O. Reg. 248/21, s. 15; O. Reg. 173/25, s. 12.

(2) A person effecting personal service of a document need not produce the original document or have it in his or her possession. R.R.O. 1990, Reg. 194, r. 16.02 (2).

Alternatives to Personal Service

Where Available

16.03 (1) Where these rules or an order of the court permit service by an alternative to personal service, service shall be made in accordance with this rule. R.R.O. 1990, Reg. 194, r. 16.03 (1).

Acceptance of Service by Lawyer

(2) Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer's office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance. O. Reg. 575/07, s. 17.

(3) By accepting service the lawyer shall be deemed to represent to the court that the lawyer has the authority of his or her client to accept service. R.R.O. 1990, Reg. 194, r. 16.03 (3); O. Reg. 575/07, s. 1.

Service by Mail to Last Known Address

(4) Service of a document may be made by sending a copy of the document together with an acknowledgment of receipt card (Form 16A) by mail to the last known address of the person to be served, but service by mail under this subrule is only effective as of the date the sender receives the card. O. Reg. 24/00, s. 3.

Service at Place of Residence

(5) Where an attempt is made to effect personal service at a person's place of residence and for any reason personal service cannot be effected, the document may be served by,

(a) leaving a copy, in a sealed envelope addressed to the person, at the place of residence with anyone who appears to be an adult member of the same household; and

(b) on the same day or the following day mailing another copy of the document to the person at the place of residence,

and service in this manner is effective on the fifth day after the document is mailed. R.R.O. 1990, Reg. 194, r. 16.03 (5).

Service on a Corporation

(6) Where the head office, registered office or principal place of business of a corporation or, in the case of an extra-provincial corporation, the attorney for service in Ontario cannot be found at the last address recorded with the Ministry of Public and Business Service Delivery, service may be made on the corporation by mailing a copy of the document to the corporation or to the attorney for service in Ontario, as the case may be, at that address. R.R.O. 1990, Reg. 194, r. 16.03 (6); O. Reg. 170/14, s. 4; O. Reg. 520/22, s. 2.

Crown in Right of Ontario, Attorney General

(7) Service of a document on the Crown in right of Ontario or on the Attorney General of Ontario may be made by emailing a copy of the document in accordance with subrule 16.06.1 (1) to the email address for service specified for the Crown or the Attorney General, as the case may be, on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

Children's Lawyer

(8) Service of a document on the Children's Lawyer, and any service of a document that involves leaving a copy with the Children's Lawyer, may be made with respect to the Children's Lawyer by emailing a copy of the document in accordance with subrule 16.06.1 (1) to the email address for service specified for the Children's Lawyer on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

Public Guardian and Trustee

(9) Service of a document on the Public Guardian and Trustee, and any service of a document that involves leaving a copy with the Public Guardian and Trustee, may be made with respect to the Public Guardian and Trustee by emailing a copy of the document in accordance with subrule 16.06.1 (1) to the email address for service specified for the Public Guardian and Trustee on the website of the Ministry of the Attorney General. O. Reg. 107/21, s. 2.

Deemed Service, Email

(10) Where service is made by email under subrule (7), (8) or (9) between 4 p.m. and midnight, it is deemed to have been made on the following day. O. Reg. 107/21, s. 2.

Substituted Service or Dispensing with Service

Where Order May be Made

16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under

these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service. R.R.O. 1990, Reg. 194, r. 16.04 (1).

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective. R.R.O. 1990, Reg. 194, r. 16.04 (2).

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules. R.R.O. 1990, Reg. 194, r. 16.04 (3).

Service on Lawyer of Record

16.05 (1) Service of a document on the lawyer of record of a party may be made,

(a) by mailing a copy to the lawyer's office;

(b) by leaving a copy with a lawyer or employee in the lawyer's office;

(c) by depositing a copy at a document exchange of which the lawyer is a member or subscriber, but service under this clause is effective only if the document or a copy of it and the copy deposited are date stamped by the document exchange in the presence of the person depositing the copy;

(c.1) by use of an electronic document exchange of which the lawyer is a member or subscriber, but, where service is made under this clause between 4 p.m. and midnight, it is deemed to have been made on the following day;

(d) Revoked: O. Reg. 689/20, s. 15 (1).

(e) by sending a copy to the lawyer's office by courier; or

(f) by emailing a copy to the last email address for service provided by the lawyer or, if no such email address has been provided, to the lawyer's last known email address in accordance with subrule 16.06.1 (1), but, where service is made under this clause between 4 p.m. and midnight, it is deemed to have been made on the following day. O. Reg. 575/07, s. 18; O. Reg. 170/14, s. 5 (1-3); O. Reg. 689/20, s. 15 (1, 2).

(2) Service of a document by depositing a copy at a document exchange under clause (1) (c) is effective on the day following the day on which it was deposited and date stamped, unless that following day is a holiday, in which

case service is effective on the next day that is not a holiday. R.R.O. 1990, Reg. 194, r. 16.05 (2).

(2.1), (3) Revoked: O. Reg. 689/20, s. 15 (3).

(3.1) Revoked: O. Reg. 170/14, s. 5 (4).

(3.2) Revoked: O. Reg. 689/20, s. 15 (3).

(4) Revoked: O. Reg. 170/14, s. 5 (5).

Service by Mail

Manner of Service

16.06 (1) Where a document is to be served by mail under these rules, a copy of the document shall be served by regular lettermail or by registered mail. O. Reg. 535/92, s. 6 (1).

Effective Date

(2) Service of a document by mail, except under subrule 16.03 (4), is effective on the fifth day after the document is mailed but the document may be filed with proof of service before service becomes effective. R.R.O. 1990, Reg. 194, r. 16.06 (2); O. Reg. 535/92, s. 6 (2).

Service by Email

Required Information

16.06.1 (1) The email message to which a document served by email in accordance with these rules is attached shall include,

(a) the sender's name, address, telephone number and email address;

(b) the date and time of transmission; and

(c) the name and telephone number of a person to contact in the event of a transmission problem. O. Reg. 170/14, s. 6; O. Reg. 689/20, s. 16 (1, 2).

(2) Revoked: O. Reg. 689/20, s. 16 (3).

Service by Courier

16.06.2 Service of a document by courier in accordance with these rules is effective on the second day following the day the courier was given the document, or, if the second day is a holiday, on the next day that is not a holiday. O. Reg. 689/20, s. 17.

Where Document Does Not Reach Person Served

16.07 Even though a person has been served with a document in accordance with these rules, the person may show on a motion to set aside the

consequences of default, for an extension of time or in support of a request for an adjournment, that the document,

(a) did not come to the person's notice; or

(b) came to the person's notice only at some time later than when it was served or is deemed to have been served. R.R.O. 1990, Reg. 194, r. 16.07.

Validating Service

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service. R.R.O. 1990, Reg. 194, r. 16.08.

Proof of Service

Affidavit of Service

16.09 (1) Service of a document may be proved by an affidavit of the person who served it (Form 16B). R.R.O. 1990, Reg. 194, r. 16.09 (1).

Lawyer's Certificate

(1.1) A lawyer may prove service of a document by a lawyer's certificate of service (Form 16B.1) if the lawyer served the document or caused it to be served and is satisfied that service was effected. O. Reg. 520/22, s. 3 (1).

Sheriff's Certificate

(2) Personal service or service under subrule 16.03 (5) (service at place of residence) of a document by a sheriff may be proved by a sheriff's certificate of service (Form 16C). R.R.O. 1990, Reg. 194, r. 16.09 (2); O. Reg. 520/22, s. 3 (2).

Lawyer's Admission or Acceptance Sufficient Proof

(3) Where a lawyer admits or accepts service of a document on behalf of a party, the lawyer's written admission or acceptance of service is sufficient proof of service and need not be verified by any other proof of service. O. Reg. 520/22, s. 3 (3).

Document Exchange

(4) Service of a document under clause 16.05 (1) (c) (document exchange) may be proved by the date stamp on the document or a copy of it. R.R.O.

1990, Reg. 194, r. 16.09 (4).

Electronic Document Exchange

(4.1) Service of a document under subclause 16.01 (4) (b) (iii) or clause 16.05 (1) (c.1) (electronic document exchange) may be proved by a record of service generated by the electronic document exchange that identifies the document that was served and indicates,

(a) the total number of pages served;

(b) the name of the person who served the document and, if the person served the document on behalf of a party, the name of the party and the nature of the relationship between the person and the party;

(c) the name of the person on whom the document was served; and

(d) the date on and time at which the document was served through the electronic document exchange. O. Reg. 170/14, s. 7 (1).

Proof of Service on Document

(5) The affidavit or certificate of service may be printed on the backsheet or on a stamp or sticker affixed to the backsheet of the document served. R.R.O. 1990, Reg. 194, r. 16.09 (5).

(6) Revoked: O. Reg. 689/20, s. 18.

RULE 17 SERVICE OUTSIDE ONTARIO

Definition

17.01 In rules 17.02 to 17.06,

"originating process" includes a counterclaim against only parties to the main action, and a crossclaim. R.R.O. 1990, Reg. 194, r. 17.01.

Service outside Ontario without Leave

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Property in Ontario

(a) in respect of real or personal property in Ontario;

Administration of Estates

(b) in respect of the administration of the estate of a deceased person,

(i) in respect of real property in Ontario, or

(ii) in respect of personal property, where the deceased person, at the time of death, was resident in Ontario;

Interpretation of an Instrument

(c) for the interpretation, rectification, enforcement or setting aside of a deed, will, contract or other instrument in respect of,

(i) real or personal property in Ontario, or

(ii) the personal property of a deceased person who, at the time of death, was resident in Ontario;

Trustee Where Assets Include Property in Ontario

(d) against a trustee in respect of the execution of a trust contained in a written instrument where the assets of the trust include real or personal property in Ontario;

Mortgage on Property in Ontario

(e) for foreclosure, sale, payment, possession or redemption in respect of a mortgage, charge or lien on real or personal property in Ontario;

Contracts

(f) in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario;

Tort Committed in Ontario

(g) in respect of a tort committed in Ontario;

(h) REVOKED: O. Reg. 231/13, s. 5.

Injunctions

(i) for an injunction ordering a party to do, or refrain from doing, anything in Ontario or affecting real or personal property in Ontario;

(j)-(l) REVOKED: O. Reg. 131/04, s. 9.

Judgment of Court Outside Ontario

(m) on a judgment of a court outside Ontario;

Authorized by Statute

(n) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario;

(o) REVOKED: O. Reg. 43/14, s. 6.

Person Resident or Carrying on Business in Ontario

(p) against a person ordinarily resident or carrying on business in Ontario;

Counterclaim, Crossclaim or Third Party Claim

(q) properly the subject matter of a counterclaim, crossclaim or third or subsequent party claim under these rules; or

Taxes

(r) made by or on behalf of the Crown or a municipal corporation to recover money owing for taxes or other debts due to the Crown or the municipality. R.R.O. 1990, Reg. 194, r. 17.02; O. Reg. 171/98, s. 2; O. Reg. 131/04, s. 9; O. Reg. 231/13, s. 5; O. Reg. 43/14, s. 6.

Service outside Ontario with Leave

17.03 (1) In any case to which rule 17.02 does not apply, the court may grant leave to serve an originating process or notice of a reference outside Ontario. R.R.O. 1990, Reg. 194, r. 17.03 (1).

(2) A motion for leave to serve a party outside Ontario may be made without notice, and shall be supported by an affidavit or other evidence showing in which place or country the person is or probably may be found, and the grounds on which the motion is made. R.R.O. 1990, Reg. 194, r. 17.03 (2).

Additional Requirements for Service outside Ontario

17.04 (1) An originating process served outside Ontario without leave shall disclose the facts and specifically refer to the provision of rule 17.02 relied on in support of such service. R.R.O. 1990, Reg. 194, r. 17.04 (1).

(2) Where an originating process is served outside Ontario with leave of the court, the originating process shall be served together with the order granting leave and any affidavit or other evidence used to obtain the order. R.R.O. 1990, Reg. 194, r. 17.04 (2).

Manner of Service outside Ontario

Definitions

17.05 (1) In this rule,

"contracting state" means a contracting state under the Convention; ("État contractant")

"Convention" means the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965. ("Convention") R.R.O. 1990, Reg. 194, r. 17.05 (1).

General Manner of Service

(2) An originating process or other document to be served outside Ontario in a jurisdiction that is not a contracting state may be served in the manner provided by these rules for service in Ontario, or in the manner provided by the law of the jurisdiction where service is made, if service made in that manner could reasonably be expected to come to the notice of the person to be served. R.R.O. 1990, Reg. 194, r. 17.05 (2).

Manner of Service in Convention States

(3) An originating process or other document to be served outside Ontario in a contracting state shall be served,

(a) through the central authority in the contracting state; or

(b) in a manner that is permitted by the Convention and that would be permitted by these rules if the document were being served in Ontario. O. Reg. 535/92, s. 7; O. Reg. 231/13, s. 6.

Proof of Service

(4) Service may be proved,

(a) in the manner provided by these rules for proof of service in Ontario;

(b) in the manner provided by the law of the jurisdiction where service is made; or

(c) in accordance with the Convention, if service is made in a contracting state (Forms 17A to 17C). R.R.O. 1990, Reg. 194, r. 17.05 (4).

Motion to Set Aside Service outside Ontario

17.06 (1) A party who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,

(a) for an order setting aside the service and any order that authorized the service; or

(b) for an order staying the proceeding. R.R.O. 1990, Reg. 194, r. 17.06 (1).

(2) The court may make an order under subrule (1) or such other order as is just where it is satisfied that,

(a) service outside Ontario is not authorized by these rules;

(b) an order granting leave to serve outside Ontario should be set aside; or

(c) Ontario is not a convenient forum for the hearing of the proceeding. R.R.O. 1990, Reg. 194, r. 17.06 (2).

(3) Where on a motion under subrule (1) the court concludes that service outside Ontario is not authorized by these rules, but the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03, the court may make an order validating the service. R.R.O. 1990, Reg. 194, r. 17.06 (3).

(4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party. R.R.O. 1990, Reg. 194, r. 17.06 (4).

RULE 18 TIME FOR DELIVERY OF STATEMENT OF DEFENCE

Time for Delivery of Statement of Defence

18.01 Except as provided in rule 18.02 or subrule 19.01 (5) (late delivery of defence) or 27.04 (2) (counterclaim against plaintiff and non-party), a statement of defence (Form 18A) shall be delivered,

(a) within twenty days after service of the statement of claim, where the defendant is served in Ontario;

(b) within forty days after service of the statement of claim, where the defendant is served elsewhere in Canada or in the United States of America; or

(c) within sixty days after service of the statement of claim, where the defendant is served anywhere else. R.R.O. 1990, Reg. 194, r. 18.01.

Notice of Intent to Defend

18.02 (1) A defendant who is served with a statement of claim and intends to defend the action may deliver a notice of intent to defend (Form 18B) within the time prescribed for delivery of a statement of defence. R.R.O. 1990, Reg. 194, r. 18.02 (1).

(2) A defendant who delivers a notice of intent to defend within the prescribed time is entitled to ten days, in addition to the time prescribed by rule 18.01,

within which to deliver a statement of defence. R.R.O. 1990, Reg. 194, r. 18.02 (2).

(3) Subrules (1) and (2) apply, with necessary modifications, to,

(a) a defendant to a counterclaim who is not already a party to the main action and who has been served with a statement of defence and counterclaim; and

(b) a third party who has been served with a third party claim. R.R.O. 1990, Reg. 194, r. 18.02 (3).

18.03 Revoked: O. Reg. 457/01, s. 4.

DISPOSITION WITHOUT TRIAL

RULE 19 DEFAULT PROCEEDINGS

Noting Default

Where no Defence Delivered

19.01 (1) Where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01 (2), require the registrar to note the defendant in default. R.R.O. 1990, Reg. 194, r. 19.01 (1); O. Reg. 113/01, s. 3.

(1.1) REVOKED: O. Reg. 43/14, s. 7.

Where Defence Struck Out

(2) Where the statement of defence of a defendant has been struck out,

(a) without leave to deliver another; or

(b) with leave to deliver another, and the defendant has failed to deliver another within the time allowed,

the plaintiff may, on filing a copy of the order striking out the statement of defence, require the registrar to note the defendant in default. R.R.O. 1990, Reg. 194, r. 19.01 (2).

Noting of Default by Co-defendant

(3) Where a plaintiff has failed to require the registrar to note a defendant in default, the court on motion of any other defendant who has delivered a statement of defence, on notice to the plaintiff, may order the registrar to note the other defendant in default. R.R.O. 1990, Reg. 194, r. 19.01 (3)

Party under Disability

(4) If a party to an action is under disability, the party may be noted in default only with leave of a judge obtained on motion under rule 7.07. O. Reg. 19/03, s. 5.

Late Delivery of Defence

(5) A defendant may deliver a statement of defence at any time before being noted in default under this rule. R.R.O. 1990, Reg. 194, r. 19.01 (5).

Consequences of Noting Default

19.02 (1) A defendant who has been noted in default,

(a) is deemed to admit the truth of all allegations of fact made in the statement of claim; and

(b) shall not deliver a statement of defence or take any other step in the action, other than a motion to set aside the noting of default or any judgment obtained by reason of the default, except with leave of the court or the consent of the plaintiff. R.R.O. 1990, Reg. 194, r. 19.02 (1).

(2) Despite any other rule, where a defendant has been noted in default, any step in the action that requires the consent of a defendant may be taken without the consent of the defendant in default. R.R.O. 1990, Reg. 194, r. 19.02 (2).

(3) Despite any other rule, a defendant who has been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise or where a party requires the personal attendance of the defendant, and except as provided in,

(a) subrule 26.04 (3) (amended pleading);

(b) subrule 27.04 (3) (counterclaim);

(c) subrule 28.04 (2) (crossclaim);

(d) subrule 29.11 (2) (fourth or subsequent party claim);

(e) subrule 54.08 (1) (motion for confirmation of report on reference);

(f) subrule 54.09 (1) (report on reference);

(g) subrule 54.09 (3) (motion to oppose confirmation of report on reference);

(h) subrule 55.02 (2) (notice of hearing for directions on reference);

(i) clause 64.03 (8) (a) (notice of taking of account in foreclosure action);

(j) subrule 64.03 (24) (notice of reference in action converted from foreclosure to sale);

(k) subrule 64.04 (7) (notice of taking of account in sale action);

(l) subrule 64.06 (8) (notice of reference in mortgage action);

(m) subrule 64.06 (17) (report on reference in mortgage action); and

(n) subrule 64.06 (21) (notice of change of account);

(o), (p) REVOKED: O. Reg. 131/04, s. 10 (2).

R.R.O. 1990, Reg. 194, r. 19.02 (3); O. Reg. 69/95, s. 19; O. Reg. 131/04, s. 10.

Setting Aside the Noting of Default

19.03 (1) The noting of default may be set aside by the court on such terms as are just. R.R.O. 1990, Reg. 194, r. 19.03 (1).

(2) Where a defendant delivers a statement of defence with the consent of the plaintiff under clause 19.02 (1) (b), the noting of default against the defendant shall be deemed to have been set aside. R.R.O. 1990, Reg. 194, r. 19.03 (2).

By Signing Default Judgment

Where Available

19.04 (1) Where a defendant has been noted in default, the plaintiff may require the registrar to sign judgment against the defendant in respect of a claim for,

(a) a debt or liquidated demand in money, including interest if claimed in the statement of claim (Form 19A);

(b) the recovery of possession of land (Form 19B);

(c) the recovery of possession of personal property (Form 19C); or

(d) foreclosure, sale or redemption of a mortgage (Forms 64B to 64D, 64G to 64K and 64M). R.R.O. 1990, Reg. 194, r. 19.04 (1).

(1.1) REVOKED: O. Reg. 14/04, s. 13.

Requisition for Default Judgment

(2) Before the signing of default judgment, the plaintiff shall file with the registrar a requisition for default judgment (Form 19D),

(a) stating that the claim comes within the class of cases for which default judgment may properly be signed;

(b) stating whether there has been any partial payment of the claim and setting out the date and amount of any partial payment;

(c) where the plaintiff has claimed prejudgment interest in the statement of claim, setting out how the interest is calculated;

(d) where the plaintiff has claimed postjudgment interest in the statement of claim at a rate other than as provided in section 129 of the *Courts of Justice Act*, setting out the rate; and

(e) stating whether the plaintiff wishes costs to be fixed by the registrar or assessed. R.R.O. 1990, Reg. 194, r. 19.04 (2).

Registrar may Decline to Sign Default Judgment

(3) The registrar may decline to sign default judgment if uncertain,

(a) whether the claim comes within the class of cases for which default judgment may properly be signed; or

(b) of the amount or rate that is properly recoverable for prejudgment or postjudgment interest. O. Reg. 171/98, s. 4.

(3.1) If the registrar declines to sign default judgment, the plaintiff may,

(a) move before a judge for judgment under rule 19.05; or

(b) in the case of a claim referred to in subrule (1), make a motion to the court for default judgment. O. Reg. 171/98, s. 4.

Where Claim Partially Satisfied

(4) Where the claim has been partially satisfied, the default judgment shall be confined to the remainder of the claim. R.R.O. 1990, Reg. 194, r. 19.04 (4).

Postjudgment Interest

(5) Where the registrar signs default judgment and the plaintiff has claimed postjudgment interest in the statement of claim at a rate other than as provided in section 129 of the *Courts of Justice Act*, the default judgment shall provide for postjudgment interest at the rate claimed. R.R.O. 1990, Reg. 194, r. 19.04 (5).

Costs

(6) On signing a default judgment, the registrar shall fix the costs under Tariff A to which the plaintiff is entitled against the defendant in default and shall include the costs in the judgment unless,

(a) the judgment directs a reference; or

(b) the plaintiff states in the requisition that he or she wishes to have the costs assessed,

in which case the judgment shall include costs to be determined on the reference or on assessment. R.R.O. 1990, Reg. 194, r. 19.04 (6).

By Motion for Judgment

19.05 (1) Where a defendant has been noted in default, the plaintiff may move before a judge for judgment against the defendant on the statement of claim in respect of any claim for which default judgment has not been signed. R.R.O. 1990, Reg. 194, r. 19.05 (1).

(2) A motion for judgment under subrule (1) shall be supported by evidence given by affidavit if the claim is for unliquidated damages. R.R.O. 1990, Reg. 194, r. 19.05 (2); O. Reg. 131/04, s. 11.

(3) On a motion for judgment under subrule (1), the judge may grant judgment, dismiss the action or order that the action proceed to trial and that oral evidence be presented. R.R.O. 1990, Reg. 194, r. 19.05 (3).

(4) Where an action proceeds to trial, a motion for judgment on the statement of claim against a defendant noted in default may be made at the trial. R.R.O. 1990, Reg. 194, r. 19.05 (4).

Facts Must Entitle Plaintiff to Judgment

19.06 A plaintiff is not entitled to judgment on a motion for judgment or at trial merely because the facts alleged in the statement of claim are deemed to be admitted, unless the facts entitle the plaintiff to judgment. R.R.O. 1990, Reg. 194, r. 19.06.

Effect of Default Judgment

19.07 A judgment obtained against a defendant who has been noted in default does not prevent the plaintiff from proceeding against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 19.07.

Setting Aside Default Judgment

19.08 (1) A judgment against a defendant who has been noted in default that is signed by the registrar or granted by the court on motion under rule 19.04 may be set aside or varied by the court on such terms as are just. R.R.O. 1990, Reg. 194, r. 19.08 (1).

(2) A judgment against a defendant who has been noted in default that is obtained on a motion for judgment on the statement of claim under rule 19.05 or that is obtained after trial may be set aside or varied by a judge on such terms as are just. R.R.O. 1990, Reg. 194, r. 19.08 (2).

(3) On setting aside a judgment under subrule (1) or (2) the court or judge may also set aside the noting of default under rule 19.03. R.R.O. 1990, Reg.

194, r. 19.08 (3).

Application to Counterclaims, Crossclaims and Third Party Claims

19.09 Rules 19.01 to 19.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims, subject to rules 28.07 (default of defence to crossclaim) and 29.07 (default of defence to third party claim). R.R.O. 1990, Reg. 194, r. 19.09.

RULE 20 SUMMARY JUDGMENT

Where Available

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

Evidence on Motion

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

Factums Required

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum that meets the requirements of rule

4.06.1. O. Reg. 14/04, s. 14; O. Reg. 300/24, s. 5.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) REVOKED: O. Reg. 394/09, s. 4.

Disposition of Motion

General

20.04 (1) REVOKED: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or

grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue is Question of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to an associate judge, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

Where Trial is Necessary

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(j.1) that any oral examination of a person or witness proceed by video conference;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs. O. Reg. 438/08, s. 14; O. Reg. 689/20, s. 19.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice. O. Reg. 438/08, s. 14.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration. O. Reg. 438/08, s. 14.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs. O. Reg. 438/08, s. 14.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just. O. Reg. 438/08, s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default. O. Reg. 438/08, s. 14.

Costs Sanctions for Improper Use of Rule

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay. O. Reg. 438/08, s. 14.

Effect of Summary Judgment

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 20.07.

Stay of Execution

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just. R.R.O. 1990, Reg. 194, r. 20.08.

Application to Counterclaims, Crossclaims and Third Party Claims

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 20.09.

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

Where Available

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

Motion to be Made Promptly

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

Factums Required

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum that meets the requirements of rule 4.06.1. O. Reg. 14/04, s. 15; O. Reg. 300/24, s. 6.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

(4) Revoked: O. Reg. 394/09, s. 5.

RULE 22 SPECIAL CASE

Where Available

22.01 (1) Where the parties to a proceeding concur in stating a question of law in the form of a special case for the opinion of the court, any party may move before a judge to have the special case determined. R.R.O. 1990, Reg. 194, r. 22.01 (1).

(2) Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case. R.R.O. 1990, Reg. 194, r. 22.01 (2).

Factums Required

22.02 (1) On a motion under rule 22.01, each party shall serve on every other party to the motion a factum that meets the requirements of rule 4.06.1. O. Reg. 14/04, s. 16; O. Reg. 300/24, s. 7.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 6.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days

before the hearing. O. Reg. 394/09, s. 6.

(4) REVOKED: O. Reg. 394/09, s. 6.

Removal into Court of Appeal

22.03 (1) A motion under rule 22.01 may be made to a judge of the Court of Appeal for leave to have a special case determined in the first instance by that court and the judge may grant leave where subrule 22.01 (2) is satisfied and where the special case raises an issue in respect of which,

(a) there are conflicting decisions of judges in Ontario and there is no decision of an appellate court in Ontario;

(b) there is a conflict between decisions of an appellate court in Ontario and an appellate court of another province, or between decisions of appellate courts of two or more other provinces; or

(c) one of the parties seeks to establish that a decision of an appellate court in Ontario should not be followed. R.R.O. 1990, Reg. 194, r. 22.03 (1).

(2) A judge who grants leave under subrule (1) may give directions in respect of the time and form in which the case is to be listed for hearing and the exchange and filing of factums, and subject to any such directions, Rule 61 (appeals to an appellate court) applies with necessary modifications. R.R.O. 1990, Reg. 194, r. 22.03 (2).

Form of Special Case

22.04 A special case (Form 22A) shall,

(a) set out concisely the material facts, as agreed on by the parties, that are necessary to enable the court to determine the question stated;

(b) refer to and include a copy of any documents that are necessary to determine the question;

(c) set out the relief sought, as agreed on by the parties, on the determination of the question of law; and

(d) be signed by the lawyers for the parties. R.R.O. 1990, Reg. 194, r. 22.04; O. Reg. 575/07, s. 2.

Hearing of Special Case

22.05 (1) On the hearing of a special case the court may draw any reasonable inference from the facts agreed on by the parties and documents referred to in the special case. R.R.O. 1990, Reg. 194, r. 22.05 (1).

(2) On the determination of the question of law the court may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 22.05 (2).

RULE 23 DISCONTINUANCE AND WITHDRAWAL

Discontinuance by Plaintiff

23.01 (1) A plaintiff may discontinue all or part of an action against any defendant,

(a) before the close of pleadings, by serving on all parties who have been served with the statement of claim a notice of discontinuance (Form 23A) and filing the notice with proof of service;

(b) after the close of pleadings, with leave of the court; or

(c) at any time, by filing the consent of all parties. R.R.O. 1990, Reg. 194, r. 23.01 (1); O. Reg. 427/01, s. 10.

(2) If a party to an action is under disability, the action may be discontinued by or against the party only with leave of a judge obtained on motion under rule 7.07.1. O. Reg. 19/03, s. 6.

Effect of Discontinuance on Counterclaim

23.02 Where an action is discontinued against a defendant who has counterclaimed, the defendant may deliver within thirty days after the discontinuance a notice of election to proceed with the counterclaim (Form 23B), and if the defendant fails to do so, the counterclaim shall be deemed to be discontinued without costs. R.R.O. 1990, Reg. 194, r. 23.02.

Effect of Discontinuance on Crossclaim or Third Party Claim

23.03 (1) Where an action is discontinued against a defendant who has crossclaimed or made a third party claim, the crossclaim or third party claim shall be deemed to be dismissed thirty days after the discontinuance unless the court orders otherwise during the thirty-day period. R.R.O. 1990, Reg. 194, r. 23.03; O. Reg. 394/09, s. 7 (1).

(1.1) Where an action against a defendant against whom a crossclaim has been made is discontinued, the crossclaim shall be deemed to be dismissed thirty days after the discontinuance, unless the court orders otherwise during the thirty-day period. O. Reg. 394/09, s. 7 (2).

Effect of deemed dismissal on subsequent action

(2) A deemed dismissal under this rule is not a defence to a subsequent action unless the court orders otherwise during the thirty-day period. O. Reg. 770/92, s. 6; O. Reg. 394/09, s. 7 (3).

Effect of Discontinuance on Subsequent Action

23.04 (1) The discontinuance of all or part of an action is not a defence to a subsequent action, unless the order giving leave to discontinue or a consent filed by the parties provides otherwise. R.R.O. 1990, Reg. 194, r. 23.04 (1).

(2) Where a plaintiff has discontinued and is liable for costs of an action, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the discontinued action, the court may order a stay of the subsequent action until the costs of the discontinued action have been paid. R.R.O. 1990, Reg. 194, r. 23.04 (2).

Costs of Discontinuance, Deemed Dismissal

23.05 (1) If all or part of an action is discontinued, any party to the action may, within thirty days after the action is discontinued, make a motion respecting the costs of the action. O. Reg. 394/09, s. 8.

(2) If a crossclaim or third party claim is deemed to be dismissed, any party to the crossclaim or third party claim may, within thirty days after the deemed dismissal, make a motion respecting the costs of the crossclaim or third party claim. O. Reg. 394/09, s. 8.

Withdrawal by Defendant

23.06 (1) A defendant may withdraw all or part of the statement of defence with respect to any plaintiff at any time by delivering to all parties a notice of withdrawal of defence (Form 23C), but,

(a) where the defendant has crossclaimed or made a third party claim, leave to withdraw must be obtained from the court; and

(b) where the defendant seeks to withdraw an admission in the statement of defence, rule 51.05 (withdrawal of admission) applies. R.R.O. 1990, Reg. 194, r. 23.06 (1).

(2) Where a defendant withdraws the whole of the statement of defence, the defendant shall be deemed to be noted in default. R.R.O. 1990, Reg. 194, r. 23.06 (2).

Application to Counterclaims, Crossclaims and Third Party Claims

23.07 Rules 23.01 to 23.06 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 23.07.

RULE 24 DISMISSAL OF ACTION FOR DELAY

Where Available

24.01 (1) A defendant who is not in default under these rules or an order of the court may move to have an action dismissed for delay where the plaintiff has failed,

(a) to serve the statement of claim on all the defendants within the prescribed time;

(b) to have noted in default any defendant who has failed to deliver a statement of defence, within thirty days after the default;

(c) to set the action down for trial within six months after the close of pleadings; or

(d) Revoked: R.R.O. 1990. Reg. 194, r. 24.01 (2).

(e) to move for leave to restore to a trial list an action that has been struck off the trial list, within thirty days after the action was struck off. R.R.O. 1990, Reg. 194, r. 24.01; R.R.O. 1990, Reg. 194, r. 24.01 (2); O. Reg. 770/92, s. 7; O. Reg. 533/95, s. 4 (1).

(2) The court shall, subject to subrule 24.02 (2), dismiss an action for delay if either of the circumstances described in paragraphs 1 and 2 of subrule 48.14 (1) applies to the action, unless the plaintiff demonstrates that dismissal of the action would be unjust. O. Reg. 259/14, s. 6.

Where plaintiff under disability

24.02 (1) Where the plaintiff is under disability, notice of a motion to dismiss an action for delay shall be served on the plaintiff's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) on the Children's Lawyer, if the plaintiff is a minor; or

(b) on the Public Guardian and Trustee, in any other case. O. Reg. 259/14, s. 7.

No Order Without Confirmation

(2) Where the Children's Lawyer or the Public Guardian and Trustee has been served under subrule (1) but is not the plaintiff's litigation guardian, the action may be dismissed under this Rule only if the Children's Lawyer or the Public Guardian and Trustee, as the case may be, confirms to the court that he or she was served and takes no position on the dismissal, unless a judge orders otherwise. O. Reg. 259/14, s. 7.

Notice of Order

24.02.1 If the defendant is successful on the motion to dismiss an action for delay, the defendant shall serve a copy of the order dismissing the action on

every defendant to the action who has crossclaimed against him or her. O. Reg. 394/09, s. 9.

Effect of Dismissal on Counterclaim

24.03 Where an action against a defendant who has counterclaimed is dismissed for delay, the defendant may within thirty days after the dismissal deliver a notice of election to proceed with the counterclaim (Form 23B), and if the defendant fails to do so, the counterclaim shall be deemed to be discontinued without costs. R.R.O. 1990, Reg. 194, r. 24.03.

Effect of Dismissal on Crossclaim or Third Party Claim

24.04 (1) Unless the court orders otherwise, where an action against a defendant who has crossclaimed or made a third party claim is dismissed for delay, the crossclaim or third party claim shall be deemed to be dismissed. O. Reg. 394/09, s. 10 (1).

(1.1) Where an action against a defendant against whom a crossclaim has been made is dismissed for delay, the crossclaim shall be deemed to be dismissed thirty days after a copy of the order dismissing the action is served on the crossclaiming defendant under rule 24.02.1, unless the court orders otherwise during the thirty-day period. O. Reg. 394/09, s. 10 (1).

Effect of deemed dismissal on subsequent action

(2) A deemed dismissal under this rule is not a defence to a subsequent action unless the order dismissing the action provides otherwise. O. Reg. 770/92, s. 8; O. Reg. 394/09, s. 10 (2).

Effect on Subsequent Action

24.05 (1) The dismissal of an action for delay is not a defence to a subsequent action unless the order dismissing the action provides otherwise. R.R.O. 1990, Reg. 194, r. 24.05 (1).

(2) Where a plaintiff's action has been dismissed for delay with costs, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest before payment of the costs of the dismissed action, the court may order a stay of the subsequent action until the costs of the dismissed action have been paid. R.R.O. 1990, Reg. 194, r. 24.05 (2).

Costs of Dismissal, Deemed Dismissal

24.05.1 (1) If an action is dismissed for delay, any party to the action may, within thirty days after the dismissal, make a motion respecting the costs of the action. O. Reg. 394/09, s. 11.

(2) If a crossclaim or third party claim is deemed to be dismissed, any party to the crossclaim or third party claim may, within thirty days after the deemed dismissal, make a motion respecting the costs of the crossclaim or third party claim. O. Reg. 394/09, s. 11.

Application to Counterclaims, Crossclaims and Third Party Claims

24.06 Rules 24.01 to 24.05.1 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 24.06; O. Reg. 394/09, s. 12.

RULE 24.1 MANDATORY MEDIATION

Purpose

24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes. O. Reg. 453/98, s. 1; O. Reg. 198/05, s. 2; O. Reg. 438/08, s. 15.

Nature of Mediation

24.1.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution. O. Reg. 453/98, s. 1.

Definitions

24.1.03 In rules 24.1.04 to 24.1.16,

"defence" means,

(a) Revoked: O. Reg. 457/01, s. 5.

(b) a notice of intent to defend,

(c) a statement of defence, and

(d) a notice of motion in response to an action, other than a motion challenging the court's jurisdiction; ("défense")

"mediation co-ordinator" means the person designated under rule 24.1.06. ("coordonnateur de la médiation") O. Reg. 453/98, s. 1; O. Reg. 627/98, s. 2; O. Reg. 457/01, s. 5.

Application

Scope

24.1.04 (1) This Rule applies to the following actions:

1. Actions that were governed by this Rule immediately before January 1, 2010.

2. Actions that are commenced in one of the following counties on or after January 1, 2010:

i. The City of Ottawa.

ii. The City of Toronto.

iii. The County of Essex.

3. Actions that are transferred to a county listed in paragraph 2 on or after January 1, 2014, unless the court orders otherwise. O. Reg. 438/08, s. 16 (1); O. Reg. 231/13, s. 7.

Exceptions

(2) Despite subrule (1), this Rule does not apply to,

(a) actions to which Rule 75.1 (Mandatory Mediation — Estates, Trusts and Substitute Decisions) applies;

(b) actions in relation to a matter that was the subject of a mediation under section 258.6 of the *Insurance Act*, if the mediation was conducted less than a year before the delivery of the first defence in the action;

(c) actions placed on the Commercial List established by practice direction in the Toronto Region;

(d) actions under Rule 64 (Mortgage Actions);

(e) actions under the *Construction Act*, except trust claims; and

(f) actions under the *Bankruptcy and Insolvency Act* (Canada). O. Reg. 438/08, s. 16 (1); O. Reg. 537/18, s. 4.

Exceptions, Class Proceedings Act, 1992

(2.1) Despite subrule (1), this Rule,

(a) applies to an action commenced under the *Class Proceedings Act, 1992* only if certification as a class proceeding has been denied; and

(b) does not apply to actions certified as class proceedings under the *Class Proceedings Act, 1992*. O. Reg. 438/08, s. 16 (1).

Crown Liability and Proceedings Act, 2019

(3) In an action to which the *Crown Liability and Proceedings Act, 2019* applies, if the notice required by section 18 of that Act has not been served, the Crown in right of Ontario is entitled to participate in mediation under this Rule but is not required to do so. O. Reg. 316/20, s. 2.

(4) SPENT: R.R.O. 1990, Reg. 194, s. 24.1.04 (4) (as amended by O. Reg. 438/08, s. 16).

Exemption from Mediation

24.1.05 The court may make an order on a party's motion exempting the action from this Rule. O. Reg. 453/98, s. 1.

Mediation Co-ordinator

24.1.06 The Attorney General or his or her delegate may designate a person as mediation co-ordinator for a county named in subrule 24.1.04 (1), to be responsible for the administration of mediation in the county under this Rule. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 17.

Local Mediation Committees

Establishment

24.1.07 (1) There shall be a local mediation committee in each county named in subrule 24.1.04 (1). O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 18 (1).

Membership

(2) The members of each committee shall be appointed by the Attorney General so as to represent lawyers, mediators, the general public and persons employed in the administration of the courts. O. Reg. 453/98, s. 1.

(3) The Chief Justice of the Superior Court of Justice shall appoint a judge or an associate judge to be a member of each committee. O. Reg. 453/98, s. 1; O. Reg. 292/99, s. 3; O. Reg. 438/08, s. 18 (2); O. Reg. 383/21, s. 15.

Functions

(4) Each committee shall,

(a) compile and keep current a list of mediators for the purposes of subrule 24.1.08 (1), in accordance with guidelines approved by the Attorney General;

(b) monitor the performance of the mediators named in the list;

(c) receive and respond to complaints about mediators named in the list. O. Reg. 453/98, s. 1.

(5) In carrying out their functions under subrule (4), committees may add mediators to the list and remove mediators from the list. O. Reg. 457/01, s. 6.

Mediators

List of Mediators

24.1.08 (1) The mediation co-ordinator for a county shall maintain a list of mediators for the county, as compiled and kept current by the local mediation committee. O. Reg. 453/98, s. 1.

(2) A mediation under this Rule shall be conducted by,

(a) a person chosen by the agreement of the parties from the list for a county;

(b) a person assigned by the mediation co-ordinator under subrule 24.1.09 (6) or (6.1) from the list for the county; or

(c) a person who is not named on a list, if the parties consent. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 19.

(3) Every person who conducts a mediation under subrule (2), whether named on the list or not, is required to comply with this Rule. O. Reg. 453/98, s. 1.

(4) Without limiting the generality of subrule (3), every person who conducts a mediation under subrule (2) shall comply with subrule 24.1.15 (1) (mediator's report). O. Reg. 453/98, s. 1.

Mediation Session

Time Limit

24.1.09 (1) A mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 20 (1).

Extension or Abridgment of Time

(2) In considering whether to exercise the power conferred by subrule (1), the court shall take into account all the circumstances, including,

(a) the number of parties, the state of the pleadings and the complexity of the issues in the action;

(b) whether a party intends to bring a motion under Rule 20 (Summary Judgment), Rule 21 (Determination of an Issue Before Trial) or Rule 22 (Special Case);

(c) whether the mediation will be more likely to succeed if the 180-day period is extended to allow the parties to obtain evidence under,

(i) Rule 30 (Discovery of Documents),

(ii) Rule 31 (Examination for Discovery),

(iii) Rule 32 (Inspection of Property),

(iv) Rule 33 (Medical Examination), or

(v) Rule 35 (Examination for Discovery by Written Questions); and

(d) whether, given the nature of the case or the circumstances of the parties, the mediation will be more likely to succeed if the 180-day period is extended or abridged. O. Reg. 244/01, s. 2; O. Reg. 438/08, s. 20 (2).

Transfer

(2.1) In the case of an action described in paragraph 3 of subrule 24.1.04 (1),

(a) subrules (1) and (6) do not apply; and

(b) the court may make an order, on motion or otherwise, specifying the date by which a mediation session must take place. O. Reg. 231/13, s. 8 (1).

Postponement

(3) Despite subrule (1) and clause (2.1) (b), the mediation session may be postponed to a later date if,

(a) the parties consent to the date in writing; and

(b) the consent is filed with the mediation co-ordinator. O. Reg. 438/08, s. 20 (4); O. Reg. 231/13, s. 8 (2).

Selection of Mediator

(4) The parties shall choose a mediator under subrule 24.1.08 (2). O. Reg. 453/98, s. 1.

(5) Before setting the action down for trial, one of the parties shall file with the mediation co-ordinator,

(a) a notice (Form 24.1A) stating the mediator's name and the date of the mediation session; or

(b) a mediator's report under subrule 24.1.15 (1) indicating that the mediation has been concluded. O. Reg. 438/08, s. 20 (5).

Assignment of Mediator

(6) If the mediation co-ordinator does not, within 180 days after the first defence has been filed, receive an order under subrule (1), a consent under subrule (3), a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, he or she shall immediately assign a mediator from the list, unless the court orders otherwise. O. Reg. 438/08, s. 20 (5).

(6.1) If the mediation co-ordinator does not, within the time provided by an order under subrule (1) or clause (2.1) (b) or a consent under subrule (3), receive a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, and the action is set down for trial, he or she shall

immediately assign a mediator from the list, unless the court orders otherwise. O. Reg. 438/08, s. 20 (5); O. Reg. 231/13, s. 8 (3).

(6.2) In the case of an action described in paragraph 3 of subrule 24.1.04 (1), if the court does not make an order under clause (2.1) (b) and the action is set down for trial without the mediation co-ordinator having received a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, he or she shall immediately assign a mediator from the list, unless the court orders otherwise. O. Reg. 231/13, s. 8 (4).

(7) The assigned mediator shall immediately fix a date for the mediation session and shall, at least 20 days before that date, serve on every party a notice (Form 24.1B) stating the place, date and time of the session and the method of attendance and advising that attendance is obligatory. O. Reg. 453/98, s. 1; O. Reg. 526/21, s. 2.

(7.1) The date fixed for the mediation session shall be within 90 days after the appointment of the mediator, unless the court orders otherwise. O. Reg. 438/08, s. 20 (6).

(8) The assigned mediator shall provide a copy of the notice to the mediation co-ordinator. O. Reg. 453/98, s. 1.

24.1.09.1 REVOKED: R.R.O. 1990, Reg. 194, s. 24.1.09.1 (3) (as amended by O. Reg. 198/05, s. 4 and O. Reg. 438/08, s. 21).

Procedure before Mediation Session

Statement of Issues

24.1.10 (1) At least seven days before the mediation session, every party shall prepare a statement in Form 24.1C and provide a copy to every other party and to the mediator. O. Reg. 453/98, s. 1.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. O. Reg. 453/98, s. 1.

(3) The party making the statement shall attach to it any documents that the party considers of central importance in the action. O. Reg. 453/98, s. 1.

Copy of Pleadings

(4) The plaintiff shall include a copy of the pleadings with the copy of the statement that is provided to the mediator. O. Reg. 453/98, s. 1.

Non-Compliance

(5) If it is not practical to conduct a mediation session because a party fails to comply with subrule (1), the mediator shall cancel the session and

immediately file with the mediation co-ordinator a certificate of non-compliance (Form 24.1D). O. Reg. 453/98, s. 1.

Attendance at Mediation Session

Who is Required to Attend

24.1.11 (1) The parties, and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise. O. Reg. 453/98, s. 1.

Representative of Insurer

(1.1) Unless the court orders otherwise, if an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse an insured party for money paid in satisfaction of all or part of a judgment in the action,

(a) a representative of the insurer shall attend the mediation session; and

(b) despite subrule (1), the insured party is not required to attend the mediation session. O. Reg. 438/08, s. 22.

Authority to Settle

(2) A party who requires another person's approval before agreeing to a settlement shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours. O. Reg. 453/98, s. 1.

Failure to Attend

24.1.12 If it is not practical to conduct a scheduled mediation session because a party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the mediation co-ordinator a certificate of non-compliance (Form 24.1D). O. Reg. 453/98, s. 1.

Non-Compliance

24.1.13 (1) When a certificate of non-compliance is filed, the mediation co-ordinator shall refer the matter to a judge or associate judge. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 23 (1); O. Reg. 383/21, s. 15.

(2) The judge or associate judge may convene a case conference under rule 50.13, and may,

(a) establish a timetable for the action;

(b) strike out any document filed by a party;

(c) dismiss the action, if the non-complying party is a plaintiff, or strike out the statement of defence, if that party is a defendant;

(d) order a party to pay costs;

(e) make any other order that is just. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 23 (2); O. Reg. 170/14, s. 8; O. Reg. 383/21, s. 15.

(3) REVOKED: O. Reg. 394/09, s. 13.

Confidentiality

24.1.14 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions. O. Reg. 453/98, s. 1.

Outcome of Mediation

Mediator's Report

24.1.15 (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator and the parties a report on the mediation. O. Reg. 453/98, s. 1.

(2) The mediation co-ordinator for the county may remove from the list maintained under subrule 24.1.08 (1) the name of a mediator who does not comply with subrule (1). O. Reg. 453/98, s. 1.

Agreement

(3) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the parties or their lawyers. O. Reg. 453/98, s. 1.

(4) If the agreement settles the action, the defendant shall file a notice to that effect,

(a) in the case of an unconditional agreement, within 10 days after the agreement is signed;

(b) in the case of a conditional agreement, within 10 days after the condition is satisfied. O. Reg. 453/98, s. 1.

Failure to Comply with Signed Agreement

(5) Where a party to a signed agreement fails to comply with its terms, any other party to the agreement may,

(a) make a motion to a judge for judgment in the terms of the agreement, and the judge may grant judgment accordingly; or

(b) continue the action as if there had been no agreement. O. Reg. 453/98, s. 1; O. Reg. 288/99, s. 14.

Consent Order for Additional Mediation Session

24.1.16 (1) With the consent of the parties the court may, at any stage in the action, make an order requiring the parties to participate in an additional mediation session. O. Reg. 453/98, s. 1.

(2) The court may include any necessary directions in the order. O. Reg. 453/98, s. 1.

(3) Rules 24.1.09 to 24.1.15 apply in respect of the additional session, with necessary modifications. O. Reg. 453/98, s. 1.

24.1.17 Revoked: O. Reg. 244/01, s. 4.

PLEADINGS

RULE 25 PLEADINGS IN AN ACTION

Pleadings Required or Permitted

Action Commenced by Statement of Claim or Notice of Action

25.01 (1) In an action commenced by statement of claim or notice of action, pleadings shall consist of the statement of claim (Form 14A, 14B or 14D), statement of defence (Form 18A) and reply (Form 25A), if any. R.R.O. 1990, Reg. 194, r. 25.01 (1).

Counterclaim

(2) In a counterclaim, pleadings shall consist of the counterclaim (Form 27A or 27B), defence to counterclaim (Form 27C) and reply to defence to counterclaim (Form 27D), if any. R.R.O. 1990, Reg. 194, r. 25.01 (2).

Crossclaim

(3) In a crossclaim, pleadings shall consist of the crossclaim (Form 28A), defence to crossclaim (Form 28B) and reply to defence to crossclaim (Form 28C), if any. R.R.O. 1990, Reg. 194, r. 25.01 (3).

Third Party Claim

(4) In a third party claim, pleadings shall consist of the third party claim (Form 29A), third party defence (Form 29B) and reply to third party defence (Form 29C), if any. R.R.O. 1990, Reg. 194, r. 25.01 (4).

Pleading Subsequent to Reply

(5) No pleading subsequent to a reply shall be delivered without the consent of the opposite party or leave of the court. R.R.O. 1990, Reg. 194, r. 25.01 (5); O. Reg. 427/01, s. 11.

Form of Pleadings

25.02 Pleadings shall be divided into paragraphs numbered consecutively, and each allegation shall, so far as is practical, be contained in a separate paragraph. R.R.O. 1990, Reg. 194, r. 25.02.

Service of Pleadings

Who is to be Served

25.03 (1) Every pleading shall be served,

(a) initially on every opposite party and on every other party who has delivered a pleading or a notice of intention to defend in the main action or in a counterclaim, crossclaim or third or subsequent party claim in the main action; and

(b) subsequently on every other party forthwith after the party delivers a pleading or a notice of intention to defend in the main action or in a counterclaim, crossclaim or third or subsequent party claim in the main action. R.R.O. 1990, Reg. 194, r. 25.03 (1).

Service on Added Parties

(2) Where a person is added as a party to an action, the party doing so shall serve on the added party all the pleadings previously delivered in the main action and in any counterclaim, crossclaim or third or subsequent party claim in the main action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 25.03 (2).

Where Personal Service Not Required

(3) Where a pleading is an originating process, personal service on parties other than an opposite party is not required. R.R.O. 1990, Reg. 194, r. 25.03 (3).

(4) REVOKED: O. Reg. 260/05, s. 4.

Time for Delivery of Pleadings

Statement of Claim

25.04 (1) The time for service of a statement of claim is prescribed by rule 14.08. R.R.O. 1990, Reg. 194, r. 25.04 (1).

Statement of Defence

(2) The time for delivery of a statement of defence is prescribed by rule 18.01. R.R.O. 1990, Reg. 194, r. 25.04 (2).

Reply

(3) A reply, if any, shall be delivered within ten days after service of the statement of defence except where the defendant counterclaims, in which

case a reply and defence to counterclaim, if any, shall be delivered within twenty days after service of the statement of defence and counterclaim. R.R.O. 1990, Reg. 194, r. 25.04 (3).

In a Counterclaim

(4) The time for delivery of pleadings in a counterclaim is prescribed by Rule 27. R.R.O. 1990, Reg. 194, r. 25.04 (4).

In a Crossclaim

(5) The time for delivery of pleadings in a crossclaim is prescribed by Rule 28. R.R.O. 1990, Reg. 194, r. 25.04 (5).

In a Third Party Claim

(6) The time for delivery of pleadings in a third party claim is prescribed by Rule 29. R.R.O. 1990, Reg. 194, r. 25.04 (6).

Close of Pleadings

25.05 Pleadings in an action are closed when,

(a) the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired; and

(b) every defendant who is in default in delivering a defence in the action has been noted in default. R.R.O. 1990, Reg. 194, r. 25.05.

Rules of Pleading — Applicable to all Pleadings

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

Condition Precedent

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence. R.R.O. 1990, Reg. 194, r. 25.06 (3).

Inconsistent Pleading

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative. R.R.O. 1990, Reg. 194, r. 25.06 (4).

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. R.R.O. 1990, Reg. 194, r. 25.06 (5).

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material. R.R.O. 1990, Reg. 194, r. 25.06 (6).

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material. R.R.O. 1990, Reg. 194, r. 25.06 (7).

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. R.R.O. 1990, Reg. 194, r. 25.06 (9).

Rules of Pleading — Applicable to Defences

Admissions

25.07 (1) In a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute. R.R.O. 1990, Reg. 194, r. 25.07 (1).

Denials

(2) Subject to subrule (6), all allegations of fact that are not denied in a party's defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact. R.R.O. 1990, Reg. 194, r. 25.07 (2).

Different Version of Facts

(3) Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party's own version of the facts in the defence. R.R.O. 1990, Reg. 194, r. 25.07 (3).

Affirmative Defences

(4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading. R.R.O. 1990, Reg. 194, r. 25.07 (4).

Effect of Denial of Agreement

(5) Where an agreement is alleged in a pleading, a denial of the agreement by the opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement. R.R.O. 1990, Reg. 194, r. 25.07 (5).

Damages

(6) In an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted. R.R.O. 1990, Reg. 194, r. 25.07 (6).

Where a Reply Is Necessary

Different Version of Facts

25.08 (1) A party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim. R.R.O. 1990, Reg. 194, r. 25.08 (1).

Affirmative Reply

(2) A party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply

setting out that matter, subject to subrule 25.06 (5) (inconsistent claims or new claims). R.R.O. 1990, Reg. 194, r. 25.08 (2).

Reply Only Where Required

(3) A party shall not deliver a reply except where required to do so by subrule (1) or (2). R.R.O. 1990, Reg. 194, r. 25.08 (3).

Deemed Denial of Allegations Where No Reply

(4) A party who does not deliver a reply within the prescribed time shall be deemed to deny the allegations of fact made in the defence of the opposite party. R.R.O. 1990, Reg. 194, r. 25.08 (4).

Rules of Pleading — Applicable to Replies

Admissions

25.09 (1) A party who delivers a reply shall admit every allegation of fact in the opposite party's defence that the party does not dispute. R.R.O. 1990, Reg. 194, r. 25.09 (1).

Effect of Denial of Agreement

(2) Where an agreement is alleged in a defence, a denial of the agreement in the opposite party's reply, or a deemed denial under subrule 25.08 (4), shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement. R.R.O. 1990, Reg. 194, r. 25.09 (2).

Particulars

25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time. R.R.O. 1990, Reg. 194, r. 25.10.

Striking out a Pleading or Other Document

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

RULE 26 AMENDMENT OF PLEADINGS

General Power of Court

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 26.01.

When Amendments may be Made

26.02 A party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or

(c) with leave of the court. R.R.O. 1990, Reg. 194, r. 26.02.

How Amendments Made

26.03 (1) An amendment to a pleading shall be made on the face of the copy filed in the court office, except that where the amendment is so extensive as to make the amended pleading difficult or inconvenient to read the party shall file a fresh copy of the original pleading as amended, bearing the date of the original pleading and the title of the pleading preceded by the word "amended". R.R.O. 1990, Reg. 194, r. 26.03 (1).

(2) An amendment to a pleading shall be underlined so as to distinguish the amended wording from the original, and the registrar shall note on the amended pleading the date on which, and the authority by which, the amendment was made. R.R.O. 1990, Reg. 194, r. 26.03 (2).

(3) Where a pleading has been amended more than once each subsequent amendment shall be underlined with an additional line for each occasion. R.R.O. 1990, Reg. 194, r. 26.03 (3).

Service of Amended Pleading

Service on Every Party to Action and Related Actions

26.04 (1) An amended pleading shall be served forthwith on every person who is, at the time of service, a party to the main action or to a counterclaim, crossclaim or third party claim in the main action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 26.04 (1).

(2) Proof of service of an amended pleading other than an originating process shall be filed forthwith after it is served. R.R.O. 1990, Reg. 194, r. 26.04 (2).

Amended Originating Process

(3) Where an amended pleading is an originating process,

(a) it need not be served personally on a party who was served with the original pleading and responded to it; and

(b) it shall be served personally or by an alternative to personal service under rule 16.03 on an opposite party who has not responded to the original pleading, whether or not the party has been noted in default. R.R.O. 1990, Reg. 194, r. 26.04 (3).

Responding to an Amended Pleading

26.05 (1) A party shall respond to an amended pleading within the time remaining for responding to the original pleading, or within ten days after service of the amended pleading, whichever is the longer period, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 26.05 (1).

(2) A party who has responded to a pleading that is subsequently amended and does not respond to the amended pleading within the prescribed time shall be deemed to rely on the party's original pleading in answer to the amended pleading. R.R.O. 1990, Reg. 194, r. 26.05 (2).

Amendment at Trial

26.06 Where a pleading is amended at the trial, and the amendment is made on the face of the record, an order need not be taken out and the pleading as amended need not be filed or served unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 26.06.

RULE 27 COUNTERCLAIM

Where Available

Against the Plaintiff

27.01 (1) A defendant may assert, by way of counterclaim in the main action, any right or claim against the plaintiff including a claim for contribution or indemnity under the *Negligence Act* in respect of another party's claim against the defendant. R.R.O. 1990, Reg. 194, r. 27.01 (1); O. Reg. 396/91, s. 4.

Against the Plaintiff and Another Person

(2) A defendant who counterclaims against a plaintiff may join as a defendant to the counterclaim any other person, whether a party to the main action or not, who is a necessary or proper party to the counterclaim. R.R.O. 1990, Reg. 194, r. 27.01 (2).

Statement of Defence and Counterclaim

27.02 A counterclaim (Form 27A or 27B) shall be included in the same document as the statement of defence and the document shall be entitled a statement of defence and counterclaim. R.R.O. 1990, Reg. 194, r. 27.02.

Counterclaim to be Issued Where Defendant to Counterclaim not already Party to Main Action

27.03 Where a person who is not already a party to the main action is made a defendant to the counterclaim, the statement of defence and counterclaim,

(a) shall be issued,

(i) within the time prescribed by rule 18.01 for delivery of the statement of defence in the main action or at any time before the defendant is noted in default, or

(ii) subsequently with leave of the court; and

(b) shall contain a second title of proceeding showing who is the plaintiff by counterclaim and who are defendants to the counterclaim. R.R.O. 1990, Reg. 194, r. 27.03; O. Reg. 12/24, s. 4.

Time for Delivery or Service of Defence and Counterclaim

Where all Parties are Parties to Main Action

27.04 (1) Where a counterclaim is only against the plaintiff, or only against the plaintiff and another person who is already a party to the main action, the statement of defence and counterclaim shall be delivered within the time prescribed by rule 18.01 for the delivery of the statement of defence in the main action, or at any time before the defendant is noted in default. R.R.O. 1990, Reg. 194, r. 27.04 (1).

Where New Party is Brought in

(2) Where a counterclaim is against the plaintiff and a defendant to the counterclaim who is not already a party to the main action, the statement of defence and counterclaim shall be served, after it has been issued, on the parties to the main action and, together with all the pleadings previously delivered in the main action, on a defendant to the counterclaim who is not already a party to the main action, and shall be filed with proof of service,

(a) within thirty days after the statement of defence and counterclaim is issued or at any time before the defendant is noted in default; or

(b) subsequently with leave of the court. R.R.O. 1990, Reg. 194, r. 27.04 (2).

(3) A statement of defence and counterclaim need not be served personally on any person who is a party to the main action, except where a defendant to

the counterclaim is also a defendant in the main action and has failed to deliver a notice of intent to defend or a statement of defence in the main action, in which case the defendant shall be served personally or by an alternative to personal service under rule 16.03 whether or not the defendant has been noted in default in the main action. R.R.O. 1990, Reg. 194, r. 27.04 (3).

Time for Delivery of Defence to Counterclaim

27.05 (1) The plaintiff and any other defendant to a counterclaim who is already a party to the main action shall deliver a defence to counterclaim (Form 27C) within twenty days after service of the statement of defence and counterclaim. R.R.O. 1990, Reg. 194, r. 27.05 (1).

(2) Where the plaintiff delivers a reply in the main action, the defence to counterclaim shall be included in the same document as the reply and the document shall be entitled a reply and defence to counterclaim. R.R.O. 1990, Reg. 194, r. 27.05 (2).

(3) Except as provided in subrule 18.02 (3) (notice of intent to defend) or 19.01 (5) (late delivery of defence), a defendant to a counterclaim who is not already a party to the main action shall deliver a defence to counterclaim,

(a) within twenty days after service of the statement of defence and counterclaim, where the defendant to the counterclaim is served in Ontario;

(b) within forty days after service of the statement of defence and counterclaim, where the defendant to the counterclaim is served elsewhere in Canada or in the United States of America; or

(c) within sixty days after service of the statement of defence and counterclaim, where the defendant to the counterclaim is served anywhere else. R.R.O. 1990, Reg. 194, r. 27.05 (3).

Time for Delivery of Reply to Defence to Counterclaim

27.06 A reply to defence to counterclaim (Form 27D), if any, shall be delivered within ten days after service of the defence to counterclaim. R.R.O. 1990, Reg. 194, r. 27.06.

Amending Defence to Add Counterclaim

27.07 (1) A defendant who has delivered a statement of defence that does not contain a counterclaim and who wishes to counterclaim only against the plaintiff or only against the plaintiff and another person who is already a party to the main action may amend the statement of defence in accordance with rules 26.02 and 26.03 in order to add the counterclaim, and rule 26.05

(responding to amended pleading) applies to the amended statement of defence and counterclaim. R.R.O. 1990, Reg. 194, r. 27.07 (1).

(2) A defendant who has delivered a statement of defence that does not contain a counterclaim and who wishes to counterclaim against the plaintiff and another person who is not already a party to the main action may, with leave of the court, have the registrar issue an amended statement of defence and counterclaim, and rule 26.05 (responding to amended pleading) applies to the amended statement of defence and counterclaim. R.R.O. 1990, Reg. 194, r. 27.07 (2).

Trial of Counterclaim

27.08 (1) A counterclaim shall be tried at the trial of the main action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 27.08 (1).

(2) Where it appears that a counterclaim may unduly complicate or delay the trial of the main action, or cause undue prejudice to a party, the court may order separate trials or order that the counterclaim proceed as a separate action. R.R.O. 1990, Reg. 194, r. 27.08 (2).

Disposition of Counterclaim

Where Claim in Main Action not Disputed

27.09 (1) Where a defendant does not dispute the claim of the plaintiff in the main action, but asserts a counterclaim, the court may stay the main action or grant judgment, with or without a stay of execution, until the counterclaim is disposed of. R.R.O. 1990, Reg. 194, r. 27.09 (1).

Where Counterclaim not Disputed

(2) Where the plaintiff does not dispute the counterclaim of a defendant, the court may stay the counterclaim or grant judgment, with or without a stay of execution, until the main action is disposed of. R.R.O. 1990, Reg. 194, r. 27.09 (2).

Where Both Claim and Counterclaim Succeed

(3) Where both the plaintiff in the main action and the plaintiff by counterclaim succeed, either in whole or in part, and there is a resulting balance in favour of one of them, the court may in a proper case give judgment for the balance and dismiss the smaller claim and may make such order for costs of the claim and counterclaim as is just. R.R.O. 1990, Reg. 194, r. 27.09 (3).

Application to Counterclaims, Crossclaims and Third Party Claims

27.10 Rules 27.01 to 27.09 apply, with necessary modifications, to the assertion of a counterclaim by a defendant to a counterclaim, by a defendant to a crossclaim and by a third party. R.R.O. 1990, Reg. 194, r. 27.10.

RULE 28 CROSSCLAIM

Where Available

28.01 (1) A defendant may crossclaim against a co-defendant who,

(a) is or may be liable to the defendant for all or part of the plaintiff's claim;

(b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,

(i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or

(ii) a related transaction or occurrence or series of transactions or occurrences; or

(c) should be bound by the determination of an issue arising between the plaintiff and the defendant. R.R.O. 1990, Reg. 194, r. 28.01 (1).

(2) A defendant who claims contribution from a co-defendant under the *Negligence Act* shall do so by way of crossclaim. R.R.O. 1990, Reg. 194, r. 28.01 (2).

Statement of Defence and Crossclaim

28.02 A crossclaim (Form 28A) shall be included in the same document as the statement of defence and the document shall be entitled a statement of defence and crossclaim. R.R.O. 1990, Reg. 194, r. 28.02.

Amending Defence to Add Crossclaim

28.03 A defendant who has delivered a statement of defence that does not contain a crossclaim and who wishes to crossclaim may amend the statement of defence in accordance with rules 26.02 and 26.03 in order to add the crossclaim, and rule 26.05 (responding to amended pleading) applies to the amended statement of defence and crossclaim. R.R.O. 1990, Reg. 194, r. 28.03.

Time for Delivery of Statement of Defence and Crossclaim

28.04 (1) A statement of defence and crossclaim shall be delivered,

(a) within the time prescribed by rule 18.01 for delivery of the statement of defence in the main action or at any time before the defendant is noted in default; or

(b) subsequently with leave, which the court shall grant unless the plaintiff would be prejudiced thereby. R.R.O. 1990, Reg. 194, r. 28.04 (1).

(2) A statement of defence and crossclaim need not be served personally on a defendant against whom a crossclaim is made, unless the defendant has failed to deliver a notice of intent to defend or a statement of defence in the main action, in which case the defendant shall be served personally or by an alternative to personal service under rule 16.03, whether or not the defendant has been noted in default in the main action. R.R.O. 1990, Reg. 194, r. 28.04 (2).

Time for Delivery of Defence to Crossclaim

Defence to Crossclaim

28.05 (1) Subject to subrule (2), a defence to crossclaim (Form 28B) shall be delivered within twenty days after service of the statement of defence and crossclaim. R.R.O. 1990, Reg. 194, r. 28.05 (1).

Where Defence to Crossclaim not Required

(2) Where,

(a) a crossclaim contains no claim other than a claim for contribution or indemnity under the *Negligence Act*;

(b) the defendant to the crossclaim has delivered a statement of defence in the main action; and

(c) the defendant to the crossclaim in response to the crossclaim relies on the facts pleaded in the defendant's statement of defence in the main action and not on a different version of the facts or on any matter that might, if not specifically pleaded, take the crossclaiming defendant by surprise,

the defendant to the crossclaim need not deliver a defence to the crossclaim and shall be deemed to deny the allegations of fact made in the crossclaim and to rely on the facts pleaded in the statement of defence in the main action. R.R.O. 1990, Reg. 194, r. 28.05 (2).

Contents of Defence to Crossclaim

May Defend Against Crossclaim and Against Plaintiff's Claim Against Co-defendant

28.06 (1) In a defence to crossclaim, the defendant may,

(a) defend against the crossclaim; and

(b) where appropriate, defend against the plaintiff's claim against the crossclaiming defendant, in which case the defendant may raise any defence open to the crossclaiming defendant. R.R.O. 1990, Reg. 194, r. 28.06 (1).

Separate Part for Defence Against Plaintiff

(2) Where the defendant defends against the plaintiff's claim against the crossclaiming defendant, the defence to crossclaim shall contain a separate part entitled a defence to plaintiff's claim against crossclaiming defendant. R.R.O. 1990, Reg. 194, r. 28.06 (2).

Consequence of Defending Against Plaintiff

(3) A defendant who defends against the plaintiff's claim against the crossclaiming defendant,

(a) has the same rights and obligations in the action, including those in respect of discovery, trial and appeal, as a defendant to that claim; and

(b) is bound by any order or determination made in the main action between the plaintiff and the crossclaiming defendant. R.R.O. 1990, Reg. 194, r. 28.06 (3).

Time for Reply by Plaintiff

(4) The plaintiff's reply, if any, to the defence to plaintiff's claim against crossclaiming defendant shall be delivered within ten days after service of that defence. R.R.O. 1990, Reg. 194, r. 28.06 (4).

Consequence of Not Defending Against Plaintiff

(5) A defendant who does not defend against the plaintiff's claim against the crossclaiming defendant is bound by any order or determination made in the main action between the plaintiff and the crossclaiming defendant. R.R.O. 1990, Reg. 194, r. 28.06 (5).

Effect of Default of Defence to Crossclaim

28.07 Where a defendant against whom a crossclaim is made is noted in default in respect of the crossclaim, the crossclaiming defendant may obtain judgment against the other defendant only at the trial of the main action or on motion to a judge. R.R.O. 1990, Reg. 194, r. 28.07.

Time for Delivery of Reply to Defence to Crossclaim

28.08 A reply to defence to crossclaim (Form 28C), if any, shall be delivered within ten days after service of the defence to crossclaim. R.R.O. 1990, Reg. 194, r. 28.08.

Trial of Crossclaim

28.09 A crossclaim shall be tried at or immediately after the trial of the main action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 28.09.

Prejudice or Delay to Plaintiff

28.10 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a crossclaim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the crossclaim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the parties to the crossclaim. R.R.O. 1990, Reg. 194, r. 28.10.

Application to Counterclaims and Third Party Claims

28.11 Rules 28.01 to 28.10 apply, with necessary modifications, to the assertion of a crossclaim between co-defendants to a counterclaim or between third parties to a third party claim. R.R.O. 1990, Reg. 194, r. 28.11.

RULE 29 THIRD PARTY CLAIM

Where Available

29.01 A defendant may commence a third party claim against any person who is not a party to the action and who,

(a) is or may be liable to the defendant for all or part of the plaintiff's claim;

(b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,

(i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or

(ii) a related transaction or occurrence or series of transactions or occurrences; or

(c) should be bound by the determination of an issue arising between the plaintiff and the defendant. R.R.O. 1990, Reg. 194, r. 29.01.

Time for Third Party Claim

Issuing

29.02 (1) A third party claim (Form 29A) shall be issued within 10 days after the defendant delivers a statement of defence, or at any time before the defendant is noted in default. O. Reg. 351/94, s. 2; O. Reg. 55/12, s. 2.

Exception, reply

(1.1) A third party claim may be issued within 10 days after the plaintiff delivers a reply in the main action to the defendant's statement of defence.

O. Reg. 351/94, s. 2.

Exceptions, consent and leave

(1.2) A third party claim may be issued at any time with the plaintiff's consent or with leave, which the court shall grant unless the plaintiff would be prejudiced thereby. O. Reg. 351/94, s. 2.

Service

(2) A third party claim shall be served on the third party personally or by an alternative to personal service under rule 16.03, together with all the pleadings previously delivered in the main action or in any counterclaim, crossclaim or third or subsequent party claim in the main action, within thirty days after the third party claim is issued. R.R.O. 1990, Reg. 194, r. 29.02 (2).

(3) A third party claim shall also be served on every other party to the main action within the time for service on the third party, but personal service is not required. R.R.O. 1990, Reg. 194, r. 29.02 (3).

Third Party Defence

29.03 Except as provided in subrule 18.02 (3) (notice of intent to defend) or 19.01 (5) (late filing of defence), a third party may defend against the third party claim by delivering a third party defence (Form 29B),

(a) within twenty days after service of the third party claim, where the third party is served in Ontario;

(b) within forty days after service of the third party claim, where the defendant is served elsewhere in Canada or in the United States of America; or

(c) within sixty days after service of the third party claim, where the third party is served anywhere else. R.R.O. 1990, Reg. 194, r. 29.03.

Reply to Third Party Defence

29.04 A reply to third party defence (Form 29C), if any, shall be delivered within ten days after service of the third party defence. R.R.O. 1990, Reg. 194, r. 29.04.

Defence of Main Action By Third Party

Third Party May Defend Main Action

29.05 (1) Where appropriate, the third party may defend against the plaintiff's claim against the defendant by delivering a statement of defence in the main action, in which the third party may raise any defence open to the defendant. R.R.O. 1990, Reg. 194, r. 29.05 (1); O. Reg. 12/24, s. 5 (1).

Consequence of Defending Main Action

(2) A third party who delivers a statement of defence in the main action,

(a) has the same rights and obligations in the main action, including those in respect of discovery, trial and appeal, as a defendant in the main action; and

(b) is bound by any order or determination made in the main action between the plaintiff and the defendant who made the third party claim. R.R.O. 1990, Reg. 194, r. 29.05 (2); O. Reg. 12/24, s. 5 (2).

Time for Statement of Defence

(3) The third party shall deliver the statement of defence within the main action within the time prescribed by rule 29.03 for the delivery of the third party defence. O. Reg. 12/24, s. 5 (3).

Time for Reply

(4) The plaintiff shall deliver a reply, if any, to the third party's statement of defence in the main action within 10 days after it is served on the plaintiff. O. Reg. 12/24, s. 5 (3).

Consequence of Not Defending Main Action

(5) A third party who does not deliver a statement of defence in the main action is bound by any order or determination made in the main action between the plaintiff and the defendant who made the third party claim. R.R.O. 1990, Reg. 194, r. 29.05 (5); O. Reg. 12/24, s. 5 (4).

Effect of Third Party Defence

29.06 Where a third party has delivered a third party defence,

(a) the third party shall be served with all subsequent documents in the main action;

(b) judgment in the main action on consent or after the noting of the defendant in default may be obtained only on notice to the third party; and

(c) where the defendant making the third party claim has also made a crossclaim against a co-defendant, the co-defendant and the third party have the same rights to discovery from each other as if they were parties to the same action. R.R.O. 1990, Reg. 194, r. 29.06.

Effect of Default of Third Party

29.07 Where a third party has been noted in default, the defendant may obtain judgment against the third party only at the trial of the main action or

on motion to a judge. R.R.O. 1990, Reg. 194, r. 29.07.

Trial of Third Party Claim

29.08 (1) After the close of pleadings in the third party claim it shall be listed for trial as an action as provided in Rule 48 without undue delay and placed on the trial list immediately after the main action. R.R.O. 1990, Reg. 194, r. 29.08 (1).

(2) The third party claim shall be tried at or immediately after the trial of the main action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 29.08 (2).

Prejudice or Delay to Plaintiff

29.09 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the third party claim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the defendant or the third party. R.R.O. 1990, Reg. 194, r. 29.09.

Third Party Directions

29.10 Any party affected by a third party claim may move for directions in respect of any matter of procedure not otherwise provided for in these rules. R.R.O. 1990, Reg. 194, r. 29.10.

Fourth and Subsequent Party Claims

29.11 (1) A third party may, by commencing a fourth party claim, assert against any person not already a party to the third party claim any claim that is properly the subject matter of a third party claim, and rules 29.01 to 29.10 apply, with necessary modifications, to the fourth party claim. R.R.O. 1990, Reg. 194, r. 29.11 (1).

(2) A fourth party claim need not be served personally on a fourth party who is a party to the main action, unless the fourth party is a defendant in that action and has failed to deliver a notice of intent to defend or a statement of defence in the main action, in which case the fourth party shall be served personally or by an alternative to personal service under rule 16.03, whether or not the fourth party has been noted in default in the main action. R.R.O. 1990, Reg. 194, r. 29.11 (2).

(2.1) Despite subrule 29.02 (2), when a fourth party claim is served on a person who is already a party to the main action or to any counterclaim, crossclaim or third party claim in the main action, the pleadings previously

delivered in the main action or in any counterclaim, crossclaim or third party claim in the main action need not be served. O. Reg. 770/92, s. 9.

(3) A fourth or subsequent party may assert any claim that is properly the subject matter of a third party claim in like manner as a third party claim. R.R.O. 1990, Reg. 194, r. 29.11 (3).

Application to Fourth and Subsequent Party Claims

29.12 The provisions of these rules that apply to third party claims apply, with necessary modifications, to fourth and subsequent party claims. R.R.O. 1990, Reg. 194, r. 29.12.

Application to Counterclaims and Crossclaims

29.13 Rules 29.01 to 29.12 apply, with necessary modifications, to the assertion of a third party claim by a defendant to a counterclaim or by a defendant to a crossclaim. R.R.O. 1990, Reg. 194, r. 29.13.

File Number

29.14 Third and subsequent party claims shall be given the same file number as the main action, followed by a suffix letter. O. Reg. 438/08, s. 24.

DISCOVERY

RULE 29.1 DISCOVERY PLAN

Non-application of Rule

29.1.01 This Rule does not apply to parties who are subject to a discovery plan established by the court under these rules. O. Reg. 438/08, s. 25; O. Reg. 537/18, s. 5.

Definition

29.1.02 In this Rule,

"document" has the same meaning as in clause 30.01 (1) (a). O. Reg. 438/08, s. 25.

Discovery Plan

Requirement for Plan

29.1.03 (1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action shall agree to a discovery plan in accordance with this rule:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).

4. Rule 33 (Medical Examination).

5. Rule 35 (Examination for Discovery by Written Questions). O. Reg. 438/08, s. 25.

Timing

(2) The discovery plan shall be agreed to before the earlier of,

(a) 60 days after the close of pleadings or such longer period as the parties may agree to; and

(b) attempting to obtain the evidence. O. Reg. 438/08, s. 25.

Contents

(3) The discovery plan shall be in writing, and shall include,

(a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;

(b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;

(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

(d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and

(e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action. O. Reg. 438/08, s. 25.

Principles re Electronic Discovery

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference. O. Reg. 438/08, s. 25.

Duty to Update Plan

29.1.04 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3). O. Reg. 438/08, s. 25.

Failure to Agree to Plan

29.1.05 (1) On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule. O. Reg. 438/08, s. 25.

Court may Impose Discovery Plan

(2) If the parties fail to agree to a discovery plan in accordance with this Rule, the court may order that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just. O. Reg. 537/18, s. 6.

RULE 29.2 PROPORTIONALITY IN DISCOVERY

Definition

29.2.01 In this Rule,

"document" has the same meaning as in clause 30.01 (1) (a). O. Reg. 438/08, s. 25.

Application

29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 34 (Procedure on Oral Examinations).
4. Rule 35 (Examination for Discovery by Written Questions). O. Reg. 438/08, s. 25.

Considerations

General

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source. O. Reg. 438/08, s. 25.

Overall Volume of Documents

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person. O. Reg. 438/08, s. 25.

RULE 30 DISCOVERY OF DOCUMENTS

Interpretation

30.01 (1) In rules 30.02 to 30.11,

(a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled. R.R.O. 1990, Reg. 194, r. 30.01 (1); O. Reg. 427/01, s. 12; O. Reg. 132/04, s. 6.

(2) In subrule 30.02 (4),

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,

(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons. R.R.O. 1990, Reg. 194, r. 30.01 (2).

Scope of Documentary Discovery

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is

claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (2); O. Reg. 438/08, s. 26.

Insurance Policy

(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

(a) to satisfy all or part of a judgment in the action; or

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action. R.R.O. 1990, Reg. 194, r. 30.02 (3).

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged. R.R.O. 1990, Reg. 194, r. 30.02 (4).

Affidavit of Documents

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. O. Reg. 438/08, s. 27 (1).

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. R.R.O. 1990, Reg. 194, r. 30.03 (2); O. Reg. 438/08, s. 27 (2).

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit. R.R.O. 1990, Reg. 194, r. 30.03 (3); O. Reg. 438/08, s. 27 (3).

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings. O. Reg. 653/00, s. 3; O. Reg. 438/08, s. 27 (4).

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial. R.R.O. 1990, Reg. 194, r. 30.03 (5).

Inspection of Documents

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m.

and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the trial of the action. R.R.O. 1990, Reg. 194, r. 30.04 (4); O. Reg. 248/21, s. 4.

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party. R.R.O. 1990, Reg. 194, r. 30.04 (5).

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim. R.R.O. 1990, Reg. 194, r. 30.04 (6).

Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which case the person shall be reimbursed for the cost of making the copy. R.R.O. 1990, Reg. 194, r. 30.04 (7).

Divided Disclosure or Production

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined. R.R.O. 1990, Reg. 194, r. 30.04 (8).

Disclosure or Production not Admission of Relevance

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility. R.R.O. 1990, Reg. 194, r. 30.05.

Where Affidavit Incomplete or Privilege Improperly Claimed

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

(a) order cross-examination on the affidavit of documents;

(b) order service of a further and better affidavit of documents;

(c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege. R.R.O. 1990, Reg. 194, r. 30.06; O. Reg. 248/21, s. 5.

Documents or Errors Subsequently Discovered

30.07 Where a party, after serving an affidavit of documents,

(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

(b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents. R.R.O. 1990, Reg. 194, r. 30.07.

Effect of Failure to Disclose or Produce for Inspection

Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

(a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or

(b) if the document is not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (1); O. Reg. 504/00, s. 3.

Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;

(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (2).

Privileged Document not to be Used without Leave

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge. R.R.O. 1990, Reg. 194, r. 30.09; O. Reg. 19/03, s. 7.

Production from Non-Parties with Leave

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and

(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. R.R.O. 1990, Reg. 194, r. 30.10 (1).

Notice of Motion

(2) A motion for an order under subrule (1) shall be made on notice,

(a) to every other party; and

(b) to the person not a party, served personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 30.10 (2).

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of

the document, the court may inspect the document to determine the issue. R.R.O. 1990, Reg. 194, r. 30.10 (3).

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original. R.R.O. 1990, Reg. 194, r. 30.10 (4).

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. O. Reg. 260/05, s. 5.

Document Deposited for Safe Keeping

30.11 The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person except with leave of the court. R.R.O. 1990, Reg. 194, r. 30.11.

RULE 30.1 DEEMED UNDERTAKING

Application

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a). O. Reg. 61/96, s. 2; O. Reg. 627/98, s. 3.

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1). O. Reg. 61/96, s. 2.

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents. O. Reg. 61/96, s. 2.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

(a) evidence that is filed with the court;

(b) evidence that is given or referred to during a hearing;

(c) information obtained from evidence referred to in clause (a) or (b). O. Reg. 61/96, s. 2.

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding. O. Reg. 61/96, s. 2.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action). O. Reg. 61/96, s. 2.

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just. O. Reg. 61/96, s. 2; O. Reg. 263/03, s. 3.

RULE 31 EXAMINATION FOR DISCOVERY

Definition

31.01 In rules 31.02 to 31.11,

"document" has the same meaning as in clause 30.01 (1) (a). R.R.O. 1990, Reg. 194, r. 31.01.

Form of Examination

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

Who may Examine and be Examined

Generally

31.03 (1) A party to an action may examine for discovery any other party adverse in interest, once, and may examine that party more than once only with leave of the court, but a party may examine more than one person as permitted by subrules (2) to (8). R.R.O. 1990, Reg. 194, r. 31.03 (1); O. Reg. 438/08, s. 28 (1).

On Behalf of Corporation

(2) Where a corporation may be examined for discovery,

(a) the examining party may examine any officer, director or employee on behalf of the corporation, but the court on motion of the corporation before the examination may order the examining party to examine another officer, director or employee; and

(b) the examining party may examine more than one officer, director or employee only with the consent of the parties or the leave of the court. O. Reg. 132/04, s. 7.

On Behalf of Partnership or Sole Proprietorship

(3) Where an action is brought by or against a partnership or a sole proprietorship using the firm name,

(a) each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be, at a material time, may be examined on behalf of the partnership or sole proprietorship; and

(b) the examining party may examine one or more employees of the partnership or sole proprietorship only with the consent of the parties or the leave of the court. O. Reg. 132/04, s. 7.

Requirements for Leave

(4) Before making an order under clause (2) (b) or (3) (b), the court shall satisfy itself that,

(a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and

(b) examination of more than one person would likely expedite the conduct of the action. O. Reg. 438/08, s. 28 (2).

In Place of Person under Disability

(5) Where an action is brought by or against a party under disability,

(a) the litigation guardian may be examined in place of the person under disability; or

(b) at the option of the examining party, the person under disability may be examined if he or she is competent to give evidence,

but where the litigation guardian is the Children's Lawyer or the Public Guardian and Trustee, the litigation guardian may be examined only with leave of the court. R.R.O. 1990, Reg. 194, r. 31.03 (5); O. Reg. 69/95, ss. 18-20.

Assignee

(6) Where an action is brought by or against an assignee, the assignor may be examined in addition to the assignee. R.R.O. 1990, Reg. 194, r. 31.03 (6).

Trustee in Bankruptcy

(7) Where an action is brought by or against a trustee of the estate of a bankrupt, the bankrupt may be examined in addition to the trustee. R.R.O. 1990, Reg. 194, r. 31.03 (7).

Nominal Party

(8) Where an action is brought or defended for the immediate benefit of a person who is not a party, the person may be examined in addition to the party bringing or defending the action. R.R.O. 1990, Reg. 194, r. 31.03 (8).

Limiting Multiple Examinations

(9) Where a party is entitled to examine for discovery,

(a) more than one person under this rule; or

(b) multiple parties who are in the same interest,

but the court is satisfied that multiple examinations would be oppressive, vexatious or unnecessary, the court may impose such limits on the right of discovery as are just. R.R.O. 1990, Reg. 194, r. 31.03 (9).

When Examination may be Initiated

Examination of Plaintiff

31.04 (1) A party who seeks to examine a plaintiff for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents. R.R.O. 1990, Reg. 194, r. 31.04 (1).

Examination of Defendant

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

(a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or

(b) the defendant has been noted in default. R.R.O. 1990, Reg. 194, r. 31.04 (2).

Completion of Examination

(3) The party who first serves on another party a notice of examination under rule 34.04 or written questions under rule 35.01 may examine first and may complete the examination before being examined by another party, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.04 (3).

Oral Examination by more than one Party

31.05 Unless the court orders or the parties agree otherwise, where more than one party is entitled to examine a party or other person for discovery without leave, there shall be only one oral examination, which may be initiated by any party adverse to the party,

(a) who is to be examined; or

(b) on behalf or in place of whom, or in addition to whom, a person is to be examined. R.R.O. 1990, Reg. 194, r. 31.05; O. Reg. 260/05, s. 6.

Time Limit

Not to Exceed Seven Hours

31.05.1 (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court. O. Reg. 438/08, s. 29.

Considerations for Leave

(2) In determining whether leave should be granted under subrule (1), the court shall consider,

(a) the amount of money in issue;

(b) the complexity of the issues of fact or law;

(c) the amount of time that ought reasonably to be required in the action for oral examinations;

(d) the financial position of each party;

(e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(f) a party's denial or refusal to admit anything that should have been admitted; and

(g) any other reason that should be considered in the interest of justice. O. Reg. 438/08, s. 29.

Scope of Examination

General

31.06 (1) A person examined for discovery shall answer, to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

(a) the information sought is evidence;

(b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or

(c) the question constitutes cross-examination on the affidavit of documents of the party being examined. R.R.O. 1990, Reg. 194, r. 31.06 (1); O. Reg. 438/08, s. 30 (1).

Identity of Persons Having Knowledge

(2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.06 (2).

Expert Opinions

(3) A party may on an examination for discovery obtain disclosure of the findings, opinions and conclusions of an expert engaged by or on behalf of the party being examined that are relevant to a matter in issue in the action and of the expert's name and address, but the party being examined need not disclose the information or the name and address of the expert where,

(a) the findings, opinions and conclusions of the expert relevant to any matter in issue in the action were made or formed in preparation for contemplated or pending litigation and for no other purpose; and

(b) the party being examined undertakes not to call the expert as a witness at the trial. R.R.O. 1990, Reg. 194, r. 31.06 (3); O. Reg. 438/08, s. 30 (2); O. Reg. 453/09, s. 1.

Insurance Policies

(4) A party may on an examination for discovery obtain disclosure of,

(a) the existence and contents of any insurance policy under which an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment; and

(b) the amount of money available under the policy, and any conditions affecting its availability. R.R.O. 1990, Reg. 194, r. 31.06 (4).

(5) No information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action. R.R.O. 1990, Reg. 194, r. 31.06 (5).

Divided Discovery

(6) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold the information until after the issue has been determined. R.R.O. 1990, Reg. 194, r. 31.06 (6).

Failure to Answer on Discovery

Failure to Answer Questions

31.07 (1) A party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question if,

(a) the party or other person refuses to answer the question, whether on the grounds of privilege or otherwise;

(b) the party or other person indicates that the question will be considered or taken under advisement, but no answer is provided within 60 days after the response; or

(c) the party or other person undertakes to answer the question, but no answer is provided within 60 days after the response. O. Reg. 260/05, s. 7.

Effect of Failure to Answer

(2) If a party, or a person examined for discovery on behalf of or in place of a party, fails to answer a question as described in subrule (1), the party may

not introduce at the trial the information that was not provided, except with leave of the trial judge. O. Reg. 260/05, s. 7.

Additional Sanction

(3) The sanction provided by subrule (2) is in addition to the sanctions provided by rule 34.15 (sanctions for default in examination). O. Reg. 260/05, s. 7.

Obligatory Status of Undertakings

(4) For greater certainty, nothing in these rules relieves a party or other person who undertakes to answer a question from the obligation to honour the undertaking. O. Reg. 260/05, s. 7.

Effect of Lawyer Answering

31.08 Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by his or her lawyer and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer. R.R.O. 1990, Reg. 194, r. 31.08; O. Reg. 575/07, s. 4.

Information Subsequently Obtained

Duty to Correct Answers

31.09 (1) Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,

(a) was incorrect or incomplete when made; or

(b) is no longer correct and complete,

the party shall forthwith provide the information in writing to every other party. R.R.O. 1990, Reg. 194, r. 31.09 (1).

Consequences of Correcting Answers

(2) Where a party provides information in writing under subrule (1),

(a) the writing may be treated at a hearing as if it formed part of the original examination of the person examined; and

(b) any adverse party may require that the information be verified by affidavit of the party or be the subject of further examination for discovery. R.R.O. 1990, Reg. 194, r. 31.09 (2).

Sanction for Failing to Correct Answers

(3) Where a party has failed to comply with subrule (1) or a requirement under clause (2) (b), and the information subsequently discovered is,

(a) favourable to the party's case, the party may not introduce the information at the trial, except with leave of the trial judge; or

(b) not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 31.09 (3).

Discovery of Non-Parties with Leave

General

31.10 (1) The court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the action, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation. R.R.O. 1990, Reg. 194, r. 31.10 (1).

Test for Granting Leave

(2) An order under subrule (1) shall not be made unless the court is satisfied that,

(a) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;

(b) it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and

(c) the examination will not,

(i) unduly delay the commencement of the trial of the action,

(ii) entail unreasonable expense for other parties, or

(iii) result in unfairness to the person the moving party seeks to examine. R.R.O. 1990, Reg. 194, r. 31.10 (2).

Costs Consequences for Examining Party

(3) A party who examines a person orally under this rule shall serve every party who attended or was represented on the examination with the transcript free of charge, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 31.10 (3).

(4) The examining party is not entitled to recover the costs of the examination from another party unless the court expressly orders otherwise. R.R.O. 1990, Reg. 194, r. 31.10 (4).

Limitation on Use at Trial

(5) The evidence of a person examined under this rule may not be read into evidence at trial under subrule 31.11 (1). R.R.O. 1990, Reg. 194, r. 31.10 (5).

Use of Examination for Discovery at Trial

Reading in Examination of Party

31.11 (1) At the trial of an action, a party may read into evidence as part of the party's own case against an adverse party any part of the evidence given on the examination for discovery of,

(a) the adverse party; or

(b) a person examined for discovery on behalf or in place of, or in addition to the adverse party, unless the trial judge orders otherwise,

if the evidence is otherwise admissible, whether the party or other person has already given evidence or not. R.R.O. 1990, Reg. 194, r. 31.11 (1); O. Reg. 260/05, s. 8.

Impeachment

(2) The evidence given on an examination for discovery may be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness. R.R.O. 1990, Reg. 194, r. 31.11 (2).

Qualifying Answers

(3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the trial judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced. R.R.O. 1990, Reg. 194, r. 31.11 (3).

Rebuttal

(4) A party who reads into evidence as part of the party's own case evidence given on an examination for discovery of an adverse party, or a person examined for discovery on behalf or in place of or in addition to an adverse party, may rebut that evidence by introducing any other admissible evidence. R.R.O. 1990, Reg. 194, r. 31.11 (4).

Party under Disability

(5) The evidence given on the examination for discovery of a party under disability may be read into or used in evidence at the trial only with leave of the trial judge. R.R.O. 1990, Reg. 194, r. 31.11 (5).

Unavailability of Deponent

(6) Where a person examined for discovery,

(a) has died;

(b) is unable to testify because of infirmity or illness;

(c) for any other sufficient reason cannot be compelled to attend at the trial; or

(d) refuses to take an oath or make an affirmation or to answer any proper question,

any party may, with leave of the trial judge, read into evidence all or part of the evidence given on the examination for discovery as the evidence of the person examined, to the extent that it would be admissible if the person were testifying in court. R.R.O. 1990, Reg. 194, r. 31.11 (6).

(7) In deciding whether to grant leave under subrule (6), the trial judge shall consider,

(a) the extent to which the person was cross-examined on the examination for discovery;

(b) the importance of the evidence in the proceeding;

(c) the general principle that evidence should be presented orally in court; and

(d) any other relevant factor. R.R.O. 1990, Reg. 194, r. 31.11 (7).

Subsequent Action

(8) Where an action has been discontinued or dismissed and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, the evidence given on an examination for discovery taken in the former action may be read into or used in evidence at the trial of the subsequent action as if it had been taken in the subsequent action. R.R.O. 1990, Reg. 194, r. 31.11 (8).

RULE 32 INSPECTION OF PROPERTY

Order for Inspection

32.01 (1) The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding. R.R.O. 1990, Reg. 194, r. 32.01 (1).

(2) For the purpose of the inspection, the court may,

(a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;

(b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and

(c) permit the taking of samples, the making of observations or the conducting of tests or experiments. R.R.O. 1990, Reg. 194, r. 32.01 (2).

(3) The order shall specify the time, place and manner of the inspection and may impose such other terms, including the payment of compensation, as are just. R.R.O. 1990, Reg. 194, r. 32.01 (3).

(4) No order for inspection shall be made without notice to the person in possession of the property unless,

(a) service of notice, or the delay necessary to serve notice, might entail serious consequences to the moving party; or

(b) the court dispenses with service of notice for any other sufficient reason. R.R.O. 1990, Reg. 194, r. 32.01 (4).

RULE 33 MEDICAL EXAMINATION OF PARTIES

Motion for Medical Examination

33.01 A motion by an adverse party for an order under section 105 of the *Courts of Justice Act* for the physical or mental examination of a party whose physical or mental condition is in question in a proceeding shall be made on notice to every other party. R.R.O. 1990, Reg. 194, r. 33.01.

Order for Examination

Contents of Order

33.02 (1) An order under section 105 of the *Courts of Justice Act* may specify the time, place and purpose of the examination and shall name the health practitioner or practitioners by whom it is to be conducted. R.R.O. 1990, Reg. 194, r. 33.02 (1).

Further Examinations

(2) The court may order a second examination or further examinations on such terms respecting costs and other matters as are just. R.R.O. 1990, Reg. 194, r. 33.02 (2).

Dispute as to Scope of Examination

33.03 The court may on motion determine any dispute relating to the scope of an examination. R.R.O. 1990, Reg. 194, r. 33.03.

Provision of Information to Party Obtaining Order

Interpretation

33.04 (1) Subrule 30.01 (1) (meaning of "document", "power") applies to subrule (2). R.R.O. 1990, Reg. 194, r. 33.04 (1).

Party to be Examined must Provide Information

(2) The party to be examined shall, unless the court orders otherwise, provide to the party obtaining the order, at least seven days before the examination, a copy of,

(a) any report made by a health practitioner who has treated or examined the party to be examined in respect of the mental or physical condition in question, other than a practitioner whose report was made in preparation for contemplated or pending litigation and for no other purpose, and whom the party to be examined undertakes not to call as a witness at the hearing; and

(b) any hospital record or other medical document relating to the mental or physical condition in question that is in the possession, control or power of the party other than a document made in preparation for contemplated or pending litigation and for no other purpose, and in respect of which the party to be examined undertakes not to call evidence at the hearing. R.R.O. 1990, Reg. 194, r. 33.04 (2).

Who may Attend On Examination

33.05 No person other than the person being examined, the examining health practitioner and such assistants as the practitioner requires for the purpose of the examination shall be present at the examination, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 33.05.

Medical Reports

Preparation of Report

33.06 (1) After conducting an examination, the examining health practitioner shall prepare a written report setting out his or her observations, the results of any tests made and his or her conclusions, diagnosis and prognosis and shall forthwith provide the report to the party who obtained the order. R.R.O. 1990, Reg. 194, r. 33.06 (1).

Service of Report

(2) The party who obtained the order shall forthwith serve the report on every other party. R.R.O. 1990, Reg. 194, r. 33.06 (2).

Penalty for Failure to Comply

33.07 A party who fails to comply with section 105 of the *Courts of Justice Act* or an order made under that section or with rule 33.04 is liable, if a

plaintiff or applicant, to have the proceeding dismissed or, if a defendant or respondent, to have the statement of defence or affidavit in response to the application struck out. R.R.O. 1990, Reg. 194, r. 33.07.

Examination by Consent

33.08 Rules 33.01 to 33.07 apply to a physical or mental examination conducted on the consent in writing of the parties, except to the extent that they are waived by the consent. R.R.O. 1990, Reg. 194, r. 33.08.

EXAMINATIONS OUT OF COURT

RULE 34 PROCEDURE ON ORAL EXAMINATIONS

Application of the Rule

34.01 Rules 34.02 to 34.19 apply to,

(a) an oral examination for discovery under Rule 31;

(b) the taking of evidence before trial under rule 36.01, subject to rule 36.02;

(c) a cross-examination on an affidavit for use on a motion or application under rule 39.02;

(d) the examination out of court of a witness before the hearing of a pending motion or application under rule 39.03; and

(e) an examination in aid of execution under rule 60.18. R.R.O. 1990, Reg. 194, r. 34.01.

Before Whom to be Held

34.02 (1) An oral examination to be held in Ontario shall be held at a time and place set out in the notice of examination or summons to a witness, before a person assigned by,

(a) an official examiner;

(b) a reporting service agreed on by the parties; or

(c) a reporting service named by the examining party. O. Reg. 171/98, s. 8.

(2) A person who objects to being examined at the time or place set out in the notice of examination or before a person assigned under subrule (1) may make a motion to show that the time, place or person is unsuitable for the proper conduct of the examination. O. Reg. 171/98, s. 8.

(3) If a motion under subrule (2) is dismissed, the court shall fix the responding party's costs on a substantial indemnity basis and order the

moving party to pay them forthwith, unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable. O. Reg. 171/98, s. 8; O. Reg. 284/01, s. 8.

Place of Examination

34.03 Where the person to be examined resides in Ontario, the examination shall take place in the county in which the person resides, unless the court orders or the person to be examined and all the parties agree otherwise. R.R.O. 1990, Reg. 194, r. 34.03.

How Attendance Required

Party

34.04 (1) Where the person to be examined is a party to the proceeding, a notice of examination (Form 34A) shall be served,

(a) on the party's lawyer of record; or

(b) where the party acts in person, on the party, personally or by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (1); O. Reg. 739/94, s. 2 (1); O. Reg. 575/07, s. 20 (1).

Person Examined on Behalf or in Place of Party

(2) Where a person is to be examined for discovery or in aid of execution on behalf or in place of a party, a notice of examination shall be served,

(a) on the party's lawyer of record; or

(b) on the person to be examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (2); O. Reg. 575/07, s. 20 (2).

Deponent of Affidavit

(3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,

(a) on the lawyer for the party who filed the affidavit; or

(b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (3); O. Reg. 739/94, s. 2 (2); O. Reg. 575/07, s. 1.

Others

(4) Where the person to be examined,

(a) is neither a party nor a person referred to in subrule (2) or (3); and

(b) resides in Ontario,

the person shall be served with a summons to witness (Form 34B), personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (4).

Attendance Money

(5) When a summons to witness is served on a witness, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness at the same time. R.R.O. 1990, Reg. 194, r. 34.04 (5).

Summons may be Issued in Blank

(6) On the request of a party or a lawyer and on payment of the prescribed fee, a registrar shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses. R.R.O. 1990, Reg. 194, r. 34.04 (6); O. Reg. 575/07, s. 1.

Person Outside Ontario

(7) Rule 53.05 (summons to a witness outside Ontario) applies to the securing of the attendance for examination of a person outside Ontario and the attendance money paid or tendered to the person shall be calculated in accordance with the *Interprovincial Summonses Act*. R.R.O. 1990, Reg. 194, r. 34.04 (7).

Person in Custody

(8) Rule 53.06 (compelling attendance of witness in custody) applies to the securing of the attendance for examination of a person in custody. R.R.O. 1990, Reg. 194, r. 34.04 (8).

34.04.1 Revoked: O. Reg. 171/98, s. 9.

Notice of Time and Place

Person to be Examined

34.05 (1) Where the person to be examined resides in Ontario, he or she shall be given not less than two days notice of the time and place of the examination, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 34.05 (1).

Every Other Party

(2) Every party to the proceeding other than the examining party shall be given not less than two days notice of the time and place of the examination. R.R.O. 1990, Reg. 194, r. 34.05 (2).

Examinations on Consent

34.06 A person to be examined and all the parties may consent to the time and place of the examination and,

(a) to the minimum notice period and the form of notice; or

(b) to dispense with notice. R.R.O. 1990, Reg. 194, r. 34.06.

Where Person to be Examined Resides outside Ontario

Contents of Order for Examination

34.07 (1) Where the person to be examined resides outside Ontario, the court may determine,

(a) whether the examination is to take place in or outside Ontario;

(b) the time and place of the examination;

(c) the minimum notice period;

(d) the person before whom the examination is to be conducted;

(e) the amount of attendance money to be paid to the person to be examined; and

(f) any other matter respecting the holding of the examination. R.R.O. 1990, Reg. 194, r. 34.07 (1).

Commission and Letter of Request

(2) Where the person is to be examined outside Ontario, the order under subrule (1) shall be in Form 34E and shall, if the moving party requests it, provide for the issuing of,

(a) a commission (Form 34C) authorizing the taking of evidence before a named commissioner; and

(b) a letter of request (Form 34D) directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined before the commissioner. R.R.O. 1990, Reg. 194, r. 34.07 (2).

(3) The commission and letter of request shall be prepared and issued by the registrar. R.R.O. 1990, Reg. 194, r. 34.07 (3).

Attendance Money

(4) Where the person to be examined resides outside Ontario and is not a party or a person to be examined on behalf or in place of a party, the examining party shall pay or tender to the person to be examined the amount

of attendance money fixed by the order under subrule (1). R.R.O. 1990, Reg. 194, r. 34.07 (4).

Duties of Commissioner

(5) A commissioner shall, to the extent that it is possible to do so, conduct the examination in the form of oral questions and answers in accordance with these rules, the law of evidence of Ontario and the terms of the commission, unless some other form of examination is required by the order or the law of the place where the examination is conducted. R.R.O. 1990, Reg. 194, r. 34.07 (5).

(6) As soon as the transcript of the examination is prepared, the commissioner shall,

(a) return the commission, together with the original transcript and exhibits, to the registrar who issued it;

(b) keep a copy of the transcript and, where practicable, the exhibits; and

(c) notify the parties who appeared at the examination that the transcript is complete and has been returned to the registrar who issued the commission. R.R.O. 1990, Reg. 194, r. 34.07 (6).

Examining Party to Serve Transcript

(7) The registrar shall send the transcript to the lawyer for the examining party and the lawyer shall forthwith serve every other party with the transcript free of charge. R.R.O. 1990, Reg. 194, r. 34.07 (7); O. Reg. 575/07, s. 1.

Person to be Examined to be Sworn

34.08 (1) Before being examined, the person to be examined shall take an oath or make an affirmation and, where the examination is conducted in Ontario, the oath or affirmation shall be administered by an official examiner or by a person authorized to administer oaths in Ontario. R.R.O. 1990, Reg. 194, r. 34.08 (1).

(2) Where the examination is conducted outside Ontario, the oath or affirmation may be administered by the person before whom the examination is conducted, a person authorized to administer oaths in Ontario or a person authorized to take affidavits or administer oaths or affirmations in the jurisdiction where the examination is conducted. R.R.O. 1990, Reg. 194, r. 34.08 (2).

Interpreter

34.09 (1) Where the person to be examined does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the person is examined, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation and the questions to and answers of the person being examined. R.R.O. 1990, Reg. 194, r. 34.09 (1).

(2) Where an interpreter is required by subrule (1) for the examination of,

(a) a party or a person on behalf or in place of a party, the party shall provide the interpreter;

(b) any other person, the examining party shall provide the interpreter,

unless the interpretation is from English to French or from French to English and an interpreter is provided by the Ministry of the Attorney General. R.R.O. 1990, Reg. 194, r. 34.09 (2).

Production of Documents on Examination

Interpretation

34.10 (1) Subrule 30.01 (1) (meaning of "document", "power") applies to subrules (2), (3) and (4). R.R.O. 1990, Reg. 194, r. 34.10 (1).

Person to be Examined Must Produce Required Documents and Things

(2) The person to be examined shall produce for inspection at the examination,

(a) on an examination for discovery, all documents in his or her possession, control or power that are not privileged and that subrule 30.04 (4) requires the person to produce; and

(b) on any examination, including an examination for discovery, all documents and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to produce. O. Reg. 248/21, s. 6 (1).

Notice or Summons May Require Documents and Things

(3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to produce for inspection at the examination,

(a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or

(b) such documents or things described in clause (a) as are specified in the notice or summons. R.R.O. 1990, Reg. 194, r. 34.10 (3); O. Reg.

438/08, s. 31; O. Reg. 248/21, s. 6 (2).

Duty to Produce Other Documents

(4) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that is relevant to a matter in issue in the proceeding and is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within two days thereafter, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 34.10 (4); O. Reg. 453/09, s. 2.

Re-examination

On Examination for Discovery

34.11 (1) A person being examined for discovery may be re-examined by his or her own lawyer and by any party adverse in interest to the examining party. R.R.O. 1990, Reg. 194, r. 34.11 (1); O. Reg. 575/07, s. 3.

On Cross-Examination on Affidavit or Examination in Aid of Execution

(2) A person being cross-examined on an affidavit or examined in aid of execution may be re-examined by his or her own lawyer. R.R.O. 1990, Reg. 194, r. 34.11 (2); O. Reg. 575/07, s. 3.

Timing and Form

(3) The re-examination shall take place immediately after the examination or cross-examination and shall not take the form of a cross-examination. R.R.O. 1990, Reg. 194, r. 34.11 (3).

On Examination for Motion or Application

(4) Re-examination of a witness examined,

(a) before the hearing of a motion or application, is governed by subrule 39.03 (2); and

(b) at the hearing of a motion or application, is governed by subrule 39.03 (4). R.R.O. 1990, Reg. 194, r. 34.11 (4).

On Examination Before Trial

(5) Re-examination of a witness examined before trial under Rule 36 is governed by subrule 36.02 (2). R.R.O. 1990, Reg. 194, r. 34.11 (5).

Objections and Rulings

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded. R.R.O. 1990, Reg. 194, r. 34.12 (1).

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing. R.R.O. 1990, Reg. 194, r. 34.12 (2).

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court. R.R.O. 1990, Reg. 194, r. 34.12 (3).

34.13 Revoked: O. Reg. 171/98, s. 10.

Improper Conduct of Examination

Adjournment to Seek Directions

34.14 (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

(a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;

(b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;

(c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or

(d) there has been a neglect or improper refusal to produce a relevant document on the examination. R.R.O. 1990, Reg. 194, r. 34.14 (1).

Sanctions for Improper Conduct or Adjournment

(2) Where the court finds that,

(a) a person's improper conduct necessitated a motion under subrule (1); or

(b) a person improperly adjourned an examination under subrule (1),

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just. R.R.O. 1990, Reg. 194, r. 34.14 (2).

Sanctions for Default or Misconduct by Person to be Examined

34.15 (1) Where a person fails to attend at the time and place fixed for an examination in the notice of examination or summons to witness or at the time and place agreed on by the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that he or she is required to produce or to comply with an order under rule 34.14, the court may,

(a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;

(b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;

(c) strike out all or part of the person's evidence, including any affidavit made by the person; and

(d) make such other order as is just. R.R.O. 1990, Reg. 194, r. 34.15 (1).

(2) Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a contempt order against the person. R.R.O. 1990, Reg. 194, r. 34.15 (2).

Examination to be Recorded

34.16 Every examination shall be recorded in its entirety in question and answer form in a manner that permits the preparation of a typed transcript of the examination, unless the court orders or the parties agree otherwise. R.R.O. 1990, Reg. 194, r. 34.16; O. Reg. 689/20, s. 20.

Typed Transcript

34.17 (1) The official examiner or person who recorded an examination shall, on the request of a party, have a typed transcript of the examination prepared and completed within four weeks after receipt of the request. O. Reg. 689/20, s. 21.

Certification

(2) The transcript shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined. O. Reg. 689/20, s. 21.

Copy to be Provided

(3) As soon as the transcript is prepared, the official examiner or person who recorded the examination shall send a copy of the transcript to the party who requested it. O. Reg. 689/20, s. 21.

Filing of Transcript

Party to Have Transcript Available

34.18 (1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court. R.R.O. 1990, Reg. 194, r. 34.18 (1).

Filing for Use on Motion or Application

(2) Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 34.18 (2); O. Reg. 171/98, s. 11; O. Reg. 394/09, s. 14.

(3) The party may file a copy of a portion of the transcript if the other parties consent. R.R.O. 1990, Reg. 194, r. 34.18 (3).

Filing for Use at Trial

(4) A copy of a transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers. R.R.O. 1990, Reg. 194, r. 34.18 (4).

Videotaping or other Recording of Examination

34.19 (1) On consent of the parties or by order of the court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the court along with the transcript. R.R.O. 1990, Reg. 194, r. 34.19 (1).

(2) Rule 34.18 applies, with necessary modifications, to a tape or other recording made under subrule (1). R.R.O. 1990, Reg. 194, r. 34.19 (2).

RULE 35 PROCEDURE ON EXAMINATION FOR DISCOVERY BY WRITTEN QUESTIONS

Questions

35.01 An examination for discovery by written questions and answers shall be conducted by serving a list of the questions to be answered (Form 35A) on the person to be examined and every other party. R.R.O. 1990, Reg. 194, r. 35.01.

Answers

35.02 (1) Written questions shall be answered by the affidavit (Form 35B) of the person being examined, served on the examining party within fifteen days after service of the list of questions. R.R.O. 1990, Reg. 194, r. 35.02 (1).

(2) The examining party shall serve the answers on every other party forthwith. R.R.O. 1990, Reg. 194, r. 35.02 (2).

Objections

35.03 An objection to answering a written question shall be made in the affidavit of the person being examined, with a brief statement of the reason for the objection. R.R.O. 1990, Reg. 194, r. 35.03.

Failure to Answer

Further List of Questions

35.04 (1) Where the examining party is not satisfied with an answer or where an answer suggests a new line of questioning, the examining party may, within ten days after receiving the answer, serve a further list of written questions which shall be answered within fifteen days after service. R.R.O. 1990, Reg. 194, r. 35.04 (1).

Court Order for Further Answers

(2) Where the person being examined refuses or fails to answer a proper question or where the answer to a question is insufficient, the court may order the person to answer or give a further answer to the question or to answer any other question either by affidavit or on oral examination. R.R.O. 1990, Reg. 194, r. 35.04 (2).

Court Order for Oral Examination

(3) Where the court is satisfied, on reading all the answers to the written questions, that some or all of them are evasive, unresponsive or otherwise unsatisfactory, the court may order the person examined to submit to oral examination on such terms respecting costs and other matters as are just. R.R.O. 1990, Reg. 194, r. 35.04 (3).

Additional Sanctions

(4) Where a person refuses or fails to answer a proper question on a written examination or to produce a document that he or she is required to produce, the court may, in addition to imposing the sanctions provided in subrules (2) and (3),

(a) if the person is a party or a person examined on behalf or in place of a party, dismiss the party's action or strike out the party's defence;

(b) strike out all or part of the person's evidence; and

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 35.04 (4).

Improper Conduct of Examination

35.05 On motion by the person being examined, or by any party, the court may terminate the written examination or limit its scope where,

(a) the right to examine is being abused by an excess of improper questions; or

(b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined. R.R.O. 1990, Reg. 194, r. 35.05.

Filing Questions and Answers

35.06 Rule 34.18 applies, with necessary modifications, to the filing of written questions and answers for the use of the court. R.R.O. 1990, Reg. 194, r. 35.06.

RULE 36 TAKING EVIDENCE BEFORE TRIAL

Where Available

Definition

36.01 (1) In this rule,

"party" includes a party to a pending or intended proceeding. O. Reg. 8/07, s. 1.

By Consent or by Order

(2) A party who intends to introduce the evidence of a person at trial may, with leave of the court or the consent of the parties, examine the person on oath or affirmation before trial for the purpose of having the person's testimony available to be tendered as evidence at the trial. O. Reg. 8/07, s. 1.

Discretion of Court

(3) In exercising its discretion to order an examination under subrule (2), the court shall take into account,

(a) the convenience of the person whom the party seeks to examine;

(b) the possibility that the person will be unavailable to testify at the trial by reason of death, infirmity or sickness;

(c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial;

(d) the expense of bringing the person to the trial;

(e) whether the witness ought to give evidence in person at the trial; and

(f) any other relevant consideration. O. Reg. 8/07, s. 1.

Expert Witness

(4) Before moving for leave to examine an expert witness under subrule (2), the moving party shall serve on every other party the report of the expert witness referred to in subrule 53.03 (1) (calling expert witness at trial) unless the court orders otherwise. O. Reg. 8/07, s. 1.

Interim Costs, Pending or Intended Proceeding

(5) Where an order is made under subrule (2) for the examination of a witness in respect of a matter that is or will be the subject of a pending or intended proceeding, the court may, if it considers it appropriate to do so, order the moving party to pay to any other party, in advance of the examination, any or all of the costs reasonably expected to arise for the other party from the examination and any related cross-examination or re-examination. O. Reg. 8/07, s. 1.

Procedure

36.02 (1) Subject to subrule (2), Rule 34 applies to the examination of a witness under rule 36.01, unless the court orders otherwise, and, for the purpose, a reference in Rule 34 to a party includes a reference to a party to a pending or intended proceeding. O. Reg. 8/07, s. 2.

(2) A witness examined under rule 36.01 may be examined, cross-examined and re-examined in the same manner as a witness at trial. R.R.O. 1990, Reg. 194, r. 36.02 (2).

Examinations outside Ontario

36.03 Where an order is made under rule 36.01 for the examination of a witness outside Ontario, the order shall, if the moving party requests it, provide for the issuing of a commission and letter of request under subrules 34.07 (2) and (3) for the taking of the evidence of the witness and, on consent of the parties, any other witness in the same jurisdiction, and the order shall be in Form 34E. R.R.O. 1990, Reg. 194, r. 36.03.

Use at Trial

36.04 (1) In subrules (2) to (7), where an action,

(a) is brought by or against a corporation, "party" includes an officer, director or employee of the corporation;

(b) is brought by or against a partnership or a sole proprietorship using the firm name, "party" includes each person who was, or is alleged to have been, a partner or the sole proprietor, as the case may be;

(c) is brought by or against a party under disability, "party" includes the litigation guardian;

(d) is brought by or against an assignee, "party" includes the assignor;

(e) is brought by or against a trustee of the estate of a bankrupt, "party" includes the bankrupt;

(f) is brought or defended for the immediate benefit of a person who is not a party, "party" includes the person for whose immediate benefit the action is brought or defended. R.R.O. 1990, Reg. 194, r. 36.04 (1); O. Reg. 69/95, s. 18.

(2) At trial any party may use the transcript and videotape or other recording of an examination under rule 36.01 or 36.03 of a witness who is not a party as the evidence of the witness, unless the court orders otherwise on the ground that the witness ought to give evidence at trial or for any other sufficient reason. R.R.O. 1990, Reg. 194, r. 36.04 (2).

(3) A witness who is not a party and whose evidence has been taken under rule 36.01 or 36.03 shall not be called to give evidence at the trial, except with leave of the trial judge. R.R.O. 1990, Reg. 194, r. 36.04 (3).

(4) With leave of the trial judge or the consent of the parties, a party may use at trial the transcript and a videotape or other recording of an examination under rule 36.01 of a witness who is a party as the evidence of the witness. R.R.O. 1990, Reg. 194, r. 36.04 (4).

(5) In exercising its discretion under subrule (4), the court shall take into account,

(a) whether the party is unavailable to testify by reason of death, infirmity or sickness;

(b) whether the party ought to give evidence in person at the trial; and

(c) any other relevant consideration. R.R.O. 1990, Reg. 194, r. 36.04 (5).

(6) Use of evidence taken under rule 36.01 or 36.03 is subject to any ruling by the trial judge respecting its admissibility. R.R.O. 1990, Reg. 194, r. 36.04 (6).

(7) The transcript and a videotape or other recording may be filed with the court at trial and need not be read or played at trial unless a party or the trial

judge requires it. R.R.O. 1990, Reg. 194, r. 36.04 (7).

MOTIONS AND APPLICATIONS

RULE 37 MOTIONS — JURISDICTION AND PROCEDURE

Notice of Motion

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.01; O. Reg. 322/24, s. 4.

Jurisdiction to Hear a Motion

Jurisdiction of Judge

37.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 (1).

Jurisdiction of an Associate Judge

(2) An associate judge has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

(a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;

(b) to set aside, vary or amend an order of a judge;

(c) to abridge or extend a time prescribed by an order that an associate judge could not have made;

(d) for judgment on consent in favour of or against a party under disability;

(e) relating to the liberty of the subject;

(f) under section 4 or 5 of the *Judicial Review Procedure Act*; or

(g) in an appeal. R.R.O. 1990, Reg. 194, r. 37.02 (2); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Jurisdiction of Registrar

(3) The registrar shall make an order granting the relief sought on a motion for an order on consent, if,

(a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;

(b) the consent states that no party affected by the order is under disability; and

(c) the order sought is for,

(i) amendment of a pleading, notice of application or notice of motion,

(ii) addition, deletion or substitution of a party,

(iii) removal of a lawyer as lawyer of record;

(iv) setting aside the noting of a party in default,

(v) setting aside a default judgment,

(vi) discharge of a certificate of pending litigation,

(vii) security for costs in a specified amount,

(viii) re-attendance of a witness to answer questions on an examination,

(ix) fulfilment of undertakings given on an examination, or

(x) dismissal of a proceeding, with or without costs. O. Reg. 19/03, s. 8; O. Reg. 575/07, s. 21.

Where Motions to be Brought

37.03 Unless the court orders otherwise, all motions shall be brought in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02 and, if a motion is to be heard in person, it shall be heard in that county. O. Reg. 689/20, s. 22.

Motions — To Whom to be Made

37.04 A motion shall be made to the court if it is within the jurisdiction of an associate judge or registrar and otherwise shall be made to a judge. R.R.O. 1990, Reg. 194, r. 37.04; O. Reg. 19/03, s. 9; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Hearing Date for Motions

Where no practice direction

37.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions. O. Reg. 770/92, s. 10; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Exception, lengthy hearing

(2) If a lawyer estimates that the hearing of the motion will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of motion is served. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

Urgent motion

(3) An urgent motion may be set down for hearing on any day on which a judge or associate judge is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Content of Notice

37.06 Every notice of motion (Form 37A) shall,

(a) state the precise relief sought;

(b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

Service of Notice

Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

Where Not Required

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (3).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

Minimum Notice Period

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.07 (6); O. Reg. 171/98, s. 12; O. Reg. 438/08, s. 33.

Filing of Notice of Motion

37.08 (1) Where a motion is made on notice, the notice of motion shall be filed with proof of service at least seven days before the hearing date in the court office where the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.08 (1); O. Reg. 171/98, s. 13; O. Reg. 438/08, s. 34.

(2) Where service of the notice of motion is not required, it shall be filed at or before the hearing. R.R.O. 1990, Reg. 194, r. 37.08 (2).

Abandoned Motions

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 37.09 (1).

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (2).

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (3).

Material for Use on Motions

Where Motion Record Required

37.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or associate judge hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Contents of Motion Record

(2) The motion record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of motion;

(c) a copy of all affidavits and other material served by any party for use on the motion;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).

Responding Party's Motion Record

(3) Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).

Material may be Filed as Part of Record

(4) A notice of motion and any other material served by a party for use on a motion may be filed, together with proof of service, as part of the party's motion record and need not be filed separately. R.R.O. 1990, Reg. 194, r. 37.10 (4).

Transcript of Evidence

(5) A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 37.10 (5).

Factum

(6) A party may serve on every other party a factum that meets the requirements of rule 4.06.1. O. Reg. 14/04, s. 18; O. Reg. 300/24, s. 8.

(7) The moving party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 15 (1).

(8) The responding party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 15 (2).

(9) REVOKED: O. Reg. 394/09, s. 15 (3).

Refusals and Undertakings Chart

(10) On a motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,

(a) the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, a refusals and undertakings chart (Form 37C) that sets out,

(i) the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,

(ii) the question number and a reference to the page of the transcript where the question appears, and

(iii) the exact words of the question; and

(b) the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show,

(i) the answer provided, or

(ii) the basis for the refusal to answer the question or satisfy the undertaking. O. Reg. 132/04, s. 8; O. Reg. 438/08, s. 35 (5, 6).

Confirmation of Motion

37.10.1 (1) A party who makes a motion on notice to another party shall confer or attempt to confer with the other party and shall, not later than 2 p.m. five days before the hearing date,

(a) give the registrar a confirmation of motion (Form 37B) by,

(i) sending it by email to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the confirmation of motion to the other party by email. O. Reg. 537/18, s. 7 (1); O. Reg. 689/20, s. 23 (1); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (1, 3).

Failure to Send Copy of Confirmation

(2) If a party fails to send a copy of the confirmation of motion to a responding party in accordance with clause (1) (b), the responding party may, not later than 10 a.m. four days before the hearing date,

(a) give the registrar a confirmation of motion (Form 37B) by,

(i) sending it by email to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the confirmation of motion to the moving party by email. O. Reg. 537/18, s. 7 (1); O. Reg. 689/20, s. 23 (2); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (2, 3).

Duty to Update

(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of motion (Form 37B) by,

(i) sending it by email to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of motion to the other party by email. O. Reg. 14/04, s. 19; O. Reg. 689/20, s. 23 (3); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 2 (3).

Effect of Failure to Confirm

(4) If no confirmation is given under subrule (1), the motion shall not be heard and is deemed to have been abandoned, unless the court orders otherwise. O. Reg. 537/18, s. 7 (2).

Costs

(5) If a motion is deemed to have been abandoned under subrule (4) and the responding party gave a confirmation of motion in accordance with subrule (2), the responding party may be heard on the costs of the abandoned motion on the hearing date scheduled for the abandoned motion. O. Reg. 537/18, s. 7 (2).

Hearing in Absence of Public

37.11 (1) A motion may be heard in the absence of the public where,

(a) the motion is to be heard and determined without oral argument;

(b) because of urgency, it is impractical to have the motion heard in public;

(c) the motion is to be heard by telephone conference or video conference;

(d) the motion is made in the course of a pre-trial conference or case conference; or

(e) the motion is before a single judge of an appellate court. R.R.O. 1990, Reg. 194, r. 37.11 (1); O. Reg. 465/93, s. 4 (1); O. Reg. 24/00, s. 7; O. Reg. 170/14, s. 9.

(2) The hearing of all other motions shall be open to the public, except as provided in section 135 of the *Courts of Justice Act*, in which case the presiding judge, associate judge or officer shall endorse,

(a) on the notice of motion leave for a hearing in the absence of the public; or

(b) on a separate document in accordance with subrule 59.02 (2), with necessary modifications. O. Reg. 689/20, s. 24; O. Reg. 383/21, s. 15.

37.12 Revoked: O. Reg. 288/99, s. 15.

Hearing without Oral Argument

Consent motions, unopposed motions and motions without notice

37.12.1 (1) Where a motion is on consent, unopposed or without notice under subrule 37.07 (2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2).

(2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

(2.1) In the case of a motion on consent in the Court of Appeal, an affidavit or other document setting out the reasons why it is appropriate to make the order sought on the motion shall also be filed with the notice of motion. O. Reg. 82/17, s. 3.

(3) Where the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

Opposed Motions in Writing

(4) The moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,

(a) the motion shall be made on at least fourteen days notice;

(b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;

(c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2); O. Reg. 766/93, s. 1 (2); O. Reg. 689/20, s. 25.

(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,

(a) a consent to the motion;

(b) a notice that the responding party does not oppose the motion;

(c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or

(d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party. O. Reg. 465/93, s. 4 (2).

(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum. O. Reg. 465/93, s. 4 (2).

Disposition of Motion

37.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,

(a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or

(b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 (1).

(2) A judge who hears a motion may,

(a) in proper case, order that the motion be converted into a motion for judgment; or

(b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 (2).

(3) Where on a motion a judge directs the trial of an issue, subrules 38.10 (2) and (3) (issue treated as action) apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 37.13 (3).

Exception, motions in estate matters

(4) Clause (2) (b) and subrule (3) do not apply to a motion under Rule 74, 74.1 or 75. O. Reg. 484/94, s. 7; O. Reg. 111/21, s. 4.

Setting Aside, Varying or Amending Orders

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 (2).

Order Made by Registrar

(3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar may be made to a judge or associate judge, at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 (3); O. Reg. 689/20, s. 26; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

(a) to the judge who made it, at any place; or

(b) to any other judge, at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 (4); O. Reg. 689/20, s. 26.

Order Made by Associate Judge

(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of an associate judge may be made,

(a) to the associate judge who made it, at any place; or

(b) to any other associate judge or to a judge, at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 37.14 (5); O. Reg. 689/20, s. 26; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Order Made in Court of Appeal or Divisional Court

(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,

(a) where the order was made by a judge, to the judge who made it or any other judge of the court; or

(b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court. R.R.O. 1990, Reg. 194, r. 37.14 (6); O. Reg. 82/17, s. 4, 17.

Motions in a Complicated Proceeding or Series of Proceedings

37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (where motions to be brought) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4; O. Reg. 689/20, s. 27.

(1.1) A judge who is directed to hear all motions under subrule (1) may refer to an associate judge any motion within the jurisdiction of an associate judge under subrule 37.02 (2) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(1.2) A judge who is directed to hear all motions under subrule (1) and an associate judge to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote

the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(2) A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 (2); O. Reg. 438/08, s. 37 (2).

Prohibiting Motions without Leave

37.16 On motion by any party, a judge or associate judge may by order prohibit another party from making further motions in the proceeding without leave, where the judge or associate judge on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. R.R.O. 1990, Reg. 194, r. 37.16; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Motion before Commencement of Proceeding

37.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith. R.R.O. 1990, Reg. 194, r. 37.17.

RULE 38 APPLICATIONS — JURISDICTION AND PROCEDURE

Application of the Rule

38.01 (1) Rules 38.02 to 38.12 apply to all proceedings commenced by a notice of application under rule 14.05, except as otherwise provided by this rule. O. Reg. 43/14, s. 8 (1); O. Reg. 322/24, s. 5 (1).

(2) Rules 38.02 and 38.09 do not apply to applications to the Divisional Court. R.R.O. 1990, Reg. 194, r. 38.01 (2).

(3) Rules 38.02 to 38.12 apply to an application made under subsection 140 (3) of the *Courts of Justice Act*, unless otherwise provided in rule 38.13 and subject to any modifications set out in that rule. O. Reg. 43/14, s. 8 (2).

(4) Rules 38.02 to 38.12 do not apply to an application made under rule 2.2.03, unless Rule 2.2 or a court order provides otherwise. O. Reg. 322/24, s. 5 (2).

Applications — To Whom to be Made

38.02 An application shall be made to a judge. R.R.O. 1990, Reg. 194, r. 38.02.

Place and Date of Hearing

Place of Commencement

38.03 (1) The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01. O. Reg. 438/08, s. 38.

Place of In-Person Hearings

(1.1) If the application is to be heard in person, it shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 689/20, s. 28.

Hearing date where no practice direction

(2) At any place where no practice direction concerning the scheduling of applications is in effect, an application may be set down for hearing on any day on which a judge is scheduled to hear applications. O. Reg. 770/92, s. 11.

Exception, lengthy hearing

(3) If a lawyer estimates that the hearing of the application will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of application is served. O. Reg. 770/92, s. 11; O. Reg. 575/07, s. 3.

Urgent application

(3.1) An urgent application may be set down for hearing on any day on which a judge is scheduled to hear applications, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 11; O. Reg. 575/07, s. 3.

Counter-Application

(4) If a notice of application has been served and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent shall make the application at the same place and time to the same judge, unless the court orders otherwise. O. Reg. 14/04, s. 20 (3).

Content of Notice

38.04 Every notice of application (Form 14E, 14E.1, 68A, 73A, 74.44 or 75.5) shall state,

(a) the precise relief sought;

(b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

(c) the documentary evidence to be used at the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.04; O. Reg. 484/94, s. 8; O.

Reg. 43/14, s. 9.

Issuing of Notice

38.05 A notice of application shall be issued as provided by rule 14.07 before it is served. R.R.O. 1990, Reg. 194, r. 38.05.

Service of Notice

Generally

38.06 (1) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions. R.R.O. 1990, Reg. 194, r. 38.06 (1).

Where Notice Ought to Have Been Served

(2) Where it appears to the judge hearing the application that the notice of application ought to have been served on a person who has not been served, the judge may,

(a) dismiss the application or dismiss it only against the person who was not served;

(b) adjourn the application and direct that the notice of application be served on the person; or

(c) direct that any judgment made on the application be served on the person. R.R.O. 1990, Reg. 194, r. 38.06 (2).

Minimum Notice Period

(3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date. R.R.O. 1990, Reg. 194, r. 38.06 (3).

Filing Proof of Service

(4) Proof of service of the notice of application shall be filed at least seven days before the hearing date in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.06 (4); O. Reg. 171/98, s. 15; O. Reg. 438/08, s. 39; O. Reg. 384/24, s. 2.

Notice of Appearance

38.07 (1) A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance (Form 38A). R.R.O. 1990, Reg. 194, r. 38.07 (1).

(2) A respondent who has not delivered a notice of appearance is not entitled to,

(a) receive notice of any step in the application;

(b) receive any further document in the application, unless,

(i) the court orders otherwise, or

(ii) the document is an amended notice of application that changes the relief sought;

(c) file material, examine a witness or cross-examine on an affidavit on the application; or

(d) be heard at the hearing of the application, except with leave of the presiding judge. O. Reg. 351/94, s. 3.

(3) Despite subrule (2), a party who is served with a notice of application outside Ontario may make a motion under subrule 17.06 (1) before delivering a notice of appearance and is entitled to be served with material responding to the motion. O. Reg. 351/94, s. 3.

Exception, applications to pass accounts

(4) Subrules (1) and (2) do not apply to a notice of application to pass accounts under Rule 74. O. Reg. 484/94, s. 9.

38.07.1 Revoked: O. Reg. 457/01, s. 8.

Abandoned Applications

38.08 (1) The applicant may abandon an application by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 38.08 (1).

(2) An applicant who fails to appear at the hearing shall be deemed to have abandoned the application unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 38.08 (2).

(3) Where an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 38.08 (3).

(4) If a party to an application is under disability, the application may be abandoned by or against that party only with leave of a judge, on notice to the party's litigation guardian and, if the litigation guardian is not the Children's Lawyer or the Public Guardian and Trustee,

(a) to the Children's Lawyer, if the party is a minor; or

(b) to the Public Guardian and Trustee, in any other case. O. Reg. 193/15, s. 3.

Material for Use on Application

Application Record and Factum

38.09 (1) The applicant shall,

(a) serve an application record, together with a factum that meets the requirements of rule 4.06.1, at least seven days before the hearing, on every respondent who has served a notice of appearance; and

(b) file the application record and factum, with proof of service, at least seven days before the hearing, in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.09 (1); O. Reg. 171/98, s. 17 (1); O. Reg. 206/02, s. 9 (1); O. Reg. 438/08, s. 40 (1, 2); O. Reg. 300/24, s. 9 (1).

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application;

(c) a copy of all affidavits and other material served by any party for use on the application;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.09 (2).

Respondent's Application Record and Factum

(3) The respondent shall serve on every other party, at least four days before the hearing, a factum that meets the requirements of rule 4.06.1. O. Reg. 171/98, s. 17 (2); O. Reg. 206/02, s. 9 (2); O. Reg. 14/04, s. 21; O. Reg. 438/08, s. 40 (3); O. Reg. 300/24, s. 9 (2).

(3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or

letter; and

(b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (4).

(3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (5).

Dispensing with Record and Factum

(4) A judge, before or at the hearing of the application, may dispense with compliance with this rule in whole or in part. R.R.O. 1990, Reg. 194, r. 38.09 (4).

Material May be Filed as Part of Record

(5) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material. R.R.O. 1990, Reg. 194, r. 38.09 (5).

Transcript of Evidence

(6) A party who intends to refer to a transcript of evidence at the hearing of an application shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 38.09 (6).

Exceptions, applications in estate matters

(7) Subrules (1) to (6) do not apply to applications under Rule 74 or 74.1. O. Reg. 484/94, s. 10; O. Reg. 111/21, s. 5.

(8) Subrules (1) to (6) apply to applications under Rule 75, but neither the applicant nor the respondent is required to serve a factum. O. Reg. 484/94, s. 10.

Confirmation of Application

Confirmation of Application

38.09.1 (1) A party who makes an application on notice to another party shall,

(a) confer or attempt to confer with the other party;

(b) not later than 2 p.m. five days before the hearing date, give the registrar a confirmation of application (Form 38B) by,

(i) sending it by email to the court office, or

(ii) leaving it at the court office; and

(c) send a copy of the confirmation of application to the other party by email. O. Reg. 14/04, s. 22; O. Reg. 438/08, s. 41; O. Reg. 689/20, s. 29 (1); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 3 (1, 2).

Effect of Failure to Confirm

(2) If no confirmation is given, the application shall not be heard, except by order of the court. O. Reg. 14/04, s. 22.

Duty to Update

(3) A party who has given a confirmation of application and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of application (Form 38B), by,

(i) sending it by email to the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of application to the other party by email. O. Reg. 14/04, s. 22; O. Reg. 689/20, s. 29 (2); O. Reg. 383/21, s. 4; O. Reg. 224/22, s. 3 (2).

Disposition of Application

38.10 (1) On the hearing of an application the presiding judge may,

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just. R.R.O. 1990, Reg. 194, r. 38.10 (1).

(2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial. R.R.O. 1990, Reg. 194, r. 38.10 (2).

(3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 38.10 (3).

Exception, applications in estate matters

(4) Clause (1) (b) and subrules (2) and (3) do not apply to applications under Rule 74, other than applications under rule 74.18, or Rule 74.1 or 75. O. Reg. 484/94, s. 11; O. Reg. 193/15, s. 4; O. Reg. 111/21, s. 6.

Setting aside Judgment on Application Made without Notice

38.11 (1) A party or other person who is affected by a judgment on an application made without notice or who fails to appear at the hearing of an application through accident, mistake or insufficient notice may move to set aside or vary the judgment, by a notice of motion that is served forthwith after the judgment comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 38.11 (1); O. Reg. 132/04, s. 10; O. Reg. 55/12, s. 3.

(2) A motion under subrule (1) may be made,

(a) at any place, to the judge who granted the judgment;

(b) at a place determined in accordance with rule 37.03 (where motions to be brought), to any other judge;

(c) to the Divisional Court, in the case of a judgment of that court. R.R.O. 1990, Reg. 194, r. 38.11 (2); O. Reg. 689/20, s. 30.

(3) On a motion under subrule (1), the judgment may be set aside or varied on such terms as are just. R.R.O. 1990, Reg. 194, r. 38.11 (3).

Striking out a Document

38.12 Rule 25.11 applies, with necessary modifications, with respect to any document filed on an application. O. Reg. 43/14, s. 10.

Applications under s. 140 (3), Courts of Justice Act

38.13 (1) This rule applies to applications made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 10.

Written Hearing

(2) An application made under subsection 140 (3) of the *Courts of Justice Act* shall be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 43/14, s. 10.

Commencement

(3) The application shall be commenced by filing both a notice of application, in Form 14E.1, and the application record described in subrule 38.09 (2). O. Reg. 43/14, s. 10.

Factum not Required

(4) A factum described in clause 38.09 (1) (a) is not required to be filed, but any factum that is filed shall be filed together with the notice of application and the application record. O. Reg. 43/14, s. 10.

Interpretation of Service of Notice Rule

(5) Subrules 38.06 (1) and (2) shall be read as if the reference to the notice of application includes reference to the application record and, if applicable, the applicant's factum. O. Reg. 43/14, s. 10.

Service on Attorney General

(6) In addition to serving the notice of application, application record and, if applicable, factum, on all parties under subrule 38.06 (1), the applicant shall serve the documents on the Attorney General of Ontario in the manner described in clause 16.02 (1) (h). O. Reg. 43/14, s. 10.

Timing of Service

(7) The notice of application, application record and, if applicable, factum shall be served within 15 days after the documents were filed or, if the service is on a person outside Ontario, within 25 days after the documents were filed. O. Reg. 43/14, s. 10.

Proof of Service

(8) Proof of service of the notice of application, application record and, if applicable, factum shall be filed immediately after they are served. O. Reg. 43/14, s. 10.

Non-application of Rules

(9) Subrules 38.03 (2), (3) and (3.1), 38.06 (3) and (4), rule 38.07, subrules 38.09 (1), (3), (3.1) and (3.2) and rule 38.09.1 do not apply to applications made under subsection 140 (3) of the *Courts of Justice Act*, unless the court orders otherwise. O. Reg. 43/14, s. 10.

Opportunity to Respond Before Making Order

(10) Despite subrule (9), the court shall not make an order under subsection 140 (4) of the *Courts of Justice Act* granting leave to institute or continue a proceeding, or rescinding a vexatious litigant order as defined in Rule 2.2, without giving the other parties and the Attorney General of Ontario an opportunity to serve and file a respondent's application record and factum. O. Reg. 43/14, s. 10; O. Reg. 322/24, s. 6.

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

Evidence by Affidavit

Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194,

r. 39.01 (1).

Service and Filing

(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Expert Witness Evidence

(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

Evidence by Cross-Examination on Affidavit

On a Motion or Application

39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party

who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions

(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

Evidence by Examination of a Witness

Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the *Courts of Justice Act*. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

Evidence by Examination for Discovery

Adverse Party's Examination

39.04 (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.

Party's Examination

(2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.

PRESERVATION OF RIGHTS IN PENDING LITIGATION

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

How Obtained

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

Where Motion Made without Notice

Maximum Duration

40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).

Extension

(2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party. R.R.O. 1990, Reg. 194, r. 40.02 (2).

(3) An extension may be granted on a motion without notice for a further period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (3).

Labour Injunctions Excepted

(4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 40.02 (4).

Undertaking

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

Factums Required

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum that meets the requirements of rule 4.06.1. O. Reg. 14/04, s. 23; O. Reg. 300/24, s. 10.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 18.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 18.

(4) Revoked: O. Reg. 394/09, s. 18.

RULE 41 APPOINTMENT OF RECEIVER

Definition

41.01 In rules 41.02 to 41.06,

"receiver" means a receiver or receiver and manager. R.R.O. 1990, Reg. 194, r. 41.01.

How Obtained

41.02 The appointment of a receiver under section 101 of the *Courts of Justice Act* may be obtained on motion to a judge in a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 41.02.

Form of Order

41.03 An order appointing a receiver shall,

(a) name the person appointed or refer that issue in accordance with Rule 54;

(b) specify the amount and terms of the security, if any, to be furnished by the receiver for the proper performance of the receiver's duties, or refer that issue in accordance with Rule 54;

(c) state whether the receiver is also appointed as manager and, if necessary, define the scope of the receiver's managerial powers; and

(d) contain such directions and impose such terms as are just. R.R.O. 1990, Reg. 194, r. 41.03.

Reference of Conduct of Receivership

41.04 An order appointing a receiver may refer the conduct of all or part of the receivership in accordance with Rule 54. R.R.O. 1990, Reg. 194, r. 41.04.

Directions

41.05 A receiver may obtain directions at any time on motion to a judge, unless there has been a reference of the conduct of the receivership, in which case the motion shall be made to the referee. R.R.O. 1990, Reg. 194, r. 41.05.

Discharge

41.06 A receiver may be discharged only by the order of a judge. R.R.O. 1990, Reg. 194, r. 41.06.

RULE 42 CERTIFICATE OF PENDING LITIGATION

Issuing of Certificate

Court Order Required

42.01 (1) A certificate of pending litigation (Form 42A) under section 103 of the *Courts of Justice Act* may be issued by a registrar only under an order of the court. R.R.O. 1990, Reg. 194, r. 42.01 (1).

Claim for Certificate to be in Originating Process

(2) A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration. R.R.O. 1990, Reg. 194, r. 42.01 (2).

Motion Without Notice

(3) A motion for an order under subrule (1) may be made without notice. R.R.O. 1990, Reg. 194, r. 42.01 (3).

Order to be Served Forthwith

(4) A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding. O. Reg. 219/91, s. 4.

Discharge of Certificate

42.02 (1) An order discharging a certificate of pending litigation under subsection 103 (6) of the *Courts of Justice Act* may be obtained on motion to the court. R.R.O. 1990, Reg. 194, r. 42.02 (1).

Factum

(2) Each party to a motion under subrule (1) shall, unless the motion is made on consent, serve on every other party to the motion a factum that meets the requirements of rule 4.06.1. O. Reg. 14/04, s. 24; O. Reg. 300/24, s. 11.

(3) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 19.

(4) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 19.

(5) Revoked: O. Reg. 394/09, s. 19.

RULE 43 INTERPLEADER

General

Definition

43.01 (1) In rules 43.02 to 43.04,

"property" means personal property and includes a debt. O. Reg. 42/05, s. 3.

Claimants

(2) For the purposes of rules 43.02 to 43.04, the following persons are claimants:

1. In the case of an application or motion for an interpleader order under subrule 43.02 (1), each person who makes a claim in respect of the property.

2. In the case of an application or motion for an interpleader order under subrule 43.02 (2),

i. the judgment debtor against whom the enforcement process has been filed,

ii. every creditor who has filed with the sheriff an enforcement process against the judgment debtor, and

iii. each person who makes a claim in respect of the property. O. Reg. 42/05, s. 3.

Where Available

Person Claiming No Beneficial Interest

43.02 (1) A person may seek an interpleader order (Form 43A) in respect of property if,

(a) two or more other persons have made adverse claims in respect of the property; and

(b) the first-named person,

(i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and

(ii) is willing to deposit the property with the court or dispose of it as the court directs. O. Reg. 42/05, s. 3.

Claims Under Rule 60.13

(2) A claimant who is entitled to do so under subrule 60.13 (4) or (5) may seek an interpleader order (Form 43A). O. Reg. 42/05, s. 3.

How Obtained

Application or Motion under Subrule 43.02 (1)

43.03 (1) The following requirements apply when a person seeks an interpleader order under subrule 43.02 (1):

1. If no proceeding has been commenced in respect of the property, the person shall make an application naming the claimants as respondents.

2. If a proceeding has been commenced in respect of the property, the person shall make a motion in the proceeding on notice to the claimants.

3. The notice of application or notice of motion shall require the claimants to attend the hearing to substantiate their claims.

4. The application or motion shall be supported by an affidavit identifying the property, containing the names and addresses of every claimant of whom the deponent has knowledge, and stating that the applicant or moving party,

i. claims no beneficial interest in the property, other than a lien for costs, fees or expenses,

ii. does not collude with any of the claimants, and

iii. is willing to deposit the property with the court or dispose of it as the court directs. O. Reg. 42/05, s. 3.

Motion under Subrule 43.02 (2)

(2) The following requirements apply when a claimant seeks an interpleader order under subrule 43.02 (2):

1. The claimant shall make a motion, on notice to the other claimants, in the proceeding in which the writ of execution was issued against the debtor.

2. The notice of motion shall require the other claimants to attend the hearing to substantiate their claims. O. Reg. 42/05, s. 3.

Disposition

Powers of Court

43.04 (1) On the hearing of an application or motion for an interpleader order, the court may,

(a) order that the applicant or moving party deposit the property with an officer of the court, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;

(b) declare that, on compliance with an order under clause (a), the liability of the applicant or moving party in respect of the property or its proceeds is extinguished; and

(c) order that the costs of the applicant or moving party be paid out of the property or its proceeds. O. Reg. 42/05, s. 3.

(2) In an order under subrule (1), the court may,

(a) order a claimant to be made a party to a proceeding already commenced in substitution for or in addition to the moving party;

(b) order the trial of an issue between the claimants, define the issue to be tried and direct which claimant is to be plaintiff and which defendant;

(c) where the question is one of law and the facts are not in dispute, decide the question without directing the trial of an issue;

(d) on the request of a claimant, determine the rights of the claimants in a summary manner, if, having regard to the value of the property and the nature of the issues in dispute, it seems desirable to do so;

(e) where a claimant fails to attend the hearing, or attends and fails to comply with an order made in the course of the proceeding, make an order declaring that the claimant and all persons claiming under the claimant are forever barred from making a claim against the applicant or moving party and all persons claiming under the applicant or moving party, without affecting the rights of the claimants as between themselves;

(f) stay any further step in a proceeding in respect of the property; and

(g) make such other order as is just. O. Reg. 42/05, s. 3.

Certain Motions to be Heard by Judge

(3) A motion for an interpleader order that is made to an associate judge and raises a genuine issue of fact or of law shall be adjourned to be heard by a judge. O. Reg. 42/05, s. 3; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

RULE 44 INTERIM RECOVERY OF PERSONAL PROPERTY

Motion for Interim Order

44.01 (1) An interim order under section 104 of the *Courts of Justice Act* for recovery of possession of personal property may be obtained on motion by the plaintiff, supported by an affidavit setting out,

(a) a description of the property sufficient to make it readily identifiable;

(b) the value of the property;

(c) that the plaintiff is the owner or lawfully entitled to possession of the property;

(d) that the property was unlawfully taken from the possession of the plaintiff or is unlawfully detained by the defendant; and

(e) the facts and circumstances giving rise to the unlawful taking or detention. R.R.O. 1990, Reg. 194, r. 44.01 (1).

(2) The notice of motion shall be served on the defendant unless the court is satisfied that there is reason to believe that the defendant may improperly attempt to prevent recovery of possession of the property or that, for any other sufficient reason, the order should be made without notice. R.R.O. 1990, Reg. 194, r. 44.01 (2).

Order to Contain Description and Value of Property

44.02 An interim order for recovery of possession of personal property shall contain a description of the property sufficient to make it readily identifiable and shall state the value of the property. R.R.O. 1990, Reg. 194, r. 44.02.

Disposition of Motion

Where Made on Notice

44.03 (1) On a motion for an interim order for recovery of possession of personal property made on notice to the defendant, the court may,

(a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take the property from the defendant and give it to the plaintiff;

(b) order the defendant to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the plaintiff security in such form and amount as the court approves, and direct that the property remain in the possession of the defendant; or

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (1).

Where Made Without Notice

(2) On a motion for an interim order for the recovery of possession of personal property made without notice to the defendant, the court may,

(a) order the plaintiff to pay into court as security twice the value of the property as stated in the order, or such other amount as the court directs, or to give the appropriate sheriff security in such form and amount as the court approves, and direct the sheriff to take and detain the property for a period of ten days after service of the interim order on the defendant before giving it to the plaintiff; or

(b) make such other order as is just. R.R.O. 1990, Reg. 194, r. 44.03 (2).

Condition and Form of Security

44.04 (1) Where an interim order for the recovery of possession of personal property requires either party to give security, the condition of the security shall be that the party providing the security will return the property to the opposite party without delay when ordered to do so, and pay any damages and costs the opposite party has sustained by reason of the interim order. R.R.O. 1990, Reg. 194, r. 44.04 (1).

(2) Where the security is by bond, the bond shall be in Form 44A and shall remain in force until the security is released under rule 44.06. R.R.O. 1990, Reg. 194, r. 44.04 (2).

(3) Where the bond is to be given by a person other than an insurer licensed under the *Insurance Act* to write surety and fidelity insurance, the person giving the bond shall first be approved by the court. R.R.O. 1990, Reg. 194, r. 44.04 (3); O. Reg. 570/98, s. 2.

Setting Aside Order

44.05 The court on motion may set aside or vary an interim order for the recovery of possession of personal property or stay enforcement of the order. R.R.O. 1990, Reg. 194, r. 44.05.

Release of Security

44.06 Any security furnished pursuant to an order made under rule 44.03 may be released on the filing of the written consent of the parties or by order of the court. R.R.O. 1990, Reg. 194, r. 44.06.

Duty of Sheriff

44.07 (1) Before proceeding to enforce an interim order for the recovery of possession of personal property, the sheriff shall ascertain that any security required by the order has been given. R.R.O. 1990, Reg. 194, r. 44.07 (1).

(2) The sheriff shall serve the order on the defendant when the property or any part of it is recovered or as soon thereafter as is possible. R.R.O. 1990, Reg. 194, r. 44.07 (2).

(3) Where the sheriff is unable to comply with the order, or it is dangerous to do so, the sheriff may move for directions from the court. R.R.O. 1990, Reg. 194, r. 44.07 (3).

(4) The sheriff shall, without delay after attempting to enforce the order and in any event within ten days after service of the order, report to the plaintiff

on what property has been recovered and, where the sheriff has failed to recover possession of all or part of the property, on what property has not been recovered and the reason for his or her failure to recover it. R.R.O. 1990, Reg. 194, r. 44.07 (4).

Where Defendant Prevents Recovery

44.08 Where the sheriff reports that the defendant has prevented the recovery of all or part of the property, the court may make an order,

(a) directing the sheriff to take any other personal property of the defendant, to the value of the property that the sheriff was prevented from recovering, and give it to the plaintiff; and

(b) directing the plaintiff to hold the substituted property until the defendant surrenders to the plaintiff the property that the sheriff was prevented from recovering. R.R.O. 1990, Reg. 194, r. 44.08.

RULE 45 INTERIM PRESERVATION OF PROPERTY

Interim Order for Preservation or Sale

45.01 (1) The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party. R.R.O. 1990, Reg. 194, r. 45.01 (1).

(2) Where the property is of a perishable nature or likely to deteriorate or for any other reason ought to be sold, the court may order its sale in such manner and on such terms as are just. R.R.O. 1990, Reg. 194, r. 45.01 (2).

Specific Fund

45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just. R.R.O. 1990, Reg. 194, r. 45.02.

Recovery of Personal Property Held as Security

45.03 (1) Where in a proceeding a party from whom the recovery of personal property is claimed does not dispute the title of the party making the claim, but claims the right to retain the property as security for a debt, the court may order the party claiming recovery of the property to pay into court or otherwise give security for the debt and such further sum, if any, for interest and costs as the court directs. R.R.O. 1990, Reg. 194, r. 45.03 (1).

(2) The affidavit in support of a motion under subrule (1) shall disclose the name of every person asserting a claim to possession of the property of whom

the party claiming recovery has knowledge and every such person shall be served with notice of the motion. R.R.O. 1990, Reg. 194, r. 45.03 (2).

(3) On compliance with an order under subrule (1), the property shall be given to the party claiming recovery and the money in court or the security shall await the outcome of the proceeding. R.R.O. 1990, Reg. 194, r. 45.03 (3).

PRE-TRIAL PROCEDURES

RULE 46 PLACE OF TRIAL

County where Proceeding Commenced or Transferred

46.01 The trial of an action shall be held in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 14/04, s. 25.

RULE 47 JURY NOTICE

Actions to be Tried with a Jury

47.01 A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before the close of pleadings, unless section 108 of the *Courts of Justice Act* or another statute requires that the action be tried without a jury. R.R.O. 1990, Reg. 194, r. 47.01.

Striking out Jury Notice

Where Jury Notice not in Accordance with Statute or Rules

47.02 (1) A motion may be made to the court to strike out a jury notice on the ground that,

(a) a statute requires a trial without a jury; or

(b) the jury notice was not delivered in accordance with rule 47.01. R.R.O. 1990, Reg. 194, r. 47.02 (1); O. Reg. 344/19, s. 1.

Where Jury Trial Inappropriate

(2) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge. R.R.O. 1990, Reg. 194, r. 47.02 (2).

Discretion of Trial Judge

(3) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury. R.R.O. 1990, Reg. 194, r. 47.02 (3).

RULE 48 LISTING FOR TRIAL

When and by Whom Action may be Set down for Trial

48.01 After the close of pleadings, any party to an action or to a counterclaim or crossclaim in the action who is not in default under these rules or an order of the court and who is ready for trial may set the action down for trial, together with any counterclaim or crossclaim. R.R.O. 1990, Reg. 194, r. 48.01.

How Action is Set down for Trial

Defended Action

48.02 (1) Where an action is defended, a party who wishes to set it down for trial may do so by serving a trial record prepared in accordance with rule 48.03 on every party to the action or to a counterclaim or crossclaim in the action and on any third or subsequent party and forthwith filing the trial record with proof of service. O. Reg. 396/91, s. 5.

Undefended Action

(2) Where the court orders the trial of an undefended action, a party who wishes to set it down for trial may do so by filing a trial record prepared in accordance with rule 48.03. O. Reg. 396/91, s. 5.

Defended Third Party Claim

(3) Where an action is a defended third party claim, a party who wishes to set it down for trial shall, in addition to complying with subrule (1), serve the trial record in the third party claim on the plaintiff in the main action within the time for service on the parties to the third party claim and shall forthwith file proof of service. O. Reg. 396/91, s. 5.

Undefended Third Party Claim

(4) Where an action is an undefended third party claim, a party who wishes to set it down for trial shall serve the trial record in the third party claim on the plaintiff in the main action and shall forthwith file proof of service. O. Reg. 396/91, s. 5.

Trial at Another Place

(5) Where an action is to be tried at a place other than where it was commenced, the party filing the trial record shall by requisition require the court file, including the trial record, to be sent to the court office at the place of trial. O. Reg. 396/91, s. 5.

Trial Record

48.03 (1) The trial record shall contain, in the following order,

(a) a table of contents, describing each document by its nature and date;

(b) a copy of any jury notice;

(c) a copy of the pleadings, including those relating to any counterclaim or crossclaim;

(d) REVOKED: O. Reg. 131/04, s. 12 (1).

(e) a copy of any demand or order for particulars of a pleading and the particulars delivered in response;

(f) a copy of any notice of amounts and particulars of special damages delivered under clause 25.06 (9) (b);

(g) a copy of any order respecting the trial, including an order made under Rule 6.1; and

(h) a certificate signed by the lawyer setting the action down, stating,

(i) that the record contains the documents required by clauses (a) to (g),

(ii) that the time for delivery of pleadings has expired,

(iii) where applicable, that a defendant who has failed to deliver a statement of defence has been noted in default, and

(iv) where applicable, that judgment has been obtained or that the action has been discontinued or dismissed against a defendant. R.R.O. 1990, Reg. 194, r. 48.03 (1); O. Reg. 131/04, s. 12 (1, 2); O. Reg. 575/07, s. 1; O. Reg. 438/08, s. 42 (1).

(2) It is the responsibility of the party who filed the trial record to place with the record, before the trial, a copy of,

(a) any notice of amounts and particulars of special damages delivered after the filing of the trial record;

(b) any order respecting the trial made after the filing of the trial record;

(c) any order under rule 50.07;

(c.1) the pre-trial conference report under rule 50.08; and

(d) in an undefended action, any affidavit to be used in evidence.

(e), (f) REVOKED: O. Reg. 131/04, s. 12 (3).

R.R.O. 1990, Reg. 194, r. 48.03 (2); O. Reg. 69/95, s. 19; O. Reg. 131/04, s. 12 (3); O. Reg. 575/07, s. 22; O. Reg. 438/08, s. 42 (2); O. Reg. 18/22, s. 1.

Consequences of Setting down

48.04 (1) Subject to subrule (3), a party who has set an action down for trial shall not initiate or continue any motion or form of discovery without leave of the court. O. Reg. 343/21, s. 1.

(2) Subrule (1) does not,

(a) relieve a party from complying with undertakings given by the party on an examination for discovery;

(b) relieve a party from any obligation imposed by,

(0.i) rule 29.1.03 (requirement for discovery plan),

(i) rule 30.07 (disclosure of documents or errors subsequently discovered),

(ii) rule 30.09 (abandonment of claim of privilege),

(iii) rule 31.07 (failure to answer on discovery),

(iv) rule 31.09 (disclosure of information subsequently obtained),

(v) rule 51.03 (duty to respond to request to admit),

(vi) rule 53.03 (service of report of expert witness); or

(vii) REVOKED: O. Reg. 131/04, s. 13.

(c) preclude a party from resorting to rule 51.02 (request to admit facts or documents). R.R.O. 1990, Reg. 194, r. 48.04 (2); O. Reg. 131/04, s. 13; O. Reg. 260/05, s. 10; O. Reg. 438/08, s. 43.

(3) Leave of the court is not required for,

(a) a motion to compel compliance with any obligation imposed by a rule listed in clause (2) (b); or

(b) a motion under rule 6.1.01 for a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages. O. Reg. 175/24, s. 2.

Placing Action on Trial List

48.05 (1) On the setting down of an action for trial, the registrar at the place of trial shall place the action on the appropriate trial list. O. Reg. 343/21, s. 2.

(2) In placing an action on a trial list, the registrar shall take into account any applicable pre-trial conference scheduling requirements in rule 50.02. O. Reg. 18/22, s. 2.

48.06 REVOKED: O. Reg. 343/21, s. 2.

Consequences of Action being Placed on Trial List

48.07 Where an action is placed on a trial list,

(a) all parties shall be deemed to be ready for trial; and

(b) REVOKED: O. Reg. 438/08, s. 44.

(c) the trial shall proceed when the action is reached on the trial list unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 48.07; O. Reg. 438/08, s. 44.

Separate Trial Lists

48.08 (1) Actions to be tried with a jury shall be placed on a trial list of jury actions and actions to be tried without a jury shall be placed on a trial list of non-jury actions. R.R.O. 1990, Reg. 194, r. 48.08 (1).

(2) Where the next scheduled sitting in a place outside Toronto is for the trial of jury actions, the trial list of non-jury actions shall be added at the end of the trial list of jury actions. R.R.O. 1990, Reg. 194, r. 48.08 (2).

Separate Speedy Trial List

48.09 The registrar shall keep a separate speedy trial list on which only actions for which a speedy trial has been ordered shall be listed. R.R.O. 1990, Reg. 194, r. 48.09.

Actions Traversed or Remaining on List at Conclusion of Sitting

48.10 Unless a judge orders otherwise, all actions traversed to the next sitting and all actions remaining on the trial list at the conclusion of a sitting shall stand in the same order at the beginning of the next appropriate trial list. R.R.O. 1990, Reg. 194, r. 48.10.

Actions Struck off Trial List

48.11 Where an action is struck off a trial list, it shall not thereafter be placed on any trial list except,

(a) in the case of an action struck off the list by a judge, with leave of a judge; or

(b) in any other case, with leave of the court. O. Reg. 55/08, s. 4.

Duty to Inform Registrar of Settlement

48.12 Every party to an action, whether it is placed on a trial list or not, shall promptly inform the registrar of any settlement of the action and shall confirm in writing that the action has been settled. R.R.O. 1990, Reg. 194, r. 48.12.

Application of the Rule

48.13 Rules 48.01 to 48.12 apply to any proceeding in which the court has directed the trial of an issue, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 48.13.

Dismissal of Action for Delay

48.14 (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):

1. The action has not been set down for trial or terminated by any means by the fifth anniversary of the commencement of the action.

2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the second anniversary of being struck off. O. Reg. 170/14, s. 10; O. Reg. 487/16, s. 8 (1).

Exceptions

(1.1) Subrule (1) does not apply to,

(a) actions placed on the Commercial List established by practice direction in the Toronto Region; and

(b) actions under the *Class Proceedings Act, 1992*. O. Reg. 487/16, s. 8 (2).

Form of Order, Electronic Issuance

(1.2) An order made under subrule (1) shall be in Form 48D. O. Reg. 487/16, s. 8 (2); O. Reg. 689/20, s. 31.

Order to be Served

(2) The registrar shall serve an order made under subrule (1) on the parties. O. Reg. 170/14, s. 10; O. Reg. 487/16, s. 8 (3).

Order to Client

(3) A lawyer who is served with an order made under subrule (1) shall promptly give a copy of the order to his or her client. O. Reg. 170/14, s. 10.

Timetable

(4) Subrule (1) does not apply if, at least 30 days before the expiry of the applicable period referred to in that subrule, a party files the following documents:

1. A timetable, signed by all the parties, that,

   i. identifies the steps to be completed before the action may be set down for trial or restored to a trial list, as the case may be,

   ii. shows the date or dates by which the steps will be completed, and

   iii. shows a date, which shall be no more than two years after the day the applicable period referred to in subrule (1) expires, before which

the action shall be set down for trial or restored to a trial list.

2. A draft order establishing the timetable. O. Reg. 170/14, s. 10.

Status Hearing

(5) If the parties do not consent to a timetable under subrule (4), any party may, before the expiry of the applicable period referred to in subrule (1), bring a motion for a status hearing. O. Reg. 170/14, s. 10.

(6) For the purposes of subrule (5), the hearing of the motion shall be convened as a status hearing. O. Reg. 170/14, s. 10.

(7) At a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and the court may,

(a) dismiss the action for delay; or

(b) if the court is satisfied that the action should proceed,

(i) set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time,

(ii) adjourn the status hearing on such terms as are just,

(iii) if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or

(iv) make such other order as is just. O. Reg. 170/14, s. 10.

Party Under Disability

(8) Subrule (1) does not apply if, at the time the registrar would otherwise be required under that subrule to dismiss an action for delay, the plaintiff is under a disability. O. Reg. 170/14, s. 10.

Effect of Dismissal

(9) Rules 24.03 to 24.05 (effect of dismissal for delay), other than subrule 24.04 (1.1), apply to an action dismissed under subrule (1). O. Reg. 170/14, s. 10; O. Reg. 487/16, s. 8 (4).

Setting Aside

(10) The dismissal of an action under subrule (1) may be set aside under rule 37.14. O. Reg. 170/14, s. 10.

(11)-(13) REVOKED: O. Reg. 487/16, s. 8 (5).

48.15 REVOKED: O. Reg. 170/14, s. 10.

RULE 49 SETTLEMENT

Definitions

49.01 In this Rule,

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") R.R.O. 1990, Reg. 194, r. 49.01; O. Reg. 50/25, s. 3.

Application to Other Claims, Motions

49.01.1 This Rule applies to actions, applications and, with necessary modifications, motions, counterclaims, crossclaims and third or subsequent party claims. O. Reg. 50/25, s. 4.

Where Offer to Settle Available

49.02 (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A). R.R.O. 1990, Reg. 194, r. 49.02 (1).

(2) REVOKED: O. Reg. 50/25, s. 5.

Time for Making Offer

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing of the proceeding commences, the costs consequences referred to in rule 49.10 do not apply. R.R.O. 1990, Reg. 194, r. 49.03; O. Reg. 50/25, s. 6.

Withdrawal or Expiry of Offer

Withdrawal

49.04 (1) An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the offer was made. R.R.O. 1990, Reg. 194, r. 49.04 (1).

(2) The notice of withdrawal of the offer may be in Form 49B. R.R.O. 1990, Reg. 194, r. 49.04 (2).

Offer Expiring after Limited Time

(3) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall be deemed to have been withdrawn when the time expires. R.R.O. 1990, Reg. 194, r. 49.04 (3).

Offer Expires when Court Disposes of Claim

(4) An offer may not be accepted after the court disposes of the claim in respect of which the offer is made. R.R.O. 1990, Reg. 194, r. 49.04 (4).

Effect of Offer

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice. R.R.O. 1990, Reg. 194, r. 49.05; O. Reg. 132/04, s. 11.

Disclosure of Offer to Court

49.06 (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading. R.R.O. 1990, Reg. 194, r. 49.06 (1).

(2) Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined. R.R.O. 1990, Reg. 194, r. 49.06 (2).

(3) An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined. R.R.O. 1990, Reg. 194, r. 49.06 (3).

Acceptance of Offer

Generally

49.07 (1) An offer to settle may be accepted by serving an acceptance of offer (Form 49C) on the party who made the offer, at any time before it is withdrawn or the court disposes of the claim in respect of which it is made. R.R.O. 1990, Reg. 194, r. 49.07 (1).

(2) Where a party to whom an offer to settle is made rejects the offer or responds with a counter-offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the court has disposed of the claim in respect of which it was made. R.R.O. 1990, Reg. 194, r. 49.07 (2).

Payment into Court or to Trustee as Term of Offer

(3) An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court or to a trustee and the defendant may accept the offer only by paying the money in accordance with the offer and notifying the plaintiff of the payment. R.R.O. 1990, Reg. 194, r. 49.07 (3).

Payment into Court or to Trustee as a Condition of Acceptance

(4) Where a defendant offers to pay money to the plaintiff in settlement of a claim, the plaintiff may accept the offer with the condition that the defendant pay the money into court or to a trustee and, where the offer is so accepted

and the defendant fails to pay the money in accordance with the acceptance, the plaintiff may proceed as provided in rule 49.09 for failure to comply with the terms of an accepted offer. R.R.O. 1990, Reg. 194, r. 49.07 (4).

Costs

(5) Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,

(a) where the offer was made by the defendant, to the plaintiff's costs assessed to the date the plaintiff was served with the offer; or

(b) where the offer was made by the plaintiff, to the plaintiff's costs assessed to the date that the notice of acceptance was served. R.R.O. 1990, Reg. 194, r. 49.07 (5).

Incorporating into Judgment

(6) Where an offer is accepted, the court may incorporate any of its terms into a judgment. R.R.O. 1990, Reg. 194, r. 49.07 (6).

Payment out of Court

(7) Where money is paid into court under subrule (3) or (4), it may be paid out on consent or by order. R.R.O. 1990, Reg. 194, r. 49.07 (7).

Party under Disability

49.08 A party under disability may make, withdraw and accept an offer to settle, but the acceptance of an offer made by a party under disability, or the acceptance by a party under disability of an offer made by another party, is not binding on the party under disability without the approval of a judge under rule 7.08, except as otherwise provided by that rule. O. Reg. 50/25, s. 7.

Failure to Comply with Accepted Offer

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no accepted offer to settle. R.R.O. 1990, Reg. 194, r. 49.09.

Costs Consequences of Failure to Accept

Plaintiff's Offer

49.10 (1) Where an offer to settle,

(a) is made by a plaintiff at least seven days before the commencement of the hearing of the proceeding;

(b) is not withdrawn and does not expire before the commencement of the hearing of the proceeding; and

(c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (1); O. Reg. 284/01, s. 11 (1); O. Reg. 50/25, s. 8.

Defendant's Offer

(2) Where an offer to settle,

(a) is made by a defendant at least seven days before the commencement of the hearing of the proceeding;

(b) is not withdrawn and does not expire before the commencement of the hearing of the proceeding; and

(c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (2); O. Reg. 284/01, s. 11 (2); O. Reg. 50/25, s. 8.

Burden of Proof

(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2). O. Reg. 219/91, s. 6.

Costs Consequences if Multiple Defendants

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by rule 49.10 do not apply to an offer to settle unless,

(a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or

(b) in the case of an offer made to the plaintiff,

(i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or

(ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer. R.R.O. 1990, Reg. 194, r. 49.11.

Offer to Contribute

49.12 (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute (Form 49D) toward a settlement of the claim. R.R.O. 1990, Reg. 194, r. 49.12 (1); O. Reg. 627/98, s. 5.

(2) The court may take an offer to contribute into account in determining whether another defendant should be ordered,

(a) to pay the costs of the defendant who made the offer; or

(b) to indemnify the defendant who made the offer for any costs that defendant is liable to pay to the plaintiff,

or to do both. R.R.O. 1990, Reg. 194, r. 49.12 (2).

(3) Rules 49.04, 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle. R.R.O. 1990, Reg. 194, r. 49.12 (3).

Discretion of Court

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. R.R.O. 1990, Reg. 194, r. 49.13.

Partial Settlement Agreements

49.14 (1) In this rule,

"partial settlement agreement" means a settlement agreement in a proceeding, whether written or unwritten, where,

(a) at least one plaintiff and at least one defendant are parties to the agreement,

(b) at least one defendant is not a party to the agreement,

(c) the agreement does not settle the proceeding in its entirety, although it may be settled in its entirety as between some parties, and the parties to

the agreement intend that the proceeding will continue to some extent, and

(d) the agreement is binding on the parties to the agreement, subject to the requirement for judicial approval under rule 7.08 if applicable. O. Reg. 50/25, s. 9.

Application

(2) The requirements of this rule apply except to the extent that a statute or a court order provides otherwise. O. Reg. 50/25, s. 9.

(3) Despite rule 49.01.1, this rule does not apply to applications for judicial review under Rule 68. O. Reg. 50/25, s. 9.

Obligation to Promptly Disclose

(4) Subject to subrule (8), a plaintiff who is a party to a partial settlement agreement shall disclose the terms of the agreement, other than the monetary value of the settlement, if any, to every other plaintiff and defendant who is not a party to the agreement,

(a) immediately after the agreement is reached, if the hearing of the proceeding has commenced; or

(b) if the hearing of the proceeding has not commenced, no later than the earlier of,

(i) seven days after the agreement is reached, and

(ii) the taking of any further step in the proceeding by any party to the agreement. O. Reg. 50/25, s. 9.

(5) Subject to subrule (8), as soon as possible after the disclosure, and in any event no later than seven days before the next date on which the parties are scheduled to appear in court, the plaintiff shall,

(a) record the terms of the partial settlement agreement, other than the monetary value of the settlement, if any, in Form 49E; and

(b) serve a copy of Form 49E on every other party to the proceeding and file it, with proof of service. O. Reg. 50/25, s. 9.

(6) The disclosure obligations in subrules (4) and (5) prevail over any agreement respecting confidentiality or non-disclosure between the parties to the partial settlement agreement. O. Reg. 50/25, s. 9.

(7) If a plaintiff fails to comply with subrule (4) or (5), the court may, on any other party's motion,

(a) make an order for costs, regardless of the outcome of the proceeding;

(b) order or permit further examinations for discovery, to be conducted at the plaintiff's expense;

(c) order additional disclosure or production of documents;

(d) strike out all or part of a party's evidence, including any affidavit made by the party;

(e) adjourn a hearing or other step that permits or requires the attendance of the parties;

(f) stay the proceeding; or

(g) make such other order as is just. O. Reg. 50/25, s. 9.

If Agreement Subject to Approval under r. 7.08

(8) In the case of a partial settlement agreement that is subject to a judge's approval under rule 7.08,

(a) within seven days after filing the notice of motion and motion record for court approval of the partial settlement agreement, the litigation guardian shall inform all other parties to the proceeding that it has filed the notice and record;

(b) if the judge approves the agreement,

(i) the judge may give directions modifying the application of subrules (4) and (5) with respect to the agreement, and

(ii) subject to any directions given under subclause (i), the litigation guardian shall, no later than seven days after the judge approves the agreement, inform all other parties to the proceeding that court approval of the partial settlement agreement has been granted;

(c) until the judge makes a determination under rule 7.08 with respect to the agreement, no step shall be taken by a party to the proceeding that may reasonably be considered to prejudice another party; and

(d) the terms of the agreement shall not be disclosed to a person who is not a party to the agreement or their lawyer, except as provided for under rule 7.08 or this rule. O. Reg. 50/25, s. 9.

No Effect on Requirement to Disclose Settlement Amount

(9) For greater certainty, where no party to a partial settlement agreement is under disability, nothing in this rule limits any requirement of a party to

disclose the monetary value of the settlement for any purpose, including to avoid double recovery. O. Reg. 50/25, s. 9.

Disclosure of Settlement Amount where Party under Disability

(10) Where a party to the partial settlement agreement is under disability, the party's litigation guardian shall seek direction from the court respecting any legal requirement to disclose the monetary value of a settlement for any purpose, including to avoid double recovery, and such direction may be sought at a case conference or on a motion heard in writing without notice. O. Reg. 50/25, s. 9.

RULE 50 CONFERENCES

Purpose

50.01 The purpose of this Rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner. O. Reg. 438/08, s. 47.

Pre-Trial Conferences for Actions

50.02 (1) Unless the court orders otherwise, within 180 days after an action is set down for trial, the parties shall schedule with the registrar a date and time acceptable to all parties and consistent with the requirements of subrule (2.1) to appear before a judge or associate judge for a pre-trial conference. O. Reg. 394/09, s. 22; O. Reg. 170/14, s. 12 (1); O. Reg. 383/21, s. 15; O. Reg. 18/22, s. 3 (1).

(2) If the parties do not schedule a pre-trial conference within 180 days after the action is set down for trial, the registrar shall, subject to any previous order,

(a) schedule a date and time consistent with the requirements of subrule (2.1) for the parties to appear before a judge or associate judge for a pre-trial conference; and

(b) give notice to the parties to appear at the scheduled date and time. O. Reg. 394/09, s. 22; O. Reg. 170/14, s. 12 (2); O. Reg. 383/21, s. 15; O. Reg. 18/22, s. 3 (2).

(2.1) Unless otherwise provided by a court order or applicable practice direction, a pre-trial conference shall be scheduled for a date that is not more than 120 days and not less than 30 days before the later of the following dates:

1. The first day fixed for the trial.

2. The first day of the sitting during which the trial is expected to be held. O. Reg. 18/22, s. 3 (3).

(3) In addition to the pre-trial conference required to be held under this rule, a judge may at any time, on his or her own initiative or at a party's request, direct that a pre-trial conference be held before a judge or associate judge. O. Reg. 170/14, s. 12 (3); O. Reg. 383/21, s. 15.

(4) This rule, as it read on March 30, 2022, continues to apply to an action that was set down for trial before March 31, 2022. O. Reg. 18/22, s. 3 (3).

Pre-Trial Conferences for Applications

50.03 In an application, a judge may at any time, on his or her own initiative or at a party's request, direct that a pre-trial conference be held before a judge or associate judge. O. Reg. 170/14, s. 13; O. Reg. 383/21, s. 15.

Certificate of Readiness to be Filed (Actions)

50.03.1 (1) At least 30 days before a pre-trial conference in an action, each party shall deliver a certificate of readiness (Form 50A) indicating whether the party intends to call any expert evidence at trial, and, if so, for each expert,

(a) whether the report of the expert required by subrule 53.03 (1) or (2), as the case may be, was served on the other parties within the time specified by that subrule; and

(b) if the expert's report was not served on the other parties within the time specified by subrule 53.03 (1) or (2), the reason why. O. Reg. 18/22, s. 4.

Application

(2) Subrule (1) applies regardless of any extension of the time to file the report. O. Reg. 18/22, s. 4.

(3) For greater certainty, if a pre-trial conference is rescheduled, subrule (1) applies with respect to the rescheduled pre-trial conference date. O. Reg. 18/22, s. 4.

Pre-trial Conference Brief

50.04 At least five days before a pre-trial conference, each party shall file with proof of service a pre-trial conference brief containing concise statements, without argument, of the following matters:

1. The nature of the proceeding.

2. The issues raised and the party's position.

3. In the case of an action, the names of the witnesses that the party is likely to call at the trial and the length of time that the evidence of each of those witnesses is estimated to take.

4. The steps that need to be completed before the action is ready for trial or the application is ready to be heard, and the length of time that it is estimated that the completion of those steps will take.

5. If any of the parties intends to seek an order granting separate hearings under rule 6.1.01, the filing party's position on proceeding by way of separate hearings. O. Reg. 438/08, s. 47; O. Reg. 175/24, s. 3.

Attendance

50.05 (1) The lawyers for the parties shall appear at the pre-trial conference and, unless the presiding judge or associate judge orders otherwise, the parties shall also participate. O. Reg. 689/20, s. 32; O. Reg. 383/21, s. 15.

Authority to Settle

(2) A party who requires another person's approval before agreeing to a settlement shall, before the pre-trial conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours. O. Reg. 438/08, s. 47.

Duty of Lawyers

(3) Every lawyer attending the pre-trial conference shall ensure that he or she has the authority to deal with the matters referred to in rule 50.06 and that he or she is fully acquainted with the facts and legal issues in the proceeding. O. Reg. 170/14, s. 14.

Matters to be Considered

50.06 The following matters shall be considered at a pre-trial conference:

1. The possibility of settlement of any or all of the issues in the proceeding.

2. Simplification of the issues.

3. The possibility of obtaining admissions that may facilitate the hearing.

4. The question of liability.

5. The amount of damages, if damages are claimed.

6. The estimated duration of the trial or hearing.

7. The advisability of having the court appoint an expert.

8. In the case of an action, the number of expert witnesses and other witnesses that may be called by each party, and dates for the service of

any outstanding or supplementary experts' reports.

9. The intention, if any, of a party to seek an order granting separate hearings under rule 6.1.01.

10. The advisability of directing a reference.

11. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding. O. Reg. 438/08, s. 47; O. Reg. 18/22, s. 5; O. Reg. 175/24, s. 4.

Powers

50.07 (1) If the proceeding is not settled at the pre-trial conference, the presiding judge or associate judge may,

(a) establish a timetable;

(a.1) if necessary, and subject to the direction of the regional senior judge or a judge designated by the regional senior judge, adjourn the date for the trial or hearing;

(b) order a case conference under rule 50.13 if it is impractical to establish a timetable; and

(c) make such order as the judge or associate judge considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2). O. Reg. 438/08, s. 47; O. Reg. 170/14, s. 15; O. Reg. 383/21, s. 15; O. Reg. 18/22, s. 6.

Order Binds Parties

(2) An order made under this rule binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice. O. Reg. 438/08, s. 47.

Copy of Order

(3) A copy of any order made under this rule shall be placed with the trial or application record. O. Reg. 438/08, s. 47.

Pre-Trial Conference Report

Requirement

50.08 (1) Following the pre-trial conference, the presiding judge or associate judge shall complete a pre-trial conference report,

(a) stating what steps need to be completed before the action is ready for the trial or hearing, and how much time is needed to complete those steps;

(b) stating the anticipated length of the trial or hearing; and

(c) setting out any other matter relevant to the trial or hearing. O. Reg. 438/08, s. 47; O. Reg. 383/21, s. 15; O. Reg. 18/22, s. 7.

Copy of Report

(2) A copy of the pre-trial conference report shall be placed with the trial or application record. O. Reg. 438/08, s. 47.

Certificate

(3) Each party or the party's lawyer shall certify on the copy of the pre-trial conference report that is to be placed with the trial or application record that he or she understands the contents of the report and acknowledges the obligation to be ready to proceed on the date fixed for the trial or hearing. O. Reg. 438/08, s. 47.

Duty of Lawyer

(4) Each lawyer who represents a party shall, in addition to giving the certificate described in subrule (3), undertake to the court to advise the party of,

(a) the contents of the pre-trial conference report; and

(b) the obligation to be ready to proceed on the date fixed for the trial or hearing. O. Reg. 438/08, s. 47.

No Disclosure

50.09 No communication shall be made to the judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in an order under rule 50.07 or in a pre-trial conference report under rule 50.08. O. Reg. 438/08, s. 47.

Pre-Trial Judge not to Preside at Hearing

50.10 (1) A judge who conducts a pre-trial conference shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties. O. Reg. 438/08, s. 47.

Conference Before Trial Judge

(2) Subrule (1) does not prevent a judge before whom a proceeding has been called for hearing from holding a conference either before or during the hearing to consider any matter that may assist in the just, most expeditious and least expensive disposition of the proceeding without disqualifying himself or herself from presiding at the hearing. O. Reg. 438/08, s. 47.

Documents to be Made Available

50.11 All documents intended to be used at the trial or hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as any medical reports and reports of experts, shall be provided to the presiding judge or associate judge at the conference. O. Reg. 438/08, s. 47; O. Reg. 383/21, s. 15.

Costs of Pre-Trial Conference

50.12 (1) At the pre-trial conference, the presiding judge or associate judge may make an order for costs of the conference, but in the absence of such an order the costs shall be assessed as part of the costs of the proceeding. O. Reg. 438/08, s. 47; O. Reg. 383/21, s. 15.

Unproductive Pre-Trial Conference

(2) If the judge or associate judge determines that a pre-trial conference over which the judge or associate judge presided was unproductive for reasons relating to a party's conduct, an order made under subrule (1) may require that the costs be paid immediately. O. Reg. 18/22, s. 8.

Case Conferences

50.13 (1) A judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or associate judge. O. Reg. 170/14, s. 16; O. Reg. 383/21, s. 15.

Attendance

(2) The lawyers for the parties shall appear at the case conference and, unless the judge or associate judge orders otherwise, the parties shall also participate. O. Reg. 689/20, s. 33; O. Reg. 383/21, s. 15.

(3) A party who requires another person's approval before agreeing to a settlement shall, before the case conference, arrange to have ready telephone access to the other person throughout the case conference, whether it takes place during or after regular business hours. O. Reg. 170/14, s. 16.

(4) Every lawyer attending the case conference shall ensure that he or she has the authority to deal with the matters referred to in subrule (5) and that he or she is fully acquainted with the facts and legal issues in the proceeding. O. Reg. 170/14, s. 16.

Matters to be Dealt With

(5) At the case conference, the judge or associate judge may,

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable. O. Reg. 170/14, s. 16; O. Reg. 383/21, s. 15.

Powers

(6) At the case conference, the judge or associate judge may, if notice has been given and it is appropriate to do so or on consent of the parties,

(a) make a procedural order;

(b) convene a pre-trial conference;

(c) give directions; and

(d) in the case of a judge,

(i) make an order for interlocutory relief, or

(ii) convene a hearing. O. Reg. 170/14, s. 16; O. Reg. 383/21, s. 15.

RULE 51 ADMISSIONS

Interpretation

51.01 In rules 51.02 to 51.06,

"authenticity" includes the fact that,

(a) a document that is said to be an original was printed, written, signed or executed as it purports to have been,

(b) a document that is said to be a copy is a true copy of the original, and

(c) where the document is a copy of a letter or email or other telecommunication, the original was sent as it purports to have been sent and received by the person to whom it is addressed. R.R.O. 1990, Reg. 194, r. 51.01; O. Reg. 689/20, s. 34.

Request to Admit Fact or Document

51.02 (1) A party may at any time, by serving a request to admit (Form 51A), request any other party to admit, for the purposes of the proceeding only, the truth of a fact or the authenticity of a document. R.R.O. 1990, Reg. 194, r. 51.02 (1).

(2) A copy of any document mentioned in the request to admit shall, where practicable, be served with the request, unless a copy is already in the possession of the other party. R.R.O. 1990, Reg. 194, r. 51.02 (2).

Effect of Request to Admit

Response Required Within Twenty Days

51.03 (1) A party on whom a request to admit is served shall respond to it within twenty days after it is served by serving on the requesting party a response to request to admit (Form 51B). R.R.O. 1990, Reg. 194, r. 51.03 (1).

Deemed Admission Where No Response

(2) Where the party on whom the request is served fails to serve a response as required by subrule (1), the party shall be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request to admit. R.R.O. 1990, Reg. 194, r. 51.03 (2).

Deemed Admission Unless Response Contains Denial or Reason for Refusal to Admit

(3) A party shall also be deemed, for the purposes of the proceeding only, to admit the truth of the facts or the authenticity of the documents mentioned in the request, unless the party's response,

(a) specifically denies the truth of a fact or the authenticity of a document mentioned in the request; or

(b) refuses to admit the truth of a fact or the authenticity of a document and sets out the reason for the refusal. R.R.O. 1990, Reg. 194, r. 51.03 (3).

Costs on Refusal to Admit

51.04 Where a party denies or refuses to admit the truth of a fact or the authenticity of a document after receiving a request to admit, and the fact or document is subsequently proved at the hearing, the court may take the denial or refusal into account in exercising its discretion respecting costs. R.R.O. 1990, Reg. 194, r. 51.04; O. Reg. 259/14, s. 9.

Withdrawal of Admission

51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court. R.R.O. 1990, Reg. 194, r. 51.05.

Order Based on Admission of Fact or Document

Motion

51.06 (1) Where an admission of the truth of a fact or the authenticity of a document is made,

(a) in an affidavit filed by a party;

(b) in the examination for discovery of a party or a person examined for discovery on behalf of a party; or

(c) by a party on any other examination under oath or affirmation in or out of court,

any party may make a motion to a judge in the same or another proceeding for such order as the party may be entitled to on the admission without waiting for the determination of any other question between the parties, and the judge may make such order as is just. R.R.O. 1990, Reg. 194, r. 51.06 (1).

(2) Where an admission of the truth of a fact or the authenticity of a document is made by a party in a pleading or is made or deemed to be made by a party in response to a request to admit, any party may make a motion in the same proceeding to a judge for such order as the party may be entitled to on the admission without waiting for the determination of any question between the parties, and the judge may make such order as is just. R.R.O. 1990, Reg. 194, r. 51.06 (2).

Exception: Deemed Undertaking

(3) If Rule 30.1 applies to the admission, its use in another proceeding is subject to Rule 30.1 (deemed undertaking). O. Reg. 61/96, s. 3.

TRIALS

RULE 52 TRIAL PROCEDURE

Failure to Attend at Trial

52.01 (1) Where an action is called for trial and all the parties fail to attend, the trial judge may strike the action off the trial list. R.R.O. 1990, Reg. 194, r. 52.01 (1).

(2) Where an action is called for trial and a party fails to attend, the trial judge may,

(a) proceed with the trial in the absence of the party;

(b) where the plaintiff attends and the defendant fails to attend, dismiss the counterclaim, if any, and allow the plaintiff to prove the claim;

(c) where the defendant attends and the plaintiff fails to attend, dismiss the action and allow the defendant to prove the counterclaim, if any; or

(d) make such other order as is just. R.R.O. 1990, Reg. 194, r. 52.01 (2).

(3) A judge may set aside or vary, on such terms as are just, a judgment obtained against a party who failed to attend at the trial. R.R.O. 1990, Reg. 194, r. 52.01 (3).

Adjournment of Trial

52.02 A judge may postpone or adjourn a trial to such time and place, and on such terms, as are just. R.R.O. 1990, Reg. 194, r. 52.02.

Court Appointed Experts

Appointment by Judge

52.03 (1) On motion by a party or on his or her own initiative, a judge may, at any time, appoint one or more independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action. R.R.O. 1990, Reg. 194, r. 52.03 (1); O. Reg. 536/18, s. 1.

(2) The expert shall be named by the judge and, where possible, shall be an expert agreed on by the parties. R.R.O. 1990, Reg. 194, r. 52.03 (2).

Contents of Order Appointing Expert

(3) The order shall contain the instructions to be given to the expert and the judge may make such further orders as he or she considers necessary to enable the expert to carry out the instructions, including, on motion by a party, an order for,

(a) inspection of property under Rule 32; or

(b) the physical or mental examination of a party under section 105 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 52.03 (3).

Remuneration of Expert

(4) The remuneration of an expert shall be fixed by the judge who appoints the expert, and shall include a fee for the expert's report and an appropriate sum for each day that attendance at the trial is required. R.R.O. 1990, Reg. 194, r. 52.03 (4).

(5) The responsibility of the parties for payment of the remuneration of an expert shall be determined in the first instance by the judge. R.R.O. 1990, Reg. 194, r. 52.03 (5).

(6) Where a motion by a party for the appointment of an expert is opposed, the judge may, as a condition of making the appointment, require the party seeking the appointment to give such security for the remuneration of the expert as is just. R.R.O. 1990, Reg. 194, r. 52.03 (6).

Report

(7) The expert shall prepare and send to the registrar a report containing the information listed in subrule 53.03 (2.1), other than an acknowledgment of expert's duty (Form 53). O. Reg. 384/24, s. 3 (1).

(7.1) The registrar shall send a copy of the report to every party. O. Reg. 384/24, s. 3 (1).

(8) The report shall be filed as evidence at the trial of the action unless the trial judge orders otherwise. R.R.O. 1990, Reg. 194, r. 52.03 (8).

(9) The judge may direct the expert to make a further or supplementary report, and subrules (7), (7.1) and (8) apply to that report. R.R.O. 1990, Reg. 194, r. 52.03 (9); O. Reg. 384/24, s. 3 (2).

Cross-examination of Expert

(10) Any party may cross-examine the expert at the trial. R.R.O. 1990, Reg. 194, r. 52.03 (10).

Liability of Parties for Remuneration of Expert

(11) The liability of the parties for payment of the remuneration of the expert shall be determined by the trial judge at the end of the trial, and a party who has paid the expert in accordance with a determination under subrule (5), if not the party determined to be liable for payment under this subrule, shall be indemnified by the party determined to be liable. R.R.O. 1990, Reg. 194, r. 52.03 (11).

Exhibits

Marking and Numbering

52.04 (1) Exhibits shall be marked and numbered consecutively, and the registrar attending the trial shall make a list of the exhibits, giving a description of each exhibit, and stating by whom it was put in evidence and, where the person who produced it is not a party or a party's lawyer, the name of that person. R.R.O. 1990, Reg. 194, r. 52.04 (1); O. Reg. 575/07, s. 1.

Return of Exhibits

(2) At any time following the trial judgment, on requisition by the lawyer or party who put an exhibit in evidence or the person who produced it and on the filing of the consent of all parties represented at the trial, the registrar may return the exhibit to the person making the requisition. R.R.O. 1990, Reg. 194, r. 52.04 (2); O. Reg. 575/07, s. 1.

(3) Subject to subrule (2), the exhibits shall remain in the possession of the registrar or the registrar of the court to which an appeal is taken,

(a) until the time for an appeal has expired; or

(b) where an appeal has been taken, until it has been disposed of. R.R.O. 1990, Reg. 194, r. 52.04 (3).

(4) On the expiration of the time for appeal or on the disposition of the appeal, the registrar on his or her own initiative shall return the exhibits to the respective lawyers or parties who put the exhibits in evidence at the trial. R.R.O. 1990, Reg. 194, r. 52.04 (4); O. Reg. 575/07, s. 2.

View by Judge or Jury

52.05 The judge or judge and jury by whom an action is being tried or the court before whom an appeal is being heard may, in the presence of the parties or their lawyers, inspect any property concerning which any question arises in the action, or the place where the cause of action arose. R.R.O. 1990, Reg. 194, r. 52.05; O. Reg. 575/07, s. 4.

Exclusion of Witnesses

Order for Exclusion

52.06 (1) The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2). R.R.O. 1990, Reg. 194, r. 52.06 (1).

Order not to Apply to Party or Witness Instructing Lawyer

(2) An order under subrule (1) may not be made in respect of a party to the action or a witness whose presence is essential to instruct the lawyer for the party calling the witness, but the trial judge may require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party. R.R.O. 1990, Reg. 194, r. 52.06 (2); O. Reg. 575/07, s. 3; O. Reg. 248/21, s. 7.

No Communication with Excluded Witnesses

(3) Where an order is made excluding a witness from the courtroom, there shall be no communication to the witness of any evidence given during his or her absence from the courtroom, except with leave of the trial judge, until after the witness has been called and has given evidence. R.R.O. 1990, Reg. 194, r. 52.06 (3).

Exclusion of Persons Interfering with Trial

(4) Nothing in this rule prevents the trial judge from excluding from the courtroom any person who is interfering with the proper conduct of the trial. R.R.O. 1990, Reg. 194, r. 52.06 (4).

Order of Presentation in Jury Trials

52.07 (1) On the trial of an action with a jury, the order of presentation shall be regulated as follows, unless the trial judge directs otherwise:

1. The plaintiff may make an opening address and, subject to paragraph 2, shall then adduce evidence.

2. A defendant may, with leave of the trial judge, make an opening address immediately after the opening address of the plaintiff, and before the plaintiff adduces any evidence.

3. When the plaintiff's evidence is concluded, the defendant may make an opening address, unless he or she has already done so, and shall then adduce evidence.

4. When the defendant's evidence is concluded, the plaintiff may adduce any proper reply evidence and the defendant shall then make a closing address, followed by the closing address of the plaintiff.

5. Where a defendant adduces no evidence after the conclusion of the plaintiff's evidence, the plaintiff shall make a closing address, followed by the closing address of the defendant. R.R.O. 1990, Reg. 194, r. 52.07 (1).

(2) Where the burden of proof in respect of all matters in issue in the action lies on the defendant, the trial judge may reverse the order of presentation. R.R.O. 1990, Reg. 194, r. 52.07 (2).

(3) Where there are two or more defendants separately represented, the order of presentation shall be as directed by the trial judge. R.R.O. 1990, Reg. 194, r. 52.07 (3); O. Reg. 575/07, s. 25 (1).

(4) Where a party is represented by a lawyer, the right to address the jury shall be exercised by the lawyer. O. Reg. 575/07, s. 25 (2).

Disagreement of the Jury

52.08 (1) Where the jury,

(a) disagrees;

(b) makes no finding on which judgment can be granted; or

(c) answers some but not all of the questions directed to it or gives conflicting answers, so that judgment cannot be granted on its findings,

the trial judge may direct that the action be retried with another jury at the same or any subsequent sitting, but where there is no evidence on which a judgment for the plaintiff could be based or where for any other reason the plaintiff is not entitled to judgment, the judge shall dismiss the action. R.R.O. 1990, Reg. 194, r. 52.08 (1).

(2) Where the answers given by a jury are sufficient to entitle a party to judgment on some but not all of the claims in the action, the judge may grant judgment on the claims in respect of which the answers are sufficient, and subrule (1) applies to the remaining claims. R.R.O. 1990, Reg. 194, r. 52.08 (2).

Recording Jury Verdict

52.09 The verdict of a jury shall be endorsed on the trial record or on a separate document in accordance with subrule 59.02 (2), with necessary modifications. O. Reg. 689/20, s. 35.

Failure to Prove a Fact or Document

52.10 Where, through accident, mistake or other cause, a party fails to prove some fact or document material to the party's case,

(a) the judge may proceed with the trial subject to proof of the fact or document afterwards at such time and on such terms as the judge directs; or

(b) where the case is being tried by a jury, the judge may direct the jury to find a verdict as if the fact or document had been proved, and the verdict shall take effect on proof of the fact or document afterwards as directed, and, if it is not so proved, judgment shall be granted to the opposite party, unless the judge directs otherwise. R.R.O. 1990, Reg. 194, r. 52.10.

RULE 53 EVIDENCE AT TRIAL

Evidence by Witnesses

Oral Evidence as General Rule

53.01 (1) Unless these rules provide otherwise, witnesses at the trial of an action shall be examined orally in court and the examination may consist of direct examination, cross-examination and re-examination. R.R.O. 1990, Reg. 194, r. 53.01 (1).

Trial Judge to Exercise Control

(2) The trial judge shall exercise reasonable control over the mode of interrogation of a witness so as to protect the witness from undue harassment or embarrassment and may disallow a question put to a witness that is vexatious or irrelevant to any matter that may properly be inquired into at the trial. R.R.O. 1990, Reg. 194, r. 53.01 (2).

(3) The trial judge may at any time direct that a witness be recalled for further examination. R.R.O. 1990, Reg. 194, r. 53.01 (3).

Leading Questions on Direct Examination

(4) Where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine him or her by means of leading questions. R.R.O. 1990, Reg. 194, r. 53.01 (4).

Interpreter

(5) Where a witness does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the witness is called, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation to the witness, the questions put to the witness and his or her answers. R.R.O. 1990, Reg. 194, r. 53.01 (5).

(6) Where an interpreter is required under subrule (5), the party calling the witness shall provide the interpreter, unless the interpretation is to be from English to French or from French to English and an interpreter is provided by the Ministry of the Attorney General. R.R.O. 1990, Reg. 194, r. 53.01 (6).

Evidence by Affidavit

With Leave of Court

53.02 (1) Before or at the trial of an action, the court may make an order allowing the evidence of a witness or proof of a particular fact or document to be given by affidavit, unless an adverse party reasonably requires the attendance of the deponent at trial for cross-examination. R.R.O. 1990, Reg. 194, r. 53.02 (1).

(2) Where an order is made under subrule (1) before the trial, it may be set aside or varied by the trial judge where it appears necessary to do so in the interest of justice. R.R.O. 1990, Reg. 194, r. 53.02 (2).

Expert Witnesses

Experts' Reports

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the opinion is based,

ii. a description of any research conducted by the expert that led him or her to form the opinion, and

iii. a list of every document, if any, relied on by the expert in forming the opinion.

6.1 A statement signed by the expert certifying that the expert is satisfied as to the authenticity of every authority or other document or record referred to in the report, other than,

i. a document or record consisting of evidence or potential evidence in the action that the expert analysed or interpreted in the report, if the document or record was provided to the expert by or on behalf of the party intending to call the expert as a witness,

ii. an authority or other document or record cited by the expert in the report only because it was referenced in a report prepared by another expert witness in the action and the expert is commenting on the reference, and

iii. an authority or other document or record referred to in the report the authenticity of which the expert doubts.

6.2 Details of the doubts the expert has respecting the authenticity of an authority, document or record described in subparagraph 6.1 iii, and of any doubts the expert may have respecting the authenticity of an authority, document or record described in subparagraph 6.1 i or ii.

7. An acknowledgment of expert's duty (Form 53) signed by the expert. O. Reg. 438/08, s. 48; O. Reg. 384/24, s. 4 (1, 2).

(2.1.1) An authority or other document or record that is published on a government website or otherwise by a government printer, in a scholarly journal or by a commercial publisher of research on the subject of the report is presumed to be authentic for the purposes of paragraph 6.1, absent evidence to the contrary. O. Reg. 384/24, s. 4 (3).

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1), (2) and (3), unless the court orders otherwise. O. Reg. 438/08, s. 48; O. Reg. 537/18, s. 8 (1).

Sanction for Failure to Address Issue in Report or Supplementary Report

(3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,

(a) a report served under this rule;

(b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or

(c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial. O. Reg. 348/97, s. 3; O. Reg. 537/18, s. 8 (2).

Extension or Abridgment of Time

(4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,

(a) by the judge or associate judge at the pre-trial conference or at any conference under Rule 77;

(b) by the court, on motion; or

(c) on the written consent of the parties, except that the parties may not consent to an extension that would affect the scheduled trial date. O. Reg. 570/98. s. 3; O. Reg. 186/10, s. 4; O. Reg. 383/21, s. 15; O. Reg. 18/22, s. 9.

Compelling Attendance at Trial

By Summons to Witness

53.04 (1) A party who requires the attendance of a person in Ontario as a witness at a trial may serve the person with a summons to witness (Form 53A) requiring him or her to attend the trial at the time and place stated in the summons, and the summons may also require the person to produce at the trial the documents or other things in his or her possession, control or power relating to the matters in question in the action that are specified in the summons. R.R.O. 1990, Reg. 194, r. 53.04 (1).

Summons may be Issued in Blank

(2) On the request of a party or a lawyer and on payment of the prescribed fee, a registrar shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses. R.R.O. 1990, Reg. 194, r. 53.04 (2); O. Reg. 575/07, s. 1.

Where Document may be Proved by Certified Copy

(3) No summons to witness for the production of an original record or document that may be proved by a certified copy shall be served without leave of the court. R.R.O. 1990, Reg. 194, r. 53.04 (3).

Summons to be Served Personally

(4) A summons to witness shall be served on the witness personally and not by an alternative to personal service and, at the same time, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness. R.R.O. 1990, Reg. 194, r. 53.04 (4).

(5) Service of a summons to witness and the payment or tender of attendance money may be proved by affidavit. R.R.O. 1990, Reg. 194, r. 53.04 (5).

Summons in Effect until Attendance No Longer Required

(6) A summons to witness continues to have effect until the attendance of the witness is no longer required. R.R.O. 1990, Reg. 194, r. 53.04 (6).

Sanctions for Failure to Obey Summons

(7) Where a witness whose evidence is material to an action is served with a summons to witness and the proper attendance money is paid or tendered to him or her, and the witness fails to attend at the trial or to remain in attendance in accordance with the requirements of the summons, the presiding judge may by a warrant for arrest (Form 53B) cause the witness to be apprehended anywhere within Ontario and forthwith brought before the court. R.R.O. 1990, Reg. 194, r. 53.04 (7).

(8) On being apprehended, the witness may be detained in custody until his or her presence is no longer required, or released on such terms as are just,

and the witness may be ordered to pay the costs arising out of the failure to attend or remain in attendance. R.R.O. 1990, Reg. 194, r. 53.04 (8).

Interprovincial Subpoena

53.05 A summons to a witness outside Ontario to compel his or her attendance under the *Interprovincial Summonses Act* shall be in Form 53C. R.R.O. 1990, Reg. 194, r. 53.05.

Compelling Attendance of Witness in Custody

53.06 The court may make an order (Form 53D) for attendance of a witness in custody whose evidence is material to an action, directing the officer having custody of a prisoner to produce him or her, on payment of the fee prescribed under the *Administration of Justice Act*, for an examination authorized by these rules or as a witness at a hearing. R.R.O. 1990, Reg. 194, r. 53.06.

Calling Adverse Party as Witness

Persons to Whom Rule Applies

53.07 (1) Subrules (2) to (7) apply in respect of the following persons:

1. An adverse party.

2. An officer, director, employee or sole proprietor of an adverse party.

3. A partner of a partnership that is an adverse party. O. Reg. 536/96, s. 4.

Securing Attendance

(2) A party may secure the attendance of a person referred to in subrule (1) as a witness at a trial,

(a) by serving the person with a summons to witness, or by serving on the adverse party or the lawyer for the adverse party, at least 10 days before the commencement of the trial, a notice of intention to call the person as a witness; and

(b) by paying or tendering attendance money calculated in accordance with Tariff A at the same time. O. Reg. 536/96, s. 4; O. Reg. 575/07, s. 1.

(3) If a person referred to in subrule (1) is in attendance at the trial, it is unnecessary to serve the person with a summons or to pay attendance money to call the person as a witness. O. Reg. 536/96, s. 4.

When Adverse Party may be Called

(4) A party may call a person referred to in subrule (1) as a witness unless,

(a) the person has already testified; or

(b) the adverse party or the adverse party's lawyer undertakes to call the person as a witness. O. Reg. 536/96, s. 4; O. Reg. 575/07, s. 4.

Cross-examination

(5) A person referred to in subrule (1) may be cross-examined by the party who called him or her as a witness and by any other party who is adverse in interest to that person. O. Reg. 536/96, s. 4.

Re-examination

(6) After a cross-examination under subrule (5), the person may be re-examined by any party who is not entitled to cross-examine under that subrule. O. Reg. 536/96, s. 4.

Failure to Testify

(7) The court may grant judgment in favour of the party calling the witness, adjourn the trial or make such other order as is just where a person required to testify under this rule,

(a) refuses or neglects to attend at the trial or to remain in attendance at the trial;

(b) refuses to be sworn; or

(c) refuses to answer any proper question put to him or her or to produce any document or other thing that he or she is required to produce. O. Reg. 536/96, s. 4.

Evidence Admissible only with Leave

53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave may be granted if the party responsible for the applicable failure satisfies the judge that,

(a) there is a reasonable explanation for the failure; and

(b) granting the leave would not,

(i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or

(ii) cause undue delay in the conduct of the trial. O. Reg. 18/22, s. 10 (1).

(2) Subrule (1) applies with respect to the following provisions:

1. Subrule 30.08 (1) (failure to disclose document).
2. Rule 30.09 (failure to abandon claim of privilege).
3. Rule 31.07 (failure to answer on discovery).

4. Subrule 31.09 (3) (failure to correct answers on discovery).

5. Subrule 53.03 (3) (failure to comply with requirements re experts' reports).

6. Subrule 76.03 (3) (failure to disclose witness). O. Reg. 284/01, s. 13; O. Reg. 260/05, s. 11; O. Reg. 18/22, s. 10 (2).

Calculation of Awards for Future Pecuniary Damages

Discount Rate

53.09 (1) The discount rate to be used in determining the amount of an award in respect of future pecuniary damages, to the extent that it reflects the difference between estimated investment and price inflation rates, is,

(a) for the 15-year period that follows the start of the trial, the greater of,

(i) the average of the value for the last Wednesday in each month of the real rate of interest on long-term Government of Canada real return bonds (Series V80691347, formerly Series V121808 and Series B113911), as published on the Bank of Canada's website for the period starting on March 1 and ending on August 31 in the year before the year in which the trial begins, less ½ per cent and rounded to the nearest 1/10 per cent, and

(ii) zero; and

(b) for any later period covered by the award, 2.5 per cent per year for each year in that period. O. Reg. 488/99, s. 2; O. Reg. 263/03, s. 4 (1); O. Reg. 231/13, s. 9 (1); O. Reg. 383/23, s. 1 (1).

Gross Up

(2) In calculating the amount to be included in the award to offset any liability for income tax on income from investment of the award, the court shall,

(a) assume that the entire award will be invested in fixed income securities; and

(b) determine the rate to be assumed for future inflation in accordance with the following formula:

g rounded to the nearest 1/10 per cent where,

$$g = (1 + i) / (1 + d) - 1$$

"i" is the average of the value for the last Wednesday in each month of the nominal rate of interest on long-term Government of Canada bonds (Series V80691331, formerly Series V121758 and Series

B113867), as published on the Bank of Canada's website for the period starting on March 1 and ending on August 31 in the year before the year in which the trial begins;

"d" is,

(a) for the 15-year period that follows the start of the trial, the greater of,

(i) the average of the value for the last Wednesday in each month of the real rate of interest on long-term Government of Canada real return bonds (Series V80691347, formerly Series V121808 and Series B113911), as published on the Bank of Canada's website for the period starting on March 1 and ending on August 31 in the year before the year in which the trial begins, less ½ per cent, and

(ii) zero, and

(b) for any later period covered by the award, 2.5 per cent per year for each year in that period.

O. Reg. 488/99, s. 2; O. Reg. 263/03, s. 4 (2); O. Reg. 231/13, s. 9 (2); O. Reg. 383/23, s. 1 (2, 3).

Transition

(3) Subrules (1) and (2), as they read on December 31, 2013, continue to apply with respect to actions in which the trial commenced before January 1, 2014. O. Reg. 383/23, s. 1 (4).

Posted Rates

(4) For the purposes of subrule (1), clause (2) (b) and subrule (3), reference may be made to the rates determined in accordance with this rule and published by the Ministry of the Attorney General on a Government of Ontario website. O. Reg. 383/23, s. 1 (4).

Prejudgment Interest Rate for Non-Pecuniary Damages

53.10 The prejudgment interest rate on damages for non-pecuniary loss in an action for personal injury is 5 per cent per year. R.R.O. 1990, Reg. 194, r. 53.10.

REFERENCES

RULE 54 DIRECTING A REFERENCE

Application of Rules 54 and 55

54.01 Rules 54 and 55 apply to references directed,

(a) under rule 54.02 or any other rule; and

(b) under a statute, subject to the provisions of the statute. R.R.O. 1990, Reg. 194, r. 54.01.

Where Reference may be Directed

Reference of Whole Proceeding or Issue

54.02 (1) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference of the whole proceeding or a reference to determine an issue where,

(a) all affected parties consent;

(b) a prolonged examination of documents or an investigation is required that, in the opinion of the judge, cannot conveniently be made at trial; or

(c) a substantial issue in dispute requires the taking of accounts. R.R.O. 1990, Reg. 194, r. 54.02 (1).

Reference of Issue

(2) Subject to any right to have an issue tried by a jury, a judge may at any time in a proceeding direct a reference to determine an issue relating to,

(a) the taking of accounts;

(b) the conduct of a sale;

(c) the appointment by the court of a guardian or receiver, or the appointment by a person of an attorney under a power of attorney;

(d) the conduct of a guardianship or receivership or the exercise of the authority of an attorney acting under a power of attorney; or

(e) the enforcement of an order. R.R.O. 1990, Reg. 194, r. 54.02 (2); O. Reg. 69/95, s. 7.

To Whom Reference may be Directed

Judge or Officer

54.03 (1) A reference may be directed to the referring judge, to another judge with that judge's consent, to a registrar or other officer of the court or to a person agreed on by the parties. O. Reg. 570/98, s. 4.

Person Agreed on by Parties

(2) Where a reference is directed to a person agreed on by the parties, the person is, for the purposes of the reference, an officer of the court directing the reference. R.R.O. 1990, Reg. 194, r. 54.03 (2).

(3) The judge directing a reference to a person agreed on by the parties may,

(a) determine his or her remuneration and the liability of the parties for its payment;

(b) refer that issue to the person to whom the reference is directed; or

(c) reserve that issue until the report on the reference is confirmed. R.R.O. 1990, Reg. 194, r. 54.03 (3).

Order Directing a Reference

54.04 (1) An order directing a reference shall specify the nature and subject matter of the reference and who is to conduct it and may,

(a) direct in general terms that all necessary inquiries be made, accounts taken and costs assessed;

(b) contain directions for the conduct of the reference; and

(c) designate which party is to have carriage of the reference. R.R.O. 1990, Reg. 194, r. 54.04 (1).

(2) An order of an associate judge or registrar directing a reference shall not require a report back, and the report or an interim report on the reference shall be confirmed under rule 54.09 (confirmation by passage of time). R.R.O. 1990, Reg. 194, r. 54.04 (2); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(3) A referee has, subject to the order directing the reference, all the powers these rules give to a referee. R.R.O. 1990, Reg. 194, r. 54.04 (3).

Motions on a Reference

54.05 (1) A referee shall hear and dispose of any motion made in connection with the reference, but in the absence of or with the consent of the referee, a motion may be heard and disposed of by a judge or associate judge. R.R.O. 1990, Reg. 194, r. 54.05 (1); O. Reg. 219/91, s. 7; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(2) Rule 37.03 (where motions to be brought) does not apply to a motion made in connection with a reference and heard by the referee. R.R.O. 1990, Reg. 194, r. 54.05 (2); O. Reg. 689/20, s. 36.

(3) Where a referee has made an order on a motion in the reference, a person who is affected by the order may make a motion to a judge to set aside or vary the order by a notice of motion served within seven days after the order is made and naming the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 54.05 (3).

Report on Reference

54.06 A referee shall make a report that contains his or her findings and conclusions. R.R.O. 1990, Reg. 194, r. 54.06.

Report must be Confirmed

54.07 (1) A report has no effect until it has been confirmed. R.R.O. 1990, Reg. 194, r. 54.07.

(2) A report shall be entered immediately after it has been confirmed and rule 59.05 (entry of order) applies, with necessary modifications. O. Reg. 396/91, s. 9.

Confirmation on Motion where Report back Required

54.08 (1) Where the order directing a reference requires the referee to report back, the report or an interim report on the reference may be confirmed only on a motion to the judge who directed the reference on notice to every party who appeared on the reference, and the judge may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just. R.R.O. 1990, Reg. 194, r. 54.08 (1); O. Reg. 288/99, s. 17.

(2) Where the judge who directed the reference is unable for any reason to hear a motion for confirmation, the motion may be made to another judge. R.R.O. 1990, Reg. 194, r. 54.08 (2).

Confirmation by Passage of Time where Report back not Required

Fifteen-Day Period to Oppose Confirmation

54.09 (1) Where the order directing a reference does not require the referee to report back, the report or an interim report on the reference is confirmed,

(a) immediately on the filing of the consent of every party who appeared on the reference; or

(b) on the expiration of fifteen days after a copy, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced, unless a notice of motion to oppose confirmation of a report is served within that time. O. Reg. 396/91, s. 10.

To Whom Motion to Oppose Confirmation Made

(2) A motion to oppose confirmation of a report shall be made to a judge other than the one who conducted the reference. R.R.O. 1990, Reg. 194, r. 54.09 (2).

Notice of Motion to Oppose Confirmation

(3) A notice of motion to oppose confirmation of a report shall,

(a) set out the grounds for opposing confirmation;

(b) be served within fifteen days after a copy of the report, with proof of service on every party who appeared on the reference, has been filed in the office in which the proceeding was commenced; and

(c) name the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 54.09 (3).

Motion for Immediate Confirmation

(4) A party who seeks confirmation before the expiration of the fifteen-day period prescribed in subrule (1) may make a motion to a judge for confirmation. R.R.O. 1990, Reg. 194, r. 54.09 (4).

Disposition of Motion

(5) A judge hearing a motion under subrule (2) or (4) may require the referee to give reasons for his or her findings and conclusions and may confirm the report in whole or in part or make such other order as is just. R.R.O. 1990, Reg. 194, r. 54.09 (5).

Referee Unable to Continue or Complete Reference

54.10 Where a referee is unable for any reason to continue or complete a reference,

(a) the parties to the reference may by consent appoint a new referee; or

(b) any party to the reference may make a motion to a judge for directions for continuation or completion of the reference. O. Reg. 536/96, s. 5.

RULE 55 PROCEDURE ON A REFERENCE

General Provisions for Conduct of Reference

Simple Procedure to be Adopted

55.01 (1) A referee shall, subject to any directions contained in the order directing the reference, devise and adopt the simplest, least expensive and most expeditious manner of conducting the reference and may,

(a) give such directions as are necessary; and

(b) dispense with any procedure ordinarily taken that the referee considers to be unnecessary, or adopt a procedure different from that ordinarily taken. R.R.O. 1990, Reg. 194, r. 55.01 (1).

Special Circumstances to be Reported

(2) A referee shall report on any special circumstances relating to the reference and shall generally inquire into, decide and report on all matters relating to the reference as fully as if they had been specifically referred. R.R.O. 1990, Reg. 194, r. 55.01 (2).

General Procedure

(3) Subject to subrule (1), a reference shall be conducted as far as possible in accordance with rules 55.01 to 55.07. R.R.O. 1990, Reg. 194, r. 55.01 (3).

Procedure on a Reference Generally

Hearing for Directions

55.02 (1) The party having carriage of the reference shall forthwith have the order directing the reference signed and entered and, within ten days after entry, request an appointment with the referee for a hearing to consider directions for the reference and, in default, any other party having an interest in the reference may assume carriage of it. R.R.O. 1990, Reg. 194, r. 55.02 (1).

(2) A notice of hearing for directions (Form 55A) and a copy of the order directing the reference shall be served on every other party to the proceeding at least five days before the hearing unless the referee directs or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 55.02 (2).

Directions

(3) At the hearing for directions, the referee shall give such directions for the conduct of the reference as are just, including,

(a) the time and place at which the reference is to proceed;

(b) any special directions concerning the parties who are to attend; and

(c) any special directions concerning what evidence is to be received and how documents are to be proved. R.R.O. 1990, Reg. 194, r. 55.02 (3).

(4) The directions may be varied or supplemented during the course of the reference. R.R.O. 1990, Reg. 194, r. 55.02 (4).

Adding Parties

(5) Where it appears to the referee that any person ought to be added as a party to the proceeding, the referee may make an order adding the person as a defendant or respondent and direct that the order, together with the order directing the reference and a notice to party added on reference (Form 55B), be served on the person, and on being served the person becomes a party to the proceeding. R.R.O. 1990, Reg. 194, r. 55.02 (5).

(6) A person served with a notice under subrule (5) may make a motion to a judge to set aside or vary the order directing the reference or the order adding the person as a party, by a notice of motion served within ten days after service of the notice under subrule (5), or where the person is served outside Ontario, within such further time as the referee directs, and naming the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 55.02 (6).

Failure to Appear on Reference

(7) A party who is served with notice of a reference under subrule (2) or (5) and does not appear in response to the notice is not entitled to notice of any step in the reference and need not be served with any document in the reference, unless the referee orders otherwise. R.R.O. 1990, Reg. 194, r. 55.02 (7).

Representation of Parties with Similar Interests

(8) Where it appears to the referee that two or more parties have substantially similar interests and can be adequately represented as a class, the referee may require them to be represented by the same lawyer and, where they cannot agree on a lawyer to represent them, the referee may designate a lawyer on such terms as are just. R.R.O. 1990, Reg. 194, r. 55.02 (8); O. Reg. 575/07, s. 1.

(9) A party referred to in subrule (8) who insists on being represented by a different lawyer shall not recover the costs of the separate representation and, unless the referee orders otherwise, shall pay all costs incurred by the other parties as a result of the separate representation. R.R.O. 1990, Reg. 194, r. 55.02 (9); O. Reg. 575/07, s. 1.

Amendment of Pleadings

(10) The referee may grant leave to make any necessary amendments to the pleadings that are not inconsistent with the order of reference. R.R.O. 1990, Reg. 194, r. 55.02 (10).

Procedure Book

(11) The referee shall keep a procedure book in which he or she shall note all steps taken and all directions given in respect of the reference, and the directions need not be embodied in a formal order or report to bind the parties. R.R.O. 1990, Reg. 194, r. 55.02 (11).

Transferring Carriage of Reference

(12) Where the party having carriage of the reference does not proceed with reasonable diligence, the referee may, on the motion of any other interested

party, transfer carriage of the reference to another party. R.R.O. 1990, Reg. 194, r. 55.02 (12).

Evidence of Witnesses

(13) Witnesses on a reference shall be examined orally unless the referee directs otherwise, and evidence taken orally shall be recorded. R.R.O. 1990, Reg. 194, r. 55.02 (13).

(14) The attendance of a person to be examined on a reference may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 55.02 (14).

Expert Witnesses

(14.1) Rule 53.03 (expert witness) and rule 53.08 (evidence admissible only with leave) apply, with necessary modifications, to the calling of an expert witness on a reference. O. Reg. 535/92, s. 12.

Expert Appointed by Referee

(14.2) A referee may appoint an independent expert and rule 52.03 (court appointed expert) applies, with necessary modifications. O. Reg. 535/92, s. 12.

Examination of Party and Production of Documents

(15) The referee may require any party to be examined and to produce such documents as the referee thinks fit and may give directions for their inspection by any other party. R.R.O. 1990, Reg. 194, r. 55.02 (15).

Filing of Documents

(16) While a reference is pending, all documents relating to it shall be filed with the referee and, on completion of the reference, the documents shall be returned to the office in which the proceeding was commenced. R.R.O. 1990, Reg. 194, r. 55.02 (16).

Execution or Delivery of Instrument

(17) Where a person refuses or neglects to execute or deliver an instrument that becomes necessary under an order directing the reference, the referee may give directions for its execution or delivery. R.R.O. 1990, Reg. 194, r. 55.02 (17).

Rulings

(18) Where the referee has made a ruling on the admissibility of evidence or any other matter relating to the conduct of the reference, the referee shall, on the request of any party, set out the ruling and the reasons for it in the report

or, in the discretion of the referee, in an interim report on the reference. R.R.O. 1990, Reg. 194, r. 55.02 (18).

Preparation of Report

(19) When the hearing of the reference is completed, the referee shall fix a date to settle the report and the party having carriage of the reference shall serve notice of the date on all parties who appeared on the reference unless the referee dispenses with notice. R.R.O. 1990, Reg. 194, r. 55.02 (19).

(20) The party having carriage of the reference shall prepare a draft report and present it to the referee on the day fixed for settling the report. R.R.O. 1990, Reg. 194, r. 55.02 (20).

(21) When the referee has settled and signed the report, the party having carriage of the reference shall forthwith serve it on all parties who appeared on the reference and file a copy with proof of service. R.R.O. 1990, Reg. 194, r. 55.02 (21).

(22) In a proceeding for the administration of the estate of a deceased person, the report shall, as far as possible, be in Form 55C. R.R.O. 1990, Reg. 194, r. 55.02 (22).

Procedure to Ascertain Interested Persons and Verify Claims

Publication of Advertisements

55.03 (1) The referee may direct the publication of advertisements for creditors or beneficiaries of an estate or trust, other unascertained persons, or their successors. R.R.O. 1990, Reg. 194, r. 55.03 (1).

Filing of Claims

(2) The advertisement shall specify a date by which and a place where interested persons may file their claims and shall notify them that, unless their claims are so filed, they may be excluded from the benefit of the order, but the referee may nevertheless accept a claim at a later time. R.R.O. 1990, Reg. 194, r. 55.03 (2).

Examination of Claims

(3) Before the day specified by the referee for the consideration of claims filed in response to the advertisement, the executor, administrator or trustee, or such other person as the referee directs, shall examine the claims and prepare an affidavit verifying a list of the claims filed in response to the advertisement and stating which claims he or she believes should be disallowed and the reasons for that belief. R.R.O. 1990, Reg. 194, r. 55.03 (3).

Adjudication of Contested Claims

(4) If a claim is contested, the referee shall order that a notice of contested claim (Form 55D), fixing a date for adjudication of the claim, be served on the claimant. R.R.O. 1990, Reg. 194, r. 55.03 (4).

Procedure on Taking of Accounts

Powers of Referee

55.04 (1) On the taking of accounts, the referee may,

(a) take the accounts with rests or otherwise;

(b) take account of money received or that might have been received but for wilful neglect or default;

(c) make allowance for occupation rent and determine the amount;

(d) take into account necessary repairs, lasting improvements, costs and other expenses properly incurred; and

(e) make all just allowances. R.R.O. 1990, Reg. 194, r. 55.04 (1).

Preparation of Accounts

(2) Where an account is to be taken, the party required to account, unless the referee directs otherwise, shall prepare the account in debit and credit form, verified by affidavit. R.R.O. 1990, Reg. 194, r. 55.04 (2).

(3) The items on each side of the account shall be numbered consecutively, and the account shall be referred to in the affidavit as an exhibit and shall not be attached to the affidavit. R.R.O. 1990, Reg. 194, r. 55.04 (3).

Books of Accounts as Proof

(4) The referee may direct that the books in which the accounts have been kept be taken as proof, in the absence of evidence to the contrary, of the matters contained in them. R.R.O. 1990, Reg. 194, r. 55.04 (4).

Production of Vouchers

(5) Before hearing a reference, the referee may fix a date for the purpose of taking the accounts and may direct the production and inspection of vouchers and, where appropriate, cross-examination on his or her affidavit of the party required to account or of the person who filed the affidavit on the party's behalf or in the party's place, with a view to ascertaining what is admitted and what is contested between the parties. R.R.O. 1990, Reg. 194, r. 55.04 (5).

Questioning Accounts

(6) A party who questions an account shall give particulars of the objection, with specific reference by number to the item in question, to the party

required to account, and the referee may require the party to give further particulars of the objection. R.R.O. 1990, Reg. 194, r. 55.04 (6).

Direction for Payment of Money

Payment into Financial Institution

55.05 (1) Where under an order directing a reference the referee directs money to be paid at a specified time and place, the referee shall direct it to be paid into a financial institution to the credit of the party entitled or to the joint credit of the party entitled and the Accountant of the Superior Court of Justice. R.R.O. 1990, Reg. 194, r. 55.05 (1); O. Reg. 292/99, s. 5; O. Reg. 399/12, s. 1 (1).

Payment Out

(2) Where money is directed to be paid out of court to the credit of the party entitled, the party may name the financial institution into which the party wishes it to be paid. R.R.O. 1990, Reg. 194, r. 55.05 (2).

(3) Where money has been paid to the joint credit of the party and the Accountant, the Accountant shall sign the cheque or direction for payment out on the production of the consent of the party paying in, verified by affidavit, or of the party's lawyer, or, in the absence of the consent, on the order of the referee. R.R.O. 1990, Reg. 194, r. 55.05 (3); O. Reg. 575/07, s. 1; O. Reg. 399/12, s. 1 (2).

Money Belonging to Minor

(4) Where it appears that money in court belongs to a minor, the referee shall require evidence of the age of the minor and shall, in the report, state the minor's birth date and full address. R.R.O. 1990, Reg. 194, r. 55.05 (4).

Money to be Paid to Creditors

(5) Where an order of reference or a report directs the payment of money out of court to creditors, the person having carriage of the reference shall deposit with the Accountant a copy of the order or report and shall serve a notice to creditor (Form 55E) on each creditor stating that payment of the creditor's claim, as allowed, may be obtained from the Accountant. R.R.O. 1990, Reg. 194, r. 55.05 (5); O. Reg. 399/12, s. 1 (3).

Reference for Conduct of Sale

Method of Sale

55.06 (1) Where a sale is ordered, the referee may cause the property to be sold by public auction, private contract or tender, or partly by one method and partly by another. R.R.O. 1990, Reg. 194, r. 55.06 (1).

Advertisement

(2) Where property is directed to be sold by auction or tender, the party having carriage of the sale shall prepare a draft advertisement according to the instructions of the referee showing,

(a) the short title of the proceeding;

(b) that the sale is by order of the court;

(c) the time and place of the sale;

(d) a short description of the property to be sold;

(e) whether the property is to be sold in one lot or several and, if in several, in how many, and in what lots;

(f) the terms of payment;

(g) that the sale is subject to a reserve bid, if that is the case; and

(h) any conditions of sale different from those set out in Form 55F. R.R.O. 1990, Reg. 194, r. 55.06 (2).

Conditions of Sale

(3) The conditions of sale by auction or tender shall be those set out in Form 55F, subject to such modifications as the referee directs. R.R.O. 1990, Reg. 194, r. 55.06 (3).

Hearing for Directions

(4) At a hearing for directions under subrule 55.02 (3), the referee shall,

(a) settle the form of the advertisement;

(b) fix the time and place of sale;

(c) name an auctioneer, where one is to be employed;

(d) give directions for publication of the advertisement;

(e) give directions for obtaining appraisals;

(f) fix a reserve bid, if any; and

(g) make all other arrangements necessary for the sale. R.R.O. 1990, Reg. 194, r. 55.06 (4).

Who May Bid

(5) All parties may bid except the party having carriage of the sale and any trustee or agent for the party or other person in a fiduciary relationship to the party. R.R.O. 1990, Reg. 194, r. 55.06 (5).

(6) Where the party having carriage of the sale wishes to bid, the referee may transfer carriage of the sale to another party or to any other person. R.R.O. 1990, Reg. 194, r. 55.06 (6).

Who Conducts Sale

(7) Where no auctioneer is employed, the referee or a person designated by the referee shall conduct the sale. R.R.O. 1990, Reg. 194, r. 55.06 (7).

Purchaser to Sign Agreement

(8) The purchaser shall enter into an agreement of purchase and sale at the time of sale. R.R.O. 1990, Reg. 194, r. 55.06 (8).

Deposit

(9) The deposit required by the conditions of sale shall be paid to the party having carriage of the sale or the party's lawyer at the time of sale and the party or lawyer shall forthwith pay the money into court in the name of the purchaser. R.R.O. 1990, Reg. 194, r. 55.06 (9); O. Reg. 575/07, s. 1.

Interim Report

(10) Where a sale is made through an auctioneer, the auctioneer shall make an affidavit concerning the result of the sale, and where no auctioneer is employed, the referee shall enter the result in the procedure book and, in either case, the referee may make an interim report on the sale (Form 55G). R.R.O. 1990, Reg. 194, r. 55.06 (10).

Objection to Sale

(11) A party may object to a sale by making a motion to the referee to set it aside, and notice of the motion shall be served on all parties to the reference and on the purchaser, who shall be deemed to be a party for the purpose of the motion. R.R.O. 1990, Reg. 194, r. 55.06 (11).

Completion of Sale

(12) The purchaser may pay the purchase money or the balance of it into court without order and, after the confirmation of the report on the sale, on notice to the party having carriage of the sale, the purchaser may obtain a vesting order. R.R.O. 1990, Reg. 194, r. 55.06 (12).

(13) Where possession is wrongfully withheld from the purchaser, either the purchaser or the party having carriage of the sale may move for a writ of possession. R.R.O. 1990, Reg. 194, r. 55.06 (13).

(14) The purchase money may be paid out of court in accordance with the report,

(a) on consent of the purchaser or the purchaser's lawyer; or

(b) on proof to the Accountant that the purchaser has received a transfer or vesting order of the property for which the money in question was paid into court. R.R.O. 1990, Reg. 194, r. 55.06 (14); O. Reg. 575/07, s. 1; O. Reg. 399/12, s. 2 (1).

(15) No transfer shall be approved until the referee is satisfied that the purchase money has been paid into court and, where a mortgage is taken for part of the purchase money, that the mortgage has been registered and deposited with the Accountant. R.R.O. 1990, Reg. 194, r. 55.06 (15); O. Reg. 399/12, s. 2 (2).

Reference to Appoint Guardian or Receiver

55.07 (1) Where, by an order directing a reference, a referee is directed to appoint a guardian or receiver, the referee shall not report on the appointment until he or she has settled and approved any security required by the order and until the security has been filed with the Accountant. R.R.O. 1990, Reg. 194, r. 55.07 (1); O. Reg. 69/95, s. 18; O. Reg. 399/12, s. 3.

(2) Where, by an order directing a reference or a report, the person so appointed is required to pass accounts or to pay money into court and has not done so, the referee may, on the passing of accounts, disallow any compensation and may charge the person with interest. R.R.O. 1990, Reg. 194, r. 55.07 (2); O. Reg. 193/15, s. 5.

COSTS

RULE 56 SECURITY FOR COSTS

Where Available

56.01 (1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

Declaration of Plaintiff's or Applicant's Place of Residence

56.02 The lawyer for the plaintiff or applicant shall, forthwith on receipt of a demand in writing from any person who has been served with the originating process, declare in writing whether the plaintiff or applicant is ordinarily resident in Ontario and, where the lawyer fails to respond to the demand, the court may order that the action or application be stayed or dismissed. R.R.O. 1990, Reg. 194, r. 56.02; O. Reg. 575/07, s. 1.

Motion for Security

56.03 (1) In an action, a motion for security for costs may be made only after the defendant has delivered a defence and shall be made on notice to the plaintiff and every other defendant who has delivered a defence or notice of intent to defend. R.R.O. 1990, Reg. 194, r. 56.03 (1).

(2) In an application, a motion for security for costs may be made only after the respondent has delivered a notice of appearance and shall be made on notice to the applicant and every other respondent who has delivered a notice of appearance. R.R.O. 1990, Reg. 194, r. 56.03 (2).

Amount and Form of Security and Time for Furnishing

56.04 The amount and form of security and the time for paying into court or otherwise giving the required security shall be determined by the court. R.R.O. 1990, Reg. 194, r. 56.04.

Form and Effect of Order

56.05 A plaintiff or applicant against whom an order for security for costs (Form 56A) has been made may not, until the security has been given, take any step in the proceeding except an appeal from the order, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 56.05.

Default of Plaintiff or Applicant

56.06 Where a plaintiff or applicant defaults in giving the security required by an order, the court on motion may dismiss the proceeding against the defendant or respondent who obtained the order, and the stay imposed by rule 56.05 no longer applies unless another defendant or respondent has obtained an order for security for costs. R.R.O. 1990, Reg. 194, r. 56.06.

Amount may be Varied

56.07 The amount of security required by an order for security for costs may be increased or decreased at any time. R.R.O. 1990, Reg. 194, r. 56.07.

Notice of Compliance

56.08 On giving the security required by an order, the plaintiff or applicant shall forthwith give notice of compliance to the defendant or respondent who obtained the order, and to every other party. R.R.O. 1990, Reg. 194, r. 56.08.

Security for Costs as Term of Relief

56.09 Despite rules 56.01 and 56.02, any party to a proceeding may be ordered to give security for costs where, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief and, where such an order is made, rules 56.04 to 56.08 apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 56.09.

RULE 57 COSTS OF PROCEEDINGS

General Principles

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

Directions to Assessment Officer

57.02 (1) Where costs are to be assessed, the court may give directions to the assessment officer in respect of any matter referred to in rule 57.01. R.R.O. 1990, Reg. 194, r. 57.02 (1).

(2) The court shall record,

(a) any direction to the assessment officer;

(b) any direction that is requested by a party and refused; and

(c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.02 (2).

Costs of a Motion

Contested Motion

57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment. O. Reg. 284/01, s. 16.

(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just. R.R.O. 1990, Reg. 194, r. 57.03 (2).

Motion Without Notice

(3) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.03 (3).

Costs on Settlement

57.04 Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the costs may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.04.

Costs where Action Brought in Wrong Court

Recovery within Monetary Jurisdiction of Small Claims Court

57.05 (1) If a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs. O. Reg. 377/95, s. 4.

(2) Subrule (1) does not apply to an action transferred to the Superior Court of Justice under section 107 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 57.05 (2); O. Reg. 292/99, s. 2 (2).

Default Judgment within Monetary Jurisdiction of Small Claims Court

(3) If the plaintiff obtains a default judgment that is within the monetary jurisdiction of the Small Claims Court, costs shall be assessed in accordance with that court's tariff. O. Reg. 377/95, s. 4.

Proceeding Dismissed for Want of Jurisdiction

(4) Where a proceeding is dismissed for want of jurisdiction, the court may make an order for the costs of the proceeding. R.R.O. 1990, Reg. 194, r. 57.05 (4).

Relief Sought Improperly

(5) If the court determines that a plaintiff included a claim for relief in a proceeding in order to be able to commence the action in the Superior Court of Justice instead of in the Small Claims Court, the court may order the payment of costs by the plaintiff. O. Reg. 176/24, s. 3.

Costs of Litigation Guardian

57.06 (1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the successful party's costs. R.R.O. 1990, Reg. 194, r. 57.06 (1).

(2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.06 (2).

Liability of Lawyer for Costs

57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;

(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.

(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 (3); O. Reg. 575/07, s. 1.

RULE 58 ASSESSMENT OF COSTS

General

58.01 Where a rule or order provides that a party is entitled to the costs of all or part of a proceeding and the costs have not been fixed by the court, they shall be assessed in accordance with rules 58.02 to 58.12. R.R.O. 1990, Reg. 194, r. 58.01; O. Reg. 284/01, s. 17.

Who May Assess Costs

General Rule

58.02 (1) Costs shall be assessed by an assessment officer, subject to subrule (2), in the place where the proceeding was commenced or heard or in a county agreed on by the parties. R.R.O. 1990, Reg. 194, r. 58.02 (1).

Reference

(2) The costs of a reference may be assessed by an assessment officer or by the referee, and for the purposes of rules 58.03 to 58.12, the referee shall be deemed to be an assessment officer. R.R.O. 1990, Reg. 194, r. 58.02 (2).

Assessment at Instance of Party Entitled

By Filing Bill of Costs and Obtaining Appointment

58.03 (1) A party entitled to costs may obtain a notice of appointment for assessment of costs (Form 58A) from the appropriate assessment officer on filing a bill of costs and a copy of the order or other document giving rise to the party's entitlement to costs with the assessment officer. R.R.O. 1990, Reg. 194, r. 58.03 (1).

(2) The notice and the bill of costs shall be served on every party interested in the assessment at least seven days before the date fixed for the assessment. R.R.O. 1990, Reg. 194, r. 58.03 (2).

Assessment at Instance of Party Liable

By Obtaining Appointment and Serving Notice

58.04 (1) Where a party entitled to costs fails or refuses to file or serve a bill of costs for assessment within a reasonable time, any party liable to pay the costs may obtain a notice to deliver a bill of costs for assessment (Form 58B) from the appropriate assessment officer. R.R.O. 1990, Reg. 194, r. 58.04 (1).

(2) The notice shall be served on every party interested in the assessment at least twenty-one days before the date fixed for the assessment. R.R.O. 1990, Reg. 194, r. 58.04 (2).

Delivery of Bill of Costs

(3) On being served with the notice, the person required to deliver a bill of costs shall file and serve a copy of the bill on every party interested in the

assessment at least seven days before the date fixed for the assessment. R.R.O. 1990, Reg. 194, r. 58.04 (3).

Failure to Deliver Bill of Costs

(4) Where a party required to deliver a bill of costs for assessment fails to do so at the time set out in the notice and thereby prejudices another party, the assessment officer may fix the costs of the defaulting party at an appropriate sum in order to prevent further prejudice to the other party. R.R.O. 1990, Reg. 194, r. 58.04 (4).

Assessment in Accordance with Tariffs

Generally

58.05 (1) If costs are to be assessed, the assessment officer shall assess and allow,

(a) lawyers' fees and disbursements in accordance with subrule 57.01 (1) and the Tariffs; and

(b) disbursements for fees paid to the court, an authorized court transcriptionist, an official examiner or a sheriff under the regulations under the *Administration of Justice Act*. O. Reg. 284/01, s. 18; O. Reg. 170/14, s. 18.

Students-at-Law and Law Clerks

(2) No other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise. O. Reg. 284/01, s. 18.

Disbursements

(3) No disbursements other than fees paid to the court shall be assessed or allowed unless it is established by affidavit or by the lawyer appearing on the assessment that the disbursement was made or that the party is liable for it. R.R.O. 1990, Reg. 194, r. 58.05 (3); O. Reg. 575/07, s. 1.

Directions

(4) An assessment officer may direct production of books and documents and give directions for the conduct of an assessment. R.R.O. 1990, Reg. 194, r. 58.05 (4).

Set Off of Costs

(5) Where parties are liable to pay costs to each other, the assessment officer may adjust the costs by way of set off. R.R.O. 1990, Reg. 194, r. 58.05 (5).

Costs of Assessment

(6) The assessment officer may, in his or her discretion, award or refuse the costs of an assessment to either party, and fix those costs. R.R.O. 1990, Reg. 194, r. 58.05 (6).

Factors to be Considered on Assessment

58.06 (1) In assessing costs the assessment officer may consider,

(a) the amount involved in the proceeding;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the duration of the hearing;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted; and

(h) any other matter relevant to the assessment of costs. R.R.O. 1990, Reg. 194, r. 58.06 (1).

(2) In assessing costs the assessment officer is bound by the court's direction or refusal to make a direction under rule 57.02, but is not bound where the court declines to make a direction and leaves the matter to the assessment officer's discretion. R.R.O. 1990, Reg. 194, r. 58.06 (2).

Costs of Abandoned Proceeding

58.07 The costs of a motion, application, action or appeal that is abandoned or deemed to be abandoned may be assessed on filing in the office of the assessment officer,

(a) the notice of motion or application served, together with an affidavit that the notice was not filed within the prescribed time, that a confirmation of motion was not given under subrule 37.10.1 (1) or that the moving party, applicant, plaintiff or appellant did not appear at the hearing, as the case may be;

(b) the notice of abandonment served; or

(c) a copy of the order dismissing the action or appeal as abandoned. O. Reg. 653/00, s. 4; O. Reg. 537/18, s. 9.

Costs of Particular Proceedings

Passing of Accounts

58.08 (1) The costs of passing the accounts of a trustee, attorney under a power of attorney, guardian or other person having similar duties relating to the management of assets shall be determined in accordance with subrules 74.18 (10) to (11.4) and (13) (costs of passing of accounts of estate trustees). O. Reg. 69/95, s. 8; O. Reg. 193/15, s. 6.

Costs out of Fund or Estate

(2) Where costs are to be paid out of a fund or estate, the assessment officer may direct what parties are to attend on the assessment and may disallow the costs of the assessment of any party whose attendance is unnecessary because the interest of the party in the fund or estate is small, remote or sufficiently protected by other interested parties. R.R.O. 1990, Reg. 194, r. 58.08 (2).

Certificate of Assessment

58.09 On the assessment of costs, the assessment officer shall set out in a certificate of assessment of costs (Form 58C) the amount of costs assessed and allowed. R.R.O. 1990, Reg. 194, r. 58.09. O. Reg. 284/01, s. 19.

Objections to Assessment

58.10 (1) On request, the assessment officer shall withhold the certificate for seven days or such other time as he or she directs, in order to allow a party who is dissatisfied with the decision of the assessment officer to serve objections on every other interested party and file them with the assessment officer, specifying concisely the grounds for the objections. R.R.O. 1990, Reg. 194, r. 58.10 (1).

(2) A party on whom objections have been served may, within seven days after service or such other time as the assessment officer directs, serve a reply to the objections on every other interested party and file it with the assessment officer. R.R.O. 1990, Reg. 194, r. 58.10 (2).

(3) The assessment officer shall then reconsider and review the assessment in view of the objections and reply and may receive further evidence in respect of the objections, and the assessment officer shall decide on the objections and complete the certificate accordingly. R.R.O. 1990, Reg. 194, r. 58.10 (3).

(4) The assessment officer may, and if requested shall, state in writing the reasons for his or her decision on the objections. R.R.O. 1990, Reg. 194, r. 58.10 (4).

Appeal from Assessment

58.11 The time for and the procedure on an appeal under clause 6 (1) (c) or 17 (b) or subsection 90 (4) of the *Courts of Justice Act* from a certificate of an assessment officer on an issue in respect of which an objection was served is governed by rule 62.01. R.R.O. 1990, Reg. 194, r. 58.11.

Costs of a Sheriff

Party may Require Assessment

58.12 (1) A sheriff claiming fees or expenses that are not prescribed by the regulations under the *Administration of Justice Act* or that have not been assessed shall, on being required by a party, furnish the party with a bill of costs and have the costs assessed by an assessment officer. R.R.O. 1990, Reg. 194, r. 58.12 (1).

(2) A sheriff who has been required to have his or her fees or expenses assessed shall not collect them until they have been assessed. R.R.O. 1990, Reg. 194, r. 58.12 (2).

(3) Either the sheriff or the party requiring the assessment may obtain an appointment for the assessment and the procedure on the assessment shall be the same as in the case of an assessment between parties. R.R.O. 1990, Reg. 194, r. 58.12 (3); O. Reg. 284/01, s. 20.

Reduction of Fees on Motion by Debtor

(4) A person liable under a writ of execution who is dissatisfied with the amount of fees or expenses claimed by a sheriff in respect of the enforcement of the writ may make a motion, before or after payment, on notice to the sheriff and, if the amount appears to be unreasonable, even though it is in accordance with Tariff A, the court may reduce the amount or order the amount to be refunded on such terms as are just. R.R.O. 1990, Reg. 194, r. 58.12 (4).

(5) Nothing in subrule (4) authorizes the court to reduce or order a refund of a fee that is prescribed by the regulations under the *Administration of Justice Act*. R.R.O. 1990, Reg. 194, r. 58.12 (5).

Costs Fixed by Registrar

When Registrar May Fix Costs

58.13 (1) A registrar may fix costs,

(a) if all the parties consent; or

(b) if the lawyer's fee does not exceed $2,000, exclusive of harmonized sales tax (HST). O. Reg. 168/05, s. 1; O. Reg. 55/12, s. 4.

(2) Under clause (1) (b), the registrar shall fix costs of $750 plus disbursements. O. Reg. 168/05, s. 1.

Documents to be Filed with Registrar

(3) When costs are to be fixed by the registrar under subrule (1), the party who has been awarded costs shall file with the registrar,

(a) a bill of costs; and

(b) a copy of a receipt for each disbursement. O. Reg. 168/05, s. 1.

ORDERS

RULE 59 ORDERS

Effective Date

59.01 An order is effective from the date on which it is made, unless it provides otherwise. R.R.O. 1990, Reg. 194, r. 59.01.

Endorsement of Orders

59.02 (1) An endorsement of an order shall be made on the appeal book, compendium, record, notice of motion, notice of application or on a separate document by the judge, associate judge or officer making the order. O. Reg. 689/20, s. 38; O. Reg. 383/21, s. 15.

Requirements if Separate Document

(2) A separate document on which an endorsement is made,

(a) may be in paper or electronic format;

(b) may include the reasons for the decision; and

(c) shall include,

(i) the name and signature of the judge, associate judge or officer making the order,

(ii) the date on which the endorsement is made,

(iii) the date of the hearing or conference,

(iv) the nature of the hearing or conference,

(v) the relief requested,

(vi) the disposition made at the hearing or conference, and

(vii) a list of the parties and lawyers who participated in the hearing or conference and a list of any parties or lawyers who did not participate in the hearing or conference. O. Reg. 689/20, s. 38; O. Reg. 383/21, s. 15.

Court File

(3) The registrar shall file endorsements in the court file. O. Reg. 689/20, s. 38.

Preparation and Form of Order

Preparation of Draft Order

59.03 (1) Any party or person affected by an order may prepare a draft order and send it to all parties who participated in the hearing or conference for approval of its form and content. O. Reg. 689/20, s. 39.

Approval

(2) If all the parties who participated in the hearing or conference approve the draft order, the party or other person who prepared the draft order may request that it be issued by the registrar by filing,

(a) the draft order; and

(b) evidence that the parties have approved the draft order. O. Reg. 689/20, s. 39.

General Form of Order

(3) A draft order must be in Form 59A (order), 59B (judgment) or 59C (order or certificate on appeal) and must contain,

(a) the name of the judge, associate judge or officer who made the order;

(b) the date on which the order was made;

(c) a recital of the particulars necessary to understand the order, including the date of the hearing or conference, the parties who participated in the hearing or conference and those who did not, and any undertaking given by a party as a condition of the order; and

(d) if the order is for the payment of money on which postjudgment interest is payable, the rate of interest and the date from which interest is payable. O. Reg. 689/20, s. 39; O. Reg. 383/21, s. 15.

(4) The operative parts of an order shall be divided into paragraphs, numbered consecutively. R.R.O. 1990, Reg. 194, r. 59.03 (4).

Order Directing Payment for Minor

(5) An order directing payment into court or to a trustee on behalf of a minor shall show the minor's birth date and full address and shall direct that a copy of the order be served on the Children's Lawyer. R.R.O. 1990, Reg. 194, r. 59.03 (5); O. Reg. 69/95, s. 19.

Order for Costs

(6) An order for the payment of costs shall direct payment to the party entitled to receive the costs and not to the party's lawyer. R.R.O. 1990, Reg. 194, r. 59.03 (6); O. Reg. 575/07, s. 1.

Order on which Interest Payable

(7) An order for the payment of money on which postjudgment interest is payable shall set out the rate of interest and the date from which interest is payable. R.R.O. 1990, Reg. 194, r. 59.03 (7).

(8) REVOKED: O. Reg. 131/04, s. 14.

Issuing Orders

Issuance

59.04 (1) An order is considered to have been issued on the completion of the following steps:

1. The signing of the order,

   i. by the judge, associate judge or officer making the order, or

   ii. by the registrar in accordance with subrule (3).

2. The registrar's dating and sealing of the order with the seal of the court. O. Reg. 689/20, s. 40; O. Reg. 383/21, s. 15.

Electronic Issuance

(2) If an order is issued electronically,

(a) subrule (1) applies instead of subrule 4.05 (1.1); and

(b) for greater certainty, the order may be sealed by use of an electronic version of the seal. O. Reg. 689/20, s. 40.

Registrar's Signature

(3) A registrar where the hearing or conference was held or where the proceeding was commenced may sign a draft order filed under subrule 59.03 (2), if the registrar is satisfied that the draft order,

(a) is in proper form; and

(b) complies with and reflects the terms of an endorsement or decision made by the person indicated in the draft order. O. Reg. 689/20, s. 40.

Provision of Issued Order

(4) An issued order shall be provided to the person who filed the draft order by,

(a) having the order emailed to,

(i) the email address most recently indicated for the person in the applicable court file, or

(ii) the email address most recently indicated for the person's lawyer in the applicable court file or, if no email address is indicated in the court file, the email address for the lawyer as published on the Law Society of Ontario's website;

(b) providing the order through Case Center, if Case Center is being used for the hearing or conference; or

(c) making the order available for pickup at the court counter, at the person's request or if email or Case Center is not available. O. Reg. 689/20, s. 40; O. Reg. 301/24, s. 1.

Procedure if Registrar not Satisfied

(5) If the registrar is not satisfied that the draft order meets requirements set out in subrule (3), the registrar shall provide notice using a method set out in subrule (4) to the person who filed the draft order that it does not comply with the requirements. O. Reg. 689/20, s. 40.

(6) If the person receives a notice from the registrar under subrule (5), the person may,

(a) file a revised draft order and, if required by the registrar, file the approval of the parties to the order in that form; or

(b) obtain an appointment to have the order settled by the person who made the order, in which case notice of the appointment (Form 59D) shall be served on all parties who participated in the hearing or conference and filed, with proof of service, at least seven days before the appointment date. O. Reg. 689/20, s. 40.

Appointment to Settle Where Form of Draft Order not Approved

(7) If approval of the draft order by the parties who participated in the hearing or conference is not received, the person may obtain an appointment to have the order settled by the registrar or, if the registrar considers it necessary, by the person who made the order, and notice of the appointment (Form 59D) shall be served on all other parties who participated in the hearing or conference and filed, with proof of service, at least seven days before the appointment date. O. Reg. 689/20, s. 40.

Urgent Cases

(8) In a case of urgency, the order may be settled and signed by the person who made it without the approval of any of the parties who participated in the hearing or conference. O. Reg. 689/20, s. 40.

Appointment to Settle Disputed Order

(9) If an objection is taken to the proposed form of the order in the course of its settlement before a registrar, the registrar shall settle the order in the form the registrar considers proper and the objecting party may obtain an appointment with the person who made the order to settle the part of the order to which objection has been taken, in which case the objecting party shall serve notice of the appointment (Form 59D) on all other parties who participated in the hearing or conference and file it, with proof of service, at least seven days before the appointment date. O. Reg. 689/20, s. 40.

(10) If the order was made by a court that consisted of more than one judge, the appointment shall be with the judge who presided at the hearing or, where that judge is unavailable, any other judge who participated in the hearing. O. Reg. 689/20, s. 40.

(11) The judge with whom an appointment is obtained under subrule (10) may refer the settling of the order to the full court that made the order. O. Reg. 689/20, s. 40.

(12) If an appointment is not obtained under subrule (9) or (10) within seven days after the registrar settles the order, the person who filed the draft order or any party may require the registrar to issue the order as settled by the registrar. O. Reg. 689/20, s. 40.

(13) After an order has been settled under subrule (9) by the person who made it, or under subrule (10) or (11), the registrar shall issue the order. O. Reg. 689/20, s. 40.

Ceasing to Hold Office or Incapacity

(14) If a judge ceases to hold office or becomes incapacitated after making an order but before it is signed, another judge may settle and sign it. O. Reg. 689/20, s. 40.

(15) If an associate judge ceases to hold office or becomes incapacitated after making an order but before it is signed, another associate judge or a judge may settle and sign it. O. Reg. 689/20, s. 40; O. Reg. 383/21, s. 15.

Transition

(16) This rule, as it read immediately before the day section 40 of Ontario Regulation 689/20 came into force, continues to apply with respect to any

orders that were issued before that day and any draft orders that were filed before that day. O. Reg. 689/20, s. 40.

Entering Orders

Order to be Entered and Filed

59.05 (1) On the issuance of an order, the registrar shall,

(a) enter the issued order in accordance with subrule (2) at the place where the proceeding was commenced or to which it has been transferred under rule 13.1.02; and

(b) file it in the court file. O. Reg. 689/20, s. 41; O. Reg. 248/21, s. 8 (1).

(2) The registrar shall enter the issued order by saving a copy of the order in electronic format in the court's case tracking system and entering details about the order as required by the case tracking system. O. Reg. 689/20, s. 41.

(3) An order of the Court of Appeal shall be entered not only by the registrar referred to in subrule (1) but also by the Registrar of the Court of Appeal. O. Reg. 689/20, s. 41.

(4) The certificate of the Registrar of the Supreme Court of Canada in respect of an order made on an appeal to that court shall be entered by the registrar in the office where the action or application was commenced, and all subsequent steps may be taken as if the order had been made in the court from which the appeal was taken. O. Reg. 689/20, s. 41; O. Reg. 248/21, s. 8 (2).

Transition

(5) This rule, as it read immediately before the day section 41 of Ontario Regulation 689/20 came into force, continues to apply with respect to any orders that were issued before that day. O. Reg. 689/20, s. 41.

Amending, Setting Aside or Varying Order

Amending

59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding. R.R.O. 1990, Reg. 194, r. 59.06 (1).

Setting Aside or Varying

(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed. R.R.O. 1990, Reg. 194, r. 59.06 (2).

Satisfaction of Order

59.07 A party may acknowledge satisfaction of an order in a document signed by the party before a witness, and the document may be filed and entered in the court office where the order was entered. R.R.O. 1990, Reg. 194, r. 59.07.

Limited Scope Retainer

59.08 (1) Despite subrule 15.01.1 (2), if an order arises from a hearing at which a lawyer who is not a party's lawyer of record appeared under a limited scope retainer for the party, that lawyer shall act in the place of the party for the purposes of this Rule. O. Reg. 231/13, s. 11.

(2) Subrule (1) does not apply if,

(a) the agreement governing the limited scope retainer provides otherwise; and

(b) the lawyer acting under the limited scope retainer provides written notice of the fact to the other parties and to the registrar. O. Reg. 231/13, s. 11.

RULE 60 ENFORCEMENT OF ORDERS

Definitions

60.01 In rules 60.02 to 60.19,

"creditor" means a person who is entitled to enforce an order for the payment or recovery of money; ("créancier")

"debtor" means a person against whom an order for the payment or recovery of money may be enforced. ("débiteur") R.R.O. 1990, Reg. 194, r. 60.01.

Enforcement of Order for Payment or Recovery of Money

General

60.02 (1) In addition to any other method of enforcement provided by law, an order for the payment or recovery of money may be enforced by,

(a) a writ of seizure and sale (Form 60A) under rule 60.07;

(b) garnishment under rule 60.08;

(c) a writ of sequestration (Form 60B) under rule 60.09; and

(d) the appointment of a receiver. R.R.O. 1990, Reg. 194, r. 60.02 (1).

Recovery of Costs without Order Awarding Costs

(2) Where under these rules a party is entitled to costs on the basis of a certificate of assessment of costs without an order awarding costs, and the costs are not paid within seven days after the certificate of assessment of costs is signed, the party may enforce payment of the costs by the means set out in subrule (1) on filing with the registrar an affidavit setting out the basis of entitlement to costs and attaching a copy of the certificate of assessment. R.R.O. 1990, Reg. 194, r. 60.02 (2).

Electronic Declaration

(3) Where a party may enforce payment of costs, payment may be enforced by a writ of seizure and sale (Form 60A) issued under rule 60.07 by the making of a declaration by an authorized Teranet user through the Teranet software, as those terms are defined in that rule, setting out the basis of the entitlement to costs. O. Reg. 221/25, s. 4.

Enforcement of Order for Possession of Land

60.03 An order for the recovery or delivery of the possession of land may be enforced by a writ of possession (Form 60C) under rule 60.10. R.R.O. 1990, Reg. 194, r. 60.03.

Enforcement of Order for Recovery of Personal Property

60.04 (1) An order for the recovery of possession of personal property other than money may be enforced by a writ of delivery (Form 60D), which may be obtained on filing with the registrar where the proceeding was commenced a requisition together with a copy of the order as entered. R.R.O. 1990, Reg. 194, r. 60.04 (1); O. Reg. 396/91, s. 11.

(2) Where the property is not delivered up under a writ of delivery, the order may be enforced by a writ of sequestration (Form 60B) under rule 60.09. R.R.O. 1990, Reg. 194, r. 60.04 (2).

Enforcement of Order to Do or Abstain from Doing any Act

60.05 An order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be enforced against the person

refusing or neglecting to obey the order by a contempt order under rule 60.11. R.R.O. 1990, Reg. 194, r. 60.05.

Enforcement by or against a Person not a Party

60.06 (1) An order that is made for the benefit of a person who is not a party may be enforced by that person in the same manner as if the person were a party. R.R.O. 1990, Reg. 194, r. 60.06 (1).

(2) An order that may be enforced against a person who is not a party may be enforced against that person in the same manner as if the person were a party. R.R.O. 1990, Reg. 194, r. 60.06 (2).

Writ of Seizure and Sale

Definitions

60.07 (0.1) In this rule,

"authorized Teranet user" means,

(a) a lawyer or a person licensed under the *Law Society Act* to provide legal services in Ontario, or

(b) a Minister or body acting under the authority of an Act of Canada or Ontario; ("utilisateur autorisé de Teranet")

"Teranet software" means the software developed by Teranet Inc. that is authorized by the Ministry of the Attorney General for the purposes of this rule. ("logiciel de Teranet") O. Reg. 221/25, s. 5 (1).

Where Available Without Leave

(1) Where an order may be enforced by a writ of seizure and sale, the creditor is entitled to the issue of one or more writs of seizure and sale (Form 60A), on filing with the registrar where the proceeding was commenced a requisition setting out,

(a) the date and amount of any payment received since the order was made; and

(b) the amount owing and the rate of postjudgment interest,

together with a copy of the order as entered and any other evidence necessary to establish the amount awarded and the creditor's entitlement. R.R.O. 1990, Reg. 194, r. 60.07 (1); O. Reg. 396/91, s. 12.

Issuance Through Teranet Software

(1.1) An authorized Teranet user may request the issue of one or more writs of seizure and sale through the Teranet software instead of filing the

documents referred to in subrule (1) with the registrar. O. Reg. 221/25, s. 5 (2).

(1.2) If a Minister or body is entitled under an Act of Canada or Ontario to file a document in the Superior Court of Justice and have it entered and enforced as if it were an order of the court, the document may be enforced by one or more writs of seizure and sale without being filed with the court by requesting the issue of the writ or writs through the Teranet software. O. Reg. 221/25, s. 5 (2).

(1.3) On the making of a request under subrule (1.2), the document is deemed to have been entered as an order of the Superior Court of Justice. O. Reg. 221/25, s. 5 (2).

(1.4) A writ of seizure and sale that is requested through the Teranet software under subrule (1.1) or (1.2) shall be issued through that software. O. Reg. 221/25, s. 5 (2).

Where Leave is Required

(2) If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a writ of seizure and sale shall not be issued unless leave of the court is first obtained. O. Reg. 770/92, s. 14.

(3) An order granting leave to issue a writ of seizure and sale ceases to have effect if the writ is not issued within one year after the date of the order granting leave, but the court may grant leave again on a subsequent motion. O. Reg. 770/92, s. 14.

Order for Payment into Court

(4) Where an order is for the payment of money into court, the writ of seizure and sale shall contain a notice that all money realized by the sheriff under the writ is to be paid into court. R.R.O. 1990, Reg. 194, r. 60.07 (4).

Order for Payment at Future Time

(5) Where an order is for payment at or after a specified future time, the writ of seizure and sale shall not be issued until after the expiration of that time. R.R.O. 1990, Reg. 194, r. 60.07 (5).

Filing of Writ with Sheriff

(5.1) A writ of seizure and sale may be filed with a sheriff. O. Reg. 43/14, s. 14 (2).

(5.2) A writ of seizure and sale that is being filed with the sheriff,

(a) may be filed electronically by an authorized Teranet user using the Teranet software; or

(b) if the writ was issued through the Teranet software, must be filed electronically by an authorized Teranet user using the Teranet software. O. Reg. 221/25, s. 5 (3).

Error in Writ Issued Through Teranet Software

(5.3) A creditor who discovers that a writ of seizure and sale that was issued using the Teranet software contains an error may, no later than two business days after the writ was filed with the sheriff, use that software to correct the error. O. Reg. 221/25, s. 5 (3).

Duration

(6) A writ of seizure and sale expires on the sixth anniversary of the date of its issue or, if it is renewed under subrule (8) or (9), on the sixth anniversary of the date on which it would have expired had it not been renewed. O. Reg. 221/25, s. 5 (4).

(7) Revoked: O. Reg. 452/98, s. 5 (2).

Renewal

(8) A writ of seizure and sale that is filed with a sheriff may be renewed before its expiration by filing a request to renew (Form 60E) with the sheriff, who shall record the date of the renewal and the new expiration date. O. Reg. 221/25, s. 5 (5).

(8.1) A request to renew may be filed electronically by an authorized Teranet user using the Teranet software. O. Reg. 221/25, s. 5 (6).

(9) A writ of seizure and sale that is not filed with a sheriff may be renewed before its expiration by filing with the registrar who issued it a requisition to renew the writ, and the registrar shall renew the writ and record the date of renewal. O. Reg. 452/98, s. 5 (3).

(9.1) A request to renew under subrule (8) or requisition to renew under subrule (9) may only be filed during the six year period preceding the expiry to which the request or requisition relates. O. Reg. 221/25, s. 5 (7).

Change or Variation of Debtor's Name

(10) Where a debtor named in a writ of seizure and sale,

(a) changes his, her or its name after the writ is issued;

(b) uses an alias; or

(c) uses a variation of spelling of the name,

the creditor may on motion made without notice seek a change or variation to the writ. R.R.O. 1990, Reg. 194, r. 60.07 (10).

(11) On a motion referred to in subrule (10), the court may order the sheriff to,

(a) amend the writ by adding the words "now or also known as", followed by the new name of the debtor, the alias or the spelling variation; and

(b) amend the index of writs to show the new name, the alias or the spelling variation.

(c) REVOKED: O. Reg. 221/25, s. 5 (8).

R.R.O. 1990, Reg. 194, r. 60.07 (11); O. Reg. 221/25, s. 5 (8).

(11.1) Amendments to a writ made under subrule (11) may be filed with the sheriff electronically by an authorized Teranet user using the Teranet software. O. Reg. 221/25, s. 5 (9).

Writ to Bear Creditor's Address

(12) Every writ of seizure and sale shall bear the name, address, telephone number and email address (if any) of the creditor and the creditor's lawyer, if any. R.R.O. 1990, Reg. 194, r. 60.07 (12); O. Reg. 575/07, s. 1; O. Reg. 221/25, s. 5 (10).

Change in Contact Information

(12.1) If, after the writ has been filed with the sheriff, the address, telephone number or email address of the creditor or the creditor's lawyer changes, the creditor shall file with the sheriff a requisition containing the new information and a request to change the information for the writ. O. Reg. 221/25, s. 5 (11).

Assignment of Writ

(12.2) If a writ of seizure and sale is assigned to another creditor after the writ has been filed with the sheriff, the new creditor shall file with the sheriff a requisition containing the name, address, telephone number and email address (if any) of the new creditor and that of his or her lawyer, if any, and a request to change the creditor's information for the writ due to an assignment. O. Reg. 43/14, s. 14 (5); O. Reg. 221/25, s. 5 (12).

Electronic Filing

(12.3) A requisition under subrule (12.1) or (12.2) may be filed electronically by an authorized Teranet user using the Teranet software. O. Reg. 221/25, s. 5 (13).

Confirmation of Assignment

(12.4) In order to confirm whether a request under subrule (12.2) is properly made, the sheriff may require the new creditor to provide to the sheriff, in the

manner and within the time the sheriff specifies, a copy of the document providing for the assignment of the writ. O. Reg. 43/14, s. 14 (5).

(12.5) If the creditor fails to comply with subrule (12.4), the sheriff may refuse the request to change the creditor's information for the writ or may reverse the change, as the case may be. O. Reg. 43/14, s. 14 (5).

Direction to Enforce

(13) Where an order may be enforced by a writ of seizure and sale, a creditor who has filed a writ of seizure and sale with a sheriff may file with the sheriff a copy of the order as entered, together with a direction to enforce (Form 60F) setting out,

(a) the date of the order and the amount awarded;

(b) the rate of postjudgment interest payable;

(c) the costs of enforcement to which the creditor is entitled under rule 60.19;

(d) the date and amount of any payment received since the order was made; and

(e) the amount owing, including postjudgment interest,

and directing the sheriff to enforce the writ for the amount owing, subsequent interest and the sheriff's fees and expenses. R.R.O. 1990, Reg. 194, r. 60.07 (13); O. Reg. 452/98, s. 5 (5).

(13.0.1) REVOKED: O. Reg. 221/25, s. 5 (14).

Sheriff may Decline to Enforce

(13.1) The sheriff may decline to enforce the writ of seizure and sale, and the creditor may make a motion to the court for directions, where the sheriff is uncertain whether the writ of seizure and sale has been properly issued or filed. O. Reg. 288/99, s. 19 (2).

Confirmation of Writ Filed Electronically

(13.2) In order to confirm whether a writ of seizure and sale filed with a sheriff electronically has been properly issued or filed, the sheriff may require the creditor to provide to the sheriff, in the manner and within the time the sheriff specifies, a copy of the order being enforced by the writ. O. Reg. 43/14, s. 14 (6).

(13.3) The sheriff may withdraw an electronically filed writ of seizure and sale if,

(a) the sheriff determines that the writ was improperly issued or filed; or

(b) the creditor fails to comply with subrule (13.2). O. Reg. 43/14, s. 14 (6).

(13.4) A writ may be withdrawn under subrule (13.3) at any time during its enforcement. O. Reg. 43/14, s. 14 (6).

(13.5) If the sheriff makes a determination that a writ of seizure and sale filed with the sheriff electronically was properly issued or filed but contains an error or otherwise differs from the order to which the writ relates, the sheriff may correct the writ to make it consistent with the order. O. Reg. 43/14, s. 14 (6).

(13.6) The sheriff shall give notice of a withdrawal under subrule (13.3) or a correction under subrule (13.5) to the creditor or the creditor's lawyer, by mail or email to the address shown on the writ. O. Reg. 43/14, s. 14 (6); O. Reg. 221/25, s. 5 (15).

Property in Hands of Receiver

(14) A writ of seizure and sale shall not be enforced against property in the hands of a receiver appointed by a court. R.R.O. 1990, Reg. 194, r. 60.07 (14).

Seizure of Personal Property

(15) Where personal property is seized under a writ of seizure and sale, the sheriff shall, on request, deliver an inventory of the property seized to the debtor or the debtor's agent or employee before or, where this is not practicable, within a reasonable time after the property is removed from the premises on which it was seized. R.R.O. 1990, Reg. 194, r. 60.07 (15).

Sale of Personal Property

(16) Personal property seized under a writ of seizure and sale shall not be sold by the sheriff unless notice of the time and place of the sale has been,

(a) mailed or emailed to the creditor or the creditor's lawyer and to the debtor, to the addresses shown on the writ for each, at least 10 days before the sale; and

(b) advertised in a manner that, in the sheriff's opinion, is likely to bring it to the public's attention and realize the best price that can be obtained under the circumstances. R.R.O. 1990, Reg. 194, r. 60.07 (16); O. Reg. 575/07, s. 1; O. Reg. 221/25, s. 5 (16).

Sale of Land

(17) A creditor may not take any step to sell land under a writ of seizure and sale until four months after the writ was filed with the sheriff or, where the

writ has been withdrawn, four months after the writ was re-filed. R.R.O. 1990, Reg. 194, r. 60.07 (17).

(18) No sale of land under a writ of seizure and sale may be held until six months after the writ was filed with the sheriff or, where the writ has been withdrawn, six months after the writ was re-filed. R.R.O. 1990, Reg. 194, r. 60.07 (18).

(19) A sale of land shall not be held under a writ of seizure and sale unless notice of the time and place of sale has been,

(a) mailed or emailed to the creditor or the creditor's lawyer and to the debtor, to the addresses shown on the writ for each, at least 30 days before the sale;

(b) published in *The Ontario Gazette* once at least 30 days before the sale and advertised in a manner that, in the sheriff's opinion, is likely to bring it to the public's attention and realize the best price that can be obtained under the circumstances; and

(c) posted in a conspicuous place in the sheriff's office for at least 30 days before the sale. R.R.O. 1990, Reg. 194, r. 60.07 (19); O. Reg. 575/07, s. 1; O. Reg. 221/25, s. 5 (17).

(20) The notice shall set out,

(a) a short description of the property to be sold;

(b) the short title of the proceeding;

(c) the time and place of the intended sale; and

(d) the name of the debtor whose interest is to be sold. R.R.O. 1990, Reg. 194, r. 60.07 (20).

(21) The sheriff may adjourn a sale to a later date where the sheriff considers it necessary in order to realize the best price that can be obtained under the circumstances, and where the sale is adjourned, it may be conducted on the later date with such further notice, if any, as the sheriff considers advisable. R.R.O. 1990, Reg. 194, r. 60.07 (21); O. Reg. 221/25, s. 5 (18).

(22) Where notice of a sale of land under a writ of seizure and sale is published in *The Ontario Gazette* before the writ expires, the sale may be completed by a sale and transfer of the land after the writ expires. R.R.O. 1990, Reg. 194, r. 60.07 (22).

Abortive Sale

(23) Where personal property or land seized under a writ of seizure and sale remains unsold for want of buyers, the sheriff shall notify the creditor of the

date and place of the attempted sale and of any other relevant circumstances. R.R.O. 1990, Reg. 194, r. 60.07 (23).

(24) On receipt of a notice under subrule (23), the creditor may instruct the sheriff in writing to sell the personal property or land in such manner as the sheriff considers will realize the best price that can be obtained under the circumstances. R.R.O. 1990, Reg. 194, r. 60.07 (24); O. Reg. 221/25, s. 5 (19).

(25) REVOKED: O. Reg. 221/25, s. 5 (20).

Documents Directed to Sheriff under an Act

Application of Rules

60.07.1 (1) These rules, other than subrule 60.07 (13), apply, with necessary modifications, to a warrant or other document that is issued by a Minister or body under an Act and directed to a sheriff, as if the document were a writ of seizure and sale. O. Reg. 43/14, s. 15.

Direction to Enforce

(2) If the Minister or body files the document with the sheriff, the Minister or body may have the document enforced by filing with the sheriff a direction to enforce, directing the sheriff to enforce the document for the amount owing, subsequent interest and the sheriff's fees and expenses, and setting out,

(a) the amount owing under the document as issued and the date of issuance;

(b) the rate of interest payable;

(c) the date and amount of any payment received since the document was issued; and

(d) the amount owing under the document, including interest. O. Reg. 43/14, s. 15.

(3) REVOKED: O. Reg. 221/25, s. 6.

Garnishment

Where Available

60.08 (1) A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons. R.R.O. 1990, Reg. 194, r. 60.08 (1).

Joint Debts Garnishable

(1.1) Where a debt is payable to the debtor and to one or more co-owners, one-half of the indebtedness or a greater or lesser amount specified in an

order made under subrule (16) may be garnished. O. Reg. 171/98, s. 21.

Where Leave Required

(2) If six years or more have elapsed since the date of the order, or if its enforcement is subject to a condition, a notice of garnishment shall not be issued unless leave of the court is first obtained. R.R.O. 1990, Reg. 194, r. 60.08 (2).

(3) An order granting leave to issue a notice of garnishment ceases to have effect if the notice is not issued within one year after the date of the order granting leave, but the court may grant leave again on a subsequent motion. R.R.O. 1990, Reg. 194, r. 60.08 (3).

Renewal

(3.1) A notice of renewal of garnishment may be issued under subrule (6.4) without leave of the court before the original notice of garnishment or any subsequent notice of renewal of garnishment expires. O. Reg. 14/04, s. 26; O. Reg. 186/10, s. 5.

Obtaining Notice of Garnishment

(4) A creditor under an order for the payment or recovery of money who seeks to enforce it by garnishment shall file with the registrar where the proceeding was commenced a requisition for garnishment (Form 60G) together with a copy of the order as entered, any other evidence necessary to establish the amount awarded and the creditor's entitlement, and an affidavit stating,

(a) the date and amount of any payment received since the order was made;

(b) the amount owing, including postjudgment interest;

(c) details of how the amount owing and the postjudgment interest are calculated;

(c.1) the address of the debtor;

(d) the name and address of each person to whom a notice of garnishment is to be directed;

(e) that the creditor believes that those persons are or will become indebted to the debtor and the grounds for the belief;

(f) such particulars of the debts as are known to the creditor;

(g) where a person to whom a notice of garnishment is to be directed is not in Ontario, that the debtor is entitled to sue that person in Ontario to recover the debt, and the basis of entitlement to sue in Ontario; and

(h) where a person to whom a notice of garnishment is to be directed is not then indebted but will become indebted to the debtor, such particulars of the date on and the circumstances under which the debt will arise as are known to the creditor. R.R.O. 1990, Reg. 194, r. 60.08 (4), O. Reg. 535/92, s. 13.

(5) The affidavit required by subrule (4) may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 60.08 (5).

(6) On the filing of the requisition and affidavit required by subrule (4), the registrar shall issue notices of garnishment (Form 60H) naming as garnishees the persons named in the affidavit and shall make a copy of each notice of garnishment and of the requisition and affidavit available to the sheriff of the county in which the debtor resides or, if the debtor resides outside Ontario, to the sheriff of the county in which the proceeding was commenced. R.R.O. 1990, Reg. 194, r. 60.08 (6); O. Reg. 221/25, s. 7 (1).

(6.1) A notice of garnishment issued under subrule (6) shall name one debtor and one garnishee. O. Reg. 534/95, s. 2.

Duration and Renewal

(6.2) A notice of garnishment remains in force for six years from the date of its issue and for a further six years from each renewal. O. Reg. 14/04, s. 26.

(6.3) A notice of garnishment may be renewed before its expiration by filing with the registrar where the proceeding was commenced a requisition for renewal of garnishment (Form 60G.1) together with the affidavit required by subrule (4). O. Reg. 14/04, s. 26.

(6.4) On the filing of the requisition and affidavit required by subrule (6.3), the registrar shall issue notices of renewal of garnishment (Form 60H.1) naming as garnishees the persons named in the affidavit and shall make a copy of each notice of renewal of garnishment and of the requisition and affidavit available to the sheriff of the county in which the debtor resides or, if the debtor resides outside Ontario, to the sheriff of the county in which the proceeding was commenced. O. Reg. 14/04, s. 26; O. Reg. 221/25, s. 7 (2).

(6.5) The provisions of these rules that apply with respect to notices of garnishment also apply with respect to notices of renewal of garnishment. O. Reg. 14/04, s. 26.

Service of Notice of Garnishment

(7) The creditor shall serve the notice of garnishment,

(a) on the debtor, together with a copy of the affidavit required by subrule (4); and

(b) on the garnishee, with a blank garnishee's statement (Form 60I) attached. R.R.O. 1990, Reg. 194, r. 60.08 (7).

(8) The notice of garnishment shall be served by ordinary mail, or by personal service or an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 60.08 (8).

(9) A notice of garnishment may be served outside Ontario if the debtor would be entitled to sue the garnishee in Ontario to recover the debt. R.R.O. 1990, Reg. 194, r. 60.08 (9).

(10) If the garnishee is a financial institution, the notice of garnishment and all further notices required to be served under this rule shall be served at the branch at which the debt is payable. O. Reg. 54/03, s. 1 (1); O. Reg. 131/04, s. 16 (1).

(10.1) REVOKED: O. Reg. 131/04, s. 16 (2).

Garnishee Liable from Time of Service

(11) The garnishee is liable to pay to the sheriff any debt of the garnishee to the debtor, up to the amount shown in the notice of garnishment or supplementary notice of garnishment, less $10 for the cost of making each payment, within ten days after service on the garnishee or ten days after the debt becomes payable, whichever is later. R.R.O. 1990, Reg. 194, r. 60.08 (11).

(12) For the purposes of subrule (11), a debt of the garnishee to the debtor includes,

(a) a debt payable at the time the notice of garnishment is served; and

(b) a debt payable (whether absolutely or on the fulfilment of a condition) after the notice is served and within six years after it is issued. O. Reg. 394/09, s. 23.

(13) For the purposes of subrule (11), a debt of the garnishee to the debtor does not include,

(a) if the garnishee is a financial institution, money in an account opened after the notice of garnishment is served;

(b) if the garnishee is an employer, a debt arising out of employment that commences after the notice is served; or

(c) if the garnishee is an insurer, a debt payable under an insurance policy that is entered into after the notice is served. R.R.O. 1990, Reg.

194, r. 60.08 (13); O. Reg. 54/03, s. 1 (2).

Payment by Garnishee to Sheriff

(14) A garnishee who admits owing a debt to the debtor shall pay it to the sheriff in the manner prescribed by the notice of garnishment, subject to section 7 of the *Wages Act*. R.R.O. 1990, Reg. 194, r. 60.08 (14).

When Garnishee Must Serve Statement

(15) A garnishee who wishes for any reason to dispute the garnishment or who pays to the sheriff less than the amount set out in the notice of garnishment because the debt is owed to the debtor and to one or more co-owners or for any other reason shall, within 10 days after service of the notice of garnishment, serve on the creditor and the debtor and file with the court a garnishee's statement (Form 60I) setting out the particulars. O. Reg. 536/96, s. 6 (2).

Notice to Co-owner of the Debt

(15.1) When a creditor is served with a garnishee's statement that indicates that the debt is owed to the debtor and to one or more co-owners, the creditor shall forthwith serve the co-owners with a notice to co-owner of the debt (Form 60I.1) and a copy of the garnishee's statement. O. Reg. 536/96, s. 6 (2).

(15.2) The notice to co-owner of the debt and the copy of the garnishee's statement shall be served by personal service or an alternative to personal service under rule 16.03. O. Reg. 536/96, s. 6 (2).

Garnishment Hearing

(16) On motion by a creditor, debtor, garnishee, co-owner of the debt or any other interested person, the court may,

(a) where it is alleged that the debt of the garnishee to the debtor has been assigned or encumbered, order the assignee or encumbrancer to appear and state the nature and particulars of the claim;

(b) determine the rights and liabilities of the garnishee, the debtor, any co-owner of the debt and any assignee or encumbrancer;

(c) vary or suspend periodic payments under a notice of garnishment; or

(d) determine any other matter in relation to a notice of garnishment,

and the court may proceed in a summary manner, but where the motion is made to an associate judge and raises a genuine issue of fact or of law, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 60.08 (16); O. Reg. 536/96, s. 6 (3); O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

(16.1) A copy of a notice of motion for a garnishment hearing shall be served on the sheriff by ordinary mail, or by personal service or an alternative to personal service under rule 16.03. O. Reg. 536/96, s. 6 (4).

Suspension of Payments

(16.1.1) The sheriff shall, on receiving a copy of a notice of a motion for a garnishment hearing, suspend the making of payments to the creditor under the notice of garnishment until the court determines the motion or the motion is abandoned or deemed to have been abandoned, as the case may be. O. Reg. 221/25, s. 7 (3).

Time for Motion

(16.2) A person who has been served with a notice to co-owner is not entitled to dispute the enforcement of the creditor's order for the payment or recovery of money or a payment made in accordance with the *Creditors' Relief Act, 2010* unless the person moves for a garnishment hearing within 30 days after being served with the notice. O. Reg. 536/96, s. 6 (4); O. Reg. 55/12, s. 6.

Enforcement against Garnishee

(17) Where the garnishee does not pay to the sheriff the amount set out in the notice of garnishment as owing by the garnishee to the debtor and does not serve and file a garnishee's statement, the creditor is entitled on motion to the court, on notice to the garnishee, to an order against the garnishee for payment of the amount that the court finds is payable to the debtor by the garnishee, or the amount set out in the notice, whichever is less. R.R.O. 1990, Reg. 194, r. 60.08 (17).

Payment by Garnishee to Person other than Sheriff

(18) Where, after service of a notice of garnishment, the garnishee pays a debt attached by the notice to a person other than the sheriff, the garnishee remains liable to pay the debt in accordance with the notice. R.R.O. 1990, Reg. 194, r. 60.08 (18).

Effect of Payment to Sheriff

(19) Payment of a debt by a garnishee in accordance with a notice of garnishment is a valid discharge of the debt, as between the garnishee and the debtor, and any co-owner of the debt, to the extent of the payment, including the amount deducted for the cost of making payment under subrule (11). R.R.O. 1990, Reg. 194, r. 60.08 (19); O. Reg. 536/96, s. 6 (5).

Creditor to Give Notice when Order Satisfied

(20) When the amount owing under an order that is enforced by garnishment has been paid, the creditor shall forthwith serve a notice of termination of

garnishment (Form 60J) on the garnishee and on the sheriff. R.R.O. 1990, Reg. 194, r. 60.08 (20).

Payment when Debt Jointly Owned

(21) Where a payment of a debt owed to the debtor and one or more co-owners has been made to the sheriff, no notice of motion for a garnishment hearing is delivered and the time for doing so has expired, the creditor may file with the sheriff, within 30 days thereafter,

(a) proof of service of the notice to co-owner; and

(b) an affidavit stating that the creditor believes that no co-owner of the debt is a person under disability and the grounds for the belief. O. Reg. 536/96, s. 6 (6).

(22) The affidavit required by subrule (21) may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. O. Reg. 536/96, s. 6 (6).

(23) Where the creditor does not file the material referred to in subrule (21), the sheriff shall return the money to the garnishee. O. Reg. 536/96, s. 6 (6).

Writ of Sequestration

Leave Required

60.09 (1) A writ of sequestration (Form 60B), directing a sheriff to take possession of and hold the property of a person against whom an order has been made and to collect and hold any income from the property until the person complies with the order, may be issued only with leave of the court, obtained on motion. R.R.O. 1990, Reg. 194, r. 60.09 (1).

(2) The court may grant leave to issue a writ of sequestration only where it is satisfied that other enforcement measures are or are likely to be ineffective. R.R.O. 1990, Reg. 194, r. 60.09 (2).

(3) In granting leave to issue a writ of sequestration, the court may order that the writ be enforced against all or part of the person's real and personal property. R.R.O. 1990, Reg. 194, r. 60.09 (3).

Variation or Discharge

(4) The court on motion may discharge or vary a writ of sequestration on such terms as are just. R.R.O. 1990, Reg. 194, r. 60.09 (4).

Writ of Possession

Leave Required

60.10 (1) A writ of possession (Form 60C) may be issued only with leave of the court, obtained on motion without notice or at the time an order entitling a party to possession is made. R.R.O. 1990, Reg. 194, r. 60.10 (1).

(2) The court may grant leave to issue a writ of possession only where it is satisfied that all persons in actual possession of any part of the land have received sufficient notice of the proceeding in which the order was obtained to have enabled them to apply to the court for relief. R.R.O. 1990, Reg. 194, r. 60.10 (2).

Duration

(3) A writ of possession remains in force for one year from the date of the order authorizing its issue, and may, before its expiry, be renewed by order for a period of one year from each renewal. R.R.O. 1990, Reg. 194, r. 60.10 (3).

Eviction Orders under Residential Tenancies Act, 2006

(4) For the purposes of subrule (3) and section 85 of the *Residential Tenancies Act, 2006*, an eviction order under that Act that is filed with the sheriff remains in force for one year from the date on which the order takes effect and may, before its expiry, be renewed by order for a period of one year from each renewal. O. Reg. 221/25, s. 8.

Contempt Order

Motion for Contempt Order

60.11 (1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made. R.R.O. 1990, Reg. 194, r. 60.11 (1).

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.11 (2).

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit. R.R.O. 1990, Reg. 194, r. 60.11 (3).

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of

justice and it appears that the person is not likely to attend voluntarily. R.R.O. 1990, Reg. 194, r. 60.11 (4).

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property. R.R.O. 1990, Reg. 194, r. 60.11 (5).

Where Corporation is in Contempt

(6) Where a corporation is in contempt, the judge may also make an order under subrule (5) against any officer or director of the corporation and may grant leave to issue a writ of sequestration under rule 60.09 against his or her property. R.R.O. 1990, Reg. 194, r. 60.11 (6).

Warrant of Committal

(7) An order under subrule (5) for imprisonment may be enforced by the issue of a warrant of committal (Form 60L). R.R.O. 1990, Reg. 194, r. 60.11 (7).

Discharging or Setting Aside Contempt Order

(8) On motion, a judge may discharge, set aside, vary or give directions in respect of an order under subrule (5) or (6) and may grant such other relief and make such other order as is just. R.R.O. 1990, Reg. 194, r. 60.11 (8).

Order that Act be done by Another Person

(9) Where a person fails to comply with an order requiring the doing of an act, other than the payment of money, a judge on motion may, instead of or in addition to making a contempt order, order the act to be done, at the expense of the disobedient person, by the party enforcing the order or any other person appointed by the judge. R.R.O. 1990, Reg. 194, r. 60.11 (9).

(10) The party enforcing the order and any person appointed by the judge are entitled to the costs of the motion under subrule (9) and the expenses incurred in doing the act ordered to be done, fixed by the judge or assessed

by an assessment officer in accordance with Rule 58. R.R.O. 1990, Reg. 194, r. 60.11 (10).

Failure to Comply with Interlocutory Order

60.12 Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,

(a) stay the party's proceeding;

(b) dismiss the party's proceeding or strike out the party's defence; or

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 60.12.

Dispute of Ownership of Property Seized by Sheriff

60.13 (1) A person who makes a claim in respect of property or the proceeds of property taken or intended to be taken by a sheriff in the execution of any enforcement process against another person shall give notice to the sheriff of the claim and the address for service of the person making the claim. R.R.O. 1990, Reg. 194, r. 60.13 (1); O. Reg. 248/21, s. 13.

(2) On receiving a claim, the sheriff shall forthwith give notice of claim (Form 60M) to every creditor of the debtor who has filed an enforcement process with the sheriff, by mail or email to the creditor at the address shown on the enforcement process, and the creditor shall within seven days after receiving the notice give the sheriff notice in writing stating whether the creditor admits or disputes the claim. R.R.O. 1990, Reg. 194, r. 60.13 (2); O. Reg. 221/25, s. 9.

(3) Where the sheriff,

(a) receives a notice admitting the claim from every creditor; or

(b) receives a notice admitting the claim from the creditor at whose direction the sheriff took or intended to take the property and does not receive a notice disputing the claim from any other creditor,

he or she shall release the property in respect of which the claim is admitted. R.R.O. 1990, Reg. 194, r. 60.13 (3).

Interpleader Proceedings

(4) Where the sheriff,

(a) does not receive a notice disputing the claim; or

(b) does not receive a notice disputing the claim from the creditor at whose direction the sheriff took or intended to take the property and receives a notice admitting the claim from every other creditor,

the sheriff shall give notice to every creditor who has filed an enforcement process with the sheriff, by mail or email to the creditor at the address shown on the enforcement process that, unless the creditor seeks an interpleader order under Rule 43 within 60 days of the date of the notice, the sheriff will release the property. O. Reg. 348/97, s. 5; O. Reg. 221/25, s. 9.

(5) Where the sheriff receives a notice disputing the claim, the sheriff shall give notice to the person making the claim by mail or email to the person's address for service that, unless the person seeks an interpleader order under Rule 43 within 60 days of the date of the notice, the sheriff shall proceed as if the claim had been abandoned. O. Reg. 348/97, s. 5; O. Reg. 248/21, s. 9; O. Reg. 221/25, s. 9.

Sheriff's Report on Execution of Writ

60.14 (1) A party or lawyer who has filed a writ with a sheriff may in writing require the sheriff to report the manner in which he or she has executed the writ and the sheriff shall do so forthwith by mailing or emailing to the party or lawyer a sheriff's report (Form 60N) to the address shown on the writ. R.R.O. 1990, Reg. 194, r. 60.14 (1); O. Reg. 575/07, s. 1; O. Reg. 221/25, s. 10.

(2) Where the sheriff fails to comply with a request made under subrule (1) within a reasonable time, the party serving the request may move before a judge for an order directing the sheriff to comply with the request. R.R.O. 1990, Reg. 194, r. 60.14 (2).

Removal or Withdrawal of Writ from Sheriff's File

Sheriff's Procedure — Executed and Expired Writs

60.15 (1) When a writ has been fully executed or has expired, the sheriff shall so indicate in his or her file, and the writ shall be removed from the active file and transferred to a separate file of executed, expired and withdrawn writs. O. Reg. 14/04, s. 27; O. Reg. 221/25, s. 11 (1).

Sheriff's Procedure — Withdrawn Writs

(2) When a writ is withdrawn, the sheriff shall record the date and time of the withdrawal, and if the writ is withdrawn as against all the debtors named in it, it shall be removed from the active file and transferred to a separate file of executed, expired and withdrawn writs. O. Reg. 14/04, s. 27; O. Reg. 221/25, s. 11 (2).

Withdrawal of Writ by Person who Filed It

(3) A person who has filed a writ with a sheriff may withdraw it as against one or more of the debtors named in it by giving the sheriff written instructions to that effect. O. Reg. 221/25, s. 11 (3).

(4) A withdrawal of writ may be filed electronically by an authorized Teranet user using the Teranet software, as those terms are defined in rule 60.07. O. Reg. 221/25, s. 11 (3).

Withdrawal of Writ on Debtor's Request

(5) When a judgment debt has been released by an order of discharge or by a certificate of full performance under the *Bankruptcy and Insolvency Act* (Canada), the debtor may request that the writ be withdrawn by giving the sheriff,

(a) a written request to withdraw the writ (Form 60O); and

(b) a certified copy of the order of discharge or a copy of the certificate of full performance. O. Reg. 260/05, s. 12.

(6) On receiving the documents described in subrule (5), the sheriff shall forthwith send the creditor, by mail or email to the creditor at the address shown on the writ, a copy of the documents and a notice that the writ will be withdrawn unless the creditor,

(a) makes a motion for an order under the *Bankruptcy and Insolvency Act* (Canada) that the judgment debt is not released by the order of discharge or certificate of full performance; and

(b) within 30 days after the date of the sheriff's notice, serves the sheriff with a copy of the notice of motion and a copy of all affidavits and other material served for use on the motion. O. Reg. 260/05, s. 12; O. Reg. 221/25, s. 11 (4).

(7) The sheriff shall withdraw the writ after the day that is 30 days after the date of the notice to the creditor, unless the creditor has taken the steps described in clause (6) (b). O. Reg. 14/04, s. 27.

(8) If the creditor takes the steps described in clause (6) (b), the sheriff shall not withdraw the writ at the debtor's request unless the court orders otherwise. O. Reg. 14/04, s. 27.

Duty of Person Filing Writ with Sheriff

60.16 (1) Where a writ of seizure and sale has been filed with a sheriff and any payment has been received by or on behalf of the creditor, the creditor shall forthwith give the sheriff notice of the payment. R.R.O. 1990, Reg. 194, r. 60.16 (1); O. Reg. 259/14, s. 10.

(1.1) Notice under subrule (1) may be filed with the sheriff electronically by an authorized Teranet user using the Teranet software, as those terms are defined in rule 60.07. O. Reg. 221/25, s. 12 (1).

(2) Where an order has been satisfied in full, the creditor shall, in accordance with subrule 60.15 (3) or, if applicable, (4), withdraw all writs of execution relating to the order from the office of any sheriff with whom they have been filed. R.R.O. 1990, Reg. 194, r. 60.16 (2); O. Reg. 221/25, s. 12 (2).

(3) Where the creditor fails to withdraw a writ as required by subrule (2), the court on motion by the debtor may order that the writ be withdrawn. R.R.O. 1990, Reg. 194, r. 60.16 (3).

Statement of Amounts Paid, Owing

(4) A creditor shall, no later than 10 days after receiving a request from the sheriff to do so, file with the sheriff a statement setting out the following information, as of the date specified by the sheriff, respecting a writ of seizure and sale:

1. The payments made under the writ.

2. The amount owing, including postjudgment interest.

3. Details respecting how the postjudgment interest was calculated. O. Reg. 221/25, s. 12 (3).

(5) A creditor may, at any time, file with the sheriff a statement setting out the information listed in subrule (4) respecting a writ of seizure and sale, as of the date specified by the creditor in the statement. O. Reg. 221/25, s. 12 (3).

(6) A statement under subrule (4) or (5) may be filed electronically by an authorized Teranet user using the Teranet software, as those terms are defined in rule 60.07. O. Reg. 221/25, s. 12 (3).

Motion for Directions

60.17 Where a question arises in relation to the measures to be taken by a sheriff in carrying out an order, writ of execution or notice of garnishment, the sheriff or any interested person may make a motion for directions,

(a) to the judge or officer who made the original order, at any place;

(b) to a judge or officer who had jurisdiction to make the original order, in the sheriff's county, despite rule 37.03 (where motions to be brought); or

(c) where an appeal has been taken from the original order, to a judge of the court to which the appeal has been taken, at any place. R.R.O. 1990, Reg. 194, r. 60.17; O. Reg. 689/20, s. 42.

Examination in Aid of Execution

Definitions

60.18 (1) In subrules (2) to (6),

"creditor" includes a person entitled to obtain or enforce a writ of possession, delivery or sequestration; ("créancier")

"debtor" includes a person against whom a writ of possession, delivery or sequestration may be or has been issued. ("débiteur") R.R.O. 1990, Reg. 194, r. 60.18 (1).

Examination of Debtor

(2) A creditor may examine the debtor in relation to,

(a) the reason for nonpayment or nonperformance of the order;

(b) the debtor's income and property;

(c) the debts owed to and by the debtor;

(d) the disposal the debtor has made of any property either before or after the making of the order;

(e) the debtor's present, past and future means to satisfy the order;

(f) whether the debtor intends to obey the order or has any reason for not doing so; and

(g) any other matter pertinent to the enforcement of the order. R.R.O. 1990, Reg. 194, r. 60.18 (2).

(3) An officer or director of a corporate debtor, or, in the case of a debtor that is a partnership or sole proprietorship, a partner or sole proprietor against whom the order may be enforced, may be examined on behalf of the debtor in relation to the matters set out in subrule (2). R.R.O. 1990, Reg. 194, r. 60.18 (3).

(4) Only one examination under subrule (2) or (3) may be held in a twelve month period in respect of a debtor in the same proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 60.18 (4).

(5) Where it appears from an examination under subrules (2) to (4) that a debtor has concealed or made away with property to defeat or defraud creditors, a judge may make a contempt order against the debtor. R.R.O. 1990, Reg. 194, r. 60.18 (5).

Examination of Person other than Debtor

(6) Where any difficulty arises concerning the enforcement of an order, the court may,

(a) make an order for the examination of any person who the court is satisfied may have knowledge of the matters set out in subrule (2); and

(b) make such order for the examination of any other person as is just. R.R.O. 1990, Reg. 194, r. 60.18 (6).

Service on Debtor

(7) Despite clause 34.04 (1) (a) (service on lawyer), a party who is to be examined in aid of execution shall be served with a notice of examination personally or by an alternative to personal service. O. Reg. 377/95, s. 5; O. Reg. 575/07, s. 1.

Costs of Enforcement

60.19 (1) A party who is entitled to enforce an order is entitled to the costs of the following steps on a partial indemnity scale, unless the court on motion orders otherwise:

1. An examination in aid of execution.

2. The issuing, service, filing, enforcement and renewal of a writ of execution and notice of garnishment.

3. Any other procedure authorized by these rules for enforcing the order. O. Reg. 206/02, s. 12 (1).

(1.1) For greater certainty, subrule (1) includes costs associated with the electronic filing or issuance under these rules of a writ of seizure and sale or any documents relating to the issuance or enforcement of a writ of seizure and sale. O. Reg. 43/14, s. 18.

(2) A party entitled to costs under subrule (1) may include in or collect under a writ of execution or notice of garnishment,

(a) $50 for the preparation of documents in connection with issuing, renewing and filing with the sheriff the writ of execution or notice of garnishment;

(b) disbursements paid to a sheriff, registrar, official examiner, authorized court transcriptionist or other public officer and to which the party is entitled under subrule (1), on filing with the sheriff or registrar a copy of a receipt for each disbursement;

(c) an amount determined in accordance with Tariff A for conducting an examination in aid of execution, on filing with the sheriff or registrar an affidavit stating that the examination was conducted; and

(d) any other costs to which the party is entitled under subrule (1), on filing with the sheriff or registrar a certificate of assessment of the costs. R.R.O. 1990, Reg. 194, r. 60.19 (2); O. Reg. 206/02, s. 12 (2, 3); O. Reg. 168/05, s. 2 (1); O. Reg. 260/05, s. 13; O. Reg. 170/14, s. 19.

(3) A sheriff or registrar may fix costs under clause (2) (c),

(a) if all the parties consent; or

(b) if the lawyer's fee does not exceed $2,000, exclusive of harmonized sales tax (HST). O. Reg. 168/05, s. 2 (2); O. Reg. 55/12, s. 7.

(4) Under clause (3) (b), the sheriff or registrar shall fix costs of $750 plus disbursements. O. Reg. 168/05, s. 2 (2).

(5) When costs are to be fixed by the sheriff or registrar under subrule (3), the party who is entitled to costs shall file a bill of costs with the sheriff or registrar. O. Reg. 168/05, s. 2 (2).

60.20 REVOKED: O. Reg. 221/25, s. 13.

APPEALS

RULE 61 APPEALS TO AN APPELLATE COURT

Application of the Rule

61.01 Rules 61.02 to 61.16 apply to all appeals to an appellate court except as provided in clause 62.01 (1) (b) or rule 62.02 and, with necessary modifications, to proceedings in an appellate court by way of,

(a) stated case under a statute;

(b) special case under rule 22.03, subject to any directions given under subrule 22.03 (2); and

(c) reference under section 8 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 61.01; O. Reg. 536/96, s. 7; O. Reg. 14/04, s. 28.

Definition

61.02 In rules 61.03 to 61.16,

"Registrar" means,

(a) in the Court of Appeal, the Registrar of the Court of Appeal, or

(b) in the Divisional Court, the registrar in the regional centre of the region where the appeal is to be heard in accordance with subsection 20 (1) of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 61.02.

Motion for Leave to Appeal to Divisional Court

Notice of Motion for Leave

61.03 (1) Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

(a) state that the motion will be heard on a date to be fixed by the Registrar;

(b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(c) be filed with proof of service in the office of the Registrar, within five days after service. R.R.O. 1990, Reg. 194, r. 61.03 (1); O. Reg. 61/96, s. 5 (2); O. Reg. 14/04, s. 29 (1).

Motion Record, Factum and Transcripts

(2) On a motion for leave to appeal to the Divisional Court, the moving party shall serve,

(a) a motion record containing, in consecutively numbered pages arranged in the following order,

(i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,

(ii) a copy of the notice of motion,

(iii) a copy of the order or decision from which leave to appeal is sought, as issued and entered,

(iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,

(iv.1) a copy of any order or decision that was the subject of the hearing before the court or tribunal from which leave to appeal is sought,

(iv.2) a copy of any reasons for the order or decision referred to in subclause (iv.1), with a further typed or printed copy if the reasons are handwritten,

(v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,

(vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and

(vii) a copy of any other material in the court file that is necessary for the hearing of the motion;

(b) a factum that meets the requirements of rule 4.06.1 and the certificate referred to in subrule 61.16 (4.1); and

(c) relevant transcripts of evidence, if they are not included in the motion record,

and shall file three copies of the motion record, factum and transcripts, if any, with proof of service, within thirty days after the filing of the notice of motion for leave to appeal. R.R.O. 1990, Reg. 194, r. 61.03 (2); O. Reg. 61/96, s. 5 (3); O. Reg. 206/02, s. 13 (1); O. Reg. 82/17, s. 6 (1); O. Reg. 12/24, s. 10; O. Reg. 300/24, s. 12 (1).

(2.1) Despite subrule (2), only one copy of a motion record, factum or transcript needs to be filed if the filing is done electronically. O. Reg. 689/20, s. 43.

(3) On a motion for leave to appeal to the Divisional Court, the responding party may, where he or she is of the opinion that the moving party's motion record is incomplete, serve a motion record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record,

and may serve a factum that meets the requirements of rule 4.06.1 and the certificate referred to in subrule 61.16 (4.1), and shall file three copies of the responding party's motion record and factum, if any, with proof of service, within fifteen days after service of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (3); O. Reg. 61/96, s. 5 (4); O. Reg. 206/02, s. 13 (2); O. Reg. 82/17, s. 6 (2); O. Reg. 300/24, s. 12 (2).

(3.1) Despite subrule (3), only one copy of a motion record or factum needs to be filed if the filing is done electronically. O. Reg. 689/20, s. 43.

Notice and Factum to State Questions on Appeal

(4) The moving party's notice of motion and factum shall, where practicable, set out the specific questions that it is proposed the Divisional Court should answer if leave to appeal is granted. R.R.O. 1990, Reg. 194, r. 61.03 (4); O. Reg. 61/96, s. 5 (5).

Date for Hearing

(5) The Registrar shall fix a date for the hearing of the motion which shall not, except with the responding party's consent, be earlier than fifteen days after the filing of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (5).

Time for Delivering Notice of Appeal

(6) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. R.R.O. 1990, Reg. 194, r. 61.03 (6).

Costs Appeal Joined with Appeal as of Right

(7) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (1); O. Reg. 14/04, s. 29 (2); O. Reg. 82/17, s. 18, 19.

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(8) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal or cross-appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (2); O. Reg. 206/02, s. 13 (3); O. Reg. 14/04, s. 29 (3); O. Reg. 394/09, s. 24; O. Reg. 82/17, s. 18, 19.

Application of Rules

(9) Subrules (1) to (6) do not apply where subrules (7) and (8) apply. O. Reg. 175/96, s. 1 (3).

Motion for Leave to Appeal to Court of Appeal

Motion in Writing

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 333/96, s. 2 (1); O. Reg. 575/07, s. 4.

Notice of Motion

(2) The notice of motion for leave to appeal shall state that the motion will be heard on a date to be fixed by the Registrar. O. Reg. 82/17, s. 7 (1).

(3) The notice of motion,

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(b) shall be filed with proof of service in the office of the Registrar within five days after service. O. Reg. 61/96, s. 6; O. Reg. 14/04, s. 30 (1).

Moving Party's Motion Record, Factum and Transcripts

(4) The moving party shall serve a motion record and transcripts of evidence, if any, as provided in subrule 61.03 (2), and a factum consisting of the following elements:

1. Part I, containing a statement identifying the moving party and the court from which it is proposed to appeal, and stating the result in that court.

2. Part II, containing a concise summary of the facts relevant to the issues on the proposed appeal, with such reference to the evidence by page and line as is necessary.

3. Part III, containing the specific questions that it is proposed the court should answer if leave to appeal is granted.

4. Part IV, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue.

5. Schedule A, containing a list of the authorities referred to.

6. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (2).

(5) Parts I to IV shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(6) The moving party shall file three printed copies of the motion record, factum and transcripts, if any, and an electronic version of the factum, and may file three copies of a book of authorities, if any, with proof of service, within 30 days after the filing of the notice of motion for leave to appeal. O. Reg. 61/96, s. 6; O. Reg. 82/17, s. 7 (2).

Responding Party's Motion Record and Factum

(7) The responding party may, if of the opinion that the moving party's motion record is incomplete, serve a motion record as provided in subrule 61.03 (3). O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2 (3).

(8) The responding party shall serve a factum consisting of the following elements:

1. Part I, containing a statement of the facts in the moving party's summary of relevant facts that the responding party accepts as correct and those facts with which the responding party disagrees and a concise summary of any additional facts relied on, with such reference to the evidence by page and line as is necessary.

2. Part II, containing the responding party's position with respect to each issue raised by the moving party, immediately followed by a concise statement of the law and authorities relating to it.

3. Part III, containing a statement of any additional issues raised by the responding party, the statement of each issue to be followed by a concise statement of the law and authorities relating to it.

4. Schedule A, containing a list of the authorities referred to.

5. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 61/96, s. 6.

(9) Parts I to III shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 61/96, s. 6.

(10) The responding party shall file three printed copies of the factum, and of the motion record, if any, and an electronic version of the factum, with proof of service, within 25 days after service of the moving party's motion record and other documents. O. Reg. 61/96, s. 6; O. Reg. 82/17, s. 7 (3).

Moving Party's Reply Factum

(11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum. O. Reg. 61/96, s. 6.

(12) The reply factum shall contain consecutively numbered paragraphs setting out the moving party's position on the issue, followed by a concise statement of the law and authorities relating to it. O. Reg. 61/96, s. 6.

(13) The moving party shall file three copies of the reply factum with proof of service within 10 days after service of the responding party's factum. O. Reg. 61/96, s. 6.

Date for Hearing

(14) The Registrar shall fix a date for the hearing of the motion, which shall not be before the earlier of the filing of the moving party's reply factum, if any, and the expiry of the time for filing the moving party's reply factum. O. Reg. 82/17, s. 7 (4).

Oral Hearing

(15) If, on considering the written materials, the court determines that an oral hearing is warranted, the court shall, despite subrule (1), order an oral hearing to determine the motion, and the Registrar shall fix a date for it. O. Reg. 82/17, s. 7 (4).

Time for Delivering Notice of Appeal

(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. O. Reg. 61/96, s. 6.

Costs Appeal Joined with Appeal as of Right

(17) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 14/04, s. 30 (2); O. Reg. 82/17, s. 18, 19.

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(18) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 175/96, s. 2; O. Reg. 206/02, s. 14; O. Reg. 14/04, s. 30 (3); O. Reg. 394/09, s. 25; O. Reg. 82/17, s. 18, 19.

Application of Rules

(19) Subrules (1) to (16) do not apply where subrules (17) and (18) apply. O. Reg. 175/96, s. 2.

Commencement of Appeals

Time for Appeal and Service of Notice

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A or 61A.1) together with the certificate required by

subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

(a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and

(b) on any person entitled by statute to be heard on the appeal. O. Reg. 14/04, s. 31; O. Reg. 536/18, s. 2 (1).

(1.1) The notice of appeal and certificate need not be served on,

(a) a defendant who was noted in default; or

(b) a respondent who has not delivered a notice of appearance, unless the respondent was heard at the hearing with leave. O. Reg. 14/04, s. 31.

Title of Proceeding

(2) The title of the proceeding in an appeal shall be in accordance with Form 61B. R.R.O. 1990, Reg. 194, r. 61.04 (2).

Notice of Appeal

(3) The notice of appeal (Form 61A or 61A.1) shall state,

(a) the relief sought;

(b) the grounds of appeal; and

(c) the basis for the appellate court's jurisdiction, including references to,

(i) any provision of a statute or regulation establishing jurisdiction,

(ii) whether the order appealed from is final or interlocutory,

(iii) whether leave to appeal is necessary and if so whether it has been granted, and

(iv) any other facts relevant to establishing jurisdiction. O. Reg. 19/03, s. 11; O. Reg. 536/18, s. 2 (2).

(4) The notice of appeal, with proof of service, shall be filed in accordance with subrule 4.05 (4) (leaving in or mailing to court office) in the Registrar's office within ten days after service. R.R.O. 1990, Reg. 194, r. 61.04 (4).

Certificate or Agreement Respecting Evidence

Appellant's Certificate Respecting Evidence

61.05 (1) In order to minimize the number of documents and the length of the transcript required for an appeal, the appellant shall serve and file, with proof of service, with the notice of appeal an appellant's certificate respecting evidence (Form 61C) setting out only the portions of the evidence that, in the

appellant's opinion, are required for the appeal. O. Reg. 570/98, s. 5; O. Reg. 82/17, s. 8 (1).

Respondent's Certificate Respecting Evidence

(2) Within fifteen days after service of the appellant's certificate, the respondent shall serve on the appellant, and file with proof of service, a respondent's certificate respecting evidence (Form 61D), confirming the appellant's certificate or setting out any additions to or deletions from it. R.R.O. 1990, Reg. 194, r. 61.05 (2); O. Reg. 82/17, s. 8 (2).

(3) A respondent who fails to serve and file a respondent's certificate within the prescribed time shall be deemed to have confirmed the appellant's certificate. R.R.O. 1990, Reg. 194, r. 61.05 (3); O. Reg. 82/17, s. 8 (3).

Agreement Respecting Evidence

(4) Instead of complying with subrules (1) to (3), the parties may, within thirty days after service of the notice of appeal, make an agreement respecting the documents to be included in the appeal book and compendium and the transcript required for the appeal. R.R.O. 1990, Reg. 194, r. 61.05 (4); O. Reg. 19/03, s. 12.

Ordering Transcripts

(5) The appellant shall within thirty days after filing the notice of appeal file proof that the appellant has ordered a transcript of all oral evidence that the parties have not agreed to omit, subject to any direction under subrule 61.09 (4) (relief from compliance). R.R.O. 1990, Reg. 194, r. 61.05 (5).

(6) A party who has previously ordered a transcript of oral evidence shall forthwith modify the order in writing to comply with the certificates or agreement. R.R.O. 1990, Reg. 194, r. 61.05 (6).

(7) When the evidence has been transcribed, the authorized court transcriptionist shall forthwith give written notice to all parties and the Registrar. R.R.O. 1990, Reg. 194, r. 61.05 (7); O. Reg. 170/14, s. 20.

Costs Sanctions for Unnecessary Evidence

(8) The court may impose costs sanctions where evidence is transcribed or exhibits are reproduced unnecessarily. R.R.O. 1990, Reg. 194, r. 61.05 (8).

Security for Costs of Appeal

61.06 (1) In an appeal where it appears that,

(a) there is good reason to believe that the appeal is frivolous and vexatious and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;

(b) an order for security for costs could be made against the appellant under rule 56.01; or

(c) for other good reason, security for costs should be ordered,

a judge of the appellate court, on motion by the respondent, may make such order for security for costs of the proceeding and of the appeal as is just. R.R.O. 1990, Reg. 194, r. 61.06 (1); O. Reg. 465/93, s. 6.

(1.1) If an order is made under subrule (1), rules 56.04, 56.05, 56.07 and 56.08 apply, with necessary modifications. O. Reg. 288/99, s. 21.

(2) If an appellant fails to comply with an order under subrule (1), a judge of the appellate court on motion may dismiss the appeal. R.R.O. 1990, Reg. 194, r. 61.06 (2).

Cross-Appeals

61.07 (1) A respondent who,

(a) seeks to set aside or vary the order appealed from; or

(b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,

shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the grounds of the cross-appeal. R.R.O. 1990, Reg. 194, r. 61.07 (1).

(1.1) A respondent may, subject to subrule (1.2), serve a notice of cross-appeal without obtaining leave to appeal for the cross-appeal if,

(a) there is an appeal as of right; or

(b) leave to appeal has been granted. O. Reg. 206/02, s. 15.

(1.2) The respondent shall obtain leave to appeal in the manner provided by subrule 61.03 (8) or 61.03.1 (18), as the case may be, if the cross-appeal is taken under a statute that requires leave for an appeal. O. Reg. 394/09, s. 26.

(2) The notice of cross-appeal, with proof of service, shall be filed in the office of the Registrar within ten days after service. R.R.O. 1990, Reg. 194, r. 61.07 (2).

(3) Where a respondent has not delivered a notice of cross-appeal, no cross-appeal may be heard except with leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.07 (3).

Amendment of Notice of Appeal or Cross-Appeal

Supplementary Notice to be Served and Filed

61.08 (1) The notice of appeal or cross-appeal may be amended without leave, before the appeal is perfected, by serving on each of the parties on whom the notice was served a supplementary notice of appeal or cross-appeal (Form 61F) and filing it with proof of service. R.R.O. 1990, Reg. 194, r. 61.08 (1).

Argument Limited to Grounds Stated

(2) No grounds other than those stated in the notice of appeal or cross-appeal or supplementary notice may be relied on at the hearing, except with leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.08 (2).

Relief Limited

(3) No relief other than that sought in the notice of appeal or cross-appeal or supplementary notice may be sought at the hearing, except with the leave of the court hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.08 (3).

Perfecting Appeals

Time for Perfecting

61.09 (1) The appellant shall perfect the appeal by complying with subrules (2) and (3),

(a) where no transcript of evidence is required for the appeal, within thirty days after filing the notice of appeal; or

(b) where a transcript of evidence is required for the appeal, within 60 days after receiving notice that the evidence has been transcribed. R.R.O. 1990, Reg. 194, r. 61.09 (1); O. Reg. 570/98, s. 6 (1).

Record and Exhibits Only If Required

(2) If the appellant or the respondent believes that a part of the record or the original exhibits from the court or tribunal from which the appeal is taken is required for the proper hearing of the appeal, the appellant or respondent may move before a judge of the appellate court for an order that they be sent to the Registrar. O. Reg. 24/00, s. 8; O. Reg. 653/00, s. 5.

Material to be Served and Filed

(3) The appellant shall,

(a) serve on every other party to the appeal and any other person entitled by statute or an order under rule 13.03 (intervention in appeal) to be heard on the appeal,

(i) the appeal book and compendium referred to in rule 61.10,

(ii) the exhibit book referred to in rule 61.10.1,

(iii) in the case of a proceeding in the Court of Appeal or if ordered by the court, a typed or printed copy of the transcript of evidence,

(iv) an electronic version of the transcript of evidence, and

(v) a typed or printed copy of the appellant's factum referred to in rule 61.11;

(b) file with the Registrar, with proof of service,

(i) three copies of the appeal book and compendium, and where the appeal is to be heard by five judges, two additional copies,

(ii) one copy of the exhibit book,

(iii) in the case of a proceeding in the Court of Appeal or if ordered by the court, a typed or printed copy of the transcript of evidence,

(iv) an electronic version of the transcript of evidence,

(v) three typed or printed copies of the appellant's factum, and where the appeal is to be heard by five judges, two additional copies, and

(vi) an electronic version of the appellant's factum; and

(c) serve on every person served under clause (a), and file with the Registrar, a certificate of perfection,

(i) stating that the appeal book and compendium, exhibit book, transcripts, if any, and appellant's factum have been filed, and

(ii) setting out, with respect to every party to the appeal and any other person entitled by statute or by an order under rule 13.03 (intervention in appeal) to be heard on the appeal,

(A) the name, address and telephone number of the party's or other person's lawyer, or

(B) the name, address for service and telephone number of the party or other person, if acting in person. O. Reg. 570/98, s. 6 (2); O. Reg. 19/03, s. 13 (1-3); O. Reg. 260/05, s. 14; O. Reg. 170/14, s. 21; O. Reg. 82/17, s. 9; O. Reg. 689/20, s. 44; O. Reg. 248/21, s. 13.

Relief from Compliance

(4) If it is necessary to do so in the interest of justice, a judge of the appellate court may give special directions and vary the rules governing the appeal

book and compendium, the exhibit book, the transcript of evidence and the appellant's factum. O. Reg. 19/03, s. 13 (4).

Notice of Listing for Hearing

(5) When an appeal is perfected, the Registrar shall place it on the list of cases to be heard at the appropriate place of hearing and shall mail a notice of listing for hearing (Form 61G) to every person listed in the certificate of perfection. R.R.O. 1990, Reg. 194, r. 61.09 (5).

Appeal Book and Compendium

61.10 (1) The appeal book and compendium shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents describing each document by its nature and date;

(b) a copy of the notice of appeal and of any notice of cross-appeal or supplementary notice of appeal or cross-appeal;

(c) a copy of the order or decision appealed from as issued and entered;

(d) a copy of the reasons of the court or tribunal appealed from, with a further typed or printed copy if the reasons are handwritten;

(e) if an earlier order or decision was the subject of the hearing before the court or tribunal appealed from, a copy of the order or decision, as issued and entered, and a copy of any reasons for it, with a further typed or printed copy if the reasons are handwritten;

(f) a copy of the pleadings or notice of application or of any other document that initiated the proceeding or defines the issues in it;

(g) a copy of any excerpts from a transcript of evidence that are referred to in the appellant's factum;

(h) a copy of any exhibits that are referred to in the appellant's factum;

(i) a copy of any other documents relevant to the hearing of the appeal that are referred to in the appellant's factum;

(j) a copy of the certificates or agreement respecting evidence referred to in rule 61.05;

(k) a copy of any order made in respect of the conduct of the appeal; and

(l) a certificate (Form 61H) signed by the appellant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, stating that the contents of the appeal book and compendium are complete and legible. O. Reg. 19/03, s. 14; O. Reg. 12/24, s. 10.

(1.1) If the appeal book and compendium is filed electronically in the Divisional Court, each document listed in the table of contents shall be hyperlinked in accordance with paragraph 3 of subrule 4.05.3 (7), with necessary modifications. O. Reg. 300/24, s. 13.

(2) The Registrar may refuse to accept an appeal book and compendium if it does not comply with these rules or is not legible. O. Reg. 19/03, s. 14.

Exhibit Book

61.10.1 The exhibit book shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents describing each exhibit by its nature, date and exhibit number or letter;

(b) any affidavit evidence, including exhibits, that the parties have not agreed to omit;

(c) transcripts of evidence used on a motion or application that the parties have not agreed to omit; and

(d) a copy of each exhibit filed at a hearing or marked on an examination that the parties have not agreed to omit, arranged in order by date (or, if there are documents with common characteristics, grouped accordingly in order by date) and not by exhibit number. O. Reg. 19/03, s. 15.

Appellant's Factum

61.11 (1) The appellant's factum shall meet the requirements of rule 4.06.1, be signed by the appellant's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and consist of,

(a) Part I, containing a statement identifying the appellant and the court or tribunal appealed from and stating the result in that court or tribunal;

(b) Part II, containing a concise overview statement describing the nature of the case and of the issues;

(c) Part III, containing a concise summary of the facts relevant to the issues on the appeal, with such reference to the transcript of evidence and the exhibits as is necessary;

(d) Part IV, containing a statement of each issue raised, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(d.1) Part V, containing a statement of the order that the appellate court will be asked to make, including any order for costs;

(e) a certificate that, in addition to including the statement required by subrule 4.06.1 (2.1), states,

(i) that an order under subrule 61.09 (2) (original record and exhibits) has been obtained or is not required,

(ii) how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for the lawyer's oral argument, not including reply,

(iii) that the factum complies with subrule (3) or, if applicable, with an order referred to in that subrule, and

(iv) the number of words contained in Parts I to V;

(v) REVOKED: O. Reg. 384/24, s. 5 (2).

(f) Schedule A, containing a list of the authorities referred to; and

(g) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws. O. Reg. 534/95, s. 4; O. Reg. 570/98, s. 9 (1); O. Reg. 24/00, s. 9; O. Reg. 19/03, s. 16 (1); O. Reg. 575/07, ss. 4, 27; O. Reg. 383/23, s. 2 (1); O. Reg. 300/24, s. 14; O. Reg. 384/24, s. 5 (1, 2).

(1.1) References to the transcript of evidence shall be by tab, page number and line in the appeal book and compendium, and references to exhibits shall be by page number in the exhibit book and by tab and page number in the appeal book and compendium. O. Reg. 19/03, s. 16 (2).

(2) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 534/95, s. 4; O. Reg. 570/98, s. 9 (2).

(3) Parts I to V shall not exceed 9,200 words and 40 pages, except with leave of the court. O. Reg. 383/23, s. 2 (2).

(4) In counting words for the purposes of subclause (1) (e) (iv) and subrule (3), every word used in Parts I to V of the factum shall be counted regardless of where it is used, including, for greater certainty, words used in citations, footnotes, headings or charts, diagrams or other visual aids. O. Reg. 383/23, s. 2 (2).

(5) REVOKED: O. Reg. 384/24, s. 5 (3).

Respondent's Factum and Compendium

Filing and Service

61.12 (1) Every respondent shall,

(a) serve on every other party to the appeal,

(i) a typed or printed copy of the respondent's factum, and

(ii) the respondent's compendium;

(b) file with the Registrar, with proof of service,

(i) three typed or printed copies of the respondent's factum, and where the appeal is to be heard by five judges, two additional copies, and

(ii) three copies of the respondent's compendium, and where the appeal is to be heard by five judges, two additional copies; and

(c) file with the Registrar an electronic version of the respondent's factum. O. Reg. 19/03, s. 17.

Time for Delivery

(2) The respondent's factum and compendium shall be delivered within 60 days after service of the appeal book and compendium, exhibit book, transcript of evidence, if any, and appellant's factum. O. Reg. 19/03, s. 17.

Contents of Respondent's Factum

(3) The respondent's factum shall meet the requirements of rule 4.06.1, be signed by the respondent's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and consist of,

(a) Part I, containing a concise overview statement describing the nature of the case and of the issues;

(b) Part II, containing a statement of the facts in the appellant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees, and a concise summary of any additional facts relied on, with such reference to the transcript of evidence and the exhibits as is necessary;

(c) Part III, containing the position of the respondent with respect to each issue raised by the appellant, immediately followed by a concise argument with reference to the law and authorities relating to that issue;

(d) Part IV, containing a statement of any additional issues raised by the respondent, the statement of each issue to be followed by a concise argument with reference to the law and authorities relating to that issue;

(e) Part V, containing a statement of the order that the appellate court will be asked to make, including any order for costs;

(f) a certificate that, in addition to including the statement required by subrule 4.06.1 (2.1), states,

(i) that an order under subrule 61.09 (2) (original record and exhibits) has been obtained or is not required,

(ii) how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for the lawyer's oral argument, not including reply,

(iii) that the factum complies with subrule (5.1) or, if applicable, with an order referred to in that subrule, and

(iv) the number of words contained in Parts I to V;

(v) REVOKED: O. Reg. 384/24, s. 6 (2).

(g) Schedule A, containing a list of the authorities referred to; and

(h) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the appellant's factum. O. Reg. 19/03, s. 17; O. Reg. 575/07, ss. 4, 28; O. Reg. 383/23, s. 3 (1); O. Reg. 300/24, s. 15 (1); O. Reg. 384/24, s. 6 (1, 2).

(4) References to the transcript of evidence shall be by tab, page number and line in the respondent's compendium, and references to exhibits shall be by page number in the exhibit book and by tab and page number in the respondent's compendium. O. Reg. 19/03, s. 17.

(5) Parts I to V shall be arranged in paragraphs numbered consecutively throughout the factum. O. Reg. 19/03, s. 17.

(5.1) Parts I to V shall not exceed 9,200 words and 40 pages, except with leave of the court. O. Reg. 383/23, s. 3 (2).

(5.2) In counting words for the purposes of subclause (3) (f) (iv) and subrule (5.1), every word used in Parts I to V of the factum shall be counted regardless of where it is used, including, for greater certainty, words used in citations, footnotes, headings or charts, diagrams or other visual aids. O. Reg. 383/23, s. 3 (2).

(5.3) REVOKED: O. Reg. 384/24, s. 6 (3).

Cross-Appeal

(6) Where a respondent has served a notice of cross-appeal under rule 61.07,

(a) the respondent shall prepare a factum as an appellant by cross-appeal and deliver it with or incorporate it in the respondent's factum; and

(b) the appellant shall deliver a factum as a respondent to the cross-appeal within 10 days after service of the respondent's factum. O. Reg.

19/03, s. 17.

Contents of Respondent's Compendium

(7) The respondent's compendium shall contain, in consecutively numbered pages with numbered tabs arranged in the following order,

(a) a table of contents describing each document by its nature and date;

(b) a copy of any excerpts from a transcript of evidence that are referred to in the respondent's factum;

(c) a copy of any exhibits that are referred to in the respondent's factum; and

(d) a copy of any other documents relevant to the hearing of the appeal that are referred to in the respondent's factum. O. Reg. 19/03, s. 17.

(7.1) If the respondent's compendium is filed electronically in the Divisional Court, each document listed in the table of contents shall be hyperlinked in accordance with paragraph 3 of subrule 4.05.3 (7), with necessary modifications. O. Reg. 300/24, s. 15 (2).

Relief from Compliance

(8) If it is necessary to do so in the interest of justice, a judge of the appellate court may give special directions and vary the rules governing the respondent's factum and the respondent's compendium. O. Reg. 19/03, s. 17.

61.12.1 Revoked: O. Reg. 19/03, s. 18.

Dismissal for Delay

Motion by Respondent

61.13 (1) Where an appellant has not,

(a) filed proof that a transcript of evidence that the parties have not agreed to omit was ordered within the time prescribed by subrule 61.05 (5); or

(b) perfected the appeal within the time prescribed by subrule 61.09 (1),

the respondent may make a motion to the Registrar, on ten days notice to the appellant, to have the appeal dismissed for delay. R.R.O. 1990, Reg. 194, r. 61.13 (1); O. Reg. 351/94, s. 5; O. Reg. 82/17, s. 10 (1).

Notice by Registrar

(2) Where the appellant has not,

(a) filed a transcript of evidence within 60 days after the Registrar received notice that the evidence has been transcribed; or

(b) perfected the appeal within one year after filing the notice of appeal,

the Registrar may serve notice on the appellant that the appeal will be dismissed for delay unless it is perfected within ten days after service of the notice. R.R.O. 1990, Reg. 194, r. 61.13 (2); O. Reg. 570/98, s. 12 (1).

(2.1) Where no transcript of evidence is required for the appeal and the appellant has not perfected it within the time prescribed by subrule 61.09 (1), the Registrar may serve notice on the appellant that the appeal will be dismissed for delay unless it is perfected within 10 days after service of the notice. O. Reg. 554/96, s. 1; O. Reg. 82/17, s. 10 (2).

Registrar to Dismiss where Default not Cured

(3) Where the appellant does not cure the default,

(a) in the case of a motion under subrule (1), before the hearing of the motion; or

(b) in the case of a notice under subrule (2) or (2.1), within ten days after service of the notice,

or within such longer period as a judge of the appellate court allows, the Registrar shall make an order in (Form 61I) dismissing the appeal for delay, with costs fixed at $750, despite rule 58.13 and shall serve the order on the parties. R.R.O. 1990, Reg. 194, r. 61.13 (3); O. Reg. 534/95, s. 6 (2); O. Reg. 168/05, s. 3; O. Reg. 82/17, s. 10 (3).

Registrar to Dismiss where Time Prescribed by Court

(3.1) Where an appellant has not perfected the appeal within the time prescribed by an order of the appellate court or a judge of that court, the Registrar shall make an order in (Form 61I) dismissing the appeal for delay, with costs fixed at $750, despite rule 58.13 and shall serve the order on the parties. O. Reg. 82/17, s. 10 (4).

Cross-Appeals

(4) Where a respondent who has served a notice of cross-appeal has not delivered a factum in the cross-appeal within 60 days after service of the appeal book and compendium, transcript of evidence and appellant's factum, the appellant may make a motion to the Registrar, on five days notice to the respondent, to have the cross-appeal dismissed for delay. R.R.O. 1990, Reg. 194, r. 61.13 (4); O. Reg. 570/98, s. 12 (2); O. Reg. 19/03, s. 19; O. Reg. 55/12, s. 8.

(5) Where the respondent does not deliver a factum in the cross-appeal before the hearing of the motion under subrule (4) or within such longer period as a judge of the appellate court allows, the Registrar shall make an

order in (Form 61I) dismissing the cross-appeal for delay, with costs fixed at $750, despite rule 58.13. R.R.O. 1990, Reg. 194, r. 61.13 (5); O. Reg. 394/09, s. 27 (1).

Motions for Leave

(6) On a motion for leave to appeal, where the moving party has not served and filed the motion record and other documents in accordance with subrule 61.03 (2) or subrules 61.03.1 (4) to (6), the responding party may make a motion to the Registrar, on 10 days notice to the moving party, to have the motion for leave to appeal dismissed for delay. O. Reg. 61/96, s. 8.

(7) On a motion for leave to appeal, where the moving party has not served and filed the motion record and other documents within 60 days after the filing of the notice of motion for leave to appeal, the Registrar may serve notice on the moving party that the motion will be dismissed for delay unless the documents are served and filed within 10 days after service of the notice. O. Reg. 61/96, s. 8.

(8) On a motion for leave to appeal, where the moving party,

(a) in the case of a motion under subrule (6), does not serve and file the documents before the hearing of that motion, or within such longer period as a judge of the appellate court allows;

(b) in the case of a notice under subrule (7), does not serve and file the documents within ten days after service of the notice or within such longer period as a judge of the appellate court allows,

the Registrar shall make an order in (Form 61J) dismissing the motion for delay, with costs fixed at $750, despite rule 58.13. R.R.O. 1990, Reg. 194, r. 61.13 (8); O. Reg. 394/09, s. 27 (2).

Automatic Dismissal by Registrar for Delay, Divisional Court Appeal

61.13.0.1 (1) Unless the court orders otherwise, the Registrar shall dismiss an appeal to the Divisional Court for delay if the appeal is not set down for hearing or terminated by any means before the later of the fifth anniversary of the filing of the notice of appeal under subrule 61.04 (4) and January 1, 2021. O. Reg. 536/18, s. 3.

Exception, Party Under Disability

(2) Subrule (1) does not apply if, at the time the Registrar would otherwise be required under that subrule to dismiss an appeal for delay, the appellant is under a disability. O. Reg. 536/18, s. 3.

Form of Order

(3) An order made under subrule (1) shall be in Form 61I.1. O. Reg. 536/18, s. 3; O. Reg. 689/20, s. 45.

Order to be Served

(4) The Registrar shall serve an order made under subrule (1) on the parties. O. Reg. 536/18, s. 3.

Order to Client

(5) A lawyer who is served with an order under subrule (4) on behalf of a client shall promptly give a copy of the order to the client. O. Reg. 536/18, s. 3.

Setting Aside

(6) The dismissal of an appeal under this rule may be set aside under rule 37.14. O. Reg. 536/18, s. 3.

Failure to Obtain Order to Continue Appeal

61.13.1 (1) If a transfer or transmission of an appellant's interest or liability takes place while an appeal is pending and no order to continue is obtained within a reasonable time, a respondent may make a motion to the Registrar, on 10 days notice to the appellant, to have the appeal dismissed for delay. O. Reg. 570/98, s. 13.

(2) If the appellant does not obtain an order to continue before the hearing of the motion or within the longer period allowed by a judge of the appellate court, the Registrar shall make an order dismissing the appeal for delay, with costs fixed at $750, despite rule 58.13. O. Reg. 570/98, s. 13; O. Reg. 394/09, s. 28.

Abandoned Appeals

Delivery of Notice of Abandonment

61.14 (1) A party may abandon an appeal or cross-appeal by delivering a notice of abandonment (Form 61K). R.R.O. 1990, Reg. 194, r. 61.14 (1).

Deemed Abandonment

(2) A party who serves a notice of appeal or cross-appeal and does not file it within ten days after service shall be deemed to have abandoned the appeal or cross-appeal, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 61.14 (2).

Effect of Abandonment

(3) Where an appeal or cross-appeal is abandoned or is deemed to have been abandoned, the appeal or cross-appeal is at an end, and the respondent or

appellant is entitled to the costs of the appeal or cross-appeal, subject to subrule (4). R.R.O. 1990, Reg. 194, r. 61.14 (3); O. Reg. 82/17, s. 11 (1).

No Costs

(4) The abandonment or deemed abandonment of the appeal or cross-appeal shall be without costs if the respondent or appellant, as the case may be, did not file a response to the appeal or cross-appeal, unless a judge of the appellate court orders otherwise. O. Reg. 82/17, s. 11 (2).

Cross-Appeal where Appeal Dismissed for Delay or Abandoned

61.15 (1) Where an appeal is dismissed for delay or is abandoned, a respondent who has cross-appealed may,

(a) within fifteen days thereafter, deliver a notice of election to proceed (Form 61L); and

(b) make a motion to a judge of the appellate court for directions in respect of the cross-appeal. R.R.O. 1990, Reg. 194, r. 61.15 (1).

(2) Where the respondent does not deliver a notice of election to proceed within fifteen days, the cross-appeal shall be deemed to be abandoned without costs unless a judge of the appellate court orders otherwise. R.R.O. 1990, Reg. 194, r. 61.15 (2).

Motions in Appellate Court

Rule 37 Applies Generally

61.16 (1) Rule 37, except rules 37.02 to 37.04 (jurisdiction to hear motions, place of hearing, to whom to be made) and rule 37.17 (motion before commencement of proceeding), applies to motions in an appellate court, with necessary modifications. O. Reg. 263/03, s. 6 (1).

(1.1) Despite subrule (1), rule 37.10.1 (confirmation of motion) does not apply in the case of a motion in the Court of Appeal. O. Reg. 82/17, s. 12 (1).

Motion to Receive Further Evidence

(2) A motion under clause 134 (4) (b) of the *Courts of Justice Act* (motion to receive further evidence) shall be made to the panel hearing the appeal. R.R.O. 1990, Reg. 194, r. 61.16 (2); O. Reg. 82/17, s. 18.

Motions Required to be Heard by One Judge

(2.1) A motion required by subsection 7 (2) or 21 (3) of the *Courts of Justice Act* to be heard and determined by one judge may be heard and determined by a panel hearing an appeal or another motion in the proceeding properly made to the panel. O. Reg. 770/92, s. 15; O. Reg. 82/17, s. 19.

Motions Required to be Heard by Panel

(2.2) A motion in the Court of Appeal for an order that finally determines an appeal, other than an order dismissing the appeal on consent, shall be heard and determined by a panel consisting of not fewer than three judges sitting together, and always of an uneven number of judges. O. Reg. 570/98, s. 14; O. Reg. 82/17, s. 16.

Motion to be Heard by More Than One Judge

(3) Where a motion in an appellate court is to be heard by more than one judge, the notice of motion shall state that the motion will be heard on a date to be fixed by the Registrar. R.R.O. 1990, Reg. 194, r. 61.16 (3).

(3.1) REVOKED: O. Reg. 263/03, s. 6 (2).

Certificate of Estimated Time for Argument

(3.2) The notice of motion shall contain a certificate stating how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for his or her oral argument, not including reply. O. Reg. 333/96, s. 3 (2); O. Reg. 575/07, s. 4.

Motion Record and Factum

(4) On a motion referred to in subrule (3),

(a) the moving party,

(i) shall serve a motion record that contains the documents referred to in subrule 37.10 (2) and a factum that meets the requirements of rule 4.06.1, and

(ii) shall file three copies of the moving party's motion record and factum, with proof of service, within 30 days after filing the notice of motion;

(b) the responding party,

(i) may, if of the opinion that the moving party's motion record is incomplete, serve a motion record that contains the documents referred to in subrule 37.10 (3),

(ii) shall serve a factum that meets the requirements of rule 4.06.1, and

(iii) shall file three copies of the responding party's motion record and factum, with proof of service, within 25 days after service of the moving party's motion record and factum; and

(c) a party who intends to refer to a transcript of evidence at the hearing shall ensure that it is included in the motion record. O. Reg. 263/03, s. 6 (3); O. Reg. 300/24, s. 16.

Certificate of Estimated Time for Argument with Factum

(4.1) If a party serves and files a factum on a motion in the Divisional Court, the factum shall contain a certificate stating how much time (expressed in hours or fractions of an hour) the party's lawyer estimates will be required for his or her oral argument, not including reply, unless the motion is to be heard in writing. O. Reg. 82/17, s. 12 (2).

Review of Registrar's Order

(5) A person affected by an order or decision of the Registrar may make a motion to a judge of the appellate court to set it aside or vary it by a notice of motion that is served forthwith after the order or decision comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 61.16 (5).

Review of Single Judge's Order

(6) A person who moves to set aside or vary the order of a judge of an appellate court under subsection 7 (5) or 21 (5) of the *Courts of Justice Act* shall do so by a notice of motion that is served and filed, with proof of service, within four days after the order is made and states that the motion will be heard on a date to be fixed by the Registrar. R.R.O. 1990, Reg. 194, r. 61.16 (6); O. Reg. 82/17, s. 12 (3).

No Review of Panel's Order

(6.1) Subject to rules 37.14 and 59.06, an order or decision of a panel of an appellate court may not be set aside or varied under these rules. O. Reg. 43/14, s. 19; O. Reg. 82/17, s. 17.

Registrar to Dismiss for Delay

(7) If the moving party has not served and filed the motion record and other documents in accordance with subrule (4),

(a) the responding party may make a motion to the Registrar, on 10 days notice to the moving party, to have the motion dismissed for delay;

(b) the Registrar may serve notice on the moving party that the motion will be dismissed for delay unless the motion record and other documents are served and filed within 10 days after service of the notice. O. Reg. 263/03, s. 6 (4).

(8) The Registrar shall make an order in Form 61J.1 dismissing the motion for delay, with costs fixed at $750, despite rule 58.13, if the moving party,

(a) in the case of a motion under clause (7) (a), does not serve and file the motion record and other documents before the hearing of that motion, or within such longer period as a judge of the appellate court allows;

(b) in the case of a notice under clause (7) (b), does not serve and file the motion record and other documents within 10 days after the notice is served, or within such longer period as a judge of the appellate court allows. O. Reg. 263/03, s. 6 (4); O. Reg. 394/09, s. 29.

RULE 62 APPEALS FROM INTERLOCUTORY ORDERS AND OTHER APPEALS

Procedure on Appeal

Application of Rule

62.01 (1) Subrules (2) to (10) apply to an appeal that is made to a judge,

(a) from an interlocutory order referred to in clause 17 (a) of the *Courts of Justice Act*;

(b) from a certificate of assessment of costs, under clause 6 (1) (c) or 17 (b) or subsection 90 (4) of that Act; or

(c) under any other statute, unless the statute or a rule provides for another procedure. R.R.O. 1990, Reg. 194, r. 62.01 (1); O. Reg. 438/08, s. 49 (1); O. Reg. 711/20, s. 4; O. Reg. 383/21, s. 5.

Time For Appeal

(2) An appeal shall be commenced by serving a notice of appeal (Form 62A) on all parties whose interests may be affected by the appeal, within seven days after the making of the order or certificate appealed from. R.R.O. 1990, Reg. 194, r. 62.01 (2); O. Reg. 14/04, s. 33 (1).

Hearing Date

(3) The notice of appeal shall name the first available hearing date that is not less than seven days after the date of service of the notice of appeal, and rule 37.05 (hearing date for motions) applies, with necessary modifications. R.R.O. 1990, Reg. 194, r. 62.01 (3).

Notice of Appeal

(4) The notice of appeal (Form 62A) shall state the relief sought and the grounds of appeal, and no grounds other than those stated in the notice may

be relied on at the hearing, except with leave of the judge hearing the appeal. R.R.O. 1990, Reg. 194, r. 62.01 (4).

(5) The notice of appeal shall be filed in the court office where the appeal is to be heard, with proof of service, not later than seven days before the hearing date. R.R.O. 1990, Reg. 194, r. 62.01 (5); O. Reg. 171/98, s. 22 (1); O. Reg. 438/08, s. 49 (2).

Place of Hearing

(6) The appeal shall be heard at a place determined in accordance with rule 37.03 (where motions to be brought). R.R.O. 1990, Reg. 194, r. 62.01 (6); O. Reg. 689/20, s. 46.

Appeal Record

(7) The appellant shall, not later than seven days before the hearing, serve on every other party and file, with proof of service, in the court office where the appeal is to be heard, an appeal record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of appeal;

(c) a copy of the order or certificate appealed from, as issued and entered, and the reasons, if any, as well as a further typed or printed copy of the reasons if they are handwritten; and

(d) such other material that was before the judge or officer appealed from as is necessary for the hearing of the appeal,

and a factum that meets the requirements of rule 4.06.1. R.R.O. 1990, Reg. 194, r. 62.01 (7); O. Reg. 171/98, s. 22 (2); O. Reg. 206/02, s. 17 (1); O. Reg. 438/08, s. 49 (3); O. Reg. 12/24, s. 6; O. Reg. 300/24, s. 17 (1).

(8) The respondent shall serve on every other party, at least four days before the hearing,

(a) a factum that meets the requirements of rule 4.06.1; and

(b) any further material that was before the judge or officer appealed from and is necessary for the hearing of the appeal. O. Reg. 14/04, s. 33 (2); O. Reg. 438/08, s. 49 (4); O. Reg. 300/24, s. 17 (2).

(8.1) The respondent's factum, and any further material, shall be filed with proof of service in the court office where the appeal is to be heard, at least

four days before the hearing. O. Reg. 171/98, s. 22 (3); O. Reg. 438/08, s. 49 (5).

(9) A judge may dispense with compliance with subrules (7) and (8), in whole or in part, before or at the hearing of the appeal. R.R.O. 1990, Reg. 194, r. 62.01 (9).

Abandoned Appeals

(10) Rule 61.14 applies, with necessary modifications, to the abandonment of an appeal under this rule. R.R.O. 1990, Reg. 194, r. 62.01 (10).

Motion for Leave to Appeal

62.02 (1) Leave to appeal to the Divisional Court from any of the following orders or decisions shall be obtained from a panel of that court in accordance with this rule:

1. An interlocutory order of a judge of the Superior Court of Justice, under clause 19 (1) (b) of the *Courts of Justice Act*.

2. A final order of a judge of the Superior Court of Justice for costs, under clauses 19 (1) (a) and 133 (b) of the *Courts of Justice Act*.

3. Any order or decision of a tribunal under a statute that provides that the order or decision may be appealed to the Divisional Court with leave of that Court, unless the statute provides for another procedure. O. Reg. 536/18, s. 4 (1); O. Reg. 176/24, s. 4.

(1.1) Revoked: O. Reg. 82/17, s. 14 (1).

Motion in Writing

(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 170/14, s. 22 (2).

Notice of Motion

(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifications, to the notice of motion for leave. O. Reg. 170/14, s. 22 (2).

Grounds on Which Leave May Be Granted

(4) Leave to appeal from an interlocutory order shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves

matters of such importance that, in the panel's opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4); O. Reg. 82/17, s. 14 (2, 3); O. Reg. 536/18, s. 4 (2).

Procedures

(5) Subrules 61.03.1 (4) to (19) (motion for leave to appeal to Court of Appeal) apply, with the following and any other necessary modifications, to the motion for leave to appeal:

1. References in those subrules to the Court of Appeal shall be read as references to the Divisional Court.

2. For the purposes of subrule 61.03.1 (4),

   i. the moving party's factum shall be limited to those facts, issues, statements of law and authorities that are relevant to a ground on which leave to appeal may be granted, and

   ii. the motion record served by the moving party shall include a document or portion of a document, including a transcript of evidence, only if the document or portion of a document is relevant to a ground on which leave to appeal may be granted and is referred to in the moving party's factum.

3. For the purposes of subrules 61.03.1 (7) and (8),

   i. the responding party's factum shall be limited to those facts, issues, statements of law and authorities that are relevant to a ground on which leave to appeal may be granted, and

   ii. any motion record served by the responding party shall include a document or portion of a document, including a transcript of evidence, only if the document or portion of a document is relevant to a ground on which leave to appeal may be granted and is referred to in the responding party's factum. O. Reg. 455/19, s. 1.

(6), (6.1), (6.2) REVOKED: O. Reg. 170/14, s. 22 (3).

(6.3) REVOKED: O. Reg. 394/09, s. 30 (3).

(7) REVOKED: O. Reg. 82/17, s. 14 (5).

Subsequent Procedure Where Leave Granted

(8) Where leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and thereafter Rule 61 applies to the appeal. R.R.O. 1990, Reg. 194, r. 62.02 (8).

RULE 63 STAY PENDING APPEAL

Automatic Stay on Delivery of Notice of Appeal

Payment of Money

63.01 (1) The delivery of a notice of appeal from an interlocutory or final order stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order. O. Reg. 465/93, s. 8.

Exception, Default Judgment

(2) The delivery of a notice of appeal from an order refusing to set aside a default judgment does not stay the default judgment, but it may be stayed by order and rule 63.02 applies as if the appeal were from the default judgment. O. Reg. 465/93, s. 8.

Eviction Order Under Residential Tenancies Act, 2006

(3) The delivery of a notice of appeal from an interlocutory or final order made under the *Residential Tenancies Act, 2006* stays, until the disposition of the appeal, any provision of the order,

(a) declaring a tenancy agreement terminated or evicting a person; or

(b) terminating a member's occupancy of a member unit in a non-profit housing co-operative and evicting the member. O. Reg. 43/14, s. 20 (2).

Co-operative Housing Orders

(4) The delivery of a notice of appeal from an interlocutory or final order made under the *Co-operative Corporations Act* stays, until the disposition of the appeal, any provision of the order declaring occupancy rights terminated or directing that a writ of possession issue. O. Reg. 465/93, s. 8.

Lifting Stay

(5) A judge of the court to which the appeal is taken may order, on such terms as are just, that the stay provided by subrule (1), (3) or (4) does not apply. O. Reg. 465/93, s. 8.

Stay by Order

By Trial Court or Appeal Court

63.02 (1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken. O. Reg.

465/93, s. 8.

Expiry of Trial Court Stay

(2) A stay granted under clause (1) (a) expires if no notice of motion for leave to appeal or no notice of appeal, as the case may be, is delivered and the time for the delivery of the relevant notice has expired. O. Reg. 534/95, s. 7.

Setting aside or Varying Stay

(3) A stay granted under subrule (1) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal may be or has been taken. O. Reg. 465/93, s. 8.

Support Order

(4) A party who obtains a stay of a support order shall obtain a certificate of stay under subrule 63.03 (4) and file it forthwith in the office of the Director of the Family Responsibility Office. O. Reg. 292/98, s. 2.

Effect of Stay

Generally

63.03 (1) Where an order is stayed, no steps may be taken under the order or for its enforcement, except,

(a) by order of a judge of the court to which a motion for leave to appeal has been made or an appeal has been taken; or

(b) as provided in subrules (2) and (3). R.R.O. 1990, Reg. 194, r. 63.03 (1).

Entry of Order and Assessment of Costs

(2) A stay does not prevent the settling, issuing and entering of the order or the assessment of costs. R.R.O. 1990, Reg. 194, r. 63.03 (2); O. Reg. 12/24, s. 7.

Writ of Execution

(3) A stay does not prevent the issue of a writ of execution or the filing of the writ in a sheriff's office or land registry office, but no instruction or direction to enforce the writ shall be given to a sheriff while the stay remains in effect. R.R.O. 1990, Reg. 194, r. 63.03 (3).

Certificate of Stay

(4) Where an order is stayed, the registrar of the court,

(a) that granted the stay; or

(b) to which an appeal has been taken,

shall issue, on requisition by a party to the appeal, a certificate of stay (Form 63A) and, when the certificate has been filed with the sheriff, the sheriff shall not commence or continue enforcement of the order until satisfied that the stay is no longer in effect. R.R.O. 1990, Reg. 194, r. 63.03 (4); O. Reg. 288/99, s. 22 (1).

(5) A requisition for a certificate of stay under subrule (4) shall state whether the stay is under subrule 63.01 (1) or by order under subrule 63.02 (1), and if by order, shall set out particulars of the order. R.R.O. 1990, Reg. 194, r. 63.03 (5); O. Reg. 288/99, s. 22 (2).

(5.1) If an order of the Landlord and Tenant Board is stayed under subsection 25 (1) of the *Statutory Powers Procedure Act*, the registrar of the court to which an appeal has been taken shall issue, on requisition by a party to the appeal, a certificate of stay (Form 63B) and, when the certificate has been filed with the sheriff, the sheriff shall not commence or continue enforcement of the order until satisfied that the stay is no longer in effect. O. Reg. 288/99, s. 22 (3); O. Reg. 43/14, s. 21 (1).

(5.2) A requisition for a certificate of stay under subrule (5.1) shall state that there is no order of the Landlord and Tenant Board that would prevent the automatic stay pending appeal. O. Reg. 288/99, s. 22 (3); O. Reg. 43/14, s. 21 (2).

Setting Aside Writ of Execution

(6) A judge of the court to which a motion for leave to appeal has been made or an appeal has been taken may set aside the issue or filing of a writ of execution where the moving party or appellant gives security satisfactory to the court. R.R.O. 1990, Reg. 194, r. 63.03 (6).

PARTICULAR PROCEEDINGS

RULE 64 MORTGAGE ACTIONS

Definition

64.01 In rules 64.02 to 64.06,

"subsequent encumbrancer" means a person who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question in the action. R.R.O. 1990, Reg. 194, r. 64.01.

Default Judgment with Reference

64.02 A reference directed by a default judgment in a mortgage action shall be directed to a judge or associate judge sitting in the county where the

action was commenced or to the registrar in that county. R.R.O. 1990, Reg. 194, r. 64.02; O. Reg. 711/20, s. 7; O. Reg. 383/21, s. 15.

Foreclosure Actions

Persons to be Joined

64.03 (1) In an action for foreclosure, all persons interested in the equity of redemption shall be named as defendants in the statement of claim, subject to subrule (2). R.R.O. 1990, Reg. 194, r. 64.03 (1).

(2) The plaintiff may commence a foreclosure action without naming subsequent encumbrancers as defendants where it appears expedient to do so by reason of their number or otherwise, but the plaintiff may make a motion without notice on a reference after judgment to add as defendants all subsequent encumbrancers who were not originally made parties. R.R.O. 1990, Reg. 194, r. 64.03 (2).

(3) On a reference, where the referee considers that subsequent encumbrancers should have been named as defendants in the statement of claim, the referee may refuse to allow the additional costs of adding them on the reference. R.R.O. 1990, Reg. 194, r. 64.03 (3).

Statement of Claim

(4) The statement of claim in a foreclosure action shall be in Form 14B. R.R.O. 1990, Reg. 194, r. 64.03 (4).

Claims that may be Joined

(5) In a foreclosure action a mortgagee may also claim,

(a) payment of the mortgage debt by any party personally liable for it; and

(b) possession of the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.03 (5).

Request to Redeem

(6) A defendant in a foreclosure action who wishes to redeem the mortgaged property shall serve on the plaintiff, and file with proof of service, a request to redeem (Form 64A) within the time prescribed by rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, whether the defendant delivers a statement of defence or not. R.R.O. 1990, Reg. 194, r. 64.03 (6); O. Reg. 534/95, s. 8 (1).

(7) A request to redeem filed by a defendant who is a subsequent encumbrancer shall contain particulars, verified by affidavit, of the claim and the amount owing. R.R.O. 1990, Reg. 194, r. 64.03 (7).

Effect of Filing Request to Redeem

(8) A defendant who has filed a request to redeem is entitled to,

(a) seven days notice of the taking of the account of the amount due to the plaintiff; and

(b) sixty days after the taking of the account of the amount due to the plaintiff, to redeem the mortgaged property,

but a defendant who is a subsequent encumbrancer is entitled to redeem only if the claim is proved on a reference or is not disputed. R.R.O. 1990, Reg. 194, r. 64.03 (8).

Default Judgment where no Request to Redeem

(9) Where a defendant in a foreclosure action has been noted in default and has not filed a request to redeem, the plaintiff,

(a) if the plaintiff wishes a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for foreclosure with a reference (Form 64B); or

(b) if the plaintiff does not wish a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for immediate foreclosure (Form 64C). R.R.O. 1990, Reg. 194, r. 64.03 (9).

Default Judgment where Request to Redeem Filed

(10) Where a defendant in a foreclosure action has been noted in default but has filed a request to redeem, the plaintiff,

(a) if the plaintiff wishes a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for foreclosure with a reference (Form 64B); or

(b) if the plaintiff does not wish a reference concerning subsequent encumbrancers, may require the registrar,

(i) to take an account of the amount due to the plaintiff,

(ii) where more than one party is entitled to redeem, to determine the priority in which each is so entitled, and

(iii) to sign judgment for foreclosure (Form 64D). R.R.O. 1990, Reg. 194, r. 64.03 (10).

(11) Where, on the taking of the account or in determining priorities, any dispute arises between the parties, or the registrar is in doubt, the registrar may sign judgment for foreclosure with a reference (Form 64B). R.R.O. 1990, Reg. 194, r. 64.03 (11).

Redemption by Named Defendant

(12) In a foreclosure action, a defendant named in the statement of claim,

(a) who has filed a request to redeem; and

(b) whose claim is proved on a reference or is not disputed, if he or she is a subsequent encumbrancer,

may redeem the mortgaged property on paying, within the time fixed by the judgment or report on a reference, the amount, including costs, found due to the plaintiff. R.R.O. 1990, Reg. 194, r. 64.03 (12).

Redemption by Encumbrancer added on Reference

(13) A subsequent encumbrancer added on a reference who attends on the reference and whose claim is proved or is not disputed is entitled to redeem the mortgaged property within the time fixed by the report on the reference. R.R.O. 1990, Reg. 194, r. 64.03 (13).

Foreclosure of Subsequent Encumbrancers

(14) Where a subsequent encumbrancer has been served with a notice of reference under subrule 64.06 (4), (7) or (8) and fails to attend and prove a claim on the reference, the referee shall so report and, on confirmation of the report, the claim of that party is foreclosed and the plaintiff may obtain a final order of foreclosure (Form 64E) against that party on motion to the court without notice. R.R.O. 1990, Reg. 194, r. 64.03 (14).

Final Order of Foreclosure

(15) Where no defendant other than a subsequent encumbrancer has filed a request to redeem, and where no subsequent encumbrancer has attended and proved a claim on the reference, the referee shall so report and, on confirmation of the report, a final order of foreclosure may be obtained against all defendants on motion to the court without notice. R.R.O. 1990, Reg. 194, r. 64.03 (15).

(16) On default of payment according to the judgment or report on a reference in a foreclosure action, a final order of foreclosure may be obtained against the party in default on motion to the court without notice. R.R.O. 1990, Reg. 194, r. 64.03 (16).

Conversion from Foreclosure to Sale

(17) A defendant in a foreclosure action who is not a subsequent encumbrancer, and who wishes a sale but does not wish to defend the action, shall serve on the plaintiff, and file with proof of service, a request for sale (Form 64F) within the time prescribed by rule 18.01 for delivery of a

statement of defence, or at any time before being noted in default, and the plaintiff may require the registrar to sign judgment for sale (Form 64G or 64H). R.R.O. 1990, Reg. 194, r. 64.03 (17); O. Reg. 534/95, s. 8 (2).

(18) A subsequent encumbrancer named as a defendant in the statement of claim in a foreclosure action who wishes a sale, but does not wish to defend the action or redeem the mortgaged property, shall within the time prescribed by rule 18.01 for delivery of a statement of defence, or at any time before being noted in default,

(a) pay into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and

(b) serve on the plaintiff, and file with proof of service, a request for sale (Form 64F), together with particulars, verified by affidavit, of the claim and the amount owing,

and the plaintiff may require the registrar to sign judgment for sale (Form 64I) conditional on proof of the subsequent encumbrancer's claim. R.R.O. 1990, Reg. 194, r. 64.03 (18); O. Reg. 534/95, s. 8 (3).

(19) A subsequent encumbrancer added on a reference in a foreclosure action who wishes a sale shall within ten days after service on the encumbrancer of notice of the reference, or where served outside Ontario, within such further time as the referee directs,

(a) pay into court the sum of $250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and

(b) serve on the plaintiff, and file with proof of service, a request for sale (Form 64F), together with particulars, verified by affidavit, of the claim and the amount owing,

and where the subsequent encumbrancer attends and proves a claim on the reference, the referee shall make an order amending the judgment from a judgment for foreclosure to a judgment for sale. R.R.O. 1990, Reg. 194, r. 64.03 (19).

(20) On the reference, the referee may require the subsequent encumbrancer to pay an additional sum of money into court as security for costs. R.R.O. 1990, Reg. 194, r. 64.03 (20).

(21) The referee shall deal with the security given under subrule (18), (19) or (20) in the report on the reference. R.R.O. 1990, Reg. 194, r. 64.03 (21).

Power to Convert from Foreclosure to Sale

(22) On the motion of any party, made to the court before judgment or to the referee after judgment, a sale may be directed instead of foreclosure and an

immediate sale may be directed without previously determining the priorities of encumbrancers or giving the usual or any time to redeem. R.R.O. 1990, Reg. 194, r. 64.03 (22).

Power to Reconvert to Foreclosure

(23) In a foreclosure action that has been converted into a sale action, on the motion of any party, made to the court before judgment or to the referee after judgment, the action may be converted back into a foreclosure action where it appears that the value of the property is unlikely to be sufficient to satisfy the claim of the plaintiff. R.R.O. 1990, Reg. 194, r. 64.03 (23).

Where Judgment for Sale Obtained in Foreclosure Action

(24) Where a judgment for sale has been obtained in a foreclosure action, a subsequent encumbrancer is entitled to notice of the hearing for directions on the reference for sale, whether the encumbrancer has filed a request to redeem the mortgaged property or not. R.R.O. 1990, Reg. 194, r. 64.03 (24).

(25) A plaintiff who wishes to transfer carriage of the sale to the defendant requesting the sale may do so by serving on the defendant a notice of election to transfer carriage of the sale and filing it with proof of service, and the defendant then has carriage of the sale and is entitled to the return of the deposit paid into court under subrule (18), (19) or (20). R.R.O. 1990, Reg. 194, r. 64.03 (25).

Procedure on Reference where Foreclosure Action Converted to Sale

(26) Where a foreclosure action is converted to a sale action under subrule (17), (18), (19) or (22), the reference shall proceed in the same manner as in a sale action. R.R.O. 1990, Reg. 194, r. 64.03 (26).

Sale Actions

Persons to be Joined

64.04 (1) In an action for sale of a mortgaged property, all persons interested in the equity of redemption, other than subsequent encumbrancers, shall be named as defendants in the statement of claim. R.R.O. 1990, Reg. 194, r. 64.04 (1).

(2) In a sale action, subsequent encumbrancers shall be added as parties on a reference after judgment. R.R.O. 1990, Reg. 194, r. 64.04 (2).

Statement of Claim

(3) The statement of claim in a sale action shall be in Form 14B. R.R.O. 1990, Reg. 194, r. 64.04 (3).

Claims that may be Joined

(4) In a sale action, a mortgagee may also claim,

(a) payment of the mortgage debt by any party personally liable for it; and

(b) possession of the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.04 (4).

Request to Redeem

(5) A defendant in a sale action who wishes to redeem the mortgaged property shall serve on the plaintiff, and file with proof of service, a request to redeem (Form 64A) within the time prescribed by rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, whether the defendant delivers a statement of defence or not. R.R.O. 1990, Reg. 194, r. 64.04 (5); O. Reg. 534/95, s. 9.

(6) In a sale action, a subsequent encumbrancer is not entitled to file a request to redeem, and where a foreclosure action is converted to a sale action, a subsequent encumbrancer is not entitled to redeem even though the encumbrancer has filed a request to redeem. R.R.O. 1990, Reg. 194, r. 64.04 (6).

Effect of Filing Request to Redeem

(7) A defendant who has filed a request to redeem is entitled to,

(a) seven days notice of the taking of the account of the amount due to the plaintiff; and

(b) sixty days after the taking of the account of the amount due to the plaintiff, to redeem the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.04 (7).

Default Judgment

(8) Where a defendant in a sale action has been noted in default and,

(a) has not filed a request to redeem, the plaintiff may require the registrar to sign judgment for immediate sale with a reference (Form 64J); or

(b) has filed a request to redeem, the plaintiff may require the registrar to sign judgment for sale with a reference (Form 64K). R.R.O. 1990, Reg. 194, r. 64.04 (8).

Redemption by Named Defendant

(9) In a sale action a defendant named in the statement of claim who has filed a request to redeem may redeem the mortgaged property on paying, within

the time fixed by the report on the reference, the amount, including costs, found due to the plaintiff. R.R.O. 1990, Reg. 194, r. 64.04 (9).

Final Order for Sale

(10) Where no defendant has filed a request to redeem and where no subsequent encumbrancer has attended and proved a claim on the reference, the referee shall so report and, on confirmation of the report, a final order for sale (Form 64L) may be obtained on motion to the court without notice. R.R.O. 1990, Reg. 194, r. 64.04 (10).

(11) On default of payment according to the judgment or a report on a reference in a sale action, a final order for sale may be obtained on motion to the court without notice. R.R.O. 1990, Reg. 194, r. 64.04 (11).

Purchase Money

(12) Where an order for sale has been obtained, the property shall be sold under the referee's direction, and the purchaser shall pay the purchase money into court unless the referee directs otherwise. R.R.O. 1990, Reg. 194, r. 64.04 (12).

(13) The purchase money shall be applied in payment of what has been found due to the plaintiff and the other encumbrancers, if any, according to their priorities, together with subsequent interest and subsequent costs. R.R.O. 1990, Reg. 194, r. 64.04 (13).

Order for Payment of Deficiency on Sale

(14) Where the purchase money is not sufficient to pay what has been found due to the plaintiff, the plaintiff is entitled, on motion to the court without notice, to an order for payment of the deficiency by any defendant liable for the mortgage debt. R.R.O. 1990, Reg. 194, r. 64.04 (14).

Redemption Actions

Persons to be Joined

64.05 (1) In an action for redemption of a mortgaged property, all persons interested in the equity of redemption, other than subsequent encumbrancers, shall be named as plaintiffs or defendants in the statement of claim. R.R.O. 1990, Reg. 194, r. 64.05 (1).

(2) In a redemption action, subsequent encumbrancers shall be added as defendants only where the plaintiff is declared foreclosed. R.R.O. 1990, Reg. 194, r. 64.05 (2).

Claims that May Be Joined

(3) In a redemption action, a person interested in the equity of redemption may also claim possession of the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.05 (3).

Judgment

(4) In a redemption action, where the defendant has been noted in default, the plaintiff may require the registrar to sign judgment for redemption (Form 64M). R.R.O. 1990, Reg. 194, r. 64.05 (4).

(5) Every judgment for redemption shall direct a reference, whether or not there are any subsequent encumbrancers. R.R.O. 1990, Reg. 194, r. 64.05 (5).

Where Plaintiff Fails to Redeem

(6) On default of payment according to the report in a redemption action, the defendant is entitled, on motion to the court without notice, to a final order of foreclosure against the plaintiff or to an order dismissing the action with costs. R.R.O. 1990, Reg. 194, r. 64.05 (6).

(7) Where the plaintiff is declared foreclosed, directions may be given, in the final order foreclosing the plaintiff or by a subsequent order, that the reference be continued for redemption or foreclosure, or for redemption or sale, against any subsequent encumbrancers, or for the adjustment of the respective rights and liabilities of the original defendants. R.R.O. 1990, Reg. 194, r. 64.05 (7); O. Reg. 333/96, s. 4.

(8) Where the reference is continued under subrule (7),

(a) for redemption or foreclosure, the reference shall proceed in the same manner as in a foreclosure action;

(b) for redemption or sale, the reference shall proceed in the same manner as in a sale action,

and for that purpose the last encumbrancer shall be treated as the owner of the equity of redemption. R.R.O. 1990, Reg. 194, r. 64.05 (8).

(9) Where the plaintiff is declared foreclosed, a subsequent encumbrancer who attends and proves a claim on the reference is entitled to thirty days to redeem the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.05 (9).

Where Nothing Due to Defendant

(10) Where, on a reference in a redemption action, nothing is found due to the defendant, the defendant is liable for the costs of the action and the defendant shall pay any balance due to the plaintiff forthwith after

confirmation of the report on the reference. R.R.O. 1990, Reg. 194, r. 64.05 (10).

Procedure on Mortgage References Generally

Rule 55 Applies

64.06 (1) Rule 55 (procedure on a reference) applies to a reference in an action for foreclosure, sale or redemption, except as provided in this rule. R.R.O. 1990, Reg. 194, r. 64.06 (1).

Plaintiff to File Material Concerning Subsequent Encumbrancers

(2) On a reference in an action for foreclosure, sale or redemption, the plaintiff shall file sufficient evidence to enable the referee to determine who appears to have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question. R.R.O. 1990, Reg. 194, r. 64.06 (2).

Duties and Powers of Referee

(3) On the reference the referee shall,

(a) add subsequent encumbrancers as defendants in accordance with subrule (4);

(b) fix a time and place for determining the validity of the claims of subsequent encumbrancers;

(c) determine who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question;

(d) take an account of what is due on the mortgage and what is due to subsequent encumbrancers who prove a claim;

(e) fix or assess the costs of the parties;

(f) fix a time and place for payment, where applicable;

(g) where the reference is for immediate sale, give directions for the sale and defer taking accounts until after the sale is held or proves abortive;

(h) where a sale is being conducted on the request of a subsequent encumbrancer, determine that the encumbrancer has a valid claim before giving directions for the sale;

(i) take all necessary steps for redemption by or foreclosure of the parties entitled to redeem the mortgaged property and, where applicable, for sale of the mortgaged property; and

(j) take subsequent accounts and fix or assess subsequent costs as required. R.R.O. 1990, Reg. 194, r. 64.06 (3).

Adding Subsequent Encumbrancers

(4) Subject to subrule 64.05 (2) (subsequent encumbrancers in redemption action), the referee shall direct all persons who appear to have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question and who were not named as defendants in the statement of claim to be added as defendants and to be served with a notice of reference to subsequent encumbrancer added on reference (Form 64N). R.R.O. 1990, Reg. 194, r. 64.06 (4).

(5) A subsequent encumbrancer added under subrule (4) may be served with documents on the reference,

(a) in the case of an execution creditor, by mail at the address shown on the writ of execution or the most recent request to renew it or, if the creditor's address is not shown, by serving the creditor's lawyer in a manner authorized by subrule 16.05 (1);

(b) in the case of a person who has registered a claim for lien under the *Construction Act*, by mail at the address for service shown on the claim for lien; or

(c) in any other case, personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 64.06 (5); O. Reg. 575/07, s. 1; O. Reg. 537/18, s. 10; O. Reg. 248/21, s. 10.

(6) A person served with a notice under subrule (4) may move within ten days after service, or where the person is served outside Ontario, within such further time as the referee directs, to set aside or vary the judgment in the action or the order adding the person as a defendant. R.R.O. 1990, Reg. 194, r. 64.06 (6).

(7) Where it appears to the referee that a person who was named as a defendant in the statement of claim may have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question, although the person was not alleged to be a subsequent encumbrancer in the statement of claim, the referee shall direct that defendant to be served with a notice of reference to subsequent encumbrancer named as original party (Form 64O). R.R.O. 1990, Reg. 194, r. 64.06 (7).

Notice of Reference to Original Defendants

(8) Subject to subrule (10), all persons who were named as defendants in the statement of claim shall be served with a notice of reference to original defendants (Form 64P), stating the names and nature of the claims of all those appearing to have a lien, charge or encumbrance on the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.06 (8).

(9) Any person named as a defendant in the statement of claim who is not a subsequent encumbrancer and who has not filed a request to redeem or a request for sale may be served with the notice of reference by mail at the person's last known address. R.R.O. 1990, Reg. 194, r. 64.06 (9).

(10) A subsequent encumbrancer who was named as a defendant in the statement of claim and who has not filed a request to redeem or a request for sale is not entitled to notice of a reference for foreclosure. R.R.O. 1990, Reg. 194, r. 64.06 (10).

Adding Parties Other than Encumbrancers

(11) Where on a reference it appears that there are persons interested in the equity of redemption, other than subsequent encumbrancers, who are not already defendants to the action, the referee may order that they be added as defendants on the reference on such terms as are just, and the order shall be served on them, together with the judgment in the action and a notice to added party (Form 64Q), personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 64.06 (11).

(12) A defendant added under subrule (11) may move within ten days after service of the material referred to in subrule (11), or where the defendant is served outside Ontario, within such further time as the referee directs, to set aside or vary the judgment in the action or the order adding the person as a defendant. R.R.O. 1990, Reg. 194, r. 64.06 (12).

Where more than one Party Entitled to Redeem

(13) One day shall be fixed for payment by all the parties entitled to redeem and, where more than one party is entitled to redeem, the referee shall determine the priority in which they are so entitled. R.R.O. 1990, Reg. 194, r. 64.06 (13).

(14) Where more than one defendant entitled to redeem makes payment, any such defendant may make a motion on the reference for further directions. R.R.O. 1990, Reg. 194, r. 64.06 (14).

Proof of Account where Mortgage Assigned

(15) In an action for foreclosure or sale by, or for redemption against, an assignee of a mortgagee, a statement of the mortgage account, verified by affidavit of the assignee, may be taken as proof of the state of the account and an affidavit is not required from the mortgagee or any intermediate assignee denying any payment to the mortgagee or intermediate assignee, unless the mortgagor or the mortgagor's assignee, or any party entitled to redeem, denies by affidavit the correctness of the statement of account. R.R.O. 1990, Reg. 194, r. 64.06 (15).

Referee's Report

(16) The referee shall set out in the report on the reference,

(a) the names of,

(i) all persons who were parties on the reference,

(ii) all subsequent encumbrancers who were served with notice of the reference, and

(iii) all subsequent encumbrancers who failed to attend on the reference and prove their claims;

(b) the amount and priority of the claims of the parties who attended and proved their claims on the reference, and the report shall show those parties as the only encumbrancers of the property; and

(c) the date on which the report was settled. R.R.O. 1990, Reg. 194, r. 64.06 (16).

(17) The report shall be served on all parties who attended on the reference and on any defendant who filed a request to redeem or a request for sale and shall be filed with proof of service. R.R.O. 1990, Reg. 194, r. 64.06 (17).

(18) Where any period fixed for payment expires within fifteen days after confirmation of the report, a new account shall be taken. R.R.O. 1990, Reg. 194, r. 64.06 (18).

Mortgagee to Transfer Property where Redeemed

(19) Subject to the *Mortgages Act*, where a party pays the amount found due on the mortgage, the mortgagee shall, unless the judgment directs otherwise, transfer the mortgaged property to the party making the payment or the party's nominee, free and clear of all encumbrances incurred by the mortgagee, and the mortgagee shall deliver up all instruments in the mortgagee's possession, control or power that relate to the mortgaged property. R.R.O. 1990, Reg. 194, r. 64.06 (19).

Registrar May Request Directions

(20) A registrar who is of the opinion that a mortgage reference directed to him or her ought to be dealt with by a judge may request directions from a judge. R.R.O. 1990, Reg. 194, r. 64.06 (20).

Change of Account

(21) Where the state of account as ascertained by an order or report has changed before the day fixed for payment, the mortgagee may, at least fifteen days before that day, serve notice of the change of account on the person

required to pay, giving particulars of the change of account and of the sum to be paid. R.R.O. 1990, Reg. 194, r. 64.06 (21).

(22) Where notice of a change of account has been served and the sums mentioned in it are proper, the court may make a final order without further notice or, on the motion for a final order, may fix a new day for payment and may require notice to be served. R.R.O. 1990, Reg. 194, r. 64.06 (22).

(23) A party served with notice of change of account who is dissatisfied may make a motion to the court to determine the amount to be paid and to fix a new day for payment. R.R.O. 1990, Reg. 194, r. 64.06 (23).

(24) Where the state of account has changed before the day fixed for payment and notice of the change has not been served,

(a) where the amount payable for redemption is reduced, a new day shall be fixed for payment, on notice to the persons entitled to redeem; or

(b) where the amount payable for redemption has increased, the mortgagee may move for a final order after the day fixed for payment, without the fixing of a new day. R.R.O. 1990, Reg. 194, r. 64.06 (24).

(25) Where the state of the new account has changed after the day fixed for payment, it is not necessary to fix a new day, unless the court so directs on the motion for a final order. R.R.O. 1990, Reg. 194, r. 64.06 (25).

(26) Where it becomes necessary to fix a new day for payment after the expiration of the original period, the further time allowed shall be thirty days, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 64.06 (26).

(27) Despite subrule (26), the court may, on motion of any party, extend or abridge the time for redemption for such time and on such terms as are just. R.R.O. 1990, Reg. 194, r. 64.06 (27).

RULE 65 PROCEEDINGS FOR ADMINISTRATION

Where Available

65.01 (1) A proceeding for the administration of the estate of a deceased person or for the execution of a trust may be commenced by notice of application,

(a) by a person claiming to be a creditor of the estate of the deceased person;

(b) by a person claiming to be a beneficiary under the will or on the intestacy of the deceased person or under the instrument of trust; or

(c) by an executor or administrator of the estate of the deceased person or a trustee. R.R.O. 1990, Reg. 194, r. 65.01 (1).

(2) A judgment for administration of an estate (Form 65A) or for execution of a trust shall be granted only if the judge is satisfied that the questions between the parties cannot otherwise be properly determined. R.R.O. 1990, Reg. 194, r. 65.01 (2).

(3) Where no accounts or insufficient accounts have been rendered, the judge may, instead of granting judgment for administration of the estate or for execution of the trust, order that the executors, administrators or trustees render to the applicant a proper statement of their accounts and may stay the application in the meantime. R.R.O. 1990, Reg. 194, r. 65.01 (3).

Where a Reference is Directed

65.02 (1) A judgment for administration of an estate or for execution of a trust shall direct a reference, and the referee has power to deal with the property of the estate or trust, including power to give all necessary directions for its realization, and shall finally wind up all matters connected with the estate or trust without any further directions, except where the special circumstances of the case require interim reports or interlocutory orders. R.R.O. 1990, Reg. 194, r. 65.02 (1).

(2) Interest on accounts taken in administration proceedings shall be computed on the debts of the deceased from the date of the judgment and on legacies from the end of one year after the death of the deceased, unless the will directs another time for payment. R.R.O. 1990, Reg. 194, r. 65.02 (2).

(3) All money realized from the estate or trust shall forthwith be paid into court, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee. R.R.O. 1990, Reg. 194, r. 65.02 (3); O. Reg. 465/93, s. 9.

RULE 66 PARTITION PROCEEDINGS

Where Available

66.01 (1) A person who is entitled to compel partition of land may commence an action or application under the *Partition Act*. O. Reg. 770/92, s. 16.

(2) A proceeding for partition or sale by or on behalf of a minor shall be on notice to the Children's Lawyer. R.R.O. 1990, Reg. 194, r. 66.01 (2); O. Reg. 69/95, s. 19.

Form of Judgment

66.02 A judgment for partition or sale shall be in Form 66A. R.R.O. 1990, Reg. 194, r. 66.02.

Proceeds of Sale

66.03 All money realized in a partition proceeding from sale of land shall forthwith be paid into court, unless the parties agree otherwise, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee. O. Reg. 396/91, s. 13.

RULE 67 PROCEEDINGS CONCERNING THE ESTATES OF MINORS

How Commenced

67.01 A proceeding for approval of the sale, mortgage, lease or other disposition of property of a minor may be commenced by notice of application on notice to the Children's Lawyer. R.R.O. 1990, Reg. 194, r. 67.01; O. Reg. 69/95, s. 19.

Affidavit in Support

67.02 (1) The affidavit in support of the application shall state,

(a) the nature and amount of all the property to which the minor is entitled;

(b) the nature and value of the property to be disposed of;

(c) what annual income the property yields; and

(d) the facts relied on to establish the necessity for the proposed disposition. R.R.O. 1990, Reg. 194, r. 67.02 (1).

(2) Where an allowance is sought for support of the minor, the affidavit shall state the amount required and the facts relied on to establish the need for the allowance and, where applicable, shall show the necessity for resorting to the property to provide the allowance. R.R.O. 1990, Reg. 194, r. 67.02 (2); O. Reg. 263/03, s. 7.

(3) Where the appointment of a guardian is sought, the affidavit shall state the reasons for the appointment and the facts relied on to justify the appointment of the person proposed. R.R.O. 1990, Reg. 194, r. 67.02 (3).

Where Consent Required

67.03 (1) Approval of the sale, mortgage, lease or other disposition of property of a minor over the age of sixteen years shall not be given unless the consent of the minor has been filed, together with a lawyer's affidavit stating the lawyer's belief that the minor understood the consent when the lawyer read and explained it. O. Reg. 575/07, s. 29.

(2) A judge hearing an application referred to in subrule (1) may dispense with the necessity of filing the minor's consent and lawyer's affidavit. O. Reg. 575/07, s. 29.

(3) The judge may examine the minor with respect to his or her consent. R.R.O. 1990, Reg. 194, r. 67.03 (3).

(4) Where the minor is outside Ontario, the judge may direct an inquiry to be made concerning the minor's consent in such manner as is just. R.R.O. 1990, Reg. 194, r. 67.03 (4).

RULE 68 PROCEEDINGS FOR JUDICIAL REVIEW

How Commenced

68.01 (1) An application to the Divisional Court or to the Superior Court of Justice for judicial review under the *Judicial Review Procedure Act* shall be commenced by notice of application, and where the application is to the Divisional Court the notice of application shall be in Form 68A. R.R.O. 1990, Reg. 194, r. 68.01 (1); O. Reg. 292/99, s. 1 (2).

(2) If the application is made to the Divisional Court and is not commenced at a regional centre, the local registrar in the place where it is commenced shall forthwith transfer a copy of the notice of application and of any material filed in support of the application to the court office in the regional centre of the region where the application is to be heard, and all further documents in the application shall be filed there. R.R.O. 1990, Reg. 194, r. 68.01 (2).

Where Leave Required

(3) If a statute, other than the *Judicial Review Procedure Act*, requires leave of the Divisional Court or the Superior Court of Justice to commence an application for judicial review, leave shall be obtained in accordance with this rule, unless the statute provides for another procedure. O. Reg. 176/24, s. 5.

(4) The motion for leave shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 176/24, s. 5.

(5) Subrules 61.03.1 (2) to (15) (motion for leave to appeal to Court of Appeal) apply, with the following and any other necessary modifications, with respect to the motion for leave:

1. References in those subrules to the Court of Appeal shall be read as references to the Divisional Court or the Superior Court of Justice, as the case may be.

2. For the purposes of subrule 61.03.1 (4),

   i. the moving party's factum shall be limited to those facts, issues, statements of law and authorities that are relevant to a ground on which leave may be granted, and

ii. the motion record served by the moving party shall include a document or portion of a document, including a transcript of evidence, only if the document or portion of a document is relevant to a ground on which leave may be granted and is referred to in the moving party's factum.

3. For the purposes of subrules 61.03.1 (7) and (8),

i. the responding party's factum shall be limited to those facts, issues, statements of law and authorities that are relevant to a ground on which leave may be granted, and

ii. any motion record served by the responding party shall include a document or portion of a document, including a transcript of evidence, only if the document or portion of a document is relevant to a ground on which leave may be granted and is referred to in the responding party's factum. O. Reg. 176/24, s. 5.

If Leave Granted

(6) If leave is granted, the notice of application required by subrule (1) shall be delivered within seven days after the granting of leave. O. Reg. 176/24, s. 5.

Applicable Procedure

Divisional Court

68.02 (1) Rule 38, except as provided in subrule 38.01 (2), and rules 68.03 to 68.07 apply to applications to the Divisional Court for judicial review. R.R.O. 1990, Reg. 194, r. 68.02 (1); O. Reg. 536/18, s. 5.

Superior Court of Justice

(2) Rule 38 applies to applications to the Superior Court of Justice for judicial review under subsection 6 (2) of the *Judicial Review Procedure Act*. R.R.O. 1990, Reg. 194, r. 68.02 (2); O. Reg. 292/99, ss. 1 (2), 2 (1).

Hearing Date in Divisional Court

68.03 A notice of application shall state that the application is to be heard on a date to be fixed by the registrar at the place of hearing. R.R.O. 1990, Reg. 194, r. 68.03.

Application Records and Factums

Applicant

68.04 (1) The applicant shall deliver an application record and a factum,

(a) where the nature of the application requires a record of the proceeding before the court or tribunal whose decision is to be reviewed, within thirty days after the record is filed; or

(b) where the nature of the application does not require such a record, within thirty days after the application is commenced. R.R.O. 1990, Reg. 194, r. 68.04 (1).

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of application;

(b.1) a copy of the reasons of the court or tribunal whose decision is to be reviewed, with a further typed or printed copy if the reasons are handwritten;

(c) a copy of all affidavits and other material served by any party for use on the application;

(d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and

(e) a copy of any other material in the court file that is necessary for the hearing of the application. R.R.O. 1990, Reg. 194, r. 68.04 (2); O. Reg. 219/91, s. 8; O. Reg. 248/21, s. 14.

(3) The applicant's factum shall meet the requirements of rule 4.06.1, be signed by the applicant's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and consist of,

(a) Part I, containing a statement identifying the applicant and the court or tribunal whose decision is to be reviewed and stating the result in that court or tribunal;

(b) Part II, containing a concise summary of the facts relevant to the issues on the application, with specific reference to the evidence;

(c) Part III, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue;

(d) Part IV, containing a statement of the order that the court will be asked to make, including any order for costs;

(d.1) a certificate that, in addition to including the statement required by subrule 4.06.1 (2.1), states how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for the lawyer's oral argument, not including reply;

(e) Schedule A, containing a list of the authorities referred to; and

(f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws,

in paragraphs numbered consecutively throughout the factum. R.R.O. 1990, Reg. 194, r. 68.04 (3); O. Reg. 575/07, s. 30 (1); O. Reg. 82/17, s. 15 (1); O. Reg. 300/24, s. 18 (1); O. Reg. 384/24, s. 7 (1).

Respondent

(4) The respondent shall deliver an application record and a factum within thirty days after service of the applicant's application record and factum. R.R.O. 1990, Reg. 194, r. 68.04 (4).

(5) The respondent's application record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the respondent on the application and not included in the application record. R.R.O. 1990, Reg. 194, r. 68.04 (5).

(6) The respondent's factum shall meet the requirements of rule 4.06.1, be signed by the respondent's lawyer, or on the lawyer's behalf by someone the lawyer has specifically authorized, and consist of,

(a) Part I, containing a statement of the facts in the applicant's summary of relevant facts that the respondent accepts as correct and those facts with which the respondent disagrees and a concise summary of any additional facts relied on, with specific reference to the evidence;

(b) Part II, containing the position of the respondent with respect to each issue raised by the applicant, immediately followed by a concise statement of the law and the authorities relating to that issue;

(c) Part III, containing a statement of any additional issues raised by the respondent, the statement of each issue to be immediately followed by a concise statement of the law and the authorities relating to that issue;

(d) Part IV, containing a statement of the order that the court will be asked to make, including any order for costs;

(d.1) a certificate that, in addition to including the statement required by subrule 4.06.1 (2.1), states how much time (expressed in hours or fractions of an hour) the lawyer estimates will be required for the lawyer's oral argument, not including reply;

(e) Schedule A, containing a list of the authorities referred to; and

(f) Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws that are not included in Schedule B to the applicant's factum,

in paragraphs numbered consecutively throughout the factum. R.R.O. 1990, Reg. 194, r. 68.04 (6); O. Reg. 575/07, s. 30 (2); O. Reg. 82/17, s. 15 (2); O. Reg. 300/24, s. 18 (2); O. Reg. 384/24, s. 7 (2).

Copies for Use of the Court

(7) The parties shall file three copies of their application records and factums for the use of the court. R.R.O. 1990, Reg. 194, r. 68.04 (7).

Material may be Filed as Part of Record

(8) Any material served by a party for use on an application may be filed, together with proof of service, as part of the party's application record and need not be filed separately if the record is filed within the time prescribed for filing the notice or other material. R.R.O. 1990, Reg. 194, r. 68.04 (8).

Transcript of Evidence

(9) A party who intends to refer to a transcript of evidence at the hearing shall file three copies of the transcript with the application record and factum, despite subrule 34.18 (2) (time for filing transcript). R.R.O. 1990, Reg. 194, r. 68.04 (9).

Certificate of Perfection

68.05 (1) The applicant shall file with the application record a certificate of perfection,

(a) stating that all the material required to be filed by the applicant for the hearing of the application has been filed; and

(b) setting out, with respect to every party to the application and any other person entitled by statute or by an order under rule 13.03 (intervention) to be heard on the application,

(i) the name, address and telephone number of the party's or other person's lawyer, or

(ii) the name, address for service and telephone number of the party or other person, if acting in person. O. Reg. 260/05, s. 15; O. Reg. 248/21, s. 13.

(2) When the certificate of perfection has been filed, the registrar shall place the application on a list for hearing and give notice of listing for hearing (Form 68B) by mail to the parties and the other persons named in the certificate of perfection. R.R.O. 1990, Reg. 194, r. 68.05 (2).

Dismissal for Delay

Motion by Respondent

68.06 (1) Where the applicant has not,

(a) delivered an application record and factum within the time prescribed by subrule 68.04 (1); or

(b) filed a certificate of perfection as required by subrule 68.05 (1),

the respondent may make a motion to the registrar at the place of hearing, on ten days notice to the applicant, to have the application dismissed for delay. R.R.O. 1990, Reg. 194, r. 68.06 (1).

Notice by Registrar

(2) Where the applicant has not delivered an application record and factum and filed a certificate of perfection within one year after the application was commenced, the registrar may serve notice on the applicant that the application will be dismissed for delay unless the applicant delivers an application record and factum and files a certificate of perfection within ten days after service of notice. R.R.O. 1990, Reg. 194, r. 68.06 (2).

Registrar to Dismiss where Default not Cured

(3) Where the applicant does not cure the default within ten days after service of a notice under subrule (1) or (2) or such longer period as a judge of the Divisional Court allows, the registrar shall make an order in Form 68C dismissing the application for delay, with costs fixed at $750, despite rule 58.13. R.R.O. 1990, Reg. 194, r. 68.06 (3); O. Reg. 394/09, s. 31.

Review of Registrar's Dismissal

(4) A party affected by an order of the registrar under subrule (3) may make a motion under subrule 61.16 (5) to set aside or vary the order. R.R.O. 1990, Reg. 194, r. 68.06 (4).

Automatic Dismissal by Registrar for Delay

68.07 (1) Unless the court orders otherwise, the Registrar shall dismiss an application to the Divisional Court for delay if the application is not set down

for hearing or terminated by any means before the later of the fifth anniversary of the filing of the notice of application under subrule 68.01 (1) and January 1, 2021. O. Reg. 536/18, s. 6.

Exception, Party Under Disability

(2) Subrule (1) does not apply if, at the time the Registrar would otherwise be required under that subrule to dismiss an application for delay, the applicant is under a disability. O. Reg. 536/18, s. 6.

Form of Order

(3) An order made under subrule (1) shall be in Form 68D. O. Reg. 536/18, s. 6; O. Reg. 689/20, s. 47.

Order to be Served

(4) The Registrar shall serve an order made under subrule (1) on the parties. O. Reg. 536/18, s. 6.

Order to Client

(5) A lawyer who is served with an order under subrule (4) on behalf of a client shall promptly give a copy of the order to the client. O. Reg. 536/18, s. 6.

Setting Aside

(6) The dismissal of an application under this rule may be set aside under rule 37.14. O. Reg. 536/18, s. 6.

RULE 69, 70 REVOKED: O. REG.131/04, S. 17.

RULE 71 REVOKED: O. REG. 288/99, S. 26.

RULE 72 PAYMENT INTO AND OUT OF COURT

Definitions

72.01 In rules 72.02 to 72.05,

"Accountant" means the Accountant of the Superior Court of Justice; ("comptable")

"registrar" means the registrar in the location where the proceeding was commenced. ("greffier") R.R.O. 1990, Reg. 194, r. 72.01; O. Reg. 292/99, s. 5; O. Reg. 399/12, s. 4.

Payment into Court

Filing with the Registrar or Accountant

72.02 (1) Subject to subrule (7), a person who seeks to pay money into court shall do so in accordance with subrules (2) to (6). O. Reg. 399/12, s. 5.

Documents to be Filed

(2) The person shall file with the Accountant or registrar, or, if the proceeding was commenced in Toronto, with the Accountant,

(a) a written request for payment into court that refers to any statutory provision or rule that authorizes the payment into court; and

(b) a copy of any order, report, offer to settle or acceptance of offer under which the money is payable. O. Reg. 399/12, s. 5.

Direction

(3) On receiving the documents filed under subrule (2), the Accountant or registrar shall give the person a direction to receive the money, addressed to a bank listed in Schedule I or II to the *Bank Act* (Canada) and specifying the account in the Accountant's name into which the money is to be paid. O. Reg. 399/12, s. 5.

Registrar to Forward Documents

(4) If the documents were filed with the registrar, the registrar shall forward the documents to the Accountant. O. Reg. 399/12, s. 5.

Payment

(5) On receiving the direction referred to in subrule (3), the person shall pay the money into the specified bank account in accordance with the direction. O. Reg. 399/12, s. 5.

Bank's Duties

(6) On receiving the money, the bank shall give a receipt to the person paying the money and immediately send a copy of the receipt to the Accountant. O. Reg. 399/12, s. 5.

Payment to the Accountant by Mail

(7) A person may pay money into court by mailing to the Accountant the documents referred to in subrule (2), together with the money that is payable. O. Reg. 399/12, s. 5.

Accountant to Provide Receipt

(8) On receiving money under subrule (7), the Accountant shall give a receipt to the person paying the money. O. Reg. 399/12, s. 5.

Notice of Payment Under Offer to Settle, Acceptance of Offer

(9) A person paying into court under an offer to settle or an acceptance of offer shall immediately serve a notice of payment into court (Form 72A) on every interested party, but the notice shall not be filed. O. Reg. 399/12, s. 5.

Receipt of Payment Under Other Authority

(10) A person paying into court other than under an offer to settle or an acceptance of offer shall immediately send a copy of the receipt received from the bank under subrule (6) or the receipt received from the Accountant under subrule (8), as the case may be, to each of the other parties. O. Reg. 399/12, s. 5.

Transfer to Accountant

(11) Money paid into court in a proceeding under the *Repair and Storage Liens Act* commenced outside Toronto before the day Ontario Regulation 399/12 comes into force that is not paid out one year after the day on which it was paid into court shall be transferred to the Accountant, unless the court orders otherwise. O. Reg. 399/12, s. 5.

Payment out of Court

Authority for Payment Out

72.03 (1) Money may be paid out of court only in accordance with an order or report, or on consent under subrule (4). R.R.O. 1990, Reg. 194, r. 72.03 (1).

Payment out under Order or Report

(2) A person who seeks payment of money out of court in accordance with an order or report shall file with the Accountant,

(a) a written request for payment out;

(b) the original order or report or a notarized copy or copy certified by the court, unless any of them has already been filed with the Accountant; and

(c) an affidavit stating,

(i) in the case of a report, that the report has been confirmed and the manner of confirmation, or

(ii) in the case of an order, that the time prescribed for an appeal has expired and no appeal is pending,

unless such an affidavit has already been filed with the Accountant,

and the Accountant shall then pay the money to the person to whom the order or report directs that it be paid. R.R.O. 1990, Reg. 194, r. 72.03 (2); O. Reg. 399/12, s. 6 (1-5).

(3) Where the Children's Lawyer or the Public Guardian and Trustee seeks payment out in accordance with an order or report, he or she may file one written request dealing with more than one proceeding and need not file the

affidavit referred to in clause (2) (c). R.R.O. 1990, Reg. 194, r. 72.03 (3); O. Reg. 69/95, ss. 19, 20; O. Reg. 399/12, s. 6 (6).

Payment Out on Consent

(4) A party who seeks payment out of court, on consent, of money paid into court shall file with the Accountant,

(a) a written request for payment out;

(b) the consent of all parties or their lawyers; and

(c) an affidavit stating that all parties have consented to the payment and that neither the party who paid the money into court nor the party to whom it is to be paid is under disability,

and the Accountant shall then pay the money out to the party in accordance with the consent. R.R.O. 1990, Reg. 194, r. 72.03 (4); O. Reg. 575/07, s. 2; O. Reg. 399/12, s. 6 (7-9).

(4.1) Subrule (4) does not apply if the money was paid into court under an order that provides that a further order is required for the money to be paid out of court. O. Reg. 399/12, s. 6 (10).

Payment Out of Interest

(5) Money paid out of court under subrule (2) or (4) shall be paid out with accrued interest, if any, unless the order, report or consent provides otherwise. R.R.O. 1990, Reg. 194, r. 72.03 (5).

Consent by Insurer on Behalf of Party

(6) Where the insurer of a party has paid money into court on behalf of the party and an affidavit setting out the relevant facts is filed with the Accountant, the consent required by clause (4) (b) may be given by the insurer on behalf of the party and, where the party is entitled to payment out, the money may be paid out to the insurer. R.R.O. 1990, Reg. 194, r. 72.03 (6); O. Reg. 399/12, s. 6 (11).

Minor Attaining Age of Majority

(7) Money in court to which a party is entitled under an order or report when the party attains the age of majority may be paid out to the party on filing with the Accountant, in the forms provided by the Accountant,

(a) a written request for payment out; and

(b) an affidavit proving the identity of the party and that the party has attained the age of majority. R.R.O. 1990, Reg. 194, r. 72.03 (7); O. Reg. 399/12, s. 6 (12, 13).

Payment Directly to Lawyer

(8) Where money has been paid into court as security for costs or an order has been made for payment of costs out of money in court and the order does not provide for payment out directly to a lawyer, the money may be paid out to the lawyer for the party entitled, on filing with the Accountant the material required by subrule (2) or (4) and, in addition, the affidavit of the party stating that the party consents to payment of the money directly to the lawyer rather than to the party. R.R.O. 1990, Reg. 194, r. 72.03 (8); O. Reg. 575/07, s. 1; O. Reg. 399/12, s. 6 (14).

Payment to Personal Representative

(9) Where money or securities in court are to be paid out or transferred to a person named in an order or report who has died, the money or securities may be paid or transferred to the deceased person's personal representative on proof to the satisfaction of the Accountant of the person's death and of the personal representative's authority. R.R.O. 1990, Reg. 194, r. 72.03 (9); O. Reg. 399/12, s. 6 (15).

Party under Disability

(10) An order for payment out of court of money in court to the credit of a person under disability may be obtained on motion to a judge by or on notice to the Children's Lawyer, unless the Public Guardian and Trustee is the person's litigation guardian, in which case the motion shall be made by or on notice to the Public Guardian and Trustee. R.R.O. 1990, Reg. 194, r. 72.03 (10); O. Reg. 69/95, ss. 9, 19, 20.

(11) A motion under subrule (10), other than a motion made by the Children's Lawyer or the Public Guardian and Trustee, shall be supported by an affidavit in Form 72B. R.R.O. 1990, Reg. 194, r. 72.03 (11); O. Reg. 69/95, ss. 19, 20.

(12) A motion under subrule (10) by the Children's Lawyer or the Public Guardian and Trustee may be made without notice unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 72.03 (12); O. Reg. 69/95, ss. 19, 20.

(13) In an order under subrule (10), the judge may fix the costs of the moving party and direct that they be paid out of the money in court directly to the moving party's lawyer. R.R.O. 1990, Reg. 194, r. 72.03 (13); O. Reg. 575/07, s. 1.

(14) Where an order is made under subrule (10) for support of a minor, the Children's Lawyer shall, on request of the moving party, obtain the cheque from the accountant and send it without charge to the moving party. R.R.O. 1990, Reg. 194, r. 72.03 (14); O. Reg. 69/95, s. 19; O. Reg. 263/03, s. 8.

Transition

(15) This rule, as it read immediately before the day Ontario Regulation 399/12 came into force, continues to apply to the payment out of court of money paid into court that is held by the registrar. O. Reg. 399/12, s. 6 (16).

Discharge of a Mortgage

72.04 (1) A person entitled to the discharge of a mortgage held by the Accountant may send to the Accountant the document required to discharge the mortgage, with a request that the Accountant execute the document. O. Reg. 399/12, s. 7 (1).

(2) If the Accountant is satisfied that the money secured by the mortgage has been paid in full, the Accountant shall execute the discharge document. O. Reg. 399/12, s. 7 (1).

(3) After executing the discharge document, the Accountant shall hand over all documents that relate to the mortgage in return for a receipt for the documents and shall assign any policy of insurance in respect of the mortgaged property to the person entitled to the discharge or as the person directs in writing. R.R.O. 1990, Reg. 194, r. 72.04 (3); O. Reg. 399/12, s. 7 (2).

Stop Order

72.05 (1) On motion without notice in a proceeding or, where there is no proceeding pending, on application without notice by a person who claims to be entitled to money or securities held or to be held in the future by the Accountant for the benefit of another person, the court may make a stop order (Form 72C) directing that the money or securities shall not be dealt with except on notice to the moving party or applicant. R.R.O. 1990, Reg. 194, r. 72.05 (1); O. Reg. 399/12, s. 8.

(2) On a motion or application for a stop order, the moving party or applicant shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to any person for which the moving party or applicant ought to compensate the person. R.R.O. 1990, Reg. 194, r. 72.05 (2).

(3) A person who has obtained an order under subrule (1) may make a motion on notice to all interested parties for an order for payment out. R.R.O. 1990, Reg. 194, r. 72.05 (3).

RULE 73 RECIPROCAL ENFORCEMENT OF UNITED KINGDOM JUDGMENTS

Definitions

73.01 In rules 73.01 to 73.03,

"Act" means the *Reciprocal Enforcement of Judgments (U.K.) Act*; ("Loi")

"Convention" means the convention appearing as a schedule to the Act; ("Convention")

"judgment" means a judgment to which the Convention applies. ("jugement") R.R.O. 1990, Reg. 194, r. 73.01.

Application for Registration of Judgment

Notice of Application

73.02 (1) Notice of an application under the Act for registration of a judgment granted by a court in the United Kingdom shall be in Form 73A. R.R.O. 1990, Reg. 194, r. 73.02 (1).

Supporting Material

(2) The application shall be supported by an affidavit that confirms the statements contained in the notice of application and sets out any additional facts necessary to establish that the applicant is entitled to register and enforce the judgment. R.R.O. 1990, Reg. 194, r. 73.02 (2).

(3) The judgment and the original proof of service of the originating process of the United Kingdom court, or certified copies of them, shall accompany the affidavit as exhibits. R.R.O. 1990, Reg. 194, r. 73.02 (3).

(4) The affidavit may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 73.02 (4).

Enforcement of Judgment

73.03 A judgment registered under the Act may be enforced as if it had been granted by the court. R.R.O. 1990, Reg. 194, r. 73.03.

RULE 74 ESTATES — NON-CONTENTIOUS PROCEEDINGS

Definitions

74.01 In this Rule and in Rules 74.1 and 75,

"estate trustee" means an executor, administrator or administrator with the will annexed; ("fiduciaire de la succession")

"estate trustee during litigation" means an administrator appointed pending an action; ("fiduciaire de la succession pour la durée du litige")

"estate trustee with a will" means an executor or an administrator with the will annexed; ("fiduciaire de la succession testamentaire")

"estate trustee without a will" means an administrator; ("fiduciaire de la succession non testamentaire")

"objection to issuing of certificate of appointment" means a caveat; ("opposition à la délivrance d'un certificat de nomination")

"proof of death" means documentary evidence of a person's death, including a death certificate issued by the Registrar General, a certificate in respect of the death issued by a funeral director, or an order made under the *Declarations of Death Act, 2002* declaring that the person has died. ("preuve de décès") O. Reg. 484/94, s. 12; O. Reg. 193/15, s. 7; O. Reg. 111/21, s. 7; O. Reg. 383/21, s. 6.

Deposit of Wills and Codicils for Safekeeping

74.02 (1) A registrar shall not receive and keep a will or codicil under section 2 of the *Estates Act* unless the deposit is made by,

(a) the testator;

(b) a person authorized by the testator in writing;

(c) a lawyer who held the will or codicil at the time of retirement from practice;

(d) the estate trustee of a lawyer who held the will or codicil at the time of the lawyer's death;

(e) the representative of a trust corporation that held the will or codicil when it ceased to do business in Ontario; or

(f) a person authorized by the court to deposit the will or codicil. O. Reg. 484/94, s. 12; O. Reg. 575/07, s. 31.

(2) An affidavit of execution of the will or codicil (Form 74D) may be deposited at the same time as the will or codicil. O. Reg. 484/94, s. 12; O. Reg. 709/21, s. 3.

(3) The registrar shall cause every will or codicil that is deposited for safekeeping to be enclosed in an envelope that is securely sealed in the presence of the depositor, and shall cause to be endorsed on the envelope the date of the deposit, the name and address of the depositor and of the testator and estate trustee or trustees named in the will, the date of birth of the testator and the date of the will or codicil. O. Reg. 484/94, s. 12.

(4) REVOKED: O. Reg. 690/20, s. 1 (1).

Access to Deposited Will or Codicil

(5) No person, except the testator in person or a guardian of the testator's property, or except by order of the court, shall remove, copy or inspect a will or codicil on deposit during the testator's lifetime. O. Reg. 484/94, s. 12; O. Reg. 69/95, s. 10.

(6) After the death of the testator, any person may copy or inspect a will or codicil of the testator on deposit, on filing a written request stating the testator's date of birth and proof of death. O. Reg. 484/94, s. 12; O. Reg. 193/15, s. 8 (1).

Request for Delivery of Will or Codicil to Estate Trustee, Person Named by Court

(7) After the death of the testator, the registrar may, on the filing of the following documents, deliver the will or codicil of the testator that is on deposit to an estate trustee named in the will or to such other person as the court may direct:

1. A request for the delivery, stating the testator's date of birth.

2. Proof of death.

3. If no order directing delivery of the will or codicil has been made, an authorization signed by every estate trustee named in the will specifying the estate trustee as the person to whom the will or codicil is to be delivered.

4. If an order directing delivery of the will or codicil has been made, a copy of the order. O. Reg. 203/17, s. 1.

Request for Delivery of Will or Codicil to Estate Trustee's Lawyer

(7.1) After the death of the testator, the registrar may, on the filing of the following documents, deliver the will or codicil of the testator that is on deposit to the lawyer for an estate trustee named in the will:

1. A request for the delivery, stating the testator's date of birth.

2. Proof of death.

3. Subject to subrule (7.2), an authorization, signed by every estate trustee named in the will, specifying the estate trustee's lawyer as the person to whom the will or codicil is to be delivered. O. Reg. 203/17, s. 1.

Same

(7.2) The following documents may be filed instead of the authorization referred to in paragraph 3 of subrule (7.1):

1. An authorization signed by every estate trustee named in the will specifying the estate trustee as the person to whom the will or codicil is to be delivered.

2. An authorization signed by the estate trustee specifying his or her lawyer as the person to whom the will or codicil is to be delivered. O. Reg. 203/17, s. 1.

Authorization

(7.3) If an estate trustee is not available to provide his or her signature for the purposes of an authorization under subrule (7) or (7.1) or paragraph 1 of subrule (7.2), the requirement to provide an authorization signed by every estate trustee named in the will may be satisfied by filing an authorization signed by every available estate trustee, together with a written explanation satisfactory to the registrar as to the reason for each missing signature. O. Reg. 203/17, s. 1.

Proof of Identification

(7.4) The registrar may, before delivering a will or codicil to a person, require that the person provide such proof of identification as the registrar specifies. O. Reg. 203/17, s. 1.

Duties of Registrar on Delivery of Will or Codicil

(7.5) In delivering a will or codicil under subrule (7) or (7.1), the registrar shall retain,

(a) a copy of the will and any codicil, certified to be a true copy by the registrar;

(b) the receipt of the person to whom the will or codicil was delivered;

(c) a copy of any authorizations filed under the subrule; and

(d) a copy of any order directing the delivery of the will or codicil. O. Reg. 203/17, s. 1; O. Reg. 690/20, s. 1 (2).

Archivist of Ontario

(8) The registrar shall deposit with the Archivist of Ontario wills and codicils that have been held for safekeeping for 125 years or more. O. Reg. 484/94, s. 12.

Request for Notice of Commencement of Proceeding

74.03 (1) At any time before a certificate of appointment of estate trustee has been issued, a person who appears to have a financial interest in the estate and who desires to be informed of the commencement of a proceeding in the estate may file with the registrar a request for notice (Form 74P), and thereafter is entitled to receive notice of the commencement of any proceeding in the estate until a certificate of appointment of estate trustee is issued, unless the court orders otherwise. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 11; O. Reg. 383/21, s. 16; O. Reg. 709/21, s. 4.

(2) Notice by the registrar under subrule (1) may be sent by regular lettermail to the address shown in the request for notice. O. Reg. 484/94, s. 12.

(3) A request for notice expires three years after it is filed but a further request may be filed at any time before a certificate of appointment of estate trustee for the estate is issued. O. Reg. 484/94, s. 12; O. Reg. 383/21, s. 16.

Certificate of Appointment of Estate Trustee

Application

74.04 (1) A person may seek a certificate of appointment of estate trustee by filing an application for a certificate of appointment of estate trustee (Form 74A) together with,

(a) proof of service in accordance with subrules (2) to (6) which, despite rule 16.09, shall be in Form 74B (affidavit of service) or 74B.1 (lawyer's certificate of service);

(b) proof of death;

(c) a draft certificate of appointment of estate trustee (Form 74C), with a copy of the will, if any, including any codicils, attached to it;

(c.1) any court order directing the issuance of the certificate;

(d) if there is a will, the original of the will and of any codicils, attached and marked as an exhibit to,

(i) if the will or codicil is not in holograph form,

(A) an affidavit of execution (Form 74D) of the will or codicil,

(B) if the will or codicil contains an alteration, erasure, obliteration or interlineation that has not been attested, an affidavit as to the condition of the will or codicil at the time of execution (Form 74E), or

(C) if each of the witnesses to the will or codicil has died or cannot be found, such other evidence of due execution as the court may require, or

(ii) if the will or codicil is in holograph form, an affidavit attesting that the handwriting and signature in the will or codicil are those of the deceased (Form 74F);

(e) a renunciation in Form 74G, from the following persons:

(i) if there is a will, from every living person who is named in the will or codicil as estate trustee who has not joined in the application and is entitled to do so, or

(ii) if there is no will, from every person who is entitled in priority or is in equal right to be named as estate trustee and who has not joined in the application;

(f) if there is no will, or if there is a will but the applicant is not named as an estate trustee in the will or a codicil, a consent to the applicant's appointment in Form 74G by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

(g) in the case of an application for a certificate of appointment of estate trustee with a will limited to the assets referred to in the will, a draft order in Form 74I granting the certificate of appointment;

(h) any security required by the *Estates Act*; and

(i) such additional or other material as the court directs. O. Reg. 709/21, s. 5; O. Reg. 435/22, s. 1; O. Reg. 520/22, s. 4; O. Reg. 388/23, s. 1.

Notification Requirements

(2) The applicant shall serve the following documents on every person entitled to share in the distribution of the estate, including charities and contingent beneficiaries:

1. The application for a certificate of appointment of estate trustee (Form 74A), including any attachments.

2. If there is a will,

i. in the case of a person entitled only to a specified item of property or a stated or determinable amount of money, a copy of the will and of any codicils, or of the applicable portion of the will or codicils, or

ii. in the case of any other beneficiary, a copy of the will and of any codicils. O. Reg. 709/21, s. 5.

Minors

(3) If a person who is entitled to share in the distribution of the estate is less than 18 years of age, the documents listed in subrule (2) shall not be served

on the person but shall instead be served on a parent or guardian and on the Children's Lawyer. O. Reg. 709/21, s. 5.

Unborn or Unascertained Persons

(4) If there may be unborn or unascertained beneficiaries, the documents listed in subrule (2) shall also be served on the Children's Lawyer. O. Reg. 709/21, s. 5.

Mentally Incapable Person

(5) If a person who is entitled to share in the distribution of the estate is mentally incapable within the meaning of section 6 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, the documents listed in subrule (2) shall also be served on,

(a) if there is a guardian with authority to act in the proceeding, the guardian;

(b) if there is no guardian with authority to act in the proceeding but there is an attorney under a power of attorney with authority to act in the proceeding, the attorney; or

(c) if there is neither a guardian nor an attorney with authority to act in the proceeding, the Public Guardian and Trustee. O. Reg. 709/21, s. 5.

Children's Lawyer, Public Guardian and Trustee

(6) If under subrule (3), (4) or (5), the documents listed in subrule (2) are required to be served on the Children's Lawyer or the Public Guardian and Trustee and there is a will, the applicant will serve, in addition to a copy of the will and of any codicils, a statement of the estimated value of the interest in the estate of the adult described in the application as lacking capacity or the minor, as the case may be, if that value is not disclosed in the application. O. Reg. 709/21, s. 5.

Method of Service

(7) Documents to be served on a person under this rule shall be served by,

(a) personal service;

(b) email, to the last email address for service provided by the person or, if no such email address has been provided, to the person's last known email address; or

(c) mail or courier, to the person's last known address. O. Reg. 709/21, s. 5.

74.05 REVOKED: O. Reg. 709/21, s. 5.

Certificate of Appointment of Foreign Estate Trustee's Nominee as Estate Trustee without a Will

Application

74.05.1 (1) An application for a certificate of appointment of foreign estate trustee's nominee as estate trustee without a will shall be in Form 74J and shall be accompanied by,

(a) a nomination (Form 74K) of the applicant by the estate trustee appointed in the jurisdiction where the deceased was domiciled at the date of death;

(b) a copy of the document appointing the foreign estate trustee, certified under the seal of the court that granted it;

(c) a certificate under the seal of the court that granted the foreign document, issued within a reasonable amount of time before the date of the application and stating that the foreign document remains effective as of the date of the certificate;

(d) the security required by the *Estates Act*; and

(e) such additional or other material as the court directs. O. Reg. 332/96, s. 3; O. Reg. 709/21, s. 6 (1, 2).

Certificate

(2) The certificate of appointment of foreign estate trustee's nominee as estate trustee without a will shall be in Form 74C. O. Reg. 709/21, s. 6 (3).

Certificate of Appointment of Succeeding Estate Trustee with a Will

Application

74.06 (1) An application for a certificate of appointment of estate trustee to succeed an estate trustee with a will or for a certificate of appointment of estate trustee to succeed an estate trustee with a will limited to the assets referred to in the will shall be in Form 74J, and shall be accompanied by,

(a) the original certificate of appointment or, if the original certificate has been lost, a copy of it certified by the court;

(b) a renunciation in Form 74G from every living person who is named in the will or codicil as an estate trustee and who has not joined in the application and is entitled to do so;

(c) if the applicant is not named as an estate trustee in the will or codicil, consent to the application in Form 74G by persons who are entitled to share in the distribution of the remaining estate and who together have a

majority interest in the value of the assets remaining in the estate at the date of the application;

(d) in the case of an application for a certificate of appointment of succeeding estate trustee with a will limited to the assets referred to in the will, a draft order (Form 74I) granting the certificate of appointment;

(e) any security required by the *Estates Act*; and

(f) such additional or other material as the court directs. O. Reg. 709/21, s. 7; O. Reg. 388/23, s. 2.

Certificate

(2) A certificate of appointment of succeeding estate trustee with a will or certificate of appointment of succeeding estate trustee with a will limited to the assets referred to in the will shall be in Form 74C. O. Reg. 709/21, s. 7.

Certificate of Appointment of Succeeding Estate Trustee without a Will

74.07 (1) An application for a certificate of appointment of estate trustee to succeed an estate trustee without a will shall be in Form 74J, and shall be accompanied by,

(a) the original certificate of appointment or, if the original certificate has been lost, a copy of it certified by the court;

(b) consent to the application in Form 74G by persons who are entitled to share in the distribution of the remaining estate and who together have a majority interest in the value of the assets remaining in the estate at the date of the application;

(c) the security required by the *Estates Act*; and

(d) such additional or other material as the court directs. O. Reg. 484/94, s. 12; O. Reg. 709/21, s. 8 (1, 2); O. Reg. 388/23, s. 3.

(2) The certificate of appointment of succeeding estate trustee without a will shall be in Form 74C. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 11; O. Reg. 709/21, s. 8 (3).

Confirmation by Resealing of Appointment of Estate Trustee with or without a Will

74.08 (1) An application for confirmation by resealing of the appointment of an estate trustee with or without a will that was granted by a court of competent jurisdiction in the United Kingdom, in a province or territory of Canada or in any British possession shall be in Form 74J, and shall be accompanied by,

(a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;

(b) the security required by the *Estates Act*; and

(c) such additional or other material as the court directs. O. Reg. 484/94, s. 12; O. Reg. 740/94, s. 2; O. Reg. 653/00, s. 7; O. Reg. 709/21, s. 9 (1).

(2) A confirmation by resealing of the appointment of an estate trustee with or without a will shall be in Form 74C. O. Reg. 484/94, s. 12; O. Reg. 709/21, s. 9 (2).

Certificate of Ancillary Appointment of Estate Trustee with a Will

74.09 (1) An application for a certificate of ancillary appointment of estate trustee with a will where the applicant has been appointed by a court having jurisdiction outside Ontario, other than a jurisdiction referred to in rule 74.08, shall be in Form 74J, and shall be accompanied by,

(a) two certified copies of the document under the seal of the court that granted it;

(b) the security required by the *Estates Act*; and

(c) such additional or other material as the court directs. O. Reg. 484/94, s. 12; O. Reg. 740/94, s. 3; O. Reg. 653/00, s. 8; O. Reg. 709/21, s. 10 (1).

(2) A certificate of ancillary appointment of estate trustee with a will shall be in Form 74C. O. Reg. 709/21, s. 10 (2).

Certificate of Appointment of Estate Trustee during Litigation

74.10 (1) An application for a certificate of appointment of estate trustee during litigation shall be in Form 74J, and shall be accompanied by,

(a) a copy of the order appointing the applicant as estate trustee during litigation;

(b) the security required by the *Estates Act*; and

(c) such additional or other material as the court directs. O. Reg. 484/94, s. 12; O. Reg. 383/21, s. 16; O. Reg. 709/21, s. 11 (1).

(2) A certificate of appointment of estate trustee during litigation shall be in Form 74C. O. Reg. 484/94, s. 12; O. Reg. 383/21, s. 16; O. Reg. 709/21, s. 11 (2).

Bonds

74.11 (1) Unless the court orders otherwise,

(a) the bond required by section 35 of the *Estates Act* shall be the bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance in Ontario (Form 74L) or of one or more personal sureties (Form 74M);

(b) a registrar of the court or a lawyer shall not be a personal surety;

(c) a personal surety must be a resident of Ontario who is not a minor;

(d) one personal surety is sufficient where the value of the assets of the estate does not exceed $100,000;

(e) the security required for a succeeding estate trustee shall be based on the value of the assets of the estate remaining to be administered at the time the application for a certificate of appointment as succeeding estate trustee is made; and

(f) the security required for confirmation by resealing of the appointment of an estate trustee, or for an ancillary appointment of an estate trustee, shall be based on the value of the assets of the estate over which the estate trustee seeks jurisdiction in Ontario. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 13; O. Reg. 575/07, s. 1; O. Reg. 709/21, s. 12.

(2) Any person, including a creditor, who has a contingent or vested interest in an estate may at any time, on notice to the estate trustee or applicant for a certificate of appointment of estate trustee or confirmation of appointment, move for an order to have a bond filed or the amount of an existing bond increased or reduced. O. Reg. 484/94, s. 12; O. Reg. 435/22, s. 2 (1).

Order Dispensing with Bond or Reducing Bond Amount

(3) An applicant for a certificate of appointment of estate trustee or confirmation of appointment may make a motion for an order,

(a) under subsection 37 (2) of the *Estates Act*, dispensing with the requirement to give the bond or reducing the amount of the bond required to be given; or

(b) under subsection 52 (3) of the *Estates Act*, permitting like security to be given covering the assets in Ontario as in the case of an application for a certificate of appointment of estate trustee. O. Reg. 435/22, s. 2 (2).

Procedures

(4) For greater certainty, Rule 37 applies with respect to a motion referred to in subrule (2) or (3). O. Reg. 435/22, s. 2 (2).

Request on Consent

(5) An applicant for a certificate of appointment of estate trustee or confirmation of appointment may, in the following circumstances, request an order referred to in subrule (3) without making a motion by filing the documents listed in subrule (6) together with the application for the certificate or confirmation of the appointment (Form 74A, 74J or 74.1A):

1. The request is made on consent of the persons who are entitled to share in the distribution of the estate.

2. None of the persons entitled to share in the distribution of the estate is,

i. a minor, or

ii. a person who is mentally incapable within the meaning of section 6 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, unless there is a guardian or attorney acting under a power of attorney with authority to act in the proceeding. O. Reg. 435/22, s. 2 (2).

(6) The following documents shall be filed together with the application:

1. A draft order (Form 74I).

2. Consent to the order in Form 74G from each person who is entitled to share in the distribution of the estate.

3. An affidavit (Form 4D) setting out,

i. that the application identifies each of the persons entitled to share in the distribution of the estate and the deceased's last occupation,

ii. the debts of the deceased at the time of death, including any obligations under an order or support agreement, and, in respect of each debt, whether the debt has been paid,

iii. whether the deceased operated a business at the time of death and, if so, whether any debts of that business have been or may be claimed against the estate and a description of each such debt and its amount,

iv. if all the debts of the estate have not been paid,

A. the value of the assets of the estate,

B. the particulars of each debt of the estate, including the debt amount and the name of the creditor, and

C. with respect to each creditor, whether any arrangements have been made with the creditor to pay the debt, and what

security the applicant proposes to put in place in order to protect the creditor,

v. whether the consents required by paragraph 2 are being filed together with the application, and

vi. whether any of the persons entitled to share in the distribution of the estate is,

A. a minor, or

B. a person who is mentally incapable within the meaning of section 6 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding and without a guardian or attorney acting under a power of attorney with authority to act in the proceeding. O. Reg. 435/22, s. 2 (2); O. Reg. 388/23, s. 4.

Procedure on Applications for Certificates of Appointment of Estate Trustees

74.12 (1) If the registrar determines that a will or codicil has been deposited in the Superior Court of Justice that prevents confirmation under clause 16 (c) or (d) of the *Estates Act*, the registrar shall send a copy of the application, together with a notice in Form 74N, to the estate trustee named in the deposited will or codicil by regular lettermail to the last address on record with the court. O. Reg. 690/20, s. 4; O. Reg. 248/21, s. 14; O. Reg. 709/21, s. 13.

(2), (3) Revoked: O. Reg. 690/20, s. 4.

Establishing Date of Execution

(4) If a will is not dated or is dated imperfectly, the date of execution may be established by the evidence of an attesting witness or, where the evidence as to the date of execution cannot be obtained, evidence that the execution took place between two specific dates or that a search has been made and no will that could be of a later date has been found. O. Reg. 484/94, s. 12.

Registrar's Notes

(5) If a judge makes an order voiding a devise or bequest of a beneficial interest under a will or codicil, or declaring that a person named in the application as a person who is entitled to share in the distribution of the estate does not have an interest in the estate, the registrar shall note that fact, and the date on which the order was made, on the certificate of appointment. O. Reg. 435/22, s. 3.

(6) Revoked: O. Reg. 435/22, s. 3.

Deposit Equal to Tax

Deposit Payable at Time of Application

74.13 (1) The deposit equal to tax referred to in the *Estate Administration Tax Act, 1998* shall be paid at the time an application for a certificate of appointment of estate trustee is made. O. Reg. 24/00, s. 14; O. Reg. 383/21, s. 16.

Exception

(2) The court may issue the certificate of appointment where the applicant,

(a) files with the court an affidavit as to the estimated value of the estate at the time of the application and pays the deposit equal to tax calculated on the estimated value; and

(b) provides an undertaking to the court that the applicant will, within six months after giving the undertaking, file a sworn statement of the total value of the estate and pay the additional tax payable if the actual value is higher than the estimated value. O. Reg. 24/00, s. 14.

(3) The court may issue the certificate of appointment without the payment of a deposit equal to tax if the applicant has obtained an order under subsection 4 (1) of the *Estate Administration Tax Act, 1998*. O. Reg. 24/00, s. 14.

(4) Where an undertaking given under subrule (2) is not fulfilled or the terms of an order under subsection 4 (1) of the *Estate Administration Tax Act, 1998* are not complied with, the court may, on the request of the registrar, make an order for compliance. O. Reg. 24/00, s. 14.

Issuance of Certificate of Appointment of Estate Trustee

74.14 (1) The registrar may issue a certificate of appointment of estate trustee (Form 74C),

(a) if the registrar is satisfied that,

(i) issuance is not prevented under section 16 of the *Estates Act*,

(ii) the application for the certificate contains the information, evidence and supporting documentation required by these rules or under any Act, and

(iii) the applicant has met the requirements of subrule 74.13 (1) or (2), or has obtained an order under subsection 4 (1) of the *Estate Administration Tax Act, 1998*; or

(b) if directed to do so by a judge. O. Reg. 690/20, s. 5; O. Reg. 709/21, s. 14 (1).

Request by Registrar

(2) In making a determination for the purposes of clause (1) (a), the registrar may request that the applicant provide to the registrar any required information, or file any required evidence or documentation. O. Reg. 690/20, s. 5.

Refusal

(3) If the registrar is not satisfied that the conditions set out in clause (1) (a) have been met, the registrar shall, subject to subrule (4), refuse to issue the certificate. O. Reg. 690/20, s. 5.

Referral to Judge

(4) The registrar shall refer an application for a certificate of appointment of estate trustee to a judge for determination if, in the registrar's opinion, the application raises an issue that requires determination by a judge. O. Reg. 690/20, s. 5.

Notice of Refusal

(5) If the registrar refuses under subrule (3) to issue the certificate, the registrar shall send a notice in Form 74O to the applicant or the applicant's lawyer by,

(a) regular lettermail to the mailing address shown in the application; or

(b) email to the email address most recently indicated for the applicant or the applicant's lawyer in the applicable court file, if any, or, in the case of a lawyer whose email address is not indicated in the court file, the email address for the lawyer as published on the Law Society of Ontario's website. O. Reg. 690/20, s. 5; O. Reg. 709/21, s. 14 (2); O. Reg. 435/22, s. 4.

Authentication of Certificate of Appointment

74.14.1 Authentication of a certificate of appointment issued under this Rule may be obtained by making a written request to the registrar of the court that issued the certificate of appointment for,

(a) a certificate of grant, to be signed by the registrar, if the authentication is intended for use in Canada; or

(b) an exemplification certificate, to be signed by the registrar and a judge of the court, if the authentication is intended for use outside Canada. O. Reg. 193/15, s. 11.

Confirmation of Estate Trustees

74.14.2 (1) This rule applies if,

(a) there has been a change of estate trustees as a result of,

(i) a devolution of executorship on the death of an estate trustee with a will,

(ii) the death of an estate trustee, if one or more surviving estate trustees continue to be authorized to act, or

(iii) a court order; or

(b) there has been no change of estate trustees. O. Reg. 193/15, s. 11.

(2) Confirmation of the status of a person as an estate trustee may be obtained by making a written request to the registrar of the court that issued the applicable certificate of appointment for a court status certificate providing the confirmation, to be signed by the registrar. O. Reg. 193/15, s. 11.

(3) If the request is for a court status certificate confirming the status of a person as an estate trustee by devolution of executorship on the death of an estate trustee with a will, the request shall be accompanied by,

(a) a copy, certified by the court, of every certificate of appointment of estate trustee issued in relation to that will and not subsequently revoked;

(b) a copy, certified by the court, of every certificate of appointment of estate trustee issued in relation to the deceased estate trustee's will and not subsequently revoked; and

(c) an affidavit setting out the circumstances authorizing the person to act as an estate trustee, with proof of death of the deceased estate trustee attached as an exhibit to the affidavit. O. Reg. 193/15, s. 11.

(4) If the request is for a court status certificate confirming the status of a surviving estate trustee under a certificate of appointment of estate trustee with a will after the death of another estate trustee appointed by the same certificate of appointment, the request shall be accompanied by an affidavit confirming the death of the estate trustee and the circumstances under which the surviving estate trustee continues to be authorized to act, with proof of death of the deceased estate trustee attached as an exhibit to the affidavit. O. Reg. 193/15, s. 11.

(5) If the request is for a court status certificate confirming the person or persons acting as an estate trustee under a certificate of appointment after a court has ordered the appointment, removal or replacement of an estate trustee, the request shall be accompanied by a copy of the order. O. Reg. 193/15, s. 11.

Orders for Assistance

Kinds of Orders

74.15 (1) In addition to a motion under section 9 of the *Estates Act*, any person who appears to have a financial interest in an estate may move,

Order to Accept or Refuse Appointment

(a) for an order requiring any person to accept or refuse an appointment as an estate trustee with a will;

(b) for an order requiring any person to accept or refuse an appointment as an estate trustee without a will;

Order to Consent or Object to Proposed Appointment

(c) for an order requiring any person to consent or object to a proposed appointment of an estate trustee;

Order to File Statement of Assets of the Estate

(d) for an order requiring an estate trustee to file with the court a statement of the nature and value, at the date of death, of each of the assets of the estate to be administered by the estate trustee;

Order for Further Particulars

(e) after receiving the statement described in clause (d), for an order for further particulars by supplementary affidavit or otherwise as the court directs;

Order to Beneficiary Witness

(f) for an order requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator;

Order to Former Spouse

(g) for an order requiring a former spouse of the deceased to take part in a determination under subsection 17 (2) of the *Succession Law Reform Act* of the validity of the appointment of the former spouse as estate trustee, a devise or bequest of a beneficial interest to the former spouse or the conferring of a general or special power of appointment on him or her;

Order to Pass Accounts

(h) for an order requiring an estate trustee to pass accounts; and

Order for Other Matters

(i) for an order providing for any other matter that the court directs. O. Reg. 484/94, s. 12; O. Reg. 248/21, s. 11; O. Reg. 709/21, s. 15 (1-7).

Notice of motion

(2) A motion under subrule (1) may be made without notice, except a motion under clause (1) (e), which requires 10 days notice to the estate trustee. O. Reg. 484/94, s. 12.

Service

(3) An order referred to in subrule (1) and an order for production under section 9 of the *Estates Act* shall be served by personal service, by an alternative to personal service or as the court directs. O. Reg. 484/94, s. 12.

Examination

(4) The court may require any person to be examined under oath for the purpose of deciding a motion under subrule (1). O. Reg. 484/94, s. 12.

Form of Orders

(5) An order under subrule (1) shall be in Form 74I. O. Reg. 709/21, s. 15 (8).

Passing of Estate Accounts

74.16 Rules 74.17 and 74.18 apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally incapable persons, guardians of the property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money. O. Reg. 484/94, s. 12; O. Reg. 69/95, s. 13.

Form of Accounts

74.17 (1) Estate trustees shall keep accurate records of the assets and transactions in the estate and accounts filed with the court shall include,

(a) on a first passing of accounts, a statement of the assets at the date of death, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets;

(b) on any subsequent passing of accounts, a statement of the assets on the date the accounts for the period were opened, cross-referenced to entries in the accounts that show the disposition or partial disposition of the assets, and a statement of the investments, if any, on the date the accounts for the period were opened;

(c) an account of all money received, but excluding investment transactions recorded under clause (e);

(d) an account of all money disbursed, including payments for trustee's compensation and payments made under a court order, but excluding investment transactions recorded under clause (e);

(e) where the estate trustee has made investments, an account setting out,

(i) all money paid out to purchase investments,

(ii) all money received by way of repayments or realization on the investments in whole or in part, and

(iii) the balance of all the investments in the estate at the closing date of the accounts;

(f) a statement of all the assets in the estate that are unrealized at the closing date of the accounts;

(g) a statement of all money and investments in the estate at the closing date of the accounts;

(h) a statement of all the liabilities of the estate, contingent or otherwise, at the closing date of the accounts;

(i) a statement of the compensation claimed by the estate trustee and, where the statement of compensation includes a management fee based on the value of the assets of the estate, a statement setting out the method of determining the value of the assets; and

(j) such other statements and information as the court requires. O. Reg. 484/94, s. 12.

(2) The accounts required by clauses (1) (c), (d) and (e) shall show the balance forward for each account. O. Reg. 484/94, s. 12.

(3) Where a will or trust deals separately with capital and income, the accounts shall be divided to show separately receipts and disbursements in respect of capital and income. O. Reg. 484/94, s. 12.

Application to Pass Accounts

Material to be Filed

74.18 (1) On the application of an estate trustee to pass accounts, the estate trustee shall file,

(a) the estate accounts for the relevant period verified by affidavit of the estate trustee (Form 74.43);

(b) a copy of the certificate of appointment of estate trustee;

(c) a copy of the latest judgment, if any, of the court relating to the passing of accounts. O. Reg. 484/94, s. 12; O. Reg. 383/21, s. 7.

Notice of Application

(2) On receiving the material referred to in subrule (1), the court shall issue a notice of the application to pass accounts (Form 74.44). O. Reg. 484/94, s. 12.

Service

(3) The applicant shall serve, by a method listed in subrule 74.04 (7), the notice of application and a copy of a draft of the judgment sought on each person who has a contingent or vested interest in the estate. O. Reg. 520/22, s. 5 (1).

(3.1) Where the Public Guardian and Trustee or the Children's Lawyer represents a person who has a contingent or vested interest in the estate, the Public Guardian and Trustee or the Children's Lawyer shall be served with the documents referred to in subrules (1) and (3). O. Reg. 377/95, s. 6.

(3.2) Where a person other than the Public Guardian and Trustee acts as an attorney under a continuing power of attorney for property or as a guardian of property for a person under disability who has a contingent or vested interest in the estate, the attorney or guardian shall be served with the documents referred to in subrules (1) and (3). O. Reg. 193/15, s. 12 (1).

(4) Where the person is served in Ontario, the documents shall be served at least 60 days before the hearing date specified in the notice of application. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (1); O. Reg. 193/15, s. 12 (2).

(5) Where the person is served outside Ontario, the documents shall be served at least 75 days before the hearing date specified in the notice of application. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (2); O. Reg. 193/15, s. 12 (3).

Person under Disability or Unknown

(6) If a person referred to in subrule (3) is under disability or is unknown, the court may appoint someone to represent the person on the passing of the accounts if,

(a) neither the Public Guardian and Trustee nor the Children's Lawyer is authorized under any Act to represent the person; and

(b) there is no litigation guardian to act for the person on the passing of the accounts. O. Reg. 193/15, s. 12 (4).

Notice of Objection to Accounts

(7) A person who is served with documents under subrule (3) or (3.2) and who wishes to object to the accounts shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a notice of objection to accounts (Form 74.45). O. Reg. 193/15, s. 12 (4).

Request for Further Notice

(8) A person who is served with documents under subrule (3) or (3.2) and who does not object to the accounts but wishes to receive notice of any further step in the application, including a request for costs or a request for increased costs, shall, at least 35 days before the hearing date specified in the notice of application, serve on the applicant, and file with proof of service, a request for further notice in passing of accounts (Form 74.45.1). O. Reg. 193/15, s. 12 (4).

(8.1) Unless the court orders otherwise, a person who serves and files a request for further notice in passing of accounts is entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material relating to costs under subrule (8.6), (11) or (11.2); and

(d) in the event of a hearing, be heard at the hearing, examine a witness and cross-examine on an affidavit, but with respect only to a request for increased costs under subrule (11). O. Reg. 193/15, s. 12 (4).

No Response

(8.2) Unless the court orders otherwise, a person who is served with documents under subrule (3) or (3.2) but does not serve and file either a notice of objection to accounts or a request for further notice in passing of accounts, is not entitled to,

(a) receive notice of any further step in the application;

(b) receive any further document in the application;

(c) file material on the application; or

(d) in the event of a hearing, be heard at the hearing, examine a witness or cross-examine on an affidavit. O. Reg. 193/15, s. 12 (4).

Response to Application — Public Guardian and Trustee or Children's Lawyer

(8.3) If the Public Guardian and Trustee or the Children's Lawyer is served with documents under subrule (3.1), the Public Guardian and Trustee or the Children's Lawyer, as the case may be, shall, at least 30 days before the hearing date specified in the notice of application, serve on the applicant and file with proof of service,

(a) a notice of objection to accounts (Form 74.45);

(b) a request for further notice in passing of accounts (Form 74.45.1);

(c) a notice of no objection to accounts (Form 74.46); or

(d) a notice of non-participation in passing of accounts (Form 74.46.1). O. Reg. 193/15, s. 12 (4).

Withdrawal of Objection

(8.4) A person who wishes to withdraw a notice of objection to accounts shall, at least 15 days before the hearing date of the application, serve on the applicant, and file with proof of service, a notice of withdrawal of objection (Form 74.48). O. Reg. 193/15, s. 12 (4).

When Hearing not Required

(8.5) An applicant may seek judgment on the passing of accounts without a hearing under subrule (9) if,

(a) no notices of objection to accounts are filed; or

(b) every notice of objection to accounts that was filed is withdrawn before the deadline set out in that subrule. O. Reg. 193/15, s. 12 (4).

Request for Costs

(8.6) Subject to subrule (11), any person served with documents under subrule (3), (3.1) or (3.2) who wishes to seek costs shall, at least 10 days before the hearing date of the application, serve on the applicant a request for costs (Form 74.49 or 74.49.1) and file the request with proof of service. O. Reg. 193/15, s. 12 (4).

Judgment on Passing of Accounts Granted Without Hearing

(9) The court may grant a judgment on passing accounts without a hearing if, at least five days before the hearing date of the application, the applicant files with the court,

(a) a record containing,

(i) proof of service of the documents specified in subrule (3), (3.1) or (3.2) in Form 16B (affidavit of service) or 16B.1 (lawyer's certificate of service),

(ii) the notices of no objection to accounts or notices of non-participation in passing of accounts of the Children's Lawyer and Public Guardian and Trustee, if served,

(iii) an affidavit (Form 74.47) of the applicant or applicant's lawyer stating that a copy of the accounts was provided to each person who was served with the notice of application and requested a copy, that the time for filing notices of objection to accounts has expired and that no notice of objection to accounts was received from any person served, or that, if a notice of objection was received, it was withdrawn as evidenced by a notice of withdrawal of objection (Form 74.48) attached to the affidavit,

(iv) requests (Form 74.49 or 74.49.1), if any, for costs of the persons served,

(iv.1) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2), and

(v) the certificate of a lawyer stating that all documents required by subclauses (i) to (iv.1) are included in the record;

(b) a draft of the judgment sought, in duplicate; and

(c) if the Children's Lawyer or the Public Guardian and Trustee was served with documents under subrule (3.1) and did not serve a notice of non-participation in passing of accounts, a copy of the draft judgment approved by the Children's Lawyer or the Public Guardian and Trustee, as the case may be. O. Reg. 484/94, s. 12; O. Reg. 69/95, ss. 19, 20; O. Reg. 332/96, s. 4 (2, 3); O. Reg. 575/07, s. 1; O. Reg. 193/15, s. 12 (5-9); O. Reg. 520/22, s. 5 (2).

Costs

(10) Where the court grants judgment on passing accounts without a hearing, the costs awarded shall be assessed in accordance with Tariff C, except as provided under subrules (11) to (11.4). O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (10).

Request for Increased Costs

(11) Where the applicant or a person served with documents under subrule (3), (3.1) or (3.2) seeks costs greater than the amount allowed in Tariff C, he or she shall, before the deadline referred to in subrule (11.1), serve on the persons referred to in subrule (11.1),

(a) a request for increased costs (Form 74.49.2 or 74.49.3) specifying the amount of the costs being sought; and

(b) a costs outline (Form 57B). O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (11).

(11.1) Unless the court orders otherwise, the documents referred to in subrule (11) shall be served on the applicant and on the following persons, as applicable, at least 15 days before the hearing date of the application:

1. Every person who has served and filed a notice of objection to accounts in accordance with subrule (7), even if he or she has since withdrawn it.

2. Every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8).

3. The Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (12).

(11.2) Any objection or consent to a request for increased costs shall be made by returning the completed Form 74.49.2 or 74.49.3, as the case may be, to the person making the request so that he or she receives it at least 10 days before the hearing date of the application. O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (13).

(11.3) Where a request for increased costs is served under subrule (11), the person making the request shall, at least five days before the hearing date of the application, file with the court a supplementary record containing,

(a) the documents served under that subrule, together with proof of service of those documents in Form 16B (affidavit of service) or 16B.1 (lawyer's certificate of service); and

(b) an affidavit containing,

(i) a summary of the responses to the request for increased costs received under subrule (11.2), and a list of the persons who failed to respond, and

(ii) the factors that contributed to the increased costs. O. Reg. 55/12, s. 12 (5); O. Reg. 193/15, s. 12 (14); O. Reg. 520/22, s. 5 (3).

Judgment on Increased Costs Granted Without Hearing

(11.4) The court may, on consideration of the documents referred to in subrule (11.3), grant judgment on a request for increased costs without a hearing, and may, for the purpose, order the person making the request to provide any additional information that the court specifies. O. Reg. 55/12, s. 12 (5).

Contested Passing of Accounts (Hearing)

(11.5) If one or more notices of objection to accounts are filed and not withdrawn, the applicant shall, at least 10 days before the hearing date of the application, serve on the persons referred to in subrule (11.6),

(a) a consolidation of all the remaining notices of objection to accounts; and

(b) a reply to notice of objection to accounts (Form 74.49.4). O. Reg. 193/15, s. 12 (15); O. Reg. 72/25, s. 1 (1).

(11.6) The documents referred to in subrule (11.5) shall be served on,

(a) every person who has served and filed a notice of objection to accounts in accordance with subrule (7) and not withdrawn it;

(b) every person who has served and filed a request for further notice in passing of accounts in accordance with subrule (8); and

(c) the Public Guardian and Trustee or Children's Lawyer, as the case may be, if the Public Guardian and Trustee or the Children's Lawyer was served with documents under subrule (3.1) and did not serve and file a notice of non-participation in passing of accounts. O. Reg. 193/15, s. 12 (15).

(11.7) If the application to pass accounts proceeds to a hearing, the applicant shall, at least five days before the hearing date, file with the court a record containing,

(a) the application to pass accounts;

(b) the documents referred to in subrule (11.5) together with proof of service;

(c) any responses to the applicant's reply to notice of objection to accounts by the persons on whom the reply was served;

(d) in the case of any notice of objection to accounts that is withdrawn after the documents referred to in subrule (11.5) were served and filed, a copy of the notice of withdrawal of objection (Form 74.48);

(e) the notices of non-participation in passing of accounts of the Public Guardian and Trustee and the Children's Lawyer, if served;

(f) any requests for further notice in passing of accounts (Form 74.45.1);

(g) any requests for costs (Form 74.49 or 74.49.1) of persons served under subrule (11.5);

(h) any requests for increased costs (Form 74.49.2 or 74.49.3), costs outlines (Form 57B) and responses to requests for increased costs received under subrule (11.2); and

(i) a draft order for directions or of the judgment sought, as the case may be. O. Reg. 193/15, s. 12 (15); O. Reg. 72/25, s. 1 (2).

(11.8) If the applicant and every person referred to under subrule (11.6), as applicable, agree to all of the terms of a draft order, the applicant shall indicate that it is a joint draft order. O. Reg. 193/15, s. 12 (15).

(11.9) If the applicant and every person referred to under subrule (11.6), as applicable, fail to agree to all of the terms of a draft order,

(a) the applicant shall indicate that it is the applicant's draft order; and

(b) any person referred to in clause (11.6) (a) may file an alternative draft order at least three days before the hearing date of the application or, with leave of the court, at the hearing. O. Reg. 193/15, s. 12 (15).

(12) No objection shall be raised at a hearing on a passing of accounts that was not raised in a notice of objection to accounts, unless the court orders otherwise. O. Reg. 484/94, s. 12; O. Reg. 55/12, s. 12 (6).

(13) At the hearing, the court may assess, or refer to an assessment officer, any bill of costs, account or charge of lawyers employed by the applicant or by a person who filed a notice of objection or a request for further notice in passing of accounts. O. Reg. 193/15, s. 12 (16).

Trial may be Directed

(13.1) On the hearing of the application, the court may order that the application or any issue proceed to trial and give such directions as are just, including directions,

(a) respecting the issues to be tried and each party's position on each issue;

(b) respecting the timing and scope of any applicable disclosure;

(c) respecting the witnesses each party intends to call, the issues to be addressed by each witness and the length of each witness' testimony; and

(d) respecting the procedure to be followed at the trial, including methods of adducing evidence. O. Reg. 193/15, s. 12 (17).

Directions regarding mediation

(13.2) In making an order under subrule (13.1), the court may, in addition to giving any direction under that subrule,

(a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

(b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 12 (17).

Form of Judgment

(14) The judgment on a passing of accounts shall be in Form 74.50 or 74.51. O. Reg. 484/94, s. 12.

RULE 74.1 SMALL ESTATES — NON-CONTENTIOUS PROCEEDINGS

Definition, Small Estate

74.1.01 In this Rule,

"small estate" means a small estate within the meaning of the *Estates Act*. O. Reg. 111/21, s. 8; O. Reg. 383/21, s. 8.

Application of Rule

74.1.02 (1) In the case of an estate that is a small estate, a person may apply for a small estate certificate under this Rule, in which case this Rule applies instead of rules 74.04 to 74.10 and 74.14. O. Reg. 383/21, s. 9.

Continued Application of Rule 74

(2) For greater certainty, Rule 74, other than rules 74.04 to 74.10 and 74.14, continues to apply with respect to small estate certificates, amended small estate certificates and applications for either certificate. O. Reg. 383/21, s. 9.

Application for Small Estate Certificate

74.1.03 (1) A person may seek a small estate certificate by filing an application for a small estate certificate (Form 74.1A) together with,

(a) a request to file an application for a small estate certificate or an amended small estate certificate (Form 74.1B);

(b) proof of death;

(c) a draft small estate certificate (Form 74.1C), with a copy of the will, if any, including any codicils, attached to it;

(c.1) any court order directing the issuance of the certificate;

(d) if there is a will, the original of the will and of any codicils, attached and marked as an exhibit to,

(i) if the will or codicil is not in holograph form,

(A) an affidavit of execution (Form 74D) of the will or codicil,

(B) if the will or codicil contains an alteration, erasure, obliteration or interlineation that has not been attested, an affidavit as to the condition of the will or codicil at the time of execution (Form 74E), or

(C) if each of the witnesses to the will or codicil has died or cannot be found, such other evidence of due execution as the court may require, or

(ii) if the will or codicil is in holograph form, an affidavit attesting that the handwriting and signature in the will or codicil are those of the deceased (Form 74F);

(e) any security required by the *Estates Act*; and

(f) such additional or other material as the court directs. O. Reg. 111/21, s. 8; O. Reg. 709/21, s. 16 (1-3); O. Reg. 435/22, s. 5.

Notification of Other Persons Required Before Filing

(2) An application for a small estate certificate may not be filed by a person until at least 30 days after the person has met the requirements of subrules (3) to (7), as applicable. O. Reg. 111/21, s. 8.

Notification Requirements

(3) The applicant shall send or give the following documents to every person entitled to share in the distribution of the estate, including charities and contingent beneficiaries:

1. The application for a small estate certificate (Form 74.1A), including any attachments.

2. If there is a will,

i. in the case of a person entitled only to a specified item of property or a stated or determinable amount of money, a copy of the will and of any codicils, or of the applicable portion of the will or codicil, or

ii. in the case of any other beneficiary, a copy of the will and of any codicils. O. Reg. 709/21, s. 16 (4).

Same, Minor

(4) If a person who is entitled to share in the distribution of the estate is less than 18 years of age, the documents listed in subrule (3) shall not be sent to the person but shall instead be sent or given to a parent or guardian and to the Children's Lawyer. O. Reg. 111/21, s. 8; O. Reg. 248/21, s. 15.

Unborn or Unascertained Persons

(5) If there may be unborn or unascertained beneficiaries, the documents listed in subrule (3) shall be also sent or given to the Children's Lawyer. O. Reg. 111/21, s. 8.

Mentally Incapable Person

(6) If a person who is entitled to share in the distribution of the estate is mentally incapable within the meaning of section 6 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, the documents listed in subrule (3) shall also be sent or given,

(a) if there is a guardian with authority to act in the proceeding, to the guardian;

(b) if there is no guardian with authority to act in the proceeding but there is an attorney under a power of attorney with authority to act in the proceeding, to the attorney; or

(c) if there is neither a guardian nor an attorney with authority to act in the proceeding, to the Public Guardian and Trustee. O. Reg. 111/21, s. 8.

Children's Lawyer, Public Guardian and Trustee

(6.1) If under subrule (4), (5) or (6), the documents listed in subrule (3) are required to be sent or given to the Children's Lawyer or the Public Guardian and Trustee and there is a will, the applicant will send or give, in addition to a copy of the will and of any codicils, a statement of the estimated value of the interest in the estate of the adult described in the application as lacking capacity or the minor, as the case may be, if that value is not disclosed in the application. O. Reg. 709/21, s. 16 (5).

Method of Sending Documents

(7) Documents to be sent to a person under this rule shall be sent to a person either by email to the person's last known email address or by mail or courier to the person's last known address. O. Reg. 709/21, s. 16 (6).

Issuing a Small Estate Certificate

74.1.04 (1) The registrar may issue a small estate certificate in Form 74.1C,

(a) if the registrar is satisfied that,

(i) issuance is not prevented under section 16 of the *Estates Act*,

(ii) the applicant has provided evidence that, as of the date of death, the estate is a small estate,

(iii) the application for the small estate certificate contains the information, evidence and supporting documentation required by these rules or under any Act, and

(iv) the applicant has met the requirements of subrule 74.13 (1) or (2), or has obtained an order under subsection 4 (1) of the *Estate Administration Tax Act, 1998*; or

(b) if directed to do so by a judge. O. Reg. 111/21, s. 8.

Request by Registrar

(2) In making a determination for the purposes of clause (1) (a), the registrar may request that the applicant provide to the registrar any required information, or file any required evidence or documentation. O. Reg. 111/21, s. 8.

Refusal

(3) If the registrar is not satisfied that the conditions set out in clause (1) (a) have been met, the registrar shall, subject to subrule (4), refuse to issue the certificate. O. Reg. 111/21, s. 8.

Referral to Judge

(4) The registrar shall refer an application for a small estate certificate to a judge for determination if, in the registrar's opinion, the application raises an issue that requires determination by a judge. O. Reg. 111/21, s. 8.

Notice of Refusal

(5) If the registrar refuses under subrule (3) to issue the certificate, the registrar shall send a notice in Form 74.1D to the applicant or the applicant's lawyer by,

(a) regular lettermail to the mailing address shown in the application; or

(b) email to the email address most recently indicated for the applicant or the applicant's lawyer in the applicable court file, if any, or, in the case of a lawyer whose email address is not indicated in the court file, the email address for the lawyer as published on the Law Society of Ontario's website. O. Reg. 111/21, s. 8.

Amending a Small Estate Certificate

74.1.05 (1) If, after a small estate certificate is issued, additional assets of the estate are discovered but the estate continues to be a small estate, the estate trustee named in the certificate may seek to obtain an amended small

estate certificate by filing an application to amend the small estate certificate (Form 74.1E), together with,

(a) a request to file an application for a small estate certificate or an amended small estate certificate (Form 74.1B);

(b) a copy of the issued small estate certificate;

(c) a draft amended small estate certificate (Form 74.1F), listing both the assets listed in the small estate certificate and the additional assets;

(d) any security required by the *Estates Act*; and

(e) such additional or other material as the court directs. O. Reg. 111/21, s. 8.

Notification of Other Persons Required Before Filing

(2) Subrules 74.1.03 (2) to (7) apply, with necessary modifications, with respect to the filing of an application for an amended small estate certificate. O. Reg. 111/21, s. 8.

Issuance

(3) Rule 74.1.04 applies, with necessary modifications, with respect to the issuance of an amended small estate certificate. O. Reg. 111/21, s. 8.

Revocation of Original Certificate

(4) A small estate certificate for an estate is deemed to have been revoked on the issuance of an amended small estate certificate for the estate. O. Reg. 111/21, s. 8.

Limit on Further Amendments

(5) An estate trustee who is issued an amended small estate certificate may only seek a further amended small estate certificate on motion to a judge. O. Reg. 111/21, s. 8.

Estate Ceases to be Small Estate

74.1.06 (1) If, after a small estate certificate or amended small estate certificate is issued, additional assets of the estate are discovered and the estate ceases to be a small estate, the estate trustee named in the certificate may make an application for a certificate of appointment of estate trustee under Rule 74. O. Reg. 111/21, s. 8.

Revocation of Small Estate Certificate

(2) A small estate certificate or amended small estate certificate for an estate is deemed to have been revoked on the issuance of a certificate of appointment for the estate under Rule 74. O. Reg. 111/21, s. 8.

Formal Proof of Testamentary Instrument

75.01 An estate trustee or any person appearing to have a financial interest in an estate may make an application under rule 75.06 to have a testamentary instrument that is being put forward as the last will of the deceased proved in such manner as the court directs. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 15.

75.01.1 Revoked: O. Reg. 383/21, s. 10.

Proof of Lost or Destroyed Will

75.02 The validity and contents of a will that has been lost or destroyed may be proved on an application,

(a) by affidavit evidence without appearance, where all persons who have a financial interest in the estate consent to the proof; or

(b) in the manner provided by the court in an order giving directions made under rule 75.06. O. Reg. 484/94, s. 12.

Objection to Issuing Certificate of Appointment

Notice of Objection

75.03 (1) At any time before a certificate of appointment of estate trustee has been issued, any person who appears to have a financial interest in the estate may give notice of an objection by filing with the court a notice of objection (Form 75.1), signed by the person or the person's lawyer, stating the nature of the interest and of the objection. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 16; O. Reg. 575/07, s. 1; O. Reg. 690/20, s. 6.

Expiry, Withdrawal and Removal of Notice of Objection

(2) A notice of objection expires three years after it is filed and may be withdrawn by the person who filed it at any time before a hearing for directions under rule 75.06 in an application for the certificate or may be removed by order of the court. O. Reg. 484/94, s. 12.

Notice to Applicant

(3) Where an application for a certificate of appointment of estate trustee has been made and a notice of objection is filed, the registrar shall send notice of the filing (Form 74O or 74.1D) to the applicant or the applicant's lawyer by,

(a) regular lettermail to the mailing address shown in the application; or

(b) email to the email address most recently indicated for the applicant or the applicant's lawyer in the applicable court file, if any, or, in the case

of a lawyer whose email address is not indicated in the court file, the email address for the lawyer as published on the Law Society of Ontario's website. O. Reg. 72/25, s. 2.

Notice to Objector

(4) An applicant who receives a notice under subrule (3) shall serve on the objector a notice to objector (Form 75.3) and file a copy of the notice and proof of service with the court. O. Reg. 484/94, s. 12.

(5) Where the objector does not serve and file a notice of appearance (Form 75.4) within 20 days after service of the notice to objector, the application shall proceed as if the notice of objection had not been filed. O. Reg. 484/94, s. 12.

Motion for Directions

(6) If the applicant does not move for directions within 30 days after service of the notice of appearance, the objector may move for directions. O. Reg. 484/94, s. 12.

Revocation of Certificate of Appointment

75.04 On the application of any person appearing to have a financial interest in an estate, the court may revoke the certificate of appointment of estate trustee where the court is satisfied that,

(a) the certificate was issued in error or as a result of a fraud on the court;

(b) the appointment is no longer effective; or

(c) the certificate should be revoked for any other reason. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 17; O. Reg. 383/21, s. 11.

Return of Certificate

Motion for Return of Certificate

75.05 (1) The court may, on motion, order that a certificate of appointment be returned to the court where,

(a) the moving party seeks a determination of the validity of the testamentary instrument for which the certificate was issued or of the entitlement of the estate trustee to the certificate; or

(b) an application has been made under rule 75.04. O. Reg. 484/94, s. 12.

Notice

(2) The motion may be made without notice unless the court orders otherwise. O. Reg. 484/94, s. 12.

Effect of Order

(3) On service of the order to return the certificate of appointment, the estate trustee shall forthwith deposit the original certificate with the registrar, and the appointment has no further effect and shall not be acted on until,

(a) the issues referred to in clause (1) (a) or the application referred to in clause (1) (b), as the case may be, have been determined by the court; or

(b) the release of the certificate is ordered under subrule (6). O. Reg. 484/94, s. 12.

Motion for Directions

(4) A party who obtains an order under clause (1) (a) shall move for directions under rule 75.06 within 30 days after the making of the order. O. Reg. 484/94, s. 12.

(5) The estate trustee may at any time move for directions under rule 75.06 for determination by the court of the matters referred to in clause (3) (a). O. Reg. 484/94, s. 12.

Release of Certificate

(6) If a motion for directions referred to in subrule (4) or (5) is not made, the court may, on motion of the estate trustee without notice, order the release to the estate trustee of the certificate of appointment. O. Reg. 484/94, s. 12.

Application or Motion for Directions

75.06 (1) Any person who appears to have a financial interest in an estate may apply for directions, or move for directions in another proceeding under this rule, as to the procedure for bringing any matter before the court. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 18 (1).

Service

(2) An application for directions (Form 75.5) or motion for directions (Form 75.6) shall be served on all persons appearing to have a financial interest in the estate, or as the court directs, at least 10 days before the hearing of the application or motion. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 18 (2).

Order

(3) On an application or motion for directions, the court may direct,

(a) the issues to be decided;

(b) who are parties, who is plaintiff and defendant and who is submitting rights to the court;

(c) who shall be served with the order for directions, and the method and times of service;

(d) procedures for bringing the matter before the court in a summary fashion, where appropriate;

(e) that the plaintiff file and serve a statement of claim (Form 75.7);

(f) that an estate trustee be appointed during litigation, and file such security as the court directs;

(f.1) Revoked: O. Reg. 193/15, s. 13 (1).

(g) such other procedures as are just. O. Reg. 484/94, s. 12; O. Reg. 290/99, s. 1; O. Reg. 193/15, s. 13 (1).

Same, mediation

(3.1) On an application or motion for directions, the court may, in addition to giving any direction under subrule (3),

(a) give any direction that may be given under subrule 75.1.05 (4), in the case of a proceeding that is subject to Rule 75.1 (mandatory mediation); or

(b) in the case of a proceeding that is not subject to Rule 75.1, order that a mediation session be conducted in accordance with Rule 75.2, and, for the purpose, give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 13 (2).

(4) An order giving directions shall be in Form 75.8. O. Reg. 484/94, s. 12; O. Reg. 709/21, s. 17.

Procedure where Statement of Claim Served

Defendant: Statement of Defence, Statement of Defence and Counterclaim or Submission of Rights to Court

75.07 (1) Where a statement of claim is delivered as directed under subrule 75.06 (3), each defendant served may serve on each party and file with proof of service,

(a) a statement of defence or a statement of defence and counterclaim; or

(b) a statement of submission of rights to the court (Form 75.10). O. Reg. 484/94, s. 12.

Plaintiff: Reply or Reply and Defence to Counterclaim

(2) A plaintiff may deliver a reply or a reply and defence to counterclaim. O. Reg. 484/94, s. 12.

(3) Revoked: O. Reg. 740/94, s. 5.

Effect of Failure to File Pleadings

(4) A person who is served with a statement of claim and who does not file a statement of defence, a statement of defence and counterclaim or a statement of submission of rights to the court is not a party to the proceeding and his or her consent to any settlement, agreement or consent judgment is not required. O. Reg. 484/94, s. 12.

Submission of Rights to Court

75.07.1 Where a person files a statement of submission of rights to the court in response to service of a statement of claim or on a motion or application for directions,

(a) the person is not a party to the proceeding and is entitled only to service by the plaintiff of written notice of the time and place of the trial and a copy of the judgment disposing of the matter;

(b) the person is not entitled to costs in the proceeding and is not liable for costs, except indirectly to the extent that costs are ordered to be paid out of the estate; and

(c) a judgment on consent following settlement shall not be given without,

(i) the written consent of the person, or

(ii) an affidavit of a lawyer of record in the proceeding attesting that a notice of settlement (Form 75.11), appended as an exhibit to the affidavit, has been personally served on the person and no rejection of settlement (Form 75.12) has been filed with the court within 10 days after service of the notice. O. Reg. 740/94, s. 6; O. Reg. 575/07, s. 32.

Claims against an Estate

Notice of Contestation of Claim

75.08 (1) A notice of contestation of a claim under section 44 or 45 of the *Estates Act* shall be in Form 75.13. O. Reg. 484/94, s. 12.

Claims

(2) A claim made against an estate under section 44 or 45 of the *Estates Act* shall be in Form 75.14. O. Reg. 484/94, s. 12.

Service

(3) The claimant shall serve the claim on the estate trustee and file the claim and the notice of contestation, with proof of service, within 30 days after service of the notice of contestation on the claimant. O. Reg. 484/94, s. 12.

Date of Trial

(4) When the claim and notice of contestation are filed, the registrar shall fix a date for trial. O. Reg. 484/94, s. 12.

Manner of Trial

(5) The trial shall proceed in a summary manner unless the judge considers it appropriate to give directions as to the issues, parties and pleadings. O. Reg. 484/94, s. 12.

Lawyer of Record

75.09 (1) The lawyer who takes any of the following steps on a party's behalf is the party's lawyer of record:

1. Filing a notice of objection under rule 75.03.
2. Moving for return of a certificate under rule 75.05.
3. Moving for directions under rule 75.06. O. Reg. 484/94, s. 12; O. Reg. 575/07, s. 33.

(2) Rule 15.02 applies, with necessary modifications, as if the notice or motion were an originating process. O. Reg. 484/94, s. 12.

RULE 75.1 MANDATORY MEDIATION — ESTATES, TRUSTS AND SUBSTITUTE DECISIONS

75.1.01 REVOKED: O. Reg. 132/04, s. 13.

Scope

75.1.02 (1) This Rule applies to proceedings,

(a) that are commenced in,

(i) the City of Toronto on or after September 1, 1999,

(ii) REVOKED: O. Reg. 193/15, s. 14 (1).

(iii) the City of Ottawa on or after January 1, 2001, or

(iv) the County of Essex on or after January 1, 2005; and

(b) to which any of the following applies,

(i) rule 74.18 (application to pass accounts), if the application is contested,

(ii) rule 75.01 (formal proof of testamentary instrument), 75.03 (objection to issuing certificate of appointment), 75.05 (return of certificate) or 75.08 (claims against an estate),

(iii) Part V of the *Succession Law Reform Act*,

(iv) the *Substitute Decisions Act, 1992*,

(v) the *Absentees Act*, the *Charities Accounting Act*, the *Estates Act*, the *Trustee Act* or the *Variation of Trusts Act*,

(vi) subrule 14.05 (3), if the matters at issue relate to an estate or trust, or

(vii) subsection 5 (2) of the *Family Law Act*. O. Reg. 290/99, s. 2; O. Reg. 132/04, s. 14; O. Reg. 193/15, s. 14 (1); O. Reg. 111/21, s. 10; O. Reg. 383/21, s. 12.

(2) The fact that an estate or trust is a party to a proceeding, by virtue of an order to continue under Rule 11 or otherwise, is not sufficient to bring the proceeding under this Rule. O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 14 (2).

Definitions

75.1.03 In this Rule,

"designated party" means a party whom an order under clause 74.18 (13.2) (a) or 75.06 (3.1) (a) or subrule 75.1.05 (4) requires to attend a mediation session; ("partie désignée")

"list", when used in reference to a county, means the list maintained for the county under subrule 24.1.08 (1); ("liste")

"mediation co-ordinator", when used in reference to a county, means the person designated as mediation co-ordinator for the county under rule 24.1.06. ("coordonnateur de la médiation") O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 15; O. Reg. 526/21, s. 3.

Exemption from Mediation

75.1.04 The court may make an order, on a party's motion or of its own motion, exempting the proceeding from this Rule. O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 16.

Directions for Conduct of Mediation

Motion for Directions

75.1.05 (1) The applicant shall make a motion, in the same way as under rule 75.06, seeking directions respecting the conduct of a mediation to which this Rule applies. O. Reg. 193/15, s. 17 (1).

(2) The notice of motion shall be served within 30 days after the last day for serving a notice of appearance. O. Reg. 290/99, s. 2.

(3) The motion may be combined with a motion under rule 75.06. O. Reg. 290/99, s. 2.

Exception

(3.1) Subrule (1) does not apply if the court has already given directions for the conduct of the mediation under clause 74.18 (13.2) (a) or 75.06 (3.1) (a), unless the court orders otherwise. O. Reg. 193/15, s. 17 (2).

Directions

(4) On the hearing of the motion under this rule, the court may direct,

(a) the issues to be mediated;

(b) who has carriage of the mediation and who shall respond;

(c) within what times the mediation session shall take place;

(d) which parties are required to attend the mediation session, the method of attendance and the manner of service;

(e) whether notice is to be given to parties submitting their rights to the court under rule 75.07.1;

(f) how the cost of the mediation is to be apportioned among the designated parties; and

(g) any other matter that may be desirable to facilitate the mediation. O. Reg. 290/99, s. 2; O. Reg. 526/21, s. 4.

(5), (6) REVOKED: O. Reg. 193/15, s. 17 (3).

Mediators

75.1.06 (1) A mediation under this rule shall be conducted by,

(a) a person chosen from the list for the county by the agreement of the designated parties;

(b) a person assigned from the list by the mediation co-ordinator for the county, at the request of a designated party; or

(c) a person who is not named on the list, if the designated parties consent. O. Reg. 290/99, s. 2.

(2) Every person who conducts a mediation under subrule (1), whether named on the list or not, is required to comply with this Rule. O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 18.

Choice of Mediator

75.1.07 (1) Within 30 days after an order giving directions is made under clause 74.18 (13.2) (a) or 75.06 (3.1) (a) or subrule 75.1.05 (4), the designated parties shall choose a mediator under subrule 75.1.06 (1). O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 19 (1).

(2) When a mediator has been chosen, the party with carriage of the mediation shall give the mediator a copy of the order giving directions. O. Reg. 290/99, s. 2.

(3) If the designated parties have not chosen a mediator by the end of the 30-day period, the party with carriage of the mediation shall immediately file with the mediation co-ordinator for the county a request for the assignment of a mediator (Form 75.1A). O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 19 (2).

(4) A copy of the order giving directions shall be attached to the request. O. Reg. 290/99, s. 2.

(5) On receiving the request, the mediation co-ordinator shall immediately assign a mediator from the list and give the mediator a copy of the order giving directions. O. Reg. 290/99, s. 2.

(6) If the party with carriage of the mediation fails to file a request, any designated party may file the request. O. Reg. 290/99, s. 2.

(7) The mediator shall, immediately on being chosen or assigned, fix a date for the mediation session and shall, at least 20 days before that date, serve on every designated party a notice (Form 75.1B) stating the place, date and time of the session and the method of attendance and advising that attendance is obligatory. O. Reg. 290/99, s. 2; O. Reg. 526/21, s. 5.

Procedure before Mediation Session

Statement of Issues

75.1.08 (1) At least seven days before the mediation session, every designated party shall prepare a statement in Form 75.1C and provide a copy to every other designated party and to the mediator. O. Reg. 290/99, s. 2.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. O. Reg. 290/99, s. 2.

(3) The party making the statement shall attach to it any documents that the party considers of central importance in the proceeding. O. Reg. 290/99, s. 2.

Non-Compliance

(4) If it is not practical to conduct a mediation session because a designated party fails to comply with subrule (1), the mediator shall cancel the session

and immediately file with the court a certificate of non-compliance (Form 75.1D). O. Reg. 290/99, s. 2.

Attendance at Mediation Session

Who is Required to Attend

75.1.09 (1) The designated parties, and their lawyers if the designated parties are represented, are required to attend the mediation session. O. Reg. 290/99, s. 2.

Authority to Settle

(2) A designated party who requires another person's approval before agreeing to a settlement shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours. O. Reg. 290/99, s. 2.

Failure to Attend

(3) If it is not practical to conduct a scheduled mediation session because a designated party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the court a certificate of non-compliance (Form 75.1D). O. Reg. 290/99, s. 2.

Remedy for Non-Compliance

75.1.10 (1) If a certificate of non-compliance is filed, the party with carriage of the mediation shall, within 15 days after the date fixed for the mediation session that was cancelled, bring a motion for further directions before a judge, except in the City of Ottawa where the motion shall be brought before an associate judge. O. Reg. 193/15, s. 20; O. Reg. 383/21, s. 15.

(1.1) If the party fails to bring the motion within that time, any other designated party may, within 30 days after the date fixed for the mediation session that was cancelled, bring the motion. O. Reg. 193/15, s. 20.

(2) The judge or associate judge may require the designated parties to appear before him or her and may,

(a) establish a timetable for the proceeding;

(b) strike out any document filed by a designated party;

(c) order a designated party to pay costs; or

(d) make any other order that is just. O. Reg. 290/99, s. 2; O. Reg. 438/08, s. 66; O. Reg. 383/21, s. 15.

Confidentiality

75.1.11 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions. O. Reg. 290/99, s. 2.

Outcome of Mediation

Mediator's Report

75.1.12 (1) Within 10 days after the mediation is concluded, the mediator shall give the mediation co-ordinator for the county and the designated parties a report on the mediation. O. Reg. 290/99, s. 2.

(2) The mediation co-ordinator may remove from the list the name of a mediator who does not comply with subrule (1). O. Reg. 290/99, s. 2.

Agreement

(3) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the designated parties or their lawyers. O. Reg. 290/99, s. 2.

(4) If the agreement resolves all the issues in dispute, the party with carriage of the mediation shall file a notice to that effect with the court,

(a) in the case of an unconditional agreement, within 10 days after the agreement is signed;

(b) in the case of a conditional agreement, within 10 days after the condition is satisfied. O. Reg. 290/99, s. 2.

(5) Despite subrule (4), if rule 7.08 (person under disability, approval of settlement) also applies to the agreement, the notice shall be filed within 10 days after the event mentioned in clause (4) (a) or (b), or within 10 days after the agreement is approved, whichever is later. O. Reg. 290/99, s. 2.

Failure to Comply with Signed Agreement

(6) If a party to a signed agreement fails to comply with its terms, any other party to the agreement may,

(a) make a motion to a judge for judgment in the terms of the agreement, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no agreement. O. Reg. 290/99, s. 2.

No Agreement

(7) If no agreement is reached that resolves all the issues in dispute, the matter shall proceed in accordance with any directions given under subrule 74.18 (13.1) or rule 75.06. O. Reg. 193/15, s. 21.

(8) Except in a contested passing of accounts under rule 74.18, if no directions have been given, a motion for directions under rule 75.06 shall be made as soon as possible by any of the designated parties. O. Reg. 193/15, s. 21.

Consent Order for Additional Mediation Session

75.1.13 (1) With the consent of the designated parties, the court may, at any stage in the proceeding, make an order requiring them to participate in an additional mediation session. O. Reg. 290/99, s. 2.

(2) The court may include any necessary directions in the order. O. Reg. 290/99, s. 2.

(3) Rules 75.1.07 to 75.1.12 apply in respect of the additional session, with necessary modifications. O. Reg. 290/99, s. 2.

75.1.14 REVOKED: O. Reg. 132/04, s. 17.

RULE 75.2 COURT-ORDERED ESTATES MEDIATION

Application

75.2.01 This Rule applies to proceedings for which the court gives direction under clause 74.18 (13.2) (b) or 75.06 (3.1) (b) that a mediation session be conducted. O. Reg. 193/15, s. 22; O. Reg. 111/21, s. 11; O. Reg. 383/21, s. 13.

Definition

75.2.02 In this Rule,

"designated party" means a party whom an order under clause 74.18 (13.2) (b) or 75.06 (3.1) (b) or subrule 75.2.03 (4) requires to attend a mediation session. O. Reg. 193/15, s. 22; O. Reg. 526/21, s. 6.

Directions for Conduct of Mediation

Motion for Directions

75.2.03 (1) The applicant shall make a motion, in the same way as under rule 75.06, seeking directions respecting the conduct of a mediation to which this Rule applies. O. Reg. 193/15, s. 22.

(2) The motion may be combined with a motion under rule 75.06. O. Reg. 193/15, s. 22.

Exception

(3) Subrule (1) does not apply if the court has already given directions for the conduct of the mediation under clause 74.18 (13.2) (b) or 75.06 (3.1) (b), unless the court orders otherwise. O. Reg. 193/15, s. 22.

Directions

(4) On the hearing of the motion under this rule, the court may give any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 22.

Mediator

75.2.04 (1) A mediation under this Rule shall be conducted by a person agreed to by the designated parties, subject to subrule (2). O. Reg. 193/15, s. 22.

(2) If the designated parties have not chosen a mediator within 30 days after an order giving directions is made under clause 74.18 (13.2) (b) or 75.06 (3.1) (b) or subrule 75.2.03 (4), as the case may be, the court shall, on motion by a designated party, assign a mediator on such terms as may be agreed to by the designated parties or ordered by the court. O. Reg. 193/15, s. 22.

(3) A mediator shall not be assigned under subrule (2) without his or her prior consent. O. Reg. 193/15, s. 22.

(4) Every person who is chosen or assigned to conduct a mediation under this Rule is required to comply with this Rule. O. Reg. 193/15, s. 22.

Procedure before Mediation Session

Statement of Issues

75.2.05 (1) At least seven days before the mediation session, every designated party shall prepare a statement in Form 75.1C and provide a copy to every other designated party and to the mediator. O. Reg. 193/15, s. 22.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. O. Reg. 193/15, s. 22.

(3) The party making the statement shall attach to it any documents that the party considers of central importance in the proceeding. O. Reg. 193/15, s. 22.

Non-Compliance

(4) If it is not practical to conduct a mediation session because a designated party fails to comply with subrule (1), the mediator shall cancel the session and immediately file with the court a certificate of non-compliance (Form 75.1D). O. Reg. 193/15, s. 22.

Attendance at Mediation Session

Who is Required to Attend

75.2.06 (1) The designated parties, and their lawyers if the designated parties are represented, are required to attend the mediation session. O. Reg. 193/15, s. 22.

Authority to Settle

(2) A designated party who requires another person's approval before agreeing to a settlement shall, before the mediation session, arrange to have ready telephone access to the other person throughout the session, whether it takes place during or after regular business hours. O. Reg. 193/15, s. 22.

Failure to Attend

(3) If it is not practical to conduct a scheduled mediation session because a designated party fails to attend within the first 30 minutes of the time appointed for the commencement of the session, the mediator shall cancel the session and immediately file with the court a certificate of non-compliance (Form 75.1D). O. Reg. 193/15, s. 22.

Remedy for Non-Compliance

75.2.07 (1) If a certificate of non-compliance is filed, the applicant shall, within 15 days after the date fixed for the mediation session that was cancelled, bring a motion for further directions. O. Reg. 193/15, s. 22.

(2) If the applicant fails to bring the motion within that time, any other designated party may, within 30 days after the date fixed for the mediation session that was cancelled, bring the motion. O. Reg. 193/15, s. 22.

(3) The court hearing the motion may require the designated parties to appear before the court and may,

(a) establish a timetable for the proceeding;

(b) strike out any document filed by a designated party;

(c) order a designated party to pay costs; or

(d) make any other order that is just. O. Reg. 193/15, s. 22.

Confidentiality

75.2.08 All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions. O. Reg. 193/15, s. 22.

Outcome of Mediation

Mediator's Report

75.2.09 (1) The mediator shall give the designated parties a report on the mediation within 10 days after the mediation is concluded. O. Reg. 193/15, s.

22.

(2) The applicant shall file the report with the court within 10 days after receiving it from the mediator. O. Reg. 193/15, s. 22.

Agreement

(3) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the designated parties or their lawyers. O. Reg. 193/15, s. 22.

(4) If the agreement resolves all the issues in dispute, the applicant or another designated party agreed to by the designated parties shall file a notice to that effect with the court,

(a) in the case of an unconditional agreement, within 10 days after the agreement is signed;

(b) in the case of a conditional agreement, within 10 days after the condition is satisfied. O. Reg. 193/15, s. 22.

(5) Despite subrule (4), if rule 7.08 (person under disability, approval of settlement) also applies to the agreement, the notice shall be filed within 10 days after the event mentioned in clause (4) (a) or (b), or within 10 days after the agreement is approved, whichever is later. O. Reg. 193/15, s. 22.

Failure to Comply with Signed Agreement

(6) If a party to a signed agreement fails to comply with its terms, any other party to the agreement may,

(a) make a motion to a judge for judgment in the terms of the agreement, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no agreement. O. Reg. 193/15, s. 22.

No Agreement

(7) If no agreement is reached that resolves all the issues in dispute, the matter shall proceed in accordance with any directions given under subrule 74.18 (13.1) or rule 75.06. O. Reg. 193/15, s. 22.

(8) Except in a contested passing of accounts under rule 74.18, if no directions have been given, a motion for directions under rule 75.06 shall be made as soon as possible by any of the designated parties. O. Reg. 193/15, s. 22.

Consent Order for Additional Mediation Session

75.2.10 (1) With the consent of the designated parties, the court may, at any stage in the proceeding, make an order requiring them to participate in an additional mediation session. O. Reg. 193/15, s. 22.

(2) The court may include any necessary directions in the order. O. Reg. 193/15, s. 22.

(3) Rules 75.2.04 to 75.2.09 apply in respect of the additional session, with necessary modifications. O. Reg. 193/15, s. 22.

RULE 76 SIMPLIFIED PROCEDURE

Application of Rule

76.01 (1) The simplified procedure set out in this Rule does not apply to,

(a) actions under the *Class Proceedings Act, 1992*;

(b) actions under the *Construction Act*, except trust claims;

(c) actions commenced or continued under the simplified procedure set out in this Rule that are subsequently assigned for case management under rule 77.05;

(d) actions in respect of which a jury notice is delivered in accordance with subrule 76.02.1 (2). O. Reg. 19/03, s. 20; O. Reg. 131/04, s. 18; O. Reg. 537/18, s. 11; O. Reg. 344/19, s. 2.

Application of Other Rules

(2) The rules that apply to an action apply to an action that is proceeding under this Rule, unless this Rule provides otherwise. O. Reg. 284/01, s. 25.

Availability of Simplified Procedure

When Mandatory

76.02 (1) The procedure set out in this Rule shall be used in an action if the following conditions are satisfied:

1. The plaintiff's claim is exclusively for one or more of the following:

   i. Money.

   ii. Real property.

   iii. Personal property.

2. The total of the following amounts is $200,000 or less exclusive of interest and costs:

   i. The amount of money claimed, if any.

   ii. The fair market value of any real property and of any personal property, as at the date the action is commenced. O. Reg. 284/01,

s. 25; O. Reg. 438/08, s. 51 (1); O. Reg. 344/19, s. 3 (1).

(2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff's claim, considered separately, meets the requirements of subrule (1). O. Reg. 284/01, s. 25.

(2.1) If there are two or more defendants, the procedure set out in this Rule shall be used if the plaintiff's claim against each defendant, considered separately, meets the requirements of subrule (1). O. Reg. 132/04, s. 18 (1).

When Optional

(3) The procedure set out in this Rule may be used in any other action at the option of the plaintiff, subject to subrules (4) to (9). O. Reg. 284/01, s. 25.

Originating Process

(4) The statement of claim (Form 14A, 14B or 14D) or notice of action (Form 14C) shall indicate that the action is being brought under this Rule. O. Reg. 284/01, s. 25.

Action Continues to Proceed Under Rule

(5) An action commenced under this Rule continues to proceed under this Rule unless,

(a) the defendant objects in the statement of defence to the action proceeding under this Rule because the plaintiff's claim does not comply with subrule (1), and the plaintiff does not abandon in the reply the claims or parts of claims that do not comply;

(b) a defendant by counterclaim, crossclaim or third party claim objects in the statement of defence to the counterclaim, crossclaim or third party claim proceeding under this Rule because the counterclaim, crossclaim or third party claim does not comply with subrule (1), and the defendant does not abandon in the reply to the counterclaim, crossclaim or third party claim the claims or parts of claims that do not comply;

(c) the defendant makes a counterclaim, crossclaim or third party claim that does not comply with subrule (1) and states in the defendant's pleading that the counterclaim, crossclaim or third party claim is to proceed under the ordinary procedure;

(d) the action is assigned for case management under rule 77.05; or

(e) any party to the action delivers a jury notice in accordance with subrule 76.02.1 (2). O. Reg. 284/01, s. 25; O. Reg. 14/04, s. 39 (1); O. Reg. 344/19, s. 3 (2).

Continuance Under Ordinary Procedure — Where Notice Required

(6) If an action commenced under this Rule may no longer proceed under this Rule because of an amendment to the pleadings under Rule 26 or as a result of the operation of subrule (5),

(a) the action is continued under the ordinary procedure; and

(b) the plaintiff shall deliver, after all the pleadings have been delivered or at the time of amending the pleadings, as the case may be, a notice (Form 76A) stating that the action and any related proceedings are continued as an ordinary action. O. Reg. 284/01, s. 25; O. Reg. 14/04, s. 39 (2); O. Reg. 438/08, s. 51 (2).

Continuance Under Simplified Procedure — Where Notice Required

(7) An action that was not commenced under this Rule, or that was commenced under this Rule but continued under the ordinary procedure, is continued under this Rule if,

(a) the consent of all the parties is filed;

(b) no consent is filed but,

(i) the plaintiff's pleading is amended under Rule 26 to comply with subrule (1), and

(ii) all other claims, counterclaims, crossclaims and third party claims comply with this Rule; or

(c) a jury notice delivered in accordance with subrule 76.02.1 (2) is struck out. O. Reg. 263/03, s. 9; O. Reg. 14/04, s. 39 (3); O. Reg. 132/04, s. 18 (2); O. Reg. 344/19, s. 3 (3).

(8) The plaintiff shall deliver a notice (Form 76A) stating that the action and any related proceedings are continued under this Rule. O. Reg. 284/01, s. 25.

Effect of Abandonment

(9) A party who abandons a claim or part of a claim or amends a pleading so that the claim, counterclaim, crossclaim or third party claim complies with subrule (1) may not bring the claim or part in any other proceeding. O. Reg. 284/01, s. 25.

Jury Trial not Available

76.02.1 (1) An action that is proceeding under this Rule shall not be tried with a jury and, subject to subrule (2), no party to the action may deliver a jury notice under rule 47.01. O. Reg. 344/19, s. 4.

(2) A party to an action that is proceeding under this Rule may deliver a jury notice under rule 47.01 if the action involves a claim for relief arising from one of the following:

1. Slander.
2. Libel.
3. Malicious arrest.
4. Malicious prosecution.
5. False imprisonment. O. Reg. 344/19, s. 4.

(3) If a jury notice is delivered in accordance with subrule (2), the action may no longer proceed under this Rule and the party delivering the jury notice shall deliver a notice (Form 76A) stating that the action and any related proceedings are continued as an ordinary action. O. Reg. 344/19, s. 4.

Affidavit of Documents

Copies of Documents

76.03 (1) A party to an action under this Rule shall, within 10 days after the close of pleadings and at the party's own expense, serve on every other party,

(a) an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power; and

(b) copies of the documents referred to in Schedule A of the affidavit of documents. O. Reg. 284/01, s. 25; O. Reg. 206/02, s. 19; O. Reg. 438/08, s. 52.

List of Potential Witnesses

(2) The affidavit of documents shall include a list of the names and addresses of persons who might reasonably be expected to have knowledge of matters in issue in the action, unless the court orders otherwise. O. Reg. 284/01, s. 25.

Effect of Failure to Disclose

(3) At the trial of the action, a party may not call as a witness a person whose name has not been disclosed in the party's affidavit of documents or any supplementary affidavit of documents, unless the court orders otherwise. O. Reg. 284/01, s. 25.

Lawyer's Certificate

(4) The lawyer's certificate under subrule 30.03 (4) (full disclosure in affidavit) shall include a statement that the lawyer has explained to the deponent the necessity of complying with subrules (1) and (2). O. Reg. 284/01, s. 25.

No Written Discovery, Cross-Examination on an Affidavit or Examination of a Witness

76.04 (1) The following are not permitted in an action under this Rule:

1. Examination for discovery by written questions and answers under Rule 35.

2. Cross-examination of a deponent on an affidavit under rule 39.02.

3. Examination of a witness on a motion under rule 39.03. O. Reg. 438/08, s. 53.

Limitation on Oral Discovery

(2) Despite rule 31.05.1 (time limit on discovery), no party shall, in conducting oral examinations for discovery in relation to an action proceeding under this Rule, exceed a total of three hours of examination, regardless of the number of parties or other persons to be examined. O. Reg. 438/08, s. 53; O. Reg. 344/19, s. 5.

Motions

Motion Form

76.05 (1) The moving party shall serve a motion form (Form 76B) in accordance with rule 37.07 and shall submit it to the court before the motion is brought and heard. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 54.

Place of In-Person Hearings

(2) If the motion is to be heard in person, it shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the parties agree otherwise or the court orders otherwise. O. Reg. 689/20, s. 48.

Materials

(3) Depending on the practical requirements of the situation, the motion may be made with or without supporting material or a motion record. O. Reg. 689/20, s. 48.

Motions Dealt with by Registrar

(4) When a motion described in subrule (5) meets one of the following conditions, the registrar shall make an order granting the relief sought:

1. The motion is for an order on consent, the consent of all parties is filed and the consent states that no party affected by the order is under disability.

2. No responding material is filed and the notice of motion or the motion form states that no party affected by the order is under disability. O. Reg. 284/01, s. 25.

(5) Subrule (4) applies to a motion for,

(a) amendment of a pleading or notice of motion;

(b) addition, deletion or substitution of a party whose consent is filed;

(c) removal of a lawyer as lawyer of record;

(d) setting aside the noting of a party in default;

(e) setting aside a default judgment;

(f) discharge of a certificate of pending litigation;

(g) security for costs in a specified amount; or

(h) dismissal of a proceeding with or without costs. O. Reg. 284/01, s. 25; O. Reg. 575/07, s. 34.

Disposition

(6) The court or registrar shall record the disposition of the motion on the motion form. O. Reg. 284/01, s. 25.

(7) No formal order is required unless,

(a) the court or registrar orders otherwise;

(b) an appeal is made to a judge; or

(c) an appeal or motion for leave to appeal is made to an appellate court. O. Reg. 284/01, s. 25.

76.06, 76.07 REVOKED: O. Reg. 438/08, s. 55.

Settlement Discussion and Documentary Disclosure

76.08 Within 60 days after the filing of the first statement of defence or notice of intent to defend, the parties shall, in a meeting or telephone call, consider whether,

(a) all documents relevant to any matter in issue have been disclosed; and

(b) settlement of any or all issues is possible. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 56.

How Defended Action is Set Down for Trial or Summary Trial

Notice of Readiness for Pre-Trial Conference

76.09 (1) Despite rule 48.02 (how action set down for trial), the plaintiff shall, within 180 days after the first statement of defence or notice of intent to defend is filed, set the action down for trial by serving a notice of readiness for pre-trial conference (Form 76C) on every party to the action and any counterclaim, crossclaim or third party claim and forthwith filing the notice with proof of service. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 57.

(2) If the plaintiff does not act under subrule (1), any other party may do so. O. Reg. 284/01, s. 25.

Certificate

(3) The party who sets the action down for trial shall certify in the notice of readiness for pre-trial conference that there was a settlement discussion. O. Reg. 284/01, s. 25.

Expert Affidavits

76.09.1 (1) A party who intends to call expert evidence at the trial of the action shall comply with rule 53.03. O. Reg. 344/19, s. 6; O. Reg. 18/22, s. 11 (1).

(2) An expert's report served under rule 53.03 shall be appended to an affidavit of the expert in which the expert adopts the report for the purpose of giving it as evidence in the action. O. Reg. 344/19, s. 6; O. Reg. 18/22, s. 11 (2).

Pre-Trial Conference

Notice

76.10 (1) A pre-trial conference shall be scheduled in accordance with rule 50.02. O. Reg. 344/19, s. 7 (1).

Parties' Proposed Trial Management Plan

(2) At least 30 days before the pre-trial conference, the parties shall agree to a proposed trial management plan that contains the following:

1. A list of every witness, including every expert witness, whose evidence a party intends to adduce at trial.

2. A division of time between the parties, the total of which shall not exceed five days, that sets out the allotted times for each party for,

   i. opening statement,

   ii. the presentation of evidence in chief by affidavit and under rule 31.11,

   iii. cross-examination of deponents,

iv. re-examination of any deponents who are cross-examined, and

v. oral argument. O. Reg. 344/19, s. 7 (2).

(3) REVOKED: O. Reg. 438/08, s. 58 (1).

Documents

(4) Despite rule 50.04 (pre-trial conference brief), at least five days before the pre-trial conference, each party shall,

(a) file,

(0.i) a copy of the parties' proposed trial management plan,

(i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,

(ii) a copy of any expert affidavit, other than a supplementary expert affidavit, and

(iii) any other material necessary for the conference; and

(b) deliver,

(i) a statement, not exceeding three pages, setting out the issues and the party's position with respect to them,

(ii) a trial management checklist (Form 76D), and

(iii) if any of the parties intends to seek an order granting separate hearings under rule 6.1.01, the filing party's position on proceeding by way of separate hearings. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 58 (2); O. Reg. 344/19, s. 7 (3-5); O. Reg. 18/22, s. 12 (1); O. Reg. 175/24, s. 5.

Trial Planning

(5) The pre-trial conference judge or associate judge shall,

(a) fix the number of witnesses, other than expert witnesses, whose evidence each party may adduce at trial;

(b) fix dates for the delivery of any witness affidavits, including any outstanding expert affidavits;

(c) REVOKED: O. Reg. 18/22, s. 12 (2).

(d) approve the parties' proposed trial management plan, with any changes to the order or time of presentation, or any other changes, that the pre-trial conference judge or associate judge may specify, subject to the requirement that the duration of the trial not exceed five days; and

(e) make such other order as the judge or associate judge considers necessary or advisable with respect to the conduct of the proceeding. O. Reg. 344/19, s. 7 (6); O. Reg. 383/21, s. 14, 15; O. Reg. 18/22, s. 12 (2).

(6), (7) REVOKED: O. Reg. 344/19, s. 7 (7).

Trial

Trial List

76.11 (1) This subrule, as it read on March 30, 2022, continues to apply to an action that was set down for trial before March 31, 2022. O. Reg. 18/22, s. 13.

Trial Record

(2) At least 10 days before the date fixed for trial, the party who set the action down for trial shall serve a trial record on every party to the action and any counterclaim, crossclaim or third party claim, and file the record with proof of service. O. Reg. 284/01, s. 25.

(3) REVOKED: O. Reg. 344/19, s. 8 (1).

(4) The trial record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the pleadings, including those relating to any counterclaim, crossclaim or third party claim;

(c) a copy of any demand or order for particulars of a pleading and the particulars delivered in response;

(d) a copy of any order respecting the trial, including a copy of the trial management plan approved by the pre-trial conference judge or associate judge;

(e) a copy of all the affidavits, including any expert affidavits, served by all the parties for use at trial; and

(f) a certificate stating that the trial record contains the documents described in clauses (a) to (e) signed by,

(i) the lawyer of the party filing the trial record, or

(ii) if the party filing the trial record is acting in person, the party. O. Reg. 284/01, s. 25; O. Reg. 575/07, s. 1; O. Reg. 344/19, s. 8 (2,

3); O. Reg. 383/21, s. 15.

Summary Trial

Procedure

76.12 (1) A trial of an action under this Rule shall proceed as follows, subject to the trial management plan approved under clause 76.10 (5) (d):

1. Before the presentation of evidence, each party may make an opening statement.

2. The plaintiff may adduce evidence, including any expert evidence, by affidavit and under rule 31.11.

3. A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.

4. The plaintiff may conduct a re-examination of any deponent who is cross-examined under this subrule.

5. When any cross-examinations and re-examinations of the plaintiff's deponents are concluded, the defendant may adduce evidence, including any expert evidence, by affidavit and under rule 31.11.

6. A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.

7. A defendant may conduct a re-examination of any deponent who is cross-examined under this subrule.

8. When any cross-examinations and re-examinations of the defendant's deponents are concluded, the plaintiff may, with leave of the trial judge, adduce any proper reply evidence.

9. After the presentation of evidence, each party may make oral argument. O. Reg. 344/19, s. 9 (1).

(2) The trial judge may vary a time set out in the approved trial management plan, subject to the requirement that the duration of the trial not exceed five days. O. Reg. 344/19, s. 9 (1).

(3) A party who intends to examine or cross-examine the deponent of an affidavit at the trial shall, at least 10 days before the date fixed for trial, give notice of that intention to the party who filed the affidavit, who shall arrange for the deponent's attendance at the trial. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 59 (2); O. Reg. 344/19, s. 9 (2).

Judgment after Trial

(4) The judge shall grant judgment after the conclusion of the trial. O. Reg. 344/19, s. 9 (3).

Limits on Costs and Disbursements Awards

Limits

76.12.1 (1) Except as provided for under rule 76.13 or an Act, no party to an action under this Rule may recover costs exceeding $50,000 or disbursements exceeding $25,000, exclusive of harmonized sales tax (HST). O. Reg. 344/19, s. 10.

Transition

(2) Subrule (1) does not apply in the case of an action that was commenced before January 1, 2020. O. Reg. 344/19, s. 10.

Costs Consequences

Opting In

76.13 (1) Regardless of the outcome of the action, if this Rule applies as the result of amendment of the pleadings under subrule 76.02 (7), the party whose pleadings are amended shall pay, on a substantial indemnity basis, the costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise. O. Reg. 284/01, s. 25; O. Reg. 132/04, s. 19 (1).

Plaintiff Denied Costs

(2) Subrules (3) to (10) apply to a plaintiff who obtains a judgment that satisfies the following conditions:

1. The judgment awards exclusively one or more of the following:

   i. Money.

   ii. Real property.

   iii. Personal property.

2. The total of the following amounts is $200,000 or less, exclusive of interest and costs:

   i. The amount of money awarded, if any.

   ii. The fair market value of any real property and of any personal property awarded, as at the date the action is commenced. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 60 (1); O. Reg. 344/19, s. 11 (1).

(3) The plaintiff shall not recover any costs unless,

(a) the action was proceeding under this Rule at the commencement of the trial; or

(b) the court is satisfied that it was reasonable for the plaintiff,

(i) to have commenced and continued the action under the ordinary procedure, or

(ii) to have allowed the action to be continued under the ordinary procedure by not abandoning claims or parts of claims that do not comply with subrule 76.02 (1), (2) or (2.1). O. Reg. 206/02, s. 20; O. Reg. 132/04, s. 19 (2); O. Reg. 438/08, s. 60 (2).

(4) Subrule (3) applies despite subrule 49.10 (1) (plaintiff's offer to settle). O. Reg. 284/01, s. 25.

(5) Subrule (3) does not apply if this Rule was unavailable because of the counterclaim, crossclaim or third party claim of another party. O. Reg. 284/01, s. 25.

Plaintiff may be Ordered to Pay Defendant's Costs

(6) The plaintiff may, in the trial judge's discretion, be ordered to pay all or part of the defendant's costs, including substantial indemnity costs, in addition to any costs the plaintiff is required to pay under subrule 49.10 (2) (defendant's offer to settle). O. Reg. 284/01, s. 25.

Defendant Objecting to Simplified Procedure

(7) In an action that includes a claim for real or personal property, if the defendant objected to proceeding under this Rule on the ground that the property's fair market value exceeded $200,000 at the date the action was commenced and the court finds the value did not exceed that amount at that date, the defendant shall pay, on a substantial indemnity basis, the costs incurred by the plaintiff that would not have been incurred had the claim originally complied with subrule 76.02 (1), (2) or (2.1), unless the court orders otherwise. O. Reg. 284/01, s. 25; O. Reg. 132/04, s. 19 (3); O. Reg. 438/08, s. 60 (3); O. Reg. 344/19, s. 11 (2).

Burden of Proof

(8) The burden of proving that the fair market value of the real or personal property at the date of commencement of the action was $200,000 or less is on the plaintiff. O. Reg. 284/01, s. 25; O. Reg. 438/08, s. 60 (4); O. Reg. 344/19, s. 11 (3).

Counterclaims, Crossclaims and Third Party Claims

(9) Subrules (1) to (8) apply, with necessary modifications, to counterclaims, crossclaims and third party claims. O. Reg. 284/01, s. 25.

Transition

(10) In the case of an action that was commenced on or after January 1, 2002 and before January 1, 2010, subrules (2), (7) and (8) apply as if "$200,000" read "$50,000". O. Reg. 344/19, s. 11 (4).

(11) In the case of an action that was commenced on or after January 1, 2010 and before January 1, 2020, subrules (2), (7) and (8) apply as if "$200,000" read "$100,000". O. Reg. 344/19, s. 11 (4).

Transition — Jury Trials

76.14 Clauses 76.01 (1) (d), 76.02 (5) (e) and 76.02 (7) (c) and rule 76.02.1 do not apply to an action in respect of which a jury notice has been delivered before January 1, 2020. O. Reg. 344/19, s. 12.

RULE 77 CIVIL CASE MANAGEMENT

Purpose and General Principles

Purpose

77.01 (1) The purpose of this Rule is to establish a case management system that provides case management only of those proceedings for which a need for the court's intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule. O. Reg. 438/08, s. 64.

General Principles

(2) This Rule shall be construed in accordance with the following principles:

1. Despite the application of case management under this Rule to a proceeding, the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties.

2. The nature and extent of the case management provided by a judge or associate judge under this Rule in respect of a proceeding shall be informed by any relevant practices, traditions, customs or judicial resource issues that apply locally in the region in which the proceeding is commenced or to which it is transferred. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

Application

Scope

77.02 (1) This Rule applies to actions and applications commenced in or transferred to one of the following counties on or after January 1, 2010 and assigned to case management by an order under these rules:

1. The City of Ottawa.
2. The City of Toronto.
3. The County of Essex. O. Reg. 438/08, s. 64.

Exceptions

(2) Despite subrule (1), this Rule does not apply to,

(a) actions or applications placed on the Commercial List established by practice direction in the Toronto Region;

(a.1) applications under Rule 2.2 (Vexatious Litigant Orders);

(b) actions or applications under Rule 74, 74.1 or 75 (Estates);

(c) applications for the removal or replacement of personal representatives under the *Trustee Act*;

(d) applications under Part V of the *Succession Law Reform Act*;

(e) applications for guardianship of property or persons under the *Substitute Decisions Act, 1992*;

(f) actions under Rule 64 (Mortgage Actions);

(g) actions under Rule 76 (Simplified Procedure);

(h) actions or applications under the *Construction Act*, except trust claims; and

(i) actions or applications under the *Bankruptcy and Insolvency Act* (Canada). O. Reg. 438/08, s. 64; O. Reg. 537/18, s. 12; O. Reg. 111/21, s. 12; O. Reg. 322/24, s. 7.

Exceptions, Class Proceedings Act, 1992

(3) Despite subrule (1), this Rule,

(a) applies to an action or application commenced under the *Class Proceedings Act, 1992* only if certification as a class proceeding has been denied; and

(b) does not apply to actions or applications certified as class proceedings under the *Class Proceedings Act, 1992*. O. Reg. 438/08, s. 64.

Conflict with Other Rules

(4) In the event of a conflict between a provision in this Rule and a provision in any other Rule, the provision in this Rule prevails. O. Reg. 438/08, s. 64.

Definitions

77.03 In this Rule,

"defence" includes a notice of intent to defend, a statement of defence, a notice of appearance and a notice of motion in response to a proceeding; ("défense")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur") O. Reg. 438/08, s. 64.

Case Management Powers

77.04 (1) A judge or associate judge may,

(a) extend or abridge a time prescribed by an order or the rules;

(b) adjourn a case conference;

(c) set aside an order made by the registrar;

(d) establish or amend a timetable; and

(e) make orders, impose terms, give directions and award costs as necessary to carry out the purpose of this Rule. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

(2) A judge or associate judge may, on his or her own initiative, require the parties to appear before him or her or to participate in a conference call to deal with any matter arising in connection with the case management of the proceeding, including a failure to comply with an order or the rules. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

(3) For greater certainty, the powers set out in subrules (1) and (2) are in addition to any other powers set out in this Rule. O. Reg. 438/08, s. 64.

Assignment for Case Management

On Consent of Parties

77.05 (1) A regional senior judge or, subject to the direction of a regional senior judge, any judge or associate judge may, with the consent of all parties, assign a proceeding to which this Rule may apply for case management under this Rule. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

No Consent

(2) At any time on or after the filing of the first defence in a proceeding to which this Rule may apply, a regional senior judge or, subject to the direction

of a regional senior judge, any judge or associate judge may assign the proceeding for case management under this Rule,

(a) on his or her own initiative; or

(b) on the request of a party or on motion if the court requires it. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

Multiple Proceedings

(3) Two or more proceedings may be assigned under subrule (1) or (2) for case management together. O. Reg. 438/08, s. 64.

Criteria

(4) In considering whether to assign a proceeding for case management, the regional senior judge, other judge or associate judge shall have regard to all the relevant circumstances, including any or all of the following:

1. The purpose set out in subrule 77.01 (1).

2. The complexity of the issues of fact or law.

3. The importance to the public of the issues of fact or law.

4. The number and type of parties or prospective parties, and whether they are represented.

5. The number of proceedings involving the same or similar parties or causes of action.

6. The amount of intervention by the court that the proceeding is likely to require.

7. The time required for discovery, if applicable, and for preparation for trial or hearing.

8. In the case of an action, the number of expert witnesses and other witnesses.

9. The time required for the trial or hearing.

10. Whether there has been substantial delay in the conduct of the proceeding. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

Assignment to Individual Management by a Judge

Assignment to Particular Judge

77.06 (1) The Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge, or a judge designated by any of them may direct that all steps in a proceeding that is assigned for case management

under this Rule be heard and conducted by a particular judge. O. Reg. 438/08, s. 64.

Limitation

(2) A judge who is directed under subrule (1) to hear all steps in a proceeding shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties. O. Reg. 438/08, s. 64.

Motions

To Whom Made

77.07 (1) A motion may be made only to a judge or associate judge. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

Same, Particular Judge

(2) If a direction is made under subrule 77.06 (1) for all steps in a proceeding to be heard by a particular judge, then any motions in the proceeding shall be made to that judge. O. Reg. 438/08, s. 64.

Referral by Particular Judge

(3) A judge who is directed under subrule 77.06 (1) to hear all steps in a proceeding may refer to an associate judge any motion within the jurisdiction of an associate judge under subrule 37.02 (2), unless the judge who made the direction directs otherwise. O. Reg. 438/08, s. 64; O. Reg. 711/20, s. 5; O. Reg. 383/21, s. 15.

Materials

(4) Depending on the practical requirements of the situation, the motion may be made with or without supporting material or a motion record. O. Reg. 689/20, s. 49.

Costs on Motion

(5) The judge or associate judge shall address the issue of costs at the conclusion of each motion in accordance with rule 57.03, regardless of whether the motion is contested. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

Formal Order Not Required

(6) The judge or associate judge may provide that no formal order need be prepared, issued or entered if the order has been recorded in writing, unless an appeal of the disposition of the motion or a motion for leave to appeal is made to a judge or an appellate court. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15; O. Reg. 12/24, s. 10.

Case Conference

77.08 A judge or associate judge may at any time, on his or her own initiative or at a party's request, convene a case conference under rule 50.13. O. Reg. 170/14, s. 23; O. Reg. 383/21, s. 15.

Transition

Definition

77.09 (1) In this rule,

"former case management rules" means one or both of Rule 77 and Rule 78, as they read immediately before January 1, 2010. O. Reg. 438/08, s. 64.

Proceedings Under Former Case Management Rules

(2) Despite anything to the contrary in this Rule, every proceeding to which the former case management rules applied immediately before January 1, 2010 shall, on and after that day, continue under this Rule. O. Reg. 438/08, s. 64.

Power to Make Orders, Give Directions

(3) A judge or associate judge may make orders or give directions that are necessary to address any procedural issues that arise in a proceeding as a result of the transition from the application of the former case management rules to the proceeding to the application of this Rule. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

Existing Orders, Directions, Timetables

(4) All orders, directions and timetables in a proceeding described in subrule (2) that are in force immediately before January 1, 2010 shall remain in force on and after that day, unless a judge or associate judge orders otherwise. O. Reg. 438/08, s. 64; O. Reg. 383/21, s. 15.

RULE 78 REVOKED: R.R.O. 1990, REG. 194, R. 78.14 (AS AMENDED BY O. REG. 198/05, S. 9; O. REG. 438/05, S. 65).

TABLE OF FORMS

Form Number	Form Title	Date of Form
1A	Notice of Objection to Proposed Method of Attendance	September 1, 2020

2.1A	Request for Stay or Dismissal Under Rule 2.1	May 1, 2025
2.1B	Notice that Proceeding (or Motion) May be Stayed or Dismissed Under Rule 2.1	June 1, 2024
2.2A	Notice of Motion for Vexatious Litigant Order	June 1, 2024
2.2B	Notice of Application for Vexatious Litigant Order	June 1, 2024
2.2C	Registrar’s Notice Proposing Consideration of Vexatious Litigant Order	June 1, 2024
2.2D	Response from Potential Subject of Vexatious Litigant Order	June 1, 2024
2.2E	Reply Respecting Potential Vexatious Litigant Order	June 1, 2024
2.2F	Order Following Initial Review Under Rule 2.2	June 1, 2024
2.2G	Vexatious Litigant Order	June 1, 2024
4A	General Heading of Documents — Actions	November 1, 2005
4B	General Heading of Documents — Applications	April 11, 2012
4C	Backsheet	September 1, 2020
4D	Affidavit	February 1, 2021
4E	Requisition	July 1, 2007
4F	Notice of Constitutional Question	February 1, 2021

7A	Notice of Required Affidavit of Litigation Guardian	May 1, 2025
7B	Request for Identification of Litigation Guardian	May 1, 2025
7C	Order to Continue (Minor Reaching Age of Majority)	May 1, 2025
8A	Notice to Alleged Partner	July 1, 2007
11A	Order to Continue (Transfer or Transmission of Interest)	November 1, 2005
14A	Statement of Claim (General)	June 9, 2014
14B	Statement of Claim (Mortgage Action — Foreclosure)	June 9, 2014
14C	Notice of Action	June 9, 2014
14D	Statement of Claim (Action Commenced by Notice of Action)	July 1, 2007
14E	Notice of Application	September 1, 2020
14E.1	Notice of Application under Subsection 140 (3) of the ***Courts Of Justice Act***	January 23, 2014
14F	Information for Court Use	May 1, 2025
15A	Notice of Change of Lawyer	July 1, 2007
15B	Notice of Appointment of Lawyer	July 1, 2007
15C	Notice of Intention to Act in Person	February 1, 2021
16A	Acknowledgment of Receipt Card	November 1, 2005

16B	Affidavit of Service	February 1, 2021
16B.1	Lawyer’s Certificate of Service	August 1, 2022
16C	Sheriff’s Certificate of Service	August 1, 2022
17A	Request for Service Abroad of Judicial or Extrajudicial Documents	November 1, 2005
17B	Summary of the Document to be Served	November 1, 2005
17C	Notice and Summary of Document	November 1, 2005
18A	Statement of Defence	July 1, 2007
18B	Notice of Intent to Defend	July 1, 2007
19A	Default Judgment (Debt or Liquidated Demand)	November 1, 2005
19B	Default Judgment (Recovery of Possession of Land)	November 1, 2005
19C	Default Judgment (Recovery of Possession of Personal Property)	November 1, 2005
19D	Requisition for Default Judgment	July 1, 2007
22A	Special Case	July 1, 2007
23A	Notice of Discontinuance	July 1, 2007
23B	Notice of Election to Proceed with Counterclaim	July 1, 2007
23C	Notice of Withdrawal of Defence	July 1, 2007
24.1A	Notice of Name of Mediator and Date of Session	February 1, 2021

24.1B	Notice by Assigned Mediator	May 3, 2021
24.1C	Statement of Issues	February 1, 2021
24.1D	Certificate of Non-Compliance	February 1, 2021
25A	Reply	July 1, 2007
27A	Counterclaim (Against Parties to Main Action Only)	July 1, 2007
27B	Counterclaim (Against Plaintiff and Person not Already Party to Main Action)	July 1, 2007
27C	Defence to Counterclaim	July 1, 2007
27D	Reply to Defence to Counterclaim	July 1, 2007
28A	Crossclaim	July 1, 2007
28B	Defence to Crossclaim	July 1, 2007
28C	Reply to Defence to Crossclaim	July 1, 2007
29A	Third Party Claim	July 1, 2007
29B	Third Party Defence	July 1, 2007
29C	Reply to Third Party Defence	July 1, 2007
30A	Affidavit of Documents (Individual)	September 1, 2020
30B	Affidavit of Documents (Corporation or Partnership)	September 1, 2020
30C	Request to Inspect Documents	July 1, 2007
34A	Notice of Examination	May 3, 2021
34B	Summons to Witness (Examination out of Court)	May 3, 2021

34C	Commission	November 1, 2005
34D	Letter of Request	November 1, 2005
34E	Order for Commission and Letter of Request	January 2, 2024
35A	Questions on Written Examination for Discovery	July 1, 2007
35B	Answers on Written Examination for Discovery	February 1, 2021
37A	Notice of Motion	September 1, 2020
37B	Confirmation of Motion	May 15, 2024
37C	Refusals and Undertakings Chart	February 1, 2021
38A	Notice of Appearance	July 1, 2007
38B	Confirmation of Application	May 15, 2024
42A	Certificate of Pending Litigation	November 1, 2005
43A	Interpleader Order — General	January 2, 2024
44A	Bond — Interim Recovery of Personal Property	November 1, 2005
47A	Jury Notice	July 1, 2007
48D	Order Dismissing Action for Delay	November 1, 2016
49A	Offer to Settle	July 1, 2007

49B	Notice of Withdrawal of Offer	July 1, 2007
49C	Acceptance of Offer	July 1, 2007
49D	Offer to Contribute	July 1, 2007
49E	Terms of Partial Settlement Agreement	March 1, 2025
50A	Certificate of Readiness	November 8, 2021
51A	Request to Admit	July 1, 2007
51B	Response to Request to Admit	July 1, 2007
53	Acknowledgment of Expert’s Duty	September 1, 2024
53A	Summons to Witness (at Hearing)	September 1, 2020
53B	Warrant for Arrest (Defaulting Witness)	November 1, 2005
53C	Summons to a Witness Outside Ontario	May 3, 2021
53D	Order for Attendance of Witness in Custody	January 2, 2024
55A	Notice of Hearing for Directions	January 2, 2024
55B	Notice to Party Added on Reference	September 1, 2020
55C	Report on Reference (Administration of Estate)	November 1, 2005
55D	Notice of Contested Claim	September 1, 2020
55E	Notice to Creditor	April 11, 2012

55F	Conditions of Sale	July 1, 2007
55G	Interim Report on Sale	November 1, 2005
56A	Order for Security for Costs	January 2, 2024
57A	Bill of Costs	November 1, 2005
57B	Costs Outline	July 1, 2007
58A	Notice of Appointment for Assessment of Costs	September 1, 2020
58B	Notice to Deliver a Bill of Costs for Assessment	September 1, 2020
58C	Certificate of Assessment of Costs	November 1, 2005
59A	Order	January 2, 2024
59B	Judgment	January 2, 2024
59C	Order on Appeal	January 2, 2024
59D	Notice of Appointment to Settle Order	January 2, 2024
60A	Writ of Seizure and Sale	May 1, 2025
60B	Writ of Sequestration	November 1, 2005
60C	Writ of Possession	November 1, 2005
60D	Writ of Delivery	November 1, 2005

60E	Request to Renew	May 1, 2025
60F	Direction to Enforce Writ of Seizure and Sale	November 1, 2005
60G	Requisition for Garnishment	November 1, 2005
60G.1	Requisition for Renewal of Garnishment	November 1, 2005
60H	Notice of Garnishment	May 1, 2025
60H.1	Notice of Renewal of Garnishment	May 1, 2025
60I	Garnishee’s Statement	November 1, 2005
60I.1	Notice to Co-owner of the Debt	April 11, 2012
60J	Notice of Termination of Garnishment	July 1, 2007
60K	Warrant for Arrest (Contempt)	November 1, 2005
60L	Warrant of Committal	November 1, 2005
60M	Notice of Claim	July 1, 2007
60N	Sheriff’s Report	July 1, 2007
60O	Request to Withdraw a Writ	November 1, 2005
61A	Notice of Appeal to the Court of Appeal	February 1, 2021
61A.1	Notice of Appeal to the Divisional Court	February 1, 2021
61B	General Heading in Proceedings in Appellate Courts	November 1, 2005

61C	Appellant’s Certificate Respecting Evidence	February 1, 2021
61D	Respondent’s Certificate Respecting Evidence	February 1, 2021
61E	Notice of Cross-Appeal	February 1, 2021
61F	Supplementary Notice of Appeal or Cross-Appeal	July 1, 2007
61G	Notice of Listing for Hearing (Appeal)	September 1, 2020
61H	Certificate of Completeness of Appeal Book and Compendium	July 1, 2007
61I	Order Dismissing Appeal or Cross-Appeal for Delay	November 1, 2016
61I.1	Order Dismissing Appeal to Divisional Court for Delay	September 1, 2018
61J	Order Dismissing Motion for Leave to Appeal for Delay	July 30, 2009
61J.1	Order Dismissing Motion for Delay	July 30, 2009
61K	Notice of Abandonment of Appeal or Cross-Appeal	July 1, 2007
61L	Notice of Election to Proceed with Cross-Appeal	July 1, 2007
62A	Notice of Appeal to a Judge	September 1, 2020
63A	Certificate of Stay	November 1, 2005
63B	Certificate of Stay	January 2, 2024

64A	Request to Redeem	September 1, 2020
64B	Default Judgment for Foreclosure with a Reference	April 1, 2021
64C	Default Judgment for Immediate Foreclosure	November 1, 2005
64D	Default Judgment for Foreclosure without a Reference	July 1, 2007
64E	Final Order of Foreclosure	January 2, 2024
64F	Request for Sale	September 1, 2020
64G	Default Judgment for Sale with a Redemption Period (Action Converted from Foreclosure to Sale)	April 1, 2021
64H	Default Judgment for Immediate Sale (Action Converted from Foreclosure to Sale)	April 1, 2021
64I	Default Judgment for Sale Conditional on Proof of Claim (Action Converted from Foreclosure to Sale)	April 1, 2021
64J	Default Judgment for Immediate Sale	April 1, 2021
64K	Default Judgment for Sale with a Redemption Period	April 1, 2021
64L	Final Order for Sale	January 2, 2024
64M	Default Judgment for Redemption	April 1, 2021
64N	Notice of Reference to Subsequent Encumbrancer Added on Reference	September 1, 2020

64O	Notice of Reference to Subsequent Encumbrancer Named as Original Party	September 1, 2020
64P	Notice of Reference to Original Defendants	September 1, 2020
64Q	Notice to Added Defendant Having Interest in Equity	September 1, 2020
65A	Judgment for Administration of Estate	January 2, 2024
66A	Judgment for Partition or Sale	January 2, 2024
68A	Notice of Application to Divisional Court for Judicial Review	September 1, 2020
68B	Notice of Listing for Hearing (Judicial Review)	September 1, 2020
68C	Order Dismissing Application for Judicial Review	July 30, 2009
68D	Order Dismissing Application for Judicial Review for Delay	September 1, 2018
72A	Notice of Payment into Court	July 1, 2007
72B	Affidavit (Motion for Payment Out of Court)	September 1, 2020
72C	Stop Order	January 2, 2024
73A	Notice of Application for Registration of United Kingdom Judgment	January 2, 2024
74A	Application for a Certificate of Appointment of Estate Trustee	January 1, 2025
74B	Affidavit of Service of Application for a Certificate of Appointment of Estate Trustee	January 1, 2025

74B.1	Lawyer’s Certificate of Service of Application for a Certificate of Appointment of Estate Trustee	May 1, 2025
74C	Certificate of Appointment of Estate Trustee	February 1, 2022
74D	Affidavit of Execution of Will or Codicil	February 1, 2022
74E	Affidavit of Condition of Will or Codicil	February 1, 2022
74F	Affidavit Regarding a Holograph Will or Codicil	November 1, 2023
74G	Renunciation and Consent	November 1, 2023
74H	Consent	September 1, 2021
74I	Order in an Estates Proceeding	January 2, 2024
74J	Application for Certificate or Confirmation of Appointment	January 1, 2025
74K	Nomination of Applicant by Foreign Estate Trustee	September 1, 2021
74L	Bond — Insurance or Guarantee Company	September 1, 2021
74M	Bond — Personal Sureties	September 1, 2021
74N	Registrar’s Notice to Estate Trustee Named in a Will or Codicil Deposited with the Court	September 1, 2021
74O	Registrar’s Notice to Applicant in an Application for a Certificate of Appointment of Estate Trustee	January 1, 2025

74P	Request for Notice of Commencement of Proceeding	September 1, 2021
74.43	Affidavit Verifying Estate Accounts	September 1, 2020
74.44	Notice of Application to Pass Accounts	August 1, 2022
74.45	Notice of Objection to Accounts	July 1, 2007
74.45.1	Request for Further Notice in Passing of Accounts	May 1, 2017
74.46	Notice of No Objection to Accounts	July 1, 2007
74.46.1	Notice of Non-Participation in Passing of Accounts	July 1, 2007
74.47	Affidavit in Support of Unopposed Judgment on Passing of Accounts	September 1, 2020
74.48	Notice of Withdrawal of Objection	July 1, 2007
74.49	Request for Costs (Person other than Children’s Lawyer or Public Guardian and Trustee)	July 1, 2007
74.49.1	Request for Costs (Children’s Lawyer or Public Guardian and Trustee)	July 1, 2007
74.49.2	Request for Increased Costs (Estate Trustee)	August 1, 2022
74.49.3	Request for Increased Costs (Person other than Estate Trustee)	August 1, 2022
74.49.4	Reply to Notice of Objection to Accounts	February 1, 2015
74.50	Judgment on Unopposed Passing of Accounts	January 2, 2024

74.51	Judgment on Contested Passing of Accounts	January 2, 2024
74.1A	Application for a Small Estate Certificate (Estate Valued at $150,000 or Less)	January 1, 2025
74.1B	Request to File an Application for a Small Estate Certificate or an Amended Small Estate Certificate	January 1, 2025
74.1C	Small Estate Certificate	February 1, 2022
74.1D	Registrar’s Notice to Applicant in an Application for a Small Estate Certificate or Amended Small Estate Certificate	January 1, 2025
74.1E	Application to Amend Small Estate Certificate	September 1, 2021
74.1F	Amended Small Estate Certificate	February 1, 2022
75.1	Notice of Objection	September 1, 2021
75.3	Notice to Objector	November 1, 2020
75.4	Notice of Appearance	November 1, 2020
75.5	Notice of Application for Directions	September 1, 2020
75.6	Notice of Motion for Directions	September 1, 2020
75.7	Statement of Claim Pursuant to Order Giving Directions	January 2, 2024
75.8	Order Giving Directions	January 2, 2024

75.10	Statement of Submission of Rights to the Court	July 1, 2007
75.11	Notice of Settlement	July 1, 2007
75.12	Rejection of Settlement	July 1, 2007
75.13	Notice of Contestation	July 1, 2007
75.14	Claim Against Estate	February 1, 2021
75.1A	Request for Assignment of Mediator	February 1, 2021
75.1B	Notice by Mediator	January 2, 2024
75.1C	Statement of Issues	February 1, 2021
75.1D	Certificate of Non-Compliance	February 1, 2021
76A	Notice Whether Action under Rule 76	February 1, 2021
76B	Simplified Procedure Motion Form	January 2, 2024
76C	Notice of Readiness for Pre-Trial Conference	February 1, 2021
76D	Trial Management Checklist	May 1, 2019

O. Reg. 575/07, s. 36; O. Reg. 55/08, s. 10; O. Reg. 438/08, s. 67; O. Reg. 394/09, s. 32; O. Reg. 186/10, s. 6; O. Reg. 55/12, s. 13; O. Reg. 43/14, s. 22; O. Reg. 170/14, s. 24; O. Reg. 259/14, s. 11; O. Reg. 193/15, s. 23 (1, 5, 6, 8); O. Reg. 193/15, s. 23; O. Reg. 147/16, s. 1; O. Reg. 281/16, s. 8; O. Reg. 487/16, s. 14; O. Reg. 82/17, s. 20; O. Reg. 203/17, s. 2; O. Reg. 584/17, s. 9; O. Reg. 536/18, s. 7; O. Reg. 537/18, s. 13; O. Reg. 344/19, s. 13; O. Reg. 316/20, s. 3; O. Reg. 689/20, s. 50; O. Reg. 690/20, s. 7; O. Reg. 711/20, s. 6; O. Reg. 107/21, s. 3; O. Reg. 111/21, s. 13; O. Reg.

248/21, s. 16; O. Reg. 383/21, s. 17; O. Reg. 526/21, s. 7; O. Reg. 709/21, s. 18; O. Reg. 18/22, s. 14; O. Reg. 224/22, s. 4; O. Reg. 435/22, s. 6; O. Reg. 520/22, s. 6; O. Reg. 188/23, s. 2; O. Reg. 388/23, s. 5; O. Reg. 12/24, s. 8; O. Reg. 301/24, s. 2; O. Reg. 322/24, s. 8; O. Reg. 384/24, s. 8; O. Reg. 50/25, s. 10; O. Reg. 72/25, s. 3; O. Reg. 173/25, s. 13; O. Reg. 221/25, s. 14.

FORMS 4A-43A REVOKED: O. REG. 77/06, S. 3.

FORM 43B REVOKED: O. REG. 260/05, S. 17.

FORMS 44A-47A REVOKED: O. REG. 77/06, S. 3.

FORMS 48A, 48B REVOKED: O. REG. 396/91, S. 14.

FORMS 48C-68C REVOKED: O. REG. 77/06, S. 3.

FORMS 69A, 69B REVOKED: O. REG. 131/04, S. 25.

FORM 69B.1 REVOKED: O. REG. 583/99, S. 3.

FORMS 69C-69Z.2 REVOKED: O. REG. 131/04, S. 25.

FORM 70A REVOKED: O. REG. 19/03, S. 25.

FORM 70A.1 REVOKED: O. REG. 292/98, S. 8.

FORMS 70A.2-70D REVOKED: O. REG. 131/04, S. 25.

FORMS 72A-76D REVOKED: O. REG. 77/06, S. 3.

FORMS 77A, 77B REVOKED: O. REG. 457/01, S. 17.

FORMS 77C-78A REVOKED: O. REG. 77/06, S. 3.

TARIFF A
LAWYERS' FEES AND DISBURSEMENTS ALLOWABLE UNDER RULES 57.01 AND 58.05

PART I — FEES

The fee for any step in a proceeding authorized by the Rules of Civil Procedure and the counsel fee for motions, applications, trials, references and appeals shall be determined in accordance with section 131 of the *Courts of Justice Act* and the factors set out in subrule 57.01 (1).

Where students-at-law or law clerks have provided services of a nature that the Law Society of Ontario authorizes them to provide, fees for those services may be allowed.

PART II — DISBURSEMENTS

21. Attendance money actually paid to a witness who is entitled to attendance money, to be calculated as follows:

1. Attendance allowance for each day of necessary attendance: $50.

2. Travel allowance, where the hearing or examination is held,

   (a) in a city or town in which the witness resides, $3.00 for each day of necessary attendance;

   (b) within 300 kilometres of where the witness resides, 24¢ a kilometre each way between his or her residence and the place of hearing or examination;

   (c) more than 300 kilometres from where the witness resides, the minimum return air fare plus 24¢ a kilometre each way from his or her residence to the airport and from the airport to the place of hearing or examination.

3. Overnight accommodation and meal allowance, where the witness resides elsewhere than the place of hearing or examination and is required to remain overnight, for each overnight stay: $75.

22. Fees or expenses actually paid to a court, authorized court transcriptionist, official examiner or sheriff under the regulations under the *Administration of Justice Act*.

23. For service or attempted service of a document,

   (a) in Ontario, the amount actually paid, not exceeding the fee payable to a sheriff under the regulations under the Administration of Justice Act;

   (b) outside Ontario, a reasonable amount;

   (c) that was ordered to be served by publication, a reasonable amount.

23.1 Fees actually paid to a mediator in accordance with Ontario Regulation 451/98 made under the *Administration of Justice Act*.

23.2 Fees actually paid to a mediator in accordance with Ontario Regulation 43/05 made under the *Administration of Justice Act*.

24. For an examination and transcript of evidence taken on the examination, the amount actually paid, not exceeding the fee payable to an official examiner under the regulations under the *Administration of Justice Act*.

25. For the preparation of a plan, model, videotape, film or photograph reasonably necessary for the conduct of the proceeding, a reasonable amount.

26. For experts' reports that were supplied to the other parties as required by the *Evidence Act* or these rules and that were reasonably necessary for the conduct of the proceeding, a reasonable amount.

27. REVOKED: O. Reg. 12/24, s. 9 (2).

28. For an expert who gives opinion evidence at the hearing or whose attendance was reasonably necessary at the hearing, a reasonable amount not exceeding $350 a day, subject to increase in the discretion of the assessment officer.

29. For an interpreter for services at the hearing or on an examination, a reasonable amount not exceeding $100 a day, subject to increase in the discretion of the assessment officer.

29.1 Where ordered by the presiding judge or officer, for translation into English or French of a document that has been filed, a reasonable amount.

30. Where ordered by the presiding judge or officer, such travelling and accommodation expenses incurred by a party as, in the discretion of the assessment officer, appear reasonable.

31. For copies of any documents or authorities prepared for or by a party for the use of the court and supplied to the opposite party, a reasonable amount.

32. For copies of records, appeal books and compendiums, and factums, a reasonable amount.

33. The cost of certified copies of documents such as orders, birth, marriage, and death certificates, abstracts of title, deeds, mortgages and other registered documents where reasonably necessary for the conduct of the proceeding.

34. The cost of transcripts of proceedings of courts or tribunals,

(a) where required by the court or the rules; or

(b) where reasonably necessary for the conduct of the proceeding.

35. Where ordered by the presiding judge or officer, for any other disbursement reasonably necessary for the conduct of the proceeding, a reasonable amount in the discretion of the assessment officer.

36. Harmonized sales tax (HST) actually paid or payable on the lawyer's fees and disbursements allowable under rule 58.05.

R.R.O. 1990, Reg. 194, Tariff A; O. Reg. 219/91, s. 16; O. Reg. 351/94, s. 19; O. Reg. 533/95, s. 12 (2); O. Reg. 453/98, s. 3; O. Reg. 290/99, s. 6; O. Reg. 24/00, s. 32; O. Reg. 652/00, s. 8; O. Reg. 113/01, s. 15; O. Reg. 244/01, ss. 5, 6; O. Reg. 284/01, s. 38; O. Reg. 457/01, s. 18; O. Reg. 19/03, s. 26; O. Reg. 131/04, s. 27; O. Reg. 42/05, s. 7; O. Reg. 575/07, s. 37; O. Reg. 55/12, s. 14; O. Reg. 170/14, s. 25; O. Reg. 12/24, s. 9.

TARIFF B REVOKED: O. REG. 131/04, S. 28.

TARIFF C
LAWYERS' COSTS ALLOWED ON PASSING OF ACCOUNTS WITHOUT A HEARING

(1) ESTATE TRUSTEE

Amount of receipts	Amount of costs
Less than $300,000	$2,500
$300,000 or more, but less than $500,000	$3,000
$500,000 or more, but less than $1,000,000	$3,500
$1,000,000 or more, but less than $3,000,000	$5,000
$3,000,000 or more	$7,500

(2) PERSON WITH FINANCIAL INTEREST IN ESTATE

If a person with a financial interest in an estate retains a lawyer to review the accounts, makes no objection to the accounts (or makes an objection and later withdraws it) and serves and files a request for costs, the person is entitled to one-half of the amount payable to the estate trustee.

(3) CHILDREN'S LAWYER OR PUBLIC GUARDIAN AND TRUSTEE

If the Children's Lawyer or the Public Guardian and Trustee makes no objection to the accounts (or makes an objection and later withdraws it) and serves and files a request for costs, he or she is entitled to three-quarters of the amount payable to the estate trustee.

Note: If two or more persons are represented by the same lawyer, they are entitled to receive only one person's costs.

Note: A person entitled to costs under this tariff is also entitled to the amount of harmonized sales tax (HST) on those costs.

O. Reg. 332/96, s. 10; O. Reg. 575/07, s. 38 (2, 3); O. Reg. 55/12, s. 15.

TAB 18

CanLII

Designation of Regions, RRO 1990, Reg 186

Current version: in force since 2007-10-01

Link to the latest version: https://canlii.ca/t/t8g

Stable link to this version: https://canlii.ca/t/1q4l

Citation to this version: Designation of Regions, RRO 1990, Reg 186, <https://canlii.ca/t/1q4l> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-22

Courts of Justice Act

R.R.O. 1990, REGULATION 186

DESIGNATION OF REGIONS

Consolidation Period: From October 1, 2007 to the e-Laws currency date.

Last amendment: O. Reg. 340/07.

This is the English version of a bilingual regulation.

1. For the purposes of the Act, the Province of Ontario is divided into the regions described in the Schedule. R.R.O. 1990, Reg. 186, s. 1.

2. Revoked: O. Reg. 340/07, s. 1.

SCHEDULE

1. Northwest Region: The territorial districts of Kenora, Rainy River and Thunder Bay.
2. Northeast Region: The territorial districts of Algoma, Cochrane, Manitoulin, Nipissing, Parry Sound, Sudbury and Timiskaming.
3. East Region:

    i. The counties of Frontenac, Hastings, Lanark, Lennox and Addington, Prince Edward and Renfrew.

    ii. The united counties of,

        A. Leeds and Grenville,

B. Prescott and Russell, and

C. Stormont, Dundas and Glengarry.

iii. The Regional Municipality of Ottawa-Carleton.

4. Central East Region:

i. The District Municipality of Muskoka.

ii. The counties of Haliburton, Northumberland, Peterborough, Simcoe and Victoria.

iii. The regional municipalities of Durham and York.

5. Toronto Region: The Municipality of Metropolitan Toronto.

6. Central West Region:

i. The counties of Bruce, Dufferin, Grey and Wellington.

ii. The regional municipalities of Halton and Peel.

7. Central South Region:

i. The County of Brant.

ii. The regional municipalities of Haldimand-Norfolk, Hamilton-Wentworth, Niagara and Waterloo.

8. Southwest Region: The counties of Elgin, Essex, Huron, Kent, Lambton, Middlesex, Oxford and Perth.

R.R.O. 1990, Reg. 186, Sched.

TAB 19

CanLII

Legislation Act, 2006, SO 2006, c 21, Sch F

This statute replaces RSO 1990, c I.11, RSO 1990, c R.21, RSO 1990, c S.21, SO 1998, c 18, Sch C.

Current version: in force since 2025-12-11

Link to the latest version:	https://canlii.ca/t/33s
Stable link to this version:	https://canlii.ca/t/56mjf
Citation to this version:	Legislation Act, 2006, SO 2006, c 21, Sch F, <https://canlii.ca/t/56mjf> retrieved on 2026-01-06
Currency:	Last updated from the e-Laws site on 2025-12-22

Legislation Act, 2006

S.O. 2006, CHAPTER 21
SCHEDULE F

Consolidation Period: From December 11, 2025 to the e-Laws currency date.

Last amendment: 2025, c. 27, Sched. 3.

PART I
GENERAL

Definitions

1 (1) In this Act,

"consolidated law" means a source law into which are incorporated,

(a) amendments, if any, that are enacted by the Legislature or filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part, and

(b) changes, if any, that are made under Part V (Change Powers); ("texte législatif codifié")

"e-Laws website" means the website of the Government of Ontario for statutes, regulations and related materials that is available on the Internet at www.e-laws.gov.on.ca or at another website address specified by a regulation made under subsection (3); ("site Web Lois-en-ligne")

"legislation" means Acts and regulations; ("législation")

"source law" means,

(a) in the case of an Act, the Act as enacted by the Legislature, and

(b) in the case of a regulation, the regulation as filed with the Registrar of Regulations under Part III (Regulations) or under a predecessor of that Part. ("texte législatif source") 2006, c. 21, Sched. F, s. 1 (1); 2009, c. 33, Sched. 2, s. 43 (1-3).

Reference to amendment includes reference to repeal, revocation

(2) A reference in this Act to amendment in relation to legislation is also a reference to repeal or revocation, unless a contrary intention appears. 2006, c. 21, Sched. F, s. 1 (2).

Regulations re e-Laws website

(3) The Attorney General may, by regulation, specify another website address for the purpose of the definition of "e-Laws website" in subsection (1). 2006, c. 21, Sched. F, s. 1 (3).

Role of Attorney General

2 The Attorney General shall,

(a) maintain the electronic database of source law and consolidated law for the e-Laws website so as to facilitate convenient and reliable public access to Ontario legislation;

(b) safeguard the accuracy and integrity of the electronic database of source law and consolidated law that appears on the e-Laws website; and

(c) safeguard the accuracy and integrity of publications of source law and consolidated law published by the King's Printer for Ontario or by an entity prescribed under clause 41 (1) (a). 2006, c. 21, Sched. F, s. 2; 2020, c. 34, Sched. 13, s. 5 (1); 2024, c. 2, Sched. 19, s. 9 (6).

Designation by Chief Legislative Counsel

3 The Chief Legislative Counsel may designate one or more lawyers employed in the Office of Legislative Counsel to exercise the powers and perform the duties of the Chief Legislative Counsel in his or her place. 2006, c. 21, Sched. F, s. 3.

Duty, obsolete Acts

4 The Chief Legislative Counsel shall, from time to time, provide to the Attorney General a list of Acts, or any parts, portions or sections of Acts, that have been rendered obsolete by events or the passage of time. 2006, c. 21, Sched. F, s. 4.

PART II
STATUTES

Citation of Acts

5 (1) An Act may be cited,

(a) by its long or short title;

(b) in English as "Statutes of Ontario" or "S.O." and in French as "Lois de l'Ontario" or "L.O.", followed by its year of enactment and its chapter number. 2006, c. 21, Sched. F, s. 5 (1); 2009, c. 33, Sched. 2, s. 43 (4).

Same

(2) An Act set out in the Revised Statutes of Ontario may be cited in English as "Revised Statutes of Ontario, (*year*)" or "R.S.O. (*year*)" and in French as "Lois refondues de l'Ontario de (*year*)" or "L.R.O. (*year*)", followed by its chapter number. 2006, c. 21, Sched. F, s. 5 (2); 2009, c. 33, Sched. 2, s. 43 (5).

Same

(3) An Act may also be cited in accordance with a method prescribed under clause 16 (a) or in accordance with accepted legislation citation practices. 2006, c. 21, Sched. F, s. 5 (3); 2009, c. 33, Sched. 2, s. 43 (6).

Enacting clause

6 An Act shall contain, at the beginning, the following words to indicate the authority by virtue of which it is passed: "His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows". 2006, c. 21, Sched. F, s. 6; 2024, c. 2, Sched. 19, s. 9 (1).

Power to amend or repeal

7 (1) Every Act reserves to the Legislature power to repeal or amend it and to revoke or modify any power or advantage that it confers. 2006, c. 21, Sched. F, s. 7 (1).

Same

(2) Any Act may be amended or repealed by an Act passed in the same session of the Legislature. 2006, c. 21, Sched. F, s. 7 (2).

Commencement of Acts

8 (1) Unless otherwise provided, an Act comes into force on the day it receives Royal Assent. 2006, c. 21, Sched. F, s. 8 (1).

Same

(2) Commencement and short title provisions in an Act and the long title of the Act are deemed to come into force on the day the Act receives Royal Assent, regardless of when the Act is specified to come into force. 2006, c. 21, Sched. F, s. 8 (2).

Provisions coming into force on a day to be named by order

(3) If an Act provides that any provisions of an Act are to come into force on a day to be named by order of the Lieutenant Governor in Council, the following rules apply to such an order:

1. Orders may be issued at different times for different parts, portions or sections of those provisions.

2. The order may be amended or revoked by a further order of the Lieutenant Governor in Council.

3. The order may be amended or revoked before the date named by the order, but not on or after that date.

4. If the order names different dates for different provisions, the order may be amended or revoked with respect to a particular provision before the date named for that provision, but not on or after that date. 2024, c. 2, Sched. 15, s. 1.

Effect of amendment to order

(4) For greater certainty, the dates referred to in paragraphs 3 and 4 of subsection (3) are the dates as amended by any amendments to that order. 2024, c. 2, Sched. 15, s. 1.

Transition — provisions to come into force on proclamation

8.1 (1) A provision of an Act that is to come into force on a day to be named by proclamation of the Lieutenant Governor is deemed to be a provision that is to come into force on a day to be named by order of the Lieutenant Governor in Council. 2024, c. 2, Sched. 15, s. 2.

Same

(2) A proclamation that names a day on which any provisions of an Act are to come into force may be amended by order of the Lieutenant Governor in Council in accordance with the rules set out in section 8, with necessary modifications. 2024, c. 2, Sched. 15, s. 2.

Continued validity of issued proclamations

(3) Any proclamation that names a day on which provisions of an Act are to come into force and that was issued on or before the day that is 30 days after the day this section came into force continues to be valid. 2024, c. 2, Sched. 15, s. 2.

Time of commencement and repeal

Commencement

9 (1) Unless otherwise provided, an Act comes into force at the first instant of the day on which it comes into force. 2006, c. 21, Sched. F, s. 9 (1).

Limitation

(2) Unless otherwise provided, an Act that comes into force on Royal Assent is not effective against a person before the earlier of the following times:

1. When the person has actual notice of it.

2. The last instant of the day on which it comes into force. 2006, c. 21, Sched. F, s. 9 (2).

Repeal

(3) Unless otherwise provided, the repeal of an Act takes effect at the first instant of the day of repeal. 2006, c. 21, Sched. F, s. 9 (3).

Exercise of delegated power before commencement

10 (1) A power conferred by an Act to make regulations or appointments or do any other thing may be exercised at any time after Royal Assent even if the Act is not yet in force. 2006, c. 21, Sched. F, s. 10 (1).

Same

(2) Until the Act comes into force, the exercise of a power in accordance with subsection (1) has no effect except as may be necessary to make the Act effective when it comes into force. 2006, c. 21, Sched. F, s. 10 (2).

Repeal of Acts, provisions not yet ordered in force

Annual report

10.1 (1) On one of the first five days on which the Legislative Assembly sits in each calendar year, the Attorney General shall table in the Assembly a report listing every Act or provision of an Act that,

(a) is to come into force on a day to be named by order of the Lieutenant Governor in Council;

(b) was enacted nine years or more before December 31 of the preceding calendar year; and

(c) was not in force on December 31 of the preceding calendar year. 2009, c. 33, Sched. 2, s. 43 (7); 2024, c. 2, Sched. 15, s. 3 (1).

Repeal

(2) Every Act or provision listed in the annual report is repealed on December 31 of the calendar year in which the report is tabled unless,

(a) it comes into force or is repealed on or before December 31 of that calendar year; or

(b) during that calendar year, the Assembly adopts a resolution that the Act or provision listed in the report not be repealed. 2009, c. 33, Sched. 2, s. 43 (7); 2024, c. 2, Sched. 15, s. 3 (2).

Publication

(3) The Attorney General shall, in each calendar year, publish on the e-Laws website a list of every Act or provision repealed under this section on December 31 of the preceding calendar year, and may publish the list in any other manner that he or she considers appropriate. 2009, c. 33, Sched. 2, s. 43 (7).

First report

(4) The first report under subsection (1) shall be tabled in 2011. 2009, c. 33, Sched. 2, s. 43 (7).

Exception, *Protecting Condominium Owners Act, 2015*

(5) Despite subsection (2), the provisions of Schedule 1 to the *Protecting Condominium Owners Act, 2015* referred to in subsection (6) shall not be repealed on December 31, 2025. 2025, c. 27, Sched. 3, s. 1 (1).

Note: On January 1, 2027, subsection 10.1 (5) of the Act is repealed. (See: 2025, c. 27, Sched. 3, s. 1 (2))

Same

(6) The provisions mentioned in subsection (5) are the following provisions of Schedule 1 to the *Protecting Condominium Owners Act, 2015*: subsections 1 (2), (11) and (18), sections 14, 18 and 24, subsection 26 (2), section 28, subsections 36 (2) and (4), section 37, subsections 39 (2) and (3), section 40, subsection 44 (1), subsections 46 (2), (3) and (4), subsections 52 (7) and (8), section 55, subsections 62 (2), (3) and (6), subsections 65 (2), (3), (4) and (5), subsections 67 (2), (3), (4) and (6), sections 98 and 99, subsection 107 (2), subsections 114 (1), (3), (4) and (5), sections 115 and 131, subsections 134 (2) and (3) and subsections 144 (2) and (4). 2025, c. 27, Sched. 3, s. 1 (1).

Note: On January 1, 2027, subsection 10.1 (6) of the Act is repealed. (See: 2025, c. 27, Sched. 3, s. 1 (2))

Endorsements on Acts

11 (1) The Clerk of the Assembly shall indicate on every Act, after the title, the date on which it receives Royal Assent. 2006, c. 21, Sched. F, s. 11 (1).

Same

(2) The date of assent forms part of the Act. 2006, c. 21, Sched. F, s. 11 (2).

Reserved bills

12 (1) In this Part, a reference to the day or date on which an Act receives Royal Assent is, in the case of a bill reserved by the Lieutenant Governor, a reference to the day on which the Lieutenant Governor signifies, by speech or message to the Assembly or by proclamation, that the bill was laid before the Governor General in Council and that the Governor General was pleased to assent to it. 2006, c. 21, Sched. F, s. 12 (1).

Endorsement, date of reservation

(2) The Clerk of the Assembly shall indicate, on every bill that is reserved, the date of reservation. 2006, c. 21, Sched. F, s. 12 (2).

Judicial notice

13 (1) Judicial notice shall be taken of the enactment and contents of an Act. 2006, c. 21, Sched. F, s. 13.

Same

(2) Judicial notice shall be taken of the issuing and contents of,

(a) every order of the Lieutenant Governor in Council that names a day on which provisions of an Act are to come into force; and

(b) every order of the Lieutenant Governor in Council that amends or revokes an order described in clause (a). 2024, c. 2, Sched. 15, s. 4.

Copies for publication

14 The Clerk of the Assembly shall provide a certified copy of each Act of the Legislature, as soon as it has been assented to, for the purpose of publication on the e-Laws website and print publication. 2006, c. 21, Sched. F, s. 14.

Publication

15 (1) Every Act of the Legislature shall be published on the e-Laws website and in print. 2006, c. 21, Sched. F, s. 15 (1).

Corrections on e-Laws website

(2) If the Chief Legislative Counsel discovers that an Act published on the e-Laws website differs from the Act as assented to, he or she shall ensure that a corrected Act is promptly published on the e-Laws website. 2006, c. 21, Sched. F, s. 15 (2); 2009, c. 33, Sched. 2, s. 43 (8).

Corrections in print

(3) If the Chief Legislative Counsel discovers that an Act published in print under subsection (1) differs from the Act as assented to, he or she may cause the corrected Act to be published in print, if he or she considers it appropriate. 2006, c. 21, Sched. F, s. 15 (3); 2009, c. 33, Sched. 2, s. 43 (9).

Publication of certain orders

(3.1) Every order of the Lieutenant Governor in Council that names a day on which provisions of an Act are to come into force, and every order of the Lieutenant Governor in Council that amends or revokes such an order, shall be published on the e-Laws website promptly after it is made. 2024, c. 2, Sched. 15, s. 5 (1).

Corrections

(3.2) If the Chief Legislative Counsel discovers that an order that is published on the e-Laws website in accordance with subsection (3.1) differs from the order that was made, the Chief Legislative Counsel shall ensure that a corrected order is promptly published on the e-Laws website. 2024, c. 2, Sched. 15, s. 5 (1).

Notice

(4) Where subsection (2), (3) or (3.2) applies, the Chief Legislative Counsel may, if he or she considers it appropriate, publish a notice of correction on the e-Laws website or in print. 2009, c. 33, Sched. 2, s. 43 (10); 2024, c. 2, Sched. 15, s. 5 (2).

Regulations

16 The Attorney General may make regulations,

(a) prescribing methods of citing Acts to supplement or provide alternatives to the methods set out in section 5;

(b) prescribing the manner of publishing Acts on the e-Laws website and in print for the purposes of subsection 15 (1). 2006, c. 21, Sched. F, s. 16; 2009, c. 33, Sched. 2, s. 43 (11).

PART III
REGULATIONS

Definitions

17 In this Part,

"Registrar" means the Registrar of Regulations appointed under section 31; ("registrateur")

"regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

(a) a by-law of a municipality or local board as defined in the *Municipal Affairs Act*, or

(b) an order of the Ontario Land Tribunal. ("règlement") 2006, c. 21, Sched. F, s. 17; 2021, c. 4, Sched. 6, s. 57.

Filing of regulations

18 (1) Every regulation shall be filed with the Registrar, except as provided in sections 19 to 21. 2006, c. 21, Sched. F, s. 18 (1).

Regulations made or approved by Lieutenant Governor in Council

(2) If a regulation is made or approved by the Lieutenant Governor in Council, a copy of the regulation certified to be a true copy by the Clerk or Deputy Clerk of the Executive Council shall be filed. 2006, c. 21, Sched. F, s. 18 (2).

Other regulations

(3) If a regulation is not made or approved by the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation, shall be filed. 2006, c. 21, Sched. F, s. 18 (3).

Same

(4) If a regulation described in subsection (3) requires the approval of a person or entity other than the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation and by the person or entity whose approval is required, shall be filed. 2006, c. 21, Sched. F, s. 18 (4).

Corporation or other entity

(5) If a corporation or other entity makes or approves a regulation, the signature of an officer or agent who has authority to sign on behalf of the corporation or entity is deemed to be the signature of the corporation or entity for the purposes of subsections (3) and (4). 2006, c. 21, Sched. F, s. 18 (5).

Proof of office not required

(6) A regulation signed by an officer or agent under subsection (5) may be filed without proof of the authority, office or signature of the person signing on behalf of the corporation or entity, but the signed regulation shall show his or her office or title. 2006, c. 21, Sched. F, s. 18 (6).

Other requirement

(7) A regulation presented for filing shall show the date on which it was made and, if approval is required, the date on which it was approved. 2006, c. 21, Sched. F, s. 18 (7).

Public inspection

(8) A filed regulation shall be made available for public inspection. 2006, c. 21, Sched. F, s. 18 (8).

Filing date

19 (1) A regulation shall not be filed on a date that is later than four months after the date on which it was made or, if approval of the regulation is required, the date it is approved. 2006, c. 21, Sched. F, s. 19 (1).

Consent to extend filing date

(2) Despite subsection (1), a regulation may be filed on a date that is later than that described in subsection (1) if consent to do so has been obtained from the person or entity authorized to make the regulation and, if the regulation requires approval, from the person or entity authorized to approve the regulation. 2006, c. 21, Sched. F, s. 19 (2).

Date to be specified

(3) The consent shall specify a date after the four-month period described in subsection (1) by which the regulation shall be filed. 2006, c. 21, Sched. F, s. 19 (3).

Timing of consent

(4) A consent to extend the filing date and any subsequent consents may be given at any time,

(a) whether before or after the four-month period described in subsection (1) has expired; and

(b) whether or not a date set out in an earlier consent has expired. 2006, c. 21, Sched. F, s. 19 (4).

Filing restriction

(5) The regulation shall not be filed after the date specified in the consent. 2006, c. 21, Sched. F, s. 19 (5).

Consent to be filed

(6) The consent extending the filing date shall be filed with the Registrar at the same time as the regulation is filed, and the rules for signing and certifying the regulation set out in section 18 apply to the consent, with necessary modifications. 2006, c. 21, Sched. F, s. 19 (6).

Same

(7) A consent filed under this section need not be published. 2006, c. 21, Sched. F, s. 19 (7).

(8) REPEALED: 2024, c. 2, Sched. 15, s. 6.

Registrar's discretion not to file

20 The Registrar may refuse to file a regulation if the rules for filing set out in section 18 or prescribed under clause 32 (a) have not been complied with. 2006, c. 21, Sched. F, s. 20.

Registrar's duty not to file

21 (1) The Registrar shall refuse to file a regulation if the regulation is not bilingual but purports to amend a bilingual regulation. 2006, c. 21, Sched. F, s. 21 (1).

Same

(2) The Registrar shall refuse to file a regulation if section 19 has not been complied with. 2006, c. 21, Sched. F, s. 21 (2).

Deemed validity of filing

(3) If a regulation that fails to meet the requirements of this section is inadvertently accepted for filing, the regulation is deemed to be validly filed despite that failure. 2006, c. 21, Sched. F, s. 21 (3).

Same

(4) Subsection (3) shall be interpreted only as validating a procedural irregularity. 2006, c. 21, Sched. F, s. 21 (4).

When regulation effective

22 (1) A regulation that is not filed has no effect. 2006, c. 21, Sched. F, s. 22 (1).

Same

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed. 2006, c. 21, Sched. F, s. 22 (2).

No retroactivity authorized

(3) Nothing in this section authorizes the making of a regulation that is effective with respect to a period before its filing. 2006, c. 21, Sched. F, s. 22 (3).

Time of commencement and revocation

Commencement

23 (1) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force at the first instant of the day on which it comes into force. 2006, c. 21, Sched. F, s. 23 (1).

Same

(1.1) A commencement provision in a regulation is deemed to come into force on the day the regulation is filed, regardless of when the regulation is specified to come into force. 2024, c. 2, Sched. 15, s. 7.

Limitation

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation is not effective against a person before the earliest of the following times:

1. When the person has actual notice of it.

2. The last instant of the day on which it is published on the e-Laws website.

3. The last instant of the day on which it is published in *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 23 (2); 2020, c. 34, Sched. 13, s. 5 (2).

Revocation

(3) Unless a regulation or an Act provides otherwise, the revocation of a regulation takes effect at the first instant of the day of revocation. 2006, c. 21, Sched. F, s. 23 (3).

Exercise of delegated power before commencement

23.1 (1) A power conferred by a regulation may be exercised at any time after the regulation is filed even if the regulation is not yet in force. 2024, c. 2, Sched. 15, s. 8.

Same

(2) Until the regulation comes into force, the exercise of a power in accordance with subsection (1) has no effect except as may be necessary to make the regulation effective when it comes into force. 2024, c. 2, Sched. 15, s. 8.

Proof of making, approval, filing and publication

When made

24 (1) Unless the contrary is proved, the date indicated on the e-Laws website or in *The Ontario Gazette* as the date on which a regulation was made is proof that the regulation was made on that date. 2006, c. 21, Sched. F, s. 24 (1); 2020, c. 34, Sched. 13, s. 5 (2).

When approved

(2) Unless the contrary is proved, if approval is required for the making of a regulation, the date indicated on the e-Laws website or in *The Ontario Gazette* as the date on which approval was given is proof that the regulation was approved on that date. 2006, c. 21, Sched. F, s. 24 (2); 2020, c. 34, Sched. 13, s. 5 (2).

When filed

(3) Unless the contrary is proved, the date indicated on the e-Laws website or in *The Ontario Gazette* as the date on which a regulation was filed is proof that the regulation was filed on that date. 2006, c. 21, Sched. F, s. 24 (3); 2020, c. 34, Sched. 13, s. 5 (2).

When published on e-Laws

(4) Unless the contrary is proved, the date of publication indicated for a regulation on the e-Laws website is proof that the regulation was published on the e-Laws website on that date. 2006, c. 21, Sched. F, s. 24 (4).

When published in *The Ontario Gazette*

(5) Unless the contrary is proved, the date of publication indicated for a regulation in *The Ontario Gazette* is proof that the regulation was published in *The Ontario Gazette* on that date. 2006, c. 21, Sched. F, s. 24 (5); 2020, c. 34, Sched. 13, s. 5 (2).

When published

25 (1) Every regulation shall be published,

(a) on the e-Laws website promptly after its filing; and

(b) in *The Ontario Gazette* within one month after its filing or in accordance with such other timelines as may be specified in a regulation made under clause 32 (c). 2006, c. 21, Sched. F, s. 25 (1); 2020, c. 34, Sched. 13, s. 5 (2).

Date of filing, publication, etc.

(2) A published regulation shall show the date of its filing, the date of its publication on the e-Laws website and the date of its publication in *The Ontario Gazette*, in the manner directed by the Registrar. 2006, c. 21, Sched. F, s. 25 (2); 2020, c. 34, Sched. 13, s. 5 (2).

Publication in order of filing

(3) Regulations shall be published in the order in which they are filed unless, in the opinion of the Registrar, for practical or technical reasons related to the publication process, it is impossible, impractical or unreasonably difficult or costly to do so. 2006, c. 21, Sched. F, s. 25 (3).

Numbering

(4) Regulations shall be numbered in the order in which they are filed, and a new series shall be commenced each year. 2006, c. 21, Sched. F, s. 25 (4).

Same, e-Laws publication

(5) For the purposes of subsection (3), regulations that are published on the e-Laws website simultaneously or as a batch are deemed to be published in the order in which they are filed. 2006, c. 21, Sched. F, s. 25 (5).

Pre-publication corrections

26 (1) At any time before a filed regulation is first published under subsection 25 (1), the Registrar may,

(a) correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature;

(b) alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation; and

(c) correct errors in the numbering of provisions and make any changes in cross-references that are required as a result. 2006, c. 21, Sched. F, s. 26 (1).

Same

(2) Corrections and alterations made under this section are deemed to be part of the regulation as filed with the Registrar under this Part. 2006, c. 21, Sched. F, s. 26 (2).

Post-publication corrections

Correction on e-Laws website

27 (1) If the Registrar discovers that a regulation published on the e-Laws website differs from the filed regulation, he or she shall ensure that a

corrected regulation is promptly published on the e-Laws website. 2006, c. 21, Sched. F, s. 27 (1); 2009, c. 33, Sched. 2, s. 43 (12).

Notice of correction on e-Laws website

(2) Where subsection (1) applies, the Registrar may, if he or she considers it appropriate, publish a notice of correction on the e-Laws website. 2009, c. 33, Sched. 2, s. 43 (13).

Notice of correction in Gazette

(3) If the Registrar discovers that a regulation published in *The Ontario Gazette* differs from the filed regulation, the Registrar may, if he or she considers it appropriate, publish a notice of correction in *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 27 (3); 2009, c. 33, Sched. 2, s. 43 (14); 2020, c. 34, Sched. 13, s. 5 (2).

Same

(4) A notice of correction published under subsection (3) may include a corrected regulation, if the Registrar considers it appropriate. 2009, c. 33, Sched. 2, s. 43 (15).

(5) REPEALED: 2009, c. 33, Sched. 2, s. 43 (15).

No validation

28 The filing, publication or correction of a regulation under this Act does not validate the regulation if it is otherwise invalid. 2006, c. 21, Sched. F, s. 28.

Judicial notice

29 Judicial notice shall be taken of the making, approval where required, filing, contents and publication of a regulation that is published on the e-Laws website or in *The Ontario Gazette*. 2006, c. 21, Sched. F, s. 29; 2020, c. 34, Sched. 13, s. 5 (2).

Citation of regulations

30 (1) A regulation may be cited in English as "Ontario Regulation" or "O. Reg." and in French as "Règlement de l'Ontario" or "Règl. de l'Ont." followed by its filing number, a forward slash and the year of its filing. 2006, c. 21, Sched. F, s. 30 (1); 2009, c. 33, Sched. 2, s. 43 (16).

Same

(2) The year of filing of a regulation may be indicated in full or by the last two figures in the year. 2006, c. 21, Sched. F, s. 30 (2).

Same

(3) A regulation set out in the Revised Regulations of Ontario may be cited,

(a) in English as "Revised Regulations of Ontario, (*year*) , Regulation (*number*)" or as "R.R.O. (*year*), Reg. (*number*)"; and

(b) in French as "Règlements refondus de l'Ontario de (*year*), Règlement (*number*)" or as "R.R.O. (*year*), Règl. (*number*)". 2006, c. 21, Sched. F, s. 30 (3); 2009, c. 33, Sched. 2, s. 43 (17).

Same

(4) A regulation may also be cited in accordance with a method prescribed under clause 32 (b) or in accordance with accepted legislation citation practices. 2006, c. 21, Sched. F, s. 30 (4); 2009, c. 33, Sched. 2, s. 43 (18).

Registrar

31 (1) A lawyer employed in the Office of Legislative Counsel shall be appointed by the Lieutenant Governor in Council as Registrar of Regulations. 2006, c. 21, Sched. F, s. 31 (1).

Duty, preparation of regulations

(2) The Registrar shall advise on and assist in the preparation of regulations. 2006, c. 21, Sched. F, s. 31 (2).

Other duties

(3) The Registrar shall,

(a) be responsible for the numbering, indexing and publication of all regulations filed under this Part;

(b) set standards respecting the format in which regulations shall be submitted for filing;

(c) exercise the powers given and perform the duties assigned under this Part. 2006, c. 21, Sched. F, s. 31 (3).

Assistant Registrars

(4) The Registrar may designate one or more lawyers employed in the Office of Legislative Counsel as Assistant Registrar to exercise the powers and perform the duties of the Registrar in his or her place. 2006, c. 21, Sched. F, s. 31 (4).

Regulations

32 The Attorney General may make regulations,

(a) prescribing methods and rules for filing regulations that supplement or provide alternatives to the rules described in section 18, to permit the establishment of an electronic regulations filing system or otherwise address technological change;

(b) prescribing methods of citing regulations to supplement or provide alternatives to the methods set out in section 30;

(c) prescribing timelines for the purposes of clause 25 (1) (b);

(d) respecting the powers and duties of the Registrar. 2006, c. 21, Sched. F, s. 32; 2009, c. 33, Sched. 2, s. 43 (19).

Standing committee

33 (1) At the commencement of each session of the Legislature, a standing committee of the Assembly shall be appointed under this section with authority to sit during the session. 2006, c. 21, Sched. F, s. 33 (1).

Regulations referred

(2) Every regulation stands permanently referred to the standing committee for the purposes of subsection (3). 2006, c. 21, Sched. F, s. 33 (2).

Terms of reference

(3) The standing committee shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling Acts, and shall deal with such other matters as are referred to it by the Assembly. 2006, c. 21, Sched. F, s. 33 (3).

Authority to call persons

(4) The standing committee may examine any member of the Executive Council or any public servant designated by the member respecting any

regulation made under an Act that is under his or her administration. 2006, c. 21, Sched. F, s. 33 (4).

Report

(5) The standing committee shall, from time to time, report to the Assembly its observations, opinions and recommendations. 2006, c. 21, Sched. F, s. 33 (5).

PART IV
PROOF OF LEGISLATION

Official law

34 (1) A bill that receives Royal Assent and is endorsed by the Clerk of the Assembly as having received Royal Assent is official law. 2006, c. 21, Sched. F, s. 34 (1).

Same

(2) A regulation that is filed with the Registrar of Regulations under Part III (Regulations) or a predecessor of that Part is official law. 2006, c. 21, Sched. F, s. 34 (2).

Official copy

35 (1) A copy of a source law or a consolidated law is an official copy of that law if,

(a) it is printed by the King's Printer for Ontario or by an entity that is prescribed under clause 41 (1) (a);

(b) it is accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b); or

(c) it is prescribed under clause 41 (1) (c) as an official copy. 2006, c. 21, Sched. F, s. 35 (1); 2024, c. 2, Sched. 19, s. 9 (6).

Disclaimer

(2) Subsection (1) does not apply to a copy that is accompanied by a disclaimer to the effect that it is not intended as official. 2006, c. 21, Sched. F, s. 35 (2); 2009, c. 33, Sched. 2, s. 43 (20).

Same

(3) In the case of a copy referred to in clause (1) (b), the copy is accompanied by a disclaimer if the disclaimer is on the e-Laws website when

the copy is accessed. 2006, c. 21, Sched. F, s. 35 (3); 2009, c. 33, Sched. 2, s. 43 (21).

Presumption, printed by King's Printer

36 Unless the contrary is proved, a copy of a source law or consolidated law purporting to be printed by the King's Printer for Ontario or other prescribed entity was so printed. 2006, c. 21, Sched. F, s. 36; 2024, c. 2, Sched. 19, s. 9 (6).

Presumption, accessed from e-Laws

37 Unless the contrary is proved, a copy of a source law or consolidated law submitted with an oral or written statement to the effect that it was accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b) was so accessed. 2006, c. 21, Sched. F, s. 37.

Official copies of source law as evidence

38 Unless the contrary is proved, an official copy of a source law is an accurate statement of that law. 2006, c. 21, Sched. F, s. 38.

Official copies of consolidated law as evidence

39 Unless the contrary is proved, an official copy of a consolidated law is an accurate statement of that law,

(a) in the case of an official copy described in clause 35 (1) (a), on the consolidation date shown on the copy;

(b) in the case of an official copy accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b), during the period indicated on the e-Laws website in respect of the copy when the copy is accessed;

(c) in the case of an official copy prescribed under clause 41 (1) (c), on the date or during the period prescribed under clause 41 (1) (d). 2006, c. 21, Sched. F, s. 39.

e-Laws, provisions not in force

40 (1) A source law or consolidated law published on the e-Laws website shall include provisions that have been enacted by the Legislature or filed under Part III (Regulations) or a predecessor of that Part, as the case may be, but that are not yet in force. 2006, c. 21, Sched. F, s. 40 (1).

Same

(2) Where a provision that is not yet in force is included in a law published on the e-Laws website, the fact that it is not yet in force shall be indicated on the website, in the manner and to the extent directed by the Chief Legislative Counsel. 2006, c. 21, Sched. F, s. 40 (2).

Regulations

41 (1) The Attorney General may make regulations,

(a) prescribing an entity for the purposes of clause 35 (1) (a);

(b) prescribing forms or formats, including print-outs, on-screen displays or other output of electronic data, for the purposes of clause 35 (1) (b);

(c) prescribing official copies for the purposes of clause 35 (1) (c);

(d) prescribing the date on or period during which a copy prescribed under clause (c) is an accurate statement of a consolidated law. 2006, c. 21, Sched. F, s. 41 (1).

Same

(2) A regulation made under clause (1) (b), (c) or (d) may be made with respect to,

(a) the manner in which a copy is created, recorded, transmitted, stored, authenticated, received, displayed or perceived;

(b) the person, body or thing that created, recorded, transmitted, stored, authenticated, received, displayed or perceived the copy; and

(c) any statement, mark or certification associated with the creation, recording, transmission, storage, authentication, reception, display or perception of the copy. 2006, c. 21, Sched. F, s. 41 (2).

PART V
CHANGE POWERS

Editorial and other changes

42 (1) This Part does not authorize any change that alters the legal effect of any Act or regulation. 2006, c. 21, Sched. F, s. 42 (1).

Same

(2) The Chief Legislative Counsel may make the following changes to consolidated laws:

1. Correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature.

2. Alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation.

2.1 Make such minor changes as may be required to ensure a consistent form of expression.

2.2 Make such minor changes as may be required to make the form of expression of an Act or regulation in French or in English more compatible with its form of expression in the other language.

3. Replace a form of reference to an Act or regulation, or a provision or other portion of an Act or regulation, with a different form of reference, in accordance with Ontario drafting practices.

4. Replace a description of a date or time with the actual date or time.

5. After a bill has been enacted, replace a reference to the bill or a provision or other portion of the bill with a reference to the Act or provision or other portion of the Act.

6. If a provision provides that it is contingent on the occurrence of a future event and the event occurs, remove text referring to the contingency and make any other changes that are required as a result.

7. Make such changes to the title of an Act or regulation, including but not limited to omitting the year from the title of an Act, as are required to accord with changes in methods of citing Acts or regulations or changes in the electronic or print presentation of Acts or regulations, and make any other changes that are required as a result.

8. If an Act or regulation provides that references to a body, office, person, place or thing are deemed or considered to be references to another body, office, person, place or thing, replace a reference to the original body, office, person, place or thing with a reference to the other.

9. When the name, title, location or address of a body, office, person, place or thing has been altered, change references to the name, title, location or address to reflect the alteration, if the body, office, person, place or thing continues under the new name or title or at the new location or address.

9.1 Make such changes as may be required to reflect a change of reigning sovereign or to otherwise change the terminology used to refer to the Crown in accordance with Ontario drafting practices.

10. Correct errors in the numbering of provisions or other portions of an Act or regulation and make any changes in cross-references that are required as a result.

11. If a provision of a transitional nature is contained in an amending Act or regulation, incorporate it as a provision of the relevant consolidated law and make any other changes that are required as a result.

12. Make a correction, if it is patent both that an error has been made and what the correction should be. 2006, c. 21, Sched. F, s. 42 (2); 2009, c. 33, Sched. 2, s. 43 (22, 23); 2024, c. 2, Sched. 19, s. 9 (2).

Exception, par. 9 of subs. (2)

(3) Paragraph 9 of subsection (2) does not apply to alterations to the name or title of,

(a) a Minister or Ministry of the Government of Ontario;

(b) a municipality, as defined in the *Municipal Act, 2001*;

(c) a non-legislative document incorporated by reference into an Act or regulation; or

(d) an Act or regulation. 2006, c. 21, Sched. F, s. 42 (3).

Error in consolidation

(4) If the Chief Legislative Counsel discovers that an error was made in the process of publishing or consolidating a consolidated law,

(a) in the case of a consolidated law published on the e-Laws website, he or she shall ensure that a corrected consolidated law is published on the e-Laws website; and

(b) in the case of a consolidated law printed by the King's Printer for Ontario or by an entity that is prescribed under clause 41 (1) (a), he or she may cause a corrected consolidated law to be published in print, if he or she considers it appropriate in the circumstances. 2006, c. 21, Sched. F, s. 42 (4); 2009, c. 33, Sched. 2, s. 43 (24); 2024, c. 2, Sched. 19, s. 9 (6).

Notice

43 (1) The Chief Legislative Counsel may provide notice of the changes made under paragraphs 1 to 3 of subsection 42 (2) and of corrections made under subsection 42 (4), in the manner that he or she considers appropriate. 2006, c. 21, Sched. F, s. 43 (1).

Same

(2) The Chief Legislative Counsel shall provide notice of the changes made under paragraphs 4 to 12 of subsection 42 (2), in the manner that he or she considers appropriate. 2006, c. 21, Sched. F, s. 43 (2).

Same

(3) In determining whether to provide notice of a change made under paragraphs 1 to 3 of subsection 42 (2) or of a correction made under subsection 42 (4), the Chief Legislative Counsel shall consider,

(a) the nature of the change or correction; and

(b) the extent to which notice, and the information provided in it, would provide assistance in understanding the relevant legislative history. 2006, c. 21, Sched. F, s. 43 (3); 2009, c. 33, Sched. 2, s. 43 (25, 26).

Same

(4) In providing notice of a change under subsection (1) or (2), the Chief Legislative Counsel shall state the change or the nature of the change. 2009, c. 33, Sched. 2, s. 43 (27).

Date of change

44 No legal significance shall be inferred from the timing of the exercise of a power under this Part. 2006, c. 21, Sched. F, s. 44.

Interpretation

45 Regardless of when a change is made to a consolidated law under this Part, the change may be read, if it is appropriate to do so,

(a) into the source law as of the date it was enacted or filed; or

(b) into earlier consolidations of the Act or regulation. 2006, c. 21, Sched. F, s. 45.

PART VI
INTERPRETATION

APPLICATION

Application to Acts and regulations

46 Every provision of this Part applies to every Act and regulation. 2006, c. 21, Sched. F, s. 46.

Contrary intention or context requiring otherwise

47 Section 46 applies unless,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context. 2006, c. 21, Sched. F, s. 47.

Existing and future legislation

48 Section 46 applies regardless of when the Act or regulation was enacted or made. 2024, c. 2, Sched. 15, s. 9.

Other documents

49 The following provisions also apply, in the same way as to a regulation, to every document that is made under an Act but is not a regulation:

1. Subsection 52 (6) (regulation continues).

2. Section 54 (regulations – power to make, amend, etc.).

3. Section 58 (reference to Act or regulation includes reference to individual provisions).

4. Section 59 (rolling incorporation of Ontario legislation), but only with respect to the document that contains the reference.

5. Section 86 (terms used in regulations).

6. Section 89 (computation of time). 2006, c. 21, Sched. F, s. 49.

Interpretation and definition provisions

50 The interpretation and definition provisions in every Act and regulation are subject to the exceptions contained in section 47. 2006, c. 21, Sched. F, s. 50.

LEGISLATIVE CHANGES

Effect of repeal and revocation

51 (1) The repeal of an Act or the revocation of a regulation does not,

(a) affect the previous operation of the repealed or revoked Act or regulation;

(b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;

(c) affect a contravention of or offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the contravention or offence; or

(d) affect an investigation, proceeding or remedy in respect of,

(i) a right, privilege, obligation or liability described in clause (b), or

(ii) a penalty, forfeiture or punishment described in clause (c). 2006, c. 21, Sched. F, s. 51 (1); 2024, c. 2, Sched. 15, s. 10.

Same

(2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (2).

Same

(3) A penalty, forfeiture or punishment described in clause (1) (c) may be imposed as if the Act or regulation had not been repealed or revoked. 2006, c. 21, Sched. F, s. 51 (3).

Effect of amendment and replacement

Application

52 (1) This section applies,

(a) if an Act is repealed and replaced;

(b) if a regulation is revoked and replaced;

(c) if an Act or regulation is amended. 2006, c. 21, Sched. F, s. 52 (1).

Authorized persons continue to act

(2) A person authorized to act under the former Act or regulation has authority to act under the corresponding provisions, if any, of the new or amended one until another person becomes authorized to do so. 2006, c. 21, Sched. F, s. 52 (2).

Proceedings continued

(3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible. 2006, c. 21, Sched. F, s. 52 (3).

New procedure

(4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment. 2006, c. 21, Sched. F, s. 52 (4).

Reduction of penalty

(5) If the new or amended Act or regulation provides for a lesser penalty, forfeiture or punishment, the lesser one applies when a sanction is imposed, after the replacement or amendment, in respect of matters that happened before that time. 2006, c. 21, Sched. F, s. 52 (5).

Regulation continues

(6) If an Act under which a regulation has been made is replaced or amended, the regulation remains in force to the extent that it is authorized by the new or amended Act. 2006, c. 21, Sched. F, s. 52 (6).

Effect of repeal and revocation on amendments

53 The repeal or revocation of an Act or regulation includes the repeal or revocation of any amendment to the Act or regulation. 2006, c. 21, Sched. F, s. 53.

Regulations – power to make, amend, etc.

54 (1) Power to make regulations includes power to amend, revoke or replace them from time to time. 2006, c. 21, Sched. F, s. 54 (1).

Survival of power to revoke

(2) Power to revoke a regulation remains even if the provision conferring power to make it has been repealed. 2006, c. 21, Sched. F, s. 54 (2).

New regulation-maker

(3) If a provision conferring power on a person or entity to make a regulation is amended, or repealed and replaced, so as to confer the power or substantially the same power on a different person or entity, the second person or entity has power to revoke, amend or replace the regulation made by the first one. 2006, c. 21, Sched. F, s. 54 (3).

Same

(4) Subsection (3) applies with necessary modifications if a power of a minister of the Crown to make regulations is conferred on a different minister of the Crown under the *Executive Council Act*. 2024, c. 2, Sched. 15, s. 11.

Obsolete regulations

55 (1) If a provision of an Act under which a regulation is made is repealed and not replaced, the regulation ceases to have effect, subject to section 51 and subsection 59 (3). 2006, c. 21, Sched. F, s. 55 (1).

Same

(2) The Lieutenant Governor in Council may, by regulation, revoke a regulation,

(a) that has ceased to have effect under subsection (1); or

(b) that has been rendered obsolete by events or the passage of time. 2006, c. 21, Sched. F, s. 55 (2).

No implication

56 (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force. 2006, c. 21, Sched. F, s. 56 (1).

Same

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different. 2006, c. 21, Sched. F, s. 56 (2).

Same

(3) The re-enactment, remaking, amendment or changing under Part V (Change Powers) of an Act or regulation does not imply an adoption of any judicial or other interpretation of the language used in the Act or regulation, or of similar language. 2006, c. 21, Sched. F, s. 56 (3).

No revival

57 The repeal or revocation of an Act or regulation does not imply the revival of an Act or regulation that is not in force or another thing that is not in existence at the time the repeal or revocation takes effect. 2006, c. 21, Sched. F, s. 57.

Reference to Act or regulation includes reference to individual provisions

58 A reference to an Act or regulation is also a reference to each provision of the Act or regulation. 2006, c. 21, Sched. F, s. 58.

References to Ontario legislation

59 (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,

(a) as amended;

(b) as changed under Part V (Change Powers); or,

(c) if the provision has been replaced, to the replacement provision. 2024, c. 2, Sched. 15, s. 12.

Same

(2) Subsection (1) applies whether the provision is amended, changed or replaced before or after the commencement of the provision containing the reference. 2024, c. 2, Sched. 15, s. 12.

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced,

(a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and

(b) the reference is to the provision as it read immediately before the repeal or revocation. 2006, c. 21, Sched. F, s. 59 (3).

References to other Canadian legislation

60 (1) A reference in an Act or regulation to a provision of an Act or regulation of Canada or of another province or territory of Canada is a reference to the provision,

(a) as amended;

(b) as changed in the exercise of a statutory power to make non-substantive changes; or,

(c) if the provision has been replaced, to the replacement provision. 2024, c. 2, Sched. 15, s. 13.

Same

(2) Subsection (1) applies whether the provision is amended, changed or replaced before or after the commencement of the provision containing the reference. 2024, c. 2, Sched. 15, s. 13.

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced, the reference is to the provision as it read immediately before the repeal or revocation. 2006, c. 21, Sched. F, s. 60 (3).

Static incorporation of foreign legislation

61 A reference in an Act or regulation to a provision of an Act or regulation of a jurisdiction outside Canada is a reference to the provision as it read when the Ontario provision containing the reference was most recently enacted, made or amended. 2006, c. 21, Sched. F, s. 61.

Incorporation of documents by reference

62 (1) The power to make a regulation may be exercised by incorporating an existing document by reference, in whole or in part. 2006, c. 21, Sched. F, s. 62 (1).

Changes

(2) The document may be incorporated subject to such changes as the maker of the regulation considers necessary. 2006, c. 21, Sched. F, s. 62 (2).

Static incorporation

(3) The reference to the document is a reference to it as it read when the provision containing the reference was most recently enacted, made or amended. 2006, c. 21, Sched. F, s. 62 (3).

Access to incorporated document and earlier versions

(4) When a document is incorporated by reference as described in subsection (1), the Minister responsible for the administration of the Act under which the

regulation is made shall take steps to ensure that,

(a) the incorporated document is readily available to the public, on and after the day the regulation or amending regulation containing the reference is filed under Part III (Regulations); and

(b) the incorporated document and any earlier versions of it that were previously incorporated into the regulation or into a predecessor of the regulation remain readily available to the public. 2006, c. 21, Sched. F, s. 62 (4); 2009, c. 33, Sched. 2, s. 43 (28).

Transition

(5) Subsection (4) applies with respect to documents incorporated by reference as described in subsection (1) on and after October 19, 2006. 2006, c. 21, Sched. F, s. 62 (5); 2024, c. 2, Sched. 15, s. 14.

General Rules of Construction

Law always speaking

63 The law is always speaking, and the present tense shall be applied to circumstances as they arise. 2006, c. 21, Sched. F, s. 63.

Rule of liberal interpretation

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

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act. 2006, c. 21, Sched. F, s. 64 (2).

Bilingual texts

65 The English and French versions of Acts and regulations that are enacted or made in both languages are equally authoritative. 2006, c. 21, Sched. F, s. 65.

Bilingual names

66 If the Act or regulation that creates or continues an entity refers to it by both an English and a French name, or if the English and French versions of the Act or regulation refer to the entity by different names, it may be referred

to for any purpose by either name or by both names. 2006, c. 21, Sched. F, s. 66.

Number

67 Words in the singular include the plural and words in the plural include the singular. 2006, c. 21, Sched. F, s. 67.

Gender

68 Gender-specific terms refer to any gender and include corporations. 2016, c. 23, s. 56.

PREAMBLES AND REFERENCE AIDS

Preambles

69 (1) A preamble to a new Act is part of that Act and may be used to help explain its purpose. 2006, c. 21, Sched. F, s. 69 (1).

Same

(2) A preamble to an Act that amends one or more other Acts is part of the amending Act and may be used to help explain the purpose of the amendments. 2006, c. 21, Sched. F, s. 69 (2).

Reference aids

70 Tables of contents, marginal notes, information included to provide legislative history, headnotes and headings are inserted in an Act or regulation for convenience of reference only and do not form part of it. 2006, c. 21, Sched. F, s. 70.

CROWN

Crown not bound, exception

71 No Act or regulation binds the Crown or affects the Crown's rights or prerogatives unless it expressly states an intention to do so. 2006, c. 21, Sched. F, s. 71; 2024, c. 2, Sched. 19, s. 9 (3).

Succession

72 (1) A change of reigning sovereign does not affect anything done or begun under the previous reigning sovereign, and all matters continue as if no succession had occurred. 2019, c. 14, Sched. 4, s. 1.

Same, offices and oaths

(2) For greater certainty, a change of reigning sovereign,

(a) does not affect any appointment or the holding of any office under the Crown; and

(b) does not require the retaking of any related oath or affirmation. 2019, c. 14, Sched. 4, s. 1.

PROCLAMATIONS

How proclamations issued

73 When an Act authorizes the Lieutenant Governor to do anything by proclamation, the proclamation,

(a) shall be issued under an order of the Lieutenant Governor in Council recommending that the proclamation be issued; and

(b) need not refer to the order in council. 2006, c. 21, Sched. F, s. 73.

Judicial notice

74 Judicial notice shall be taken of the issuing and contents of every proclamation. 2006, c. 21, Sched. F, s. 74.

75 REPEALED: 2024, c. 2, Sched. 15, s. 15.

APPOINTMENTS, POWERS AND DELEGATION

Appointments

76 (1) A provision authorizing the Lieutenant Governor in Council, the Lieutenant Governor or a minister of the Crown to appoint a person to an office authorizes an appointment for a fixed term or an appointment during pleasure, and if the appointment is during pleasure, it may be revoked at any time, without cause and without giving notice. 2006, c. 21, Sched. F, s. 76 (1).

Remuneration and expenses

(2) A provision described in subsection (1) authorizes the Lieutenant Governor in Council to determine the remuneration and expenses of the person who is appointed. 2006, c. 21, Sched. F, s. 76 (2).

Implied powers

77 Power to appoint a person to a public office includes power to,

(a) reappoint or remove the person;

(b) appoint a deputy with the same powers as the holder of the office, subject to specified conditions, or with limited powers as specified; and

(c) temporarily appoint another person to the office if it is vacant or if the holder of the office is absent or unable to act. 2006, c. 21, Sched. F, s. 77.

Incidental powers

78 If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included. 2006, c. 21, Sched. F, s. 78.

Performance when occasion requires

79 Powers that are conferred on a person may be exercised, and duties that are imposed on a person shall be performed, whenever the occasion requires. 2006, c. 21, Sched. F, s. 79.

Powers and duties remain despite delegation

80 A person on whom an Act confers a power or imposes a duty may exercise it even if it has been delegated to another person. 2006, c. 21, Sched. F, s. 80.

Delegation of regulation-making power

80.1 (1) A person on whom an Act confers power to make a regulation may delegate the power only if an Act specifically authorizes the delegation of that regulation-making power. 2009, c. 33, Sched. 2, s. 43 (29).

Exception

(2) Subsection (1) does not apply in respect of an order to amend or revoke an order that was made under section 17 of the *Ontario Planning and Development Act, 1994*, section 47 of the *Planning Act* or a predecessor of either of those sections, before the day section 7 of Schedule 10 to the *Fighting Delays, Building Faster Act, 2025* came into effect. 2025, c. 14, Sched. 10, s. 7.

Survival of delegation

81 The delegation of a power or duty remains valid until it is revoked or amended, even if the author of the delegation is no longer in office. 2006, c. 21, Sched. F, s. 81.

General or particular

82 (1) A regulation may be general or particular in its application. 2006, c. 21, Sched. F, s. 82 (1).

Classes

(2) The power to make a regulation includes the power to prescribe a class. 2006, c. 21, Sched. F, s. 82 (2).

Same

(3) For the purposes of subsection (2), a class may be defined,

(a) in terms of any attribute or combination of attributes; or

(b) as consisting of, including or excluding a specified member. 2006, c. 21, Sched. F, s. 82 (3).

Fee regulations

83 This Act authorizes the Lieutenant Governor in Council to make regulations under an Act, prescribing fees to be charged by persons whom the Act or a regulation made under the Act requires or authorizes to do anything, if the Act itself does not provide for such regulations. 2006, c. 21, Sched. F, s. 83.

Deviations from required form

84 Deviations from a form whose use is required under an Act do not invalidate the form if,

(a) they do not affect the substance and are unlikely to mislead; and

(b) the form is organized in the same or substantially the same way as the form whose use is required. 2006, c. 21, Sched. F, s. 84.

Definitions

Different forms of defined terms

85 If a term is defined, other forms of the same term have corresponding meanings. 2006, c. 21, Sched. F, s. 85.

Terms used in regulations

86 Terms used in regulations have the same meaning as in the Act under whose authority they are made. 2006, c. 21, Sched. F, s. 86.

Definitions

87 In every Act and regulation,

"Act" means an Act of the Legislature, and "statute" has the same meaning; ("loi")

"Assembly" and "Legislative Assembly" mean the Legislative Assembly of Ontario; ("Assemblée", "Assemblée législative")

"Court of Appeal" means the Court of Appeal for Ontario; ("Cour d'appel")

"Divisional Court" means the Divisional Court of the Superior Court of Justice; ("Cour divisionnaire")

"Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and His other Realms and Territories, and Head of the Commonwealth; ("Sa Majesté", "la Reine", "le Roi", "la Couronne")

"holiday" means a holiday as described in section 88; ("jour férié")

"individual" means a natural person; ("particulier")

"legally qualified medical practitioner" and similar expressions indicating legal recognition of a person as a member of the medical profession mean a member of the College of Physicians and Surgeons of Ontario; ("médecin dûment qualifié")

"Legislature" means the Lieutenant Governor acting by and with the advice and consent of the Assembly; ("Législature")

"Lieutenant Governor" means the Lieutenant Governor of Ontario, or the person administering the Government of Ontario for the time being in His Majesty's name, by whatever title he or she is designated; ("lieutenant-gouverneur")

"Lieutenant Governor in Council" means the Lieutenant Governor acting by and with the advice of the Executive Council of Ontario; ("lieutenant-gouverneur en conseil")

"mentally ill", when used in reference to a person, means suffering from such a disorder of the mind that he or she requires care, supervision and control for his or her own protection or welfare, or for the protection of others; ("mentalement malade")

"newspaper", in a provision requiring publication, means a document that,

(a) is printed in sheet form, published at regular intervals of a week or less and circulated to the general public, and

(b) consists primarily of news of current events of general interest; ("journal")

"now", "next", "heretofore" and "hereafter" relate to the date of coming into force of the provision in which they are used; ("maintenant", "prochainement", "jusqu'ici", "dorénavant")

"peace officer" includes,

(a) a person employed to serve or execute civil process, including a sheriff, deputy sheriff and sheriff's officer, and a bailiff of the Small Claims Court,

(b) a justice of the peace,

(c) an officer or permanent employee of a correctional institution, or of a place of detention or custody, and

(d) a person employed to maintain the public peace, including a police officer and constable; ("agent de la paix")

"person" includes a corporation; ("personne")

"proclamation" means a proclamation issued by the Lieutenant Governor under the Great Seal; ("proclamation")

"regulation" means a regulation that is filed under Part III (Regulations); ("règlement")

"rules of court" means rules made under Part IV of the *Courts of Justice Act*, or otherwise by an authority having power to make rules regulating court practices and procedures. ("règles de pratique") 2006, c. 21, Sched. F, s. 87; 2009, c. 33, Sched. 2, s. 43 (30, 31); 2017, c. 2, Sched. 2, s. 25; 2024, c. 2, Sched. 19, s. 9 (4, 5).

TIME

Holidays

88 (1) This section applies for the purposes of the definition of "holiday" in section 87. 2006, c. 21, Sched. F, s. 88 (1).

Same

(2) The following days are holidays:

1. Sunday.

2. New Year's Day.

2.1 Family Day.

3. Good Friday.

4. Easter Monday.

5. Victoria Day.

6. Canada Day.

7. Labour Day.

8. Thanksgiving Day.

9. Remembrance Day.

10. Christmas Day.

11. Boxing Day.

12. Any day fixed as a holiday by proclamation of the Governor General or Lieutenant Governor. 2006, c. 21, Sched. F, s. 88 (2); 2009, c. 33, Sched. 2, s. 43 (32).

Same

(3) When New Year's Day falls on a Sunday, the following Monday is also a holiday. 2006, c. 21, Sched. F, s. 88 (3).

Same

(4) In accordance with the *Holidays Act* (Canada), when July 1 is a Sunday, Canada Day falls on July 2. 2006, c. 21, Sched. F, s. 88 (4).

Same

(5) When Christmas Day falls on a Saturday, the following Monday is also a holiday, and when it falls on a Sunday, the following Tuesday is also a holiday. 2006, c. 21, Sched. F, s. 88 (5).

Computation of time

Holidays

89 (1) Time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday. 2006, c. 21, Sched. F, s. 89 (1).

Days on which offices closed

(2) Time limits for registering or filing documents or for doing anything else that expire on a day when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business. 2006, c. 21, Sched. F, s. 89 (2).

Number of days between events

(3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days. 2006, c. 21, Sched. F, s. 89 (3).

Specified day included

(4) A period of time described as beginning or ending on, at or with a specified day includes that day. 2006, c. 21, Sched. F, s. 89 (4).

Specified day excluded

(5) A period of time described as beginning before or after a specified day excludes that day. 2006, c. 21, Sched. F, s. 89 (5).

Months

(6) If a period of time is described as a number of months before or after a specified day, the following rules apply:

1. The number of months is counted from the specified day, excluding the month in which the specified day falls.

2. The period includes the day in the last month counted that has the same calendar number as the specified day or, if that month has no day with that number, its last day.

3. REPEALED: 2009, c. 33, Sched. 2, s. 43 (33).

2006, c. 21, Sched. F, s. 89 (6); 2009, c. 33, Sched. 2, s. 43 (33); 2024, c. 2, Sched. 15, s. 16.

Leap years

(7) The anniversary of an event that took place on February 29 falls on February 28, except in a leap year. 2006, c. 21, Sched. F, s. 89 (7).

Age

90 A person attains an age specified as a number of years at the first instant of the corresponding anniversary of his or her birth. 2006, c. 21, Sched. F, s. 90.

Private Acts

91 (1) A private Act does not affect the rights of a person or entity except as mentioned in the Act. 2006, c. 21, Sched. F, s. 91 (1).

Same

(2) Subsection (1) does not apply to a private Act respecting the powers or duties of a municipality. 2006, c. 21, Sched. F, s. 91 (2).

Corporations, implied provisions

92 (1) A provision of an Act that creates a corporation,

(a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;

(b) gives a majority of the members of the corporation power to bind the others by their acts; and

(c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them. 2006, c. 21, Sched. F, s. 92 (1).

Restricted application

(2) Subsection (1) applies to a corporation only if the provision creating it is in force immediately before October 19, 2006. 2006, c. 21, Sched. F, s. 92 (2); 2024, c. 2, Sched. 15, s. 17.

Majority

93 If something is required or authorized to be done by more than two persons, a majority of them may do it. 2006, c. 21, Sched. F, s. 93.

Reference to series

94 If reference is made to a series, the first and last items are included. 2006, c. 21, Sched. F, s. 94.

Oaths, affirmations and declarations

95 A requirement that a person take an oath or be sworn is satisfied by an affirmation or a declaration. 2006, c. 21, Sched. F, s. 95.

Requirements for security and sureties

Security

96 (1) A requirement to give security is a requirement to give security that is sufficient for the purpose. 2006, c. 21, Sched. F, s. 96 (1).

Sureties

(2) Subsection (1) also applies, with necessary modifications, to a surety, and if the provision refers to sureties without specifying the number of persons, one is sufficient. 2006, c. 21, Sched. F, s. 96 (2).

Immunity provisions

97 (1) Where words referring to actions or other proceedings for damages are used in a provision excluding or limiting the liability of the Crown or any other person, third or subsequent party proceedings and proceedings for contribution and indemnity or restitution are included. 2006, c. 21, Sched. F, s. 97 (1).

Transition

(2) Subsection (1) applies in respect of proceedings commenced on or after October 4, 2000. 2006, c. 21, Sched. F, s. 97 (2).

PART VII
UNCONSOLIDATED ACTS AND REGULATIONS

Unconsolidated Acts

98 (1)-(3) OMITTED (AMENDS OR REPEALS OTHER ACTS). 2006, c. 21, Sched. F, s. 98 (1-3).

Consolidation

(4) The Chief Legislative Counsel may at any time cause an Act that is unconsolidated and unrepealed to be consolidated and published on the e-Laws website as consolidated law. 2009, c. 33, Sched. 2, s. 43 (34).

French version

(5) If the Chief Legislative Counsel causes an Act to be consolidated under subsection (4), he or she shall, in the case of a public Act, or may, in the case of a private Act,

(a) prepare a French version of the Act; and

(b) cause the French version to be consolidated and published on the e-Laws website as consolidated law together with the English version. 2009, c. 33, Sched. 2, s. 43 (34).

Revision

(6) For the purposes of consolidating an Act under subsection (4), Part V (Change Powers) applies in respect of the consolidated Act with the following modifications:

1. Subsection 42 (2) shall be read as including power to,

   i. omit provisions that are obsolete, and

   ii. alter the numbering and arrangement of provisions.

2. Subsection 42 (3) does not apply.

3. Subsection 43 (1) shall be read as including reference to the changes referred to in subparagraphs 1 i and ii. 2009, c. 33, Sched. 2, s. 43 (34).

Unconsolidated regulations

99 (1), (2) OMITTED (AMENDS, REPEALS OR REVOKES OTHER LEGISLATION). 2006, c. 21, Sched. F, s. 99 (1, 2).

Consolidation

(3) The Chief Legislative Counsel may at any time cause a regulation that is unconsolidated and unrevoked to be consolidated and published on the e-Laws website as consolidated law. 2009, c. 33, Sched. 2, s. 43 (35).

French version

(4) If the Chief Legislative Counsel causes a regulation to be consolidated under subsection (3), he or she may,

(a) prepare a French version of the regulation; and

(b) cause the French version to be consolidated and published on the e-Laws website as consolidated law together with the English version. 2009, c. 33, Sched. 2, s. 43 (35).

Revision

(5) For the purposes of consolidating a regulation under subsection (3), Part V (Change Powers) applies in respect of the consolidated regulation with the following modifications:

1. Subsection 42 (2) shall be read as including power to,

i. omit provisions that are obsolete, and

ii. alter the numbering and arrangement of provisions.

2. Subsection 42 (3) does not apply.

3. Subsection 43 (1) shall be read as including reference to the changes referred to in subparagraphs 1 i and ii. 2009, c. 33, Sched. 2, s. 43 (35).

Resolution of Uncertainty or Transition

Resolution of uncertainty or transition

100 (1) The Lieutenant Governor in Council may make regulations in respect of an Act repealed by section 98 or a regulation revoked by section 99,

(a) to resolve any uncertainty in respect of,

(i) any right, privilege, obligation or liability related to the Act or regulation, or

(ii) the effect of the repeal of the Act or the revocation of the regulation;

(b) to resolve any transitional matters that may arise in relation to the repeal or revocation. 2006, c. 21, Sched. F, s. 100 (1).

Same

(2) For greater certainty, a regulation under subsection (1) may address any uncertainty or transitional matter that arises before the day the regulation is filed. 2006, c. 21, Sched. F, s. 100 (2).

PART VIII (OMITTED)

101-142 Omitted (amends or repeals other Acts). 2006, c. 21, Sched. F, ss. 101-142.

PART IX (OMITTED)

143 Omitted (provides for coming into force of provisions of this Act). 2006, c. 21, Sched. F, s. 143.

144 Omitted (enacts short title of this Act). 2006, c. 21, Sched. F, s. 144.

TAB 20

CanLII

Public Service of Ontario Act, 2006, SO 2006, c 35, Sch A

Current version: in force since 2024-04-01

Link to the latest version: https://canlii.ca/t/345

Stable link to this version: https://canlii.ca/t/568d3

Citation to this version: Public Service of Ontario Act, 2006, SO 2006, c 35, Sch A, <https://canlii.ca/t/568d3> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-22

Public Service of Ontario Act, 2006

S.O. 2006, CHAPTER 35
SCHEDULE A

Consolidation Period: From April 1, 2024 to the e-Laws currency date.

Last amendment: 2021, c. 4, Sched. 3, s. 27.

PART I
GENERAL

Purpose, Interpretation and Application

Purposes of this Act

1 The following are the purposes of this Act:

1. To ensure that the public service of Ontario is effective in serving the public, the government and the Legislature.
2. To ensure that the public service of Ontario is non-partisan, professional, ethical and competent.
3. To set out roles and responsibilities in the administration of the public service of Ontario.
4. To provide a framework in law for the leadership and management of the public service of Ontario.
5. To set out rights and duties of public servants concerning ethical conduct.
6. To set out rights and duties of public servants concerning political activity.
7. To establish procedures for the disclosure and investigation of wrongdoing in the public service of Ontario and to protect public servants who disclose wrongdoing from reprisals. 2006, c. 35, Sched. A, s. 1.

Interpretation

2 (1) In this Act,

"Commission public body" means a public body that is prescribed as a Commission public body under clause 8 (1.1) (b); ("organisme public rattaché à la Commission")

"Conflict of Interest Commissioner" means the Conflict of Interest Commissioner described in section 14 as it read immediately before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force; ("commissaire aux conflits d'intérêts")

"government appointee" means a person who is a public servant by virtue of paragraph 5 of subsection (2); ("personne nommée par le gouvernement")

"Integrity Commissioner" means the Integrity Commissioner appointed under the *Members' Integrity Act, 1994*; ("commissaire à l'intégrité")

"minister" means a member of the Executive Council; ("ministre")

"minister's office" includes the office of the parliamentary assistant, if any, assigned to the minister; ("cabinet d'un ministre")

"prescribed" means prescribed by regulation; ("prescrit")

"public body" means a body that is prescribed as a public body under clause 8 (1.1) (a); ("organisme public")

"public service of Ontario" means,

(a) ministries, including ministers' offices, and

(b) public bodies; ("fonction publique de l'Ontario")

"regulation" means a regulation under this Act. ("règlement") 2006, c. 35, Sched. A, s. 2 (1); 2009, c. 33, Sched. 17, s. 10 (1, 2); 2018, c. 17, Sched. 35, s. 1.

Public servant

(2) For the purposes of this Act, the following are public servants:

1. Every person employed under Part III.
2. The Secretary of the Cabinet.
3. Every deputy minister.
4. Every employee of a public body.
5. Every person appointed by the Lieutenant Governor in Council, the Lieutenant Governor or a minister to a public body. 2006, c. 35, Sched. A, s. 2 (2).

Certain appointees not public servants

(3) For the purposes of this Act, judges, justices of the peace, associate judges, deputy judges, the Small Claims Court Administrative Judge and officers of the Assembly are not public servants. 2006, c. 35, Sched. A, s. 2 (3); 2018, c. 17, Sched. 45, s. 14; 2021, c. 4, Sched. 3, s. 27.

Application of Act to former public servants

3 Except where otherwise provided, a reference in this Act to a former public servant is a reference to a person who ceased to be a public servant on or after the day on which this section comes into force. 2006, c. 35, Sched. A, s. 3.

Application of Act to Cabinet Office, etc.

4 For the purposes of this Act, the Cabinet Office is a ministry, the Premier is its minister and the Secretary of the Cabinet is its deputy minister. 2006, c. 35, Sched. A, s. 4.

Oaths and Affirmations

Oath or affirmation of allegiance

5 (1) Every public servant shall swear or affirm his or her allegiance to the Crown as prescribed under clause 8 (1) (c). 2006, c. 35, Sched. A, s. 5 (1).

Exception

(2) Subsection (1) does not apply to a public servant in the circumstances prescribed under clause 8 (1) (d). 2006, c. 35, Sched. A, s. 5 (2).

Oath or affirmation of office

6 Every public servant shall swear or affirm an oath of office as prescribed under clause 8 (1) (c). 2006, c. 35, Sched. A, s. 6.

Administering oath, affirmation

7 An oath or affirmation may only be administered under section 5 or 6 by a person prescribed under clause 8 (1) (e). 2006, c. 35, Sched. A, s. 7.

REGULATIONS

Regulations, Part I

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

(a), (b) Repealed: 2009, c. 33, Sched. 17, s. 10 (3).

(c) respecting the wording of oaths and affirmations required under sections 5 and 6 and the manner of making them;

(d) prescribing the circumstances in which a public servant is exempt from the requirement to swear or affirm his or her allegiance to the Crown under subsection 5 (1);

(e) prescribing persons who have the authority to administer an oath or affirmation for the purposes of sections 5 and 6. 2006, c. 35, Sched. A, s. 8 (1); 2009, c. 33, Sched. 17, s. 10 (3).

Same, Minister

(1.1) The minister responsible for the administration of this Act may make regulations,

(a) prescribing the bodies that are public bodies for the purposes of the definition of "public body" in subsection 2 (1);

(b) prescribing as Commission public bodies, for the purposes of the definition of "Commission public body" in subsection 2 (1), public bodies,

(i) for which the Public Service Commission may, under this or any other Act, appoint public servants under Part III, or

(ii) in respect of which there is no statutory authority to employ employees. 2009, c. 33, Sched. 17, s. 10 (4).

Scope of regulations

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 8 (2).

PART II
ROLES AND RESPONSIBILITIES IN THE ADMINISTRATION OF THE PUBLIC SERVICE OF ONTARIO

PUBLIC SERVICE COMMISSION

Commission continued

9 (1) The Civil Service Commission is continued under the name the Public Service Commission in English and Commission de la fonction publique in French. 2006, c. 35, Sched. A, s. 9 (1).

Composition

(2) The Public Service Commission shall be composed of a chair and at least two other members appointed by the Lieutenant Governor in Council. 2006, c. 35, Sched. A, s. 9 (2).

Remuneration, etc.
(3) The Lieutenant Governor in Council may fix the remuneration and allowance for expenses of members of the Public Service Commission. 2006, c. 35, Sched. A, s. 9 (3).

Powers, duties and functions
10 The Public Service Commission may exercise the powers and shall perform the duties and functions assigned to it under this or any other Act. 2006, c. 35, Sched. A, s. 10.

Employees
11 (1) Such employees as are considered necessary for the proper conduct of the business of the Public Service Commission may be appointed under Part III. 2006, c. 35, Sched. A, s. 11 (1).

Consultants
(2) The Public Service Commission may retain such technical and professional consultants as it considers necessary for the proper conduct of the Commission's business, at the remuneration and on the terms that the Commission approves. 2006, c. 35, Sched. A, s. 11 (2).

Annual report
12 (1) The Public Service Commission shall prepare an annual report, provide it to the minister responsible for the administration of this Act and make it available to the public. 2017, c. 34, Sched. 46, s. 49 (1).

Same
(2) The Public Service Commission shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

(a) the form and content of the annual report;

(b) when to provide it to the minister; and

(c) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 49 (1).

Same
(3) The Public Service Commission shall include such additional content in the annual report as the minister may require. 2017, c. 34, Sched. 46, s. 49 (1).

Tabling of annual report
12.1 The minister responsible for the administration of this Act shall table the Public Service Commission's annual report in the Assembly and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when to table it. 2017, c. 34, Sched. 46, s. 49 (1).

No personal liability
13 (1) No action or other proceeding may be instituted against the Public Service Commission or a member of or an employee in the Commission for any act done or omitted in good faith in the exercise or intended exercise of the Commission's powers or in the execution or intended execution of the Commission's duties or functions. 2006, c. 35, Sched. A, s. 13 (1).

Crown liability
(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject. 2006, c. 35, Sched. A, s. 13 (2); 2019, c. 7, Sched. 17, s. 149 (1).

INTEGRITY COMMISSIONER

Integrity Commissioner
14 (1) The Integrity Commissioner may exercise the powers and shall perform the duties and functions assigned to him or her under this Act. 2018, c. 17, Sched. 35, s. 2.

Designate

(2) The Integrity Commissioner may designate in writing an employee of the office of the Commissioner to fulfil the duties of the Commissioner under this Act, subject to any conditions or restrictions set out in the designation. 2018, c. 17, Sched. 35, s. 2.

Employees

15 (1) The Integrity Commissioner may hire, pursuant to section 23.11 of the *Members' Integrity Act, 1994*, such employees as he or she considers necessary for the proper exercise of the powers and performance of the duties and functions of the Commissioner under this Act. 2018, c. 17, Sched. 35, s. 2.

Consultants

(2) The Integrity Commissioner may retain such technical and professional consultants as he or she considers necessary for the proper exercise of the powers and performance of the duties and functions of the Commissioner under this Act, at the remuneration and on the terms that the Commissioner approves. 2018, c. 17, Sched. 35, s. 2.

Employees continued

16 (1) The employees who work in the office of the Conflict of Interest Commissioner immediately before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force become employees of the Office of the Assembly on that day. 2018, c. 17, Sched. 35, s. 2.

Same

(2) The employment of the employees described in subsection (1) is not terminated or severed, including for the purposes of the *Employment Standards Act, 2000*, and the employment of the employees immediately before and after the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force is continuous for the purposes of calculating an employee's length or period of employment. 2018, c. 17, Sched. 35, s. 2.

Transfers

17 (1) The Crown in right of Ontario may transfer to the Integrity Commissioner any of its rights, obligations, assets and liabilities relating to the office of the Conflict of Interest Commissioner or any interest in or entitlement to such a right, obligation, asset and liability, with or without consideration, on terms and conditions agreed upon between the Crown and the Integrity Commissioner. 2018, c. 17, Sched. 35, s. 2.

Agreement assignable

(2) Where an agreement is the subject of a transfer under subsection (1), it shall be deemed to be assignable by the minister responsible for the administration of this Act without the consent of any party to the agreement. 2018, c. 17, Sched. 35, s. 2.

Other agreements

(3) The Crown may enter into such other agreements, execute such documents and instruments, and do such other acts and things as the minister responsible for the administration of this Act considers necessary or advisable to effect a transfer authorized in subsection (1). 2018, c. 17, Sched. 35, s. 2.

Annual report

18 The Integrity Commissioner shall include in his or her annual report prepared under section 24 of the *Members' Integrity Act, 1994* a report on the exercise of the powers and performance of the duties and functions of the Commissioner under this Act, and may include such additional content as the Management Board of Cabinet or the minister responsible for the administration of this Act requests. 2018, c. 17, Sched. 35, s. 2.

Immunity

19 Sections 25 and 26 of the *Members' Integrity Act, 1994* apply to the Integrity Commissioner and the employees of the office of the Commissioner in respect of their duties under this Act. 2018, c. 17, Sched. 35, s. 2.

19.1 Repealed: 2018, c. 17, Sched. 35, s. 2.

Protection from liability

20 (1) No cause of action arises, no proceeding may be brought and no remedy is available or damages, costs or compensation payable in connection with any amendment made by Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* to this Act or anything done or not done in accordance with those amendments. 2018, c. 17, Sched. 35, s. 2.

Same

(2) Subsection (1) applies whether the cause of action on which a proceeding is based arose before or after the day that subsection comes into force. 2018, c. 17, Sched. 35, s. 2.

Proceedings set aside

(3) Any proceeding referred to in subsection (1) commenced before the day that subsection comes into force is deemed to have been dismissed, without costs, on that day. 2018, c. 17, Sched. 35, s. 2.

20.1 Repealed: 2018, c. 17, Sched. 35, s. 3 (2).

Public Service Grievance Board

Public Service Grievance Board continued

21 (1) The board known as the Public Service Grievance Board in English and Commission des griefs de la fonction publique in French is continued. 2006, c. 35, Sched. A, s. 21 (1).

Composition

(2) The Public Service Grievance Board shall be composed of a chair and at least two other members appointed by the Lieutenant Governor in Council for a fixed term. 2006, c. 35, Sched. A, s. 21 (2).

Remuneration, etc.

(3) The Lieutenant Governor in Council may fix the remuneration and allowance for expenses of members of the Public Service Grievance Board. 2006, c. 35, Sched. A, s. 21 (3).

Powers, duties and functions

22 The Public Service Grievance Board may exercise the powers and shall perform the duties and functions assigned to it under this or any other Act. 2006, c. 35, Sched. A, s. 22.

Procedures

23 (1) Proceedings before the Public Service Grievance Board shall be governed in accordance with the following:

1. Subject to paragraph 2, the *Statutory Powers Procedure Act* and any rules made under that Act by the Board apply to proceedings before the Board.
2. On the coming into force of a regulation made under subsection (2) establishing procedural rules for proceedings before the Board, the *Statutory Powers Procedure Act* and any rules made under that Act cease to apply to proceedings before the Board to the extent that the *Statutory Powers Procedure Act* and any rules made under it conflict with the regulation. 2006, c. 35, Sched. A, s. 23 (1).

Same

(2) The Lieutenant Governor in Council may make regulations establishing procedural rules for proceedings before the Public Service Grievance Board. 2006, c. 35, Sched. A, s. 23 (2).

Same

(3) Without limiting the generality of subsection (2), a regulation made under that subsection may provide for transitional provisions respecting the application of procedural rules to proceedings before the Public Service Grievance Board. 2006, c. 35, Sched. A, s. 23 (3).

Same

(4) A regulation made under subsection (2) may be general or particular in its application. 2006, c. 35, Sched. A, s. 23 (4).

Restriction, decision on grievance

24 (1) In making a decision on a grievance, the Public Service Grievance Board shall not provide for the employment of a public servant in a position that involves direct responsibility for or provides an opportunity for contact with a vulnerable person specified in a regulation made under clause 31 (1) (a) if the Board has found that the public servant,

(a) has applied force to a vulnerable person, except the minimum force necessary for self-defence or the defence of another person or necessary to restrain the vulnerable person for his or her own protection; or

(b) has sexually molested a vulnerable person. 2006, c. 35, Sched. A, s. 24 (1).

Same

(2) Where subsection (1) applies, the Public Service Grievance Board may provide for the employment of the public servant in another, substantially equivalent, position. 2006, c. 35, Sched. A, s. 24 (2).

Criminal conviction or discharge

25 (1) If a public servant is convicted or discharged of an offence under the *Criminal Code* (Canada) in respect of an act or omission that results in discipline or dismissal and the discipline or dismissal becomes the subject matter of a grievance before the Public Service Grievance Board, proof of the conviction or discharge shall be taken as conclusive evidence that the public servant committed the act or omission after,

(a) the time for an appeal has expired; or

(b) if an appeal was taken, the appeal was dismissed and no further appeal is available. 2006, c. 35, Sched. A, s. 25 (1).

Adjournment pending appeal to be granted

(2) If an adjournment of a grievance is requested pending an appeal of a conviction or a discharge mentioned in subsection (1), the Public Service Grievance Board shall grant the adjournment. 2006, c. 35, Sched. A, s. 25 (2).

Decisions final

26 A decision of the Public Service Grievance Board is final. 2006, c. 35, Sched. A, s. 26.

No personal liability

27 (1) No action or other proceeding may be instituted against the Public Service Grievance Board or a member of or an employee in the Board for any act done or omitted in good faith in the exercise or intended exercise of the Board's powers or in the execution or intended execution of the Board's duties and functions. 2006, c. 35, Sched. A, s. 27 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject. 2006, c. 35, Sched. A, s. 27 (2); 2019, c. 7, Sched. 17, s. 149 (2).

Other Officials

Secretary of the Cabinet

28 The Secretary of the Cabinet is the clerk of the Executive Council and the head of the public service of Ontario. 2006, c. 35, Sched. A, s. 28.

Deputy ministers

29 (1) The deputy minister of a ministry, acting on behalf of the minister, is responsible for the operation of the ministry. 2006, c. 35, Sched. A, s. 29 (1).

Responsibility to inform minister

(2) The deputy minister shall give the minister such information as the minister may require to carry out his or her responsibilities as the minister of the ministry, a member of the Executive Council and a member of the Assembly. 2006, c. 35, Sched. A, s. 29 (2).

Responsibility re public servants

(3) Deputy ministers shall promote effective, non-partisan, professional, ethical and competent public service by public servants. 2006, c. 35, Sched. A, s. 29 (3).

Powers, duties and functions

(4) A deputy minister shall exercise such powers and perform such duties and functions as may be assigned to him or her under this or any other Act or by the Lieutenant Governor in Council or by the minister. 2006, c. 35, Sched. A, s. 29 (4).

Acting deputy ministers

30 (1) The Secretary of the Cabinet may designate in writing a public servant to exercise the powers and perform the duties and functions of the deputy minister in his or her absence. 2006, c. 35, Sched. A, s. 30 (1).

Same

(2) The Secretary of the Cabinet may delegate his or her power to designate under subsection (1) to a deputy minister with respect to his or her ministry. 2006, c. 35, Sched. A, s. 30 (2).

Same

(3) The Secretary of the Cabinet may impose conditions and restrictions that govern the exercise of the delegated power. 2006, c. 35, Sched. A, s. 30 (3).

Regulations

Regulations, Part II

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

(a) specifying who is a vulnerable person for the purposes of section 24;

(b) prescribing powers, duties and functions of the Public Service Grievance Board, in addition to those provided under this Act;

(c) prescribing circumstances in addition to those set out in this Act in which a public servant may file a grievance with the Public Service Grievance Board;

(d) prescribing matters that cannot be the subject of a grievance before the Public Service Grievance Board;

(e) prescribing classes of public servants who are not eligible to file a grievance with the Public Service Grievance Board;

(f) prescribing remedy powers of the Public Service Grievance Board in respect of circumstances prescribed under clause (c);

(g) prescribing powers, duties and functions of the Public Service Commission and the Integrity Commissioner under this Act, in addition to those already provided;

(h) providing for the delegation and subdelegation of the powers, duties and functions prescribed under clause (g), in the manner and to the persons or bodies specified in the regulations, subject to such restrictions or conditions as may be prescribed. 2006, c. 35, Sched. A, s. 31 (1); 2018, c. 17, Sched. 35, s. 4.

Same

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 31 (2).

PART III
EMPLOYMENT BY THE CROWN

Appointment by the Public Service Commission

Appointment by the Public Service Commission

Employment in a ministry

32 (1) The Public Service Commission may appoint persons to employment by the Crown to work in a ministry, other than in a minister's office. 2006, c. 35, Sched. A, s. 32 (1).

Employment in a Commission public body

(2) The Public Service Commission may appoint persons to employment by the Crown to work in a Commission public body. 2006, c. 35, Sched. A, s. 32 (2).

Fixed term or otherwise

(3) An appointment by the Public Service Commission may be for a fixed term or otherwise. 2006, c. 35, Sched. A, s. 32 (3).

Same

(4) A person appointed by the Public Service Commission for a fixed term may be reappointed for one or more further terms. 2006, c. 35, Sched. A, s. 32 (4).

Creation of positions

33 (1) The Management Board of Cabinet may, by directive, create classes of position for public servants appointed by the Public Service Commission and determine the duties of and qualifications for the positions. 2006, c. 35, Sched. A, s. 33 (1).

Salary or wage ranges

(2) The Management Board of Cabinet may, by directive, determine salary ranges or wage ranges for public servants appointed by the Public Service Commission. 2006, c. 35, Sched. A, s. 33 (2).

Other remuneration

(3) The Management Board of Cabinet may, by directive, determine other remuneration, including benefits, for public servants appointed by the Public Service Commission. 2006, c. 35, Sched. A, s. 33 (3).

Other terms, conditions of employment

(4) The Management Board of Cabinet may, by directive, establish other terms and conditions of employment for public servants appointed by the Public Service Commission and for deputy ministers. 2006, c. 35, Sched. A, s. 33 (4); 2009, c. 33, Sched. 17, s. 10 (5).

General or particular

(5) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 33 (5).

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive issued under this section. 2006, c. 35, Sched. A, ss. 33 (6), 157.

Archive

(7) The Management Board of Cabinet shall maintain an archive of all directives issued by it under this section indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 33 (7).

Discipline and dismissal

34 The Public Service Commission may for cause,

(a) impose disciplinary measures, including suspension, on a public servant appointed by it, as the Commission considers appropriate; and

(b) dismiss from employment a public servant appointed by it, as the Commission considers appropriate. 2009, c. 33, Sched. 17, s. 10 (6).

Suspension, maximum period

35 A suspension under section 34 by the Public Service Commission may continue for a period not exceeding one month and, during the suspension, the public servant is not entitled to receive a salary, wages or any other remuneration, including benefits. 2006, c. 35, Sched. A, s. 35.

Commission may investigate

36 (1) The Public Service Commission may conduct an investigation in order to determine whether there is cause for the purposes of section 34. 2006, c. 35, Sched. A, s. 36 (1).

Suspension pending an investigation

(2) The Public Service Commission may, pending the conclusion of an investigation, suspend the public servant for a period not exceeding the period prescribed under clause 55 (1) (a). 2006, c. 35, Sched. A, s. 36 (2).

Same

(3) The Public Service Commission may withhold the public servant's salary, wages or any other remuneration, including benefits, during the suspension under this section if it considers it appropriate to do so, and may, at the end of the investigation, reimburse amounts that were withheld if it considers it appropriate to do so. 2006, c. 35, Sched. A, s. 36 (3).

Probationary period

37 (1) Where the Public Service Commission appoints a public servant to employment for a term that is not fixed, the Commission may direct that the public servant be on probation for a period of not more than one year. 2006, c. 35, Sched. A, s. 37 (1).

Same

(2) While on probation under subsection (1), the public servant may be dismissed for failure to meet the requirements of his or her position. 2006, c. 35, Sched. A, s. 37 (2).

Dismissal without cause

38 (1) The Public Service Commission may without cause dismiss a public servant appointed by it who is employed in a class of position that is prescribed under clause 55 (1) (b) by giving the public servant reasonable notice or by giving the public servant compensation in lieu of notice. 2006, c. 35, Sched. A, s. 38 (1).

Reinstatement

(2) An order to reinstate a public servant who is dismissed under subsection (1) shall not be made by any court, tribunal or other arbitrator. 2006, c. 35, Sched. A, s. 38 (2).

Dismissal for certain reasons

39 The Public Service Commission may dismiss a public servant appointed by it for the following reasons:

1. A shortage of work.
2. A shortage of funds.
3. The elimination of the public servant's position.
4. A material change in the ministry or Commission public body in which the public servant works. 2006, c. 35, Sched. A, s. 39.

Effect of dismissal

40 When the dismissal of a public servant takes effect, he or she ceases to be employed by the Crown. 2006, c. 35, Sched. A, s. 40.

Resignation

41 (1) A public servant appointed by the Public Service Commission may resign from his or her position by giving at least two weeks notice in writing of the intention to resign to the Commission. 2006, c. 35, Sched. A, s. 41 (1).

Withdrawal

(2) A public servant may, by giving notice in writing to the Public Service Commission, withdraw the notice of intention to resign at any time before its effective date if,

(a) no person has been appointed or selected for appointment by the Commission to the position held by the public servant; and

(b) the Commission approves the withdrawal. 2006, c. 35, Sched. A, s. 41 (2).

Effect of resignation

(3) When the resignation of a public servant takes effect, he or she ceases to be employed by the Crown. 2006, c. 35, Sched. A, s. 41 (3).

Abandonment

42 (1) If a public servant appointed by the Public Service Commission is absent from work without approved leave for a period of two weeks or more, the Commission may declare, in writing, that the public servant has abandoned the position and that his or her employment by the Crown is terminated. 2006, c. 35, Sched. A, s. 42 (1).

Effect of termination

(2) When a declaration with respect to a public servant is made under subsection (1), the termination takes effect and the public servant ceases to be employed by the Crown. 2006, c. 35, Sched. A, s. 42 (2).

Directives, human resources

43 (1) The Public Service Commission may issue directives for effective management and administration of human resources in relation to public servants appointed by it and in relation to deputy ministers. 2006, c. 35, Sched. A, s. 43 (1); 2009, c. 33, Sched. 17, s. 10 (7).

Directives, non-partisan

(2) The Public Service Commission shall ensure by directive that the recruitment and employment of public servants appointed by it are non-partisan. 2006, c. 35, Sched. A, s. 43 (2).

Conflict

(3) In the case of a conflict between a directive issued by the Public Service Commission under subsection (1) and a policy, procedure or directive of the Management Board of Cabinet under the *Management Board of Cabinet Act* or under this Act, the latter prevails. 2006, c. 35, Sched. A, s. 43 (3).

Same

(4) The Management Board of Cabinet shall not set a policy or procedure under the *Management Board of Cabinet Act* or issue a directive under that Act or under this Act that would be inconsistent with the non-partisan nature of the public service of Ontario. 2006, c. 35, Sched. A, s. 43 (4).

General or particular

(5) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 43 (5).

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive issued under this section. 2006, c. 35, Sched. A, ss. 43 (6), 157.

Archive

(7) The Public Service Commission shall maintain an archive of all directives issued by it under this section indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 43 (7).

Delegation by Commission

Delegation, public servants appointed to work in a ministry

44 (1) The Public Service Commission may delegate any of its powers, duties or functions under subsection 32 (1) and sections 34 to 42 in respect of public servants appointed by it to work in a ministry to the deputy minister of the ministry. 2006, c. 35, Sched. A, s. 44 (1).

Subdelegation by deputy minister

(2) A deputy minister may subdelegate any of the powers, duties or functions delegated to him or her under subsection (1) to one or more public servants employed under this Part who work in his or her ministry. 2006, c. 35, Sched. A, s. 44 (2).

Same

(3) With the permission of the Public Service Commission, a deputy minister may subdelegate to one or more persons any of the powers, duties or functions delegated to him or her under subsection (1), other than the power to dismiss a public servant and the power to make a declaration under subsection 42 (1). 2006, c. 35, Sched. A, s. 44 (3).

Delegation, public servants appointed to work in Commission public body

(4) Subject to subsection (5), the Public Service Commission may delegate any of its powers, duties or functions under subsection 32 (2) and sections 34 to 42 in respect of public servants appointed by it to work in a Commission public body to a deputy minister or to,

(a) an individual who is prescribed under subsection 55 (1.1) for the body; or

(b) the chair of the body, if no individual is prescribed under subsection 55 (1.1) for the body. 2006, c. 35, Sched. A, s. 44 (4); 2009, c. 33, Sched. 17, s. 10 (8).

Limitation

(5) The power to dismiss a public servant and the power to make a declaration under subsection 42 (1) may only be delegated under subsection (4) by the Public Service Commission to a deputy minister. 2006, c. 35, Sched. A, s. 44 (5).

Subdelegation by deputy minister

(6) A deputy minister may subdelegate any of the powers, duties or functions delegated to him or her under subsection (4) to one or more public servants employed under this Part who work in his or her ministry. 2006, c. 35, Sched. A, s. 44 (6).

Subdelegation by chair or prescribed individual

(7) A person referred to in clause (4) (a) or (b) may subdelegate any of the powers, duties or functions delegated to him or her under subsection (4) to one or more public servants employed under this Part who work in the body. 2006, c. 35, Sched. A, s. 44 (7).

Same

(8) With the permission of the Public Service Commission, a person referred to in clause (4) (a) or (b) may subdelegate any of the powers, duties or functions delegated to him or her under subsection (4) to one or more persons. 2006, c. 35, Sched. A, s. 44 (8).

Conditions and restrictions

(9) A person or body who delegates or subdelegates powers, duties or functions under this section may impose conditions and restrictions that govern the exercise of the delegated powers or the performance of the delegated duties or functions. 2006, c. 35, Sched. A, s. 44 (9).

Same

(10) Despite a permission provided in this section to subdelegate, a delegation under this section may provide that delegated powers, duties and functions may not be subdelegated. 2006, c. 35, Sched. A, s. 44 (10).

Delegation by Management Board of Cabinet

45 (1) The Management Board of Cabinet may delegate its powers, duties or functions under section 33 to the Public Service Commission. 2006, c. 35, Sched. A, s. 45 (1).

Conditions

(2) The Management Board of Cabinet may impose conditions and restrictions that govern the exercise of the delegated powers or the performance of the delegated duties or functions. 2006, c. 35, Sched. A, s. 45 (2).

Secondment to minister's office

46 At the request of a minister, the Public Service Commission may assign persons appointed under subsection 32 (1) to work in the minister's office for a fixed term. 2006, c. 35, Sched. A, s. 46.

APPOINTMENT TO WORK IN A MINISTER'S OFFICE

Employment in a minister's office

47 An individual designated by the Premier in relation to a minister's office for the purposes of this section or, if no such individual is designated, the minister may appoint persons to employment by the Crown to work in the minister's office for a fixed term. 2006, c. 35, Sched. A, s. 47.

Creation of positions

48 (1) The Management Board of Cabinet may, by directive, create classes of position for public servants appointed under section 47 and determine the duties of and qualifications for the positions. 2006, c. 35, Sched. A, s. 48 (1).

Salary or wage ranges

(2) The Management Board of Cabinet may, by directive, determine salary ranges or wage ranges for public servants appointed under section 47. 2006, c. 35, Sched. A, s. 48 (2).

Other remuneration

(3) The Management Board of Cabinet may, by directive, determine other remuneration, including benefits, for public servants appointed under section 47. 2006, c. 35, Sched. A, s. 48 (3).

Other terms, conditions of employment

(4) The Management Board of Cabinet may, by directive, establish other terms and conditions of employment for public servants appointed under section 47. 2006, c. 35, Sched. A, s. 48 (4).

General or particular

(5) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 48 (5).

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive made under this section. 2006, c. 35, Sched. A, ss. 48 (6), 157.

Archive

(7) The Management Board of Cabinet shall maintain an archive of all directives issued by it under this section indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 48 (7).

Disciplinary measures

49 Sections 34 to 36 and sections 39 to 42 apply with necessary modifications in respect of public servants appointed under section 47 and, for the purpose,

(a) a reference to a public servant appointed by the Public Service Commission shall be read as a reference to a public servant appointed under section 47; and

(b) a reference to the Public Service Commission shall be read as a reference to an individual designated by the Premier in relation to a minister's office for the purposes of section 47 or, if no such individual is designated, the minister. 2006, c. 35, Sched. A, s. 49.

Dismissal without cause

50 (1) An individual designated by the Premier in relation to a minister's office for the purposes of section 47 or, if no such individual is designated, the minister may without cause dismiss a public servant appointed under section 47 by giving the public servant reasonable notice or by giving the public servant compensation in lieu of notice. 2006, c. 35, Sched. A, s. 50 (1).

Reinstatement

(2) An order to reinstate a public servant who is dismissed under subsection (1) shall not be made by any court, tribunal or other arbitrator. 2006, c. 35, Sched. A, s. 50 (2).

Delegation

Delegation by Premier's designate

51 (1) An individual designated by the Premier in relation to a minister's office for the purposes of section 47 may delegate any of his or her powers, duties and functions under sections 47 to 50 to the minister or to the minister's executive assistant. 2006, c. 35, Sched. A, s. 51 (1).

Subdelegation by minister

(2) A minister may subdelegate any of the powers, duties or functions delegated to the minister under subsection (1) to the minister's executive assistant. 2006, c. 35, Sched. A, s. 51 (2).

Delegation by minister

(3) If no individual is designated by the Premier in relation to a minister's office for the purposes of section 47, the minister may delegate any of his or her powers, duties and functions under sections 47 to 50 to the minister's executive assistant. 2006, c. 35, Sched. A, s. 51 (3).

Conditions and restrictions

(4) A person who delegates or subdelegates powers, duties and functions under this section may impose conditions and restrictions that govern the exercise of the delegated powers or the performance of the delegated duties or functions. 2006, c. 35, Sched. A, s. 51 (4).

GENERAL

Status as employee of the Crown

52 (1) A person's status as an employee of the Crown in a ministry or a Commission public body is established only by appointment in writing under this Part. 2006, c. 35, Sched. A, s. 52 (1).

Same

(2) For greater certainty, a person's status as an employee of the Crown in a ministry or in a Commission public body cannot be inferred from his or her workplace or workplace activities. 2006, c. 35, Sched. A, s. 52 (2).

Government appointees employed under this Part

53 A public servant employed under this Part who is also a government appointee is subject to the terms and conditions of employment applicable to him or her under this Part. 2006, c. 35, Sched. A, s. 53.

Fixed term

54 A public servant employed under this Part whose employment is for a fixed term ceases to be employed by the Crown when that period expires. 2006, c. 35, Sched. A, s. 54.

Regulations

Regulations, Part III

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

(a) prescribing the maximum period for a suspension pending an investigation for the purposes of subsection 36 (2);

(b) prescribing classes of position for the purposes of subsection 38 (1).

(c) Repealed: 2009, c. 33, Sched. 17, s. 10 (9).

2006, c. 35, Sched. A, s. 55 (1); 2009, c. 33, Sched. 17, s. 10 (9).

Same, Minister

(1.1) The minister responsible for the administration of this Act may make regulations prescribing an individual for the purposes of clause 44 (4) (a). 2009, c. 33, Sched. 17, s. 10 (10).

Scope of regulations

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 55 (2).

PART IV
ETHICAL CONDUCT

Application of Conflict of Interest Rules to Public Servants and Former Public Servants

Application

56 (1) Sections 57 to 65 apply to public servants and former public servants other than public servants who work or, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 56 (1).

Same, ministers' offices

(2) Sections 66 to 69 apply to public servants and former public servants who work or who, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 56 (2).

Ministries (Other than Ministers' Offices) and Public Bodies

Rules for ministries

57 Every public servant and every former public servant who works or, immediately before ceasing to be a public servant, worked in a ministry shall comply with the conflict of interest rules prescribed under clause 71 (1) (a) that apply in respect of the ministry. 2006, c. 35, Sched. A, s. 57.

Rules for public bodies

58 (1) Every public servant and every former public servant who works or, immediately before ceasing to be a public servant, worked in a public body shall comply with the conflict of interest rules that apply to him or her, determined as follows:

1. The conflict of interest rules that apply to the public servant or former public servant are the rules, if any, approved and published by the Integrity Commissioner under section 59 or 60 for the public body.

2. During the year beginning on the day on which this section comes into force, if no conflict of interest rules are approved and published by the Conflict of Interest Commissioner under section 59 or 60 for a Commission public body, the conflict of interest rules prescribed under clause 71 (1) (a) apply to the public servant or former public servant, with necessary modifications.

3. During the year beginning on the day on which this section comes into force, if no conflict of interest rules are approved and published by the Conflict of Interest Commissioner under section 59 or 60 for a public body that is not a Commission public body, the conflict of interest rules that apply to the public servant or former public servant are the rules that applied to him or her immediately before this section comes into force.

4. On and after August 21, 2008 and before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force, if no conflict of interest rules are approved and published by the Conflict of Interest Commissioner for a public body, the conflict of interest rules prescribed under clause 71 (1) (a) of this Act apply to the public servant or former public servant, with necessary modifications.

5. On and after the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force, if no conflict of interest rules are approved and published by the Integrity Commissioner for a public body, the conflict of interest rules prescribed under clause 71 (1) (a) of this Act apply to the public servant or former public servant, with necessary modifications. 2006, c. 35, Sched. A, s. 58; 2018, c. 17, Sched. 35, s. 5 (1), 14.

Transition

(2) Subject to subsection 59 (3), rules approved and published by the Conflict of Interest Commissioner before the day section 2 of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018* comes into force are deemed to be approved by the Integrity Commissioner under section 59 of this Act until they are amended or revoked. 2018, c. 17, Sched. 35, s. 5 (2).

Rules prepared by public bodies

59 (1) A public body may submit proposed conflict of interest rules with respect to the body to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 59 (1); 2018, c. 17, Sched. 35, s. 14.

Approval of proposed rules

(2) The Integrity Commissioner shall approve, in writing, the rules proposed for a public body under subsection (1) if, in the Commissioner's opinion, the proposed rules establish a degree of ethical conduct that is at least equivalent to the degree of ethical conduct established by the conflict of interest rules prescribed under clause 71 (1) (a), having regard to the powers, duties and functions of the public body. 2006, c. 35, Sched. A, s. 59 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) Conflict of interest rules approved by the Integrity Commissioner have no effect unless the rules are published in accordance with subsection (4). 2006, c. 35, Sched. A, s. 59 (3); 2018, c. 17, Sched. 35, s. 14.

Same

(4) The Integrity Commissioner shall publish approved conflict of interest rules on the Commissioner's website, and shall indicate on the rules the date on which they were so published. 2006, c. 35, Sched. A, s. 59 (4); 2018, c. 17, Sched. 35, s. 14.

Same

(5) Conflict of interest rules published in accordance with subsection (4) take effect on the date of publication indicated under subsection (4) or on such later date as may be specified on the website by the Integrity Commissioner in respect of the published rules. 2006, c. 35, Sched. A, s. 59 (5); 2018, c. 17, Sched. 35, s. 14.

Non-application

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to rules made by a public body and approved by the Commissioner under subsection (2). 2006, c. 35, Sched. A, ss. 59 (6), 157.

Change in rules

60 (1) If the rules prescribed under clause 71 (1) (a) change and, in the Integrity Commissioner's opinion, rules approved and published under section 59 for a public body no longer meet the test set out in subsection 59 (2), the Commissioner may request that the body amend its rules and submit the amended rules to the Commissioner within a time period specified by him or her. 2006, c. 35, Sched. A, s. 60 (1); 2018, c. 17, Sched. 35, s. 6.

Same

(2) The Integrity Commissioner may extend the time period within which the amended rules may be submitted, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 60 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) Subsections 59 (2) to (6) apply, with necessary modifications, to rules submitted under subsection (1). 2006, c. 35, Sched. A, s. 60 (3).

Change in rules

61 (1) Subsections (2) and (3) apply if,

(a) a public body fails to submit amended rules within the time period specified under subsection 60 (1) or (2);

(b) the Integrity Commissioner notifies a public body that amended rules submitted by it under subsection 60 (1) do not meet the test set out in subsection 59 (2); or

(c) the public body rescinds the rules made by it under section 59 or 60 and notifies the Integrity Commissioner of the rescission in writing. 2006, c. 35, Sched. A, s. 61 (1); 2018, c. 17, Sched. 35, s. 14.

Same

(2) The conflict of interest rules that were in effect for the public body cease to apply to the body and the conflict of interest rules prescribed under clause 71 (1) (a) apply to the body with such modifications as are necessary having regard to the body's powers, duties and functions, on and after the date specified by the Integrity Commissioner under subsection (3). 2006, c. 35, Sched. A, s. 61 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) The Integrity Commissioner shall publish a notice on the Commissioner's website specifying a date for the purposes of subsection (2). 2006, c. 35, Sched. A, s. 61 (3); 2018, c. 17, Sched. 35, s. 14.

Ethics executive for public servants

62 (1) The ethics executive for a public servant is determined as follows:

1. The ethics executive for a public servant employed under Part III who works in a ministry, other than in a minister's office, is the deputy minister.
2. The ethics executive for a deputy minister is the Secretary of the Cabinet.
3. The ethics executive for a public servant who works in a public body, whether as a government appointee, as an employee under Part III or as an employee of the public body is the individual who is prescribed under subsection 71 (1.1) for the public servant or, if no individual is prescribed under that clause for the public servant, the chair of the body.
4. The ethics executive for the Secretary of the Cabinet, the chairs of public bodies and any individuals prescribed under subsections 55 (1.1) and 71 (1.1) is the Integrity Commissioner.
5. Repealed: 2018, c. 17, Sched. 35, s. 7.

2006, c. 35, Sched. A, s. 62 (1); 2009, c. 33, Sched. 17, s. 10 (11); 2018, c. 17, Sched. 35, s. 7, 14.

Delegation, O.P.P.

(2) The deputy minister of the Ministry of Community Safety and Correctional Services may delegate any of his or her powers, duties and functions as ethics executive with respect to members of the Ontario Provincial Police to the Commissioner of the Ontario Provincial Police. 2006, c. 35, Sched. A, s. 62 (2).

Ethics executive for former public servant

63 The ethics executive for a former public servant is determined as follows:

1. The ethics executive for a former public servant who, immediately before ceasing to be a public servant, was a public servant employed under Part III who worked in a ministry, other than in a minister's office, is the Public Service Commission.
2. The ethics executive for a former public servant who, immediately before ceasing to be a public servant, worked in a public body, whether as a government appointee, as an employee under Part III or as an employee of the public body, is the Integrity Commissioner.
3. The ethics executive for a former deputy minister or a former Secretary of the Cabinet is the Integrity Commissioner. 2006, c. 35, Sched. A, s. 63; 2018, c. 17, Sched. 35, s. 14.

Promotion of ethical conduct

64 The ethics executive for a public servant who works in a ministry, other than in a minister's office, or who works in a public body shall,

(a) ensure that public servants who work in the ministry or the public body are familiar with the conflict of interest rules that apply in respect of the ministry or the public body; and

(b) promote ethical conduct by public servants who work in the ministry or the public body. 2006, c. 35, Sched. A, s. 64.

Role of ethics executive

Questions for ethics executive

65 (1) A public servant or former public servant may request that his or her ethics executive determine a question about the application of conflict of interest rules to the public servant or former public servant. 2006, c. 35, Sched. A, s. 65 (1).

Same

(2) A supervisor of a public servant may request that the public servant's ethics executive determine a question about the application of conflict of interest rules to the public servant. 2006, c. 35, Sched. A, s. 65 (2).

Duty to notify

(3) If a public servant or a former public servant has personal or pecuniary interests that could raise an issue under the conflict of interest rules that apply to him or her, the public servant or former public servant shall notify his or her ethics executive. 2006, c. 35, Sched. A, s. 65 (3).

Inquiries

(4) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a conflict of interest rule has been or is about to be contravened by a public servant or former public servant. 2006, c. 35, Sched. A, s. 65 (4).

Determinations and directions

(5) An ethics executive shall,

(a) make a determination with respect to any matter that is brought to the attention of the ethics executive under subsections (1) to (3) or that is the subject of inquiry under subsection (4); and

(b) in the case of a determination that there is a conflict of interest or potential conflict of interest, give the public servant or former public servant directions, if any, that the ethics executive considers appropriate to address the conflict of interest or potential conflict of interest. 2006, c. 35, Sched. A, s. 65 (5).

Same

(6) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer any matter that is brought to the ethics executive's attention under subsections (1) to (3) or that is the subject of inquiry under subsection (4) to the Integrity Commissioner, to be dealt with by the Commissioner under subsection (5). 2006, c. 35, Sched. A, s. 65 (6); 2018, c. 17, Sched. 35, s. 8, 14.

Same

(7) Where an ethics executive has referred a matter to the Integrity Commissioner under subsection (6), the Commissioner shall inform the ethics executive of any determination made or direction given by the Commissioner under subsection (5) as a result of the referral. 2006, c. 35, Sched. A, s. 65 (7); 2018, c. 17, Sched. 35, s. 14.

Compliance with direction

(8) A public servant or former public servant shall comply with a direction of the ethics executive or the Integrity Commissioner. 2006, c. 35, Sched. A, s. 65 (8); 2018, c. 17, Sched. 35, s. 14.

Contravention by government appointee

(9) If an ethics executive or the Integrity Commissioner makes a determination under subsection (5) that a government appointee has contravened a conflict of interest rule, the ethics executive or the Integrity Commissioner, as the case may be, shall notify the minister responsible for the body to which the government appointee is appointed of the contravention. 2006, c. 35, Sched. A, s. 65 (9); 2018, c. 17, Sched. 35, s. 14.

Same

(10) If the Integrity Commissioner makes a determination under subsection (5) that a former public servant who, immediately before ceasing to be a public servant, worked in a public body as a government appointee has contravened a conflict of interest rule, the Commissioner shall notify the minister responsible for the body to which the government appointee was appointed of the contravention. 2006, c. 35, Sched. A, s. 65 (10); 2018, c. 17, Sched. 35, s. 14.

MINISTERS' OFFICES

Rules for ministers' offices

66 Every public servant and every former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office shall comply with the conflict of interest rules prescribed under clause 71 (1) (c) that apply in respect of the minister's office. 2006, c. 35, Sched. A, s. 66.

Promotion of ethical conduct

67 A minister shall,

(a) ensure that public servants who work in the minister's office are familiar with the conflict of interest rules that apply in respect of the minister's office; and

(b) promote ethical conduct by public servants who work in the minister's office. 2006, c. 35, Sched. A, s. 67.

Ethics executive

68 The ethics executive for a public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office is the Integrity Commissioner. 2006, c. 35, Sched. A, s. 68.

Role of ethics executive

Questions for ethics executive

69 (1) A public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office may request that his or her ethics executive determine a question about the application of conflict of interest rules to the public servant or former public servant. 2006, c. 35, Sched. A, s. 69 (1).

Same

(2) A supervisor of a public servant who works in a minister's office may request that the public servant's ethics executive determine a question about the application of conflict of interest rules to the public servant. 2006, c. 35, Sched. A, s. 69 (2).

Duty to notify

(3) If a public servant or a former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office has personal or pecuniary interests that could raise an issue under the conflict of interest rules that apply to him or her, the public servant or former public servant shall notify his or her ethics executive. 2006, c. 35, Sched. A, s. 69 (3).

Inquiries

(4) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a conflict of interest rule has been or is about to be contravened by a public servant or a former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 69 (4).

Determinations and directions

(5) The ethics executive shall,

(a) make a determination with respect to any matter that is brought to his or her attention under subsections (1) to (3) or that is the subject of inquiry under subsection (4); and

(b) in the case of a determination that there is a conflict of interest or potential conflict of interest, give the public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office directions, if any, that the ethics executive considers appropriate to address the conflict of interest or potential conflict of interest. 2006, c. 35, Sched. A, s. 69 (5).

Compliance with direction

(6) A public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office shall comply with a direction of the ethics executive. 2006, c. 35, Sched. A, s. 69 (6).

Notice to minister

(7) The ethics executive shall notify the minister if the ethics executive,

(a) makes a determination under subsection (5) that a public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office has a conflict of interest or potential conflict of interest; or

(b) gives a direction under subsection (5) to a public servant or former public servant who works or, immediately before ceasing to be a public servant, worked in a minister's office. 2006, c. 35, Sched. A, s. 69 (7).

PENALTY

Penalty

70 A public servant who contravenes a conflict of interest rule applicable to him or her or who contravenes a direction under section 65 or 69 is subject to disciplinary measures, including suspension and dismissal. 2006, c. 35, Sched. A, s. 70.

REGULATIONS

Regulations, Part IV

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

(a) establishing conflict of interest rules for public servants and former public servants who work or, immediately before ceasing to be a public servant, worked in a ministry, other than in a minister's office, for the purposes of section 57;

(b) Repealed: 2009, c. 33, Sched. 17, s. 10 (12).

(c) establishing conflict of interest rules for public servants and former public servants who work or, immediately before ceasing to be a public servant, worked in a minister's office, for the purposes of section 66;

(d) prescribing powers, duties and functions of an ethics executive in relation to conflict of interest matters, in addition to those provided under this Act;

(e) respecting procedures to be followed in connection with this Part. 2006, c. 35, Sched. A, s. 71 (1); 2009, c. 33, Sched. 17, s. 10 (12).

Same, Minister

(1.1) The minister responsible for the administration of this Act may make regulations prescribing individuals for the purposes of paragraph 3 of subsection 62 (1). 2009, c. 33, Sched. 17, s. 10 (13).

Scope of regulations

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 71 (2).

PART V
POLITICAL ACTIVITY

Interpretation

Political activity

72 For the purposes of this Part, a public servant engages in political activity when,

(a) the public servant does anything in support of or in opposition to a federal or provincial political party;

(b) the public servant does anything in support of or in opposition to a candidate in a federal, provincial or municipal election;

(c) the public servant is or seeks to become a candidate in a federal, provincial or municipal election; or

(d) the public servant comments publicly and outside the scope of the duties of his or her position on matters that are directly related to those duties and that are dealt with in the positions or policies of a federal or provincial political party or in the positions or policies publicly expressed by a candidate in a federal, provincial or municipal election. 2006, c. 35, Sched. A, s. 72.

Ethics executive

73 (1) For the purposes of this Part, the ethics executive for a public servant is,

(a) in the case of a public servant who works in a minister's office, the Integrity Commissioner;

(b) in the case of any other public servant, his or her ethics executive determined under subsection 62 (1). 2006, c. 35, Sched. A, s. 73 (1).

Same

(2) Subsection 62 (2) applies to the deputy minister of the Ministry of Community Safety and Correctional Services as ethics executive with respect to members of the Ontario Provincial Police. 2006, c. 35, Sched. A, s. 73 (2).

Rules for Political Activity of Most Public Servants

Application

74 Sections 75 to 84 apply to public servants other than,

(a) specially restricted public servants within the meaning of subsection 85 (2); or

(b) public servants who work in a minister's office. 2006, c. 35, Sched. A, s. 74.

Right to engage

75 A public servant is entitled to engage in political activity, subject to the restrictions set out under this Part. 2006, c. 35, Sched. A, s. 75.

Right to decline

76 A public servant is entitled to decline to engage in political activity. 2006, c. 35, Sched. A, s. 76.

Prohibited political activities

77 A public servant shall not,

(a) engage in political activity in the workplace;

(b) engage in political activity while wearing a uniform associated with a position in the public service of Ontario;

(c) use government premises, equipment or supplies when engaging in political activity; or

(d) associate his or her position with political activity, except if the public servant is or is seeking to become a candidate in a federal, provincial or municipal election, and then only to the extent necessary to identify the public servant's position and work experience. 2006, c. 35, Sched. A, s. 77.

Definition, "election period"

78 In sections 79 to 82,

"election period" means,

(a) in respect of a political activity that relates to a federal or provincial election, the period starting on the day that a writ is issued for the election and ending on the polling day for the election,

(b) in respect of a political activity that relates to a municipal election, the period starting 60 days before the polling day for the election and ending on the polling day for the election. 2006, c. 35, Sched. A, s. 78.

Restricted political activities

79 (1) Subject to subsection (2), unless a public servant has been granted an unpaid leave of absence under section 80, he or she shall not,

(a) be or seek to become a candidate in a federal or provincial election;

(b) solicit funds on behalf of a federal or provincial party or a federal, provincial or municipal candidate if his or her duties include,

(i) supervising other public servants, or

(ii) dealing directly with members of the public if those members of the public may perceive him or her as a person able to exercise power over them;

(c) comment publicly, outside the scope of his or her duties as a public servant, on matters that are directly related to those duties and that are addressed in the policies of a federal or provincial party or in the policies of a candidate in a federal, provincial or municipal election;

(d) engage in political activity if doing so could interfere with the performance of his or her duties as a public servant; or

(e) engage in political activity if doing so could conflict with,

(i) in the case of a public servant who works in a ministry, the interests of the Crown,

(ii) in the case of a public servant who works in a public body, the interests of the public body. 2006, c. 35, Sched. A, s. 79 (1).

Exception

(2) A public servant who is or seeks to become a candidate in a federal or provincial election at any time other than during an election period is not required to be on an unpaid leave of absence to do so, if his or her ethics executive determines under subsection 80 (3) that a leave is not necessary in the circumstances. 2006, c. 35, Sched. A, s. 79 (2).

Application to engage in restricted political activity

80 (1) A public servant who wishes to engage in political activity described in subsection 79 (1) may apply under this section to his or her ethics executive and the application shall specify the political activity. 2006, c. 35, Sched. A, s. 80 (1).

Same

(2) Subject to subsection (3), on receiving the application, the ethics executive,

(a) shall grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity during an election period; and

(b) may grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity at a time other than during an election period, if the ethics executive considers it appropriate to do so. 2006, c. 35, Sched. A, s. 80 (2).

Same

(3) In the case of an application to be or seek to become a candidate in a federal or provincial election at a time other than during an election period, the ethics executive shall determine whether an unpaid leave of absence is necessary in the circumstances and, if it is necessary, shall grant the leave. 2006, c. 35, Sched. A, s. 80 (3).

Leave of absence for other political activity

81 (1) A public servant may apply under this section to his or her ethics executive for an unpaid leave of absence for the purposes of engaging in political activity other than political activity that is prohibited under section 77 or restricted under subsection 79 (1). 2006, c. 35, Sched. A, s. 81 (1).

Same

(2) On receiving the application, the ethics executive,

(a) shall grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity during an election period; and

(b) may grant the public servant an unpaid leave of absence, in the case of an application to engage in political activity at a time other than during an election period, if the ethics executive considers it appropriate to do so. 2006, c. 35, Sched. A, s. 81 (2).

Length of leave

82 If an unpaid leave of absence is granted under section 80 or 81, the following rules apply to the length of the leave:

1. A leave of absence granted to enable a public servant to engage in political activity during an election period shall not begin earlier than the beginning of the election period and shall not end later than the end of the election period.
2. A leave of absence granted to enable a public servant to engage in political activity other than during an election period shall begin and end in accordance with the regulations under clause 107 (1) (a) or, if no regulation applies in respect of the leave, on dates determined by the ethics executive to be appropriate in the circumstances. 2006, c. 35, Sched. A, s. 82.

Continuous service

83 The period of an unpaid leave granted under section 80 or 81 shall not be counted in determining the length of the public servant's service, but the service before and after the period of leave is deemed to be continuous for all purposes. 2006, c. 35, Sched. A, s. 83.

Role of ethics executive

Questions for ethics executive

84 (1) A public servant or his or her supervisor may request that the public servant's ethics executive determine a question about the political activity rights that apply in respect of the public servant. 2006, c. 35, Sched. A, s. 84 (1).

Duty to notify

(2) A public servant shall notify his or her ethics executive if the public servant's political activities could conflict with,

(a) in the case of a public servant who works in a ministry, the interests of the Crown;

(b) in the case of a public servant who works in a public body, the interests of the public body. 2006, c. 35, Sched. A, s. 84 (2).

Inquiries

(3) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a public servant has engaged or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 84 (3).

Determinations and directions

(4) An ethics executive shall,

(a) make a determination with respect to any matter that is brought to the attention of the ethics executive under subsection (1) or (2) or that is the subject of inquiry under subsection (3); and

(b) in the case of a determination that a public servant has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, give the public servant directions, if any, that the ethics executive considers appropriate to address the matter. 2006, c. 35, Sched. A, s. 84 (4).

Same

(5) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer any matter that is brought to the ethics executive's attention under subsection (1) or (2) or that is the subject of inquiry under subsection (3) to the Integrity Commissioner to be dealt with by the Commissioner under subsection (4). 2006, c. 35, Sched. A, s. 84 (5); 2018, c. 17, Sched. 35, s. 9, 14.

Same

(6) Where an ethics executive has referred a matter to the Integrity Commissioner under subsection (5), the Commissioner shall inform the ethics executive of any determination made or direction given by the Commissioner under subsection (4) as a result of the referral. 2006, c. 35, Sched. A, s. 84 (6); 2018, c. 17, Sched. 35, s. 14.

Compliance with direction

(7) A public servant shall comply with a direction of the ethics executive or the Integrity Commissioner. 2006, c. 35, Sched. A, s. 84 (7); 2018, c. 17, Sched. 35, s. 14.

Contravention by government appointee

(8) If an ethics executive or the Integrity Commissioner makes a determination under subsection (4) that a government appointee has engaged in political activity in contravention of this Part or of a direction or regulation under this Part, the ethics executive or the Commissioner, as the case may be, shall notify the minister responsible for the body to which the government appointee is appointed regarding the matter. 2006, c. 35, Sched. A, s. 84 (8); 2018, c. 17, Sched. 35, s. 14.

Rules for Political Activity of Specially Restricted Public Servants

Application

85 (1) Sections 86 to 93 apply to specially restricted public servants within the meaning of subsection (2). 2006, c. 35, Sched. A, s. 85 (1).

Specially restricted public servants

(2) The following are specially restricted public servants:

1. Repealed: 2018, c. 17, Sched. 35, s. 10.
2. The Secretary of the Cabinet.
3. Every deputy minister or associate deputy minister in a ministry.
4. Every assistant deputy minister in a ministry.
5. Every director in a ministry.
6. Every deputy director of a legal services branch of a ministry.
7. Every Crown Attorney.
8. Every commissioned officer and detachment commander in the Ontario Provincial Police.
9. Every government appointee who is a member of a tribunal prescribed under clause 107 (1) (b).
10. A public servant in a class prescribed under clause 107 (1) (c). 2006, c. 35, Sched. A, s. 85 (2); 2018, c. 17, Sched. 35, s. 10.

No political activity except as permitted

86 A specially restricted public servant shall not engage in political activity except as permitted under this Part. 2006, c. 35, Sched. A, s. 86.

Right to decline

87 A specially restricted public servant is entitled to decline to engage in political activity. 2006, c. 35, Sched. A, s. 87.

Prohibited political activities

88 In engaging in political activity that is permitted under section 89, 90 or 92, a specially restricted public servant shall not,

(a) engage in political activity in the workplace;

(b) engage in political activity while wearing a uniform associated with a position in the public service of Ontario;

(c) use government premises, equipment or supplies when engaging in political activity;

(d) associate his or her position with political activity, except if the public servant is or is seeking to become a candidate in a federal, provincial or municipal election, and then only to the extent necessary to identify the public servant's position and work experience; or

(e) engage in political activity if doing so could interfere with the performance of his or her duties as a public servant. 2006, c. 35, Sched. A, s. 88.

Permitted political activities

89 (1) A specially restricted public servant may,

(a) vote in a federal, provincial or municipal election;

(b) contribute money to a federal or provincial party or to a federal, provincial or municipal candidate;

(c) be a member of a federal or provincial party; and

(d) attend an all-candidates meeting. 2006, c. 35, Sched. A, s. 89 (1).

Limitation

(2) Clauses (1) (b) and (c) do not apply to the Secretary of the Cabinet or a deputy minister. 2006, c. 35, Sched. A, s. 89 (2); 2018, c. 17, Sched. 35, s. 11.

Permitted political activities if authorized

90 (1) A specially restricted public servant, if authorized under subsection (4), may,

(a) be or seek to become a candidate in a municipal election;

(b) campaign on behalf of a candidate in a municipal election. 2006, c. 35, Sched. A, s. 90 (1).

Authorization

(2) A specially restricted public servant who wishes to engage in political activity described in subsection (1) may apply under this section for authorization. 2006, c. 35, Sched. A, s. 90 (2).

Same

(3) The application shall specify the political activity for which authorization is sought and shall be made to the ethics executive for the specially restricted public servant. 2006, c. 35, Sched. A, s. 90 (3).

Same

(4) On receiving the application, the ethics executive shall make such inquiries as he or she considers appropriate and shall authorize the specially restricted public servant to engage in all or some of the political activity specified in the application if, in the opinion of the ethics executive, the activities would not interfere with the performance of the public servant's duties and,

(a) in the case of a public servant who works in a ministry, would not conflict with the interests of the Crown;

(b) in the case of a public servant who works in a public body, would not conflict with the interests of the body. 2006, c. 35, Sched. A, s. 90 (4).

Same

(5) In granting an authorization, an ethics executive may impose any conditions and restrictions that he or she considers appropriate in the circumstances, including requiring the specially restricted public servant to be on an unpaid leave of absence. 2006, c. 35, Sched. A, s. 90 (5).

Same

(6) If, in granting an authorization, an ethics executive requires that a specially restricted public servant be on an unpaid leave of absence, the leave of absence shall begin and end in accordance with the regulations under clause 107 (1) (a) or, if no regulation applies in respect of the leave, on dates determined by the ethics executive to be appropriate in the circumstances. 2006, c. 35, Sched. A, s. 90 (6).

Continuous service

91 The period of an unpaid leave granted under section 90 shall not be counted in determining the length of the public servant's service, but the service before and after the period of leave is deemed to be continuous for all purposes. 2006, c. 35, Sched. A, s. 91.

Part-time government appointees

92 (1) This section applies to specially restricted public servants who are part-time government appointees. 2006, c. 35, Sched. A, s. 92 (1).

Authorization

(2) A public servant described in subsection (1) may apply under this section for authorization to engage in any political activity that is not permitted to him or her under section 89, other than,

(a) political activity that is prohibited under section 88; or

(b) political activity for which he or she may seek authorization under section 90. 2006, c. 35, Sched. A, s. 92 (2).

Same

(3) The application shall specify the political activity and shall be made to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 92 (3); 2018, c. 17, Sched. 35, s. 14.

Same

(4) On receiving the application, the Integrity Commissioner shall make such inquiries as he or she considers appropriate and shall authorize the public servant to engage in all or some of the political activity specified in the application if in the opinion of the Commissioner the activities would not,

(a) interfere with the performance of the public servant's duties; or

(b) conflict with the interests of the public body to which the public servant is appointed. 2006, c. 35, Sched. A, s. 92 (4); 2018, c. 17, Sched. 35, s. 14.

Same

(5) In forming an opinion under subsection (4), the Integrity Commissioner shall consider the following:

1. The nature of the political activity specified in the application.
2. The scope of the discretion exercised by the public servant in his or her work, if the exercise of the discretion could reasonably be perceived to be affected by political considerations.
3. The visibility of the public servant's position.
4. Such other factors as the Commissioner considers appropriate. 2006, c. 35, Sched. A, s. 92 (5); 2018, c. 17, Sched. 35, s. 14.

Same

(6) In granting an authorization, the Integrity Commissioner may impose any conditions and restrictions that he or she considers appropriate in the circumstances, including requiring the public servant to be on an unpaid leave of absence. 2006, c. 35, Sched. A, s. 92 (6); 2018, c. 17, Sched. 35, s. 14.

Same

(7) If in granting an authorization the Integrity Commissioner requires that a public servant be on an unpaid leave of absence, the leave shall begin and end,

(a) in accordance with the regulations under clause 107 (1) (a); or

(b) if no regulation applies in respect of the leave, on dates determined by the Integrity Commissioner to be appropriate in the circumstances. 2006, c. 35, Sched. A, s. 92 (7); 2018, c. 17, Sched. 35, s. 14.

Role of ethics executive

Questions for ethics executive

93 (1) A specially restricted public servant or his or her supervisor may request that the public servant's ethics executive determine a question about the political activity rights that apply in respect of the public servant. 2006, c. 35, Sched. A, s. 93 (1).

Duty to notify

(2) A specially restricted public servant shall notify his or her ethics executive if the public servant's political activities could conflict with,

(a) in the case of a public servant who works in a ministry, the interests of the Crown;

(b) in the case of a public servant who works in a public body, the interests of the public body. 2006, c. 35, Sched. A, s. 93 (2).

Inquiries

(3) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a specially restricted public servant has engaged or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 93 (3).

Determinations and directions

(4) An ethics executive shall,

(a) make a determination with respect to any matter that is brought to the attention of the ethics executive under subsection (1) or (2) or that is the subject of inquiry under subsection (3); and

(b) in the case of a determination that a public servant has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, give the public servant directions, if any, that the ethics executive considers appropriate to address the matter. 2006, c. 35, Sched. A, s. 93 (4).

Same

(5) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer any matter that is brought to the ethics executive's attention under subsection (1) or (2) or that is the subject of inquiry under subsection (3) to the Integrity Commissioner to be dealt with by the Commissioner under subsection (4). 2006, c. 35, Sched. A, s. 93 (5); 2018, c. 17, Sched. 35, s. 12, 14.

Same

(6) Where an ethics executive has referred a matter to the Integrity Commissioner under subsection (5), the Commissioner shall inform the ethics executive of any determination made or direction given by the Commissioner under subsection (4) as a result of the referral. 2006, c. 35, Sched. A, s. 93 (6); 2018, c. 17, Sched. 35, s. 14.

Compliance with direction

(7) A specially restricted public servant shall comply with a direction of the ethics executive or the Integrity Commissioner. 2006, c. 35, Sched. A, s. 93 (7); 2018, c. 17, Sched. 35, s. 14.

Contravention by government appointee

(8) If an ethics executive or the Integrity Commissioner makes a determination under subsection (4) that a government appointee has engaged in a political activity in contravention of this Part or a direction or regulation under this Part, the ethics executive or the Integrity Commissioner, as the case may be, shall notify the minister responsible for the body to which the government appointee is appointed regarding the matter. 2006, c. 35, Sched. A, s. 93 (8); 2018, c. 17, Sched. 35, s. 14.

Rules for Political Activity of Public Servants in Ministers' Offices

Application

94 Sections 95 to 98 apply to public servants who work in a minister's office. 2006, c. 35, Sched. A, s. 94.

Right to engage

95 A public servant who works in a minister's office is entitled to engage in political activity, subject to the restrictions set out under this Part. 2006, c. 35, Sched. A, s. 95.

Right to decline

96 A public servant who works in a minister's office is entitled to decline to engage in political activity, unless the political activity is related to the performance of a ministerial power, duty or function. 2006, c. 35, Sched. A, s. 96.

Prohibited political activities

97 A public servant who works in a minister's office shall not,

(a) engage in a political activity in the workplace that is unrelated to the performance of a ministerial power, duty or function;

(b) use government premises, equipment or supplies when engaging in political activity that is unrelated to the performance of a ministerial power, duty or function; or

(c) engage in political activity that could conflict with the interests of the Crown. 2006, c. 35, Sched. A, s. 97.

Role of ethics executive

Questions for ethics executive

98 (1) A public servant who works in a minister's office or his or her supervisor may request that the public servant's ethics executive determine a question about the political activity rights that apply in respect of the public servant. 2006, c. 35, Sched. A, s. 98 (1).

Duty to notify

(2) A public servant who works in a minister's office shall notify his or her ethics executive if the public servant's political activities could conflict with the interests of the Crown. 2006, c. 35, Sched. A, s. 98 (2).

Inquiries

(3) The ethics executive may make such inquiries as he or she considers appropriate in response to a request, a notification or where the ethics executive has concerns that a public servant who works in a minister's office has engaged or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 98 (3).

Determinations and directions

(4) The ethics executive shall,

(a) make a determination with respect to any matter that is brought to his or her attention under subsection (1) or (2) or that is the subject of inquiry under subsection (3); and

(b) in the case of a determination that a public servant who works in a minister's office has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, give the public servant directions, if any, that the ethics executive considers appropriate to address the matter. 2006, c. 35, Sched. A, s. 98 (4).

Compliance with direction

(5) A public servant who works in a minister's office shall comply with a direction of the ethics executive. 2006, c. 35, Sched. A, s. 98 (5).

Notice to minister

(6) If the ethics executive makes a determination under subsection (4) that a public servant who works in a minister's office has or is about to engage in political activity in contravention of this Part or a direction or regulation under this Part, or gives a direction to a public servant who works in a minister's office under subsection (4), the ethics executive shall notify the minister. 2006, c. 35, Sched. A, s. 98 (6).

Penalty

Penalty

99 A public servant who engages in political activity in contravention of this Part or a direction or regulation under this Part is subject to disciplinary measures, including suspension and dismissal. 2006, c. 35, Sched. A, s. 99.

Effect of Election to Office

Effect of election, provincial or federal

100 If a public servant is elected to the Parliament of Canada or to a provincial Assembly, his or her employment by the Crown or by a public body, or his or her appointment to a public body, is terminated. 2006, c. 35, Sched. A, s. 100.

Effect of election, municipal

101 (1) If a public servant is elected to a municipal office, his or her employment by the Crown or by a public body, or his or her appointment to a public body, is terminated if it is determined under subsection (3) that termination is warranted. 2006, c. 35, Sched. A, s. 101 (1).

Same

(2) A public servant who is considering seeking election to a municipal office may ask his or her ethics executive to make the determination under subsection (3) before the election. 2006, c. 35, Sched. A, s. 101 (2).

Determination by ethics executive

(3) The ethics executive shall determine that termination is warranted if, in the opinion of the ethics executive, the public servant's responsibilities in the municipal office,

(a) would interfere with the performance of his or her duties as a public servant; or

(b) would,

(i) in the case of a public servant who works in a ministry, conflict with the interests of the Crown, or

(ii) in the case of a public servant who works in a public body, conflict with the interests of the body. 2006, c. 35, Sched. A, s. 101 (3).

Referral by ethics executive

(4) If an ethics executive, other than the Integrity Commissioner, considers it appropriate to do so, the ethics executive may refer the making of the determination under subsection (3) to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 101 (4); 2018, c. 17, Sched. 35, s. 13, 14.

Same

(5) Where an ethics executive has referred the making of the determination under subsection (3) to the Integrity Commissioner, the Commissioner shall inform the ethics executive of his or her determination. 2006, c. 35, Sched. A, s. 101 (5); 2018, c. 17, Sched. 35, s. 14.

Notice to minister

(6) Where a determination under subsection (3) relates to a government appointee to a public body, the ethics executive or the Integrity Commissioner, as the case may be, shall inform the minister responsible for the public body of the determination. 2006, c. 35, Sched. A, s. 101 (6); 2018, c. 17, Sched. 35, s. 14.

Reinstatement

102 (1) This section does not apply to the following:

1. A former public servant whose employment was terminated under section 100 or 101 and whose employment immediately before the termination was for a fixed term.
2. A former government appointee whose appointment was terminated under section 100 or 101. 2006, c. 35, Sched. A, s. 102 (1).

Same

(2) If a former public servant ceases to be a member of the Parliament of Canada within five years after his or her employment is terminated by section 100, the former public servant may apply to be reinstated. 2006, c. 35, Sched. A, s. 102 (2).

Same

(3) If a former public servant ceases to be a member of a provincial Assembly within five years after his or her employment is terminated by section 100, the former public servant may apply to be reinstated. 2006, c. 35, Sched. A, s. 102 (3).

Same

(4) If a former public servant ceases to hold a municipal office within four years after his or her employment is terminated by section 101, the former public servant may apply to be reinstated. 2006, c. 35, Sched. A, s. 102 (4).

Same

(5) An application for reinstatement must be made within 12 months after the applicant ceases to be a member of the Parliament of Canada, a member of a provincial Assembly or the holder of a municipal office, as the case may be. 2006, c. 35, Sched. A, s. 102 (5).

Same

(6) A former public servant appointed by the Public Service Commission whose employment was terminated under section 100 or 101 may apply to the Commission for reinstatement. 2006, c. 35, Sched. A, s. 102 (6).

Same

(7) A former public servant whose employment by a public body was terminated under section 100 or 101 may apply for reinstatement to the public body. 2006, c. 35, Sched. A, s. 102 (7).

Same

(8) An application under subsection (6) or (7) shall be granted if a position for which the applicant is qualified is vacant. 2006, c. 35, Sched. A, s. 102 (8).

Same

(9) Another person’s right to be appointed or assigned to the vacant position by virtue of a collective agreement or under a directive issued under section 43 prevails over the right conferred by subsection (8). 2006, c. 35, Sched. A, s. 102 (9).

Continuous service

(10) The period during which the applicant’s employment is terminated shall not be counted in determining the length of the public servant’s service, but the service before and after the termination is deemed to be continuous for all purposes. 2006, c. 35, Sched. A, s. 102 (10).

No reprisals

103 (1) No person shall take a reprisal against a public servant because he or she has,

(a) engaged in political activity in accordance with this Part or the regulations; or

(b) exercised his or her right under this Part to decline to engage in political activity. 2006, c. 35, Sched. A, s. 103 (1).

Same

(2) For the purposes of subsection (1), a reprisal is any measure taken against a public servant that adversely affects his or her employment or appointment and includes but is not limited to,

(a) ending or threatening to end a public servant's employment or appointment;

(b) disciplining or suspending or threatening to discipline or suspend a public servant;

(c) imposing or threatening to impose a penalty related to the employment or appointment of a public servant;

(d) intimidating or coercing a public servant in relation to his or her employment or appointment. 2006, c. 35, Sched. A, s. 103 (2).

Complaint about reprisal, discipline

104 (1) A public servant described in subsection (2), (3) or (4) may complain under this section that he or she,

(a) has suffered a reprisal prohibited by section 103; or

(b) is disciplined for a contravention of this Part or a direction or regulation under this Part. 2006, c. 35, Sched. A, s. 104 (1).

Public servant subject to collective agreement

(2) A public servant who is subject to the terms and conditions of a collective agreement may have the complaint dealt with by final and binding settlement by arbitration in accordance with the agreement. 2009, c. 33, Sched. 17, s. 10 (14).

Public servant not subject to collective agreement

(3) A public servant employed under Part III who is not subject to the terms and conditions of a collective agreement may file the complaint with the Public Service Grievance Board. 2009, c. 33, Sched. 17, s. 10 (14).

Other public servant

(4) A public servant employed by a public body who is not subject to the terms and conditions of a collective agreement may file the complaint with the Ontario Labour Relations Board. 2009, c. 33, Sched. 17, s. 10 (14).

Inquiry by Board

(5) The Ontario Labour Relations Board may inquire into a complaint filed under subsection (4) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act. 2006, c. 35, Sched. A, s. 104 (5).

Same

(6) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (4), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995* apply with necessary modifications. 2006, c. 35, Sched. A, s. 104 (6).

Exception

(7) Despite anything in this section, a person who is a police officer under the *Community Safety and Policing Act, 2019* shall have his or her complaint dealt with under section 191 of that Act. 2006, c. 35, Sched. A, s. 104 (7); 2019, c. 1, Sched. 4, s. 52 (1).

Order

(8) If the Public Service Grievance Board, the Ontario Labour Relations Board or the Grievance Settlement Board determines, on the completion of an inquiry into a complaint made under subsection (2), (3) or (4), that a reprisal has been taken in contravention of subsection 103 (1), or that the employee should not be disciplined or that a lesser penalty would be more appropriate, the Board may make an order that it considers just and reasonable in the circumstances, directing the relevant ministry or public body or a person acting on behalf of the ministry or public body to do or refrain from doing anything in relation to the contravention. 2006, c. 35, Sched. A, s. 104 (8).

Same

(9) Without limiting the generality of subsection (8), an order under that subsection may direct the ministry or public body, or person acting on behalf of the ministry or public body, to do one or more of the following:

1. Cease doing an action that is the subject of a complaint under subsection (1).
2. Take steps to rectify harm related to a complaint under subsection (1).
3. Reinstate the employment of a public servant whose employment was terminated.
4. Compensate the public servant for loss of any remuneration, including benefits. 2006, c. 35, Sched. A, s. 104 (9).

Same

(10) A board may not make an order under subsection (8) for punitive damages or for costs. 2006, c. 35, Sched. A, s. 104 (10).

Settlements may be filed with board

105 (1) A written and signed settlement of a complaint made under subsection 104 (1) may, if a party to the settlement believes that the settlement has been breached, be filed,

(a) in the case of a settlement of a complaint by a public servant described in subsection 104 (2), if the collective agreement is governed by the *Crown Employees Collective Bargaining Act, 1993*, with the Grievance Settlement Board;

(b) in the case of a settlement of a complaint by a public servant described in subsection 104 (3), with the Public Service Grievance Board;

(c) in the case of a settlement of a complaint by a public servant described in subsection 104 (4), with the Ontario Labour Relations Board. 2006, c. 35, Sched. A, s. 105 (1).

Same

(2) Where a settlement of a complaint is filed with a board under this section, the board shall inquire into the matter and, if the board concludes that the settlement has been breached, the board may,

(a) make an order requiring compliance with the settlement; or

(b) make an order respecting the complaint that could have been made in respect of that complaint under subsection 104 (8). 2006, c. 35, Sched. A, s. 105 (2).

Same

(3) Subsections 104 (5) and (6) apply with necessary modifications to the Ontario Labour Relations Board acting under subsection (2). 2006, c. 35, Sched. A, s. 105 (3).

Order may be filed in court

106 (1) An order of the Grievance Settlement Board, the Public Service Grievance Board or the Ontario Labour Relations Board under subsection 104 (8) or 105 (2) may be filed in the Superior Court of Justice. 2006, c. 35, Sched. A, s. 106 (1).

Same

(2) An order that is filed under subsection (1) is enforceable as if it were an order of the Superior Court of Justice. 2006, c. 35, Sched. A, s. 106 (2).

Same

(3) Section 129 of the *Courts of Justice Act* applies in respect of an order filed with the Superior Court of Justice under subsection (1) and, for the purpose, the date on which the order is filed is deemed to be the date of the order. 2006, c. 35, Sched. A, s. 106 (3).

Regulations

Regulations, Part V

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

(a) respecting the length of unpaid leaves of absence granted under section 82, subsection 90 (6) or clause 92 (7) (a), including specifying dates on which a leave may begin and end and establishing maximum periods for a leave;

(b) prescribing tribunals for the purposes of paragraph 9 of subsection 85 (2);

(c) on the recommendation of the Public Service Commission, prescribing classes of public servants for the purposes of paragraph 10 of subsection 85 (2);

(d) governing political activities of public servants who work in a minister's office;

(e) prescribing powers, duties and functions of an ethics executive in relation to political activity matters, in addition to those provided under this Act;

(f) respecting procedures to be followed in connection with this Part. 2006, c. 35, Sched. A, s. 107 (1).

Delegation

(2) The Public Service Commission may delegate any of its advisory responsibilities associated with clause (1) (c) to the Integrity Commissioner. 2006, c. 35, Sched. A, s. 107 (2); 2018, c. 17, Sched. 35, s. 14.

Same

(3) In prescribing classes under clause (1) (c), the Lieutenant Governor in Council shall consider,

(a) the extent to which public servants in a prescribed class are likely to be involved in providing policy advice directly to a minister;

(b) the scope of discretion likely to be exercised by public servants in a prescribed class, where the exercise of the discretion could reasonably be perceived to be affected by political considerations;

(c) the visibility of public servants in a prescribed class; and

(d) any other matter that the Lieutenant Governor in Council considers appropriate. 2006, c. 35, Sched. A, s. 107 (3).

Scope of regulations

(4) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 107 (4).

PART VI
DISCLOSING AND INVESTIGATING WRONGDOING

Interpretation and Application

Interpretation

108 (1) In this Part,

"wrongdoing" means,

(a) a contravention by a public servant, a minister or parliamentary assistant of an Act of the Assembly or of the Parliament of Canada, or of a regulation made under such an Act,

(b) an act or omission of a public servant, a minister or parliamentary assistant that creates a grave danger to the life, health or safety of persons or to the environment, where the danger is unreasonable having regard to his or her duties, powers and functions and any other relevant circumstance,

(c) gross mismanagement by a public servant, a minister or parliamentary assistant in the work of the public service of Ontario,

(d) directing or counselling wrongdoing within the meaning of clauses (a) to (c) by a public servant, a minister or parliamentary assistant. 2006, c. 35, Sched. A, s. 108 (1).

Same

(2) A reference in clauses (a) to (d) of the definition of "wrongdoing" in subsection (1),

(a) to an act or omission of a public servant includes an act or omission of a former public servant if the act or omission occurred while the individual was a public servant;

(b) to an act or omission of a minister or parliamentary assistant includes an act or omission of a former minister or a former parliamentary assistant if the act or omission occurred while the individual was a minister or a parliamentary assistant. 2006, c. 35, Sched. A, s. 108 (2).

Interpretation, former public servants

109 In this Part, despite section 3, a reference to a former public servant includes a person who ceased, before the day on which this section comes into force, to be,

(a) a public servant within the meaning of the *Public Service Act*;

(b) an employee of a public body within the meaning of this Act;

(c) a government appointee within the meaning of this Act. 2006, c. 35, Sched. A, s. 109.

Application of Part

110 This Part applies to wrongdoing associated with the public service of Ontario and its work. 2006, c. 35, Sched. A, s. 110.

Disclosure Procedures

Public servants to be informed

111 (1) A deputy minister of a ministry shall ensure that public servants who work in the ministry are familiar with the procedures for disclosure of wrongdoing under this Part and the protections from reprisals for disclosing wrongdoing under this Part. 2006, c. 35, Sched. A, s. 111 (1).

Same

(2) The chair of a public body shall ensure that public servants who work in the body are familiar with the procedures for disclosure of wrongdoing under this Part and the protections from reprisals for disclosing wrongdoing under this Part. 2006, c. 35, Sched. A, s. 111 (2).

Fair and expeditious

112 The Integrity Commissioner and every person or body to whom a matter is referred under subsection 118 (2), 122 (2) or 123 (1) shall carry out their functions under this Part in a manner that,

(a) is fair and is as informal and expeditious as possible; and

(b) protects the identities of persons involved in disclosures of wrongdoing, including persons who make disclosures, witnesses and persons alleged to be responsible for wrongdoing except where the interests of fairness require that a person's identity be disclosed to one or more persons. 2006, c. 35, Sched. A, s. 112.

Disclosure despite conflict with other Acts

113 (1) Subject to subsection (2), a right under this Part to make a disclosure prevails over anything provided under any other Act or otherwise at law that prohibits the disclosure. 2006, c. 35, Sched. A, s. 113 (1).

Restrictions on disclosure

(2) Nothing in this Part authorizes a public servant or former public servant to make a disclosure to the Integrity Commissioner of anything,

(a) that would reveal the substance of deliberations of the Executive Council or any of its Committees without authority to do so;

(b) that is subject to solicitor-client privilege; or

(c) that is prepared by or for counsel for a Ministry or a public body for use in giving legal advice or in contemplation of or for use in litigation. 2006, c. 35, Sched. A, s. 113 (2).

Same

(3) Nothing in this Part shall be interpreted to limit any right that any public servant may have under any other Act or otherwise at law to disclose information about wrongdoing in the public service of Ontario. 2006, c. 35, Sched. A, s. 113 (3).

Disclosure, procedures

114 Where a public servant or former public servant has reason to believe that there has been wrongdoing, he or she may disclose the wrongdoing in accordance with the procedures established under section 115. 2006, c. 35, Sched. A, s. 114.

Directives

Directives, Public Service Commission

115 (1) The Public Service Commission may by directive establish procedures to deal with disclosures of wrongdoing by,

(a) a public servant who works in a ministry; and

(b) a former public servant who worked in a ministry immediately before ceasing to be a public servant. 2006, c. 35, Sched. A, s. 115 (1).

Directives, Management Board of Cabinet

(2) The Management Board of Cabinet may by directive establish procedures to deal with disclosures of wrongdoing by,

(a) public servants who work in a public body; and

(b) former public servants who worked in a public body immediately before ceasing to be a public servant. 2006, c. 35, Sched. A, s. 115 (2).

Same

(3) Without limiting the generality of subsections (1) and (2), directives issued under those subsections may,

(a) establish procedures by which a public servant or former public servant may make disclosures of wrongdoing, including directions as to the persons to whom disclosures may be made;

(b) establish procedures to protect the identities of persons involved in the disclosure process, including persons who make disclosures, witnesses and persons alleged to be responsible for wrongdoing; and

(c) provide for exceptions to be made to procedures described in clause (b) where the interests of fairness require that a person's identity be disclosed to one or more persons. 2006, c. 35, Sched. A, s. 115 (3).

Same

(4) Directives issued under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 115 (4).

Same

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a directive issued under this section. 2006, c. 35, Sched. A, ss. 115 (5), 157.

Archive

(6) The Public Service Commission shall maintain an archive of all directives issued under subsection (1) indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 115 (6).

Same

(7) The Management Board of Cabinet shall maintain an archive of all directives issued under subsection (2) indicating the period during which each directive applies. 2006, c. 35, Sched. A, s. 115 (7).

Disclosure to the Integrity Commissioner

Disclosure to Integrity Commissioner

116 A public servant or former public servant may disclose wrongdoing to the Integrity Commissioner if,

(a) the public servant or former public servant has reason to believe that it would not be appropriate to disclose the wrongdoing in accordance with the directives issued under section 115;

(b) the public servant or former public servant has already disclosed the wrongdoing in accordance with the directives issued under section 115 and has concerns that the matter is not being dealt with appropriately; or

(c) directives applying to the public servant or former public servant have not been issued under section 115. 2006, c. 35, Sched. A, s. 116.

Initial assessment by Integrity Commissioner

117 Where the Integrity Commissioner receives a disclosure of wrongdoing under section 116, the Commissioner shall refuse to deal with the disclosure if one or more of the following circumstances apply:

1. The subject matter of the disclosure is being dealt with by another person or body as a matter of law enforcement or in accordance with a procedure established under this or any other Act.
2. The subject matter of the disclosure is an employment or labour relations matter that could be dealt with through a dispute resolution mechanism, including a grievance procedure, established under this or any other Act, under a collective agreement or under an agreement of another kind.
3. The subject matter of the disclosure is a matter that could be dealt with under Part XII of the *Community Safety and Policing Act, 2019*.
4. The subject matter of the disclosure is the subject of,
    i. a decision made in the exercise of an adjudicative function by a court or other tribunal under this or any other Act, or
    ii. deliberations that have led or may lead to a decision made in the exercise of an adjudicative function by a court or other tribunal under this or any other Act.
5. The subject matter of the disclosure is related to the exercise of discretion by a prosecutor in relation to the prosecution of an offence.
6. The subject matter of the disclosure is not sufficiently important or the disclosure is frivolous, vexatious or made in bad faith.
7. There has been a substantial delay between the disclosure and the incidents that are the subject matter of the disclosure and because of the delay the proceeding would serve no useful purpose.
8. The subject matter of the disclosure relates solely to a public policy decision.
9. There is a valid reason, other than a circumstance described in paragraphs 1 to 8, for not proceeding with the disclosure. 2006, c. 35, Sched. A, s. 117; 2019, c. 1, Sched. 4, s. 52 (2).

Referral by Integrity Commissioner

118 (1) This section applies where the Integrity Commissioner receives a disclosure of wrongdoing under section 116 and does not refuse to deal with the disclosure under section 117. 2006, c. 35, Sched. A, s. 118 (1).

Same

(2) The Integrity Commissioner shall determine, from among the persons mentioned in subsection (3), the person who, in the opinion of the Commissioner, is in the best position to investigate the disclosure and shall,

(a) provide the person with a written summary of the disclosure and any other information that the Commissioner has received in relation to the matter that the Commissioner considers may assist the person in dealing with the matter;

(b) direct the person to cause an investigation to be conducted into the subject matter of the disclosure; and

(c) direct the person to report the results of the investigation to the Commissioner. 2006, c. 35, Sched. A, s. 118 (2).

Same

(3) The persons to whom the Integrity Commissioner may refer a matter under subsection (2) are:

1. A deputy minister.
2. Any individual prescribed under subsection 71 (1.1).
3. The chair of a public body.
4. The Secretary of the Cabinet.
5. An individual designated by the Premier for the purposes of this section. 2006, c. 35, Sched. A, s. 118 (3).

Same

(4) Where a matter respecting the Ontario Provincial Police is referred to the deputy minister of the Ministry of Community Safety and Correctional Services under subsection (2), the deputy minister may delegate any of his or her powers, duties and functions associated with the referral to the Commissioner of the Ontario Provincial Police. 2006, c. 35, Sched. A, s. 118 (4).

Same

(5) Subject to subsections (6) and (7), a person who receives a referral under subsection (2) shall deliver the report mentioned in clause (2) (c) to the Integrity Commissioner within 30 days of receiving the direction under clause (2) (b). 2006, c. 35, Sched. A, s. 118 (5).

Same

(6) On request from the person who receives a referral under subsection (2), the Integrity Commissioner may extend the time period within which the report must be delivered, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 118 (6).

Same

(7) The Integrity Commissioner may reduce the time period within which the report must be delivered if in his or her opinion circumstances make it appropriate to do so. 2006, c. 35, Sched. A, s. 118 (7).

Referral not appropriate

119 A person who has received a referral under subsection 118 (2) shall refer the disclosure of wrongdoing back to the Integrity Commissioner if, in the opinion of that person, it is not appropriate for him or her to investigate the disclosure because of lack of appropriate resources, actual or apparent conflict of interest or other reason. 2006, c. 35, Sched. A, s. 119.

Report after referral

120 (1) A report from a person who has received a referral under subsection 118 (2) shall be in writing and shall include:

1. A summary of the subject matter of the disclosure.
2. A description of the steps taken in the investigation conducted by the person to whom the referral is made.
3. A summary of the evidence obtained during the investigation.
4. A statement of the findings resulting from the investigation of the disclosure, including a statement about any wrongdoing that was discovered.
5. A description of any corrective action that has been taken or that is proposed to be taken as a result of the investigation. 2006, c. 35, Sched. A, s. 120 (1).

Same

(2) The Integrity Commissioner may waive or abridge a requirement of this section in order to expedite the report if in his or her opinion circumstances make it appropriate to do so. 2006, c. 35, Sched. A, s. 120 (2).

Receipt of report by Integrity Commissioner

121 (1) On receiving a report from a person who has received a referral under subsection 118 (2), the Integrity Commissioner may,

(a) require the person to provide a written report to the Commissioner containing such further information as the Commissioner specifies;

(b) make recommendations to the person;

(c) require the person to provide a written report to the Commissioner respecting the implementation of any recommendations made under clause (b) and, to the extent that a recommendation has not been implemented, explain why that is the case. 2006, c. 35, Sched. A, s. 121 (1).

Time periods

(2) The Integrity Commissioner shall specify time periods for meeting the requirements of subsection (1). 2006, c. 35, Sched. A, s. 121 (2).

Same

(3) On request, the Integrity Commissioner may extend the time periods within which requirements under subsection (1) must be met, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 121 (3).

Same

(4) The Integrity Commissioner may reduce the time periods within which requirements under subsection (1) must be met if in his or her opinion circumstances make it appropriate to do so. 2006, c. 35, Sched. A, s. 121 (4).

INVESTIGATION BY INTEGRITY COMMISSIONER

Investigation by Integrity Commissioner

122 (1) The Integrity Commissioner may initiate an investigation of a disclosure of wrongdoing only if,

(a) the Commissioner is not satisfied with a report about the disclosure received under section 118 or 121;

(b) a person who has received a referral under subsection 118 (2) has referred the disclosure back to the Commissioner under section 119; or

(c) a person who has received a referral under subsection 118 (2) has not delivered a report about the disclosure within the time period required under section 118 or 121. 2006, c. 35, Sched. A, s. 122 (1).

Referral instead of investigation

(2) Instead of initiating an investigation under subsection (1), the Integrity Commissioner may refer the matter to another person or body so that it may be dealt with as a matter of law enforcement or in accordance with a procedure established under this or any other Act if, in the opinion of the Commissioner, this would be more appropriate than initiating an investigation under subsection (1). 2006, c. 35, Sched. A, s. 122 (2).

Same

(3) When referring a matter to another person or body under subsection (2), the Integrity Commissioner shall provide the person or body with a written summary of the disclosure and any other information that the Commissioner has received in relation to the matter that the Commissioner considers may assist the person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 122 (3).

Same

(4) Where the Integrity Commissioner has referred a matter to a person or body under subsection (2), the Commissioner shall not initiate an investigation unless the person or body has informed the Commissioner,

(a) that it will not proceed with an investigation of the matter;

(b) that it has concluded its investigation of the matter; or

(c) that it will not provide information referred to in subsection (6). 2006, c. 35, Sched. A, s. 122 (4).

Exception

(5) Despite subsection (4), the Integrity Commissioner may initiate an investigation under subsection (1) if, in the opinion of the Commissioner, doing so is in the public interest and would not interfere with or impede the other person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 122 (5).

Same

(6) A person or body to which a matter is referred under subsection (2) shall promptly inform the Integrity Commissioner if it decides not to proceed with an investigation or when it concludes an investigation. 2006, c. 35, Sched. A, s. 122 (6).

Same

(7) Where the person or body decides that informing the Integrity Commissioner in accordance with subsection (6) would be contrary to the public interest, it shall instead promptly inform the Commissioner that it will not provide information referred to in that subsection. 2006, c. 35, Sched. A, s. 122 (7).

Referral in course of investigation

123 (1) At any time during the course of an investigation by the Integrity Commissioner under this Part, he or she may refer the matter to another person or body so that it may be dealt with as a matter of law enforcement or in accordance with a procedure established under this or any other Act if, in the opinion of the Commissioner, this would be more appropriate than continuing the investigation. 2006, c. 35, Sched. A, s. 123 (1).

Same

(2) When referring a matter to another person or body under subsection (1), the Integrity Commissioner shall provide the person or body with a written summary of the disclosure and any other information that the Commissioner has received in relation to the matter that the Commissioner considers may assist the person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 123 (2).

Same

(3) Where the Integrity Commissioner has referred a matter to a person or body under subsection (1), the Commissioner shall suspend the investigation and may continue it only if the person or body has informed the Commissioner,

(a) that it will not proceed with an investigation of the matter;

(b) that it has concluded its investigation of the matter; or

(c) that it will not provide information referred to in subsection (5). 2006, c. 35, Sched. A, s. 123 (3).

Same

(4) Despite subsection (3), the Integrity Commissioner may continue an investigation under subsection (1) if, in the opinion of the Commissioner, doing so is in the public interest and would not interfere with or impede the other person or body in dealing with the matter. 2006, c. 35, Sched. A, s. 123 (4).

Same

(5) A person or body to which a matter is referred under subsection (1) shall promptly inform the Integrity Commissioner if it decides not to proceed with an investigation or when it concludes an investigation. 2006, c. 35, Sched. A, s. 123 (5).

Same

(6) Where the person or body decides that informing the Integrity Commissioner in accordance with subsection (5) would be contrary to the public interest, it shall instead promptly inform the Commissioner that it will not provide information referred to in that subsection. 2006, c. 35, Sched. A, s. 123 (6).

Investigation to cease in certain circumstances

124 The Integrity Commissioner shall cease his or her investigation under this Part of a disclosure if, in his or her opinion, one or more of the circumstances described in paragraphs 2 to 9 of section 117 apply. 2006, c. 35, Sched. A, s. 124.

Right to answer allegation

125 (1) If, at any time during the course of an investigation by the Integrity Commissioner under this Part, it appears to the Integrity Commissioner that there may be grounds to make a report under section 129 that might adversely affect a person or body, the Commissioner shall take reasonable measures to provide that person or body with an opportunity to be heard on the relevant matters. 2006, c. 35, Sched. A, s. 125 (1).

Same

(2) The person or body may be represented by a person authorized to practise law or provide legal services under the *Law Society Act*. 2006, c. 35, Sched. A, s. 156.

Same

(3) Except as provided in this section, the Commissioner need not hold a hearing and no person or body has a right to be heard by the Commissioner. 2006, c. 35, Sched. A, s. 125 (3).

Powers on investigation

126 (1) The Integrity Commissioner may require any public servant or former public servant to,

(a) provide any information that he or she may have if, in the opinion of the Commissioner, the information may be relevant to the investigation;

(b) produce any relevant document or thing that may be in his or her possession or under his or her control if, in the opinion of the Commissioner, the document or thing may be relevant to the investigation. 2006, c. 35, Sched. A, s. 126 (1).

Oral evidence

(2) The Integrity Commissioner may summon any public servant or former public servant who, in the Commissioner's opinion, is able to give evidence about any matter that may be relevant to the investigation and may examine him or her, on oath or affirmation. 2006, c. 35, Sched. A, s. 126 (2).

Inspection of premises

(3) The Integrity Commissioner may enter and inspect any premises of the public service of Ontario, at any reasonable time, for the purposes of the investigation. 2006, c. 35, Sched. A, s. 126 (3).

Same

(4) Before entering premises under subsection (3), the Integrity Commissioner shall notify the head of the organization occupying the premises of his or her intention to do so. 2006, c. 35, Sched. A, s. 126 (4).

Restriction on powers

127 (1) The Integrity Commissioner may not require the provision of information, the production of a document or thing or the giving of an answer if the Deputy Attorney General certifies that the provision, production or answer,

(a) might interfere with or impede the detection, investigation or prosecution of an offence; or

(b) might reveal the substance of deliberations of the Executive Council or any of its Committees without authority to do so. 2006, c. 35, Sched. A, s. 127 (1).

Same

(2) The Integrity Commissioner may not require the provision of information, the production of a document or thing or the giving of an answer if the Commissioner of the Ontario Provincial Police certifies that the provision, production or answer might interfere with or impede the detection or investigation of an offence. 2006, c. 35, Sched. A, s. 127 (2).

Same

(3) The Integrity Commissioner may not require the provision of information, the production of a document or thing or the giving of an answer if the provision, production or answer might disclose,

(a) information that is subject to solicitor-client privilege; or

(b) information prepared by or for counsel for a Ministry or a public body for use in giving legal advice or in contemplation of or for use in litigation. 2006, c. 35, Sched. A, s. 127 (3).

Same

(4) Unless the disclosure is required by law or permitted under this Act, the Integrity Commissioner and every person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their attention in the performance of their duties, powers or functions under this Part. 2006, c. 35, Sched. A, s. 127 (4).

Privilege

128 (1) A person who is required to provide information, produce a document or thing or give an answer in the course of an investigation by the Integrity Commissioner has the same privileges in relation to the provision of information, the production of documents or things and the answering of questions as witnesses have in any court proceeding. 2006, c. 35, Sched. A, s. 128 (1).

Protection

(2) Except on the trial of a person for perjury, no statement made or answer given by that or any other person in the course of an investigation by the Integrity Commissioner is admissible in evidence against any person in a court or at an inquiry or in any other proceeding, and no evidence in respect of the investigation by the Integrity Commissioner shall be given against any person. 2006, c. 35, Sched. A, s. 128 (2).

Right to object to answer

(3) A person giving a statement or answer in the course of an investigation by the Integrity Commissioner under this Part shall be informed by the person presiding over the investigation or proceeding of the right to object to answer a question under section 5 of the *Canada Evidence Act*. 2006, c. 35, Sched. A, s. 128 (3).

Prosecution

(4) No person is liable for prosecution for an offence under any Act by reason of his or her compliance with a requirement under this Part. 2006, c. 35, Sched. A, s. 128 (4).

Report on Conclusion of Investigation by Integrity Commissioner

Report on conclusion of investigation

129 (1) On concluding an investigation of a disclosure under this Part, the Integrity Commissioner shall make a report to the person to whom the Commissioner made the referral under subsection 118 (2). 2006, c. 35, Sched. A, s. 129 (1).

Same

(2) If the person to whom the Integrity Commissioner made the referral under subsection 118 (2) referred the matter back to the Commissioner under section 119 and the Integrity Commissioner considers that it would be inappropriate to make the report required by subsection (1) to that person, the Commissioner shall make the report to such other public servant as the Commissioner considers appropriate in the circumstances. 2006, c. 35, Sched. A, s. 129 (2).

Same

(3) Subsections (1) and (2) apply whether or not the Integrity Commissioner has made a finding of wrongdoing. 2006, c. 35, Sched. A, s. 129 (3).

Same

(4) A report required by subsection (1) shall be in writing and shall include,

(a) findings of wrongdoing, if any;

(b) reasons to support any findings;

(c) any recommendations that the Commissioner considers appropriate. 2006, c. 35, Sched. A, s. 129 (4).

Copy to Minister

(5) The Integrity Commissioner shall provide a copy of the report to a minister where the disclosure alleged wrongdoing,

(a) in the ministry of the minister; or

(b) in a public body for which the minister has responsibility. 2006, c. 35, Sched. A, s. 129 (5).

Further report

(6) If the report includes recommendations under clause (4) (c), the Integrity Commissioner may require the person to whom the Commissioner made the report under subsection (1) or (2), as the case may be, to provide a further report to the Commissioner, in writing and within a time period specified by the Commissioner,

(a) describing any action taken or proposed to be taken in response to the recommendations; and

(b) explaining why a recommended action was not taken or is not proposed to be taken. 2006, c. 35, Sched. A, s. 129 (6).

Same

(7) On request from the person to whom the Integrity Commissioner made the referral under subsection 118 (2), the Commissioner may extend the time period within which the further report must be provided, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 129 (7).

Copy to Minister

(8) The Integrity Commissioner shall provide a copy of the further report under subsection (6) to the minister entitled to receive a copy of the report under subsection (5). 2006, c. 35, Sched. A, s. 129 (8).

PUBLIC REPORTS BY INTEGRITY COMMISSIONER

Public report

130 (1) This section applies where the Integrity Commissioner has made a report respecting a disclosure of wrongdoing under section 129 and is of the opinion that it is in the public interest that a public report be made. 2006, c. 35, Sched. A, s. 130 (1).

Same

(2) In the circumstances described in subsection (1), the Integrity Commissioner shall make a public report respecting the disclosure. 2006, c. 35, Sched. A, s. 130 (2).

Same

(3) If the Integrity Commissioner has required a further report under subsection 129 (6), the Commissioner shall not make a public report until,

(a) the further report has been delivered to the Commissioner; or

(b) the time period specified under subsection 129 (6) has expired or, if the Commissioner has extended the time period under subsection 129 (7), the extended period has expired and no further report has been delivered to the Commissioner. 2006, c. 35, Sched. A, s. 130 (3).

Same

(4) The Integrity Commissioner shall ensure that the public report is readily accessible to the public by ensuring that the public report is published on one or more Internet sites and by such other means as the Commissioner considers appropriate. 2006, c. 35, Sched. A, s. 130 (4).

Same

(5) Where the Integrity Commissioner makes a public report, he or she shall also deliver the report to the Speaker of the Assembly, who shall lay the report before the Assembly at the earliest reasonable opportunity. 2006, c. 35, Sched. A, s. 130 (5).

Contents of public report

131 (1) Subject to subsections (2) and (3), the Integrity Commissioner shall not include, in a public report under section 130,

(a) information that would be subject to an exemption under sections 12 to 21.1 of the *Freedom of Information and Protection of Privacy Act*;

(b) information that would be excluded under section 65 of the *Freedom of Information and Protection of Privacy Act*; or

(c) information to which subsection 67 (2) of the *Freedom of Information and Protection of Privacy Act* would apply. 2006, c. 35, Sched. A, s. 131 (1).

Same

(2) With the consent of the person who received the Integrity Commissioner's report under subsection 129 (1) or (2), the Commissioner may disclose, in a public report under section 130,

(a) information that would be subject to an exemption under sections 13, 14, 18, 19, 20 or 21.1 of the *Freedom of Information and Protection of Privacy Act*; or

(b) information that would be excluded under subsection 65 (6) of the *Freedom of Information and Protection of Privacy Act*. 2006, c. 35, Sched. A, s. 131 (2).

Same

(3) The Commissioner may disclose, in a public report under section 130, information that would be subject to an exemption under section 13, 17, 18, 20, 21 or 21.1 of the *Freedom of Information and Protection of Privacy Act* or that would be excluded under subsection 65 (6) of that Act if, in his or her opinion,

(a) disclosure of the information is necessary to establish the grounds for the Commissioner's findings of wrongdoing or recommendations; and

(b) there is a compelling public interest in the disclosure that outweighs the harm that the disclosure may cause. 2006, c. 35, Sched. A, s. 131 (3).

Same

(4) The Integrity Commissioner, rather than the head, shall determine whether information would be subject to an exemption or an exclusion under a provision of the *Freedom of Information and Protection of Privacy Act*. 2006, c. 35, Sched. A, s. 131 (4).

Same

(5) Before making the determination under subsection (4), the Integrity Commissioner shall make reasonable efforts to obtain advice on the matter from the head. 2006, c. 35, Sched. A, s. 131 (5).

Before making public report

132 (1) Before making the determination under subsection 131 (4), the Integrity Commissioner,

(a) shall ask the person to whom the report was made under subsection 129 (1) or (2) for submissions as to the making of the determination under subsection 131 (4); and

(b) shall, if the Commissioner considers it appropriate to do so in the interests of fairness, provide any information contained in the report to a person to whom the information relates and ask the person for submissions as to the making of the determination under subsection 131 (4). 2006, c. 35, Sched. A, s. 132 (1).

Same

(2) The Integrity Commissioner shall specify time periods within which submissions may be made under subsection (1). 2006, c. 35, Sched. A, s. 132 (2).

Same

(3) On request from a person referred to in clause (1) (a) or (b), the Integrity Commissioner may extend the time periods within which the submissions must be made, either before or after the expiry of the period. 2006, c. 35, Sched. A, s. 132 (3).

Same

(4) The Integrity Commissioner shall not make a public report or deliver it to the Speaker of the Assembly until the time periods specified for submissions under subsection (2) or (3) has expired. 2006, c. 35, Sched. A, s. 132 (4).

Annual report, activities under this Part

133 (1) The annual report of the Integrity Commissioner required by section 24 of the *Members' Integrity Act, 1994* shall include,

(a) the number of disclosures received by the Commissioner under section 116 during the year;

(b) the number of refusals made by the Commissioner under section 117 during the year;

(c) the number of referrals made by the Commissioner under subsection 118 (2) during the year;

(d) the number of reports in which the Commissioner makes recommendations under section 121 during the year;

(e) a summary of what the Commissioner knows respecting responses to recommendations under section 121 during the year;

(f) the number of investigations initiated by the Commissioner under section 122 during the year;

(g) a summary of what the Commissioner knows respecting the outcomes during the year of findings of reprisals under this Part;

(h) anything else that the Commissioner considers relevant in respect of his or her activities under this Part during the year. 2006, c. 35, Sched. A, s. 133 (1).

Same

(2) Sections 131 and 132 apply, with necessary modifications, to the contents of the annual report that are required by subsection (1). 2006, c. 35, Sched. A, s. 133 (2).

Integrity Commissioner's Duty to Inform Person Who Made Disclosure

Duty to inform discloser, refusal to deal

134 (1) Where the Integrity Commissioner refuses to deal with a disclosure under section 117, he or she shall so inform the person who made the disclosure under section 116. 2006, c. 35, Sched. A, s. 134 (1).

Same

(2) Subject to section 137, the Integrity Commissioner may inform the person of his or her reasons for refusing to deal with the disclosure under section 117. 2006, c. 35, Sched. A, s. 134 (2).

Duty to inform discloser, no investigation

135 (1) Where the Integrity Commissioner receives a report under section 118 or 121 and does not initiate an investigation under section 122, the Commissioner shall so inform the person who made the disclosure under section 116. 2006, c. 35, Sched. A, s. 135 (1).

Same

(2) Subject to section 137, the Integrity Commissioner may give the person who made the disclosure such information respecting the investigation and findings as the Commissioner considers appropriate in the circumstances. 2006, c. 35, Sched. A, s. 135 (2).

Duty to inform discloser, no public report

136 (1) Where the Integrity Commissioner has a duty to report under section 129 but does not have a duty to make a public report under section 130, the Commissioner shall inform the person who made the disclosure under section 116 that he or she has concluded the investigation. 2006, c. 35, Sched. A, s. 136 (1).

Same

(2) Subject to section 137, the Integrity Commissioner may give the person who made the disclosure such information respecting the investigation and findings as the Commissioner considers appropriate in the circumstances. 2006, c. 35, Sched. A, s. 136 (2).

Limitation on duty to inform

137 (1) The Integrity Commissioner shall not give the person who made the disclosure,

(a) information that would be subject to an exemption under sections 12 to 21.1 of the *Freedom of Information and Protection of Privacy Act*;

(b) information that would be excluded under section 65 of the *Freedom of Information and Protection of Privacy Act*; or

(c) information to which subsection 67 (2) of the *Freedom of Information and Protection of Privacy Act* applies. 2006, c. 35, Sched. A, s. 137 (1).

Same

(2) In determining whether information would be subject to an exemption or an exclusion under a provision of the *Freedom of Information and Protection of Privacy Act*, the Integrity Commissioner shall exercise the discretion that the head has under the provision. 2006, c. 35, Sched. A, s. 137 (2).

Same

(3) Before exercising discretion under subsection (2), the Integrity Commissioner shall make reasonable efforts to obtain advice on the matter from the head. 2006, c. 35, Sched. A, s. 137 (3).

Duty to inform discloser, public report

138 Where the Integrity Commissioner has a duty to make a public report under section 130, he or she shall provide the report to the person who made the disclosure under section 116. 2006, c. 35, Sched. A, s. 138.

PROTECTION FROM REPRISALS

No reprisals

139 (1) No person shall take a reprisal against a public servant because he or she has,

(a) sought advice about making a disclosure about wrongdoing in accordance with this Part;

(b) made a disclosure about wrongdoing in accordance with this Part;

(c) co-operated in an investigation or other process related to a disclosure of wrongdoing made in accordance with this Part;

(d) acted in compliance with this Part; or

(e) sought enforcement of this Part. 2006, c. 35, Sched. A, s. 139 (1).

Same

(2) For the purposes of subsection (1), a reprisal is any measure taken against a public servant that adversely affects his or her employment or appointment and includes but is not limited to,

(a) ending or threatening to end a public servant's employment or appointment;

(b) disciplining or suspending or threatening to discipline or suspend a public servant;

(c) imposing or threatening to impose a penalty related to the employment or appointment of a public servant;

(d) intimidating or coercing a public servant in relation to his or her employment or appointment. 2006, c. 35, Sched. A, s. 139 (2).

Complaint about reprisal

140 (1) A public servant described in subsection (2), (3) or (4) may complain under this section that he or she has suffered a reprisal prohibited by section 139. 2006, c. 35, Sched. A, s. 140 (1).

Public servant subject to collective agreement

(2) A public servant who is subject to the terms and conditions of a collective agreement may have the complaint dealt with by final and binding settlement by arbitration in accordance with the agreement or may file the complaint with the Ontario Labour Relations Board. 2009, c. 33, Sched. 17, s. 10 (15).

Public servant not subject to collective agreement

(3) A public servant employed under Part III who is not subject to the terms and conditions of a collective agreement may file the complaint with the Public Service Grievance Board. 2009, c. 33, Sched. 17, s. 10 (15).

Other public servant

(4) A public servant employed by a public body who is not subject to the terms and conditions of a collective agreement may file the complaint with the Ontario Labour Relations Board. 2009, c. 33, Sched. 17, s. 10 (15).

Inquiry by Board

(5) The Ontario Labour Relations Board may inquire into a complaint filed under subsection (2) or (4) and section 96 of the *Labour Relations Act, 1995*, except subsection (5), applies with necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act. 2006, c. 35, Sched. A, s. 140 (5).

Same

(6) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2) or (4), sections 110, 111, 114 and 116 of the *Labour Relations Act, 1995* apply with necessary modifications. 2006, c. 35, Sched. A, s. 140 (6).

Exception

(7) Despite anything in this section, a person who is a police officer under the *Community Safety and Policing Act, 2019* shall have his or her complaint dealt with under section 191 of that Act. 2006, c. 35, Sched. A, s. 140 (7); 2019, c. 1, Sched. 4, s. 52 (3).

Order

(8) If the Public Service Grievance Board, the Ontario Labour Relations Board or the Grievance Settlement Board determines, on the completion of an inquiry into a complaint filed under subsection (2), (3) or (4), that a reprisal has been taken in contravention of subsection 139 (1), the Board may make an order that it considers just and reasonable in the circumstances, directing the relevant ministry or public body or a person acting on behalf of the ministry or public body to do or refrain from doing anything in relation to the contravention. 2006, c. 35, Sched. A, s. 140 (8).

Same

(9) Without limiting the generality of subsection (8), an order under that subsection may direct that the ministry or public body, or a person acting on behalf of the ministry or public body, do one or more of the following:

1. Cease doing an act or acts complained of under subsection (1).
2. Take steps to rectify harm related to a complaint under subsection (1).
3. Reinstate the employment of a public servant whose employment was terminated.

4. Compensate the public servant for loss of any remuneration, including benefits. 2006, c. 35, Sched. A, s. 140 (9).

Same

(10) Without limiting the generality of subsection (8), where the board is of the view that continuation of the employment relationship is inappropriate, the board may direct the ministry or public body, or person acting on behalf of the ministry or public body to terminate the public servant's employment and provide compensation in lieu of reasonable notice of the termination. 2006, c. 35, Sched. A, s. 140 (10).

Same

(11) A board may not make an order under subsection (8) for punitive damages or for costs. 2006, c. 35, Sched. A, s. 140 (11).

Same

(12) Where a board has made a finding under subsection (8) that a reprisal has been taken, the board shall inform the Integrity Commissioner of the finding. 2006, c. 35, Sched. A, s. 140 (12).

Onus of proof

(13) On an inquiry into a complaint filed with the Public Service Grievance Board, the Ontario Labour Relations Board or the Grievance Settlement Board under this section, the burden of proof that an employer or a person acting on behalf of an employer did not act contrary to subsection 139 (1) lies on the employer or the person acting on behalf of the employer. 2006, c. 35, Sched. A, s. 140 (13).

Settlements may be filed with Board

141 (1) A written and signed settlement of a complaint made under subsection 140 (1) may, if a party to the settlement believes that the settlement has been breached, be filed,

(a) in the case of a settlement of a complaint by a public servant described in subsection 140 (2) where the complaint is filed with the Ontario Labour Relations Board under that subsection, with the Ontario Labour Relations Board;

(b) in the case of a complaint by a public servant described in subsection 140 (2) that is not filed with the Ontario Labour Relations Board under that subsection and that was settled by the parties to a collective agreement governed by the *Crown Employees Collective Bargaining Act, 1993*, with the Grievance Settlement Board;

(c) in the case of a settlement of a complaint by a public servant described in subsection 140 (3), with the Public Service Grievance Board;

(d) in the case of a settlement of a complaint by a public servant described in subsection 140 (4), with the Ontario Labour Relations Board. 2006, c. 35, Sched. A, s. 141 (1).

Same

(2) Where a settlement is filed with a board under this section, the board shall inquire into the matter and, if the board concludes that the settlement has been breached, the Board may,

(a) make an order requiring compliance with the settlement; or

(b) make an order respecting the complaint that could have been made in respect of that complaint under subsection 140 (8). 2006, c. 35, Sched. A, s. 141 (2).

Same

(3) Subsections 140 (5) and (6) apply with necessary modifications to the Ontario Labour Relations Board acting under subsection (2). 2006, c. 35, Sched. A, s. 141 (3).

Order may be filed in court

142 (1) An order of the Grievance Settlement Board, the Public Service Grievance Board or the Ontario Labour Relations Board under subsection 140 (8) or 141 (2) may be filed in the Superior Court of Justice. 2006, c. 35, Sched. A, s. 142 (1).

Same

(2) An order that is filed under subsection (1) is enforceable as if it were an order of the Superior Court of Justice. 2006, c. 35, Sched. A, s. 142 (2).

Same

(3) Section 129 of the *Courts of Justice Act* applies in respect of an order filed with the Superior Court of Justice under subsection (1) and, for the purpose, the date on which the order is filed is deemed to be the date of the order. 2006, c. 35, Sched. A, s. 142 (3).

PENALTIES, PROHIBITIONS AND OFFENCES

Penalties

143 A public servant who contravenes subsection 139 (1) or any of subsections 144 (1) to (4) is subject to disciplinary measures, including suspension or dismissal. 2006, c. 35, Sched. A, s. 143.

Prohibitions

144 (1) No person shall wilfully obstruct the Integrity Commissioner in the exercise of his or her powers or the performance of his or her duties or functions under this Part. 2006, c. 35, Sched. A, s. 144 (1).

Same

(2) No person shall, in disclosing a wrongdoing under this Part, or in the course of an investigation or other proceeding under this Part, knowingly make a false or misleading statement. 2006, c. 35, Sched. A, s. 144 (2).

Same

(3) No person shall, knowing that a document or other thing is likely to be relevant to an investigation or other proceeding under this Part,

(a) destroy or alter the document or other thing;

(b) falsify the document or other thing or make a false document or other thing;

(c) conceal the document or other thing. 2006, c. 35, Sched. A, s. 144 (3).

Same

(4) No person shall direct, counsel or cause in any manner any person to do anything described in this section. 2006, c. 35, Sched. A, s. 144 (4).

Offence

145 (1) A person who contravenes any of subsections 144 (1) to (4) is guilty of an offence. 2006, c. 35, Sched. A, s. 145 (1).

Same

(2) A person who contravenes subsection 139 (1) is guilty of an offence. 2006, c. 35, Sched. A, s. 145 (2).

Same

(3) A prosecution for an offence under subsection (2) shall not be commenced unless there has been a finding by a board under subsection 140 (8) that a reprisal was taken in contravention of subsection 139 (1). 2006, c. 35, Sched. A, s. 145 (3).

MISCELLANEOUS

Assistance to the Commissioner

146 The Integrity Commissioner may engage, on a temporary basis, the services of a person with technical or specialized knowledge to advise or assist the Commissioner in the exercise of his or her powers or the performance of his or her duties or functions. 2006, c. 35, Sched. A, s. 146.

Provision of legal services

147 Subject to regulations under subsection 150 (1), the Integrity Commissioner may arrange and pay for the provision of legal services to a public servant or other person involved in any investigation or other proceeding under this Part. 2006, c. 35, Sched. A, s. 147; 2009, c. 33, Sched. 17, s. 10 (16).

Disclosure does not waive privilege

148 A disclosure under this Part does not constitute waiver of any privilege that may exist with respect to the information or other thing disclosed. 2006, c. 35, Sched. A, s. 148.

FIVE-YEAR REVIEW

Five-year review

149 (1) Five years after this section comes into force, the minister responsible for the administration of this Act shall ensure that a review is conducted of the administration and operation of this Part and that a report setting out the findings from the review is prepared. 2006, c. 35, Sched. A, s. 149 (1).

Same

(2) The minister shall deliver the report to the Speaker of the Assembly, who shall lay the report before the Assembly at the earliest reasonable opportunity. 2006, c. 35, Sched. A, s. 149 (2).

REGULATIONS

Regulations, Part VI

150 (1) The Lieutenant Governor in Council may make regulations respecting the provision of legal services under section 147. 2006, c. 35, Sched. A, s. 150 (1).

Same

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 150 (2).

PART VII
MISCELLANEOUS

Statutory Powers Procedure Act

151 The *Statutory Powers Procedure Act* does not apply to proceedings and decisions under this Act, except as provided under section 23. 2006, c. 35, Sched. A, s. 151.

Agreement in conflict with regulation, directive

152 Where a provision in a collective agreement conflicts with a provision of a regulation or a directive made under this Act, the provision in the collective agreement prevails over the provision of the regulation or directive. 2006, c. 35, Sched. A, s. 152.

Implementation of collective agreements, etc.

153 Subject to section 10 of the *Ontario Provincial Police Collective Bargaining Act, 2006*, the minister responsible for the administration of this Act shall by order implement collective agreements made in accordance with the collective bargaining procedures applicable to public servants employed under Part III of this Act. 2006, c. 35, Sched. A, s. 153.

REGULATIONS

Regulations, general

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

(a) providing for the collection, use and disclosure of personal information about public servants and former public servants,

(i) for the purposes of this Act, and

(ii) for the purposes of managing and administering human resources in the public service of Ontario, including but not limited to providing integrated human resources programs for the public service of Ontario;

(b) providing for any transitional matter that the Lieutenant Governor in Council considers necessary or advisable for the effective implementation of this Act or the regulations or directives under it;

(b.1) providing for any transitional matter arising from the enactment of Schedule 35 to the *Restoring Trust, Transparency and Accountability Act, 2018*;

(c) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act. 2006, c. 35, Sched. A, s. 154 (1); 2018, c. 17, Sched. 35, s. 15 (1).

Same

(2) Regulations made under this section may be general or particular in their application. 2006, c. 35, Sched. A, s. 154 (2).

Conflict

(3) If there is a conflict between a regulation made under clause (1) (b.1) and a provision of this or any other Act or a provision of another regulation made under this or any other Act, the regulation made under clause (1) (b.1) prevails. 2018, c. 17, Sched. 35, s. 15 (2).

Transitional Matters

Status of employees

155 (1) A person who was, immediately before this section comes into force, a public servant within the meaning of the *Public Service Act*, as that Act read immediately before its repeal by section 1 of Schedule C to the *Public Service of Ontario Statute Law Amendment Act, 2006*, and who at that time worked in a ministry, other than in a minister's office, is, on the day this section comes into force, a public servant appointed under Part III of this Act to employment in a ministry. 2006, c. 35, Sched. A, s. 155 (1).

Same

(2) A person who was, immediately before this section comes into force, a public servant within the meaning of the *Public Service Act*, as that Act read immediately before its repeal by section 1 of Schedule C to the *Public Service of Ontario Statute Law Amendment Act, 2006*, and who at that time worked in a minister's office, is, on the day this section comes into force, a public servant appointed under Part III of this Act to employment in a minister's office. 2006, c. 35, Sched. A, s. 155 (2).

Same

(3) A person who was, immediately before this section comes into force, appointed under the *Public Service Act*, as that Act read immediately before its repeal by section 1 of Schedule C to the *Public Service of Ontario Statute Law Amendment Act, 2006*, to work in a Commission public body is, on the day this section comes into force, a public servant appointed by the Public Service Commission under Part III of this Act to employment in a Commission public body. 2006, c. 35, Sched. A, s. 155 (3).

156, 157 Omitted (provides for amendments to this Act). 2006, c. 35, Sched. A, ss. 156, 157.

158 Omitted (provides for coming into force of provisions of this Act). 2006, c. 35, Sched. A, s. 158.

159 Omitted (enacts short title of this Act). 2006, c. 35, Sched. A, s. 159.

1167

TAB 21

CanLII

Conflict of Interest Commissioner: Powers, Duties and Functions, O Reg 384/07

Current version: in force since 2019-05-01

Link to the latest version: https://canlii.ca/t/s5f

Stable link to this version: https://canlii.ca/t/53ktv

Citation to this version: Conflict of Interest Commissioner: Powers, Duties and Functions, O Reg 384/07, <https://canlii.ca/t/53ktv> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-22

Public Service of Ontario Act, 2006

ONTARIO REGULATION 384/07

INTEGRITY COMMISSIONER: POWERS, DUTIES AND FUNCTIONS UNDER THE ACT

Consolidation Period: From May 1, 2019 to the e-Laws currency date.

Last amendment: 83/19.

This is the English version of a bilingual Regulation.

Advice, education and training

1. The Integrity Commissioner has the following additional powers, duties and functions:

1. Upon request, to advise the Public Service Commission or its delegate in respect of conflict of interest matters relating to the appointment or proposed appointment of a person under subsection 32 (1) or (2) of the Act to employment by the Crown.
2. Upon request, to advise the Public Service Commission and ethics executives about conflict of interest matters affecting the public service of Ontario.
3. Upon the request of the Public Service Commission or an ethics executive, to act as a conflict of interest advisor to consultants or other independent contractors who provide services to a ministry or a Commission public body and to persons who are seconded to a position in a ministry or a Commission public body from a position outside the public service of Ontario.
4. Upon request, to provide advice about conflicts of interest to a minister or to the Director of the Public Appointments Secretariat in respect of the proposed appointment of a person to a public body.

5. If a public servant makes the declaration to the Commissioner respecting the public servant's financial interests that is required by the conflict of interest rules established under Part IV of the Act, to advise the public servant's ethics executive about the actions that may be taken by the public servant in order to avoid contravening the conflict of interest rules, including advice concerning the transfer of ownership or control of an asset to a neutral third party.
6. To educate and train ethics executives about their responsibilities under the Act. O. Reg. 384/07, s. 1; O. Reg. 83/19, s. 2.

Decisions under subsection 65 (5) of the Act

2. (1) This section applies with respect to matters referred to the Integrity Commissioner under subsection 65 (6) of the Act. O. Reg. 384/07, s. 2 (1); O. Reg. 83/19, s. 3.

(2) Without limiting the generality of the Commissioner's powers under subsection 65 (5) of the Act, he or she may take any of the following actions in respect of a matter referred to him or her under subsection 65 (6) of the Act:

1. Recommend that the Crown not do business with a person or entity that employs or uses the services of a former public servant whose employment or services would contravene the conflict of interest rules.
2. Require a public servant to take or refrain from taking specified actions in order to avoid contravening the conflict of interest rules, including requiring the public servant to transfer ownership or control of an asset to a neutral third party.
3. Require a public servant to notify his or her supervisor of decisions that the public servant proposes to make that could result in a contravention of the conflict of interest rules, and require the public servant to obtain the supervisor's approval for the proposed decisions.
4. Recommend disciplinary measures that may be imposed on a public servant, including suspension or dismissal, or recommend that the public servant's resignation be accepted.
5. Recommend that a public servant be transferred to another position or assigned to perform other duties in order to avoid or remedy a contravention of the conflict of interest rules.
6. Recommend that a public servant be temporarily relieved from duties that have resulted in a contravention of the conflict of interest rules or that may result in such a contravention. O. Reg. 384/07, s. 2 (2).

Collection, use and disclosure of personal information

3. (1) The Integrity Commissioner shall collect and use the personal information that is necessary to enable him or her to perform his or her duties under section 65 of the Act and under the conflict of interest rules established under Part IV of the Act. O. Reg. 384/07, s. 3 (1); O. Reg. 83/19, s. 4.

(2) The Commissioner shall not disclose personal information collected under subsection (1) unless one or more of the following circumstances exist:

1. The person to whom the information relates consents to the disclosure.
2. The disclosure is required in connection with a legal proceeding relating to the Act or a regulation made under it.
3. The disclosure is made for the purpose of complying with an Act of the Legislature or an Act of Parliament or a treaty, agreement or arrangement made thereunder.
4. The disclosure is made to a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
5. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to verify information given to the Commissioner or to an ethics executive by the public servant.
6. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to determine whether the public servant has contravened, or may have contravened, the conflict of interest rules.
7. The Commissioner considers it to be reasonably necessary to disclose the information to a person or entity in order to enable the person or entity to perform his, her or its duties under the Act. O. Reg. 384/07, s. 3 (2).

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 384/07, s. 4.

TAB 22

CanLII

AI analysis by CanLII

AI-generated

Overview

The Ontario Regulation 380/07 under the Public Service of Ontario Act, 2006, addresses the conditions under which public servants in certain positions may be dismissed without cause. It specifies the classes of positions that fall under this provision, focusing on senior management and other managerial roles. The regulation aims to delineate the scope of employment security for public servants by identifying which positions are subject to dismissal without cause, thereby providing clarity on employment terms for these roles (section 1).

The regulation explicitly excludes positions whose incumbents are represented by a bargaining agent for collective bargaining purposes under the Crown Employees Collective Bargaining Act, 1993. This exclusion ensures that employees covered by collective agreements are not subject to the same dismissal provisions, thereby protecting their negotiated employment rights (section 1).

The regulation was last amended by O. Reg. 341/16 and has been in effect since October 12, 2016, as part of the ongoing consolidation of Ontario's public service employment regulations (note).

Provisions' Outline

Dismissal Without Cause (section 1)

- Prescribes classes of positions for dismissal without cause, including senior management and managerial roles, while excluding those represented by a bargaining agent.

Omitted Provisions (section 2)

- Contains provisions related to the coming into force of the regulation, which are not included in the text.

Generated on 2025-02-04

This feature is limited to a few collections. The present AI analysis was made possible with the financial support of the **Law Foundation of Ontario**.
You may use our **feedback form** to send us your questions or suggestions.

Dismissal Without Cause (Part III of the Act), O Reg 380/07

Current version: in force since 2016-10-12

Link to the latest version: https://canlii.ca/t/s4z

Stable link to this version: https://canlii.ca/t/52t9p

Citation to this version: Dismissal Without Cause (Part III of the Act), O Reg 380/07, <https://canlii.ca/t/52t9p> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-22

Public Service of Ontario Act, 2006

ONTARIO REGULATION 380/07

DISMISSAL WITHOUT CAUSE (PART III OF THE ACT)

Consolidation Period: From October 12, 2016 to the e-Laws currency date.

Last amendment: 341/16.

This is the English version of a bilingual regulation.

Dismissal without cause

1. (1) The following classes of position are prescribed for the purposes of subsection 38 (1) of the Act:

1. Any class of position of public servants employed in a senior management capacity and classified under subsection 33 (1) of the Act as a position within the Senior Management Group.
2. Any class of position of public servants employed in a managerial, administrative, professional, technical, clerical, operational or confidential capacity and classified under subsection 33 (1) of the Act as a position within the Management Compensation Plan. O. Reg. 380/07, s. 1 (1).

(2) Subsection (1) does not apply with respect to classes of positions whose incumbents are represented by a bargaining agent for the purposes of collective bargaining under the *Crown Employees Collective Bargaining Act, 1993*. O. Reg. 380/07, s. 1 (2).

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 380/07, s. 2.

TAB 23

CanLII

Ethics Executive: Additional Powers, Duties and Functions Under Part IV of the Act, O Reg 383/07

Current version: in force since 2016-02-03

Link to the latest version: https://canlii.ca/t/s5b

Stable link to this version: https://canlii.ca/t/52ljq

Citation to this version: Ethics Executive: Additional Powers, Duties and Functions Under Part IV of the Act, O Reg 383/07, <https://canlii.ca/t/52ljq> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Public Service of Ontario Act, 2006

ONTARIO REGULATION 383/07

ETHICS EXECUTIVE: ADDITIONAL POWERS, DUTIES AND FUNCTIONS UNDER PART IV OF THE ACT

Consolidation Period: From February 3, 2016 to the e-Laws currency date.

Last amendment: 17/16.

This is the English version of a bilingual regulation.

Decisions under subsection 65 (5) of the Act

1. Without limiting the generality of the powers of an ethics executive under subsection 65 (5) of the Act, he or she may take any of the following actions in respect of a matter referred to in that subsection:

1. Require a public servant to notify his or her supervisor of decisions that the public servant proposes to make that could result in a contravention of the conflict of interest rules established under Part IV of the Act, and require the public servant to obtain the supervisor's approval for the proposed decisions.
2. Recommend disciplinary measures that may be imposed on a public servant, including suspension or dismissal, or recommend that the public servant's resignation be accepted.
3. Recommend that a public servant be transferred to another position or assigned to perform other duties in order to avoid or remedy a contravention of the conflict of interest rules.
4. Recommend that a public servant be temporarily relieved from duties that have resulted in a contravention of the conflict of interest rules or that may result in such a contravention.
5. Direct a public servant to transfer ownership or control of an asset to a neutral third party in order to avoid contravening the conflict of interest rules. O. Reg. 383/07, s. 1.

Collection, use and disclosure of personal information

2. (1) An ethics executive shall collect and use the personal information that is necessary to enable him or her to perform his or her duties under section 65 of the Act and under the conflict of interest rules established under Part IV of the Act. O. Reg. 383/07, s. 2 (1).

(2) An ethics executive shall not disclose personal information collected under subsection (1) unless one or more of the following circumstances exist:

1. The person to whom the information relates consents to the disclosure.
2. The disclosure is required in connection with a legal proceeding relating to the Act or a regulation made under it.
3. The disclosure is made for the purpose of complying with an Act of the Legislature or an Act or Parliament or a treaty, agreement or arrangement made thereunder.
4. The disclosure is made to a law enforcement agency in Canada to aid an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.
5. The ethics executive considers it to be reasonably necessary to disclose the information to a person or entity in order to verify information given to the ethics executive by the public servant.
6. The ethics executive considers it to be reasonably necessary to disclose the information to a person or entity in order to determine whether the public servant has contravened, or may have contravened, the conflict of interest rules.
7. The ethics executive considers it to be reasonably necessary to disclose the information to a person or entity in order to enable the person or entity to perform his, her or its duties under the Act. O. Reg. 383/07, s. 2 (2).

3. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 383/07, s. 3.

TAB 24

CanLII

Oaths and Affirmations, O Reg 373/07

Current version: in force since 2017-11-06

Link to the latest version: https://canlii.ca/t/s4h

Stable link to this version: https://canlii.ca/t/5316w

Citation to this version: Oaths and Affirmations, O Reg 373/07, <https://canlii.ca/t/5316w> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Public Service of Ontario Act, 2006

ONTARIO REGULATION 373/07

OATHS AND AFFIRMATIONS

Consolidation Period: From November 6, 2017 to the e-Laws currency date.

Last amendment:. 385/17.

This is the English version of a bilingual regulation.

Definitions

0.1 In this Regulation,

"Indigenous peoples" includes the First Nations, Inuit and Métis peoples within Canada; ("peuples autochtones")

"Indigenous person" means an individual who forms part of the Indigenous peoples. ("Autochtone") O. Reg. 385/17, s. 1.

Oath or affirmation of allegiance

1. (1) The following oath or affirmation of allegiance to the Crown is prescribed for the purposes of subsection 5 (1) of the Act:

"I swear (or solemnly affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second (*or the reigning sovereign for the time being*), her heirs and successors according to law. So help me God. (Omit this phrase in an affirmation.)"

O. Reg. 373/07, s. 1 (1).

(2) The public servant may make the oath or affirmation in either English or French. O. Reg. 373/07, s. 1 (2).

Exemptions, oath or affirmation of allegiance

2. (1) A public servant who is not a citizen of Canada but is a citizen of another country is exempt from the requirement under subsection 5 (1) of the Act to swear or affirm his or her allegiance to the Crown if the public servant asserts that making the oath or affirmation could result in the loss of that citizenship. O. Reg. 373/07, s. 2.

(2) A public servant who identifies as an Indigenous person is exempt from the requirement under subsection 5 (1) of the Act to swear or affirm his or her allegiance to the Crown if the public servant asserts that making the oath or affirmation would be inconsistent with his or her views regarding the relationship between the Crown and Indigenous peoples. O. Reg. 385/17, s. 2.

Oath or affirmation of office

3. (1) The following oath or affirmation of office is prescribed for the purposes of section 6 of the Act:

"I swear (or solemnly affirm) that I will faithfully discharge my duties as a public servant; I will respect the laws of Canada and Ontario, including the recognition and affirmation of the aboriginal and treaty rights of Indigenous peoples in the Constitution; and, except as I may be legally authorized or required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a public servant. So help me God. (Omit this phrase in an affirmation.)"

O. Reg. 385/17, s. 3 (1).

(2) The public servant may make the oath or affirmation in either English or French. O. Reg. 373/07, s. 3 (2).

(3) Subsection (1), as remade by Ontario Regulation 385/17, applies to a public servant who is making the oath or affirmation on or after the day that that Regulation comes into force. O. Reg. 385/17, s. 3 (2).

Administration of oath or affirmation

4. (1) Any of the persons described in Column 2 of the Table to this section is authorized to administer an oath or affirmation by a public servant who is appointed to a position described in Column 1 in the same row. O. Reg. 111/08, s. 1.

(2) In the Table to this section,

"appointed commissioner for taking affidavits" means a person who is appointed under subsection 4 (1) of the *Commissioners for taking Affidavits Act* as a commissioner for taking affidavits; ("commissaire aux affidavits nommé")

"lawyer in the public service of Ontario" means a person employed as legal counsel,

(a) under subsection 32 (1) of the Act to work in a ministry, other than in a minister's office,

(b) under subsection 32 (2) of the Act to work in a Commission public body, or

(c) by a public body that is not a Commission public body. ("avocat de la fonction publique de l'Ontario")

TABLE

PERSONS AUTHORIZED TO ADMINISTER OATHS AND AFFIRMATIONS

Item	Column 1 Public servant making the oath or affirmation	Column 2 Persons authorized to administer the oath or affirmation
1.	A public servant who works in a ministry, but not in a minister's office	· the deputy minister of the ministry,
		· a public servant who is employed under Part III of the Act and who exercises managerial functions in a ministry,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
2.	A public servant who works in a minister's office	· a minister,
		· a public servant who is employed under Part III of the Act and who exercises managerial functions in the Office of the Premier, the Cabinet Office or the minister's office,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.

3.	A public servant, other than a government appointee, who works in a Commission public body	· the public servant's ethics executive as determined under subsection 62 (1) of the Act,
		· a public servant who is employed under Part III of the Act and who exercises managerial functions in the Commission public body or in the ministry to whom the Commission public body reports,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
4.	A public servant, other than a government appointee, who works in a public body that is not a Commission public body	· the public servant's ethics executive as determined under subsection 62 (1) of the Act,
		· a public servant who exercises managerial functions in the public body,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
5.	A government appointee to a public body	· the chair of the public body,
		· a lawyer in the public service of Ontario,
		· any other public servant who is an appointed commissioner for taking affidavits.
6.	The chair of a public body	· a public servant employed under Part III of the Act who works in the Cabinet Office and who is an appointed commissioner for taking affidavits,
		· a lawyer in the public service of Ontario.

O. Reg. 111/08, s. 1.

5. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 373/07, s. 5.

TAB 25

CanLII

Provision of Legal Services Under Section 147 of the Act, O Reg 385/07

Current version: in force since 2007-08-20

Link to the latest version:	https://canlii.ca/t/s5l
Stable link to this version:	https://canlii.ca/t/1n09
Citation to this version:	Provision of Legal Services Under Section 147 of the Act, O Reg 385/07, <https://canlii.ca/t/1n09> retrieved on 2026-01-06
Currency:	Last updated from the e-Laws site on 2025-12-29

Public Service of Ontario Act, 2006

ONTARIO REGULATION 385/07

PROVISION OF LEGAL SERVICES UNDER SECTION 147 OF THE ACT

Consolidation Period: From August 20, 2007 to the e-Laws currency date.

No amendments.

This is the English version of a bilingual regulation.

Restrictions on eligibility

1. (1) The Integrity Commissioner is not permitted to arrange or pay for the provision of legal services under section 147 of the Act to a public servant or former public servant involved in any investigation or other proceeding under Part VI of the Act unless,

(a) the investigation or other proceeding relates to a disclosure that has been received by the Commissioner under section 116 of the Act, other than a disclosure which the Commissioner has refused under section 117 of the Act to deal with; or

(b) the investigation or other proceeding relates to a complaint that has been made under section 140 of the Act. O. Reg. 385/07, s. 1 (1).

(2) The Integrity Commissioner is not permitted to arrange or pay for the provision of legal services under section 147 of the Act to a public servant or former public servant if the Crown, another employer or a bargaining agent has offered to provide or pay for legal services in whole or in part but the offer has not been accepted. O. Reg. 385/07, s. 1 (2).

(3) The Integrity Commissioner is not permitted to arrange or pay for the provision of legal services under section 147 of the Act to a person who is not a public servant or former public servant. O. Reg. 385/07, s. 1 (3).

Limit on amount

2. (1) The maximum amount that the Integrity Commissioner is permitted to pay for legal services under section 147 of the Act provided to a public servant or former public servant is $3,000 for a disclosure received under section 116 of the Act and $3,000 for a complaint made under section 140 of the Act. O. Reg. 385/07, s. 2 (1).

(2) If any legal services for a public servant or former public servant are being paid for by the Crown, another employer or a bargaining agent, the maximum amount that the Integrity Commissioner is permitted by subsection (1) to pay is reduced by the amount paid by the Crown, the employer or the bargaining agent, as the case may be, for the legal services. O. Reg. 385/07, s. 2 (2).

Factors

3. When deciding whether to arrange and pay for the provision of legal services under section 147 of the Act to a public servant or former public servant, the Integrity Commissioner shall consider the following factors and such other matters as the Commissioner considers relevant:

1. The ability of the public servant or former public servant to pay for legal services.
2. The degree to which the public interest may be affected by the alleged wrongdoing or reprisal. O. Reg. 385/07, s. 3.

Recommendation

4. Two years after this Regulation comes into force, the Integrity Commissioner shall give a recommendation about the efficacy of this Regulation to the minister responsible for the administration of the Act. O. Reg. 385/07, s. 4.

5. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 385/07, s. 5.

TAB 26

CanLII

Public Bodies and Commission Public Bodies - Definitions, O Reg 146/10

Current version: in force since 2025-01-01

Link to the latest version: https://canlii.ca/t/8n04

Stable link to this version: https://canlii.ca/t/56fx2

Citation to this version: Public Bodies and Commission Public Bodies - Definitions, O Reg 146/10, <https://canlii.ca/t/56fx2> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Public Service of Ontario Act, 2006

ONTARIO REGULATION 146/10

PUBLIC BODIES AND COMMISSION PUBLIC BODIES — DEFINITIONS

Consolidation Period: From January 1, 2025 to the e-Laws currency date.

Last amendment: 567/24.

This is the English version of a bilingual regulation.

Public bodies

1. Each body that is listed in Column 1 of Table 1 is prescribed as a public body for the purposes of the Act. O. Reg. 146/10, s. 1.

Commission public bodies

2. A public body that is listed in Column 1 of Table 1 is prescribed as a Commission public body for the purposes of the Act if so indicated in the corresponding row in Column 2. O. Reg. 286/16, s. 1.

3. Omitted (revokes other Regulations). O. Reg. 146/10, s. 3.

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 146/10, s. 4.

TABLE 1

Item	Column 1 Public bodies	Column 2 Commission public body?
1.	Accessibility Standards Advisory Council	Yes
2.	Revoked: O. Reg. 88/24, s. 1 (1).	
3.	Advisory Council on Drinking Water Quality and Testing Standards	Yes
4.	Revoked: O. Reg. 567/24, s. 1 (1).	
5.	Advisory Council to the Order of Ontario	Yes
6.	AgriCorp	No
7.	Agricultural Research Institute of Ontario	Yes
8.	Agriculture, Food and Rural Affairs Appeal Tribunal	Yes
9.	Alcohol and Gaming Commission of Ontario	No
10.	Algonquin Forestry Authority	No
11.	Animal Care Review Board	Yes
12.	Assessment Review Board	Yes
13.	Revoked: O. Reg. 88/24, s. 1 (1).	
13.1	Big Game Management Advisory Committee	Yes
14.	Revoked: O. Reg. 903/21, s. 1 (2).	
15.	Revoked: O. Reg. 270/21, s. 1 (2).	
16.	Building Code Commission	Yes

17.	Revoked: O. Reg. 270/21, s. 1 (2).	
18.	Building Materials Evaluation Commission	Yes
18.0.1	Building Ontario Fund	No
18.1	Business Risk Management Review Committee	Yes
19.	Revoked: O. Reg. 270/21, s. 1 (2).	
20.	The Centennial Centre of Science and Technology	Yes
20.1	Centralized Supply Chain Ontario	No
21.	Child and Family Services Review Board	Yes
22.	Revoked: O. Reg. 88/24, s. 1 (1).	
23.	Revoked: O. Reg. 440/22, s. 1 (1).	
24.	Committee on the Status of Species at Risk in Ontario	Yes
25.	Committee to Evaluate Drugs	Yes
26.	Consent and Capacity Board	Yes
27.	Revoked: O. Reg. 903/21, s. 1 (2).	
28.	Constable Joe MacDonald Public Safety Officers' Survivors Scholarship Fund Committee	Yes
29.	Revoked: O. Reg. 440/22, s. 1 (1).	
30.	Crown Employees Grievance Settlement Board	Yes
31.	Revoked: O. Reg. 270/21, s. 1 (2).	
32.	Custody Review Board	Yes
33.	Death Investigation Oversight Council	Yes

34.	Revoked: O. Reg. 106/19, s. 1 (1).	
35.	Education Quality and Accountability Office	Yes
36.	Education Relations Commission	Yes
37.	Revoked: O. Reg. 270/21, s. 1 (2).	
38.	Revoked: O. Reg. 903/21, s. 1 (2).	
39.	Revoked: O. Reg. 270/21, s. 1 (2).	
39.1	Financial Services Regulatory Authority of Ontario	No
40.	Financial Services Tribunal	Yes
41.	Fire Marshal’s Public Fire Safety Council	No
42.	Fire Safety Commission	Yes
43.	Fish and Wildlife Heritage Commission	Yes
44.	French Language Health Services Advisory Council	Yes
45.	Grain Financial Protection Board	Yes
46.	Greenbelt Council	Yes
47.	Revoked: O. Reg. 270/21, s. 1 (2).	
48.	Health Professions Appeal and Review Board	Yes
49.	Revoked: O. Reg. 903/21, s. 1 (2).	
50.	Health Services Appeal and Review Board	Yes
50.1	Revoked: O. Reg. 270/21, s. 1 (2).	
51.	Higher Education Quality Council of Ontario	No
51.1	Housing Supply Action Plan Implementation Team	Yes

52.	Human Rights Legal Support Centre	No
53.	Human Rights Tribunal of Ontario	Yes
53.1	iGaming Ontario	No
53.1.1	Indigenous Justice Group	Yes
53.2	Intellectual Property Ontario	No
54.	Investment Advisory Committee of the Public Guardian and Trustee	Yes
54.1	Invest Ontario	No
55.	Revoked: O. Reg. 88/24, s. 1 (3).	
56.	Lake Simcoe Coordinating Committee	Yes
57.	Lake Simcoe Science Committee	Yes
58.	Landlord and Tenant Board	Yes
59.	Languages of Instruction Commission of Ontario	Yes
59.1	Law Enforcement Complaints Agency	Yes
60.	Legal Aid Ontario	No
61.	Licence Appeal Tribunal	Yes
62.	Liquor Control Board of Ontario	No
63.	Livestock Financial Protection Board	Yes
64.	Revoked: O. Reg. 270/21, s. 1 (2).	
65.	Revoked: O. Reg. 345/24, s. 1 (1).	
66.	Revoked: O. Reg. 88/24, s. 1 (3).	
66.1	Revoked: O. Reg. 394/19, s. 1 (1).	
66.2	Revoked: O. Reg. 903/21, s. 1 (2).	

67.	McMichael Canadian Art Collection	No
68.	Revoked: O. Reg. 270/21, s. 1 (2).	
69.	Metrolinx	No
70.	Metropolitan Toronto Convention Centre Corporation	No
71.	Minister’s Advisory Council on Special Education	Yes
72.	Nawiinginokiima Forest Management Corporation	No
73.	Niagara Escarpment Commission	Yes
74.	Niagara Parks Commission	No
75.	Normal Farm Practices Protection Board	Yes
76.	Northern Ontario Heritage Fund Corporation	Yes
77.	Office for Victims of Crime	Yes
78.	Revoked: O. Reg. 106/19, s. 1 (2).	
79.	Office of the Employer Adviser	Yes
80.	Office of the Fairness Commissioner	Yes
81.	Revoked: O. Reg. 345/24, s. 1 (1).	
82.	Office of the Worker Adviser	Yes
83.	Ontario Advisory Committee on HIV/AIDS	Yes
84.	Ontario Agency for Health Protection and Promotion	No
84.1	Ontario Cannabis Retail Corporation	No
85.	Revoked: O. Reg. 88/24, s. 1 (3).	
86.	Ontario Civilian Police Commission	Yes

87.	Ontario Clean Water Agency	Yes
87.1	Ontario Combative Sport Advisory Council	Yes
88.	Ontario Educational Communications Authority	No
89.	Ontario Electricity Financial Corporation	No
90.	Ontario Energy Board	No
91.	Ontario Farm Products Marketing Commission	Yes
92.	Ontario Financing Authority	Yes
93.	Ontario Food Terminal Board	No
94.	Ontario French-language Educational Communications Authority	No
95.	Ontario Geographic Names Board	Yes
95.1	Ontario Health	No
96.	Ontario Health atHome	No
97.	Ontario Heritage Trust	Yes
98.	Revoked: O. Reg. 88/24, s. 1 (5).	
99.	Ontario Honours Advisory Council	Yes
100.	Ontario Human Rights Commission	Yes
101.	Revoked: O. Reg. 88/24, s. 1 (5).	
102.	Ontario Infrastructure and Lands Corporation	No
102.1	Revoked: O. Reg. 345/24, s. 1 (1).	
103.	Ontario Internal Audit Committee	Yes
104.	Ontario Labour Relations Board	Yes

104.1	Ontario Land Tribunal	Yes
105.	Ontario Lottery and Gaming Corporation	No
106.	Ontario Media Development Corporation	Yes
107.	Revoked: O. Reg. 270/21, s. 1 (2).	
108.	Revoked: O. Reg. 270/21, s. 1 (2).	
109.	Revoked: O. Reg. 88/24, s. 1 (7).	
110.	Revoked: O. Reg. 368/18, s. 1 (8).	
111.	Ontario Northland Transportation Commission	No
112.	Ontario Parks Board	Yes
113.	Ontario Parole Board	Yes
114.	Ontario Place Corporation	Yes
115.	Ontario Police Arbitration and Adjudication Commission	Yes
116.	Ontario Public Service Pension Board	No
117.	Revoked: O. Reg. 199/17, s. 1 (4).	
118.	Ontario Research Fund Advisory Board	Yes
119.	Ontario Review Board	Yes
120.	Ontario Securities Commission	No
121.	Ontario Special Education Tribunal (English)	Yes
122.	Ontario Special Education Tribunal (French)	Yes
123.	Ontario Tourism Marketing Partnership Corporation	Yes
124.	Ontario Trillium Foundation	No

125.	Ottawa Convention Centre Corporation	No
126.	Owen Sound Transportation Company Limited	No
126.1	Patient and Family Advisory Council	Yes
127.	Pay Equity Hearings Tribunal	Yes
128.	Pay Equity Office	Yes
129.	Revoked: O. Reg. 270/21, s. 1 (2).	
130.	Revoked: O. Reg. 88/24, s. 1 (7).	
131.	Revoked: O. Reg. 270/21, s. 1 (2).	
132.	Post Secondary Education Quality Assessment Board	Yes
133.	Premier’s Council on Equality of Opportunity	Yes
134.	Province of Ontario Council for the Arts	No
135.	Provincial Advisory Committee on Francophone Affairs	Yes
136.	Provincial Judges Pension Board	No
136.1	Provincial Land and Development Facilitator	Yes
137.	Provincial Schools Authority	No
138.	Public Service Grievance Board	Yes
139.	Rabies Advisory Committee	Yes
140.	Royal Ontario Museum	No
141.	Rural Economic Development Advisory Panel	Yes
142.	Science North	No

142.1	Skilled Trades Ontario	No
143.	Social Benefits Tribunal	Yes
144.	Soldiers' Aid Commission	Yes
144.1	Special Investigations Unit	Yes
144.2	Species at Risk Conservation Trust	No
145.	Species at Risk Program Advisory Committee	Yes
146.	St. Lawrence Parks Commission	Yes
146.1	Temagami Forest Management Corporation	No
147.	Toronto Islands Residential Community Trust Corporation	No
148.	Revoked: O. Reg. 88/24, s. 1 (9).	
149.	Revoked: O. Reg. 88/24, s. 1 (9).	
149.1	Venture Ontario	Yes
150.	Walkerton Clean Water Centre	No
151.	Workplace Safety and Insurance Appeals Tribunal	No
152.	Workplace Safety and Insurance Board	No

O. Reg. 286/16, s. 2; O. Reg. 199/17, s. 1; O. Reg. 368/18, s. 1; O. Reg. 106/19, s. 1; O. Reg. 394/19, s. 1; O. Reg. 270/21, s. 1; O. Reg. 903/21, s. 1; O. Reg. 440/22, s. 1; O. Reg. 88/24, s. 1; O. Reg. 345/24, s. 1; O. Reg. 567/24, s. 1.

TAB 27

CanLII

Suspension Pending Investigation (Part III of the Act), O Reg 379/07

Current version: in force since 2016-10-12

Link to the latest version: https://canlii.ca/t/s4t

Stable link to this version: https://canlii.ca/t/52t9x

Citation to this version: Suspension Pending Investigation (Part III of the Act), O Reg 379/07, <https://canlii.ca/t/52t9x> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Public Service of Ontario Act, 2006

ONTARIO REGULATION 379/07

SUSPENSION PENDING INVESTIGATION (PART III OF THE ACT)

Consolidation Period: From October 12, 2016 to the e-Laws currency date.

Last amendment: 343/16.

This is the English version of a bilingual regulation.

Suspension pending investigation

1. The maximum period of a suspension under subsection 36 (2) of the Act is two years. O. Reg. 379/07, s. 1.

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 379/07, s. 2.

TAB 28

CanLII

Administration of Justice Act, RSO 1990, c A.6

Current version: in force since 2021-09-01

Link to the latest version: https://canlii.ca/t/7q

Stable link to this version: https://canlii.ca/t/555lz

Citation to this version: Administration of Justice Act, RSO 1990, c A.6, <https://canlii.ca/t/555lz> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Administration of Justice Act

R.S.O. 1990, CHAPTER A.6

Consolidation Period: From September 1, 2021 to the e-Laws currency date.

Last amendment: 2021, c. 4, Sched. 3, s. 18.

Definitions

1 In this Act,

"administration of justice" means the provision, maintenance and operation of,

(a) the courts of justice of the Province of Ontario,

(b) land registry offices,

(c) jails, and

(d) the offices of coroners and Crown Attorneys,

for the performance of their functions, including any functions delegated to such courts, institutions or offices or any official thereof by or under any Act; ("administration de la justice")

"fee" means a fee whose payment is required by a regulation made under this Act; ("frais")

"Ministry" means the Ministry of the Attorney General. ("ministère") R.S.O. 1990, c. A.6, s. 1; 2004, c. 31, Sched. 1, s. 1.

Portion remitted to Ontario

2 Despite any other Act, but subject to Part X of the *Provincial Offences Act*, every municipality shall pay to the Treasurer of Ontario all fines that are required by any Act to be paid over to the municipality, other than fines imposed for contravention of the by-laws of the municipality or a local board thereof. R.S.O. 1990, c. A.6, s. 2; 2000, c. 26, Sched. A, s. 1.

Retaining special services

3 (1) Where, in the opinion of the Crown Attorney, special services are necessary for the detection of crime or the capture of a person who is believed to have committed a crime of a serious character, the Crown Attorney may authorize and direct any person to perform such service, and shall certify upon the account to be rendered by the person what the Crown Attorney considers to be a reasonable allowance to be paid to the person employed. R.S.O. 1990, c. A.6, s. 3 (1).

Employment and payment of interpreter

(2) The Crown Attorney may employ an interpreter in any criminal cause or investigation or at a coroner's inquest, and the interpreter shall be paid such amount as the Crown Attorney certifies to be reasonable. R.S.O. 1990, c. A.6, s. 3 (2).

Payment for special services

4 (1) Where services are rendered by a person in connection with a prosecution and the services are rendered by the direction or with the approval of the Deputy Attorney General, the person rendering the services is entitled to be paid such sum as the Deputy Attorney General directs. R.S.O. 1990, c. A.6, s. 4 (1).

Remuneration of witness coming to Ontario

(2) Where the Deputy Attorney General is of the opinion that it is necessary in order to procure the attendance as a witness for the Crown at a criminal trial of a person resident out of Ontario and that such person should be compensated for his or her loss of time and expenses in attending the trial, the Deputy Attorney General may direct that such sum as he or she considers reasonable be paid to such person. R.S.O. 1990, c. A.6, s. 4 (2).

Bringing accused to trial

(3) Where the Deputy Attorney General is of the opinion that it is advisable to bring a person charged with an offence from a place out of or in Ontario to the place of trial in Ontario, he or she may direct that such be done. R.S.O. 1990, c. A.6, s. 4 (3).

Purpose

4.1 The purpose of sections 4.2 to 4.10 is to provide a mechanism for fee waivers that is fair and proportionate, so that individuals who might otherwise be denied access to justice because of their financial circumstances can be excused from paying fees. 2020, c. 11, Sched. 1, s. 1.

Effect of certificate

4.2 (1) The person named in a certificate given under section 4.3, 4.4, 4.5 or 4.7 is excused from paying any fees that,

(a) would be payable on or after the date of the certificate; and

(b) relate to the court proceeding or tribunal order described in the certificate. 2004, c. 31, Sched. 1, s. 2; 2009, c. 33, Sched. 2, s. 2 (1).

Subject to revocation

(2) Subsection (1) is subject to the revocation of the certificate under section 4.10. 2020, c. 11, Sched. 1, s. 2.

Fee waiver re court proceeding: clerk or registrar

Request

4.3 (1) A person may request a fee waiver under this section with respect to a court proceeding by giving a written request, in the form provided by the Ministry, to the clerk or registrar of the court in which the proceeding is or would be commenced. 2004, c. 31, Sched. 1, s. 2.

Timing

(2) The request may be made at any stage in the proceeding. 2004, c. 31, Sched. 1, s. 2.

Same

(3) Without limiting the generality of subsection (2), a person who has not previously obtained a fee waiver may request one after an order is made in the proceeding, in order to be excused from paying any fees relating to the enforcement of the order. 2004, c. 31, Sched. 1, s. 2.

Certificate

(4) If the clerk or registrar determines that the person meets the prescribed conditions, he or she shall give the person a certificate indicating that all fees that are or would be payable by the person on or after the date of the certificate with respect to the proceeding, including any fees relating to the enforcement of an order in the proceeding, are waived. 2004, c. 31, Sched. 1, s. 2.

Decision final

(5) The decision of the clerk or registrar is final. 2004, c. 31, Sched. 1, s. 2.

Fee waiver re court proceeding: judge, etc.

Request

4.4 (1) A person may request a fee waiver under this section with respect to a court proceeding by giving a written request, in the form provided by the Ministry, to a judge, deputy judge or associate judge of the court in which the proceeding is or would be commenced. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (1); 2021, c. 4, Sched. 3, s. 18.

Timing

(2) The request may be made at any stage in the proceeding. 2004, c. 31, Sched. 1, s. 2.

Same

(3) Without limiting the generality of subsection (2), a person who has not previously obtained a fee waiver may request one after an order is made in the proceeding, in order to be excused from paying any fees relating to the enforcement of the order. 2004, c. 31, Sched. 1, s. 2.

Role of clerk or registrar

(4) The clerk or registrar of the court shall consider the request before it is considered by the judge, deputy judge or associate judge, and if he or she determines that the person meets the prescribed conditions referred to in subsection 4.3 (4),

(a) the clerk or registrar shall deal with the request as if it had been made under section 4.3 rather than under this section; and

(b) subsections (5) to (9) do not apply. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (2); 2021, c. 4, Sched. 3, s. 18.

Order re certificate

(5) If the judge, deputy judge or associate judge is of the opinion that the person meets the conditions set out in subsection (7), he or she shall make an order directing the clerk or registrar to give the person a certificate indicating that all fees that are or would be payable by the person with respect to the proceeding on or after the date of the certificate, including any fees relating to the enforcement of an order in the proceeding, are waived. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (1); 2021, c. 4, Sched. 3, s. 18.

Date of certificate

(6) The date of the certificate shall be the date on which the order is made under subsection (5). 2004, c. 31, Sched. 1, s. 2.

Conditions

(7) The conditions referred to in subsection (5) are:

1. The person cannot, without undue hardship, afford to pay fees relating to the proceeding or to the enforcement of an order made in the proceeding, as the case may be.

2. Commencing, defending, continuing or intervening in the proceeding, as the case may be, is not frivolous, vexatious or otherwise an abuse of the process of the court. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 3.

Exception

(8) The condition set out in paragraph 2 of subsection (7) does not need to be satisfied in the case of a request described in subsection (3). 2004, c. 31, Sched. 1, s. 2.

Decision final

(9) The decision of the judge, deputy judge or associate judge is final. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (1); 2021, c. 4, Sched. 3, s. 18.

Fee waiver re enforcement of court order or tribunal order: sheriff

Request

4.5 (1) A person who is entitled to have a court order or a tribunal order enforced by a sheriff on payment of a fee may request a fee waiver under this section by giving the sheriff a written request, in the form provided by the Ministry. 2009, c. 33, Sched. 2, s. 2 (2).

Certificate

(2) If the sheriff determines that the person meets the prescribed conditions, he or she shall give the person a certificate indicating that all fees relating to the enforcement of the order that are or would be payable by the person on or after the date of the certificate are waived. 2009, c. 33, Sched. 2, s. 2 (2).

Decision final

(3) The sheriff's decision is final. 2009, c. 33, Sched. 2, s. 2 (2).

Bailiff

(4) In the case of the enforcement of a court order, references in this section to a sheriff include a bailiff. 2009, c. 33, Sched. 2, s. 2 (2).

4.6 Repealed: 2009, c. 33, Sched. 2, s. 2 (2).

Fee waiver re enforcement of tribunal order: judge, etc.

Request

4.7 (1) A person who is entitled to have a tribunal order enforced by a sheriff on payment of a fee may request a fee waiver under this section by giving a written request, in the form provided by the Ministry,

(a) to a judge or deputy judge of the Small Claims Court, if the order relates only to the payment of an amount within the monetary jurisdiction of that court; or

(b) to a judge or associate judge of the Superior Court of Justice, in any other case. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (1); 2021, c. 4, Sched. 3, s. 18.

Role of clerk or registrar

(2) The clerk or registrar of the court shall consider the request before it is considered by the judge, deputy judge or associate judge, and if the clerk or registrar determines that the person meets the prescribed conditions referred to in subsection 4.3 (4),

(a) he or she shall give the person a certificate indicating that all fees relating to the enforcement of the tribunal order that are or would be payable by the person on or after the date of the certificate are waived; and

(b) subsections (3) to (5) do not apply. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (2); 2021, c. 4, Sched. 3, s. 18.

Order re certificate

(3) If the judge, deputy judge or associate judge is of the opinion that the person cannot, without undue hardship, afford to pay fees relating to the enforcement of the tribunal order, he or she shall make an order directing the clerk or registrar to give the person a certificate indicating that all such fees that are or would be payable by the person on or after the date of the certificate are waived. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 4, 6 (1); 2021, c. 4, Sched. 3, s. 18.

Date of certificate

(4) The date of the certificate shall be the date on which the order is made under subsection (3). 2004, c. 31, Sched. 1, s. 2.

Decision final

(5) The decision of the judge, deputy judge or associate judge is final. 2004, c. 31, Sched. 1, s. 2; 2020, c. 11, Sched. 1, s. 6 (1); 2021, c. 4, Sched. 3, s. 18.

Rules of court and *Statutory Powers Procedure Act* do not apply

4.8 The rules of court and the *Statutory Powers Procedure Act* do not apply to requests under sections 4.3, 4.4, 4.5 and 4.7. 2004, c. 31, Sched. 1, s. 2; 2009, c. 33, Sched. 2, s. 2 (3).

No fee for request

4.9 No fee is payable for anything done in connection with a request under section 4.3, 4.4, 4.5 or 4.7. 2004, c. 31, Sched. 1, s. 2; 2009, c. 33, Sched. 2, s. 2 (4).

Revocation of fee waiver

4.10 (1) A certificate given to a person under section 4.3 or 4.4 respecting a court proceeding or enforcement in a proceeding may, despite anything to the contrary in those sections, be revoked by order of a judge, deputy judge or associate judge of the court in which the proceeding was commenced, if the judge, deputy judge or associate judge is of the opinion that the person's actions in the proceeding or enforcement are frivolous, vexatious or otherwise an abuse of the process of the court. 2020, c. 11, Sched. 1, s. 5; 2021, c. 4, Sched. 3, s. 18.

Same

(2) A certificate given to a person under section 4.5 or 4.7 respecting the enforcement of an order may, despite anything to the contrary in those sections, be revoked by order of a judge, deputy judge or associate judge of the court in which the order was made or filed, as the case may be, if the judge, deputy judge or associate judge is of the opinion that the person's actions in the enforcement are frivolous, vexatious or otherwise an abuse of the process of the court. 2020, c. 11, Sched. 1, s. 5; 2021, c. 4, Sched. 3, s. 18.

Submissions

(3) Before making an order under subsection (1) or (2), the judge, deputy judge or associate judge shall give the person an opportunity to make submissions. 2020, c. 11, Sched. 1, s. 5; 2021, c. 4, Sched. 3, s. 18.

Same

(4) Submissions shall be made in the manner and form specified by the judge, deputy judge or associate judge. 2020, c. 11, Sched. 1, s. 5; 2021, c. 4, Sched. 3, s. 18.

Restriction on further fee waivers

(5) In making an order under subsection (1) or (2), the judge, deputy judge or associate judge may make an order that the person may not, despite anything contrary in this Act, make any further requests for a fee waiver under this Act with respect to the same proceeding or any related proceeding or with respect to the same enforcement, without permission obtained in advance from a judge, deputy judge or associate judge, as applicable. 2020, c. 11, Sched. 1, s. 5; 2021, c. 4, Sched. 3, s. 18.

Decision final

(6) The decision of the judge, deputy judge or associate judge is final. 2020, c. 11, Sched. 1, s. 5; 2021, c. 4, Sched. 3, s. 18.

Rules of court and *Statutory Powers Procedure Act* do not apply

(7) The rules of court and the *Statutory Powers Procedure Act* do not apply to this section. 2020, c. 11, Sched. 1, s. 5.

No fee

(8) No fee is payable for anything done in connection with this section. 2020, c. 11, Sched. 1, s. 5.

Regulations

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

(a) requiring the payment of fees for any thing required or authorized under any Act to be done by any person in the administration of justice and prescribing the amounts of the fees or a method of determining them;

(b) providing for the payment of fees and allowances by Ontario in connection with services under any Act for the administration of justice and prescribing the amounts of the fees and allowances;

(c) requiring the payment of fees in respect of proceedings in any court and prescribing the amounts of the fees;

(d) exempting persons or classes of persons from paying a fee prescribed under clause (a) or (c);

(e) prescribing conditions for the purposes of subsections 4.3 (4) and 4.5 (2);

(f) exempting a fee from the application of sections 4.3 to 4.9;

(g) exempting persons or classes of persons from the application of sections 4.3 to 4.9;

(h) governing requests under sections 4.3, 4.4, 4.5 and 4.7. 2004, c. 31, Sched. 1, s. 3; 2009, c. 33, Sched. 2, s. 2 (5, 6); 2010, c. 1, Sched. 6, s. 8.

Different fees

(2) A regulation made under clause (1) (a) or (c) may prescribe different fees for different persons or classes of persons. 2004, c. 31, Sched. 1, s. 3.

Maximum amounts

(3) A regulation made under clause (1) (a) or (c) may establish a maximum amount for a fee rather than prescribing a specific amount. 2004, c. 31, Sched. 1, s. 3.

General or particular

(4) A regulation made under subsection (1) may be general or particular in its application. 2004, c. 31, Sched. 1, s. 3.

TAB 29

CanLII

Superior Court of Justice and Court of Appeal - Fees, O Reg 293/92

Current version: in force since 2025-12-19

Link to the latest version:	https://canlii.ca/t/rws
Stable link to this version:	https://canlii.ca/t/56mn3
Citation to this version:	Superior Court of Justice and Court of Appeal - Fees, O Reg 293/92, <https://canlii.ca/t/56mn3> retrieved on 2026-01-18
Currency:	Last updated from the e-Laws site on 2026-01-12

Administration of Justice Act

ONTARIO REGULATION 293/92

SUPERIOR COURT OF JUSTICE AND COURT OF APPEAL — FEES

Consolidation Period: From December 19, 2025 to the e-Laws currency date.

Last amendment: 395/25.

This is the English version of a bilingual regulation.

1. (1) The following fees are payable, except in respect of proceedings to which section 1.2 applies:

1. On the issue of the following:
   i. A statement of claim, notice of action or notice of application, $243.

ii. A third or subsequent party claim, $243.

iii. A statement of defence and counterclaim adding a party, $243.

iv. A summons to a witness, $33.

v. A certificate, other than a certificate of a search by the registrar required on an application for a certificate of appointment of estate trustee, $33.

vi. A commission, $60.

vii. A writ of execution, $77.

viii. A notice of garnishment or notice of renewal of garnishment (including the filing of the notice with the sheriff), $155.

2. On the signing of the following:

i. An order directing a reference, subject to subparagraph ii, $315.

ii. An order on requisition directing the assessment of a bill under the *Solicitors Act*,

A. if obtained by a client, $105,

B. if obtained by a solicitor, $194.

iii. A notice of appointment for the assessment of costs under the Rules of Civil Procedure, $138.

3. On the filing of the following:

i. A notice of intent to defend, $194.

ii. If no notice of intent to defend has been filed by the same party, a statement of defence, a defence to counterclaim, a defence to crossclaim or a third party defence, $194.

iii. A notice of appearance, $172.

iv. A notice of motion served on another party, a notice of motion without notice, a notice of motion for a consent order or a notice of motion for leave to appeal, other than a notice of motion in a family law appeal, $339.

v. A notice of return of motion, other than a notice of return of motion in a family law appeal, $339.

vi. In a family law appeal, a notice of motion served on another party, a notice of motion without notice, a notice of motion for a consent order or a notice of return of motion, $134.

vii. A notice of motion for leave to appeal in a family law case, $134.

viii. A requisition for signing of default judgment by registrar, $177.

ix. A trial record, $859, for the first time only.

x. A notice of appeal or cross-appeal from an interlocutory order, $243.

xi. A notice of appeal or cross-appeal to an appellate court of a final order of the Small Claims Court, $138.

xii. A notice of appeal or cross-appeal to an appellate court of a final order of any court or tribunal, other than the Small Claims Court or the Consent and Capacity Board, $243.

xiii. A request to redeem or request for sale, $138.

xiv. A jury notice in a civil proceeding, $138.

4. For obtaining an appointment with a registrar for settlement of an order, $138.

5. For perfecting an appeal or judicial review application, $645.

6. For making up and forwarding of papers, documents and exhibits, $105, plus any applicable transportation costs.

7. For making copies of documents,

i. not requiring certification, $1 per page,

ii. requiring certification, $4 per page.

8. For the inspection of a court file by,

i. a person who has entered into an agreement with the Ministry of the Attorney General for the bulk inspection of court files, $4 per file,

ii. any other person, other than a solicitor or party in the proceeding, $11 per file.

9. For the retrieval from storage of a court file, $83.

10. For the taking of an affidavit or declaration by a commissioner for taking affidavits, $22.

11. For a copy on compact disc (CD) of a digital recording of a court hearing in respect of a case, if such a recording exists and a copy is available,

i. $23 for a single day’s recording, and

ii. $11 for each additional day’s recording, if the request is made at the same time as a request under subparagraph i. O. Reg. 42/19, s. 1; O. Reg. 550/22, s. 1.

(2) Despite subsection (1), no fee is payable under this Regulation in relation to a proceeding under Part II of the *Prevention of and Remedies for Human Trafficking Act, 2017* by or on behalf of a party to such a proceeding. O. Reg. 344/18, s. 1.

1.1 (1) If a minor or other person under disability is entitled to receive a payment or payments under a multi-provincial/territorial assistance program agreement between Ontario and a person who has been infected with the human immunodeficiency virus through the receipt by transfusion of blood or a blood product, no fee is payable for the issue of a notice of application under Rule 7.08 of the Rules of Civil Procedure on behalf of the minor or other person under disability, despite subparagraph 1 i of subsection 1 (1). O. Reg. 272/94, s. 1; O. Reg. 136/04, s. 2; O. Reg. 335/16, s. 2 (1); O. Reg. 42/19, s. 2.

(2) Revoked: O. Reg. 335/16, s. 2 (2).

1.2 (1) The following fees are payable in respect of proceedings that are governed by Ontario Regulation 114/99 (Family Law Rules), except for proceedings under rule 38 (appeals), to which section 1 applies:

1. On the filing of an application, $214.

2. On the filing of an answer, other than an answer referred to in paragraph 3, $171.

3. On the filing of an answer that includes a request for a divorce by a respondent, $214.

4. On the placing of an application on the list for hearing, $445.

5. On the issue of a summons to a witness, $33.

6. On the issue of a certificate, $25.

7. For making copies of documents,

   i. not requiring certification, $1 per page,

   ii. requiring certification, $4 per page.

8. For making up and forwarding papers, documents and exhibits, $105, plus any applicable transportation costs.

9. For a copy on compact disc (CD) of a digital recording of a court hearing in respect of a case, if such a recording exists and a copy is available,

   i. $23 for a single day's recording, and

ii. $11 for each additional day's recording, if the request is made at the same time as a request under subparagraph i. O. Reg. 42/19, s. 3; O. Reg. 550/22, s. 2.

(2) Despite subsection (1), no fees are payable for the filing of an application, the filing of an answer or the placing of an application on the list for hearing in respect of,

(a) proceedings under the *Children's Law Reform Act*, the *Family Law Act* (except Parts I and II), the *Family Responsibility and Support Arrears Enforcement Act, 1996*, the *Marriage Act* or the *Interjurisdictional Support Orders Act, 2002*; or

(b) proceedings to enforce a parenting order, contact order or order for support made under an Act referred to in clause (a). O. Reg. 136/04, s. 3; O. Reg. 29/21, s. 1.

2. (1) The following fees are payable in estate matters:

1. For a certificate of succeeding estate trustee or a certificate of estate trustee during litigation, $138.

2. For an application of an estate trustee to pass accounts, including all services in connection with it, $432.

3. For a notice of objection to accounts, $93.

4. For an application other than an application to pass accounts, including an application for proof of lost or destroyed will, a revocation of a certificate of appointment, an application for directions or the filing of a claim and notice of contestation, $232.

5. For a notice of objection other than a notice of objection to accounts, including the filing of a notice of appearance, $94.

6. For a request for notice of commencement of proceedings, $94.

7. For the deposit of a will or codicil for safekeeping, $28.

8. For an assessment of costs, including the certificate, $67. O. Reg. 42/19, s. 4; O. Reg. 550/22, s. 3.

(2) The fees set out in section 1 are payable in estate matters in addition to the fees set out in subsection (1). O. Reg. 293/92, s. 2.

3. (1) The following fees are payable in an action under the *Construction Act*:

1. If the claim, crossclaim, counterclaim or third party claim does not exceed $6,000, on the issuing of a statement of claim, crossclaim, counterclaim or third party claim, $105.

2. If the claim, crossclaim, counterclaim or third party claim exceeds $6,000,

i. on the issue of a statement of claim, crossclaim, counterclaim or third party claim, $243,

ii. on the filing of a statement of defence, $172,

iii. on the issue of a certificate of action, $138,

iv. on the filing of a trial record, $859. O. Reg. 42/19, s. 5; O. Reg. 550/22, s. 4.

(2) The fees set out in subsection (1) are payable in addition to those set out in subsection 1 (1), other than in paragraphs 1, 2 and 3 of that subsection. O. Reg. 42/19, s. 5.

4. (1) The following fees are payable in respect of an application under the *Repair and Storage Liens Act*:

1. On the filing of an application, $243.

2. On the filing of a notice of objection, $172.

3. On the issue of an initial certificate or final certificate, $138.

4. On the issue of a writ of seizure, $77. O. Reg. 42/19, s. 5; O. Reg. 550/22, s. 5.

(2) The fees set out in subsection (1) are payable in addition to those set out in subsection 1 (1), other than in paragraphs 1, 2 and 3 of that subsection. O. Reg. 42/19, s. 5.

5. (1) The following fees are payable to an official examiner:

1. For the appointment, for each person examined, $10.

2. For the provision of facilities, $34, plus, if the examination is longer than two hours, $17 for each additional hour (or part of an hour).

3. For a reporter's attendance, $42, plus, if the examination is longer than two hours, $21 for each additional hour (or part of an hour).

4. For the transcript of an examination, regardless of the party ordering,

i. $4 per page for one copy of the first transcript ordered,

ii. $4 per page for one copy of each transcript ordered after the reporter has satisfied the order for a transcript described in subparagraph i, and

iii. $1 for each additional copy ordered before the reporter has satisfied the order for a transcript described in subparagraph i or ii.

5. For handling costs, $6 per invoice.

6. For cancellation of or failure to keep an appointment, with less than three working days' notice,

i. for the cancellation or failure to attend, $12,

ii. for the first two hours reserved for the appointment, $76, and

iii. for each additional hour (or part of an hour) reserved for the appointment, $38. O. Reg. 212/97, s. 4; O. Reg. 335/16, s. 6 (1); O. Reg. 550/22, s. 6 (1).

(2) The official examiner shall be paid, in addition to the fees set out in subsection (1), a travelling allowance in accordance with Regulation 11 of the Revised Regulations of Ontario, 1990 (Kilometre Allowances) made under the Act for attendance out of the office. O. Reg. 293/92, s. 5 (2); O. Reg. 335/16, s. 6 (2).

(3) If a party requires a transcript within five working days of placing the order for the transcript, the party shall pay the official examiner $1 per page, in addition to the fee set out in paragraph 4 of subsection (1). O. Reg. 293/92, s. 5 (3); O. Reg. 335/16, s. 6 (3); O. Reg. 550/22, s. 6 (2).

(4) If a party requires a transcript within two working days of placing the order for the transcript, the party shall pay the official examiner $2 per page, in addition to the fee set out in paragraph 4 of subsection (1). O. Reg. 293/92, s. 5 (4); O. Reg. 335/16, s. 6 (3); O. Reg. 550/22, s. 6 (3).

(5) If more than one party requires a transcript as described in subsection (3) or (4), only the first party to place the order shall be required to pay the additional fee.

Note: A solicitor who is charged more than the amounts provided in section 5 of this Regulation or who receives a transcript that does not substantially conform with Rule 4.09 of the Rules of Civil Procedure should notify the Assistant Deputy Minister, Courts Administration Division, Ministry of the Attorney General, in writing.

O. Reg. 293/92, s. 5 (5).

6. (1) Beginning on January 1, 2027, and on every third January 1 that follows, the fees payable under this Regulation shall be adjusted in accordance with the following, subject to subsection (3):

1. The fees payable immediately before the applicable January 1 date shall be increased by the percentage change between the Ontario Consumer Price Index for the calendar year that is two years before the year in which the adjustment is being made, and the Ontario Consumer

Price Index for the calendar year that is five years before the year in which the adjustment is being made.

2. If the percentage change in the Ontario Consumer Price Index between the two applicable calendar years, as set out in paragraph 1, results in a negative amount, the fees shall not be increased.

3. Any fee that, once increased in accordance with paragraph 1, results in an amount that is not a whole number shall be rounded to the nearest dollar. O. Reg. 335/16, s. 7; O. Reg. 42/19, s. 6 (1); O. Reg. 550/22, s. 7; O. Reg. 395/25, s. 1.

(2) For the purposes of subsection (1), the Ontario Consumer Price Index is the Consumer Price Index for Ontario (All-Items) as published by Statistics Canada. O. Reg. 335/16, s. 7.

(3) A fee shall not be adjusted under subsection (1) if, before the date on which the adjustment would otherwise take effect, the Minister responsible for the administration of the Act,

(a) determines that the fee as adjusted would exceed full cost recovery; and

(b) publishes notice of the determination, confirming the amount of the fee, on a Government of Ontario website. O. Reg. 335/16, s. 7.

(4) REVOKED: O. Reg. 42/19, s. 6 (2).

7. If the applicable filing fee is paid on the filing of a document electronically in accordance with the rules of court, the fee is not payable again on the subsequent filing of a paper copy of the document. O. Reg. 42/19, s. 7.

TAB 30

CanLII

Fees and Expenses - Sheriff's Officers, Process Servers, Escorts and Municipal Police Forces, RRO 1990, Reg 6

Current version: in force since 1994-03-10

Link to the latest version: https://canlii.ca/t/tjv

Stable link to this version: https://canlii.ca/t/1qsm

Citation to this version: Fees and Expenses - Sheriff's Officers, Process Servers, Escorts and Municipal Police Forces, RRO 1990, Reg 6, <https://canlii.ca/t/1qsm> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Administration of Justice Act

R.R.O. 1990, REGULATION 6

FEES AND EXPENSES — SHERIFF'S OFFICERS, PROCESS SERVERS, ESCORTS AND MUNICIPAL POLICE FORCES

Consolidation Period: From March 10, 1994 to the e-Laws currency date.

Last amendment: O.Reg. 132/94.

This is the English version of a bilingual regulation.

1. (1) The following persons who perform the described services in connection with the administration of justice, including those categories of public servants performing such services during off-duty periods upon the approval of the respective deputy minister or the respective deputy minister's designee, shall be paid the following fees:

1. Sheriff's officers and process servers:

   i. The serving of any writ, summons, subpoena, notice pleading or other document for each party served: $6.40.

   ii. The enforcement of any court order, where the cost of enforcement is borne by the Crown in right of Ontario, per hour: $14.10.

2. Escorts — conveying prisoners to a penitentiary for medical examinations or to another jurisdiction, or a juvenile to a training school or for medical examination:

   i. Where the distance of escorting is less than eighty kilometres, one way,

      A. per hour: $7.50, and

B. minimum: $21.00.

ii. Where the distance of escorting is eighty kilometres or more, and less than 200 kilometres one way, per escort: $62.50.

iii. Where the distance is more than 200 kilometres, per escort: $78.00.

iv. Where the escorting occupies more than one twenty-four hour period, per day: $62.50.

3. Municipal police forces — for executing a warrant of committal for non-payment of a fine payable under section 2 of the Act to the Minister of Finance or serving personally a notice of suspension of driver's licence for non-payment of a fine, for each execution or service: $1.50. R.R.O. 1990, Reg. 6, s. 1 (1); O. Reg. 588/91, s. 1 (1, 2).

(2) The fees set out in paragraph 1 of subsection (1) apply in respect of services performed on and after the 1st day of January, 1990. R.R.O. 1990, Reg. 6, s. 1 (2); O. Reg. 588/91, s. 1 (3).

2. (1) A kilometre allowance for executing a warrant or serving a writ, summons, subpoena, notice, pleading or other document, where an allowance is not otherwise payable under a regulation made under the Act, shall be as set out in Regulation 11 of the Revised Regulations of Ontario, 1990 ("Kilometre Allowances"). R.R.O. 1990, Reg. 6, s. 2 (1).

(2) Persons conveying prisoners to a penitentiary or another jurisdiction or escorting a juvenile to a training school shall receive reimbursement of meal and accommodation expenses in conformity with the provisions of the Ministry of the Attorney General Manual of Administration, and,

(a) where public conveyance is used, the actual travelling expenses; or

(b) where a private conveyance is used, a kilometre allowance as set out in Regulation 11 of the Revised Regulations of Ontario, 1990 ("Kilometre Allowances"). R.R.O. 1990, Reg. 6, s. 2 (2).

TAB 31

CanLII

Fees for Court Transcripts, O Reg 94/14

Please note that this regulation comes into force on 2014-05-01 (O Reg 94/14) but is not available on the source website.
This regulation replaces O Reg 587/91.

Current version: in force since 2022-04-01

Link to the latest version: https://canlii.ca/t/8srq

Stable link to this version: https://canlii.ca/t/55f9z

Citation to this version: Fees for Court Transcripts, O Reg 94/14, <https://canlii.ca/t/55f9z> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Administration of Justice Act

ONTARIO REGULATION 94/14

FEES FOR COURT TRANSCRIPTS

Consolidation Period: From April 1, 2022 to the e-Laws currency date.

Last amendment: 145/22.

This is the English version of a bilingual regulation.

Definitions

1. In this Regulation,

"authorized court transcriptionist" means a member of a class of persons authorized by the Attorney General to transcribe recordings and certify transcripts; ("transcripteur judiciaire autorisé")

"certified transcript" means a transcript of a recording that is certified in accordance with the regulations made under the *Evidence Act* for the purposes of subsection 5 (2) of that Act; ("transcription certifiée conforme")

"recording" means a recording made under subsection 5 (1) of the *Evidence Act* of a court proceeding or of evidence in a court proceeding. ("enregistrement") O. Reg. 94/14, s. 1; O. Reg. 145/22, s. 1 (1, 2).

Fees

2. (1) Except as otherwise provided by this section, the following fees are payable to an authorized court transcriptionist:

1. To transcribe all or part of a recording and provide a certified transcript in electronic format, the greater of $25 and,

    i. $11.75 per page, if the transcript is to be provided within 24 hours,

    ii. $8.80 per page, if the transcript is to be provided within five business days, or

    iii. $6.30 per page, in any other case.

2. To transcribe all or part of a recording and provide a certified transcript in paper format, the greater of $25 and,

    i. $12.55 per page, if the transcript is to be provided within 24 hours,

    ii. $9.60 per page, if the transcript is to be provided within five business days, or

    iii. $7.10 per page, in any other case.

3. For a certified transcript, in electronic format, of any part of a recording that has already been transcribed,

    i. if ordered together with a certified transcript in paper format following transcription, no charge, or

    ii. if not ordered together with a certified transcript in paper format following transcription, $25.

4. For a certified transcript, in paper format, of any part of a recording that has already been transcribed, the greater of $25 and 80 cents per page.

5. To transcribe all or part of a recording and provide a transcript in an accessible electronic format, the fee payable under paragraph 1, determined by reference to the transcript before it is adapted for accessibility.

6. For a transcript, in an accessible electronic format, of any part of a recording that has already been transcribed,

    i. if ordered together with a certified transcript following transcription, no charge, or

    ii. in any other case, $25. O. Reg. 145/22, s. 2.

(2) The fees specified under paragraphs 1 and 2 of subsection (1) for transcription of all or part of a recording and provision of a certified transcript are not payable if,

(a) that part of the recording has already been transcribed by another authorized court transcriptionist; and

(b) the authorized court transcriptionist who receives the order to transcribe part of a recording that has already been transcribed fails to notify the ordering party of the existing transcription. O. Reg. 145/22, s. 2.

(3) In the case of a certified transcript of all or part of a recording that is being provided for use in an appeal, fees payable under paragraphs 1 and 2 of subsection (1) are payable only with respect to any newly-transcribed pages of the transcript, with the title and table of contents pages being treated as newly-transcribed pages. O. Reg. 145/22, s. 2.

(4) In the case of certified transcripts that are required to be filed in paper format with the Court of Appeal or Divisional Court in an appeal, the fees specified in this section are only payable with respect to a single certified transcript. O. Reg. 145/22, s. 2.

Transcripts for judges

3. Fees payable under section 2 for transcripts requested by a judge for the judge's own use shall be paid by the Province of Ontario. O. Reg. 94/14, s. 3.

Transition

4. This Regulation, as it read immediately before the day section 2 of Ontario Regulation 145/22 made under the Act came into force, continues to apply with respect to orders placed before that day. O. Reg. 145/22, s. 3.

5. Revoked: O. Reg. 145/22, s. 3.

TAB 32

CanLII

Sheriffs - Fees, O Reg 294/92

Current version: in force since 2016-11-06

Link to the latest version: https://canlii.ca/t/rww

Stable link to this version: https://canlii.ca/t/52tlt

Citation to this version: Sheriffs - Fees, O Reg 294/92, <https://canlii.ca/t/52tlt> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Administration of Justice Act

ONTARIO REGULATION 294/92

SHERIFFS — FEES

Consolidation Period: From November 6, 2016 to the e-Laws currency date.

Last amendment: O. Reg. 333/16.

This is the English version of a bilingual regulation.

1. (1) The following fees are payable to a sheriff:
    1. For up to three attempts, whether or not successful, to serve a document, $100 for each person to be served.
    2. For filing or renewing a writ of execution or order that a sheriff is liable or required to enforce and for delivering a copy of the writ or order or a renewal of it to the land registrar of a land titles division, $100.
    3. For filing or renewing a writ of execution or order that a sheriff is liable or required to enforce and that is not required to be delivered to a land registrar of a land titles division, $75.
    4. For filing a writ of seizure or a direction to seize under the *Repair and Storage Liens Act*, $115.
    5. For each attempt, whether or not successful, to enforce a writ of delivery, a writ of sequestration, an order for interim recovery of personal property, an order for interim preservation of personal property, or a writ of seizure or direction to seize under the *Repair and Storage Liens Act*, $400.
    6. For each attempt, whether or not successful, to enforce a writ of seizure and sale or an order directing a sale, $240.
    7. For each attempt, whether or not successful, to enforce any other writ of execution or order, $240.
    8. For a search for writs, per name searched, $11 before November 2, 2015, and the amount determined under subsection (4) on and after that date.

9. For each report showing the details of a writ, lien or order or for a copy of a writ, lien or order,

i. before November 2, 2015, $6, up to a maximum fee of $60 for each name searched, and

ii. on and after that date, the amount determined under subsection (4), up to a maximum fee for each name searched of the amount determined under subsection (5).

10. For preparing a schedule of distribution under the *Creditors' Relief Act*, $45 per writ or notice of garnishment listed on the schedule, up to a maximum fee of an amount equal to 20 per cent of the money received.

11. For a calculation for satisfaction of writs and garnishments, $45 per writ or notice of garnishment.

12. For any service or act ordered by a court for which no fee is provided, $55 for each hour (or part of an hour) spent performing the service or doing the act.

13. For making copies of documents, other than writs of execution, orders and certificates of lien,

i. not requiring certification, $1 per page,

ii. requiring certification, $3.50 per page. O. Reg. 217/00, s. 1; O. Reg. 508/10, s. 1 (1); O. Reg. 12/11, s. 1 (1); O. Reg. 333/16, s. 1.

(2) In addition to the fees set out in paragraphs 5, 6, 7 and 12 of subsection (1), the person who requests the service shall pay the sheriff his or her reasonable and necessary disbursements in providing the services described in those paragraphs. O. Reg. 358/94, s. 1.

(3) In subsections (4) to (8),

"actual fee" means, for a specified year, the fee that is payable on the annual effective date in the specified year; ("frais réels")

"actual maximum fee" means, for a specified year, the maximum fee that is payable on the annual effective date in the specified year; ("frais maximaux réels")

"annual effective date" means the first Monday in November; ("date d'effet annuelle")

"Consumer Price Index" means the Consumer Price Index for Canada, all-items, not seasonally adjusted (2002=100), as published by Statistics Canada in Table 5 of *The Consumer Price Index* (Catalogue no. 62-001-X). ("Indice des prix à la consommation") O. Reg. 508/10, s. 1 (2); O. Reg. 12/11, s. 1 (2).

(4) For the purposes of paragraphs 8 and 9 of subsection (1), the following is the amount of the fee that is payable on and after November 2, 2015:

1. The fee payable on and after November 2, 2015 and before the annual effective date in 2016 is the amount determined in accordance with the following rules:

i. Calculate the notional fee for 2015 using the formula,

$$(A \times B \times 0.5) + A$$

in which,

"A" is the actual fee payable for 2014, and

"B" is the indexation factor for 2015, as determined in accordance with subsection (6).

ii. Choose the amount that is the higher of the notional fee for 2015 and the actual fee for 2014.

iii. The amount chosen, as rounded to the nearest multiple of five cents, is the amount of the fee payable on and after November 2, 2015 and before the annual effective date in 2016. O. Reg. 508/10, s. 1 (2).

2. The fee payable on and after the annual effective date in a specified year after 2015 and before the annual effective date in the following year is the amount determined in accordance with the following rules:

i. Calculate the notional fee for the year using the formula,

$$(C \times D \times 0.5) + C$$

in which,

"C" is the notional fee for the preceding year, and

"D" is the indexation factor for the specified year, as determined in accordance with subsection (7).

ii. Choose the amount that is the higher of the notional fee for the year and the actual fee for the preceding year.

iii. The amount chosen, as rounded to the nearest multiple of five cents, is the amount of the fee payable on and after the annual effective date in the specified year and before the annual effective date in the following year. O. Reg. 508/10, s. 1 (2); O. Reg. 12/11, s. 1 (2).

(5) For the purposes of paragraph 9 of subsection (1), the applicable maximum fee payable on and after November 2, 2015 is determined in accordance with the rules set out in subsection (4), with necessary modifications, to be read as if each reference to "fee", "notional fee" or "actual fee" in that subsection were a reference to "maximum fee", "notional maximum fee" or "actual maximum fee", respectively. O. Reg. 508/10, s. 1 (2); O. Reg. 12/11, s. 1 (2).

(6) The indexation factor for 2015 is the percentage, rounded to the nearest one-thousandth, that is calculated using the formula,

$$[(1 + E) \times (1 + F) \times (1 + G) \times (1 + H) \times (1 + J)] - 1$$

in which,

"E" is the Consumer Price Index percentage change, for June 2011, from the corresponding month of the previous year,

"F" is the Consumer Price Index percentage change, for June 2012, from the corresponding month of the previous year,

"G" is the Consumer Price Index percentage change, for June 2013, from the corresponding month of the previous year,

"H" is the Consumer Price Index percentage change, for June 2014, from the corresponding month of the previous year, and

"J" is the Consumer Price Index percentage change, for June 2015, from the corresponding month of the previous year.

O. Reg. 508/10, s. 1 (2); O. Reg. 12/11, s. 1 (2).

(7) The indexation factor for a specified year after 2015 is the Consumer Price Index percentage change, for June of the specified year, from the corresponding month of the previous year. O. Reg. 508/10, s. 1 (2); O. Reg. 12/11, s. 1 (2).

(8) A reference in subsection (6) or (7) to the Consumer Price Index percentage change, for a month, from the corresponding month of the previous year is a reference to the percentage change published by Statistics Canada in Table 5 of *The Consumer Price Index* (Catalogue no. 62-001-X). O. Reg. 508/10, s. 1 (2); O. Reg. 12/11, s. 1 (2).

2. In addition to the fees and disbursements set out in section 1, the person who requests the service shall pay the sheriff a travel allowance as set out in Regulation 11 of the Revised Regulations of Ontario, 1990 (Kilometre Allowances) made under the Act for the distance he or she necessarily travels, both ways, between the court house and the place where the sheriff,

(a) Revoked: O. Reg. 431/93, s. 2.

(b) enforces or attempts to enforce a writ or order; or

(c) performs or attempts to perform any other service directed by a court. O. Reg. 294/92, s. 2; O. Reg. 431/93, s. 2; O. Reg. 333/16, s. 2.

3. Omitted (revokes other Regulations). O. Reg. 294/92, s. 3.

TAB 33

CanLII

Evidence Act, RSO 1990, c E.23

Current version: in force since 2024-03-06

Link to the latest version: https://canlii.ca/t/2c4

Stable link to this version: https://canlii.ca/t/5671x

Citation to this version: Evidence Act, RSO 1990, c E.23, <https://canlii.ca/t/5671x> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Evidence Act

R.S.O. 1990, CHAPTER E.23

Consolidation Period: From March 6, 2024 to the e-Laws currency date.

Last amendment: 2024, c. 2, Sched. 19, s. 6.

Definitions

1 In this Act,

"action" includes an issue, matter, arbitration, reference, investigation, inquiry, a prosecution for an offence committed against a statute of Ontario or against a by-law or regulation made under any such statute and any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Ontario; ("action")

"court" includes a judge, arbitrator, umpire, commissioner, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence; ("tribunal")

"spouse" means a spouse as defined in section 1 of the *Family Law Act*. ("conjoint") R.S.O. 1990, c. E.23, s. 1; 2005, c. 5, s. 25 (1).

Application of Act

2 This Act applies to all actions and other matters whatsoever respecting which the Legislature has jurisdiction. R.S.O. 1990, c. E.23, s. 2.

Administration of oaths and affirmations

Authorized persons

3 (1) Where by any Act of the Legislature or order of the Assembly an oath or affirmation is authorized or directed to be administered, the oath or affirmation may be administered by any person authorized to take affidavits in Ontario. R.S.O. 1990, c. E.23, s. 3 (1).

Courts

(2) Every court has power to administer or cause to be administered an oath or affirmation to every witness who is called to give evidence before the court. R.S.O. 1990, c. E.23, s. 3 (2).

Certification

4 Where an oath, affirmation or declaration is directed to be made before a person, he or she has power and authority to administer it and to certify to its having been made. R.S.O. 1990, c. E.23, s. 4.

Recordings and transcripts of evidence

Recording

5 (1) Despite any Act, regulation or the rules of court, a stenographic reporter, shorthand writer, stenographer or other person who is authorized to record evidence and proceedings in an action in a court or in a proceeding authorized by or under any Act may record the evidence and the proceedings by any form of shorthand or by any device for recording sound of a type approved by the Attorney General. R.S.O. 1990, c. E.23, s. 5 (1).

Admissibility of transcripts

(2) Despite any Act or regulation or the rules of court, a transcript of the whole or a part of any evidence that has or proceedings that have been recorded in accordance with subsection (1) and that has or have been certified in accordance with the Act, regulation or rule of court, if any, applicable thereto and that is otherwise admissible by law is admissible in evidence whether or not the witness or any of the parties to the action or proceeding has approved the method used to record the evidence and the proceedings and whether or not he or she has read or signed the transcript. R.S.O. 1990, c. E.23, s. 5 (2).

Regulations

(3) The Attorney General may make regulations,

(a) requiring the certification of recordings of evidence and proceedings under subsection (1), and respecting the certification of those recordings;

(b) requiring the certification of transcripts under subsection (2), and respecting the certification of those transcripts; and

(c) prescribing the format, wording or content of certificates to be used in connection with certification under clauses (a) and (b). 2001, c. 9, Sched. B, s. 8; 2011, c. 1, Sched. 1, s. 2.

Witnesses, not incapacitated by crime, etc.

6 No person offered as a witness in an action shall be excluded from giving evidence by reason of any alleged incapacity from crime or interest. R.S.O. 1990, c. E.23, s. 6.

Admissibility notwithstanding interest or crime

7 Every person offered as a witness shall be admitted to give evidence although he or she has an interest in the matter in question or in the event of the action and although he or she has been previously convicted of a crime or offence. R.S.O. 1990, c. E.23, s. 7.

Evidence of parties

8 (1) The parties to an action and the persons on whose behalf it is brought, instituted, opposed or defended are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of themselves or of any of the parties, and the spouses of such parties and persons are, except as hereinafter otherwise provided, competent and compellable to give evidence on behalf of any of the parties. R.S.O. 1990, c. E.23, s. 8 (1); 2005, c. 5, s. 25 (2).

Evidence of spouse

(2) Without limiting the generality of subsection (1), a spouse may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. R.S.O. 1990, c. E.23, s. 8 (2); 2005, c. 5, s. 25 (3).

Witness not excused from answering questions tending to criminate

9 (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to criminate the witness or may tend to establish his or her liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (1).

Answer not to be used in evidence against witness

(2) If, with respect to a question, a witness objects to answer upon any of the grounds mentioned in subsection (1) and if, but for this section or any Act of the Parliament of Canada, he or she would therefore be excused from answering such question, then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him or her in any civil proceeding or in any proceeding under any Act of the Legislature. R.S.O. 1990, c. E.23, s. 9 (2).

Evidence in proceedings in consequence of adultery

10 The parties to a proceeding instituted in consequence of adultery and the spouses of such parties are competent to give evidence in such proceedings, but no witness in any such proceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she is guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery. R.S.O. 1990, c. E.23, s. 10; 2005, c. 5, s. 25 (4).

Communications made during marriage

11 A person is not compellable to disclose any communication made to the person by his or her spouse during the marriage. 2005, c. 5, s. 25 (5).

Expert evidence

12 Where it is intended by a party to examine as witnesses persons entitled, according to the law or practice, to give opinion evidence, not more than three of such witnesses may be called upon either side without the leave of the judge or other person presiding. R.S.O. 1990, c. E.23, s. 12.

Actions by or against heirs, etc.

13 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S.O. 1990, c. E.23, s. 13.

Actions by or against incapable persons, etc.

14 An opposite or interested party in an action by or against one of the following persons shall not obtain a verdict, judgment or decision on the party's own evidence, unless the evidence is corroborated by some other material evidence:

1. A person who has been found,
    i. incapable of managing property under the *Substitute Decisions Act, 1992* or under the *Mental Health Act*,
    ii. incapable of personal care under the *Substitute Decisions Act, 1992*, or
    iii. incapable by a court in Canada or elsewhere.
2. A patient in a psychiatric facility.
3. A person who, because of a mental disorder within the meaning of the *Mental Health Act*, is incapable of giving evidence. 2009, c. 33, Sched. 2, s. 32 (1).

Use of examination for discovery of officer or employee of corporation at trial

15 An examination for discovery, or any part thereof, of an officer or employee of a corporation made under the rules of court may be used as evidence at the trial by any party adverse in interest to the corporation, subject to such protection to the corporation as the rules of court provide. R.S.O. 1990, c. E.23, s. 15.

Mode of administering oath

16 Where an oath may be lawfully taken, it may be administered to a person while such person holds in his or her hand a copy of the Old or New Testament without requiring him or her to kiss the same, or, when the person objects to being sworn in this manner or declares that the oath so administered is not binding upon the person's conscience, then in such manner and form and with such ceremonies as he or she declares to be binding. R.S.O. 1990, c. E.23, s. 16.

Affirmation in lieu of oath

17 (1) A person may, instead of taking an oath, make an affirmation or declaration that is of the same force and effect as if the person had taken an oath in the usual form. 2009, c. 33, Sched. 2, s. 32 (2).

Certifying affirmation

(2) Where the evidence is in the form of an affidavit or written deposition, the person before whom it is taken shall certify that the deponent satisfied him or her that the deponent was a person entitled to affirm. R.S.O. 1990, c. E.23, s. 17 (2).

Presumption of competency

18 (1) A person of any age is presumed to be competent to give evidence. 1995, c. 6, s. 6 (1).

Challenge, examination

(2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person. 1995, c. 6, s. 6 (1).

Exception

(3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead. 1995, c. 6, s. 6 (1).

Evidence of witness under 14

18.1 (1) When the competence of a proposed witness who is a person under the age of 14 is challenged, the court may admit the person's evidence if the person is able to communicate the evidence, understands the nature of an oath or solemn affirmation and testifies under oath or solemn affirmation. 1995, c. 6, s. 6 (1).

Same

(2) The court may admit the person's evidence, if the person is able to communicate the evidence, even though the person does not understand the nature of an oath or solemn affirmation, if the person understands what it means to tell the truth and promises to tell the truth. 1995, c. 6, s. 6 (1).

Further discretion

(3) If the court is of the opinion that the person's evidence is sufficiently reliable, the court has discretion to admit it, if the person is able to communicate the evidence, even if the person understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth. 1995, c. 6, s. 6 (1).

Corroboration not required, witness under 14

18.2 (1) Evidence given by a person under the age of 14 need not be corroborated. 1995, c. 6, s. 6 (1).

No mandatory warning

(2) It is not necessary to instruct the trier of fact that it is unsafe to rely on the uncorroborated evidence of a person under the age of 14. 1995, c. 6, s. 6 (1).

Videotaped testimony, witness under 18

18.3 (1) A videotape of the testimony of a witness under the age of 18 that satisfies the conditions set out in subsection (2) may be admitted in evidence, if the court is of the opinion that this is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness. 1995, c. 6, s. 6 (1).

Conditions

(2) The judge or other person who is to preside at the trial and the lawyers of the parties to the proceeding shall be present when the testimony is given, and the lawyers shall be given an opportunity to examine the witness in the same way as if he or she were testifying in the courtroom. 1995, c. 6, s. 6 (1).

Screen, support person

(3) Subsection 18.4 (1) and section 18.5 apply with necessary modifications when testimony is being videotaped. 1995, c. 6, s. 6 (1).

Effect of admitting videotape

(4) If a videotape is admitted under subsection (1), the witness need not attend or testify and shall not be summoned to testify. 1995, c. 6, s. 6 (1).

Exception

(5) However, in exceptional circumstances, the court may require the witness to attend and testify even though a videotape of his or her testimony has been admitted in evidence. 1995, c. 6, s. 6 (1).

Videotaped interview

(6) With the leave of the court, a videotape of an interview with a person under the age of 18 may be admitted in evidence if the person, while testifying, adopts the contents of the videotape. 1995, c. 6, s. 6 (1).

Hearsay exceptions preserved

(7) Subsection (6) is in addition to any rule of law under which a videotape may be admitted in evidence. 1995, c. 6, s. 6 (1).

Special measures, witness under 18

Screen

18.4 (1) A witness under the age of 18 may testify behind a screen or similar device that allows the witness not to see an adverse party, if the court is of the opinion that this is likely to help the witness give complete and accurate testimony or that it is in the best interests of the witness, and if the condition set out in subsection (4) is satisfied. 1995, c. 6, s. 6 (1).

Closed-circuit television

(2) The court may order that closed-circuit television be used instead of a screen or similar device if the court is of the opinion that,

(a) a screen or similar device is insufficient to allow the witness to give complete and accurate testimony; or

(b) the best interests of the witness require the use of closed-circuit television. 1995, c. 6, s. 6 (1).

Same

(3) If the court makes an order under subsection (2), the witness shall testify outside the courtroom and his or her testimony shall be shown in the courtroom by means of closed-circuit television. 1995, c. 6, s. 6 (1).

Condition

(4) When a screen or similar device or closed-circuit television is used, the judge and jury and the parties to the proceeding and their lawyers shall be able to see and hear the witness testify. 1995, c. 6, s. 6 (1).

Support person, witness under 18

18.5 (1) During the testimony of a witness under the age of 18, a support person chosen by the witness may accompany him or her. 1995, c. 6, s. 6 (1).

Court's discretion

(2) If the court determines that the support person chosen by the witness is not appropriate for any reason, the witness is entitled to choose another support person. 1995, c. 6, s. 6 (1).

Examples

(3) The following are examples of reasons on the basis of which the court may determine that the support person chosen by a witness is not appropriate:

1. The court is of the opinion that the support person may attempt to influence the testimony of the witness.
2. The support person behaves in a disruptive manner.
3. The support person is also a witness in the proceeding. 1995, c. 6, s. 6 (1).

Personal cross-examination by adverse party

18.6 (1) The court may prohibit personal cross-examination of a witness under the age of 18 by an adverse party if the court is of the opinion that such a cross-examination,

(a) would be likely to affect adversely the ability of the witness to give evidence; or

(b) would not be in the best interests of the witness. 1995, c. 6, s. 6 (1).

Alternatives

(2) If the court prohibits personal cross-examination by the adverse party, the cross-examination may be conducted in some other appropriate way (for example, by means of questions written by the adverse party and read to the witness by the court). 1995, c. 6, s. 6 (1).

Attendance of witnesses

19 A witness served in due time with a summons issued out of a court in Ontario, and paid proper witness fees and conduct money, who makes default in obeying such summons, without any lawful and reasonable impediment, in addition to any penalty he or she may incur as for a contempt of court, is liable to an action on the part of the person by whom, or on whose behalf, he or she has been summonsed for any damage that such person may sustain or be put to by reason of such default. R.S.O. 1990, c. E.23, s. 19.

[*The following provisions were enacted by the Province of Canada as part of Chapter 9 of 1854. They were carried into the Consolidated Statutes of Canada, 1859 as sections 4-11 and 13 of Chapter 79. They have appeared in their present form in successive revisions since Confederation. They are revised in the Revised Statutes of Ontario to provide for gender-neutrality and to include a French version. See Rideout vs Rideout (1956) O.W.N. 644*].

Courts may issue subpoenas to any part of Canada

4. If in any action or suit depending in any of Her Majesty's Superior Courts of Law or Equity in Canada, it appears to the Court, or when not sitting, it appears to any Judge of the Court that it is proper to compel the personal attendance at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the Court in which the action or suit is pending, the Court or Judge, in their or his or her discretion, may order that a writ called a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue in special form, commanding such person to attend as a witness at such trial or *enquête* or examination of witnesses wherever he or she may be in Canada.

Service thereof in any part of Canada to be good

5. The service of any such writ or process in any part of Canada, shall be valid and effectual to all intents and purposes, as if the same had been served within the jurisdiction of the Court from which it has issued, according to the practice of such Court.

When not to be issued

6. No such writ shall be issued in any case in which an action is pending for the same cause of action, in that section of the Province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside.

Writs to be specially noted

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the Court or Judge making such order, and no such writ shall issue without such special order.

Consequences of disobedience

8. In case any person so served does not appear according to the exigency of such writ or process, the Court out of which the same issued, may, upon proof made of the service thereof, and of such default to the satisfaction of such Court, transmit a certificate of such default, under the seal of the same Court, to any of Her Majesty's Superior Courts of Law or Equity in that part of Canada in which the person so served may reside, being out of the jurisdiction of the Court transmitting such certificate, and the Court to which such certificate is sent, shall thereupon proceed against and punish such person so having made default, in like manner as they might have done if such person had neglected or refused to appear to a writ of subpoena or other similar process issued out of such last mentioned Court.

If expenses paid or tendered

9. No such certificate of default shall be transmitted by any Court, nor shall any person be punished for neglect or refusal to attend any trial or *enquête* or examination of witnesses, in obedience to any such subpoena or other similar process, unless it be made to appear to the Court transmitting and also to the Court receiving such certificate, that a reasonable and sufficient sum of money, according to the rate *per diem* and per mile allowed to witnesses by the law and practice of the Superior Court of Law within the jurisdiction of which such person was found, to defray the expenses of coming and attending to give evidence and of returning from giving evidence, had been tendered to such person at the time when the writ of subpoena, or other similar process was served upon him or her.

How service proved

10. The service of such writs of subpoena or other similar process, in Lower Canada, shall be proved by the certificate of a Bailiff within the jurisdiction where the service has been made, under his or her oath of office, and such service in Upper Canada by the affidavit of service endorsed on or annexed to such writ by the person who served the same.

Costs of attendance provided for

11. The costs of the attendance of any such witness shall not be taxed against the adverse party to such suit, beyond the amount that would have been allowed on a commission *rogatoire*, or to examine witnesses unless the Court or Judge before whom such trial or *enquête* or examination of witnesses is had, so orders.

. . . . .

Power to issue commissions to examine witnesses preserved

13. Nothing herein contained shall affect the power of any Court to issue a commission for the examination of witnesses out of its jurisdiction, nor affect the admissibility of any evidence at any trial or proceeding, where such evidence is now by law receivable, on the ground of any witness being beyond the jurisdiction of the Court.

Examination of witnesses, proof of contradictory written statements

20 A witness may be cross-examined as to previous statements made by him or her in writing, or reduced into writing, relative to the matter in question, without the writing being shown to the witness, but, if it is intended to contradict the witness by the writing, his or her attention shall, before such contradictory proof is given, be called to those parts of the writing that are to be used for the purpose of so contradicting the witness, and the judge or other person presiding at any time during the trial or proceeding may require the production of the writing for his or her inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as he or she thinks fit. R.S.O. 1990, c. E.23, s. 20.

Proof of contradictory oral statements

21 If a witness upon cross-examination as to a former statement made by him or her relative to the matter in question and inconsistent with his or her present testimony does not distinctly admit that he or she did make such statement, proof may be given that the witness did in fact make it, but before such proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1990, c. E.23, s. 21.

Proof of previous conviction of a witness

22 (1) A witness may be asked whether he or she has been convicted of any crime, and upon being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved, and a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted, or by the deputy of the officer, is, upon proof of the identity of the witness as such convict, sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate. R.S.O. 1990, c. E.23, s. 22 (1).

(2) Repealed: 1995, c. 6, s. 6 (2).

Proof of conviction or discharge

22.1 (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

(a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or

(b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available. 1995, c. 6, s. 6 (3).

Same

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding. 1995, c. 6, s. 6 (3).

Same

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate. 1995, c. 6, s. 6 (3).

How far a party may discredit his or her own witness

23 A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but the party may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony, but before such last-mentioned proof is given the circumstances of the proposed statement sufficient to designate the particular occasion shall be mentioned to the witness and the witness shall be asked whether or not he or she did make such statement. R.S.O. 1990, c. E.23, s. 23.

Letters patent

24 Letters patent under the Great Seal of the United Kingdom, or of any other of His Majesty's dominions, may be proved by the production of an exemplification thereof, or of the enrolment thereof, under the Great Seal under which such letters patent were issued, and such exemplification has the like force and effect for all purposes as the letters patent thereby exemplified or enrolled, as well against His Majesty as against all other persons whomsoever. R.S.O. 1990, c. E.23, s. 24; 2024, c. 2, Sched. 19, s. 6 (3).

24.1 Repealed: 2006, c. 21, Sched. F, s. 110.

24.2 Repealed: 2006, c. 21, Sched. F, s. 110.

Copies of statutes, etc.

25 Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be published by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within His Majesty's dominions, shall be admitted in evidence to prove the contents thereof. R.S.O. 1990, c. E.23, s. 25; 2020, c. 34, Sched. 13, s. 3 (1); 2024, c. 2, Sched. 19, s. 6 (1).

Proclamations, orders, etc.

26 Proof in the absence of evidence to the contrary of a proclamation, order, regulation or appointment to office made or issued,

(a) by the Governor General or the Governor General in Council, or other chief executive officer or administrator of the Government of Canada; or

(b) by or under the authority of a minister or head of a department of the Government of Canada or of a provincial or territorial government in Canada; or

(c) by a Lieutenant Governor or Lieutenant Governor in Council or other chief executive officer or administrator of Ontario or of any other province or territory in Canada,

may be given by the production of,

(d) a copy of the *Canada Gazette* or of the official gazette for a province or territory purporting to contain a notice of such proclamation, order, regulation or appointment;

(e) a copy of such proclamation, order, regulation or appointment purporting to be published by the King's Printer for Ontario, the printer for the Government of Canada or the government printer for the province or territory; or

(f) a copy of or extract from such proclamation, order, regulation or appointment purporting to be certified to be a true copy by such minister or head of a department or by the clerk, or assistant or acting clerk of the Executive Council or by the head of a department of the Government of Canada or of a provincial or territorial government or by his or her deputy or acting deputy. R.S.O. 1990, c. E.23, s. 26; 1993, c. 27, Sched.; 2020, c. 34, Sched. 13, s. 3 (2); 2024, c. 2, Sched. 19, s. 6 (2).

Orders signed by Secretary of State or member of Executive Council

27 An order in writing purporting to be signed by the Secretary of State of Canada and to be written by command of the Governor General shall be received in evidence as the order of the Governor General and an order in writing purporting to be signed by a member of the Executive Council and to be written by command of the Lieutenant Governor shall be received in evidence as the order of the Lieutenant Governor. R.S.O. 1990, c. E.23, s. 27.

Notices in *Gazette*

28 Copies of proclamations and of official and other documents, notices and advertisements published in the *Canada Gazette*, or in *The Ontario Gazette*, or in the official gazette of any province or territory in Canada are proof, in the absence of evidence to the contrary, of the originals and of the contents thereof. R.S.O. 1990, c. E.23, s. 28; 2020, c. 34, Sched. 13, s. 3 (3).

Public or official documents

29 Where the original record could be received in evidence, a copy of an official or public document in Ontario, purporting to be certified under the hand of the proper officer, or the person in whose custody such official or public document is placed, or of a document, by-law, rule, regulation or proceeding, or of an entry in a register or other book of a corporation, created by charter or statute in Ontario, purporting to be certified under the seal of the corporation and the hand of the presiding officer or secretary thereof, is receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof. R.S.O. 1990, c. E.23, s. 29.

Privilege in case of official documents

30 Where a document is in the official possession, custody or power of a member of the Executive Council, or of the head of a ministry of the public service of Ontario, if the deputy head or other officer of the ministry has the document in his or her personal possession, and is called as a witness, he or she is entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the ministry, to object to producing the document on the ground that it is privileged, and such objection may be taken by him or her in the same manner, and has the same effect, as if such member of the Executive Council or head of the ministry were personally present and made the objection. R.S.O. 1990, c. E.23, s. 30.

Sharing of information within public sector not affecting privilege

30.1 (1) In this section,

"public sector body" means,

(a) the Crown in right of Ontario,

(b) a Crown agency as defined in the *Crown Liability and Proceedings Act, 2019*,

(c) a Crown corporation as defined in the *Crown Liability and Proceedings Act, 2019*, or

(d) any person, body or office specified by the regulations made under subsection (7). 2024, c. 2, Sched. 7, s. 1.

Privilege not waived, affected

(2) If a public sector body shares information on a confidential basis with another public sector body, the sharing does not constitute a waiver of, or otherwise affect, any privilege that applies with respect to the information. 2024, c. 2, Sched. 7, s. 1.

Same

(3) For the purposes of subsection (2), privilege includes solicitor-client privilege, litigation privilege, settlement privilege and public interest immunity. 2024, c. 2, Sched. 7, s. 1.

Same

(4) Subsection (2) applies regardless of whether the public sector body is required to share the information. 2024, c. 2, Sched. 7, s. 1.

Retroactive application

(5) This section is deemed to have applied with respect to any sharing of information between public sector bodies before the day the *Enhancing Access to Justice Act, 2024* received Royal Assent. 2024, c. 2, Sched. 7, s. 1.

Same

(6) In the case of a person, body or office that becomes a public sector body after the day the *Enhancing Access to Justice Act, 2024* receives Royal Assent, this section is also deemed to have applied with respect to any sharing of information with or by the person, body or office before becoming a public sector body. 2024, c. 2, Sched. 7, s. 1.

Regulations

(7) The Lieutenant Governor in Council may make regulations prescribing persons, bodies or offices for the purposes of clause (d) of the definition of "public sector body" in subsection (1). 2024, c. 2, Sched. 7, s. 1.

Books of accounts of municipalities and government departments

31 (1) Repealed: 2002, c. 17, Sched. F, Table.

Copies of entries

(2) A copy of an entry in a book of account kept by a municipality or in a department of the Government of Canada or of Ontario shall be received as proof in the absence of evidence to the contrary of such entry and of the matters, transactions and accounts recorded therein, if it is proved by the oath, affirmation or affidavit of an officer of the municipality or of the department,

(a) that the book was, at the time of the making of the entry, one of the ordinary books kept by the municipality or in the department;

(b) that the entry was apparently, and as the deponent believes, made in the usual and ordinary course of business of the municipality or department; and

(c) that such copy is a true copy thereof. R.S.O. 1990, c. E.23, s. 31 (2); 1993, c. 27, Sched.

Copies of public books or documents

32 (1) Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, a copy thereof or extract therefrom is admissible in evidence if it is proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original was entrusted. R.S.O. 1990, c. E.23, s. 32 (1).

Copies to be delivered if required

(2) Such officer shall furnish the certified copy or extract to any person applying for it at a reasonable time, upon the person paying therefor a sum not exceeding 10 cents for every folio of 100 words. R.S.O. 1990, c. E.23, s. 32 (2).

Books and records of banks

Definition

33 (1) In this section,

"bank" means a bank to which the *Bank Act* (Canada) applies and includes a branch, agency or office of a bank. R.S.O. 1990, c. E.23, s. 33 (1); 2002, c. 8, Sched. I, s. 10.

Copies of entries

(2) Subject to this section, a copy of an entry in a book or record kept in a bank is in any action to which the bank is not a party proof in the absence of evidence to the contrary of such entry and of the matters, transactions and accounts therein recorded. R.S.O. 1990, c. E.23, s. 33 (2); 1993, c. 27, Sched.

Proof required as to entry in ordinary course of business

(3) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was at the time of making the entry one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the bank, or its successor, and that such copy is a true copy thereof, and such proof may be given by the manager or accountant, or a former manager of the bank or its successor, and may be given orally or by affidavit. R.S.O. 1990, c. E.23, s. 33 (3).

Production of books to be required only under order

(4) A bank or officer of a bank is not, in an action to which the bank is not a party, compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court or a judge made for special cause. R.S.O. 1990, c. E.23, s. 33 (4).

Inspection of account

(5) On the application of a party to an action, the court or judge may order that such party be at liberty to inspect and take copies of any entries in the books or records of a bank for the purposes of such proceeding, but a person whose account is to be inspected shall be served with notice of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the court or judge that such person cannot be notified personally, such notice may be given by addressing it to the bank. R.S.O. 1990, c. E.23, s. 33 (5).

Costs

(6) The costs of an application to a court or judge under or for the purposes of this section, and the costs of any thing done or to be done under an order of a court or judge made under or for the purposes of this section, are in the discretion of the court or judge who may order such costs or any part thereof to be paid to a party by the bank, where such costs have been occasioned by a default or delay on the part of the bank, and any such order against a bank may be enforced as if the bank were a party to the proceeding. R.S.O. 1990, c. E.23, s. 33 (6).

Prints from photographic film

Definitions

34 (1) In this section,

"person" includes,

(a) the Government of Canada and of a province of Canada, and a department, commission, board or branch of any such government,

(b) a corporation, its successors and assigns, and

(c) the heirs, executors, administrators or other legal representatives of a person; ("personne")

"photographic film" includes any photographic plate, microphotographic film and photostatic negative, and "photograph" has a corresponding meaning. ("pellicule photographique", "photographier") R.S.O. 1990, c. E.23, s. 34 (1).

Admissible in evidence

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by a person,

(a) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and

(b) is destroyed by or in the presence of such person or of one or more of the person's employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film is admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible. R.S.O. 1990, c. E.23, s. 34 (2).

(3) Repealed: 1999, c. 12, Sched. B, s. 7 (1).

(4) Repealed: 1999, c. 12, Sched. B, s. 7 (1).

Proof of compliance with conditions

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit sworn or affirmed before a notary public, and, unless the court otherwise orders, a notarial copy of any such affidavit is admissible in evidence in lieu of the original affidavit. R.S.O. 1990, c. E.23, s. 34 (5).

Electronic records

Definitions

34.1 (1) In this section,

"data" means representations, in any form, of information or concepts; ("données")

"electronic record" means data that is recorded or stored on any medium in or by a computer system or other similar device, that can be read or perceived by a person or a computer system or other similar device, and includes a display, printout or other output of that data, other than a printout referred to in subsection (6); ("document électronique")

"electronic records system" includes the computer system or other similar device by or in which data is recorded or stored, and any procedures related to the recording and storage of electronic records. ("système d'archivage électronique") 1999, c. 12, Sched. B, s. 7 (2).

Application

(2) This section does not modify any common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence. 1999, c. 12, Sched. B, s. 7 (2).

Power of court

(3) A court may have regard to evidence adduced under this section in applying any common law or statutory rule relating to the admissibility of records. 1999, c. 12, Sched. B, s. 7 (2).

Authentication

(4) The person seeking to introduce an electronic record has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. 1999, c. 12, Sched. B, s. 7 (2).

Application of best evidence rule

(5) Subject to subsection (6), where the best evidence rule is applicable in respect of an electronic record, it is satisfied on proof of the integrity of the electronic record. 2000, c. 26, Sched. A, s. 7 (1).

Same

(5.1) The integrity of an electronic record may be proved by evidence of the integrity of the electronic records system by or in which the data was recorded or stored, or by evidence that reliable encryption techniques were used to support the integrity of the electronic record. 2000, c. 26, Sched. A, s. 7 (1).

What constitutes record

(6) An electronic record in the form of a printout that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the printout, is the record for the purposes of the best evidence rule. 1999, c. 12, Sched. B, s. 7 (2).

Presumption of integrity

(7) In the absence of evidence to the contrary, the integrity of the electronic records system by or in which an electronic record is recorded or stored is proved for the purposes of subsection (5),

(a) by evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record, and there are no other reasonable grounds to doubt the integrity of the electronic records system;

(b) if it is established that the electronic record was recorded or stored by a party to the proceeding who is adverse in interest to the party seeking to introduce it; or

(c) if it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceeding and who did not record or store it under the control of the party seeking to introduce the record. 1999, c. 12, Sched. B, s. 7 (2).

Standards

(8) For the purpose of determining under any rule of law whether an electronic record is admissible, evidence may be presented in respect of any standard, procedure, usage or practice on how electronic records are to be recorded or stored, having regard to the type of business or endeavour that used, recorded or stored the electronic record and the nature and purpose of the electronic record. 1999, c. 12, Sched. B, s. 7 (2).

Proof by affidavit

(9) The matters referred to in subsections (6), (7) and (8) may be established by an affidavit given to the best of the deponent's knowledge and belief. 1999, c. 12, Sched. B, s. 7 (2).

Cross-examination

(10) A deponent of an affidavit referred to in subsection (9) that has been introduced in evidence may be cross-examined as of right by a party to the proceeding who is adverse in interest to the party who has introduced the affidavit or has caused the affidavit to be introduced. 1999, c. 12, Sched. B, s. 7 (2).

Same

(11) Any party to the proceeding may, with leave of the court, cross-examine a person referred to in clause (7) (c). 1999, c. 12, Sched. B, s. 7 (2).

Business records

Definitions

35 (1) In this section,

"business" includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; ("entreprise")

"record" includes any information that is recorded or stored by means of any device. ("document") R.S.O. 1990, c. E.23, s. 35 (1).

Where business records admissible

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. R.S.O. 1990, c. E.23, s. 35 (2).

Notice and production

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party's intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. R.S.O. 1990, c. E.23, s. 35 (3).

Surrounding circumstances

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility. R.S.O. 1990, c. E.23, s. 35 (4).

Previous rules as to admissibility and privileged documents not affected

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. R.S.O. 1990, c. E.23, s. 35 (5).

Judicial notice to be taken of signatures of judges, etc.

36 (1) All courts, judges, justices, associate judges, clerks of courts, commissioners and other officers acting judicially, shall take judicial notice of the signature of any judge of any court in Canada, in Ontario and in every other province and territory in Canada, where the judge's signature is appended or attached to a decree, order, certificate, affidavit, or judicial or official document. R.S.O. 1990, c. E.23, s. 36 (1); 1996, c. 25, s. 5; 2020, c. 11, Sched. 5, s. 15; 2021, c. 4, Sched. 3, s. 21.

Interpretation

(2) The members of the Canadian Transport Commission and a referee appointed under the *Drainage Act* shall be deemed judges for the purposes of this section. R.S.O. 1990, c. E.23, s. 36 (2); 2017, c. 8, Sched. 17, s. 6; 2021, c. 4, Sched. 6, s. 47.

Proof of handwriting, when not required

37 No proof is required of the handwriting or official position of a person certifying to the truth of a copy of or extract from any proclamation, order, regulation or appointment, or to any matter or thing as to which he or she is by law authorized or required to certify. R.S.O. 1990, c. E.23, s. 37.

Foreign judgments, etc., how proved

38 A judgment, decree or other judicial proceeding recovered, made, had or taken in the Supreme Court of Judicature or in any court of record in England or Ireland or in any of the superior courts of law, equity or bankruptcy in Scotland, or in any court of record in Canada, or in any of the provinces or territories in Canada, or in any British colony or possession, or in any court of record of the United States of America, or of any state of the United States of America, may be proved by an exemplification of the same under the seal of the court without any proof of the authenticity of such seal or other proof whatever, in the same manner as a judgment, decree or other judicial proceeding of the Superior Court of Justice may be proved by an exemplification thereof. R.S.O. 1990, c. E.23, s. 38; 2000, c. 26, Sched. A, s. 7 (2).

Copies of notarial acts in Quebec admissible

39 (1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his or her possession as such notary or prothonotary, is receivable in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved. R.S.O. 1990, c. E.23, s. 39 (1).

How impeached

(2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary. R.S.O. 1990, c. E.23, s. 39 (2).

Protests of bills and notes

40 A protest of a bill of exchange or promissory note purporting to be under the hand of a notary public wherever made is proof, in the absence of evidence to the contrary, of the allegations and facts therein stated. R.S.O. 1990, c. E.23, s. 40.

Effect of certain certificates of notaries

41 Any note, memorandum or certificate purporting to be made by a notary public in Canada, in his or her own handwriting or to be signed by him or her at the foot of or embodied in any protest, or in a regular register of official acts purporting to be kept by him or her is proof, in the absence of evidence to the contrary, of the fact of notice of non-acceptance or non-payment of a bill of exchange or promissory note having been sent or delivered at the time and in the manner stated in such note, certificate or memorandum. R.S.O. 1990, c. E.23, s. 41.

Proving titles under Small Claims Court executions

42 In proving a title under a sheriff's conveyance based upon an execution issued from the Small Claims Court, it is sufficient to prove the judgment recovered in the Small Claims Court without proof of any prior proceedings. R.S.O. 1990, c. E.23, s. 42.

Solemn declaration

43 Any person authorized to take declarations in Ontario may receive the solemn declaration of any person in attestation of the truth of any fact or of any account rendered in writing and the declaration and any declaration authorized or required by any Act of the Legislature shall be in the following form:

I, ..., solemnly declare that (*state* the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Declared before me

at the of

this day of , 20

A Commissioner, etc.

R.S.O. 1990, c. E.23, s. 43.

Oaths, etc., administered by commissioned officers

44 (1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made in or outside Ontario before a person who holds a commission as an officer in the Canadian Forces and is on full-time service is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario. R.S.O. 1990, c. E.23, s. 44 (1).

Admissibility

(2) A document that purports to be signed by a person mentioned in subsection (1) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him or her and on which the officer's rank and unit are shown below his or her signature is admissible in evidence without proof of the signature or rank or unit or that he or she is on full-time service. R.S.O. 1990, c. E.23, s. 44 (2).

Oaths, etc., administered outside Ontario

45 (1) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before,

(a) a judge;

(b) a magistrate;

(c) an officer of a court of justice;

(d) a commissioner for taking affidavits or other competent authority of the like nature;

(e) a notary public;

(f) the head of a city, town, village, township or other municipality;

(g) an officer of any of His Majesty's diplomatic or consular services, including an ambassador, envoy, minister, charge d'affairs, counsellor, secretary, attache, consul-general, consul, vice-consul, pro-consul, consular agent, acting consul-general, acting consul, acting vice-consul and acting consular agent;

(h) an officer of the Canadian diplomatic, consular or representative services, including, in addition to the diplomatic and consular officers mentioned in clause (g), a high commissioner, permanent delegate, acting high commissioner, acting permanent delegate, counsellor and secretary; or

(i) a Canadian Government trade commissioner or assistant trade commissioner,

exercising his or her functions or having jurisdiction or authority as such in the place in which it is administered, sworn, affirmed or made, is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario. R.S.O. 1990, c. E.23, s. 45 (1); 2024, c. 2, Sched. 19, s. 6 (3).

Idem

(2) An oath, affidavit, affirmation or statutory declaration administered, sworn, affirmed or made outside Ontario before a notary public for Ontario or before a commissioner for taking affidavits in Ontario is as valid and effectual to all intents and purposes as if it had been duly administered, sworn, affirmed or made in Ontario before a commissioner for taking affidavits in Ontario. R.S.O. 1990, c. E.23, s. 45 (2).

Admissibility

(3) A document that purports to be signed by a person mentioned in subsection (1) or (2) in testimony of an oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made before him or her, and on which the person's office is shown below his or her signature, and,

(a) in the case of a notary public, that purports to have impressed thereon or attached thereto his or her official seal;

(b) in the case of a person mentioned in clause (1) (f), that purports to have impressed thereon or attached thereto the seal of the municipality;

(c) in the case of a person mentioned in clause (1) (g), (h) or (i), that purports to have impressed thereon or attached thereto his or her seal or the seal or stamp of his or her office or of the office to which he or she is attached,

is admissible in evidence without proof of his or her signature or of his or her office or official character or of the seal or stamp and without proof that he or she was exercising his or her functions or had jurisdiction or authority in the place in which the oath, affidavit, affirmation or statutory declaration was administered, sworn, affirmed or made. R.S.O. 1990, c. E.23, s. 45 (3).

Formal defects, when not to vitiate

46 No informality in the heading or other formal requisites to any affidavit, declaration or affirmation made or taken before a commissioner or other person authorized to take affidavits under the *Commissioners for Taking Affidavits Act*, or under this Act, is any objection to its reception in evidence if the court or judge before whom it is tendered thinks proper to receive it. R.S.O. 1990, c. E.23, s. 46; 2020, c. 7, Sched. 4, s. 10.

Affidavit sworn before solicitor for a party

47 An affidavit or declaration is not inadmissible or unusable in evidence in an action for the reason only that it is made before the solicitor of a party to the action or before the partner, associate, clerk or agent of such solicitor. R.S.O. 1990, c. E.23, s. 47.

Admissibility of copies of depositions

48 (1) Where an examination or deposition of a party or witness has been taken before a judge or other officer or person appointed to take it, copies of it, certified under the hand of the judge, officer or other person taking it, shall, without proof of the signature, be received and read in evidence, saving all just exceptions. R.S.O. 1990, c. E.23, s. 48 (1).

Presumption

(2) An examination or deposition received or read in evidence under subsection (1) shall be presumed to represent accurately the evidence of the party or witness, unless there is good reason to doubt its accuracy. R.S.O. 1990, c. E.23, s. 48 (2).

Effect of probate, etc., as evidence of will, etc.

49 In order to establish a devise or other testamentary disposition of or affecting real estate, probate of the will or letters of administration with the will annexed containing such devise or disposition, or a copy thereof, under the seal of the court that granted it or under the seal of the Superior Court of Justice, are proof, in the absence of evidence to the contrary, of the will and of its validity and contents. R.S.O. 1990, c. E.23, s. 49; 2000, c. 26, Sched. A, s. 7 (2).

Proof in the case of will of real estate filed in courts outside Ontario

50 (1) Where a person dies in any of His Majesty's possessions outside Ontario having made a will sufficient to pass real estate in Ontario, purporting to devise, charge or affect real estate in Ontario, the party desiring to establish any such disposition, after giving one month's notice to the opposite party to the proceeding of the party's intentions so to do, may produce and file the probate of the will or letters of administration with the will annexed or a certified copy thereof under the seal of the court that granted the same with a certificate of the judge, registrar or clerk of such court that the original will is filed and remains in the court and purports to have been executed before two witnesses, and such probate or letters of administration or certified copy with such certificate is, unless the court otherwise orders, proof in the absence of evidence to the contrary of the will and of its validity and contents. R.S.O. 1990, c. E.23, s. 50 (1); 1993, c. 27, Sched; 2024, c. 2, Sched. 19, s. 6 (3).

Effect of certificate

(2) The production of the certificate mentioned in subsection (1) is proof in the absence of evidence to the contrary of the facts therein stated and of the authority of the judge, registrar or clerk, without proof of his or her appointment, authority or signature. R.S.O. 1990, c. E.23, s. 50 (2); 1993, c. 27, Sched.

Military records

51 The production of a certificate, purporting to be signed by an authority authorized in that behalf by the *National Defence Act* (Canada) or by regulations made thereunder, stating that the person named in the certificate died, or was deemed to have died, on a date set forth therein, is proof, in the absence of evidence to the contrary, for any purpose to which the authority of the Legislature extends that the person so named died on that date, and also of the office, authority and signature of the person signing the certificate, without any proof of his or her appointment, authority or signature. R.S.O. 1990, c. E.23, s. 51.

Reports and evidence of practitioners

Definition

52 (1) In this section,

"practitioner" means,

(a) a member of a College as defined in subsection 1 (1) of the *Regulated Health Professions Act, 1991*,

(b) a drugless practitioner registered under the *Drugless Practitioners Act*,

(c) a person licensed or registered to practise in another part of Canada under an Act that is similar to an Act referred to in clause (a) or (b). R.S.O. 1990, c. E.23, s. 52 (1); 1998, c. 18, Sched. G, s. 50.

Medical reports

(2) A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days notice has been given to all other parties, admissible in evidence in the action. R.S.O. 1990, c. E.23, s. 52 (2).

Entitlement

(3) Unless otherwise ordered by the court, a party to an action is entitled, at the time that notice is given under subsection (2), to a copy of the report together with any other report of the practitioner that relates to the action. R.S.O. 1990, c. E.23, s. 52 (3).

Report required

(4) Except by leave of the judge presiding at the trial, a practitioner who signs a report with respect to a party shall not give evidence at the trial unless the report is given to all other parties in accordance with subsection (2). R.S.O. 1990, c. E.23, s. 52 (4).

If practitioner called unnecessarily

(5) If a practitioner is required to give evidence in person in an action and the court is of the opinion that the evidence could have been produced as effectively by way of a report, the court may order the party that required the attendance of the practitioner to pay as costs therefor such sum as the court considers appropriate. R.S.O. 1990, c. E.23, s. 52 (5).

Registered instruments

Definition

53 (1) In this section,

"instrument" has the meaning assigned to it in section 1 of the *Registry Act*. R.S.O. 1990, c. E.23, s. 53 (1).

Proof

(2) A copy of an instrument or memorial, certified to be a true copy by the land registrar in whose office the instrument or memorial is deposited, filed, kept or registered, is proof of the original, in the absence of evidence to the contrary, except in the cases provided for in subsection (3). 1998, c. 18, Sched. B, s. 7 (2).

Where certified copies of registered instruments may be used

(3) Where it would be necessary to produce and prove an instrument or memorial that has been so deposited, filed, kept or registered in order to establish such instrument or memorial and the contents thereof, the party intending to prove it may give notice to the opposite party, at least ten days before the trial or other proceeding in which the proof is intended to be adduced, that the party intends at the trial or other proceeding to give in evidence, as proof of the instrument or memorial, a copy thereof certified by the land registrar, and in every such case the copy so certified is sufficient evidence of the instrument or memorial and of its validity and contents unless the party receiving the notice, within four days after such receipt, gives notice that the party disputes its validity, in which case the costs of producing and proving it may be ordered to be paid by any or either of the parties as is considered just. R.S.O. 1990, c. E.23, s. 53 (3); 1998, c. 18, Sched. B, s. 7 (3).

Filing copies of official documents

54 (1) Where a public officer produces upon a summons an original document, it shall not be deposited in court unless otherwise ordered, but, if the document or a copy is needed for subsequent reference or use, a copy thereof or of so much thereof as is considered necessary, certified under the hand of the officer producing the document or otherwise proved, shall be filed as an exhibit in the place of the original, and the officer is entitled to receive in addition to his or her ordinary fees the fees for any certified copy, to be paid to the officer before it is delivered or filed. R.S.O. 1990, c. E.23, s. 54 (1).

When original to be retained

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer and the exhibit shall be retained in court and filed. R.S.O. 1990, c. E.23, s. 54 (2).

Proof of certain written instruments

55 (1) A party intending to prove the original of a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account or other written instrument used in business or other transactions, may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that the party intends to give in evidence as proof of the contents a writing purporting to be a copy of the documents, and in the notice shall name some convenient time and place for the inspection thereof. R.S.O. 1990, c. E.23, s. 55 (1).

Inspection

(2) Such copy may then be inspected by the opposite party, and is without further proof sufficient evidence of the contents of the original document, and shall be accepted and taken in lieu of the original, unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that the party intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original, and the costs attending any production or proof of the original document are in the discretion of the court. R.S.O. 1990, c. E.23, s. 55 (2).

Where no attestation required

56 It is not necessary to prove, by the attesting witness, an instrument to the validity of which attestation is not requisite. R.S.O. 1990, c. E.23, s. 56.

Comparison of disputed writing with genuine

57 Comparison of a disputed writing with a writing proved to the satisfaction of the court to be genuine shall be permitted to be made by a witness, and such writings and the evidence of witnesses respecting them may be submitted to the court or jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.O. 1990, c. E.23, s. 57.

Where instruments offered in evidence may be impounded

58 Where a document is received in evidence, the court admitting it may direct that it be impounded and kept in such custody for such period and subject to such conditions as seem proper, or until the further order of the court or of the Superior Court of Justice or of a judge thereof, as the case may be. R.S.O. 1990, c. E.23, s. 58; 2000, c. 26, Sched. A, s. 7 (2).

Evidence dispensed with under *Vendors and Purchasers Act*

59 It is not necessary in an action to produce any evidence that, by section 1 of the *Vendors and Purchasers Act*, is dispensed with as between vendor and purchaser, and the evidence declared to be sufficient as between vendor and purchaser is sufficient in the absence of evidence to the contrary for the purposes of the action. R.S.O. 1990, c. E.23, s. 59; 1993, c. 27, Sched.

Evidence for foreign tribunals

60 (1) Where it is made to appear to the Superior Court of Justice or a judge thereof, that a court or tribunal of competent jurisdiction in a foreign country has duly authorized, by commission, order or other process, for a purpose for which a letter of request could be issued under the rules of court, the obtaining of the testimony in or in relation to an action, suit or proceeding pending in or before such foreign court or tribunal, of a witness out of the jurisdiction thereof and within the jurisdiction of the court or judge so applied to, such court or judge may order the examination of such witness before the person appointed, and in the manner and form directed by the commission, order or other process, and may, by the same or by a subsequent order, command the attendance of a person named therein for the purpose of being examined, or the production of a writing or other document or thing mentioned in the order, and may give all such directions as to the time and place of the examination, and all other matters connected therewith as seem proper, and the order may be enforced, and any disobedience thereto punished, in like manner as in the case of an order made by the court or judge in an action pending in the court or before a judge of the court. R.S.O. 1990, c. E.23, s. 60 (1); 2000, c. 26, Sched. A, s. 7 (2).

Payment of expenses of witness

(2) A person whose attendance is so ordered is entitled to the like conduct money and payment for expenses and loss of time as upon attendance at a trial in the Superior Court of Justice. R.S.O. 1990, c. E.23, s. 60 (2); 2000, c. 26, Sched. A, s. 7 (2).

Right of refusal to answer questions and to produce documents

(3) A person examined under such commission, order or process has the like right to object to answer questions tending to criminate himself or herself, and to refuse to answer any questions that, in an action pending in the court by which or by a judge whereof or before the judge by whom the order for examination was made, the witness would be entitled to object or to refuse to answer, and no person shall be compelled to produce at the examination any writing, document or thing that the person could not be compelled to produce at the trial of such an action. R.S.O. 1990, c. E.23, s. 60 (3).

Administration of oath

(4) Where the commission, order or other process, or the instructions of the court accompanying the same, direct that the person to be examined shall be sworn or shall affirm, the person so appointed has authority to administer the oath to the person or take his or her affirmation. R.S.O. 1990, c. E.23, s. 60 (4).

TAB 34

CanLII

Certification of Recordings and Transcripts, O Reg 158/03

Current version: in force since 2022-12-05

Link to the latest version: https://canlii.ca/t/rdw

Stable link to this version: https://canlii.ca/t/55pgw

Citation to this version: Certification of Recordings and Transcripts, O Reg 158/03, <https://canlii.ca/t/55pgw> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Evidence Act

ONTARIO REGULATION 158/03

CERTIFICATION OF RECORDINGS AND TRANSCRIPTS

Consolidation Period: From December 5, 2022 to the e-Laws currency date.

Last amendment: 531/22.

This is the English version of a bilingual regulation.

Application

1. This Regulation applies to proceedings in the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice. O. Reg. 158/03, s. 1.

Definition

2. In this Regulation,

"approved device" means a device for recording sound of a type approved by the Attorney General, as mentioned in subsection 5 (1) of the Act. O. Reg. 158/03, s. 2.

Certification of recordings

3. (1) A recording made under subsection 5 (1) of the Act by means of an approved device shall be certified in Form 1 by a person who,

(a) is authorized to record evidence and proceedings under subsection 5 (1) of the Act; and

(b) is in charge of the approved device while the recording is being made. O. Reg. 158/03, s. 3 (1); O. Reg. 109/11, s. 1.

(2) The certificate in Form 1 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the recording is a recording of evidence and proceedings in the proceeding. O. Reg. 158/03, s. 3 (2); O. Reg. 109/11, s. 1.

Certification of transcripts

4. (1) A transcript made under subsection 5 (2) of the Act from a recording made under subsection 5 (1) of the Act by means of an approved device shall be certified by a person described in subsection (1.1),

(a) in paper format in Form 2, if the transcript is in paper format; or

(b) in electronic format in Form 3, if the transcript is in electronic format. O. Reg. 531/22, s. 1 (1).

(1.1) The transcript shall be certified by a person who has proofread the transcript in its entirety against the recording to confirm that the transcript is accurate, but need not be the same person who transcribed the recording. O. Reg. 531/22, s. 1 (1).

(2) The recording shall be transcribed, and the transcript proofread and certified, by a person who is trained and qualified to transcribe recordings and is a member of a class of persons who are authorized to do so by the Attorney General, but need not be the same person who is in charge of the approved device while the recording is being made. O. Reg. 158/03, s. 4 (2); O. Reg. 531/22, s. 1 (2).

(3) The certificate in Form 2 or 3 is admissible in evidence and is proof, in the absence of evidence to the contrary, that the transcript is a transcript of the certified recording of evidence and proceedings in the proceeding that is identified in the certificate in Form 2 or 3. O. Reg. 92/04, s. 1; O. Reg. 109/11, s. 1; O. Reg. 531/22, s. 1 (3).

(4) The certificate in Form 2 or 3 has the status referred to in subsection (3), with respect to admissibility and proof, without being accompanied by a certificate in Form 1 relating to the certified recording that is identified in the certificate in Form 2 or 3. O. Reg. 92/04, s. 1; O. Reg. 109/11, s. 1; O. Reg. 531/22, s. 1 (3).

(5) When a certificate in Form 2 or 3 is completed, nothing further is required to certify the transcript. O. Reg. 92/04, s. 1; O. Reg. 109/11, s. 1; O. Reg. 531/22, s. 1 (3).

(6) Subsections (3) to (5) apply with respect to any electronically distributed or duplicated copy of an electronic transcript certified in Form 3. O. Reg. 531/22, s. 1 (4).

Forms

5. In this Regulation, when a form is referred to by number, the reference is to the form with that number that is described in the Table of Forms at the end of this Regulation and is available on the Internet through www.ontariocourtforms.on.ca. O. Reg. 109/11, s. 2.

TABLE OF FORMS

Form Number	Form Name	Date of Form
1	Certificate of Recording (Subsection 5 (1))	March 17, 2011
2	Certificate of Transcript (Subsection 5 (2))	September 1, 2022
3	Electronic Certificate of Transcript (Subsection 5 (2))	September 1, 2022

O. Reg. 124/17, s. 1; O. Reg. 531/22, s. 2.

FORMS 1, 2 REVOKED: O. REG. 109/11, S. 4.

TAB 35

CanLII

Statutory Powers Procedure Act, RSO 1990, c S.22

Current version: in force since 2025-07-01

Link to the latest version: https://canlii.ca/t/2qg

Stable link to this version: https://canlii.ca/t/56jsg

Citation to this version: Statutory Powers Procedure Act, RSO 1990, c S.22, <https://canlii.ca/t/56jsg> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Statutory Powers Procedure Act

R.S.O. 1990, CHAPTER S.22

Consolidation Period: From July 1, 2025 to the e-Laws currency date.

Last amendment: 2024, c. 28, Sched. 25, s. 1, 2.

Interpretation

1 (1) In this Act,

"electronic hearing" means a hearing held by conference telephone or some other form of electronic technology allowing persons to hear one another; ("audience électronique")

"hearing" means a hearing in any proceeding; ("audience")

"licence" includes any permit, certificate, approval, registration or similar form of permission required by law; ("autorisation")

"municipality" has the same meaning as in the *Municipal Affairs Act*; ("municipalité")

"oral hearing" means a hearing at which the parties or their representatives attend before the tribunal in person; ("audience orale")

"proceeding" means a proceeding to which this Act applies; ("instance")

"representative" means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding; ("représentant")

"statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not; ("compétence légale de décision")

"tribunal" means one or more persons, whether or not incorporated and however described, upon which a statutory power of decision is conferred by or under a statute; ("tribunal")

"written hearing" means a hearing held by means of the exchange of documents, whether in written form or by electronic means. ("audience écrite") R.S.O. 1990, c. S.22, s. 1 (1); 1994, c. 27, s. 56 (1-3); 2002, c. 17, Sched. F, Table; 2006, c. 21, Sched. C, s. 134 (1, 2).

Meaning of "person" extended

(2) A municipality, an unincorporated association of employers, a trade union or council of trade unions who may be a party to a proceeding in the exercise of a statutory power of decision under the statute conferring the power shall be deemed to be a person for the purpose of any provision of this Act or of any rule made under this Act that applies to parties. R.S.O. 1990, c. S.22, s. 1 (2).

Liberal construction of Act and rules

2 This Act, and any rule made by a tribunal under subsection 17.1 (4) or section 25.1, shall be liberally construed to secure the just, most expeditious

and cost-effective determination of every proceeding on its merits. 1999, c. 12, Sched. B, s. 16 (1); 2006, c. 19, Sched. B, s. 21 (1).

Application of Act

3 (1) Subject to subsection (2), this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. R.S.O. 1990, c. S.22, s. 3 (1); 1994, c. 27, s. 56 (5).

Where Act does not apply

(2) This Act does not apply to a proceeding,

(a) before the Assembly or any committee of the Assembly;

(b) in or before,

(i) the Court of Appeal,

(ii) the Superior Court of Justice,

(iii) the Ontario Court of Justice,

(iv) the Family Court of the Superior Court of Justice,

(v) the Small Claims Court, or

(vi) a justice of the peace;

(c) to which the Rules of Civil Procedure apply;

(d) before an arbitrator to which the *Arbitration Act, 1991* or the *Labour Relations Act, 1995* applies;

(e) at a coroner's inquest;

(f) of a commission appointed under the *Public Inquiries Act, 2009*;

(g) of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he or she may have power to make; or

(h) of a tribunal empowered to make regulations, rules or by-laws in so far as its power to make regulations, rules or by-laws is concerned. R.S.O. 1990, c. S.22, s. 3 (2); 1994, c. 27, s. 56 (6); 2006, c. 19, Sched. C, s. 1 (1, 2, 4); 2009, c. 33, Sched. 6, s. 87; 2021, c. 25, Sched. 27, s. 1.

Waiver

Waiver of procedural requirement

4 (1) Any procedural requirement of this Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal. 1997, c. 23, s. 13 (1).

Same, rules

(2) Any provision of a tribunal's rules made under section 25.1 may be waived in accordance with the rules. 1994, c. 27, s. 56 (7).

Disposition without hearing

4.1 If the parties consent, a proceeding may be disposed of by a decision of the tribunal given without a hearing, unless another Act or a regulation that applies to the proceeding provides otherwise. 1997, c. 23, s. 13 (2).

Panels, certain matters

4.2 (1) A procedural or interlocutory matter in a proceeding may be heard and determined by a panel consisting of one or more members of the tribunal, as assigned by the chair of the tribunal. 1994, c. 27, s. 56 (8).

Assignments

(2) In assigning members of the tribunal to a panel, the chair shall take into consideration any requirement imposed by another Act or a regulation that applies to the proceeding that the tribunal be representative of specific interests. 1997, c. 23, s. 13 (3).

Decision of panel

(3) The decision of a majority of the members of a panel, or their unanimous decision in the case of a two-member panel, is the tribunal's decision. 1994, c. 27, s. 56 (8).

Panel of one, reduced panel

Panel of one

4.2.1 (1) The chair of a tribunal may decide that a proceeding be heard by a panel of one person and assign the person to hear the proceeding unless there is a statutory requirement in another Act that the proceeding be heard by a panel of more than one person.

Reduction in number of panel members

(2) Where there is a statutory requirement in another Act that a proceeding be heard by a panel of a specified number of persons, the chair of the tribunal may assign to the panel one person or any lesser number of persons than the number specified in the other Act if all parties to the proceeding consent. 1999, c. 12, Sched. B, s. 16 (2).

Expiry of term

4.3 If the term of office of a member of a tribunal who has participated in a hearing expires before a decision is given, the term shall be deemed to continue, but only for the purpose of participating in the decision and for no other purpose. 1997, c. 23, s. 13 (4).

Incapacity, failure to complete hearing or make decision

Incapacity, panel of one

4.4 (1) In the case of a panel of one person, if the person dies or is or appears to be, for any other reason, unable to complete a hearing or to make a decision, the chair of the tribunal may, on a party's motion to the tribunal or on the chair's own initiative, assign another panel to complete the hearing or make a decision in the person's place. 2024, c. 28, Sched. 25, s. 1.

Incapacity, panel of more than one

(2) In the case of a panel of more than one person, if a member of the panel dies or is unable for any other reason to complete a hearing or to participate in a decision, the remaining member or members may complete the hearing or make a decision. 2024, c. 28, Sched. 25, s. 1.

Failure to meet reasonable time frame

(3) If the chair of the tribunal is of the opinion that a panel has failed to complete a hearing or make a decision within a reasonable time, the chair may specify a deadline by which the panel must complete the hearing or make a decision. 2024, c. 28, Sched. 25, s. 1.

Same

(4) For the purposes of subsection (3), the chair of the tribunal,

(a) shall consider,

(i) the guidelines established by the tribunal under section 16.2, and

(ii) the service standard policy developed by the tribunal under section 5 of the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, if applicable; and

(b) may consider any other matter that, in the chair's opinion, is relevant in the circumstances. 2024, c. 28, Sched. 25, s. 1.

Failure to meet specified deadline

(5) If a panel fails to meet a deadline specified under subsection (3), the chair of the tribunal may, on a party's motion to the tribunal or on the chair's own initiative, assign another panel to complete the hearing or make a decision in the first panel's place. 2024, c. 28, Sched. 25, s. 1.

If assigned to another panel

(6) The panel assigned under subsection (1) or (5) shall determine whether to,

(a) continue the hearing or make a decision on the basis of the existing evidentiary record, subject to subsection (8); or

(b) rehear the proceeding. 2024, c. 28, Sched. 25, s. 1.

Same, submissions

(7) If the panel permits, the parties to the proceeding may make submissions on the determination to be made by the panel under subsection (6). 2024, c. 28, Sched. 25, s. 1.

Same, powers

(8) Despite clause (6) (a), the panel may, during or after the hearing, recall a witness or require further evidence. 2024, c. 28, Sched. 25, s. 1.

Other Acts and regulations

(9) This section is subject to any other Act or regulation that applies to the proceeding. 2024, c. 28, Sched. 25, s. 1.

Decision not to process commencement of proceeding

4.5 (1) Subject to subsection (3), upon receiving documents relating to the commencement of a proceeding, a tribunal or its administrative staff may

decide not to process the documents relating to the commencement of the proceeding if,

(a) the documents are incomplete;

(b) the documents are received after the time required for commencing the proceeding has elapsed;

(c) the fee required for commencing the proceeding is not paid; or

(d) there is some other technical defect in the commencement of the proceeding.

Notice

(2) A tribunal or its administrative staff shall give the party who commences a proceeding notice of its decision under subsection (1) and shall set out in the notice the reasons for the decision and the requirements for resuming the processing of the documents.

Rules under s. 25.1

(3) A tribunal or its administrative staff shall not make a decision under subsection (1) unless the tribunal has made rules under section 25.1 respecting the making of such decisions and those rules shall set out,

(a) any of the grounds referred to in subsection (1) upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of a proceeding; and

(b) the requirements for the processing of the documents to be resumed.

Continuance of provisions in other statutes

(4) Despite section 32, nothing in this section shall prevent a tribunal or its administrative staff from deciding not to process documents relating to the commencement of a proceeding on grounds that differ from those referred to in subsection (1) or without complying with subsection (2) or (3) if the tribunal or its staff does so in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Dismissal of proceeding without hearing

4.6 (1) Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if,

(a) the proceeding is frivolous, vexatious or is commenced in bad faith;

(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; or

(c) some aspect of the statutory requirements for bringing the proceeding has not been met.

Notice

(2) Before dismissing a proceeding under this section, a tribunal shall give notice of its intention to dismiss the proceeding to,

(a) all parties to the proceeding if the proceeding is being dismissed for reasons referred to in clause (1) (b); or

(b) the party who commences the proceeding if the proceeding is being dismissed for any other reason.

Same

(3) The notice of intention to dismiss a proceeding shall set out the reasons for the dismissal and inform the parties of their right to make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Right to make submissions

(4) A party who receives a notice under subsection (2) may make written submissions to the tribunal with respect to the dismissal within the time specified in the notice.

Dismissal

(5) A tribunal shall not dismiss a proceeding under this section until it has given notice under subsection (2) and considered any submissions made under subsection (4).

Rules

(6) A tribunal shall not dismiss a proceeding under this section unless it has made rules under section 25.1 respecting the early dismissal of proceedings and those rules shall include,

(a) any of the grounds referred to in subsection (1) upon which a proceeding may be dismissed;

(b) the right of the parties who are entitled to receive notice under subsection (2) to make submissions with respect to the dismissal; and

(c) the time within which the submissions must be made.

Continuance of provisions in other statutes

(7) Despite section 32, nothing in this section shall prevent a tribunal from dismissing a proceeding on grounds other than those referred to in subsection (1) or without complying with subsections (2) to (6) if the tribunal dismisses the proceeding in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Classifying proceedings

4.7 A tribunal may make rules under section 25.1 classifying the types of proceedings that come before it and setting guidelines as to the procedural steps or processes (such as preliminary motions, pre-hearing conferences, alternative dispute resolution mechanisms, expedited hearings) that apply to each type of proceeding and the circumstances in which other procedures may apply. 1999, c. 12, Sched. B, s. 16 (3).

Alternative dispute resolution

4.8 (1) A tribunal may direct the parties to a proceeding to participate in an alternative dispute resolution mechanism for the purposes of resolving the proceeding or an issue arising in the proceeding if,

(a) it has made rules under section 25.1 respecting the use of alternative dispute resolution mechanisms; and

(b) all parties consent to participating in the alternative dispute resolution mechanism.

Definition

(2) In this section,

"alternative dispute resolution mechanism" includes mediation, conciliation, negotiation or any other means of facilitating the resolution of issues in dispute.

Rules

(3) A rule under section 25.1 respecting the use of alternative dispute resolution mechanisms shall include procedural guidelines to deal with the following:

1. The circumstances in which a settlement achieved by means of an alternative dispute resolution mechanism must be reviewed and approved by the tribunal.

2. Any requirement, statutory or otherwise, that there be an order by the tribunal.

Mandatory alternative dispute resolution

(4) A rule under subsection (3) may provide that participation in an alternative dispute resolution mechanism is mandatory or that it is mandatory in certain specified circumstances.

Person appointed to mediate, etc.

(5) A rule under subsection (3) may provide that a person appointed to mediate, conciliate, negotiate or help resolve a matter by means of an alternative dispute resolution mechanism be a member of the tribunal or a person independent of the tribunal. However, a member of the tribunal who is so appointed with respect to a matter in a proceeding shall not subsequently hear the matter if it comes before the tribunal unless the parties consent.

Continuance of provisions in other statutes

(6) Despite section 32, nothing in this section shall prevent a tribunal from directing parties to a proceeding to participate in an alternative dispute resolution mechanism even though the requirements of subsections (1) to (5) have not been met if the tribunal does so in accordance with the provisions of an Act that are in force on the day this section comes into force. 1999, c. 12, Sched. B, s. 16 (3).

Mediators, etc.: not compellable, notes not evidence

Mediators, etc., not compellable

4.9 (1) No person employed as a mediator, conciliator or negotiator or otherwise appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism shall be compelled to give testimony or produce documents in a proceeding before the tribunal or in a civil proceeding with respect to matters that come to his or her knowledge in the course of exercising his or her duties under this or any other Act.

Evidence in civil proceedings

(2) No notes or records kept by a mediator, conciliator or negotiator or by any other person appointed to facilitate the resolution of a matter before a tribunal by means of an alternative dispute resolution mechanism under this or any

other Act are admissible in a civil proceeding. 1999, c. 12, Sched. B, s. 16 (3).

Parties

5. The parties to a proceeding shall be the persons specified as parties by or under the statute under which the proceeding arises or, if not so specified, persons entitled by law to be parties to the proceeding. R.S.O. 1990, c. S.22, s. 5.

Written hearings

5.1 (1) A tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding. 1997, c. 23, s. 13 (6).

Exception

(2) The tribunal shall not hold a written hearing if a party satisfies the tribunal that there is good reason for not doing so.

Same

(2.1) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters. 1999, c. 12, Sched. B, s. 16 (4).

Documents

(3) In a written hearing, all the parties are entitled to receive every document that the tribunal receives in the proceeding. 1994, c. 27, s. 56 (10).

Electronic hearings

5.2 (1) A tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding. 1997, c. 23, s. 13 (7).

Exception

(2) The tribunal shall not hold an electronic hearing if a party satisfies the tribunal that holding an electronic rather than an oral hearing is likely to cause the party significant prejudice.

Same

(3) Subsection (2) does not apply if the only purpose of the hearing is to deal with procedural matters.

Participants to be able to hear one another

(4) In an electronic hearing, all the parties and the members of the tribunal participating in the hearing must be able to hear one another and any witnesses throughout the hearing. 1994, c. 27, s. 56 (10).

Different kinds of hearings in one proceeding

5.2.1 A tribunal may, in a proceeding, hold any combination of written, electronic and oral hearings. 1997, c. 23, s. 13 (8).

Pre-hearing conferences

5.3 (1) If the tribunal's rules made under section 25.1 deal with pre-hearing conferences, the tribunal may direct the parties to participate in a pre-hearing conference to consider,

(a) the settlement of any or all of the issues;

(b) the simplification of the issues;

(c) facts or evidence that may be agreed upon;

(d) the dates by which any steps in the proceeding are to be taken or begun;

(e) the estimated duration of the hearing; and

(f) any other matter that may assist in the just and most expeditious disposition of the proceeding. 1994, c. 27, s. 56 (11); 1997, c. 23, s. 13 (9).

Other Acts and regulations

(1.1) The tribunal's power to direct the parties to participate in a pre-hearing conference is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (10).

Who presides

(2) The chair of the tribunal may designate a member of the tribunal or any other person to preside at the pre-hearing conference.

Orders

(3) A member who presides at a pre-hearing conference may make such orders as he or she considers necessary or advisable with respect to the conduct of the proceeding, including adding parties.

Disqualification

(4) A member who presides at a pre-hearing conference at which the parties attempt to settle issues shall not preside at the hearing of the proceeding unless the parties consent. 1994, c. 27, s. 56 (11).

Application of s. 5.2

(5) Section 5.2 applies to a pre-hearing conference, with necessary modifications. 1997, c. 23, s. 13 (10).

Disclosure

5.4 (1) If the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may, at any stage of the proceeding before all hearings are complete, make orders for,

(a) the exchange of documents;

(b) the oral or written examination of a party;

(c) the exchange of witness statements and reports of expert witnesses;

(d) the provision of particulars;

(e) any other form of disclosure. 1994, c. 27, s. 56 (12); 1997, c. 23, s. 13 (11).

Other Acts and regulations

(1.1) The tribunal's power to make orders for disclosure is subject to any other Act or regulation that applies to the proceeding. 1997, c. 23, s. 13 (12).

Exception, privileged information

(2) Subsection (1) does not authorize the making of an order requiring disclosure of privileged information. 1994, c. 27, s. 56 (12).

Notice of hearing

6 (1) The parties to a proceeding shall be given reasonable notice of the hearing by the tribunal. R.S.O. 1990, c. S.22, s. 6 (1).

Statutory authority

(2) A notice of a hearing shall include a reference to the statutory authority under which the hearing will be held.

Oral hearing

(3) A notice of an oral hearing shall include,

(a) a statement of the time, place and purpose of the hearing; and

(b) a statement that if the party notified does not attend at the hearing, the tribunal may proceed in the party's absence and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Written hearing

(4) A notice of a written hearing shall include,

(a) a statement of the date and purpose of the hearing, and details about the manner in which the hearing will be held;

(b) a statement that the hearing shall not be held as a written hearing if the party satisfies the tribunal that there is good reason for not holding a written hearing (in which case the tribunal is required to hold it as an electronic or oral hearing) and an indication of the procedure to be followed for that purpose;

(c) a statement that if the party notified neither acts under clause (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13); 1997, c. 23, s. 13 (13); 1999, c. 12, Sched. B, s. 16 (5).

Electronic hearing

(5) A notice of an electronic hearing shall include,

(a) a statement of the time and purpose of the hearing, and details about the manner in which the hearing will be held;

(b) a statement that the only purpose of the hearing is to deal with procedural matters, if that is the case;

(c) if clause (b) does not apply, a statement that the party notified may, by satisfying the tribunal that holding the hearing as an electronic hearing is likely to cause the party significant prejudice, require the tribunal to hold the hearing as an oral hearing, and an indication of the procedure to be followed for that purpose; and

(d) a statement that if the party notified neither acts under clause (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party

will not be entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (13).

Effect of non-attendance at hearing after due notice

7 (1) Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing, the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding. R.S.O. 1990, c. S.22, s. 7; 1994, c. 27, s. 56 (14).

Same, written hearings

(2) Where notice of a written hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (4) (b) nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding.

Same, electronic hearings

(3) Where notice of an electronic hearing has been given to a party to a proceeding in accordance with this Act and the party neither acts under clause 6 (5) (c), if applicable, nor participates in the hearing in accordance with the notice, the tribunal may proceed without the party's participation and the party is not entitled to any further notice in the proceeding. 1994, c. 27, s. 56 (15).

Where character, etc., of a party is in issue

8. Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. R.S.O. 1990, c. S.22, s. 8.

Hearings to be public; maintenance of order

Hearings to be public, exceptions

9 (1) An oral hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing in the absence of the public. R.S.O. 1990, c. S.22, s. 9 (1); 1994, c. 27, s. 56 (16).

Written hearings

(1.1) In a written hearing, members of the public are entitled to reasonable access to the documents submitted, unless the tribunal is of the opinion that clause (1) (a) or (b) applies. 1994, c. 27, s. 56 (17).

Electronic hearings

(1.2) An electronic hearing shall be open to the public unless the tribunal is of the opinion that,

(a) it is not practical to hold the hearing in a manner that is open to the public; or

(b) clause (1) (a) or (b) applies. 1997, c. 23, s. 13 (14).

Maintenance of order at hearings

(2) A tribunal may make such orders or give such directions at an oral or electronic hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose. R.S.O. 1990, c. S.22, s. 9 (2); 1994, c. 27, s. 56 (18).

Proceedings involving similar questions

9.1 (1) If two or more proceedings before a tribunal involve the same or similar questions of fact, law or policy, the tribunal may,

(a) combine the proceedings or any part of them, with the consent of the parties;

(b) hear the proceedings at the same time, with the consent of the parties;

(c) hear the proceedings one immediately after the other; or

(d) stay one or more of the proceedings until after the determination of another one of them.

Exception

(2) Subsection (1) does not apply to proceedings held under section 21 of the *Ontario Land Tribunal Act, 2021*. 1994, c. 27, s. 56 (19); 2021, c. 4, Sched. 6, s. 91.

Same

(3) Clauses (1) (a) and (b) do not apply to a proceeding if,

(a) any other Act or regulation that applies to the proceeding requires that it be heard in private;

(b) the tribunal is of the opinion that clause 9 (1) (a) or (b) applies to the proceeding. 1994, c. 27, s. 56 (19); 1997, c. 23, s. 13 (15).

Conflict, consent requirements

(4) The consent requirements of clauses (1) (a) and (b) do not apply if another Act or a regulation that applies to the proceedings allows the tribunal to combine them or hear them at the same time without the consent of the parties. 1997, c. 23, s. 13 (16).

Use of same evidence

(5) If the parties to the second-named proceeding consent, the tribunal may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time under clause (1) (b). 1994, c. 27, s. 56 (19).

Right to representation

10 A party to a proceeding may be represented by a representative. 2006, c. 21, Sched. C, s. 134 (3).

Examination of witnesses

10.1 A party to a proceeding may, at an oral or electronic hearing,

(a) call and examine witnesses and present evidence and submissions; and

(b) conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues

in the proceeding. 1994, c. 27, s. 56 (20).

Rights of witnesses to representation

11 (1) A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal. 2006, c. 21, Sched. C, s. 134 (4).

Idem

(2) Where an oral hearing is closed to the public, the witness's representative is not entitled to be present except when that witness is giving evidence. R.S.O. 1990, c. S.22, s. 11 (2); 1994, c. 27, s. 56 (22); 2006, c. 21, Sched. C, s. 134 (5).

Summonses

12 (1) A tribunal may require any person, including a party, by summons,

(a) to give evidence on oath or affirmation at an oral or electronic hearing; and

(b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal,

relevant to the subject-matter of the proceeding and admissible at a hearing. R.S.O. 1990, c. S.22, s. 12 (1); 1994, c. 27, s. 56 (23).

Form and service of summons

(2) A summons issued under subsection (1) shall be in the prescribed form (in English or French) and,

(a) where the tribunal consists of one person, shall be signed by him or her;

(b) where the tribunal consists of more than one person, shall be signed by the chair of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under the statute constituting the tribunal. 1994, c. 27, s. 56 (24).

Same

(3) The summons shall be served personally on the person summoned. 1994, c. 27, s. 56 (24).

Fees and allowances

(3.1) The person summoned is entitled to receive the same fees or allowances for attending at or otherwise participating in the hearing as are paid to a person summoned to attend before the Superior Court of Justice. 1994, c. 27, s. 56 (24); 2006, c. 19, Sched. C, s. 1 (1).

Bench warrant

(4) A judge of the Superior Court of Justice may issue a warrant against a person if the judge is satisfied that,

(a) a summons was served on the person under this section;

(b) the person has failed to attend or to remain in attendance at the hearing (in the case of an oral hearing) or has failed otherwise to participate in the hearing (in the case of an electronic hearing) in accordance with the summons; and

(c) the person's attendance or participation is material to the ends of justice. 1994, c. 27, s. 56 (25); 2006, c. 19, Sched. C, s. 1 (1).

Same

(4.1) The warrant shall be in the prescribed form (in English or French), directed to any police officer, and shall require the person to be apprehended anywhere within Ontario, brought before the tribunal forthwith and,

(a) detained in custody as the judge may order until the person's presence as a witness is no longer required; or

(b) in the judge's discretion, released on a recognizance, with or without sureties, conditioned for attendance or participation to give evidence. 1994, c. 27, s. 56 (25).

Proof of service

(5) Service of a summons may be proved by affidavit in an application to have a warrant issued under subsection (4). 1994, c. 27, s. 56 (26).

Certificate of facts

(6) Where an application to have a warrant issued is made on behalf of a tribunal, the person constituting the tribunal or, if the tribunal consists of more than one person, the chair of the tribunal may certify to the judge the facts relied on to establish that the attendance or other participation of the

person summoned is material to the ends of justice, and the judge may accept the certificate as proof of the facts. 1994, c. 27, s. 56 (26).

Same

(7) Where the application is made by a party to the proceeding, the facts relied on to establish that the attendance or other participation of the person is material to the ends of justice may be proved by the party's affidavit. 1994, c. 27, s. 56 (26).

Contempt proceedings

13 (1) Where any person without lawful excuse,

(a) on being duly summoned under section 12 as a witness at a hearing makes default in attending at the hearing; or

(b) being in attendance as a witness at an oral hearing or otherwise participating as a witness at an electronic hearing, refuses to take an oath or to make an affirmation legally required by the tribunal to be taken or made, or to produce any document or thing in his or her power or control legally required by the tribunal to be produced by him or her or to answer any question to which the tribunal may legally require an answer; or

(c) does any other thing that would, if the tribunal had been a court of law having power to commit for contempt, have been contempt of that court,

the tribunal may, of its own motion or on the motion of a party to the proceeding, state a case to the Divisional Court setting out the facts and that court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of that person and after hearing any statement that may be offered in defence, punish or take steps for the punishment of that person in like manner as if he or she had been guilty of contempt of the court. R.S.O. 1990, c. S.22, s. 13; 1994, c. 27, s. 56 (27).

Same

(2) Subsection (1) also applies to a person who,

(a) having objected under clause 6 (4) (b) to a hearing being held as a written hearing, fails without lawful excuse to participate in the oral or electronic hearing of the matter; or

(b) being a party, fails without lawful excuse to attend a pre-hearing conference when so directed by the tribunal. 1997, c. 23, s. 13 (17).

Protection for witnesses

14 (1) A witness at an oral or electronic hearing shall be deemed to have objected to answer any question asked him or her upon the ground that the answer may tend to criminate him or her or may tend to establish his or her liability to civil proceedings at the instance of the Crown, or of any person, and no answer given by a witness at a hearing shall be used or be receivable in evidence against the witness in any trial or other proceeding against him or her thereafter taking place, other than a prosecution for perjury in giving such evidence. R.S.O. 1990, c. S.22, s. 14 (1); 1994, c. 27, s. 56 (28);. 2021, c. 25, Sched. 27, s. 2.

(2) REPEALED: 1994, c. 27, s. 56 (29).

Evidence

What is admissible in evidence at a hearing

15 (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

(a) any oral testimony; and

(b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

What is inadmissible in evidence at a hearing

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

(3) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

Copies

(4) Where a tribunal is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at a hearing.

Photocopies

(5) Where a document has been filed in evidence at a hearing, the tribunal may, or the person producing it or entitled to it may with the leave of the tribunal, cause the document to be photocopied and the tribunal may authorize the photocopy to be filed in evidence in the place of the document filed and release the document filed, or may furnish to the person producing it or the person entitled to it a photocopy of the document filed certified by a member of the tribunal.

Certified copy admissible in evidence

(6) A document purporting to be a copy of a document filed in evidence at a hearing, certified to be a copy thereof by a member of the tribunal, is admissible in evidence in proceedings in which the document is admissible as evidence of the document. R.S.O. 1990, c. S.22, s. 15.

Use of previously admitted evidence

15.1 (1) The tribunal may treat previously admitted evidence as if it had been admitted in a proceeding before the tribunal, if the parties to the proceeding consent. 1994, c. 27, s. 56 (30).

Definition

(2) In subsection (1),

"previously admitted evidence" means evidence that was admitted, before the hearing of the proceeding referred to in that subsection, in any other proceeding before a court or tribunal, whether in or outside Ontario.

Additional power

(3) This power conferred by this section is in addition to the tribunal's power to admit evidence under section 15. 1997, c. 23, s. 13 (18).

Witness panels

15.2 A tribunal may receive evidence from panels of witnesses composed of two or more persons, if the parties have first had an opportunity to make submissions in that regard. 1994, c. 27, s. 56 (31).

Notice of facts and opinions

16 A tribunal may, in making its decision in any proceeding,

(a) take notice of facts that may be judicially noticed; and

(b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge. R.S.O. 1990, c. S.22, s. 16.

Interim decisions and orders

16.1 (1) A tribunal may make interim decisions and orders.

Conditions

(2) A tribunal may impose conditions on an interim decision or order.

Reasons

(3) An interim decision or order need not be accompanied by reasons. 1994, c. 27, s. 56 (32).

Time frames

16.2 A tribunal shall establish and make publicly available guidelines setting out the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings. 1999, c. 12, Sched. B, s. 16 (6); 2024, c. 28, Sched. 25, s. 2.

Decision; interest

Decision

17 (1) A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party. R.S.O. 1990, c. S.22, s. 17; 1993, c. 27, Sched.

Interest

(2) A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated. 1994, c. 27, s. 56 (33).

Costs

17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of

another party's costs in a proceeding. 2006, c. 19, Sched. B, s. 21 (2).

Exception

(2) A tribunal shall not make an order to pay costs under this section unless,

(a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and

(b) the tribunal has made rules under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Amount of costs

(3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Rules

(4) A tribunal may make rules with respect to,

(a) the ordering of costs;

(b) the circumstances in which costs may be ordered; and

(c) the amount of costs or the manner in which the amount of costs is to be determined. 2006, c. 19, Sched. B, s. 21 (2).

Same

(5) Subsections 25.1 (3), (4), (5) and (6) apply with respect to rules made under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Continuance of provisions in other statutes

(6) Despite section 32, nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in, and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on February 14, 2000. 2006, c. 19, Sched. B, s. 21 (2).

Submissions must be in writing

(7) Despite sections 5.1, 5.2 and 5.2.1, submissions for a costs order, whether under subsection (1) or under an authority referred to in subsection (6), shall be made by way of written or electronic documents, unless a party satisfies

the tribunal that to do so is likely to cause the party significant prejudice. 2015, c. 23, s. 5.

(8), (9) REPEALED: 2015, c. 23, s. 5.

Notice of decision

18 (1) The tribunal shall send each party who participated in the proceeding, or the party's representative, a copy of its final decision or order, including the reasons if any have been given,

(a) by regular lettermail;

(b) by electronic transmission;

(c) by telephone transmission of a facsimile; or

(d) by some other method that allows proof of receipt, if the tribunal's rules made under section 25.1 deal with the matter. 1994, c. 27, s. 56 (34); 1997, c. 23, s. 13 (19); 2006, c. 21, Sched. C, s. 134 (6).

Use of mail

(2) If the copy is sent by regular lettermail, it shall be sent to the most recent addresses known to the tribunal and shall be deemed to be received by the party on the fifth day after the day it is mailed. 1994, c. 27, s. 56 (34).

Use of electronic or telephone transmission

(3) If the copy is sent by electronic transmission or by telephone transmission of a facsimile, it shall be deemed to be received on the day after it was sent, unless that day is a holiday, in which case the copy shall be deemed to be received on the next day that is not a holiday. 1994, c. 27, s. 56 (34).

Use of other method

(4) If the copy is sent by a method referred to in clause (1) (d), the tribunal's rules made under section 25.1 govern its deemed day of receipt. 1994, c. 27, s. 56 (34).

Failure to receive copy

(5) If a party that acts in good faith does not, through absence, accident, illness or other cause beyond the party's control, receive the copy until a later date than the deemed day of receipt, subsection (2), (3) or (4), as the case may be, does not apply. 1994, c. 27, s. 56 (34).

Enforcement of orders

19 (1) A certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such. 1994, c. 27, s. 56 (35); 2006, c. 19, Sched. C, s. 1 (1).

Notice of filing

(2) A party who files an order under subsection (1) shall notify the tribunal within 10 days after the filing. 1994, c. 27, s. 56 (35).

Order for payment of money

(3) On receiving a certified copy of a tribunal's order for the payment of money, the sheriff shall enforce the order as if it were an execution issued by the Superior Court of Justice. 1994, c. 27, s. 56 (35); 2006, c. 19, Sched. C, s. 1 (1).

Record of proceeding

20 A tribunal shall compile a record of any proceeding in which a hearing has been held which shall include,

(a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;

(b) the notice of any hearing;

(c) any interlocutory orders made by the tribunal;

(d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;

(e) the transcript, if any, of the oral evidence given at the hearing; and

(f) the decision of the tribunal and the reasons therefor, where reasons have been given. R.S.O. 1990, c. S.22, s. 20.

Adjournments

21 A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. R.S.O. 1990, c. S.22, s. 21.

Correction of errors

21.1 A tribunal may at any time correct a typographical error, error of calculation or similar error made in its decision or order. 1994, c. 27, s. 56 (36).

Power to review

21.2 (1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order. 1997, c. 23, s. 13 (20).

Time for review

(2) The review shall take place within a reasonable time after the decision or order is made.

Conflict

(3) In the event of a conflict between this section and any other Act, the other Act prevails. 1994, c. 27, s. 56 (36).

Administration of oaths

22 A member of a tribunal has power to administer oaths and affirmations for the purpose of any of its proceedings and the tribunal may require evidence before it to be given under oath or affirmation. R.S.O. 1990, c. S.22, s. 22.

Powers re control of proceedings

Abuse of processes

23 (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes. R.S.O. 1990, c. S.22, s. 23 (1).

Limitation on examination

(2) A tribunal may reasonably limit further examination or cross-examination of a witness where it is satisfied that the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding. 1994, c. 27, s. 56 (37).

Exclusion of representatives

(3) A tribunal may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser. 2006, c. 21, Sched. C, s. 134 (7).

Notice, etc.

24 (1) Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous or for any other reason, it is impracticable,

(a) to give notice of the hearing; or

(b) to send its decision and the material mentioned in section 18,

to all or any of the parties individually, the tribunal may, instead of doing so, cause reasonable notice of the hearing or of its decision to be given to such parties by public advertisement or otherwise as the tribunal may direct.

Contents of notice

(2) A notice of a decision given by a tribunal under clause (1) (b) shall inform the parties of the place where copies of the decision and the reasons therefor, if reasons were given, may be obtained. R.S.O. 1990, c. S.22, s. 24.

Appeal operates as stay, exception

25. (1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

(a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or

(b) the tribunal or the court or other appellate body orders otherwise. 1997, c. 23, s. 13 (21).

Idem

(2) An application for judicial review under the *Judicial Review Procedure Act*, or the bringing of proceedings specified in subsection 2 (1) of that Act is not an appeal within the meaning of subsection (1). R.S.O. 1990, c. S.22, s. 25 (2).

Control of process

25.0.1 A tribunal has the power to determine its own procedures and practices and may for that purpose,

(a) make orders with respect to the procedures and practices that apply in any particular proceeding; and

(b) establish rules under section 25.1. 1999, c. 12, Sched. B, s. 16 (8).

Rules

25.1 (1) A tribunal may make rules governing the practice and procedure before it. 1994, c. 27, s. 56 (38).

Application

(2) The rules may be of general or particular application. 1994, c. 27, s. 56 (38).

Consistency with Acts

(3) The rules shall be consistent with this Act and with the other Acts to which they relate. 1994, c. 27, s. 56 (38).

Public access

(4) The tribunal shall make the rules available to the public in English and in French. 1994, c. 27, s. 56 (38).

Legislation Act, 2006, Part III

(5) Rules adopted under this section are not regulations as defined in Part III (Regulations) of the *Legislation Act, 2006*. 1994, c. 27, s. 56 (38); 2006, c. 21, Sched. F, s. 136 (1).

Additional power

(6) The power conferred by this section is in addition to any power to adopt rules that the tribunal may have under another Act. 1994, c. 27, s. 56 (38).

Regulations

26 The Lieutenant Governor in Council may make regulations prescribing forms for the purpose of section 12. 1994, c. 27, s. 56 (41).

Rules, etc., available to public

27 A tribunal shall make any rules or guidelines established under this or any other Act available for examination by the public. 1999, c. 12, Sched. B, s. 16 (9).

Substantial compliance

28 Substantial compliance with requirements respecting the content of forms, notices or documents under this Act or any rule made under this or any other Act is sufficient. 1999, c. 12, Sched. B, s. 16 (9).

Prohibition on photographs, recordings, dissemination

29 (1) No person shall,

(a) take or attempt to take a photograph, audio or video recording or other record capable of producing or transmitting visual or aural representations by electronic means or otherwise,

(i) at a hearing,

(ii) of any person entering or leaving the room in which a hearing is to be or has been convened, or

(iii) of any person in the building in which a hearing is to be or has been convened if there is reasonable ground for believing that the person is there for the purpose of attending or leaving the hearing, other than in an area of the building designated by the tribunal for the purpose and with the person's consent;

(b) publish, broadcast, reproduce or otherwise disseminate a photograph, recording or record taken in contravention of clause (a); or

(c) broadcast, reproduce or otherwise disseminate an audio recording described in clause (2) (b). 2021, c. 25, Sched. 27, s. 3.

Non-application

(2) Subsection (1) does not apply with respect to,

(a) the unobtrusive making of notes or sketches of events at a hearing by a person;

(b) the making of an audio recording at a hearing, unobtrusively and in a manner authorized by the tribunal, by a representative, a party acting on

their own behalf or a journalist, for the sole purpose of supplementing or replacing notes; or

(c) subject to the authorization of the tribunal, any act referred to in subsection (1),

(i) if it is required for the presentation of evidence, the making of a record or any other purpose of the hearing,

(ii) with the consent of the parties and witnesses, or

(iii) in connection with any ceremonial proceeding. 2021, c. 25, Sched. 27, s. 3.

Offence and penalty

(3) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than $25,000. 2021, c. 25, Sched. 27, s. 3.

30, 31 REPEALED: 1994, c. 27, s. 56 (40).

Conflict

32 Unless it is expressly provided in any other Act that its provisions and regulations, rules or by-laws made under it apply despite anything in this Act, the provisions of this Act prevail over the provisions of such other Act and over regulations, rules or by-laws made under such other Act which conflict therewith. R.S.O. 1990, c. S.22, s. 32; 1994, c. 27, s. 56 (42).

33, 34 REPEALED: 1994, c. 27, s. 56 (43).

FORMS 1, 2 REPEALED: 1994, C. 27, S. 56 (44).

TAB 36

CanLII

Licence Appeal Tribunal Act, 1999, SO 1999, c 12, Sch G

Current version: in force since 2025-01-01	
Link to the latest version:	https://canlii.ca/t/2zc
Stable link to this version:	https://canlii.ca/t/56f9t
Citation to this version:	Licence Appeal Tribunal Act, 1999, SO 1999, c 12, Sch G, <https://canlii.ca/t/56f9t> retrieved on 2026-01-18
Currency:	Last updated from the e-Laws site on 2026-01-12

Licence Appeal Tribunal Act, 1999

S.O. 1999, CHAPTER 12
SCHEDULE G

Consolidation Period: From January 1, 2025 to the e-Laws currency date.

Last amendment: 2023, c. 23, Sched. 1, s. 114.

Definition

1 In this Act,

"Tribunal" means the Licence Appeal Tribunal. 1999, c. 12, Sched. G, s. 1.

Tribunal established

2 (1) There is hereby established a tribunal to be known in English as the Licence Appeal Tribunal and in French as Tribunal d'appel en matière de permis. 1999, c. 12, Sched. G, s. 2 (1).

Members

(2) The Tribunal shall consist of not fewer than three members. 1999, c. 12, Sched. G, s. 2 (2).

Appointment

(3) The Lieutenant Governor in Council shall appoint the members and designate the term of their appointment. 1999, c. 12, Sched. G, s. 2 (3).

Remuneration and expenses

(4) Each member of the Tribunal, other than a full-time member, shall receive the remuneration that the Lieutenant Governor in Council determines and reimbursement for the member's reasonable and necessary expenses incurred in attending meetings and in transacting the business of the Tribunal. 1999, c. 12, Sched. G, s. 2 (4).

Duties and powers

3 (1) The Tribunal shall hold the hearings and perform the other duties that are assigned to it by or under any Act or regulation. 1999, c. 12, Sched. G, s. 3 (1).

Powers

(2) Except as limited by this Act, the Tribunal has all the powers that are necessary or expedient for carrying out its duties. 1999, c. 12, Sched. G, s. 3 (2).

Quorum

4 (1) One member of the Tribunal constitutes a quorum and may exercise all the powers of the Tribunal. 1999, c. 12, Sched. G, s. 4 (1).

Chair and vice-chair

(2) The Lieutenant Governor in Council shall designate one of the members as chair and may designate one or more other members as vice-chairs of the Tribunal. 1999, c. 12, Sched. G, s. 4 (2).

Duties of chair

(3) The chair shall have general supervision and direction over the conduct of the affairs of the Tribunal and, subject to subsection (4), shall arrange the sittings of the Tribunal and assign members to panels to conduct hearings as circumstances require. 1999, c. 12, Sched. G, s. 4 (3); 2011, c. 1, Sched. 5, s. 5 (1).

Composition of panel

(4) The panel that conducts a hearing shall include a member of the Tribunal who is a legally qualified medical practitioner if the hearing involves,

(a) an appeal of a suspension of a driver's licence under section 50 of the *Highway Traffic Act*; and

(b) the appeal involves the medical condition or fitness to drive of the holder of the licence. 1999, c. 12, Sched. G, s. 4 (4).

Chair of panel

(5) The chair shall appoint a chair for each panel from the members sitting on the panel. 1999, c. 12, Sched. G, s. 4 (5).

Resolving deadlock

(6) If a panel of the Tribunal consists of two members and they do not agree on a decision, the decision of the chair of the panel shall be the decision of the panel. 1999, c. 12, Sched. G, s. 4 (6).

(7) Repealed: 2011, c. 1, Sched. 5, s. 5 (2).

No personal liability

5 No action or other proceeding for damages shall be instituted against any member of the Tribunal or anyone appointed to the service of the Tribunal for any act done in good faith in the execution or intended execution of the person's duty or for any alleged neglect or default in the execution in good faith of the person's duty. 1999, c. 12, Sched. G, s. 5.

Hearings re liquor, cannabis or gaming

5.1 (1) This section applies to hearings held by the Tribunal under section 14 of the *Alcohol and Gaming Commission of Ontario Act, 2019* or under the *Cannabis Licence Act, 2018*, the *Gaming Control Act, 1992*, the *Horse Racing Licence Act, 2015*, the *Liquor Licence and Control Act, 2019* or the *Vintners Quality Alliance Act, 1999*. 2018, c. 12, Sched. 2, s. 54 (1); 2019, c. 15, Sched. 1, s. 23 (1); 2019, c. 15, Sched. 22, s. 97 (1).

Parties

(2) The Registrar under the *Alcohol and Gaming Commission of Ontario Act, 2019*, the person who required the hearing and the other persons that the Tribunal specifies are parties to the hearing. 2015, c. 38, Sched. 9, s. 46 (2); 2018, c. 12, Sched. 2, s. 54 (2); 2019, c. 15, Sched. 1, s. 23 (2).

Notice

(3) The Tribunal shall give notice of the hearing to the parties in the manner it considers appropriate. 2011, c. 1, Sched. 1, s. 5 (1).

Jurisdiction

(4) The Tribunal has jurisdiction to determine all questions of fact or law that arise in matters before it. 2011, c. 1, Sched. 1, s. 5 (1).

Stay

(5) An order of the Tribunal takes effect immediately unless the order provides otherwise but if section 11 allows for an appeal to the Divisional Court and such an appeal is made, that court may grant a stay of the order until the appeal has been disposed of. 2011, c. 1, Sched. 1, s. 5 (1).

Rules of Tribunal

6 (1) The Tribunal may make rules establishing procedures for hearings held by the Tribunal and the rights of parties to the hearings including,

(a) rules requiring that, despite any other Act, parties shall submit disagreements to mechanisms of alternate dispute resolution that are set out in the rules before they are entitled to a hearing before the Tribunal on the subject matter of the disagreement; and

(b) rules applicable if a member of the Tribunal conducting a hearing is unable to continue to conduct the hearing for any reason. 1999, c. 12, Sched. G, s. 6 (1); 2011, c. 1, Sched. 1, s. 5 (2).

Continuation of hearing

(2) A rule made under clause (1) (b) may provide for the continuation or termination of the hearing, with or without the consent of the parties, or the commencement of a fresh hearing by a panel differently composed if the initial hearing is terminated. 1999, c. 12, Sched. G, s. 6 (2).

Recording of evidence

(3) The Tribunal may make rules providing that the oral evidence given before the Tribunal at a hearing may be recorded if a party to the hearing so requests and pays the fee established by the Tribunal for that purpose. 1999, c. 12, Sched. G, s. 6 (3).

Special application

(4) A rule made under this section may be general or specific in its application and may apply differently to different hearings. 1999, c. 12, Sched. G, s. 6 (4).

Not regulations

(5) A rule made under this section shall not be deemed to be a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*. 1999, c. 12, Sched. G, s. 6 (5); 2006, c. 21, Sched. F, s. 136 (1).

Conflict

(6) A rule made under this section does not prevail over any provision of this or any other Act, or a regulation made under this or any other Act, that sets out requirements for procedures for hearings held by the Tribunal or rights of parties to the hearings. 1999, c. 12, Sched. G, s. 6 (6).

Extension of time

7 Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time. 1999, c. 12, Sched. G, s. 7.

Frivolous or vexatious application

8 If, on the application of a party to a hearing before the Tribunal with notice to the other parties, the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing

or may terminate the hearing at any time and make an order of costs as it considers appropriate in the circumstances. 1999, c. 12, Sched. G, s. 8.

Fees and charges

9 Subject to the approval of the Minister responsible for the administration of this Act, the Tribunal may establish fees or other charges to be paid by parties to hearings before the Tribunal. 1999, c. 12, Sched. G, s. 9.

Service of decisions and orders

10 The Tribunal shall send a copy of its final decision or order, including any reasons, to each party to a hearing, or to the person who represented the party. 2011, c. 1, Sched. 5, s. 5 (3).

Appeal

11 (1) Subject to subsections (2) to (6), a party to a proceeding before the Tribunal relating to a matter under any of the following Acts may appeal from its decision or order to the Divisional Court in accordance with the rules of court:

Bailiffs Act

Board of Funeral Services Act

Building Code Act, 1992

Cannabis Licence Act, 2018

Collection and Debt Settlement Services Act

Combative Sports Act, 2019

Condominium Management Services Act, 2015

Consumer Protection Act, 2002

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 11 (1) of the Act is amended by striking out "*Consumer Protection Act, 2002*" and substituting "*Consumer Protection Act, 2023*". (See: 2023, c. 23 Sched. 1, s. 114)

Consumer Reporting Act

Discriminatory Business Practices Act

Funeral, Burial and Cremation Services Act, 2002

Gaming Control Act, 1992

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 11 (1) of the Act is amended by adding the following: (See: 2017, c. 5, Sched. 1, s. 79)

Home Inspection Act, 2017

Horse Racing Licence Act, 2015

Insurance Act

Liquor Licence and Control Act, 2019

Motor Vehicle Dealers Act, 2002

New Home Construction Licensing Act, 2017

Ontario Career Colleges Act, 2005

Ontario New Home Warranties Plan Act

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 11 (1) of the Act is amended by striking out "*Ontario New Home Warranties Plan Act*". (See: 2017, c. 33, Sched. 2, s. 78 (2))

Payday Loans Act, 2008

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 11 (1) of the *Act* is amended by adding the following: (See: 2017, c. 33, Sched. 2, s. 78 (1))

Protection for Owners and Purchasers of New Homes Act, 2017

Trust in Real Estate Services Act, 2002

Ticket Sales Act, 2017

Towing and Storage Safety and Enforcement Act, 2021

Travel Industry Act, 2002

Upholstered and Stuffed Articles Act

Vintners Quality Alliance Act, 1999

1999, c. 12, Sched. G, s. 11; 2002, c. 33, s. 143; 2004, c. 19, s. 14; 2005, c. 17, s. 49; 2005, c. 28, Sched. L, s. 59; 2005, c. 34, s. 55; 2006, c. 29, s. 63; 2008, c. 9, s. 80; 2011, c. 1, Sched. 1, s. 5 (3, 4); 2013, c. 13, Sched. 1, s. 15; 2014, c. 9, Sched. 5, s. 5 (1, 2); 2015, c. 38, Sched. 9, s. 46 (3); 2015, c. 38, Sched. 13, s. 2 (1); 2015, c. 28, Sched. 2, s. 81; 2017, c. 33, Sched. 1, s. 89; 2017, c. 33, Sched. 3, s. 38; 2018, c. 12, Sched. 2, s. 54 (3); 2019, c. 7, Sched. 9, s. 52; 2019, c. 14, Sched. 10, s. 9; 2019, c. 15, Sched. 22, s. 97 (2); 2020, c. 1, s. 34; 2020, c. 36, Sched. 12, s. 21; 2022, c. 2, Sched. 8, s. 1; 2023, c. 9, Sched. 29, s. 12.

Certain appeals

(2) Subsections (3) to (5) apply to appeals of decisions made in respect of proceedings under the *Cannabis Licence Act, 2018*, the *Gaming Control Act, 1992*, the *Horse Racing Licence Act, 2015*, the *Liquor Licence and Control Act, 2019* or the *Vintners Quality Alliance Act, 1999*. 2018, c. 12, Sched. 2, s. 54 (4); 2019, c. 15, Sched. 22, s. 97 (3).

Question of law only

(3) An appeal may be made on a question of law only. 2011, c. 1, Sched. 1, s. 5 (5).

Registrar a party

(4) The Registrar under the *Alcohol and Gaming Commission of Ontario Act, 2019* is a party to the appeal. 2018, c. 12, Sched. 2, s. 54 (4); 2019, c. 15, Sched. 1, s. 23 (3).

Right to be heard

(5) The Minister responsible for administration of the Act under which the decision that is the subject of the appeal was made is entitled to be heard, by counsel or otherwise, on the appeal. 2018, c. 12, Sched. 2, s. 54 (4).

Insurance Act appeals — question of law only

(6) An appeal from a decision of the Tribunal relating to a matter under the *Insurance Act* may be made on a question of law only. 2014, c. 9, Sched. 5, s. 5 (3).

Regulations

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

(a) prescribing rules of practice and procedure for proceedings before the Tribunal with respect to appeals to the Tribunal under the *Highway Traffic Act*;

(b) governing transitional matters relating to hearings of matters under the *Racing Commission Act, 2000*, as a result of the coming into force of the *Horse Racing Licence Act, 2015*;

(c), (d) Repealed: 2015, c. 38, Sched. 9, s. 46 (6);

(e) governing transitional matters relating to disputes in respect of statutory accident benefits as defined in subsection 224 (1) of the *Insurance Act* as a result of the coming into force of section 14 of Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*;

(f) REPEALED: 2019, c. 15, Sched. 22, s. 97 (4).

2011, c. 1, Sched. 1, s. 5 (6); 2014, c. 9, Sched. 5, s. 6; 2015, c. 38, Sched. 9, s. 46 (6); 2015, c. 38, Sched. 13, s. 3; 2019, c. 15, Sched. 22, s. 97 (4).

Scope of regulations

(2) The prescribed rules may be of general or particular application. 1999, c. 12, Sched. G, s. 12 (2).

Conflict

(3) If the prescribed rules conflict with the *Statutory Powers Procedure Act* or any other Act or rules made under that Act or any other Act, the prescribed rules prevail. 1999, c. 12, Sched. G, s. 12 (3).

13-36 OMITTED (AMENDS OR REPEALS OTHER ACTS). 1999, c. 12, Sched. G, ss. 13-36.

37 OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1999, c. 12, Sched. G, s. 37.

38 OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1999, c. 12, Sched. G, s. 38.

TAB 37

CanLII

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, SO 2009, c 33, Sch 5

Current version: in force since 2019-05-01

Link to the latest version: https://canlii.ca/t/8mns

Stable link to this version: https://canlii.ca/t/53ktg

Citation to this version: Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, SO 2009, c 33, Sch 5, <https://canlii.ca/t/53ktg> retrieved on 2026-01-18

Former title: Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

Currency: Last updated from the e-Laws site on 2026-01-12

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

S.O. 2009, CHAPTER 33
SCHEDULE 5

Consolidation Period: From May 1, 2019 to the e-Laws currency date.

Last amendment: 2018, c. 17, Sched. 35, s. 16.

PURPOSE AND INTERPRETATION

Purpose

1 The purpose of this Act is to ensure that adjudicative tribunals are accountable, transparent and efficient in their operations while remaining independent in their decision-making. 2009, c. 33, Sched. 5, s. 1.

Definitions

2 In this Act,

"adjudicative tribunal" means an agency, board, commission, corporation or other entity that is prescribed; ("tribunal décisionnel")

"governance accountability documents" means the memorandum of understanding, business plan and annual report required by sections 11, 12 and 13, respectively; ("documents de responsabilisation en matière de gouvernance")

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

"public accountability documents" means the mandate and mission statement, consultation policy, service standard policy, ethics plan and member accountability framework required by sections 3, 4, 5, 6 and 7, respectively; ("documents de responsabilisation à l'égard du public")

"responsible minister", in relation to an adjudicative tribunal, means the minister of the Crown who is responsible to the Assembly for the tribunal. ("ministre responsable") 2009, c. 33, Sched. 5, s. 2.

PUBLIC ACCOUNTABILITY DOCUMENTS

Mandate and mission statement

3 (1) Every adjudicative tribunal shall develop a mandate and mission statement. 2009, c. 33, Sched. 5, s. 3 (1).

Contents

(2) The mandate and mission statement must contain,

(a) a statement of the tribunal's legislative mandate, with reference to the Act that establishes its mandate and to any Act or Acts that add to its mandate;

(b) the tribunal's mission statement; and

(c) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 3 (2).

Approval

(3) The mandate and mission statement must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 3 (3).

Consultation policy

4 (1) Every adjudicative tribunal shall develop a consultation policy. 2009, c. 33, Sched. 5, s. 4 (1).

Contents

(2) The consultation policy must describe whether and how the tribunal will consult with the public when it is considering changes to its rules or policies, including consultation with any persons, entities or groups of persons or entities whose interests, in the opinion of the tribunal's chair, would be affected by those changes. 2009, c. 33, Sched. 5, s. 4 (2).

Same

(3) The consultation policy must contain any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 4 (3).

Approval

(4) The consultation policy must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 4 (4).

Service standard policy

5 (1) Every adjudicative tribunal shall develop a service standard policy. 2009, c. 33, Sched. 5, s. 5 (1).

Contents

(2) The service standard policy must contain,

(a) a statement of the standards of service that the tribunal intends to provide;

(b) a process for making, reviewing and responding to complaints about the service provided by the tribunal; and

(c) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 5 (2).

Approval

(3) The service standard policy must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 5 (3).

Relationship to other remedies

(4) Nothing in the service standard policy shall be interpreted as affecting,

(a) a process or remedy available under the *Ombudsman Act*;

(b) a right of appeal from decisions of the tribunal available under any Act; or

(c) a right to bring an application for judicial review. 2009, c. 33, Sched. 5, s. 5 (4).

Ethics plan

6 (1) Every adjudicative tribunal shall develop an ethics plan. 2009, c. 33, Sched. 5, s. 6 (1).

Contents

(2) The contents of the ethics plan shall be prescribed and must also include any matter specified in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 6 (2).

Approval

(3) The ethics plan must be approved by the Integrity Commissioner appointed under the *Public Service of Ontario Act, 2006*. 2009, c. 33, Sched. 5, s. 6 (3); 2018, c. 17, Sched. 35, s. 16.

Conflict with *Public Service of Ontario Act, 2006*

(4) In the event of any conflict between an adjudicative tribunal's ethics plan and the conflict of interest rules made under the *Public Service of Ontario Act, 2006* that apply to the tribunal, the conflict of interest rules prevail. 2009, c. 33, Sched. 5, s. 6 (4).

Member accountability framework

7 (1) Every adjudicative tribunal shall develop a member accountability framework. 2009, c. 33, Sched. 5, s. 7 (1).

Contents

(2) The member accountability framework must contain,

(a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;

(b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;

(c) a code of conduct for the members of the tribunal; and

(d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 7 (2).

Approval

(3) The member accountability framework must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 7 (3).

Publication, Amendment and Review of Public Accountability Documents

Publication of public accountability documents

8 Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public. 2009, c. 33, Sched. 5, s. 8.

Amendments to public accountability documents

9 An adjudicative tribunal may amend its public accountability documents, and the person required to approve the original document is also required to approve any amendment to the document. 2009, c. 33, Sched. 5, s. 9.

Review of public accountability documents

10 Every adjudicative tribunal shall review its public accountability documents to determine whether they require amendment every three years after their initial publication. 2009, c. 33, Sched. 5, s. 10.

Governance Accountability Documents

Memorandum of understanding

11 (1) Every adjudicative tribunal shall enter into a memorandum of understanding with its responsible minister. 2009, c. 33, Sched. 5, s. 11 (1).

Contents

(2) The memorandum of understanding must address,

(a) the financial, staffing and administrative arrangements for the tribunal;

(b) the accountability relationships of the tribunal, including its duty to account to its responsible minister;

(c) the recruitment, orientation and training of the tribunal's members;

(d) the committee structure of the tribunal, if any;

(e) the tribunal's planning and reporting requirements; and

(f) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 11 (2).

Expiry

(3) The memorandum of understanding expires five years after the day it is entered into, and may be renewed before that day for another five years. 2009, c. 33, Sched. 5, s. 11 (3).

Review

(4) The tribunal and its responsible minister shall review the memorandum of understanding after there is a change in the responsible minister or the chair of the tribunal, and, in any event, at least once before it expires. 2009, c. 33, Sched. 5, s. 11 (4).

Continuation of expired memorandum

(5) A memorandum of understanding that has expired continues in effect, despite its expiry, until it is renewed or replaced. 2009, c. 33, Sched. 5, s. 11 (5).

Publication

(6) The tribunal's responsible minister shall make the memorandum of understanding available to the public. 2009, c. 33, Sched. 5, s. 11 (6).

Transition

(7) An adjudicative tribunal and its responsible minister may agree that a memorandum of understanding entered into by them before the day that subsection (1) becomes applicable to the tribunal and that is still in effect on that day is a memorandum of understanding entered into by them on the day subsection (1) becomes applicable to the tribunal for the purposes of this section. 2009, c. 33, Sched. 5, s. 11 (7).

Business plan

12 (1) Every adjudicative tribunal shall develop a business plan for a prescribed period of time. 2009, c. 33, Sched. 5, s. 12 (1).

Contents

(2) The contents of the business plan shall be prescribed and must also include any matter specified in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 12 (2).

Approval

(3) The business plan must be approved by the tribunal's responsible minister. 2009, c. 33, Sched. 5, s. 12 (3).

Publication

(4) The tribunal shall make the business plan available to the public. 2009, c. 33, Sched. 5, s. 12 (4).

Annual report

13 (1) Every adjudicative tribunal shall prepare an annual report, provide it to the responsible minister no later than 90 days after the end of the tribunal's fiscal year and make it available to the public. 2017, c. 34, Sched. 46, s. 1 (1).

Same

(2) The tribunal shall comply with such directives as may be issued by the Management Board of Cabinet with respect to,

(a) the form and content of the annual report; and

(b) when and how to make it available to the public. 2017, c. 34, Sched. 46, s. 1 (1).

Same

(3) The tribunal shall include such additional content in the annual report as the responsible minister may require. 2017, c. 34, Sched. 46, s. 1 (1).

Tabling of annual report

13.1 The responsible minister shall table each adjudicative tribunal's annual report in the Assembly no later than 30 days after determining that the annual report meets the requirements of section 13 and shall comply with such directives as may be issued by the Management Board of Cabinet with respect to when and how to make that determination. 2017, c. 34, Sched. 46, s. 1 (1).

This Act prevails re annual reports

13.2 In the event of any conflict between section 13 or 13.1 and a provision of another Act or a regulation respecting an adjudicative tribunal's annual report, section 13 or 13.1 prevails. 2017, c. 34, Sched. 46, s. 1 (1).

Appointment to Adjudicative Tribunals

Adjudicative tribunal members to be selected by competitive, merit-based process

14 (1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:

1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
2. Aptitude for impartial adjudication.
3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules. 2009, c. 33, Sched. 5, s. 14 (1).

Tribunal-specific qualifications

(2) If a member of an adjudicative tribunal is required by or under any other Act to possess specific qualifications, a person shall not be appointed to the tribunal unless he or she possesses those qualifications. 2009, c. 33, Sched. 5, s. 14 (2).

Publication

(3) The responsible minister of an adjudicative tribunal shall make public the recruitment process to select one or more persons to be appointed to the tribunal and in doing so shall specify,

(a) the steps intended to be taken in the recruitment process; and

(b) the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed. 2009, c. 33, Sched. 5, s. 14 (3).

Chair to recommend appointments, reappointments

(4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed. 2009, c. 33, Sched. 5, s. 14 (4).

Conflict with other Acts, regulations

(5) In the event of any conflict between this section and a provision of another Act or of a regulation made under another Act respecting the appointment of members of an adjudicative tribunal, the provision of the other Act or regulation prevails. 2009, c. 33, Sched. 5, s. 14 (5).

Designation of clusters

15 The Lieutenant Governor in Council may by regulation designate two or more adjudicative tribunals as a cluster if, in the opinion of the Lieutenant Governor in Council, the matters that the tribunals deal with are such that they can operate more effectively and efficiently as part of a cluster than alone. 2009, c. 33, Sched. 5, s. 15.

Governance structure of clusters

Executive chair

16 (1) The Lieutenant Governor in Council may appoint an executive chair to be responsible for all of the adjudicative tribunals included in a cluster. 2009, c. 33, Sched. 5, s. 16 (1).

Associate chairs

(2) The Lieutenant Governor in Council may appoint an associate chair for each adjudicative tribunal that is included in a cluster. 2009, c. 33, Sched. 5, s. 16 (2).

Alternate executive chairs

(3) The Lieutenant Governor in Council may appoint one or more of the associate chairs as alternate executive chairs of the cluster, and an alternate executive chair shall act in the place of the executive chair if the executive chair is unable to act or if the position of executive chair is vacant. 2009, c. 33, Sched. 5, s. 16 (3).

Vice-chairs

(4) The Lieutenant Governor in Council may appoint one or more vice-chairs for each adjudicative tribunal that is included in a cluster, and a vice-chair shall act in the place of the tribunal's associate chair if the associate chair is unable to act or if the position of associate chair is vacant. 2009, c. 33, Sched. 5, s. 16 (4).

Chairs must be members of tribunals

(5) The executive chair and each alternate executive chair must also be members of each of the adjudicative tribunals in the cluster and the associate chair and each vice-chair must also be members of the tribunal to which they are appointed as associate chair and vice-chair. 2009, c. 33, Sched. 5, s. 16 (5).

Powers, duties, etc., of executive chair

17 (1) The executive chair shall have the powers, duties and functions assigned to the chair of each adjudicative tribunal that is included in the cluster by this or any other Act or by any regulation, order-in-council or ministerial or Management Board of Cabinet directive. 2009, c. 33, Sched. 5, s. 17 (1).

Delegation

(2) The executive chair may delegate to an associate chair or vice-chair of an adjudicative tribunal that is included in the cluster any power, duty or function, except a power, duty or function he or she may have as an ethics executive under the *Public Service of Ontario Act, 2006*. 2009, c. 33, Sched. 5, s. 17 (2).

Protection from liability

(3) The executive chair, alternate executive chair and associate chair of an adjudicative tribunal that is included in a cluster shall be entitled to the same protection from liability as the chair of the tribunal. 2009, c. 33, Sched. 5, s. 17 (3).

Same

(4) The vice-chairs and members of an adjudicative tribunal that is included in a cluster shall be entitled to the same protection from liability as the members of the tribunal. 2009, c. 33, Sched. 5, s. 17 (4).

Crown liability

(5) Any provision in another Act that addresses the Crown's liability for the actions or omissions of an adjudicative tribunal that is included in a cluster or of a chair, vice-chair or member of an adjudicative tribunal that is included in a cluster applies with necessary modifications to the adjudicative tribunal. 2009, c. 33, Sched. 5, s. 17 (5).

References to chair in other Acts, etc.

(6) Except as provided in a regulation made under this Act, any reference in this or any other Act or a regulation to the chair of an adjudicative tribunal that is included in a cluster shall be read as a reference to the tribunal's executive chair. 2009, c. 33, Sched. 5, s. 17 (6).

Joint accountability documents

18 (1) All the adjudicative tribunals included in a cluster shall jointly develop, prepare or enter into, as the case may be, the public accountability documents and governance accountability documents required by this Act. 2009, c. 33, Sched. 5, s. 18 (1).

Same

(2) Section 3, 4, 5, 6 or 7, as the case may be, and sections 8, 9 and 10 apply with necessary modifications to any public accountability document jointly developed by all the adjudicative tribunals in a cluster. 2009, c. 33, Sched. 5, s. 18 (2).

Same

(3) Section 11, 12 or 13 to 13.2, as the case may be, applies with necessary modifications to any governance accountability document jointly developed, prepared or entered into, as the case may be, by all the adjudicative tribunals in a cluster. 2009, c. 33, Sched. 5, s. 18 (3); 2017, c. 34, Sched. 46, s. 1 (2).

This Act prevails re governance of clusters

19 In the event of any conflict between section 16 or 17 and a provision of another Act or a regulation respecting the governance of an adjudicative tribunal that is included in a cluster, section 16 or 17 prevails. 2009, c. 33, Sched. 5, s. 19.

General Matters

Chair is responsible for tribunals

20 (1) The chair of an adjudicative tribunal is responsible for ensuring that the tribunal performs the duties and functions required of it under this or any other Act and that it is in compliance with any other Act or any regulation applicable to it. 2009, c. 33, Sched. 5, s. 20 (1).

Effect of failure to comply

(2) Any failure of an adjudicative tribunal or its chair to comply with this Act does not affect the validity of any action taken or decision made by the tribunal or the chair. 2009, c. 33, Sched. 5, s. 20 (2).

Review of tribunals

21 (1) An adjudicative tribunal's responsible minister shall direct a public servant employed under Part III of the *Public Service of Ontario Act, 2006* or any other person to conduct a review of the adjudicative tribunal at least once every six years. 2009, c. 33, Sched. 5, s. 21 (1).

Matters for review

(2) The review required by subsection (1) must address,

(a) the tribunal's mandate and whether it continues to be relevant;

(b) the functions performed by the tribunal, and whether they are best performed by the tribunal or whether they would be better performed by another entity;

(c) the tribunal's governance structure and management systems, and whether they continue to be appropriate to its mandate and functions;

(d) the tribunal's financial and human resources and its financial and information systems;

(e) the tribunal's business planning, performance measurement and reporting practices;

(f) whether the tribunal has effective processes in place to ensure its compliance with any applicable Act, regulation or directive of the Management Board of Cabinet;

(g) whether the tribunal is effective in achieving its mandate and serving the public;

(h) whether changes should be made to the tribunal or whether the tribunal should be discontinued; and

(i) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 21 (2).

Additional reviews

(3) An adjudicative tribunal's responsible minister may at any time direct a public servant employed under Part III of the *Public Service of Ontario Act, 2006* or any other person to conduct a review of the adjudicative tribunal in respect of any of the matters listed in subsection (2). 2009, c. 33, Sched. 5, s. 21 (3).

Protection of personal information

(4) Nothing in this section authorizes a person conducting a review under subsection (1) or subsection (3) to collect, or an adjudicative tribunal to disclose to such person, any information that is personal information within the meaning of the *Freedom of Information and Protection of Privacy Act* or personal health information within the meaning of the *Personal Health Information Protection Act, 2004*. 2009, c. 33, Sched. 5, s. 21 (4).

Application of *Public Service of Ontario Act, 2006*, *Management Board of Cabinet Act*

22 Nothing in this Act affects any obligation or requirement imposed by or under the *Public Service of Ontario Act, 2006* or the *Management Board of Cabinet Act* on a person who is appointed as a chair, vice-chair or member of an adjudicative tribunal. 2009, c. 33, Sched. 5, s. 22.

Regulations

Regulations

23 The Lieutenant Governor in Council may make regulations,

(a) prescribing agencies, boards, commissions, corporations or other entities for the purpose of the definition of "adjudicative tribunal" in section 2;

(b) prescribing the contents of the ethics plan required by section 6;

(c) prescribing a period of time for the purpose of subsection 12 (1) and the contents of the business plan required by section 12;

(d) governing the publication of the recruitment process required by subsection 14 (3);

(e) respecting the waiver of any requirement set out in section 14, including waiving any such requirement;

(f) prescribing references in this or any other Act or in a regulation to the chair of an adjudicative tribunal that are to be read other than as described in subsection 17 (6) and prescribing how such references shall be read in relation to the adjudicative tribunal that is included in a cluster;

(g) prescribing other matters to be addressed in a review of an adjudicative tribunal required by section 21;

(h) prescribing other matters to be addressed or included in any public accountability document or governance accountability document;

(i) prescribing the date by or time within which an adjudicative tribunal must comply with any provision or requirement of this Act or of a regulation made under this Act respecting a public accountability document or governance accountability document;

(j) prescribing the form and format of any public accountability document or governance accountability document;

(k) governing the publication of the public accountability documents or governance accountability documents or of the review required by section 21. 2009, c. 33, Sched. 5, s. 23.

24 Omitted (provides for coming into force of provisions of this Act). 2009, c. 33, Sched. 5, s. 24.

25 Omitted (enacts short title of this Act). 2009, c. 33, Sched. 5, s. 25.

1302

TAB 38

CanLII

Adjudicative Tribunals and Clusters, O Reg 126/10

Current version: in force since 2022-01-01

Link to the latest version: https://canlii.ca/t/8mtz

Stable link to this version: https://canlii.ca/t/55czx

Citation to this version: Adjudicative Tribunals and Clusters, O Reg 126/10, <https://canlii.ca/t/55czx> retrieved on 2026-01-18

Former title: General

Currency: Last updated from the e-Laws site on 2026-01-12

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 126/10

ADJUDICATIVE TRIBUNALS AND CLUSTERS

Consolidation Period: From January 1, 2022 to the e-Laws currency date.

Last amendment: 668/21.

This is the English version of a bilingual regulation.

Adjudicative tribunals

1. Each of the agencies, boards, commissions, corporations and other entities listed in Schedule 1 to this Regulation is prescribed for the purposes of the definition of “adjudicative tribunal” in section 2 of the Act. O. Reg. 126/10, s. 1.

1.1 Revoked: O. Reg. 352/21, s. 1.

Cluster, Tribunals Ontario

2. The following adjudicative tribunals are designated as a cluster of tribunals entitled “Tribunals Ontario” in English and “Tribunaux décisionnels Ontario” in French:

1. Animal Care Review Board.
2. Assessment Review Board.
3. Revoked: O. Reg. 282/20, s. 2.
4. Child and Family Services Review Board.
5. Revoked: O. Reg. 282/20, s. 2.
6. Revoked: O. Reg. 668/21, s. 1.

7. Custody Review Board.

8. Revoked: O. Reg. 282/20, s. 2.

9. Fire Safety Commission.

10. Human Rights Tribunal of Ontario.

11. Landlord and Tenant Board.

12. Licence Appeal Tribunal.

13., 14. Revoked: O. Reg. 282/20, s. 2.

15. Ontario Civilian Police Commission.

16. Ontario Parole Board.

17. Ontario Special Education Tribunal (English).

18. Ontario Special Education Tribunal (French).

19. Social Benefits Tribunal. O. Reg. 494/18, s. 1; O. Reg. 282/20, s. 2; O. Reg. 668/21, s. 1.

3., 4. Revoked: O. Reg. 494/18, s. 1.

SCHEDULE 1
ADJUDICATIVE TRIBUNALS

1. Agriculture, Food and Rural Affairs Appeal Tribunal.

2. Animal Care Review Board.

3. Assessment Review Board.

4. Revoked: O. Reg. 352/21, s. 2 (1).

5. Revoked: O. Reg. 257/21, s. 1 (2).

6. Building Code Commission.

7. Child and Family Services Review Board.

8. Revoked: O. Reg. 494/18, s. 2.

9. Consent and Capacity Board.

10. Revoked: O. Reg. 352/21, s. 2 (1).

11. Revoked: O. Reg. 668/21, s. 2.

12. Crown Employees Grievance Settlement Board.

13. Custody Review Board.

14. Revoked: O. Reg. 494/18, s. 2.

15. Revoked: O. Reg. 352/21, s. 2 (1).

15.1 Financial Services Tribunal.

16. Fire Safety Commission.

17. Health Professions Appeal and Review Board.

18. Health Services Appeal and Review Board.

19. Human Rights Tribunal of Ontario.

20. Landlord and Tenant Board.

21. Licence Appeal Tribunal.

21.1 Revoked: O. Reg. 352/21, s. 2 (1).

22. Revoked: O. Reg. 257/21, s. 1 (2).

22.1 Revoked: O. Reg. 352/21, s. 2 (1).

23. Normal Farm Practices Protection Board.

24. Ontario Civilian Police Commission.

25. Ontario Labour Relations Board.

26. Ontario Land Tribunal.

27. Ontario Parole Board.

28. Ontario Review Board.

29. Ontario Special Education Tribunal (English).

30. Ontario Special Education Tribunal (French).

31. Revoked: O. Reg. 494/18, s. 2.

32. Pay Equity Hearings Tribunal.

33. Revoked: O. Reg. 257/21, s. 1 (2).

34. Public Service Grievance Board.

35. Revoked: O. Reg. 10/11, s. 3.

36. Social Benefits Tribunal.

37. Workplace Safety and Insurance Appeals Tribunal.

O. Reg. 126/10, Sched; O. Reg. 10/11, s. 3; O. Reg. 470/17, s. 2; O. Reg. 81/18, s. 2; O. Reg. 494/18, s. 2; O. Reg. 257/21, s. 1; O. Reg. 352/21, s. 2; O. Reg. 668/21, s. 2.

TAB 39

CanLII

Appointment to Adjudicative Tribunals, O Reg 88/11

Current version: in force since 2019-08-21

Link to the latest version: https://canlii.ca/t/8p74

Stable link to this version: https://canlii.ca/t/53pq8

Citation to this version: Appointment to Adjudicative Tribunals, O Reg 88/11, <https://canlii.ca/t/53pq8> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 88/11

APPOINTMENT TO ADJUDICATIVE TRIBUNALS

Consolidation Period: From August 21, 2019 to the e-Laws currency date.

Last amendment: 273/19.

This is the English version of a bilingual regulation.

Public information about recruitment process

1. (1) This section applies with respect to the requirement under subsection 14 (3) of the Act to make information public about the recruitment process for selecting persons to be appointed to an adjudicative tribunal. O. Reg. 88/11, s. 1 (1).

(2) The information specified by subsection 14 (3) of the Act must be made available to the public on a government website for at least 10 days before the closing date of the competition for the appointment, excluding Saturdays, Sundays and holidays. O. Reg. 88/11, s. 1 (2).

(3) If the requirement under subsection 14 (1) of the Act to use a competitive, merit-based process for selecting a member of an adjudicative tribunal is waived under section 2 of this Regulation, the requirement under subsection 14 (3) of the Act to make information public about the recruitment process for that appointment is also waived. O. Reg. 88/11, s. 1 (3).

Waiver of competitive, merit-based selection process

2. (1) The requirement in subsection 14 (1) of the Act to use a competitive, merit-based process for selecting a member of an adjudicative tribunal is waived in the following circumstances:

1. If a member of the tribunal is being reappointed.

2. If a former member of the tribunal is being reappointed, but only if his or her prior appointment expired within 90 days of the date of the reappointment.

3. If a member of one adjudicative tribunal is being appointed to another tribunal.

4. If the person being appointed to the tribunal was a candidate for appointment to an adjudicative tribunal within 12 months before the date of the intended appointment and,

   i. the selection process for the appointment to the tribunal was a competitive, merit-based process, and

   ii. although the person was not appointed to the tribunal, it was determined that the person was qualified for such an appointment.

5. If the person being appointed must, under an Act, be nominated or selected by a person or entity other than the Lieutenant Governor in Council or a minister.

6. If the person being appointed must, under an Act, be nominated or selected jointly by a person or entity representing one or more employers (including the Crown as an employer) and by a trade union or other collective bargaining agent representing employees.

7. If the appointment is needed to ensure that the tribunal has the quorum or minimum number of members specified under an Act. O. Reg. 88/11, s. 2 (1).

(2) The requirement in subsection 14 (1) of the Act to use a competitive, merit-based process for selecting a member of an adjudicative tribunal may be waived in the following circumstances, if the person or entity authorized to appoint the member considers it appropriate to do so:

1. If the tribunal is the successor of another adjudicative tribunal that has been restructured or discontinued and if the person being appointed to the successor tribunal was a member of the predecessor tribunal when it was restructured or discontinued.

2. If the appointment is being made to fill an unanticipated vacancy on the tribunal.

3. If the appointment is being made on an urgent basis for a maximum period of six months. O. Reg. 88/11, s. 2 (2); O. Reg. 273/19, s. 1 (1).

(2.1) If the requirement to use a competitive, merit-based process is waived under paragraph 3 of subsection (2) with respect to the appointment of a member of an adjudicative tribunal, the waivers under paragraphs 1, 2, 3, 4 and 7 of subsection (1) do not apply, and a waiver under subsection (2) may not be used, with respect to the reappointment or further appointment of the member. O. Reg. 273/19, s. 1 (2).

(2.2) If the requirement to use a competitive, merit-based process is waived under paragraph 3 of subsection (2) with respect to the appointment of a member of an adjudicative tribunal, a further waiver under that paragraph may not be used with respect to a successive appointment of another member to that tribunal. O. Reg. 273/19, s. 1 (2).

(3) If the requirement to use a competitive, merit-based process is waived under subsection (2) with respect to the appointment of a member of an adjudicative tribunal, notice of the use of the waiver must be included in the next annual report of the adjudicative tribunal. O. Reg. 88/11, s. 2 (3).

Waiver of chair's recommendation, etc.

3. The prohibition in subsection 14 (4) of the Act against the appointment or reappointment of a member of an adjudicative tribunal without the recommendation of the chair of the tribunal is waived with respect to the appointment or reappointment of a person as chair of the adjudicative tribunal. O. Reg. 88/11, s. 3.

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 88/11, s. 4.

1310

TAB 40

CanLII

Business Plan — Contents, O Reg 89/11

Current version: in force since 2017-07-05

Link to the latest version: https://canlii.ca/t/8p75

Stable link to this version: https://canlii.ca/t/52zgl

Citation to this version: Business Plan — Contents, O Reg 89/11, <https://canlii.ca/t/52zgl> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 89/11

BUSINESS PLAN — CONTENTS

Consolidation Period: From July 5, 2017 to the e-Laws currency date.

Last amendment: O. Reg. 271/17.

This is the English version of a bilingual regulation.

Contents of business plan

1. (1) The prescribed period of time for a business plan, as required by subsection 12 (1) of the Act, is three years. O. Reg. 89/11, s. 1 (1).

(2) A business plan must contain the following:

1. A detailed description of the mandate of the adjudicative tribunal.
2. The proposed budget of the adjudicative tribunal for the three-year period.
3. The number of employees, expressed as full-time equivalents (FTEs), who are assigned as staff to the adjudicative tribunal at the beginning of the three-year period.
4. The performance measures to be used by the adjudicative tribunal to evaluate its effectiveness and efficiency.
5. The annual performance targets of the adjudicative tribunal for the three-year period. O. Reg. 89/11, s. 1 (2).

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 89/11, s. 2.

1313

TAB 41

CanLII

Deadlines re Accountability Documents, O Reg 90/11

Current version: in force since 2017-07-05

Link to the latest version: https://canlii.ca/t/8p76

Stable link to this version: https://canlii.ca/t/52zgr

Citation to this version: Deadlines re Accountability Documents, O Reg 90/11, <https://canlii.ca/t/52zgr> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009

ONTARIO REGULATION 90/11

DEADLINES RE ACCOUNTABILITY DOCUMENTS

Consolidation Period: From July 5, 2017 to the e-Laws currency date.

Last amendment: O. Reg. 272/17.

This is the English version of a bilingual regulation.

Definitions

1. In this Regulation,

"start-up date" means, in relation to an adjudicative tribunal that is not part of a cluster, the later of,

(a) the date on which the legislative provision establishing the tribunal comes into force, and

(b) the effective date of the appointment of the initial chair of the tribunal; ("date d'entrée en vigueur")

"start-up date" means, in relation to a cluster, the later of,

(a) the date on which the provision of the regulation designating the cluster comes into force, and

(b) the effective date of the appointment of the initial executive chair of the cluster. ("date d'entrée en vigueur")
O. Reg. 90/11, s. 1.

Deadline re public accountability documents

2. (1) An adjudicative tribunal that is not part of a cluster shall develop its public accountability documents no later than 12 months after the start-up date for the tribunal. O. Reg. 90/11, s. 2 (1).

(2) A cluster shall jointly develop its public accountability documents no later than 12 months after the start-up date for the cluster. O. Reg. 90/11, s. 2 (2).

(3) Despite subsections (1) and (2), if an adjudicative tribunal is prescribed or a cluster is designated before the date on which this Regulation comes into force, the deadline for developing the public accountability documents is 12 months after the date on which this Regulation comes into force. O. Reg. 90/11, s. 2 (3).

Deadline re certain governance accountability documents

3. (1) An adjudicative tribunal that is not part of a cluster shall enter into a memorandum of understanding and develop a business plan no later than 12 months after the start-up date for the tribunal. O. Reg. 90/11, s. 3 (1).

(2) A cluster shall enter into a memorandum of understanding and develop a business plan no later than 12 months after the start-up date for the cluster. O. Reg. 90/11, s. 3 (2).

(3) Despite subsections (1) and (2), if an adjudicative tribunal is prescribed or a cluster is designated before the date on which this Regulation comes into force, the deadline for entering into a memorandum of understanding and developing a business plan is 12 months after the date on which this Regulation comes into force. O. Reg. 90/11, s. 3 (3).

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 90/11, s. 4.

TAB 42

CanLII

Ethics Plan - Contents, O Reg 91/11

Current version: in force since 2011-04-01

Link to the latest version: https://canlii.ca/t/8p77

Stable link to this version: https://canlii.ca/t/l1sc

Citation to this version: Ethics Plan - Contents, O Reg 91/11, <https://canlii.ca/t/l1sc> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Adjudicative Tribunals Accountability, Governance And Appointments Act, 2009
Loi de 2009 sur la responsabilisation et la gouvernance des tribunaux décisionnels et les nominations à ces tribunaux

ONTARIO REGULATION 91/11

ETHICS PLAN — CONTENTS

Consolidation Period: From April 1, 2011 to the e-Laws currency date.

No amendments.

This Regulation is made in English only.

Contents of ethics plans

1. The ethics plan required by subsection 6 (1) of the Act must contain the following:

1. A description of the practices and procedures for ensuring that members are familiar with the requirements of Part IV (Ethical Conduct) and Part V (Political Activity) of the *Public Service of Ontario Act, 2006*. The practices and procedures must include an annual notice for members containing information about the requirements of Parts IV and V of that Act.

2. A description of the practices and procedures for ensuring that members are familiar with the code of conduct that forms part of the member accountability

framework for the adjudicative tribunal. The practices and procedures must include an annual notice for members containing information about the code of conduct. O. Reg. 91/11, s. 1.

2. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 91/11, s. 2.

TAB 43

CanLII

Tribunal Adjudicative Records Act, 2019, SO 2019, c 7, Sch 60

Current version: in force since 2019-07-01

Link to the latest version: https://canlii.ca/t/97dp

Stable link to this version: https://canlii.ca/t/53n9b

Citation to this version: Tribunal Adjudicative Records Act, 2019, SO 2019, c 7, Sch 60, <https://canlii.ca/t/53n9b> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Tribunal Adjudicative Records Act, 2019

S.O. 2019, CHAPTER 7
SCHEDULE 60

Consolidation Period: From July 1, 2019 to the e-Laws currency date.

Last amendment: 2019, c. 7, Sched. 17, s. 171 (4).

Interpretation
1 (1) In this Act,

"adjudicative record" means a record referred to in subsection (2); ("document décisionnel")

"confidentiality order" means an order made by a tribunal under subsection 2 (2); ("ordonnance de confidentialité")

"tribunal" means an adjudicative tribunal prescribed by the regulations made under this Act. ("tribunal")

Adjudicative records
(2) Subject to subsection (3), the following are adjudicative records for the purposes of this Act:

1. An application or other document by which a proceeding before a tribunal is commenced.
2. A notice of a hearing before a tribunal.
3. A written submission filed with a tribunal in respect of a proceeding before the tribunal.
4. A document that has been admitted as evidence at a hearing of a tribunal or otherwise relied upon by a tribunal in making a decision or an order.
5. A transcript of oral evidence given at a hearing of a tribunal.
6. A decision or an order made by a tribunal and any reasons for the decision or order.
7. A docket or schedule of hearings of a tribunal.
8. A register of proceedings before a tribunal.

9. Any other record that relates to a proceeding before a tribunal and that is prescribed by the regulations made under this Act.

Excluded records

(3) The following are not adjudicative records for the purposes of this Act:

1. Personal notes, draft decisions, draft orders and communications related to draft decisions or draft orders that are created by or for a member of a tribunal in connection with a proceeding before the tribunal in which the member is presiding.
2. Personal notes created by or for a person appointed by a tribunal to help resolve a matter in a proceeding before the tribunal by means of an alternative dispute resolution mechanism.
3. Records related to any attempt to resolve a matter in a proceeding before a tribunal by means of an alternative dispute resolution mechanism, unless the record forms part of a decision or an order of the tribunal.

Disposal of records

(4) Nothing in this Act shall be interpreted as restricting a tribunal from disposing of any of its adjudicative records in accordance with its usual practices.

Adjudicative records public

2 (1) A tribunal shall make those adjudicative records in its possession that relate to proceedings commenced on or after the day this section comes into force available to the public in accordance with this Act, including any rules made under section 3.

Confidentiality orders

(2) A tribunal may, of its own motion or on the application of a person referred to in subsection (3), order that an adjudicative record or portion of an adjudicative record be treated as confidential and that it not be disclosed to the public if the tribunal determines that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters contained in the record are of such a nature that the public interest or the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be available to the public.

Who may apply

(3) The following persons may apply to the tribunal for a confidentiality order in respect of an adjudicative record:

1. A party to a proceeding to which the adjudicative record relates.
2. A person who would be affected by the disclosure of the information contained in the adjudicative record or a portion of the adjudicative record.

Scope of order

(4) A confidentiality order may apply to adjudicative records regardless of when the proceeding to which they relate was commenced.

Rules

3 (1) A tribunal may make rules governing procedures for providing access to adjudicative records and for obtaining a confidentiality order.

***Legislation Act, 2006*, Part III**

(2) Part III (Regulations) of the *Legislation Act, 2006* does not apply to any rules made under this section.

Public access to rules

(3) A tribunal shall make any rules made under this section available to the public in English and in French.

Power to set, charge fees

4 A tribunal may, subject to the approval of the minister responsible for the administration of the part of the Act that establishes the tribunal, set and charge fees for providing access to adjudicative records.

Enforcement of confidentiality orders

5 (1) A certified copy of a confidentiality order may be filed in the Superior Court of Justice by,

(a) the tribunal that made the order;

(b) a party to a proceeding to which the order relates; or

(c) a person who would be affected by the disclosure of the information contained in an adjudicative record or portion of an adjudicative record that is to be treated as confidential in accordance with the order.

Same

(2) On filing in the Superior Court of Justice, the confidentiality order shall be enforceable as if it were an order of that court.

Notice of filing

(3) A party or a person referred to in clause (1) (c) who files a confidentiality order shall notify the tribunal that made it within 10 days after the filing.

Protection from personal liability

6 (1) No action or other proceeding may be commenced against a member or an employee of a tribunal for an act or omission done or omitted by the member or the employee in good faith in the execution or intended execution of any duty or power under this Act. 2019, c. 7, Sched. 60, s. 6 (1).

Crown liability

(2) Despite subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, subsection (1) does not relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which the Crown would otherwise be subject. 2019, c. 7, Sched. 60, s. 6 (2); 2019, c. 7, Sched. 17, s. 171 (4).

Conflict

7 In the event of a conflict between a provision of this Act and a provision of any other Act or a regulation made under another Act, the provision of this Act prevails unless the regulations made under this Act provide otherwise.

Regulations

8 The Lieutenant Governor in Council may make regulations,

(a) prescribing adjudicative tribunals for the purposes of the definition of “tribunal” in subsection 1 (1);

(b) prescribing additional records for the purposes of subsection 1 (2);

(c) providing that a provision of another Act or of a regulation made under another Act prevails over a provision of this Act in the event of a conflict.

9 Omitted (amends, repeals or revokes other legislation).

10 Omitted (provides for coming into force of provisions of this Act).

11 Omitted (enacts short title of this Act).

1324

TAB 44

CanLII

General, O Reg 211/19

Current version: in force since 2025-09-01

Link to the latest version: https://canlii.ca/t/982m

Stable link to this version: https://canlii.ca/t/56l75

Citation to this version: General, O Reg 211/19, <https://canlii.ca/t/56l75> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Tribunal Adjudicative Records Act, 2019

ONTARIO REGULATION 211/19

GENERAL

Consolidation Period: From September 1, 2025 to the e-Laws currency date.

Last amendment: 204/25.

This is the English version of a bilingual regulation.

Tribunals

1. The adjudicative tribunals listed in Schedule 1 to this Regulation are prescribed for the purposes of the definition of "tribunal" in subsection 1 (1) of the Act.

Conflict

2. The following provisions prevail over a provision of the Act in the event of a conflict:

1. Subsections 87 (7) to (10) and section 227 of the *Child, Youth and Family Services Act, 2017*.

2. Subsections 29 (17) and (18) and 38 (4) and (5) and sections 68 and 69 of the *Colleges Collective Bargaining Act, 2008*.

3. Subsection 123 (2) of the *Employment Standards Act, 2000*.

4. Subsection 116 (1) of the *Environmental Bill of Rights, 1993*, in respect of the application of the provisions of the *Labour Relations Act, 1995* set out in paragraph 7.

5. Subsection 174 (14) of the *Environmental Protection Act*, in respect of the application of the provisions of the *Labour Relations Act, 1995* set out in paragraph 7.

6. The provisions of any regulation made under section 16 of the *Financial Services Tribunal Act, 2017*.

7. Subsections 7 (13) and 63 (4) and section 119 of the *Labour Relations Act, 1995*.

8. Subsection 20 (2) and clauses 63 (1) (c) and (f) of the *Occupational Health and Safety Act*.

9. Subsection 21 (3) of the *Ontario Provincial Police Collective Bargaining Act, 2006*, in respect of the application of section 119 of the *Labour Relations Act, 1995*.

10. Subsection 32 (4) of the *Pay Equity Act*.

Note: On the day subsection 18 (2) of the *Pay Transparency Act, 2018* comes into force, section 2 of the Regulation is amended by adding the following paragraph: (See: O. Reg. 211/19, s. 3)

10.1 Subsection 18 (2) of the *Pay Transparency Act, 2018*.

11. Subsection 99 (1) of the *Provincial Offences Act*.

12. Subsection 4 (1) of the *School Boards Collective Bargaining Act, 2014*, in respect of the application of the provisions of the *Labour Relations Act, 1995* set out in paragraph 7.

3. Omitted (provides for amendments to this Regulation).

4. Omitted (provides for coming into force of provisions of this Regulation).

schedule 1
Prescribed tribunals

1. Agriculture, Food and Rural Affairs Appeal Tribunal.

2. Animal Care Review Board.

3. Assessment Review Board.

4. Building Code Commission.

5. Child and Family Services Review Board.

6. Revoked: O. Reg. 370/21, s. 1 (1).

7. Revoked: O. Reg. 667/21, s. 1.

8. Custody Review Board.

9. Revoked: O. Reg. 370/21, s. 1 (1).

10. Financial Services Tribunal.

11. Fire Safety Commission.

12. Health Professions Appeal and Review Board.

13. Health Services Appeal and Review Board.

14. Human Rights Tribunal of Ontario.

15. Landlord and Tenant Board.

16. Licence Appeal Tribunal.

17.-19. Revoked: O. Reg. 370/21, s. 1 (1).

20. Normal Farm Practices Protection Board.

21. Revoked: O. Reg. 204/25, s. 1.

22. Ontario Labour Relations Board.

22.1 Ontario Land Tribunal.

23. Ontario Review Board.

24. Ontario Securities Commission.

25. Ontario Special Education Tribunal (English).

26. Ontario Special Education Tribunal (French).

27. Pay Equity Hearings Tribunal.

28. Revoked: O. Reg. 370/21, s. 1 (1).

O. Reg. 370/21, s. 1; O. Reg. 667/21, s. 1; O. Reg. 204/25, s. 1.

TAB 45

Insurance Act, RSO 1990, c I.8

French Version
RSS
Current version: in force since 2026-01-01
Link to the latest version :
https://canlii.ca/t/2g6
Stable link to this version :
https://canlii.ca/t/56mvl
Citation to this version:
Insurance Act, RSO 1990, c I.8, <https://canlii.ca/t/56mvl> retrieved on 2026-01-18
Currency:
Last updated from the e-Laws site on 2026-01-12
Browse myCanLII
Set up citation alert
Save this legislation
Set up amendment alert
Share this legislation

Insurance Act

R.S.O. 1990, CHAPTER I.8

Consolidation Period: From January 1, 2026 to the e-Laws currency date.

Last amendment: 2025, c. 15, Sched. 11.

DEFINITIONS

Definitions

1 In this Act, except where inconsistent with the definition sections of any Part,

"accountant" means a person who is licensed under the *Public Accounting Act, 2004*; ("comptable")

"actuary" means a Fellow of the Canadian Institute of Actuaries; ("actuaire")

"adjuster" means a person who,

(a) on behalf of an insurer or an insured, for compensation, directly or indirectly solicits the right to negotiate the settlement of or investigate a loss or claim under a contract or a fidelity, surety or guaranty bond issued by an insurer, or investigates, adjusts or settles any such loss or claim, or

(b) holds himself, herself or itself out as an adjuster, investigator, consultant or adviser with respect to the settlement of such losses or claims,

but does not include,

(c) a barrister or solicitor acting in the usual course of the practice of law,

(d) a trustee or agent of the property insured,

(e) a salaried employee of a licensed insurer while acting on behalf of such insurer in the adjustment of losses,

(f) a person who is employed as an appraiser, engineer or other expert solely for the purpose of giving expert advice or evidence, or

(g) a person who acts as an adjuster of marine losses only; ("expert d'assurance")

"agent" means a person who, for compensation, commission or any other thing of value,

(a) solicits insurance on behalf of an insurer who has appointed the person to act as the agent of such insurer or on behalf of the Facility Association under the *Compulsory Automobile Insurance Act*, or

(b) solicits insurance on behalf of an insurer or transmits, for a person other than himself, herself or itself, an application for, or a policy of insurance to or from such insurer, or offers or assumes to act in the negotiation of such insurance or in negotiating its continuance or renewal with such insurer,

and who is not a member of the Registered Insurance Brokers of Ontario; ("agent")

"Authority" means the Financial Services Regulatory Authority of Ontario continued under subsection 2 (1) of the *Financial Services Regulatory Authority of Ontario Act, 2016*; ("Autorité")

"Authority rule" means a rule made under subsection 121.0.1 (1); ("règle de l'Autorité")

"automobile" includes a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that runs on rails, watercraft or aircraft; ("automobile")

"broker" means an insurance broker within the meaning of the *Registered Insurance Brokers Act*; ("courtier")

"cash-mutual corporation" means a corporation without share capital that is empowered to undertake insurance on both the cash plan and the mutual plan; ("société mutuelle au comptant")

"chief agency" means the principal office or place of business in Ontario of any licensed insurer having its head office out of Ontario; ("agence principale")

"Chief Executive Officer" means the Chief Executive Officer appointed under subsection 10 (2) of the *Financial Services Regulatory Authority of Ontario Act, 2016*; ("directeur général de l'Autorité")

"Commission" means the former Financial Services Commission of Ontario that was established under the repealed *Financial Services Commission of Ontario Act, 1997*; ("Commission")

"compensation association" means a body corporate or unincorporated association the purpose of which is to provide compensation to claimants and policyholders of insolvent insurers and that has been designated under the regulations as a compensation association; ("association d'indemnisation")

"contract" means a contract of insurance, and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement; ("contrat")

"debt obligation" means a bond, debenture, note or other evidence of indebtedness, whether the debt is secured or unsecured; ("titre de créance")

"due application" includes such information, evidence and material as the Chief Executive Officer requires to be furnished and the payment of the fees established by the Minister in respect of any application, certificate or document required or issued by virtue of this Act; ("demande régulière")

"entity" includes a corporation, trust, partnership, fund, unincorporated association or organization, the Crown, a Crown agency, the government of a foreign country or of a political subdivision of a foreign country and any agency of that government; ("entité")

"exchange" or "reciprocal insurance exchange" means a group of subscribers exchanging reciprocal contracts of indemnity or insurance with each other through the same attorney; ("bourse" ou "bourse d'assurance réciproque")

"financial institution" means,

(a) an insurer that is incorporated or organized under the laws of Canada or of any province of Canada,

(b) a bank or authorized foreign bank within the meaning of section 2 of the *Bank Act* (Canada),

(c) a loan or trust corporation incorporated or organized under the laws of Canada or any province of Canada,

(d) an entity that,

(i) is incorporated or organized under the laws of Canada or of any province of Canada, and

(ii) primarily engages in dealing in securities, including portfolio management and investment counselling,

(e) a credit union or caisse populaire incorporated under the laws of any province of Canada or an association to which the *Cooperative Credit Associations Act* (Canada) applies,

(f) an entity that is prescribed or is a member of a class that is prescribed; ("institution financière")

"foreign jurisdiction" means a jurisdiction other than Ontario; ("ressort étranger")

"fraternal society" means a society, order or association incorporated for the purpose of making with its members only, and not for profit, contracts of life insurance or accident and sickness insurance in accordance with its constitution, by-laws and rules and this Act; ("société fraternelle")

"governing executive authority" means the executive committee, executive board, management committee, grand executive committee or such other board, committee or body as is charged under the constitution and rules of a fraternal society with its general management between general meetings; ("organe de direction")

"head office" means the place where the chief executive officer of an insurer transacts business; ("siège social")

"insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance; ("assurance")

"insurance fund" or "insurance funds", as applied to a fraternal society or as applied to a corporation not incorporated exclusively for the transaction of insurance, includes all money, securities for money and assets appropriated by the rules of the society or corporation to the payment of insurance liabilities or appropriated for the management of the insurance branch or department or division of the society, or otherwise legally available for insurance liabilities, but does not include funds of a trade union appropriated to or applicable for the voluntary assistance of wage earners unemployed or upon strike; ("fonds d'assurance")

"insurance money" means the amount payable by an insurer under a contract, and includes all benefits, surplus, profits, dividends, bonuses, and annuities payable under the contract; ("sommes assurées")

"insurance on the cash plan" means any insurance that is not mutual insurance; ("assurance au comptant")

"insurer" means the person who undertakes or agrees or offers to undertake a contract; ("assureur")

"lodge" includes a primary subordinate division, by whatever name known, of a fraternal society; ("loge")

Note: On a day to be named by proclamation of the Lieutenant Governor, section 1 of the Act is amended by adding the following definition: (See: 2024, c. 20, Sched. 10, s. 1)

"managing general agent" means a corporation or partnership or an entity belonging to a class prescribed by Authority rule that holds a managing general agent licence issued under Part XIV.1; ("agent général gestionnaire")

"Minister" means the Minister of Finance; ("ministre")

"motor vehicle liability policy" means a policy or part of a policy evidencing a contract insuring,

(a) the owner or driver of an automobile, or

(b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person's employee or agent or any other person on that person's behalf,

against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof; ("police de responsabilité automobile")

"mutual benefit society" means a mutual corporation formed for the purpose of providing insurance against sickness, disability or death for its members, or for these and any other purposes necessary or incidental thereto except life insurance, but does not include a pension fund or employees' mutual benefit society incorporated under or subject to the *Corporations Act*; ("société de secours mutuel")

"mutual corporation" means a corporation without share capital that is empowered to undertake mutual insurance exclusively; ("société mutuelle")

"mutual insurance" means a contract of insurance in which the consideration is not fixed or certain at the time the contract is made and is to be determined at the termination of the contract or at fixed periods during the term of the contract according to the experience of the insurer in respect of all similar contracts, whether or not the maximum amount of such consideration is predetermined; ("assurance mutuelle")

"non-owner's policy" means a motor vehicle liability policy insuring a person solely in respect of the use or operation by that person or on that person's behalf of an automobile that is not owned by that person; ("police de non-propriétaire")

"officer" includes a trustee, director, manager, treasurer, secretary or member of the board or committee of management of an insurer and a person appointed by the insurer to sue and be sued in its behalf; ("dirigeant")

"owner's policy" means a motor vehicle liability policy insuring a person in respect of the ownership, use or operation of an automobile owned by that person and within the description or definition thereof in the policy and, if the contract so provides, in respect of the use or operation of any other automobile; ("police de propriétaire")

"paid in", when applied to the capital stock of an insurer or to any shares thereof, means the amount paid to the insurer on its shares, not including the premium, if any, paid thereon, whether such shares are or are not fully paid; ("versé")

"paid up", when applied to the capital stock of an insurer or to any shares thereof, means the capital stock or shares on which there remains no liability, actual or contingent, to the issuing insurer; ("libéré")

"participating share" means a share of a corporation that carries the right to participate in the earnings of the corporation to an unlimited degree and to participate in a distribution of the remaining property of the corporation on dissolution; ("action participante")

"policy" means the instrument evidencing a contract; ("police")

"premium" means the single or periodical payment under a contract for insurance, and includes dues, assessments, administration fees paid for the administration or servicing of such contract, and other considerations; ("prime")

"premium note" means an instrument given as consideration for insurance whereby the maker undertakes to pay such sum or sums as may be legally demanded by the insurer, but the aggregate of which sums does not exceed an amount specified in the instrument; ("billet de souscription")

"property" includes profits, earnings and other pecuniary interests, and expenditure for rents, interest, taxes and other outgoings and charges and in respect of inability to occupy the insured premises, but only to the extent of express provision in the contract; ("biens")

"rate", in relation to automobile insurance, means all amounts payable under contracts of automobile insurance for an identified risk whether expressed in dollar terms or in some other manner and includes commissions, surcharges, fees, discounts, rebates and dividends; ("taux")

"regulations" means the regulations made under this Act; ("règlements")

"risk classification system", in relation to automobile insurance, means the elements used for the purpose of classifying risks in the determination of rates for a coverage or category of automobile insurance, including the variables, criteria, rules and procedures used for that purpose; ("système de classement des risques")

"security" means, when used to refer to a form of investment,

(a) a share of any class of shares of a corporation or a debt obligation of a corporation, and includes a warrant of a corporation, but does not include a deposit with a financial institution, any instrument evidencing a deposit with a financial institution or a policy, or

(b) any ownership interest in or debt obligation of an unincorporated entity, but does not include a policy; ("titre"or "valeur mobilière")

"security interest" means an interest in or charge upon property by way of mortgage, hypothec, pledge or otherwise, to secure the payment of a debt or the performance of another obligation; ("sûreté")

"spouse" means either of two persons who,

(a) are married to each other,

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or

(c) are not married to each other and live together in a conjugal relationship outside marriage; ("conjoint")

Note: On a day to be named by proclamation of the Lieutenant Governor, section 1 of the Act is amended by adding the following definition: (See: 2024, c. 20, Sched. 10, s. 1)

"sub-managing general agent" means a managing general agent that performs managing general agent activities pursuant to an agreement with another managing general agent or sub-managing general agent; ("sous-agent général gestionnaire")

"Superintendent" means the former position of Superintendent of Financial Services under the repealed *Financial Services Commission of Ontario Act, 1997*. ("surintendent")

"Tribunal" means the Financial Services Tribunal continued under the *Financial Services Tribunal Act, 2017*; ("Tribunal")

"upon proof", as applied to any matter connected with the licensing of an insurer or other person, means upon proof to the satisfaction of the Chief Executive Officer; ("sur preuve")

"voting share" means a share of a corporation carrying voting rights under all circumstances or by reason of an event that has occurred and is continuing or by reason of a condition that has been fulfilled. ("action avec droit de vote") R.S.O. 1990, c. I.8, s. 1; 1993, c. 10, s. 2; 1994, c. 11, s. 336; 1996, c. 21, s. 1; 1997, c. 19, s. 10 (1); 1997, c. 28, s. 64; 1999, c. 6, s. 31 (1); 1999, c. 12, Sched. I, s. 4 (1, 2); 2002, c. 18, Sched. H, s. 4 (1-4); 2004, c. 8, s. 46; 2004, c. 31, Sched. 20, s. 1; 2005, c. 5, s. 35 (1, 2); 2006, c. 33, Sched. O, s. 1; 2014, c. 9, Sched. 3, s. 1; 2017, c. 34, Sched. 17, s. 22; 2018, c. 8, Sched. 13, s. 1, 22; 2019, c. 14, Sched. 9, s. 1; 2020, c. 34, Sched. 7, s. 1; 2020, c. 36, Sched. 14, s. 8 (1).

Section 101.1 of the Insurance Act

Information on claims

101.1 Every insurer shall provide the Chief Executive Officer or an agency designated by the Chief Executive Officer with information prescribed by the regulations about applications

for insurance and claims made to the insurer at such times and subject to such conditions as are prescribed by the regulations. 1996, c. 21, s. 13; 1997, c. 28, s. 102; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 101.1 of the Act is amended by striking out "the regulations" wherever it appears and substituting in each case "the Authority rules". (See: 2017, c. 34, Sched. 21, s. 5)

Note: On a day to be named by proclamation of the Lieutenant Governor, the French version of section 101.1 of the Act is amended. (See: 2022, c. 17, Sched. 2, s. 1)

Note: On a day to be named by proclamation of the Lieutenant Governor, the Act is amended by adding the following section: (See: 2018, c. 8, Sched. 13, s. 8)

Information on claims and repair history

101.2 The Chief Executive Officer or an agency designated by the Chief Executive Officer shall provide the persons prescribed by the Authority rules with the information prescribed by the Authority rules about the claims and repair history, including the costs relating to repairs, of a motor vehicle in accordance with such requirements as may be prescribed by the Authority rules. 2018, c. 8, Sched. 13, s. 8.

Note: On a day to be named by proclamation of the Lieutenant Governor, the French version of section 101.2 of the Act is amended. (See: 2022, c. 17, Sched. 2, s. 2)

Note: On a day to be named by proclamation of the Lieutenant Governor, the Act is amended by adding the following section: (See: 2022, c. 17, Sched. 2, s. 3)

Information on automobile insurance fraud

101.3 (1) Every insurer shall provide the Chief Executive Officer or an agency designated by the Chief Executive Officer with information prescribed by the Authority rules about automobile insurance fraud at such times and in accordance with such requirements as may be prescribed by the Authority rules. 2022, c. 17, Sched. 2, s. 3.

Same, authority to collect, use and disclose information

(2) The Chief Executive Officer and any agency designated by the Chief Executive Officer are authorized to directly or indirectly collect, use and disclose personal information about identifiable individuals if the collection, use or disclosure of the information is for the purpose of assessing and detecting automobile insurance fraud under subsection (1). 2022, c. 17, Sched. 2, s. 3.

Definition

(3) In this section,

"personal information" means personal information within the meaning of the *Freedom of Information and Protection of Privacy Act*. 2022, c. 17, Sched. 2, s. 3.

Interpretation, Part VI

224 (1) In this Part,

“automobile” includes,

(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and

(b) a vehicle prescribed by regulation to be an automobile; (“automobile”)

“contract” means a contract of automobile insurance that,

(a) is undertaken by an insurer that is licensed to undertake automobile insurance in Ontario, or

(b) is evidenced by a policy issued in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule by an insurer that has filed an undertaking under section 226.1; (“contrat”)

“excluded driver” means a person named as an excluded driver in an endorsement under section 249; (“conducteur exclu”)

“fault determination rules” means the rules prescribed under paragraph 21 of subsection 121 (1); (“règles de détermination de la responsabilité”)

“health care” includes all goods and services for which payment is provided by the medical, rehabilitation and attendant care benefits provided for in the Statutory Accident Benefits Schedule; (“soins de santé”)

“insured” means a person insured by a contract whether named or not and includes every person who is entitled to statutory accident benefits under the contract whether or not described therein as an insured person; (“assuré”)

“listed expenses” means, in connection with statutory accident benefits, the amounts payable that, under section 288.1, are listed expenses; (“frais désignés”)

“occupant”, in respect of an automobile, means,

(a) the driver,

(b) a passenger, whether being carried in or on the automobile,

(c) a person getting into or on or getting out of or off the automobile; (“personne transportée”)

“public transit” means,

(a) any service for which a fare is charged for transporting the public by automobiles operated by or on behalf of a municipality or a local board as defined in the Municipal Affairs Act, or under an agreement between a municipality and a person, firm or corporation, but does not include special transportation facilities for persons with disabilities or transportation by special purpose facilities such as school buses or ambulances, and

(b) any service prescribed by regulation to be public transit, in the circumstances and subject to the terms, conditions, provisions, exclusions and limits prescribed by the regulation,

but does not include any service prescribed by regulation not to be public transit, in the circumstances and subject to the terms, conditions, provisions, exclusions and limits prescribed by the regulation; (“transport en commun”)

"public transit vehicle" means an automobile while being used for public transit; ("véhicule de transport en commun")

"service provider's licence" means a licence issued under section 288.5; ("permis de fournisseur de services")

"spouse" means either of two persons who,

(a) are married to each other,

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Act, or

(c) have lived together in a conjugal relationship outside marriage,

(i) continuously for a period of not less than three years, or

(ii) in a relationship of some permanence, if they are the parents of a child; ("conjoint")

"statutory accident benefits" means the benefits set out in the regulations made under paragraphs 9 and 10 of subsection 121 (1); ("indemnités d'accident légales")

"Statutory Accident Benefits Schedule" means the regulations made under paragraphs 9 and 10 of subsection 121 (1). ("Annexe sur les indemnités d'accident légales") R.S.O. 1990, c. I.8, s. 224 (1); 1993, c. 10, s. 1; 1996, c. 21, s. 15; 1999, c. 6, s. 31 (4); 2002, c. 22, s. 115; 2005, c. 5, s. 35 (5-8); 2011, c. 9, Sched. 21, s. 2; 2013, c. 2, Sched. 8, s. 12; 2016, c. 23, s. 55 (1).

(2)-(5) Repealed: 2020, c. 34, Sched. 7, s. 6 (1).

Additional benefits

(6) An insurer, with the approval of the Chief Executive Officer, may offer optional benefits in excess of the benefits that must be provided under the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 224 (6); 1993, c. 10, s. 1; 1997, c. 28, s. 109; 2018, c. 8, Sched. 13, s. 22.

Idem

(7) Optional benefits offered under subsection (6) shall be deemed to be statutory accident benefits and the Statutory Accident Benefits Schedule applies to them with necessary modifications. R.S.O. 1990, c. I.8, s. 224 (7); 1993, c. 10, s. 1.

Transition

(8) The following provisions, as they read immediately before the day section 8 of Schedule 7 to the Better for People, Smarter for Business Act, 2020 came into force, continue to apply to proceedings commenced before that day:

1. Section 266.

2. Section 267.

3. Section 267.1.

4. Subsection 267.5 (1). 2020, c. 34, Sched. 7, s. 6 (2).

Same

(9) Sections 266 to 267.1, as they read immediately before the day section 8 of Schedule 7 to the Better for People, Smarter for Business Act, 2020 came into force, continue to apply to new proceedings for loss or damage from bodily injury or death arising from the use or operation, before November 1, 1996, of an automobile in Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule, during the applicable periods as provided for in those sections. 2020, c. 34, Sched. 7, s. 6 (2).

Exception re insured

225 Except as provided in the Statutory Accident Benefits Schedule, the insured under a contract shall be deemed not to include any person who sustains loss or damage while any automobile insured under the contract is being used or operated by an excluded driver. R.S.O. 1990, c. I.8, s. 225; 1993, c. 10, s. 1.

Application of Part

226 (1) This Part does not apply to contracts insuring only against,

(a) loss of or damage to an automobile while in or on described premises;

(b) loss of or damage to property carried in or upon an automobile; or

(c) liability for loss of or damage to property carried in or upon an automobile.

Idem

(2) This Part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the Highway Traffic Act unless it is insured under a contract evidenced by a form of policy approved under this Part.

Idem

(3) This Part does not apply to a contract insuring solely the interest of a person who has a lien upon, or has as security legal title to, an automobile and who does not have possession of the automobile. R.S.O. 1990, c. I.8, s. 226.

Out-of-province insurers

226.1 An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule may file an undertaking with the Chief Executive Officer, in the form provided by the Chief Executive Officer, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in sections 251, 265 and 268 when the insured automobiles are operated in Ontario. 1996, c. 21, s. 16; 1997, c. 28, s. 110; 2018, c. 8, Sched. 13, s. 22.

Approval of Forms

Approval of forms

227 (1) An insurer shall not use a form of any of the following documents in respect of automobile insurance unless the form has been approved by the Chief Executive Officer:

1. An application for insurance.

2. A policy, endorsement or renewal.

3. A claims form.

4. A continuation certificate. 1996, c. 21, s. 17; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Application for insurance

(1.1) Paragraph 1 of subsection (1) does not apply if, in accordance with the regulations, the insurer uses a form of application for insurance that is prescribed by the regulations. 1996, c. 21, s. 17.

Approval of policies in special cases

(2) Where, in the opinion of the Chief Executive Officer, any provision of this Part, including any statutory condition, is wholly or partly inappropriate to the requirements of a contract or is inapplicable by reason of the requirements of any Act, he or she may approve a form of policy, or part thereof, or endorsement evidencing a contract sufficient or appropriate to insure the risks required or proposed to be insured, and the contract evidenced by the policy or endorsement in the form so approved is effective and binding according to its terms even if those terms are inconsistent with, vary, omit or add to any provision or condition of this Part. R.S.O. 1990, c. I.8, s. 227 (2); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Approval of extensions

(3) The Chief Executive Officer may, if he or she considers it to be in the public interest, approve a form of motor vehicle liability policy or endorsement thereto that extends the insurance beyond that prescribed in this Part. R.S.O. 1990, c. I.8, s. 227 (3); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Conditions of approval of extension

(4) The Chief Executive Officer, in granting an approval under subsection (3), may require the insurer to charge an additional premium for the extension and to state that fact in the policy or in any endorsement. R.S.O. 1990, c. I.8, s. 227 (4); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Standard policies

(5) The Chief Executive Officer may approve the form of standard policies containing insuring agreements and provisions in conformity with this Part for use by insurers in general. 1993, c. 10, s. 14; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Publication

(6) If the Chief Executive Officer approves a form of standard policy, the Chief Executive Officer shall cause a copy of the form to be published on the website of the Authority, but it is not necessary to publish endorsement forms approved for use with the standard policy. 1993, c. 10, s. 14; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22; 2019, c. 14, Sched. 9, s. 8.

Revocation of approval

(7) The Chief Executive Officer may revoke an approval given under this section, and, upon notification of the revocation in writing, no insurer shall thereafter use or deliver a form that contravenes the notification. R.S.O. 1990, c. I.8, s. 227 (7); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Reason for decision

(8) The Chief Executive Officer shall, on request of any interested insurer, specify in writing his or her reasons for granting, refusing or revoking an approval of a form. R.S.O. 1990, c. I.8, s. 227 (8); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Application form

228 Where so required by the regulations, no insurer shall use a form of application other than a prescribed form. R.S.O. 1990, c. I.8, s. 228.

Other Information

Information for applicants, etc.

229 (1) An insurer or broker shall supply at such times as may be prescribed by the Authority rules such information as may be prescribed by the Authority rules to applicants for automobile insurance and to named insureds under contracts. R.S.O. 1990, c. I.8, s. 229 (1); 1993, c. 10, s. 15 (1); 2017, c. 34, Sched. 21, s. 17.

Information deemed to be part of application

(2) Information supplied under subsection (1) by an insurer or by a broker on behalf of an insurer to an applicant for automobile insurance shall be deemed to be a part of the application. R.S.O. 1990, c. I.8, s. 229 (2); 1993, c. 10, s. 15 (2).

Information from brokers

230 (1) A broker shall provide to an applicant for insurance the names of all the insurers with whom the broker has an agency contract relating to automobile insurance and all information obtained by the broker relating to quotations on automobile insurance for the applicant. 1996, c. 21, s. 18.

Information from agents

(2) An agent shall inform an applicant for automobile insurance of the insurer or the insurers within an affiliated group of insurers that the agent represents. 2002, c. 22, s. 116.

Request for written information

(3) The broker or agent shall provide the information referred to in subsection (1) or (2) in writing if the applicant so requests. 2002, c. 22, s. 116.

Application and Policy

Persons forbidden to act as agent

231 No person carrying on the business of financing the sale or purchase of automobiles and no automobile dealer, insurance agent or broker and no officer or employee of such a person, dealer, agent or broker shall act as the agent of an applicant for the purpose of signing an application for automobile insurance. R.S.O. 1990, c. I.8, s. 231.

Policy, formal requirements

Copy of application in policy

232 (1) A copy of the written application, signed by the insured or the insured's agent, or, if no signed application is made, a copy of the purported application, or a copy of such part of the application or purported application as is material to the contract, shall be embodied in, endorsed upon or attached to the policy when issued by the insurer. R.S.O. 1990, c. I.8, s. 232 (1).

Policy issued where no signed application

(2) If no signed written application is received by the insurer prior to the issue of the policy, the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, a form of application to be completed and signed by the insured and returned to the insurer. R.S.O. 1990, c. I.8, s. 232 (2).

Insured entitled to copy

(3) Subject to subsection (5), the insurer shall deliver or mail to the insured named in the policy, or to the agent for delivery or mailing to the insured, the policy or a true copy thereof and every endorsement or other amendment to the contract. R.S.O. 1990, c. I.8, s. 232 (3).

Form of policy

(4) Where a written application signed by the insured or the insured's agent is made for a contract, the policy evidencing the contract shall be deemed to be in accordance with the application unless the insurer points out in writing to the insured named in the policy in what respect the policy differs from the application, and, in that event, the insured shall be deemed to have accepted the policy unless within one week from the receipt of the notification the insured informs the insurer in writing that the insured rejects the policy. R.S.O. 1990, c. I.8, s. 232 (4).

Certificate of policy

(5) If an insurer adopts a standard policy approved under subsection 227 (5), it may, instead of issuing the policy, issue a certificate in a form approved by the Chief Executive Officer. 1993, c. 10, s. 16 (1); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Effect of certificate

(5.1) A certificate issued under subsection (5) is of the same force and effect as if it were the standard policy, subject to the limits and coverages shown by the insurer on the certificate and any endorsements issued with or subsequent to the certificate. 1993, c. 10, s. 16 (1).

Copy of policy

(5.2) At the request of an insured to whom a certificate has been issued under subsection (5), the insurer shall provide a copy of the standard policy approved by the Chief Executive Officer. 1993, c. 10, s. 16 (1); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Application

(6) Where a certificate is issued under subsection (5), subsection (8) of this section and subsections 261 (2) and 263 (5.3) apply with necessary modifications. R.S.O. 1990, c. I.8, s. 232 (6); 1993, c. 10, s. 16 (2).

Proof of terms of policy

(7) Where an insurer issues a certificate under subsection (5), proof of the terms of the policy may be given by production of a copy of the form of standard policy approved by the Chief Executive Officer accessed from the website of the Authority. 2019, c. 14, Sched. 9, s. 9.

Endorsement on forms

(8) Upon every application form and policy, there shall be printed or stamped in conspicuous type a copy of subsection 233 (1). R.S.O. 1990, c. I.8, s. 232 (8).

232.1 Repealed: 2020, c. 34, Sched. 7, s. 7.

Misrepresentation or violation of conditions renders claim invalid

233 (1) Where,

(a) an applicant for a contract,

(i) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or

(ii) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein;

(b) the insured contravenes a term of the contract or commits a fraud; or

(c) the insured wilfully makes a false statement in respect of a claim under the contract,

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited. R.S.O. 1990, c. I.8, s. 233 (1).

Statutory accident benefits protected

(2) Subsection (1) does not invalidate such statutory accident benefits as are set out in the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 233 (2); 1993, c. 10, s. 1.

Use of application as defence

(3) No statement of the applicant shall be used in defence of a claim under the contract unless it is contained in the signed written application therefor or, where no signed written application is made, in the purported application, or part thereof, that is embodied in, endorsed upon or attached to the policy.

Idem

(4) No statement contained in a purported copy of the application, or part thereof, other than a statement describing the risk and the extent of the insurance, shall be used in defence of a claim under the contract unless the insurer proves that the applicant made the statement attributed to the applicant in the purported application, or part thereof. R.S.O. 1990, c. I.8, s. 233 (3, 4).

Statutory conditions

234 (1) The conditions prescribed by the regulations made under paragraph 15.1 of subsection 121 (1) are statutory conditions and shall be deemed to be part of every contract to which they apply and shall be printed in English or French in every policy to which they apply with the heading “Statutory Conditions” or “Conditions légales”, as may be appropriate.

Variation

(2) No variation or omission of or addition to a statutory condition is binding on the insured.

Exceptions

(3) Except as otherwise provided in the contract, the statutory conditions referred to in subsection (1) do not apply to the insurance required by section 265 or 268.

Definition

(4) In subsection (1),

"policy" does not include an interim receipt or binder. 1993, c. 10, s. 17.

Notice of termination

235 An insurer may, by registered mail, personal delivery, prepaid courier or electronic means, give to an insured a notice of termination of a contract in accordance with the statutory conditions referred to in subsection 234 (1). 2020, c. 36, Sched. 22, s. 6.

Notice of expiry or variation

236 (1) If an insurer does not intend to renew a contract or if an insurer proposes to renew a contract on varied terms, the insurer shall,

(a) give the named insured not less than thirty days notice in writing of the insurer's intention or proposal; or

(b) give the broker, if any, through whom the contract was placed forty-five days notice in writing of the insurer's intention or proposal. R.S.O. 1990, c. I.8, s. 236 (1).

Idem

(2) Subject to subsection (4), a broker to whom an insurer has given notice under clause (1) (b) shall give the named insured under the contract not less than thirty days notice in writing of the insurer's intention or proposal. R.S.O. 1990, c. I.8, s. 236 (2).

Reasons

(3) Notices given under subsections (1) and (2) shall set out the reasons for the insurer's intention or proposal. R.S.O. 1990, c. I.8, s. 236 (3).

Exception

(4) Where, before a broker is required to have given notice to a named insured under subsection (2), the broker places with another insurer a replacement contract containing substantially similar terms as the expiring contract, the broker is exempted from giving notice under subsection (2). R.S.O. 1990, c. I.8, s. 236 (4).

Effect of failure to comply

(5) A contract of insurance is in force until there is compliance with subsections (1), (2) and (3). R.S.O. 1990, c. I.8, s. 236 (5).

Exception

(6) This section does not apply to prescribed types of contracts in prescribed circumstances. 2002, c. 22, s. 117.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 236 (6) of the Act is repealed and the following substituted: (See: 2017, c. 34, Sched. 21, s. 18)

Exception

(6) This section does not apply to types of contracts prescribed by the Authority rules in the circumstances prescribed by the Authority rules. 2017, c. 34, Sched. 21, s. 18.

Limitation on termination

237 (1) If so required by the regulations and unless the insurer has complied therewith, an insurer shall not decline to issue or terminate or refuse to renew a contract in respect of such coverages and endorsements as may be set out in the regulations or decline to issue, terminate or refuse to renew any contract or refuse to provide or continue any coverage or endorsement on any ground set out in the regulations. R.S.O. 1990, c. I.8, s. 237 (1).

Information

(2) The Chief Executive Officer may require insurers, agents and brokers to provide such information, material and evidence as the Chief Executive Officer considers necessary to determine compliance with subsection (1). R.S.O. 1990, c. I.8, s. 237 (2); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Exemption

(3) An insurer may apply to the Chief Executive Officer for an exemption from subsection (1). R.S.O. 1990, c. I.8, s. 237 (3); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Idem

(4) An application for an exemption from compliance with subsection (1) shall be in a form approved by the Chief Executive Officer and shall be filed together with such information, materials and evidence as the Chief Executive Officer considers necessary. R.S.O. 1990, c. I.8, s. 237 (4); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Idem

(5) The Chief Executive Officer may exempt an insurer in whole or in part from compliance with subsection (1) if, in the opinion of the Chief Executive Officer, compliance with the regulations would impair the solvency of the insurer or would cause the insurer to be in contravention of this Act or the regulations. R.S.O. 1990, c. I.8, s. 237 (5); 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Non-application

(6) Subsection (1) does not apply in respect of a contract if any payment in respect of premiums payable under the contract or under any ancillary agreement is overdue or if,

(a) the insured has given false particulars of the described automobile to the prejudice of the insurer;

(b) the insured has knowingly misrepresented or failed to disclose in an application for insurance any fact required to be stated therein. R.S.O. 1990, c. I.8, s. 237 (6).

Grounds to terminate

238 (1) An insurer shall not decline to issue, terminate or refuse to renew a contract or refuse to provide or continue a coverage or endorsement, except on a ground filed with the Chief Executive Officer under this section. 1993, c. 10, s. 19; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Filing of grounds

(2) An insurer shall file with the Chief Executive Officer the grounds on which the insurer intends to decline to issue, terminate or refuse to renew a contract or refuse to provide or continue a coverage or endorsement. 1993, c. 10, s. 19; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Material to be furnished

(3) The grounds shall be filed in a form approved by the Chief Executive Officer and shall be filed together with such information, material and evidence as the Chief Executive Officer may specify. 1993, c. 10, s. 19; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Request for additional information

(3.1) The Chief Executive Officer may require that the insurer provide such additional information, material and evidence as the Chief Executive Officer may specify in order to make a decision with respect to a filed ground. 2010, c. 26, Sched. 9, s. 1 (1); 2018, c. 8, Sched. 13, s. 22.

Prohibition from using ground

(4) The Chief Executive Officer shall notify the insurer orally or otherwise that the insurer is prohibited from using one or more of the grounds filed under subsection (2) if the Chief Executive Officer is of the opinion that the ground,

(a) is subjective;

(b) is arbitrary;

(c) bears little or no relationship to the risk to be borne by the insurer in respect of an insured; or

(d) is contrary to public policy. 2010, c. 26, Sched. 9, s. 1 (2); 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (4) of the Act is repealed and the following substituted: (See: 2017, c. 34, Sched. 21, s. 19 (1))

Prohibition from using ground

(4) The Superintendent shall notify the insurer orally or otherwise that the insurer is prohibited from using one or more of the grounds filed under subsection (2) if the Superintendent is of the opinion that the ground is not just and reasonable, having considered the criteria set out in the Authority rules. 2017, c. 34, Sched. 21, s. 19 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (4) of the Act, as re-enacted by section 19 of Schedule 21 to the Stronger, Fairer Ontario Act (Budget Measures), 2017, is amended by striking out “Superintendent” wherever it appears and substituting in each case “Chief Executive Officer”. (See: 2018, c. 8, Sched. 13, s. 10)

When insurer may use ground

(4.1) Unless the Chief Executive Officer notifies the insurer that the insurer is prohibited from using a ground, the insurer may use the ground 30 days after the later of,

(a) the day the insurer files the ground under subsection (2); or

(b) the day the additional information, material or evidence requested is provided, if the Chief Executive Officer requires the insurer to provide additional information, material or evidence under subsection (3.1). 2010, c. 26, Sched. 9, s. 1 (2); 2018, c. 8, Sched. 13, s. 22.

Notice

(5) If the Chief Executive Officer notifies an insurer orally that the insurer is prohibited from using a ground, the Chief Executive Officer shall promptly mail a written notice to the insurer confirming that fact. 1993, c. 10, s. 19; 1997, c. 28, s. 111; 2018, c. 8, Sched. 13, s. 22.

Appeal to Tribunal

(6) If the Chief Executive Officer notifies an insurer that the insurer is prohibited from using a ground, the insurer may within 15 days appeal the decision to the Tribunal. 1997, c. 28, s. 112; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (6) of the Act is repealed and the following substituted: (See: 2017, c. 34, Sched. 21, s. 19 (2))

Decision final

(6) A decision of the Superintendent is final for all purposes. 2017, c. 34, Sched. 21, s. 19 (2).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (6) of the Act, as re-enacted by section 19 of Schedule 21 to the Stronger, Fairer Ontario Act (Budget Measures), 2017, is amended by striking out “Superintendent” and substituting “Chief Executive Officer”. (See: 2018, c. 8, Sched. 13, s. 10)

Prohibition by Tribunal

(7) After the hearing, the Tribunal shall prohibit the insurer from using the ground if the Tribunal finds that the ground comes within any of clauses (4) (a), (b), (c) and (d). 1997, c. 28, s. 112.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (7) of the Act is repealed and the following substituted: (See: 2017, c. 34, Sched. 21, s. 19 (2))

Definition

(7) In this section,

“insurer” includes the Facility Association. 2017, c. 34, Sched. 21, s. 19 (2).

Reconsideration

(8) The Chief Executive Officer may, at any time, give notice in writing to an insurer that,

(a) he or she is of the opinion that a ground that has been filed under this section or the manner in which it is applied comes within any of clauses (4) (a), (b), (c) and (d); and

(b) he or she intends to prohibit the use of the ground or to prohibit the use of the ground in a specified manner. 1997, c. 28, s. 112; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (8) of the Act is repealed. (See: 2017, c. 34, Sched. 21, s. 19 (2))

Request for hearing

(9) Within 15 days after receiving the notice, the insurer may request in writing that the Tribunal hold a hearing before the Chief Executive Officer takes any action described in the notice. 1997, c. 28, s. 112; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (9) of the Act is repealed. (See: 2017, c. 34, Sched. 21, s. 19 (2))

Hearing

(10) If, within the time period allowed, the insurer requests a hearing, the Tribunal shall hold a hearing. 1997, c. 28, s. 112.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (10) of the Act is repealed. (See: 2017, c. 34, Sched. 21, s. 19 (2))

No request for hearing

(11) If, within the time period allowed, the insurer does not request a hearing, the Chief Executive Officer may take any action described in the notice. 1997, c. 28, s. 112; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (11) of the Act is repealed. (See: 2017, c. 34, Sched. 21, s. 19 (2))

Powers of Tribunal

(12) At a hearing, if the Tribunal finds that the ground or the manner in which it applies comes within any of clauses (4) (a), (b), (c) and (d), the Tribunal shall prohibit the insurer from using the ground or from using it in a specified manner. 1997, c. 28, s. 112.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (12) of the Act is repealed. (See: 2017, c. 34, Sched. 21, s. 19 (2))

Information to provide

(13) The Chief Executive Officer or the Tribunal may require insurers, agents and brokers to provide the information, material and evidence that the Chief Executive Officer or Tribunal, as the case requires, considers necessary for the purposes of this section. 1997, c. 28, s. 112; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 238 (13) of the Act is repealed. (See: 2017, c. 34, Sched. 21, s. 19 (2))

Affiliated automobile insurers, concurrent filing

238.1 (1) The Chief Executive Officer may require that affiliated insurers who write automobile insurance in Ontario file their grounds under section 238 concurrently. 2010, c. 26, Sched. 9, s. 2; 2018, c. 8, Sched. 13, s. 22.

Insurer's application, consideration of affiliate's grounds

(2) The Chief Executive Officer may consider the grounds filed by the affiliates of an insurer when deciding on the grounds filed by the insurer. 2010, c. 26, Sched. 9, s. 2; 2018, c. 8, Sched. 13, s. 22.

Interpretation

(3) For the purpose of this section, an insurer is considered to be affiliated with another insurer if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person. 2010, c. 26, Sched. 9, s. 2.

Motor Vehicle Liability Policies

Policy coverage

Coverage of owner's policy, specific automobile

239 (1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

(a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and

(b) resulting from bodily injury to or the death of any person and damage to property. R.S.O. 1990, c. I.8, s. 239 (1).

Saving, statutory accident benefits

(2) A lack of consent does not invalidate such statutory accident benefits as are set out in the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 239 (2); 1993, c. 10, s. 1.

Coverage of owner's policy, other automobiles

(3) Where the contract evidenced by an owner's policy also provides insurance against liability in respect of an automobile not owned by the insured named in the contract, an insurer may stipulate in the contract that the insurance is restricted to such persons as are specified in the contract. R.S.O. 1990, c. I.8, s. 239 (3).

Death of person named in owner's policy

(4) Where the insured named in an owner's policy dies, the following persons shall be deemed to be the insured under the policy:

1. The spouse of the deceased insured.

2. In respect of the described automobile, a newly-acquired automobile that was acquired by the deceased insured prior to his or her death and a temporary substitute automobile, all as defined by the policy,

i. any person having proper temporary custody thereof until grant of probate or administration to the personal representative of the deceased insured,

ii. the personal representative of the deceased insured. R.S.O. 1990, c. I.8, s. 239 (4); 1999, c. 6, s. 31 (5); 2005, c. 5, s. 35 (9).

Insurer not liable re excluded driver

240 If a contract evidenced by a motor vehicle liability policy names an excluded driver, the insurer is not liable to any person under the contract or under this Act or the regulations for any loss or damage that occurs while the excluded driver is driving an automobile insured under the contract, except as provided in the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 240; 1993, c. 10, s. 1.

Coverage of non-owner's policy

241 Every contract evidenced by a non-owner's policy insures the person named therein and such other person, if any, as is specified in the policy against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

(a) arising directly or indirectly from the use or operation of an automobile within the definition thereof in the policy, other than an automobile owned by him, her or it or registered in his, her or its name; and

(b) resulting from bodily injury to or the death of any person, and damage to property. R.S.O. 1990, c. I.8, s. 241.

Persons deemed not owners

242 For the purposes of this Part, a person shall not be deemed to be the owner of an automobile for the reason only that the person has a lien on the automobile or has legal title to the automobile as security. R.S.O. 1990, c. I.8, s. 242.

Territorial limits

243 (1) Insurance under sections 239 and 241 applies to the ownership, use or operation of the insured automobile in Canada, the United States of America and any other jurisdiction designated in the Statutory Accident Benefits Schedule, and on a vessel plying between ports of Canada, the United States of America or a designated jurisdiction. 1996, c. 21, s. 20.

Same

(1.1) Payment provided for under subsection 265 (1) applies to loss or damage resulting from an accident involving an uninsured or unidentified automobile in Canada, the United States of America and any other jurisdiction designated in the Statutory Accident Benefits Schedule, and on a vessel plying between ports of Canada, the United States of America or a designated jurisdiction. 2002, c. 22, s. 118.

Same

(2) Statutory accident benefits provided under section 268 apply to the use or operation of any automobile in Canada, the United States of America and any other jurisdiction designated in the Statutory Accident Benefits Schedule, and on a vessel plying between ports of Canada, the United States of America or a designated jurisdiction. 1996, c. 21, s. 20.

Rights of unnamed insured

244 Any person insured by but not named in a contract to which section 239 or 241 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor. R.S.O. 1990, c. I.8, s. 244.

Additional agreements

245 Every contract evidenced by a motor vehicle liability policy shall provide that, where a person insured by the contract is involved in an accident resulting from the ownership, or directly or indirectly from the use or operation of an automobile in respect of which insurance is provided under the contract and resulting in loss or damage to persons or property, the insurer shall,

(a) upon receipt of notice of loss or damage caused to persons or property, make such investigations, conduct such negotiations with the claimant and effect such settlement of any resulting claims as are deemed expedient by the insurer;

(b) defend in the name and on behalf of the insured and at the cost of the insurer any civil action that is at any time brought against the insured on account of loss or damage to persons or property;

(c) pay all costs assessed against the insured in any civil action defended by the insurer and any interest accruing after entry of judgment upon that part of the judgment that is within the limits of the insurer's liability; and

(d) where the injury is to a person, reimburse the insured for outlay for such medical aid as is immediately necessary at the time. R.S.O. 1990, c. I.8, s. 245.

Liability for contamination

246 Liability arising from contamination of property carried in an automobile shall not be deemed to be liability arising from the ownership, use or operation of such automobile. R.S.O. 1990, c. I.8, s. 246.

Other liability, possible exclusions

247 The insurer may provide under a contract evidenced by a motor vehicle liability policy, in either or both of the following cases, that it shall not be liable,

(a) to indemnify any person engaged in the business of selling, repairing, maintaining, servicing, storing or parking automobiles for any loss or damage sustained while engaged in the use or operation of or while working upon the automobile in the course of that business unless the person is the owner of the automobile or is an employee of the owner of the automobile;

(b) for loss of or damage to property carried in or upon the automobile or to any property owned or rented by or in the care, custody or control of the insured. R.S.O. 1990, c. I.8, s. 247.

Liability for damage caused by machinery, etc.

248 Subject to the limitations and exclusions of the endorsement, the insurer may provide by endorsement to a contract evidenced by a motor vehicle liability policy that it shall not be liable for loss or damage resulting from the ownership, use or operation of any machinery or apparatus, including its equipment, mounted on or attached to the automobile while such automobile is at the site of the use or operation of that machinery or apparatus. R.S.O. 1990, c. I.8, s. 248.

Excluded driver endorsement

249 A named insured may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract. R.S.O. 1990, c. I.8, s. 249.

Liability, possible exclusions for other uses

250 (1) The insurer may provide under a contract evidenced by a motor vehicle liability policy, in one or more of the following cases, that, except as provided in the Statutory Accident Benefits Schedule, it shall not be liable while,

(a) the automobile is rented or leased to another person;

(b) the automobile is used to carry explosives or to carry radio-active material for research, education, development or industrial purposes or for purposes incidental thereto;

(c) the automobile is used as a taxicab, public omnibus, livery, jitney or sightseeing conveyance or for carrying passengers for compensation or hire;

(d) where the insured vehicle is an automobile, other than a trailer, it is used for towing a trailer owned by the insured unless like indemnity is also provided by the insurer in respect of the trailer;

(e) where the insured vehicle is a trailer, it is towed by an automobile owned by the insured unless like indemnity is also provided by the insurer in respect of the automobile. R.S.O. 1990, c. I.8, s. 250 (1); 1993, c. 10, s. 1.

Definition

(2) In clause (1) (b),

"radio-active material" means,

(a) spent nuclear fuel rods that have been exposed to radiation in a nuclear reactor,

(b) radio-active waste material,

(c) unused enriched nuclear fuel rods, or

(d) any other radio-active material of such quantity and quality as to be harmful to persons or property if its container were destroyed or damaged. R.S.O. 1990, c. I.8, s. 250 (2).

Exception

(3) Clause (1) (a) does not include the use by an employee of his or her automobile on the business of the employee's employer and for which the employee is paid. R.S.O. 1990, c. I.8, s. 250 (3).

Certain rules excepted

(4) Clause (1) (c) does not include,

(a) the use by a person of the person's automobile for the carriage of another person in return for the former's carriage in the automobile of the latter;

(b) the occasional and infrequent use by a person of the person's automobile for the carriage of another person who shares the cost of the trip;

(c) the use by a person of the person's automobile for the carriage of a temporary or permanent domestic servant of the insured or his or her spouse;

(d) the use by a person of the person's automobile for the carriage of a client or customer or a prospective client or customer; or

(e) the occasional and infrequent use by the insured of the insured's automobile for the transportation of children to or from school or school activities conducted within the educational program. R.S.O. 1990, c. I.8, s. 250 (4); 1999, c. 6, s. 31 (6); 2005, c. 5, s. 35 (10).

Minimum liability under policy

251 (1) Every contract evidenced by a motor vehicle liability policy insures, in respect of any one accident, to the limit of at least $200,000, exclusive of interest and costs, against liability resulting from bodily injury to or the death of one or more persons and loss of or damage to property.

Priorities

(2) The contract shall be interpreted to mean that where, by reason of any one accident, liability results from bodily injury or death and from loss of or damage to property,

(a) claims against the insured arising out of bodily injury or death have priority to the extent of $190,000 over claims arising out of loss of or damage to property; and

(b) claims against the insured arising out of loss of or damage to property have priority to the extent of $10,000 over claims arising out of bodily injury or death.

Minimum limits where separate limits designated

(3) The insurer may, instead of specifying a limit in the policy for an inclusive amount, specify a limit of liability of at least $200,000, exclusive of interest and costs, against liability resulting from bodily injury to or the death of one or more persons and a limit of liability of at least $200,000, exclusive of interest and costs, against liability for loss of or damage to property.

Variation of limits

(4) Nothing in this Part precludes an insurer, with respect to a limit or limits in excess of those specified in subsection (1) or (3), from increasing or reducing the limit or limits specified in the contract with respect to the use or operation of the automobile by a named person, but no reduction is effective for a limit less than that required under subsection (1) or (3). R.S.O. 1990, c. I.8, s. 251.

Liability arising from use, etc., outside Ontario

252 (1) Every motor vehicle liability policy issued in Ontario shall provide that, in the case of liability arising out of the ownership or, directly or indirectly, out of the use or operation of the automobile in any province or territory of Canada, in a jurisdiction of the United States of America or in any other jurisdiction designated in the Statutory Accident Benefits Schedule,

(a) the insurer is liable up to the minimum limits prescribed for that province, territory or jurisdiction if those limits are higher than the limits prescribed by the policy;

(b) the insurer will not set up a defence to a claim that could not be set up if the policy were a motor vehicle liability policy issued in that province, territory or jurisdiction; and

(c) the insured, by acceptance of the policy, constitutes and appoints the insurer as the insured's irrevocable attorney to appear and defend in any province or territory of Canada, any jurisdiction of the United States of America or any other jurisdiction designated in the Statutory Accident Benefits Schedule in which an action is brought against the insured arising out of the ownership, use or operation of the automobile. 1996, c. 21, s. 21.

Power of attorney binding

(2) A provision in a motor vehicle liability policy in accordance with clause (1) (c) is binding on the insured. R.S.O. 1990, c. I.8, s. 252 (2).

Excess insurance

253 (1) Nothing in this Part precludes an insurer from providing insurance under a contract evidenced by a motor vehicle liability policy restricted to a limit in excess of that provided by another designated contract evidenced by a motor vehicle liability policy, whether the designated contract is a first loss insurance or an excess insurance.

Termination of excess insurance

(2) Where the contract designated in the excess contract terminates or is terminated, the excess contract is also automatically terminated. R.S.O. 1990, c. I.8, s. 253.

Agreement for partial payment of claim by insured

254 Nothing in this Part precludes an insurer from entering into an agreement with its insured under a contract evidenced by a motor vehicle liability policy providing that the insured will reimburse the insurer in an agreed amount in respect of any claim by or judgment in favour of a third party against the insured, and the agreement may be enforced against the insured according to its tenor. R.S.O. 1990, c. I.8, s. 254.

Liability for nuclear energy hazard

255 (1) In this section,

"nuclear energy hazard" means the radio-active, toxic, explosive or other hazardous properties of nuclear substances under the Nuclear Safety and Control Act (Canada). 2004, c. 31, Sched. 20, s. 7.

Liability when nuclear energy contract also in force

(2) Where an insured is covered, whether named therein or not, under a contract evidenced by a motor vehicle liability policy for loss or damage resulting from bodily injury to or the death of any person or damage to property arising directly or indirectly out of a nuclear energy hazard and is also covered, whether named therein or not, against such loss or damage under a contract evidenced by a policy of nuclear energy hazard liability insurance issued by a group of insurers and in force at the time of the event giving rise to the loss or damage,

(a) the motor vehicle liability insurance is excess to the nuclear energy hazard liability insurance, and the insurer under the contract of motor vehicle liability insurance is not liable to pay beyond the minimum limits prescribed by section 251; and

(b) the unnamed insured under the contract of nuclear energy liability insurance may, in respect of such loss or damage, recover indemnity under that contract in the same manner and to the same extent as if named therein as the insured, and for that purpose the unnamed insured shall be deemed to be a party to the contract and to have given consideration therefor. R.S.O. 1990, c. I.8, s. 255 (2).

When contract deemed in force

(3) For the purpose of this section, a contract of nuclear energy hazard liability insurance shall be deemed to be in force at the time of the event giving rise to the loss or damage, even if the limits of liability thereunder have been exhausted. R.S.O. 1990, c. I.8, s. 255 (3).

Advance payments and release by claimant

256 (1) Where an insurer makes a payment on behalf of an insured under a contract evidenced by a motor vehicle liability policy to a person who is or claims to be entitled to recover from the insured covered by the policy, the payment constitutes, to the extent of the payment, a release by the person or the person's personal representative of any claim that the person or the person's personal representative or any person claiming through or under him or by virtue of Part V of the Family Law Act may have against the insured and the insurer.

Idem

(2) Nothing in this section precludes the insurer making the payment from demanding, as a condition precedent to such payment, a release from the person or the person's personal representative or any other person to the extent of such payment.

Payment to be taken into account

(3) Where the person commences an action, the court shall adjudicate upon the matter first without reference to the payment but in giving judgment the payment shall be taken into account and the person shall only be entitled to judgment for the net amount, if any.

Intention

(4) The intention of this section is to permit payments to a claimant without prejudice to the defendant or the defendant's insurer, either as an admission of liability or otherwise, and the fact of any payment shall not be disclosed to the judge or jury until after judgment but before formal entry thereof. R.S.O. 1990, c. I.8, s. 256.

Defence where more than one contract

257 (1) Where a person is insured under more than one contract evidenced by a motor vehicle liability policy, whether the insurance is first loss insurance or excess, and a question arises under clause 245 (b) between an insurer and the insured or between the insurers as to which insurer shall undertake the obligation to defend in the name and on behalf of the insured, whether or not any insurer denies liability under its contract, the insured or any insurer may apply to the Superior Court of Justice, and the court shall give such directions as may appear proper with respect to the performance of the obligation. R.S.O. 1990, c. I.8, s. 257 (1); 2006, c. 19, Sched. C, s, 1 (1).

Hearing

(2) On an application under subsection (1), the only parties entitled to notice thereof and to be heard thereon are the insured and the insured's insurers, and no material or evidence used or taken upon such an application is admissible upon the trial of an action brought against the insured for loss or damage to persons or property arising out of the use or operation of the automobile in respect of which the insurance is provided. R.S.O. 1990, c. I.8, s. 257 (2).

Order

(3) An order under subsection (1) does not affect the rights and obligations of the insurers in respect of payment of any indemnity under their respective policies. R.S.O. 1990, c. I.8, s. 257 (3).

Contribution

(4) Where indemnity is provided to the insured under two or more contracts and one or more of them are excess insurance, the insurers shall, as between themselves, contribute to the payment of expenses, costs and reimbursement for which provision is made in section 245 in accordance with their respective liabilities for damages awarded against the insured. R.S.O. 1990, c. I.8, s. 257 (4).

Application of insurance money, 3rd party claims, etc.

258 (1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, even if such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the person's judgment and of any other judgments or claims against the insured covered by the contract and may, on the person's own behalf and on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied. R.S.O. 1990, c. I.8, s. 258 (1).

(2) Repealed: 2002, c. 24, Sched. B, s. 39 (2).

Other creditors excluded

(3) A creditor of the insured is not entitled to share in the insurance money payable under any contract unless the creditor's claim is one for which indemnity is provided for by that contract. R.S.O. 1990, c. I.8, s. 258 (3).

Insurer absolutely liable

(4) The right of a person who is entitled under subsection (1) to have insurance money applied upon the person's judgment or claim is not prejudiced by,

(a) an assignment, waiver, surrender, cancellation or discharge of the contract, or of any interest therein or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the contract;

(b) any act or default of the insured before or after that event in contravention of this Part or of the terms of the contract; or

(c) any contravention of the Criminal Code (Canada) or a statute of any province or territory of Canada or of any state or the District of Columbia of the United States of America by the owner or driver of the automobile,

and nothing mentioned in clause (a), (b) or (c) is available to the insurer as a defence in an action brought under subsection (1). R.S.O. 1990, c. I.8, s. 258 (4).

Section applicable to purported policy

(5) It is not a defence to an action under this section that an instrument issued as a motor vehicle liability policy by a person engaged in the business of an insurer and alleged by a party to the action to be such a policy is not a motor vehicle liability policy, and this section applies with necessary modifications to the instrument. R.S.O. 1990, c. I.8, s. 258 (5).

Contribution among insurers

(6) The insurer may require any other insurers liable to indemnify the insured in whole or in part in respect of judgments or claims to which reference is made in subsection (1) to be made parties to the action and contribute according to their respective liabilities, whether the contribution is rateably or by way of first loss or excess insurance, as the case may be, and the insured shall on demand furnish the insurer with particulars of all other insurance covering the subject-matter of the contract. R.S.O. 1990, c. I.8, s. 258 (6).

Payment into court

(7) Where any person has recovered a judgment against the insured and is entitled to bring action under subsection (1), and the insurer admits liability to pay the insurance money under the contract and the insurer considers that,

(a) there are or may be other claimants; or

(b) there is no person capable of giving and authorized to give a valid discharge for payment who is willing to do so,

the insurer may apply to the court without notice for an order for payment of the money into court, and the court may, upon such notice, if any, as it thinks necessary, make an order accordingly. R.S.O. 1990, c. I.8, s. 258 (7).

Effect of order

(8) The receipt of the proper officer of the court is sufficient discharge to the insurer for the insurance money paid into court under subsection (7), and the insurance money shall be dealt with as the court may order upon application of any person interested therein. R.S.O. 1990, c. I.8, s. 258 (8).

Defence to excess limits claim relating to s. 250 coverage

(9) Despite anything contained therein to the contrary, every contract evidenced by a motor vehicle liability policy shall, for the purposes of this section, be deemed to provide all the types of coverage mentioned in section 250, but the insurer is not liable to a claimant with respect to such coverage in excess of the limits mentioned in section 251. R.S.O. 1990, c. I.8, s. 258 (9).

Defence where coverage under s. 247 or 248

(10) Where one or more contracts provide for coverage of a type mentioned in section 247 or 248, except as provided in subsection (12), the insurer may,

(a) with respect to that type of coverage; and

(b) as against a claimant,

avail itself of any defence that it is entitled to set up against the insured, despite subsection (4). R.S.O. 1990, c. I.8, s. 258 (10).

Defence where excess limits

(11) Where one or more contracts provide for coverage in excess of the limits mentioned in section 251, except as provided in subsection (12), the insurer may,

(a) with respect to the coverage in excess of those limits; and

(b) as against a claimant,

avail itself of any defence that it is entitled to set up against the insured, despite subsection (4). R.S.O. 1990, c. I.8, s. 258 (11).

Defence where vehicle used in business of carrying passengers

(12) Where a contract provides coverage of the type mentioned in clause 216 (a) of The Insurance Act, being chapter 224 of the Revised Statutes of Ontario, 1970, in respect of an automobile operated in the business of carrying passengers for compensation or hire and insured for that purpose, the insurer may,

(a) with respect to that type of coverage; and

(b) as against a claimant,

only avail itself of a defence that it is entitled to set up against the insured in respect of that part of the coverage, if any, that exceeds,

(c) the limits mentioned in section 251; or

(d) the minimum limits required for that type of coverage by or under any other Act,

whichever is the greater. R.S.O. 1990, c. I.8, s. 258 (12).

Insured's liability to reimburse insurer

(13) The insured shall reimburse the insurer upon demand in the amount that the insurer has paid by reason of this section and that it would not otherwise be liable to pay. R.S.O. 1990, c. I.8, s. 258 (13).

Insurer may be made third party

(14) Where an insurer denies liability under a contract evidenced by a motor vehicle liability policy, it shall, upon application to the court, be made a third party in any action to which the insured is a party and in which a claim is made against the insured by any party to the action in which it is or might be asserted that indemnity is provided by the contract, whether or not the insured enters an appearance or defence in the action. R.S.O. 1990, c. I.8, s. 258 (14).

Rights of insurer

(15) Upon being made a third party, the insurer may,

(a) contest the liability of the insured to any party claiming against the insured;

(b) contest the amount of any claim made against the insured;

(c) deliver any pleadings in respect of the claim of any party claiming against the insured;

(d) have production and discovery from any party adverse in interest; and

(e) examine and cross-examine witnesses at the trial,

to the same extent as if it were a defendant in the action. R.S.O. 1990, c. I.8, s. 258 (15).

Idem

(16) An insurer may avail itself of subsection (15) even if another insurer is defending in the name and on behalf of the insured an action to which its insured is a party. R.S.O. 1990, c. I.8, s. 258 (16).

Notice of accident

258.1 (1) If an automobile insured under a contract is involved in an incident that is required to be reported to the police under the Highway Traffic Act or in respect of which the insured intends to make a claim under the contract, the insured shall give the insurer written notice of the incident, with all available particulars.

Same

(2) Subject to subsection (3), the notice required by subsection (1) shall be given to the insurer within seven days of the incident.

Same

(3) If the insured is unable because of incapacity to comply with subsection (1) within seven days of the incident, the insured shall comply as soon as possible thereafter. 1996, c. 21, s. 22.

Application of ss. 258.3 to 258.6

258.2 Sections 258.3 to 258.6 apply only in respect of a claim for loss or damage from bodily injury or death arising from the use or operation, after section 29 of the Automobile Insurance Rate Stability Act, 1996 comes into force, of an automobile in Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule. 1996, c. 21, s. 22.

Notice and disclosure before action

258.3 (1) An action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall not be commenced unless,

(a) the plaintiff has applied for statutory accident benefits;

(b) the plaintiff served written notice of the intention to commence the action on the defendant within 120 days after the incident or within such longer period as a court in which the action may be commenced may authorize, on motion made before or after the expiry of the 120-day period;

(c) the plaintiff provided the defendant with the information prescribed by the regulations within the time period prescribed by the regulations;

(d) the plaintiff has, at the defendant's expense, undergone examinations by one or more persons selected by the defendant who are members of Colleges as defined in the Regulated Health Professions Act, 1991, if the defendant requests the examinations within 90 days after receiving the notice under clause (b);

(e) the plaintiff has provided the defendant with a statutory declaration describing the circumstances surrounding the incident and the nature of the claim being made, if the statutory declaration is requested by the defendant; and

(f) the plaintiff has provided the defendant with evidence of the plaintiff's identity, if evidence of the plaintiff's identity is requested by the defendant.

Notice to insurer

(2) An insured who receives a notice under clause (1) (b) shall give a copy of the notice to the insurer within seven days of receiving the notice.

Same

(3) If the insured is unable because of incapacity to comply with subsection (2) within seven days of receiving the notice, the insured shall comply as soon as possible thereafter.

Contents of notice

(4) The notice under clause (1) (b) shall inform the person to whom it is given of the obligation under subsection (2).

Limits on examination

(5) An examination under clause (1) (d) shall not be unnecessarily repetitious and shall not involve a procedure that is unreasonable or dangerous.

Examiner may ask questions

(6) A person examined under clause (1) (d) shall answer the questions of the examiner relevant to the examination.

Copy of report

(7) If a person who performs an examination under clause (1) (d) gives a report on the examination to the defendant, the defendant shall ensure that the plaintiff receives a copy of the report within 60 days after the defendant receives the report.

Prejudgment interest

(8) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, no prejudgment interest shall be awarded under section 128 of the Courts of Justice Act for any period of time before the plaintiff served the notice under clause (1) (b).

Same

(8.1) Subsection 128 (2) of the Courts of Justice Act does not apply in respect of the calculation of prejudgment interest for damages for non-pecuniary loss in an action referred to in subsection (8). 2014, c. 9, Sched. 3, s. 12.

Failure to comply

(9) Despite subsection (1), a person may commence an action without complying with subsection (1), but the court shall consider the non-compliance in awarding costs.

Service

(10) Section 33 applies, with necessary modifications, to the service of a notice under clause (1) (b). 1996, c. 21, s. 22.

Duty to disclose limits

258.4 An insurer that receives a notice under clause 258.3 (1) (b) shall promptly inform the plaintiff whether there is a motor vehicle liability policy issued by the insurer to the defendant and, if so,

(a) the liability limits under the policy; and

(b) whether the insurer will respond under the policy to the claim. 1996, c. 21, s. 22.

Duty of insurer re settlement of claim

258.5 (1) An insurer that is defending an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile on behalf of an insured or that receives a notice under clause 258.3 (1) (b) from an insured shall attempt to settle the claim as expeditiously as possible.

Advance payment

(2) If the insurer admits liability in respect of all or part of a claim for income loss, the insurer shall make payments to the person making the claim pending the determination of the amount owing.

Amount of payments

(3) The amount of the payments under subsection (2) shall be based on the insurer's estimate of the amount owing in respect of the claim for income loss, having regard to any information provided to the insurer by the person making the claim.

Application of subss. 256 (1-3)

(4) Subsections 256 (1), (2) and (3) apply, with necessary modifications, to advance payments made under this section.

Failure to comply

(5) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, an insurer's failure to comply with this section shall be considered by the court in awarding costs. 1996, c. 21, s. 22.

Mediation

258.6 (1) A person making a claim for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile and an insurer that is defending an action in respect of the claim on behalf of an insured or that receives a notice under clause 258.3 (1) (b) in respect of the claim shall, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.

Failure to comply

(2) In an action in respect of the claim, a person's failure to comply with this section shall be considered by the court in awarding costs. 1996, c. 21, s. 22.

Notice of action and judgment against insured

Insured to give notice of action

259 (1) Every insured against whom an action is commenced for damages occasioned by an automobile shall give notice thereof in writing to the insurer within five days after service of every notice or process in the action.

Insured to disclose insurance

(2) Every insured against whom an action is commenced for damages occasioned by an automobile shall, upon recovery of a judgment against the insured, disclose to a judgment creditor entitled to the benefit of any motor vehicle liability policy particulars of such contract within ten days after written demand therefor. R.S.O. 1990, c. I.8, s. 259.

Limitation period

259.1 A proceeding against an insurer under a contract in respect of loss or damage to an automobile or its contents shall be commenced within one year after the happening of the loss or damage. 2002, c. 24, Sched. B, s. 39 (3).

Physical Damage Cover

Physical damage cover, limitations and exclusions

260 Subject to subsection 227 (1), the insurer may provide in a contract such exclusions and limitations, in respect of loss of or damage to or the loss of use of the automobile, as it considers necessary. R.S.O. 1990, c. I.8, s. 260.

Partial payment of loss clause

261 (1) A contract or part of a contract providing insurance against loss of or damage to an automobile and the loss of use thereof may contain a clause to the effect that, in the event of loss, the insurer shall pay only,

(a) an agreed portion of any loss that may be sustained; or

(b) the amount of the loss after deduction of a sum specified in the policy,

and in either case not exceeding the amount of the insurance. R.S.O. 1990, c. I.8, s. 261 (1).

Mandatory deductible

(1.1) Despite subsection (1), in the circumstances prescribed by the regulations, a contract or part of a contract providing insurance against loss of or damage to an automobile and the loss of use thereof shall contain a clause to the effect that, in the event of loss, the insurer shall pay only the amount of the loss after deduction of a sum specified in the policy not exceeding the amount of the insurance. 1996, c. 21, s. 23 (1).

Stamping required

(2) Where a clause is inserted in accordance with subsection (1) or (1.1), there shall be printed or stamped upon the face of the policy in conspicuous type the words “This policy contains a partial payment of loss clause” or the French equivalent. R.S.O. 1990, c. I.8, s. 261 (2); 1996, c. 21, s. 23 (2).

Claims under other contracts to be adjusted

262 (1) Where a claim is made under any contract other than a contract evidenced by a motor vehicle liability policy, the insurer shall, despite any agreement, adjust the amount of the claim with the insured named in the contract as well as with any person having an interest indicated in the contract. R.S.O. 1990, c. I.8, s. 262 (1).

Exception

(2) Despite subsection (1), if notice of a claim is given or proof of loss is made by a person having an interest indicated in the contract, and no notice is given and no proof of loss is made by the insured within sixty days after the day the notice or proof is required under the contract, the insurer may adjust and pay the claim to the other person having an interest indicated in the contract. 1993, c. 10, s. 20.

Direct Compensation — Property Damage

Accidents involving two or more insured automobiles

263 (1) This section applies if,

(a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;

(b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Chief Executive Officer, in the form provided by the Chief Executive Officer, an undertaking to be bound by this section; and

(c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Chief Executive Officer, in the form provided by the Chief Executive Officer, an undertaking to be bound by this section. 1993, c. 10, s. 21 (1); 1997, c. 28, s. 113; 2018, c. 8, Sched. 13, s. 22.

Exempt automobiles, undertaking to be bound

(1.1) This section applies, with necessary modifications, in respect of an automobile the owner, operator or lessee of which is exempt from the requirement to be insured under the Compulsory Automobile Insurance Act, if the organization that is financially responsible for the damages resulting from the accident involving the automobile files with the Chief Executive Officer an undertaking to be bound by this section. 1997, c. 19, s. 10 (29); 1997, c. 28, s. 114 (2); 2018, c. 8, Sched. 13, s. 22.

Damage recovery from insured's insurer

(2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection 239 (1) as though the insured were a third party. R.S.O. 1990, c. I.8, s. 263 (2).

Same, application of s. 233

(2.1) Despite subsection (6), section 233 applies to claims made under subsection (2). 2020, c. 36, Sched. 22, s. 7 (1).

Same, election not to recover

(2.2) An insured may elect, in accordance with the regulations, not to recover damages from the insured's insurer under subsection (2). 2021, c. 40, Sched. 14, s. 4.

Same

(2.3) Despite subsection (6), if an insured makes an election under subsection (2.2),

(a) in addition to the restrictions set out in subsection (5), the insured has no right of action under subsection (2) against the insured's insurer for damages to the insured's automobile or its contents, or for loss of use; and

(b) the insured's insurer shall not issue or offer collision or upset coverage, as referred to in the standard policy forms approved by the Chief Executive Officer under subsection 227 (5), to the insured. 2021, c. 40, Sched. 14, s. 4.

Fault-based recovery

(3) Recovery under subsection (2) shall be based on the degree of fault of the insurer's insured as determined under the fault determination rules. R.S.O. 1990, c. I.8, s. 263 (3).

Dispute resolution

(4) An insured may bring an action against the insurer if the insured is not satisfied that the degree of fault established under the fault determination rules accurately reflects the actual degree of fault or the insured is not satisfied with a

proposed settlement and the matters in issue shall be determined in accordance with the ordinary rules of law. R.S.O. 1990, c. I.8, s. 263 (4).

Restrictions on other recovery

(5) If this section applies,

(a) an insured has no right of action against any person involved in the incident other than the insured's insurer for damages to the insured's automobile or its contents or for loss of use;

(a.1) an insured has no right of action against a person under an agreement, other than a contract of automobile insurance, in respect of damages to the insured's automobile or its contents or loss of use, except to the extent that the person is at fault or negligent in respect of those damages or that loss;

(b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section. R.S.O. 1990, c. I.8, s. 263 (5); 1996, c. 21, s. 24 (1).

Agreement for partial payment

(5.1) Nothing in this Part precludes an insurer, in a contract belonging to a class prescribed by the regulations, from agreeing with an insured that, in the event that a claim is made by the insured under this section, the insurer shall pay only,

(a) an agreed portion of the amount that the insured would otherwise be entitled to recover; or

(b) the amount that the insured would otherwise be entitled to recover, reduced by a sum specified in the agreement. 1993, c. 10, s. 21 (2).

Application of subs. (5.1)

(5.2) Subsection (5.1) does not apply unless, before the insurer enters into the contract referred to in that subsection, the insurer offers to enter into another contract with the prospective insured that does not contain the agreement referred to in that subsection but is identical to the contract referred to in subsection (5.1) in all other respects except for the amount of the premium. 1993, c. 10, s. 21 (2).

Mandatory deductible

(5.2.1) In the circumstances prescribed by the regulations, a contract belonging to a class prescribed for the purpose of subsection (5.1) shall provide that, in the event that a claim is made by the insured under this section, the insurer shall pay only the amount that the insured would otherwise be entitled to recover, reduced by a sum specified in the contract. 1996, c. 21, s. 24 (2).

Application of subs. (5.2)

(5.2.2) Subsection (5.2) does not apply to a contract that contains a provision required by subsection (5.2.1). 1996, c. 21, s. 24 (2).

Stamping required

(5.3) If a contract contains an agreement referred to in subsection (5.1) or a provision required by subsection (5.2.1), the policy shall have printed or stamped on its face in conspicuous type the words "This policy contains a partial payment of recovery clause for property damage" in English or "La présente police comporte une clause de

recouvrement partiel en cas de dommages matériels" in French, as may be appropriate. 1993, c. 10, s. 21 (2); 1996, c. 21, s. 24 (3).

Other coverages not affected

(6) This section does not affect an insured's right to recover in respect of any physical damage coverage in respect of the insured automobile. R.S.O. 1990, c. I.8, s. 263 (6).

Non-application

(7) This section does not apply to damages to those contents of an automobile that are being carried for reward. R.S.O. 1990, c. I.8, s. 263 (7).

Idem

(8) This section does not apply if the damage occurred before the 22nd day of June, 1990. R.S.O. 1990, c. I.8, s. 263 (8).

Idem

(9) This section does not apply if both automobiles are owned by the same person. R.S.O. 1990, c. I.8, s. 263 (9).

Idem

(10) This section does not apply to damage to an automobile owned by the insured or to its contents if the damage is caused by the insured while driving another automobile. R.S.O. 1990, c. I.8, s. 263 (10).

264 Repealed: 1996, c. 21, s. 25.

Limited Accident Insurances

Uninsured automobile coverage

265 (1) Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,

(a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

(b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; and

(c) a person insured under the contract is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile,

subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations. R.S.O. 1990, c. I.8, s. 265 (1).

Definitions

(2) For the purposes of this section,

"insured automobile" means the automobile as defined or described under the contract; ("automobile assurée")

"owner" includes, in respect of an accident occurring on or after the day this definition comes into force, a person who is a lessee for the purposes of section 192 of the Highway Traffic Act; ("propriétaire")

"person insured under the contract" means,

(a) in respect of a claim for damage to the insured automobile, the owner of the automobile,

(b) in respect of a claim for damage to the contents of the insured automobile, the owner of the contents,

(c) in respect of a claim for bodily injuries or death,

(i) any person while an occupant of the insured automobile,

(ii) the insured and his or her spouse and any dependent relative of either,

(A) while an occupant of an uninsured automobile, or

(B) while not the occupant of an automobile or of railway rolling stock that runs on rails, who is struck by an uninsured or unidentified automobile,

(iii) if the insured is a corporation, unincorporated association or partnership, any director, officer, employee or partner of the insured for whose regular use the insured automobile is furnished, and his or her spouse and any dependent relative of the person or the spouse,

(A) while an occupant of an uninsured automobile, or

(B) while not the occupant of an automobile or of railway rolling stock that runs on rails, who is struck by an uninsured or unidentified automobile,

where such director, officer, employee or partner or his or her spouse is not the owner of an automobile insured under a contract; ("personne assurée aux termes du contrat")

"unidentified automobile" means an automobile with respect to which the identity of either the owner or driver cannot be ascertained; ("automobile non identifiée")

"uninsured automobile" means an automobile with respect to which neither the owner nor driver thereof has applicable and collectible bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include an automobile owned by or registered in the name of the insured or his or her spouse. ("automobile non assurée") R.S.O. 1990, c. I.8, s. 265 (2); 1999, c. 6, s. 31 (7, 8); 2005, c. 5, s. 35 (11, 12); 2005, c. 31, Sched. 12, s. 2; 2016, c. 23, s. 55 (2, 3).

Exclusion from coverage

(3) Despite the definition of "person insured under the contract" in subsection (2), a person who sustains loss or damage while the insured automobile is being used or operated by an excluded driver shall be deemed not to be a person insured under the contract in which the excluded driver is named, except as provided in the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 265 (3); 1993, c. 10, s. 1.

Idem

(4) Where a dependent relative referred to in clause (c) of the definition of "person insured under the contract" in subsection (2),

(a) is the owner of an automobile insured under a contract; or

(b) sustains bodily injuries or dies as the result of accident while the occupant of his or her own uninsured automobile,

such relative shall be deemed not to be a dependent relative for the purposes of this section. R.S.O. 1990, c. I.8, s. 265 (4); 2016, c. 23, s. 55 (4).

Regulations

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

(a) prescribing, amending or altering the terms, conditions, provisions, exclusions and limits with respect to payments under subsection (1);

(b) deeming any term, condition, provision, exclusion or limit as prescribed, amended or altered by a regulation made under clause (a) to be included in any motor vehicle liability policy made or renewed on or after the effective date of the regulation and in any motor vehicle liability policy that is subsisting on the effective date of the regulation;

(c) requiring that terms, conditions, provisions, exclusions and limits, as prescribed, amended or altered by a regulation made under clause (a), be attached to or included in every motor vehicle liability policy as a schedule in or to the policy. R.S.O. 1990, c. I.8, s. 265 (5).

Subrogation

(6) Where an amount is paid under subsection (1), the insurer is subrogated to the rights of the person to whom such amount is paid and the insurer may maintain an action in its name or in the name of such person against any other person or persons responsible for the use or operation of the uninsured or unidentified automobile. R.S.O. 1990, c. I.8, s. 265 (6).

Restriction on recovery

(7) No person has a right of action against any other person in respect of damage to an uninsured automobile or its contents arising directly or indirectly from the use or operation of an automobile if at the time of the damage the uninsured automobile was required by any Act to be insured under a contract evidenced by a motor vehicle liability policy. R.S.O. 1990, c. I.8, s. 265 (7).

Release

(8) A release under section 274 does not enure to the benefit of any person against whom the insurer may subrogate under subsection (6). R.S.O. 1990, c. I.8, s. 265 (8).

Application

(9) This section applies to all contracts evidenced by motor vehicle liability policies made or renewed on or after the 1st day of March, 1980, and all contracts evidenced by motor vehicle liability policies that were subsisting on the 1st day of March, 1980, shall be deemed to provide for the payments referred to in subsection (1) in respect of an accident arising out of the use or operation of an automobile occurring on or after that date. R.S.O. 1990, c. I.8, s. 265 (9).

266 Repealed: 2020, c. 34, Sched. 7, s. 8.

267 Repealed: 2020, c. 34, Sched. 7, s. 8.

267.1 Repealed: 2020, c. 34, Sched. 7, s. 8.

Publication of deductible amounts

267.2 (1) Before the 1st day of January in each year after 1994, the Chief Executive Officer shall determine in accordance with this section and publish on the website of the Authority,

(a) the non-pecuniary loss deductible to be used under subparagraph i of paragraph 3 of subsection 267.1 (8) as it read immediately before the day section 8 of Schedule 7 to the Better for People, Smarter for Business Act, 2020 came into force in respect of awards of damages made in the year that begins on the 1st day of January; and

(b) the Family Law Act deductible to be used under subparagraph ii of paragraph 3 of subsection 267.1 (8) as it read immediately before the day section 8 of Schedule 7 to the Better for People, Smarter for Business Act, 2020 came into force in respect of awards of damages made in the year that begins on the 1st day of January. 1993, c. 10, s. 25; 1997, c. 28, s. 115; 2018, c. 8, Sched. 13, s. 22; 2019, c. 14, Sched. 9, s. 10; 2020, c. 34, Sched. 7, s. 9.

Rules for determination

(2) The following rules apply to the determination of the non-pecuniary loss deductible and the Family Law Act deductible:

1. The non-pecuniary loss deductible for 1993 and 1994 is $10,000.

2. The Family Law Act deductible for 1993 and 1994 is $5,000.

3. The non-pecuniary loss deductible and the Family Law Act deductible for a year after 1994 shall be determined by adjusting the deductible for the previous year by the percentage change in the Consumer Price Index for Canada (All Items), as published by Statistics Canada under the authority of the Statistics Act (Canada), for the period from September in the year immediately preceding the previous year to September of the previous year.

4. Despite paragraph 3, if the Consumer Price Index information required by paragraph 3 to determine the deductibles for a year is not available by the 1st day of November in the previous year, or if in the Chief Executive Officer's opinion the information published by Statistics Canada does not provide a reasonable reflection of changes in consumer prices, the Chief Executive Officer may determine the deductibles in a manner that the Chief Executive Officer considers will provide a reasonable reflection of changes in consumer prices. 1993, c. 10, s. 25; 1997, c. 28, s. 115; 2018, c. 8, Sched. 13, s. 22, 23.

Court Proceedings for Accidents on or after November 1, 1996

Definitions, ss. 267.4 to 267.12

267.3 In sections 267.4 to 267.12,

"owner" includes an operator as defined in subsection 16 (1) of the Highway Traffic Act and a person who is a lessee for the purposes of section 192 of that Act; ("propriétaire")

"protected defendant" means a person who is protected from liability by subsections 267.5 (1), (3) and (5). ("défendeur exclu") 2005, c. 31, Sched. 12, s. 3.

Application of ss. 267.5 to 267.11, automobile use on or after Nov. 1, 1996

267.4 (1) Sections 267.5 to 267.11 apply only to proceedings for loss or damage from bodily injury or death arising from the use or operation, after November 1, 1996, of an automobile in Canada, the United States of America or a jurisdiction designated in the Statutory Accident Benefits Schedule. 1996, c. 21, s. 29; 2020, c. 34, Sched. 7, s. 10.

Effect of amendments

(2) Subsection (1) shall not be interpreted as requiring an amendment made to sections 267.5 to 267.11 to apply in respect of the use or operation, before the amendment came into force, of an automobile. 2002, c. 22, s. 119.

Protection from liability

Income loss and loss of earning capacity

267.5 (1) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for the following damages for income loss and loss of earning capacity from bodily injury or death arising directly or indirectly from the use or operation of the automobile:

1. Damages for income loss suffered in the seven days after the incident.

2. Damages for income loss suffered more than seven days after the incident and before the trial of the action in excess of 70 per cent of the amount of gross income that is lost during that period, as determined in accordance with the regulations.

3. Damages for loss of earning capacity suffered after the incident and before the trial of the action in excess of 70 per cent of the loss of earning capacity during that period, as determined in accordance with the regulations. 1996, c. 21, s. 29; 2010, c. 1, Sched. 11, s. 1 (1); 2011, c. 9, Sched. 21, s. 3 (1); 2020, c. 34, Sched. 7, s. 11.

Application

(2) Subsection (1) applies to all actions, including actions under subsection 61 (1) of the Family Law Act. 1996, c. 21, s. 29.

Protection from liability; health care expenses

(3) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for expenses that have been incurred or will be incurred for health care resulting from bodily injury arising directly or indirectly from the use or operation of the automobile unless, as a result of the use or operation of the automobile, the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function. 2002, c. 22, s. 120 (1); 2011, c. 9, Sched. 21, s. 3 (2).

(4) Repealed: 2002, c. 22, s. 120 (2).

Non-pecuniary loss

(5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act, from bodily injury or

death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function. 1996, c. 21, s. 29; 2011, c. 9, Sched. 21, s. 3 (3).

Application of subss. (1), (3) and (5)

(6) Subsections (1), (3) and (5) do not protect a person from liability if the person is defended in the action by an insurer that is not licensed to undertake automobile insurance in Ontario unless the insurer has filed an undertaking under section 226.1. 1996, c. 21, s. 29.

Same, public transit vehicles

(6.1) In respect of an incident that occurs on or after the date this subsection comes into force, subsections (1), (3) and (5) do not protect the owner or driver of a public transit vehicle if it did not collide with another automobile or any other object in the incident. 2011, c. 9, Sched. 21, s. 3 (4).

Amount of damages for non-pecuniary loss

(7) Subject to subsections (5), (12), (13) and (15), in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the court shall determine the amount of damages for non-pecuniary loss to be awarded against a protected defendant in accordance with the following rules:

1. The court shall first determine the amount of damages for non-pecuniary loss for which the protected defendant would be liable without regard to this Part.

2. The determination under paragraph 1 shall be made in the same manner as a determination of the amount of damages for non-pecuniary loss in an action to which this section does not apply and, in particular, without regard to,

i. the statutory accident benefits provided for under subsection 268 (1),

ii. the provisions of this section that protect protected defendants from liability for damages for pecuniary loss, and

iii. the provisions of paragraph 3.

3. Subject to subsections (8), (8.1) and (8.1.1), the amount of damages for non-pecuniary loss to be awarded against the protected defendant shall be determined by reducing the amount determined under paragraph 1 by,

i. in the case of damages for non-pecuniary loss other than damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act, the greater of,

A. $15,000, and

B. the amount prescribed by the regulations, and

ii. in the case of damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act, the greater of,

A. $7,500, and

B. the amount prescribed by the regulations.

4. If fault or negligence on the part of the person entitled to damages for non-pecuniary loss contributed to those damages, the award for damages shall be reduced under paragraph 3 before the damages are apportioned under section 3 of the Negligence Act. 1996, c. 21, s. 29; 2002, c. 22, s. 120 (3); 2010, c. 1, Sched. 11, s. 1 (2).

Application of subpar. 3 i of subs. (7)

(8) Subparagraph 3 i of subsection (7) does not apply if the amount of damages for non-pecuniary loss, other than damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act, would exceed the amount determined in accordance with subsection (8.3) in the absence of that subparagraph. 2002, c. 22, s. 120 (4); 2015, c. 20, Sched. 17, s. 3 (1).

Application of subpar. 3 ii of subs. (7)

(8.1) Subparagraph 3 ii of subsection (7) does not apply if the amount of damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act would exceed the amount determined in accordance with subsection (8.4) in the absence of that subparagraph. 2002, c. 22, s. 120 (4); 2015, c. 20, Sched. 17, s. 3 (2).

No reduction under par. 3 i or ii of subs. (7)

(8.1.1) Subparagraphs 3 i and ii of subsection (7) do not apply to damages awarded for non-pecuniary loss awarded in respect of a person who dies as a direct or indirect result of an incident that occurs after August 31, 2010. 2010, c. 1, Sched. 11, s. 1 (3).

Application of subss. (7)-(8.1.1)

(8.2) Subsections (7), (8), (8.1) and (8.1.1) apply in respect of each person who is entitled to damages for non-pecuniary loss. 2002, c. 22, s. 120 (4); 2010, c. 1, Sched. 11, s. 1 (4).

Amount in subs. (8)

(8.3) For the purposes of subsection (8), the amount shall be determined in accordance with the following rules:

1. Until December 31, 2015, the amount is $121,799.

2. On January 1, 2016, the amount set out in paragraph 1 shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) for that year.

3. On the 1st day of January in every year after 2016, the amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) for the year. 2015, c. 20, Sched. 17, s. 3 (3).

Amount in subs. (8.1)

(8.4) For the purposes of subsection (8.1), the amount shall be determined in accordance with the following rules:

1. Until December 31, 2015, the amount is $60,899.

2. On January 1, 2016, the amount set out in paragraph 1 shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) for that year.

3. On the 1st day of January in every year after 2016, the amount that applied for the previous year shall be revised by adjusting the amount by the indexation percentage published under subsection 268.1 (1) for the year. 2015, c. 20, Sched. 17, s. 3 (3).

Publication of adjusted amounts

(8.5) For every year after 2015, at the time an indexation percentage is published under subsection 268.1 (1), the Chief Executive Officer shall publish on the website of the Authority the amounts to which the amounts determined in accordance with subsections (8.3) and (8.4) shall be revised, effective the 1st day of January. 2015, c. 20, Sched. 17, s. 3 (3); 2018, c. 8, Sched. 13, s. 22; 2019, c. 14, Sched. 9, s. 11.

Costs

(9) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the determination of a party's entitlement to costs shall be made with regard to the effect of paragraph 3 of subsection (7) on the amount of damages, if any, awarded for non-pecuniary loss. 1996, c. 21, s. 29; 2015, c. 20, Sched. 17, s. 3 (4).

Liability of other persons

(10) Subsections (1), (3) and (5) do not relieve any person from liability other than a protected defendant. 1996, c. 21, s. 29.

Vicarious liability

(10.1) Despite any provision of this Part, a person vicariously liable for the fault or negligence of a protected defendant is not, in respect of the person's vicarious liability, liable for any amount greater than the amount of damages for which the protected defendant is liable. 2002, c. 22, s. 120 (5).

(11) Repealed: 2002, c. 22, s. 120 (6).

Motion to determine if threshold met; non-pecuniary loss

(12) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before trial with the consent of the parties or in accordance with an order of a judge who conducts a pre-trial conference, determine for the purpose of subsections (3) and (5) whether, as a result of the use or operation of the automobile, the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function. 1996, c. 21, s. 29; 2002, c. 22, s. 120 (7).

Determination binding

(13) The determination of a judge on a motion under subsection (12) is binding on the parties at the trial. 1996, c. 21, s. 29; 2002, c. 22, s. 120 (8).

(14) Repealed: 2002, c. 22, s. 120 (9).

Determination at trial; non-pecuniary loss

(15) If no motion is made under subsection (12), the trial judge shall determine for the purpose of subsections (3) and (5) whether, as a result of the use or operation of the automobile, the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function. 1996, c. 21, s. 29; 2002, c. 22, s. 120 (10).

No action by uninsured owner or lessee

267.6 (1) Despite any other Act, a person is not entitled in an action in Ontario to recover any loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile if, at the time of the incident, the person was contravening subsection 2 (1) of the Compulsory Automobile Insurance Act in respect of that automobile.

Prosecution not necessary

(2) Subsection (1) applies whether or not the person was prosecuted for or convicted of an offence under the Compulsory Automobile Insurance Act. 1996, c. 21, s. 29.

Joint and several liability with other tortfeasors

267.7 (1) If, in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, one or more protected defendants and one or more other persons are found to be liable for damages,

(a) the other persons,

(i) are jointly and severally liable with the protected defendants for the damages for which the protected defendants are liable, having regard to section 267.5, and

(ii) are solely liable for any amount by which the amount mentioned in subclause (i) is less than the amount that the other persons would have been liable to make contribution and indemnify the protected defendants in respect of damages in the absence of section 267.5;

(b) the other persons are liable to make contribution and indemnify the protected defendants in respect of damages to the same extent as if section 267.5 did not apply, up to the amount for which the protected defendants are liable having regard to section 267.5; and

(c) the protected defendants are liable to make contribution and indemnify the other persons for the amount that the protected defendants are liable, having regard to section 267.5, reduced by the amount that the other persons are liable to make contribution and indemnify the protected defendants under clause (b).

Separate determinations

(2) Liability shall be determined under subsection (1) separately for each of the following categories of damages:

1. Damages for income loss and loss of earning capacity.

2. Damages for expenses that have been incurred or will be incurred for health care.

3. Damages for pecuniary loss, other than damages referred to in paragraphs 1 and 2.

4. Damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the Family Law Act.

Determination of liability

(3) For the purposes of subsection (1), the liability of all persons involved in the incident from which the action arose shall be determined as though all persons wholly or partly responsible for the damages were parties to the action even though any of those persons is not actually a party. 1996, c. 21, s. 29.

Collateral benefits

Income loss and loss of earning capacity

267.8 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by the following amounts:

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the income loss and loss of earning capacity.

2. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.

3. All payments in respect of the incident that the plaintiff has received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment. 1996, c. 21, s. 29.

Exception

(2) No reduction shall be made under subsection (1) for payments in respect of income loss if the payments are in respect of income loss suffered in the seven days after the incident. 1996, c. 21, s. 29.

Priority with other tortfeasors

(3) If persons other than protected defendants are liable for damages for income loss or loss of earning capacity, the reduction required by subsection (1) shall first be applied to the damages for which the protected defendants and the other persons are jointly and severally liable under subclause 267.7 (1) (a) (i), and any excess shall be applied to the amount for which the other persons are solely liable under subclause 267.7 (1) (a) (ii). 1996, c. 21, s. 29.

Health care expenses

(4) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for expenses that have been incurred or will be incurred for health care shall be reduced by the following amounts:

1. All payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of the expenses for health care.

2. All payments in respect of the incident that the plaintiff has received before the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law. 1996, c. 21, s. 29.

Exception

(5) Paragraph 2 of subsection (4) does not apply to a payment made by the Ministry of Health and Long-Term Care if the action is brought under section 30 of the Health Insurance Act. 1996, c. 21, s. 29; 2006, c. 19, Sched. L, s. 11 (3).

Other pecuniary loss

(6) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for pecuniary loss, other than the damages for income loss or loss of earning capacity and the damages for expenses that have been incurred or will be incurred for health care, shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care. 1996, c. 21, s. 29.

Non-pecuniary loss

(7) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages in respect of non-pecuniary loss to which a plaintiff is entitled shall not be reduced because of any payments or benefits that the plaintiff has received or is entitled to receive. 1996, c. 21, s. 29.

Contributory negligence

(8) The reductions required by subsections (1), (4) and (6) shall be made after any apportionment of damages required by section 3 of the Negligence Act. 1996, c. 21, s. 29.

Future collateral benefits

(9) A plaintiff who recovers damages for income loss, loss of earning capacity, expenses that have been or will be incurred for health care, or other pecuniary loss in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall hold the following amounts in trust:

1. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of income loss or loss of earning capacity.

2. All payments in respect of the incident that the plaintiff receives after the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan.

3. All payments in respect of the incident that the plaintiff receives after the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment.

4. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of expenses for health care.

5. All payments in respect of the incident that the plaintiff receives after the trial of the action under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law.

6. All payments in respect of the incident that the plaintiff receives after the trial of the action for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care. 1996, c. 21, s. 29.

Payments from trust

(10) A plaintiff who holds money in trust under subsection (9) shall pay the money to the persons from whom damages were recovered in the action, in the proportions that those persons paid the damages. 1996, c. 21, s. 29.

Disputes

(11) Any dispute concerning a plaintiff's liability to make payments under subsection (10) shall, on the request of a person who claims to be entitled to a payment under that subsection, be submitted to arbitration in accordance with the Arbitration Act, 1991. 1996, c. 21, s. 29.

Assignment of future collateral benefits

(12) The court that heard and determined the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile, on motion, may order that, subject to any conditions the court considers just,

(a) the plaintiff who recovered damages in the action assign to the defendants or the defendants' insurers all rights in respect of all payments to which the plaintiff who recovered damages is entitled in respect of the incident after the trial of the action,

(i) for statutory accident benefits in respect of income loss or loss of earning capacity,

(ii) for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan,

(iii) under a sick leave plan arising by reason of the plaintiff's occupation or employment,

(iv) for statutory accident benefits in respect of expenses for health care,

(v) under any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan or law, and

(vi) for statutory accident benefits in respect of pecuniary loss, other than income loss, loss of earning capacity and expenses for health care; and

(b) the plaintiff who recovered damages in the action co-operate with the defendants or the defendants' insurers in any claim or proceeding brought by the defendants or the defendants' insurers in respect of a payment assigned pursuant to clause (a). 1996, c. 21, s. 29.

Application of subs. (9)

(13) Subsection (9) no longer applies if an order is made under subsection (12). 1996, c. 21, s. 29.

Pension legislation

(14) In the event of a conflict, subsections (9) to (13) prevail over,

(a) sections 65, 66 and 67 of the Pension Benefits Act; and

(b) sections 10, 11 and 12 of the Pooled Registered Pension Plans Act, 2015. 2015, c. 9, s. 30.

Workplace Safety and Insurance Act, 1997

(15) Payments or benefits received or that were, are or may become available to a person under the Workplace Safety and Insurance Act, 1997 shall not be applied under subsection (1), (4) or (6) to reduce the damages awarded. 1996, c. 21, s. 29; 1997, c. 16, s. 9 (4).

(16) Repealed: 1997, c. 16, s. 9 (5).

Limitation on subrogation

(17) A person who has made a payment described in subsection (1), (4) or (6) is not subrogated to a right of recovery of the insured against another person in respect of that payment.

Exception

(18) Subsection (17) does not apply if,

(a) the Ministry of Health and Long-Term Care made the payment; and

(b) the right of recovery is against a person other than a person insured under a motor vehicle liability policy issued in Ontario. 1996, c. 21, s. 29; 2006, c. 19, Sched. L, s. 11 (3).

Workplace Safety and Insurance Board

(19) The Workplace Safety and Insurance Board is not subrogated to a right of recovery of the insured against another person in respect of a payment or benefit paid by the Workplace Safety and Insurance Board to the insured or in respect of a liability to make such payment or benefit. 1996, c. 21, s. 29; 1997, c. 16, s. 9 (6).

Determination of liability

(20) For the purposes of subsections (1), (3), (4) and (6), the damages payable by a person who is a party to the action shall be determined as though all persons wholly or partly responsible for the damages were parties to the action even though any of those persons is not actually a party.

Interpretation

(21) For the purpose of subsection (1), (4) or (6), a payment shall be deemed not to be available to a plaintiff if the plaintiff made an application for the payment and the application was denied.

Same

(22) Subsection (21) does not apply if the court is satisfied that the plaintiff impaired his or her entitlement to the payment by,

(a) failing to give any notice required by law of the application for the payment;

(b) failing to make himself or herself reasonably available for any examination that was requested by the person to whom the application was made and that was required by law; or

(c) settling in bad faith his or her entitlement to the payment to the detriment of a person found liable for damages in the action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile. 1996, c. 21, s. 29.

Proceedings by action

267.9 A proceeding for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall be brought only by way of an action. 1996, c. 21, s. 29.

Structured judgments

267.10 In the circumstances prescribed by the regulations, the court shall order that an award for damages in an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall be paid periodically on such terms as the court considers just. 1996, c. 21, s. 29.

No gross-up for income tax

267.11 (1) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, an award against a protected defendant shall not include any amount to offset liability for income tax payable on income from investment of the award with respect to,

(a) damages for income loss or loss of earning capacity;

(b) damages that are payable periodically pursuant to an order of a court under section 267.10;

(c) any component of an award, other than an award for damages mentioned in clause (b), that the plaintiff and defendant agree the defendant shall pay on a periodic basis. 2002, c. 22, s. 123.

Application

(2) Clause (1) (a) does not apply to an award for income loss or loss of earning capacity under subsection 61 (1) of the Family Law Act. 2002, c. 22, s. 123.

Liability of lessors

267.12 (1) Despite any other provision in this Part, except subsections (4) and (5), in an action in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of a motor vehicle that is leased, the maximum amount for which the lessor or lessors of the motor vehicle are liable in respect of the same incident in their capacity as lessors of the motor vehicle is the amount determined under subsection (3) less any amounts,

(a) that are recovered for loss or damage from bodily injury or death under the third party liability provisions of contracts evidenced by motor vehicle liability policies issued to persons other than a lessor;

(b) that are in respect of the use or operation of the motor vehicle; and

(c) that are in respect of the same incident. 2005, c. 31, Sched. 12, s. 4.

Same

(2) For the purposes of subsection (1), the amounts referred to in clauses (1) (a), (b) and (c) include only amounts recovered under the coverages referred to in subsections 239 (1) and (3) and section 241 and exclude,

(a) any sum referred to in subsection 265 (1);

(b) any amount payable as damages by the Motor Vehicle Accident Claims Fund under the Motor Vehicle Accident Claims Act; and

(c) any other amounts determined in the manner prescribed by the regulations. 2005, c. 31, Sched. 12, s. 4.

Maximum amount

(3) The maximum amount for the purposes of subsection (1) is the greatest of,

(a) $1,000,000;

(b) the amount of third party liability insurance required by law to be carried in respect of the motor vehicle; and

(c) the amount determined in the manner prescribed by the regulations, if regulations are made prescribing the manner for determining an amount for the purposes of this clause. 2005, c. 31, Sched. 12, s. 4.

Exceptions

(4) Subsection (1) does not apply,

(a) in such circumstances as may be prescribed by the regulations or to such persons, classes of persons, motor vehicles or classes of motor vehicles as may be prescribed in the regulations, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed by the regulations;

(b) in respect of amounts payable by a lessor other than by reason of the vicarious liability imposed under section 192 of the Highway Traffic Act; or

(c) in respect of a motor vehicle used as a taxicab, livery vehicle or limousine for hire unless the lessor or lessors of the motor vehicle and the lessee are dealing with each other at arm's length. 2005, c. 31, Sched. 12, s. 4; 2019, c. 8, Sched. 2, s. 1.

Application of subs. (1)

(5) Subsection (1) applies only to proceedings for loss or damage from bodily injury or death arising from the use or operation of a motor vehicle on or after the day this section comes into force. 2005, c. 31, Sched. 12, s. 4.

Definitions

(6) In this section,

"lessor" means, in respect of a motor vehicle, a person who is leasing or renting the motor vehicle to another person for any period of time, and "leased" has a corresponding meaning; ("bailleur")

"motor vehicle" has the same meaning as in subsection 1 (1) of the Highway Traffic Act. ("véhicule automobile") 2005, c. 31, Sched. 12, s. 4.

Statutory accident benefits

268 (1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule. 1993, c. 10, s. 26 (1).

Exception, public transit vehicles

(1.1) Despite subsection (1) and the Statutory Accident Benefits Schedule, no statutory accident benefits are payable in respect of an occupant of a public transit vehicle, in respect of an incident that occurs on or after the date this subsection comes into force, if the public transit vehicle did not collide with another automobile or any other object in the incident. 2011, c. 9, Sched. 21, s. 4.

(1.2), (1.3) Repealed: 1996, c. 21, s. 30 (1).

Indexation

(1.4) Subject to subsection (1.5) and to the terms, conditions, provisions, exclusions and limits established by the Statutory Accident Benefits Schedule, the Schedule shall provide that, in respect of incidents involving the use or operation, after December 31, 1993 and before November 1, 1996, of an automobile,

(a) every continuing periodic amount payable by an insurer as an income replacement benefit, education disability benefit, caregiver benefit or loss of earning capacity benefit in accordance with the Schedule shall be revised, effective the 1st day of January in every year after 1994, using the indexation percentage published under subsection 268.1 (1); and

(b) every monetary amount set out in the Schedule shall be revised, effective the 1st day of January in every year after 1994, by adjusting the amount by the indexation percentage published under subsection 268.1 (1). 1993, c. 10, s. 26 (1); 1996, c. 21, s. 30 (2); 2020, c. 34, Sched. 7, s. 12.

No decrease in payments

(1.5) A continuing periodic amount payable by an insurer in accordance with the Statutory Accident Benefits Schedule shall not be reduced by the operation of the indexation percentage referred to in subsection (1.4). 1993, c. 10, s. 26 (1).

Liability to pay

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,

i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,

iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.

2. In respect of non-occupants,

i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,

ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,

iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,

iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

Liability

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

Choice of insurer

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

Same

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or a dependant, as defined in the Statutory Accident Benefits Schedule, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9); 2005, c. 5, s. 35 (13).

Same

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

Same

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10); 2005, c. 5, s. 35 (14).

Excess insurance

(6) Except as provided in the Statutory Accident Benefits Schedule, the insurance mentioned in subsection (1) is excess insurance to any other insurance not being automobile insurance of the same type indemnifying the injured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268 (6); 2024, c. 20, Sched. 10, s. 9.

Idem

(7) The insurance mentioned in subsection (1) is excess insurance to any other insurance indemnifying the injured person or in respect of a deceased person for the expenses. R.S.O. 1990, c. I.8, s. 268 (7).

Payments pending dispute resolution

(8) Where the Statutory Accident Benefits Schedule provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved. R.S.O. 1990, c. I.8, s. 268 (8); 1993, c. 10, s. 1.

Winding-up orders

268.0.1 (1) The making of a winding-up order in respect of an insurer under the Winding-up and Restructuring Act (Canada) shall not be taken into account in determining under section 268 whether the insurer is liable to pay statutory accident benefits. 2002, c. 22, s. 124.

Motor Vehicle Accident Claims Fund

(2) If an insurer in respect of which a winding-up order has been made under the Winding-up and Restructuring Act (Canada) is liable to pay statutory accident benefits, the benefits, including any benefits that were outstanding at the time the order was made, shall be paid out of the Motor Vehicle Accident Claims Fund. 2002, c. 22, s. 124.

Application

(3) This section applies to winding-up orders made after this section comes into force. 2002, c. 22, s. 124.

Publication of indexation percentage

268.1 (1) Before the 1st day of January in each year, the Chief Executive Officer shall determine in accordance with this section and publish on the website of the Authority the indexation percentage to be used effective the 1st day of January under subsections 267.5 (8.3), (8.4) and 268 (1.4). 1993, c. 10, s. 27; 1997, c. 28, s. 115; 2015, c. 20, Sched. 17, s. 4; 2018, c. 8, Sched. 13, s. 22; 2020, c. 34, Sched. 7, s. 13.

Rules for determination

(2) The following rules apply to the determination of the indexation percentage to be used under subsections 267.5 (8.3), (8.4) and 268 (1.4) effective the 1st day of January in a year:

1. The indexation percentage shall be the percentage change in the Consumer Price Index for Canada (All Items), as published by Statistics Canada under the authority of the Statistics Act (Canada), for the period from September in the year immediately preceding the previous year to September of the previous year.

2. Despite paragraph 1, if the Consumer Price Index information required by paragraph 1 to determine the indexation percentage is not available by the 1st day of November in the previous year, or if in the Chief Executive Officer's opinion the information published by Statistics Canada does not provide a reasonable reflection of changes in consumer prices, the Chief Executive Officer may determine the indexation percentage in a manner that the Chief Executive Officer considers will provide a reasonable reflection of changes in consumer prices. 1993, c. 10, s. 27; 1997, c. 28, s. 115; 2015, c. 20, Sched. 17, s. 4; 2018, c. 8, Sched. 13, s. 22, 23.

Publication of monetary amounts in Schedule

(3) At the time an indexation percentage is published under subsection (1), the Chief Executive Officer shall publish on the website of the Authority the amounts to which the monetary amounts set out in the Statutory Accident Benefits Schedule shall be revised, effective the 1st day of January, in accordance with clause 268 (1.4) (b). 1993, c. 10, s. 27; 1997, c. 28, s. 115; 2018, c. 8, Sched. 13, s. 22; 2019, c. 14, Sched. 9, s. 12.

Rules of interpretation, Statutory Accident Benefits Schedule

268.2 The Statutory Accident Benefits Schedule shall be interpreted in accordance with the rules made under paragraph 10.2 of subsection 121 (1). 1993, c. 10, s. 27; 1996, c. 21, s. 31.

Guidelines, Statutory Accident Benefits Schedule

268.3 (1) The Chief Executive Officer may issue guidelines on the interpretation and operation of the Statutory Accident Benefits Schedule or any provision of that Schedule. 1993, c. 10, s. 27; 1997, c. 28, s. 116; 2018, c. 8, Sched. 13, s. 22.

Same

(1.1) The Chief Executive Officer may issue guidelines setting out the treatment, services, measures or goods applicable in respect of types of impairments for the purposes of payment of a medical or rehabilitation benefit provided under the Statutory Accident Benefits Schedule, and such guidelines may include conditions, restrictions and limits with respect to such treatment, services, measures or goods. 2002, c. 22, s. 125; 2018, c. 8, Sched. 13, s. 22.

Effect of guideline

(2) Subject to section 268.2, a guideline shall be considered in any determination involving the interpretation of the Statutory Accident Benefits Schedule. 1993, c. 10, s. 27.

Incorporation by reference

(2.1) Despite subsection (2), a guideline that is incorporated by reference into the Statutory Accident Benefits Schedule is binding. 2013, c. 2, Sched. 8, s. 13.

Effective date

(3) A guideline takes effect on the day it is published in The Ontario Gazette. 1993, c. 10, s. 27.

Immunity

268.4 No action or other proceeding for damages may be commenced against any person for an act done or omitted in good faith in conducting an assessment by a designated assessment centre under the Statutory Accident Benefits Schedule. 2002, c. 22, s. 126.

Particulars of insurance

269 (1) A person who is entitled to statutory accident benefits or his or her personal representative is entitled to particulars as to whether the owner or operator of any automobile against whom the person may have a claim has insurance that provides for statutory accident benefits and the name of the insurer, if any. R.S.O. 1990, c. I.8, s. 269 (1); 1993, c. 10, s. 1.

Demand for particulars

(2) The person or his or her personal representative may demand, in writing, the particulars described in subsection (1) from the owner or operator of the automobile or the insurer, if any, of either of them. 2019, c. 7, Sched. 33, s. 7.

Reply

(3) Every owner, operator and insurer shall comply with a demand under subsection (2) within ten days of receiving the demand. R.S.O. 1990, c. I.8, s. 269 (3).

Definition

(4) In this section,

"owner" includes a person who is a lessee for the purposes of section 192 of the Highway Traffic Act. 2005, c. 31, Sched. 12, s. 5.

Rights of unnamed insured

270 Any person insured by but not named in a contract to which section 265 or 268 applies may recover under the contract in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor. R.S.O. 1990, c. I.8, s. 270.

Payment into court

271 (1) Where an insurer admits liability for insurance money payable under section 265 or 268 and it appears that,

(a) there are adverse claimants;

(b) the whereabouts of an insured person entitled is unknown; or

(c) subject to subsections (1.1) and (1.2), there is no person capable of giving and authorized to give a valid discharge therefor who is willing to do so,

the insurer may, at any time after thirty days after the date upon which the insurance money becomes payable, apply to the court without notice for an order for payment of the money into the Superior Court of Justice, and the court may upon such notice, if any, as it thinks necessary make an order accordingly. R.S.O. 1990, c. I.8, s. 271 (1); 1993, c. 10, s. 28 (1); 2006, c. 19, Sched. C, s. 1 (1).

Minors

(1.1) If an insurer admits liability for insurance money payable to a minor under section 265 or 268, the insurer shall pay the money and any applicable interest into the Superior Court of Justice to the credit of the minor. 1993, c. 10, s. 28 (2); 2006, c. 19, Sched. C, s. 1 (1).

Same, affidavit

(1.2) No order is necessary for payment into the Superior Court of Justice under subsection (1.1), but the proper officer of the court shall receive the money if the insurer files with the court an affidavit showing the amount payable and the name, date of birth and residence of the minor. 1993, c. 10, s. 28 (2); 2006, c. 19, Sched. C, s. 1 (1).

Same, notice to Children's Lawyer

(1.3) The insurer shall promptly give the Children's Lawyer notice of a payment into court under subsection (1.2) and a copy of the affidavit filed under that subsection. 2009, c. 33, Sched. 16, s. 7 (4).

Same, authorized payments

(1.4) An insurer may, despite subsection (1.1), pay insurance money and applicable interest payable to a minor under section 265 or 268 to,

(a) the guardian of the property of the minor, appointed under section 47 of the Children's Law Reform Act;

(b) a person referred to in subsection 51 (1) of the Children's Law Reform Act, if the payment does not exceed the amount set out in that subsection; or

(c) the minor, if payment directly to the minor is authorized by the regulations. 1993, c. 10, s. 28 (2).

Discharge of insurer

(2) The receipt of the proper officer of the court is sufficient discharge to the insurer for the insurance money paid into the Superior Court of Justice, and the insurance money shall be dealt with as the court orders. R.S.O. 1990, c. I.8, s. 271 (2); 2006, c. 19, Sched. C, s. 1 (1).

272 Repealed: 2002, c. 24, Sched. B, s. 39 (4).

Claimant's obligation to inform

273 (1) Where any person makes a claim for damages in respect of bodily injury or death sustained by the person or any other person while driving or being carried in or upon or entering or getting onto or alighting from or as a result of being struck by an automobile, the claimant shall furnish the person against whom the claim is made full particulars of all insurance available to the claimant under contracts falling within the scope of section 268. R.S.O. 1990, c. I.8, s. 273.

Claim for statutory accident benefits

(2) If a person makes a claim for statutory accident benefits, the person shall furnish the person against whom the claim is made with full particulars of,

(a) all insurance available to the person under contracts to which subsection 268 (1) applies;

(b) any medical, surgical, dental, hospitalization, rehabilitation or long-term care plan under which benefits are available to the person;

(c) any income continuation benefit plan that provides benefits for loss of income under which benefits are available to the person;

(d) any law of a jurisdiction outside Canada under which benefits are available to the person; and

(e) any claim made by the person under a sick leave plan arising by reason of the person's occupation or employment. 1993, c. 10, s. 29.

Information to Ministry of Children, Community and Social Services, etc.

273.1 (1) Every insurer shall provide the Ministry of Children, Community and Social Services, a municipality, a board established under the District Social Services Administration Boards Act, a band approved under section 15 of the General Welfare Assistance Act, a delivery agent or delivery partner under the Ontario Works Act, 1997 or a delivery agent under the Ontario Disability Support Program Act, 1997, with such information as may be prescribed by the regulations, including personal information, subject to such conditions as may be prescribed by the regulations. 2021, c. 25, Sched. 21, s. 24.

Definition

(2) In this section,

"insurer" includes the Facility Association. 1997, c. 25, Sched. E, s. 5; 2002, c. 17, Sched. F, Table.

Release

274 (1) Payments made or available to a person under the Statutory Accident Benefits Schedule constitute, to the extent of the payments, a release by the person, the person's personal representatives, the person's insurer and anyone claiming through or under the person or by virtue of Part V of the Family Law Act,

(a) of any claim under subsection 265 (1) or 268 (1), if the claim arises directly or indirectly from the use or operation, before January 1, 1994, of an automobile; and

(b) of any claim under subsection 268 (1), if the claim arises directly or indirectly from the use or operation, on or after January 1, 1994, of an automobile. 1993, c. 10, s. 30; 1996, c. 21, s. 33 (1, 2).

Same; accidents on or after Nov. 1, 1996

(2) Payments made or available to a person under the Statutory Accident Benefits Schedule in respect of a claim arising directly or indirectly from the use or operation, after section 29 of the Automobile Insurance Rate Stability Act, 1996 comes into force, of an automobile constitute, to the extent of the payments, a release by the person, the person's personal representatives, the person's insurer and anyone claiming through or under the person or by virtue of Part V of the Family Law Act,

(a) of any claim under subsection 268 (1); and

(b) to the extent that the payments are made in respect of lost income, of any claim under subsection 265 (1). 1996, c. 21, s. 33 (3).

Indemnification in certain cases

275 (1) The insurer responsible under subsection 268 (2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose. R.S.O. 1990, c. I.8, s. 275 (1); 1993, c. 10, s. 1.

Idem

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules. R.S.O. 1990, c. I.8, s. 275 (2).

Deductible

(3) No indemnity is available under subsection (2) in respect of the first $2,000 of statutory accident benefits paid in respect of a person described in that subsection. R.S.O. 1990, c. I.8, s. 275 (3); 1993, c. 10, s. 1.

Arbitration

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitration Act, 1991. R.S.O. 1990, c. I.8, s. 275 (4); 2015, c. 20, Sched. 17, s. 5.

Stay of arbitration

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a proceeding before the Licence Appeal Tribunal under section 280 or to an appeal from such a proceeding. 2014, c. 9, Sched. 3, s. 13.

Terms of certain insurances, insurance under s. 265

276 Subject to subsection 227 (1), an insurer may in a policy,

(a) provide insurance that is less extensive in scope than the insurance mentioned in section 265; and

(b) provide the terms of the contract that relate to the insurance mentioned in section 265. R.S.O. 1990, c. I.8, s. 276.

Other Insurance

Other insurance

277 (1) Subject to section 255, insurance under a contract evidenced by a valid owner's policy of the kind mentioned in the definition of "owner's policy" in section 1 is, in respect of liability arising from or occurring in connection with the ownership, or directly or indirectly with the use or operation of an automobile owned by the insured named in the contract and within the description or definition thereof in the policy, a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy is excess insurance only. R.S.O. 1990, c. I.8, s. 277 (1).

Order in which policies are to respond

(1.1) Despite subsection (1), if an automobile is leased, the following rules apply to determine the order in which the third party liability provisions of any available motor vehicle liability policies shall respond in respect of liability arising from or occurring in connection with the ownership or, directly or indirectly, with the use or operation of the automobile on or after the day this subsection comes into force:

1. Firstly, insurance available under a contract evidenced by a motor vehicle liability policy under which the lessee of the automobile is entitled to indemnity as an insured named in the contract.

2. Secondly, insurance available under a contract evidenced by a motor vehicle liability policy under which the driver of the automobile is entitled to indemnity, either as an insured named in the contract, as the spouse of an insured named in the contract who resides with that insured or as a driver named in the contract, is excess to the insurance referred to in paragraph 1.

3. Thirdly, insurance available under a contract evidenced by a motor vehicle liability policy under which the owner of the automobile is entitled to indemnity as an insured named in the contract is excess to the insurance referred to in paragraphs 1 and 2. 2005, c. 31, Sched. 12, s. 6 (1).

If more than one policy required to respond

(1.2) For the purposes of the application of each of paragraphs 1, 2 and 3 of subsection (1.1), if insurance is available under more than one motor vehicle liability policy that is required to respond, each insurer is liable only for its rateable proportion of any liability, expense, loss or damage. 2005, c. 31, Sched. 12, s. 6 (1).

Exceptions

(1.3) Subsection (1.1) does not apply,

(a) to an insured's right of recovery referred to in subsection 263 (2);

(b) if the automobile is not a motor vehicle as defined in subsection 1 (1) of the Highway Traffic Act; or

(c) if subsection 267.12 (1) does not apply. 2005, c. 31, Sched. 12, s. 6 (1).

Insurer liable only for its rateable proportion of liability, etc.

(2) Subject to sections 255 and 268 and to subsection (1) of this section, if the insured named in a contract has or places any other valid insurance, whether against liability for the ownership, use or operation of or against loss of or damage to an automobile or otherwise, of the insured's interest in the subject-matter of the contract or any part thereof, the insurer is liable only for its rateable proportion of any liability, expense, loss or damage. R.S.O. 1990, c. I.8, s. 277 (2).

Rateable proportion defined

(3) "Rateable proportion" as used in subsections (1.2) and (2) means,

(a) if there are two insurers liable and each has the same policy limits, each of the insurers shall share equally in any liability, expense, loss or damage;

(b) if there are two insurers liable with different policy limits, the insurers shall share equally up to the limit of the smaller policy limit;

(c) if there are more than two insurers liable, clauses (a) and (b) apply with necessary modifications. R.S.O. 1990, c. I.8, s. 277 (3); 2005, c. 31, Sched. 12, s. 6 (2).

Lessee defined

(4) In this section,

"lessee" means, in respect of an automobile, a person who is leasing or renting the automobile for any period of time, and "leased" has a corresponding meaning. 2005, c. 31, Sched. 12, s. 6 (3).

Subrogation

Subrogation

278 (1) An insurer who makes any payment or assumes liability therefor under a contract is subrogated to all rights of recovery of the insured against any person and may bring action in the name of the insured to enforce those rights. R.S.O. 1990, c. I.8, s. 278 (1).

Pro-rating recovery

(2) Where the net amount recovered whether by action or on settlement is, after deduction of the costs of the recovery, not sufficient to provide complete indemnity for the loss or damage suffered, the amount remaining shall be divided between the insurer and the insured in the proportion in which the loss or damage has been borne by them. R.S.O. 1990, c. I.8, s. 278 (2).

Action when s. 261 applies

(3) Where the interest of an insured in any recovery is limited to the amount provided under a clause in the contract to which section 261 applies, the insurer shall have control of the action. R.S.O. 1990, c. I.8, s. 278 (3).

Application to court

(4) Where the interest of an insured in any recovery exceeds that referred to in subsection (3) and the insured and the insurer cannot agree as to,

(a) the solicitors to be instructed to bring the action in the name of the insured;

(b) the conduct and carriage of the action or any matters pertaining thereto;

(c) any offer of settlement or the apportionment thereof, whether action has been commenced or not;

(d) the acceptance of any money paid into court or the apportionment thereof;

(e) the apportionment of costs; or

(f) the launching or prosecution of an appeal,

either party may apply to the Superior Court of Justice for the determination of the matters in question, and the court shall make such order as it considers reasonable having regard to the interests of the insured and the insurer in any recovery in the action or proposed action or in any offer of settlement. R.S.O. 1990, c. I.8, s. 278 (4); 2006, c. 19, Sched. C, s. 1 (1).

Idem

(5) On an application under subsection (4), the only parties entitled to notice and to be heard thereon are the insured and the insurer, and no material or evidence used or taken upon the application is admissible upon the trial of an action brought by or against the insured or the insurer. R.S.O. 1990, c. I.8, s. 278 (5).

Concurrence in settlement or release

(6) A settlement or release given before or after an action is brought does not bar the rights of the insured or the insurer, as the case may be, unless they have concurred therein. R.S.O. 1990, c. I.8, s. 278 (6).

Dispute Resolution — Statutory Accident Benefits

Definitions

279 For the purposes of sections 280 to 283,

“insured person” includes a person who is claiming funeral expenses or a death benefit under the Statutory Accident Benefits Schedule; (“personne assurée”)

“Licence Appeal Tribunal” means the Licence Appeal Tribunal established under the Licence Appeal Tribunal Act, 1999. (“Tribunal d’appel en matière de permis”) 2014, c. 9, Sched. 3, s. 14.

Resolution of disputes

280 (1) This section applies with respect to the resolution of disputes in respect of an insured person’s entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled. 2014, c. 9, Sched. 3, s. 14.

Application to Tribunal

(2) The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1). 2014, c. 9, Sched. 3, s. 14.

Limit on court proceedings

(3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review. 2014, c. 9, Sched. 3, s. 14.

Resolution in accordance with Schedule

(4) The dispute shall be resolved in accordance with the Statutory Accident Benefits Schedule. 2014, c. 9, Sched. 3, s. 14.

Orders, powers and duties

(5) The regulations may provide for and govern the orders and interim orders that the Licence Appeal Tribunal may make and may provide for and govern the powers and duties that the Licence Appeal Tribunal shall have for the purposes of conducting the proceeding. 2014, c. 9, Sched. 3, s. 14.

Orders for costs, other amounts

(6) Without limiting what else the regulations may provide for and govern, the regulations may provide for and govern the following:

1. Orders, including interim orders, to pay costs, including orders requiring a person representing a party to pay costs personally.

2. Orders, including interim orders, to pay amounts even if those amounts are not costs or amounts to which a party is entitled under the Statutory Accident Benefits Schedule. 2014, c. 9, Sched. 3, s. 14.

280.1 Repealed: 2014, c. 9, Sched. 3, s. 14.

Protection of benefits after Tribunal resolution

281 (1) After the Licence Appeal Tribunal issues a decision, the insurer shall not reduce benefits to the insured person on the basis of an alleged change of circumstances, alleged new evidence or an alleged error except as provided under this section. 2014, c. 9, Sched. 3, s. 14.

When benefits may be reduced

(2) The insurer may reduce benefits if,

(a) the insured person agrees;

(b) the insurer is authorized to do so as a result of a successful appeal of the Licence Appeal Tribunal’s decision; or

(c) the insurer is authorized to do so by the Licence Appeal Tribunal. 2014, c. 9, Sched. 3, s. 14.

281.1 Repealed: 2014, c. 9, Sched. 3, s. 14.

Assessment of dispute resolution costs

282 (1) The Lieutenant Governor in Council may, in accordance with the regulations, assess all insurers that have issued motor vehicle liability policies in Ontario for expenses and expenditures of the Licence Appeal Tribunal relating to disputes described in subsection 280 (1). 2014, c. 9, Sched. 3, s. 14.

Same

(2) If an assessment is made under subsection (1), the share of a particular insurer shall be determined in the manner prescribed by regulation, which may take into account the degree of usage made of the Licence Appeal Tribunal that is specified in the regulations. 2014, c. 9, Sched. 3, s. 14.

Same, fees received

(3) In setting an assessment under subsection (1), the Lieutenant Governor in Council shall take into account the fees received from insurers and insured persons in respect of disputes described in subsection 280 (1). 2014, c. 9, Sched. 3, s. 14.

Insurer's duty to pay

(4) An insurer shall pay the amount assessed against it. 2014, c. 9, Sched. 3, s. 14.

Unpaid assessments

(4.1) If an insurer that is assessed does not pay the assessment, the unpaid amount of the assessment is a debt due to the Crown and the Crown may recover the debt by action or by any other remedy or procedure available by law to the Crown for the collection of debts owed to the Crown, whether or not the Chief Executive Officer exercises the rights set out in subsections (5) and (6). 2016, c. 37, Sched. 10, s. 2; 2018, c. 8, Sched. 13, s. 22.

Same

(5) If an insurer fails to pay an assessment made under subsection (1), the Chief Executive Officer may suspend or cancel the insurer's licence. 2014, c. 9, Sched. 3, s. 14; 2018, c. 8, Sched. 13, s. 22.

Same

(6) The Chief Executive Officer may revive the licence of an insurer whose licence was suspended or cancelled under subsection (5) if the insurer pays all amounts owing by the insurer under this section. 2014, c. 9, Sched. 3, s. 14; 2018, c. 8, Sched. 13, s. 22.

Transition — regulations

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

(a) providing for transitional matters in connection with the resolution of disputes described in subsection (2);

(b) governing when a dispute arises and when it is finally determined for the purposes of clause (2) (a);

(c) providing for transitional matters in connection with the coming into force of the following provisions:

(i) Sections 1 to 10, subsections 11 (1) to (4) and (6) to (8) and sections 13 and 14, of Schedule 3 of the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014, which amend this Act.

(ii) Repealed: 2020, c. 36, Sched. 14, s. 8 (3).

(iii) Section 7 of Schedule 5 of the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014, which amends the Motor Vehicle Accident Claims Act. 2014, c. 9, Sched. 3, s. 14; 2020, c. 36, Sched. 14, s. 8 (3).

Unresolved prior disputes

(2) The disputes referred to in clause (1) (a) are disputes that,

(a) arise before the transition date but are not finally determined before that date; and

(b) are in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which the insured person is entitled. 2014, c. 9, Sched. 3, s. 14.

Regulations relating to disputes

(3) Without limiting what regulations may be made under clause (1) (a), the regulations under that clause may,

(a) provide that sections 279 to 282 do not apply or apply with such modifications as the regulations may specify;

(b) provide that sections 279 to 287 as those sections read immediately before being repealed by section 14 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014 apply with such modifications as the regulations may specify;

(c) provide for other provisions of this Act, as those provisions read immediately before being amended or repealed by a provision of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014, to apply with such modifications as the regulations may specify;

(d) provide for the continuation of,

(i) the office of the director of arbitrations appointed under section 6 as that section read immediately before being repealed by section 2 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014,

(ii) arbitrators appointed under section 8 as that section read immediately before being repealed by section 4 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014, and

(iii) mediators appointed under section 9 as that section read immediately before being repealed by section 5 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014;

(e) provide for the continuation of the powers and duties that any of the officials referred to in clause (d) had before the transition date to be exercised by the officials continued by regulations made under clause (d) or to be exercised by other persons or bodies specified in the regulations. 2014, c. 9, Sched. 3, s. 14.

Other regulations

(4) Without limiting what regulations may be made under clause (1) (c), the regulations under that clause may,

(a) if the regulations made under clause (1) (a) provide for the continuation of the office of the director of arbitrations appointed under section 6 as that section read immediately before being repealed by section 2 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014, provide for that official to continue to be a member of the Financial Services Commission of Ontario, despite subsection 2 (2) of the Financial Services Commission of Ontario Act, 1997;

(b) govern how section 25 of the Financial Services Commission of Ontario Act, 1997 applies in respect of assessments that cover expenses and expenditures relating to disputes described in subsection (2);

(c) modify the application of clause 6 (2) (b) of the Motor Vehicle Accident Claims Act with respect to disputes described in subsection (2). 2014, c. 9, Sched. 3, s. 14.

Transition date

(5) In this section,

"transition date" means the date on which this section (as re-enacted by section 14 of Schedule 3 to the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014) comes into force. 2014, c. 9, Sched. 3, s. 14.

284 Repealed: 2014, c. 9, Sched. 3, s. 14.

284.1 Repealed: 2014, c. 9, Sched. 3, s. 14.

285 Repealed: 2014, c. 9, Sched. 3, s. 14.

286 Repealed: 2014, c. 9, Sched. 3, s. 14.

287 Repealed: 2014, c. 9, Sched. 3, s. 14.

288 Repealed: 2014, c. 9, Sched. 3, s. 14.

Insurers' Payments for Listed Expenses — Statutory Accident Benefits

Listed expenses in connection with statutory accident benefits

288.1 (1) For the purposes of this Part, the following are listed expenses in connection with statutory accident benefits:

1. Amounts payable for such assessments, examinations, reports, forms or plans authorized or required by the Statutory Accident Benefits Schedule as may be prescribed for the purposes of this section and expenses relating to those assessments, examinations, reports, forms and plans.

2. Amounts payable for prescribed goods or services that relate to such medical benefits, rehabilitation benefits, attendant care benefits and other statutory accident benefits as may be prescribed for the purposes of this section. 2013, c. 2, Sched. 8, s. 14; 2014, c. 7, Sched. 14, s. 4.

Exceptions

(2) Despite subsection (1), the regulations may specify that certain types of amounts payable are not listed expenses in such circumstances as may be prescribed. 2013, c. 2, Sched. 8, s. 14.

Restrictions re payments for listed expenses

Payment by insurer

288.2 (1) An insurer is not permitted to make payments for listed expenses directly to a person or entity who does not hold a service provider's licence at the applicable time, as determined in accordance with the regulations. 2013, c. 2, Sched. 8, s. 15.

Exception

(2) The restriction imposed by subsection (1) does not apply with respect to payments to such persons or entities as may be prescribed, or in such circumstances as may be prescribed. 2013, c. 2, Sched. 8, s. 15.

Reimbursement of insured person

(3) An insurer is permitted to reimburse an insured person for a listed expense, whether or not the payment for which reimbursement is sought was made to the holder of a service provider's licence. 2013, c. 2, Sched. 8, s. 15.

Motor Vehicle Accident Claims Fund

(4) This section applies, with necessary modifications, with respect to the Motor Vehicle Accident Claims Fund. 2013, c. 2, Sched. 8, s. 15.

Public registry re service provider's licences

288.3 (1) The Chief Executive Officer shall maintain one or more registers listing the holders of a service provider's licence and the former holders of such a licence. 2013, c. 2, Sched. 8, s. 16; 2018, c. 8, Sched. 13, s. 22.

Same

(2) The registers must contain such other information as may be prescribed. 2013, c. 2, Sched. 8, s. 16.

Same

(3) The information in a register shall be made available for inspection by the public without charge and in accordance with the regulations. 2013, c. 2, Sched. 8, s. 16.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 288.3 (3) of the Act is amended by striking out "the regulations" at the end and substituting "the Authority rules". (See: 2017, c. 34, Sched. 21, s. 20)

Service provider's licence — attributes and duties

288.4 (1) The holder of a service provider's licence is eligible to be paid directly by an insurer for listed expenses in connection with statutory accident benefits. 2013, c. 2, Sched. 8, s. 17.

Standards for business systems and practices, etc.

(2) It is a condition of a service provider's licence that the licensee is required to comply with such standards as may be prescribed with respect to its business systems and practices, in connection with statutory accident benefits, and such standards as may be prescribed with respect to matters of integrity in the management of the licensee's operations. 2013, c. 2, Sched. 8, s. 17.

Invoices for listed expenses

(3) It is a condition of a service provider's licence that the licensee is required to submit invoices to the applicable insurer, or to such other person or entity as the insurer directs, for payment of listed expenses in connection with statutory accident benefits. 2013, c. 2, Sched. 8, s. 17.

Other conditions

(4) A service provider's licence is subject to such other conditions as may be prescribed or as may be imposed by the Chief Executive Officer or Tribunal with respect to the matters described in subsection (2) and with respect to the administration of this Act and the Statutory Accident Benefits Schedule. 2013, c. 2, Sched. 8, s. 17; 2018, c. 8, Sched. 13, s. 22.

Same

(5) For greater certainty, a regulation prescribing conditions may require the licensee to submit periodic reports to the Chief Executive Officer. 2013, c. 2, Sched. 8, s. 17; 2018, c. 8, Sched. 13, s. 22.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 288.4 (5) of the Act is amended by striking out “a regulation” and substituting “an Authority rule”. (See: 2017, c. 34, Sched. 21, s. 21 (1))

Principal representative

(6) A licensee shall designate an individual as the licensee’s principal representative to exercise such powers and perform such duties as may be prescribed, and the individual so designated shall carry out his or her powers and duties in accordance with the regulations, if any. 2013, c. 2, Sched. 8, s. 17.

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 288.4 (6) of the Act is amended by striking out “the regulations” and substituting “the Authority rules”. (See: 2017, c. 34, Sched. 21, s. 21 (2))

Same

(7) An individual who satisfies the prescribed criteria is eligible to be designated as a licensee’s principal representative. 2013, c. 2, Sched. 8, s. 17.

Issuance of service provider’s licence

Application

288.5 (1) A person or entity who wishes to apply for a service provider’s licence shall submit an application to the Chief Executive Officer in the manner required by the Chief Executive Officer and shall give the Chief Executive Officer such information, evidence and material as he or she may require and shall pay the applicable fee. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22; 2024, c. 20, Sched. 10, s. 26.

Withdrawal of application

(2) The applicant may withdraw the application at any time before the licence is issued. 2013, c. 2, Sched. 8, s. 18.

Issuance of licence

(3) The Chief Executive Officer shall issue a service provider’s licence to an applicant who satisfies the prescribed requirements relating to its business systems and practices and the management of its operations,

(a) unless the Chief Executive Officer believes, on reasonable grounds, that the applicant is not suitable to hold a licence having regard to such circumstances as may be prescribed relating to the applicant’s business systems and practices and the management of its operations or having regard to such other matters as the Chief Executive Officer considers appropriate; or

(b) unless an administrative penalty imposed on the applicant under Part XVIII.1 has not been paid. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Not transferable

(4) A service provider’s licence is not transferable. 2013, c. 2, Sched. 8, s. 18.

Proposal to refuse application

(5) If the Chief Executive Officer proposes to refuse to issue a service provider's licence to an applicant, the Chief Executive Officer shall take the steps required by section 288.7. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Proposal to impose conditions

(6) If the Chief Executive Officer proposes to issue the service provider's licence and, without the applicant's consent, to impose conditions on the licence, the Chief Executive Officer shall take the steps required by section 288.7. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Amendment of licence

(7) The Chief Executive Officer may amend a service provider's licence at any time. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Proposal to amend

(8) If the Chief Executive Officer proposes to amend a service provider's licence without the licensee's consent, the Chief Executive Officer shall take the steps required by section 288.7. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Revocation, suspension or surrender of service provider's licence

Revocation or suspension

288.6 (1) The Chief Executive Officer may, by order, revoke or suspend a service provider's licence in any of the following circumstances:

1. The licensee ceases to satisfy a prescribed requirement for issuance of the licence.

2. The licensee has contravened or failed to comply with this Act, the regulations or a condition of the licence.

3. The Chief Executive Officer believes, on reasonable grounds, that the licensee is no longer suitable to be licensed having regard to such circumstances as may be prescribed relating to the licensee's business systems and practices and the management of its operations or having regard to such other matters as the Chief Executive Officer considers appropriate.

4. Such other circumstances as may be prescribed. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Proposal to revoke or suspend

(2) If the Chief Executive Officer proposes to revoke or suspend a service provider's licence under subsection (1) without the licensee's consent, the Chief Executive Officer shall take the steps required by section 288.7. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Expedited order to revoke or suspend

(3) The Chief Executive Officer may, by order, revoke or suspend a service provider's licence in any of the following circumstances, without taking the steps required by section 288.7:

1. The licensee fails to pay an administrative penalty imposed under Part XVIII.1.

2. Such other circumstances as may be prescribed. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Effect of suspension

(4) During a suspension, the licensee is deemed not to hold a service provider's licence for the purposes of section 288.2. 2013, c. 2, Sched. 8, s. 18.

Interim order suspending licence

(5) If, in the Chief Executive Officer's opinion, the interests of the public may be adversely affected by any delay in the revocation or suspension of a licence as a result of the steps required by section 288.7, the Chief Executive Officer may, without notice, make an interim order suspending the licence and may do so before or after giving the notice required by subsection 288.7 (2) with respect to the proposal to revoke or suspend the licence. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22, 23.

Effect of interim order

(6) An interim order suspending a service provider's licence takes effect immediately and remains in effect until the expiry of the period for requesting a hearing under subsection 288.7 (3) about the Chief Executive Officer's proposal to revoke or suspend the licence. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 23.

Same

(7) Despite subsection (6), if the Chief Executive Officer does not give the licensee the notice required by subsection 288.7 (2) within 21 days after the day on which the interim order is made or within such other period as may be prescribed, the interim order expires at the end of the 21-day period or the prescribed period, as the case may be. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Extension of interim order

(8) If the licensee requests a hearing about the Chief Executive Officer's proposal to revoke or suspend the licence, the Chief Executive Officer may extend the interim order until the proposal is finally determined. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22, 23.

Application to surrender licence

(9) A licensee may apply to the Chief Executive Officer for permission to surrender the service provider's licence and shall submit the application to the Chief Executive Officer in the manner required by the Chief Executive Officer, shall give the Chief Executive Officer such information, evidence and material as he or she may require and shall pay the applicable fee. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22; 2024, c. 20, Sched. 10, s. 26.

Decision re surrender

(10) The Chief Executive Officer shall allow the applicant to surrender the licence unless the Chief Executive Officer believes, on reasonable grounds, that the surrender of the licence is not in the public interest having regard to such criteria as may be prescribed relating to the licensee's business systems and practices and the management of its operations and such other factors as the Chief Executive Officer considers appropriate. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Same

(11) If the Chief Executive Officer allows the surrender of the licence, the Chief Executive Officer may impose conditions relating to the licensee's business systems and practices or the management of its operations in connection with the surrender. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Proposal to refuse application to surrender

(12) If the Chief Executive Officer proposes to refuse to allow the surrender of the licence, the Chief Executive Officer shall take the steps required by section 288.7. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Proposal to impose conditions

(13) If the Chief Executive Officer proposes to allow the surrender of the licence and, without the applicant's consent, to impose conditions in connection with the surrender, the Chief Executive Officer shall take the steps required by section 288.7. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Revocation of order suspending licence

(14) The Chief Executive Officer may, at any time, revoke an order or an interim order that suspends a service provider's licence. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Chief Executive Officer's proposal to refuse application, etc.

288.7 (1) This section applies if the Chief Executive Officer proposes to do any of the following things:

1. Refuse to issue a service provider's licence to an applicant.

2. Issue a service provider's licence and, without the applicant's consent, impose conditions.

3. Amend a service provider's licence without the licensee's consent.

4. Revoke a service provider's licence under subsection 288.6 (1) without the licensee's consent.

5. Suspend a service provider's licence under subsection 288.6 (1) without the licensee's consent.

6. Refuse to allow the surrender of a service provider's licence.

7. Allow the surrender of a service provider's licence and, without the applicant's consent, impose conditions in connection with the surrender. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Notice of proposal

(2) The Chief Executive Officer shall give written notice of the proposal to the applicant or licensee, including the reasons for the proposal; the Chief Executive Officer shall also inform the applicant or licensee that he, she or it can request a hearing by the Tribunal about the proposal and shall advise the applicant or licensee about the process for requesting a hearing. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Hearing requested

(3) If the applicant or licensee requests a hearing in writing within 15 days after the notice under subsection (2) is given, the Tribunal shall hold a hearing. 2013, c. 2, Sched. 8, s. 18.

Order

(4) The Tribunal may, by order, direct the Chief Executive Officer to carry out the proposal, with or without changes, or substitute its opinion for that of the Chief Executive Officer, and the Tribunal may impose such conditions as it considers appropriate in the circumstances. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

Appeal

(5) A party to a hearing held by the Tribunal may appeal the order of the Tribunal to the Divisional Court. 2013, c. 2, Sched. 8, s. 18.

Effect of appeal

(6) An order of the Tribunal takes effect immediately, but if the order is appealed, the Tribunal may grant a stay of the order until the appeal is finally determined. 2013, c. 2, Sched. 8, s. 18.

Hearing not requested

(7) If the applicant or licensee does not request a hearing, or does not make the request in accordance with subsection (3), the Chief Executive Officer may carry out the proposal. 2013, c. 2, Sched. 8, s. 18; 2018, c. 8, Sched. 13, s. 22.

TAB 46

CanLII

Automobile Insurance, RRO 1990, Reg 664

Current version: in force since 2024-01-01

Link to the latest version: https://canlii.ca/t/tlw

Stable link to this version: https://canlii.ca/t/565kf

Citation to this version: Automobile Insurance, RRO 1990, Reg 664, <https://canlii.ca/t/565kf> retrieved on 2026-01-18

Currency: Last updated from the e-Laws site on 2026-01-12

Insurance Act

R.R.O. 1990, REGULATION 664

AUTOMOBILE INSURANCE

Consolidation Period: From June 26, 2025 to the e-Laws currency date.

Last amendment: 56/25 (as am. by 131/25).

This is the English version of a bilingual regulation.

Definitions

1. In this Regulation,

"commercial vehicle" means an automobile used primarily to transport materials, goods, tools or equipment in connection with the insured's occupation, and includes a police department vehicle, a fire department vehicle, a driver training vehicle, a vehicle designed specifically for construction or maintenance purposes, a vehicle rented for thirty days or less, or a trailer intended for use with a commercial vehicle; ("véhicule utilitaire")

"fleet" means a group of not fewer than five automobiles that meets the following requirements:

1. At least five of the automobiles in the group are commercial vehicles, public vehicles or vehicles used for business purposes.

2. The automobiles in the group are,

i. under common ownership or management, and any automobiles in the group that are subject to a lease agreement for a period in excess of 30 days are leased to the same insured person, or

ii. available for hire through a common online-enabled application or system for the pre-arrangement of transportation, and insured under a contract of automobile insurance in which the automobile owner or lessee, as the case may be, has coverage as an insured named in the contract; ("parc automobile")

"public vehicle" means an automobile used primarily to provide transportation services to the public, and includes an ambulance, bus, funeral vehicle, limousine or taxi. ("véhicule public") O. Reg. 780/93, s. 2; O. Reg. 275/03, s. 1; O. Reg. 43/16, s. 1; O. Reg. 252/16, s. 1.

2. Revoked: O. Reg. 391/02, s. 1.

Monthly Premium Payments (Section 234 of the Act)

3. (1) This section applies with respect to statutory condition 3 as set out in the Schedule to Ontario Regulation 777/93. O. Reg. 780/93, s. 3 (1).

(2) An insurer is not required to permit an insured to pay the premium in instalments unless all of the following conditions are met:

1. The insurer, together with its affiliates, insured at least 10,000 private passenger automobiles in Ontario during the previous year.

2. The contract is written on Ontario Automobile Policy 1 or Ontario Policy Form 2.

3. The contract does not insure a commercial vehicle or public vehicle.

4. The contract does not insure five or more vehicles that are under common ownership or management.

5. The total annual premium payable under the contract exceeds $300.

6. The insured has not had more than one automobile insurance policy terminated by an insurer for non-payment of the premium during the thirty-six months before the contract takes effect. O. Reg. 780/93, s. 3 (1); O. Reg. 464/96, s. 2.

(3) Revoked: O. Reg. 780/93, s. 3 (1).

(4) As a precondition for permitting an insured to pay the premium in instalments, an insurer may require that the insured,

(a) make an initial payment equal to two monthly instalments of the premium; and

the purported settlement or the right of the insured person to rescind the settlement, the insurer shall hold the money in trust until the matter is determined, at which time the amount and any income on the amount,

(a) shall be paid to the insured, if it is determined or agreed that there was a valid settlement that was not rescinded; and

(b) shall be returned to the insurer, if it is determined or agreed that there was no settlement, or that the settlement was invalid or was rescinded. O. Reg. 483/01, s. 1.

(10) A restriction in a settlement on an insured person's right to apply to the Licence Appeal Tribunal under subsection 280 (2) of the Act or appeal from a decision of the Licence Appeal Tribunal is void unless the insurer complied with subsections (2) and (3) and one of the following conditions is satisfied:

1. The settlement is entered into on or after the first anniversary of the day of the accident that gave rise to the claim.

2. Before entering into the settlement,

i. the insured applied to the Licence Appeal Tribunal under subsection 280 (2) of the Act, and

ii. if there were applicable rules or procedures of the Licence Appeal Tribunal in respect of case conferences at the time of the settlement, a case conference was held in accordance with the rules or procedures. O. Reg. 43/16, s. 2 (4).

(11), (12) Revoked : O. Reg. 43/16, s. 2 (5).

9.2 (1) Section 9.1 applies only with respect to settlements made on or after the transition date. O. Reg. 43/16, s. 3.

(2) Subsection 9.1 (3), as it read immediately before the transition date, applies with respect to settlements for which written notice under subsection 9.1 (2) was given before the transition date but which were made on or after the transition date. O. Reg. 43/16, s. 3.

(3) Section 9.1, as it read immediately before the transition date, applies with respect to settlements made before the transition date, with necessary modifications, and the following modifications:

1. Subsections 9.1 (2) to (5), as they read on February 28, 2002, continue to apply with respect to settlements for which written notice under subsection 9.1 (2) was given before March 1, 2002.

2. In addition to a mediation proceeding, subsection 9.1 (8) applies in respect of an application to the Licence Appeal Tribunal under subsection 280 (2) of the Act.

3. In addition to the right to mediate, litigate, appeal or apply to vary an order, subsection 9.1 (10) applies to the right to apply to the Licence Appeal Tribunal under

TAB 47

CanLII

Disputes Between Insurers, O Reg 283/95

Current version: in force since 2019-06-08

Link to the latest version: https://canlii.ca/t/rvj

Stable link to this version: https://canlii.ca/t/53mpn

Citation to this version: Disputes Between Insurers, O Reg 283/95, <https://canlii.ca/t/53mpn> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act
Loi sur les assurances

ONTARIO REGULATION 283/95

DISPUTES BETWEEN INSURERS

Consolidation Period: From June 8, 2019 to the e-Laws currency date.

Last amendment: 126/19.

This Regulation is made in English only.

0.1 In this Regulation,

"application" means an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule;

"benefits" means statutory accident benefits as defined in subsection 224 (1) of the Act;

"completed application" means a completed and signed application;

"Fund" means the Motor Vehicle Accident Claims Fund continued under subsection 2 (1) of the *Motor Vehicle Accident Claims Act*;

"Schedule" means, in respect of an accident, the *Statutory Accident Benefits Schedule* as defined in subsection 224 (1) of the Act that applies in respect of the accident. O. Reg. 38/10, s. 1.

1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

2. (1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2.

(2) Subsection (1) applies in respect of benefits that may be payable as a result of an accident that occurs before September 1, 2010. O. Reg. 38/10, s. 2.

2.1 (1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.

(2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.

(3) The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.

(4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.

(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer. O. Reg. 38/10, s. 3.

(6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits. O. Reg. 38/10, s. 3.

(7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance. O. Reg. 38/10, s. 3.

(8) In subsection (7),

"insurer" does not include the Fund. O. Reg. 38/10, s. 3.

3. (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).

(1.1) If the dispute relates to an accident that occurred on or after September 1, 2010, a notice required under subsection (1) must also be given to the Fund if the insurer claims the Fund is required to pay benefits. O. Reg. 38/10, s. 4.

(2) An insurer may give notice after the 90-day period if,

(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).

(2.1) If the dispute relates to an accident that occurred on or after September 1, 2010, the Fund may give a notice under subsection (1) after the 90-day period and is not required to comply with subsection (2). O. Reg. 38/10, s. 4.

(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7. O. Reg. 283/95, s. 3 (3).

3.1 (1) This section applies to disputes relating to accidents occurring on or after September 1, 2010. O. Reg. 38/10, s. 5.

(2) Before giving a notice to the Fund under section 3, an insurer must,

(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and

(b) provide particulars to the Fund of the investigation and the results of the investigation. O. Reg. 38/10, s. 5.

4. (1) An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Chief Executive Officer. O. Reg. 283/95, s. 4; O. Reg. 305/98, s. 1; O. Reg. 126/19, s. 2.

(2) Despite subsection (1), if the insurer that gives notice under section 3 is the Fund, no notice shall be given to the insured person under subsection (1). O. Reg. 38/10, s. 6.

5. (1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer of the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (1).

(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (2).

(3) Subject to subsection 7 (5), an insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured

person was notified in writing of an agreement and the insured person has not initiated an arbitration under the *Arbitration Act, 1991*. O. Reg. 283/95, s. 5 (3); O. Reg. 38/10, s. 7.

6. (1) The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 6.

(2) Upon request by the first insurer that receives a completed application for benefits, the insured person shall submit to one examination under oath for the purpose of determining who is required to pay benefits under section 268 of the Act. O. Reg. 16/13, s. 1.

(3) No other insurer is entitled to require the insured person to submit to an examination under oath for the purpose of determining who is required to pay benefits under section 268 of the Act. O. Reg. 16/13, s. 1.

(4) The scope of the examination under oath is limited to matters that are relevant to determining who is required to pay benefits under section 268 of the Act. O. Reg. 16/13, s. 1.

(5) The insured person is entitled to be represented at his or her own expense at the examination under oath by such counsel or other representative of his or her choice as the law permits. O. Reg. 16/13, s. 1.

(6) The insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the insured person and shall give him or her reasonable advance notice of the following:

1. The date and location of the examination.

2. The insured person's entitlement to be represented in the manner described in subsection (5).

3. The reason for the examination.

4. The fact that the scope of the examination is limited to matters that are relevant to determining who is required to pay statutory accident benefits under section 268 of the Act. O. Reg. 16/13, s. 1.

7. (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed. O. Reg. 38/10, s. 8.

(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insured person. O. Reg. 38/10, s. 8.

(3) The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3. O. Reg. 38/10, s. 8.

(4) Despite subsection (3), the arbitration may be initiated by the Fund at any time before or after the expiry of the time limit set out in subsection (3) if the Fund is paying benefits in respect of an accident that occurred on or after September 1, 2010. O. Reg. 38/10, s. 8.

(5) No insured person is entitled to initiate or participate as a party to an arbitration under this section if the insurer paying benefits is the Fund. O. Reg. 38/10, s. 8.

(6) If the dispute relates to an accident that occurred on or after September 1, 2010, the failure of an insurer other than the Fund to comply with section 2.1 or 3.1 may be the subject of a special award made by the arbitrator. O. Reg. 38/10, s. 8.

8. (1) Except as provided in this Regulation, the *Arbitration Act, 1991* applies to an arbitration under this Regulation. O. Reg. 283/95, s. 8 (1).

(2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:

1. If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.

2. A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator.

3. Subject to paragraph 4, once a date for the arbitration is scheduled, the arbitration must be conducted on that day.

4. The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.

5. Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration. O. Reg. 38/10, s. 9.

(3) The decision of an arbitrator made under this Regulation must be made public. O. Reg. 38/10, s. 9.

(4) If the decision relates to an accident that occurred on or after September 1, 2010, the decision must be made public,

(a) by the insurer that the arbitrator finds to be liable to pay the benefits; and

(b) in a manner and form specified by the Chief Executive Officer. O. Reg. 38/10, s. 9; O. Reg. 126/19, s. 2.

9. (1) Unless otherwise ordered by the arbitrator or agreed to by all the parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration. O. Reg. 283/95, s. 9 (1).

(2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*. O. Reg. 283/95, s. 9 (2).

10. (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).

(2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3. O. Reg. 283/95, s. 10 (2).

(3) The dispute among the insurers shall be resolved in one arbitration. O. Reg. 283/95, s. 10 (3).

11. References in this Regulation to a form approved by the Chief Executive Officer are deemed to include the last form approved by the Superintendent for the purposes of the relevant provision prior to June 8, 2019 until the Chief Executive Officer approves a subsequent form for the purposes of the relevant provision. O. Reg. 126/19, s. 1.

Tab A

CanLII

Versions

- [ ] 4. since 2019-06-08 (current)
- [ ] 3. between 2013-06-01 and 2019-06-07 (past)
- [ ] 2. between 2010-09-01 and 2013-05-31 (past)
- [ ] *1. between 1998-07-01 and 2010-08-31 (past)*

Prior versions are unavailable on CanLII

Disputes Between Insurers, O Reg 283/95

This version is not the latest.

Past version: in force between 1998-07-01 and 2010-08-31

Link to the latest version: https://canlii.ca/t/rvj

Stable link to this version: https://canlii.ca/t/1mcr

Citation to this version: Disputes Between Insurers, O Reg 283/95, <https://canlii.ca/t/1mcr> retrieved on 2026-01-19

Insurance Act

Loi sur les assurances

ONTARIO REGULATION 283/95

DISPUTES BETWEEN INSURERS

Consolidation Period: From February 26, 2010 to the e-Laws currency date.

Last amendment: O. Reg. 38/10.

This Regulation is made in English only.

Note: On September 1, 2010, the Regulation is amended by adding the following section:

0.1 In this Regulation,

"application" means an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule;

"benefits" means statutory accident benefits as defined in subsection 224 (1) of the Act;

"completed application" means a completed and signed application;

"Fund" means the Motor Vehicle Accident Claims Fund continued under subsection 2 (1) of the *Motor Vehicle Accident Claims Act*;

"Schedule" means, in respect of an accident, the *Statutory Accident Benefits Schedule* as defined in subsection 224 (1) of the Act that applies in respect of the accident. O. Reg. 38/10, s. 1.

See: O. Reg. 38/10, ss. 1, 11.

1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

2. The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2.

Note: On September 1, 2010, section 2 is amended by adding the following subsection:

(2) Subsection (1) applies in respect of benefits that may be payable as a result of an accident that occurs before September 1, 2010. O. Reg. 38/10, s. 2.

See: O. Reg. 38/10, ss. 2, 11.

Note: On September 1, 2010, the Regulation is amended by adding the following section:

2.1 (1) This section applies in respect of benefits that may be payable as a result of an accident that occurs on or after September 1, 2010. O. Reg. 38/10, s. 3.

(2) An insurer shall promptly provide an application and any other appropriate forms in accordance with the Schedule to an applicant who notifies the insurer that he or she wishes to apply for benefits. O. Reg. 38/10, s. 3.

(3) The application provided by the insurer must include the insurer's name, mailing address and telephone and facsimile numbers. O. Reg. 38/10, s. 3.

(4) The applicant shall use the application provided by the insurer and shall send the completed application to only one insurer. O. Reg. 38/10, s. 3.

(5) An insurer that provides an application under subsection (2) to an applicant shall not take any action intended to prevent or stop the applicant from submitting a completed application to the insurer and shall not refuse to accept the completed application or redirect the applicant to another insurer. O. Reg. 38/10, s. 3.

(6) The first insurer that receives a completed application for benefits from the applicant shall commence paying the benefits in accordance with the provisions of the Schedule pending the resolution of any dispute as to which insurer is required to pay the benefits. O. Reg. 38/10, s. 3.

(7) An insurer that fails to comply with this section shall reimburse the Fund or another insurer for any legal fees, adjuster's fees, administrative costs and disbursements that are reasonably incurred by the Fund or other insurer as a result of the non-compliance. O. Reg. 38/10, s. 3.

(8) In subsection (7),

"insurer" does not include the Fund. O. Reg. 38/10, s. 3.

See: O. Reg. 38/10, ss. 3, 11.

3. (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).

Note: On September 1, 2010, section 3 is amended by adding the following subsection:

(1.1) If the dispute relates to an accident that occurred on or after September 1, 2010, a notice required under subsection (1) must also be given to the Fund if the insurer claims the Fund is required to pay benefits. O. Reg. 38/10, s. 4.

See: O. Reg. 38/10, ss. 4, 11.

(2) An insurer may give notice after the 90-day period if,

(a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and

(b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).

Note: On September 1, 2010, section 3 is amended by adding the following subsection:

(2.1) If the dispute relates to an accident that occurred on or after September 1, 2010, the Fund may give a notice under subsection (1) after the 90-day period and is not required to comply with subsection (2). O. Reg. 38/10, s. 4.

See: O. Reg. 38/10, ss. 4, 11.

(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7. O. Reg. 283/95, s. 3 (3).

Note: On September 1, 2010, the Regulation is amended by adding the following section:

3.1 (1) This section applies to disputes relating to accidents occurring on or after September 1, 2010. O. Reg. 38/10, s. 5.

(2) Before giving a notice to the Fund under section 3, an insurer must,

(a) complete a reasonable investigation to determine if any other insurer or insurers are liable to pay benefits in priority to the Fund; and

(b) provide particulars to the Fund of the investigation and the results of the investigation. O. Reg. 38/10, s. 5.

See: O. Reg. 38/10, ss. 5, 11.

4. An insurer that gives notice under section 3 shall also give notice to the insured person using a form approved by the Superintendent. O. Reg. 283/95, s. 4; O. Reg. 305/98, s. 1.

Note: On September 1, 2010, section 4 is amended by adding the following subsection:

(2) Despite subsection (1), if the insurer that gives notice under section 3 is the Fund, no notice shall be given to the insured person under subsection (1). O. Reg. 38/10, s. 6.

See: O. Reg. 38/10, ss. 6, 11.

5. (1) An insured person who receives a notice under section 4 shall advise the insurer paying benefits in writing within 14 days whether he or she objects to the transfer

of the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (1).

(2) If the insured person does not advise the insurer within 14 days that he or she objects to the transfer of the claim, the insured person is not entitled to object to any subsequent agreement or decision to transfer the claim to the insurers referred to in the notice. O. Reg. 283/95, s. 5 (2).

(3) An insured person who has given notice of an objection is entitled to participate as a party in any subsequent proceeding to settle the dispute and no agreement between insurers as to which insurer should pay the claim is binding unless the insured person consents to the agreement or 14 days have passed since the insured person was notified in writing of an agreement and the insured person has not initiated an arbitration under the *Arbitration Act, 1991*. O. Reg. 283/95, s. 5 (3).

Note: On September 1, 2010, subsection (3) is amended by adding at the beginning "Subject to subsection 7 (5)". See: O. Reg. 38/10, ss. 7, 11.

6. The insured person shall provide the insurers with all relevant information needed to determine who is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 6.

7. (1) If the insurers cannot agree as to who is required to pay benefits or if the insured person disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991*. O. Reg. 283/95, s. 7 (1).

(2) The insurer paying benefits under section 2, any other insurer against whom the obligation to pay benefits is claimed or the insured person who has given notice of an objection to a change in insurers under section 5 may initiate the arbitration but no arbitration may be initiated after one year from the time the insurer paying benefits under section 2 first gives notice under section 3. O. Reg. 283/95, s. 7 (2).

Note: On September 1, 2010, section 7 is revoked and the following substituted:

7. (1) If the insurers cannot agree as to who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insurer paying benefits under section 2 or 2.1 or any other insurer against whom the obligation to pay benefits is claimed. O. Reg. 38/10, s. 8.

(2) If an insured person was entitled to receive a notice under section 4, has given a notice of objection under section 5 and disagrees with an agreement among insurers that an insurer other than the insurer selected by the insured person should pay the benefits, the

dispute shall be resolved through an arbitration under the *Arbitration Act, 1991* initiated by the insured person. O. Reg. 38/10, s. 8.

(3) The arbitration may be initiated by an insurer or by the insured person no later than one year after the day the insurer paying benefits first gives notice under section 3. O. Reg. 38/10, s. 8.

(4) Despite subsection (3), the arbitration may be initiated by the Fund at any time before or after the expiry of the time limit set out in subsection (3) if the Fund is paying benefits in respect of an accident that occurred on or after September 1, 2010. O. Reg. 38/10, s. 8.

(5) No insured person is entitled to initiate or participate as a party to an arbitration under this section if the insurer paying benefits is the Fund. O. Reg. 38/10, s. 8.

(6) If the dispute relates to an accident that occurred on or after September 1, 2010, the failure of an insurer other than the Fund to comply with section 2.1 or 3.1 may be the subject of a special award made by the arbitrator. O. Reg. 38/10, s. 8.

See: O. Reg. 38/10, ss. 8, 11.

8. (1) Except as provided in this Regulation, the *Arbitration Act, 1991* applies to an arbitration under this Regulation. O. Reg. 283/95, s. 8 (1).

(2) The decisions of an arbitrator made under this Regulation shall be public. O. Reg. 283/95, s. 8 (2).

Note: On September 1, 2010, subsection (2) is revoked and the following substituted:

(2) The following rules apply with respect to an arbitration of a dispute relating to an accident that occurs on or after September 1, 2010:

1. If an insurer to whom a notice to initiate arbitration is delivered does not respond to the notice within 30 days, the insurer is deemed to have accepted the jurisdiction of the arbitrator proposed in the notice.

2. A pre-arbitration hearing must be scheduled and take place no later than 120 days after the appointment of the arbitrator.

3. Subject to paragraph 4, once a date for the arbitration is scheduled, the arbitration must be conducted on that day.

4. The arbitrator may grant an adjournment on such terms as the arbitrator considers appropriate, but only if there is cogent and compelling evidence of the reasons why the hearing cannot proceed on the scheduled day.

5. Unless consented to by all parties, the hearing of the arbitration must be completed within two years after the commencement of the arbitration. O. Reg. 38/10, s. 9.

(3) The decision of an arbitrator made under this Regulation must be made public. O. Reg. 38/10, s. 9.

(4) If the decision relates to an accident that occurred on or after September 1, 2010, the decision must be made public,

(a) by the insurer that the arbitrator finds to be liable to pay the benefits; and

(b) in a manner and form specified by the Superintendent. O. Reg. 38/10, s. 9.

See: O. Reg. 38/10, ss. 9, 11.

9. (1) Unless otherwise ordered by the arbitrator or agreed to by all the parties before the commencement of the arbitration, the costs of the arbitration for all parties, including the cost of the arbitrator, shall be paid by the unsuccessful parties to the arbitration. O. Reg. 283/95, s. 9 (1).

(2) The costs referred to in subsection (1) shall be assessed in accordance with section 56 of the *Arbitration Act, 1991*. O. Reg. 283/95, s. 9 (2).

10. (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have equal or higher priority under section 268 of the Act, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).

(2) This Regulation applies to the other insurers given notice in the same way that it applies to the original insurer given notice under section 3. O. Reg. 283/95, s. 10 (2).

(3) The dispute among the insurers shall be resolved in one arbitration. O. Reg. 283/95, s. 10 (3).

11. If the Motor Vehicle Accident Claims Fund receives an application for benefits, sections 4 and 5 do not apply and the insured person is not entitled to initiate or participate as a party in an arbitration under section 7. O. Reg. 283/95, s. 11.

Note: On September 1, 2010, section 11 is revoked. See: O. Reg. 38/10, ss. 10, 11.

TAB 48

CanLII

Agents, O Reg 347/04

This regulation replaces RRO 1990, Reg 663.

Current version: in force since 2023-06-02

Link to the latest version: https://canlii.ca/t/s28

Stable link to this version: https://canlii.ca/t/5619z

Citation to this version: Agents, O Reg 347/04, <https://canlii.ca/t/5619z> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act

ONTARIO REGULATION 347/04

agents

Consolidation Period: From June 2, 2023 to the e-Laws currency date.

Last amendment: 113/23.

This is the English version of a bilingual regulation.

Definitions

Definitions

1. (1) In this Regulation,

"accident and sickness insurance licence" means a licence referred to in paragraph 2 of subsection 392.2 (2) of the Act; ("permis d'assurance contre les accidents et la maladie")

"general insurance licence" means a licence referred to in paragraph 3 of subsection 392.2 (2) of the Act; ("permis d'assurance de dommages")

"Level II life insurance examination" means an examination set by the Superintendent for agents who held a life insurance licence before July 1, 2003 and who have held a life

insurance licence for at least two years; ("examen d'assurance-vie de niveau II")

"life insurance licence" means a licence referred to in paragraph 1 of subsection 392.2 (2) of the Act; ("permis d'assurance-vie")

"Life Licence Qualification Program" means a program approved by the Chief Executive Officer for applicants for accident and sickness insurance licences and life insurance licences. ("programme de qualification du permis d'assurance-vie") O. Reg. 347/04, s. 1 (1); O. Reg. 261/14, s. 1; O. Reg. 145/19, s. 3.

(2) For the purposes of this Regulation, a determination of the length of time that a person has held a life insurance licence may include time that the person held a licence in another province or territory of Canada or in a state of the United States of America, if the Chief Executive Officer is satisfied that the licence is equivalent to an Ontario life insurance licence. O. Reg. 347/04, s. 1 (2); O. Reg. 145/19, s. 3.

Licences

Requirement for licence

2. (1) No individual, partnership or corporation shall act as an agent unless the individual, partnership or corporation is licensed under this Regulation. O. Reg. 347/04, s. 2 (1).

(2) Subsection (1) applies to an individual, corporation or partnership who acts as an agent even if they are an employee, director, officer, shareholder or partner of an agent licensed under this Regulation. O. Reg. 347/04, s. 2 (2).

Application for licence

3. (1) An application for an agent's licence shall be accompanied by,

(a) the certificate of a sponsoring insurer certifying that the applicant is appointed to act as the insurer's agent; and

(b) a statement by the sponsoring insurer indicating that it has taken steps to screen the applicant and is satisfied that the applicant is suitable to carry on business as an agent. O. Reg. 347/04, s. 3 (1).

(2) Subsection (1) does not apply to an application by a corporation or partnership for a life insurance licence. O. Reg. 347/04, s. 3 (2).

(3) An application for an agent's licence shall be in a form obtained from the Chief Executive Officer. O. Reg. 347/04, s. 3 (3); O. Reg. 145/19, s. 3.

Qualifications for licence

4. (1) An applicant for a licence shall be granted a licence if the Chief Executive Officer is satisfied that the applicant,

(a) is of good character and reputation;

(b) is possessed of a reasonable educational background, if the applicant is an individual;

(c) if previously employed or engaged in business, has a satisfactory record in the employment or business;

(d) has completed a course acceptable to the Chief Executive Officer for the Life Licence Qualification Program and passed the examination approved by the Chief Executive Officer for the Program, if the applicant is an individual and is applying for a life insurance licence;

(e) has completed the accident and sickness component of a course acceptable to the Chief Executive Officer for the Life Licence Qualification Program and passed the examination approved by the Chief Executive Officer that relates to that component of the Program, if the applicant is an individual and is applying for an accident and sickness insurance licence;

(f) has passed a qualifying examination approved by the Chief Executive Officer for the purpose, if the applicant is an individual and is applying for a general insurance licence;

(g) continues to have the qualifications tested by the examination referred to in clause (d), the examination referred to in clause (e) or the examination referred to in clause (f), as the case may be, if the applicant is an individual who previously held a licence of the class he or she is applying for but does not currently hold a licence of that class;

(h) is not engaged in any business or occupation that would jeopardize the applicant's integrity, independence or competence as an agent;

(i) is otherwise a suitable person to receive a licence;

(j) intends to hold himself, herself or itself out publicly and carry on business in good faith as an agent;

(k) has not made the application for the purpose of obtaining a licence to act as an agent in respect of any particular risk or risks or directly or indirectly to obtain an agent's commission for insurance on the applicant's own life or property or on the lives or property of the applicant's family, employer or fellow employees; and

(l) has a mailing address in Ontario that is known to the Chief Executive Officer, that is not a post office box and that is suitable to permit service by registered mail. O. Reg. 347/04, s. 4 (1); O. Reg. 145/19, s. 3.

(2) An individual may be granted a licence even if he or she does not meet the qualifications described in clause (1) (d), (e) or (f) if the Chief Executive Officer is satisfied that the individual has qualifications equivalent to the qualifications described in clause (1) (d), (e) or (f), as the case may be. O. Reg. 347/04, s. 4 (2); O. Reg. 145/19, s. 3.

(2.1) An individual shall be deemed, for the purposes of clause 4 (1) (d) only, to meet the qualifications described in that clause if he or she is applying for the renewal of a life

insurance licence and the Chief Executive Officer is satisfied that the individual was previously deemed to have met the qualifications. O. Reg. 261/14, s. 2; O. Reg. 145/19, s. 3.

(2.2) An individual shall be deemed, for the purposes of clause 4 (1) (e) only, to meet the qualifications described in that clause if he or she is applying for the renewal of an accident and sickness insurance licence and the Chief Executive Officer is satisfied that the individual was previously deemed to have met the qualifications. O. Reg. 261/14, s. 2; O. Reg. 145/19, s. 3.

(2.3) An individual shall be deemed, for the purposes of clause 4 (1) (g) only, to continue to have the qualifications tested by the examination referred to in clause 4 (1) (d) if,

(a) the Chief Executive Officer is satisfied that the individual continues to have the qualifications tested by the Level II life insurance examination; and

(b) the individual,

(i) previously passed that examination, or

(ii) was previously determined by the Chief Executive Officer to have the qualifications tested by that examination. O. Reg. 261/14, s. 2; O. Reg. 145/19, s. 3.

(2.4) An individual shall be deemed, for the purposes of clause 4 (1) (g) only, to continue to have the qualifications tested by the examination referred to in clause 4 (1) (e) if,

(a) the Chief Executive Officer is satisfied that the individual continues to have the qualifications tested by the examination approved by the Chief Executive Officer for individuals who applied before January 1, 2003 to write the examination for accident and sickness insurance licenses; and

(b) the individual,

(i) previously passed that examination, or

(ii) was previously determined by the Chief Executive Officer to have the qualifications tested by that examination. O. Reg. 261/14, s. 2; O. Reg. 145/19, s. 3.

(3) An individual shall be granted a licence even if he or she does not meet the qualifications described in clause (1) (d), (e) or (f) if,

(a) the individual is a resident of a province, other than Ontario, or territory of Canada that is a party to the Agreement on Internal Trade as defined in subsection 2 (1) of the *Ontario Labour Mobility Act, 2009*;

(b) the individual produces a certificate in good standing from the authority that licences or regulates insurance agents in the province or territory in which the individual resides that certifies that the individual is licensed for the class of insurance for which the application is made;

(c) the individual demonstrates knowledge of matters applicable to practising as an insurance agent in Ontario, if this is required by the Chief Executive Officer of all applicants under this subsection, and if so required, in the manner required by the Chief Executive Officer, which shall not include material additional training, experience, examinations or assessments; and

(d) the individual complies with any requirements for insurance agents that are listed on the website of the Ministry of Training, Colleges and Universities or other website specified in a regulation made under the *Ontario Labour Mobility Act, 2009* pursuant to subsection 9 (3) of that Act. O. Reg. 297/11, s. 1; O. Reg. 145/19, s. 3.

(4) Despite subsection (3), if an individual's certificate referred to in clause (3) (b) is subject to a condition, the Chief Executive Officer may,

(a) impose an equivalent condition on the agent's licence issued to the individual; or

(b) refuse to issue an agent's licence to the individual, if the Chief Executive Officer cannot impose an equivalent condition on the agent's licence. O. Reg. 297/11, s. 1; O. Reg. 145/19, s. 3.

(5) An individual may be granted a licence even if he or she does not meet the qualifications described in clause (1) (d), (e) or (f) if,

(a) the individual is a resident of a state of the United States;

(b) the individual produces a certificate in good standing from the authority that licences or regulates insurance agents in the state in which the individual resides that certifies that the individual is licensed for the class of insurance for which the application is made; and

(c) the individual demonstrates knowledge of matters applicable to practising as an insurance agent in Ontario, if required by the Chief Executive Officer, and if so required, in the manner required by the Chief Executive Officer. O. Reg. 297/11, s. 1; O. Reg. 145/19, s. 3.

Name

5. (1) A licence shall not be issued to an applicant who is not a corporation and who carries on business alone in a name other than the applicant's own. O. Reg. 347/04, s. 5 (1).

(2) Despite subsection (1), a licence may be issued to an applicant described in that subsection if the applicant has purchased the business and uses the name of the seller together with the applicant's own for a period not exceeding three years. O. Reg. 347/04, s. 5 (2).

Change in agent's contact information

5.1 An agent licensed under this Regulation shall, if the agent's mailing address, e-mail address, telephone number or fax number changes, provide the Chief Executive Officer

with the new address or number within five days after the change is effective. O. Reg. 297/11, s. 2; O. Reg. 145/19, s. 3.

Expiration of licence

6. A licence expires on the date specified in the licence or, if no date is specified, on the second anniversary of the date the licence was last issued or renewed. O. Reg. 347/04, s. 6.

Application for renewal of licence

7. (1) An application for renewal of a licence shall be made in the same manner as for a licence in the first instance. O. Reg. 347/04, s. 7 (1).

(2) Despite subsection (1), subsection 3 (1) of this Regulation does not apply in respect of an application for the renewal of a life insurance licence if the applicant has held a life insurance licence for at least two years. O. Reg. 261/14, s. 3.

(3) The Chief Executive Officer may require an applicant for renewal of licence to file,

(a) a return, verified by a statutory declaration, showing the applicant's accounts payable and accounts receivable, together with the time when each account receivable first became due;

(b) a financial statement of the applicant's insurance agency operations, verified by a public accountant, chartered accountant or similarly qualified person;

(c) statements from persons who deliver continuing education courses, certifying which courses have been completed by the applicant;

(d) a statement certifying that the applicant maintains errors and omissions insurance or another form of financial guarantee in accordance with section 13, or a copy of the policy or certificate of the insurance or evidence of the financial guarantee; and

(e) such other information as the Chief Executive Officer may require. O. Reg. 347/04, s. 7 (3); O. Reg. 145/19, s. 3.

(4) An application for renewal of a licence may be refused on any grounds on which the Chief Executive Officer is authorized to suspend or revoke the licence. O. Reg. 347/04, s. 7 (4); O. Reg. 145/19, s. 3.

Suspension or revocation of licence

8. The Chief Executive Officer may suspend or revoke a licence on any grounds on which an application for a licence may be refused or if, after due investigation and hearing, it appears to the Chief Executive Officer that the licensee,

(a) has violated any provision of the licence in the licensee's operations as an agent;

(b) has made a material misstatement or omission in the application for the licence;

(c) has been guilty of a fraudulent act or practice; or

(d) has demonstrated incompetence or untrustworthiness to transact the insurance agency business for which the licence has been granted. O. Reg. 347/04, s. 8; O. Reg. 145/19, s. 3.

Exemptions from licensing

9. (1) Subsection 392.2 (6) of the Act and section 2 of this Regulation do not apply to the following persons in the following circumstances:

1. A collector of insurance premiums who does not solicit applications for or the renewal or continuance of insurance contracts or act or aid in negotiating insurance contracts or the renewal of insurance contracts, if the collector's collection fee does not exceed 5 per cent of any amount collected.

2. An officer or a salaried employee of the head office of a fraternal society who solicits insurance contracts on behalf of the society and does not receive any commission.

3. A member of a fraternal society who solicits insurance contracts on behalf of the society and who is not an officer or salaried employee described in paragraph 2, unless the member devotes or intends to devote more than half of his or her time to soliciting those contracts or has in the previous 12 months solicited and procured life insurance contracts on behalf of the society in an amount in excess of $20,000.

4. An officer or salaried employee of the head office of an insurer who solicits contracts of life insurance and accident and sickness insurance on behalf of the insurer and who does not receive any commission.

5. A transportation company or an officer or employee of a transportation company, when acting as an agent for an insurer with respect to travel insurance, accident and sickness insurance or baggage insurance. O. Reg. 347/04, s. 9 (1); O. Reg. 68/07, s. 1; O. Reg. 261/14, s. 4.

(2) Paragraph 4 of subsection (1) does not apply without the written approval of the Chief Executive Officer to an officer or employee whose application for a licence as an agent has been refused or whose licence as an agent has been revoked or suspended. O. Reg. 347/04, s. 9 (2); O. Reg. 145/19, s. 3.

Appointment and Termination of Agents

Appointment of agent

10. (1) A sponsoring insurer that appoints an agent, by written contract or otherwise, shall forthwith notify the Chief Executive Officer in writing of the appointment, giving the full name, address and licence number of the agent. O. Reg. 347/04, s. 10 (1); O. Reg. 145/19, s. 3.

(2) Subsection (1) and subsections 392.6 (1), (2) and (3) of the Act do not apply in respect of an agent who holds a life insurance licence if,

(a) the agent is a corporation or partnership; or

(b) the agent has held a life insurance licence for at least two years. O. Reg. 347/04, s. 10 (2); O. Reg. 261/14, s. 5.

Return of licence

11. (1) If a sponsoring insurer that has certified its appointment of an agent to the Chief Executive Officer terminates the appointment, the agent shall forthwith notify the Chief Executive Officer in writing of that fact and shall return the agent's licence to the Chief Executive Officer. O. Reg. 347/04, s. 11 (1); O. Reg. 145/19, s. 3.

(2) Subsection (1) does not apply in respect of an agent who has held a life insurance licence for at least two years. O. Reg. 347/04, s. 11 (2).

Insurer's Compliance System

Insurer's compliance system

12. (1) Every insurer that authorizes one or more agents to act on behalf of the insurer shall establish and maintain a system that is reasonably designed to ensure that each agent complies with the Act, the regulations, the Authority rules and the agent's licence. O. Reg. 347/04, s. 12 (1); O. Reg. 113/23, s. 1.

(2) The system referred to in subsection (1) must screen each agent for suitability to carry on business as an agent. O. Reg. 347/04, s. 12 (2).

(3) An insurer shall report to the Chief Executive Officer if it has reasonable grounds to believe that an agent who acts on behalf of the insurer is not suitable to carry on business as an agent. O. Reg. 347/04, s. 12 (3); O. Reg. 145/19, s. 3.

Duties of Life Insurance Agents

Errors and omissions insurance

13. An agent who holds a life insurance licence shall maintain,

(a) errors and omissions insurance in a form approved by the Chief Executive Officer in an amount of at least $1,000,000 in respect of any one occurrence with extended coverage for loss resulting from fraudulent acts; or

(b) another form of financial guarantee in a form approved by the Chief Executive Officer in an amount of at least $1,000,000 in respect of any one occurrence. O. Reg. 347/04, s. 13; O. Reg. 145/19, s. 1, 3.

Continuing education

14. An individual who holds a life insurance licence shall complete at least 30 hours every two years of continuing education acceptable to the Chief Executive Officer in respect of life insurance. O. Reg. 347/04, s. 14; O. Reg. 145/19, s. 3.

Disclosure of insurers, etc.

15. (1) An individual who holds a life insurance licence shall disclose in writing the names of all the insurers that the individual represents to every prospective insured and to every insured who makes an application to renew or replace a policy of life insurance. O. Reg. 347/04, s. 15 (1).

(2) An individual who holds a life insurance licence shall disclose in writing the names of all the providers of financial products or services that the individual represents to every prospective purchaser of a financial product or service other than insurance. O. Reg. 347/04, s. 15 (2).

Conflicts of interest

16. An agent who holds a life insurance licence shall disclose in writing to a client or prospective client any conflict of interest or potential conflict of interest of the agent that is associated with a transaction or recommendation. O. Reg. 347/04, s. 16.

Prohibited conduct

17. An agent who holds a life insurance licence shall not,

(a) offer inducement or use coercion or undue influence in order to control, direct or secure insurance business;

(b) for the purpose of encouraging the insured under an existing contract of life insurance to enter into another contract of life insurance, directly or indirectly induce or attempt to induce the insured to,

(i) allow the existing contract to lapse, contrary to the insured's interests,

(ii) surrender the existing contract for cash, paid up or extended insurance, or other valuable consideration, contrary to the insured's interests, or

(iii) borrow a substantial amount against the existing contract, whether in a single loan or over a period of time, contrary to the insured's interests;

(c) make a false or misleading statement or representation in the solicitation or registration of insurance;

(d) make or deliver an incomplete comparison of any policy or contract of insurance with that of another insurer in the solicitation or registration of insurance;

(e) coerce or propose, directly or indirectly, to coerce a prospective buyer of life insurance through the influence of a professional or a business relationship or otherwise to give a preference with respect to the policy of life insurance that would not otherwise be given on the effecting of a life insurance contract; or

(f) hold himself, herself or itself out, directly or indirectly, by representation or omission, in a way that is misleading in respect of the insurers on whose behalf the agent acts. O. Reg. 347/04, s. 17.

Life insurance to fund expenses for funeral, cemetery, etc.

17.1 (1) In this section,

"licensed services" and "licensed supplies" have the meanings assigned by subsection 1 (1) of the *Funeral, Burial and Cremation Services Act, 2002*; ("fournitures autorisées", "services autorisés")

"contract to fund funeral, burial or cremation expenses" means a contract of life insurance the proceeds of which are intended to be used primarily to fund, directly or indirectly, the purchase of licensed services or licensed supplies. ("contrat servant à financer des frais funéraires, d'enterrement ou de crémation") O. Reg. 31/11, s. 1 (1).

(2) An agent who holds a life insurance licence,

(a) shall not contact, by telephone or in person, any person for the purpose of soliciting the making or negotiation of a contract to fund funeral, burial or cremation expenses unless the person has requested the agent to contact him or her for that purpose;

(b) shall not contact by any means any person who is in a hospital, long-term care home or hospice for the purpose of soliciting the making or negotiation of a contract to fund funeral, burial or cremation expenses unless the person has requested the agent to contact him or her for that purpose; and

(c) shall disclose in writing to every prospective purchaser of a contract to fund funeral, burial or cremation expenses that the purchase under the contract does not constitute the purchase of licensed services or licensed supplies. O. Reg. 31/11, s. 1.

Transition

Transition

18. (1) The reference in the definition of "Life Licence Qualification Program" in subsection 1 (1) to a program approved by the Chief Executive Officer is deemed to include the last such program approved by the Superintendent prior to June 8, 2019 until the Chief Executive Officer approves a subsequent program. O. Reg. 145/19, s. 2.

(2) References in section 4 to a course acceptable to the Chief Executive Officer or to an examination approved by the Chief Executive Officer are deemed to include the last course acceptable to the Superintendent or the last examination approved by the Superintendent, as the case may be, prior to June 8, 2019 until the Chief Executive Officer finds a subsequent course acceptable or approves a subsequent examination. O. Reg. 145/19, s. 2.

(3) For the purposes of subclauses 4 (2.3) (b) (ii) and 4 (2.4) (b) (ii), an individual meets the requirements of those subclauses if the individual was previously determined by the Superintendent to have the necessary qualifications. O. Reg. 145/19, s. 2.

(4) References in section 13 to a form approved by the Chief Executive Officer are deemed to include the last form approved by the Superintendent for the purposes of that section prior to June 8, 2019 until the Chief Executive Officer approves a subsequent form for the purposes of that section. O. Reg. 145/19, s. 2.

(5) The reference in section 14 to continuing education acceptable to the Chief Executive Officer in respect of life insurance is deemed to include continuing education that was acceptable to the Superintendent immediately prior to June 8, 2019. O. Reg. 145/19, s. 2.

19.-23. Revoked: O. Reg. 261/14, s. 6.

24. Omitted (revokes other Regulations). O. Reg. 347/04, s. 24.

TAB 49

CanLII

Administrative Penalties, O Reg 408/12

Current version: in force since 2023-06-02

Link to the latest version: https://canlii.ca/t/8r5b

Stable link to this version: https://canlii.ca/t/56198

Citation to this version: Administrative Penalties, O Reg 408/12, <https://canlii.ca/t/56198> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act

ONTARIO REGULATION 408/12

ADMINISTRATIVE PENALTIES

Consolidation Period: From December 16, 2025 to the e-Laws currency date.

Last amendment: 371/25.

This is the English version of a bilingual regulation.

INTERPRETATION

Interpretation

1. A provision that is listed or set out in a schedule to this Regulation without reference to a statute, regulation or Authority rule is a provision of the Act. O. Reg. 408/12, s. 1; O. Reg. 209/22, s. 1.

Prescribed provisions

2. The provisions of the Act, the regulations and the Authority rules that are listed in Schedules 1, 2 and 2.1 are prescribed for the purpose of imposing a general administrative penalty under section 441.3 of the Act. O. Reg. 408/12, s. 2; O. Reg. 230/14, s. 1; O. Reg. 209/22, s. 2.

Maximum penalty

3. (1) The maximum penalty that may be imposed under section 441.3 of the Act for a contravention of or failure to comply with a requirement imposed by a provision listed in Schedule 1 is the maximum amount specified in subsection 441.5 (1) of the Act. O. Reg. 408/12, s. 3 (1).

(2) The maximum penalty that may be imposed under section 441.3 of the Act for a contravention of or failure to comply with a requirement imposed by a provision listed in Schedule 2 is,

(a) $100,000 for a person other than an individual;

(b) $50,000 for an individual. O. Reg. 408/12, s. 3 (2).

(3) The maximum penalty that may be imposed under section 441.3 of the Act for a contravention of or failure to comply with a requirement imposed by a provision listed in Schedule 2.1 is $25,000. O. Reg. 230/14, s. 2.

Determination of amount of penalty

4. (1) The Chief Executive Officer is authorized to determine the amount of a penalty imposed under section 441.3 of the Act, subject to the limits set out in section 3. O. Reg. 408/12, s. 4 (1); O. Reg. 135/19, s. 1.

(2) The Chief Executive Officer shall consider only the following criteria when determining the amount of an administrative penalty to be imposed under section 441.3 of the Act for a purpose set out in section 441.2 of the Act:

1. The degree to which the contravention or failure was intentional, reckless or negligent.

2. The extent of the harm or potential harm to others resulting from the contravention or failure.

3. The extent to which the person tried to mitigate any loss or to take other remedial action.

4. The extent to which the person derived or reasonably might have expected to derive, directly or indirectly, any economic benefit from the contravention or failure.

5. Any other contraventions of or failures to comply with a requirement established under the Act or with any other financial services legislation of Ontario or of any jurisdiction during the preceding five years by the person. O. Reg. 408/12, s. 4 (2); O. Reg. 135/19, s. 1.

Deadline for paying penalty

5. (1) A person on whom a penalty has been imposed under section 441.3 of the Act shall pay the penalty no later than 30 days after the person is given notice of the order imposing the penalty or such longer time as may be specified in the order. O. Reg. 408/12, s. 5 (1).

(2) If a person requests a hearing on the notice of a proposal to impose a penalty in accordance with subsection 441.3 (5) of the Act, the person shall pay the penalty no later than 30 days after the matter is finally determined or such longer time as may be specified in the order. O. Reg. 408/12, s. 5 (2).

SUMMARY ADMINISTRATIVE PENALTIES IMPOSED UNDER SECTION 441.4 OF THE ACT

Prescribed provisions

6. The provisions of the Act or of a regulation that are set out in Column 1 of Schedule 3 and the provisions of the Act that are listed in Schedule 4 are prescribed for the purpose of imposing a summary administrative penalty under section 441.4 of the Act. O. Reg. 408/12, s. 6.

Amount of penalty

7. The amount that is set out in Column 2 of Schedule 3 opposite a provision set out in Column 1 of Schedule 3 is the penalty that may be imposed under section 441.4 of the Act for a contravention of or failure to comply with a requirement imposed by that provision. O. Reg. 408/12, s. 7.

Daily penalty

8. (1) Subject to subsection (2), the Chief Executive Officer may impose a penalty of $250 for each day or part of a day on which a contravention of or failure to comply with a requirement imposed by a provision listed in Schedule 4 occurs or continues. O. Reg. 408/12, s. 8 (1); O. Reg. 135/19, s. 1.

(2) The maximum penalty that may be imposed under section 441.4 of the Act for a contravention of or failure to comply with a requirement imposed by a provision listed in Schedule 4 is the maximum amount specified in subsection 441.5 (2) of the Act. O. Reg. 408/12, s. 8 (2).

Deadline for paying penalty

9. (1) A person on whom a penalty has been imposed under section 441.4 of the Act shall pay the penalty no later than 30 days after the person is given

notice of the order imposing the penalty or such longer time as may be specified in the order. O. Reg. 408/12, s. 9 (1).

(2) If a person appeals the Chief Executive Officer's order in accordance with subsection 441.4 (4) of the Act, the person shall pay the penalty no later than 30 days after the matter is finally determined or such longer time as may be specified in the varied or confirmed order. O. Reg. 408/12, s. 9 (2); O. Reg. 135/19, s. 1.

10. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS REGULATION). O. Reg. 408/12, s. 10.

SCHEDULE 1
GENERAL ADMINISTRATIVE PENALTIES IMPOSED UNDER SECTION 441.3 OF THE ACT — MAXIMUM PENALTY SPECIFIED IN ACT

Item	Provision
1.	REVOKED: O. Reg. 238/13, s. 1 (1).
2.	REVOKED: O. Reg. 238/13, s. 1 (1).
3.	subsection 40 (1)
4.	subsection 40 (2)
5.	subsection 40 (3)
6.	subsection 40 (4)
7.	subsection 40 (6)
8.	subsection 40 (7)
9.	subsection 65.1 (2)
10.	subsection 102 (8)
11.	subsection 102 (11)
12.	subsection 110 (2)
13.	clause 110 (6) (a)
14.	clause 110 (6) (b)

15. section 115

16. subsection 117 (1)

17. subsection 117 (3)

18. subsection 237 (1)

19. subsection 237 (2)

20. subsection 238 (1)

20.1 subsection 288.2 (1)

21. subsection 392.2 (6)

22. section 395

23. subsection 413.1 (1)

24. subsection 417 (1)

25. subsection 417 (2)

26. section 439, subsection 3 (2) of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

27. section 439, subsection 3 (3) of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

28. section 439, section 4 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

29. section 439, section 5 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

30. section 439, section 6 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

31. section 439, section 7 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

32. section 439, section 8 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

33. section 439, section 9 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

34. section 439, section 10 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

35. section 439, section 11 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

36. section 439, section 12 of Authority Rule 2020-002 (Unfair Or Deceptive Acts Or Practices)

37. - 41. Revoked: O. Reg. 209/22, s. 3.

42. section 439, Section 5 of O. Reg. 132/97 (Variable Insurance Contracts)

43. section 439, Section 6 of O. Reg. 132/97 (Variable Insurance Contracts)

44. section 439, Section 8 of O. Reg. 132/97 (Variable Insurance Contracts)

44.1 subsection 442.1 (5)

44.2 subsection 442.3 (1)

44.3 subsection 442.3 (3), but only in respect of a request under subsection 442.3 (1)

44.4 subsection 443 (2)

44.5 subsection 443 (3)

44.6 subsection 443 (3.1)

44.7 subsection 444 (6)

44.8 subsection 446.1 (1)

44.9 subsection 446.1 (2)

45. clause 447 (2) (a)

46.	clause 447 (2) (A.1)
47.	clause 447 (2) (A.2)
48.	clause 447 (2) (A.3)
49.	Section 2 of O. Reg 347/04 (Agents)
50.	Section 12 of O. Reg. 347/04 (Agents)
51.	Section 17 of O. Reg. 347/04 (Agents)
52.	Subsection 2.1 (2) of O. Reg. 283/95 (Disputes Between Insurers)
53.	Subsection 2.1 (3) of O. Reg. 283/95 (Disputes Between Insurers)
54.	Subsection 2.1 (5) of O. Reg. 283/95 (Disputes Between Insurers)
55.	Subsection 2.1 (6) of O. Reg. 283/95 (Disputes Between Insurers)
56.	Subsection 2.1 (7) of O. Reg. 283/95 (Disputes Between Insurers)
57.	Subsection 3.1 (2) of O. Reg. 283/95 (Disputes Between Insurers)

O. Reg. 408/12, Sched. 1; O. Reg. 238/13, s. 1; O. Reg. 230/14, s. 3; O. Reg. 262/14, s. 1; O. Reg. 209/22, s. 3; O. Reg. 112/23, s. 1.

SCHEDULE 2
GENERAL ADMINISTRATIVE PENALTIES IMPOSED UNDER SECTION 441.3 OF THE ACT — LESSER MAXIMUM PENALTIES PRESCRIBED BY SUBSECTION 3 (2)

Item	Provision
1.	section 105
2.	section 106
3.	subsection 109 (1)

4. subsection 110 (5)

5. section 111

6. section 121.15

7. subsection 227 (1)

8. subsection 227 (7)

9. section 228

10. subsection 232 (8)

11. section 371

12. subsection 397 (7)

13. subsection 400 (9)

14. section 401

15. section 403

16. subsection 413.1 (2)

17. subsection 417.0.1 (1)

18. subsection 417.0.1 (3)

19. section 439, Section 7 of O. Reg. 132/97 (Variable Insurance Contracts)

20. section 439, clause 9 (a) of O. Reg. 132/97 (Variable Insurance Contracts)

21. section 439, clause 9 (b) of O. Reg. 132/97 (Variable Insurance Contracts)

22. section 439, clause 9 (c) of O. Reg. 132/97 (Variable Insurance Contracts)

23. section 439, Section 9.1 of O. Reg. 132/97 (Variable Insurance Contracts)

24. subsection 445 (1)

25. subsection 445 (2)

26. Section 13 of O. Reg. 347/04 (Agents)

27. Section 16 of O. Reg. 347/04 (Agents)

Note: On January 1, 2026, Schedule 2 to the Regulation is amended by adding the following items: (See: O. Reg. 371/25, s. 1 (1))

3.1 subsection 2 (1) of Authority Rule 2024 – 002 (Total Cost Reporting)

3.2 section 6 of Authority Rule 2024 – 002 (Total Cost Reporting)

3.3 section 7 of Authority Rule 2024 – 002 (Total Cost Reporting)

3.4 section 8 of Authority Rule 2024 – 002 (Total Cost Reporting)

3.5 section 9 of Authority Rule 2024 – 002 (Total Cost Reporting)

3.6 section 10 of Authority Rule 2024 – 002 (Total Cost Reporting)

Note: On January 1, 2026, item 19 of Schedule 2 to the Regulation is revoked. (See: O. Reg. 371/25, s. 1 (2))

O. Reg. 408/12, Sched. 2; O. Reg. 230/14, s. 4.

SCHEDULE 2.1
GENERAL ADMINISTRATIVE PENALTIES IMPOSED UNDER SECTION 441.3 OF THE ACT — LESSER MAXIMUM PENALTIES PRESCRIBED BY SUBSECTION 3 (3)

Item	Provision
1.	Section 3 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)
2.	Subsection 4 (1) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)
3.	Subsection 4 (2) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

4. Section 5 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

5. Section 6 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

6. Section 7 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

7. Section 8 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

8. Subsection 9 (1) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

9. Subsection 10 (1) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

10. Section 11 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

11. Section 12 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

12. Section 13 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

13. Section 13.1 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

14. Section 14 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

15. Section 15 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

16. Subsection 16 (2) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

17. Section 17 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

18. Section 18 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)

19. Section 2 of O. Reg. 349/13 (Service Providers — Principal Representatives)

O. Reg. 230/14, s. 5; O. Reg. 30/15, s. 1.

SCHEDULE 3
SUMMARY ADMINISTRATIVE PENALTIES IMPOSED UNDER SECTION 441.4 OF THE ACT — PRESCRIBED PENALTY

Item	Column 1 — Provision	Column 2 — Penalty
1.	subsection 35 (2)	$1,000
2.	section 51	$1,000
3.	subsection 54 (7)	$1,000
4.	subsection 101 (4)	$1,000
5.	section 121.5	$1,000
6.	subsection 121.8 (2)	$1,000
7.	section 121.10	$1,000
8.	section 121.11	$1,000

9.	section 147	$1,000
10.	subsection 174 (4)	$1,000
11.	section 177	$1,000
12.	subsection 229 (1)	$1,000
13.	subsection 230 (1)	$1,000
14.	subsection 230 (2)	$1,000
15.	subsection 230 (3)	$1,000
16.	subsection 232 (5.2)	$1,000
17.	section 232.1	$1,000
18.	subsection 236 (1)	$3,000
19.	subsection 236 (2)	$3,000
20.	subsection 236 (3)	$3,000
21.	subsection 346 (1)	$1,000
22.	section 355	$1,000
23.	subsection 392.6 (4)	$1,000
24.	REVOKED: O. Reg. 262/14, s. 2 (2).	
25.	subsection 399 (3)	$3,000
26.	subsection 414 (2.1)	$1,000
27.	Section 5.1 of O. Reg. 347/04 (Agents)	$1,000
28.	Subsection 10 (1) of O. Reg. 347/04 (Agents)	$1,000
29.	Subsection 11 (1) of O. Reg. 347/04 (Agents)	$3,000
30.	Section 14 of O. Reg. 347/04 (Agents)	$1,000
31.	Subsection 15 (1) of O. Reg. 347/04 (Agents)	$3,000

32.	Subsection 15 (2) of O. Reg. 347/04 (Agents)	$3,000
33.	subsection 3 (5.1) of Reg. 664, R.R.O. 1990 (Automobile Insurance)	$1,000
34.	subsection 3 (6) of Reg. 664 of R.R.O. 1990 (Automobile Insurance)	$1,000
35.	subsection 17 (1.1) of Reg. 664 of R.R.O. 1990 (Automobile Insurance)	$1,000
36.	subsection 17 (2) of Reg. 664 of R.R.O. 1990 (Automobile Insurance)	$1,000
37.	subsection 17 (3) of Reg. 664 of R.R.O. 1990 (Automobile Insurance)	$1,000
38.	subsection 17 (4) of Reg. 664 of R.R.O. 1990 (Automobile Insurance)	$1,000
39.	subsection 17 (6) of Reg. 664 of R.R.O. 1990 (Automobile Insurance)	$1,000
40.	subsection 2 (1) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
41.	subsection 2 (2) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
42.	subsection 2 (3) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
43.	subsection 2 (4) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
44.	section 2.1 of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
45.	section 2.2 of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
46.	subsection 3 (1) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000

47.	subsection 3 (2) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
48.	subsection 3.1 (1) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
49.	subsection 3.1 (2) of Reg. 674 of R.R.O. 1990 (Replacement Of Life Insurance Contracts)	$1,000
50.	Section 19 of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)	$250
51.	Subsection 20 (1) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)	$250
52.	Subsection 20 (2) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)	$250
53.	Subsection 21 (1) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)	$1,000
54.	Subsection 21 (2) of O. Reg. 90/14 (Service Providers — Standards for Business Systems and Practices and Other Prescribed Conditions)	$1,000

O. Reg. 408/12, Sched. 3; O. Reg. 230/14, s. 6; O. Reg. 262/14, s. 2; O. Reg. 30/15, s. 1.

SCHEDULE 4
SUMMARY ADMINISTRATIVE PENALTIES IMPOSED UNDER SECTION 441.4 OF THE ACT — DAILY PENALTY

Item	Provision
1.	subsection 101 (1)
2.	subsection 101 (2)
3.	section 101.1

4. clause 102 (1) (a)

5. clause 102 (1) (b)

6. subsection 102 (3)

7. subsection 121.13 (3)

O. Reg. 408/12, Sched. 4.

TAB 50

CanLII

Prescribed Information for the Purposes of Section 101.1 of the Act, O Reg 534/06

Current version: in force since 2010-09-01

Link to the latest version: https://canlii.ca/t/skr

Stable link to this version: https://canlii.ca/t/kwq4

Citation to this version: Prescribed Information for the Purposes of Section 101.1 of the Act, O Reg 534/06, <https://canlii.ca/t/kwq4> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act

ONTARIO REGULATION 534/06

PRESCRIBED INFORMATION FOR THE PURPOSES OF SECTION 101.1 OF THE ACT

Consolidation Period: From September 1, 2010 to the e-Laws currency date.

Last amendment: 39/10.

This is the English version of a bilingual regulation.

Definitions

1. In this Regulation,

"agent of automobile insurers" includes an agent of automobile insurers specified in a Guideline,

(a) issued for the purposes of section 44.1 or subsection 68 (3.2) of Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996) made under the Act, or

(b) applicable for the purposes of section 49 or subsection 64 (7) of Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act; ("agent d'assureurs automobiles")

"automobile insurer" means an insurer licensed under the Act to undertake or agree to offer or undertake a contract of automobile insurance in Ontario; ("assureur automobile")

"claim related to health care" means,

(a) a claim for a benefit under Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996), made under the Act, that arises by reason of an impairment as defined under that regulation, or

(b) a claim for a benefit under Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act, that arises by reason of an impairment as defined under that regulation; (“demande de règlement pour soins de santé”)

“insured” means an insured as defined in subsection 224 (1) of the Act; (“assuré”)

“personal information” means information that is personal information for the purposes of the *Personal Information Protection and Electronic Documents Act* (Canada) and personal health information for the purposes of the *Personal Health Information Protection Act, 2004*. (“renseignements personnels”) O. Reg. 534/06, s. 1; O. Reg. 39/10, s. 1.

Prescribed information

2. (1) Information concerning the types of goods and services for which an automobile insurer is liable under contracts of automobile insurance in respect of claims related to health care and the costs of those goods and services is prescribed for the purposes of section 101.1 of the Act. O. Reg. 534/06, s. 2 (1).

(2) Information described in subsection (1) shall not include personal information. O. Reg. 534/06, s. 2 (2).

(3) As a condition to providing the information described in subsection (1), automobile insurers and any agent of automobile insurers shall, in accordance with the *Personal Information Protection and Electronic Documents Act* (Canada), take steps to ensure that the personal information upon which the information described in subsection (1) is based is accurate, complete and up to date. O. Reg. 534/06, s. 2 (3).

Conditions relating to personal information

3. The following conditions apply to all personal information in the custody or under the control of every automobile insurer and any agent of automobile insurers:

1. Any agent of automobile insurers and every automobile insurer shall, in accordance with the *Personal Information Protection and Electronic Documents Act* (Canada), take steps that are reasonable in the circumstances to ensure,
    i. that all personal information in its custody or under its control is protected against theft, loss and unauthorized use or disclosure, and

    ii. that all records containing personal information are protected against unauthorized copying, modification or disposal.

2. Any agent of automobile insurers and every automobile insurer shall, in accordance with the *Personal Information Protection and Electronic Documents Act* (Canada), ensure that all records in its custody or under its control that contain personal information are retained, transferred and disposed of in a secure manner.
3. Without limiting the generality of paragraphs 1 and 2, any agent of automobile insurers and every automobile insurer shall,
    i. implement administrative, technical, physical and contractual safeguards to protect the confidentiality of personal information and the privacy of insureds with respect to their personal information, and

    ii. collect, use and disclose personal information only as permitted or required by law and, without limiting the generality of the foregoing, in accordance with section 49 of the *Personal Health Information Protection Act, 2004* and paragraph 7 (3) (d) of the *Personal Information Protection and Electronic Documents Act* (Canada). O. Reg. 534/06, s. 3.

4. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 534/06, s. 4.

1451

TAB 51

CanLII

Statutory Accident Benefits Schedule - Accidents Before January 1, 1994, RRO 1990, Reg 672

Past version: in force between 2016-04-01 and 2020-07-02

Link to the latest version: https://canlii.ca/t/tm4

Stable link to this version: https://canlii.ca/t/52mwz

Citation to this version: Statutory Accident Benefits Schedule - Accidents Before January 1, 1994, RRO 1990, Reg 672, <https://canlii.ca/t/52mwz> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act
Loi sur les assurances

R.R.O. 1990, REGULATION 672

STATUTORY ACCIDENT BENEFITS SCHEDULE — ACCIDENTS BEFORE JANUARY 1, 1994

Note: This Regulation was revoked on July 3, 2020. (See: O. Reg. 346/20, s. 1)
Last amendment: 346/20.

This Regulation is made in English only.

PART I
GENERAL

Title

1. This Regulation may be cited as the *Statutory Accident Benefits Schedule — Accidents Before January 1, 1994*.
O. Reg. 779/93, s. 3.

Definitions

2. In this Regulation,

"accident" means an incident in which the use or operation of an automobile causes, directly or indirectly, physical, psychological or mental injury or causes damage to any prosthesis, denture, prescription eyewear, hearing aid or other medical or dental device;

"insured automobile", in respect of a particular motor vehicle liability policy, means the described automobile and includes a newly-acquired or temporary substitute automobile, all as defined by the policy;

"insured person", in respect of a particular motor vehicle liability policy, means,

(a) in respect of accidents in Ontario, an occupant of the insured automobile,

(b) in respect of accidents outside Ontario, a person living and ordinarily present in Ontario who is an occupant of the insured automobile,

(c) the named insured, his or her spouse and any dependant of either of them while the occupant of any other automobile,

(d) any person who is not the occupant of an automobile or of rolling stock that runs on rails who is involved in an accident in Ontario involving the insured automobile,

(e) the named insured, his or her spouse and any dependant of either of them who is not the occupant of an automobile or of rolling stock that runs on rails who is involved in an accident,

(f) the named insured, his or her spouse and any dependant of either of them who is not involved in an accident but who suffers psychological or mental injury as the result of an accident involving a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother or sister or a dependant of the named insured or of his or her spouse. R.R.O. 1990, Reg. 672, s. 2; O. Reg. 779/93, s. 2 (1).

Interpretation

3. (1) If the insured automobile is made available for the regular use of an individual, whether or not a resident of Ontario, by a corporation, unincorporated association, partnership, sole proprietorship or other entity or is rented to an individual who is a resident of Ontario, this Regulation applies to the individual and his or her spouse and their dependants as if the individual were a named insured. R.R.O. 1990, Reg. 672, s. 3 (1); O. Reg. 779/93, s. 2 (1).

(2) For the purposes of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support on the other person or the other person's spouse. R.R.O. 1990, Reg. 672, s. 3 (2); O. Reg. 779/93, s. 2 (1).

Duty to Provide Benefits

4. The benefits set out in this Regulation will be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring after section 266 of the *Insurance Act* comes into force and before January 1, 1994. R.R.O. 1990, Reg. 672, s. 4; O. Reg. 779/93, ss. 2 (1), 4.

Application Despite Certain Provisions of Insurance Act

5. Subject to section 17, the insurer will pay the benefits under this Regulation despite section 225, subsection 233 (1), section 240, subsection 265 (3) and statutory condition 1 (1) of section 234 of the *Insurance Act*. R.R.O. 1990, Reg. 672, s. 5; O. Reg. 779/93, s. 2 (1).

PART II
SUPPLEMENTARY MEDICAL AND REHABILITATION BENEFITS AND CARE BENEFITS

Supplementary Medical and Rehabilitation Benefits

6. (1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident all reasonable expenses resulting from the accident within the benefit period set out in subsection (3) for,

(a) medical, psychological, surgical, dental, hospital, chiropractic, nursing and ambulance services and the services of physiotherapists;

(b) prostheses, dentures, prescription eyewear, hearing aids and other medical or dental devices;

(c) rehabilitation, life-skills training and occupational counselling and training;

(d) transportation for the person to and from treatment, counselling and training sessions, including transportation for an assistant;

(e) home renovations to accommodate the needs of the insured person;

(f) other goods and services, whether medical or non-medical in nature, which the insured person requires because of the accident R.R.O. 1990, Reg. 672, s. 6 (1).

(2) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident an allowance that is reasonable having regard to all of the circumstances for expenses actually incurred by a spouse, child, grandchild, parent, grandparent, brother or sister of the insured person in visiting the insured person during his or her treatment or recovery. R.R.O. 1990, Reg. 672, s. 6 (2).

(3) For the purposes of this section, the benefit period is the longer of the two following periods calculated from the day of the accident and ending on the anniversary of the accident:

1. Ten years.

2. Twenty years less the age of the insured person on the day of the accident. R.R.O. 1990, Reg. 672, s. 6 (3).

(4) Subject to subsections (5) and (6), the insurer, before making a payment for an expense under subsection (1), may require the insured person to submit a statement signed by the insured person's qualified medical practitioner or psychological advisor stating that the expense is necessary for the insured person's treatment or rehabilitation. R.R.O. 1990, Reg. 672, s. 6 (4).

(5) A person qualified to practise as a chiropractor may sign a statement required under subsection (4) in respect of chiropractic services under clause (1) (a). R.R.O. 1990, Reg. 672, s. 6 (5).

(6) A person qualified to practise dentistry may sign a statement required under subsection (4) in respect of dental services and dentures under clauses (1) (a) and (b). R.R.O. 1990, Reg. 672, s. 6 (6).

(7) In case of a dispute concerning an expense described in clause (1) (a), (b) or (d), the insurer will pay the expense pending resolution of the dispute. R.R.O. 1990, Reg. 672, s. 6 (7).

(8) The maximum amount payable under this section is $500,000 with respect to each insured person. R.R.O. 1990, Reg. 672, s. 6 (8).

Care Benefits

7. (1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident, for the care, if any, required by the insured person,

(a) the reasonable cost of a professional caregiver or the amount of gross income reasonably lost by a person other than the insured person as a result of the accident in caring for the insured person; and

(b) all reasonable expenses resulting from the accident in caring for the insured person after the accident. R.R.O. 1990, Reg. 672, s. 7 (1).

(2) The maximum amount payable per month under this section is $3,000 a month with respect to each insured person. R.R.O. 1990, Reg. 672, s. 7 (2).

(3) The maximum amount payable under this section is $500,000 with respect to each insured person. R.R.O. 1990, Reg. 672, s. 7 (3).

Damage to Clothing, Glasses, Hearing Aids and Other Devices

8. The insurer will pay an insured person for the reasonable cost of repairing or replacing clothing worn by the insured person at the time of an accident and prostheses, dentures, prescription eyewear, hearing aids and other medical or dental devices that are lost or damaged in an accident. R.R.O. 1990, Reg. 672, s. 8.

EXCEPTION

9. (1) The insurer will not pay any portion of an expense referred to in subsection 6 (1) or (2) or subsection 7 (1) for a service that is reasonably available to the insured person under any insurance plan or law or under any other plan or law that will pay the expense. R.R.O. 1990, Reg. 672, s. 9 (1).

(2) The insurer will pay benefits under this Part even though the insured person is entitled to or has received benefits under an Act administered by the Ministry of Community and Social Services for Ontario or under similar legislation in another jurisdiction. R.R.O. 1990, Reg. 672, s. 9 (2).

(3) For the purpose of subsection (2), a service, benefit or entitlement provided under an Act, the administration of which was transferred from the Ministry of Community and Social Services to the Ministry of Health by Order-in-Council, shall be deemed to be provided under an Act administered by the Ministry of Community and Social Services for Ontario so long as the nature of the service, benefit or entitlement remains substantially the same as it was before the transfer. O. Reg. 660/93, s. 1.

PART III
FUNERAL EXPENSES AND DEATH BENEFITS

FUNERAL EXPENSES

10. The insurer will pay with respect to each insured person who dies as a result of an accident funeral expenses incurred up to $3,000 if Optional Benefit 1 has not been purchased, and up to $7,500 if it has been purchased. R.R.O. 1990, Reg. 672, s. 10.

DEATH BENEFITS

11. (1) If, as a result of an accident, an insured person dies within the benefit period set out in subsection (3), the insurer will pay with respect to the insured person, if Optional Benefit 1 has not been purchased,

(a) $25,000 to his or her spouse, if the deceased is survived by a spouse who was his or her spouse at the time of the accident;

(b) $25,000 to his or her dependants, if the deceased is survived by any dependant who was a dependant at the time of the accident and is not survived by a spouse who is entitled to a benefit under this section;

(c) $10,000 to each of his or her surviving dependants who was a dependant at the time of the accident; and

(d) if, at the time of the accident, the deceased was a dependant, $10,000,

(i) to the person upon whom the deceased was dependent or, if that person is dead, to the surviving spouse of that person if the surviving spouse was the deceased's primary caregiver, or

(ii) to the other surviving dependants of the person upon whom the deceased was dependent if that person and his or her spouse are dead. R.R.O. 1990, Reg. 672, s. 11 (1).

(2) If, as a result of an accident, an insured person dies within the benefit period set out in subsection (3), the insurer will pay with respect to the insured person, if Optional Benefit 1 has been purchased,

(a) $50,000 to his or her spouse, if the deceased is survived by a spouse who was his or her spouse at the time of the accident;

(b) $50,000 to his or her dependants, if the deceased is survived by any dependant who was a dependant at the time of the accident and is not survived by a spouse who is entitled to a benefit under this section;

(c) $20,000 to each of his or her surviving dependants who was a dependant at the time of the accident; and

(d) if, at the time of the accident, the deceased was a dependant, $20,000,

(i) to the person upon whom the deceased was dependent or, if that person is dead, to the surviving spouse of that person if the surviving spouse was the deceased's primary caregiver, or

(ii) to the other surviving dependants of the person upon whom the deceased was dependent if that person and his or her spouse are dead. R.R.O. 1990, Reg. 672, s. 11 (2).

(3) For the purposes of subsections (1) and (2), the benefit period is,

(a) 180 days from the day of the accident unless clause (b) applies; or

(b) 156 weeks from the day of the accident if during that period there has been continuous disability as a result of the accident. R.R.O. 1990, Reg. 672, s. 11 (3).

(4) If at the time of the accident the deceased person had more than one person entitled to claim as his or her spouse, the $25,000 payment under clause (1) (a) or $50,000 under clause (2) (a) will be divided equally between or among such persons who survive the deceased and who at the time of the death were still spouses of the deceased. R.R.O. 1990, Reg. 672, s. 11 (4).

(5) Payments under clauses (1) (b) and (d) and clauses (2) (b) and (d) will be paid in equal shares to the surviving dependants. R.R.O. 1990, Reg. 672, s. 11 (5).

(6) No amount is payable under subsection (1) or (2) to a spouse or dependant unless the spouse or dependant, as the case may be, survives the deceased by thirty days. R.R.O. 1990, Reg. 672, s. 11 (6).

PART IV
WEEKLY BENEFITS

Income Benefit

12. (1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident a weekly income benefit during the period in which the insured person suffers substantial inability to perform the essential tasks of his or her occupation or employment if the insured person meets the qualifications set out in subsection (2) or (3). R.R.O. 1990, Reg. 672, s. 12 (1).

(2) The following qualifications apply to an insured person who claims a weekly benefit under subsection (1):

1. He or she must have been at the time of the accident,

   i. employed or self-employed,

   ii. on a temporary lay-off, or

   iii. entitled to start work within one year under a legitimate offer of employment made before the accident and evidenced in writing.

2. He or she as a result of and within two years of the accident must have suffered a substantial inability to perform the essential tasks of his or her occupation or employment. R.R.O. 1990, Reg. 672, s. 12 (2).

(3) A person who was unemployed and who was not self-employed at the time of the accident is qualified to receive a weekly benefit under subsection (1) if he or she was employed or self-employed for any 180 days in the twelve-month period before the accident, and if he or she as a result of and within two years of the accident has suffered a substantial inability to perform the essential tasks of the occupation or employment in which he or she spent the most time during the twelve-month period before the accident. R.R.O. 1990, Reg. 672, s. 12 (3).

(4) Subject to subsection (5), the weekly benefit under subsection (1) will be the lesser of,

(a) $600 plus, if Optional Benefit 2 has been purchased, the amount of the benefit chosen; and

(b) 80 per cent of the insured person's gross weekly income from his or her occupation or employment, less any payments for loss of income, except Unemployment Insurance benefits,

   (i) received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan, or

   (ii) received under any sick leave plan. R.R.O. 1990, Reg. 672, s. 12 (4).

(5) The insurer is not required to pay a weekly benefit under subsection (1),

(a) for the first week of the disability;

(b) for any period in excess of 156 weeks unless it has been established that the injury continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience. R.R.O. 1990, Reg. 672, s. 12 (5).

(6) The insurer is not required to pay a weekly benefit under subsection (1) to a person described in subparagraph iii of paragraph 1 of subsection (2) until the day the person would have been entitled under the contract to begin employment unless before that day the person is qualified for a benefit under another paragraph of that subsection. R.R.O. 1990, Reg. 672, s. 12 (6).

(7) The following rules apply to the calculation of gross weekly income:

1. A person's gross weekly income shall be deemed to be the greatest of,

   i. his or her average gross weekly income from his or her occupation or employment for the four weeks preceding the accident,

   ii. his or her average gross weekly income from his or her occupation or employment for the fifty-two weeks preceding the accident,

   iii. $232.

2. When a person becomes qualified to receive an income benefit under subparagraph iii of paragraph 1 of subsection (2), the person's gross weekly income shall be deemed to be the greatest of,

   i. if the person was qualified under either subparagraph i or ii of paragraph 1 of subsection (2), his or her gross weekly income as determined under paragraph 1,

   ii. the gross weekly income payable under the contract of employment,

   iii. $232.

3. Business expenses which cease as a result of the accident shall be deducted from a person's income from self-employment before calculating his or her gross weekly income. R.R.O. 1990, Reg. 672, s. 12 (7).

BENEFIT IF NO INCOME

13. (1) The insurer will pay with respect to each insured person who sustains physical, psychological or mental injury as a result of an accident, a weekly benefit during the period in which the insured person suffers substantial inability to perform the essential tasks in which he or she would normally engage if he or she meets the qualifications set out in subsection (2). R.R.O. 1990, Reg. 672, s. 13 (1).

(2) The following qualifications apply to an insured person who claims weekly benefits under subsection (1):

1. He or she as a result of and within two years of the accident must have suffered a substantial inability to perform the essential tasks in which he or she would normally engage.
2. He or she must not be entitled to receive a benefit under section 12 at the time of the payment of a benefit under this section or, if entitled to a benefit under that section, he or she must be a primary caregiver as described in subsection (4) and have only income from self-employment from work in his or her home.
3. He or she must attain the age of sixteen years before being eligible to receive the weekly benefit. R.R.O. 1990, Reg. 672, s. 13 (2).

(3) The weekly benefit under subsection (1) will be $185 less any payments for loss of income, except Unemployment Insurance benefits,

(a) received by or available to the insured person under the laws of any jurisdiction or under any income continuation benefit plan; or

(b) received under any sick leave plan. R.R.O. 1990, Reg. 672, s. 13 (3).

(4) The insurer will pay to an insured person who is receiving a weekly benefit under subsection (1), or who but for section 17 would be entitled to the weekly benefit, a benefit of $50 per week if Optional Benefit 3 has not been purchased, or $100 per week if it has been purchased, for each person who at the time of the accident was residing with the insured person and in respect of whom the insured person was the primary caregiver if the person receiving the care was less than sixteen years of age or if the person required the care because of physical or mental incapacity. R.R.O. 1990, Reg. 672, s. 13 (4).

(5) The maximum amount payable under subsection (4) is $200 per week, if Optional Benefit 3 has not been purchased, and $400 per week if it has been purchased. R.R.O. 1990, Reg. 672, s. 13 (5).

(6) A weekly benefit under subsection (4) ceases,

(a) when the person cared for attains age sixteen, unless he or she is incapacitated;

(b) when the incapacity of the person cared for ceases; or

(c) when the insured person ceases to be eligible for a benefit under subsection (1) or when the insured person would cease to be eligible had he or she not been disqualified under section 17. R.R.O. 1990, Reg. 672, s. 13 (6).

(7) A person cannot receive benefits under this section and section 12 at the same time. R.R.O. 1990, Reg. 672, s. 13 (7).

(8) The insurer is not required to pay a weekly benefit under this section,

(a) for the first week of the disability;

(b) for any period in excess of 156 weeks unless it has been established that the injury continuously prevents the insured person from engaging in substantially all of the activities in which the person would normally engage. R.R.O. 1990, Reg. 672, s. 13 (8).

Interim Payments

14. (1) The insurer will pay full benefits under this Part until the insured person receives payments that would reduce the insurer's obligation through the operation of subsection 12 (4) or 13 (3) if the insured person has applied to receive the payments. R.R.O. 1990, Reg. 672, s. 14 (1).

(2) The insurer will pay benefits under this Part even though the insured person is entitled to, or has received, benefits under an Act administered by the Ministry of Community and Social Services for Ontario or under similar legislation in another jurisdiction. R.R.O. 1990, Reg. 672, s. 14 (2).

Deductions

15. The insurer may deduct from any benefit payable under this Part 80 per cent of any income received or available from any occupation or employment subsequent to the accident. R.R.O. 1990, Reg. 672, s. 15.

Temporary Return to School or Work

16. (1) Subject to section 15 and subsection (3), a person receiving a benefit under this Part may attend school or accept, or return to, work at any time during the first two years following the accident for any period of time without affecting his or her benefits under this Part if, as a result of the accident, he or she is unable to continue at school or in the occupation or employment. R.R.O. 1990, Reg. 672, s. 16 (1).

(2) Subject to section 15 and subsection (3), after the two-year period referred to in subsection (1), a person receiving a benefit under this Part may attend school or accept, or return to, an occupation or employment for periods of up to ninety days without affecting his or her benefits under this Part if he or she, as a result of the injury, is unable to continue at school or in the occupation or employment. R.R.O. 1990, Reg. 672, s. 16 (2).

(3) The insurer is not required to pay weekly benefits under section 13 for any week in which the insured person attends school. R.R.O. 1990, Reg. 672, s. 16 (3).

EXCLUSIONS

17. (1) The insurer is not required to pay benefits under subsection 12 (1) or 13 (1) in respect of a driver of an automobile at the time of the accident,

(a) if, as a result of the accident, the driver is convicted of operating the automobile while his or her ability to operate it was impaired by alcohol or a drug, or of driving while his or her blood alcohol level exceeded the limits permitted by law or of an indictable offence related to the operation of the automobile;

(b) if, as a result of the accident, the driver is asked to provide a breath sample and he or she is convicted for failure to provide the sample;

(c) if, as a result of the accident, the driver is convicted of operating the automobile while it was not insured under a motor vehicle liability policy;

(d) if the driver was not authorized by law to drive the automobile;

(e) if the driver is an excluded driver under the contract of automobile insurance; or

(f) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent. R.R.O. 1990, Reg. 672, s. 17 (1).

(2) Clause (1) (d) does not apply to a driver who is not authorized by law to drive an automobile only by reason of a suspension of a licence for failure to pay a fine. R.R.O. 1990, Reg. 672, s. 17 (2).

(3) The insurer is not required to pay benefits under subsection 12 (1) or 13 (1),

(a) in respect of any person who has made, or who knows of, a material misrepresentation which induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in the risk material to the contract; or

(b) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent. R.R.O. 1990, Reg. 672, s. 17 (3).

(4) Clause (3) (b) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering statutory accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured. R.R.O. 1990, Reg. 672, s. 17 (4); O. Reg. 779/93, s. 2 (2).

PART V
ACCIDENTS IN QUEBEC

BENEFITS

18. (1) The insurer will pay with respect to a person insured in Quebec who dies or who sustains physical, psychological or mental injury as a result of an accident in Quebec or who incurs a cost described in section 6, as the person may elect,

(a) benefits as provided in Part II (Supplementary Medical and Rehabilitation Benefits and Care Benefits), Part III (Funeral Expenses and Death Benefits) and Part IV (Weekly Benefits); or

(b) benefits in the same amounts and subject to the same conditions as if the person was a resident of Quebec (as defined in the *Automobile Insurance Act* (Quebec) and the regulations made under that Act) and was entitled to payments under that Act and those regulations. R.R.O. 1990, Reg. 672, s. 18 (1).

(2) A person who elects to claim a benefit as provided in clause (1) (a) is thereafter eligible only for benefits under Parts II, III and IV. R.R.O. 1990, Reg. 672, s. 18 (2).

(3) A person who elects to claim a benefit as provided in clause (1) (b) is thereafter ineligible for benefits under Parts II, III and IV. R.R.O. 1990, Reg. 672, s. 18 (3).

(4) For the purposes of this Part, a person is insured in Quebec if the person at the time of the accident,

(a) was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;

(b) met the criteria prescribed for recovery under the *Automobile Insurance Act* (Quebec);

(c) was not the owner or driver of, or an occupant of, an automobile registered in Quebec; and

(d) was,

(i) an occupant of the insured automobile,

(ii) the named insured, his or her spouse or a dependant of either of them while the occupant of any other automobile,

(iii) a person who was not the occupant of an automobile and was struck by the insured automobile,

(iv) the named insured, his or her spouse or a dependant of either of them and was struck by any other automobile,

(v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of either of them who was injured,

(A) while the occupant of any other automobile, or

(B) by any other automobile while not the occupant of the automobile, or

(vi) a person struck by an automobile that was driven by a person described in subclause (i), (ii) or (v). R.R.O. 1990, Reg. 672, s. 18 (4).

PART VI
OPTIONAL BENEFITS

Options

19. (1) Every insurer shall offer the following optional benefits:

1. Optional Benefit 1: Increased Funeral Expenses and Death Benefits

If this option is purchased,

(a) the maximum amount payable under section 10 (Funeral Expenses) will be $7,500; and

(b) the maximum amount payable under section 11 (Death Benefits) will be the amounts set out in subsection 11 (2).

2. Optional Benefit 2: Increased Weekly Income Benefit

If this option is purchased, the amount referred to in clause 12 (4) (a) will be increased by such amount from the following as may be chosen when purchasing the option:

1. $150.

2. $300.

3. $450.

3. Optional Benefit 3: Increased Primary Caregiver Benefit

If this option is purchased, the amount payable under subsection 13 (4) will be $100 per week per person. R.R.O. 1990, Reg. 672, s. 19 (1).

(2) Optional benefits may be purchased at any time before an accident in respect of which a claim is made. R.R.O. 1990, Reg. 672, s. 19 (2).

PART VII
WORKERS' COMPENSATION

Effect of Workers' Compensation Benefits

20. The insurer will not pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan. R.R.O. 1990, Reg. 672, s. 20; O. Reg. 779/93, s. 2 (1).

Interim Payments

21. (1) Despite section 20, the insurer will pay full benefits under this Regulation to a person described in that section until the resolution of any action brought by the person in any court to recover for personal injuries resulting from the accident under which the workers' compensation claim arose or until the person receives payments under a workers' compensation law or plan if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. R.R.O. 1990, Reg. 672, s. 21 (1); O. Reg. 779/93, s. 2 (1).

(2) The amount of statutory accident benefits recoverable by the insurer under the assignment in subsection (1) shall be determined in accordance with the following formula:

$$A = T - C$$

Where,

A = amount recoverable;

T = total compensation for personal injury received by the insured person under all contracts of automobile insurance excluding any amount received as a special award under subsection 282 (10) or 283 (7) of the Act as it read immediately before the transition date within the meaning of subsection 283 (5) of the Act and any amount received as interest;

C = compensation for personal injury the insured person would have recovered under all contracts of automobile insurance had the statutory accident benefits not been paid.

R.R.O. 1990, Reg. 672, s. 21 (2); O. Reg. 779/93, s. 2 (2); O. Reg. 47/16, s. 1.

PART VIII
MISCELLANEOUS

Notice, Application for Benefits

22. (1) The insured person or the person otherwise entitled to make a claim shall,

(a) give initial notice of a claim to the insurer, in writing, within thirty days from the date of the accident or as soon as practicable thereafter; and

(b) furnish to the insurer within ninety days of the giving of the notice under clause (a) a completed application for statutory accident benefits respecting the accident and the resulting loss. R.R.O. 1990, Reg. 672, s. 22 (1); O. Reg. 779/93, s. 2 (2).

(2) A failure to comply with a time limit set out in subsection (1) does not invalidate a claim if the claimant has a reasonable excuse and so long as there is compliance within two years of the accident. R.R.O. 1990, Reg. 672, s. 22 (2).

Certificates, Examinations

23. (1) Unless waived by the insurer, the insured person or the person otherwise entitled to make a claim under Part IV shall furnish a certificate from a qualified medical practitioner or psychological advisor of the insured person's choice as to the cause and nature of the injury for which the claim is made, an estimate of the duration of the disability caused by the accident and a treatment plan. R.R.O. 1990, Reg. 672, s. 23 (1).

(2) In respect of claims under Part IV, the insurer may, on reasonable notice, require an examination of the insured person by a qualified medical practitioner, psychological advisor or chiropractor as often as it reasonably requires, and require an autopsy of a deceased insured person in accordance with the law relating to autopsies. R.R.O. 1990, Reg. 672, s. 23 (2).

(3) The insurer will pay the reasonable cost of examinations under subsection (1) if the cost is not payable under any insurance plan or law or under any other plan or law. R.R.O. 1990, Reg. 672, s. 23 (3).

(4) The insurer will pay the cost of all certificates under subsection (1) and for all examinations and certificates under subsection (2). R.R.O. 1990, Reg. 672, s. 23 (4).

Payment of Claims, Refusal to Pay

24. (1) Amounts payable under Parts II, III and V are overdue if not mailed or otherwise delivered by the insurer within thirty days after it has received a completed application for statutory accident benefits. R.R.O. 1990, Reg. 672, s. 24 (1); O. Reg. 779/93, s. 2 (2).

(2) Amounts payable under Part IV are overdue if not mailed or otherwise delivered by the insurer within ten days after it has received a completed application for statutory accident benefits or if the insurer fails to make a payment required by subsection (3). R.R.O. 1990, Reg. 672, s. 24 (2); O. Reg. 779/93, s. 2 (2).

(3) Payments under Parts IV and V shall be mailed or otherwise delivered at least once every second week while the insurer remains liable to the insured person. R.R.O. 1990, Reg. 672, s. 24 (3).

(4) The insurer will pay interest on overdue payments from the date they become overdue at the rate of 2 per cent per month. R.R.O. 1990, Reg. 672, s. 24 (4).

(5) Subsection (3) does not apply if the insurer prepays benefits owing. R.R.O. 1990, Reg. 672, s. 24 (5).

(6) Despite subsections (1), (2) and (3), a payment is not overdue if, at the time it would have become payable, the certificate required by subsection 23 (1) has not been received by the insurer, six weeks have passed since the insurer received the completed application for statutory accident benefits and the insurer has not waived the requirement that the certificate be supplied. R.R.O. 1990, Reg. 672, s. 24 (6); O. Reg. 779/93, s. 2 (2).

(7) If subsection (6) applies, the payment becomes overdue if the amount payable is not mailed or otherwise delivered by the insurer within ten days after the insurer has received the certificate. R.R.O. 1990, Reg. 672, s. 24 (7).

(8) If the insurer refuses to pay an amount claimed in an application for statutory accident benefits, the insurer shall forthwith give written notice to the insured person giving the reasons for the refusal. R.R.O. 1990, Reg. 672, s. 24 (8); O. Reg. 779/93, s. 2 (2).

Restriction on Proceedings

25. (1) Subject to subsection (2), an insured person shall not apply to the Licence Appeal Tribunal under subsection 280 (2) of the Act if any of the following circumstances exist:

1. The requirements of section 22 have not been satisfied.
2. The insured person has not made themselves reasonably available for any examination required under section 23. O. Reg. 47/16, s. 2.

(2) The Licence Appeal Tribunal may permit an insured person to apply despite paragraph 2 of subsection (1). O. Reg. 47/16, s. 2.

(3) The Licence Appeal Tribunal may impose terms and conditions on a permission granted under subsection (2) of this section. O. Reg. 47/16, s. 2.

Time Limit for Proceedings

26. An application under subsection 280 (2) of the Act in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed or, if the person has attended school or accepted, or returned to, an occupation or employment, as permitted by section 16, within two years after the insurer's refusal to pay further benefits. O. Reg. 47/16, s. 2.

Repayments to Insurer

27. (1) A person must repay to the insurer any benefit received under this Regulation that is paid to the person through error or fraud. R.R.O. 1990, Reg. 672, s. 27 (1); O. Reg. 779/93, s. 2 (1).

(2) A person must repay to the insurer any benefit received under sections 12 and 13 that is paid to him or her if the person or the person in respect of whom the payment was made was disqualified from payment under section 17. R.R.O. 1990, Reg. 672, s. 27 (2).

(3) A person must repay to the insurer any benefit received under sections 12 and 13 to the extent of any payments received by the person that are deductible from benefits under subsection 12 (4) or 13 (3). R.R.O. 1990, Reg. 672, s. 27 (3).

(4) The insurer may charge interest from the day the amount owing to the insurer under this section is determined at the bank rate on that day. R.R.O. 1990, Reg. 672, s. 27 (4).

(5) In subsection (4),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada). R.R.O. 1990, Reg. 672, s. 27 (5).

Copies of Regulation

28. The insurer, at a named insured person's request, will provide a copy of this Regulation to the person without charge. R.R.O. 1990, Reg. 672, s. 28; O. Reg. 779/93, s. 2 (1).

Forms

29. Each of the following documents shall be in a form approved by the Superintendent:

1. An initial application for benefits under Part II, IV or V.
2. An application for additional benefits under Part II, IV or V.
3. An application for benefits under Part III.
4. A certificate required by subsection 23 (1). O. Reg. 47/16, s. 3.

FORMS 1-4 REVOKED: O. REG. 47/16, S. 4.

TAB 52

CanLII

Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996, O Reg 776/93

This regulation is repealed, spent or not in force since 2020-07-03.

Past version: in force between 2016-04-01 and 2020-07-02

Link to the latest version: https://canlii.ca/t/sxp

Stable link to this version: https://canlii.ca/t/52pc5

Citation to this version: Statutory Accident Benefits Schedule - Accidents After December 31, 1993 and Before November 1, 1996, O Reg 776/93, <https://canlii.ca/t/52pc5> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act

ONTARIO REGULATION 776/93

STATUTORY ACCIDENT BENEFITS SCHEDULE — ACCIDENTS AFTER DECEMBER 31, 1993 AND BEFORE NOVEMBER 1, 1996

Note: This Regulation was revoked on July 3, 2020. (See: O. Reg. 347/20, s. 1)
Last amendment: 347/20.

This is the English version of a bilingual regulation.

PART I
INTERPRETATION

Definitions

1. In this Regulation,

"accident" means an incident in which, directly or indirectly, the use or operation of an automobile causes an impairment or causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device; ("accident")

"chiropractor" means a person authorized by law to practise chiropractic; ("chiropraticien")

"dentist" means a person authorized by law to practise dentistry; ("dentiste")

"Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996" means the document of that name, dated February 2016 and available on the website of the Commission; ("Formulaire d'évaluation des besoins en soins auxiliaires - accidents survenus après le 31 décembre 1993 mais avant le 1er novembre 1996")

"health practitioner", in respect of a particular impairment, means a physician or,

(a) a chiropractor, if the impairment is one that a chiropractor is authorized by law to treat,

(b) a dentist, if the impairment is one that a dentist is authorized by law to treat,

(c) an optometrist, if the impairment is one that an optometrist is authorized by law to treat,

(d) a psychologist, if the impairment is one that a psychologist is authorized by law to treat, or

(e) a physiotherapist, if the impairment is one that a physiotherapist is authorized by law to treat; ("praticien de la santé")

"impairment" means a loss or abnormality of psychological, physiological or anatomical structure or function; ("déficience")

"insured automobile", in respect of a particular motor vehicle liability policy, means any automobile covered by the policy; ("automobile assurée")

"insured person", in respect of a particular motor vehicle liability policy, means,

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured, and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile, or

(ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside of Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, or

(c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the sixty days before the accident; ("personne assurée")

"member of a health profession" means a member of a College as defined in the *Regulated Health Professions Act, 1991*; ("membre d'une profession de la santé")

"optometrist" means a person who is authorized by law to practise optometry; ("optométriste")

"personal and vocational characteristics" include,

(a) employment history,

(b) education and training,

(c) vocational interests and aptitudes,

(d) vocational skills,

(e) physical abilities,

(f) cognitive abilities, and

(g) language abilities; ("caractéristiques personnelles et professionnelles")

"physician" means a person authorized by law to practise medicine; ("médecin")

"physiotherapist" means a person authorized by law to practise physiotherapy; ("physiothérapeute")

"psychologist" means a person authorized by law to practise psychology; ("psychologue")

"spouse" means either of two persons who,

(a) are married to each other,

(b) have together entered into a marriage that is voidable or void, in good faith on the part of the person asserting a right under this Regulation, or

(c) have lived together in a conjugal relationship outside marriage at some point during the previous year and have lived together in a conjugal relationship outside marriage,

(i) continuously for a period of at least one year, or

(ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child or have demonstrated a settled intention to treat a child as a child of their family; ("conjoint")

"temporary disability benefits" means,

(a) benefits paid under Part II, III or IV of this Regulation,

(b) benefits paid under Part V of this Regulation, unless the benefits are paid more than 104 weeks after the onset of the disability,

(c) benefits paid under section 32 of this Regulation,

(d) benefits paid under Part IV of Regulation 672 of the Revised Regulations of Ontario, 1990, unless the benefits have been paid for more than 156 weeks,

(e) benefits paid under Part II of Subsection 2 of Schedule C to the *Insurance Act* as it existed before June 22, 1990, unless the benefits have been paid for more than 104 weeks,

(f) benefits paid under section 37, subsection 43 (9) or subsection 147 (2) of the *Workers' Compensation Act*, or

(g) any other periodic temporary benefit paid under an income continuation plan or law, other than,

(i) unemployment insurance benefits,

(ii) benefits paid under Part V of this Regulation more than 104 weeks after the onset of the disability,

(iii) benefits paid under Part IV of Regulation 672 of the Revised Regulations of Ontario, 1990 for more than 156 weeks, or

(iv) benefits paid under Part II of subsection 2 of Schedule C to the *Insurance Act* as it existed before June 22, 1990 that have been paid for more than 104 weeks. ("indemnités d'invalidité temporaires") O. Reg. 776/93, s. 1; O. Reg. 781/94, s. 1; O. Reg. 26/06, s. 1; O. Reg. 46/16, s. 1.

Partial Inability to Carry on Normal Life

2. For the purpose of this Regulation, a person suffers a partial inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person suffers an impairment that results in a substantial inability to engage in,

(a) personal care activities in which the person ordinarily engaged before the accident;

(b) mobility activities in which the person ordinarily engaged before the accident;

(c) household activities in which the person ordinarily engaged before the accident;

(d) activities in which the person ordinarily engaged before the accident that require the exercise of cognitive powers;

(e) activities in which the person ordinarily engaged before the accident that require the ability to control emotions or behaviour; or

(f) activities in which the person ordinarily engaged before the accident that require communication abilities. O. Reg. 776/93, s. 2.

Complete Inability to Carry on Normal Life

3. For the purpose of this Regulation, a person suffers a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person suffers an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident. O. Reg. 776/93, s. 3.

Dependants

4. For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse. O. Reg. 776/93, s. 4.

Employment

5. For the purpose of this Regulation, a person is employed if, for salary, wages, other remuneration or profit, the person is engaged in employment, including self-employment, or is the holder of an office, and "employment" has a corresponding meaning. O. Reg. 776/93, s. 5.

Payments for Loss of Income

6. For the purpose of this Regulation, payments of severance pay or termination pay are not payments for loss of income. O. Reg. 776/93, s. 6.

PART II
INCOME REPLACEMENT BENEFITS

Entitlement to Benefits

7. (1) An insured person who sustains an impairment as a result of an accident is entitled to a weekly income replacement benefit if the insured person meets any of the following qualifications:

1. The insured person was employed at the time of the accident and, as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of that employment.
2. The insured person,
    i. was not employed at the time of the accident,
    ii. was employed at some point during the 156 weeks before the accident,
    iii. was sixteen years of age or more or was excused from attendance at school under the *Education Act* at the time of the accident, and
    iv. as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the time period designated under subsection (2).
3. The insured person,
    i. was entitled at the time of the accident to start work within one year under a legitimate contract of employment that was made before the accident and that is evidenced in writing, and
    ii. as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of the employment he or she was entitled to start under the contract.
4. The insured person,
    i. was on strike from or was locked out from an employment at the time of the accident or was, at the time of the accident, on a layoff from an employment to which he or she was entitled to be recalled pursuant to a collective agreement, and
    ii. as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of the employment.
5. The insured person,

i. received weekly caregiver benefits under Part IV as a result of the accident but is no longer receiving them because there is no person who meets the qualifications set out in subsection 18 (5), or would have qualified for weekly caregiver benefits as a result of the accident but for,

A. the death as a result of the accident of the person in respect of whom the insured person was the primary caregiver, or

B. the operation of subsection 18 (3),

ii. was employed at some point during the period that began 156 weeks before the person first became a primary caregiver and ended on the day of the accident, and

iii. as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the time period designated under subsection (4).

6. The insured person,

i. was on pregnancy leave, parental leave or unpaid leave from an employment at the time of the accident, and

ii. as a result of and within two years of the accident, suffers a substantial inability to perform the essential tasks of the employment. O. Reg. 776/93, s. 7 (1); O. Reg. 781/94, s. 2.

(2) Subject to subsection (3), a person who applies for benefits under paragraph 1 or 2 of subsection (1) shall designate one of the following time periods:

1. The four weeks before the accident.
2. The fifty-two weeks before the accident.
3. The 156 weeks before the accident. O. Reg. 776/93, s. 7 (2).

(3) A person who was self-employed at any time during the four weeks before the accident shall not designate the four-week period under paragraph 1 of subsection (2). O. Reg. 776/93, s. 7 (3).

(4) A person who applies for benefits under paragraph 5 of subsection (1) shall designate a period of fifty-two consecutive weeks in the period that began 156 weeks before the person first became a primary caregiver and ended on the day of the accident. O. Reg. 776/93, s. 7 (4).

Period of Benefit

8. (1) Subject to subsections (2) to (4), a weekly income replacement benefit under section 7 is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 7. O. Reg. 776/93, s. 8 (1).

(2) The insurer is not required to pay a weekly income replacement benefit,

(a) under paragraph 3 of subsection 7 (1), until the day the person would have been entitled under the contract to begin employment;

(b) under paragraph 4 of subsection 7 (1), until the day the person would have been entitled to return to employment;

(c) under paragraph 5 of subsection 7 (1), until the day on which there is no person who meets the qualifications set out in subsection 18 (5); and

(d) under paragraph 6 of subsection 7 (1), until the day the person would have returned to employment. O. Reg. 776/93, s. 8 (2).

(3) No weekly income replacement benefit is payable under this Part for the first week of the disability. O. Reg. 776/93, s. 8 (3).

(4) Subsection (3) does not apply to a weekly income replacement benefit payable under paragraph 5 of subsection 7 (1) if the person entitled to the benefit received weekly caregiver benefits under Part IV as a result of the accident. O. Reg. 776/93, s. 8 (4).

Gross Annual Income

9. (1) For the purpose of determining the amount of a person's weekly income replacement benefit under paragraph 1 or 2 of subsection 7 (1), the person's gross annual income from employment shall be deemed to be the following amount:

1. In the case of a person who designated the four weeks before the accident under paragraph 1 of subsection 7 (2), the person's gross income from employment for the four weeks before the accident, multiplied by thirteen.
2. In the case of a person who designated the fifty-two weeks before the accident under paragraph 2 of subsection 7 (2), the person's gross income from employment for the fifty-two weeks before the accident.
3. In the case of a person who designated the 156 weeks before the accident under paragraph 3 of subsection 7 (2), the person's gross income from employment for the 156 weeks before the accident, divided by three. O. Reg. 776/93, s. 9 (1).

(2) For the purpose of subsection (1), a person who,

(a) is entitled to weekly income replacement benefits under paragraph 1 of subsection 7 (1);

(b) designated the four weeks before the accident under paragraph 1 of subsection 7 (2); and

(c) started the employment in which he or she was engaged at the time of the accident during the four weeks before the accident,

may elect that the person's gross income from employment for the four weeks before the accident be deemed to be the amount determined by taking the person's gross income from employment for the part of the four-week period for which the person earned income from the employment in which he or she was engaged at the time of the accident and extrapolating it over the rest of the four-week period. O. Reg. 776/93, s. 9 (2).

(3) For the purpose of subsection (1), a person who,

(a) is entitled to weekly income replacement benefits under paragraph 1 of subsection 7 (1);

(b) designated the fifty-two weeks before the accident under paragraph 2 of subsection 7 (2);

(c) was self-employed at the time of the accident; and

(d) started the self-employment in which he or she was engaged at the time of the accident during the fifty-two weeks before the accident,

may elect that the person's gross income from employment for the fifty-two weeks before the accident be deemed to be the amount determined by taking the person's income from the self-employment in which he or she was engaged at the time of the accident for the part of the fifty-two-week period for which the person earned income from that employment and extrapolating it over the rest of the fifty-two-week period. O. Reg. 776/93, s. 9 (3).

(4) For the purpose of determining the amount of a person's weekly income replacement benefit under paragraph 5 of subsection 7 (1), the person's gross annual income from employment shall be deemed to be the person's gross income from employment for the time period designated under subsection 7 (4). O. Reg. 776/93, s. 9 (4).

(5) For the purpose of determining the amount of a person's weekly income replacement benefit under paragraph 3, 4 or 6 of subsection 7 (1), the person's gross annual income from employment shall be deemed to be the greatest of the following amounts:

1. If the person is qualified under paragraph 3 of subsection 7 (1), the gross income payable under the contract of employment, extrapolated to reflect an annual income.
2. If the person is qualified under paragraph 4 of subsection 7 (1), the gross income payable in the employment he or she was on strike from, was locked out from or was on a layoff from, extrapolated to reflect an annual income.
3. If the person is qualified under paragraph 6 of subsection 7 (1), the gross income payable in the employment he or she was on leave from, extrapolated to reflect an annual income.
4. If the person is also qualified under paragraph 1 or 2 of subsection 7 (1), his or her gross annual income as determined under subsections (1) and (2). O. Reg. 776/93, s. 9 (5).

(6) A determination under subsection (1) or (4) of the person's gross income from employment for a period of time shall include temporary disability benefits received in respect of that period and benefits received under the *Unemployment Insurance Act* (Canada) in respect of that period. O. Reg. 776/93, s. 9 (6).

(7) If a person is entitled to weekly income replacement benefits under paragraph 1 of subsection 7 (1) and is not entitled to a benefit under paragraph 4 or 6 of subsection 7 (1), a determination under subsection (1) of the person's gross income from employment for a period of time shall be made by taking the person's gross income from employment for the part of that period for which the person earned income from employment and extrapolating it over any part of the period for which the person,

(a) did not receive temporary disability benefits or benefits under the *Unemployment Insurance Act* (Canada); and

(b) did not earn any income from employment for one of the following reasons:

1. The person was not employed.
2. The person was on a leave of absence without pay.
3. The person was on a layoff from employment.
4. The person was on strike from employment or was locked out from employment. O. Reg. 776/93, s. 9 (7).

Amount of Benefit

10. (1) The amount of a weekly income replacement benefit shall be 90 per cent of the insured person's net weekly income from employment determined in accordance with section 81 or 82. O. Reg. 776/93, s. 10 (1).

(2) Subject to subsection (3) and section 75, the amount of a weekly income replacement benefit shall not be less than $185 if, during the week in respect of which the benefit is payable,

(a) the insured person is suffering a partial or complete inability to carry on a normal life as a result of the accident, if 104 weeks or less have elapsed since the person first qualified for weekly income replacement benefits or weekly caregiver benefits; or

(b) the insured person is suffering a complete inability to carry on a normal life as a result of the accident, if more than 104 weeks have elapsed since the person first qualified for weekly income replacement benefits or weekly caregiver benefits. O. Reg. 776/93, s. 10 (2).

(3) The insurer may deduct from the amount of the weekly income replacement benefits payable to an insured person a percentage of the net income received by the insured person in respect of any employment subsequent to the accident. O. Reg. 776/93, s. 10 (3).

(4) The percentage mentioned in subsection (3) shall be,

(a) 75 per cent, if the insured person started the employment more than twenty-six weeks after the onset of the disability in respect of which the weekly income replacement benefits are paid and has been engaged in the employment for less than twenty-six weeks; and

(b) 90 per cent, in any other case. O. Reg. 776/93, s. 10 (4).

(5) Subject to section 82, for the purpose of subsection (3), the net income received by a person in respect of an employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Unemployment Insurance Act* (Canada) on the gross income.
2. The contribution payable by the person under the *Canada Pension Plan* on the gross income.
3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income. O. Reg. 776/93, s. 10 (5).

(6) For the purpose of subsection (3), net income from self-employment for a person who was self-employed at the time of the accident shall be determined without making any deductions for,

(a) expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose; and

(c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident. O. Reg. 776/93, s. 10 (6).

(7) If the insured person was self-employed at the time of the accident and the person incurs losses from self-employment as a result of the accident, the insurer shall add to the amount of the weekly income replacement benefits payable to the person 90 per cent of the losses from self-employment incurred as a result of the accident. O. Reg. 776/93, s. 10 (7).

(8) For the purpose of subsection (7), losses from self-employment shall be determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9 (2) of the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), without making any deductions for,

(a) expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose;

(c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident;

(d) expenses that are eligible for capital cost allowance or an allowance on eligible capital property; or

(e) losses deductible under section 111 of the *Income Tax Act* (Canada). O. Reg. 776/93, s. 10 (8).

(9) The weekly amount paid to a person under this Part shall not exceed $1,000 after making any deductions permitted by subsection 75 (1). O. Reg. 776/93, s. 10 (9).

Withdrawal from the Workforce

11. (1) If an insured person who is receiving weekly income replacement benefits under this Part had permanently withdrawn from the workforce at the time of the accident, the insurer may, subject to subsections (2) to (9), stop payment of the benefits. O. Reg. 776/93, s. 11 (1).

(2) An insurer that believes it is entitled to stop payment of benefits under subsection (1) shall notify the insured person of its intention to stop payment and the notice shall provide the information contained in subsections (3) and (4). O. Reg. 776/93, s. 11 (2).

(3) If the insured person does not commence proceedings in accordance with the Act to dispute the stoppage in payment within 30 days after the notice was given, the insurer may stop paying the benefits. O. Reg. 46/16, s. 2 (1).

(4) If the insured person commences proceedings in accordance with the Act to dispute the stoppage in payment within 30 days after the notice was given, the insurer shall continue to pay the benefit until the dispute is resolved. O. Reg. 46/16, s. 2 (1).

(5) Subsection (4) does not apply if the insured person notifies the insurer in writing that the person does not wish to receive payments of the benefit pending resolution of the dispute. O. Reg. 776/93, s. 11 (5).

(6) If the dispute is the subject of a proceeding, the insurer has the burden of proving on clear and convincing evidence that the insured person had permanently withdrawn from the workforce at the time of the accident. O. Reg. 776/93, s. 11 (6); O. Reg. 46/16, s. 2 (2).

(7) When a dispute is resolved and it is determined that the insurer is not entitled to stop payment of the benefit, the insurer shall pay with interest any payments that were withheld under subsection (5). O. Reg. 776/93, s. 11 (7).

(8) The interest payable under subsection (7) shall be calculated from the date each payment would have been made in the absence of subsection (5) at the bank rate in effect on the date the first payment was withheld under subsection (5). O. Reg. 776/93, s. 11 (8).

(9) In subsection (8),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada). O. Reg. 776/93, s. 11 (9).

(10) When a dispute is resolved and it is determined that the insurer is entitled to stop payment of the benefit, the insured person shall repay to the insurer the amount of the benefits received under this Part after the notice was given under subsection (2). O. Reg. 776/93, s. 11 (10).

Benefits after Age Sixty-five

12. (1) Subject to subsection (2), no weekly income replacement benefits are payable to a person under this Part after the person attains sixty-five years of age. O. Reg. 776/93, s. 12 (1).

(2) If a person who is entitled to weekly income replacement benefits under paragraph 1, 3 or 4 of subsection 7 (1) attained sixty-five years of age before the accident, the amount determined under subsection 10 (1) during each of the first 208 weeks of the disability in respect of which the benefit is payable shall be deemed to be the amount that would be determined in the absence of this section multiplied by the factor set out in Column 2 of the Table to this subsection opposite the range that includes the number of weeks that the person has suffered from the disability in respect of which the benefit is payable.

TABLE

Number of Weeks of Disability	Factor
Less than 52	1.0
52 or more but less than 104	0.8
104 or more but less than 156	0.6
156 or more but less than 208	0.3

O. Reg. 776/93, s. 12 (2).

(3) No further income replacement benefits are payable under this Part to a person to whom subsection (2) applies if more than 208 weeks have passed since the onset of the disability in respect of which the benefit is paid. O. Reg. 776/93, s. 12 (3).

(4) Subsection 10 (2) applies to weekly income replacement benefits paid to a person to whom subsection (2) applies. O. Reg. 776/93, s. 12 (4).

(5) Subsections 10 (3) to (8) do not apply to weekly income replacement benefits paid to a person to whom subsection (2) applies. O. Reg. 776/93, s. 12 (5).

(6) Subsections (1) and (3) do not prevent a person from qualifying for weekly disability benefits under Part V. O. Reg. 776/93, s. 12 (6).

Responsibility to Seek Employment

13. (1) An insured person who is entitled to weekly income replacement benefits under this Part shall make reasonable efforts to,

(a) return to the employment in which he or she engaged at the time of the accident; or

(b) obtain employment that satisfies the criteria set out in subsection 30 (2). O. Reg. 776/93, s. 13 (1).

(2) Subsection (1) does not apply if,

(a) employment would be detrimental to the person's treatment or recovery; or

(b) the insured person is participating in a vocational rehabilitation program. O. Reg. 776/93, s. 13 (2).

(3) If an insured person does not comply with subsection (1), the insurer may notify the person that the insurer intends to reduce the amount of the weekly benefit in accordance with subsection (4) and the notice shall provide the information contained in subsections (4) and (5). O. Reg. 776/93, s. 13 (3).

(4) If at least thirty days have elapsed after the insured person received the notice and the person is still not complying with subsection (1), the insurer may, despite subsection 10 (2) but subject to subsection (5), deduct from the net weekly income used to determine the amount of the benefit under subsection 10 (1) 90 per cent of the net weekly income determined in accordance with section 81 or 82 that the person could earn in an employment that satisfies the criteria set out in subsection 30 (2). O. Reg. 776/93, s. 13 (4).

(5) If within thirty days after receiving the notice, the insured person disputes the reduction in accordance with the Act and furnishes the insurer with a certificate from a health practitioner stating that employment would be detrimental to the person's treatment or recovery or that the insured person is participating in a vocational rehabilitation program, the insurer shall continue to pay the benefit without any reduction until the dispute is resolved. O. Reg. 776/93, s. 13 (5); O. Reg. 46/16, s. 3.

(6) Subsections (3) and (4) do not apply if the insurer is making a reduction under subsection 73 (4). O. Reg. 776/93, s. 13 (6).

Temporary Return to Employment

14. (1) A person receiving weekly income replacement benefits under this Part may return to or start an employment at any time during the 104 weeks following the onset of the disability in respect of which the benefits are paid without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in the employment. O. Reg. 776/93, s. 14 (1).

(2) After the 104-week period referred to in subsection (1), a person receiving weekly income replacement benefits under this Part may return to or start an employment for periods of up to ninety days without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in the employment. O. Reg. 776/93, s. 14 (2).

PART III
EDUCATION DISABILITY BENEFITS

Weekly Benefits

15. (1) An insured person who sustains an impairment as a result of an accident is entitled to a weekly education disability benefit if the insured person meets the following qualifications:

1. The insured person,
    i. was less than sixteen years of age at the time of the accident,
    ii. was enrolled on a full-time basis in elementary, secondary or post-secondary education at time of the accident, or
    iii. completed his or her education less than one year before the accident and was not employed, after completing his or her education and before the accident, in an employment that reflected his or her education and training.
2. The insured person, as a result of and within two years of the accident,
    i. suffers a substantial inability to continue his or her education, in the case of an insured person who qualifies under subparagraph i or ii of paragraph 1,
    ii. suffers a substantial inability to engage in employment that reflects his or her education and training, in the case of an insured person who qualifies under subparagraph iii of paragraph 1, or
    iii. suffers a partial or complete inability to carry on a normal life, in the case of an insured person who qualifies under subparagraph i, ii or iii of paragraph 1. O. Reg. 776/93, s. 15 (1).

(2) Subject to subsections (3) and (4), the weekly education disability benefit is payable during the period that the insured person suffers,

(a) a substantial inability to continue his or her education, in the case of an insured person who qualifies under subparagraph i of paragraph 2 of subsection (1);

(b) a substantial inability to engage in employment that reflects his or her education and training, in the case of an insured person who qualifies under subparagraph ii of paragraph 2 of subsection (1); or

(c) a partial or complete inability to carry on a normal life, in the case of an insured person who qualifies under subparagraph iii of paragraph 2 of subsection (1). O. Reg. 776/93, s. 15 (2).

(3) No weekly education disability benefit is payable under this section,

(a) for any period before the insured person attains sixteen years of age; or

(b) for the first week of the disability. O. Reg. 776/93, s. 15 (3).

(4) If an insured person qualifies for weekly education disability benefits under subparagraph iii of paragraph 2 of subsection (1) and does not qualify under subparagraph i or ii of paragraph 2 of subsection (1), no weekly education disability benefit is payable under this section more than 104 weeks after the insured person first qualified for weekly education disability benefits unless the insured person is suffering a complete inability to carry on a normal life as a result of the accident. O. Reg. 776/93, s. 15 (4).

(5) The amount of a weekly education disability benefit shall be equal to half of the net weekly income determined in accordance with section 81 or 82 using a gross annual income from employment equal to 52 multiplied by the Average Weekly Earnings for Ontario, Industrial Aggregate, for the month of June in the year immediately preceding the year in which the benefit is first payable, as published by Statistics Canada under the authority of the *Statistics Act* (Canada). O. Reg. 776/93, s. 15 (5).

(6) The insurer may deduct from the amount of the weekly education disability benefits payable to an insured person under this section a percentage of the net income received by the insured person in respect of any employment subsequent to the accident. O. Reg. 781/94, s. 3.

(7) The percentage mentioned in subsection (6) shall be,

(a) 75 per cent, if the insured person started the employment more than 26 weeks after the onset of the disability in respect of which the weekly education disability benefits are paid and has been engaged in the employment for less than 26 weeks; and

(b) 90 per cent, in any other case. O. Reg. 781/94, s. 3.

(8) Subject to section 82, for the purpose of subsection (6), the net income received by a person in respect of an employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Unemployment Insurance Act* (Canada) on the gross income.
2. The contribution payable by the person under the *Canada Pension Plan* on the gross income.
3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income. O. Reg. 781/94, s. 3.

(9) No weekly education disability benefits are payable to a person under this section,

(a) after the person attains 65 years of age, if the person had not attained that age at the time of the accident; or

(b) for more than 104 weeks, if the person had attained 65 years of age at the time of the accident. O. Reg. 781/94, s. 3.

(10) Subsection (9) does not prevent a person from qualifying for weekly disability benefits under Part V. O. Reg. 781/94, s. 3.

LUMP SUM BENEFITS

16. (1) Subject to subsections (2) and (3), an insured person who sustains an impairment as a result of an accident is entitled to a lump sum education disability benefit of,

(a) $2,000 for each year of elementary education that the person is unable to attend or successfully complete as a result of the accident;

(b) $4,000 for each year or, if the person is enrolled in a secondary school organized on a semester basis, $2,000 for each semester, to a maximum of $4,000 in any year, of secondary education that the person is unable to attend or successfully complete as a result of the accident; and

(c) $8,000 for each year or, if the person is enrolled in a post-secondary educational institution organized on a semester basis, $4,000 for each semester, to a maximum of $8,000 in any year, of post-secondary education that the person is unable to attend or successfully complete as a result of the accident. O. Reg. 776/93, s. 16 (1).

(2) A person who was sixteen years of age or more at the time of the accident is entitled to lump sum education disability benefits under this section in respect of not more than,

(a) one year of elementary education;

(b) one year or, if the person is enrolled in a secondary school organized on a semester basis, two semesters of secondary education; or

(c) one year or, if the person is enrolled in a post-secondary educational institution organized on a semester basis, two semesters of post-secondary education. O. Reg. 776/93, s. 16 (2).

(3) If the accident occurred before the person attained sixteen years of age, only one lump sum education disability benefit is payable under this section after the person attains sixteen years of age. O. Reg. 776/93, s. 16 (3).

(4) A lump sum education disability benefit under this section shall be paid at the end of the year or semester in respect of which it is payable. O. Reg. 776/93, s. 16 (4).

(5) If a person is unable to attend or successfully complete a year or semester of education as a result of an accident, a determination for the purpose of this section of whether the education was elementary, secondary or post-secondary education shall be made on the assumption that, if the accident had not occurred, the person would have successfully attended and completed all previous years and semesters of education that he or she was unable to attend or successfully complete as a result of the accident. O. Reg. 776/93, s. 16 (5).

Temporary Return to Education

17. (1) A person receiving education disability benefits under this Part may return to elementary, secondary or post-secondary education at any time during the 104 weeks following the onset of the disability in respect of which the benefits are paid without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in elementary, secondary or post-secondary education. O. Reg. 776/93, s. 17 (1).

(2) After the 104-week period referred to in subsection (1), a person receiving education disability benefits under this Part may return to elementary, secondary or post-secondary education for periods of up to ninety days without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in elementary, secondary or post-secondary education. O. Reg. 776/93, s. 17 (2).

PART IV
CAREGIVER BENEFITS

18. (1) An insured person who sustains an impairment as a result of an accident is entitled to a weekly caregiver benefit if the insured person meets the following qualifications:

1. At the time of the accident, the insured person was residing with a person in respect of whom the insured person was the primary caregiver and the person receiving the care was less than sixteen years of age or required the care because of physical or mental incapacity.
2. The insured person was not employed on a full-time basis and was not self-employed at the time of the accident.
3. As a result of and within two years of the accident, the insured person,
    i. suffers a substantial inability to engage in the caregiving activities in which he or she engaged at the time of the accident, or

    ii. suffers a partial or complete inability to carry on a normal life. O. Reg. 776/93, s. 18 (1).

(2) Subject to subsections (3) and (4), the weekly caregiver benefit under this section is payable during the period that the insured person suffers,

(a) a substantial inability to engage in the caregiving activities in which he or she engaged at the time of the accident; or

(b) a partial or complete inability to carry on a normal life. O. Reg. 776/93, s. 18 (2).

(3) No weekly caregiver benefit is payable under this section for the first week of the disability. O. Reg. 776/93, s. 18 (3).

(4) If an insured person qualifies for weekly caregiver benefits under subparagraph ii of paragraph 3 of subsection (1) and does not qualify under subparagraph i of paragraph 3 of subsection (1), no weekly caregiver benefit is payable under this section more than 104 weeks after the insured person first qualified for weekly caregiver benefits unless the insured person is suffering a complete inability to carry on a normal life as a result of the accident. O. Reg. 776/93, s. 18 (4).

(5) The amount of a weekly caregiver benefit shall be $250 for the first person who meets the following qualifications, plus $50 for each additional person who meets the following qualifications:

1. The person resided with the insured person at the time of the accident.
2. The insured person was the primary caregiver in respect of the person at the time of the accident.
3. At the time the benefit is paid, the person,
    i. is less than sixteen years of age, or
    ii. requires care because of physical or mental incapacity. O. Reg. 776/93, s. 18 (5).

(6) The insurer may deduct from the amount of the weekly caregiver benefits payable to an insured person under this section a percentage of the net income received by the insured person in respect of any employment subsequent to the accident. O. Reg. 781/94, s. 4.

(7) The percentage mentioned in subsection (6) shall be,

(a) 75 per cent, if the insured person started the employment more than 26 weeks after the onset of the disability in respect of which the weekly caregiver benefits are paid and has been engaged in the employment for less than 26 weeks; and

(b) 90 per cent, in any other case. O. Reg. 781/94, s. 4.

(8) Subject to section 82, for the purpose of subsection (6), the net income received by a person in respect of an employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Unemployment Insurance Act* (Canada) on the gross income.
2. The contribution payable by the person under the *Canada Pension Plan* on the gross income.
3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income. O. Reg. 781/94, s. 4.

PART V
OTHER DISABILITY BENEFITS

19. (1) An insured person who sustains an impairment as a result of an accident is entitled to a weekly disability benefit if the insured person, as a result of and within two years of the accident, suffers a partial or complete inability to carry on a normal life and,

(a) the insured person never met the qualifications for a benefit under subsection 7 (1), 15 (1) or 18 (1), or under Part VI, in respect of the accident;

(b) the insured person received weekly income replacement benefits under Part II or weekly education disability benefits under section 15 as a result of the accident and payment of the benefits ceased under section 11 or 12 or subsection 15 (9); or

(c) the insured person received weekly caregiver benefits under Part IV as a result of the accident and there is no longer any person who meets the qualifications set out in subsection 18 (5). O. Reg. 776/93, s. 19 (1); O. Reg. 781/94, s. 5.

(2) Subject to subsection (3), the amount of the weekly disability benefit under this section shall be $185. O. Reg. 776/93, s. 19 (2).

(3) The insurer may deduct from the amount of the weekly disability benefits payable to an insured person under this section a percentage of the net income received by the insured person in respect of any employment subsequent to the accident. O. Reg. 776/93, s. 19 (3).

(4) The percentage mentioned in subsection (3) shall be,

(a) 75 per cent, if the insured person started the employment more than twenty-six weeks after the onset of the disability in respect of which the weekly disability benefits are paid and has been engaged in the employment for less than twenty-six weeks; and

(b) 90 per cent, in any other case. O. Reg. 776/93, s. 19 (4).

(5) Subject to section 82, for the purpose of subsection (3), the net income received by a person in respect of an employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Unemployment Insurance Act* (Canada) on the gross income.
2. The contribution payable by the person under the *Canada Pension Plan* on the gross income.
3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income. O. Reg. 776/93, s. 19 (5).

(6) Subject to subsection (7), the weekly disability benefit is payable during the period that the insured person suffers a partial or complete inability to carry on a normal life. O. Reg. 776/93, s. 19 (6).

(7) No weekly disability benefit is payable under this section,

(a) for any period before the insured person attains sixteen years of age;

(b) for the first week of the disability; or

(c) more than 104 weeks after the insured person first qualified for weekly disability benefits, weekly income replacement benefits or weekly caregiver benefits, unless the insured person is suffering a complete inability to carry on a normal life as a result of the accident. O. Reg. 776/93, s. 19 (7).

PART VI
LOSS OF EARNING CAPACITY BENEFITS

Entitlement to Benefits

20. (1) An insurer shall pay an insured person weekly loss of earning capacity benefits instead of weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV or weekly disability benefits under Part V if the payment of loss of earning capacity benefits is authorized by this Part. O. Reg. 776/93, s. 20 (1).

(2) A weekly loss of earning capacity benefit under this Part is payable during the lifetime of the insured person and is subject to such adjustments in the amount of the benefit as are provided in this Regulation. O. Reg. 776/93, s. 20 (2).

Application of Sections 21 to 25

20.1 Sections 21 to 25 apply only if, before March 1, 2006,

(a) the insurer has refused to pay weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV or weekly disability benefits under Part V;

(b) the insurer has not made an offer with respect to the payment of weekly loss of earning capacity benefits under section 21 and there is no agreement under section 24 or 25; and

(c) one of the following has been commenced in accordance with subsection 279 (1) of the Act, as it read immediately before the day on which section 14 of Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014* comes into force, in respect of the insured person's entitlement to a benefit referred to in clause (a),

(i) an arbitration proceeding under section 282 of the Act, as it read immediately before the day on which section 14 of Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014* comes into force,

(ii) an arbitration proceeding under the *Arbitration Act, 1991*, or

(iii) a court proceeding. O. Reg. 26/06, s. 2; O. Reg. 46/16, s. 4.

INSURER'S OFFER

21. (1) Subject to subsections (7) to (9), an insurer shall promptly deliver a written offer to an insured person with respect to the payment of weekly loss of earning capacity benefits if one or more of the following circumstances occurs:

1. The insured person qualified for weekly income replacement benefits under Part II and continues to qualify for those benefits 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits.
2. The insured person qualified for weekly income replacement benefits under Part II, did not qualify for those benefits 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits, but subsequently becomes entitled to resume receiving weekly income replacement benefits under section 14.
3. The insured person qualified for weekly caregiver benefits under Part IV, subsequently elected under section 61 to receive weekly income replacement benefits under Part II, and 104 weeks after the onset of the disability in respect of which he or she first qualified for weekly caregiver benefits continues to qualify for weekly income replacement benefits.
4. The insured person qualified for weekly education disability benefits under section 15 and, 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits or on the date the person attains sixteen years of age, whichever occurs later, continues to qualify for weekly education disability benefits.
5. The insured person qualified for weekly education disability benefits under section 15, does not qualify for those benefits 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits or on the date the person attains sixteen years of age, whichever occurs later, but subsequently becomes entitled to resume receiving weekly education disability benefits under section 17.
6. The insured person qualified for weekly caregiver benefits under Part IV, is unable as a result of the accident to earn what he or she could reasonably have earned at the time of the accident, elects at any time 104 weeks or more after the onset of the disability in respect of which he or she first qualified for weekly caregiver benefits to be governed by this Part instead of Part IV or V and,
    i. continues to qualify for weekly caregiver benefits, or
    ii. ceases to qualify for weekly caregiver benefits because there is no longer any person who meets the qualifications set out in subsection 18 (5).
7. The insured person qualified for weekly disability benefits under Part V, continues to qualify for those benefits 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits, and,
    i. is unable as a result of the accident to earn what he or she could reasonably have earned at the time of the accident,
    ii. would have joined or returned to the workforce at some time after the accident, and

iii. elects to be governed by this Part instead of Part V. O. Reg. 776/93, s. 21 (1).

(2) If a person qualifies for weekly caregiver benefits under Part IV 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits, the insurer shall promptly provide the person with notice that he or she may be entitled to make the election referred to in paragraph 6 of subsection (1). O. Reg. 776/93, s. 21 (2).

(3) If a person qualifies for weekly disability benefits under Part V 104 weeks after the onset of the disability in respect of which he or she first qualified for those benefits, the insurer shall promptly provide the person with notice that he or she may be entitled to make the election referred to in paragraph 7 of subsection (1). O. Reg. 776/93, s. 21 (3).

(4) An election under paragraph 6 or 7 of subsection (1) may not be changed. O. Reg. 776/93, s. 21 (4).

(5) An offer under subsection (1) shall specify,

(a) the insured person's pre-accident earning capacity determined in accordance with section 29;

(b) the type of employment that best satisfies the criteria set out in subsection 30 (2);

(c) the insured person's residual earning capacity determined in accordance with section 30; and

(d) the amount of the weekly loss of earning capacity benefit, if any, determined in accordance with section 28. O. Reg. 776/93, s. 21 (5).

(6) The offer shall include a notice that, if the offer is not accepted within forty-five days after its receipt or such longer period to which the insurer and the insured person may agree, the insured person shall be deemed to have rejected the offer in respect of both residual earning capacity and pre-accident earning capacity and the insured person will be required to be examined under section 65. O. Reg. 776/93, s. 21 (6); O. Reg. 26/06, s. 3.

(7) Subsection (1) does not apply if the insured person is sixty-five years of age or older. O. Reg. 776/93, s. 21 (7).

(8) The time for delivering an offer under subsection (1) may be extended by agreement between the insurer and the insured person. O. Reg. 776/93, s. 21 (8).

(9) If an insured person suffers an impairment as a result of an accident that occurs after the accident in respect of which an offer would, in the absence of this subsection, be given under subsection (1), and the latter accident results in a disability in respect of which weekly benefits are payable under Part II, section 15, Part IV or Part V, the operation of subsection (1) is delayed until 104 weeks after the latter accident. O. Reg. 776/93, s. 21 (9).

Insured Person's Response to Offer

22. (1) An insured person who receives the insurer's offer under section 21 may give the insurer a written response,

(a) agreeing to the insurer's offer; or

(b) rejecting the insurer's offer in respect of the person's pre-accident earning capacity or the person's residual earning capacity, or both. O. Reg. 776/93, s. 22 (1).

(2) The rejection of an offer under clause (1) (b) does not prevent the insurer and insured person from entering into negotiations in an effort to enter into an agreement regarding the payment of loss of earning capacity benefits. O. Reg. 776/93, s. 22 (2).

(3) Any agreement to pay weekly loss of earning capacity benefits under this Part shall be in writing and shall specify the particulars set out in subsection 21 (5). O. Reg. 776/93, s. 22 (3).

(4) If the insured person and insurer enter into an agreement under this Part and the payment of loss of earning capacity benefits is authorized under the agreement, the insurer shall begin to pay weekly loss of earning capacity benefits in accordance with the agreement. O. Reg. 776/93, s. 22 (4).

Procedure if no Agreement

23. (1) An insured person who does not accept the insurer's offer within forty-five days after receiving it shall be deemed to have rejected the insurer's offer in respect of both residual earning capacity and pre-accident earning capacity. O. Reg. 776/93, s. 23 (1).

(2) If an insured person rejects the insurer's offer in respect of residual earning capacity, the insurer shall give notice that it requires the insured person to be examined under section 65. O. Reg. 26/06, s. 4 (1).

(2.1) Within 14 days after receiving the report of the examination under section 65, the insurer shall give to the insured person a document setting out its determination with respect to the payment of loss of earning capacity benefits and the information specified in clauses 21 (5) (a) to (d). O. Reg. 26/06, s. 4 (1).

(3) If an insured person rejects the insurer's offer in respect of pre-accident earning capacity, the dispute may be resolved in accordance with the Act, based on section 29 of this Regulation. O. Reg. 776/93, s. 23 (3); O. Reg. 46/16, s. 5 (1).

(4) Revoked: O. Reg. 26/06, s. 4 (2).

(5) Subject to subsection (8), if an insured person rejects the insurer's offer in respect of residual earning capacity or both residual earning capacity and pre-accident earning capacity, the insurer may commence paying weekly loss of earning capacity benefits to the insured person 14 days after receiving the report of the examination conducted under section 65. O. Reg. 781/94, s. 6 (1); O. Reg. 26/06, s. 4 (3).

(5.1) Revoked: O. Reg. 26/06, s. 4 (4).

(5.2) Subject to subsection (8), if an insured person rejects the insurer's offer in respect of pre-accident earning capacity but not residual earning capacity, the insurer may, upon receiving the rejection, commence paying weekly loss of earning capacity benefits to the insured person based on the insurer's offer made under section 21. O. Reg. 781/94, s. 6 (1).

(6) Revoked: O. Reg. 26/06, s. 4 (4).

(7) By agreement between the insurer and the insured person,

(a) the forty-five-day period referred to in subsection (1) may be extended;

(b) the examination referred to in subsection (2) may be delayed.

(c), (d) Revoked: O. Reg. 781/94, s. 6 (3).

O. Reg. 776/93, s. 23 (7); O. Reg. 781/94, s. 6 (3); O. Reg. 26/06, s. 4 (5).

(8) Subject to subsection 65 (5.1), the insurer shall continue to pay benefits under Part IV or V pending the resolution of a dispute under this section, if the person continues to qualify for those benefits. O. Reg. 26/06, s. 4 (6); O. Reg. 46/16, s. 5 (2).

Agreement Before Offer

24. A person who has not received an offer under section 21 and who is entitled to receive weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV or weekly disability benefits under Part V may agree in writing with the insurer that the insurer will pay the person weekly loss of earning capacity benefits instead of the weekly benefits the person would otherwise be entitled to. O. Reg. 776/93, s. 24.

Examination Before Offer

25. A person who has not received an offer under section 21 and who is entitled to receive weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV or weekly disability benefits under Part V may agree in writing with the insurer that the person shall be examined under section 65. O. Reg. 26/06, s. 5.

Designated Assessment Centres (Residual Earning Capacity)

26. (1) The Superintendent may, for the purpose of this Part,

(a) Revoked: O. Reg. 26/06, s. 6 (1).

(b) specify the types of impairments that each designated assessment centre is authorized to assess. O. Reg. 776/93, s. 26 (1); O. Reg. 304/98, s. 1; O. Reg. 26/06, s. 6 (1).

(2) The accident benefits advisory committee appointed under section 7 of the *Insurance Act* may, for the purpose of this Part, establish procedures, standards and guidelines that shall be used by designated assessment centres in conducting assessments. O. Reg. 776/93, s. 26 (2).

(3) In this Part,

"designated assessment centre" means an assessment centre designated before March 1, 2006 by the Superintendent under clause (1) (a), as it read before March 1, 2006. O. Reg. 26/06, s. 6 (2).

27. Revoked: O. Reg. 26/06, s. 7.

Transitional

27.1 (1) Sections 21 to 27, as they read on February 28, 2006, continue to apply in respect of loss of earning capacity benefits if, before March 1, 2006, an insurer has delivered a written offer with respect to the payment of weekly loss of earning capacity benefits to the insured person under subsection 21 (1), as it read on February 28, 2006, or if the insurer and the insured person have agreed in writing under section 25, as it read on February 28, 2006, that the insured person should be assessed under section 27. O. Reg. 26/06, s. 8.

(2) Despite subsection (1), if an assessment of an insured person by a designated assessment centre cannot be conducted or completed on or after March 1, 2006 because there is no designated assessment centre that satisfies the requirements of this Part, the insurer may give the insured person a notice in writing requiring the insured person to be examined under section 65 in respect of loss of earning capacity benefits, instead of being assessed by a designated assessment centre, and the provisions of this Regulation, as they read after February 28, 2006, apply in respect of loss of earning capacity benefits after the notice is given. O. Reg. 26/06, s. 8.

Amount of Benefit

28. (1) The amount of a weekly loss of earning capacity benefit for an insured person shall be determined in accordance with the following formula:

$$A = 0.90 \times (B - C)$$

where,

A = the amount of the weekly loss of earning capacity benefit,

B = the person's pre-accident earning capacity, determined in accordance with section 29,

C = the person's residual earning capacity, determined in accordance with section 30.

O. Reg. 776/93, s. 28 (1).

(2) Despite subsection (1), the amount of a weekly loss of earning capacity benefit for an insured person who has received weekly education disability benefits under section 15 shall be the amount determined in accordance with the following formula:

$$A = B – (0.90 \times C)$$

where,

A = the amount of the weekly loss of earning capacity benefit,

B = the person's pre-accident earning capacity, determined in accordance with section 29,

C = the person's residual earning capacity, determined in accordance with section 30.

O. Reg. 776/93, s. 28 (2).

(3) Subject to section 75, the amount of a weekly loss of earning capacity benefit shall not be less than $185 if, during the week in respect of which the benefit is payable, the insured person is suffering a complete inability to carry on a normal life as a result of the accident. O. Reg. 776/93, s. 28 (3).

(4) The weekly amount paid to a person under this Part shall not exceed $1,000 after making any deductions permitted by subsection 75 (1). O. Reg. 776/93, s. 28 (4).

Determining Pre-Accident Earning Capacity

29. (1) For the purpose of determining the amount of a weekly loss of earning capacity benefit under this Part, the pre-accident earning capacity of a person who is entitled to receive weekly income replacement benefits under paragraph 1, 3, 4 or 6 of subsection 7 (1) shall be deemed to be the person's net weekly income from employment used in section 10 in determining the amount of weekly income replacement benefits immediately before payment of the weekly loss of earning capacity benefits begins, converted to a full-time net weekly income in accordance with section 86, if section 86 applies. O. Reg. 776/93, s. 29 (1).

(2) Despite subsection (1), the pre-accident earning capacity of a person who is entitled to receive weekly income replacement benefits under paragraph 1 of subsection 7 (1) and who was self-employed at the time of the accident shall be the net weekly income determined in accordance with section 81 or 82 using the gross annual income from employment that the person could reasonably have earned at the time of the accident, having regard to the person's personal and vocational characteristics at that time. O. Reg. 776/93, s. 29 (2).

(3) For the purpose of determining the amount of a weekly loss of earning capacity benefit under this Part, the pre-accident earning capacity of a person who is entitled to receive weekly income replacement benefits under paragraph 2 or 5 of subsection 7 (1), weekly caregiver benefits under Part IV or weekly disability benefits under Part V shall be deemed to be the person's net weekly income determined in accordance with section 81 or 82 using the gross annual income from employment that the person could reasonably have earned at the time of the accident, having regard to the person's personal and vocational characteristics at that time. O. Reg. 776/93, s. 29 (3).

(4) The amount of a person's pre-accident earning capacity determined under subsections (1), (2) and (3) shall not be less than,

(a) the net weekly income determined in accordance with section 81 or 82 using a gross annual income from employment equal to the person's gross income from employment, including any temporary disability benefits and any benefits received under the *Unemployment Insurance Act* (Canada), for a period specified by the person of fifty-two consecutive weeks in the 156-week period before the accident, in the case of a person entitled to receive weekly income replacement benefits under paragraphs 1, 2, 3, 4 or 6 of subsection 7 (1), or a person who was self-employed at the time of the accident; or

(b) the net weekly income determined in accordance with section 81 or 82 using a gross annual income from employment equal to the person's gross income from employment, including any temporary disability benefits and any benefits received under the *Unemployment Insurance Act* (Canada), for a period specified by the person of fifty-two consecutive weeks in the period that began 156 weeks before the person first became a primary caregiver and ended on the day of the accident, in the case of a person who is entitled to receive weekly income benefits under paragraph 5 of subsection 7 (1) or weekly caregiver benefits under Part IV. O. Reg. 776/93, s. 29 (4).

(5) For the purpose of determining the amount of a weekly loss of earning capacity benefit under this Part, the pre-accident earning capacity of a person who is entitled to weekly education disability benefits under section 15 shall be determined in accordance with the following formula:

$$B = D \times E$$

where,

B = the pre-accident earning capacity,

D = the factor in the Table to this subsection set out opposite the range that includes the age the person has attained at the time the weekly loss of earning capacity benefit is to be paid,

E = the net weekly income determined in accordance with section 81 or 82 using a gross annual income from employment equal to 52 multiplied by the Average Weekly Earnings for Ontario, Industrial Aggregate, for the month of June in the year immediately preceding the year in which the determination of pre-accident earning capacity is first made under this section, as published by Statistics Canada under the authority of the *Statistics Act* (Canada).

TABLE

Age Range (Years)	Factor
16 or over but under 18	0.55
18 or over but under 20	0.60
20 or over but under 22	0.65
22 or over but under 24	0.70
24 or over but under 26	0.75
26 or over but under 28	0.80
28 or over but under 30	0.85
30 or over	0.90

O. Reg. 776/93, s. 29 (5).

(6) For the purpose of subsections (2) and (3), a temporary disability that the person had at the time of the accident shall not be considered in determining the gross annual income from employment that the person could reasonably have earned at that time. O. Reg. 776/93, s. 29 (6).

Determining Residual Earning Capacity

30. (1) For the purpose of this Part, the residual earning capacity of a person shall be deemed to be the net weekly income determined in accordance with section 81 or 82 using the gross annual income that the person could earn from the type of employment that best satisfies the criteria set out in subsection (2). O. Reg. 776/93, s. 30 (1).

(2) The criteria referred to in subsection (1) are:

1. The person,
    i. is able and qualified to perform the essential tasks of the employment, or
    ii. would be able and qualified to perform the essential tasks of the employment if the person had not refused to obtain treatment or participate in rehabilitation that was reasonable, available and necessary to permit the person to engage in the employment.
2. The employment exists in the area in which the person lives and is accessible to the person.

3. It would be reasonable to expect the person to engage in the employment having regard to the possibility of deterioration in the person's impairment and to the person's personal and vocational characteristics. O. Reg. 776/93, s. 30 (2).

(3) For the purpose of subsection (2), a person is able and qualified to perform the essential tasks of an employment if,

(a) the person does not have any impairment that permanently prevents the person from performing those tasks; and

(b) the person has the job skills and any licence or other credentials required to perform those tasks, or could obtain those skills and the licence or credentials without significant effort. O. Reg. 776/93, s. 30 (3).

Termination of Other Benefits

31. No weekly income replacement benefits are payable to a person under Part II, no weekly education disability benefits are payable to a person under section 15, no weekly caregiver benefits are payable to a person under Part IV and no weekly disability benefits are payable to a person under Part V,

(a) after loss of earning capacity benefits begin to be paid to the person under this Part; or

(b) if the amount of the weekly loss of earning capacity benefits payable to the person has been determined in accordance with this Part to be zero. O. Reg. 776/93, s. 31.

Temporary Supplement to Benefits

32. (1) If a person who is entitled to receive weekly loss of earning capacity benefits as a result of an accident and who is engaged in an employment becomes unable for a temporary period, as a result of the accident, to engage in employment in which the person could earn the gross annual income that was used to determine the person's residual earning capacity for the purpose of determining the amount of the person's weekly loss of earning capacity benefit, the insurer shall, during that period, pay the person a weekly supplement to the loss of earning capacity benefits. O. Reg. 776/93, s. 32 (1).

(2) Subsection (1) applies only if the person provides the insurer with a certificate from a health practitioner stating that the person has become unable for a temporary period, as a result of the accident, to engage in employment in which the person could earn the gross annual income that was used to determine the person's residual earning capacity for the purpose of determining the amount of the person's weekly loss of earning capacity benefit. O. Reg. 776/93, s. 32 (2).

(3) Subsection (2) does not prevent the insurer from disputing a claim for a weekly supplement in accordance with subsection 280 (2) of the Act, but the insurer shall pay the weekly supplement pending resolution of the dispute. O. Reg. 46/16, s. 6.

(4) Subject to subsections (5) and (6), the amount of the weekly supplement shall be equal to the lesser of the following amounts:

1. 90 per cent of the person's residual earning capacity that was used for the purpose of determining the amount of the person's weekly loss of earning capacity benefit before the temporary period.
2. 90 per cent of the net weekly income determined in accordance with section 81 or 82 from the type of employment in which the person is unable to engage during the temporary period. O. Reg. 776/93, s. 32 (4).

(5) The sum of the weekly loss of earning capacity benefits and the weekly supplement shall not exceed $1,000 after making any deductions permitted by section 75. O. Reg. 776/93, s. 32 (5).

(6) No supplement shall be paid under this section for a period of more than one year or after the person attains sixty-five years of age. O. Reg. 776/93, s. 32 (6).

(7) Subsection (1) applies whether or not the person is engaged in the type of employment that satisfies the criteria set out in subsection 30 (2) at the time the determination occurs. O. Reg. 776/93, s. 32 (7).

Mandatory Review of Amount of Benefit

33. (1) The insurer shall review the amount of the weekly loss of earning capacity benefit,

(a) three years after loss of earning capacity benefits are first paid to a person; and

(b) eight years after loss of earning capacity benefits are first paid to the person. O. Reg. 776/93, s. 33 (1).

(2) Subsection (1) does not apply after the person attains sixty-five years of age. O. Reg. 776/93, s. 33 (2).

(3) The insurer may, for the purposes of the review, give notice that it requires the person to be examined under section 65. O. Reg. 26/06, s. 9.

(4) After the review, the insurer shall give the person a notice of determination with respect to the review. O. Reg. 26/06, s. 9.

(5) If the insurer required an examination under section 65, the insurer shall give the notice of determination required under subsection (4) within 14 days after receiving the report of the examination. O. Reg. 26/06, s. 9.

(6) The notice of determination shall state,

(a) that the insurer shall continue to pay a weekly loss of earning capacity benefit in the same amount as the person's current benefit, if the insurer determines there has been no material change in the ability of the person to earn the amount that is being used for the purpose of determining the person's residual earning capacity; or

(b) that the insurer will pay the person a weekly loss of earning capacity benefit, as determined in accordance with section 28, based on the insurer's determination of the person's current residual earning capacity, as determined in accordance with section 30, if clause (a) does not apply. O. Reg. 26/06, s. 9.

(7) A notice of determination described in clause (6) (b) shall include,

(a) the type of employment that the insurer has determined will best satisfy the criteria set out in subsection 30 (2);

(b) the person's residual earning capacity, as determined by the insurer in accordance with section 30;

(c) the reasons for the insurer's determinations described in clauses (a) and (b); and

(d) the amount of weekly loss of earning capacity benefit, if any, payable to the person, as determined by the insurer in accordance with section 28. O. Reg. 26/06, s. 9.

(8) Sections 28 to 30 apply, with necessary modifications, for the purposes of adjusting the amount of the weekly loss of earning capacity benefits payable to a person. O. Reg. 26/06, s. 9.

(9) An insurer shall not reduce the amount of the weekly loss of earning capacity benefits payable to a person unless,

(a) the insurer required the person to attend an examination under section 65 and has received the report of the examination; or

(b) the insurer is entitled to withhold payment of the benefits under subsection 65 (5.1). O. Reg. 26/06, s. 9.

(10) Sections 21 to 27 and subsections (1) to (5), as they read on February 28, 2006, continue to apply in respect of a review by an insurer of the amount of weekly loss of earnings capacity benefits if, before March 1, 2006, the insurer made an offer under subsection (3), as it read before March 1, 2006, in respect of the amount of the benefits. O. Reg. 26/06, s. 9.

(11) Despite subsection (10), if an assessment of a person by a designated assessment centre cannot be conducted or completed on or after March 1, 2006 for the purposes of a review under this section because there is no designated assessment centre that satisfies the requirements of this Part, the insurer may give the person a notice in writing requiring the person to be examined under section 65 in respect of the review, instead of being assessed by a designated assessment centre, and the provisions of this Regulation, as they read after February 28, 2006, apply in

respect of the review after the notice is given. O. Reg. 26/06, s. 9.

Deterioration in Impairment

34. (1) A person receiving weekly loss of earning capacity benefits may require the insurer to review the amount of the benefit if the person provides the insurer with a certificate from a health practitioner stating that the person has suffered a permanent deterioration in his or her impairment as a result of the accident that makes the person unable to engage in employment in which the person could earn the gross annual income that was used to determine the person's residual earning capacity for the purpose of determining the amount of the person's weekly loss of earning capacity benefit. O. Reg. 776/93, s. 34 (1).

(2) Subsection (1) does not apply after the person attains sixty-five years of age. O. Reg. 776/93, s. 34 (2).

(3) Subsection (1) applies whether or not the person is engaged in the type of employment that satisfies the criteria set out in subsection 30 (2) at the time the deterioration occurs. O. Reg. 776/93, s. 34 (3).

(4) Subsection (1) applies only if,

(a) more than one year has elapsed since loss of earning capacity benefits were first paid to the person in respect of the accident and a review is not yet required by clause 33 (1) (a);

(b) more than one year has elapsed since the review required by clause 33 (1) (a) and a review is not yet required by clause 33 (1) (b); or

(c) more than one year has elapsed since the review required by clause 33 (1) (b). O. Reg. 776/93, s. 34 (4).

(5) No review may be required under subsection (1) within one year after a previous review was made under this section. O. Reg. 776/93, s. 34 (5).

(6) Subsections 33 (3) to (11) apply, with necessary modifications, to a review required by this section. O. Reg. 776/93, s. 34 (6); O. Reg. 26/06, s. 10.

Adjustment at Age Sixty-five

35. (1) When a person who is receiving weekly loss of earning capacity benefits under this Part attains sixty-five years of age, the amount of the weekly loss of earning capacity benefits shall be adjusted to the amount determined in accordance with the following formula:

$$A = B \times 0.02 \times C$$

where,

A = the amount to which the amount of the weekly loss of earning capacity benefits shall be adjusted,

B = the amount of the weekly loss of earning capacity benefit that the person was entitled to receive immediately before attaining sixty-five years of age, without making any deductions permitted by section 75,

C = the lesser of,

i. 35, and

ii. the number of years during which the person qualified for weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV, weekly disability benefits under Part V or weekly loss of earning capacity benefits under this Part before attaining sixty-five years of age.

O. Reg. 776/93, s. 35 (1).

(2) The amount of a weekly loss of earning capacity benefit that has been adjusted under subsection (1) shall not be less than $185 if, during the week in respect of which the benefit is payable, the insured person is suffering a complete inability to carry on a normal life as a result of the accident. O. Reg. 776/93, s. 35 (2).

PART VII
SUPPLEMENTARY MEDICAL BENEFITS

Entitlement to Benefits

36. (1) If an insured person sustains an impairment as a result of an accident, the insurer shall pay for all reasonable expenses incurred by or on behalf of the insured person as a result of the accident for,

(a) medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech-language pathology services;

(b) chiropractic, psychological, occupational therapy and physiotherapy services;

(c) medication;

(d) prescription eyewear;

(e) dentures and other dental devices;

(f) hearing aids, wheelchairs or other mobility devices, prostheses, orthotics and other medical devices;

(g) transportation for the insured person to and from treatment sessions, including transportation for an aide or attendant;

(h) other goods and services of a medical nature that the insured person requires. O. Reg. 776/93, s. 36 (1).

(2) The insurer is not liable to pay any expense under subsection (1) for goods or services that are experimental in nature. O. Reg. 776/93, s. 36 (2).

(3) Transportation expenses under clause (1) (g) in respect of an insured person's automobile are limited to expenses for fuel, oil, maintenance, tires and parking. O. Reg. 776/93, s. 36 (3).

(4) Subject to subsections (5) and 39 (6), the insurer shall pay an expense under subsection (1) pending resolution of a dispute described in subsection 280 (1) of the Act relating to the expense. O. Reg. 46/16, s. 7.

(5) The insurer is not liable to pay more than $3,000 in respect of an expense under clause (1) (d), (e) or (f) pending the determination of a dispute described in subsection 280 (1) of the Act relating to the expense. O. Reg. 46/16, s. 7.

Certificate

37. (1) The insurer may require a person claiming payment of an expense under section 36 to furnish a certificate from the person's health practitioner stating that the expense is reasonable and is necessary for the person's treatment. O. Reg. 776/93, s. 37 (1).

(2) In the case of an expense that is of a continuing nature, the insurer may require a certificate to be furnished under subsection (1) as often as reasonably necessary. O. Reg. 776/93, s. 37 (2).

Designated Assessment Centres (Medical and Rehabilitation)

38. (1) The Superintendent may, for the purpose of this Part,

(a) Revoked: O. Reg. 26/06, s. 12 (1).

(b) specify the types of impairments that each designated assessment centre is authorized to assess. O. Reg. 776/93, s. 38 (1); O. Reg. 304/98, s. 2; O. Reg. 26/06, s. 12 (1).

(2) The accident benefits advisory committee appointed under section 7 of the *Insurance Act* may, for the purpose of this Part, establish procedures, standards and guidelines that shall be used by designated assessment centres in conducting assessments. O. Reg. 776/93, s. 38 (2).

(3) In this Part,

designated assessment centre" means an assessment centre designated before March 1, 2006 by the Superintendent under clause (1) (a), as it read before March 1, 2006. O. Reg. 26/06, s. 12 (2).

EXAMINATION

39. (1) If the insurer receives a certificate under section 37 in respect of an expense, the insurer may give the insured person a notice requiring the person to be examined under section 65. O. Reg. 26/06, s. 13 (1).

(2) Subsection (1) does not apply to an expense under clause 36 (1) (b) or (c) unless,

(a) the expense was incurred more than eight weeks after the accident; or

(b) the insurer has already paid more than $2,000 for expenses under clauses 36 (1) (b) and (c) in respect of the insured person as a result of the accident. O. Reg. 776/93, s. 39 (2).

(3) Subsection (1) does not apply to an expense under clause 36 (1) (d), (e) or (g). O. Reg. 776/93, s. 39 (3).

(4) Subsection (1) does not apply to an expense under clause 36 (1) (f) if the Ministry of Health pays part of the cost of the item for which the expense was incurred. O. Reg. 776/93, s. 39 (4).

(5) If the insurer requires the insured person to be examined under section 65, the insurer shall provide the insured person with 14 days notice of the examination and 14 days notice of the examination shall be considered to be reasonable notice of the examination for the purposes of subsection 65 (2). O. Reg. 26/06, s. 13 (2).

(6) Subject to the determination of a dispute described in subsection 280 (1) of the Act relating to the expense, the insurer is not required to pay an expense if the insurer has received the report of the examination under section 65 and gives notice under subsection 39.1 (6) that it refuses to pay the expense. O. Reg. 46/16, s. 8.

(6.1)-(12) Revoked: O. Reg. 26/06, s. 13 (2).

PAYMENT OF BENEFITS

39.1 (1) Subject to subsection 65 (5), an insurer shall mail or deliver a benefit that is payable under this Part to the person entitled within 14 days after the insurer receives an application for the benefit. O. Reg. 781/94, s. 9.

(2) An amount payable under this Part is overdue if the insurer fails to comply with subsection (1). O. Reg. 781/94, s. 9.

(3) If, before payment becomes overdue under subsection (2), the insurer requires that a certificate be furnished under subsection 37 (1) in respect of the benefit,

(a) subsections (1) and (2) do not apply;

(b) the insurer shall mail or deliver the benefit to the person entitled within 14 days after the insurer receives the certificate; and

(c) the amount payable becomes overdue if the insurer fails to comply with clause (b). O. Reg. 781/94, s. 9.

(4) If, before payment becomes overdue under clause (3) (b) in respect of an expense under clause 36 (1) (a), (b) or (c) for services or medication received outside Canada on an elective basis, or an expense under clause 36 (1) (f) for an item for which the Ministry of Health is not paying part of the cost, or an expense under clause 36 (1) (h), the insurer requires that an examination be conducted under section 65,

(a) subsections (1), (2) and (3) do not apply;

(b) the insurer shall,

(i) mail or deliver the payment of the expense to the person entitled within 14 days after the insurer receives the report of the examination under section 65, or

(ii) give the person a notice in accordance with subsection (6) if the insurer refuses to pay the expense; and

(c) the amount payable becomes overdue if the insurer fails to comply with clause (b). O. Reg. 781/94, s. 9; O. Reg. 26/06, s. 14 (1, 2).

(5) When a benefit is paid under this Part, the insurer shall provide the insured person with a written explanation of how the amount of the benefit was determined. O. Reg. 781/94, s. 9.

(6) If the insurer refuses to pay a benefit under this Part, it shall give the insured person notice of the reasons for the refusal within 14 days after the insurer receives the report of the examination under section 65. O. Reg. 26/06, s. 14 (3).

TRANSITIONAL

39.2 (1) Subsection 36 (4) and sections 39 and 39.1, as they read on February 28, 2006, continue to apply in respect of a claim for payment of an expense under section 36 if, before March 1, 2006, an insurer has given a notice to the insured person under section 39, as it read on February 28, 2006, requiring the insured person to be assessed. O. Reg. 26/06, s. 15.

(2) Despite subsection (1), if an assessment of an insured person by a designated assessment centre cannot be conducted or completed on or after March 1, 2006 because there is no designated assessment centre that satisfies the requirements of this Part, the insurer may give the insured person a notice in writing requiring the insured person to be examined under section 65 in respect of the claim, instead of being assessed by a designated assessment centre, and the provisions of this Regulation, as they read after February 28, 2006, apply in respect of the disposition of the claim after the notice is given. O. Reg. 26/06, s. 15.

PART VIII
REHABILITATION BENEFITS

ENTITLEMENT TO BENEFITS

40. (1) If an insured person sustains an impairment as a result of an accident, the insurer shall pay for reasonable measures,

(a) to reduce or eliminate the effects of any disability resulting from the impairment; and

(b) to facilitate the insured person's reintegration into his or her family, the labour market and the rest of society. O. Reg. 776/93, s. 40 (1).

(2) The payments required by subsection (1) for the purpose of facilitating the insured person's reintegration into the labour market include payment for vocational rehabilitation measures that are reasonably necessary to enable the person to,

(a) engage in an employment that is as similar as possible to employment in which he or she engaged before the accident; or

(b) lead as normal a work life as possible. O. Reg. 776/93, s. 40 (2).

(3) In determining what payments are required under subsection (2), regard shall be had to the insured person's personal and vocational characteristics. O. Reg. 776/93, s. 40 (3).

(4) The payments required by subsection (1) for the purpose of facilitating the insured person's reintegration into his or her family and the rest of society include payment for social rehabilitation measures that are reasonably necessary to,

(a) return the insured person as much as possible to the family and social situations in which he or she lived before the accident;

(b) assist the insured person to adjust to family and social situations as a result of the accident; and

(c) maintain the insured person's level of function within the home and family. O. Reg. 776/93, s. 40 (4).

(5) The payments required under this section include payment of all reasonable expenses incurred by or on behalf of the insured person as a result of the accident for a purpose referred to in clause (1) (a) or (b) for,

(a) social rehabilitation, including life skills training, family counselling, social rehabilitation counselling, financial counselling, home renovations and home devices to accommodate the needs of the insured person, vehicles, vehicle modifications to accommodate the needs of the insured person, and communications aids for the insured person's home;

(b) vocational rehabilitation, including employment counselling, vocational assessments, vocational training, academic training, workplace modifications and workplace devices to accommodate the needs of the insured person, and communications aids for the insured person's employment;

(c) services provided by a case manager related to the co-ordination of medical, rehabilitation and attendant care services for the insured person;

(d) transportation for the insured person to and from counselling sessions, training sessions and assessments, including transportation for an aide or attendant;

(e) other goods and services that the insured person requires. O. Reg. 776/93, s. 40 (5).

(6) Transportation expenses under clause (5) (d) in respect of an insured person's automobile are limited to expenses for fuel, oil, maintenance, tires and parking. O. Reg. 776/93, s. 40 (6).

(7) Subject to subsections (8) and 45 (4), the insurer shall pay an expense under subsection (5) pending resolution of a dispute described in subsection 280 (1) of the Act relating to the expense. O. Reg. 46/16, s. 9.

(8) The insurer is not liable to pay an expense under clause (5) (c) pending resolution of a dispute described in subsection 280 (1) of the Act relating to the expense unless the insurer agreed to the appointment of the case manager before the expense was incurred. O. Reg. 46/16, s. 9.

Home Modifications

41. (1) If it is more reasonable to purchase a new home to accommodate the needs of an insured person than to renovate the insured person's existing home, the insurer shall contribute to the cost of a new home in an amount equal to the value of the renovations to the existing home that would have been required to accommodate the needs of the insured person. O. Reg. 776/93, s. 41 (1).

(2) Expenses incurred only for the purpose of giving an insured person access to areas of his or her home that are not needed for ordinary living shall be deemed not to be reasonable expenses for the purposes of this Part. O. Reg. 776/93, s. 41 (2).

Vehicle Modifications

42. (1) If it is more reasonable to purchase a new vehicle to accommodate the needs of an insured person than to modify an existing vehicle, the insurer shall contribute to the cost of a new vehicle in an amount equal to the cost of the new vehicle, less the trade-in value of the existing vehicle. O. Reg. 776/93, s. 42 (1).

(2) Expenses incurred to purchase or modify a vehicle to accommodate the needs of an insured person shall be deemed not to be reasonable expenses for the purposes of this Part if they are incurred within five years after the last expenses incurred for that purpose in respect of the same accident. O. Reg. 776/93, s. 42 (2).

Certificate

43. (1) The insurer may require a person claiming payment of an expense under section 40 to furnish one of the following certificates, as selected by the person claiming payment:

1. A certificate from the person's physician stating that the expense is reasonable and is necessary for the person's rehabilitation.
2. A certificate from the person's chiropractor or psychologist stating that the expense is reasonable and is necessary for the person's rehabilitation, if the impairment is one that the chiropractor or psychologist is authorized by law to treat.

3. A certificate from the person's physician or, if the impairment is one that a psychologist is authorized by law to treat, the person's psychologist, stating that,

   i. a member of a health profession, other than a physician or psychologist, has expressed in writing the opinion that the expense is reasonable and is necessary for the person's rehabilitation, and

   ii. the physician or psychologist does not disagree with the opinion. O. Reg. 776/93, s. 43 (1).

(2) Subsection (1) does not apply to an expense under clause 40 (5) (c) or an expense for a vocational rehabilitation program referred to in subsection 76 (4). O. Reg. 776/93, s. 43 (2).

(3) If a physician or psychologist signs a certificate under paragraph 3 of subsection (1), he or she shall attach to the certificate the written opinion of the member of the health profession. O. Reg. 776/93, s. 43 (3).

(4) In the case of an expense that is of a continuing nature, the insurer may require a certificate to be furnished under subsection (1) as often as reasonably necessary. O. Reg. 776/93, s. 43 (4).

Designated Assessment Centres (Medical and Rehabilitation)

44. The assessment centres designated before March 1, 2006 for the purpose of Part VII shall be deemed to have been designated for the purpose of this Part and,

(a) the Superintendent may, for the purpose of this Part, specify the types of impairments that each designated assessment centre is authorized to assess; and

(b) the accident benefits advisory committee appointed under section 7 of the *Insurance Act* may, for the purpose of this Part, establish procedures, standards and guidelines that shall be used by designated assessment centres in conducting assessments. O. Reg. 776/93, s. 44; O. Reg. 304/98, s. 3; O. Reg. 26/06, s. 17.

Examination

45. (1) If the insurer receives a certificate under section 43 in respect of an expense, the insurer may give the insured person a notice requiring the insured person to be examined under section 65. O. Reg. 26/06, s. 18 (1).

(2) Subsection (1) does not apply to an expense under clause 40 (5) (c) or (d) or an expense for a vocational rehabilitation program referred to in subsection 76 (4). O. Reg. 776/93, s. 45 (2).

(3) If the insurer requires the insured person to be examined under section 65, the insurer shall provide the insured person with 14 days notice of the examination and 14 days notice of the examination shall be considered to be reasonable notice of the examination for the purposes of subsection 65 (2). O. Reg. 26/06, s. 18 (2).

(4) Subject to the determination of a dispute described in subsection 280 (1) of the Act relating to the expense, the insurer is not required to pay an expense if the insurer has received the report of the examination under section 65 and gives notice under subsection 45.1 (6) that it refuses to pay the expense. O. Reg. 46/16, s. 10.

(5)-(12) Revoked: O. Reg. 26/06, s. 18 (2).

Payment of Benefits

45.1 (1) Subject to subsection 65 (5), an insurer shall mail or deliver a benefit that is payable under this Part to the person entitled within 14 days after the insurer receives an application for the benefit. O. Reg. 781/94, s. 11.

(2) An amount payable under this Part is overdue if the insurer fails to comply with subsection (1). O. Reg. 781/94, s. 11.

(3) If, before payment becomes overdue under subsection (2), the insurer requires that a certificate be furnished under subsection 43 (1) in respect of the benefit,

(a) subsections (1) and (2) do not apply;

(b) the insurer shall mail or deliver the benefit to the person entitled within 14 days after the insurer receives the certificate; and

(c) the amount payable becomes overdue if the insurer fails to comply with clause (b). O. Reg. 781/94, s. 11.

(4) If, before payment becomes overdue under clause (3) (b) in respect of an expense under section 40, the insurer requires an examination under section 65,

(a) subsections (1), (2) and (3) do not apply;

(b) the insurer shall,

(i) mail or deliver the payment of the expense to the person entitled within 14 days after the insurer receives the report of the examination under section 65, or

(ii) give the person a notice in accordance with subsection (6) if the insurer refuses to pay the expense; and

(c) the amount payable becomes overdue if the insurer fails to comply with clause (b). O. Reg. 781/94, s. 11; O. Reg. 26/06, s. 19 (1, 2).

(5) When a benefit is paid under this Part, the insurer shall provide the insured person with a written explanation of how the amount of the benefit was determined. O. Reg. 781/94, s. 11.

(6) If the insurer refuses to pay a benefit under this Part, it shall give the insured person notice of the reasons for the refusal within 14 days after the insurer receives the report of the examination under section 65. O. Reg. 26/06, s. 19 (3).

Transitional

45.2 (1) Subsection 40 (7) and sections 45 and 45.1, as they read on February 28, 2006, continue to apply in respect of a claim for payment of an expense under section 40 if, before March 1, 2006, an insurer has given a notice to the insured person under subsection 45 (1), as it read on February 28, 2006, requiring the insured person to be assessed. O. Reg. 26/06, s. 20.

(2) Despite subsection (1), if an assessment of an insured person by a designated assessment centre cannot be conducted or completed on or after March 1, 2006 because there is no designated assessment centre that satisfies the requirements of this Part, the insurer may give the insured person a notice in writing requiring the insured person to be examined under section 65 in respect of the claim, instead of being assessed by a designated assessment centre, and the provisions of this Regulation, as they read after February 28, 2006, apply in respect of the disposition of the claim after the notice is given. O. Reg. 26/06, s. 20.

PART IX
MAXIMUM LIMIT ON SUPPLEMENTARY MEDICAL BENEFITS AND REHABILITATION BENEFITS

46. (1) The total of all benefits paid under Parts VII and VIII in respect of an insured person shall not exceed $1,000,000 in respect of any one accident. O. Reg. 776/93, s. 46 (1).

(2) The maximum limit applicable under subsection (1) shall be the maximum limit that was in effect on the date of the accident, even if the maximum limit has been revised under section 80. O. Reg. 776/93, s. 46 (2).

PART X
ATTENDANT CARE BENEFITS

Entitlement to Benefits

47. (1) If an insured person sustains an impairment as a result of an accident, the insurer shall pay for all reasonable expenses incurred by or on behalf of the insured person as a result of the accident for,

(a) services provided by an aide or attendant; or

(b) services provided by a long-term care facility, including a nursing home, home for the aged or chronic care hospital. O. Reg. 776/93, s. 47 (1).

(2) For the purposes of clause (1) (a), an aide or attendant may be any person who is capable of providing the services, including a family member of the insured person, even if the aide or attendant does not possess any special qualifications. O. Reg. 776/93, s. 47 (2).

(3) Subsection (1) does not apply to expenses for which payment may be obtained under clause 36 (1) (g) or 40 (5) (d). O. Reg. 776/93, s. 47 (3).

(4) Subject to subsections (5) to (7), the maximum amount payable under this section in respect of an insured person is $3,000 per month. O. Reg. 776/93, s. 47 (4).

(5) If, as a result of the accident, the insured person suffers cervical spinal cord injuries, severe brain injuries or an upper bilateral amputation or other injuries that cause the total loss of use of both hands or arms, the maximum amount payable under this section in respect of the insured person is $6,000 per month. O. Reg. 776/93, s. 47 (5).

(6) If, as a result of the accident, the insured person suffers injuries mentioned in subsection (5) and another injury that by itself would have required services referred to in subsection (1), the maximum amount payable under this section in respect of the insured person is $10,000 per month. O. Reg. 776/93, s. 47 (6).

(7) If, as a result of the accident, the insured person suffers severe brain injuries that cause violent behaviour that may result in physical harm to the insured person or other persons, the maximum amount payable under this section in respect of the insured person is $10,000 per month. O. Reg. 776/93, s. 47 (7).

(8) For the purposes of this section, brain injuries are severe brain injuries only if, within a reasonable period after the accident, the person scored nine points or less on the Glasgow Coma Scale as published in *Management of Head Injuries*, Contemporary Neurology series, Volume 20, (F.A. Davis Company, 1981). O. Reg. 776/93, s. 47 (8); O. Reg. 781/94, s. 12 (1).

(9) The benefits payable to an insured person under this section shall be determined in accordance with the Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996 and subsection 50 (6). O. Reg. 781/94, s. 12 (2); O. Reg. 26/06, s. 21; O. Reg. 46/16, s. 11.

Certificate

48. (1) The insurer may require a person claiming payment of an expense under section 47 to furnish a certificate from a member of a health profession who is authorized by law to treat the person's impairment stating that the expense is reasonable and is necessary for the person's care. O. Reg. 776/93, s. 48 (1).

(2) In the case of an expense that is of a continuing nature, the insurer may require a certificate to be furnished under subsection (1) as often as reasonably necessary. O. Reg. 776/93, s. 48 (2).

Designated Assessment Centres (Attendant Care)

49. (1) The Superintendent may, for the purpose of this Part,

(a) Revoked: O. Reg. 26/06, s. 22 (1).

(b) specify the types of impairments that each designated assessment centre is authorized to assess. O. Reg. 776/93, s. 49 (1); O. Reg. 304/98, s. 4; O. Reg. 26/06, s. 22 (1).

(2) The accident benefits advisory committee appointed under section 7 of the *Insurance Act* may, for the purpose of this Part, establish procedures, standards and guidelines that shall be used by designated assessment centres in conducting assessments. O. Reg. 776/93, s. 49 (2).

(3) In this Part,

"designated assessment centre" means an assessment centre designated before March 1, 2006 by the Superintendent under clause (1) (a), as it read before March 1, 2006. O. Reg. 26/06, s. 22 (2).

EXAMINATION

50. (1) The insured person may, by written notice to the insurer, elect to be examined under section 65. O. Reg. 26/06, s. 23.

(2) If an insurer receives a certificate under section 48 in respect of an expense, the insurer may give the insured person notice requiring the insured person to be examined under section 65. O. Reg. 26/06, s. 23.

(3) Despite subsections (1) and (2), an insured person shall not be examined under section 65 within 12 months after the last assessment under this section, as it read before March 1, 2006, or the last examination under section 65 relating to services referred to in section 47. O. Reg. 26/06, s. 23.

(4) If the insured person elects to be examined or the insurer requires the insured person to be examined, the insurer shall provide to the insured person 14 days notice of the examination and 14 days notice of the examination shall be considered to be reasonable notice of the examination for the purposes of subsection 65 (2). O. Reg. 26/06, s. 23.

(5) Within 14 days of receipt of the report of examination, the insurer shall give the insured person notice of the amount to be paid by the insurer to the insured person for the future provision of services referred to in section 47. O. Reg. 26/06, s. 23.

(6) The determination under subsection (5) shall be made in accordance with the Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996 and shall be based on the following hourly rates for services:

1. For care described in Part I of the Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996, $11.08 per hour.
2. For care described in Part II of the Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996, the minimum hourly wage for the period to which the payment relates, as prescribed under the *Employment Standards Act, 2000.*
3. For care described in Part III of the Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996, $17.72 per hour. O. Reg. 26/06, s. 23; O. Reg. 46/16, s. 12.

PAYMENT OF BENEFITS

50.1 (1) Subject to subsection 65 (5), an insurer shall mail or deliver a benefit that is payable under this Part to the person entitled within 14 days after the insurer receives an application for the benefit. O. Reg. 781/94, s. 14.

(2) An amount payable under this Part is overdue if the insurer fails to comply with subsection (1). O. Reg. 781/94, s. 14.

(3) If, before payment becomes overdue under subsection (2), the insurer requires that a certificate be furnished under subsection 48 (1) in respect of the benefit,

(a) subsections (1) and (2) do not apply;

(b) the insurer shall mail or deliver the benefit to the person entitled within 14 days after the insurer receives the certificate; and

(c) the amount payable becomes overdue if the insurer fails to comply with clause (b). O. Reg. 781/94, s. 14.

(4) When a benefit is paid under this Part, the insurer shall provide the insured person with a written explanation of how the amount of the benefit was determined. O. Reg. 781/94, s. 14.

(5) If the insurer refuses to pay a benefit under this Part, it shall give the insured person notice of the reasons for the refusal within 14 days after the insurer receives the report of the examination under section 65. O. Reg. 26/06, s. 24.

TRANSITIONAL

50.2 (1) Sections 50 and 50.1, as they read on February 28, 2006, continue to apply in respect of a claim for payment of an expense under section 47 if, before March 1, 2006, an insured person has given a notice to the insurer under subsection 50 (1), as it read on February 28, 2006, or the insurer has given a notice to the insured person under subsection 50 (2), as it read on February 28, 2006, for the insured person to be assessed. O. Reg. 26/06, s. 25.

(2) Despite subsection (1), if an assessment of an insured person by a designated assessment centre cannot be conducted or completed on or after March 1, 2006 because there is no designated assessment centre that satisfies the requirements of this Part, the insurer may give the insured person a notice in writing requiring the insured person to be examined under section 65 in respect of the claim, instead of being assessed by a designated assessment centre, and the provisions of this Regulation, as they read after February 28, 2006, apply in respect of the disposition of the claim after the notice is given. O. Reg. 26/06, s. 25.

PART XI
DEATH BENEFITS

51. (1) If an insured person dies as a result of an accident, the insured person is survived by a spouse who was his or her spouse at the time of the accident and,

(a) the insured person met any of the qualifications set out in subsection 7 (1), the insurer shall pay the spouse an amount equal to the insured person's net weekly income from employment determined in accordance with section 81 or 82 multiplied by 187.2;

(b) the insured person did not meet any of the qualifications set out in subsection 7 (1), the insurer shall pay the spouse $50,000. O. Reg. 776/93, s. 51 (1).

(2) If an insured person dies as a result of an accident, the insured person is survived by one or more dependants who were dependants at the time of the accident and no benefit is payable to a spouse under subsection (1), the insurer shall pay the dependants an amount equal to the amount that would be payable to the spouse under subsection (1) if the insured person had a spouse who was entitled to payment under that subsection. O. Reg. 776/93, s. 51 (2).

(3) If the insured person met any of the qualifications set out in subsection 7 (1),

(a) the insured person's gross annual income shall be deemed for the purpose of subsections (1) and (2) to be the gross annual income that would have been used to determine the amount of the insured person's weekly income replacement benefits under Part II had the insured person survived and been entitled to those benefits; and

(b) the insured person shall be deemed for the purpose of subsections (1) and (2) to have made the designations and elections referred to in subsections 7 (2) and (4) and section 9 that would result in the highest possible benefit under subsection (1) or (2) for the insured person's spouse or dependants. O. Reg. 776/93, s. 51 (3).

(4) If an insured person dies as a result of an accident, the insurer shall pay, in addition to any benefit payable under subsection (1) or (2),

(a) $10,000 to each person who was a dependant of the insured person at the time of the accident; and

(b) $10,000 to each former spouse of the insured person to whom the insured person was obligated at the time of the accident to provide support under a domestic contract or court order. O. Reg. 776/93, s. 51 (4).

(5) If an insured person dies as a result of an accident and, at the time of the accident, the insured person was a dependant, the insurer shall pay $10,000,

(a) to the person upon whom the insured person was dependent or, if that person is dead or dies within thirty days of the insured person's death, to the surviving spouse of that person if the surviving spouse was the insured person's primary caregiver; or

(b) to the surviving dependants of the person upon whom the insured person was dependent, if that person is dead and no payment is required by clause (a). O. Reg. 776/93, s. 51 (5).

(6) Benefits are payable under subsections (1) to (5) only if the insured person dies within,

(a) 180 days from the day of the accident unless clause (b) applies; or

(b) 156 weeks from the day of the accident if during that period there has been continuous disability as a result of the accident. O. Reg. 776/93, s. 51 (6).

(7) If at the time of the accident the insured person had more than one person entitled to claim as his or her spouse, the payment under subsection (1) shall be divided equally between or among such persons who survive the insured person and who at the time of the death were still spouses of the insured person. O. Reg. 776/93, s. 51 (7).

(8) The payment under subsection (1) or (2) shall not be less than $50,000 and shall not be more than $200,000. O. Reg. 776/93, s. 51 (8).

(9) Payments under subsection (2) or clause (5) (b) shall be paid in equal shares to the surviving dependants. O. Reg. 776/93, s. 51 (9).

(10) No amount is payable to a person under this section if the person dies within thirty days of the insured person's death. O. Reg. 776/93, s. 51 (10).

(11) The amount of a payment under this section shall be determined as of the date of the insured person's death, even if the amount has been revised under section 80. O. Reg. 776/93, s. 51 (11).

(12) A person who conducts an autopsy of the dead person shall provide a copy of his or her report to the insurer and to the person claiming a benefit under this Regulation. O. Reg. 776/93, s. 51 (12).

PART XII
FUNERAL BENEFITS

52. (1) The insurer shall pay the funeral expenses incurred in respect of an insured person who dies as a result of an accident. O. Reg. 776/93, s. 52 (1).

(2) The maximum amount payable under this section in respect of an insured person is $6,000. O. Reg. 776/93, s. 52 (2).

(3) The maximum amount applicable under subsection (2) shall be the maximum amount that was in effect on the date of the funeral, even if the maximum amount has been revised under section 80. O. Reg. 776/93, s. 52 (3).

PART XIII
COMPENSATION FOR OTHER PECUNIARY LOSSES

Expenses of Visitors

53. (1) If an insured person sustains an impairment as a result of an accident, each of the individuals described in subsection (2) is entitled to an allowance that is reasonable having regard to all of the circumstances for expenses actually incurred in visiting the insured person during his or her treatment or recovery. O. Reg. 776/93, s. 53 (1).

(2) The individuals referred to in subsection (1) are,

(a) the spouse, children, grandchildren, parents, grandparents, brothers and sisters of the insured person;

(b) an individual who was living with the insured person at the time of the accident;

(c) an individual who has demonstrated a settled intention to treat the insured person as a child of the individual's family; and

(d) an individual whom the insured person has demonstrated a settled intention to treat as a child of the insured person's family. O. Reg. 776/93, s. 53 (2).

Dependant Care Expenses

54. (1) If an insured person sustains an impairment as a result of an accident, the insurer shall pay for additional expenses reasonably incurred by or on behalf of the insured person in caring for the insured person's dependants as a result of the accident. O. Reg. 776/93, s. 54 (1).

(2) Subsection (1) applies only in respect of an insured person who was employed at the time of the accident and who is not receiving weekly caregiver benefits under Part IV. O. Reg. 776/93, s. 54 (2).

(3) No benefit is payable under this section after the insured person dies. O. Reg. 776/93, s. 54 (3).

(4) Subject to subsection (5), the amount payable under subsection (1) shall not exceed $75 per week for the first dependant and $25 per week for each additional dependant. O. Reg. 776/93, s. 54 (4).

(5) The total amount payable under this section shall not exceed $150 per week. O. Reg. 776/93, s. 54 (5).

Housekeeping and Home Maintenance Expenses

55. If an insured person sustains an impairment as a result of an accident, the insurer shall pay for additional expenses reasonably incurred by or on behalf of the insured person as a result of the accident for housekeeping and home maintenance services. O. Reg. 776/93, s. 55.

Damage to Clothing, Glasses, Hearing Aids, etc.

56. The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person in repairing or replacing,

(a) clothing worn by the insured person at the time of an accident; or

(b) prescription eyewear, dentures, hearing aids, prostheses, other medical or dental devices, and other personal items belonging to the insured person that are lost or damaged in an accident. O. Reg. 776/93, s. 56.

Cost of Examinations

57. (1) The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person in obtaining and attending an examination or assessment for the purpose of this Regulation or in obtaining a certificate or report for the purpose of this Regulation, including,

(a) fees charged by a person who conducts an examination or assessment or provides a certificate or report; and

(b) transportation expenses incurred in attending an examination, including transportation expenses for an aide or attendant. O. Reg. 776/93, s. 57 (1).

(2) Transportation expenses under clause (1) (b) in respect of an insured person's automobile are limited to expenses for fuel, oil, maintenance, tires and parking. O. Reg. 776/93, s. 57 (2).

PART XIV
EXCLUSIONS

58. (1) The insurer is not required to pay income replacement benefits under Part II, education disability benefits under Part III, disability benefits under Part V or loss of earning capacity benefits under Part VI in respect of a person who was the driver of an automobile at the time of the accident,

(a) if, as a result of the accident, the driver is convicted of operating the automobile while his or her ability to operate it was impaired by alcohol or a drug, or of driving while his or her blood alcohol level exceeded the limits permitted by law or of an indictable offence related to the operation of the automobile;

(b) if, as a result of the accident, the driver is asked to provide a breath sample and he or she is convicted for failure to provide the sample;

(c) if, as a result of the accident, the driver is convicted of operating the automobile while it was not insured under a motor vehicle liability policy;

(d) if the driver was not authorized by law to drive the automobile;

(e) if the driver is an excluded driver under the contract of automobile insurance; or

(f) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent. O. Reg. 776/93, s. 58 (1).

(2) Clause (1) (d) does not apply to a driver who is not authorized by law to drive an automobile only by reason of a suspension of a licence for failure to pay a fine. O. Reg. 776/93, s. 58 (2).

(3) The insurer is not required to pay income replacement benefits under Part II, education disability benefits under Part III, disability benefits under Part V or loss of earning capacity benefits under Part VI,

(a) in respect of any person who has made, or who knows of, a material misrepresentation that induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in the risk material to the contract; or

(b) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent. O. Reg. 776/93, s. 58 (3).

(4) Clause (3) (b) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering statutory accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured. O. Reg. 776/93, s. 58 (4).

PART XV
PROCEDURE

Notice and Application for Benefits

59. (1) A person who wants to apply for benefits under this Regulation shall notify the insurer within thirty days after the circumstances arose that gave rise to the entitlement to benefits, or as soon as practicable thereafter. O. Reg. 776/93, s. 59 (1).

(2) The insurer shall promptly provide the person with,

(a) the appropriate application forms;

(b) a written explanation of the benefits available under this Regulation; and

(c) written information to assist the person in applying for benefits, including information to assist the person in making any possible elections. O. Reg. 776/93, s. 59 (2).

(3) The person shall submit an application for the benefits to the insurer within ninety days of receiving the application forms. O. Reg. 776/93, s. 59 (3).

(4) A failure to comply with a time limit set out in subsection (1) or (3) does not disentitle a person to benefits if the person has a reasonable excuse. O. Reg. 776/93, s. 59 (4).

Certificate for Weekly Benefits

60. An insurer may require a person who has applied for or who is receiving weekly benefits under Part II, section 15 or Part IV or V to furnish a certificate from a health practitioner of the insured person's choice as to the cause and nature of the impairment, an estimate of the duration of the disability caused by the accident and a treatment plan. O. Reg. 781/94, s. 15.

Election of Weekly Benefits

61. (1) No more than one weekly benefit shall be paid to an insured person under this Regulation for the same period of time. O. Reg. 776/93, s. 61 (1).

(2) If it appears from an application for benefits under this Regulation that, in the absence of subsection (1), a person would be entitled to receive more than one weekly benefit under Part II, section 15 and Part IV, the insurer shall notify the person that the person must, within thirty days of receiving the notice, elect which weekly benefit he or she wishes to receive. O. Reg. 776/93, s. 61 (2).

(3) Within thirty days of receiving the notice, the person shall elect which weekly benefit he or she wishes to receive. O. Reg. 776/93, s. 61 (3).

(4) Pending receipt of the person's election, the insurer shall pay one of the weekly benefits to which the person is entitled and, when the insurer receives the election, the insurer shall adjust the amount of the weekly payments retroactively to the date the person became entitled to the weekly benefits that the person has elected. O. Reg. 776/93, s. 61 (4).

(5) If the person does not elect which benefit he or she wishes to receive within the thirty-day period referred to in subsection (3), the person shall be deemed to have elected the highest weekly benefit. O. Reg. 776/93, s. 61 (5).

(6) If a person ceases to receive weekly caregiver benefits under Part IV because there is no longer anyone who meets the qualifications set out in subsection 18 (5) and the person meets the qualifications set out in paragraph 5 of subsection 7 (1), the insured person is entitled to elect to receive weekly income replacement benefits under Part II and the insurer shall notify the person of that entitlement. O. Reg. 776/93, s. 61 (6).

(7) Subject to subsection (6), an election under this section may not be changed. O. Reg. 776/93, s. 61 (7).

Payment of Weekly Benefits

62. (1) An insurer shall mail or deliver a weekly benefit that is payable under Part II, section 15, Part IV or Part V to the insured person within fourteen days after the insurer receives an application for the benefit. O. Reg. 776/93, s. 62 (1).

(2) The insurer shall mail or deliver weekly benefits under Part II, section 15 or Part IV, V or VI to the insured person at least once every second week while the insured person remains entitled to receive the benefits. O. Reg. 776/93, s. 62 (2).

(3) Subsection (2) does not apply if the insurer prepays benefits owing. O. Reg. 776/93, s. 62 (3).

(4) An amount payable under Part II, section 15 or Part IV, V or VI is overdue if the insurer fails to comply with subsection (1) or (2). O. Reg. 776/93, s. 62 (4).

(5) Despite subsection (4), a payment is not overdue if the insurer required that a certificate be furnished under section 60 in respect of the payment and more than six weeks have elapsed without the certificate being furnished. O. Reg. 776/93, s. 62 (5).

(6) If subsection (5) applies and the certificate is later furnished, the payment becomes overdue if the amount payable is not mailed or otherwise delivered by the insurer within fourteen days after it received the certificate. O. Reg. 776/93, s. 62 (6).

(7) When a weekly benefit is first paid under Part II, section 15, Part IV or Part V or the amount of the weekly benefit is changed, the insurer shall provide the insured person with a written explanation of how the amount of the weekly benefit was determined. O. Reg. 776/93, s. 62 (7).

(8) If the insurer refuses to pay weekly benefits under Part II, section 15 or Part IV or V, it shall give the insured person notice of the reasons for the refusal,

(a) within 14 days after receiving an application for the benefits, if the refusal occurs before the application is approved;

(b) by the day on which it would have paid the next weekly benefit, if the refusal occurs after the application is approved. O. Reg. 781/94, s. 16.

63. Revoked: O. Reg. 26/06, s. 26.

64. Revoked: O. Reg. 26/06, s. 27.

INSURER EXAMINATIONS

65. (1) An insurer may, for the purposes of any of Parts II to VIII, X and XIII and as often as reasonably necessary, give an insured person notice requiring the person to be examined by one or more persons specified by the insurer, each of whom is a member of a health profession or a person with expertise in vocational rehabilitation. O. Reg. 776/93, s. 65 (1); O. Reg. 781/94, s. 18 (2).

(2) An examination under subsection (1) shall be scheduled by the insurer and, for that purpose, the insurer shall make reasonable efforts to schedule the examination for a time that is convenient for the insured person and shall provide the insured person with reasonable notice of the examination. O. Reg. 776/93, s. 65 (2).

(3) The person or persons who conduct the examination shall prepare a report and provide a copy of the report to the insurer and to the insured person. O. Reg. 776/93, s. 65 (3).

(3.1) If the examination relates to a claim for attendant care benefits, the report of the examination shall include a completed the Form for Assessment of Attendant Care Needs - Accidents After December 31, 1993 and Before November 1, 1996. O. Reg. 26/06, s. 28; O. Reg. 46/16, s. 13.

(4) A notice referred to in subsection (1) shall state the expense to which the examination relates. O. Reg. 776/93, s. 65 (4).

(5) If the insured person fails or refuses to make himself or herself reasonably available for an examination under subsection (1), the insurer is not required to pay the benefits under section 16 or Part VII, VIII, X or XIII, as specified in the notice under subsection (1), until the person submits to the examination. O. Reg. 781/94, s. 18 (3).

(5.1) If the insured person fails or refuses to submit to an examination under subsection (1), the insurer may withhold payment of the weekly benefits under Part II, section 15 or Part IV, V or VI until the person submits to the examination and, when the person submits to the examination, the insurer shall,

(a) resume payment of the benefits; and

(b) pay the benefits that were not paid. O. Reg. 781/94, s. 18 (3).

66. Revoked: O. Reg. 781/94, s. 19.

Payment of Certain Benefits

67. (1) Subject to subsection 65 (5), an insurer shall mail or deliver a benefit that is payable under section 16 or Part XI, XII or XIII to the person entitled within thirty days after the insurer receives an application for the benefit. O. Reg. 776/93, s. 67 (1); O. Reg. 781/94, s. 20 (2).

(2) An amount payable under section 16 or Part XI, XII or XIII is overdue if the insurer fails to comply with subsection (1). O. Reg. 776/93, s. 67 (2).

(3) When a benefit is paid under section 16 or Part XI, XII or XIII, the insurer shall provide the insured person with a written explanation of how the amount of the benefit was determined. O. Reg. 776/93, s. 67 (3).

(4) If the insurer refuses to pay a benefit under section 16 or Part XI, XII or XIII, it shall give the insured person notice of the reasons for the refusal within 30 days after receiving an application for the benefit. O. Reg. 776/93, s. 67 (4); O. Reg. 781/94, s. 20 (3).

Interest on Overdue Payments

68. If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly. O. Reg. 776/93, s. 68.

Prior Approval of Expenses

69. (1) A person may, before an expense referred to in Part VII, VIII, X or XIII is incurred, request the insurer to,

(a) confirm in advance that it will pay for the expense; or

(b) authorize the person to have the expense billed directly to the insurer, subject to reasonable conditions established by the insurer. O. Reg. 776/93, s. 69 (1).

(2) The insurer may refuse the request only if there are reasonable grounds to believe that the expense is one for which the insurer would not be required to pay. O. Reg. 776/93, s. 69 (2).

(3) The insurer shall respond to the request,

(a) within fourteen days after the person who made the request supplies the insurer with the information reasonably required to determine whether the expense is one for which the insurer would be required to pay, in the case of an expense claimed under Part VII, VIII or X; and

(b) within thirty days after the person who made the request supplies the insurer with the information reasonably required to determine whether the expense is one for which the insurer would be required to pay, in the case of an expense claimed under Part XIII. O. Reg. 776/93, s. 69 (3).

(4) If the insurer refuses the request, it shall give the person who made the request notice of the reasons for the refusal. O. Reg. 776/93, s. 69 (4).

Repayments to Insurer

70. (1) A person shall repay to the insurer any benefit received under this Regulation that is paid to the person through error, wilful misrepresentation or fraud. O. Reg. 776/93, s. 70 (1).

(2) The obligation to repay a benefit received under this Regulation that was paid to a person through error does not apply unless notice is given under subsection (5) within twelve months after the payment was made to the person. O. Reg. 776/93, s. 70 (2).

(3) A person shall repay to the insurer any benefit received under Part II, III, V or VI that is paid to him or her if the person or the person in respect of whom the payment was made was disqualified from payment under Part XIV. O. Reg. 776/93, s. 70 (3).

(4) A person shall repay to the insurer any benefit received under Parts II to VI to the extent of any payments received by the person that are deductible from those benefits under this Regulation. O. Reg. 776/93, s. 70 (4).

(5) If a person is required to repay an amount to an insurer under this section, the insurer,

(a) shall give the person notice of the amount that is required to be repaid; and

(b) if the person is receiving weekly benefits under this Regulation, may give the person notice that the insurer intends to collect the repayment by deducting up to 20 per cent of the amount of the weekly benefit from each payment of the weekly benefit. O. Reg. 776/93, s. 70 (5).

(6) An insurer that has given the notice referred to in clause (5) (b) may collect the repayment by deducting up to 20 per cent of the amount of the weekly benefit from each payment of the weekly benefit. O. Reg. 776/93, s. 70 (6).

(7) The insurer may charge interest on an amount repayable under this section from the fifteenth day after notice is given under subsection (5) at the bank rate in effect on that day. O. Reg. 776/93, s. 70 (7).

(8) In subsection (7),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada). O. Reg. 776/93, s. 70 (8).

Right to Dispute

71. If an insurer refuses to pay a benefit that a person has applied for under this Regulation or reduces the amount of a benefit that a person received under this Regulation, the insurer shall inform the person in writing of the procedure for resolving disputes that are described in subsection 280 (1) of the Act. O. Reg. 776/93, s. 71; O. Reg. 46/16, s. 14.

Restriction on proceedings

71.1 (1) Subject to subsection (2), an insured person shall not apply to the Licence Appeal Tribunal under subsection 280 (2) of the Act if any of the following circumstances exist:

1. The insured person has not complied with section 59.
2. The insured person was required to submit to an assessment, and provide the information required for it, under section 23, 25, 39, 45 or 50, but has not done so. O. Reg. 46/16, s. 15.

(2) The Licence Appeal Tribunal may permit an insured person to apply despite paragraph 2 of subsection (1). O. Reg. 46/16, s. 15.

(3) The Licence Appeal Tribunal may impose terms and conditions on a permission granted under subsection (2) of this section. O. Reg. 46/16, s. 15.

Time Limit for Proceedings

72. An application under subsection 280 (2) of the Act in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed or, if the person has engaged in an employment as permitted by section 14 of this Regulation or has returned to elementary, secondary or post-secondary education as permitted by section 17 of this Regulation, within two years after the insurer's refusal to pay further benefits. O. Reg. 46/16, s. 15.

PART XVI
RESPONSIBILITY TO OBTAIN TREATMENT AND PARTICIPATE IN REHABILITATION

73. (1) A person entitled to weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV or weekly disability benefits under Part V shall obtain such treatment and participate in such rehabilitation as is reasonable, available and necessary to,

(a) permit the person to engage in an employment that satisfies the criteria set out in subsection 30 (2), in the case of a person entitled to weekly income replacement benefits under Part II; or

(b) shorten the period during which the weekly benefits are payable, in any other case. O. Reg. 776/93, s. 73 (1).

(2) Subsection (1) does not apply if compliance with subsection (1) would be detrimental to the person's treatment or recovery. O. Reg. 776/93, s. 73 (2).

(3) If a person refuses to comply with subsection (1), the insurer may notify the person that the insurer intends to reduce the amount of the weekly benefit in accordance with subsection (4) and the notice shall provide the information contained in subsections (4) and (5). O. Reg. 776/93, s. 73 (3).

(4) If at least thirty days have elapsed after giving the notice and the person is still refusing to comply with subsection (1), the insurer may, subject to subsection (5), reduce the amount of the weekly benefit by 50 per cent. O. Reg. 776/93, s. 73 (4).

(5) If, within thirty days after the notice is given, the person disputes the reduction in accordance with subsection 280 (2) of the Act and provides the insurer with a certificate from a physician or other member of a health profession stating that the person is complying with subsection (1) or that compliance with subsection (1) would be detrimental to the person's treatment or recovery, the insurer shall continue to pay the weekly benefit without any reduction until the dispute is resolved. O. Reg. 776/93, s. 73 (5); O. Reg. 46/16, s. 16.

(6) Revoked: O. Reg. 26/06, s. 30.

(7) Subsections (3) and (4) do not apply if the insurer is making a deduction under subsection 13 (4). O. Reg. 776/93, s. 73 (7).

PART XVII
INTERACTION WITH OTHER SYSTEMS

Social Assistance Payments

74. (1) The insurer shall pay benefits under this Regulation even though the insured person is entitled to, or has received, benefits under an Act administered by the Ministry of Community and Social Services for Ontario or under similar legislation in another jurisdiction. O. Reg. 776/93, s. 74 (1).

(2) For the purpose of subsection (1), a service, benefit or entitlement provided under an Act, the administration of which was transferred from the Ministry of Community and Social Services to the Ministry of Health by Order-in-Council, shall be deemed to be provided under an Act administered by the Ministry of Community and Social Services for Ontario so long as the nature of the service, benefit or entitlement remains substantially the same as it was before the transfer. O. Reg. 776/93, s. 74 (2).

Collateral Benefits

75. (1) The insurer may deduct the following amounts from the amount payable to an insured person for weekly income replacement benefits under Part II, education disability benefits under section 15, caregiver benefits under Part IV, other disability benefits under Part V or weekly loss of earning capacity benefits under Part VI:

1. Net payments for loss of income that have been received by the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation plan.
2. Net payments for loss of income that have not been received by the insured person but are available to the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation plan, unless the insured person has applied to receive the payments for loss of income. O. Reg. 776/93, s. 75 (1); O. Reg. 781/94, s. 22.

(2) Despite subsection (1), no deduction shall be made for,

(a) unemployment insurance benefits that have been received by or are available to the insured person;

(b) payments under a sick leave plan that have not been received by the insured person but are available to the insured person; or

(c) payments under a workers' compensation law or plan that have not been received by the insured person and to which the insured person is not entitled because the insured person has elected under the workers' compensation law or plan to bring an action. O. Reg. 776/93, s. 75 (2).

(3) Subsection (1) does not apply to,

(a) weekly income replacement benefits paid to a person to whom subsection 12 (2) applies; or

(b) weekly loss of earning capacity benefits that have been adjusted under subsection 35 (1). O. Reg. 776/93, s. 75 (3).

(4) The insurer may deduct the following amounts from any weekly income replacement benefits payable to an insured person under Part II, any weekly education disability benefits payable to an insured person under section 15, any weekly caregiver benefits payable to an insured person under Part IV or any weekly disability benefits payable to an insured person under Part V:

1. Any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.

2. Any other periodic benefit being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident, if the insured person was receiving the other periodic benefit at the time he or she first qualified for the weekly income replacement benefits under Part II, weekly education disability benefits under section 15, weekly caregiver benefits under Part IV or weekly disability benefits under Part V, and, at that time, the other periodic benefit was a temporary disability benefit. O. Reg. 776/93, s. 75 (4).

(5) Subsection (4) does not apply to weekly income replacement benefits paid to a person to whom subsection 12 (2) applies. O. Reg. 776/93, s. 75 (5).

(6) The insurer may deduct the following amounts from the amount of the weekly supplement payable to a person under section 32:

1. Net payments for loss of income that have been received by the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation plan in respect of the employment in which the person is unable to engage during the temporary period, except to the extent that the net payments for loss of income have been deducted under subsection (1) from the amount of the weekly loss of earning capacity benefits payable to the insured person.

2. Net payments for loss of income that have not been received by the insured person but are available to the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation plan in respect of the employment in which the person is unable to engage during the temporary period, unless the insured person has applied to receive the payments for loss of income, except to the extent that the net payments for loss of income have been deducted under subsection (1) from the amount of the weekly loss of earning capacity benefits payable to the insured person. O. Reg. 776/93, s. 75 (6).

(7) Despite subsection (6), no deduction shall be made for,

(a) unemployment insurance benefits that have been received by or are available to the insured person; or

(b) payments under a sick leave plan that have not been received by the insured person but are available to the insured person. O. Reg. 776/93, s. 75 (7).

(8) For the purpose of this section, net payments for loss of income shall be determined by subtracting from the gross amount of payments for loss of income the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross amount of payments for loss of income. O. Reg. 776/93, s. 75 (8).

(9) Despite subsection (8), an insurer may elect that all determinations required by this section of net payments for loss of income be made in accordance with the publication of the Ontario Insurance Commission dated November 25, 1993 and entitled "Net Payments for Loss of Income (Collateral Benefits) Table". O. Reg. 776/93, s. 75 9).

(10) Subject to subsection (11), an election under subsection (9) applies to all persons in respect of whom determinations of net payments for loss of income are required by this section. O. Reg. 776/93, s. 75 (10).

(11) An election under subsection (9) does not apply to a determination of net payments for loss of income if the gross payments for loss of income exceed $1,850 per week. O. Reg. 776/93, s. 75 (11).

(12) An election under subsection (9) may be revoked. O. Reg. 776/93, s. 75 (12).

(13) No payment is required for that portion of an expense referred to in Part VII, VIII, X or XIII that is reasonably available in respect of the insured person under any insurance plan or law or under any other plan or law. O. Reg. 776/93, s. 75 (13).

Workers' Compensation Benefits

76. (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan. O. Reg. 776/93, s. 76 (1).

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 10 of the *Workers' Compensation Act* so long as the election is not made primarily for the purpose of claiming benefits under this Regulation. O. Reg. 776/93, s. 76 (2).

(3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 10 of the *Workers' Compensation Act*, no benefits are payable to the person under Part II, III, IV or V in respect of any period of time before the person makes the election. O. Reg. 776/93, s. 76 (3).

(4) If a person who would be entitled to benefits under this Regulation in the absence of subsection (1) elects to bring an action referred to in section 10 of the *Workers' Compensation Act* and there is a dispute concerning the insurer's liability to pay an expense for a vocational rehabilitation program that the person was attending at the time of the election and continues to attend, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 776/93, s. 76 (4).

(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. O. Reg. 776/93, s. 76 (5).

Accidents in Quebec

77. (1) The insurer shall pay with respect to a person insured in Quebec who dies or who sustains an impairment as a result of an accident in Quebec or who incurs a cost described in section 36 or 40, as the person may elect,

(a) benefits provided by this Regulation, other than benefits referred to in clause (b); or

(b) benefits in the same amounts and subject to the same conditions as if the person was a resident of Quebec (as defined in the *Automobile Insurance Act* (Quebec) and the regulations made under that Act) and was entitled to payments under that Act and those regulations. O. Reg. 776/93, s. 77 (1).

(2) A person who elects to claim a benefit as provided in clause (1) (a) is thereafter eligible only for benefits referred to in that clause. O. Reg. 776/93, s. 77 (2).

(3) A person who elects to claim a benefit as provided in clause (1) (b) is thereafter ineligible for benefits referred to in clause (1) (a). O. Reg. 776/93, s. 77 (3).

(4) For the purpose of this Part, a person is insured in Quebec if the person at the time of the accident,

(a) was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;

(b) met the criteria prescribed for recovery under the *Automobile Insurance Act* (Quebec);

(c) was not the owner or driver of, or an occupant of an automobile registered in Quebec; and

(d) was,

(i) an occupant of the insured automobile,

(ii) the named insured, his or her spouse or a dependant of either of them while the occupant of any automobile,

(iii) a person who was not the occupant of an automobile and was struck by the insured automobile,

(iv) the named insured, his or her spouse or a dependant of either of them and was struck by any automobile,

(v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of either of them who suffered an impairment,

(A) while the occupant of any automobile,

(B) by any automobile while not the occupant of the automobile, or

(vi) a person struck by an automobile that was driven by a person described in subclause (i), (ii) or (v). O. Reg. 776/93, s. 77 (4).

NON-RESIDENTS

78. (1) A benefit set out in this Regulation that is paid in respect of a person who was not living and ordinarily present in Ontario at the time of the accident shall, if the benefit is provided under a contract evidenced by a motor vehicle liability policy issued in Ontario or under the *Motor Vehicle Accident Claims Act*, be reduced by the extent to which the person was at fault or negligent in the accident. O. Reg. 776/93, s. 78 (1).

(2) Subsection (1) does not apply to a benefit paid to a person who, at the time of the accident,

(a) was an occupant of an insured automobile;

(b) was a named insured under a contract evidenced by a motor vehicle liability policy; or

(c) was the spouse of a person referred to in clause (b) or a dependant of the person or of his or her spouse. O. Reg. 776/93, s. 78 (2).

PART XVIII
INDEXATION

WEEKLY BENEFITS

79. (1) Each of the following amounts shall be revised, effective the 1st day of January in every year after 1994, by adjusting the amount by the indexation percentage published under section 268.1 of the *Insurance Act*:

1. The net weekly income from employment used to determine the amount of a person's weekly income replacement benefit under Part II.
2. The amount of a person's weekly education disability benefit under section 15.
3. The amount of a person's weekly caregiver benefit under Part IV.

4. The net weekly incomes used to determine the amount of a person's weekly loss of earning capacity benefit under Part VI, if the benefit is payable to a person who is less than sixty-five years of age.
5. The amount of a person's weekly loss of earning capacity benefit under Part VI, if the person is sixty-five years of age or more and is not receiving a weekly benefit of $185 under subsection 35 (2). O. Reg. 776/93, s. 79 (1).

(2) Subsection (1) does not apply to the amount referred to in paragraph 1 of subsection (1) if the person has been receiving the weekly income replacement benefits for less than one year after the onset of the disability in respect of which the benefits are payable. O. Reg. 776/93, s. 79 (2).

(3) No amount shall be reduced by the operation of subsection (1). O. Reg. 776/93, s. 79 (3).

(4) The amount of a weekly loss of earning capacity benefit under Part VI that is payable to a person who is receiving a weekly benefit of $185 under subsection 28 (3) or 35 (2) shall be revised to the amount to which it would have been revised under subsection (1) if subsection 28 (3) or 35 (2) had never applied to the person, effective the 1st day of January in the year in which, if subsection 28 (3) or 35 (2) had never applied, the person's weekly benefit would have been revised to an amount greater than $185. O. Reg. 776/93, s. 79 (4).

Monetary Amounts in this Regulation

80. (1) Every monetary amount referred to in this Regulation shall be revised, effective the 1st day of January in every year after 1994, by adjusting the amount by the indexation percentage published under section 268.1 of the *Insurance Act*. O. Reg. 776/93, s. 80 (1).

(2) On or before the 1st day of January in every year, the Superintendent shall publish in *The Ontario Gazette* the amounts to which each monetary amount referred to in this Regulation will be revised by the operation of subsection (1). O. Reg. 776/93, s. 80 (2); O. Reg. 304/98, s. 6.

(3) Subsections (1) and (2) do not apply to the following amounts:

1. The $185 amount referred to in subsection 10 (2).
2. The $185 amount referred to in subsection 19 (2).
3. The $185 amount referred to in subsection 28 (3).
4. The $185 amount referred to in subsection 35 (2).
4.1 The $3,000 amount referred to in subsection 36 (5).
4.2 The $2,000 amount referred to in clause 39 (2) (b).
4.3 The $1,850 amount referred to in subsection 75 (11).
5. The $185 amount referred to in paragraph 5 of subsection 79 (1).
6. The $185 amounts referred to in subsection 79 (4).
7. The $96,200 amount referred to in clause 82 (3) (a).
8. The $1,850 amount referred to in clause 82 (3) (b). O. Reg. 776/93, s. 80 (3); O. Reg. 781/94, s. 23.

PART XIX
INCOME CALCULATIONS

Net Weekly Income Formula

81. (1) For the purpose of this Regulation, a person's net weekly income from employment shall be determined in accordance with the following formula:

$$A = (B – C – D – E)/52$$

where,

A = the person's net weekly income from employment,

B = the person's gross annual income from employment,

C = the annual premium payable by the person under the *Unemployment Insurance Act* (Canada) on the gross annual income from employment,

D = the annual contribution payable by the person under the *Canada Pension Plan* on the gross annual income from employment,

E = the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross annual income from employment.

O. Reg. 776/93, s. 81 (1).

(2) For the purpose of subsection (1), the person whose net weekly income from employment is to be determined shall be deemed to be a resident of Ontario. O. Reg. 776/93, s. 81 (2).

Net Weekly Income Tables

82. (1) Despite subsections 10 (5) and 19 (5) and section 81, an insurer may elect that,

(a) in the case of persons whose income from employment does not include income from self-employment, all determinations required by this Regulation of a person's net weekly income from employment or net income in respect of an employment subsequent to an accident shall be made in accordance with the publication of the Ontario Insurance Commission dated November 25, 1993 and entitled "Net Weekly Income Table — Other than Self-Employment"; and

(b) in the case of persons whose income from employment consists only of income from self-employment, all determinations required by this Regulation of a person's net weekly income from employment or net income in respect of an employment subsequent to an accident shall be made in accordance with the publication of the Ontario Insurance Commission dated November 25, 1993 and entitled "Net Weekly Income Table — Self-Employment". O. Reg. 776/93, s. 82 (1).

(2) Subject to subsection (3), an election under subsection (1) applies to all persons described in subsection (1) in respect of whom determinations of net weekly income from employment and net income in respect of an employment subsequent to an accident are required by this Regulation. O. Reg. 776/93, s. 82 (2).

(3) An election under subsection (1) does not apply to,

(a) a determination of net weekly income from employment if the person's gross annual income from employment exceeds $96,200; or

(b) a determination of net income in respect of an employment subsequent to an accident if the gross income received from the employment exceeds $1,850 per week. O. Reg. 776/93, s. 82 (3).

(4) An election under subsection (1) may be revoked. O. Reg. 776/93, s. 82 (4).

Income from Self-Employment

83. For the purpose of this Regulation, a person's income from self-employment shall be determined in the same manner as the person's profit from the business in which the person was self-employed would be determined under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), but without taking into account,

(a) expenses that are eligible for capital cost allowance or an allowance on eligible capital property;

(b) capital gains or losses; or

(c) losses deductible under section 111 of the *Income Tax Act* (Canada). O. Reg. 776/93, s. 83.

Pre-Determined Income from Self-Employment

84. Despite section 83, an insurer and a named insured who is self-employed and not otherwise employed may agree in a contract evidenced by a motor vehicle liability policy that, for the purpose of determining benefits under this Regulation in respect of an accident that occurs during the period covered by the contract, the named insured's gross income from self-employment for every week shall be deemed to be the weekly income amount specified in the contract if, at the time of the accident, the person continues to engage in the self-employment in which he or she engaged at the time the contract was entered into and the person is not otherwise employed. O. Reg. 776/93, s. 84.

Income Tax Calculations

85. (1) For the purpose of this Regulation, the income tax payable by a person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) shall be determined having regard to only the following deductions and tax credits that apply to the person under those Acts:

1. Alimony and maintenance payments deduction.
2. Basic personal tax credit.
3. Married person's tax credit or equivalent to married tax credit.
4. Age tax credit.
5. Disability tax credit.
6. Unemployment insurance premium tax credit.
7. *Canada Pension Plan* tax credit.
8. *Quebec Pension Plan* tax credit. O. Reg. 776/93, s. 85 (1).

(2) If a determination of the income tax payable by a person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) is necessary to determine the amount of a benefit under this Regulation, a person who applies for the benefit shall provide the insurer with such information as is reasonably necessary to enable the insurer to determine the income tax payable by the insured person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario). O. Reg. 776/93, s. 85 (2).

(3) Failure to comply with subsection (2) does not relieve the insurer from any time limit established by this Regulation for the payment of the benefit, but the insurer shall determine the amount of the benefit on the basis of its best estimate of the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), subject to later adjustment of the amount of the benefit when subsection (2) is complied with. O. Reg. 776/93, s. 85 (3).

Conversion of Part-Time Income to Full-Time Income

86. (1) For the purpose of subsection 29 (1), a person's net weekly income used in determining the person's pre-accident earning capacity shall be converted to a full-time net weekly income in accordance with this section if,

(a) the person was employed on a part-time basis at some point during the period of time used under section 9 for the purpose of determining the amount of the person's weekly income replacement benefits;

(b) the person would have worked on a full-time basis at some time after the accident; and

(c) the gross income used under section 9 for the purpose of determining the amount of the person's weekly income replacement benefits includes income from employment other than self-employment. O. Reg. 776/93, s. 86 (1).

(2) The full-time net weekly income shall be determined in accordance with section 81 or 82 using a gross annual income determined in accordance with the following formula:

$$A = B \times C \times 52$$

where,

A = the gross annual income,

B = the person's hourly rate of wages or salary in the employment designated under subsection (3),

C = the number of hours in a regular work week for a person employed on a full-time basis in the employment designated under subsection (3), determined in accordance with subsection (4).

O. Reg. 776/93, s. 86 (2).

(3) For the purpose of subsection (2), the person shall designate one employment, other than self-employment, in which the person engaged on a part-time basis during the time period used under section 9 for the purpose of determining the amount of the person's weekly income replacement benefits. O. Reg. 776/93, s. 86 (3).

(4) For the purpose of subsection (2), the number of hours in a regular work week for a person employed on a full-time basis in the employment designated under subsection (3) shall be determined in accordance with the following rules:

1. If the number of hours in a regular work week for a person employed on a full-time basis is fixed by a collective agreement or by law for a person employed in the position in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
2. If rule 1 does not apply but there is a standard number of hours in a regular work week for a person employed on a full-time basis in the position in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
3. If rules 1 and 2 do not apply but there is a standard number of hours in a regular work week for other persons employed on a full-time basis in the workplace in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
4. If rules 1 to 3 do not apply but there is a standard number of hours in a regular work week for persons employed on a full-time basis in the industry or profession in which the person whose full-time net weekly income is to be determined was employed, that number of hours shall be used for the purpose of subsection (2).
5. If rules 1 to 4 do not apply but there is a reasonable method for establishing the number of hours in a regular work week for a person employed on a full-time basis for the purpose of subsection (2), that method shall be used.
6. If rules 1 to 5 do not apply, the number of hours in a regular work week for a person employed on a full-time basis shall be deemed to be 36.5 hours for the purpose of subsection (2). O. Reg. 776/93, s. 86 (4).

Severance Pay, Termination Pay

87. For the purpose of this Regulation, payments of severance pay or termination pay shall not be included in a determination of a person's income. O. Reg. 776/93, s. 87.

PART XX
MISCELLANEOUS

Application

88. (1) The benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents occurring after December 31, 1993 and before November 1, 1996. O. Reg. 463/96, s. 2.

(2) Benefits payable under this Regulation in respect of an insured person shall be paid by the insurer who is liable to pay under subsection 268 (2) of the *Insurance Act*. O. Reg. 776/93, s. 88 (2).

(3) Subject to Part XIV, the insurer shall pay the benefits under this Regulation despite section 225, subsection 233 (1), section 240 and subsection 265 (3) of the *Insurance Act*. O. Reg. 776/93, s. 88 (3).

Method of Payment

89. Subject to clause 69 (1) (b) and to section 271 of the *Insurance Act*, payment of a benefit under this Regulation shall be made by cheque payable to the person entitled to the benefit, despite any direction to the contrary. O. Reg. 776/93, s. 89.

Assignment of Benefits

90. (1) The assignment of a benefit under this Regulation is void. O. Reg. 776/93, s. 90 (1).

(2) Subsection (1) does not apply to,

(a) the assignment of a benefit to the Ministry of Community and Social Services; or

(b) the assignment of a benefit to the Ministry of Health in respect of a service, benefit or entitlement provided under an Act the administration of which was transferred by Order-in-Council from the Ministry of Community and Social Services to the Ministry of Health. O. Reg. 776/93, s. 90 (2).

Company Automobiles, Rental Automobiles

91. (1) Subject to subsection (3), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or an insured automobile is rented to an individual who is living and ordinarily present in Ontario, the individual shall be deemed for the purpose of this Regulation to be the named insured. O. Reg. 776/93, s. 91 (1); O. Reg. 781/94, s. 24 (1).

(2) Subject to subsection (3), if an insured automobile is made available for the regular use of an individual who is not living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, the individual shall be deemed for the purpose of this Regulation to be the named insured while the individual, his or her spouse or any dependant of either of them is an occupant of the insured automobile. O. Reg. 776/93, s. 91 (2); O. Reg. 781/94, s. 24 (2).

(3) Subsections (1) and (2) apply in respect of accidents occurring before January 1, 1995. O. Reg. 781/94, s. 24 (3).

(4) Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or if an insured automobile is rented for a period of more than 30 days to an individual who is living and ordinarily present in Ontario, the individual shall be deemed to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation. O. Reg. 781/94, s. 24 (3).

(5) Subject to subsection (7), if an insured automobile is rented for a period of 30 days or less to an individual who is living and ordinarily present in Ontario, the individual shall be deemed not to be the named insured under the policy insuring the automobile for the purpose of payment of the statutory accident benefits set out in this Regulation. O. Reg. 781/94, s. 24 (3).

(6) Subject to subsection (7), if an insured automobile is made available for the regular use of an individual who is not living and ordinarily present in Ontario by a corporation, unincorporated association, partnership, sole proprietorship or other entity, the individual shall be deemed to be the named insured under the policy insuring the automobile while the individual, his or her spouse or any dependant of either of them is an occupant of the insured automobile. O. Reg. 781/94, s. 24 (3).

(7) Subsections (4), (5) and (6) apply in respect of accidents occurring on or after January 1, 1995. O. Reg. 781/94, s. 24 (3).

Copies of Regulation

92. On request, the insurer shall provide a copy of this Regulation without charge to a named insured or a person entitled to benefits under this Regulation. O. Reg. 776/93, s. 92.

Notices

93. If an insurer is required or permitted by this Regulation to give a notice to an insured person, the notice shall be given in writing. O. Reg. 776/93, s. 93.

FORMS

94. Each of the following documents shall be in a form approved by the Superintendent:

1. A certificate under subsection 13 (5).
2. A certificate under subsection 32 (2).
3. A certificate under subsection 34 (1).
4. Revoked: O. Reg. 26/06, s. 31.

4.1 An explanation under subsection 39.1 (5).

4.2 A notice under subsection 39.1 (6).

5. Revoked: O. Reg. 26/06, s. 31.

5.1 An explanation under subsection 45.1 (5).

5.2 A notice under subsection 45.1 (6).

5.3 An explanation under subsection 50.1 (4).

5.4 A notice under subsection 50.1 (5).

6. The application forms referred to in clause 59 (2) (a).
7. The explanation required by clause 59 (2) (b).
8. A certificate under section 60.
9. An election under subsection 61 (3) or (6).
10. An explanation under subsection 62 (7).
11. A notice under subsection 62 (8).
12. Revoked: O. Reg. 781/94, s. 25 (2).
13. Revoked: O. Reg. 26/06, s. 31.
14. Revoked: O. Reg. 781/94, s. 25 (4).
15. Revoked: O. Reg. 781/94, s. 25 (4).
16. An explanation under subsection 67 (3).
17. A notice under subsection 67 (4).
18. An agreement under section 84. O. Reg. 776/93, s. 94; O. Reg. 781/94, s. 25; O. Reg. 304/98, s. 7; O. Reg. 26/06, s. 31.

TITLE

95. This Regulation may be cited as the *Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996*. O. Reg. 463/96, s. 3.

96. Omitted (provides for coming into force of provisions of the English version of this Regulation). O. Reg. 776/93, s. 96.

FORM 1 REVOKED: O. REG. 46/16, S. 17.

TAB 53

CanLII

Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996, O Reg 403/96

This regulation is repealed, spent or not in force since 2020-07-03.

Past version: in force between 2016-04-01 and 2020-07-02

Link to the latest version: https://canlii.ca/t/s7q

Stable link to this version: https://canlii.ca/t/52pc6

Citation to this version: Statutory Accident Benefits Schedule - Accidents on or After November 1, 1996, O Reg 403/96, <https://canlii.ca/t/52pc6> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act

ONTARIO REGULATION 403/96

STATUTORY ACCIDENT BENEFITS SCHEDULE — ACCIDENTS ON OR AFTER NOVEMBER 1, 1996

Note: This Regulation was revoked on July 3, 2020. (See: O. Reg. 348/20, s. 1)
Last amendment: 348/20.

This is the English version of a bilingual regulation.

PART I
GENERAL

Title

1. This Regulation may be cited as the *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*. O. Reg. 462/96, s. 2.

Definitions and Interpretation

2. (1) In this Regulation,

"accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device; ("accident")

"assessment of attendant care needs" means a written assessment of attendant care needs that satisfies the requirements of section 39; ("évaluation des besoins en soins auxiliaires")

"attendant care benefit" means the benefit provided by section 16; ("indemnité de soins auxiliaires")

"business day" means a day that is not,

(a) Saturday, or

(b) a holiday within the meaning of subsection 29 (1) of the *Interpretation Act*, other than Easter Monday and Remembrance Day; ("jour ouvrable")

"caregiver benefit" means the benefit provided by Part IV; ("indemnité de soignant")

"case manager" means a person who provides services related to the coordination of goods or services for which payment is provided by a medical, rehabilitation or attendant care benefit; ("gestionnaire de cas")

"chiropractor" means a person authorized by law to practise chiropractic; ("chiropraticien")

"death benefit" means the benefit provided by section 25; ("prestation de décès")

"dentist" means a person authorized by law to practise dentistry; ("dentiste")

"designated assessment" means an assessment arranged or conducted by a designated assessment centre under section 43; ("évaluation désignée")

"designated assessment centre" means an assessment centre that was designated before January 1, 2005 under section 52 as that section read on February 28, 2006; ("centre d'évaluation désigné")

"disability certificate" means, in respect of a person, a certificate from a health practitioner of the person's choice that states the cause and nature of the person's impairment and contains an estimate of the duration of the disability in respect of which the person is making or has made a claim for a benefit set out in this Regulation; ("certificat d'invalidité")

"funeral benefit" means the benefit provided by section 26; ("indemnité pour frais funéraires")

"*Guideline*" means,

(a) a guideline issued by the Superintendent under subsection 268.3 (1) of the Act that is published in *The Ontario Gazette*,

(b) a Pre-approved Framework Guideline,

(c) a guideline that is included in the professional fee guidelines, the *Transportation Expense Guidelines* or the *Optional Indexation Benefit Guidelines*, as published in *The Ontario Gazette* by the Ontario Insurance Commission or Financial Services Commission of Ontario,

(d) a guideline published in *The Ontario Gazette* that is an amended version of a guideline referred to in clause (a), (b) or (c); ("directive")

"health practitioner", in respect of a particular impairment, means a physician or,

(a) a chiropractor, if the impairment is one that a chiropractor is authorized by law to treat,

(b) a dentist, if the impairment is one that a dentist is authorized by law to treat,

(b.1) an occupational therapist, if the impairment is one that an occupational therapist is authorized by law to treat,

(c) an optometrist, if the impairment is one that an optometrist is authorized by law to treat,

(d) a psychologist, if the impairment is one that a psychologist is authorized by law to treat,

(e) a physiotherapist, if the impairment is one that a physiotherapist is authorized by law to treat; ("praticien de la santé")

(f) a registered nurse with an extended certificate of registration, if the impairment is one that the nurse is authorized by law to treat, or

(g) a speech-language pathologist, if the impairment is one that a speech-language pathologist is authorized by law to treat;

"impairment" means a loss or abnormality of a psychological, physiological or anatomical structure or function; ("déficience")

"income replacement benefit" means the benefit provided by Part II; ("indemnité de remplacement de revenu")

"insured automobile", in respect of a particular motor vehicle liability policy, means any automobile covered by the policy; ("automobile assurée")

"insured person", in respect of a particular motor vehicle liability policy, means,

(a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse of the named insured and any dependant of the named insured or spouse, if the named insured, specified driver, spouse or dependant,

(i) is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile, and

(c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the 60 days before the accident; ("personne assurée")

"medical benefit" means the benefit provided by section 14; ("indemnité pour frais médicaux")

"member of a health profession" means a member of a College as defined in the *Regulated Health Professions Act, 1991*; ("membre d'une profession de la santé")

"non-earner benefit" means the benefit provided by Part III; ("indemnité de personne sans revenu d'emploi")

"occupational therapist" means a person authorized by law to practise occupational therapy; ("ergothérapeute")

"optometrist" means a person who is authorized by law to practise optometry; ("optométriste")

"person in need of care" means, in respect of an insured person, another person who is less than 16 years of age or who requires care because of physical or mental incapacity; ("personne ayant besoin de soins")

"personal and vocational characteristics" include,

(a) employment history,

(b) education and training,

(c) vocational aptitudes,

(d) vocational skills,

(e) physical abilities,

(f) cognitive abilities, and

(g) language abilities; ("caractéristiques personnelles et professionnelles")

"personal information" means information that is personal information for the purposes of the *Personal Information Protection and Electronic Documents Act* (Canada) and personal health information for the purposes of the *Personal Health Information Protection Act, 2004*; ("renseignements personnels")

"physician" means a person authorized by law to practise medicine; ("médecin")

"*Pre-approved Framework Guideline*" means a guideline,

(a) that is issued by the Superintendent under subsection 268.3 (1.1) of the Act and published in *The Ontario Gazette*, and

(b) which establishes, in respect of one or more impairments, a treatment framework; ("directive relative à un cadre de traitement préapprouvé")

"psychologist" means a person authorized by law to practise psychology; ("psychologue")

"physiotherapist" means a person authorized by law to practice physiotherapy; ("physiothérapeute")

"registered nurse with an extended certificate of registration" means a person authorized by law to practise nursing who holds an extended certificate of registration under the *Nursing Act, 1991*; ("infirmière autorisée ou infirmier autorisé titulaire d'un certificat d'inscription supérieur")

"rehabilitation benefit" means the benefit provided by section 15; ("indemnité de réadaptation")

"social worker" means a member of the Ontario College of Social Workers and Social Service Workers who holds a certificate of registration for social work under the *Social Work and Social Service Work Act, 1998*; ("travailleur social")

"speech-language pathologist" means a person authorized by law to practise speech-language pathology; ("orthophoniste")

"spouse" has the same meaning as in Part VI of the *Insurance Act*; ("conjoint") O. Reg. 403/96, s. 2 (1); O. Reg. 114/00, s. 1 (1, 2); O. Reg. 281/03, s. 1 (1-4); O. Reg. 458/03, s. 1; O. Reg. 314/05, s. 1 (1, 2); O. Reg. 546/05, s. 1; O. Reg. 533/06, s. 1; O. Reg. 295/07, s. 1.

(1.1) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs before October 1, 2003 is,

(a) paraplegia or quadriplegia;

(b) the amputation or other impairment causing the total and permanent loss of use of both arms;

(c) the amputation or other impairment causing the total and permanent loss of use of both an arm and a leg;

(d) the total loss of vision in both eyes;

(e) brain impairment that, in respect of an accident, results in,

(i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or

(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;

(f) subject to subsections (2) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or

(g) subject to subsections (2) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5); O. Reg. 314/05, s. 1 (1, 2).

(1.2) For the purposes of this Regulation, a catastrophic impairment caused by an accident that occurs after September 30, 2003 is,

(a) paraplegia or quadriplegia;

(b) the amputation or other impairment causing the total and permanent loss of use of both arms or both legs;

(c) the amputation or other impairment causing the total and permanent loss of use of one or both arms and one or both legs;

(d) the total loss of vision in both eyes;

(e) subject to subsection (1.4), brain impairment that, in respect of an accident, results in,

(i) a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or

(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;

(f) subject to subsections (1.4), (2.1) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or

(g) subject to subsections (1.4), (2.1) and (3), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder. O. Reg. 281/03, s. 1 (5).

(1.3) Subsection (1.4) applies if an insured person is under the age of 16 years at the time of the accident and none of the Glasgow Coma Scale, the Glasgow Outcome Scale or the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, referred to in clause (1.2) (e), (f) or (g) can be applied by reason of the age of the insured person. O. Reg. 281/03, s. 1 (5).

(1.4) For the purposes of clauses (1.2) (e), (f) and (g), an impairment sustained in an accident by an insured person described in subsection (1.3) that can reasonably be believed to be a catastrophic impairment shall be deemed to be the impairment that is most analogous to the impairment referred to in clause (1.2) (e), (f) or (g), after taking into consideration the developmental implications of the impairment. O. Reg. 281/03, s. 1 (5).

(2) Clauses (1.1) (f) and (g) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs before October 1, 2003 unless,

(a) the insured person's health practitioner states in writing that the insured person's condition has stabilized and is not likely to improve with treatment; or

(b) three years have elapsed since the accident. O. Reg. 403/96, s. 2 (2); O. Reg. 281/03, s. 1 (6).

(2.1) Clauses (1.2) (f) and (g) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs after September 30, 2003 unless,

(a) the insured person's health practitioner states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment; or

(b) two years have elapsed since the accident. O. Reg. 281/03, s. 1 (7).

(3) For the purpose of clauses (1.1) (f) and (g) and (1.2) (f) and (g), an impairment that is sustained by an insured person but is not listed in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 shall be deemed to be the impairment that is listed in that document and that is most analogous to the impairment sustained by the insured person. O. Reg. 403/96, s. 2 (3); O. Reg. 281/03, s. 1 (8).

(4) For the purpose of this Regulation, a person suffers a complete inability to carry on a normal life as a result of an accident if, and only if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident. O. Reg. 403/96, s. 2 (4).

(5) For the purpose of this Regulation, a person is employed if, for salary, wages, other remuneration or profit, the person is engaged in employment, including self-employment, or is the holder of an office, and "employment" has a corresponding meaning. O. Reg. 403/96, s. 2 (5).

(6) For the purpose of this Regulation, a person is a dependant of another person if the person is principally dependent for financial support or care on the other person or the other person's spouse. O. Reg. 403/96, s. 2 (6); O. Reg. 114/00, s. 1 (3); O. Reg. 314/05, s. 1 (3).

(7) For the purpose of this Regulation, an aide or attendant for a person includes a family member or friend who acts as the person's aide or attendant, even if the family member or friend does not possess any special qualifications. O. Reg. 403/96, s. 2 (7).

(8) For the purpose of this Regulation, payments of severance pay or termination pay are not payments for loss of income. O. Reg. 403/96, s. 2 (8).

(9) For the purpose of this Regulation, payments for loss of income under an income continuation benefit plan shall be deemed to include the following payments:

1. Payments of disability pension benefits under the *Canada Pension Plan*.
2. Periodic payments of insurance, if the insurance,
    i. is offered by the insurer only to persons who are employed at the time the contract for the insurance is entered into, and
    ii. is offered by the insurer only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment. O. Reg. 482/01, s. 1.

(10) Subsection (9) only applies in respect of accidents that occur on or after January 1, 2002. O. Reg. 482/01, s. 1.

APPLICATION

3. (1) In this section,

"New Regulation" means Ontario Regulation 34/10 (Statutory Accident Benefits Schedule — Effective September 1, 2010), made under the Act. O. Reg. 35/10, s. 1.

(1.1) Subject to subsection (1.3), the benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of accidents that occur on or after November 1, 1996 and before September 1, 2010. O. Reg. 35/10, s. 1.

(1.2) Section 24 and Parts X, XI, XII, XIII and XV do not apply after August 31, 2010. O. Reg. 35/10, s. 1.

(1.3) No amount referred to in this Regulation shall be paid after August 31, 2010. O. Reg. 35/10, s. 1.

(1.4) An amount that would, but for subsection (1.3), be paid under this Regulation after August 31, 2010 shall be paid under the New Regulation, but in the amount determined,

(a) under this Regulation, other than section 24; or

(b) under subsections 25 (1), (3), (4) and (5) of the New Regulation. O. Reg. 35/10, s. 1.

(1.5) None of the following actions shall be taken on or after September 1, 2010 in respect of an accident that occurred on or after November 1, 1996 and before September 1, 2010:

1. The delivery of a disability certificate for the purpose of section 20, 35 or 37.
2. The delivery of a notice to an insurer under subsection 32 (1) of a person's intention to apply for a benefit.
3. A request under clause 37 (1) (a) by an insurer.
4. The delivery of a treatment confirmation form for the purpose of section 37.1 or 37.2.

5. The delivery by an insurer of a notice for the purpose of section 37.3.
6. The delivery of a treatment plan for the purpose of section 38.
7. The delivery by an insurer of a notice for the purpose of section 38.1.
8. The delivery of an application under section 38.2 for approval of an assessment or examination.
9. The delivery under section 39 of an assessment of attendant care needs.
10. The delivery by an insurer of a notice for the purpose of subsection 39 (5).
11. The delivery of an application under section 40 for a determination of whether an impairment sustained by the insured person is a catastrophic impairment.
12. The delivery by an insurer of any notice requiring an insured person to be examined under section 42. O. Reg. 35/10, s. 1.

(1.6) Any action referred to in subsection (1.5) that is not taken before September 1, 2010 may instead be taken under the corresponding provision of the New Regulation and, for that purpose, any time limit set out in the New Regulation applies as if any action previously taken under this Regulation was taken under the New Regulation. O. Reg. 35/10, s. 1.

(2) The benefits set out in this Regulation shall be provided in respect of accidents that occur in Canada or the United States of America, or on a vessel plying between ports of Canada or the United States of America. O. Reg. 403/96, s. 3 (2).

(3) Benefits payable under this Regulation in respect of an insured person shall be paid by the insurer that is liable to pay under subsection 268 (2) of the *Insurance Act*. O. Reg. 403/96, s. 3 (3).

(4) Subject to Part IX, the insurer shall pay the benefits under this Regulation despite section 225, subsection 233 (1), section 240 and subsection 265 (3) of the *Insurance Act*. O. Reg. 403/96, s. 3 (4).

PART II
INCOME REPLACEMENT BENEFIT

Eligibility Criteria

4. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an income replacement benefit if the insured person meets any of the following qualifications:

1. The insured person was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment.
2. The insured person,
    i. was not employed at the time of the accident,
    ii. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident,
    iii. was 16 years of age or more or was excused from attendance at school under the *Education Act* at the time of the accident, and
    iv. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident.
3. The insured person,

i. was entitled at the time of the accident to start work within one year under a legitimate contract of employment that was made before the accident and that is evidenced in writing, and

ii. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment he or she was entitled to start under the contract. O. Reg. 403/96, s. 4.

(2) Despite subsection (1), paragraph 3 of that subsection applies only if the accident occurs before April 15, 2004. O. Reg. 458/03, s. 2.

Period of Benefit

5. (1) Subject to subsection (2), an income replacement benefit is payable during the period that the insured person suffers a substantial inability to perform the essential tasks of the employment in respect of which he or she qualifies for the benefit under section 4. O. Reg. 403/96, s. 5 (1).

(2) The insurer is not required to pay an income replacement benefit,

(a) for the first week of the disability;

(b) for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience;

(c) in the case of an insured person who qualifies for the benefit under paragraph 3 of section 4, for the period before the day he or she would have been entitled under the contract to begin employment;

(d) for any period longer than 12 weeks after the accident, in the case of an insured person whose impairment is a Grade I whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*, if the accident occurred after April 14, 2004; or

(e) for any period longer than 16 weeks after the accident, in the case of an insured person whose impairment is a Grade II whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*, if the accident occurred after April 14, 2004. O. Reg. 403/96, s. 5 (2); O. Reg. 458/03, s. 3; O. Reg. 295/07, s. 2.

Amount of Benefit

6. (1) The amount of the income replacement benefit shall be,

(a) for each of the first 104 weeks of disability, 80 per cent of the insured person's net weekly income from employment determined in accordance with section 61; and

(b) for each week after the first 104 weeks of disability, the greater of the amount specified in clause (a) and $185. O. Reg. 403/96, s. 6 (1).

(2) The insurer may deduct from the amount of the income replacement benefit payable to an insured person 80 per cent of the net income received by the insured person in respect of any employment subsequent to the accident. O. Reg. 403/96, s. 6 (2).

(3) For the purpose of subsection (2), the net income received by an insured person in respect of employment subsequent to the accident shall be determined by subtracting the following amounts from the gross income received by the person in respect of the employment subsequent to the accident:

1. The premium payable by the person under the *Employment Insurance Act* (Canada) on the gross income.
2. The contribution payable by the person under the *Canada Pension Plan* on the gross income.
3. The income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross income. O. Reg. 403/96, s. 6 (3).

(4) For the purpose of subsection (2), net income from self-employment for an insured person who was self-employed at the time of the accident shall be determined without making any deductions for,

(a) expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose; and

(c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident. O. Reg. 403/96, s. 6 (4).

(5) If the insured person was self-employed at the time of the accident and the person incurs losses from self-employment as a result of the accident, the insurer shall add to the amount of the income replacement benefit payable to the person 80 per cent of the losses from self-employment incurred as a result of the accident. O. Reg. 403/96, s. 6 (5).

(6) For the purpose of subsection (5), losses from self-employment shall be determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9 (2) of the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), without making any deductions for,

(a) expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) salary expenses that were paid to replace the person's active participation in the business, except to the extent that those expenses were reasonable for that purpose;

(c) non-salary expenses that were different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses were necessary to prevent or reduce any losses resulting from the accident;

(d) expenses that are eligible for capital cost allowance or an allowance on eligible capital property; or

(e) losses deductible under section 111 of the *Income Tax Act* (Canada). O. Reg. 403/96, s. 6 (6).

Collateral Payments for Loss of Income and Maximum Amount of Benefit

7. (1) Despite subsections 6 (1) and (5), but subject to subsection 6 (2), the weekly amount of an income replacement benefit payable to a person shall be the lesser of the following amounts:

1. The amount determined under subsections 6 (1) and (5), reduced by,

   i. net weekly payments for loss of income that are being received by the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, and

   ii. net weekly payments for loss of income that are not being received by the person but are available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the person has applied to receive the payments for loss of income.

2. The greater of the following amounts:

   i. $400.

   ii. If the optional income replacement benefit referred to in section 27 has been purchased and is applicable to the person, the amount fixed by the optional benefit. O. Reg. 403/96, s. 7 (1); O. Reg. 462/96, s. 4; O. Reg. 281/03, s. 2 (1, 2).

(2) For the purposes of paragraph 1 of subsection (1), the amount determined under subsections 6 (1) and (5) shall not be reduced by,

(a) benefits under the *Employment Insurance Act* (Canada) that are being received by or are available to the person;

(b) payments under a sick leave plan that are not being received by the person but are available to the person; or

(c) payments under a workers' compensation law or plan that are not being received by the person and to which the person is not entitled because the person has elected under the workers' compensation law or plan to bring an action. O. Reg. 403/96, s. 7 (2); O. Reg. 281/03, s. 2 (3).

(3) For the purpose of this section, net weekly payments for loss of income shall be determined by subtracting from the gross weekly amount of payments for loss of income the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross weekly amount of payments for loss of income. O. Reg. 403/96, s. 7 (3).

(4) For the purpose of subsection (3), the person whose net weekly payments for loss of income are to be determined shall be deemed to be a resident of Ontario. O. Reg. 403/96, s. 7 (4).

Gross Income Calculations

8. (1) An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was not self-employed at any time during the four weeks before the accident shall designate one of the following time periods:

1. The four weeks before the accident.
2. The 52 weeks before the accident. O. Reg. 403/96, s. 8 (1).

(2) An insured person who is eligible for an income replacement benefit under paragraph 1 of section 4 and who was self-employed at any time during the four weeks before the accident shall designate one of the following time periods:

1. The 52 weeks before the accident.
2. The last fiscal year completed before the accident for the business in which the person was self-employed, if the business completed a fiscal year before the accident. O. Reg. 403/96, s. 8 (2).

(3) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 1 of section 4 shall be deemed to be the following amount:

1. In the case of a person who designated the four weeks before the accident under paragraph 1 of subsection (1), the person's gross income from employment for the four weeks before the accident, multiplied by 13.
2. In the case of a person who designated the 52 weeks before the accident under paragraph 2 of subsection (1) or paragraph 1 of subsection (2), the person's gross income from employment for the 52 weeks before the accident.
3. In the case of a person who designated the last fiscal year completed before the accident under paragraph 2 of subsection (2), the person's gross income from employment for that fiscal year. O. Reg. 403/96, s. 8 (3); O. Reg. 462/96, s. 5.

(4) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 2 of section 4 shall be deemed to be the person's gross income from employment for the 52 weeks before the accident. O. Reg. 403/96, s. 8 (4).

(5) For the purpose of determining the amount of an insured person's income replacement benefit, the gross annual income from employment for a person who qualifies for a benefit under paragraph 3 of section 4 shall be deemed to be the gross income payable under the contract of employment, extrapolated to reflect an annual income. O. Reg. 403/96, s. 8 (5).

(6) A determination of gross income under subsection (3) or (4) shall include any benefits received under the *Employment Insurance Act* (Canada) or a predecessor of that Act in respect of the relevant period. O. Reg. 403/96, s. 8 (6).

(7) If a person qualifies for an income replacement benefit under paragraph 1 or 2 of section 4 and also qualifies under paragraph 3 of section 4, the person's gross annual income from employment shall be determined under subsection (3) or (4), as the case may be, until the day he or she would have been entitled to begin employment under the contract described in paragraph 3 of section 4, and thereafter the person's gross annual income from employment shall be determined in accordance with subsection (5). O. Reg. 403/96, s. 8 (7).

ADJUSTMENT AFTER AGE 65

9. (1) Despite sections 6 and 7, if a person is receiving an income replacement benefit immediately before attaining 65 years of age, the weekly amount of the benefit shall be adjusted, on the later of the date the person attains 65 years of age and the second anniversary of the date the person began receiving the benefit, to the amount determined in accordance with the following formula:

$$A = B \times 0.02 \times C$$

where,

A = the amount to which the weekly amount of the income replacement benefit shall be adjusted,

B = the weekly amount of the income replacement benefit that the person was entitled to receive immediately before the adjustment, including any additions required by subsection 6 (5) but without making any deductions permitted by subsection 6 (2),

C = the lesser of,

i. 35, and

ii. the number of years during which the person qualified for the income replacement benefit before the adjustment is made.

O. Reg. 403/96, s. 9 (1).

(2) An income replacement benefit that has been adjusted under subsection (1) is payable until the person dies. O. Reg. 403/96, s. 9 (2).

(3) Section 5 and subsections 6 (2) to (6) do not apply to an income replacement benefit that has been adjusted under subsection (1). O. Reg. 403/96, s. 9 (3).

ENTITLEMENT ARISING AFTER AGE 65

10. (1) Despite sections 6 and 7, if a person becomes entitled to receive an income replacement benefit after attaining 65 years of age, the weekly amount of the benefit shall be the amount determined under section 7 multiplied by the factor set out in Column 2 of the Table to this subsection opposite the number of weeks that have elapsed since the person became entitled to receive the benefit.

TABLE

Column 1 Number of weeks since Entitlement Arose	Column 2 Factor
Less than 52 weeks	1.0
52 weeks or more but less than 104 weeks	0.8
104 weeks or more but less than 156 weeks	0.6
156 weeks or more but less than 208 weeks	0.3
208 weeks or more	0.0

(2) An income replacement benefit is no longer payable to a person to whom subsection (1) applies if more than 208 weeks have elapsed since the person became entitled to the benefit. O. Reg. 403/96, s. 10 (2).

(3) Subsections 6 (2) to (6) do not apply to the income replacement benefit paid to a person to whom subsection (1) applies. O. Reg. 403/96, s. 10 (3).

10.1 The age distinctions in sections 9 and 10 apply despite the *Human Rights Code*. O. Reg. 536/06, s. 1.

Temporary Return to Employment

11. A person receiving an income replacement benefit may return to or start an employment at any time during the 104 weeks following the onset of the disability in respect of which the benefit is paid without affecting his or her entitlement to resume receiving benefits under this Part if, as a result of the accident, he or she is unable to continue in the employment. O. Reg. 403/96, s. 11.

PART III
NON-EARNER BENEFIT

12. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a non-earner benefit if the insured person meets any of the following qualifications:

1. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit.
2. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident, received a caregiver benefit as a result of the accident and there is no longer a person in need of care.
3. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and,
    i. was enrolled on a full-time basis in elementary, secondary or post-secondary education at the time of the accident, or

    ii. completed his or her education less than one year before the accident and was not employed, after completing his or her education and before the accident, in an employment that reflected his or her education and training. O. Reg. 403/96, s. 12 (1).

(2) Subject to subsection (3), the amount of the non-earner benefit shall be $185 for each week that the insured person is eligible to receive the benefit. O. Reg. 403/96, s. 12 (2).

(3) If a person qualifies for a non-earner benefit under paragraph 3 of subsection (1) and more than 104 weeks have elapsed since the onset of the disability, the amount of the non-earner benefit shall be $320 for each week that the insured person continues to be eligible to receive the benefit. O. Reg. 403/96, s. 12 (3).

(4) The insurer may deduct the following amounts from the amount payable to an insured person as a non-earner benefit:

1. Net weekly payments for loss of income that are being received by the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan.
2. Net weekly payments for loss of income that are not being received by the insured person but are available to the insured person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, unless the insured person has applied to receive the payments for loss of income. O. Reg. 403/96, s. 12 (4); O. Reg. 462/96, s. 6.

(5) For the purpose of subsection (4), subsections 7 (2) and (3) apply with necessary modifications. O. Reg. 403/96, s. 12 (5).

(6) Subject to subsection (7), the non-earner benefit is payable during the period that the insured person suffers a complete inability to carry on a normal life. O. Reg. 403/96, s. 12 (6).

(7) The insurer,

(a) is not required to pay a non-earner benefit for the first 26 weeks after the onset of the complete inability to carry on a normal life; and

(b) is not required to pay a non-earner benefit for any period before the insured person attains 16 years of age. O. Reg. 403/96, s. 12 (7).

(8) Sections 9 and 10 apply, with necessary modifications, to a non-earner benefit and, for that purpose, the reference in subsection 10 (1) to "the amount determined under section 7" shall be deemed to be a reference to the amount referred to in subsection (2) of this section. O. Reg. 403/96, s. 12 (8).

PART IV
CAREGIVER BENEFIT

13. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a caregiver benefit if the insured person meets all of the following qualifications:

1. At the time of the accident,
   i. the insured person was residing with a person in need of care, and
   ii. the insured person was the primary caregiver for the person in need of care and did not receive any remuneration for engaging in caregiving activities.
2. As a result of and within 104 weeks after the accident, the insured person suffers a substantial inability to engage in the caregiving activities in which he or she engaged at the time of the accident. O. Reg. 403/96, s. 13 (1).

(2) The caregiver benefit shall pay for reasonable and necessary expenses incurred as a result of the accident in caring for a person in need of care. O. Reg. 403/96, s. 13 (2).

(3) The amount of the caregiver benefit shall not exceed,

(a) for the first person in need of care,
   (i) $250 per week, or
   (ii) if the optional caregiver and dependant care benefit referred to in section 27 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit; and

(b) for each additional person in need of care,
   (i) $50 per week, or
   (ii) if the optional caregiver and dependant care benefit referred to in section 27 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit. O. Reg. 403/96, s. 13 (3).

(4) The insurer is not required to pay a caregiver benefit for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to carry on a normal life. O. Reg. 403/96, s. 13 (4).

PART V
MEDICAL, REHABILITATION AND ATTENDANT CARE BENEFITS

Medical Benefit

14. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit. O. Reg. 403/96, s. 14 (1).

(2) The medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

(a) medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech-language pathology services;

(b) chiropractic, psychological, occupational therapy and physiotherapy services;

(c) medication;

(d) prescription eyewear;

(e) dentures and other dental devices;

(f) hearing aids, wheelchairs or other mobility devices, prostheses, orthotics and other assistive devices;

(g) transportation for the insured person to and from treatment sessions, including transportation for an aide or attendant;

(h) other goods and services of a medical nature that the insured person requires. O. Reg. 403/96, s. 14 (2).

(3) The insurer is not liable to pay a medical benefit for goods or services that are experimental in nature. O. Reg. 403/96, s. 14 (3).

(4) The insurer is not liable to pay a medical benefit for expenses related to professional services described in clause (2) (a), (b) or (h) rendered to an insured person that exceed the maximum rate or amount of expenses established under the *Guidelines* applicable to the claim. O. Reg. 281/03, s. 3.

(4.1) If the *Guidelines* applicable to the claim establish a range of rates or amounts for expenses related to professional services rendered to an insured person,

(a) the highest rate or amount in the range shall be deemed, for the purposes of subsection (4), to be the maximum rate or amount established under the *Guidelines* applicable to the claim; and

(b) an insurer that is liable to pay a medical benefit for expenses related to the services described in clause (2) (a), (b) or (h) shall not pay less than the lowest amount or rate in the range unless the insured person's claim is for less than the lowest amount or rate in the range. O. Reg. 281/03, s. 3.

(5) Subject to subsection (6), the insurer is not liable to pay a medical benefit under clause (2) (g) for expenses related to transportation unless the expenses are authorized by, and are calculated by applying the rates set out in, the *Transportation Expense Guidelines* published in *The Ontario Gazette* by the Ontario Insurance Commission or Financial Services Commission of Ontario, as they may be amended from time to time. O. Reg. 403/96, s. 14 (5); O. Reg. 303/98, s. 1 (2).

(6) The insurer is not liable to pay a medical benefit under clause (2) (g) for expenses related to,

(a) the first 50 kilometres of transportation in the insured person's automobile to and from a treatment session if the accident occurred before April 15, 2004; or

(b) the first 50 kilometres of transportation to and from a treatment session if the accident occurred after April 14, 2004, unless the insured person sustained a catastrophic impairment as a result of the accident. O. Reg. 458/03, s. 4.

Rehabilitation Benefit

15. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a rehabilitation benefit. O. Reg. 403/96, s. 15 (1).

(2) The rehabilitation benefit shall pay for reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's reintegration into his or her family, the rest of society and the labour market. O. Reg. 403/96, s. 15 (2).

(3) Measures to reintegrate an insured person into the labour market include measures that are reasonable and necessary to enable the person to,

(a) engage in employment that is as similar as possible to employment in which he or she engaged before the accident; or

(b) lead as normal a work life as possible. O. Reg. 403/96, s. 15 (3).

(4) In determining whether a measure is reasonable and necessary for the purpose of subsection (3), the insurer shall consider the insured person's personal and vocational characteristics. O. Reg. 403/96, s. 15 (4).

(5) The rehabilitation benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for a purpose referred to in subsection (2) for,

(a) life skills training;

(b) family counselling;

(c) social rehabilitation counselling;

(d) financial counselling;

(e) employment counselling;

(f) vocational assessments;

(g) vocational or academic training;

(h) workplace modifications and workplace devices, including communications aids, to accommodate the needs of the insured person;

(i) home modifications and home devices, including communications aids, to accommodate the needs of the insured person, or the purchase of a new home if it is more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate the insured person's existing home;

(j) vehicle modifications to accommodate the needs of the insured person, or the purchase of a new vehicle if it is more reasonable to purchase a new vehicle to accommodate the needs of the insured person than to modify an existing vehicle;

(k) transportation for the insured person to and from counselling and training sessions, including transportation for an aide or attendant;

(l) other goods and services that the insured person requires, except services provided by a case manager. O. Reg. 403/96, s. 15 (5); O. Reg. 281/03, s. 4 (1).

(6) The insurer is not liable to pay a rehabilitation benefit for expenses related to professional services described in any of clauses (5) (a) to (g) or clause (5) (l) rendered to an insured person that exceed the maximum rate or amount of expenses established under the *Guidelines* applicable to the claim. O. Reg. 281/03, s. 4 (2).

(6.1) If the *Guidelines* applicable to the claim establish a range of rates or amounts for expenses related to professional services rendered to an insured person,

(a) the highest rate or amount in the range shall be deemed, for the purpose of subsection (6), to be the maximum rate or amount established under the *Guidelines* applicable to the claim; and

(b) an insurer that is liable to pay a rehabilitation benefit for expenses related to the services described in any of clauses (5) (a) to (g) or clause (5) (l) shall not pay less than the lowest amount or rate in the range unless the insured person's claim is for less than the lowest amount or rate in the range. O. Reg. 281/03, s. 4 (2).

(7) For the purpose of clause (5) (i), expenses incurred to renovate the insured person's home shall be deemed not to be reasonable and necessary expenses if the renovations are only for the purpose of giving the insured person access to areas of the home that are not needed for ordinary living. O. Reg. 403/96, s. 15 (7).

(8) The amount of the rehabilitation benefit for the purchase of a new home shall not exceed the value of the renovations to the insured person's existing home that would have been required to accommodate the needs of the insured person. O. Reg. 403/96, s. 15 (8).

(9) For the purpose of clause (5) (j), expenses incurred to purchase or modify a vehicle to accommodate the needs of an insured person shall be deemed not to be reasonable and necessary expenses if they are incurred within five years after the last expenses incurred for that purpose in respect of the same accident. O. Reg. 403/96, s. 15 (9).

(10) The amount of the rehabilitation benefit for the purchase of a new vehicle shall not exceed the cost of the new vehicle, less the trade-in value of the existing vehicle. O. Reg. 403/96, s. 15 (10).

(11) Subject to subsection (12), the insurer is not liable to pay a rehabilitation benefit under clause (5) (k) for expenses related to transportation unless the expenses are authorized by, and are calculated by applying the rates set out in, the *Transportation Expense Guidelines* published in *The Ontario Gazette* by the Ontario Insurance Commission or Financial Services Commission of Ontario, as they may be amended from time to time. O. Reg. 403/96, s. 15 (11); O. Reg. 303/98, s. 2 (2).

(12) The insurer is not liable to pay a rehabilitation benefit under clause (5) (k) for expenses related to,

(a) the first 50 kilometres of transportation in the insured person's automobile to and from a counselling or training session if the accident occurred before April 15, 2004; or

(b) the first 50 kilometres of transportation to and from a counselling or training session if the accident occurred after April 14, 2004, unless the insured person sustained a catastrophic impairment as a result of the accident. O. Reg. 458/03, s. 5.

Attendant Care Benefit

16. (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident an attendant care benefit. O. Reg. 403/96, s. 16 (1).

(1.1) Despite subsection (1), if the accident occurred after April 14, 2004, no attendant care benefit is payable to an insured person whose impairment is a Grade I or Grade II whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*. O. Reg. 295/07, s. 3.

(2) The attendant care benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

(a) services provided by an aide or attendant; or

(b) services provided by a long-term care facility, including a nursing home, home for the aged or chronic care hospital. O. Reg. 403/96, s. 16 (2).

(3) Subsection (2) does not apply to expenses for which payment may be obtained under clause 14 (2) (g), 15 (5) (k) or subsection 24 (1.6). O. Reg. 403/96, s. 16 (3); O. Reg. 533/06, s. 2.

(4) The monthly amount payable by the attendant care benefit shall be determined in accordance with Form 1. O. Reg. 403/96, s. 16 (4).

(5) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules:

1. If the accident occurred before October 1, 2003, the amount of the attendant care benefit payable in respect of the insured person shall not exceed,

    i. $3,000 per month, if the insured person did not sustain a catastrophic impairment as a result of the accident, or

    ii. $6,000 per month, if the insured person sustained a catastrophic impairment as a result of the accident.

2. If the accident occurred on or after October 1, 2003 and the optional medical, rehabilitation and attendant care benefit referred to in section 27 has not been purchased and does not apply to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed,

    i. $3,000 per month, if the insured person did not sustain a catastrophic impairment as a result of the accident, or

    ii. $6,000 per month, if the insured person sustained a catastrophic impairment as a result of the accident.

3. If the accident occurred on or after October 1, 2003 and the optional medical, rehabilitation and attendant care benefit referred to in section 27 has been purchased and applies to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed the monthly limit under subsection 27 (5). O. Reg. 281/03, s. 5; O. Reg. 458/03, s. 6 (2).

Case Manager Services

17. (1) The insurer shall pay all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for services provided by a qualified case manager in accordance with a treatment plan if,

(a) the insured person sustains a catastrophic impairment as a result of the accident; or

(b) the accident occurred on or after October 1, 2003 and the optional medical, rehabilitation and attendant care benefit referred to in section 27 has been purchased and applies to the insured person. O. Reg. 281/03, s. 6.

(2) The insurer is not liable under subsection (1) to pay expenses related to professional services rendered to an insured person that exceed the maximum rate or amount of expenses established under the *Guidelines* applicable to the claim. O. Reg. 281/03, s. 6.

(3) If the *Guidelines* applicable to the claim establish a range of rates or amounts for expenses related to professional services rendered to an insured person,

(a) the highest rate or amount in the range shall be deemed, for the purpose of subsection (2), to be the maximum rate or amount established under the *Guidelines* applicable to the claim; and

(b) an insurer that is liable under subsection (1) to pay expenses related to the services rendered to the insured person shall not pay less than the lowest amount or rate in the range, unless the insured person's claim is for less than the lowest amount or rate in the range. O. Reg. 281/03, s. 6.

Duration of Medical, Rehabilitation and Attendant Care Benefits

18. (1) No medical or rehabilitation benefit is payable for expenses incurred,

(a) more than 10 years after the accident, in the case of an insured person who was 15 years of age or more at the time of the accident; or

(b) after the insured person attains 25 years of age, in the case of an insured person who was less than 15 years of age at the time of the accident. O. Reg. 403/96, s. 18 (1).

(2) No attendant care benefit is payable for expenses incurred more than 104 weeks after the accident. O. Reg. 403/96, s. 18 (2).

(3) Subsections (1) and (2) do not apply in respect of an insured person who sustains a catastrophic impairment as a result of the accident. O. Reg. 403/96, s. 18 (3).

(4) Subsections (1) and (2) do not apply if the optional medical, rehabilitation and attendant care benefit referred to in section 27 has been purchased and is applicable to the insured person. O. Reg. 403/96, s. 18 (4).

Maximum Limits on Medical, Rehabilitation and Attendant Care Benefits

19. (1) The sum of the medical and rehabilitation benefits paid in respect of an insured person shall not exceed, for any one accident,

(a) $100,000; or

(b) if the insured person sustained a catastrophic impairment as a result of the accident, $1,000,000. O. Reg. 403/96, s. 19 (1).

(2) The amount of the attendant care benefit paid in respect of an insured person shall not exceed, for any one accident,

(a) $1,000,000, if the insured person sustained a catastrophic impairment as a result of the accident;

(b) nil, if the accident occurred after April 14, 2004 and the insured person's impairment is a Grade I or Grade II whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*; or

(c) $72,000 in any other case. O. Reg. 458/03, s. 7; O. Reg. 295/07, s. 4.

(3) If the optional medical, rehabilitation and attendant care benefit referred to in section 27 was purchased and applies to the insured person, the maximum limits fixed by the optional benefit apply and subsection (1) and clauses (2) (a) and (c) do not apply. O. Reg. 458/03, s. 7.

(4) For the purpose of subsection (1), the medical and rehabilitation benefits paid in respect of an insured person include any amount paid in respect of the insured person under section 17. O. Reg. 403/96, s. 19 (4).

PART VI
PAYMENT OF OTHER EXPENSES

Lost Educational Expenses

20. (1) The insurer shall pay for lost educational expenses incurred by or on behalf of an insured person who sustains an impairment as a result of an accident if,

(a) at the time of the accident, the insured person was enrolled in a program of elementary, secondary, post-secondary or continuing education; and

(b) as a result of the accident, the insured person is unable to continue the program. O. Reg. 403/96, s. 20 (1).

(2) The amount payable under this section shall not exceed $15,000. O. Reg. 403/96, s. 20 (2).

(2.1) The insurer may require a person who claims or is receiving benefits under this section to furnish a disability certificate as often as is reasonably necessary. O. Reg. 546/05, s. 2.

(2.2) If an insurer requires a disability certificate, the person shall furnish a new disability certificate, completed as of a date after the date of the insurer's request, within 15 business days after receiving the insurer's request. O. Reg. 546/05, s. 2.

(2.3) If the person fails to comply with subsection (2.2), no amount is payable for lost educational expenses until the person furnishes the completed disability certificate. O. Reg. 546/05, s. 2.

(3) In this section,

"lost educational expenses" means expenses incurred before the accident for tuition, books, equipment or room and board in respect of the program term or program year in which the insured person was enrolled at the time of the accident, if the expenses are related to the program that the insured person is unable to continue. O. Reg. 403/96, s. 20 (3).

Expenses of Visitors

21. (1) If an insured person sustains an impairment as a result of an accident, the insurer shall pay for reasonable and necessary expenses incurred by the following persons as a result of the accident in visiting the insured person during his or her treatment or recovery:

1. The spouse, children, grandchildren, parents, grandparents, brothers and sisters of the insured person.
2. An individual who was living with the insured person at the time of the accident.
3. An individual who has demonstrated a settled intention to treat the insured person as a child of the individual's family.
4. An individual whom the insured person has demonstrated a settled intention to treat as a child of the insured person's family. O. Reg. 403/96, s. 21 (1); O. Reg. 114/00, s. 2; O. Reg. 314/05, s. 2.

(2) No payment is required under this section for expenses incurred more than 104 weeks after the accident. O. Reg. 403/96, s. 21 (2).

(3) Subsection (2) does not apply if the insured person sustained a catastrophic impairment as a result of the accident. O. Reg. 403/96, s. 21 (3).

Housekeeping and Home Maintenance

22. (1) The insurer shall pay for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains an impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident. O. Reg. 403/96, s. 22 (1).

(2) The amount payable under this section shall not exceed $100 per week. O. Reg. 403/96, s. 22 (2).

(3) No payment is required under this section for expenses incurred more than 104 weeks after the onset of the disability. O. Reg. 403/96, s. 22 (3).

(4) Subsection (3) does not apply if the insured person sustained a catastrophic impairment as a result of the accident. O. Reg. 403/96, s. 22 (4).

Damage to Clothing, Glasses, Hearing Aids, etc.

23. The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person in repairing or replacing,

(a) clothing worn by the insured person at the time of an accident that was lost or damaged as a result of the accident; or

(b) prescription eyewear, dentures, hearing aids, prostheses and other medical or dental devices that were lost or damaged as a result of an accident. O. Reg. 403/96, s. 23.

Cost of Examinations

24. (1) The insurer shall pay the following expenses incurred by or on behalf of an insured person:

1. Reasonable fees charged by a health practitioner for preparing a disability certificate required under section 20, 35 or 37.
2. Fees charged in accordance with a *Pre-approved Framework Guideline* by a health practitioner for preparing a treatment confirmation form for the purposes of section 37.1.

3. Fees charged in accordance with a *Pre-approved Framework Guideline* by a member of a health profession for conducting an assessment or examination and preparing a report for the purposes of section 37.1.

4. Reasonable fees charged by a health practitioner for reviewing a treatment plan under section 38, and for approving it if appropriate.

5. Reasonable fees charged by a member of a health profession or a social worker for preparing an application under section 38.2 for approval of an assessment or examination.

6. Reasonable fees charged by a member of a health profession for preparing an assessment of attendant care needs under section 39.

7. Reasonable fees charged by a health practitioner for preparing an application under section 40 for a determination of whether the insured person has sustained a catastrophic impairment.

8. Fees charged for a designated assessment of the insured person.

9. Subject to subsection 24.1 (2), reasonable fees charged by a member of a health profession for consulting with a person who is conducting or has conducted an examination of the insured person under section 42, if the conditions set out in subsection 24.1 (1) are satisfied.

10. Reasonable fees and expenses in accordance with section 42.1 that are charged for an assessment or examination of the insured person and the preparation of a report of the assessment or examination.

11. Reasonable fees, other than fees referred to in any of paragraphs 1 to 10, that are charged by a member of a health profession or a social worker for conducting an assessment or examination and preparing a report if the assessment or examination is reasonably required in connection with a benefit that is claimed or in connection with the preparation of a treatment plan, disability certificate, assessment of attendant care needs or application for the determination of a catastrophic impairment, and,

    i. the assessment or examination relates to ancillary goods or services described in section 37.2 and is contemplated by a treatment confirmation form submitted in accordance with section 37.1,

    ii. the insured person applied for approval of the assessment or examination either in a treatment plan submitted under section 38 or by way of a separate application submitted under section 38.2, or

    iii. the insurer approved the expense or the approval of the insurer is not required by reason of subsection (1.2). O. Reg. 546/05, s. 3 (1).

(1.1) Despite subsection (1), an insurer is not required to pay for an assessment or examination referred to in subparagraph 11 ii of subsection (1) if the expense for the assessment or examination is incurred,

(a) before the insurer approves the expense;

(b) before the insurer receives the report of an examination under section 42, if the insurer requires the insured person to be examined under that section; or

(c) before the insurer receives the report of a designated assessment, in the case of an application for approval of an assessment or examination under section 38.2, if the insured person is required to undergo a designated assessment. O. Reg. 546/05, s. 3 (1).

(1.2) Despite subsection (1.1), the prior approval of an insurer is not required for the following:

1. An assessment or examination for the purposes of preparing a treatment plan under section 38 in circumstances in which an immediate risk of harm to the insured person or a person in the insured person's care makes obtaining the prior approval of the insurer impractical.

2. Not more than three assessments or examinations for the purposes of preparing a treatment plan under section 38 if not more than one assessment or examination is done by the same person and the cost of each assessment or examination does not exceed $200.

3. An assessment or examination for the purposes of preparing a disability certificate under section 20, 35 or 37 if the cost of the assessment or examination does not exceed $200.

4. Revoked: O. Reg. 546/05, s. 3 (2).

5. An assessment or examination for the purposes of preparing an assessment of attendant care needs under section 39, but not an assessment or examination relating to an impairment that comes within a *Pre-approved Framework Guideline* unless the *Guideline* expressly states that the prior approval of the insurer is not required for the assessment or examination.

6. An assessment or examination for the purposes of determining if an insured person has a catastrophic impairment, if the insured person is hospitalized or is in a long-term care facility at the time of the assessment or examination.

7. An assessment or examination conducted after the insurer notifies the insured person that, before the assessment or examination is conducted, the insurer does not require the submission of a treatment plan under section 38 or an application for approval of an assessment or examination under section 38.2.

8. Revoked: O. Reg. 546/05, s. 3 (3).

O. Reg. 281/03, s. 7 (1); O. Reg. 546/05, s. 3 (2, 3).

(1.3)-(1.5) Revoked: O. Reg. 546/05, s. 3 (4).

(1.6) Subject to subsection (4), the insurer shall pay reasonable expenses incurred by or on behalf of an insured person for transportation expenses incurred in transporting the insured person to and from an assessment or examination referred to in subsection (1), including transportation expenses for an aide or an attendant. O. Reg. 281/03, s. 7 (1).

(2) The insurer is not liable under subsection (1) for expenses related to professional services rendered to an insured person that exceed the maximum rate or amount of expenses established under the *Guidelines* applicable to the claim. O. Reg. 281/03, s. 7 (1).

(2.1) If the *Guidelines* applicable to the claim establish a range of rates or amounts for expenses related to professional services rendered to an insured person,

(a) the highest rate or amount in the range shall be deemed, for the purpose of subsection (2), to be the maximum rate or amount established under the *Guidelines* applicable to the claim; and

(b) an insurer that is liable to pay expenses related to the services rendered to the insured person shall not pay less than the lowest amount or rate in the range, unless the insured person's claim is for less than the lowest amount or rate in the range. O. Reg. 281/03, s. 7 (1).

(3) Subject to subsection (4), the insurer is not liable under subsection (1.6) to pay for expenses related to transportation unless the expenses are authorized by, and are calculated by applying the rates set out in, the *Transportation Expense Guidelines* published in *The Ontario Gazette* by the Ontario Insurance Commission or Financial Services Commission of Ontario, as they may be amended from time to time. O. Reg. 403/96, s. 24 (3); O. Reg. 303/98, s. 4 (2); O. Reg. 281/03, s. 7 (2).

(4) The insurer is not liable under subsection (1.6) to pay for expenses related to,

(a) the first 50 kilometres of transportation in the insured person's automobile to and from an examination or assessment if the examination or assessment relates to an accident that occurred before April 15, 2004; or

(b) the first 50 kilometres of transportation to and from an examination or assessment if the examination or assessment relates to an accident that occurred after April 14, 2004, unless the insured person sustained a catastrophic impairment as a result of the accident. O. Reg. 458/03, s. 8.

(5) Vocational assessments referred to in clause 15 (5) (f) are not assessments for the purposes of this section. O. Reg. 281/03, s. 7 (4).

24.1 (1) The following conditions must be satisfied for the purposes of paragraph 9 of subsection 24 (1):

1. The consulting fees must be charged by one of the following persons:

    i. the health practitioner who prepared the disability certificate, if the examination relates to a claim in respect of which a disability certificate is required under this Regulation,

    ii. the health practitioner who approved the treatment plan, if the examination relates to a claim for medical or rehabilitation benefits,

    iii. the member of the health profession who prepared the assessment of attendant care needs, if the examination relates to an application under section 39, or

    iv. the health practitioner who prepared the application, if the examination relates to an application under section 40 to assist the insurer determine whether the insured person has sustained a catastrophic impairment.

2. The consultation must be arranged by mutual agreement of the person who is conducting or has conducted the examination under section 42 and the health practitioner or member of the health profession involved in the consultation.

3. The fees must be reasonable and, subject to subsection (2), shall not exceed the amount ordinarily charged for a 30 minute professional consultation by telephone. O. Reg. 546/05, s. 4.

(2) If under a *Guideline* a maximum rate or amount for expenses is established that applies to the claim with respect to which the examination under section 42 and consultation relate and the payment of the fees for the consultation would result in the expenses exceeding this maximum rate or amount, only the portion of the fees for the consultation that would not result in the expenses for the claim exceeding the maximum rate or amount shall be paid. O. Reg. 546/05, s. 4.

PART VII
DEATH AND FUNERAL BENEFITS

Death Benefit

25. (1) The insurer shall pay a death benefit in respect of an insured person if he or she dies as result of an accident,

(a) within 180 days after the accident; or

(b) within 156 weeks after the accident, if during that period the insured person was continuously disabled as a result of the accident. O. Reg. 403/96, s. 25 (1).

(2) The death benefit shall provide for the following payments:

1. A payment to the insured person's spouse of,

    i. $25,000, or

    ii. if the optional death and funeral benefit referred to in section 27 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit.

2. A payment to each of the insured person's dependants, and to each person to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order, of,

    i. $10,000, or

    ii. if the optional death and funeral benefit referred to in section 27 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit.

3. If no payment is required by paragraph 1, an additional payment to the insured person's dependants and the persons, other than a former spouse of the insured person, to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order, to be divided equally among the persons entitled, in an amount equal to $25,000 if the accident occurred before October 1, 2003 or, if the accident occurred on or after October 1, 2003,

   i. $25,000, or

   ii. if the optional death and funeral benefit referred to in section 27 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit.

4. A payment of $10,000 to each former spouse of the insured person to whom the insured person was obligated at the time of the accident to provide support under a domestic contract or court order.

5. A payment of $10,000 to,

   i. a person in respect of whom the insured person was a dependant at the time of the accident,

   ii. the spouse of a person in respect of whom the insured person was a dependant at the time of the accident, if the spouse was the insured person's primary caregiver at the time of the accident and the person in respect of whom the insured person was a dependant at the time of the accident dies before the insured person or within 30 days after the insured person, or

   iii. the dependants of a person in respect of whom the insured person was a dependant at the time of the accident, if no payment is required by subparagraph i or ii, to be divided equally among the persons entitled. O. Reg. 403/96, s. 25 (2); O. Reg. 114/00, s. 3 (1); O. Reg. 281/03, s. 8 (1); O. Reg. 314/05, s. 3 (1-3).

(3) No payment shall be made under this section to a person who dies before the insured person or within 30 days after the insured person. O. Reg. 403/96, s. 25 (3).

(4) If at the time of the accident the insured person had more than one spouse who is entitled to a payment under this section, the payment shall be divided equally among them. O. Reg. 403/96, s. 25 (4); O. Reg. 114/00, s. 3 (2); O. Reg. 314/05, s. 3 (4).

(4.1) If at the time of the accident the insured person was a dependant in respect of more than one person who is entitled to a payment under this section, the payment shall be divided equally among the persons in respect of whom the insured person was a dependant. O. Reg. 281/03, s. 8 (2).

(5) If requested by the insurer, a person who conducts an autopsy of the insured person shall provide a copy of his or her report to the insurer. O. Reg. 403/96, s. 25 (5).

(6) In this section,

"spouse" means a person who was, at the time of the accident,

(a) a spouse, or

(b) if the accident occurred before the definition of "same-sex partner" in Part VI of the Act was repealed, a same-sex partner within the meaning of that Part as it read on January 1, 2004. O. Reg. 314/05, s. 3 (5).

FUNERAL BENEFIT

26. (1) The insurer shall pay a funeral benefit in respect of an insured person who dies as a result of an accident. O. Reg. 403/96, s. 26 (1).

(2) The funeral benefit shall pay for funeral expenses incurred in an amount not exceeding,

(a) $6,000; or

(b) if the optional death and funeral benefit referred to in section 27 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit. O. Reg. 403/96, s. 26 (2).

PART VIII
OPTIONAL BENEFITS

Description of Optional Benefits

27. (1) Every insurer shall offer the following optional benefits:

1. An optional income replacement benefit that fixes the amount referred to in subparagraph ii of paragraph 2 of subsection 7 (1) at $600, $800 or $1,000, as selected by the named insured under the policy, for the purpose of determining the weekly amount of an income replacement benefit.

2. An optional caregiver and dependant care benefit that,

   i. fixes the maximum payment for expenses incurred in caring for a person in need of care at $325 per week for the first person in need of care and $75 per week for each additional person in need of care, instead of the amounts specified in subclauses 13 (3) (a) (i) and 13 (3) (b) (i), and

   ii. provides for the dependant care benefit described in section 28.

3. An optional medical, rehabilitation and attendant care benefit that provides for the following maximum limits on medical, rehabilitation and attendant care benefits, instead of the limits specified in subsections 19 (1) and (2), and that provides for no limitation on the period of time for which expenses shall be paid for medical, rehabilitation and attendant care benefits:

   i. The sum of the medical and rehabilitation benefits paid in respect of an insured person shall not exceed, for any one accident,

      A. $1,100,000, or

      B. $2,000,000, if the insured person sustained a catastrophic impairment as a result of the accident.

   ii. The amount of the attendant care benefit paid in respect of an insured person shall not exceed, for any one accident,

      A. $2,000,000, if the insured person sustained a catastrophic impairment as a result of the accident,

      B. $1,072,000 in any case in which the insured person did not sustain as a result of the accident,

         1. a catastrophic impairment, or

         2. an impairment in an accident occurring after April 14, 2004 that is a Grade I or Grade II whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*, or

      C. nil, if the accident occurred after April 14, 2004 and the insured person's impairment is a Grade I or Grade II whiplash-associated disorder that comes within a *Pre-approved Framework Guideline*.

   iii. Despite the limits established by subparagraphs i and ii, the overall total of the medical, rehabilitation and attendant care benefits paid in respect of an insured person for any one accident shall not exceed,

      A. $1,172,000, or

      B. $3,000,000, if the insured person sustained a catastrophic impairment as a result of the accident.

4. An optional death and funeral benefit that,

   i. fixes the amount payable under paragraph 1 of subsection 25 (2) at $50,000, instead of the amount specified in subparagraph 1 i of subsection 25 (2),

   ii. fixes the amount payable under paragraph 2 of subsection 25 (2) at $20,000, instead of the amount specified in subparagraph 2 i of subsection 25 (2),

   iii. fixes the amount payable under paragraph 3 of subsection 25 (2) at $50,000 if the accident occurred on or after October 1, 2003, instead of the amount specified in subparagraph 3 i of subsection 25 (2), and

   iv. fixes the maximum payment for funeral expenses at $8,000 instead of the amount specified in clause 26 (2) (a).

5. An optional indexation benefit, as described in section 29. O. Reg. 403/96, s. 27 (1); O. Reg. 114/00, s. 4 (1); O. Reg. 281/03, s. 9 (1); O. Reg. 458/03, s. 9 (1); O. Reg. 295/07, s. 5.

(2) The optional benefits referred to in subsection (1) are applicable only to,

(a) the named insured;

(b) the spouse of the named insured;

(c) the dependants of the named insured and of the named insured's spouse; and

(d) the persons specified in the policy as drivers of the insured automobile. O. Reg. 403/96, s. 27 (2); O. Reg. 114/00, s. 4 (2); O. Reg. 314/05, s. 4.

(3) An optional benefit may be purchased at any time before an accident in respect of which a claim is made. O. Reg. 403/96, s. 27 (3).

(3.1) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in Ontario Policy Change Form 47 (OPCF 47), as approved by the Commissioner of Insurance on December 3, 1996 under section 227 of the *Insurance Act*. O. Reg. 551/96, s. 1; O. Reg. 303/98, s. 5.

(4) For the purpose of paragraph 3 of subsection (1), the medical and rehabilitation benefits paid in respect of an insured person include any amount paid in respect of the insured person under section 17. O. Reg. 403/96, s. 27 (4).

(5) The maximum monthly attendant care benefit payable in respect of an insured person shall not exceed $6,000 if the benefit is payable in respect of an accident that occurs on or after October 1, 2003. O. Reg. 458/03, s. 9 (2).

Dependant Care Benefit

28. (1) The dependant care benefit shall pay for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident in caring for the insured person's dependants, if the insured person meets the following qualifications:

1. The insured person sustained an impairment as a result of the accident.
2. The insured person was employed at the time of the accident.
3. The insured person is not receiving a caregiver benefit. O. Reg. 403/96, s. 28 (1).

(2) No payment is required under this section in respect of an expense incurred after the insured person dies. O. Reg. 403/96, s. 28 (2).

(3) The amount payable under this section shall not exceed $75 per week for the first dependant and $25 per week for each additional dependant. O. Reg. 403/96, s. 28 (3).

(4) The total amount payable under this section shall not exceed $150 per week. O. Reg. 403/96, s. 28 (4).

Optional Indexation Benefit

29. (1) The optional indexation benefit shall provide that the following amounts shall be subject to annual indexation in accordance with subsections (2) and (3):

1. The weekly amount of any income replacement or non-earner benefit payable under this Regulation, without regard to any reductions made under subparagraphs i and ii of paragraph 1 of subsection 7 (1).
2. The following amounts:
    i. The amounts specified in subparagraphs i and ii of paragraph 2 of subsection 7 (1).
    ii. The amounts specified in subsections 12 (2) and (3).
    iii. The amounts specified in subclauses 13 (3) (a) (i) and (ii) and 13 (3) (b) (i) and (ii).
    iv. The amounts specified in clauses 16 (5) (a) and (b).
3. If the optional medical, rehabilitation and attendant care benefit referred to in section 27 was purchased and is applicable to the insured person, the following amounts:
    i. The outstanding balance with respect to medical and rehabilitation benefits, as calculated under subsection (4).
    ii. The outstanding balance with respect to attendant care benefits, as calculated under subsection (6).
    iii. The outstanding balance with respect to medical, rehabilitation and attendant care benefits, as calculated under subsection (8).
4. If paragraph 3 does not apply, the following amounts:
    i. The outstanding balance with respect to medical and rehabilitation benefits, as calculated under subsection (10).
    ii. The outstanding balance with respect to attendant care benefits, as calculated under subsection (12). O. Reg. 403/96, s. 29 (1); O. Reg. 462/96, s. 7 (1).

(2) The indexation shall be performed on January 1 of every year following an accident to which the optional indexation benefit applies by adjusting the amount to be indexed by the percentage change in the Consumer Price Index for Canada (All Items), as published by Statistics Canada under the authority of the *Statistics Act* (Canada), for the period from September in the year immediately preceding the previous year to September of the previous year. O. Reg. 403/96, s. 29 (2).

(3) Subsection (2) is subject to the *Optional Indexation Benefit Guidelines* published in *The Ontario Gazette* by the Ontario Insurance Commission or Financial Services Commission of Ontario, as they may be amended from time to time, except that those guidelines shall not provide for an adjustment of the amount to be indexed by a percentage greater than the percentage change in the applicable Consumer Price Index. O. Reg. 403/96, s. 29 (3); O. Reg. 303/98, s. 6.

(4) For the purpose of subparagraph i of paragraph 3 of subsection (1), the outstanding balance with respect to medical and rehabilitation benefits is calculated by subtracting the total of medical and rehabilitation benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies from the indexation balance calculated under subsection (5). O. Reg. 403/96, s. 29 (4).

(5) The indexation balance for the purpose of subsection (4) is,

(a) in the first year the optional indexation benefit applies, the amount specified in sub-subparagraph A or B, as the case may be, of subparagraph i of paragraph 3 of subsection 27 (1);

(b) in each subsequent year, the outstanding balance for the previous year, as calculated under subsection (4) and indexed under subsection (2). O. Reg. 403/96, s. 29 (5).

(6) For the purpose of subparagraph ii of paragraph 3 of subsection (1), the outstanding balance with respect to attendant care benefits is calculated by subtracting the total of attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies from the indexation balance calculated under subsection (7). O. Reg. 403/96, s. 29 (6).

(7) The indexation balance for the purpose of subsection (6) is,

(a) in the first year the optional indexation benefit applies, the amount specified in sub-subparagraph A or B, as the case may be, of subparagraph ii of paragraph 3 of subsection 27 (1);

(b) in each subsequent year, the outstanding balance for the previous year, as calculated under subsection (6) and indexed under subsection (2). O. Reg. 403/96, s. 29 (7).

(8) For the purpose of subparagraph iii of paragraph 3 of subsection (1), the outstanding balance with respect to medical, rehabilitation and attendant care benefits is calculated by subtracting the total of medical, rehabilitation and attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies from the indexation balance calculated under subsection (9). O. Reg. 403/96, s. 29 (8).

(9) The indexation balance for the purpose of subsection (8) is,

(a) in the first year the optional indexation benefit applies, the amount specified in sub-subparagraph A or B, as the case may be, of subparagraph iii of paragraph 3 of subsection 27 (1);

(b) in each subsequent year, the outstanding balance for the previous year, as calculated under subsection (8) and indexed under subsection (2). O. Reg. 403/96, s. 29 (9).

(10) For the purpose of subparagraph i of paragraph 4 of subsection (1), the outstanding balance with respect to medical and rehabilitation benefits is calculated by subtracting the total of medical and rehabilitation benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies from the indexation balance calculated under subsection (11). O. Reg. 403/96, s. 29 (10); O. Reg. 462/96, s. 7 (2).

(11) The indexation balance for the purpose of subsection (10) is,

(a) in the first year the optional indexation benefit applies, the amount specified in clause 19 (1) (a) or (b), as the case may be;

(b) in each subsequent year, the outstanding balance for the previous year, as calculated under subsection (10) and indexed under subsection (2). O. Reg. 403/96, s. 29 (11).

(12) For the purpose of subparagraph ii of paragraph 4 of subsection (1), the outstanding balance with respect to attendant care benefits is calculated by subtracting the total of attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies from the indexation balance calculated under subsection (13). O. Reg. 403/96, s. 29 (12); O. Reg. 462/96, s. 7 (3).

(13) The indexation balance for the purpose of subsection (12) is,

(a) in the first year the optional indexation benefit applies, the amount specified in clause 19 (2) (a) or (b), as the case may be;

(b) in each subsequent year, the outstanding balance for the previous year, as calculated under subsection (12) and indexed under subsection (2). O. Reg. 403/96, s. 29 (13).

PART IX
GENERAL EXCLUSIONS

30. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22 in respect of a person who was the driver of an automobile at the time of the accident,

(a) if the driver knew or ought reasonably to have known that he or she was operating the automobile while it was not insured under a motor vehicle liability policy;

(b) if the driver was driving the automobile without a valid driver's licence;

(c) if the driver is an excluded driver under the contract of automobile insurance; or

(d) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent. O. Reg. 403/96, s. 30 (1).

(2) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22,

(a) in respect of any person who has made, or who knows of, a material misrepresentation that induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in the risk material to the contract;

(b) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent;

(c) in respect of a person who, at the time of the accident,

(i) was engaged in an act for which the person is convicted of a criminal offence, or

(ii) was an occupant of an automobile that was being used in connection with an act for which the person is convicted of a criminal offence; or

(d) in respect of a person who is convicted under section 254 of the *Criminal Code* (Canada) of failing to comply with a lawful demand to provide a breath sample in connection with the accident. O. Reg. 403/96, s. 30 (2); O. Reg. 281/03, s. 10 (1).

(3) Clause (2) (b) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured. O. Reg. 403/96, s. 30 (3).

(4) If a person sustains an impairment as a result of an accident and,

(a) at the time of the accident, the person was engaged in, or was an occupant of an automobile that was being used in connection with, an act for which the person is charged with a criminal offence; or

(b) the person is charged under section 254 of the *Criminal Code* (Canada) with failing to comply with a lawful demand to provide a breath sample in connection with the accident,

the insurer shall hold in trust any amounts payable under an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22 until the charge is finally disposed of, at which time the amounts and any income on the amounts,

(c) shall be returned to the insurer, if the person is found guilty of the offence or an included offence; or

(d) shall be paid to the person entitled to the payment, if the person is not found guilty of the offence or an included offence. O. Reg. 403/96, s. 30 (4).

(5) In this section,

"criminal offence" means,

(a) operating an automobile while the ability to operate the automobile is impaired by alcohol or a drug,

(b) operating an automobile while the concentration of alcohol in the operator's blood exceeds the limit permitted by law,

(c) failing to comply with a lawful demand to provide a breath sample, or

(d) any other criminal offence, whether or not the offence is related to the operation of an automobile. O. Reg. 403/96, s. 30 (5); O. Reg. 281/03, s. 10 (2).

PART X
PROCEDURES FOR CLAIMING BENEFITS

Failure to Comply with Time Limits

31. (1) A person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation. O. Reg. 403/96, s. 31 (1).

(2) Subsection (1) does not apply to the time limits set out in section 51. O. Reg. 403/96, s. 31 (2).

Notice and Application for Benefits

32. (1) A person shall notify the insurer of his or her intention to apply for a benefit under this Regulation. O. Reg. 281/03, s. 11 (1).

(1.1) A person shall notify the insurer under subsection (1) no later than,

(a) the 30th day after the circumstances arose that gave rise to the entitlement to the benefit, or as soon as practicable after that day, if those circumstances arose as a result of an accident that occurred before October 1, 2003; or

(b) the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable after that day, if those circumstances arose as a result of an accident that occurred on or after October 1, 2003. O. Reg. 281/03, s. 11 (1).

(2) The insurer shall promptly provide the person with,

(a) the appropriate application forms;

(b) a written explanation of the benefits available under this Regulation;

(c) information to assist the person in applying for benefits; and

(d) information on any possible elections relating to income replacement, non-earner and caregiver benefits. O. Reg. 403/96, s. 32 (2).

(2.1) If an insurer that is subject to a Guideline referred to in subsection 68 (3.2) determines, acting reasonably that there is a likelihood that the person may, in connection with the accident, deliver one or more documents referred to in subsection 68 (3.2), the insurer shall provide the following information to the central processing agency referred to in that subsection:

1. The name, address, gender and date of birth of the person.
2. The date of the accident.
3. Particulars of the automobile insurance policy under which the person alleges he or she is entitled to a benefit or benefits, including,
    i. the name of the insurer,
    ii. the policy number, and
    iii. the name of the person to whom the policy was issued.
4. The claim number assigned by the insurer.

5. Any other information reasonably required by the central processing agency to enable it to carry out its obligations to the insurer under this Regulation. O. Reg. 533/06, s. 3.

(2.2) An insurer's obligation to provide the information referred to in subsection (2.1) may be discharged by,

(a) providing the information to the central processing agency; or

(b) confirming, correcting or supplementing the information previously provided to the central processing agency. O. Reg. 533/06, s. 3.

(3) The person shall submit a signed application for the benefit to the insurer within 30 days after receiving the application forms. O. Reg. 403/96, s. 32 (3); O. Reg. 533/06, s. 4 (1).

(3.1) If an insurer receives an incomplete application for a benefit under this Regulation, the insurer shall notify the person within 10 business days after receiving the incomplete application that the application is incomplete and shall indicate what is missing. O. Reg. 281/03, s. 11 (2); O. Reg. 546/05, s. 5 (1); O. Reg. 533/06, s. 4 (2).

(3.2) Subsection (3.1) applies only if,

(a) the insurer, after a reasonable review of the incomplete application, is unable to determine without the missing information if a benefit is payable; or

(b) the application has not been signed by the person. O. Reg. 533/06, s. 4 (3).

(4) If a person is required by an insurer to submit an additional application in respect of a benefit that the person is receiving or may be eligible to receive, the person shall submit the additional application to the insurer within 30 days after receiving the additional application forms from the insurer. O. Reg. 403/96, s. 32 (4).

(5) If subsection (3.1) applies in respect of an incomplete application, no benefit is payable before the person provides the missing information or signs the application, as the case may be. O. Reg. 281/03, s. 11 (2); O. Reg. 533/06, s. 4 (4).

(6) Despite any shorter time limit in this Regulation, if a person fails without a reasonable explanation to notify an insurer under subsection (1) within the time required under subsection (1.1), the insurer may delay determining if the person is entitled to a benefit under section 35, 38, 39 or 41 and may delay paying the benefit until the later of,

(a) 45 days after the day the insurer receives the person's application; or

(b) 10 business days after the day the person complies with any request made by the insurer under subsection 33 (1) or (1.1). O. Reg. 546/05, s. 5 (2).

Pre-claim Examination

32.1 (1) This section applies if,

(a) as a result of an accident, an insured person was admitted to a hospital or long-term care facility and is still in the hospital or facility or was discharged within the previous three days;

(b) the insured person may be entitled to medical benefits for an assistive device referred to in clause 14 (2) (f), rehabilitation benefits under clause 15 (5) (i) or attendant care benefits under section 16; and

(c) no application has yet been made for a benefit to which the insured person may be entitled as a result of the accident. O. Reg. 546/05, s. 6.

(2) At the insured person's request or with his or her consent, the insurer may arrange for the insured person to be examined at the insurer's expense for the purposes of assisting the insurer in determining if the insured person is entitled to receive a benefit described in clause (1) (b) that would assist the insured person after his or her discharge from the hospital or long-term care facility. O. Reg. 546/05, s. 6.

(3) An examination under this section shall be conducted by one or more members of one or more health professions who are chosen by the insurer. O. Reg. 546/05, s. 6.

(4) The insurer shall notify the insured person of the name of the person or persons who will conduct the examination and the day, time and place for the examination. O. Reg. 546/05, s. 6.

(5) The insurer shall, before the examination, obtain the written and signed consent of the insured person for the examination. O. Reg. 546/05, s. 6.

(6) The person or persons who conducted the examination shall, within five business days after conducting the examination, prepare a written report and, if applicable, an assessment of attendant care needs and provide a copy to,

(a) the insurer;

(b) the insured person; and

(c) if the insured person has a health practitioner, that health practitioner. O. Reg. 546/05, s. 6.

(7) An examination under this section is voluntary and any failure or refusal of an insured person to consent to an examination under this section does not affect any rights the insured person may have to apply for or receive benefits as a result of the accident. O. Reg. 546/05, s. 6.

(8) The report of an examination under this section shall not be relied on by an insurer in making a determination that an insured person is not entitled to a benefit under this Regulation. O. Reg. 546/05, s. 6.

Duty of Applicant to Provide Information

33. (1) A person applying for a benefit under this Regulation shall, within 10 business days after receiving a request from the insurer, provide the insurer with the following:

1. Any information reasonably required to assist the insurer in determining the person's entitlement to a benefit.
2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.
3. The number, street and municipality where the person ordinarily resides.
4. Proof of the person's identity. O. Reg. 403/96, s. 33 (1); O. Reg. 546/05, s. 7.

(1.1) If requested by the insurer, a person who applies for a benefit under this Regulation as a result of an accident shall submit to an examination under oath, but is not required to,

(a) submit to more than one examination under oath in respect of matters relating to the same accident; or

(b) submit to an examination under oath during a period when the person is incapable of being examined under oath because of his or her physical, mental or psychological condition. O. Reg. 281/03, s. 12 (1).

(1.2) A person is entitled to be represented at his or her own expense at the examination under oath by such counsel or other representative of his or her choice as the law otherwise permits. O. Reg. 281/03, s. 12 (1).

(1.3) The insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the person and shall give the person reasonable advance notice of the following:

1. The date and location of the examination.
2. That the person is entitled to be represented in the manner described in subsection (1.2).
3. The reason or reasons for the examination.
4. That the scope of the examination will be limited to matters that are relevant to the person's entitlement to benefits. O. Reg. 281/03, s. 12 (1).

(1.4) The insurer shall limit the scope of the examination under oath to matters that are relevant to the person's entitlement to benefits under this Regulation. O. Reg. 281/03, s. 12 (1).

(2) The insurer is not liable to pay a benefit in respect of any period during which the insured person failed to comply with subsection (1) or (1.1). O. Reg. 281/03, s. 12 (2).

(3) Subsection (2) does not apply in respect of a non-compliance with subsection (1.1) if,

(a) the insurer fails to comply with subsection (1.3) or (1.4); or

(b) the insurer interferes with the insured person's right to be represented as described in subsection (1.2). O. Reg. 281/03, s. 12 (2).

(4) If an insured person who failed to comply with subsection (1) or (1.1) subsequently complies with that subsection, the insurer,

(a) shall resume payment of the benefit, if a benefit was being paid; and

(b) shall pay all amounts that were withheld during the period of non-compliance, if the insured person provides a reasonable explanation for the delay in complying with the subsection. O. Reg. 281/03, s. 12 (2).

34. Revoked: O. Reg. 546/05, s. 8.

INCOME REPLACEMENT, NON-EARNER OR CAREGIVER BENEFITS AND HOUSEKEEPING OR HOME MAINTENANCE EXPENSES

35. (1) In this section and section 37,

"specified benefit" means an income replacement benefit, non-earner benefit, caregiver benefit or a payment for housekeeping or home maintenance services under section 22. O. Reg. 546/05, s. 9.

(2) An insured person who applies for a specified benefit shall submit with the application a disability certificate completed no earlier than 10 business days before the date the application is submitted. O. Reg. 546/05, s. 9.

(3) Within 10 business days after the insurer receives the application and completed disability certificate, the insurer shall,

(a) pay the specified benefit;

(b) send a request to the insured person under subsection 33 (1) or (1.1); or

(c) notify the insured person that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 9.

(4) If the insurer sends a request to the insured person under subsection 33 (1) or (1.1), the insurer shall, within 10 business days after the insured person complies with the request,

(a) pay the specified benefit; or

(b) notify the insured person that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 9.

(5) Every income replacement benefit, non-earner benefit or caregiver benefit shall be paid at least once every second week, subject to any prepayment of the benefit by the insurer. O. Reg. 546/05, s. 9.

(6) An insurer may make a determination that an insured person is not entitled to a specified benefit if,

(a) the insured person failed or refused to submit the completed disability certificate required under subsection (2);

(b) the insurer has received the report of the examination under section 42, if the insurer has required the insured person to be examined under that section;

(c) the insurer is entitled under subsection (10) to refuse to pay the specified benefit; or

(d) the insured person is not entitled to the specified benefit for reasons unrelated to whether the insured person has an impairment that entitles the insured person to the specified benefit. O. Reg. 546/05, s. 9.

(7) If an insurer determines that an insured person is not entitled to receive a specified benefit by reason of clause (6) (a), (c) or (d), the insurer shall give the insured person a copy of its determination,

(a) within 10 business days after receiving the application, if the insured person is not entitled to the specified benefit by reason of clause (6) (a) or (d); or

(b) within 10 business days after the insured person failed or refused to comply with subsection 42 (10), if the insured person is not entitled to the specified benefit by reason of clause (6) (c). O. Reg. 546/05, s. 9.

(8) Within five business days after receiving the report of the examination of the insured person under section 42, the insurer shall give a copy of the report and of the insurer's determination to the insured person and to the health practitioner who completed the disability certificate submitted with the application. O. Reg. 546/05, s. 9.

(9) The insurer shall set out in its determination the specified benefits and expenses the insurer agrees to pay, the specified benefits and expenses the insurer refuses to pay and the reasons for the insurer's decision. O. Reg. 546/05, s. 9.

(10) If the insured person fails or refuses to comply with subsection 42 (10), the insurer,

(a) may make a determination that the insured person is not entitled to any specified benefit; and

(b) may refuse to pay specified benefits relating to the period after the insured person failed or refused to comply with subsection 42 (10) and before the insured person submits to the examination or provides the material required by that subsection. O. Reg. 546/05, s. 9.

(11) If the insured person subsequently complies with subsection 42 (10), the insurer shall,

(a) reconsider the application and make a new determination under this section; and

(b) pay all amounts, if any, that were withheld during the period of non-compliance, if the insurer determines that the insured person is entitled to any specified benefits and the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with subsection 42 (10). O. Reg. 546/05, s. 9.

(12) If the insurer determines after receipt of the report under section 42 that the insured person is entitled to a specified benefit, the insurer shall pay the specified benefit within 10 business days after receiving the report. O. Reg. 546/05, s. 9.

(13) If an insured person fails to submit a completed disability certificate with his or her application for a specified benefit, no specified benefits are payable for the period after the day the insurer receives the application and before the day the insurer receives the completed disability certificate. O. Reg. 546/05, s. 9.

(14) If the insurer fails to provide a copy of the report of the examination under section 42 or its determination in respect of the claim by the 15th business day after the day the examination was completed or was required under paragraph 2 or 3 of subsection 42 (11) to be completed, the insurer shall pay all specified benefits to which the application relates for the period commencing on that day and ending on the day the insurer gives the insured person the report or determination. O. Reg. 546/05, s. 9.

Election of Income Replacement, Non-earner or Caregiver Benefit

36. (1) Only one of the following benefits may be paid to a person in respect of a period of time:

1. An income replacement benefit.
2. A non-earner benefit.
3. A caregiver benefit. O. Reg. 403/96, s. 36 (1).

(2) If a person's application indicates that he or she may qualify for more than one of the benefits referred to in subsection (1), the insurer shall notify the person that he or she must elect within 30 days after receiving the notice which benefit he or she wishes to receive. O. Reg. 403/96, s. 36 (2).

(3) The insurer shall deliver the notice under subsection (2) within 10 business days after receiving the person's application. O. Reg. 403/96, s. 36 (3); O. Reg. 546/05, s. 10.

Determination of Continuing Entitlement to Specified Benefits

37. (1) If an insurer wishes to determine if an insured person is still entitled to a specified benefit, the insurer,

(a) shall request that the insured person submit within 15 business days a new disability certificate completed as of a date on or after the date of the request; and

(b) may notify the insured person that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 11.

(2) An insurer shall not discontinue paying a specified benefit to an insured person unless,

(a) the insured person fails or refuses to submit a completed disability certificate as required under clause (1) (a);

(b) the insurer has received the report of the examination under section 42, if the insurer required the insured person to be examined under that section;

(c) the insurer is entitled under subsection (7) to refuse to pay the specified benefit;

(d) the insured person has resumed his or her pre-accident employment duties;

(e) the insurer is no longer required to pay the specified benefit by reason of clause 5 (2) (d) or (e), subsection 22 (3) or 33 (2) or section 55 or 56; or

(f) the insured person is not entitled to the specified benefit for a reason unrelated to whether he or she has an impairment that entitles the insured person to receive the specified benefit. O. Reg. 546/05, s. 11.

(3) If an insured person fails to submit a completed disability certificate as required under clause (1) (a), no specified benefits are payable for the period commencing the 15th business day after the day the insured person received the insurer's request and ending, if the insured person subsequently submits a completed disability certificate, the day the insurer receives the completed disability certificate. O. Reg. 546/05, s. 11.

(4) If the insurer determines that the person is not entitled to receive any specified benefit by reason of clause (2) (a), (c), (d), (e) or (f), the insurer shall give to the insured person a copy of its determination. O. Reg. 546/05, s. 11.

(5) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination with respect to the specified benefit to the insured person and to the health practitioner who completed the disability certificate. O. Reg. 546/05, s. 11.

(6) The determination of the insurer shall specify,

(a) the specified benefits and expenses the insurer agrees to pay;

(b) the specified benefits and expenses the insurer refuses to pay;

(c) the reasons for the insurer's decision; and

(d) if the insurer determines that the insured person is not entitled to a specified benefit, the date that payment of the benefit will be stopped. O. Reg. 546/05, s. 11.

(7) If the insured person fails or refuses to comply with subsection 42 (10), the insurer may,

(a) make a determination that the insured person is no longer entitled to the specified benefit; and

(b) despite subsection (9), refuse to pay specified benefits relating to the period after the insured person failed or refused to comply with subsection 42 (10) and before the insured person submits to the examination or provides the material required under that subsection. O. Reg. 546/05, s. 11.

(8) If the insured person subsequently complies with subsection 42 (10), the insurer shall,

(a) reconsider the insured person's entitlement to the specified benefit and make a determination;

(b) subject to the insurer's determination, resume payment of the specified benefit; and

(c) pay all amounts, if any, that were withheld during the period of non-compliance if the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with subsection 42 (10). O. Reg. 546/05, s. 11.

(9) If an insurer requires an insured person to be examined under section 42 and determines that the insured person is not entitled to a specified benefit, the insurer shall not stop payment of the specified benefit unless it has provided to the insured person a copy of the report of the examination and its determination under this section. O. Reg. 546/05, s. 11.

PRE-APPROVED FRAMEWORK GUIDELINES

37.1 (1) This section applies if an insured person,

(a) submits or intends to submit an application for a benefit in accordance with section 32; and

(b) claims medical or rehabilitation benefits in respect of an impairment that comes within a *Pre-approved Framework Guideline*. O. Reg. 281/03, s. 15.

(2) The insured person shall submit to the insurer, within the time specified in the *Pre-approved Framework Guideline* applicable to the impairment, a treatment confirmation form that satisfies the following requirements:

1. The treatment confirmation form shall be prepared by a health practitioner who is authorized by law to treat the impairment that is the subject of the form and who will be the health practitioner responsible for providing goods and services under the treatment confirmation form.
2. The treatment confirmation form shall contain details concerning the impairment and specify the *Pre-approved Framework Guideline* under which benefits are claimed.
3. The treatment confirmation form shall include a statement by the health practitioner who prepared the form,
    i. disclosing any conflict of interest that he or she has that relates to the goods or services to be provided under the *Pre-approved Framework Guideline*,
    ii. confirming that he or she has made reasonable inquiries to determine if any person who referred the insured person to a person who will provide goods or services under the *Pre-approved Framework Guideline* has a conflict of interest relating to the treatment, and
    iii. disclosing any conflict of interest that a person who referred the insured person to a person who will provide goods or services under the *Pre-approved Framework Guideline* has that relates to the treatment.
4. The treatment confirmation form shall be signed by the insured person, unless the insurer waives this requirement. O. Reg. 281/03, s. 15; O. Reg. 533/06, s. 5.

(3) A lawyer or other representative who acts for the insured person in respect of the application for a benefit or in respect of any civil proceeding arising from the accident shall, at the time the treatment confirmation form is submitted, give the insurer and the insured person written notice disclosing any conflict of interest that the lawyer or representative has relating to the claim for benefits. O. Reg. 281/03, s. 15.

(4) If a conflict of interest is disclosed in the treatment confirmation form or by a person under subsection (3), the insurer may refuse the application. O. Reg. 281/03, s. 15.

(5) Within five business days after receiving a treatment confirmation form, the insurer shall send a notice that complies with the following rules to the insured person and to the health practitioner, acknowledging receipt of the treatment confirmation form:

1. The notice shall state whether the policy referred to in the treatment confirmation form was in force at the time of the accident.
2. If the insurer refuses the application by reason of a conflict of interest, the notice shall state the reason the application is refused, what the conflict of interest is and that the insured person may submit a new application.
3. If the treatment confirmation form includes a claim for ancillary goods or services referred to in section 37.2, the notice shall comply also with the requirements of that section. O. Reg. 281/03, s. 15.

(6) Despite subsection (4), the insurer shall not refuse an application because of a conflict of interest if there is no other person within 50 kilometres of the insured person's residence who is able to provide the goods or services to which the conflict of interest relates. O. Reg. 281/03, s. 15.

(7) If an insured person submits an application under section 32 and a treatment confirmation form under this section in respect of an impairment and the claim is accepted by the insurer, the insurer is liable to pay benefits of a type described in section 14 or 15 in respect of the impairment only in accordance with,

(a) the *Pre-approved Framework Guideline* to which the treatment confirmation form relates; and

(b) the requirements of section 37.2, if that section applies in respect of the claim. O. Reg. 281/03, s. 15.

(8) If the insured person has submitted an application under section 32 to the insurer, the insurer shall pay a benefit referred to in subsection (7) within 30 days after receiving an invoice for goods or services,

(a) that have been provided under the *Pre-approved Framework Guideline* to which the treatment confirmation form relates;

(b) that the insurer has agreed under section 37.2 to pay for and that have been provided; or

(c) that the insurer is required under subsection 37.2 (9) to pay for and that have been provided. O. Reg. 281/03, s. 15; O. Reg. 546/05, s. 12 (1).

(9) An insurer is not liable to pay benefits under more than one treatment confirmation form relating to the same *Pre-approved Framework Guideline*. O. Reg. 281/03, s. 15.

(10) An insured person may receive benefits under two or more *Pre-approved Framework Guidelines* if permitted under the *Guidelines*. O. Reg. 281/03, s. 15.

(11) An insured person shall submit an amended treatment confirmation form if, during the course of treatment under a *Pre-approved Framework Guideline*, he or she changes the health practitioner who is responsible for providing goods and services under the treatment confirmation form. O. Reg. 281/03, s. 15.

(12) The insurer is liable to pay for goods and services under an amended treatment confirmation form only to the extent the goods and services have not already been provided under the *Pre-approved Framework Guideline*. O. Reg. 281/03, s. 15.

(13) Revoked: O. Reg. 546/05, s. 12 (2).

(14) If goods or services available under a *Pre-approved Framework Guideline* are not provided within the times specified in the applicable *Guideline*, any claim for medical or rehabilitation benefits to which the *Guideline* would otherwise apply shall, subject to section 37.2, be submitted in accordance with section 38. O. Reg. 281/03, s. 15.

(15) If it is determined in any dispute about an insured person's entitlement to medical or rehabilitation benefits or related assessments or examinations that a *Pre-approved Framework Guideline* applies to the insured person and the insured person received benefits or underwent assessments or examinations under the *Pre-approved Framework Guideline*,

(a) the benefits shall be deemed to have been reasonable and necessary for the purposes of sections 14 and 15; and

(b) the assessments and examinations shall be deemed to have been reasonably required for the purposes of section 24. O. Reg. 281/03, s. 15; O. Reg. 45/16, s. 1.

37.2 (1) In this section, ancillary goods or services, in respect of an impairment to which a *Pre-approved Framework Guideline* applies, are goods or services for which the *Guideline*,

(a) requires the insurer's approval; and

(b) permits a claim to be made in a treatment confirmation form under section 37.1. O. Reg. 281/03, s. 15.

(2) If a treatment confirmation form under section 37.1 includes a claim for ancillary goods or services, the insurer shall,

(a) include in the notice required under subsection 37.1 (5) a statement of which ancillary goods and services, if any, the insurer agrees to pay for; and

(b) notify the insured person that the insurer requires the insured person to be examined under section 42, if the insurer has not agreed to pay for all of the ancillary goods and services included in the claim. O. Reg. 546/05, s. 13.

(3) A notice referred to in clause (2) (b) must be given to the insured person within five business days after the day the insurer receives the treatment confirmation form. O. Reg. 546/05, s. 13.

(4) If the insurer fails to comply with the requirements of subsection 37.1 (5) or subsection (3) of this section within the time required under those subsections, the insurer shall pay for all ancillary goods and services delivered under the treatment confirmation form. O. Reg. 546/05, s. 13.

(5) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination with respect to payment for the ancillary goods and services to the insured person and the health practitioner who prepared the treatment confirmation form. O. Reg. 546/05, s. 13.

(6) The determination of the insurer shall specify the ancillary goods and services the insurer agrees to pay for, the ancillary goods and services the insurer refuses to pay for and the reasons for the insurer's decision. O. Reg. 546/05, s. 13.

(7) If an insured person fails or refuses to comply with subsection 42 (10), the insurer may make a determination that the insured person is not entitled to payment for the ancillary goods and services to which the examination relates. O. Reg. 546/05, s. 13.

(8) If an insured person subsequently complies with subsection 42 (10), the insurer shall reconsider the insured person's claim and make a determination under this section. O. Reg. 546/05, s. 13.

(9) If the insurer fails to provide a copy of the report of the examination under section 42 or its determination in respect of the claim by the day determined in the following manner, the insurer shall pay for all ancillary goods and services provided in accordance with the treatment confirmation form:

1. If the attendance of the insured person was not required for the examination under section 42, the day is the 10th business day after the day the material required under subsection 42 (10) was provided.

2. If the attendance of the insured person was required for the examination, the day is the 15th business day after the day the examination was completed or was required under paragraph 2 or 3 of subsection 42 (11) to be completed. O. Reg. 546/05, s. 13.

37.3 (1) This section applies to a claim for medical or rehabilitation benefits under section 37.1 or 37.2 in respect of an impairment that is asserted by the insurer to come within a *Pre-approved Framework Guideline* if the insurer gives the insured person a notice informing the insured person that the insurer will pay for the goods and services described in the *Pre-approved Framework Guideline* without the submission of a treatment confirmation form under either of those sections. O. Reg. 533/06, s. 6.

(2) If an insurer gives notice under subsection (1), the notice shall satisfy the following criteria:

1. The notice must specify which *Pre-approved Framework Guideline* the insurer asserts to be applicable to the claimant's impairment and confirm that the insurer will pay for goods and services under section 37.1 in accordance with the *Pre-approved Framework Guideline* without the submission of a treatment confirmation form under that section.
2. The notice must describe the expenses for ancillary goods or services, if any, as referred to in section 37.2, that the insurer will pay without the submission of a treatment confirmation form and shall specify,
    i. the types of expenses,
    ii. any restrictions on the amount of the expenses, and
    iii. any restrictions on when the expenses may be incurred.
3. The notice must disclose any conflict of interest that the insurer has relating to any person who will provide goods or services to whom the insured person is referred by the insurer. O. Reg. 533/06, s. 6.

(3) If an insurer gives notice under subsection (1),

(a) the insurer shall, if the insured person has submitted an application under section 32 to the insurer, pay the expenses described in the notice within 30 days after receiving an invoice for them; and

(b) if there is a dispute under section 280 of the Act about whether, for the purpose of subsection 14 (2) or 15 (5), an expense described in the notice is reasonable or necessary, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 533/06, s. 6; O. Reg. 45/16, s. 2.

(4) An insured person who receives a notice under subsection (1) may, despite the notice, submit a treatment confirmation form in accordance with section 37.1 or a treatment plan in accordance with section 38, in which case this section shall not apply. O. Reg. 533/06, s. 6.

Medical and Rehabilitation Benefits

38. (1) Subject to subsection (2.1), this section applies to,

(a) any claim for medical or rehabilitation benefits other than,
    (i) a claim payable under section 37.1, and
    (ii) a claim for ancillary goods and services referred to in section 37.2; and

(b) applications for assessments or examinations that are submitted with a treatment plan under subsection (2). O. Reg. 281/03, s. 16 (1); O. Reg. 546/05, s. 14 (1).

(1.1) An insurer is not liable to pay any expense in respect of medical benefits or rehabilitation benefits that was incurred before the insured person submits an application for the benefit that satisfies the requirements of subsection (2) unless the expense is for an ambulance or other goods or services provided on an emergency basis not more than five business days after the accident to which the application relates. O. Reg. 546/05, s. 14 (2).

(2) An application under this section must be signed by the insured person, unless the insurer waives that requirement, and must include, unless section 38.1 applies,

(a) a treatment plan that complies with subsection (3), prepared by a member of a health profession or by a social worker; and

(b) a statement by a health practitioner approving the treatment plan referred to in clause (a) and stating that he or she is of the opinion,

(i) that the expenses contemplated by the treatment plan are reasonable and necessary for the insured person's treatment or rehabilitation, and

(ii) that the impairment sustained by the insured person does not come within a *Pre-approved Framework Guideline*. O. Reg. 281/03, s. 16 (2); O. Reg. 546/05, s. 14 (3).

(2.1) An insurer may refuse to accept a treatment plan under this section that provides for goods or services to be received in respect of any period during which the insured person is entitled to receive goods or services under a *Pre-approved Framework Guideline*, unless the *Guideline* allows the insured person to receive both, and the insurer's refusal is final and not subject to review. O. Reg. 281/03, s. 16 (2).

(2.2) Nothing in subsection (2.1) prevents an insured person, while receiving goods or services under a *Pre-approved Framework Guideline*, from submitting a treatment plan applicable to a period other than the period referred to in that subsection. O. Reg. 281/03, s. 16 (2).

(3) The treatment plan shall include a statement by the person who prepared the plan,

(a) disclosing any conflict of interest that he or she has relating to the treatment plan;

(b) indicating that he or she has made reasonable inquiries to determine whether any person who referred the insured person to a person who will provide goods or services contemplated by the treatment plan has a conflict of interest relating to the treatment plan; and

(c) disclosing any conflict of interest that a person who referred the insured person to a person who will provide goods or services contemplated by the treatment plan has relating to the treatment plan. O. Reg. 403/96, s. 38 (3); O. Reg. 546/05, s. 14 (4); O. Reg. 533/06, s. 7.

(3.1) Revoked: O. Reg. 546/05, s. 14 (5).

(4) A lawyer or other representative who acts for the insured person in respect of the application or in respect of any civil proceeding arising from the accident shall, at the time the application is submitted, give the insurer and the insured person written notice disclosing any conflict of interest that the lawyer or other representative has relating to the treatment plan. O. Reg. 403/96, s. 38 (4).

(5) If a conflict of interest is disclosed under subsection (3) or (4), the insurer may, within 10 business days after receiving the application, give the insured person notice that the application is refused and that the insured person may submit a new application. O. Reg. 403/96, s. 38 (5); O. Reg. 546/05, s. 14 (6).

(6) Subsection (5) does not apply if there is no other person within 50 kilometres of the insured person's residence who is able to provide the goods or services from which the conflict of interest arises. O. Reg. 403/96, s. 38 (6).

(7) On receiving the application, the insurer shall promptly determine whether the insurer is required to pay for the goods and services contemplated by the treatment plan. O. Reg. 403/96, s. 38 (7).

(8) If no notice is given under subsection (5), the insurer shall give the insured person one of the following notices:

1. A notice,

i. that discloses any conflict of interest the insurer has relating to the treatment plan,

ii. that describes the goods and services, if any, contemplated by the treatment plan that the insurer agrees to pay for, and

iii. that advises the insured person, if the insurer has not agreed to pay for all goods and services contemplated by the treatment plan, that the insurer requires the insured person to be examined under section 42 relating to the goods and services the insurer has not agreed to pay for.

2. A notice advising the insured person that the insurer,

i. believes that the insured person may have an impairment to which a *Pre-approved Framework Guideline* applies, and

ii. requires the insured person to be examined under section 42 to assist the insurer in determining if the insured person has an impairment to which a *Pre-approved Framework Guideline* applies. O. Reg. 281/03, s. 16 (4); O. Reg. 546/05, s. 14 (7).

(8.1) A notice under subsection (8) must be given,

(a) within 10 business days after the insurer receives the application, in the case of a notice described in paragraph 1 of subsection (8); or

(b) within five business days after the insurer receives the application, in the case of a notice described in paragraph 2 of subsection (8). O. Reg. 281/03, s. 16 (4); O. Reg. 546/05, s. 14 (8).

(8.2) If the insurer fails to give a notice under subsection (8) in accordance with subsection (8.1), the following rules apply:

1. In the case of a notice under paragraph 2 of subsection (8),

i. the insurer shall not take the position that the insured person has an impairment to which a *Pre-approved Framework Guideline* applies, and

ii. the insurer shall give a notice described in paragraph 1 of subsection (8) in accordance with subsection (8.1).

2. In the case of a notice under paragraph 1 of subsection (8), the insurer shall pay for all goods and services provided under the treatment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives the notice described in paragraph 1 of subsection (8). O. Reg. 281/03, s. 16 (4); O. Reg. 546/05, s. 14 (9, 10).

(9) If the insurer discloses a conflict of interest relating to the treatment plan, the insured person may, within 10 business days after receiving the notice under paragraph 1 of subsection (8), withdraw the application and submit a new application. O. Reg. 403/96, s. 38 (9); O. Reg. 281/03, s. 16 (5); O. Reg. 546/05, s. 14 (11).

(10) Subsection (9) does not apply if there is no other person within 50 kilometres of the insured person's residence who is able to provide the goods or services from which the conflict of interest arises. O. Reg. 403/96, s. 38 (10).

(11) If the application is not withdrawn under subsection (9), the insurer shall pay for goods and services the insurer agreed to pay for in the notice under paragraph 1 of subsection (8) within 30 days after receiving an invoice for them. O. Reg. 281/03, s. 16 (6).

(12), (12.1) Revoked: O. Reg. 546/05, s. 14 (12).

(12.2) If an insurer gives a notice described in paragraph 2 of subsection (8), the insured person may submit a treatment confirmation form under section 37.1 and, pending the insurer's determination, may receive goods and services in accordance with the *Pre-approved Framework Guideline* and such ancillary goods and services as the insurer believes to be appropriate for the insured person's impairment. O. Reg. 546/05, s. 14 (13).

(12.3) Revoked: O. Reg. 546/05, s. 14 (13).

(13) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination to the insured person and to the health practitioner who approved the treatment plan. O. Reg. 546/05, s. 14 (13).

(14) The determination of the insurer shall specify,

(a) the goods and services contemplated by the treatment plan that the insurer agrees to pay for, the goods and services the insurer refuses to pay for and the reasons for the insurer's decision, in the case where the insurer gave a notice referred to in paragraph 1 of subsection (8); or

(b) whether the insurer has determined that the insured person has an impairment to which a *Pre-approved Framework Guideline* applies and the reasons for the insurer's decision, in the case where the insurer gave a notice referred to in paragraph 2 of subsection (8). O. Reg. 546/05, s. 14 (13).

(15) If an insured person fails or refuses to comply with subsection 42 (10), the insurer may make a determination that the insured person is not entitled to the goods and services contemplated by the treatment plan. O. Reg. 546/05, s. 14 (13).

(16) If an insured person subsequently complies with subsection 42 (10), the insurer shall reconsider the insured person's claim and make a determination under this section. O. Reg. 546/05, s. 14 (13).

(17) If the insurer fails to provide a copy of the report of the examination under section 42 or its determination in respect of the claim by the day determined under subsection (17.1),

(a) the insurer shall pay for all goods and services provided in accordance with the treatment plan during the period commencing on that day and ending on the day the insurer gives the insured person the report or determination; and

(b) the insurer shall not take the position that the insured person has an impairment to which a *Pre-approved Framework Guideline* applies. O. Reg. 546/05, s. 14 (13).

(17.1) For the purposes of subsection (17), the day is determined as follows:

1. If the attendance of the insured person was not required for the examination under section 42, the day is the 10th business day after the day the material required under subsection 42 (10) was provided.
2. If the attendance of the insured person was required for the examination, the day is the 15th business day after the day the examination was completed or was required under paragraph 2 or 3 of subsection 42 (11) to be completed. O. Reg. 546/05, s. 14 (13).

(17.2) An insurer shall pay an expense in respect of medical or rehabilitation benefits that it has agreed to pay or that it is required under this section to pay within 30 days after receiving an invoice for the expense. O. Reg. 546/05, s. 14 (13).

(18) Revoked: O. Reg. 546/05, s. 14 (13).

(19) If, after giving notice under subparagraph 1 i of subsection (8), it comes to the attention of the insurer that a person described in subsection (3) or (4) has a conflict of interest relating to the treatment plan, the insurer may give the insured person notice requiring the insured person, within 10 business days after receiving the notice, to amend the treatment plan to remove the conflict of interest. O. Reg. 403/96, s. 38 (19); O. Reg. 281/03, s. 16 (12); O. Reg. 546/05, s. 14 (14).

(20) If the insured person does not comply with a notice under subsection (19), the insurer is not required to pay for any further expenses for goods or services from which the conflict of interest arises. O. Reg. 403/96, s. 38 (20).

(21) Subsection (20) does not apply if there is no other person within 50 kilometres of the insured person's residence who is able to provide the goods or services from which the conflict of interest arises. O. Reg. 403/96, s. 38 (21).

(22)-(25) Revoked: O. Reg. 281/03, s. 16 (13).

38.1 (1) This section applies to a claim for a medical or rehabilitation benefit under section 38 if the insurer gives the insured person a notice informing the insured person that the insurer will pay the expenses without the submission of a treatment plan under that section. O. Reg. 281/03, s. 17.

(2) If the insurer gives the insured person a notice under subsection (1),

(a) the notice shall describe the expenses that the insurer will pay without the submission of a treatment plan and shall specify,

(i) the types of expenses,

(ii) any restrictions on the amount of the expenses, and

(iii) any restrictions on when the expenses may be incurred;

(b) the insurer shall pay expenses described in the notice within 30 days after receiving an invoice for them; and

(c) if there is a dispute under section 280 of the Act about whether, for the purpose of subsection 14 (2) or 15 (5), an expense described in the notice is reasonable or necessary, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 281/03, s. 17; O. Reg. 45/16, s. 3.

(3) The insurer shall give the insured person a notice disclosing any conflict of interest that the insurer has relating to any person who will provide goods or services to whom the insured person is referred by the insurer. O. Reg. 281/03, s. 17; O. Reg. 533/06, s. 8 (1).

(4) Every member of a health profession and social worker who refers an insured person to another person to obtain goods or services in respect of which a medical or rehabilitation benefits will be paid by an insurer under this section shall give the insurer and the insured person written notice disclosing any conflict of interest the member of the health profession or social worker has relating to the provision of the goods or services. O. Reg. 546/05, s. 15; O. Reg. 533/06, s. 8 (2).

(5) If a conflict of interest is disclosed under subsection (4), the insurer may give the insured person a notice requiring the insured person to submit a treatment plan to the insurer under section 38 and, if a notice is given under this subsection,

(a) the insurer is relieved of any obligation under this section to pay expenses other than expenses incurred before the notice was given;

(b) subsections (1) to (4) do not apply; and

(c) the insured person may submit an application and treatment plan under section 38. O. Reg. 281/03, s. 17.

38.2 (1) This section applies to an application prepared by a member of a health profession or social worker for approval of an assessment or examination of an insured person if the application is not submitted as part of a treatment plan under section 38. O. Reg. 546/05, s. 16 (1).

(2) The application shall include a statement by the member of a health profession or social worker who is to conduct the assessment or examination,

(a) disclosing any conflict of interest that he or she has relating to the assessment or examination to which the application relates;

(b) indicating that he or she has made reasonable inquiries to determine whether any person who referred the insured person to him or her has a conflict of interest relating to the assessment or examination and, if there is a conflict of interest, disclosing the conflict of interest that the person has; and

(c) stating that the assessment or examination is reasonably required in relation to a benefit. O. Reg. 281/03, s. 17; O. Reg. 546/05, s. 16 (2); O. Reg. 533/06, s. 9.

(3) A lawyer or other representative who acts for the insured person in respect of the application or with respect to any civil proceeding arising from the accident shall, at the time the application is submitted, give the insurer and the insured person written notice disclosing any conflict of interest that the lawyer or other representative has relating to the application. O. Reg. 281/03, s. 17.

(4) If a conflict of interest is disclosed under subsection (2) or (3), the insurer may refuse the application and, within two business days after receiving the application, give the insured person notice that the application is refused and that the insured person may submit a new application. O. Reg. 281/03, s. 17.

(5) Despite subsection (4), the insurer shall not refuse the application because of a conflict of interest if there is no other person within 50 kilometres of the insured person's residence who is able to conduct the assessment or examination. O. Reg. 281/03, s. 17.

(6) If the insurer has not refused the application under subsection (4), the insurer shall give the insured person and the person who prepared the application a notice,

(a) within two business days after receiving the application if the application is received before March 1, 2006 and the amount to be charged is $180 or less;

(b) within five business days after receiving the application if the application is received before March 1, 2006 and the amount to be charged exceeds $180; or

(c) within three business days after receiving the application, if the application is received on or after March 1, 2006. O. Reg. 546/05, s. 16 (3).

(7) The notice under subsection (6) must,

(a) state which assessments or examinations in the application the insurer agrees to pay for;

(b) advise the insured person that the insurer requires the insured person to be examined under section 42, if the insurer has not agreed to pay for all assessments or examinations to which the application relates; and

(c) disclose any conflict of interest that the insurer has relating to any assessment or examination to which the application relates. O. Reg. 546/05, s. 16 (3).

(8) A notice required under subsection (6) may be given verbally if, as soon as practicable afterwards, written confirmation of the notice is given to every person who received verbal notice. O. Reg. 546/05, s. 16 (3).

(9) If the insurer does not refuse the application under subsection (4) but fails to give the notice as required under subsection (6), the insurer shall pay for all assessments and examinations to which the application relates. O. Reg. 281/03, s. 17.

(10) If, in a notice under subsection (6), the insurer discloses a conflict of interest relating to an assessment or examination, the insured person may withdraw the application and submit a new application within two business days after receiving the notice from the insurer. O. Reg. 281/03, s. 17.

(11) Despite subsection (10), the insured person shall not withdraw the application or submit a new application if there is no other person within 50 kilometres of the insured person's residence who is able to conduct the assessment or examination. O. Reg. 281/03, s. 17.

(12) If the application is not withdrawn under subsection (10), the insurer shall pay for all assessments and examinations it agreed to pay for in the notice under subsection (6) and shall make each payment within 30 days after receiving an invoice for the cost of the assessment or examination. O. Reg. 281/03, s. 17.

(13) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination with respect to the application to the insured person and the person who prepared the application. O. Reg. 546/05, s. 16 (4).

(13.1) The determination of the insurer shall specify the assessments or examinations the insurer agrees to pay for, the assessments or examinations the insurer refuses to pay for and the reasons for the insurer's decision. O. Reg. 546/05, s. 16 (4).

(13.2) If an insured person fails or refuses to comply with subsection 42 (10), the insurer may make a determination that the insured person is not entitled to the expenses to which the examination relates. O. Reg. 546/05, s. 16 (4).

(13.3) If an insured person subsequently complies with subsection 42 (10), the insurer shall reconsider the application and make a determination under this section. O. Reg. 546/05, s. 16 (4).

(13.4) If the insurer fails to provide a copy of the report of the examination under section 42 or its determination in respect of the application by the day determined in the following manner, the insurer shall pay for all assessments and examinations to which the application relates:

1. If the attendance of the insured person was not required for the examination under section 42, the day is the 10th business day after the day the material required under subsection 42 (10) was provided.
2. If the attendance of the insured person was required for the examination, the day is the 15th business day after the day the examination was completed or was required under paragraph 2 or 3 of subsection 42 (11) to be completed. O. Reg. 546/05, s. 16 (4).

(13.5) An insurer shall pay for all assessments and examinations that it has agreed to pay for or that it is required under this section to pay for within 30 days after receiving an invoice for the cost of the assessment or examination. O. Reg. 546/05, s. 16 (4).

(14) If, after giving a notice under subsection (6) in which the insurer agrees to pay for an assessment or examination, it comes to the insurer's attention that a person described in subsection (2) or (3) has a conflict of interest relating to the assessment or examination, the insurer may give the insured person notice requiring the insured person, within five business days after receiving the notice, to amend the application so that no conflict of interest will arise. O. Reg. 281/03, s. 17.

(15) If the insured person does not amend the application as required under subsection (14), the insurer is not required to pay for the assessment or examination referred to in that subsection. O. Reg. 281/03, s. 17.

(16) Subsection (14) does not apply if there is no other person within 50 kilometres of the insured person's residence who is able to conduct the assessment or examination to which the conflict of interest relates. O. Reg. 281/03, s. 17.

Conflict of Interest

38.3 (1) For the purposes of sections 37.1, 37.3, 38, 38.1 and 38.2,

(a) a person has a conflict of interest relating to the provision of goods or services if,

(i) the person or a related person may receive a financial benefit, directly or indirectly, as a result of the provision, by the related person or another person, of the goods or services, and

(ii) the person who may receive the financial benefit is not the employee of the person who will provide the goods or services and does not have a contract with the person who will provide the goods or services or under which goods or services of that kind are provided; and

(b) an insurer has a conflict of interest relating to the provision of goods or services to an insured person if,

(i) the insurer may receive a financial benefit, directly or indirectly, as a result of the provisions of the goods or services, or

(ii) the goods or services will be provided by a person pursuant to a subsisting arrangement with the insurer under which goods or services referred to in this Regulation are or will be provided at the insurer's expense. O. Reg. 281/03, s. 17; O. Reg. 533/06, s. 10.

(2) A related person, in respect of a person who is not a corporation, is an individual who is,

(a) the spouse of the person;

(b) connected with the person by blood relationship or adoption; or

(c) connected by blood relationship to the spouse of the person. O. Reg. 281/03, s. 17; O. Reg. 314/05, s. 5.

(3) For the purposes of subsection (2),

(a) persons are connected by blood relationship if one is the child or other descendant of the other or is the brother or sister of the other; and

(b) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as a child of a person who is connected by blood relationship, otherwise than as brother or sister, to the other. O. Reg. 281/03, s. 17.

Attendant Care Benefits

39. (1) An application for attendant care benefits for an insured person must be in the form of an assessment of attendant care needs for the insured person that is prepared and submitted to the insurer by a member of a health profession who is authorized by law to treat the person's impairment. O. Reg. 546/05, s. 17.

(2) Within 10 business days after receiving the assessment of attendant care needs, the insurer shall give the insured person a notice that,

(a) advises the insured person which, if any, expenses described in the assessment of attendant care needs the insurer agrees to pay; and

(b) advises the insured person that the insurer requires the insured person to be examined under section 42, if the insurer has not agreed to pay all expenses described in the assessment of attendant care needs. O. Reg. 546/05, s. 17.

(3) An insurer may, but is not required to, pay an expense incurred before an assessment of attendant needs that complies with subsection (1) is submitted to the insurer. O. Reg. 546/05, s. 17.

(4) The insurer shall begin payment of attendant care benefits within 10 business days after receiving the assessment of attendant care needs and, pending receipt by the insurer of the report of any examination under section 42 required by the insurer, shall calculate the amount of the benefits based on the assessment of attendant care needs. O. Reg. 546/05, s. 17.

(5) If an insurer wants to determine if an insured person is still entitled to attendant care benefits, wants to determine if the benefits are being paid in the appropriate amount or wants to determine both, the insurer shall give the person a notice requesting that a new assessment of attendant care needs for the insured person that complies with subsection (1) be submitted to the insurer within 10 business days after the insured person receives the notice. O. Reg. 546/05, s. 17.

(6) Subject to subsection (10), a notice under subsection (5) may also advise the insured person that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 17.

(7) Subject to subsection (10), new assessments of attendant care needs may be submitted to an insurer at any time there are changes that would affect the amount of the benefits. O. Reg. 546/05, s. 17.

(8) If a new assessment of attendant care needs indicates that it is appropriate to increase the amount of the attendant care benefits and the insurer has not already advised the insured person that the insurer requires the insured person to be examined under section 42, the insurer may give a notice to the insured person advising that the insurer requires the insured person to be examined under section 42. O. Reg. 546/05, s. 17.

(9) If a new assessment of attendant care needs is required under subsection (5) or the insurer requires an examination under section 42, the insurer shall, subject to section 18, continue to pay the insured person attendant care benefits at the same rate until the insurer receives the assessment of attendant care needs or the report of the examination, as applicable. O. Reg. 546/05, s. 17.

(10) If more than 104 weeks have elapsed since the accident, the insurer shall not require the insured person to be examined under section 42 to determine the insured person's entitlement to attendant care benefits and the insured person shall not submit nor be required to submit an assessment of attendant care needs to the insurer unless,

(a) the insured person is or may be entitled under section 18 to receive attendant care benefits more than 104 weeks after the accident; and

(b) at least 52 weeks have elapsed since the last examination under section 42. O. Reg. 546/05, s. 17.

(11) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination with respect to the benefit to the insured person and to the member of the health profession who prepared the assessment of attendant care needs. O. Reg. 546/05, s. 17.

(12) The insurer's determination shall specify the benefits and expenses the insurer agrees to pay, the benefits and expenses the insurer refuses to pay and the reasons for the insurer's decision. O. Reg. 546/05, s. 17.

(13) If an insured person fails or refuses to comply with subsection 42 (10), the insurer may,

(a) make a determination that the insured person is not entitled to attendant care benefits; and

(b) refuse to pay attendant care benefits relating to the period after the person failed or refused to comply with subsection 42 (10) and before the insured person submits to the examination and provides the material required by subsection 42 (10). O. Reg. 546/05, s. 17.

(14) If an insured person subsequently complies with subsection 42 (10), the insurer shall,

(a) reconsider the application and make a determination under this section;

(b) subject to the new determination, resume payment of attendant care benefits; and

(c) pay all amounts, if any, that were withheld during the period of non-compliance, if the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with subsection 42 (10). O. Reg. 546/05, s. 17.

(15) If an insurer determines that an insured person is not entitled, by reason of section 18, to attendant care benefits for expenses incurred more than 104 weeks after the accident, the insurer shall give the insured person a notice of its determination, with reasons, not less than 10 business days before the last payment of attendant care benefits. O. Reg. 546/05, s. 17.

(16) An assessment of attendant care needs under this section in respect of accidents occurring on or after March 31, 2008 shall be in the form of and contain the information required in the "Assessment of Attendant Care Needs" dated March 1, 2008 and available on the website for the Financial Services Commission of Ontario. O. Reg. 63/08, s. 1.

(16.1) Revoked: O. Reg. 63/08, s. 1.

(17) An assessment of attendant care needs under this section in respect of accidents occurring on or after February 1, 2007 but before March 31, 2008 shall be in the form of and contain the information required in the "Assessment of Attendant Care Needs" dated December 31, 2006 and available on the website for the Financial Services Commission of Ontario. O. Reg. 63/08, s. 1.

(18) An assessment of attendant care needs under this section in respect of accidents occurring on or after March 1, 2006 but before February 1, 2007 shall be in the form of and contain the information required in the "Assessment of Attendant Care Needs" dated December 31, 2005, as it read on March 1, 2006 and available on the website for the Financial Services Commission of Ontario. O. Reg. 63/08, s. 1.

(19) An assessment of attendant care needs under this section in respect of accidents occurring before March 1, 2006 shall be in Form 1, as it read on February 28, 2006 and available on the website for the Financial Services Commission of Ontario. O. Reg. 63/08, s. 1.

Determination of Catastrophic Impairment

40. (1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment. O. Reg. 403/96, s. 40 (1).

(2) Within 30 days after receiving an application under subsection (1), the insurer shall give the insured person,

(a) a notice stating that the insurer has determined that the impairment is a catastrophic impairment; or

(b) a notice advising the insured person that the insurer requires the insured person to be examined under section 42 to assist the insurer in determining if the impairment is a catastrophic impairment. O. Reg. 546/05, s. 18.

(3) If an application is made under this section not more than 104 weeks after the accident and, immediately before the application was made, the insured person was receiving attendant care benefits,

(a) the insurer shall continue to pay attendant care benefits to the insured person during the period before the insurer makes a determination under this section; and

(b) the amount of the attendant care benefits for the period referred to in clause (a) shall be determined on the assumption that the insured person's impairment is a catastrophic impairment. O. Reg. 546/05, s. 18.

(3.1) Revoked: O. Reg. 546/05, s. 18.

(4) Within five business days after receiving the report of an examination under section 42, the insurer shall give a copy of the report and the insurer's determination of whether the insured person's impairment is a catastrophic impairment to the insured person and to the health practitioner who prepared the application under this section. O. Reg. 546/05, s. 18.

(5) The determination of the insurer shall specify the reasons for the insurer's determination of whether the insured person's impairment is a catastrophic impairment. O. Reg. 546/05, s. 18.

(6) If an insured person fails or refuses to comply with subsection 42 (10), the insurer,

(a) may make a determination that the insured person does not have a catastrophic impairment;

(b) may stop payment of any benefits that are payable only if the insured person has a catastrophic impairment; and

(c) may, in respect of the period after the insured person failed or refused to comply with subsection 42 (10) and before the insured person submits to the examination and provides the material required by subsection 42 (10), refuse to pay a benefit or expense that is payable only if the person has a catastrophic impairment. O. Reg. 546/05, s. 18.

(7) If an insured person subsequently complies with subsection 42 (10), the insurer shall,

(a) reconsider the application and make a determination under this section;

(b) subject to the determination, resume payment of benefits, if benefits were being paid before the examination; and

(c) pay all amounts, if any, that were withheld during the period of non-compliance, if the insurer determines that the insured person sustained a catastrophic impairment and the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with subsection 42 (10). O. Reg. 546/05, s. 18.

(8) If the insurer fails to provide a copy of the report of the examination under section 42 or its determination in respect of the application by the day determined in the following manner, the insurer shall, for the period commencing on that day and ending on the day the insurer gives the insured person the report or determination, pay all amounts in respect of benefits and goods and services to which the insured person would be entitled if he or she had sustained a catastrophic impairment:

1. If the attendance of the insured person was not required for the examination under section 42, the day is the 15th business day after the day the material required under subsection 42 (10) was provided.
2. If the attendance of the insured person was required for the examination, the day is the 15th business day after the day the examination was completed or was required under paragraph 2 or 3 of subsection 42 (11) to be completed. O. Reg. 546/05, s. 18.

Other Benefits

41. (1) If a person is entitled to a death benefit, a funeral benefit or a benefit under Part VI, the insurer shall pay the benefit within 30 days after the insurer receives the application for the benefit. O. Reg. 403/96, s. 41 (1).

(2) If the insurer refuses to pay a benefit referred to in subsection (1), the insurer shall give the person notice of the reasons for the refusal within 30 days after the insurer receives the application for the benefit. O. Reg. 403/96, s. 41 (2).

(3) In the case of a benefit described in section 22, subsections (1) and (2) are subject to sections 35 and 37. O. Reg. 546/05, s. 19.

Transitional Rules — March 1, 2006

41.1 (1) Subject to subsection (2), sections 34, 35 and 37, as they read on February 28, 2006, continue to apply in respect of a claim by a person for income replacement, non-earner or caregiver benefits if, under subsection 37 (1), as it read on February 28, 2006, the insurer gave or was required to give the person, before March 1, 2006, a notice with respect to the claim. O. Reg. 546/05, s. 20.

(2) If, after February 28, 2006, an insurer wishes to determine if a person continues to be entitled to receive income replacement, non-earner or caregiver benefits, section 37, as it reads after February 28, 2006 applies. O. Reg. 546/05, s. 20.

(3) Subsections 37.2 (2) to (5), as they read on February 28, 2006, continue to apply in respect of a claim by an insured person for ancillary goods or services if, under subsection 37.1 (5) as it read on February 28, 2006, the insurer gave or was required to give the insured person, before March 1, 2006, a notice under section 37.1 as it read on February 28, 2006, stating that the insurer requires the insured person to be assessed by a designated assessment centre in respect of ancillary goods or services for which the insurer will not pay. O. Reg. 546/05, s. 20.

(4) Section 38, as it read on February 28, 2006, continues to apply in respect of a claim for medical and rehabilitation benefits by an insured person if, under subsection 38 (8.1) as it read on February 28, 2006, the insurer gave or was required to give the insured person, before March 1, 2006, a notice referred to in subclause 38 (12) (b) (ii) or (12.1) (b) (ii), as it read on February 28, 2006. O. Reg. 546/05, s. 20.

(5) If, before March 1, 2006, an insured person has submitted an application under subsection 38 (3.1), as it read on February 28, 2006, subsection 38 (18) as it read on that day continues to apply in respect of the application. O. Reg. 546/05, s. 20.

(6) Subsections 38.2 (8) and (13), as they read on February 28, 2006, and subsections 38.2 (9) to (12) and (14) to (16) apply in respect of an application for approval for an assessment or examination if, under subsection 38.2 (6), as it read on February 28, 2006, the insurer gave or was required to give the insured person, before March 1, 2006, a notice under subsection 38.2 (6), as it read on February 28, 2006, requiring the insured person to be assessed by a designated assessment centre. O. Reg. 546/05, s. 20.

(7) Section 39, as it read on February 28, 2006, continues to apply to an application for attendant care benefits by an insured person if, under subsection 39 (4), as it read on February 28, 2006, the insurer gave or was required to give the insured person, before March 1, 2006, a notice under subsection 39 (4), as it read on February 28, 2006, requiring the insured person to be assessed by a designated assessment centre. O. Reg. 546/05, s. 20.

(8) Section 39, as it read on February 28, 2006, continues to apply to an application for an increase in attendant care benefits if, under subsection 39 (7) or (8), as it read on February 28, 2006, an insurer gave or was required to give the insured person, before March 1, 2006, a notice requiring the insured person to be assessed by a designated assessment centre. O. Reg. 546/05, s. 20.

(9) Section 40, as it read on February 28, 2006, continues to apply to an application for a determination of whether an insured person has a catastrophic impairment if, under subsection 40 (2), as it read on February 28, 2006, the insurer gave or was required to give the insured person, before March 1, 2006, a notice under subsection 40 (2), as it read on February 28, 2006, requiring the insured person to be assessed by a designated assessment centre. O. Reg. 546/05, s. 20.

(10) Despite subsections (1) to (9), if a designated assessment of an insured person cannot be conducted or completed on or after March 1, 2006 because there is no designated assessment centre that satisfies the requirements of section 53, the insurer may give the insured person notice under subsection 42 (4), as it reads after February 28, 2006, requiring the insured person to be examined under section 42 in respect of the claim or application, instead of being assessed by a designated assessment centre, and the provisions of this Regulation, as they read after February 28, 2006, apply in respect of the disposition of the claim or application after the notice is given. O. Reg. 546/05, s. 20.

Examination Required by Insurer

42. (1) For the purposes of assisting an insurer determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, an insurer may, as often as is reasonably necessary, require an insured person to be examined under this section by one or more persons chosen by the insurer who are members of a health profession or are social workers or who have expertise in vocational rehabilitation. O. Reg. 546/05, s. 21.

(2) Subsection (1) does not apply with respect to,

(a) a benefit to which section 37.1 applies, other than an amount claimed for ancillary goods or services referred to in section 37.2; or

(b) a funeral benefit or death benefit. O. Reg. 546/05, s. 21.

(3) Subject to subsection (7), each of the following examinations under this section shall be limited to an examination of material provided under subsection (10) in respect of the insured person without requiring the attendance of the insured person:

1. An examination for the purposes of section 37.2 to assist the insurer in determining whether to pay for ancillary goods or services claimed by the insured person.
2. An examination after an application is made under section 38 to assist the insurer in determining if the insured person has an impairment to which a *Pre-approved Framework Guideline* applies.
3. An examination for the purposes of section 38 to assist the insurer in determining whether to pay for goods or services contemplated by a treatment plan if the goods and services are substantially similar to goods or services the insurer previously refused to pay for when they were included in a previous treatment plan submitted to the insurer on behalf of the insured person in respect of the same accident.
4. An examination for the purposes of section 38.2 relating to an application for approval of an assessment or examination.
5. An examination for the purposes of section 40 that relates only to the issue of whether the insured person has a brain impairment that results in a score of 9 or less on the Glasgow Coma Scale referred to in subclause 2 (1.2) (e) (i). O. Reg. 546/05, s. 21.

(4) Whenever the insurer requires an insured person to be examined under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,

(a) the reasons for the examination;

(b) the type of examination that will be conducted and whether the attendance of the insured person is required during the examination;

(c) the name of the person or persons who will conduct the examination, the regulated health professions to which they belong and their titles and designations indicating their specialization, if any, in their professions; and

(d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days. O. Reg. 546/05, s. 21.

(5) If the insurer has already notified the insured person under this Regulation that the insurer requires the insured person to be examined under this section, the insurer shall give the notice required under subsection (4),

(a) not more than two business days after the previous notice was given, if the attendance of the insured person is not required at the examination, unless the examination is for the purposes of assisting the insurer determine if the insured person has a catastrophic impairment; or

(b) not more than five business days after the previous notice was given and, unless the insured person and the insurer mutually agree otherwise, not less than five business days before the examination, if the attendance of the insured person is required at the examination or if the examination is for the purposes of assisting the insurer determine if the insured person has a catastrophic impairment. O. Reg. 546/05, s. 21.

(6) If the insurer is not authorized under another section of this Regulation to give the insured person notice that the insurer requires the insured person to be examined under this section, the insurer shall give the insured person the notice required under subsection (4) not less than five business days before the examination, unless the insured person and insurer mutually agree otherwise. O. Reg. 546/05, s. 21.

(7) If a notice under subsection (4) indicates that the attendance of the insured person is not required for the examination and it is subsequently determined by the person conducting the examination that the insured person should be in attendance and personally examined, the insurer shall give a notice to the insured person within two business days after the day the notice described in subsection (4) is given and at least five business days before the examination,

(a) notifying the insured person of the change in the type of examination;

(b) requiring the attendance of the insured person at the examination; and

(c) setting out the day, time and location of the examination and, if the examination will require more than one day, setting out the same information for the subsequent days. O. Reg. 546/05, s. 21.

(8) A notice under subsection (4) or (7) may be verbal if a written confirmation is given as soon as practicable afterwards. O. Reg. 546/05, s. 21.

(9) The following applies if the attendance of the insured person is required at an examination:

1. The insurer shall make reasonable efforts to schedule the examination for a day and time that are convenient for the insured person.
2. Subject to paragraph 3, the examination must be conducted, unless the insured person otherwise consents, at a location that is not more than,
    i. 30 kilometres from the insured person's residence, if the residence is in the City of Toronto or in The Regional Municipality of Durham, The Regional Municipality of Halton, The Regional Municipality of Peel or The Regional Municipality of York, or
    ii. 50 kilometres from the insured person's residence, if the residence is not in a municipality described in subparagraph i.
3. If, after taking reasonable steps, the insurer is unable to arrange for a qualified person to conduct the examination at a location within the distance required under subparagraph 2 i or ii, as applicable, the insurer may arrange for the examination to be conducted by a qualified person at a location that is reasonable in the circumstances. O. Reg. 546/05, s. 21.

(10) For the purposes of the examination,

(a) the insured person and the insurer shall, within five business days after the day the notice of the examination under subsection (4) or (7) is received by the insured person, provide to the person or persons conducting the examination all reasonably available information and documents that are relevant or necessary for the review of the insured person's medical condition; and

(b) if the attendance of the insured person is required at the examination, the insured person shall attend the examination and submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination. O. Reg. 546/05, s. 21.

(11) Subject to subsection (12), if the insured person complies with subsection (10), the person or persons conducting the examination shall complete the examination, prepare a report of their findings and provide a copy of the report to the insurer in accordance with the following:

1. If the attendance of the insured person was not required for the examination, the examination must be completed and a copy of the report provided to the insurer,
    i. not more than 10 business days after the day the notice of the examination under subsection (4) was given to the insured person, if the examination relates to whether the insured person has a catastrophic impairment, or

ii. not more than five business days after the day the notice of the examination under subsection (4) was given to the insured person, in any other case.

2. If the attendance of the insured person was required at the examination and the examination relates to whether the insured person has sustained a catastrophic impairment or, if the insured person has sustained a catastrophic impairment, relates to whether the insured person is entitled to medical benefits, rehabilitation benefits, specified benefits under section 35 or attendant care benefits,

i. the examination must be completed not more than 30 business days after the day the notice relating to the examination was given under subsection (4) or, if a notice was given under subsection (7), 30 business days after the day that notice was given, and

ii. a copy of the report of the examination must be given to the insurer not later than 10 business days after the day the examination was completed.

3. If the attendance of the insured person was required at the examination and paragraph 2 does not apply,

i. the examination must be completed not more than 10 business days after the day the notice relating to the examination was given under subsection (4) or, if a notice was given under subsection (7), 10 business days after the day that notice was given, and

ii. a copy of the report of the examination must be given to the insurer not later than 10 business days after the day the examination was completed. O. Reg. 546/05, s. 21.

(12) If an insured person who failed or refused to comply with subsection (10) subsequently complies, the following rules apply:

1. If the attendance of the insured person was not required for the examination, the examination must be completed and a copy of the report provided to the insurer,

i. not more than 10 business days after the day the material required under subsection (10) was provided, if the examination relates to whether the insured person has a catastrophic impairment, or

ii. not more than five business days after the day the material required under subsection (10) was provided in any other case.

2. If the attendance of the insured person was required for the examination, a copy of the report of the examination must be given to the insurer not later than 10 business days after the day the examination was completed. O. Reg. 546/05, s. 21.

(13) If the examination relates to a claim for attendant care benefits, the report of the examination must include an assessment of attendant care needs. O. Reg. 546/05, s. 21.

Assessment or Examination after Denial of Benefits

42.1 (1) In this section,

"original provider" means, in respect of an insured person, the member of a health profession who, in accordance with this Regulation, approved the treatment plan, prepared the assessment of attendant care needs, completed the disability certificate or prepared the application under section 40, as applicable, that was submitted to the insurer with respect to the insured person. O. Reg. 546/05, s. 21.

(2) This section applies in respect of an insured person if the following conditions are satisfied:

1. An examination of the insured person was conducted under section 42 and the insurer gave to the insured person a copy of the report of the examination and the insurer's determination.
2. The insurer's determination is,

i. that the insured person is not entitled to benefits, if the examination related to a claim for benefits, or

ii. that the insured person does not have a catastrophic impairment, if the examination related to an application under section 40.

3. The examination under section 42 was not related to,

i. a claim for ancillary goods or services referred to in section 37.2, or

ii. an application under section 38.2 for approval for an assessment or examination.

4. The examination under section 42 was not for the purposes of assisting the insurer determine if the insured person has an impairment to which a *Pre-approved Framework Guideline* applies.

5. If the examination under section 42 related to a claim for a specified benefit under section 35, no assessment or examination relating to that benefit has been conducted previously under this section.

6. If the examination under section 42 related to a claim for an attendant care benefits under section 39, no assessment or examination relating to that benefit has been conducted under this section within the previous 12 months.

7. The examination under section 42 was not an examination to which subsection 42 (6) applied. O. Reg. 546/05, s. 21.

(3) The insurer shall pay fees in accordance with this section for an assessment or examination of the insured person and for the preparation of a report of the assessment or examination if the following conditions are satisfied:

1. The assessment or examination and the report of the assessment or examination are limited to the portions of the report of the examination under section 42 with which the insured person does not agree and that are relevant to the denial of the claim or application.

2. The assessment or examination is conducted by one or more members of a health profession who are authorized under this section to conduct the assessment or examination.

3. If the insured person has sustained a catastrophic impairment or the examination under section 42 relates to whether the insured person has sustained a catastrophic impairment, the assessment or examination under this section is conducted and the report provided to the insurer not more than 80 business days after the day the insurer gave the insured person notice of its determination.

4. If the insured person has not sustained a catastrophic impairment and the examination under section 42 does not relate to whether the insured person has sustained a catastrophic impairment, the assessment or examination is conducted and the report is provided to the insurer not more than 40 business days after the day the insurer gave the insured person notice of its determination. O. Reg. 546/05, s. 21.

(4) Subject to paragraph 2 of subsection (3) and subsections (5) and (6), an assessment or examination under this section must be conducted by the original provider or, if the insured person had more than one original provider, the original provider designated by the insured person. O. Reg. 546/05, s. 21.

(5) The assessment or examination under this section may be conducted by any person who is a member of any health profession if,

(a) the original provider is not a member of the same health profession as the person who conducted the examination under section 42; or

(b) the original provider is a member of the same health profession as the person who conducted the examination under section 42, but is not legally authorized to practise in the same specialty. O. Reg. 546/05, s. 21.

(6) If members of two or more health professions conducted the examination under section 42, the assessment or examination under this section may be conducted by one or more persons other than the original provider. O. Reg. 546/05, s. 21.

(7) The assessment or examination under this section shall be limited to an examination of the material provided under subsection 42 (10) to the person who conducted the examination under section 42 if,

(a) the examination under section 42 was conducted by a person who,

(i) is a member of the same health profession as the original provider, and

(ii) is legally authorized to practise in the same specialty as the original provider, if the original provider is legally authorized to practise in a specialty;

(b) the examination under section 42 was limited to an examination of the material provided under subsection 42 (10) to the person who conducted that examination; or

(c) the assessment or examination relates to a claim for medical benefits or rehabilitation benefits and an assessment or examination of the insured person with respect to the same accident has been conducted under this section within the previous 12 months. O. Reg. 546/05, s. 21.

(8) If the insured person does not have a catastrophic impairment and the assessment or examination under this section does not relate to whether the insured person has a catastrophic impairment, the total amount payable for an assessment or examination under this section, for the preparation of the report of the assessment or examination and for any related expenses permitted under section 24 shall not exceed the amount determined as follows:

1. If the assessment or examination is limited to, or required by this section to be limited to, an examination of the material provided under subsection 42 (10), the maximum amount payable is $450.
2. If the assessment or examination is not limited to nor required by this section to be limited to an examination of the material provided under subsection 42 (10), the maximum amount payable is,

i. $900 if the assessment or examination is conducted by one or more members of a health profession and at least one of them is a physician who is legally authorized to practise in a medical specialty other than family medicine, or

ii. $775 if the assessment or examination is conducted by one or more members of a health profession and none of them are physicians described in subparagraph i. O. Reg. 546/05, s. 21.

(9) Amounts payable under this section shall be paid by the insurer within 30 days after receipt of an invoice for the amounts. O. Reg. 546/05, s. 21.

(10) An assessment or examination under this section shall be used only for the purposes of assisting in the resolution of a dispute described in subsection 280 (1) of the Act and the insurer is not required as a result of receiving the report of the assessment or examination to allow any application or pay any benefit that it otherwise would not have allowed or paid. O. Reg. 546/05, s. 21; O. Reg. 45/16, s. 4.

Designated Assessments

43. (1) The following rules apply if a designated assessment is required under this Regulation:

1. The insurer shall notify the designated assessment centre within five business days.
2. The insured person and the insurer shall provide the person or persons who will conduct the designated assessment with such information as is reasonably necessary, within the same period of five business days referred to in paragraph 1.
3. The designated assessment centre shall promptly notify the insured person and arrange for the designated assessment.
4. The insured person shall submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons who conduct the designated assessment. O. Reg. 281/03, s. 21.

(2) The following rules apply if an insured person does not submit to a designated assessment arranged under subsection (1) or fails to comply with paragraph 2 or 4 of subsection (1):

1. The insurer may stop payment of the benefit related to the designated assessment until the insured person submits to the designated assessment and complies with paragraphs 2 and 4 of subsection (1).

2. No benefit is payable for the period after the insured person fails to submit to the designated assessment or fails to comply with paragraph 2 or 4 of subsection (1) and before the insured person subsequently submits to an examination under subsection (1) and complies with paragraphs 2 and 4 of subsection (1). O. Reg. 281/03, s. 21.

(3) If an insured person subsequently submits to a designated assessment and is in compliance with paragraphs 2 and 4 of subsection (1), the insurer,

(a) shall resume payment of the benefit; and

(b) shall pay all amounts that were withheld during the period of non-compliance, if the insured person provides a reasonable explanation for not submitting to the designated assessment or not complying with paragraph 2 or 4 of subsection (1), as the case may be. O. Reg. 281/03, s. 21.

(4) After conducting the designated assessment, the person or persons who conducted the designated assessment shall prepare a report and provide a copy of the report to,

(a) the insurer;

(b) the insured person; and

(c) the insured person's health practitioner. O. Reg. 281/03, s. 21.

(5) Subject to subsection (11), the designated assessment centre shall deliver the report within 14 days after the completion of the designated assessment. O. Reg. 281/03, s. 21.

(6) If the designated assessment is required under section 37 in respect of a claim for an income replacement, non-earner or caregiver benefit, the report of the designated assessment shall include a statement as to whether the insured person continues to have a disability that entitles the insured person to continue to receive the benefit. O. Reg. 281/03, s. 21.

(7) If the designated assessment is required under section 37.2, the report of the designated assessment shall state whether the ancillary goods and services claimed in the treatment confirmation form are reasonable and necessary. O. Reg. 281/03, s. 21.

(8) If the designated assessment is required under section 38, the report of the designated assessment shall,

(a) state whether the goods or services to be provided under the treatment plan are reasonable and necessary and shall include recommendations relating to the future provision of goods and services to the insured person for his or her treatment and rehabilitation, if the purpose of the designated assessment is to determine if the goods and services are reasonable and necessary; and

(b) state whether the impairment comes within a *Pre-approved Framework Guideline*, if the purpose of the designated assessment is to determine if the insured person has an impairment to which a *Pre-approved Framework Guideline* applies. O. Reg. 281/03, s. 21.

(9) In the case of a designated assessment described in clause (8) (b), the report of the designated assessment centre shall also state whether the goods or services to be provided under the treatment plan are reasonable and necessary and shall include recommendations relating to the future provision of goods and services to the insured person for his or her treatment and rehabilitation, if the report states that the impairment does not come within a *Pre-approved Framework Guideline*. O. Reg. 281/03, s. 21.

(10) If the designated assessment is required under section 38.2, the report of the designated assessment shall state whether an expense in respect of an assessment or examination is payable under section 24. O. Reg. 281/03, s. 21.

(11) Despite subsection 53 (9), if the designated assessment is conducted to determine whether there are medical or rehabilitation benefits payable otherwise than under a *Pre-approved Framework Guideline* or the designated assessment is required under section 38.2, the designated assessment centre shall deliver its report to the insured person and the insurer within five business days after the later of,

(a) the day it receives the information required to be provided under paragraph 2 of subsection (1); or

(b) the day any conflict of interest disclosed by the designated assessment centre under section 53 in respect of the designated assessment is resolved under that section. O. Reg. 281/03, s. 21.

(12) If an insurer fails to give a notice required under subsection (1) in accordance with that subsection, the insurer shall pay for the goods and services that are the subject of the designated assessment and that relate to the period commencing on the day the insurer was required to give the notice and ending on the day the insurer gives the notice. O. Reg. 281/03, s. 21.

(13) If the designated assessment is required under section 39 in respect of a claim for an attendant care benefit, the report shall include,

(a) an assessment of attendant care needs; and

(b) recommendations on the future provision of attendant care services to the insured person. O. Reg. 281/03, s. 21; O. Reg. 546/05, s. 22.

(14) If the designated assessment is required under section 40 to determine whether an impairment is a catastrophic impairment, the report shall include a statement of whether, in the opinion of the person or persons who conducted the designated assessment, the impairment is a catastrophic impairment. O. Reg. 281/03, s. 21.

Method of Payment

44. (1) An insurer shall pay a benefit under this Regulation,

(a) by mailing or delivering a cheque payable to the person entitled to the benefit to the address where the person ordinarily resides; or

(b) with the consent of the person entitled to the benefit, by electronic funds transfer to an account in the name of the person. O. Reg. 403/96, s. 44 (1).

(2) Despite subsection (1),

(a) an insurer may arrange to be invoiced directly and to pay directly for goods or services provided in respect of an insured person;

(b) an insurer may pay a benefit into court under section 271 of the *Insurance Act*; or

(c) where the person entitled to the benefit has so directed in writing, an insurer shall pay the benefit directly to the person who submitted an invoice in respect of the benefit to a central processing agency in accordance with subsection 44.1 (1). O. Reg. 403/96, s. 44 (2); O. Reg. 533/06, s. 11.

44.1 (1) Despite any other provision of this Regulation, if a benefit that would otherwise be payable by an insurer is payable in respect of an expense for goods or services specified in a Guideline issued for the purposes of this section, an insurer to whom the Guideline applies shall not pay the benefit unless an invoice for the expense, in the form approved by the Superintendent and including all of the information required by the form,

(a) is delivered to the insurer, if neither of paragraph 2 or 3 of subsection 68 (3.2) applies; or

(b) is deemed to be received by the insurer under subsection 68 (3.3) or (3.4), if paragraph 2 or 3 of subsection 68 (3.2) applies. O. Reg. 533/06, s. 12.

(2) An insurer shall not waive the submission of an invoice for goods or services to which subsection (1) applies. O. Reg. 533/06, s. 12.

(3) If a Guideline issued for the purposes of subsection 68 (3.2) specifies that invoices are to be delivered to a central processing agency on behalf of insurers to whom the Guideline applies, every such insurer that receives an invoice that complies with subsection (1) shall report the following to the central processing agency in the manner and within the time required by the Guideline:

1. The date or dates on which the goods or services referred to in the invoice were delivered or rendered.
2. The names, addresses and professional college registration numbers, if applicable, of each provider of goods or services referred to in the invoice.
3. Particulars of the goods or services referred to in the invoice.
4. Particulars of the injury or injuries in respect of which the goods or services were delivered or rendered.
5. The amount, if any, paid in respect of the goods or services referred to in the invoice by any person other than the insurer.
6. The amount paid by the insurer in respect of the invoice.
7. The amount paid by the insurer in respect of each separately described component of the invoice.
8. The date on which a decision was made on payment or other disposition of the invoice.
9. Any other disposition of the invoice.
10. The information referred to in subsection 32 (2.1).
11. Such additional information as may be specified in the Guideline, if the invoice is in respect of expenses described in a notice given by the insurer under subsection 37.3 (1) or 38.1 (1). O. Reg. 533/06, s. 12.

Explanation of Benefit Amounts

45. When a benefit is first paid or the amount of the benefit is subsequently changed, the insurer shall provide the insured person with a written explanation of how the amount of the benefit was determined. O. Reg. 403/96, s. 45.

Overdue Payments

46. (1) An amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under this Part. O. Reg. 403/96, s. 46 (1).

(2) If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly. O. Reg. 403/96, s. 46 (2).

Repayments to Insurer

47. (1) A person shall repay to the insurer,

(a) any benefit under this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;

(b) any income replacement or non-earner benefit that is paid to the person if he or she, or a person in respect of whom the payment was made, was disqualified from payment under Part IX;

(c) any income replacement, non-earner or caregiver benefit or any benefit under Part VI, to the extent of any payments received by the person that are deductible from those benefits under this Regulation;

(d) if, by reason of subsection 41.1 (1), subsection 37 (4), as it read on February 28, 2006, applies, any income replacement benefits, non-earner or caregiver benefits that is paid for the period after the insurer gave notice under subsection 37 (1), as it read on that date, and before the date of the report of the designated assessment centre; or

(e) fees paid by the insurer that are referred to in paragraph 8 of subsection 24 (1) if the insured person fails, without a reasonable explanation, to attend a designated assessment that has been arranged, or cancels a designated assessment without providing such notice as may be specified in the *Pre-assessment Cancellation Fee Schedule* established by the committee referred to in section 52, as it may be amended from time to time, that he or she will not be attending the designated assessment. O. Reg. 403/96, s. 47 (1); O. Reg. 281/03, s. 22; O. Reg. 546/05, s. 23.

(2) If a person is required to repay an amount to an insurer under this section,

(a) the insurer shall give the person notice of the amount that is required to be repaid; and

(b) if the person is receiving an income replacement or caregiver benefit, the insurer may give the person notice that the insurer intends to collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit. O. Reg. 403/96, s. 47 (2).

(3) The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made. O. Reg. 403/96, s. 47 (3).

(4) Subsection (3) does not apply if the benefit was paid as a result of wilful misrepresentation or fraud. O. Reg. 403/96, s. 47 (4).

(5) An insurer that has given the notice referred to in clause (2) (b) may collect the repayment by deducting up to 20 per cent of the amount of the benefit from each payment of the benefit. O. Reg. 403/96, s. 47 (5).

(6) The insurer may charge interest on an amount repayable under this section from the fifteenth day after notice is given under subsection (2) at the bank rate in effect on that day. O. Reg. 403/96, s. 47 (6).

(7) In subsection (6),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada). O. Reg. 403/96, s. 47 (7).

Termination of Benefits for Material Misrepresentation

48. (1) If an insured person has wilfully misrepresented material facts with respect to an application for a benefit, the insurer may terminate payment of the benefit. O. Reg. 403/96, s. 48 (1).

(2) The insurer shall not terminate payment under subsection (1) unless the insurer provides the insured person with notice of the reasons for terminating payment. O. Reg. 403/96, s. 48 (2).

Right to Dispute

49. If an insurer refuses to pay a benefit under this Regulation or reduces the amount of a benefit that a person is receiving under this Regulation, the insurer shall provide the person with a written notice concerning the person's right to dispute. O. Reg. 281/03, s. 23.

Restriction on Proceedings

50. (1) Subject to subsection (2), an insured person shall not apply to the Licence Appeal Tribunal under subsection 280 (2) of the Act if any of the following circumstances exist:

1. The insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or submitted an application for the benefit within the times prescribed by this Regulation.
2. If the insured person was required to undergo a designated assessment under section 43, the insured person has not undergone the designated assessment or has not complied with that section. O. Reg. 45/16, s. 5.

(2) The Licence Appeal Tribunal may permit an insured person to apply despite paragraph 2 of subsection (1). O. Reg. 45/16, s. 5.

(3) The Licence Appeal Tribunal may impose terms and conditions on a permission granted under subsection (2) of this section. O. Reg. 45/16, s. 5.

Time Limit for Proceedings

51. An application under subsection 280 (2) of the Act in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed. O. Reg. 45/16, s. 5.

PART XI
DESIGNATED ASSESSMENT CENTRES

Establishment of Designated Assessment Centres

52. The committee appointed under section 7 of the *Insurance Act* shall,

(a) Revoked: O. Reg. 546/05, s. 25.

(b) specify the types of impairments that each designated assessment centre is authorized to assess; and

(c) specify the types of assessments that each designated assessment centre is authorized to conduct. O. Reg. 403/96, s. 52; O. Reg. 546/05, s. 25.

52.1 The committee referred to in section 52 may suspend, revoke or modify a designation under section 52, subject to such terms and conditions as the committee specifies. O. Reg. 281/03, s. 25.

52.2 (1) When required by the committee referred to in section 52, every designated assessment centre shall provide the Superintendent with such information respecting the performance of its functions as the committee may require. O. Reg. 281/03, s. 25.

(2) Information required under subsection (1) shall be provided at such times and in such manner as the committee may determine and direct. O. Reg. 281/03, s. 25.

(3) The Superintendent shall review the information compiled under subsection (1) and may take such action in respect of the information as the Superintendent considers appropriate. O. Reg. 281/03, s. 25.

(4) If a designated assessment centre fails to comply with a request for information under subsection (1), the Superintendent may report the deficiency to the committee referred to in section 52. O. Reg. 281/03, s. 25.

Designated Assessment Centres

53. (1) A designated assessment shall be conducted by a designated assessment centre selected in accordance with this section. O. Reg. 313/03, s. 1 (1).

(1.1) A designated assessment must be conducted by a designated assessment centre that,

(a) is authorized to assess impairments of the type sustained by the insured person; and

(b) is authorized to conduct the type of designated assessment that is required. O. Reg. 313/03, s. 1 (1).

(1.2) A designated assessment must be conducted by a designated assessment centre that is located within,

(a) 30 kilometres of the insured person's residence, if,

(i) the insured person's residence is located in the City of Toronto or the regional municipality of Durham, Halton, Peel or York, and

(ii) a designated assessment centre that complies with subsection (1.1) is located within 30 kilometres of the insured person's residence; or

(b) 50 kilometres of the insured person's residence, if,

(i) the insured person's residence is not located in the City of Toronto or the regional municipality of Durham, Halton, Peel or York, and

(ii) a designated assessment centre that complies with subsection (1.1) is located within 50 kilometres of the insured person's residence. O. Reg. 313/03, s. 1 (1).

(1.3) Subject to subsections (1.1) and (1.2), the insurer and the insured person may jointly select the designated assessment centre if the selection is made not later than the second business day after the insurer or the insured person, as the case may be, receives notice from the other that a designated assessment is required under this Regulation. O. Reg. 313/03, s. 1 (1).

(1.4) If the insurer and the insured person do not jointly select the designated assessment centre in accordance with subsection (1.3), the Superintendent shall, subject to subsections (1.1) and (1.2), select the designated assessment centre. O. Reg. 313/03, s. 1 (1).

(2) If the designated assessment centre is selected by the Superintendent, the designated assessment centre shall, before conducting the designated assessment, give the insurer and the insured person notice disclosing any conflict of interest that the centre has relating to the designated assessment. O. Reg. 313/03, s. 1 (2).

(3) The designated assessment centre shall give any notice required under subsection (2) in respect of a designated assessment described in subsection 43 (11) within three business days after receipt of the request for the designated assessment. O. Reg. 281/03, s. 26.

(4) If a conflict of interest is disclosed under subsection (2),

(a) the designated assessment centre shall conduct the designated assessment if the insurer and the insured person agree; or

(b) if the insurer and the insured person do not agree, the designated assessment shall be conducted, subject to subsections (1.1), (1.2) and (2), by another designated assessment centre selected by the Superintendent. O. Reg. 281/03, s. 26; O. Reg. 313/03, s. 1 (3).

(5) For the purposes of clause (4) (b), the insurer and the insured person shall be deemed not to agree in the case of a designated assessment described in subsection 43 (11) unless they agree by the end of the third business day after the day the insurer receives the notice under subsection (2) or the insured person receives the notice under subsection (2), whichever day is later. O. Reg. 281/03, s. 26.

(6)-(8) Revoked: O. Reg. 313/03, s. 1 (4).

(9) Except as otherwise required under subsection 43 (11), a designated assessment centre must begin a designated assessment within 14 days after receiving a request for the designated assessment. O. Reg. 281/03, s. 26.

(10) If a designated assessment centre is unable to begin a designated assessment within 14 days after receiving the request for the assessment, the insured person or the insurer may require that, subject to subsections (1.1), (1.2) and (2), the designated assessment be conducted by another designated assessment centre selected by the Superintendent. O. Reg. 313/03, s. 1 (5).

(10.1) The Superintendent may, with the consent of the Minister, delegate in writing to any person the Superintendent's authority to select designated assessment centres under this section. O. Reg. 313/03, s. 1 (5).

(11) For the purpose of this section, a designated assessment centre has a conflict of interest relating to a designated assessment if,

(a) the insurer, the insured person or a lawyer or other representative acting on behalf of the insurer or the insured person has a financial interest in the designated assessment centre; or

(b) the designated assessment centre, a related person, an assessor or consultant who will carry out all or part of the designated assessment or a facility owned or controlled, directly or indirectly, in whole or in part, by the centre or a related person,

(i) has provided goods or services to the person to be assessed, other than a previous designated assessment,

(ii) prepared or approved a treatment confirmation form under section 37.1, a treatment plan under section 38 or an application for approval of an assessment or examination under section 38.2 for the person to be assessed, or

(iii) is identified by a treatment confirmation form, treatment plan or an application for approval of an assessment or examination as a person who will provide goods or services to the person to be assessed. O. Reg. 281/03, s. 26.

(12) In clause (11) (b),

"related person" means, in respect of a designated assessment centre, an owner, partner or another person who has a financial interest in the designated assessment centre, but does not include a person who has a financial interest in the designated assessment centre by reason only of being a creditor who deals at arm's length with the designated assessment centre. O. Reg. 281/03, s. 26.

54. (1) A designated assessment centre that conducts an assessment under this Regulation of a person who sustains an impairment as a result of an accident shall not, after the assessment, provide any goods or services to the person in respect of the accident. O. Reg. 403/96, s. 54 (1).

(2) Subsection (1) does not apply if,

(a) the insured person and the insurer agree; or

(b) there is no other person within 50 kilometres of the insured person's residence who is able to provide the goods or services. O. Reg. 403/96, s. 54 (2).

(3) Subsection (1) does not prevent the designated assessment centre from conducting another assessment of the person. O. Reg. 403/96, s. 54 (3).

PART XII
RESPONSIBILITY TO OBTAIN TREATMENT, PARTICIPATE IN REHABILITATION AND SEEK EMPLOYMENT

Treatment and Rehabilitation

55. (1) An insured person entitled to an income replacement, non-earner or caregiver benefit shall obtain such treatment and participate in such rehabilitation as is reasonable, available and necessary to,

(a) permit the insured person to engage in employment that satisfies the criteria set out in subsection (2), in the case of an insured person entitled to an income replacement benefit; or

(b) shorten the period during which the benefit is payable, in any other case. O. Reg. 403/96, s. 55 (1).

(2) The criteria referred to in clause (1) (a) are:

1. The insured person,

i. is able and qualified to perform the essential tasks of the employment, or

ii. would be able and qualified to perform the essential tasks of the employment if the insured person obtained treatment and participated in rehabilitation that is reasonable, available and necessary to permit the person to engage in the employment.

2. The employment exists in the area in which the insured person lives.

3. It would be reasonable to expect the insured person to engage in the employment having regard to the possibility of deterioration in the insured person's impairment and to the insured person's personal and vocational characteristics. O. Reg. 403/96, s. 55 (2).

(3) Subsection (1) does not apply if compliance with subsection (1) would be detrimental to the insured person's treatment or recovery. O. Reg. 403/96, s. 55 (3).

(4) If an insured person does not comply with subsection (1), the insurer may notify the insured person that the insurer intends to stop payment of the benefit in accordance with subsection (5). O. Reg. 281/03, s. 28.

(5) If at least 10 business days have elapsed after a notice was given under subsection (4) and the insured person has not complied with subsection (1), the insurer may stop payment of the benefit. O. Reg. 281/03, s. 28; O. Reg. 546/05, s. 26.

(6) Section 37 does not apply in respect of a stoppage of benefits, or proposed stoppage of benefits, under this section. O. Reg. 281/03, s. 28.

(7) If, after the stoppage of benefits under subsection (5), the insured person subsequently complies with subsection (1), the insurer shall resume payment of the benefit in respect of periods after the insured person complied. O. Reg. 281/03, s. 28.

Employment

56. (1) An insured person who is entitled to an income replacement benefit shall make reasonable efforts to,

(a) return to the employment in which he or she engaged at the time of the accident; or

(b) obtain employment for which he or she is reasonably suited by education, training or experience. O. Reg. 403/96, s. 56 (1).

(2) Subsection (1) does not apply if,

(a) employment would be detrimental to the insured person's treatment or recovery; or

(b) the insured person is participating in a vocational rehabilitation program. O. Reg. 403/96, s. 56 (2).

(3) If an insured person does not comply with subsection (1), the insurer may notify the insured person that the insurer intends to stop payment of the benefit in accordance with subsection (4). O. Reg. 281/03, s. 29.

(4) If at least 10 business days have elapsed after a notice is given under subsection (3) and the insured person is not in compliance with subsection (1), the insurer may stop payment of the benefit. O. Reg. 281/03, s. 29; O. Reg. 546/05, s. 27.

(5) Section 37 does not apply in respect of a stoppage of benefits, or proposed stoppage of benefits, under this section. O. Reg. 281/03, s. 29.

(6) If, after the stoppage of benefits under subsection (4), the insured person subsequently complies with subsection (1), the insurer shall resume payment of the benefit in respect of periods after the insured person complied. O. Reg. 281/03, s. 29.

PART XIII
INTERACTION WITH OTHER SYSTEMS

Accidents outside Ontario

57. (1) If, as a result of an accident in another province or territory of Canada or a jurisdiction in the United States of America, a person insured in that jurisdiction dies or sustains an impairment or incurs an expense described in section 14, 15 or 16, the insurer shall pay, as the person may elect,

(a) benefits provided by this Regulation, other than the benefits referred to in clause (b); or

(b) benefits in the same amounts and subject to the same conditions as if the person was a resident of the jurisdiction in which the accident occurred and was entitled to payments under the law of that jurisdiction. O. Reg. 403/96, s. 57 (1).

(1.1) Subsection (1) does not apply if the person receives benefits under the law of the jurisdiction in which the accident occurred. O. Reg. 462/96, s. 8 (1).

(2) A person who elects to claim a benefit as provided in clause (1) (a) is thereafter eligible only for benefits referred to in that clause. O. Reg. 403/96, s. 57 (2).

(3) A person who elects to claim a benefit as provided in clause (1) (b) is thereafter ineligible for benefits referred to in clause (1) (a). O. Reg. 403/96, s. 57 (3).

(4) For the purpose of this section, a person is insured in the jurisdiction in which the accident occurred if the person, at the time of the accident,

(a) was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;

(b) met the criteria prescribed for recovery under the law of the jurisdiction in which the accident occurred;

(c) was not the owner or driver of, or an occupant of an automobile registered in the jurisdiction in which the accident occurred; and

(d) was,

(i) an occupant of the insured automobile,

(ii) the named insured, a person specified in the policy as a driver of the insured automobile, the spouse of the named insured or a dependant of the named insured or spouse, while the occupant of any automobile,

(iii) a person who was not the occupant of an automobile and was struck by the insured automobile,

(iv) the named insured, his or her spouse or a dependant of the named insured or spouse and was struck by any automobile,

(v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of the person or spouse who suffered an impairment,

(A) while the occupant of any automobile,

(B) by any automobile while not the occupant of the automobile, or

(vi) a person struck by an automobile that was driven by a person described in subclause (i), (ii) or (v). O. Reg. 403/96, s. 57 (4); O. Reg. 462/96, s. 8 (2); O. Reg. 114/00, s. 6; O. Reg. 314/05, s. 6.

Social Assistance Payments

58. (1) The insurer shall pay benefits under this Regulation even though the insured person is entitled to, or has received, benefits under an Act administered by the Ministry of Community and Social Services for Ontario or under similar legislation in another jurisdiction. O. Reg. 403/96, s. 58 (1).

(2) For the purpose of subsection (1), a service, benefit or entitlement provided under an Act, the administration of which was transferred from the Ministry of Community and Social Services to the Ministry of Health by order in council, shall be deemed to be provided under an Act administered by the Ministry of Community and Social Services for Ontario so long as the nature of the service, benefit or entitlement remains substantially the same as it was before the transfer. O. Reg. 403/96, s. 58 (2).

59. (1) The insurer is not required to pay benefits under this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under any workers' compensation law or plan. O. Reg. 403/96, s. 59 (1).

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* so long as the election is not made primarily for the purpose of claiming benefits under this Regulation. O. Reg. 403/96, s. 59 (2); O. Reg. 281/03, s. 30 (1).

(3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the *Workplace Safety and Insurance Act, 1997*, no income replacement, caregiver or non-earner benefit is payable to the person in respect of any period of time before the person makes the election. O. Reg. 403/96, s. 59 (3); O. Reg. 462/96, s. 9; O. Reg. 281/03, s. 30 (2).

(4) If a person who would be entitled to benefits under this Regulation in the absence of subsection (1) elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* and there is a dispute concerning the insurer's liability to pay an expense for a vocational rehabilitation program that the person was attending at the time of the election and continues to attend, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 403/96, s. 59 (4); O. Reg. 281/03, s. 30 (3).

(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. O. Reg. 403/96, s. 59 (5).

Other Collateral Benefits

60. (1) The insurer may deduct the following amounts from the amount payable to an insured person as an income replacement or non-earner benefit:

1. Any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.
2. Any other periodic benefit being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident, if the insured person was receiving the other periodic benefit at the time he or she first qualified for the income replacement or non-earner benefit, and, at that time, the other periodic benefit was a temporary disability benefit. O. Reg. 403/96, s. 60 (1).

(2) Payment of a medical, rehabilitation or attendant care benefit or a benefit under Part VI is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law. O. Reg. 403/96, s. 60 (2).

(3) In this section,

"temporary disability benefit" means,

(a) an income replacement or non-earner benefit paid under this Regulation, unless the benefit is paid more than 104 weeks after the onset of the disability,

(b) a caregiver benefit paid under this Regulation,

(c) benefits paid under Part II, III or IV or section 32 of Ontario Regulation 776/93,

(d) benefits paid under Part V of Ontario Regulation 776/93, unless the benefits have been paid for more than 104 weeks,

(e) benefits paid under Part IV of Regulation 672 of the Revised Regulations of Ontario, 1990, unless the benefits have been paid for more than 156 weeks,

(f) benefits paid under Part II of Subsection 2 of Schedule C to the *Insurance Act* as it existed before June 22, 1990, unless the benefits have been paid for more than 104 weeks,

(g) benefits paid under section 37, subsection 43 (9) or subsection 147 (2) of the pre-1997 Act, as defined in Part IX of the *Workplace Safety and Insurance Act, 1997,* in respect of injuries that occurred before January 1, 1998, including benefits paid under those provisions as those provisions are deemed to have been amended by Part IX of the *Workplace Safety and Insurance Act, 1997,*

(g.1) benefits paid under subsection 43 (3) of the *Workplace Safety and Insurance Act, 1997* in respect of injuries that occurred after December 31, 1997, or

(h) any other periodic temporary benefit paid under an income continuation benefit plan or law, other than,

(i) benefits under the *Employment Insurance Act* (Canada),

(ii) a non-earner benefit paid under this Regulation more than 104 weeks after the onset of the disability,

(iii) benefits paid under Part V of Ontario Regulation 776/93 for more than 104 weeks,

(iv) benefits paid under Part IV of Regulation 672 of the Revised Regulations of Ontario, 1990 for more than 156 weeks, or

(v) benefits paid under Part II of Subsection 2 of Schedule C to the *Insurance Act* as it existed before June 22, 1990 that have been paid for more than 104 weeks. O. Reg. 403/96, s. 60 (3); O. Reg. 462/96, s. 10; O. Reg. 281/03, s. 31.

PART XIV
INCOME CALCULATION

Net Weekly Income Formula

61. (1) For the purpose of this Regulation, a person's net weekly income from employment shall be determined in accordance with the following formula:

$$A = (B – C – D – E)/52$$

where,

A = the person's net weekly income from employment,

B = the person's gross annual income from employment,

C = the annual premium payable by the person under the *Employment Insurance Act* (Canada) on the gross annual income from employment,

D = the annual contribution payable by the person under the *Canada Pension Plan* on the gross annual income from employment,

E = the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) on the gross annual income from employment.

O. Reg. 403/96, s. 61 (1).

(2) For the purpose of subsection (1), the person whose net weekly income from employment is to be determined shall be deemed to be a resident of Ontario. O. Reg. 403/96, s. 61 (2).

Income from Self-Employment

62. (1) For the purpose of this Regulation, a person's income from self-employment shall be determined in the same manner as the person's profit from the business in which the person was self-employed would be determined under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), but without taking into account,

(a) expenses that are eligible for capital cost allowance or an allowance on eligible capital property;

(b) capital gains or losses; or

(c) losses deductible under section 111 of the *Income Tax Act* (Canada). O. Reg. 403/96, s. 62 (1).

(2) Despite subsection (1), an insurer and a named insured who is self-employed and not otherwise employed may agree in a contract evidenced by a motor vehicle liability policy that, for the purpose of determining benefits under this Regulation in respect of an accident that occurs during the period covered by the contract, the named insured's gross income from self-employment for every week shall be deemed to be the weekly income amount specified in the contract if, at the time of the accident, the person continues to engage in the self-employment in which he or she engaged at the time the contract was entered into and the person is not otherwise employed. O. Reg. 403/96, s. 62 (2).

(3) In specifying a weekly income amount for the purpose of subsection (2), the insurer and insured may use information from any source, including,

(a) personal and corporate income tax returns and assessments;

(b) personal and corporate financial statements; and

(c) published data on the average wage for the industry or occupation in which the insured is self-employed. O. Reg. 403/96, s. 62 (3).

Income Tax Calculations

63. (1) For the purpose of this Regulation, the income tax payable by a person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) shall be determined having regard to only the following deductions and tax credits that apply to the person under those Acts:

1. Alimony and maintenance payments deduction.
2. Basic personal tax credit.
3. Married person's tax credit or equivalent to married tax credit.
4. Age tax credit.
5. Disability tax credit.
6. Employment insurance premium tax credit.
7. *Canada Pension Plan* tax credit.
8. *Quebec Pension Plan* tax credit. O. Reg. 403/96, s. 63 (1).

(2) If a determination of the income tax payable by a person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario) is necessary to determine the amount of a benefit under this Regulation, the applicant for the benefit shall provide the insurer with such information as is reasonably necessary to enable the insurer to make the determination. O. Reg. 462/96, s. 11.

(3) Failure to comply with subsection (2) does not relieve the insurer from any time limit established by this Regulation for the payment of the benefit, but the insurer shall determine the amount of the benefit on the basis of its best estimate of the income tax payable by the person under the *Income Tax Act* (Canada) and the *Income Tax Act* (Ontario), subject to later adjustment of the amount of the benefit when subsection (2) is complied with. O. Reg. 403/96, s. 63 (3).

Severance or Termination Pay

64. For the purpose of this Regulation, payments of severance pay or termination pay shall not be included in a determination of a person's income. O. Reg. 403/96, s. 64.

Unreported Income

64.1 (1) If, under the *Income Tax Act* (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income, a person is required to report the amount of his or her income, the person's income before an accident that occurs after April 14, 2004 shall be determined for the purposes of this Regulation without reference to any income the person has failed to report contrary to that Act or legislation. O. Reg. 458/03, s. 11.

(2) Where the amount of a person's income before an accident is determined for the purposes of this Regulation in accordance with subsection (1), the amount of the income may be adjusted to reflect any change in the amount of the person's income reported or determined in accordance with the *Income Tax Act* (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income. O. Reg. 458/03, s. 11.

PART XV
MISCELLANEOUS

Assignment of Benefits

65. (1) Except as otherwise provided by subsection (2), the assignment of a benefit under this Regulation is void. O. Reg. 45/16, s. 6 (1).

(2) Subsection (1) does not apply to,

(a) an assignment under section 267.8 of the *Insurance Act*;

(b) an assignment of a benefit to,

(i) the Ministry of Community, Family and Children's Services,

(ii) a delivery agent under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*, or

(iii) The Minister of Finance under subsection 6.1 (4) of the *Motor Vehicle Accident Claims Act*; or

(c) the assignment of a benefit to the Ministry of Health in respect of a service, benefit or entitlement provided under an Act the administration of which was transferred by order in council from the Ministry of Community and Social Services to the Ministry of Health. O. Reg. 403/96, s. 65 (2); O. Reg. 281/03, s. 32.

(3) If the assignment of a benefit to a person is void,

(a) subsection 280 (2) of the Act does not apply to the person; and

(b) subsection 280 (3) of the Act does apply to the person, but the exception in that subsection, which permits bringing a proceeding, does not apply to the person. O. Reg. 45/16, s. 6 (2).

Company Automobiles and Rental Automobiles

66. (1) An individual who is living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; or

(b) the insured automobile is being rented by the individual for a period of more than 30 days. O. Reg. 403/96, s. 66 (1); O. Reg. 462/96, s. 12 (1).

(2) An individual who is not living and ordinarily present in Ontario shall be deemed for the purpose of this Regulation to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(a) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity; and

(b) the individual, his or her spouse or any dependant of the individual or spouse is an occupant of the insured automobile. O. Reg. 403/96, s. 66 (2); O. Reg. 462/96, s. 12 (2); O. Reg. 114/00, s. 7; O. Reg. 314/05, s. 7.

Copies of Regulation

67. On request, the insurer shall provide a copy of this Regulation without charge to a named insured or a person entitled to benefits under this Regulation. O. Reg. 403/96, s. 67.

68. (1) Except as otherwise permitted by this Regulation, all notices required or permitted under this Regulation, other than a notice under subsection 32 (1) or (3.1), shall be in writing. O. Reg. 546/05, s. 28 (1).

(2) Any document, including a notice in writing, required or permitted under this Regulation to be given to a person may be delivered,

(a) by faxing the document to the person or to the solicitor or authorized representative, if any, of the person in accordance with subsection (6);

(b) by leaving a copy of the document with the solicitor or authorized representative, if any, of the person, or with an employee in the office of the solicitor or authorized representative;

(c) by personal delivery to the person;

(d) by letter mail, certified mail or registered mail,

(i) in the case of an insurer, addressed to the insurer or its chief executive officer at the insurer's head office in Ontario as identified in the records of the Superintendent,

(ii) in the case of a person other than an insurer, addressed to the person at his or her last known address; or

(e) by electronic means, if the intended recipient of the document consents to delivery by electronic means. O. Reg. 281/03, s. 33; O. Reg. 533/06, s. 13 (1).

(2.1) For the purposes of clauses (2) (a) and (b), an authorized representative may include, subject to subsection (2.2),

(a) a member of a health profession if the document is a notice under subsection 38 (5) or (8), 38.2 (4) or (6) or 42 (4) or a report prepared under section 42; or

(b) a member of a health profession who is a health practitioner if the document is a notice under subsection 37.1 (4) or (5). O. Reg. 546/05, s. 28 (2).

(2.2) Subsection (2.1) does not apply unless,

(a) the insured person is not represented at the relevant time by a solicitor or another authorized representative;

(b) the insured person gives to the insurer a signed authorization and direction specifying which documents listed in subsection (2.1) that the insurer is authorized and directed to give to the member of the health profession;

(c) the signed authorization and direction is given to the insurer before the document is given to the member of the health profession; and

(d) the member of the health profession has agreed to act in accordance with the authorization and direction. O. Reg. 546/05, s. 28 (2).

(3) Despite clause (2) (d), any notice or other document that must be given within five or fewer business days shall not be delivered by letter mail. O. Reg. 281/03, s. 33; O. Reg. 458/03, s. 12.

(3.1) The functional equivalency rules set out in sections 4 to 13 of the *Electronic Commerce Act, 2000* apply in the case of the delivery of a document by electronic means under clause (2) (e). O. Reg. 533/06, s. 13 (2).

(3.2) Despite subsection (2), but subject to subsection (3.10), the following rules apply in the circumstances specified in a Guideline issued for the purposes of this section to a document that is listed in section 69, is specified in the Guideline and is required under this Regulation to be delivered to an insurer to whom the Guideline applies:

1. Subject to paragraphs 2 and 3, the document and any attachments to it shall be delivered to the insurer only in a manner specified in the Guideline.

2. If the Guideline specifies that a document, exclusive of attachments to it, is to be delivered to a central processing agency on behalf of the insurer,

i. the document shall be delivered not to the insurer but only to the central processing agency specified in the Guideline and only in a manner specified in the Guideline, and

ii. attachments to the document shall be delivered not to the central processing agency but only to the insurer in a manner specified in the Guideline.

3. If the Guideline specifies that a document, together with attachments to it, is to be delivered to a central processing agency on behalf of the insurer, the document and the attachments shall be delivered not to the insurer but only to the central processing agency specified in the Guideline and only in a manner specified in the Guideline.

4. A document referred to in paragraph 1, 2 or 3 shall be deemed not to have been received by the insurer to whom it is addressed, if it is delivered to the insurer otherwise than as specified in the Guideline. O. Reg. 533/06, s. 13 (3).

(3.3) A document referred to in paragraph 2 of subsection (3.2) is deemed to be received by the insurer to whom it is addressed on the later of,

(a) the date on which the document, delivered in a manner specified in the Guideline to the central processing agency on behalf of an insurer to whom the Guideline applies, is determined by the central processing agency to be duly completed and to contain all information required by this Regulation to be included in it; and

(b) the date on which the last of any attachments is received by the insurer. O. Reg. 533/06, s. 13 (3).

(3.4) A document referred to in paragraph 3 of subsection (3.2) is deemed to be received by the insurer to whom it is addressed when the document and any attachments to it are delivered in a manner specified in the Guideline to the central processing agency on behalf of an insurer to whom the Guideline applies and the document is determined by the central processing agency to be duly completed and to contain all information required by this Regulation to be included in it. O. Reg. 533/06, s. 13 (3).

(3.5) For the purposes of subsections (3.3) and (3.4), the central processing agency shall be deemed to have determined, on the day the document was delivered to the central processing agency in a manner specified by the Guideline, that the document is duly completed and contains all information required by this Regulation to be included in it unless the central processing agency notifies the sender, in a manner specified in the Guideline and not later than the second business day after the document was delivered to the central processing agency, that the document is not duly completed or does not contain all information required by this Regulation to be included in it. O. Reg. 533/06, s. 13 (3).

(3.6) A notice under subsection (3.5) shall include sufficient particulars to enable the sender to remedy the deficiency. O. Reg. 533/06, s. 13 (3).

(3.7) The central processing agency shall, as soon as practicable, make the contents of the document available to the insurer to whom the document is addressed. O. Reg. 533/06, s. 13 (3).

(3.8) An insurer that is deemed by subsection (3.3) or (3.4) to have received a document, other than an invoice to which subsection 44.1 (1) applies, shall in the manner and within the time required by the Guideline provide the central processing agency with the following information, which may include personal information:

1. Particulars of the goods or services referred to in the document for which the insurer agrees to pay and the amount the insurer agrees to pay in respect of such goods or services.

2. Particulars of the goods or services referred to in the document for which the insurer does not agree to pay. O. Reg. 533/06, s. 13 (3).

(3.9) Following receipt of the last of any attachments to a document in accordance with paragraph 2 of subsection (3.2), an insurer shall notify the central processing agency for the purpose of the application of clause (3.3) (b), in the manner and within the time required by the Guideline. O. Reg. 533/06, s. 13 (3).

(3.10) Subsections (3.2) to (3.9) do not apply to a document if the insurer has waived the requirement that the document be submitted to the insurer in circumstances permitted by this Regulation. O. Reg. 533/06, s. 13 (3).

(3.11) Nothing in this Regulation prohibits any person from delivering a document to which subsection (3.2) applies to the central processing agency on behalf of a person otherwise required to deliver it. O. Reg. 533/06, s. 13 (3).

(4) If an attempt is made to personally deliver a document to a person at his or her place of residence and, for any reason, it is not possible to personally deliver the document to the person, the document may be delivered by leaving a copy, in a sealed envelope addressed to the person, at the person's place of residence with anyone who appears to be an adult member of the same household. O. Reg. 380/03, s. 3.

(5) In the absence of evidence to the contrary, a person is deemed to receive anything delivered by letter mail under clause (2) (d) on the fifth business day after the day the document is mailed in accordance with clause (2) (d). O. Reg. 380/03, s. 3; O. Reg. 458/03, s. 12.

(6) A document that is delivered by fax must include a cover page indicating,

(a) the sender's name, address and telephone number;

(b) the name of the person for whom the document is intended;

(c) the date of the accident to which the document relates;

(d) the name, address and telephone number of the person to whom the document relates;

(e) the date and time the fax is sent;

(f) the total number of pages faxed, including the cover page;

(g) the telephone number from which the document is faxed; and

(h) the name and telephone number of a person to contact in the event of transmission problems with the fax. O. Reg. 281/03, s. 33.

(7) A document delivered in accordance with clause (2) (a), (b), (c) or (e) after 5 p.m. local time of the recipient shall be deemed to be delivered on the next business day. O. Reg. 281/03, s. 33; O. Reg. 533/06, s. 13 (4).

(8) Despite subclause (2) (d) (i) and subsections (5) and (7), if the insurer provides the name and address of a contact person to whom documents are to be delivered, anything delivered to the insurer that is not addressed to the attention of the contact person at that address shall not be considered to have been delivered to the insurer until it is received by the contact person. O. Reg. 281/03, s. 33.

(8.1) Subject to subsection (7), subsection 22 (3) of the *Electronic Commerce Act, 2000* applies to determine when a document delivered in accordance with clause (2) (e) is deemed to be delivered to the recipient. O. Reg. 533/06, s. 13 (5).

(8.2) Where subsection (3.3) or (3.4) applies, the recipient for the purposes of subsection (8.1) is the central processing agency. O. Reg. 533/06, s. 13 (6).

(9) A reference in this Regulation to a number of days between two events shall be read as excluding the day on which the first event happens and including the day on which the second event happens. O. Reg. 281/03, s. 33.

(10) Subject to subsection (11), if any provision of this Regulation requires a person to do anything within a time period expressed in days or business days, the time period is deemed to expire on the last day of the time period at 5 p.m. local time. O. Reg. 281/03, s. 33.

(11) If a time period in which a person is required to do anything expires on a day that is not a business day, the time period is deemed to expire on the next day that is a business day at 5 p.m. local time. O. Reg. 281/03, s. 33.

(12) For the purposes of subsections (10) and (11), if the person delivering a document or notice and the person to whom the document or notice is to be delivered are in different time zones, references to 5 p.m. local time shall be read as references to the time when it is 5 p.m. in one time zone and after 5 p.m. in the other time zone. O. Reg. 281/03, s. 33.

(13) A member of a health profession who receives a document under the authority of subsection (2.1) shall immediately notify the insured person by telephone of the substance of the document and send a copy of the document to the insured person by ordinary mail or fax. O. Reg. 546/05, s. 28 (2).

(14) An insurer shall not deliver documents to a member of a health profession in reliance on an authorization under subsection (2.2) unless the documents are expressly specified in the authorization referred to in that subsection. O. Reg. 546/05, s. 28 (2).

SUBSTITUTE DECISION-MAKERS

68.1 Any consent, notice or other thing to be given by or to an insured person under this Regulation may be given by or to a person exercising a power of decision on behalf of the insured person under the authority of the *Substitute Decisions Act, 1992* or as authorized under the *Health Care Consent Act, 1996*. O. Reg. 546/05, s. 29.

FORMS

69. Each of the following documents shall be in a form approved by the Superintendent:

1. An application form referred to in clause 32 (2) (a).
2. A disability certificate.
2.1 A consent under section 32.1.
2.2 A notice under subsection 35 (3) or (4).
3. A notice under section 36.
4. A notice under subsection 37.1 (5).
5. A treatment confirmation form under section 37.1.
5.1 A notice under subsection 37.2 (2).
6. An application referred to in section 38, including the treatment plan.
6.1 A notice under subsection 38 (8).
7. An application under section 38.2.
7.1 A notice under subsection 38.2 (6).
7.2 A notice under section 39 advising an insured person that the insurer requires him or her to be examined under section 42.
8. An application under subsection 40 (1).
9. A notice under subsection 40 (2).
10. A report of a designated assessment.
10.1 A notice under section 42.
10.2 An invoice in respect of an expense for goods or services specified in a Guideline issued for the purposes of section 44.1.
11. An explanation under section 45.
12. A notice under section 49. O. Reg. 281/03, s. 34; O. Reg. 546/05, s. 30; O. Reg. 533/06, s. 14.

69.1 (1) Any document that is required by section 69 to be in a form approved by the Superintendent and to which subsection 68 (3.2) applies and any other document specified in a Guideline issued for the purposes of this section is duly completed and includes all information required by this Regulation to be included in it if,

(a) every field not identified on the form as an optional field is completed in accordance with subsection (2); and

(b) if any field on the form that is identified as an optional field is completed, it is completed in accordance with subsection (2). O. Reg. 533/06, s. 15.

(2) If the form specifies the manner or the format in which a field is to be completed, completion of the field shall be in that manner and in that format. O. Reg. 533/06, s. 15.

Transition

70. (1) Despite anything else in this Regulation, if a motor vehicle liability policy is in effect on the day this Regulation comes into force, subsections (2) and (3) apply until the earlier of the following:

1. The first expiry date under the motor vehicle liability policy.
2. The date on which the motor vehicle liability policy is terminated by the insurer or the insured. O. Reg. 403/96, s. 70 (1).

(2) The following benefits are deemed to be included in the motor vehicle liability policy, and are applicable to an insured person in respect of the motor vehicle liability policy:

1. The optional income replacement benefit referred to in paragraph 1 of subsection 27 (1) that fixes the amount referred to in subparagraph ii of paragraph 2 of subsection 7 (1) at $1,000.
2. The optional caregiver and dependant care benefit referred to in paragraph 2 of subsection 27 (1).
3. The optional death and funeral benefit referred to in paragraph 4 of subsection 27 (1). O. Reg. 403/96, s. 70 (2).

(3) The sum of the medical, rehabilitation and attendant care benefits paid under the motor vehicle liability policy for any one accident in respect of an insured person who does not sustain a catastrophic impairment as a result of the accident shall not exceed $1,000,000, and the limits set out in clauses 19 (1) (a) and (2) (a) do not apply. O. Reg. 403/96, s. 70 (3).

70.1 Form 1, as it read on September 30, 2003, continues to apply in respect of accidents occurring before October 1, 2003. O. Reg. 281/03, s. 35.

71. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 403/96, s. 71.

FORM 1 REVOKED: O. REG. 546/05, S. 31.

TAB 54

CanLII

Statutory Accident Benefits Schedule, O Reg 34/10

Current version: in force since 2025-07-01

Link to the latest version: https://canlii.ca/t/8ms8

Stable link to this version: https://canlii.ca/t/56jsz

Citation to this version: Statutory Accident Benefits Schedule, O Reg 34/10, <https://canlii.ca/t/56jsz> retrieved on 2026-01-06

Currency: Last updated from the e-Laws site on 2025-12-29

Insurance Act

ONTARIO REGULATION 34/10

Statutory Accident bEnefits Schedule — Effective September 1, 2010

Consolidation Period: From July 1, 2025 to the e-Laws currency date.

Last amendment: 58/25.

This is the English version of a bilingual regulation.

Part I
General

Citation

1. This Regulation may be cited as the *Statutory Accident Benefits Schedule — Effective September 1, 2010*. O. Reg. 34/10, s. 1.

Application and transition rules

2. (1) Except as otherwise provided, the benefits set out in this Regulation shall be provided under every contract evidenced by a motor vehicle liability policy in respect of

accidents occurring on or after September 1, 2010. O. Reg. 34/10, s. 2 (1); O. Reg. 251/15, s. 1 (1); O. Reg. 383/24, s. 1 (1).

Note: On July 1, 2026, section 2 of the Regulation is amended by adding the following subsections: (See: O. Reg. 383/24, s. 1 (2))

(1.0.1) The benefits set out in Parts II, IV, V and VI of this Regulation shall be offered as optional benefits under every contract evidenced by a motor vehicle liability policy entered into or renewed on or after July 1, 2026. O. Reg. 383/24, s. 1 (2).

(1.0.2) Subject to subsection (1.0.4), if a contract evidenced by a motor vehicle liability policy is renewed on or after July 1, 2026, the benefits set out in Parts II, IV, V and VI of this Regulation, as they read immediately before July 1, 2026, are deemed to continue as optional benefits in the amounts previously payable under the contract unless the named insured and the insurer agree, in writing, that the named insured declines any of the benefits or makes changes to the amount payable in respect of a benefit. O. Reg. 383/24, s. 1 (2).

(1.0.3) On or after July 1, 2026, a named insured and an insurer may agree, in writing, to change a contract evidenced by a motor vehicle liability policy entered into before that date in respect of the optional benefits set out in Parts II, IV, V and VI of this Regulation. O. Reg. 383/24, s. 1 (2).

(1.0.4) Despite any provision of a contract evidenced by a motor vehicle liability policy, on and after July 1, 2026, the optional benefits set out in Parts II, IV, V and VI of this Regulation are only applicable to,

(a) the named insured;

(b) the spouse of the named insured;

(c) the dependants of the named insured and of the named insured’s spouse; and

(d) the persons specified in the policy as drivers of the insured automobile. O. Reg. 383/24, s. 1 (2).

(1.1) The following provisions, as they read immediately before O. Reg. 251/15 came into force, apply in respect of accidents occurring on or after September 1, 2010 and before June 1, 2016:

1. The definition of “neuropsychologist” in subsection 3 (1).

2. Subsections 3 (2) to (6).

3. Subsection 15 (1).

4. Subsection 16 (3).

5. Section 38.

6. Subsection 39 (2).

7. Subsection 40 (8).

8. Subsections 42 (11) and (15).

9. Subsections 45 (2) and (4). O. Reg. 251/15, s. 1 (2).

(1.2) The following provisions, as they read immediately before O. Reg. 251/15 came into force, apply in respect of contracts entered into or renewed on or after September 1, 2010 and before June 1, 2016:

1. Section 12.

2. Subsection 17 (1).

3. Subsections 18 (3) to (5).

4. Subsection 19 (3).

5. Section 20.

6. Subsections 28 (1), (5) and (6).

7. Subsections 30 (1) and (4) to (8).

8. Subsections 42 (12) and (16).

9. Subsection 50 (3).

10. Subsection 57 (4). O. Reg. 251/15, s. 1 (2); O. Reg. 251/15, s. 1 (2).

(2) Subsections 25 (1), (3), (4) and (5), Parts VIII and IX, other than subsections 50 (2) to (5), and Parts X, XI and XII, as they read immediately before Ontario Regulation 251/15 came into force apply with such modifications as are necessary in respect of benefits provided under the Old Regulation with respect to accidents that occurred on or after November 1, 1996 and before September 1, 2010 and, for that purpose, the following rules apply:

1. References in paragraph 2 of subsection 25 (1), subsections 38 (1), (5), (7), (9), (10), (11), (12) and (14), sections 40 and 41 and subsection 44 (3) to the Minor Injury Guideline shall be read as references to the *Pre-approved Framework Guideline* referred to in the Old Regulation that would apply.

2. An amount that would, but for subsection 3 (1.3) of the Old Regulation, be paid under the Old Regulation after August 31, 2010 shall be paid under this Regulation in the amount determined,

i. under the Old Regulation, other than under section 24 of that Regulation, or

ii. under subsections 25 (1), (3), (4) and (5).

3. An amount described in paragraph 2 that is paid under this Regulation shall not include any amount previously paid under the Old Regulation. O. Reg. 34/10, s. 2 (2); O. Reg.

251/15, s. 1 (3).

(3) The benefits set out in this Regulation shall be provided in respect of accidents that occur in Canada or the United States of America, or on a vessel plying between ports of Canada or the United States of America. O. Reg. 34/10, s. 2 (3).

(4) Benefits payable under this Regulation in respect of an insured person shall be paid by the insurer that is liable to pay under subsection 268 (2) of the Act. O. Reg. 34/10, s. 2 (4).

(5) Subject to Part VII, the insurer shall pay the benefits under this Regulation despite section 225, subsection 233 (1), section 240 and subsection 265 (3) of the Act. O. Reg. 34/10, s. 2 (5).

Definitions and interpretation

3. (1) In this Regulation,

"accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device; ("accident")

"authorized transportation expense" means, in respect of an insured person, expenses related to transportation,

(a) that are authorized by, and calculated by applying the rates set out in, the most recent transportation expense guideline published by the Financial Services Regulatory Authority of Ontario, and

(b) that, unless the insured person sustained a catastrophic impairment as a result of the accident, relate to transportation expenses incurred only after the first 50 kilometres of a trip; ("frais de transport autorisés")

"business day" means a day that is not,

(a) Saturday, or

(b) a holiday within the meaning of section 88 of the *Legislation Act, 2006*, other than Easter Monday and Remembrance Day; ("jour ouvrable")

"chiropractor" means a person authorized by law to practise chiropractic; ("chiropraticien")

"dentist" means a person authorized by law to practise dentistry; ("dentiste")

"disability certificate" means, in respect of a person, a certificate from a health practitioner of the person's choice that states the cause and nature of the person's impairment and contains an estimate of the duration of the disability in respect of which the person is making or has made an application for a benefit described in this Regulation; ("certificat d'invalidité")

"*Guideline*" means,

(a) a guideline, including the Minor Injury Guideline, issued by the Chief Executive Officer under subsection 268.3 (1) of the Act and published in *The Ontario Gazette*,

(b) a guideline that is included in the professional fee guidelines or the *Optional Indexation Benefit Guidelines*, as published in *The Ontario Gazette* by the Financial Services Regulatory Authority of Ontario, or

(c) a guideline published in *The Ontario Gazette* that is an amended version of a guideline referred to in clause (a) or (b); ("directive")

"health practitioner" means, in respect of a particular impairment,

(a) a physician,

(b) a chiropractor, if the impairment is one that a chiropractor is authorized by law to treat,

(c) a dentist, if the impairment is one that a dentist is authorized by law to treat,

(d) an occupational therapist, if the impairment is one that an occupational therapist is authorized by law to treat,

(e) an optometrist, if the impairment is one that an optometrist is authorized by law to treat,

(f) a psychologist, if the impairment is one that a psychologist is authorized by law to treat,

(g) a physiotherapist, if the impairment is one that a physiotherapist is authorized by law to treat,

(h) a registered nurse with an extended certificate of registration, if the impairment is one that the nurse is authorized by law to treat, or

(i) a speech-language pathologist, if the impairment is one that a speech-language pathologist is authorized by law to treat; ("praticien de la santé")

"impairment" means a loss or abnormality of a psychological, physiological or anatomical structure or function; ("déficience")

"insured automobile" means, in respect of a particular motor vehicle liability policy, an automobile covered by the policy; ("automobile assurée")

"insured person" means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario; ("personne assurée")

"minor injury" means one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury; ("blessure légère")

"Minor Injury *Guideline*" means a guideline,

(a) that is issued by the Chief Executive Officer under subsection 268.3 (1.1) of the Act and published in *The Ontario Gazette*, and

(b) that establishes a treatment framework in respect of one or more minor injuries; ("Directive sur les blessures légères")

"neuropsychologist" means a psychologist authorized by law to practise neuropsychology who has been registered to practice as a neuropsychologist in Canada for a minimum of five years; ("neuropsychologue")

"occupational therapist" means a person authorized by law to practise occupational therapy; ("ergothérapeute")

"Old Regulation" means Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996), made under the Act; ("ancien règlement")

"person in need of care" means, in respect of an insured person, another person who is under 16 years of age or who requires care because of physical or mental incapacity; ("personne ayant besoin de soins")

"personal and vocational characteristics" include,

(a) employment history,

(b) education and training,

(c) vocational aptitudes,

(d) vocational skills,

(e) physical abilities,

(f) cognitive abilities, and

(g) language abilities; (“caractéristiques personnelles et professionnelles”)

“physician” means a person authorized by law to practise medicine; (“médecin”)

“physiotherapist” means a person authorized by law to practice physiotherapy; (“physiothérapeute”)

“private corporation” means a corporation whose shares are not publicly traded and that is not controlled by one or more corporations whose shares are publicly traded; (“société fermée”)

“psychologist” means a person authorized by law to practise psychology; (“psychologue”)

“registered nurse with an extended certificate of registration” means a person authorized by law to practise nursing who holds an extended certificate of registration under the *Nursing Act, 1991*; (“infirmière autorisée ou infirmier autorisé titulaire d’un certificat d’inscription supérieur”)

“regulated health profession” means a profession governed by a College as defined in the *Regulated Health Professions Act, 1991* *or* the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Service Work Act, 1998*; (“profession de la santé réglementée”)

“regulated health professional” means a member of a regulated health profession; (“professionnel de la santé réglementé”)

“self-employed person” means a person who,

(a) engages in a trade, occupation, profession or other type of business as a sole proprietor or as a partner, other than a limited partner, of a partnership, or

(b) is a controlling mind of a business carried on through one or more private corporations some or all of whose shares are owned by the person; (“travailleur indépendant”)

“self-employment” means a trade, occupation, profession or other type of business the essential tasks of which are carried on by a self-employed person; (“travail indépendant”)

“spouse” has the same meaning as in Part VI of the Act; (“conjoint”)

“sprain” means an injury to one or more tendons or ligaments or to one or more of each, including a partial but not a complete tear; (“entorse”)

“strain” means an injury to one or more muscles, including a partial but not a complete tear; (“foulure”)

“subluxation” means a partial but not a complete dislocation of a joint; (“subluxation”)

“whiplash associated disorder” means a whiplash injury that,

(a) does not exhibit objective, demonstrable, definable and clinically relevant neurological signs, and

(b) does not exhibit a fracture in or dislocation of the spine; ("entorse cervicale")

"whiplash injury" means an injury that occurs to a person's neck following a sudden acceleration-deceleration force. ("coup de fouet cervical") O. Reg. 34/10, s. 3 (1); O. Reg. 289/10, s. 1 (1); O. Reg. 251/15, s. 2 (1); O. Reg. 123/19, s. 1 (1-4).

(2) The reference in clause (a) of the definition of "authorized transportation expense" to the transportation expense guideline published by the Financial Services Regulatory Authority of Ontario is deemed to include the last Transportation Expense Guideline published by the Financial Services Commission of Ontario prior to June 8, 2019 until the Financial Services Regulatory Authority of Ontario publishes a subsequent transportation expense guideline. O. Reg. 123/19, s. 1 (5).

(3) For the purposes of the definitions of "Guideline" and "Minor Injury Guideline", references to a guideline issued by the Chief Executive Officer are deemed to include the last guideline issued by the Superintendent for the purposes of the relevant definition prior to June 8, 2019 until the Chief Executive Officer issues a subsequent guideline for the purposes of the relevant definition. O. Reg. 123/19, s. 1 (5).

(4) For the purpose of the definition of "Guideline", the reference to a guideline published by the Financial Services Regulatory Authority of Ontario is deemed to include the last guideline published by the Financial Services Commission of Ontario for the purposes of that definition prior to June 8, 2019 until the Financial Services Regulatory Authority of Ontario publishes a subsequent guideline for the purposes of that definition. O. Reg. 123/19, s. 1 (5).

(5), (6) Revoked: O. Reg. 251/15, s. 2 (2).

(7) For the purposes of this Regulation,

(a) a person suffers a complete inability to carry on a normal life as a result of an accident if, as a result of the accident, the person sustains an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident;

(b) a person is a dependant of an individual if the person is principally dependent for financial support or care on the individual or the individual's spouse;

(c) an aide or attendant for a person includes a family member or friend who acts as the person's aide or attendant, even if the family member or friend does not possess any special qualifications;

(d) payments for loss of income under an income continuation benefit plan are deemed to include,

(i) payments of disability pension benefits under the *Canada Pension Plan*,

(ii) periodic payments of insurance, irrespective of whether the contract for the insurance provides for a waiting period, deductible amount or similar limitation or restriction and irrespective of whether the contract is paid for in whole or in part by the employer, if the insurance is offered by the insurer,

(A) to persons who are employed while the contract for the insurance is in effect, and

(B) only on the basis that the maximum benefit payable is limited to an amount calculated with reference to the insured person's income from employment;

(e) subject to subsection (8), an expense in respect of goods or services referred to in this Regulation is not incurred by an insured person unless,

(i) the insured person has received the goods or services to which the expense relates,

(ii) the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and

(iii) the person who provided the goods or services,

(A) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or

(B) sustained an economic loss as a result of providing the goods or services to the insured person;

(f) an individual who is living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, or

(ii) the insured automobile is being rented by the individual for a period of more than 30 days; and

(g) an individual who is not living and ordinarily present in Ontario is deemed to be the named insured under the policy insuring an automobile at the time of an accident if, at the time of the accident,

(i) the insured automobile is being made available for the individual's regular use by a corporation, unincorporated association, partnership, sole proprietorship or other entity, and

(ii) the individual, his or her spouse or any dependant of the individual or spouse is an occupant of the insured automobile. O. Reg. 34/10, s. 3 (7); O. Reg. 289/10, s. 1 (3); O. Reg. 194/11, s. 1.

(8) If in a dispute described in subsection 280 (1) of the Act, the Licence Appeal Tribunal finds that an expense was not incurred because the insurer unreasonably withheld or

delayed payment of a benefit in respect of the expense, the Licence Appeal Tribunal may, for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred. O. Reg. 44/16, s. 1.

Catastrophic impairment

3.1 (1) For the purposes of this Regulation, an impairment is a catastrophic impairment if an insured person sustains the impairment in an accident that occurs on or after June 1, 2016 and the impairment results in any of the following:

1. Paraplegia or tetraplegia that meets the following criteria:

i. The insured person's neurological recovery is such that the person's permanent grade on the ASIA Impairment Scale, as published in Marino, R.J. et al, *International Standards for Neurological Classification of Spinal Cord Injury*, Journal of Spinal Cord Medicine, Volume 26, Supplement 1, Spring 2003, can be determined.

ii. The insured person's permanent grade on the ASIA Impairment Scale is or will be,

A. A, B or C, or

B. D, and

1. the insured person's score on the Spinal Cord Independence Measure, Version III, item 12 (Mobility Indoors), as published in Catz, A., Itzkovich, M., Tesio L. et al, *A multicentre international study on the Spinal Cord Independence Measure, version III: Rasch psychometric validation*, Spinal Cord (2007) 45, 275-291 and applied over a distance of up to 10 metres on an even indoor surface is 0 to 5,

2. the insured person requires urological surgical diversion, an implanted device, or intermittent or constant catheterization in order to manage a residual neuro-urological impairment, or

3. the insured person has impaired voluntary control over anorectal function that requires a bowel routine, a surgical diversion or an implanted device.

2. Severe impairment of ambulatory mobility or use of an arm, or amputation that meets one of the following criteria:

i. Trans-tibial or higher amputation of a leg.

ii. Amputation of an arm or another impairment causing the total and permanent loss of use of an arm.

iii. Severe and permanent alteration of prior structure and function involving one or both legs as a result of which the insured person's score on the Spinal Cord Independence Measure, Version III, item 12 (Mobility Indoors), as published in Catz, A., Itzkovich, M., Tesio L. et al, *A multicentre international study on the Spinal Cord Independence Measure, version III: Rasch psychometric validation*, Spinal Cord (2007) 45, 275-291 and applied over a distance of up to 10 metres on an even indoor surface is 0 to 5.

3. Loss of vision of both eyes that meets the following criteria:

i. Even with the use of corrective lenses or medication,

A. visual acuity in both eyes is 20/200 (6/60) or less as measured by the Snellen Chart or an equivalent chart, or

B. the greatest diameter of the field of vision in both eyes is 20 degrees or less.

ii. The loss of vision is not attributable to non-organic causes.

4. If the insured person was 18 years of age or older at the time of the accident, a traumatic brain injury that meets the following criteria:

i. The injury shows positive findings on a computerized axial tomography scan, a magnetic resonance imaging or any other medically recognized brain diagnostic technology indicating intracranial pathology that is a result of the accident, including, but not limited to, intracranial contusions or haemorrhages, diffuse axonal injury, cerebral edema, midline shift or pneumocephaly.

ii. When assessed in accordance with Wilson, J., Pettigrew, L. and Teasdale, G., Structured Interviews for the Glasgow Outcome Scale and the Extended Glasgow Outcome Scale: Guidelines for Their Use, Journal of Neurotrauma, Volume 15, Number 8, 1998, the injury results in a rating of,

A. Vegetative State (VS or VS*), one month or more after the accident,

B. Upper Severe Disability (Upper SD or Upper SD*) or Lower Severe Disability (Lower SD or Lower SD*), six months or more after the accident, or

C. Lower Moderate Disability (Lower MD or Lower MD*), one year or more after the accident.

5. If the insured person was under 18 years of age at the time of the accident, a traumatic brain injury that meets one of the following criteria:

i. The insured person is accepted for admission, on an in-patient basis, to a public hospital named in a Guideline with positive findings on a computerized axial tomography scan, a magnetic resonance imaging or any other medically recognized brain diagnostic technology indicating intracranial pathology that is a result of the accident, including, but not limited to, intracranial contusions or haemorrhages, diffuse axonal injury, cerebral edema, midline shift or pneumocephaly.

ii. The insured person is accepted for admission, on an in-patient basis, to a program of neurological rehabilitation in a paediatric rehabilitation facility that is a member of the Ontario Association of Children’s Rehabilitation Services.

iii. One month or more after the accident, the insured person’s level of neurological function does not exceed category 2 (Vegetative) on the King’s Outcome Scale for Childhood Head Injury as published in Crouchman, M. et al, *A practical outcome scale for paediatric head injury*, Archives of Disease in Childhood, 2001: 84: 120-124.

iv. Six months or more after the accident, the insured person's level of neurological function does not exceed category 3 (Severe disability) on the King's Outcome Scale for Childhood Head Injury as published in Crouchman, M. et al, *A practical outcome scale for paediatric head injury*, Archives of Disease in Childhood, 2001: 84: 120-124.

v. Nine months or more after the accident, the insured person's level of function remains seriously impaired such that the insured person is not age-appropriately independent and requires in-person supervision or assistance for physical, cognitive or behavioural impairments for the majority of the insured person's waking day.

6. Subject to subsections (2) and (5), a physical impairment or combination of physical impairments that, in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th edition, 1993, results in 55 per cent or more physical impairment of the whole person.

7. Subject to subsections (2) and (5) a mental or behavioural impairment, excluding traumatic brain injury, determined in accordance with the rating methodology in Chapter 14, Section 14.6 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 6th edition, 2008, that, when the impairment score is combined with a physical impairment described in paragraph 6 in accordance with the combining requirements set out in the Combined Values Table of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 percent or more impairment of the whole person.

8. Subject to subsections (3) and (5), an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993 results in a class 4 impairment (marked impairment) in three or more areas of function that precludes useful functioning or a class 5 impairment (extreme impairment) in one or more areas of function that precludes useful functioning, due to mental or behavioural disorder. O. Reg. 251/15, s. 3; O. Reg. 116/16, s. 1; O. Reg. 383/24, s. 2.

(2) Paragraphs 6 and 7 of subsection (1) do not apply in respect of an insured person who sustains an impairment as a result of an accident unless,

(a) two years have elapsed since the accident; or

(b) an assessment conducted by a physician three months or more after the accident determines that,

(i) the insured person has a physical impairment or combination of physical impairments determined in accordance with paragraph 6 of subsection (1), or a combination of a mental or behavioural impairment and a physical impairment determined in accordance with paragraph 7 of subsection (1) that results in 55 per cent or more impairment of the whole person, and

(ii) the insured person's condition is unlikely to improve to less than 55 per cent impairment of the whole person. O. Reg. 251/15, s. 3.

(3) Paragraph 8 of subsection (1) does not apply in respect of an insured person who sustains an impairment as a result of the accident unless,

(a) two years have elapsed since the accident; or

(b) a physician states in writing that the insured person's impairment is unlikely to improve to less than a class 4 impairment (marked impairment) in three or more areas of function that precludes useful functioning, due to mental or behavioural disorder. O. Reg. 251/15, s. 3.

(4) Subsection (5) applies to an insured person who was under the age of 18 at the time of the accident and whose impairment is not a catastrophic impairment within the meaning of subsection (1). O. Reg. 251/15, s. 3.

(5) If the insured person's impairment can reasonably be believed to be a catastrophic impairment for the purposes of paragraph 6, 7 or 8 of subsection (1), the impairment shall be deemed to be the impairment referred to in paragraph 6, 7 or 8 of subsection (1) that is most analogous to the impairment, after taking into consideration the developmental implications of the impairment. O. Reg. 251/15, s. 3.

PART II
INCOME REPLACEMENT, Non-earner and Caregiver BENEFITs

Income Replacement Benefits

Note: On July 1, 2026, the heading to section 4 of the Regulation is revoked. (See: O. Reg. 383/24, s. 3)

Interpretation

4. (1) In this Part,

"gross employment income" means salary, wages and other remuneration from employment, including fees and other remuneration for holding office, and any benefits received under the *Employment Insurance Act* (Canada), but excludes any retiring allowance within the meaning of the *Income Tax Act* (Canada) and severance pay that may be received; ("revenu brut d'emploi")

"gross weekly employment income" means, in respect of an insured person, the amount of the person's gross annual employment income, as determined under subsection (2), divided by 52; ("revenu brut hebdomadaire d'emploi")

"other income replacement assistance" means, in respect of an insured person who sustains an impairment as a result of an accident,

(a) the amount of any gross weekly payment for loss of income that is received by or available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan, other than,

(i) a benefit under the *Employment Insurance Act* (Canada),

(ii) a payment under a sick leave plan that is available to the person but is not being received, and

(iii) a payment under a workers' compensation law or plan that is not being received by the person because the person has elected under the workers' compensation law or plan to bring an action and is not entitled to the payment, and

(b) the amount of any gross weekly payment for loss of income, other than a benefit or payment described in subclauses (a) (i) to (iii) that may be available to the person as a result of the accident under the laws of any jurisdiction or under any income continuation benefit plan but is not being received by the person and for which the person has not made an application. ("autre assistance au titre du remplacement du revenu") O. Reg. 34/10, s. 4 (1).

(2) The gross annual employment income of an insured person is determined as follows:

1. In the case of a person referred to in subparagraph 1 i of subsection 5 (1) who was not a self-employed person at any time during the four weeks before the accident, the person's gross annual employment income is whichever of the following amounts the person designates:

i. The person's gross employment income for the four weeks before the accident, multiplied by 13.

ii. The person's gross employment income for the 52 weeks before the accident.

2. Subject to paragraph 3, the person's gross annual employment income is his or her gross employment income for the 52 weeks before the accident if,

i. the person qualifies for a benefit under subparagraph 1 i of subsection 5 (1) and was a self-employed person at any time during the four weeks before the accident, or

ii. the person qualifies for a benefit under subparagraph 1 ii of subsection 5 (1).

3. If the person described in subparagraph 2 i was self-employed for at least one year before the accident, the person may designate as his or her gross annual employment income the amount of his or her gross employment income during the last fiscal year of the business that ended on or before the day of the accident. O. Reg. 34/10, s. 4 (2); O. Reg. 370/10, s. 1.

(3) A self-employed person's weekly income or loss from self-employment at the time of the accident is the amount that would be 1/52 of the amount of the person's income or loss from the business for the last completed taxation year as determined in accordance with Part I of the *Income Tax Act* (Canada). O. Reg. 34/10, s. 4 (3).

(4) A self-employed person's loss from self-employment after an accident is determined in the same manner as losses from the business in which the person was self-employed would be determined under subsection 9 (2) of the *Income Tax Act* (Canada) without making any deductions for,

(a) any expenses that were not reasonable or necessary to prevent a loss of revenue;

(b) any salary expenses paid to replace the self-employed person's active participation in the business, except to the extent that the expenses are reasonable in the circumstances; and

(c) any non-salary expenses that are different in nature or greater than the non-salary expenses incurred before the accident, except to the extent that those expenses are reasonable in the circumstances and necessary to prevent or reduce any losses resulting from the accident. O. Reg. 34/10, s. 4 (4).

(5) If, under the *Income Tax Act* (Canada) or legislation of another jurisdiction that imposes a tax calculated by reference to income, a person is required to report the amount of his or her income, the person's income before an accident shall be determined for the purposes of this Part without reference to any income the person has failed to report contrary to that Act or legislation. O. Reg. 34/10, s. 4 (5).

(6) The amount of a person's gross annual employment income and the amount of the person's income or loss from self-employment may be adjusted for the purposes of this Part to reflect any subsequent change in the amount determined by the Canada Revenue Agency under the *Income Tax Act* (Canada) or by the relevant government or agency under the legislation of another jurisdiction that imposes a tax calculated by reference to income. O. Reg. 34/10, s. 4 (6).

Note: On July 1, 2026, the Regulation is amended by adding the following section: (See: O. Reg. 383/24, s. 4)

Benefits optional

4.1 (1) Every insurer shall offer the following optional benefits under every contract evidenced by a motor vehicle liability policy and, if a benefit is purchased, the applicable rules set out in this Part apply:

1. An income replacement benefit, as described in sections 5 to 11.

2. A non-earner benefit, as described in section 12.

3. A caregiver benefit, as described in section 13. O. Reg. 383/24, s. 4.

(2) The optional benefits referred to in subsection (1) are only applicable to,

(a) the named insured;

(b) the spouse of the named insured;

(c) the dependants of the named insured and of the named insured's spouse; and

(d) the persons specified in the policy as drivers of the insured automobile. O. Reg. 383/24, s. 4.

(3) An optional benefit referred to in subsection (1) may be purchased at any time before an accident in respect of which an application for benefits is made. O. Reg. 383/24, s. 4.

(4) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in the form approved by the Chief Executive Officer for that purpose under section 227 of the Act. O. Reg. 383/24, s. 4.

Note: On July 1, 2026, the Regulation is amended by adding the following heading before section 5 of the Regulation: (See: O. Reg. 383/24, s. 5)

Income Replacement Benefits

Eligibility criteria

5. (1) The insurer shall pay an income replacement benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies one or both of the following conditions:

1. The insured person,

i. was employed at the time of the accident and, as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of that employment, or

ii. was not employed at the time of the accident but,

A. was employed for at least 26 weeks during the 52 weeks before the accident or was receiving benefits under the *Employment Insurance Act* (Canada) at the time of the accident,

B. was at least 16 years old or was excused from attending school under the *Education Act* at the time of the accident, and

C. as a result of and within 104 weeks after the accident, suffers a substantial inability to perform the essential tasks of the employment in which the insured person spent the most time during the 52 weeks before the accident.

2. The insured person,

i. was a self-employed person at the time of the accident, and

ii. suffers, as a result of and within 104 weeks after the accident, a substantial inability to perform the essential tasks of his or her self-employment. O. Reg. 34/10, s. 5 (1).

(2) Despite subsection (1), an insured person is not eligible to receive income replacement benefits if he or she is eligible to receive and has elected under section 35 to receive either a non-earner benefit or a caregiver benefit under this Part. O. Reg. 34/10, s. 5 (2).

Period of benefit

6. (1) Subject to subsection (2), an income replacement benefit is payable for the period in which the insured person suffers a substantial inability to perform the essential tasks of his or her employment or self-employment. O. Reg. 34/10, s. 6 (1).

(2) The insurer is not required to pay an income replacement benefit,

(a) for the first week of the disability; or

(b) after the first 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment or self-employment for which he or she is reasonably suited by education, training or experience. O. Reg. 34/10, s. 6 (2).

Amount of weekly income replacement benefit

7. (1) The weekly amount of an income replacement benefit payable to an insured person who becomes entitled to the benefit before his or her 65th birthday is the lesser of "A" and "B" where,

"A" is the weekly base amount determined under subsection (2) less the total of all other income replacement assistance, if any, for the particular week the benefit is payable, and

"B" is $400 or, if an optional income replacement benefit referred to in section 28 has been purchased and applies to the person, the amount fixed by the optional benefit. O. Reg. 34/10, s. 7 (1).

Note: On July 1, 2026, the value of "B" in subsection 7 (1) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 6)

"B" is the amount fixed by the optional benefit.

(2) For the purposes of subsection (1), the weekly base amount in respect of an insured person is determined as follows:

1. Determine whichever of the following amounts is applicable:

i. 70 per cent of the amount, if any, by which the sum of the insured person's gross weekly employment income and weekly income from self-employment exceeds the amount of the insured person's weekly loss from self-employment, if the weekly income replacement benefit is for one of the first 104 weeks of disability, or

ii. the greater of the amount determined for the purposes of subparagraph i and $185, if the weekly income replacement benefit is for a week for which the person is entitled to receive an income replacement benefit after the first 104 weeks of disability.

2. To the amount determined under paragraph 1, add 70 per cent of the amount of the insured person's weekly loss from self-employment that he or she incurs as a result of the accident. O. Reg. 34/10, s. 7 (2).

(3) The insurer may deduct from the amount of an income replacement benefit payable to an insured person,

(a) 70 per cent of any gross employment income received by the insured person as a result of being employed after the accident and during the period in which he or she is eligible to receive an income replacement benefit; and

(b) 70 per cent of any income from self-employment earned by the insured person after the accident and during the period in which he or she is eligible to receive an income replacement benefit. O. Reg. 34/10, s. 7 (3).

(4) The insurer shall pay an expense incurred by or on behalf of an insured person for the preparation of a report for the purpose of calculating the person's income from employment or self-employment if all of the following conditions are satisfied:

1. The insured person is applying for an income replacement benefit under this Part that is based on the employment or self-employment considered in the report.

2. The report is prepared by a member of a designated body within the meaning of the *Public Accounting Act, 2004*.

3. The expense is reasonable and necessary for the purpose of determining the insured person's entitlement to an income replacement benefit. O. Reg. 34/10, s. 7 (4); O. Reg. 289/10, s. 2.

(5) The insurer is not required to pay more than a total of $2,500 for the preparation of one or more reports under subsection (4) in respect of an insured person. O. Reg. 34/10, s. 7 (5).

Adjustment after age 65

8. (1) If a person is receiving an income replacement benefit immediately before his or her 65th birthday, the weekly amount of the benefit is adjusted, on the later of the day of the person's 65th birthday and the second anniversary of the day the person began receiving the benefit, to the amount determined in accordance with the following formula:

C × 0.02 × D

in which,

"C" is the weekly amount of the income replacement benefit that the person was entitled to receive immediately before the adjustment, before any deductions permitted by subsection 7 (3),

"D" is the lesser of,

(a) 35, and

(b) the number of years during which the person qualified for the income replacement benefit before the adjustment is made.

O. Reg. 34/10, s. 8 (1).

(2) Despite section 6, an income replacement benefit that has been adjusted under subsection (1) is payable, without any deductions under clause 7 (3) (a) or (b), until the person dies. O. Reg. 34/10, s. 8 (2).

If entitlement first arises on or after 65th birthday

9. (1) If an insured person becomes entitled to receive an income replacement benefit on or after his or her 65th birthday,

(a) subject to clause 6 (2) (a) and despite clause 6 (2) (b), the insured person is entitled to an income replacement benefit for not more than 208 weeks after becoming entitled to the benefit; and

(b) the weekly amount of the benefit is the weekly amount of the income replacement benefit otherwise determined under section 7 before any deductions permitted by subsection 7 (3), multiplied by the factor set out in Column 2 of the Table to this subsection opposite the number of weeks that have elapsed since the person became entitled to receive the benefit.

TABLE

Column 1 Number of weeks since Entitlement Arose	Column 2 Factor
Less than 52 weeks	1.0
52 weeks or more but less than 104 weeks	0.8
104 weeks or more but less than 156 weeks	0.6
156 weeks or more but less than 208 weeks	0.3

O. Reg. 34/10, s. 9 (1).

(2) No deduction may be made under clause 7 (3) (a) or (b) from an income replacement benefit determined under subsection (1). O. Reg. 34/10, s. 9 (2).

No violation of *Human Rights Code*

10. The age distinctions in sections 8 and 9 apply despite the *Human Rights Code*.
O. Reg. 34/10, s. 10.

Temporary return to employment

11. A person receiving an income replacement benefit may return to or start employment or self-employment at any time during the first 104 weeks for which he or she is receiving the benefit without affecting his or her entitlement to resume receiving any benefits to which he or she is entitled under this Part if, as a result of the accident, he or she is unable to continue the employment or self-employment. O. Reg. 34/10, s. 11.

Non-Earner Benefits

Non-earner benefit

12. (1) The insurer shall pay a non-earner benefit to an insured person who sustains an impairment as a result of an accident if the insured person satisfies any of the following conditions:

1. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and does not qualify for an income replacement benefit.

2. The insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident and,

i. was enrolled on a full-time basis in elementary, secondary or post-secondary education at the time of the accident, or

ii. completed his or her education less than one year before the accident and was neither employed nor a self-employed person after completing his or her education and before the accident, in a capacity that reflected his or her education and training. O. Reg. 34/10, s. 12 (1).

(2) The amount of a non-earner benefit is $185 for each week during the period that the insured person suffers a complete inability to carry on a normal life, less the total of all other income replacement assistance, if any, for the same week. O. Reg. 34/10, s. 12 (2); O. Reg. 251/15, s. 4 (1).

Note: On July 1, 2026, subsection 12 (2) of the Regulation is amended by striking out "$185" and substituting "the amount fixed by the optional benefit". (See: O. Reg. 383/24, s. 7)

(3) The insurer is not required to pay a non-earner benefit,

(a) for the first four weeks after the onset of the complete inability to carry on a normal life;

(b) before the insured person is 18 years of age;

(c) for more than 104 weeks after the accident; or

(d) if the insured person is eligible to receive and has elected under section 35 to receive either an income replacement benefit or a caregiver benefit under this Part. O. Reg. 251/15, s. 4 (2).

(4), (5) Revoked: O. Reg. 251/15, s. 4 (2).

Caregiver Benefits

Caregiver benefit

13. (1) The insurer shall pay a caregiver benefit to or for an insured person who sustains a catastrophic impairment as a result of an accident if, as a result of and within 104 weeks after the accident, the insured person suffers a substantial inability to engage in the caregiving activities in which he or she was engaged at the time of the accident and if, at the time of the accident,

Note: On July 1, 2026, subsection 13 (1) of the Regulation is amended by striking out "a catastrophic impairment" in the portion before clause (a) and substituting "an impairment". (See: O. Reg. 383/24, s. 8 (1))

(a) the insured person was residing with a person in need of care; and

(b) the insured person was the primary caregiver for the person in need of care and did not receive any remuneration for engaging in caregiving activities. O. Reg. 34/10, s. 13 (1).

(2) The caregiver benefit shall pay for reasonable and necessary expenses incurred as a result of the accident in caring for a person in need of care, but shall not exceed,

(a) $250 per week for the first person in need of care; and

Note: On July 1, 2026, clause 13 (2) (a) of the Regulation is amended by striking out "$250" at the beginning and substituting "the amount fixed by the optional benefit". (See: O. Reg. 383/24, s. 8 (2))

(b) $50 per week for each additional person in need of care. O. Reg. 34/10, s. 13 (2).

Note: On July 1, 2026, clause 13 (2) (b) of the Regulation is amended by striking out "$50" at the beginning and substituting "the amount fixed by the optional benefit". (See: O. Reg. 383/24, s. 8 (3))

(3) Despite subsection (1), no caregiver benefit is payable to an insured person if he or she is eligible to receive and has elected under section 35 to receive either an income replacement benefit or a non-earner benefit under this Part. O. Reg. 34/10, s. 13 (3).

(4) Despite subsection (1), no caregiver benefit is payable for any period longer than 104 weeks of disability unless, as a result of the accident, the insured person is suffering a complete inability to carry on a normal life. O. Reg. 34/10, s. 13 (4).

PART III
MEDICAL, REHABILITATION AND ATTENDANT CARE BENEFITS

Insurer liable to pay benefits

14. Except as otherwise provided in this Regulation, an insurer is liable to pay the following benefits to or on behalf of an insured person who sustains an impairment as a result of an accident:

1. Medical and rehabilitation benefits under sections 15 to 17.

2. If the impairment is not a minor injury, attendant care benefits under section 19. O. Reg. 34/10, s. 14.

Medical benefits

15. (1) Subject to section 18, medical benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

(a) medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech-language pathology services;

(b) chiropractic, psychological, occupational therapy and physiotherapy services;

(c) medication;

(d) prescription eyewear;

(e) dentures and other dental devices;

(f) hearing aids, wheelchairs or other mobility devices, prostheses, orthotics and other assistive devices;

(g) transportation for the insured person to and from treatment sessions, including transportation for an aide or attendant; and

(h) other goods and services of a medical nature that the insurer agrees are essential for the treatment of the insured person, and for which a benefit is not otherwise provided in this Regulation. O. Reg. 34/10, s. 15 (1); O. Reg. 251/15, s. 5.

(2) Despite subsection (1), the insurer is not liable to pay medical benefits,

(a) for goods or services that are experimental in nature;

(b) for expenses related to goods and services described in subsection (1) rendered to an insured person that exceed the maximum rate or amount of expenses established under the Guidelines, other than for expenses related to the services described in clause (1) (g); or

(c) for transportation expenses other than authorized transportation expenses. O. Reg. 34/10, s. 15 (2); O. Reg. 14/13, s. 1.

Rehabilitation benefits

16. (1) Subject to section 18, rehabilitation benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person in undertaking activities and measures described in subsection (3) that are reasonable and necessary for

the purpose of reducing or eliminating the effects of any disability resulting from the impairment or to facilitate the person's reintegration into his or her family, the rest of society and the labour market. O. Reg. 34/10, s. 16 (1).

(2) Measures to reintegrate an insured person into the labour market are considered reasonable and necessary, taking into consideration the person's personal and vocational characteristics, if they enable the person to,

(a) engage in employment or self-employment that is as similar as possible to the employment or self-employment in which he or she was engaged at the time of the accident; or

(b) lead as normal a work life as possible. O. Reg. 34/10, s. 16 (2).

(3) The activities and measures referred to in subsection (1) are,

(a) life skills training;

(b) family counselling;

(c) social rehabilitation counselling;

(d) financial counselling;

(e) employment counselling;

(f) vocational assessments;

(g) vocational or academic training;

(h) workplace modifications and workplace devices, including communications aids, to accommodate the needs of the insured person;

(i) home modifications and home devices, including communications aids, to accommodate the needs of the insured person, or the purchase of a new home if it is more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate his or her existing home;

(j) vehicle modifications to accommodate the needs of the insured person, or the purchase of a new vehicle if it is more reasonable to purchase a new vehicle to accommodate the needs of the insured person than to modify an existing vehicle;

(k) transportation for the insured person to and from counselling and training sessions, including transportation for an aide or attendant; and

(l) other goods and services that the insurer agrees are essential for the rehabilitation of the insured person, and for which a benefit is not otherwise provided in this Regulation, except,

(i) services provided by a case manager; and

(ii) housekeeping and caregiver services. O. Reg. 34/10, s. 16 (3); O. Reg. 251/15, s. 6.

(4) Despite subsection (1), the insurer is not liable to pay rehabilitation benefits,

(a) for expenses related to goods and services described in subsection (3) rendered to an insured person that exceed the maximum rate or amount of expenses established under the Guidelines, other than for expenses related to the services described in clause (3) (k);

(b) for expenses incurred to renovate the insured person's home if the renovations are only for the purpose of giving the insured person access to areas of the home that are not needed for ordinary living;

(c) for the purchase of a new home in excess of the value of the renovations to the insured person's existing home that would be required to accommodate the needs of the insured person;

(d) for expenses incurred to purchase or modify a vehicle to accommodate the needs of the insured person that are incurred within five years after the last expenses incurred for that purpose in respect of the same accident;

(e) for the purchase of a new vehicle in excess of the amount by which the cost of the new vehicle exceeds the trade-in value of the existing vehicle;

(f) for transportation expenses other than authorized transportation expenses. O. Reg. 34/10, s. 16 (4); O. Reg. 14/13, s. 2.

Case manager services

17. (1) Subject to subsection (2), medical or rehabilitation benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of an insured person as a result of the accident for services provided by a qualified case manager in accordance with a treatment and assessment plan under section 38,

(a) if the insured person sustains a catastrophic impairment as a result of the accident; or

(b) if the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28 (1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28 (1) is available to the insured person. O. Reg. 34/10, s. 17 (1); O. Reg. 251/15, s. 7.

(2) The insurer is not liable to pay expenses for case manager services that exceed the maximum rate or amount of expenses established under the Guidelines. O. Reg. 34/10, s. 17 (2).

(3) In this section,

"qualified case manager" means a person who provides services related to the co-ordination of goods or services for which payment is provided by a medical, rehabilitation or attendant care benefit. O. Reg. 34/10, s. 17 (3); O. Reg. 289/10, s. 3.

Monetary limits re medical and rehabilitation benefits

18. (1) The sum of the medical and rehabilitation benefits payable in respect of an insured person who sustains an impairment that is predominantly a minor injury shall not exceed $3,500 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019 for any one accident, less the sum of all amounts paid in respect of the insured person in accordance with the Minor Injury Guideline. O. Reg. 34/10, s. 18 (1); O. Reg. 123/19, s. 2 (1).

(2) Despite subsection (1), the limit in that subsection does not apply to an insured person if his or her health practitioner determines and provides compelling evidence that the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the limit or is limited to the goods and services authorized under the Minor Injury Guideline. O. Reg. 34/10, s. 18 (2); O. Reg. 347/13, s. 1; O. Reg. 123/19, s. 2 (2).

(3) The sum of the medical, rehabilitation and attendant care benefits paid in respect of an insured person who is not subject to the financial limit in subsection (1) shall not exceed, for any one accident,

(a) $65,000 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019; or

(b) if the insured person sustained a catastrophic impairment as a result of the accident, $1,000,000 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019. O. Reg. 251/15, s. 8 (1); O. Reg. 123/19, s. 2 (3, 4).

(4) The maximum amounts set out in subsection (3) apply unless modified by any optional benefits that are available under paragraph 3, 4 or 5 of subsection 28 (1). O. Reg. 34/10, s. 18 (4); O. Reg. 251/15, s. 8 (2).

(5) For the purposes of subsections (1) and (3), medical, rehabilitation and, where applicable, attendant care benefits payable in respect of an insured person include all fees and expenses for conducting assessments and examinations and preparing reports in connection with any benefit or payment to or for an insured person under this Regulation, other than,

(a) fees in connection with any examination required by an insurer under section 44; and

(b) expenses in respect of a report referred to in subsection 7 (4). O. Reg. 34/10, s. 18 (5); O. Reg. 251/15, s. 8 (3).

Attendant care benefit

19. (1) Attendant care benefits shall pay for all reasonable and necessary expenses,

(a) that are incurred by or on behalf of the insured person as a result of the accident for services provided by an aide or attendant or by a long-term care facility, including a long-

term care home under *the Fixing Long-Term Care Act, 2021* or a chronic care hospital; and

(b) that, to the extent any of the expenses referred to in clause (a) are for transportation, are authorized transportation expenses for which no medical benefit described in clause 15 (1) (g) is payable, no rehabilitation benefit described in clause 16 (3) (k) is payable and no amount is payable under subsection 25 (4). O. Reg. 34/10, s. 19 (1); O. Reg. 292/22, s. 1.

(2) Subject to subsection (3), the amount of a monthly attendant care benefit is determined in accordance with the version of the document entitled "Assessment of Attendant Care Needs" that is required to be submitted under section 42 and is calculated by,

(a) multiplying the total number of hours per month of each type of attendant care listed in the document that the insured person requires by an hourly rate that does not exceed the maximum hourly rate, as established under the Guidelines, that is payable in respect of that type of care; and

(b) adding the amounts determined under clause (a), if more than one type of attendant care is required. O. Reg. 34/10, s. 19 (2).

(3) The amount of the attendant care benefit payable in respect of an insured person shall not exceed the amount determined under the following rules:

1. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28 (1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28 (1) has not been purchased and does not apply to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed,

i. $3,000 per month plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019, if the insured person did not sustain a catastrophic impairment as a result of the accident, or

ii. $6,000 per month plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019, if the insured person sustained a catastrophic impairment as a result of the accident.

2. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 3 of subsection 28 (1) has been purchased and applies to the insured person, the amount of the attendant care benefit payable in respect of the insured person shall not exceed the amount set out in subparagraph 1 i.

3. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28 (1) or the catastrophic impairment benefit referred to in paragraph 5 of subsection 28 (1) has been purchased and applies to the insured person,

the amount of the attendant care benefit payable in respect of the insured person shall not exceed the monthly limit under subsection 28 (7).

4. Despite paragraphs 1, 2 and 3, if a person who provided attendant care services (the "attendant care provider") to or for the insured person did not do so in the course of the employment, occupation or profession in which the attendant care provider would ordinarily have been engaged for remuneration, but for the accident, the amount of the attendant care benefit payable in respect of that attendant care shall not exceed the amount of the economic loss sustained by the attendant care provider during the period while, and as a result of, providing the attendant care.

5. Despite paragraphs 1, 2 and 3, if a person who provided attendant care services (the "attendant care provider") to or for the insured person did so for remuneration, and the actual expenses incurred in respect of the attendant care services are lower than the amount of the monthly attendant care benefit as determined under subsection (2), the insurer shall only be liable for payment of the incurred expenses. O. Reg. 251/15, s. 9; O. Reg. 123/19, s. 3.

Duration of medical, rehabilitation and attendant care benefits

20. (1) Subject to subsection (2), no medical, rehabilitation and attendant care benefit is payable for expenses incurred,

(a) more than 260 weeks after the accident, in the case of an insured person who was at least 18 years of age at the time of the accident; or

(b) after the insured person's 28th birthday, in the case of an insured person who was under 18 years of age at the time of the accident. O. Reg. 251/15, s. 10.

(2) The time limits set out in subsection (1) do not apply in respect of an insured person,

(a) who sustains a catastrophic impairment as a result of the accident; or

(b) who is entitled to optional medical, rehabilitation and attendant care benefits under paragraph 4 of subsection 28 (1) or catastrophic impairments benefits under paragraph 5 of subsection 28 (1). O. Reg. 251/15, s. 10.

PART IV
PAYMENT OF OTHER EXPENSES

Note: On July 1, 2026, Part IV of the Regulation is amended by adding the following section: (See: O. Reg. 383/24, s. 9)

Benefits optional

20.1 (1) Every insurer shall offer the following optional benefits under every contract evidenced by a motor vehicle liability policy and, if a benefit is purchased, the applicable rules set out in this Part apply:

1. A benefit to cover lost educational expenses, as described in section 21.

2. A benefit to cover expenses of visitors, as described in section 22.

3. A benefit to cover housekeeping and home maintenance expenses, as described in section 23.

4. A benefit to cover damage to clothing, glasses, hearing aids, etc., as described in section 24. O. Reg. 383/24, s. 9.

(2) The optional benefits referred to in subsection (1) are only applicable to,

(a) the named insured;

(b) the spouse of the named insured;

(c) the dependants of the named insured and of the named insured's spouse; and

(d) the persons specified in the policy as drivers of the insured automobile. O. Reg. 383/24, s. 9.

(3) The optional benefits referred to in subsection (1) may be purchased at any time before an accident in respect of which an application for benefits is made. O. Reg. 383/24, s. 9.

(4) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in the form approved by the Chief Executive Officer for that purpose under section 227 of the Act. O. Reg. 383/24, s. 9.

Lost educational expenses

21. (1) The insurer shall pay for up to $15,000 for lost educational expenses incurred by or on behalf of an insured person who sustains an impairment as a result of an accident if,

Note: On July 1, 2026, subsection 21 (1) of the Regulation is amended by striking out "$15,000" in the portion before clause (a) and substituting "the amount fixed by the optional benefit". (See: O. Reg. 383/24, s. 10)

(a) at the time of the accident, the insured person was enrolled in a program of elementary, secondary, post-secondary or continuing education; and

(b) as a result of the accident, the insured person is unable to continue the program. O. Reg. 34/10, s. 21 (1).

(2) The insurer may require a person who applies for or is receiving benefits under this section to furnish a disability certificate as often as is reasonably necessary. O. Reg. 34/10, s. 21 (2).

(3) If an insurer requires a disability certificate, the person shall furnish a new disability certificate, completed as of a date after the date of the insurer's request, within 15 business days after receiving the insurer's request. O. Reg. 34/10, s. 21 (3).

(4) If the person fails to comply with subsection (3), no amount is payable for lost educational expenses until the person furnishes the completed disability certificate. O. Reg. 34/10, s. 21 (4).

(5) In this section,

"lost educational expenses" means expenses incurred before the accident for tuition, books, equipment or room and board in respect of the program term or program year in which the insured person was enrolled at the time of the accident, if the expenses are related to the program that the insured person is unable to continue. O. Reg. 34/10, s. 21 (5).

Expenses of visitors

22. (1) If an insured person sustains an impairment as a result of an accident, the insurer shall pay for reasonable and necessary expenses incurred not more than 104 weeks after the accident by the following persons as a result of the accident in visiting the insured person during his or her treatment or recovery:

Note: On July 1, 2026, subsection 22 (1) of the Regulation is amended by adding "up to the maximum amount fixed by the optional benefit" after "recovery" in the portion before paragraph 1. (See: O. Reg. 383/24, s. 11)

1. The spouse, children, grandchildren, parents, grandparents, brothers and sisters of the insured person.

2. An individual who was living with the insured person at the time of the accident.

3. An individual who has demonstrated a settled intention to treat the insured person as a child of the individual's family.

4. An individual whom the insured person has demonstrated a settled intention to treat as a child of the insured person's family. O. Reg. 34/10, s. 22 (1).

(2) The time limit of 104 weeks does not apply if the insured person sustained a catastrophic impairment as a result of the accident. O. Reg. 34/10, s. 22 (2).

Housekeeping and home maintenance

23. (1) The insurer shall pay up to $100 per week for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident for housekeeping and home maintenance services if, as a result of the accident, the insured person sustains a catastrophic impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he or she normally performed before the accident. O. Reg. 34/10, s. 23.

Note: On July 1, 2026, section 23 of the Regulation is amended by striking out "$100 per week" and substituting "the amount fixed by the optional benefit" and by striking out "a catastrophic impairment" and substituting "an impairment". (See: O. Reg. 383/24, s. 12 (1))

Note: On July 1, 2026, section 23 of the Regulation is amended by adding the following subsection: (See: O. Reg. 383/24, s. 12 (2))

(2) Despite subsection (1), if the impairment sustained by the insured person is not a catastrophic impairment, expenses incurred more than 104 weeks after the onset of the disability are not payable by the insurer. O. Reg. 383/24, s. 12 (2).

Damage to clothing, glasses, hearing aids, etc.

24. The insurer shall pay for all reasonable expenses incurred by or on behalf of an insured person in repairing or replacing the following:

Note: On July 1, 2026, section 24 of the Regulation is amended by adding "up to the maximum amount fixed by the optional benefit" after "following" in the portion before paragraph 1. (See: O. Reg. 383/24, s. 13)

1. Clothing worn by the insured person at the time of the accident that was lost or damaged as a result of the accident.

2. Prescription eyewear, dentures, hearing aids, prostheses and other medical or dental devices that were lost or damaged as a result of the accident. O. Reg. 34/10, s. 24.

Note: On July 1, 2026, the Regulation is amended by adding the following heading before section 25: (See: O. Reg. 383/24, s. 14)

Part iv.1
payment of examination expenses

Cost of examinations

25. (1) The insurer shall pay the following expenses incurred by or on behalf of an insured person:

1. Reasonable fees charged for preparing a disability certificate if required under section 21, 36 or 37, including any assessment or examination necessary for that purpose.

2. Fees charged in accordance with the Minor Injury Guideline by a person authorized by the Guideline for preparing a treatment confirmation form and for conducting an assessment or examination and preparing a report as authorized by the Guideline.

3. Reasonable fees charged by a health practitioner for reviewing and approving a treatment and assessment plan under section 38, including any assessment or examination necessary for that purpose, if any one or more of the goods, services, assessments or examinations described in the treatment and assessment plan have been:

i. approved by the insurer,

ii. deemed by this Regulation to be payable by the insurer, or

iii. determined to be payable by the insurer on the resolution of a dispute described in subsection 280 (1) of the Act.

4. Reasonable fees charged by an occupational therapist or a registered nurse for preparing an assessment of attendant care needs under section 42, including any assessment or examination necessary for that purpose.

5. Reasonable fees charged for preparing an application under section 45 for a determination of whether the insured person has sustained a catastrophic impairment, including any assessment or examination necessary for that purpose. O. Reg. 34/10, s. 25 (1); O. Reg. 44/16, s. 2.

(2) Despite subsection (1), an insurer is not required to pay for an assessment or examination conducted in the insured person's home unless the insured person has sustained an impairment that is not a minor injury. O. Reg. 34/10, s. 25 (2).

(3) The insurer is not liable under subsection (1) for expenses related to professional services rendered to an insured person that exceed the maximum rate or amount of expenses established under the Guidelines. O. Reg. 34/10, s. 25 (3); O. Reg. 14/13, s. 3.

(4) The insurer shall pay reasonable expenses incurred by or on behalf of an insured person for authorized transportation expenses incurred in transporting the insured person to and from an assessment or examination referred to in subsection (1), including transportation expenses for an aide or an attendant. O. Reg. 34/10, s. 25 (4).

(5) Despite any other provision of this Regulation, an insurer shall not pay,

(a) more than a total of $2,000 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019 in respect of fees and expenses for conducting any one assessment or examination and for preparing reports in connection with it, whether it is conducted at the instance of the insured person or the insurer; or

(b) any amount in respect of fees for preparing a future care plan, a life care plan or a similar plan or for any assessment or examination conducted in connection with the preparation of the plan. O. Reg. 34/10, s. 25 (5); O. Reg. 289/10, s. 4; O. Reg. 123/19, s. 4.

PART V
DEATH AND FUNERAL BENEFITS

Note: On July 1, 2026, Part V of the Regulation is amended by adding the following section: (See: O. Reg. 383/24, s. 15)

Benefits optional

25.1 (1) Every insurer shall offer the following optional benefits under every contract evidenced by a motor vehicle liability policy and, if a benefit is purchased, the applicable rules set out in this Part apply:

1. A death benefit, as described in section 26.

2. A funeral benefit, as described in section 27. O. Reg. 383/24, s. 15.

(2) The optional benefits referred to in subsection (1) are only applicable to,

(a) the named insured;

(b) the spouse of the named insured;

(c) the dependants of the named insured and of the named insured's spouse; and

(d) the persons specified in the policy as drivers of the insured automobile. O. Reg. 383/24, s. 15.

(3) An optional benefit referred to in subsection (1) may be purchased at any time before an accident in respect of which an application for benefits is made. O. Reg. 383/24, s. 15.

(4) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in the form approved by the Chief Executive Officer for that purpose under section 227 of the Act. O. Reg. 383/24, s. 15.

Death benefit

26. (1) The insurer shall pay a death benefit in respect of an insured person who dies as result of an accident,

(a) within 180 days after the accident; or

(b) within 156 weeks after the accident, if during that period the insured person was continuously disabled as a result of the accident. O. Reg. 34/10, s. 26 (1).

(2) The death benefit shall provide the following payments:

1. A payment to the insured person's spouse of,

i. $25,000, or

ii. if the optional death and funeral benefit referred to in section 28 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit.

Note: On July 1, 2026, paragraph 1 of subsection 26 (2) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 16 (1))

1. A payment to the insured person's spouse of the amount fixed by the optional benefit.

2. A payment to each of the insured person's dependants and to each person to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order of,

i. $10,000, or

ii. if the optional death and funeral benefit referred to in section 28 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit.

Note: On July 1, 2026, paragraph 2 of subsection 26 (2) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 16 (1))

2. A payment to each of the insured person's dependants and to each person to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order of the amount fixed by the optional benefit.

3. If no payment is required by paragraph 1, an additional payment to the insured person's dependants and the persons, other than a former spouse of the insured person, to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order, to be divided equally among the persons entitled, of,

i. $25,000, or

ii. if the optional death and funeral benefit referred to in section 28 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit.

Note: On July 1, 2026, paragraph 3 of subsection 26 (2) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 16 (1))

3. If no payment is required by paragraph 1, an additional payment to the insured person's dependants and the persons, other than a former spouse of the insured person, to whom the insured person had an obligation at the time of the accident to provide support under a domestic contract or court order, to be divided equally among the persons entitled, of the amount fixed by the optional benefit.

4. A payment of $10,000 to each former spouse of the insured person to whom the insured person was obligated at the time of the accident to provide support under a domestic contract or court order.

Note: On July 1, 2026, paragraph 4 of subsection 26 (2) of the Regulation is amended by striking out "$10,000" and substituting "the amount fixed by the optional benefit". (See: O. Reg. 383/24, s. 16 (2))

5. A payment of $10,000 to,

i. a person in respect of whom the insured person was a dependant at the time of the accident,

ii. the spouse of a person in respect of whom the insured person was a dependant at the time of the accident, if the spouse was the insured person's primary caregiver at the time of the accident and the person in respect of whom the insured person was a dependant at the time of the accident dies before the insured person or within 30 days after the insured person, or

iii. the dependants of a person in respect of whom the insured person was a dependant at the time of the accident, if no payment is required by subparagraph i or ii, to be divided equally among the persons entitled. O. Reg. 34/10, s. 26 (2).

Note: On July 1, 2026, paragraph 5 of subsection 26 (2) of the Regulation is amended by striking out "$10,000" and substituting "the amount fixed by the optional benefit". (See: O. Reg. 383/24, s. 16 (2))

(3) No payment shall be made under this section to a person who dies before the insured person or within 30 days after the insured person. O. Reg. 34/10, s. 26 (3).

(4) If at the time of the accident the insured person had more than one spouse who is entitled to a payment under this section, the payment shall be divided equally among them. O. Reg. 34/10, s. 26 (4).

(5) If at the time of the accident the insured person was a dependant in respect of more than one person who is entitled to a payment under this section, the payment shall be divided equally among the persons in respect of whom the insured person was a dependant. O. Reg. 34/10, s. 26 (5).

(6) If requested by the insurer, a person who conducts an autopsy of the insured person shall provide a copy of his or her report to the insurer. O. Reg. 34/10, s. 26 (6).

Funeral benefit

27. (1) The insurer shall pay a funeral benefit in respect of an insured person who dies as a result of an accident. O. Reg. 34/10, s. 27 (1).

(2) The funeral benefit shall pay for funeral expenses incurred in an amount not exceeding,

(a) $6,000; or

(b) if the optional death and funeral benefit referred to in section 28 has been purchased and is applicable to the insured person, the amount fixed by the optional benefit. O. Reg. 34/10, s. 27 (2).

Note: On July 1, 2026, subsection 27 (2) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 17)

(2) The funeral benefit shall pay for funeral expenses incurred in an amount not exceeding the amount fixed by the optional benefit. O. Reg. 383/24, s. 17.

PART VI
OPTIONAL BENEFITS

Note: On July 1, 2026, the heading to Part VI of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 18)

Part vi
additional optional benefits

Description of optional benefits

28. (1) Every insurer shall offer the following optional benefits:

1. An optional income replacement benefit that increases the maximum weekly amount of $400 referred to in the definition of "B" in subsection 7 (1) to $600, $800 or $1,000, as selected by the named insured under the policy.

Note: On July 1, 2026, paragraph 1 of subsection 28 (1) of the Regulation is revoked. (See: O. Reg. 383/24, s. 19 (1))

2. An optional caregiver, housekeeping and home maintenance benefit that,

i. provides caregiver benefits payable in the circumstances described in section 13 if, as a result of and within 104 weeks after the accident, the insured person suffers a substantial inability to engage in the caregiving activities in which he or she engaged at the time of the accident even if the impairment sustained by the insured person is not a catastrophic impairment, but not for any period longer than 104 weeks of disability unless, as a result of the accident, the insured person is suffering a complete inability to carry on a normal life, and

ii. provides a housekeeping and home maintenance benefit payable in the circumstances described in section 23 even if the impairment sustained by the insured person is not a catastrophic impairment, but not for expenses incurred more than 104 weeks after the onset of the disability.

Note: On July 1, 2026, paragraph 2 of subsection 28 (1) of the Regulation is revoked. (See: O. Reg. 383/24, s. 19 (1))

3. An optional medical, rehabilitation and attendant care benefit of up to $130,000 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019 in respect of an insured person for any one accident in which the impairment sustained by the insured person is not a catastrophic impairment, instead of the maximum amount specified in clause 18 (3) (a).

4. An optional medical, rehabilitation and attendant care benefit of up to the following maximum amounts plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019, instead of the maximum amount specified in subsection 18 (3), and that does not limit the period of time for which expenses are to be paid by the insurer for medical, rehabilitation and attendant care benefits:

i. $1,000,000 if the insured person did not sustain a catastrophic impairment as a result of the accident.

ii. $2,000,000 if the insured person sustained a catastrophic impairment as a result of the accident.

5. An optional catastrophic impairment benefit for medical, rehabilitation and attendant care benefits of up to $1,000,000 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019 if the insured person sustained a catastrophic impairment as a result of the accident.

6. An optional death and funeral benefit that,

i. fixes the amount payable under paragraph 1 of subsection 26 (2) at $50,000, instead of the amount specified in subparagraph 1 i of subsection 26 (2),

ii. fixes the amount payable under paragraph 2 of subsection 26 (2) at $20,000, instead of the amount specified in subparagraph 2 i of subsection 26 (2),

iii. fixes the amount payable under paragraph 3 of subsection 26 (2) at $50,000 instead of the amount specified in subparagraph 3 i of subsection 26 (2), and

iv. fixes the maximum payment for funeral expenses at $8,000 instead of the amount specified in clause 27 (2) (a).

Note: On July 1, 2026, paragraph 6 of subsection 28 (1) of the Regulation is revoked. (See: O. Reg. 383/24, s. 19 (1))

7. An optional dependant care benefit, as described in section 29.

8. An optional indexation benefit, as described in section 30. O. Reg. 34/10, s. 28 (1); O. Reg. 251/15, s. 11 (1); O. Reg. 123/19, s. 5 (1-3).

Note: On July 1, 2026, section 28 of the Regulation is amended by adding the following subsection: (See: O. Reg. 383/24, s. 19 (2))

(1.1) Nothing in this section restricts or otherwise limits an insurer from offering an optional benefit not listed in this Regulation that has been approved by the Chief Executive Officer. O. Reg. 383/24, s. 19 (2).

(2) The optional benefits referred to in subsection (1) are applicable only to,

(a) the named insured;

(b) the spouse of the named insured;

(c) the dependants of the named insured and of the named insured’s spouse; and

(d) the persons specified in the policy as drivers of the insured automobile. O. Reg. 34/10, s. 28 (2).

(3) An optional benefit may be purchased at any time before an accident in respect of which an application for benefits is made. O. Reg. 34/10, s. 28 (3).

(4) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in Ontario Policy Change Form 47

(OPCF 47), as approved by the Commissioner of Insurance on December 3, 1996 under section 227 of the Act. O. Reg. 34/10, s. 28 (4).

Note: On July 1, 2026, subsection 28 (4) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 19 (3))

(4) If a person purchases an optional benefit referred to in subsection (1), the insurer shall issue to the person the endorsement set out in the form approved by the Chief Executive Officer for that purpose under section 227 of the Act. O. Reg. 383/24, s. 19 (3).

(5) For the purposes of paragraphs 3, 4 and 5 of subsection (1), the medical, rehabilitation and attendant care benefits payable in respect of an insured person include all fees and expenses for conducting assessments and examinations and preparing reports in connection with any benefit or payment to or for an insured person under this Regulation, other than,

(a) fees in connection with any examination required by an insurer under section 44; and

(b) expenses in respect of a report referred to in subsection 7 (4). O. Reg. 251/15, s. 11 (2).

(6) For the purposes of paragraphs 3, 4 and 5 of subsection (1), no attendant care benefit is payable if the insured person's impairment is a minor injury. O. Reg. 251/15, s. 11 (2).

(7) For the purposes of paragraphs 4 and 5 of subsection (1),

(a) the maximum monthly attendant care benefit payable in respect of an insured person shall not exceed $6,000 plus the amount of any applicable harmonized sales tax payable under Part IX of the *Excise Tax Act (Canada)* for accidents that occur on or after June 3, 2019; and

(b) the medical and rehabilitation benefits payable in respect of an insured person include any amount paid in respect of the insured person for services provided by a qualified case manager as authorized under section 17. O. Reg. 251/15, s. 11 (2); O. Reg. 123/19, s. 5 (4).

Optional dependant care benefit

29. (1) The optional dependant care benefit shall pay for reasonable and necessary additional expenses incurred by or on behalf of an insured person as a result of an accident in caring for the insured person's dependants, if the insured person satisfies the following conditions:

1. The insured person sustained an impairment as a result of the accident.

2. The insured person was employed at the time of the accident.

3. The insured person is not receiving a caregiver benefit. O. Reg. 34/10, s. 29 (1).

(2) Despite subsection (1), the amount of optional dependant care benefits shall not exceed $75 per week for the first dependant and $25 per week for each additional dependant, to a maximum amount of $150 per week. O. Reg. 34/10, s. 29 (2).

Note: On July 1, 2026, subsection 29 (2) of the Regulation is revoked and the following substituted: (See: O. Reg. 383/24, s. 20)

(2) Despite subsection (1), the amount of optional dependant care benefits shall not exceed the amount fixed by the optional benefit. O. Reg. 383/24, s. 20.

(3) No optional dependant care benefit is payable in respect of an expense incurred after the insured person dies. O. Reg. 34/10, s. 29 (3).

Optional indexation benefit

30. (1) The optional indexation benefit shall provide that the following amounts are subject to annual indexation in accordance with subsections (2) and (3):

1. The weekly amount of any income replacement or non-earner benefit payable under this Regulation, determined without regard to any other income replacement assistance, within the meaning of subsection 4 (1), that is received by the insured person.

2. The following amounts:

i. The amounts specified in the definition of "B" in subsection 7 (1).

ii. The amounts specified in subsections 12 (2) and (3).

iii. The amounts specified in subsection 13 (2).

iv. The amounts specified in paragraphs 1 and 3 of subsection 19 (3).

3. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 3 of subsection 28 (1) was purchased and is applicable to the insured person, the outstanding balance with respect to medical, rehabilitation and attendant care benefits, as calculated under subsection (4).

4. If the optional medical, rehabilitation and attendant care benefit referred to in paragraph 4 of subsection 28 (1) was purchased and is applicable to the insured person, the outstanding balance with respect to medical, rehabilitation and attendant care benefits, as calculated under subsection (5).

5. If the optional catastrophic impairment benefit referred to in paragraph 5 of subsection 28 (1) was purchased and is applicable to the insured person, the outstanding balance with respect to medical, rehabilitation and attendant care benefits, as calculated under subsection (6).

6. If paragraphs 3, 4 and 5 do not apply, the outstanding balance with respect to medical, rehabilitation and attendant care benefits, as calculated under subsection (7). O. Reg. 34/10, s. 30 (1); O. Reg. 251/15, s. 12 (1).

(2) The indexation shall be performed on January 1 of every year following an accident to which the optional indexation benefit applies by adjusting the amount to be indexed by the percentage change in the Consumer Price Index for Canada (All Items), as published by Statistics Canada under the authority of the *Statistics Act* (Canada), for the period from September in the year immediately preceding the previous year to September of the previous year. O. Reg. 34/10, s. 30 (2).

(3) Subsection (2) is subject to the Optional Indexation Benefit Guidelines published in *The Ontario Gazette* by the former Ontario Insurance Commission or the Financial Services Commission of Ontario, as they may be amended from time to time by the Financial Services Regulatory Authority of Ontario, except that those guidelines shall not provide an adjustment of the amount to be indexed by a percentage greater than the percentage change in the applicable Consumer Price Index. O. Reg. 34/10, s. 30 (3); O. Reg. 123/19, s. 6.

(4) For the purpose of paragraph 3 of subsection (1), the outstanding balance with respect to medical, rehabilitation and attendant care benefits is the amount calculated using the formula,

E – F

in which,

"E" is the indexation balance for the year equal to,

(a) the amount specified in paragraph 3 of subsection 28 (1), if the year is the first year the optional indexation benefit applies, or

(b) the outstanding balance for the previous year as calculated under this subsection and indexed under subsection (2), if the year is the second or a subsequent year the optional indexation benefit applies, and

"F" is the total of medical, rehabilitation and attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies.

O. Reg. 251/15, s. 12 (2).

(5) For the purpose of paragraph 4 of subsection (1), the outstanding balance with respect to medical, rehabilitation and attendant care benefits is calculated using the formula,

G – H

in which,

"G" is the indexation balance for the year equal to,

(a) the amount specified in subparagraph 4 i or ii, as the case may be, of subsection 28 (1), if the year is the first year the optional indexation benefit applies, or

(b) the outstanding balance for the previous year as calculated under this subsection and indexed under subsection (2), if the year is the second or a subsequent year the optional indexation benefit applies, and

"H" is the total of medical, rehabilitation and attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies.

O. Reg. 251/15, s. 12 (2).

(6) For the purpose of paragraph 5 of subsection (1), the outstanding balance with respect to medical, rehabilitation and attendant care benefits is calculated using the formula,

I – J

in which,

"I" is the indexation balance for the year equal to,

(a) the amount specified in paragraph 5 of subsection 28 (1), if the year is the first year the optional indexation benefit applies, or

(b) the outstanding balance for the previous year as calculated under this subsection and indexed under subsection (2), if the year is the second or a subsequent year the optional indexation benefit applies, and

"J" is the total of medical, rehabilitation and attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies.

O. Reg. 251/15, s. 12 (2).

(7) For the purpose of paragraph 6 of subsection (1), the outstanding balance with respect to medical, rehabilitation and attendant care benefits is calculated using the formula,

K – L

in which,

"K" is the indexation balance for the year equal to,

(a) the amount specified in clause 18 (3) (a) or (b), as the case may be, if the year is the first year the optional indexation benefit applies, or

(b) the outstanding balance for the previous year as calculated under this subsection and indexed under subsection (2), if the year is the second or a subsequent year the optional indexation benefit applies, and

"L" is the total of medical, rehabilitation and attendant care benefits paid by the insurer in the year preceding January 1 of the year to which the optional indexation benefit applies.

O. Reg. 251/15, s. 12 (2).

(8) Revoked: O. Reg. 251/15, s. 12 (2).

PART VII
GENERAL EXCLUSIONS

Circumstances in which certain benefits not payable

31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,

(a) in respect of a person who was the driver of an automobile at the time of the accident,

(i) if the driver knew or ought reasonably to have known that he or she was operating the automobile while it was not insured under a motor vehicle liability policy,

(ii) if the driver was driving the automobile without a valid driver's licence,

(iii) if the driver is an excluded driver under the contract of automobile insurance, or

(iv) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent;

(b) in respect of any person who has made, or who knows of, a material misrepresentation that induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in a risk material to the contract;

(c) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent;

(d) in respect of a person who, at the time of the accident,

(i) was engaged in an act for which the person is convicted of a criminal offence, or

(ii) was an occupant of an automobile that was being used in connection with an act for which the person is convicted of a criminal offence;

(e) in respect of a person who is convicted of an offence under section 320.15 of the *Criminal Code* (Canada) of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident; or

(f) in respect of a person who was convicted of an offence under section 254 of the *Criminal Code* (Canada), as it read before December 18, 2018, of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident.
O. Reg. 34/10, s. 31 (1); O. Reg. 444/18, s. 1 (1, 2).

(2) Clause (1) (c) does not prevent an excluded driver or any other occupant of an automobile driven by the excluded driver from recovering accident benefits under a motor vehicle liability policy in respect of which the excluded driver or other occupant is a named insured. O. Reg. 34/10, s. 31 (2).

(3) The insurer shall hold in trust any amounts payable as an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23 to a person who sustains an impairment as a result of an accident if,

(a) at the time of the accident, the person was engaged in, or was an occupant of an automobile that was being used in connection with, an act for which the person is charged with a criminal offence;

(b) the person is charged with an offence under section 320.15 of the *Criminal Code* (Canada) of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident; or

(c) the person is charged with an offence under section 254 of the *Criminal Code* (Canada), as it read before December 18, 2018, of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident. O. Reg. 34/10, s. 31 (3); O. Reg. 444/18, s. 1 (3, 4).

(4) On the final disposition of all charges described in clause (3) (a) or (b), the amounts and any income on the amounts described in subsection (3),

(a) shall be returned to the insurer, if the person is found guilty of the offence or an included offence; or

(b) shall be paid to the person entitled to the payment, if the person is not found guilty of the offence and an included offence. O. Reg. 34/10, s. 31 (4).

(5) In this section,

"criminal offence" means,

(a) operating an automobile while the ability to operate the automobile is impaired by alcohol or a drug or a combination of alcohol and a drug,

(b) operating an automobile while the concentration of alcohol or drug in the operator's blood exceeds the limit permitted by law,

(c) failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation, or

(d) any other criminal offence, whether or not the offence is related to the operation of an automobile. O. Reg. 444/18, s. 1 (5).

PART VIII
PROCEDURES FOR CLAIMING BENEFITS

General

Notice to insurer and application for benefits

32. (1) A person who intends to apply for one or more benefits described in this Regulation shall notify the insurer of his or her intention no later than the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable after that day. O. Reg. 34/10, s. 32 (1).

(2) The insurer shall promptly provide the person with,

(a) the appropriate application forms;

(b) a written explanation of the benefits available;

(c) information to assist the person in applying for benefits; and

(d) information on the election relating to income replacement, non-earner and caregiver benefits, if applicable. O. Reg. 34/10, s. 32 (2).

(3) If an insurer that is subject to a Guideline referred to in subsection 64 (7) determines, acting reasonably, that there is a likelihood that the person may, in connection with the accident, deliver one or more documents referred to in that subsection, the insurer shall provide the following information to the central processing agency referred to in that subsection:

1. The name, address, gender and date of birth of the person.

2. The date of the accident.

3. Particulars of the automobile insurance policy under which the person asserts he or she is entitled to a benefit or benefits, including,

i. the name of the insurer,

ii. the policy number, and

iii. the name of the person to whom the policy was issued.

4. The claim number assigned by the insurer.

5. Any other information reasonably required by the central processing agency to enable it to carry out its obligations to the insurer under this Regulation. O. Reg. 34/10, s. 32 (3).

(4) An insurer's obligation to provide the information referred to in subsection (3) may be discharged by,

(a) providing the information to the central processing agency; or

(b) confirming, correcting or supplementing the information previously provided to the central processing agency. O. Reg. 34/10, s. 32 (4).

(5) The applicant shall submit a completed and signed application for benefits to the insurer within 30 days after receiving the application forms. O. Reg. 34/10, s. 32 (5).

(6) If an insurer receives an incomplete or unsigned application, the insurer shall notify the applicant within 10 business days after receiving the application and shall advise the applicant of the missing information that is required or that the applicant's signature is missing, as appropriate. O. Reg. 34/10, s. 32 (6).

(7) The insurer shall not give a notice under subsection (6) unless,

(a) the insurer, after a reasonable review of the incomplete application, is unable to determine, without the missing information, whether a benefit is payable; or

(b) the application has not been signed by the applicant. O. Reg. 34/10, s. 32 (7).

(8) If subsection (6) applies in respect of an incomplete application, no benefit is payable before the applicant provides the missing information or signs the application, as the case may be. O. Reg. 34/10, s. 32 (8).

(9) If an applicant is required by an insurer to submit an additional application in respect of a benefit that the applicant is receiving or may be eligible to receive, the applicant shall submit the additional application to the insurer within 30 days after receiving the additional application forms from the insurer. O. Reg. 34/10, s. 32 (9).

(10) Despite any shorter time limit in this Regulation, if an applicant fails without a reasonable explanation to notify an insurer under subsection (1) within the time required under that subsection, the insurer may delay determining if the applicant is entitled to a benefit and may delay paying the benefit until the later of,

(a) 45 days after the day the insurer receives the completed and signed application; or

(b) 10 business days after the day the applicant complies with any request made by the insurer under subsection 33 (1) or (2). O. Reg. 34/10, s. 32 (10).

Duty of applicant to provide information

33. (1) An applicant shall, within 10 business days after receiving a request from the insurer, provide the insurer with the following:

1. Any information reasonably required to assist the insurer in determining the applicant's entitlement to a benefit.

2. A statutory declaration as to the circumstances that gave rise to the application for a benefit.

3. The number, street and municipality where the applicant ordinarily resides.

4. Proof of the applicant's identity. O. Reg. 34/10, s. 33 (1).

(2) If requested by the insurer, an applicant shall submit to an examination under oath, but is not required,

(a) to submit to more than one examination under oath in respect of matters relating to the same accident; or

(b) to submit to an examination under oath during a period when the person is incapable of being examined under oath because of his or her physical, mental or psychological condition. O. Reg. 34/10, s. 33 (2).

(3) An applicant is entitled to be represented at his or her own expense at an examination under oath by such counsel or other representative of his or her choice as the law permits. O. Reg. 34/10, s. 33 (3).

(4) The insurer shall make reasonable efforts to schedule the examination under oath for a time and location that are convenient for the applicant and shall give the applicant reasonable advance notice of the following:

1. The date and location of the examination.

2. That the applicant is entitled to be represented in the manner described in subsection (3).

3. The reason or reasons for the examination.

4. That the scope of the examination will be limited to matters that are relevant to the applicant's entitlement to benefits. O. Reg. 34/10, s. 33 (4).

(5) The insurer shall limit the scope of the examination under oath to matters that are relevant to the applicant's entitlement to benefits described in this Regulation. O. Reg. 34/10, s. 33 (5).

(6) The insurer is not liable to pay a benefit in respect of any period during which the insured person fails to comply with subsection (1) or (2). O. Reg. 34/10, s. 33 (6).

(7) Subsection (6) does not apply in respect of a non-compliance with subsection (2) if,

(a) the insurer fails to comply with subsection (4) or (5); or

(b) the insurer interferes with the applicant's right to be represented as described in subsection (3). O. Reg. 34/10, s. 33 (7).

(8) If an applicant who failed to comply with subsection (1) or (2) subsequently complies with that subsection, the insurer,

(a) shall resume payment of the benefit, if a benefit was being paid; and

(b) shall pay all amounts that were withheld during the period of non-compliance, if the applicant provides a reasonable explanation for the delay in complying with the subsection. O. Reg. 34/10, s. 33 (8).

(9) Clause (2) (a) shall not be interpreted as prohibiting an additional examination of the applicant under oath, under Ontario Regulation 283/95 (Disputes Between Insurers) made under the Act, at the insurer's request that is conducted for the purpose of

determining who is liable under section 268 of the Act to pay statutory accident benefits in respect of the accident. O. Reg. 14/13, s. 4.

Result if fail to comply with time limits

34. A person's failure to comply with a time limit set out in this Part does not disentitle the person to a benefit if the person has a reasonable explanation. O. Reg. 34/10, s. 34.

Election of income replacement, non-earner or caregiver benefit

35. (1) If an application indicates that the applicant may qualify for two or more of the income replacement benefit, the non-earner benefit and the caregiver benefit under Part II, the insurer shall, within 10 business days after receiving the application, give a notice to the applicant advising the applicant that he or she must elect, within 30 days after receiving the notice, the benefit he or she wishes to receive. O. Reg. 34/10, s. 35 (1).

(2) If an applicant is determined to have sustained a catastrophic impairment as a result of an accident, the insurer shall, within 10 business days of the date of the determination, give a notice to the applicant advising the applicant that, despite any election previously made under subsection (1), he or she may elect, within 30 days after receiving the notice, to receive a caregiver benefit if the applicant would otherwise qualify for a caregiver benefit. O. Reg. 34/10, s. 35 (2).

(3) The applicant's election under subsection (1) is final, regardless of any change in circumstances, and can be subsequently changed only if permitted under subsection (2). O. Reg. 34/10, s. 35 (3); O. Reg. 347/13, s. 3.

Claim for Income Replacement Benefit, Non-Earner Benefit, Caregiver Benefit or Payment for Housekeeping or Home Maintenance Services

Application

36. (1) In this section and section 37,

"specified benefit" means an income replacement benefit, non-earner benefit, caregiver benefit or a payment for housekeeping or home maintenance services under section 23. O. Reg. 34/10, s. 36 (1).

(2) An applicant for a specified benefit shall submit a completed disability certificate with his or her application under section 32. O. Reg. 34/10, s. 36 (2).

(3) An applicant who fails to submit a completed disability certificate is not entitled to a specified benefit for any period before the completed disability certificate is submitted. O. Reg. 34/10, s. 36 (3).

(4) Within 10 business days after the insurer receives the application and completed disability certificate, the insurer shall,

(a) pay the specified benefit;

(b) give the applicant a notice explaining the medical and any other reasons why the insurer does not believe the applicant is entitled to the specified benefit and, if the insurer requires an examination under section 44 relating to the specified benefit, advising the applicant of the requirement for an examination; or

(c) send a request to the applicant under subsection 33 (1) or (2). O. Reg. 34/10, s. 36 (4).

(5) If the insurer sends a request to the applicant under subsection 33 (1) or (2), the insurer shall, within 10 business days after the applicant complies with the request,

(a) pay the specified benefit; or

(b) give the applicant a notice described in clause (4) (b). O. Reg. 34/10, s. 36 (5).

(6) If the insurer fails to comply with subsection (4) or (5) within the applicable time limit, the insurer shall pay the specified benefit for the period starting on the day the insurer received the application and completed disability certificate and ending, if the insurer subsequently gives a notice described in subsection (4) (b), on the day the insurer gives the notice. O. Reg. 34/10, s. 36 (6).

(7) If the insurer requires the applicant to undergo an examination under section 44, the insurer shall, within 10 days after receiving the report of the examination,

(a) give a copy of the report to the applicant and to the person who completed the disability certificate submitted with the application; and

(b) provide the applicant with a notice indicating the amount, if any, that the insurer agrees to pay in respect of the specified benefit, the amount, if any, the insurer refuses to pay in respect of the specified benefit and the medical and any other reasons for the insurer's decision. O. Reg. 34/10, s. 36 (7).

(8) Within 10 business days after delivering the notice under clause (7) (b), the insurer shall pay the amount, if any, that the insurer agrees to pay in respect of the specified benefit. O. Reg. 34/10, s. 36 (8).

(9) Every income replacement benefit, non-earner benefit or caregiver benefit shall be paid at least once every second week, subject to any prepayment of the benefit by the insurer. O. Reg. 34/10, s. 36 (9).

Determination of continuing entitlement to specified benefits

37. (1) If an insurer wishes to determine if an insured person is still entitled to a specified benefit, the insurer may, but not more often than is reasonably necessary,

(a) request that the insured person submit, within 15 business days, a new disability certificate completed as of a date on or after the date of the request;

(b) notify the insured person that the insurer requires an examination under section 44; or

(c) do both. O. Reg. 34/10, s. 37 (1).

(2) An insurer shall not discontinue paying a specified benefit to an insured person unless,

(a) the insured person fails or refuses to submit a completed disability certificate if requested to do so under subsection (1);

(b) the disability certificate submitted on behalf of the insured person does not support the insured person's continuing entitlement to the benefit;

(c) the insurer has received the report of the examination under section 44, if the insurer required an examination under that section, and has determined that the insured person is not entitled to the benefit;

(d) the insurer is entitled under subsection (7) to refuse to pay the specified benefit;

(e) the insured person has resumed his or her pre-accident employment duties;

(f) the insurer is no longer required to pay the specified benefit by reason of subsection (7), paragraph 2 of subsection 28 (1), subsection 33 (6) or section 57 or 58; or

Note: On July 1, 2026, clause 37 (2) (f) of the Regulation is amended by striking out "paragraph 2 of subsection 28 (1)". (See: O. Reg. 383/24, s. 21)

(g) the insured person is not entitled to the specified benefit for a reason unrelated to whether he or she has an impairment that entitles the insured person to receive the specified benefit. O. Reg. 34/10, s. 37 (2).

(3) If an insured person fails to submit a completed disability certificate as required under subsection (1), no specified benefits are payable for the period commencing the 15th business day after the day the insured person received the insurer's request and ending, if the insured person subsequently submits a completed disability certificate, the day the insurer receives the completed disability certificate. O. Reg. 34/10, s. 37 (3).

(4) If the insurer determines that an insured person is not entitled or is no longer entitled to receive a specified benefit on any one or more grounds set out in subsection (2), the insurer shall advise the insured person of its determination and the medical and any other reasons for its determination. O. Reg. 34/10, s. 37 (4).

(5) Within 10 business days after receiving the report of an examination under section 44, the insurer shall give a copy of the report to the insured person and to the person who completed the disability certificate, if one was provided in accordance with subsection (1). O. Reg. 34/10, s. 37 (5).

(6) Within 10 business days after receiving the report of an examination under section 44, the insurer shall provide the insured person with a notice of determination setting out,

(a) the specified benefits the insurer agrees to pay;

(b) the specified benefits the insurer refuses to pay;

(c) the medical and any other reasons for the insurer's decision; and

(d) if the insurer determines that the insured person is not entitled to a specified benefit, the date that payment of the benefit will be stopped. O. Reg. 34/10, s. 37 (6).

(7) If the insured person fails or refuses to comply with subsection 44 (9), the insurer may,

(a) make a determination that the insured person is no longer entitled to the specified benefit; and

(b) refuse to pay specified benefits relating to the period after the insured person failed or refused to comply with that subsection and before the insured person complies with that subsection. O. Reg. 34/10, s. 37 (7).

(8) If the insured person subsequently complies with subsection 44 (9), the insurer shall,

(a) reconsider the insured person's entitlement to the specified benefit; and

(b) if the insurer determines that the insured person is still entitled to the specified benefit,

(i) resume payment of the specified benefit, and

(ii) pay all amounts, if any, that were withheld during the period of non-compliance if the insured person provides not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with that subsection. O. Reg. 34/10, s. 37 (8).

Claim for Medical or Rehabilitation Benefits

Claims for medical and rehabilitation benefits and for approval of assessments, etc.

38. (1) This section applies to,

(a) medical and rehabilitation benefits other than benefits payable in accordance with the Minor Injury Guideline; and

(b) all applications for approval of assessments or examinations. O. Reg. 34/10, s. 38 (1).

(2) An insurer is not liable to pay an expense in respect of a medical or rehabilitation benefit or an assessment or examination that was incurred before the insured person submits a treatment and assessment plan that satisfies the requirements of subsection (3) unless,

(a) the insurer gives the insured person a notice under subsection 39 (1) stating that the insurer will pay the expense without a treatment and assessment plan;

(b) the expense is for an ambulance or other goods or services provided on an emergency basis not more than five business days after the accident to which the application relates;

(c) the expense is reasonable and necessary as a result of the impairment sustained by the insured person for,

(i) drugs prescribed by a regulated health professional, or

(ii) goods referred to in clauses 15 (1) (d) to (f) and 16 (3) (h) to (j) with a cost of $250 or less per item; or

(d) the insurer agrees that the expense is essential for the treatment or rehabilitation of the insured person for goods or services referred to in clause 15 (1) (h) or 16 (3) (l) with a cost of $250 or less per item or service, as the case may be. O. Reg. 34/10, s. 38 (2); O. Reg. 251/15, s. 13 (1, 2).

(3) A treatment and assessment plan must,

(a) be signed by the insured person unless the insurer waives that requirement;

(b) be completed and signed by a regulated health professional; and

(c) include a statement by a health practitioner approving the treatment and assessment plan and stating that he or she is of the opinion that the goods, services, assessments and examinations described in the treatment and assessment plan and their proposed costs are reasonable and necessary for the insured person's treatment or rehabilitation and,

(i) stating, if the treatment and assessment plan is in respect of an accident that occurred on or after September 1, 2010,

(A) that the insured person's impairment is not predominantly a minor injury, or

(B) that the insured person's impairment is predominantly a minor injury but, based on compelling evidence provided by the health practitioner, the insured person does not come within the Minor Injury Guideline because the insured person has a pre-existing medical condition that was documented by a health practitioner before the accident and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the limit or is limited to the goods and services authorized under the Minor Injury Guideline, or

(ii) stating, if the treatment and assessment plan is in respect of an accident that occurred before September 1, 2010, that the expenses contemplated by the treatment and assessment plan are reasonable and necessary for the insured person's treatment or rehabilitation. O. Reg. 34/10, s. 38 (3); O. Reg. 347/13, s. 4; O. Reg. 251/15, s. 13 (3); O. Reg. 123/19, s. 7.

(4) A claim for dental goods or services completed and signed by a dentist and in the form approved by the Ontario Dental Association is deemed to be a treatment and

assessment plan that satisfies the requirements of subsection (3). O. Reg. 34/10, s. 38 (4).

(5) An insurer may refuse to accept a treatment and assessment plan if the plan describes goods or services to be received or an assessment or examination to be conducted in respect of any period during which the insured person is entitled to receive goods or services under the Minor Injury Guideline in respect of the impairment. O. Reg. 34/10, s. 38 (5).

(6) An insurer's refusal to accept a treatment and assessment plan under subsection (5) is final and is not subject to review. O. Reg. 34/10, s. 38 (6).

(7) Nothing in subsection (5) prevents an insured person, while receiving goods or services under the Minor Injury Guideline, from submitting a treatment and assessment plan applicable to a period other than the period for which the insured person is receiving goods or services under the Minor Injury Guideline. O. Reg. 34/10, s. 38 (7).

(8) Within 10 business days after it receives the treatment and assessment plan, the insurer shall give the insured person a notice that identifies the goods, services, assessments and examinations described in the treatment and assessment plan that the insurer agrees to pay for, any the insurer does not agree to pay for and the medical reasons and all of the other reasons why the insurer considers any goods, services, assessments and examinations, or the proposed costs of them, not to be reasonable and necessary. O. Reg. 34/10, s. 38 (8); O. Reg. 14/13, s. 5.

(8.1) If the insurer has not agreed that the goods and services referred to in clause 15 (1) (h) or 16 (3) (l) are essential, the notice under subsection (8) must so advise the insured person. O. Reg. 251/15, s. 13 (4).

(9) If the insurer believes that the Minor Injury Guideline applies to the insured person's impairment, the notice under subsection (8) must so advise the insured person. O. Reg. 34/10, s. 38 (9).

(10) If the insurer has not agreed to pay for all goods, services, assessments and examinations described in the treatment and assessment plan or believes that the Minor Injury Guideline applies to the insured person's impairment, the notice under subsection (8) may notify the insured person that the insurer requires the insured person to undergo an examination under section 44. O. Reg. 34/10, s. 38 (10).

(11) If the insurer fails to give a notice in accordance with subsection (8) in connection with a treatment and assessment plan, the following rules apply:

1. The insurer is prohibited from taking the position that the insured person has an impairment to which the Minor Injury Guideline applies.

2. The insurer shall pay for all goods, services, assessments and examinations described in the treatment and assessment plan that relate to the period starting on the 11th business day after the day the insurer received the application and ending on the day the insurer gives a notice described in subsection (8). O. Reg. 34/10, s. 38 (11).

(12) If an insurer advises an insured person that the Minor Injury Guideline applies, the insured person may submit a treatment confirmation form under section 40 and, pending the insurer's determination, may receive goods and services in accordance with the Minor Injury Guideline. O. Reg. 34/10, s. 38 (12).

(13) Within 10 business days after receiving the report of an examination conducted under section 44 for the purpose of the treatment and assessment plan, the insurer shall give a copy of the report to the insured person and to the regulated health professional who prepared the treatment and assessment plan. O. Reg. 34/10, s. 38 (13).

(14) Within 10 business days after receiving the report, the insurer shall,

(a) provide the insured person with a notice indicating the goods and services described in the treatment and assessment plan that the insurer agrees to pay for, the goods and services the insurer refuses to pay for and the medical and any other reasons for the insurer's decision; or

(b) if the insurer determines that the Minor Injury Guideline applies, advise the insured person that the Minor Injury Guideline applies to the insured person's impairment and provide medical and any other reasons for the insurer's determination. O. Reg. 34/10, s. 38 (14).

(15) The insurer shall pay for goods and services the insurer agreed to pay for in the notice under subsection (8) or (14) or is required to pay for under this section within 30 days after receiving an invoice for them. O. Reg. 34/10, s. 38 (15).

If no treatment and assessment plan required

39. (1) This section applies to a claim for a medical or rehabilitation benefit or an application for approval of an assessment or examination under section 38 if the insurer gives the insured person a notice informing the insured person that the insurer will pay the expenses without the submission of a treatment and assessment plan under that section. O. Reg. 34/10, s. 39 (1).

(2) If the insurer gives the insured person a notice under subsection (1),

(a) the notice must describe the expenses that the insurer will pay without the submission of a treatment and assessment plan and shall specify,

(i) the types of expenses,

(ii) any restrictions on the amount of the expenses, and

(iii) any restrictions on when the expenses are to be incurred;

(b) the insurer shall comply with the requirements set out in any applicable Guideline if the notice is given in connection with a proposal, recommendation or suggestion that the insured person receive goods or services from a person named by the insurer;

(c) the insurer shall pay expenses described in the notice within 30 days after receiving an invoice for them; and

(d) the insurer shall, if there is a dispute described in subsection 280 (1) of the Act about whether for the purposes of subsection 15 (1) or 16 (3) an expense described in the notice is reasonable or necessary, or whether for the purposes of clause 15 (1) (h) or 16 (3) (l) an expense described in the notice is essential, pay the expense pending resolution of the dispute. O. Reg. 34/10, s. 39 (2); O. Reg. 44/16, s. 3.

Claim for Medical or Rehabilitation Benefits to Which Minor Injury Guideline Applies

Minor Injury Guideline

40. (1) This section applies to a person if,

(a) the person sustains, as a result of an accident, a minor injury to which the Minor Injury Guideline applies; and

(b) the person submits or intends to submit an application under section 32 for medical or rehabilitation benefits. O. Reg. 34/10, s. 40 (1).

(2) The person shall submit, within the time specified in the Minor Injury Guideline, a treatment confirmation form that satisfies the following requirements:

1. The treatment confirmation form must be prepared and signed by a health practitioner,

i. who is authorized by law to treat the impairment that is the subject of the form,

ii. who is authorized under the Minor Injury Guideline to complete the treatment confirmation form, and

iii. who will be the health practitioner responsible for providing the goods and services described in the treatment confirmation form.

2. The treatment confirmation form must contain details concerning the impairment and specify the provisions of the Minor Injury *Guideline that apply.*

3. The treatment confirmation form must be signed by the person claiming benefits, unless the insurer waives this requirement. O. Reg. 34/10, s. 40 (2).

(3) Within five business days after receiving a treatment confirmation form, the insurer shall send a notice to the person claiming benefits and to the health practitioner,

(a) acknowledging receipt by the insurer of the treatment confirmation form; and

(b) advising if the person claiming benefits is an insured person with respect to the accident. O. Reg. 34/10, s. 40 (3).

(4) If the person also submits a completed and signed application under section 32 and the insurer accepts the claim for benefits, the insurer shall, within 30 days of receipt, pay every invoice for goods and services described in section 15 or 16 that are provided in accordance with the Minor Injury Guideline. O. Reg. 34/10, s. 40 (4).

(5) An insured person shall submit an amended treatment confirmation form if, during the course of treatment under the Minor Injury Guideline, he or she changes the health

practitioner who is responsible for providing goods and services described in the treatment confirmation form. O. Reg. 34/10, s. 40 (5).

(6) The insurer is liable to pay for goods and services described in an amended treatment confirmation form only to the extent the goods and services have not already been provided in accordance with the Minor Injury Guideline. O. Reg. 34/10, s. 40 (6).

(7) If goods or services available under the Minor Injury Guideline are not provided within the times specified in that Guideline, the insured person shall submit a treatment and assessment plan under section 38 if he or she wishes to obtain medical or rehabilitation benefits to which the Minor Injury Guideline would otherwise apply**.** O. Reg. 34/10, s. 40 (7).

(8) If it is determined, in any dispute described in subsection 280 (1) of the Act about an insured person's entitlement to medical or rehabilitation benefits or related assessments or examinations, that the Minor Injury Guideline applies to an insured person and the insured person received benefits or underwent assessments or examinations under that Guideline,

(a) the benefits are deemed to be reasonable and necessary, or essential, as the case may be, for the purposes of sections 15 and 16; and

(b) the assessments and examinations are deemed to have been reasonably required for the purposes of section 25. O. Reg. 34/10, s. 40 (8); O. Reg. 251/15, s. 15; O. Reg. 44/16, s. 4.

If treatment confirmation form not required

41. (1) This section applies to a claim for medical or rehabilitation benefits under section 40 in respect of a minor injury,

(a) if the insurer gives the insured person a notice informing the insured person that the insurer offers to pay for the goods and services described in the Minor Injury Guideline without the submission of a treatment confirmation form; and

(b) if the insured person accepts the insurer's offer and does not submit a treatment confirmation form in accordance with section 40 or a treatment and assessment plan in accordance with section 38 after receiving the notice described in clause (a). O. Reg. 34/10, s. 41 (1).

(2) If this section applies, the following rules apply:

1. If the notice is given in connection with a proposal, recommendation or suggestion that the insured person receive goods or services from a person named by the insurer, the insurer shall also comply with any applicable Guideline.

2. After the insured person submits an application under section 32 to the insurer, the insurer shall pay the expenses described in the notice within 30 days after receiving an invoice for them. O. Reg. 34/10, s. 41 (2).

Claim for Attendant Care Benefits

Application for attendant care benefits

42. (1) Subject to subsection (2), an application for attendant care benefits for an insured person must be,

(a) in the form of and contain the information required to be provided in the version of the document entitled "Assessment of Attendant Care Needs" that is approved by the Chief Executive Officer for use in connection with the claim; and

(b) prepared and submitted to the insurer by an occupational therapist or a registered nurse. O. Reg. 34/10, s. 42 (1); O. Reg. 123/19, s. 9.

(2) If a Guideline issued for the purpose of this section specifies conditions, restrictions or limits with respect to the preparation of an assessment of attendant care needs, the assessment of attendant care needs must be prepared in accordance with the Guideline. O. Reg. 34/10, s. 42 (2).

(3) Within 10 business days after receiving the assessment of attendant care needs, the insurer shall give the insured person a notice that specifies the expenses described in the assessment of attendant care needs the insurer agrees to pay, the expenses the insurer refuses to pay and the medical and any other reasons for the insurer's decision. O. Reg. 34/10, s. 42 (3).

(4) A notice under subsection (3) may require the insured person to undergo an examination under section 44 if the insurer has not agreed to pay all expenses described in the assessment of attendant care needs. O. Reg. 34/10, s. 42 (4).

(5) An insurer may, but is not required to, pay an expense incurred before an assessment of attendant needs that complies with this section is submitted to the insurer. O. Reg. 34/10, s. 42 (5).

(6) The insurer shall begin payment of attendant care benefits within 10 business days after receiving the assessment of attendant care needs and, pending receipt by the insurer of the report of any examination under section 44 required by the insurer, shall calculate the amount of the benefits based on the assessment of attendant care needs. O. Reg. 34/10, s. 42 (6).

(7) If an insurer wants to determine if an insured person is still entitled to attendant care benefits, wants to determine if the benefits are being paid in the appropriate amount or wants to determine both, the insurer shall give the person a notice requesting that a new assessment of attendant care needs for the insured person be prepared in accordance with this section and submitted to the insurer within 15 business days after the insured person receives the notice. O. Reg. 34/10, s. 42 (7).

(8) Subject to subsection (12), a notice under subsection (7) may also advise the insured person that the insurer requires an examination under section 44. O. Reg. 34/10, s. 42 (8).

(9) Subject to subsection (12), new assessments of attendant care needs may be submitted to an insurer at any time there are changes that would affect the amount of the benefits. O. Reg. 34/10, s. 42 (9).

(10) If a new assessment of attendant care needs indicates that it is appropriate to increase the amount of the attendant care benefits and the insurer has not already advised the insured person that the insurer requires an examination under section 44, the insurer may give a notice to the insured person advising that the insurer requires an examination under that section. O. Reg. 34/10, s. 42 (10).

(11) If a new assessment of attendant care needs is required under subsection (7) or the insurer requires an examination under section 44, the insurer shall, subject to subsection 18 (3) and section 20, continue to pay the insured person attendant care benefits at the same rate until the insurer receives the assessment of attendant care needs or the report of the examination, as applicable. O. Reg. 34/10, s. 42 (11); O. Reg. 251/15, s. 16 (1).

(12) If more than 104 weeks have elapsed since the accident, the insurer shall not require an examination under section 44 to determine the insured person's entitlement to attendant care benefits and the insured person shall not submit nor be required to submit an assessment of attendant care needs to the insurer unless at least 52 weeks have elapsed since the last examination under section 44 relating to entitlement to attendant care benefits. O. Reg. 251/15, s. 16 (2).

(13) Within 10 business days after receiving the report of an examination under section 44, the insurer shall,

(a) give a copy of the report to the person who prepared the assessment of attendant care needs; and

(b) provide the insured person with a notice specifying the benefits and expenses the insurer agrees to pay, the benefits and expenses the insurer refuses to pay and the medical and any other reasons for the insurer's decision. O. Reg. 34/10, s. 42 (13).

(14) If an insured person fails or refuses to comply with subsection 44 (9), the insurer may,

(a) make a determination that the insured person is not entitled to attendant care benefits; and

(b) refuse to pay attendant care benefits relating to the period after the person failed or refused to comply with that subsection and before the insured person submits to the examination and provides the material required by that subsection. O. Reg. 34/10, s. 42 (14).

(15) If an insured person subsequently complies with subsection 44 (9), the insurer shall,

(a) reconsider the application and make a determination under this section;

(b) subject to the new determination, subsection 18 (3) and section 20, resume payment of attendant care benefits; and

(c) pay all amounts, if any, that were withheld during the period of non-compliance, if the insured person provides, not later than the 10th business day after the failure or refusal to comply, or as soon as practicable after that day, a reasonable explanation for not complying with that subsection. O. Reg. 34/10, s. 42 (15); O. Reg. 251/15, s. 16 (3).

(16) If an insurer determines that an insured person is not entitled by reason of section 20 to attendant care benefits for expenses incurred more than 260 weeks after the accident, the insurer shall give the insured person a notice of its determination, with reasons, not less than 10 business days before the last payment of attendant care benefits. O. Reg. 34/10, s. 42 (16); O. Reg. 251/15, s. 16 (4).

Other Types of Benefits

Parts IV and V expenses and benefits

43. (1) If a person is entitled to a death benefit, a funeral benefit or a benefit under Part IV, the insurer shall pay the benefit within 30 days after the insurer receives an application for the benefit. O. Reg. 34/10, s. 43 (1).

(2) If the insurer refuses to pay a benefit referred to in subsection (1), the insurer shall give the person a notice of the refusal and the medical and any other reasons for the refusal within 30 days after the insurer receives the application for the benefit. O. Reg. 34/10, s. 43 (2).

(3) In the case of a benefit for housekeeping and home maintenance services under section 23, subsections (1) and (2) are subject to sections 36 and 37. O. Reg. 34/10, s. 43 (3).

Additional Matters

Examination required by insurer

44. (1) For the purposes of assisting an insurer to determine if an insured person is or continues to be entitled to a benefit under this Regulation for which an application is made, but not more often than is reasonably necessary, an insurer may require an insured person to be examined under this section by one or more persons chosen by the insurer who are regulated health professionals or who have expertise in vocational rehabilitation. O. Reg. 34/10, s. 44 (1).

(2) Despite subsection (1), if a Guideline specifies conditions, restrictions or limits with respect to the determination of whether an impairment is a catastrophic impairment and the purpose of the examination is to determine whether the insured person has sustained a catastrophic impairment, the determination must be made in accordance with those conditions, restrictions and limits. O. Reg. 34/10, s. 44 (2).

(3) Subsection (1) does not apply with respect to,

(a) a benefit payable in accordance with the Minor Injury Guideline; or

(b) a funeral benefit or death benefit. O. Reg. 34/10, s. 44 (3).

(4) Subject to subsection (7), an examination under this section may be limited by the insurer to an examination of material provided under subsection (9) in respect of the insured person without requiring the attendance of the insured person. O. Reg. 34/10, s. 44 (4).

(5) If the insurer requires an examination under this section, the insurer shall arrange for the examination at its expense and shall give the insured person a notice setting out,

(a) the medical and any other reasons for the examination;

(b) whether the attendance of the insured person is required at the examination;

(c) the name of the person or persons who will conduct the examination, any regulated health profession to which they belong and their titles and designations indicating their specialization, if any, in their professions; and

(d) if the attendance of the insured person is required at the examination, the day, time and location of the examination and, if the examination will require more than one day, the same information for the subsequent days. O. Reg. 34/10, s. 44 (5).

(6) If the attendance of the insured person is required at the examination, the insurer shall give the notice required under subsection (5) not less than five business days before the examination, unless the insured person and the insurer mutually agree otherwise. O. Reg. 34/10, s. 44 (6).

(7) If the notice under subsection (5) indicates that the attendance of the insured person is not required at the examination and it is subsequently determined by the person conducting the examination that the insured person should be in attendance and personally examined, the insurer shall give a notice to the insured person at least five business days before the examination,

(a) notifying the insured person of the change;

(b) requiring the attendance of the insured person at the examination; and

(c) setting out the day, time and location of the examination and, if the examination will require more than one day, setting out the same information for the subsequent days. O. Reg. 34/10, s. 44 (7).

(8) A notice under subsection (5) or (7) may be verbal if a written confirmation is given as soon as practicable afterwards. O. Reg. 34/10, s. 44 (8).

(9) The following rules apply in respect of the examination:

1. If the attendance of the insured person is not required, the insured person and the insurer shall, within five business days after the day the notice under subsection (5) is received by the insured person, provide to the person or persons conducting the examination such information and documents as are relevant or necessary for the review of the insured person’s medical condition.

2. If the attendance of the insured person is required,

i. the insurer shall make reasonable efforts to schedule the examination for a day, time and location that are convenient for the insured person,

ii. the insured person and the insurer shall, not later than five business days before the day scheduled for the examination, provide to the person or persons conducting the examination such information and documents as are relevant or necessary for the review of the insured person's medical condition, and

iii. the insured person shall attend the examination and submit to all reasonable physical, psychological, mental and functional examinations requested by the person or persons conducting the examination.

3. If the examination relates to an application for attendant care benefits, the report of the examination must include an assessment of attendant care needs prepared in accordance with section 42. O. Reg. 34/10, s. 44 (9).

Determination of catastrophic impairment

45. (1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment. O. Reg. 34/10, s. 45 (1).

(2) The following rules apply with respect to an application under subsection (1):

1. An assessment or examination in connection with a determination of catastrophic impairment shall be conducted only by a physician but the physician may be assisted by such other regulated health professionals as he or she may reasonably require.

2. Despite paragraph 1, if the impairment is a traumatic brain impairment only, the assessment or examination may be conducted by a neuropsychologist who may be assisted by such other regulated health professionals as he or she may reasonably require.

3. If a Guideline specifies conditions, restrictions or limits with respect to the determination of whether an impairment is a catastrophic impairment, the determination must be made in accordance with those conditions, restrictions and limits. O. Reg. 34/10, s. 45 (2); O. Reg. 289/10, s. 5; O. Reg. 251/15, s. 17 (1).

(3) Within 10 business days after receiving an application under subsection (1) prepared and signed by the person who conducted the assessment or examination under subsection (2), the insurer shall give the insured person,

(a) a notice stating that the insurer has determined that the impairment is a catastrophic impairment; or

(b) a notice stating that the insurer has determined that the impairment is not a catastrophic impairment and specifying the medical and any other reasons for the insurer's decision and, if the insurer requires an examination under section 44 relating to whether the impairment is a catastrophic impairment, so advising the insured person. O. Reg. 34/10, s. 45 (3).

(4) If an application is made under this section not more than 260 weeks after the accident and, immediately before the application was made, the insured person was receiving attendant care benefits,

(a) the insurer shall continue to pay attendant care benefits to the insured person during the period before the insurer makes a determination under this section; and

(b) the amount of the attendant care benefits for the period referred to in clause (a) shall be determined on the assumption that the insured person's impairment is a catastrophic impairment. O. Reg. 34/10, s. 45 (4); O. Reg. 251/15, s. 17 (2).

(5) Within 10 business days after receiving the report of an examination under section 44, the insurer shall,

(a) give a copy of the report to the insured person and to the person who prepared the application under this section; and

(b) provide the insured person with a notice stating that the insurer has determined that the impairment is a catastrophic impairment or is not a catastrophic impairment and setting out the medical and any other reasons for the insurer's determination. O. Reg. 34/10, s. 45 (5).

(6) If an insured person is determined to have sustained a catastrophic impairment as a result of an accident, the insured person is entitled to payment of all expenses incurred before the date of the determination and to which the insured person would otherwise be entitled to payment under this Regulation by virtue of having sustained a catastrophic impairment. O. Reg. 34/10, s. 45 (6).

Determination of catastrophic impairment — certain traumatic brain injuries

45.1 If an insured person who is under 18 years of age at the time of the accident sustains a traumatic brain injury that meets the criteria in subparagraph 5 i or 5 ii of subsection 3.1 (1) and that was caused by an accident that occurs on or after June 1, 2016, the person may submit an application under subsection 45 (1) and subsections 45 (2) to (5) do not apply, and the impairment is deemed to be a catastrophic impairment for the purposes of subsection 45 (6). O. Reg. 251/15, s. 18.

Conflict of interest re referrals by insurer

46. (1) This section applies if an insurer intends to refer an insured person to a person with whom the insurer has a potential conflict of interest and the referral is for the purpose of,

(a) the insured person obtaining any goods or services referred to in section 15 or 16 from the person recommended by the insurer; or

(b) the insured person being examined or assessed, other than under section 44, by the person recommended by the insurer. O. Reg. 34/10, s. 46 (1).

(2) The insurer shall not refer the insured person to the person unless the insurer has first given the insured person a notice that satisfies the following and the insured person gives a written consent to obtain the goods or services from or be examined or assessed by the person:

1. The notice must specify the nature of the relationship between the insurer and the person, including the terms of remuneration of the person.

2. The notice must specify the nature, amount and duration, if applicable, of the goods or services or the assessment or examination.

3. The notice must inform the insured person that he or she is free to decline the proposed referral, or to revoke any consent given at any time, and that doing so will not prejudice or adversely affect the insured person's entitlement to benefits.

4. The notice must inform the insured person that he or she is free to choose from whom the insured person prefers to receive the goods and services, or by whom the insured person prefers to be assessed or examined, in accordance with this Regulation, and that doing so will not prejudice or adversely affect the insured person's entitlement to benefits under this Regulation.

5. The notice must inform the insured person of his or her rights and responsibilities with respect to the goods, services, assessments and examinations. O. Reg. 34/10, s. 46 (2).

(3) In this section, an insurer is deemed to have a potential conflict of interest with a person if,

(a) the insurer may receive a financial benefit, directly or indirectly, as a result of the provision of goods or services by, on behalf of, or under the authority or supervision of the person; or

(b) goods or services will be provided by, on behalf of, or under the authority or supervision of the person,

(i) pursuant to a subsisting arrangement with the insurer under which goods or services referred to in this Regulation are or will be provided at the insurer's expense, or

(ii) as a result of the insurer's referral, recommendation or suggestion of the person to the insured person. O. Reg. 34/10, s. 46 (3).

Part Ix
Payment of Benefits

Definition — provider

46.1 In this Part,

"provider" means,

(a) a person who submits an invoice to an insured person or insurer for payment under this Regulation for goods or services, whether the goods or services were provided by the

person or by another person, and

(b) a person, other than the person who submits the invoice described in clause (a), who provided any of the goods or services referred to in the invoice. O. Reg. 194/11, s. 2.

Duty of provider to provide information

46.2 (1) An insurer may request any of the following information from a provider:

1. Any information required to assist the insurer, acting reasonably, to determine its liability for the payment, including access to inspect and copy the originals of any treatment confirmation form, treatment and assessment plan, assessment of attendant care needs and other documents giving rise to the claim for payment.

2. A statutory declaration as to the circumstances that gave rise to the invoice, including particulars of the goods and services provided.

3. In the case of a provider described in clause (a) of the definition of "provider" in section 46.1,

i. the name and full municipal business address of the provider and of every provider described in clause (b) of that definition, and

ii. proof of the provider's identity and of the identities of every provider described in clause (b) of that definition. O. Reg. 194/11, s. 2.

(2) The provider shall give the insurer the information requested under subsection (1) within 10 business days after receiving the request. O. Reg. 194/11, s. 2.

(3) For the purpose of section 51, the amount payable by an insurer under an invoice is not overdue and no interest accrues on it during any period during which a provider fails to comply with subsection (2). O. Reg. 194/11, s. 2.

Duty of insured person to provide information

46.3 (1) An insurer may request any of the following information from an insured person who submits an invoice to the insurer for payment for goods or services under this Regulation, or from an insured person on whose behalf such an invoice is submitted:

1. Confirmation in writing that the goods or services were provided to the insured person.

2. A statutory declaration as to the circumstances that gave rise to the invoice, including particulars as to when, where and by whom the goods or services were provided. O. Reg. 14/13, s. 6.

(2) The insured person shall give the insurer the information requested under subsection (1) within 10 business days after receiving the request. O. Reg. 14/13, s. 6.

(3) For the purpose of section 51, the amount payable by an insurer under an invoice is not overdue and no interest accrues on it during any period during which an insured person fails to comply with subsection (2). O. Reg. 14/13, s. 6.

Deduction of collateral benefits

47. (1) The insurer may deduct the following amounts from the amount payable to an insured person as an income replacement or non-earner benefit under this Regulation:

1. Any temporary disability benefits being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident.

2. Any other periodic benefit being received by the insured person in respect of a period following the accident and in respect of an impairment that occurred before the accident, if the insured person was receiving that other periodic benefit at the time he or she first qualified for the income replacement or non-earner benefit and, at that time, the other periodic benefit was a temporary disability benefit. O. Reg. 34/10, s. 47 (1).

(2) Payment of a medical, rehabilitation or attendant care benefit or a benefit under Part IV is not required for that portion of an expense for which payment is reasonably available to the insured person under any insurance plan or law or under any other plan or law. O. Reg. 34/10, s. 47 (2).

Note: On July 1, 2026, subsection 47 (2) of the Regulation is amended by adding "or Part IV.1" after "Part IV". (See: O. Reg. 383/24, s. 22)

Note: On July 1, 2026, section 47 of the Regulation is amended by adding the following subsection: (See: O. Reg. 58/25, s. 1 (1))

(2.1) Despite subsection (2), payment of a medical or rehabilitation benefit, other than for medication expenses, for an accident that occurs in Ontario on or after July 1, 2026 is required for that portion of an expense for which payment is reasonably available to the insured person under a supplementary health insurance plan. O. Reg. 58/25, s. 1 (1).

(3) In this section,

Note: On July 1, 2026, subsection 47 (3) of the Regulation is amended by adding the following definition: (See: O. Reg. 58/25, s. 1 (2))

"supplementary health insurance plan" means,

(a) a group plan, including a plan sponsored by an employer or a union as part of an employee benefits program, or purchased through a professional association or group, for medical and rehabilitation coverage, or

(b) an individual plan, including a plan purchased by an individual from an insurance agent, broker or company, for medical and rehabilitation coverage; ("régime d'assurance maladie complémentaire")

"temporary disability benefit" means,

(a) an income replacement or non-earner benefit paid under this Regulation or the Old Regulation, unless the benefit is paid more than 104 weeks after the onset of the disability,

(b) a caregiver benefit paid under this Regulation or the Old Regulation,

(c) benefits paid under Part III or IV or section 32 of Ontario Regulation 776/93,

(d) benefits paid under section 37, subsection 43 (9) or subsection 147 (2) of the pre-1997 Act, as defined in Part IX of the *Workplace Safety and Insurance Act, 1997*, in respect of injuries that occurred before January 1, 1998, including benefits paid under those provisions as those provisions are deemed to have been amended by Part IX of the *Workplace Safety and Insurance Act, 1997*,

(e) benefits paid under subsection 43 (3) of the *Workplace Safety and Insurance Act, 1997* in respect of injuries that occurred after December 31, 1997, or

(f) any other periodic temporary benefit paid under an income continuation benefit plan or law, other than,

(i) benefits under the *Employment Insurance Act* (Canada),

(ii) a non-earner benefit paid under this Regulation or the Old Regulation more than 104 weeks after the onset of the disability,

(iii) benefits paid under Part V of Ontario Regulation 776/93 for more than 104 weeks,

(iv) benefits paid under Part IV of Regulation 672 of the Revised Regulations of Ontario, 1990 for more than 156 weeks, or

(v) benefits paid under Part II of Subsection 2 of Schedule C to the *Insurance Act* as it existed before June 22, 1990 that have been paid for more than 104 weeks. O. Reg. 34/10, s. 47 (3).

Method of payment

48. (1) An insurer shall pay a benefit under this Regulation,

(a) by mailing or delivering a cheque payable to the person entitled to the benefit to the address where the person ordinarily resides; or

(b) with the consent of the person entitled to the benefit, by electronic funds transfer to an account in the name of the person. O. Reg. 34/10, s. 48 (1).

(2) Despite subsection (1),

(a) an insurer may arrange to be invoiced directly and to pay directly for goods or services provided in respect of an insured person;

(b) an insurer may pay a benefit into court under section 271 of the Act; or

(c) if the person entitled to the benefit has so directed in writing, an insurer shall pay the benefit directly to the person who submitted an invoice in respect of the benefit to a central processing agency in accordance with section 49. O. Reg. 34/10, s. 48 (2); O. Reg. 370/10, s. 2.

Amounts payable under a Guideline

49. (1) Despite any other provision of this Regulation, if a benefit that would otherwise be payable by an insurer is payable in respect of an expense for goods or services specified in a Guideline that applies for the purposes of this section, an insurer to whom the Guideline applies shall not pay the benefit unless an invoice for the expense, in the form approved by the Chief Executive Officer and including all of the information required by the form,

(a) is delivered to the insurer, if neither of paragraph 2 or 3 of subsection 64 (7) applies; or

(b) is deemed to be received by the insurer under subsection 64 (8) or (9), if paragraph 2 or 3 of subsection 64 (7) applies. O. Reg. 34/10, s. 49 (1); O. Reg. 123/19, s. 9.

(2) An insurer shall not waive the submission of an invoice for goods or services to which subsection (1) applies. O. Reg. 34/10, s. 49 (2).

(3) If an insurer to whom a Guideline referred to in subsection (1) applies receives an invoice that complies with subsection (1), the insurer shall, in the circumstances set out in the Guideline, report the following to the central processing agency in the manner and within the time required by the Guideline:

1. The date or dates on which the goods or services referred to in the invoice were delivered or rendered.

2. The names, addresses and professional college registration numbers, if applicable, of each provider of goods or services referred to in the invoice.

3. Particulars of the goods or services referred to in the invoice.

4. Particulars of the injury or injuries in respect of which the goods or services were delivered or rendered.

5. The amount, if any, paid in respect of the goods or services referred to in the invoice by any person other than the insurer.

6. The amount paid by the insurer in respect of the invoice.

7. The amount paid by the insurer in respect of each separately described component of the invoice.

8. The date on which a decision was made on payment or other disposition of the invoice.

9. Any other disposition of the invoice.

10. The information referred to in subsection 32 (3).

11. Such additional information as may be specified in the Guideline, if the invoice is in respect of expenses described in a notice given by the insurer under subsection 39 (1) or 41 (1). O. Reg. 34/10, s. 49 (3); O. Reg. 227/14, s. 1.

Amounts payable under a Guideline — unlicensed provider

49.1 If an insured person receives goods or services specified in a Guideline that applies for the purposes of section 49 from a provider who does not hold a licence issued under subsection 288.5 (3) of the Act, the following rules apply in addition to the requirements of section 49:

1. The provider shall deliver an invoice for the expense, in the form approved by the Chief Executive Officer and including all of the information required by the form, to the insured person to whom the goods or services referred to in the invoice were delivered or rendered.

2. The insured person to whom the goods or services were delivered or rendered shall deliver the invoice described in paragraph 1 to the insurer. O. Reg. 227/14, s. 2; O. Reg. 123/19, s. 9.

Explanation of benefit amounts

50. (1) When a benefit is first paid or the amount of a benefit is subsequently changed, the insurer shall provide the insured person with a written explanation of how the amount of the benefit was determined. O. Reg. 34/10, s. 50 (1).

(2) While medical, rehabilitation or attendant care benefits are being claimed by or are being paid to or on behalf of an insured person, the insurer shall deliver benefit statements to the insured person in accordance with this section. O. Reg. 34/10, s. 50 (2).

(3) A benefit statement required under subsection (2) shall include a statement of,

(a) the amount paid to the date of the benefit statement in respect of medical, rehabilitation and attendant care benefits;

(b) the additional amount remaining in respect of medical, rehabilitation and attendant care benefits, taking into account the applicable maximum limits referred to in sections 18 and 28, if the insured person were to be entitled to payment of those benefits;

(c) the amount paid to the date of the benefit statement in respect of attendant care benefits;

(d) the amount paid to the date of the benefit statement in respect of medical and rehabilitation benefits;

(e) the amount paid by the insurer to the date of the benefit statement in respect of examinations conducted under section 44; and

(f) if the Chief Executive Officer approves a benefit statement form for the purposes of this section, such other information as may be required by the approved form. O. Reg. 34/10, s. 50 (3); O. Reg. 14/13, s. 7; O. Reg. 251/15, s. 19; O. Reg. 123/19, s. 9.

(4) Subject to subsection (5), the benefit statements must be delivered at the following times:

1. If it has been determined that the insured person has sustained a catastrophic impairment as a result of the accident, a benefit statement must be delivered at least once a year, commencing not later than 12 months after the date the insured person was determined to have sustained the catastrophic impairment.

2. In any other case, a benefit statement must be delivered at least once every two months, commencing not later than two months after the application for the benefit was first made. O. Reg. 34/10, s. 50 (4).

(5) Despite subsection (2), an insurer is not required to deliver a benefit statement if all of the amounts referred to in subsection (3) are unchanged from the amounts set out in the most recent benefit statement delivered in accordance with this section. O. Reg. 34/10, s. 50 (5).

Overdue payments

51. (1) An amount payable in respect of a benefit is overdue if the insurer fails to pay the benefit within the time required under this Regulation. O. Reg. 34/10, s. 51 (1).

(2) If payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount in accordance with this section for each day the amount is overdue. O. Reg. 236/14, s. 1.

(3) Interest is payable at the rate of 1 per cent per month, compounded monthly, from the date on which the amount becomes overdue until the earlier of the following dates:

1. The date on which the overdue amount is paid.

2. The date, if any, on which interest becomes payable in accordance with subsection (4). O. Reg. 236/14, s. 1.

(4) In case of a dispute in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled, interest on the benefits in dispute is calculated at the prejudgment interest rate described in subsection 128 (3) of the *Courts of Justice Act* that is used for past pecuniary loss, and is payable for the period that begins on the date on which an application to the Licence Appeal Tribunal is brought under subsection 280 (2) of the Act and ends on the date a settlement is reached or a decision is issued that finally disposes of the dispute. O. Reg. 236/14, s. 1; O. Reg. 44/16, s. 5.

(5) Despite subsection (3), if payment of the benefit is overdue on December 31, 2014, interest is payable on the overdue amount at the rate of 1 per cent per month, compounded monthly, from the date on which the amount became overdue until the date on which the overdue amount is paid. O. Reg. 236/14, s. 1.

Repayments to insurer

52. (1) Subject to subsection (3), a person is liable to repay to the insurer,

(a) any benefit described in this Regulation that is paid to the person as a result of an error on the part of the insurer, the insured person or any other person, or as a result of wilful misrepresentation or fraud;

(b) any income replacement or non-earner benefit under Part II that is paid to the person if he or she, or a person in respect of whom the payment was made, was disqualified from receiving the benefit under Part VII; or

(c) any income replacement, non-earner or caregiver benefit under Part II or any benefit under Part IV, to the extent of any payments received by the person that are deductible under this Regulation from the amount of the benefit. O. Reg. 34/10, s. 52 (1).

(2) If a person is liable to repay an amount to an insurer under this section,

(a) the insurer shall give the person notice of the amount that is required to be repaid; and

(b) the insurer may, if the person is receiving an income replacement or caregiver benefit, give the person notice that the insurer intends to collect the amount by reducing each subsequent payment of the benefit by up to 20 per cent of the amount that would otherwise be the amount of the benefit. O. Reg. 34/10, s. 52 (2).

(3) If the notice required under subsection (2) is not given within 12 months after the payment of the amount that is to be repaid, the person to whom the notice would have been given ceases to be liable to repay the amount unless it was originally paid to the person as a result of wilful misrepresentation or fraud. O. Reg. 34/10, s. 52 (3).

(4) An insurer that has given a notice referred to in clause (2) (b) may obtain repayment in the manner described in the notice. O. Reg. 34/10, s. 52 (4).

(5) The insurer may charge interest on the outstanding balance of the amount to be repaid for the period starting on the 15th day after the notice is given under subsection (2) and ending on the day repayment is received in full, calculated at the bank rate in effect on the 15th day after the notice under subsection (2) is given. O. Reg. 34/10, s. 52 (5).

(6) In subsection (5),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short term advances to the banks listed in Schedule I to the *Bank Act* (Canada). O. Reg. 34/10, s. 52 (6).

Termination of benefits for material misrepresentation

53. An insurer may terminate the payment of benefits to or on behalf of an insured person,

(a) if the insured person has wilfully misrepresented material facts with respect to the application for the benefit; and

(b) if the insurer provides the insured person with a notice setting out the reasons for the termination. O. Reg. 34/10, s. 53.

Notice of right to dispute insurer's refusal to pay or reduction of benefits

54. If an insurer refuses to pay a benefit or reduces the amount of a benefit that a person is receiving, the insurer shall provide the person with a written notice advising the person of his or her right to dispute the refusal or reduction. O. Reg. 34/10, s. 54.

Restriction on proceedings

55. (1) Subject to subsection (2), an insured person shall not apply to the Licence Appeal Tribunal under subsection 280 (2) of the Act if any of the following circumstances exist:

1. The insured person has not notified the insurer of the circumstances giving rise to a claim for a benefit or has not submitted an application for the benefit within the times prescribed by this Regulation.

2. The insurer has provided the insured person with notice in accordance with this Regulation that it requires an examination under section 44, but the insured person has not complied with that section.

3. The issue in dispute relates to the insurer's denial of liability to pay an amount under an invoice on the grounds that,

i. the insurer requested information from a provider under subsection 46.2 (1), and

ii. the insurer is unable, acting reasonably, to determine its liability for the amount payable under the invoice because the provider has not complied with the request in whole or in part. O. Reg. 44/16, s. 6.

(2) The Licence Appeal Tribunal may permit an insured person to apply despite paragraph 2 or 3 of subsection (1). O. Reg. 44/16, s. 6.

(3) The Licence Appeal Tribunal may impose terms and conditions on a permission granted under subsection (2). O. Reg. 44/16, s. 6.

Time limit for proceedings

56. An application under subsection 280 (2) of the Act in respect of a benefit shall be commenced within two years after the insurer's refusal to pay the amount claimed. O. Reg. 44/16, s. 6.

PART X
RESPONSIBILITY TO OBTAIN TREATMENT, PARTICIPATE IN REHABILITATION AND SEEK EMPLOYMENT or Self-employment

Treatment and rehabilitation

57. (1) This section applies to an insured person if compliance with subsection (2) would not be detrimental to his or her treatment or recovery. O. Reg. 34/10, s. 57 (1).

(2) An insured person who is entitled to an income replacement, non-earner or caregiver benefit shall obtain such treatment and participate in such rehabilitation as is reasonable, available and necessary to,

(a) permit the insured person to engage in employment or self-employment in accordance with the criteria set out in subsection (3), in the case of an insured person entitled to an income replacement benefit; or

(b) shorten the period during which the benefit is payable, in any other case. O. Reg. 34/10, s. 57 (2).

(3) The criteria referred to in clause (2) (a) are:

1. The essential tasks of the employment or self-employment are of a type that the insured person,

i. is able and qualified to perform, or

ii. would be able and qualified to perform if the insured person obtained treatment and participated in rehabilitation that is reasonable, available and necessary to permit the person to engage in the employment or self-employment.

2. The place of employment or self-employment is in the area in which the insured person lives or it is reasonable for the insured person to engage in the employment or self-employment in that area.

3. The employment or self-employment is of a type in which it would be reasonable to expect the insured person to engage, having regard to the possibility of deterioration in the insured person's impairment and to the insured person's personal and vocational characteristics. O. Reg. 34/10, s. 57 (3).

(4) If the insured person is still receiving medical, rehabilitation and attendant care benefits and fails to obtain treatment or participate in rehabilitation in accordance with subsection (2), the insurer may notify the insured person that the insurer intends to stop payment of the income replacement, non-earner or caregiver benefit in accordance with subsection (5). O. Reg. 34/10, s. 57 (4); O. Reg. 251/15, s. 20.

(5) If at least 10 business days have elapsed after a notice is given under subsection (4) and the insured person has not complied with subsection (2), the insurer may stop payment of the benefit. O. Reg. 34/10, s. 57 (5).

(6) Section 37 does not apply in respect of a stoppage of benefits, or proposed stoppage of benefits, under this section. O. Reg. 34/10, s. 57 (6).

(7) If, after the stoppage of benefits under subsection (5), the insured person subsequently complies with subsection (2), the insurer shall resume payment of the benefit for periods after the insured person complied. O. Reg. 34/10, s. 57 (7).

Employment and self-employment

58. (1) This section applies to an insured person who is entitled to an income replacement benefit if,

(a) returning to employment or to self-employment would not be detrimental to his or her treatment or recovery; and

(b) he or she is not participating in a vocational rehabilitation program. O. Reg. 34/10, s. 58 (1).

(2) The insured person shall make reasonable efforts to,

(a) return to the employment or self-employment in which he or she was engaged at the time of the accident;

(b) obtain employment for which he or she is reasonably suited by education, training or experience; or

(c) engage in self-employment for which he or she is reasonably suited by education, training or experience. O. Reg. 34/10, s. 58 (2).

(3) If the insured person fails to make reasonable efforts to comply with subsection (2), the insurer may notify the insured person that the insurer intends to stop payment of the benefit in accordance with subsection (4). O. Reg. 34/10, s. 58 (3).

(4) If at least 10 business days have elapsed after a notice is given under subsection (3) and the insured person has not complied with subsection (2), the insurer may stop payment of the benefit. O. Reg. 34/10, s. 58 (4).

(5) Section 37 does not apply in respect of a stoppage of benefits, or proposed stoppage of benefits, under this section. O. Reg. 34/10, s. 58 (5).

(6) If, after the stoppage of benefits under subsection (4), the insured person subsequently complies with subsection (2), the insurer shall resume payment of the benefit for periods after the insured person complies. O. Reg. 34/10, s. 58 (6).

PART XI
Interaction with Other systems

Accidents outside Ontario

59. (1) This section applies if,

(a) as a result of an accident in another province or territory of Canada or a jurisdiction in the United States of America, a person insured in that jurisdiction within the meaning of subsection (4) dies or sustains an impairment or incurs an expense described in section 15, 16 or 19; and

(b) no benefits are received under the law of the jurisdiction in which the accident occurred. O. Reg. 34/10, s. 59 (1).

(2) The person, or the person claiming benefits in respect of him or her, may elect to receive either of the following, but not both:

1. The benefits described in this Regulation, other than the benefits referred to in paragraph 2.

2. Benefits in the same amounts and subject to the same conditions as if the person was a resident of the jurisdiction in which the accident occurred and was entitled to payments under the law of that jurisdiction. O. Reg. 34/10, s. 59 (2).

(3) If an election is made under subsection (2), the insurer shall pay benefits in accordance with the election. O. Reg. 34/10, s. 59 (3).

(4) For the purpose of this section, a person is insured in the jurisdiction in which the accident occurred if, at the time of the accident,

(a) the person was authorized by law to be or to remain in Canada and was living and ordinarily present in Ontario;

(b) the person met the criteria prescribed for recovery under the law of the jurisdiction in which the accident occurred;

(c) the person was not an owner, driver or occupant of an automobile registered in the jurisdiction in which the accident occurred; and

(d) the person,

(i) was an occupant of the insured automobile,

(ii) was the named insured, a person specified in the policy as a driver of the insured automobile, the spouse of the named insured or a dependant of the named insured or spouse and was an occupant of an automobile,

(iii) was the named insured, his or her spouse or a dependant of the named insured or spouse and was struck by an automobile while not an occupant of an automobile,

(iv) was struck by the insured automobile while not an occupant of an automobile,

(v) if the named insured is a corporation, unincorporated association, partnership or sole proprietorship, was a person for whose regular use the insured automobile was supplied, his or her spouse or a dependant of the person or spouse and suffered an impairment while being the occupant of an automobile or suffered an impairment caused by an automobile of which he or she was not an occupant, or

(vi) was struck by an automobile that was driven by a person described in subclause (i), (ii) or (v). O. Reg. 34/10, s. 59 (4).

Social assistance payments

60. The insurer shall pay benefits described in this Regulation even though the insured person is entitled to or has received social assistance or similar payments, services or

benefits under an Act of the Legislative Assembly or under similar legislation in another jurisdiction. O. Reg. 34/10, s. 60.

Workplace Safety and Insurance Act, 1997

61. (1) The insurer is not required to pay benefits described in this Regulation in respect of any insured person who, as a result of an accident, is entitled to receive benefits under the Workplace Safety and Insurance Act, 1997 or any other workers' compensation law or plan. O. Reg. 34/10, s. 61 (1).

(2) Subsection (1) does not apply in respect of an insured person who elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* if the election is not made primarily for the purpose of claiming benefits under this Regulation. O. Reg. 34/10, s. 61 (2).

(3) If a person is entitled to receive benefits under this Regulation as a result of an election made under section 30 of the *Workplace Safety and Insurance Act, 1997*, no income replacement, non-earner or caregiver benefit is payable under this Regulation to the person in respect of any period of time before the person makes the election. O. Reg. 34/10, s. 61 (3).

(4) If a person who would be entitled to benefits under this Regulation in the absence of subsection (1) elects to bring an action referred to in section 30 of the *Workplace Safety and Insurance Act, 1997* and there is a dispute concerning the insurer's liability to pay an expense for a vocational rehabilitation program the person was attending at the time of the election and continues to attend, the insurer shall pay the expense pending resolution of the dispute. O. Reg. 34/10, s. 61 (4).

(5) Despite subsection (1), if there is a dispute about whether subsection (1) applies to a person, the insurer shall pay full benefits to the person under this Regulation pending resolution of the dispute if,

(a) the person makes an assignment to the insurer of any benefits under any workers' compensation law or plan to which he or she is or may become entitled as a result of the accident; and

(b) the administrator or board responsible for the administration of the workers' compensation law or plan approves the assignment. O. Reg. 34/10, s. 61 (5).

Part XII
Miscellaneous

Assignment of benefits

62. (1) Except as otherwise provided by subsection (2), the assignment of a benefit under this Regulation is void. O. Reg. 44/16, s. 7 (1).

(2) The following assignments are not void:

1. An assignment under section 267.8 of the Act.

2. An assignment of a benefit to,

i. the Ministry of Community and Social Services,

ii. a delivery agent under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*, or

iii. the Minister of Finance under subsection 6.1 (4) of the *Motor Vehicle Accident Claims Act*. O. Reg. 34/10, s. 62 (2).

(3) If the assignment of a benefit to a person is void,

(a) subsection 280 (2) of the Act does not apply; and

(b) subsection 280 (3) of the Act does apply to the person, but the exception in that subsection, which permits bringing a proceeding, does not apply to the person. O. Reg. 44/16, s. 7 (2).

Copies of this Regulation

63. On request, the insurer shall provide a copy of this Regulation without charge to a named insured or a person entitled to benefits under this Regulation. O. Reg. 34/10, s. 63.

Notices and delivery

64. (1) Except as otherwise permitted by this Regulation, all notices required or permitted under this Regulation, other than a notice under subsection 32 (1) or (6), must be in writing. O. Reg. 34/10, s. 64 (1).

(2) Any document, including a notice in writing, required or permitted under this Regulation to be given to a person may be delivered,

(a) by faxing the document to the person or to the solicitor or authorized representative, if any, of the person in accordance with subsection (19);

(b) by leaving a copy of the document with the solicitor or authorized representative, if any, of the person, or with an employee in the office of the solicitor or authorized representative;

(c) by personal delivery to the person;

(c.1) by prepaid courier if there is a record by the person who has delivered it that the document has been delivered;

(d) by ordinary or registered mail,

(i) in the case of an insurer, addressed to the insurer or its chief executive officer at the insurer's head office in Ontario as identified in the records of the Chief Executive Officer,

(ii) in the case of a person other than an insurer, addressed to the person at his or her last known address; or

(e) by electronic means, if the intended recipient of the document consents to delivery by electronic means. O. Reg. 34/10, s. 64 (2); O. Reg. 123/19, s. 9; O. Reg. 705/21, s. 1 (1); O. Reg. 58/25, s. 2.

(3) For the purposes of clauses (2) (a) and (b), but subject to subsection (4), an authorized representative may include a regulated health professional if the document is a notice under subsection 38 (8) or 44 (5) or (7) or a report prepared under section 44. O. Reg. 34/10, s. 64 (3).

(4) Subsection (3) does not apply unless,

(a) the insured person is not represented at the relevant time by a solicitor or another authorized representative;

(b) the insured person gives to the insurer a signed authorization and direction specifying which documents listed in subsection (3) that the insurer is authorized and directed to give to the regulated health professional;

(c) the signed authorization and direction is given to the insurer before the document is given to the regulated health professional; and

(d) the regulated health professional has agreed to act in accordance with the authorization and direction. O. Reg. 34/10, s. 64 (4).

(5) Despite clause (2) (d), any notice or other document that must be given within fewer than five business days shall not be delivered by ordinary mail. O. Reg. 34/10, s. 64 (5).

(6) The functional equivalency rules set out in sections 4 to 13 of the *Electronic Commerce Act, 2000* apply in the case of the delivery of a document by electronic means under clause (2) (e). O. Reg. 34/10, s. 64 (6).

(7) Despite subsection (2), but subject to subsection (15), the following rules apply in the circumstances specified in a Guideline issued for the purposes of this section to a document that is listed in section 66, is specified in the Guideline and is required under this Regulation to be delivered to an insurer to whom the Guideline applies:

1. Subject to paragraphs 2 and 3, the document and any attachments to it shall be delivered to the insurer only in a manner specified in the Guideline.

2. If the Guideline specifies that a document, exclusive of attachments to it, is to be delivered to a central processing agency on behalf of the insurer,

i. the document shall be delivered not to the insurer but only to the central processing agency specified in the Guideline and only in a manner specified in the Guideline, and

ii. attachments to the document shall be delivered not to the central processing agency but only to the insurer in a manner specified in the Guideline.

3. If the Guideline specifies that a document, together with attachments to it, is to be delivered to a central processing agency on behalf of the insurer, the document and the

attachments shall be delivered not to the insurer but only to the central processing agency specified in the Guideline and only in a manner specified in the Guideline.

4. A document referred to in paragraph 1, 2 or 3 shall be deemed not to have been received by the insurer to whom it is addressed, if it is delivered to the insurer otherwise than as specified in the Guideline. O. Reg. 34/10, s. 64 (7).

(8) A document referred to in paragraph 2 of subsection (7) is deemed to be received by the insurer to whom it is addressed on the later of,

(a) the date on which the document, delivered in a manner specified in the Guideline to the central processing agency on behalf of an insurer to whom the Guideline applies, is determined by the central processing agency to be duly completed and to contain all information required by this Regulation to be included in it; and

(b) the date on which the last of any attachments is received by the insurer. O. Reg. 34/10, s. 64 (8).

(9) A document referred to in paragraph 3 of subsection (7) is deemed to be received by the insurer to whom it is addressed when the document and any attachments to it are delivered in a manner specified in the Guideline to the central processing agency on behalf of an insurer to whom the Guideline applies and the document is determined by the central processing agency to be duly completed and to contain all information required by this Regulation to be included in it. O. Reg. 34/10, s. 64 (9).

(10) For the purposes of subsections (8) and (9), the central processing agency shall be deemed to have determined, on the day the document was delivered to the central processing agency in a manner specified by the Guideline, that the document is duly completed and contains all information required by this Regulation to be included in it unless the central processing agency notifies the sender, in a manner specified in the Guideline and not later than the second business day after the document was delivered to the central processing agency, that the document is not duly completed or does not contain all information required by this Regulation to be included in it. O. Reg. 34/10, s. 64 (10).

(11) A notice under subsection (10) must include sufficient particulars to enable the sender to remedy the deficiency. O. Reg. 34/10, s. 64 (11).

(12) The central processing agency shall, as soon as practicable, make the contents of the document available to the insurer to whom the document is addressed. O. Reg. 34/10, s. 64 (12).

(13) An insurer that is deemed by subsection (8) or (9) to have received a document, other than an invoice to which subsection 49 (1) applies, shall in the manner and within the time required by the Guideline provide the central processing agency with the following information, which may include personal information:

1. Particulars of the goods or services referred to in the document for which the insurer agrees to pay and the amount the insurer agrees to pay in respect of such goods or

services.

2. Particulars of the goods or services referred to in the document for which the insurer does not agree to pay. O. Reg. 34/10, s. 64 (13).

(14) Following receipt of the last of any attachments to a document in accordance with paragraph 2 of subsection (7), an insurer shall notify the central processing agency for the purpose of the application of clause (8) (b), in the manner and within the time required by the Guideline. O. Reg. 34/10, s. 64 (14).

(15) Subsections (7) to (14) do not apply to a document if the insurer has waived the requirement that the document be submitted to the insurer in circumstances permitted by this Regulation. O. Reg. 34/10, s. 64 (15).

(16) Nothing in this Regulation prohibits any person from delivering a document to which subsection (7) applies to the central processing agency on behalf of a person otherwise required to deliver it. O. Reg. 34/10, s. 64 (16).

(17) If an attempt is made to personally deliver a document to a person at his or her place of residence and, for any reason, it is not possible to personally deliver the document to the person, the document may be delivered by leaving a copy, in a sealed envelope addressed to the person, at the person's place of residence with anyone who appears to be an adult member of the same household. O. Reg. 34/10, s. 64 (17).

(18) In the absence of evidence to the contrary, a person is deemed to receive anything delivered by ordinary mail under clause (2) (d) on the fifth business day after the day the document is mailed in accordance with clause (2) (d). O. Reg. 34/10, s. 64 (18).

(19) A document that is delivered by fax must include a cover page indicating,

(a) the sender's name, address and telephone number;

(b) the name of the person for whom the document is intended;

(c) the date of the accident to which the document relates;

(d) the name, address and telephone number of the person to whom the document relates;

(e) the date and time the fax is sent;

(f) the total number of pages faxed, including the cover page;

(g) the telephone number from which the document is faxed; and

(h) the name and telephone number of a person to contact in the event of transmission problems with the fax. O. Reg. 34/10, s. 64 (19).

(20) A document delivered in accordance with clause (2) (a), (b), (c), (c.1) or (e) after 5 p.m. local time of the recipient shall be deemed to be delivered on the next business day. O. Reg. 34/10, s. 64 (20); O. Reg. 705/21, s. 1 (2).

(21) Despite subclause (2) (d) (i) and subsections (18) and (20), if the insurer provides the name and address of a contact person to whom documents are to be delivered, anything delivered to the insurer that is not addressed to the attention of the contact person at that address shall not be considered to have been delivered to the insurer until it is received by the contact person. O. Reg. 34/10, s. 64 (21).

(22) Subject to subsection (20), subsection 22 (3) of the *Electronic Commerce Act, 2000* applies to determine when a document delivered in accordance with clause (2) (e) is deemed to be delivered to the recipient. O. Reg. 34/10, s. 64 (22).

(23) If subsection (8) or (9) applies, the recipient for the purposes of subsection (22) is the central processing agency. O. Reg. 34/10, s. 64 (23).

(24) A reference in this Regulation to a number of days between two events shall be read as excluding the day on which the first event happens and including the day on which the second event happens. O. Reg. 34/10, s. 64 (24).

(25) Subject to subsection (26), if any provision of this Regulation requires a person to do anything within a time period expressed in days or business days, the time period is deemed to expire on the last day of the time period at 5 p.m. local time. O. Reg. 34/10, s. 64 (25).

(26) If a time period in which a person is required to do anything expires on a day that is not a business day, the time period is deemed to expire on the next day that is a business day at 5 p.m. local time. O. Reg. 34/10, s. 64 (26).

(27) For the purposes of subsections (25) and (26), if the person delivering a document or notice and the person to whom the document or notice is to be delivered are in different time zones, references to 5 p.m. local time shall be read as references to the time when it is 5 p.m. in one time zone and after 5 p.m. in the other time zone. O. Reg. 34/10, s. 64 (27).

(28) A regulated health professional who receives a document under the authority of subsection (3) shall immediately notify the insured person by telephone of the substance of the document and send a copy of the document to the insured person. O. Reg. 34/10, s. 64 (28); O. Reg. 705/21, s. 1 (3).

(29) An insurer shall not deliver documents to a regulated health professional in reliance on an authorization under subsection (4) unless the documents are expressly specified in the authorization referred to in that subsection. O. Reg. 34/10, s. 64 (29).

(30) In this section,

"personal information" means information that is personal information for the purposes of the *Personal Information Protection and Electronic Documents Act* (Canada) or personal health information for the purposes of the *Personal Health Information Protection Act, 2004*. O. Reg. 34/10, s. 64 (30).

Substitute decision-makers

65. Any consent, notice or other thing to be given by or to an insured person under this Regulation may be given by or to a person exercising a power of decision on behalf of the insured person under the authority of the *Substitute Decisions Act, 1992* or as authorized under the *Health Care Consent Act, 1996*. O. Reg. 34/10, s. 65.

Forms

66. Each of the following documents shall be in a form approved by the Chief Executive Officer:

1. An application form referred to in clause 32 (2) (a).

2. A disability certificate under section 21, 36 or 37.

3. A notice under section 35.

4. A treatment and assessment plan referred to in section 38.

5. A treatment confirmation form under section 40.

6. A notice under subsection 40 (3).

7. An application for attendant care benefits under section 42 (Assessment of Attendant Care Needs).

8. An application under subsection 45 (1).

9. An invoice in respect of an expense for goods or services specified in a Guideline applicable for the purposes of section 49. O. Reg. 34/10, s. 66; O. Reg. 123/19, s. 9.

When form is considered completed

67. (1) Any document that is required by section 66 to be in a form approved by the Chief Executive Officer and to which subsection 64 (7) applies and any other document specified in a Guideline applicable for the purposes of this section is duly completed and includes all information required by this Regulation to be included in it if,

(a) every field not identified on the form as an optional field is completed in accordance with subsection (2); and

(b) if any field on the form that is identified as an optional field is completed, it is completed in accordance with subsection (2). O. Reg. 34/10, s. 67 (1); O. Reg. 123/19, s. 9.

(2) If the form specifies the manner or the format in which a field is to be completed, completion of the field shall be in that manner and in that format. O. Reg. 34/10, s. 67 (2).

Transition re forms

67.1 References in this Regulation to a form approved by the Chief Executive Officer are deemed to include the last form approved by the Superintendent for the purposes of the

relevant provision prior to June 8, 2019 until the Chief Executive Officer approves a subsequent form for the purposes of the relevant provision. O. Reg. 123/19, s. 8.

Part XIII
Transitional Provisions

Transitional, optional benefits

68. (1) Despite any other provision of this Regulation and unless otherwise agreed in writing by the named insured and the insurer, subsection (2) applies to every motor vehicle liability policy that is in effect on September 1, 2010 until the earlier of,

(a) the first expiry date under the motor vehicle liability policy; and

(b) the day on which the motor vehicle liability policy is terminated by the insurer or the insured, if the policy is terminated before the day referred to in clause (a). O. Reg. 34/10, s. 68 (1).

(2) The following benefits are deemed to be included in the motor vehicle liability policy and are applicable to an insured person in respect of the motor vehicle liability policy:

1. The optional caregiver, housekeeping and home maintenance benefit referred to in paragraph 2 of subsection 28 (1).

Note: On July 1, 2026, paragraph 1 of subsection 68 (2) is amended by adding "as it read immediately before July 1, 2026" at the end. (See: O. Reg. 383/24, s. 23)

2. The optional medical and rehabilitation benefit referred to in paragraph 3 of subsection 28 (1), as it read immediately before Ontario Regulation 251/15 came into force.

3. The optional attendant care benefit referred to in paragraph 4 of subsection 28 (1), as it read immediately before Ontario Regulation 251/15 came into force.

4. All optional benefits referred to in subsection 27 (1) or section 28 or 29 of the Old Regulation that were purchased and still in effect on September 1, 2010. O. Reg. 34/10, s. 68 (2); O. Reg. 251/15, s. 21.

Application of Regulation 672, O. Reg. 776/93 and O. Reg. 403/96

68.1 For greater certainty, the following rules apply with respect to accidents that occurred before September 1, 2010:

1. Regulation 672 of the Revised Regulations of Ontario, 1990 (Statutory Accident Benefits Schedule — Accidents before January 1, 1994), as it read immediately before it was revoked by Ontario Regulation 346/20, continues to apply in respect of accidents occurring before January 1, 1994.

2. Ontario Regulation 776/93 (Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996), as it read immediately before it was revoked by Ontario Regulation 347/20, continues to apply in respect of accidents occurring after December 31, 1993 and before November 1, 1996.

3. Ontario Regulation 403/96 (Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996), as it read immediately before it was revoked by Ontario Regulation 348/20, continues to apply in respect of accidents occurring on or after November 1, 1996 and before September 1, 2010. O. Reg. 349/20, s. 1.

Part XIV (omitted)

69. Omitted (provides for coming into force of provisions of this Regulation). O. Reg. 34/10, s. 69.

TAB 55

Access to Justice Act, 2006, S.O. 2006, c. 21 - Bill 14

Download Word Print

Explanatory note

CHAPTER 21

**An Act to promote
access to justice
by amending or repealing
various Acts and by enacting
the Legislation Act, 2006**

Assented to October 19, 2006

CONTENTS

1.	Contents of Act
2.	Commencement
3.	Short title
Schedule A	Amendments to the Courts of Justice Act
Schedule B	Amendments to the Justices of the Peace Act and the Public Authorities Protection Act
Schedule C	Amendments to the Law Society Act and related amendments to other Acts
Schedule D	Amendments to the Limitations Act, 2002
Schedule E	Amendments to the Provincial Offences Act
Schedule F	Legislation Act, 2006

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

Contents of Act

1. This Act consists of this section, sections 2 and 3 and the Schedules to this Act.

Fr

Commencement

2. (1) Subject to subsections (2) and (3), this Act comes into force on the day it receives Royal Assent.

Same

(2) The Schedules to this Act come into force as provided in each Schedule.

Same

(3) If a Schedule to this Act provides that any provisions are to come into force on a day to be named by proclamation of the Lieutenant Governor, the proclamation may apply to the whole or any portion of the Schedule, and proclamations may be issued at different times with respect to any of those provisions.

Short title

3. The short title of this Act is the *Access to Justice Act, 2006*.

SCHEDULE A
AMENDMENTS TO THE COURTS OF JUSTICE ACT

1. The definition of "region" in section 1 of the *Courts of Justice Act* is amended by striking out "74" and substituting "79.1".

2. Subsection 8 (6) of the Act is amended by striking out "Treasurer of Ontario" and substituting "Minister of Finance".

3. Subsection 19 (1) of the Act is repealed and the following substituted:

Divisional Court jurisdiction

(1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master.

Fr

Same

(1.1) If the notice of appeal is filed before the day section 3 of Schedule A to the *Access to Justice Act, 2006* comes into force, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $25,000, exclusive of costs;

(b) for periodic payments that amount to not more than $25,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

Same

(1.2) If the notice of appeal is filed on or after the day section 3 of Schedule A to the *Access to Justice Act, 2006* comes into force, clause (1) (a) applies in respect of a final order,

(a) for a single payment of not more than $50,000, exclusive of costs;

(b) for periodic payments that amount to not more than $50,000, exclusive of costs, in the 12 months commencing on the date the first payment is due under the order;

(c) dismissing a claim for an amount that is not more than the amount set out in clause (a) or (b); or

(d) dismissing a claim for an amount that is more than the amount set out in clause (a) or (b) and in respect of which the judge or jury indicates that if the claim had been allowed the amount awarded would have been not more than the amount set out in clause (a) or (b).

4. Section 33 of the Act is amended by adding the following subsection:

Duty of Chief Justice

(7) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Deputy Judges Council.

5. (1) Subsection 42 (2) of the Act is repealed and the following substituted:

Qualification

(2) No person shall be appointed as a provincial judge unless he c

Fr

(a) has been a member of the bar of one of the provinces or territories of Canada for at least 10 years; or

(b) has, for an aggregate of at least 10 years,

(i) been a member of a bar mentioned in clause (a), and

(ii) after becoming a member of such a bar, exercised powers and performed duties of a judicial nature on a full-time basis in respect to a position held under a law of Canada or of one of its provinces or territories.

(2) Subsection 42 (3) of the Act is amended by striking out "may appoint" and substituting "may, on the recommendation of the Attorney General, appoint".

(3) Subsection 42 (4) of the Act is repealed and the following substituted:

Associate chief justices

(4) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint two provincial judges as associate chief justices of the Ontario Court of Justice.

(4) Subsection 42 (6) of the Act is repealed and the following substituted:

Regional senior judges

(6) The Lieutenant Governor in Council may, on the recommendation of the Attorney General, appoint a provincial judge to be the regional senior judge of the Ontario Court of Justice for each region.

Same

(6.1) Before making a recommendation referred to in subsection (4) or (6), the Attorney General shall consult with the Chief Justice of the Ontario Court of Justice.

6. Subsection 51.9 (2) of the Act is amended by striking out "the standards of conduct" and substituting "any standards of conduct".

7. Subsection 52 (4) of the Act is repealed and the following substituted:

Regional meeting of judges

(4) The judges of the Court of Ontario in each region shall meet at least once in each year in order to consider this Act, the rules of court and the administra stice in the region generally, on a day fixed jointly by the regional senior judge of t or Court of Justice and the regional senior judge of the Ontario Court of Justice.

Fr

8. Clause 53 (1) (d) of the Act is repealed.

9. Clause 65 (2) (a.2) of the Act is repealed and the following substituted:

(a.2) the Chief Justice of the Ontario Court of Justice, or another judge of that court designated by the Chief Justice;

10. (1) Subsection 66 (1) of the Act is repealed and the following substituted:

Civil rules

(1) Subject to the approval of the Attorney General, the Civil Rules Committee may make rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings, except for proceedings in relation to which the Family Rules Committee may make rules under section 68.

(2) Subsection 66 (2) of the Act is amended by striking out "for the courts described in subsection (1)" in the portion before clause (a) and substituting "under subsection (1)".

(3) Subsections 66 (3) and (4) of the Act are repealed and the following substituted:

Same

(3) Nothing in subsection (1) or (2) authorizes the making of rules that conflict with an Act, but rules may be made under subsection (1) supplementing the provisions of an Act in respect of practice and procedure.

Same

(4) Rules made under subsection (1) in relation to the matters described in clauses (2) (p), (v) and (w) shall be reviewed at least once in every four-year period.

Application

(5) A rule made under this section may be general or particular in its application.

11. Clause 67 (2) (d) of the Act is amended by striking out "at his or her designation, an associate chief justice" and substituting "an associate chief justice designated by the Chief Justice".

12. Subsections 68 (1), (2) and (3) of the Act a[Fr]ealed and the following substituted:

Family rules

(1) Subject to the approval of the Attorney General, the Family Rules Committee may make rules for the Court of Appeal, the Superior Court of Justice and the Ontario Court of Justice in relation to the practice and procedure of those courts in the proceedings referred to in the Schedule to section 21.8.

Same

(2) Subsections 66 (2), (3) and (5) apply with necessary modifications to the Family Rules Committee making rules under subsection (1).

13. Subsection 70 (2) of the Act is amended by striking out "Subject to the approval of the Lieutenant Governor in Council" at the beginning and substituting "Subject to the approval of the Attorney General".

14. Part V of the Act is repealed and the following substituted:

PART V
ADMINISTRATION OF THE COURTS

Goals

71. The administration of the courts shall be carried on so as to,

(a) maintain the independence of the judiciary as a separate branch of government;

(b) recognize the respective roles and responsibilities of the Attorney General and the judiciary in the administration of justice;

(c) encourage public access to the courts and public confidence in the administration of justice;

(d) further the provision of high-quality services to the public; and

(e) promote the efficient use of public resources.

Role of Attorney General

72. The Attorney General shall superintend all matters connected with the administration of the courts, other than the following:

1. Matters that are assigned by law to the judiciary, including authority to direct and supervise the sittings and the assignment of the judicial duties of the court.

2. Matters related to the education, conduct and discipline of ... and justices of the peace, which are governed by other provisions of this Act, ... *es of the Peace Act* and Acts of the Parliament of Canada.

Fr

3. Matters assigned to the judiciary by a memorandum of understanding under section 77.

Court officers and staff

Appointment

73. (1) Registrars, sheriffs, court clerks, assessment officers and any other administrative officers and employees that are considered necessary for the administration of the courts in Ontario may be appointed under the *Public Service Act*.

Exercise of powers

(2) A power or duty given to a registrar, sheriff, court clerk, bailiff, assessment officer, Small Claims Court referee or official examiner under an Act, regulation or rule of court may be exercised or performed by a person or class of persons to whom the power or duty has been assigned by the Deputy Attorney General or a person designated by the Deputy Attorney General.

Same

(3) Subsection (2) applies in respect of an Act, regulation or rule of court made under the authority of the Legislature or of the Parliament of Canada.

Destruction of documents

74. Documents and other materials that are no longer required in a court office shall be disposed of in accordance with the directions of the Deputy Attorney General, subject to the approval of,

(a) in the Court of Appeal, the Chief Justice of Ontario;

(b) in the Superior Court of Justice, the Chief Justice of the Superior Court of Justice;

(c) in the Ontario Court of Justice, the Chief Justice of the Ontario Court of Justice.

Powers of chief or regional senior judge

75. (1) The powers and duties of a judge who has authority to direct and supervise the sittings and the assignment of the judicial duties of his or her court include the following:

1. Determining the sittings of the court.

2. Assigning judges to the sittings.

3. Assigning cases and other judicial duties to individual judges.

4. Determining the sitting schedules and places of sittings for individual judges.

5. Determining the total annual, monthly and weekly workload of individual judges.

Fr

6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

Powers re masters, case management masters

(2) Subsection (1) applies, with necessary modifications, in respect of directing and supervising the sittings and assigning the judicial duties of masters and case management masters.

Direction of court staff

76. (1) In matters that are assigned by law to the judiciary, registrars, court clerks, court reporters, interpreters and other court staff shall act at the direction of the chief justice of the court.

Same

(2) Court personnel referred to in subsection (1) who are assigned to and present in a courtroom shall act at the direction of the presiding judge, master or case management master while the court is in session.

Memoranda of understanding between Attorney General and Chief Justices

Court of Appeal

77. (1) The Attorney General and the Chief Justice of Ontario may enter into a memorandum of understanding governing any matter relating to the administration of the Court of Appeal.

Superior Court of Justice

(2) The Attorney General and the Chief Justice of the Superior Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court.

Ontario Court of Justice

(3) The Attorney General and the Chief Justice of the Ontario Court of Justice may enter into a memorandum of understanding governing any matter relating to the administration of that court.

Scope

(4) A memorandum of understanding under this section may deal with the respective roles and responsibilities of the Attorney General and the judiciary in t istration of justice, but shall not deal with any matter assigned by law to the judiciary.

Fr

Publication

(5) The Attorney General shall ensure that each memorandum of understanding entered into under this section is made available to the public, in English and French.

Ontario Courts Advisory Council

78. (1) The council known as the Ontario Courts Advisory Council is continued under the name Ontario Courts Advisory Council in English and Conseil consultatif des tribunaux de l'Ontario in French.

Same

(2) The Ontario Courts Advisory Council is composed of,

(a) the Chief Justice of Ontario, who shall preside, and the Associate Chief Justice of Ontario;

(b) the Chief Justice and the Associate Chief Justice of the Superior Court of Justice and the Senior Judge of the Family Court;

(c) the Chief Justice and the associate chief justices of the Ontario Court of Justice; and

(d) the regional senior judges of the Superior Court of Justice and of the Ontario Court of Justice.

Mandate

(3) The Ontario Courts Advisory Council shall meet to consider any matter relating to the administration of the courts that is referred to it by the Attorney General or that it considers appropriate on its own initiative, and shall make recommendations on the matter to the Attorney General and to its members.

Ontario Courts Management Advisory Committee

79. (1) The committee known as the Ontario Courts Management Advisory Committee is continued under the name Ontario Courts Management Advisory Committee in English and Comité consultatif de gestion des tribunaux de l'Ontario in French.

Same

(2) The Ontario Courts Management Advisory Committee is composed of,

(a) the Chief Justice and Associate Chief Justice of Ontario, the Chief Justice and Associate Chief Justice of the Superior Court of Justice, the Senior Judge of the Family Court and the Chief Justice and associate chief justices of the Ontario Court of Justice;

(b) the Attorney General, the Deputy Attorney General, the Assistant Deputy Attorney General responsible for courts administration, the Assistant Deputy Attorney General responsible for criminal law and two other public servants chosen by the Attorney General;

Fr

(c) three lawyers appointed by The Law Society of Upper Canada and three lawyers appointed by the County and District Law Presidents' Association; and

(d) not more than six other persons, appointed by the Attorney General with the concurrence of the judges mentioned in clause (a) and the lawyers appointed under clause (c).

Who presides

(3) The following persons shall preside over meetings of the Committee, by rotation at intervals fixed by the Committee:

1. A judge mentioned in clause (2) (a), selected by the judges mentioned in that clause.

2. The Attorney General, or a person mentioned in clause (2) (b) and designated by the Attorney General.

3. A lawyer appointed under clause (2) (c), selected by the lawyers appointed under that clause.

4. A person appointed under clause (2) (d), selected by the persons appointed under that clause.

Function of Committee

(4) The function of the Committee is to consider and recommend to the relevant bodies or authorities policies and procedures to promote the better administration of justice and the effective use of human and other resources in the public interest.

Regions

79.1 (1) For administrative purposes related to the administration of justice in the province, Ontario is divided into the regions prescribed under subsection (2).

Regulations

(2) The Lieutenant Governor in Council may make regulations prescribing regions for the purposes of this Act.

Regional Courts Management Advisory Committee

79.2 (1) The committee in each region known as the Regional Courts Management Advisory Committee is continued under the name Regional Courts Management Advisory Committee in English and Comité consultatif régional de gestion des tribunaux in French, and is composed of,

(a) the regional senior judge of the Superior Court of Justice, [Fr] nal senior judge of the Ontario Court of Justice and, in a region where the Family Court has jurisdiction, a judge chosen by the Chief Justice of the Superior Court of Justice;

(b) the regional director of courts administration for the Ministry of the Attorney General and the regional director of Crown attorneys;

(c) two lawyers appointed jointly by the presidents of the county and district law associations in the region; and

(d) not more than two other persons, appointed by the Attorney General with the concurrence of the judges mentioned in clause (a) and the lawyers appointed under clause (c).

Who presides

(2) The following persons shall preside over meetings of the Committee, by rotation at intervals fixed by the Committee:

1. A judge mentioned in clause (1) (a), selected by the judges mentioned in that clause.

2. An official mentioned in clause (1) (b), selected by the officials mentioned in that clause.

3. A lawyer appointed under clause (1) (c), selected by the lawyers appointed under that clause.

4. A person appointed under clause (1) (d), selected by the persons appointed under that clause.

Function of Committee

(3) The function of the Committee is to consider and recommend to the relevant bodies or authorities policies and procedures for the region to promote the better administration of justice and the effective use of human and other resources in the public interest.

Frequency of meetings

(4) The Committee shall meet at least once each year.

Annual report on administration of courts

79.3 (1) Within six months after the end of every fiscal year, the Attorney General shall cause a report to be prepared on the administration of the courts during that fiscal year, in consultation with the Chief Justice of Ontario, the Chief Justice of the Superior Court of Justice and the Chief Justice of the Ontario Court of Justice.

Same

(2) The annual report shall provide information about progress in meeting the goals set out in section 71 and shall be made available to the public in English and French.

Inclusion in Ministry's annual report

Fr

(3) The Attorney General may cause all or part of the annual report on the administration of the courts to be incorporated into the corresponding annual report referred to in the *Ministry of the Attorney General Act*.

15. Section 86.1 of the Act is amended by adding the following subsection:

Duty of Chief Justice

(10) The Chief Justice shall ensure that any standards of conduct are made available to the public, in English and French.

16. Paragraph 3 of subsection 108 (2) of the Act is repealed and the following substituted:

3. Relief in proceedings referred to in the Schedule to section 21.8.

17. The Act is amended by adding the following section:

Periodic payment, medical malpractice actions

116.1 (1) Despite section 116, in a medical malpractice action where the court determines that the award for the future care costs of the plaintiff exceeds the prescribed amount, the court shall, on a motion by the plaintiff or a defendant that is liable to pay the plaintiff's future care costs, order that the damages for the future care costs of the plaintiff be satisfied by way of periodic payments.

The order

(2) If the court makes an order under subsection (1), the court shall determine the amount and frequency of the periodic payments without regard to inflation and shall order the defendant to provide security for those payments in the form of an annuity contract that satisfies the criteria set out in subsection (3).

Form of security

(3) The annuity contract shall satisfy the following criteria:

1. The annuity contract must be issued by a life insurer.

2. The annuity must be designed to generate payments in respect of which the beneficiary is not required to pay income taxes.

3. The annuity must include protection from inflation to a degree reasonably available in the market for such annuities.

Fr

Directions from the court

(4) If the parties are unable to agree on the terms of the annuity, either party may seek directions from the court about the terms.

Filing and approval of plan

(5) Unless the court orders otherwise, a proposed plan to provide security required by an order under subsection (2) shall be filed with the court within 30 days of the judgment or within another period that the court may specify, and the court may approve the proposed plan, with or without modifications.

Effect of providing security

(6) If security is provided in accordance with a plan approved by the court, the defendant by whom or on whose behalf the security is provided is discharged from all liability to the plaintiff in respect of damages that are to be paid by periodic payments, but the owner of the security remains liable for the periodic payments until they are paid.

Effect of not providing security

(7) If a proposed plan is not filed in accordance with subsection (5) or is not approved by the court, the court shall, at the request of any party to the proceeding, vacate the portions of the judgment in which periodic payments are awarded and substitute a lump sum award.

Application for lump sum

(8) The court may order that the future care costs be paid in whole or in part by way of a lump sum payment to the extent that the plaintiff satisfies the court that a periodic payment award is unjust, having regard to the capacity of the periodic payment award to meet the needs for which the damages award for future care costs is intended to provide compensation.

Amount to offset liability for income tax

(9) If the court does not make an order for periodic payments under subsection (1) or makes an order for a lump sum payment under subsection (7) or (8), the court shall make an award for damages that shall include an amount to offset liability for income tax on income from investment of the award except to the extent that the evidence shows that the plaintiff will not derive taxable income from investing the award.

Periodic payments exempt from garnishment, etc.

(10) Periodic payments of damages for future care costs are exempt from seizure or garnishment to the same extent that wages are exempt under [illegible] of the *Wages Act*, unless the seizure or garnishment is made by a provider of c[illegible]e plaintiff and the seizure or garnishment is to pay for the costs of products, services or accommodations or any one of them with respect to the plaintiff.

Fr

Future review

(11) In an order made under this section, the court may, with the consent of all the affected parties, order that the award be subject to future review and revision in such circumstances and on such terms as the court considers just.

Regulations

(12) The Lieutenant Governor in Council may make regulations prescribing or calculating the amount of future care costs for the purpose of subsection (1).

Definitions

(13) In this section,

"future care costs" means the cost of medical care or treatment, rehabilitation services or other care, treatment, services, products or accommodations that is incurred at a time after judgment; ("coûts des soins futurs")

"medical malpractice action" means an action for personal injuries alleged to have arisen from negligence or malpractice in respect of professional services requested of, or rendered by, a health professional who is a member of a health profession as defined in the *Regulated Health Professions Act, 1991* or an employee of the health professional or for which a hospital as defined in the *Public Hospitals Act* is held liable; ("action pour faute professionnelle médicale")

"prescribed amount" means $250,000 or such greater amount as may be prescribed by regulation, calculated as a present value at the time of judgment in accordance with the Rules of Civil Procedure. ("montant prescrit")

Transition

(14) This section applies to all proceedings in which a final judgment at trial or final settlement has not been made on the day the *Access to Justice Act, 2006* receives Royal Assent.

18. Subsection 127 (2) of the Act is repealed and the following substituted:

Calculation and publication of interest rates

(2) After the first day of the last month of each quarter, a person designated by the Deputy Attorney General shall forthwith,

(a) determine the prejudgment and postjudgment interest ra[Fr] next quarter; and

(b) publish in the prescribed manner a table showing the rate determined under clause (a) for the next quarter and the rates determined under clause (a) or under a

predecessor of that clause for all the previous quarters during the preceding 10 years.

Regulations

(3) The Attorney General may, by regulation, prescribe the manner in which the table described in clause (2) (b) is to be published.

Commencement

19. (1) Subject to subsection (2), this Schedule comes into force on the day the *Access to Justice Act, 2006* receives Royal Assent.

Same

(2) Sections 1, 3, 4, 8, 14, 15 and 18 come into force on a day to be named by proclamation of the Lieutenant Governor.

SCHEDULE B
AMENDMENTS TO THE JUSTICES OF THE PEACE ACT AND THE PUBLIC AUTHORITIESPROTECTION ACT

Justices of the Peace Act

1. (1) The definitions of "non-presiding justice of the peace" and "presiding justice of the peace" in section 1 of the *Justices of the Peace Act* are repealed.

(2) The definition of "Review Council" in section 1 of the Act is amended by striking out "section 9" at the end and substituting "section 8".

2. Section 2 of the Act is repealed and the following substituted:

Appointment of justices

2. (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint full-time justices of the peace.

Part-time justices

(2) A person appointed as a part-time justice of the peace before subsection (1) came into force continues in office as a part-time justice of the peace.

Fr

Change to full-time

(3) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may change a person's appointment as a part-time justice of the peace to an appointment as a full-time justice of the peace.

Consultation

(4) Before making a recommendation under subsection (3), the Attorney General must obtain the recommendation of the Chief Justice of the Ontario Court of Justice on the matter.

3. The Act is amended by adding the following section:

Justices of the Peace Appointments Advisory Committee

2.1 (1) A committee known as the Justices of the Peace Appointments Advisory Committee in English and Comité consultatif sur la nomination des juges de paix in French is established.

Function

(2) The function of the Advisory Committee is to classify candidates for appointment as justices of the peace and to report on the classifications to the Attorney General.

Composition

(3) The Advisory Committee is composed of seven core members as follows:

1. A judge of the Ontario Court of Justice appointed by the Chief Justice of the Ontario Court of Justice.

2. A justice of the peace appointed by the Chief Justice of the Ontario Court of Justice.

3. A justice of the peace appointed by the Chief Justice of the Ontario Court of Justice who is either the Senior Justice of the Peace Responsible for the Ontario Native Justice of the Peace Program or another justice of the peace familiar with aboriginal issues or, when the justice of the peace so appointed is not available to act as a member of the Advisory Committee, another justice of the peace familiar with aboriginal issues who is designated by the Chief Justice of the Ontario Court of Justice.

4. Four persons appointed by the Attorney General.

Regional members

(4) In addition to the core members appointed under subsection (3), the Advisory Committee shall include the following regional members in respect of its functions in a particular region:

1. The regional senior judge of the Ontario Court of Justice for the region or another judge of the Ontario Court of Justice from the same region [illegible]ed by the regional senior judge.

Fr

2. The regional senior justice of the peace for the region or, when he or she is not available to act as a member of the Advisory Committee, another justice of the peace from the same region who is designated by the regional senior judge.

3. Not more than five other persons appointed by the Attorney General.

4. A member of the bar in the region appointed by the Attorney General from a list of three names submitted to the Attorney General by the Law Society of Upper Canada.

Criteria

(5) In the appointment of members under paragraph 4 of subsection (3) and paragraph 3 of subsection (4), the importance of reflecting, in the composition of the Advisory Committee as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized.

Term of office

(6) The members appointed under paragraph 4 of subsection (3) and under paragraphs 3 and 4 of subsection (4) hold office for three-year terms and may be reappointed.

Staggered terms

(7) Despite subsection (6), the following applies to the first appointments to the Advisory Committee:

1. Two of the members appointed under paragraph 4 of subsection (3) hold office for a two-year term.

2. Two of the regional members for each region appointed under paragraph 3 of subsection (4) hold office for a one-year term.

Remuneration

(8) The members appointed under paragraph 4 of subsection (3) and under paragraphs 3 and 4 of subsection (4) are entitled to receive the daily remuneration that is fixed by the Lieutenant Governor in Council.

Chair

(9) The Attorney General shall designate one of the core members to chair the Advisory Committee for a term of up to three years.

Term of office

(10) The same person may serve as chair for two or more terms.

Fr

Chair votes

(11) The chair is entitled to vote and may cast a second deciding vote if there is a tie.

Manner of operating

(12) The Advisory Committee shall perform its function in the following manner:

1. It shall develop a candidate application form that specifies what supporting material is required, and it shall make the form available to the public.

2. It shall develop the application procedure and the general selection criteria and make information about them available to the public.

3. It shall advertise annually for applications for justice of the peace positions in each region.

4. It shall accept applications for justice of the peace positions on an ongoing basis.

5. It shall review all applications and evaluate them at least once each year or on the request of the Attorney General and may interview any of the candidates.

6. It shall conduct the advertising and review process in accordance with general selection criteria, including the assessment of skills and abilities, community awareness, personal characteristics of candidates and the recognition of the desirability of reflecting the diversity of Ontario's population in appointments of justices of the peace.

7. It shall determine the skills, abilities and personal characteristics that are desired in a justice of the peace and make information about them available to the public.

8. It shall classify candidates as "Not Qualified", "Qualified" or "Highly Qualified" and report the classifications to the Attorney General.

Quorum

(13) The quorum for decisions under paragraph 8 of subsection (12) is two core members and seven regional members from the region for which an appointment is considered.

Vacancies

(14) If a vacancy occurs among the members appointed under paragraph 4 of subsection (3) or under paragraph 3 or 4 of subsection (4), a new member may be appointed under the applicable provision for the remainder of the term.

Qualification

(15) A candidate shall not be considered by the Advisory Committee unless he or she has performed paid or volunteer work equivalent to at least 10 years of full-time experience and,

(a) has a university degree;

(b) has a diploma or advanced diploma granted by a c applied arts and technology or a community college following completion of a program that is the equivalent in class hours of a full-time program of at least four academic semesters;

Fr

(c) has a degree from an institution, other than a university, that is authorized to grant the degree,

(i) under the *Post-secondary Education Choice and Excellence Act, 2000*,

(ii) under a special Act of the Assembly that establishes or governs the institution, or

(iii) under legislation of another province or territory of Canada;

(d) has successfully completed a program designated as an equivalency under subsection (16); or

(e) meets the equivalency requirement set out in subsection (17).

Equivalency programs

(16) For the purposes of clause (15) (d), the Attorney General may designate programs that involve training in the justice system, including programs designed to enhance diversity in the justice system, as programs that meet the educational equivalency, and shall make the list of programs so designated public.

Exceptional qualifications

(17) For the purposes of clause (15) (e), a candidate may be considered to have met the equivalency requirement if he or she clearly demonstrates exceptional qualifications, including life experience, but does not have the educational requirements set out in clauses (15) (a) to (d).

Recommendation by Attorney General

(18) The Attorney General shall recommend to the Lieutenant Governor in Council for appointment as a justice of the peace only a candidate whom the Advisory Committee has classified as “Qualified” or “Highly Qualified”.

Annual report

(19) The Advisory Committee shall submit to the Attorney General an annual report in English and in French of its activities.

Tabling

(20) The Attorney General shall submit the annual report to the Lieutenant Governor in Council and shall then table it in the Assembly.

Staff

(21) Such officers and employees of the Advisory Committee a sidered necessary may be appointed under the *Public Service Act*.

Fr

Meetings

(22) The Advisory Committee may hold its meetings in person or through electronic means, including telephone conferencing and video conferencing.

Use of forms, etc.

(23) After the materials referred to in paragraphs 1 and 2 of subsection (12) are made publicly available, candidates submitting applications shall do so using the application form developed by the Advisory Committee and shall follow its procedures.

Transitional

(24) Any applications received by the Ministry of the Attorney General before the coming into force of this section for appointment as a justice of the peace shall be provided to the Advisory Committee and the applications may be considered by the Advisory Committee even though they are not in the form required by subsection (23).

Same

(25) Applications received by the Advisory Committee before the application form referred to in paragraph 1 of subsection (12) is made publicly available may be considered by the Advisory Committee even though they are not in the form required by subsection (23).

4. Section 4 of the Act is repealed and the following substituted:

Presiding justices

4. (1) Every justice of the peace is a presiding justice of the peace.

Exception

(2) Despite subsection (1), a person appointed as a non-presiding justice of the peace before that subsection came into force continues in office as a non-presiding justice of the peace.

Change to presiding

(3) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may change a person's appointment as a non-presiding justice of the peace to an appointment as a presiding justice of the peace.

Consultation

(4) Before making a recommendation under subsection (3), the Attorney General must obtain the recommendation of the Chief Justice of the Ontario Court of Justice on the matter.

Undesignated justices

(5) A person appointed as a justice of the peace before August [redacted] who has not been designated as a presiding or non-presiding justice of the peace shall not exercise any authority or receive any remuneration as a justice of the peace.

Fr

5. The Act is amended by adding the following section:

Per diem justices

5.1 (1) The Attorney General, on the request of a justice of the peace, may change his or her designation from that of a full-time or part-time justice of the peace to that of a per diem justice of the peace if the following conditions are met:

1. The Chief Justice of the Ontario Court of Justice recommends that the justice of the peace be designated as a per diem justice of the peace.

2. The justice of the peace provided services on or after April 1, 2000 as a full-time or part-time justice of the peace.

3. The justice of the peace has retired or will retire as a full or part-time justice of the peace before reaching the age of 70 years.

Previously retired justices of the peace

(2) A justice of the peace who retired before the day this section comes into force may be designated as a per diem justice of the peace if he or she has not attained the age of 70 years.

Term of appointment

(3) A per diem justice of the peace may serve until he or she attains the age of 70 years.

6. The Act is amended by adding the following section:

Accommodation of needs

5.2 (1) A justice of the peace who believes that he or she is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated may apply to the Review Council for an order under subsection (2).

Duty of Review Council

(2) If the Review Council finds that the justice of the peace is unable, because of a disability, to perform the essential duties of the office unless his or her needs are accommodated, it shall order that the needs of the justice of the peace be accommodated to the extent necessary to enable him or her to perform those duties.

Undue hardship

(3) Subsection (2) does not apply if the Review Council is satisfied that making an order would impose undue hardship on the person responsible for accommodating the needs of the justice of the peace, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Fr

Opportunity to participate

(4) The Review Council shall not make an order under subsection (2) against a person without ensuring that the person has had an opportunity to participate and make submissions.

Crown bound

(5) The order binds the Crown.

7. Sections 8 and 9 of the Act are repealed and the following substituted:

Review Council

8. (1) The council known in English as the Justices of the Peace Review Council and in French as Conseil d'évaluation des juges de paix is continued.

Functions

(2) The functions of the Review Council are,

(a) to consider applications under section 5.2 for the accommodation of needs;

(b) to establish complaints committees from among its members to review and investigate complaints under section 11;

(c) to review and approve standards of conduct under section 13;

(d) to deal with continuing education plans under section 14; and

(e) to decide whether a justice of the peace may engage in other remunerative work.

Composition

(3) The Review Council is composed of,

(a) the Chief Justice of the Ontario Court of Justice, or another judge of the Ontario Court of Justice designated by the Chief Justice;

(b) the Associate Chief Justice Co-ordinator of Justices of the Peace;

(c) three justices of the peace appointed by the Chief Justice of the Ontario Court of Justice;

(d) two judges of the Ontario Court of Justice appointed by the Chief Justice of the Ontario Court of Justice;

(e) one regional senior justice of the peace appointed by the Chief Justice of the Ontario Court of Justice;

(f) a lawyer appointed by the Attorney General from a list of three names submitted to the Attorney General by the Law Society of Upper Canada;

Fr

(g) four persons appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General.

Criteria

(4) In the appointment of members under clause (3) (g), the importance of reflecting, in the composition of the Review Council as a whole, Ontario's linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized.

Term of office

(5) The members who are appointed under clauses (3) (f) and (g) hold office for four-year terms and are eligible for reappointment.

Staggered terms

(6) Despite subsection (5), the following applies to the first appointments to the Review Council:

1. The lawyer appointed under clause (3) (f) holds office for a six-year term.

2. One of the persons appointed under clause (3) (g) holds office for a six-year term and one holds office for a two-year term.

Chair

(7) The Chief Justice of the Ontario Court of Justice or, in his or her absence, the Associate Chief Justice Co-ordinator of Justices of the Peace, shall chair all meetings of the Review Council.

Same

(8) The chair is entitled to vote and may cast a second deciding vote if there is a tie.

Vacancies

(9) If a vacancy occurs among the members appointed under clause (3) (f) or (g), a new member may be appointed under the applicable provision for the remainder of the term.

Temporary members

(10) The Chief Justice of the Ontario Court of Justice may appoint a judge or a justice of the peace who is not a member of the Review Council to be a temporary member of a complaints committee or hearing panel in order to deal fully with the matter.

Quorum

(11) The following quorum rules apply:

1. Six members, including the chair, constitute a quorum.

Fr

2. At least half the members present must be judges or justices of the peace.

Voting by chair

(12) The chair of a complaints committee established under subsection 11 (1) or a hearing panel established under subsection 11.1 (1) is entitled to vote.

Disqualification

(13) The members of the Review Council who were members of a complaints committee dealing with a complaint shall not participate in a hearing of the complaint under section 11.1.

Staff

(14) Such officers and employees of the Review Council as are considered necessary may be appointed under the *Public Service Act*.

Expert assistance

(15) The Review Council may engage persons, including counsel, to assist it and its complaints committees and hearing panels.

Support services

(16) The Review Council shall provide support services, including initial orientation and continuing education, to enable its members to participate effectively, devoting particular attention to the needs of the members who are neither judges nor lawyers and administering a part of its budget for support services separately for that purpose.

Same

(17) The Review Council shall administer a part of its budget for support services separately for the purpose of accommodating the needs of any members who have disabilities.

Confidential records

(18) The Review Council, a complaints committee or a hearing panel may order that any information or documents relating to a meeting, investigation or hearing that was not held in public are confidential and shall not be disclosed or made public.

Same

(19) Subsection (18) applies whether the information or documents are in the possession of the Review Council, a complaints committee, a hearing panel, the Attorney General or any other person.

Fr

Exceptions

(20) Subsection (18) does not apply to information and documents,

(a) that this Act requires the Review Council to disclose; or

(b) that have not been treated as confidential and were not prepared exclusively for the purposes of a Review Council meeting or for an investigation of a complaint or for a hearing.

Personal liability

(21) No action or other proceeding for damages shall be instituted against the Review Council or any of its members or employees or any person acting under the authority of the Review Council, a complaints committee or hearing panel for any act done in good faith in the execution or intended execution of any power or duty of the Review Council, a complaints committee or a hearing panel or for any neglect or default in the exercise or performance in good faith of such power or duty.

Testimonial immunity

(22) No member or employee of the Review Council and no person acting under its authority may be compelled to give evidence in any administrative or civil proceeding in relation to anything done or omitted to be done in carrying out the purposes of this Act.

Remuneration

(23) The members who are appointed under clauses (3) (f) and (g) are entitled to receive the daily remuneration that is fixed by the Lieutenant Governor in Council.

Meetings

(24) The Review Council may hold its meetings in person or through electronic means, including telephone conferencing and video conferencing.

Other duties of Review Council

Provision of information to public

9. (1) The Review Council shall provide, in courthouses and elsewhere, information about itself and about its role in the justice system, including information about how members of the public may obtain assistance in making complaints.

Same

(2) In providing information, the Review Council shall emphasize the elimination of cultural and linguistic barriers and the accommodation of the needs of pe h disabilities.

Fr

Assistance to public

(3) Where necessary, the Review Council shall arrange for the provision of assistance to members of the public in the preparation of documents for making complaints.

Telephone access

(4) The Review Council shall provide province-wide free telephone access, including telephone access for the deaf, to information about itself and its role in the justice system.

Persons with disabilities

(5) To enable persons with disabilities to participate effectively in the complaints process, the Review Council shall ensure that their needs are accommodated, at the Council's expense, unless it would impose undue hardship on the Council to do so, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Open and closed hearings and meetings

(6) Meetings of the Review Council and of its complaints committees shall be held in private but, subject to subsection 11.1 (4), hearings under section 11.1 shall be open to the public.

Annual report

(7) After the end of each year, the Review Council shall make an annual report to the Attorney General on its affairs, in English and French, including, with respect to all complaints received or dealt with during the year, a summary of the complaint, the findings and a statement of the disposition, but the report shall not include information that might identify the justice of the peace, the complainant or a witness.

Tabling

(8) The Attorney General shall submit the annual report to the Lieutenant Governor in Council and shall then table the report in the Assembly.

8. Section 10 of the Act is repealed and the following substituted:

Rules

10. (1) The Review Council may establish rules of procedure for complaints committees and for hearing panels and the Review Council shall make the rules available to the public.

Regulations Act

(2) The *Regulations Act* does not apply to rules established by the Review Council.

SPPA, s. 28

(3) Section 28 of the *Statutory Powers Procedure Act* does not apply to the Review Council.

Fr

Use of official languages of courts

10.1 (1) The information provided under subsections 9 (1), (3) and (4) and any rules established under subsection 10 (1) shall be made available in English and French.

Same

(2) Complaints against justices of the peace may be made in English or French.

Same

(3) A hearing under section 11.1 shall be conducted in English, but a complainant or witness who speaks French or a justice of the peace who is the subject of a complaint and who speaks French is entitled, on request,

(a) to be given, before the hearing, French translations of documents that are written in English and are to be considered at the hearing;

(b) to be provided with the assistance of an interpreter at the hearing; and

(c) to be provided with simultaneous interpretation into French of the English portions of the hearing.

Bilingual hearing

(4) The Review Council may direct that a hearing to which subsection (3) applies be conducted bilingually, if it is of the opinion that it can be properly conducted in that manner.

Part of hearing

(5) A direction under subsection (4) may apply to a part of the hearing and, in that case, subsections (6) and (7) apply with necessary modifications.

Same

(6) In a bilingual hearing,

(a) oral evidence and submissions may be given or made in English or French, and shall be recorded in the language in which they are given or made;

(b) documents may be filed in either language; and

(c) the reasons for a decision may be written in either language.

Same

(7) In a bilingual hearing, if the complainant or the justice of the peace who is the subject of the complaint does not speak both languages, he or she is entitled, on request, to have simultaneous interpretation of any evidence, submissions or discussions spoken in the other language and translation of any document filed or reasons written in the other language.

Fr

Complaint re justice of the peace

10.2 (1) Any person may make a complaint to the Review Council about the conduct of a justice of the peace.

Same

(2) A complaint to the Review Council must be made in writing.

Same

(3) If a complaint about the conduct of a justice of the peace is made to any other justice of the peace or to a judge or the Attorney General, the other justice of the peace or the judge or the Attorney General, as the case may be, shall provide the person making the complaint with information about the Review Council's role in the justice system and about how a complaint may be made, and shall refer the person to the Review Council.

Information re complaint

(4) At any person's request, the Review Council may confirm or deny that a particular complaint has been made to it.

9. On the later of the day section 8 of Schedule B to the *Access to Justice Act, 2006* comes into force and section 134 of Schedule F to that Act comes into force, subsection 10 (2) of the *Justices of the Peace Act* is repealed and the following substituted:

Legislation Act, 2006

(2) Part III (Regulations) of the *Legislation Act, 2006* does not apply to rules established by the Review Council.

10. Section 11 of the Act is repealed and the following substituted:

Investigations

Complaints committees

11. (1) As soon as possible after receiving a complaint about the conduct of a justice of the peace, the Review Council shall establish a complaints committee and the complaints committee shall investigate the complaint and dispose of the matter as provided in subsection (15).

Composition

(2) A complaints committee shall be composed of,

(a) a judge who shall chair the complaints committee;

(b) a justice of the peace; and

Fr

(c) a member who is neither a judge nor a justice of the peace.

Timely reporting to complainant

(3) The complaints committee shall report in a timely manner to the complainant that it has received the complaint and it shall report in a timely manner to the complainant on its disposition of the matter.

Disqualification

(4) The members of a complaints committee who investigate a complaint shall not participate in a hearing in respect of the complaint.

Rotation of members

(5) The eligible members of the Review Council shall all serve on complaints committees on a rotating basis.

Quorum

(6) All the members of a complaints committee constitute a quorum.

Investigation

(7) The complaints committee shall conduct such investigation as it considers appropriate.

Investigation private

(8) The investigation shall be conducted in private.

Powers of complaints committee

(9) Section 4.2, subsections 12 (1) to (3.1) and sections 13, 14, 15 and 22 of the *Statutory Powers Procedure Act* apply to the activities of a complaints committee.

Rules of procedure

(10) The rules of procedure established under subsection 10 (1) apply to the activities of a complaints committee.

Interim recommendations

(11) The complaints committee may recommend to a regional senior judge that, until the final disposition of a complaint,

(a) the justice of the peace who is the subject of a complaint not be assigned work; or

(b) the justice of the peace who is the subject of a complaint be reassigned to another location.

Fr

Same

(12) The recommendation shall be made to the regional senior judge appointed for the region to which the justice of the peace is assigned and the regional senior judge may,

(a) decide to not assign work to the justice of the peace until the final disposition of the complaint but he or she shall continue to be paid; or

(b) with the consent of the justice of the peace, reassign him or her to another location until the final disposition of the complaint.

Exception: certain complaints

(13) If the complaint is against a justice of the peace or regional senior justice of the peace who is a member of the Review Council, any recommendation under subsection (11) in connection with the complaint shall be made to the Chief Justice of the Ontario Court of Justice, who may,

(a) decide to not assign work to the justice of the peace or regional senior justice of the peace until the final disposition of the complaint but he or she shall continue to be paid; or

(b) with the consent of the justice of the peace or regional senior justice of the peace, reassign him or her to another location until the final disposition of the complaint.

Same

(14) A justice of the peace or regional senior justice of the peace who is a member of the Review Council and who is the subject of a complaint shall not be a member of any complaints committee or hearing panel until the final disposition of the complaint.

Complaints committee's decision

(15) When its investigation is complete, the complaints committee shall,

(a) dismiss the complaint if it is frivolous, an abuse of process or outside the jurisdiction of the complaints committee;

(b) invite the justice of the peace to attend before the complaints committee to receive advice concerning the issues raised in the complaint or send the justice of the peace a letter of advice concerning the issues raised in the complaint, or both;

(c) order that a formal hearing into the complaint be held by a hearing panel; or

(d) refer the complaint to the Chief Justice of the Ontario Court of Justice.

Compensation

(16) The complaints committee may recommend that the justice of the peace be compensated for all or part of the cost of legal services incurred in connection with the investigation.

Fr

Maximum

(17) The amount of compensation recommended under subsection (16) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.

Report

(18) The complaints committee shall report to the Review Council on its decision and, except where it orders a formal hearing, it shall not identify the complainant or the justice of the peace who is the subject of the complaint in the report.

Frivolous complaints, etc.

(19) Without restricting the powers of a complaints committee under clause (15) (a), a complaints committee may dismiss a complaint at any time if it is of the opinion that the complaint is frivolous, an abuse of process or outside the jurisdiction of the complaints committee.

Hearings

Hearing panels

11.1 (1) When a hearing is ordered under subsection 11 (15), the chair of the Review Council shall establish a hearing panel from among the members of the Review Council to hold a hearing in accordance with this section.

Composition

(2) A hearing panel shall be composed of,

(a) a judge who shall chair the panel;

(b) a justice of the peace; and

(c) a member who is a judge, a lawyer or a member of the public.

Quorum

(3) All the members of the panel constitute a quorum.

Application of *SPPA*

(4) The *Statutory Powers Procedure Act*, except sections 4 and 28, applies to the hearing.

Rules of procedure

(5) The rules of procedure established under subsection 10 (1) ap hearing.

Fr

Communication re subject-matter of hearing

(6) The members of the panel participating in the hearing shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any party, counsel, agent or other person, unless all the parties and their counsel or agents receive notice and have an opportunity to participate.

Exception

(7) Subsection (6) does not preclude the Review Council from engaging counsel to assist the panel in accordance with subsection 8 (15).

Parties

(8) The panel shall determine who are the parties to the hearing.

Orders prohibiting publication

(9) If the complaint involves allegations of sexual misconduct or sexual harassment, the panel shall, at the request of a complainant or of a witness who testifies to having been the victim of such conduct by the justice of the peace, prohibit the publication of information that might identify the complainant or witness, as the case may be.

Dispositions

(10) After completing the hearing, the panel may dismiss the complaint, with or without a finding that it is unfounded or, if it upholds the complaint, it may,

(a) warn the justice of the peace;

(b) reprimand the justice of the peace;

(c) order the justice of the peace to apologize to the complainant or to any other person;

(d) order that the justice of the peace take specified measures, such as receiving education or treatment, as a condition of continuing to sit as a justice of the peace;

(e) suspend the justice of the peace with pay, for any period;

(f) suspend the justice of the peace without pay, but with benefits, for a period up to 30 days; or

(g) recommend to the Attorney General that the justice of the peace be removed from office in accordance with section 11.2.

Same

(11) The panel may adopt any combination of the dispositions set out in clauses (10) (a) to (f).

Disability

Fr

(12) If the panel finds that the justice of the peace is unable, because of a disability, to perform the essential duties of the office, but would be able to perform them if his or her

needs were accommodated, it shall order that the justice of the peace's needs be accommodated to the extent necessary to enable him or her to perform those duties.

Application of subs. (12)

(13) Subsection (12) applies if,

(a) the effect of the disability on the justice of the peace's performance of the essential duties of the office was a factor in the complaint; and

(b) the panel dismisses the complaint or makes a disposition under clauses (10) (a) to (f).

Undue hardship

(14) Subsection (12) does not apply if the panel is satisfied that making an order would impose undue hardship on the person responsible for accommodating the justice of the peace's needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Opportunity to participate

(15) The panel shall not make an order under subsection (12) against a person without ensuring that the person has had an opportunity to participate and make submissions.

Crown bound

(16) An order made under subsection (12) binds the Crown.

Compensation

(17) The panel may recommend that the justice of the peace be compensated for all or part of the cost of legal services incurred in connection with the hearing.

Maximum

(18) The amount of compensation recommended under subsection (17) shall be based on a rate for legal services that does not exceed the maximum rate normally paid by the Government of Ontario for similar services.

Report to Attorney General

(19) The panel may make a report to the Attorney General about the complaint, investigation, hearing and disposition, subject to any order made under subsection 8 (18), and the Attorney General may make the report public if of the opinion that this would be in the public interest.

Non-identification of persons

Fr

(20) A complainant or witness at whose request an order was made under subsection (9) shall not be identified in the report.

Continuing publication ban

(21) If an order was made under subsection (9) and the panel dismisses the complaint with a finding that it was unfounded, the justice of the peace shall not be identified in the report without his or her consent and the panel shall order that information that relates to the complaint and might identify the justice of the peace shall never be made public without his or her consent.

Transitional

(22) A complaint against a justice of the peace that is made to the Review Council before the day this section comes into force, and considered at a meeting of the Review Council before that day, shall be dealt with in accordance with sections 11 and 12 of this Act, as they read immediately before that day.

Removal from office

11.2 (1) A justice of the peace may be removed from office only by order of the Lieutenant Governor in Council.

Removal for cause

(2) The order may be made only if,

(a) a complaint about the justice of the peace has been made to the Review Council; and

(b) a hearing panel, after a hearing under section 11.1, recommends to the Attorney General that the justice of the peace be removed on the ground that he or she has become incapacitated or disabled from the due execution of his or her office by reason of,

(i) inability, because of a disability, to perform the essential duties of his or her office, if an order to accommodate the justice of the peace's needs would not remedy the inability, or could not be made because it would impose undue hardship on the person responsible for meeting those needs, or was made but did not remedy the inability,

(ii) conduct that is incompatible with the due execution of his or her office, or

(iii) failure to perform the duties of his or her office.

Order to be tabled

Fr

(3) The order shall be laid before the Legislative Assembly if it is in session or, if not, within 15 days after the commencement of the next session.

11. Section 12 of the Act is repealed and the following substituted:

Associate Chief Justice Co-ordinator of Justices of the Peace

12. The Associate Chief Justice Co-ordinator of Justices of the Peace, under the direction of the Chief Justice of the Ontario Court of Justice shall advise and assist the Chief Justice on all matters related to justices of the peace.

12. Section 13 of the Act is repealed and the following substituted:

Standards of conduct

13. (1) The Associate Chief Justice Co-ordinator of Justices of the Peace may establish standards of conduct for justices of the peace, including a plan for bringing the standards into effect, and shall implement the standards and plan when they have been reviewed and approved by the Review Council.

Duty of Associate Chief Justice Co-ordinator of Justices of the Peace

(2) The Associate Chief Justice Co-ordinator of Justices of the Peace shall ensure that any standards of conduct are made available to the public, in English and French, when they have been approved by the Review Council.

Goals

(3) The following are among the goals that the Associate Chief Justice Co-ordinator of Justices of the Peace may seek to achieve by establishing standards of conduct for justices of the peace:

1. Recognizing the independence of justices of the peace.

2. Maintaining the high quality of the justice system and ensuring the efficient administration of justice.

3. Enhancing equality and a sense of inclusiveness in the justice system.

4. Ensuring that conduct of justices of the peace is consistent with the respect accorded to them.

5. Emphasizing the need to ensure the on-going development of justices of the peace and the growth of their social awareness through continuing education.

Justice's retirement, etc., inability or failure to give decision

Decision after retirement, etc.

13.1 (1) A justice of the peace may, within 90 days after reaching [Fr] t age, resigning or being appointed to a court, give a decision, or participate in the giving of a decision, in any matter previously tried or heard before the justice of the peace.

Inability to give decision

(2) If a justice of the peace has commenced hearing a matter and,

(a) dies without giving a decision;

(b) is for any reason unable to make a decision; or

(c) does not give a decision under subsection (1),

a party may make a motion to the Chief Justice of the Ontario Court of Justice for an order that the matter be reheard, and the Chief Justice may order that the matter be reheard by another justice of the peace or by a judge.

Failure to give decision

(3) If a justice of the peace has heard a matter and fails to give a decision,

(a) in the case of a judgment, within six months; or

(b) in any other case, within three months,

the Chief Justice of the Ontario Court of Justice may extend the time in which the decision may be given and, if necessary, relieve the justice of the peace of his or her other duties until the decision is given.

Continued failure

(4) If time has been extended under subsection (3) but the justice of the peace fails to give the decision within that time, unless the Chief Justice of the Ontario Court of Justice grants a further extension,

(a) the Chief Justice shall report the failure and the surrounding circumstances to the Review Council as a complaint in accordance with section 10.2; and

(b) a party may make a motion to the Chief Justice for an order that the matter be reheard, and the Chief Justice may order that the matter be reheard by another justice of the peace or by a judge.

Rehearing

(5) If the Chief Justice of the Ontario Court of Justice makes an order under subsection (2) or clause (4) (b) for the rehearing of a matter, he or she,

(a) may direct that the rehearing be conducted on the transcript of evidence taken at the original hearing, subject to the discretion of the justice of the peace or judge presiding at the rehearing to recall a witness or require further eviden

(b) may give such other directions as are considered just.

Fr

13. The Act is amended by adding the following section:

Role of regional senior judges

15. (1) The regional senior judge, under the direction of the Chief Justice of the Ontario Court of Justice, shall direct and supervise the sittings of the justices of the peace in his or her region and the assignment of their judicial duties, and the authority of the regional senior judge shall include,

(a) the approval of duty rosters;

(b) the determination of the sittings for justices of the peace and the assignment of justices of the peace to those sittings;

(c) the assignment of cases and other judicial duties to individual justices of the peace;

(d) the determination of sitting schedules and places of sittings for individual justices of the peace; and

(e) the preparation of trial lists and the assignment of court rooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

Dedicated justices

(2) In exercising his or her functions under subsection (1), the regional senior judge may temporarily assign a per diem justice of the peace to do exclusively one of the following:

1. Hear matters under the *Provincial Offences Act*.

2. Hear matters under one or more other Ontario Acts specified by the regional senior judge.

3. Hear matters under an Act of the Parliament of Canada.

4. Carry out other judicial duties specified by the regional senior judge.

Delegation

(3) A regional senior judge of the Ontario Court of Justice may delegate the authority to exercise specified functions under subsections (1) and (2) to the regional senior justice of the peace and to one or more other justices of the peace from the same region.

Transfer to a judge

(4) In the case of a trial that would otherwise be held before a justice of the peace, any party may submit a request to the regional senior judge of the Ontario Court of Justice for the region to have the trial held before a judge, and the regional senior judge shall determine whether the matter shall be heard by a judge.

Delegation

Fr

(5) A regional senior judge of the Ontario Court of Justice may delegate the authority to exercise his or her functions under subsection (4) to a judge of the Ontario Court of Justice.

Final decision

(6) A decision made by a regional senior judge or his or her delegate under subsection (4) is final.

Crown rights under other Acts

(7) Nothing in this section affects the rights of the Crown, the Attorney General or a counsel or agent of either of them, under any other Act, to require that a provincial judge preside over a proceeding in respect of an offence under that Act.

Duties outside court house

(8) A justice of the peace shall not act as a justice of the peace outside a courthouse except under the direction of the regional senior judge.

Duty rosters public

(9) The duty rosters shall be made available to the public.

14. The Act is amended by adding the following section:

Regional senior justices of the peace

16. (1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint a regional senior justice of the peace for each region.

Consultation

(2) Before recommending an appointment under subsection (1), the Attorney General shall consult with the Chief Justice of the Ontario Court of Justice.

Functions

(3) A regional senior justice of the peace shall advise and assist the Associate Chief Justice Co-ordinator of Justices of the Peace and the regional senior judge in all matters pertaining to justices of the peace.

Terms of office

(4) Regional senior justices of the peace each hold office for three years.

Further appointment

(5) A regional senior justice of the peace may be reappointed a further term of three years, on the recommendation of the Chief Justice of the Ontario Court of Justice and,

Fr

if the Chief Justice so recommends, the Lieutenant Governor in Council shall reappoint the regional senior justice of the peace.

Salary at end of term

(6) A regional senior justice of the peace whose term expires continues to be a justice of the peace and is entitled to receive the greater of the current annual salary of a justice of the peace and the annual salary he or she received immediately before the expiry.

Transition

(7) Regional senior justices of the peace in office immediately before the coming into force of this section are continued in office and,

(a) if a regional senior justice of the peace is serving a first three-year term, he or she may be appointed to a second three-year term; and

(b) if a regional senior justice of the peace is serving a second three-year term, is ineligible for reappointment.

15. Subsection 17 (2) of the Act is repealed.

16. Section 18 of the Act is amended by striking out "if any".

17. Section 19 of the Act is repealed and the following substituted:

Other work

19. A justice of the peace shall not engage in any other remunerative work without the approval of the Review Council.

18. (1) Clauses 21 (1) (a), (b) and (f) of the Act are repealed and the following substituted:

(a) providing for the remuneration of per diem justices of the peace;

(2) Subsection 21 (3) of the Act is repealed.

19. Section 22 of the Act is repealed.

Public Authorities Protection Act

20. Subsections 6 (2), (3) and (4) of the *Public Authorities Protection Act* are repealed and the following substituted:

Dismissal of action

(2) In the case of a warrant issued by a justice, if, after such demand and compliance therewith by showing the warrant to and permitting a copy thereof to be taken by the person

Fr

demanding the same, an action is brought against such constable, police officer, bailiff or officer, or such person so acting, for any cause, on the production and proof of the warrant at the trial of the action, judgment shall be given for the defendant despite any defect of jurisdiction in the justice.

Same

(3) In the case of a warrant issued by a clerk, if, after such demand and compliance therewith by showing the warrant to and permitting a copy thereof to be taken by the person demanding the same, an action is brought against such constable, police officer, bailiff or officer, or such person so acting, for any cause without making the clerk who issued the warrant a defendant, on the production and proof of the warrant at the trial of the action, judgment shall be given for the defendant despite any defect of jurisdiction in the clerk.

Action brought jointly against clerk and constable or bailiff

(4) In the case of a warrant issued by a clerk, if the action is brought jointly against such clerk and such constable, police officer, bailiff or other officer or person so acting, on proof of such warrant, judgment shall be given for the constable, police officer, bailiff or other officer and for the person so acting despite the defect in jurisdiction.

Costs

(5) In the case of a warrant issued by a clerk, if the judgment is given against the clerk, the plaintiff, in addition to any costs awarded to him or her, is entitled to recover such costs as he or she is liable to pay to the defendant for whom judgment is given.

Transition

(6) Subsections (2), (3) and (4), as they read on the day before the coming into force of section 20 of Schedule B to the *Access to Justice Act, 2006*, continue to apply with respect to actions commenced on or before that day.

COMMENCEMENT

Commencement

21. (1) Subject to subsection (2), this Schedule comes into force on the day the *Access to Justice Act, 2006* receives Royal Assent.

Same

(2) Sections 1 to 19 come into force on a da be named by proclamation of the Lieutenant Governor.

Fr

SCHEDULE C
AMENDMENTS TO THE LAW SOCIETY ACT AND RELATED AMENDMENTS TO OTHER ACTS

Amendments to the Law Society Act

1. The *Law Society Act* is amended by striking out the heading immediately before section 1 and substituting the following:

PART 0.I

2. (1) Subsection 1 (1) of the Act is amended by adding the following definition:

"adjudicative body" means any body that, after the presentation of evidence or legal argument by one or more persons, makes a decision that affects a person's legal interests, rights or responsibilities and, without limiting the generality of the foregoing, includes,

(a) a federal or provincial court,

(b) a tribunal established under an Act of Parliament or under an Act of the Legislature of Ontario,

(c) a commission or board appointed under an Act of Parliament or under an Act of the Legislature of Ontario to conduct an inquiry or inquest, and

(d) an arbitrator; ("organisme juridictionnel")

(2) The definition of "Appeal Panel" in subsection 1 (1) of the Act is amended by striking out "established" and substituting "continued".

(3) The definitions of "certificate of authorization" and "elected bencher" in subsection 1 (1) of the Act are repealed and the following substituted:

"certificate of authorization" means a certificate of authorization issued under this Act authorizing the corporation named in it to practise law in Ontario, to provide legal services in Ontario or to do both; ("certificat d'autorisation")

"elected bencher" means a person who is elected as a bencher under subsection 15 (1) or 16 (1) or becomes a bencher under subsection 15 (3) or 16 (3) or (6); ("conseiller élu")

(4) The definition of "Hearing Panel" in subsecti of the Act is amended by striking out "established" and substitu ontinued".

Fr

(5) Subsection 1 (1) of the Act is amended by adding the following definitions:

"licence" means a licence issued under this Act; ("permis")

"licensed" means licensed under this Act; ("pourvu d'un permis")

"licensee" means,

(a) a person licensed to practise law in Ontario as a barrister and solicitor, or

(b) a person licensed to provide legal services in Ontario; ("titulaire de permis")

(6) The definition of "member" in subsection 1 (1) of the Act is repealed.

(7) Subsection 1 (1) of the Act is amended by adding the following definitions:

"person who is authorized to practise law in Ontario" means,

(a) a person who is licensed to practise law in Ontario as a barrister and solicitor and whose licence is not suspended, or

(b) a person who is not a licensee but is permitted by the by-laws to practise law as a barrister and solicitor in Ontario; ("personne autorisée à pratiquer le droit en Ontario")

"person who is authorized to provide legal services in Ontario" means,

(a) a person who is licensed to provide legal services in Ontario and whose licence is not suspended, or

(b) a person who is not a licensee but is permitted by the by-laws to provide legal services in Ontario; ("personne autorisée à fournir des services juridiques en Ontario")

"professional business" means,

(a) in the case of a person licensed to practise law in Ontario as a barrister and solicitor, the practice of law and the business operations relating to it,

(b) in the case of a person licensed to provide legal services in Ontario, the provision of legal services and the business operations relating to it; ("activités professionnelles")

(8) The definition of "professional corporation" in subsection 1 (1) of the Act is repealed and the following substituted:

"professional corporation" means a corporation incorporated or continued under the *Business Corporations Act* that holds a valid certificate of authorization; ("société professionnelle")

(9) The definition of "Secretary" in subsection 1 (1) of the Act is repealed.

Fr

(10) Section 1 of the Act is amended by adding the following subsections:

Licensee

(4) For greater certainty, a person whose licence is suspended or is in abeyance is a licensee, but a person whose licence has been revoked, whose application to surrender his or her licence has been accepted under section 30 or whose licence is deemed to have been surrendered under section 31 is not a licensee.

Provision of legal services

(5) For the purposes of this Act, a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person.

Same

(6) Without limiting the generality of subsection (5), a person provides legal services if the person does any of the following:

1. Gives a person advice with respect to the legal interests, rights or responsibilities of the person or of another person.

2. Selects, drafts, completes or revises, on behalf of a person,

   i. a document that affects a person's interests in or rights to or in real or personal property,

   ii. a testamentary document, trust document, power of attorney or other document that relates to the estate of a person or the guardianship of a person,

   iii. a document that relates to the structure of a sole proprietorship, corporation, partnership or other entity, such as a document that relates to the formation, organization, reorganization, registration, dissolution or winding-up of the entity,

   iv. a document that relates to a matter under the *Bankruptcy and Insolvency Act* (Canada),

   v. a document that relates to the custody of or access to children,

   vi. a document that affects the legal interests, rights or responsibilities of a person, other than the legal interests, rights or responsibilities referred to in subparagraphs i to v, or

   vii. a document for use in a proceeding before an adjudicative body.

3. Represents a person in a proceeding before an adjudicative body.

Fr

4. Negotiates the legal interests, rights or responsibilities of a person.

Representation in a proceeding

(7) Without limiting the generality of paragraph 3 of subsection (6), doing any of the following shall be considered to be representing a person in a proceeding:

1. Determining what documents to serve or file in relation to the proceeding, determining on or with whom to serve or file a document, or determining when, where or how to serve or file a document.

2. Conducting an examination for discovery.

3. Engaging in any other conduct necessary to the conduct of the proceeding.

Not practising law or providing legal services

(8) For the purposes of this Act, the following persons shall be deemed not to be practising law or providing legal services:

1. A person who is acting in the normal course of carrying on a profession or occupation governed by another Act of the Legislature, or an Act of Parliament, that regulates specifically the activities of persons engaged in that profession or occupation.

2. An employee or officer of a corporation who selects, drafts, completes or revises a document for the use of the corporation or to which the corporation is a party.

3. An individual who is acting on his or her own behalf, whether in relation to a document, a proceeding or otherwise.

4. An employee or a volunteer representative of a trade union who is acting on behalf of the union or a member of the union in connection with a grievance, a labour negotiation, an arbitration proceeding or a proceeding before an administrative tribunal.

5. A person or a member of a class of persons prescribed by the by-laws, in the circumstances prescribed by the by-laws.

Terms, conditions, etc.

(9) For the purposes of this Act, a term, condition, limitation or restriction shall be considered to be imposed on a licensee, regardless of whether it is imposed on the licensee or on the licensee's licence and regardless of whether it is imposed by the by-laws on all licences of the class held by the licensee or is imposed on the particular licensee or on his or her licence by an order made under this Act.

Fr

Internal references

(10) A reference in this Act to something done or omitted to be done under this Act, a Part of this Act or a provision of this Act shall be interpreted as referring to the Act, the Part or the provision, as it read on the day the thing was done or omitted to be done.

3. The Act is amended by adding the following section:

Transition

Definitions

1.1 (1) In this section,

"amendment day" means the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* comes into force; ("jour de la modification")

"member" means a member as defined in section 1, as it reads immediately before the amendment day, and "membership" has a corresponding meaning. ("membre", "qualité de membre")

Members deemed licensees

(2) Every person who is a member immediately before the amendment day shall be deemed to become, on the amendment day, a person licensed to practise law in Ontario as a barrister and solicitor and to hold the class of licence determined under the by-laws.

Abeyance

(3) If a person's membership in the Society is in abeyance under section 31 immediately before the amendment day, the person's licence shall be deemed to be in abeyance under section 31 on the amendment day.

Admission application deemed licence application

(4) If, immediately before the amendment day, an application for admission to the Society as a member under section 27 has not yet been accepted or refused, the application shall be deemed to become, on the amendment day, an application for a licence to practise law in Ontario as a barrister and solicitor.

Resignation application deemed surrender application

(5) If, immediately before the amendment day, an application by a person under subsection 30 (1) to resign his or her membership in the Society has not yet been accepted or refused, the application shall be deemed to become, on the amendment day, an application by the person under subsection 30 (1) to surrender his or her licence.

Readmission application deemed licence applicatio

Fr

(6) If, immediately before the amendment day, the Hearing Panel has not yet made a decision under subsection 30 (3) or 49.42 (4) respecting an application for readmission as a member, the application shall be deemed to become, on the amendment day, an application to the Society for a new licence to practise law in Ontario as a barrister and solicitor.

Application to restore membership deemed application to restore licence

(7) If, immediately before the amendment day, an application by a person under subsection 31 (2) to have his or her membership in the Society restored has not yet been accepted or refused, the application shall be deemed to become, on the amendment day, an application by the person under subsection 31 (2) to have his or her licence restored.

Order imposing term, condition, etc.

(8) If an order imposing a term, condition, limitation or restriction on a person's rights and privileges as a member is in effect immediately before the amendment day, the order shall be deemed to become, on the amendment day, an order imposing the same term, condition, limitation or restriction on the person's licence.

Order suspending rights and privileges deemed order suspending licence

(9) If an order suspending a person's rights and privileges as a member is in effect immediately before the amendment day, the order shall be deemed to become, on the amendment day, an order suspending the person's licence.

Prohibition order

(10) If an order under section 50.2 prohibiting a person from contravening section 50 is in effect immediately before the amendment day, the order shall be deemed to become, on the amendment day, an order under clause 26.3 (1) (a) prohibiting the person from contravening subsection 26.1 (1) or (2), as the case may be.

Termination of orders for failure to use legal skills

(11) Every order under section 49.1 that is in effect immediately before the day section 42 of Schedule C to the *Access to Justice Act, 2006* comes into force is terminated on that day.

Licence deemed permit

(12) Any of the following licences that is in effect immediately before the amendment day shall be deemed to become, on the amendment day, a permit a[illegible]g the holder to do the same things that were authorized by the licence:

1. A licence authorizing a limited liability partnership to practise law.

Fr

2. A licence authorizing a person to give legal advice respecting the law of a jurisdiction outside Canada.

3. A licence authorizing a partnership, corporation or other organization to engage in a practice of law whereby it maintains one or more offices outside Ontario and one or more offices in Ontario.

4. A licence authorizing a person, partnership, corporation or other organization to practise another profession in addition to practising law.

4. The Act is amended by adding the following heading immediately after section 1.1:

PART I

5. Subsection 2 (2) of the Act is repealed and the following substituted:

Status

(2) The Society is a corporation without share capital and its members at a point in time are,

(a) the person who is the Treasurer at that time;

(b) the persons who are benchers at that time;

(c) the persons who are at that time licensed to practise law in Ontario as barristers and solicitors; and

(d) the persons who are at that time licensed to provide legal services in Ontario, who shall be referred to as paralegal members.

6. Section 3 of the Act is amended by adding "of the Society" after "members".

7. The Act is amended by adding the following sections:

Function of the Society

4.1 It is a function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of l equally to persons who practise law in Ontario and persons who provide legal s Ontario.

Fr

Principles to be applied by the Society

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.

2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.

3. The Society has a duty to protect the public interest.

4. The Society has a duty to act in a timely, open and efficient manner.

5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

8. Subsection 5 (4) of the Act is amended by striking out "members" and substituting "licensees".

9. Subsection 6 (1) of the Act is repealed and the following substituted:

Application of *Corporations Act*

(1) Section 84, subsections 129 (2) and (3) and section 317 of the *Corporations Act* do not apply to the Society.

10. Subsection 8 (2) of the Act is repealed.

11. Section 10 of the Act is repealed and the following substituted:

Government of the Society

10. The benchers shall govern the affairs of the Society.

12. (1) Subsection 12 (1) of the Act is amended by striking out "members" in the portion before paragraph 1 and substituting "licensees".

(2) Subsection 12 (2) of the Act is amended by striking out "whether or not they are members" in the portion before paragraph 1.

(3) Subsections 12 (3) and (7) of the Act are repealed and the following substituted:

Same

Fr

(3) Subsections (1) and (2) do not apply to a person whose licence is in abeyance under section 31.

. . . . .

Same

(7) If a bencher licensed to practise law in Ontario as a barrister and solicitor chooses under subsection (6) to continue in office as an elected bencher, he or she is eligible to be re-elected under subsection 15 (1), without prejudice to his or her right to become a bencher under subsection (1) or (2) at any time so long as he or she is still an elected bencher.

Same

(8) If a bencher licensed to provide legal services in Ontario chooses under subsection (6) to continue in office as an elected bencher, he or she is eligible to be re-elected under subsection 16 (1), without prejudice to his or her right to become a bencher under subsection (1) or (2) at any time so long as he or she is still an elected bencher.

13. Subsection 13 (1) of the Act is amended by striking out "having to do with the legal profession in any way" and substituting "having to do in any way with the practice of law in Ontario or the provision of legal services in Ontario".

14. Section 14 of the Act is amended by striking out "member" and substituting "licensee".

15. Section 15 of the Act is repealed and the following substituted:

Benchers licensed to practise law

15. (1) Forty persons who are licensed to practise law in Ontario as barristers and solicitors shall be elected as benchers in accordance with the by-laws.

Regions

(2) The benchers elected under subsection (1) shall be elected for regions prescribed by the by-laws.

Vacancies

(3) Any vacancies in the offices of benchers who are licensed to practise law in Ontario as barristers and solicitors may be filled in accordance with the by-la

Fr

Ceasing to be bencher

(4) A person who is elected as a bencher under subsection (1) or who holds the office of elected bencher under subsection (3) ceases to be a bencher if the person ceases to be licensed to practise law in Ontario as a barrister and solicitor.

16. The Act is amended by adding the following section:

Benchers licensed to provide legal services

16. (1) Two persons who are licensed to provide legal services in Ontario shall be elected as benchers in accordance with the by-laws.

Regions

(2) If the by-laws so require, the benchers elected under subsection (1) shall be elected for regions prescribed by the by-laws.

Vacancies

(3) Any vacancies in the offices of benchers who are licensed to provide legal services in Ontario may be filled in accordance with the by-laws.

Ceasing to be bencher

(4) A person who is elected as a bencher under subsection (1) or who holds the office of elected bencher under subsection (3) ceases to be a bencher if the person ceases to be licensed to provide legal services in Ontario.

First election

(5) The first election of benchers under subsection (1) shall take place on the day prescribed by the by-laws.

Interim benchers

(6) Until the first election of benchers under subsection (1) takes place, their offices shall be filled by two persons appointed by the Attorney General for Ontario from among the five persons appointed to the Paralegal Standing Committee under clause 25.2 (2) (a).

Same

(7) The benchers who hold office under subsection (6) at the time of the first election of the five persons referred to in clause 25.1 (3) (a) to the Paralegal Standing Committee continue to hold office under subsection (6) until the first election of benchers under subsection (1) takes place.

17. (1) Subsection 23 (1) of the Act is repeale Fr **the following substituted:**

Lay benchers

(1) The Lieutenant Governor in Council may appoint eight persons who are not licensees as benchers.

(2) Subsection 23 (2) of the Act is repealed and the following substituted:

Term of office

(2) Every appointment under subsection (1) expires immediately before the first regular Convocation following the first election of benchers under subsection 15 (1) that takes place after the effective date of the appointment.

(3) Section 23 of the Act is amended by adding the following subsection:

Termination of appointment

(5) A person's appointment under this section is terminated if the person becomes a licensee.

18. Subsection 25 (3) of the Act is repealed and the following substituted:

Re-election as Treasurer

(3) The Treasurer is eligible for re-election as Treasurer, despite having ceased to hold office as an elected bencher, but,

(a) after a new election of benchers takes place under subsection 15 (1), a Treasurer who is a person licensed to practise law in Ontario may be re-elected as Treasurer only if he or she was elected as a bencher in that election; and

(b) after a new election of benchers takes place under subsection 16 (1), a Treasurer who is a person licensed to provide legal services in Ontario may be re-elected as Treasurer only if he or she was elected as a bencher in that election.

19. The Act is amended by adding the following sections:

PARALEGAL STANDING COMMITTEE

Paralegal Standing Committee

Establishment

25.1 (1) Convocation shall establish a standing committee to be known as the Paralegal Standing Committee in English and Comité permanent des paraju[illegible]rench.

Jurisdiction

Fr

(2) The Committee shall be responsible for such matters as the by-laws specify relating to the regulation of persons who provide legal services in Ontario.

Composition

(3) The Committee shall consist of 13 persons, of whom,

(a) five shall be persons licensed to provide legal services in Ontario;

(b) five shall be elected benchers who are licensed to practise law in Ontario as barristers and solicitors; and

(c) three shall be lay benchers.

Committee members licensed to provide legal services

(4) The five persons referred to in clause (3) (a) shall be elected as members of the Committee in accordance with the by-laws.

Vacancies

(5) Any vacancies in the offices of the five persons referred to in clause (3) (a) shall be filled in accordance with the by-laws.

Other Committee members

(6) The five persons referred to in clause (3) (b) and the three persons referred to in clause (3) (c) shall be appointed as members of the Committee by Convocation on the recommendation of the Treasurer.

Chair

(7) The chair of the Committee shall be one of the five persons referred to in clause (3) (a) and shall be appointed by the Committee in accordance with the by-laws.

Ceasing to be member of Committee

(8) A person referred to in clause (3) (a) who is elected as a member of the Committee under subsection (4) or who becomes a member of the Committee under subsection (5) ceases to be a member of the Committee if the person ceases to be licensed to provide legal services in Ontario.

Same

(9) A person referred to in clause (3) (b) who is appointed as a member of the Committee under subsection (6) ceases to be a member of the Committee if the person ceases to be an elected bencher licensed to practise law in Ontario as a barrister and solicitor.

Fr

Same

(10) A person referred to in clause (3) (c) who is appointed as a member of the Committee under subsection (6) ceases to be a member of the Committee if the person ceases to be a lay bencher.

Interim Committee

25.2 (1) The first election of the five persons referred to in clause 25.1 (3) (a) shall take place on the day prescribed by the by-laws.

Same

(2) Until the first election of the five persons referred to in clause 25.1 (3) (a) takes place,

(a) their offices shall be filled by five persons appointed by the Attorney General for Ontario; and

(b) the office of chair of the Committee shall be filled by a person appointed by the Attorney General for Ontario from among the five persons appointed under clause (a).

Same

(3) Until the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* comes into force, the offices of the five persons referred to in clause 25.1 (3) (b) shall be filled by five elected benchers as defined in section 1, as it reads before that day, who shall be appointed as members of the Committee by Convocation on the recommendation of the Treasurer.

20. Section 26 of the Act is repealed and the following substituted:

Meeting

26. (1) The Treasurer shall convene a meeting of the following persons in each year for the purpose set out in subsection (2):

1. The chair and the vice-chair of each standing committee.

2. The president of each county or district law association, or his or her nominee, being a member of his or her association.

3. One person licensed to practise law in Ontario as a barrister and solicitor who is a full-time teacher at each law school in Ontario approved by the Society, to be appointed annually by the faculty of the law school.

Purpose

(2) The purpose of the meeting is to consider the manner in which the persons licensed to practise law in Ontario as barristers and solicitors are discharg obligations to the public and generally matters affecting the practice of law as a wh

Fr

21. The Act is amended by adding the following heading immediately after section 26:

PART I.1

22. The Act is amended by adding the following sections:

PROHIBITIONS AND OFFENCES

Prohibitions

Non-licensee practising law or providing legal services

26.1 (1) Subject to subsection (5), no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario.

Non-licensee holding out, etc.

(2) Subject to subsections (6) and (7), no person, other than a licensee whose licence is not suspended, shall hold themself out as, or represent themself to be, a person who may practise law in Ontario or a person who may provide legal services in Ontario.

Licensee practising law or providing legal services

(3) No licensee shall practise law in Ontario or provide legal services in Ontario except to the extent permitted by the licensee's licence.

Licensee holding out, etc.

(4) No licensee shall hold themself out as, or represent themself to be, a person who may practise law in Ontario or a person who may provide legal services in Ontario, without specifying, in the course of the holding out or representation, the restrictions, if any,

(a) on the areas of law that the licensee is authorized to practise or in which the licensee is authorized to provide legal services; and

(b) on the legal services that the licensee is authorized to provide.

Exception, non-licensee practising law or providing legal services

(5) A person who is not a licensee may practise law or provide legal services in Ontario if and to the extent permitted by the by-laws.

Exception, non-licensee holding out, etc.

(6) A person who is not a licensee may hold themself out as, or represent themself to be, a person who may practise law in Ontario, if,

(a) the by-laws permit the person to practise law in Ontario; and

Fr

(b) the person specifies, in the course of the holding out or representation, the restrictions, if any, on the areas of law that the person is authorized to practise.

Same

(7) A person who is not a licensee may hold themself out as, or represent themself to be, a person who may provide legal services in Ontario, if,

(a) the by-laws permit the person to provide legal services in Ontario; and

(b) the person specifies, in the course of the holding out or representation, the restrictions, if any,

(i) on the areas of law in which the person is authorized to provide legal services, and

(ii) on the legal services that the person is authorized to provide.

Agent

(8) This section applies to a person, even if the person is acting as agent under the authority of an Act of the Legislature or an Act of Parliament.

Offences

Contravening s. 26.1

26.2 (1) Every person who contravenes section 26.1 is guilty of an offence and on conviction is liable to a fine of,

(a) not more than $25,000 for a first offence; and

(b) not more than $50,000 for each subsequent offence.

Giving foreign legal advice

(2) Every person who gives legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws is guilty of an offence and on conviction is liable to a fine of,

(a) not more than $25,000 for a first offence; and

(b) not more than $50,000 for each subsequent offence.

Condition of probation order: compensation or restitution

(3) The court that convicts a person of an offence under this section may prescribe as a condition of a probation order that the person pay compensation or make restitution to any person who suffered a loss as a result of the offence.

Condition of probation order: not to contravene s.

Fr

(4) The court that convicts a person of an offence under subsection (1) may prescribe as a condition of a probation order that the person shall not contravene section 26.1.

Condition of probation order: not to give foreign legal advice

(5) The court that convicts a person of an offence under subsection (2) may prescribe as a condition of a probation order that the person shall not give legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws.

Order for costs

(6) Despite any other Act, the court that convicts a person of an offence under this section may order the person to pay the prosecutor costs toward fees and expenses reasonably incurred by the prosecutor in the prosecution.

Deemed order

(7) A certified copy of an order for costs made under subsection (6) may be filed in the Superior Court of Justice by the prosecutor and, on filing, shall be deemed to be an order of that court for the purposes of enforcement.

Limitation

(8) A prosecution for an offence under this section shall not be commenced more than two years after the date on which the offence was alleged to have been committed.

Order prohibiting contravention, etc.

26.3 (1) On the application of the Society, the Superior Court of Justice may,

(a) make an order prohibiting a person from contravening section 26.1, if the court is satisfied that the person is contravening or has contravened section 26.1;

(b) make an order prohibiting a person from giving legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws, if the court is satisfied that the person is giving or has given legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws.

No prosecution or conviction required

(2) An order may be made,

(a) under clause (1) (a), whether or not the person has been prosecuted for or convicted of the offence of contravening section 26.1;

(b) under clause (1) (b), whether or not the person has been prosecuted for or convicted of the offence of giving legal advice respecting the law of a jurisdiction outside Canada in contravention of the by-laws.

Fr

Order to vary or discharge

(3) Any person may apply to the Superior Court of Justice for an order varying or discharging an order made under subsection (1).

23. (1) The heading immediately preceding section 27 and subsections 27 (1), (2) and (3) of the Act are repealed and the following substituted:

LICENSING

Licensing

Classes of licence

(1) The classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and any terms, conditions, limitations or restrictions imposed on each class of licence shall be as set out in the by-laws.

Good character requirement

(2) It is a requirement for the issuance of every licence under this Act that the applicant be of good character.

Duty to issue licence

(3) If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of licence, the Society shall issue a licence of that class to the applicant.

(2) Subsection 27 (4) of the Act is amended by striking out "for admission to the Society" and substituting "for a licence".

(3) Subsection 27 (6) of the Act is amended by striking out "for admission to the Society" and substituting "for a licence".

(4) Subsection 27 (7) of the Act is repealed.

24. Section 27.1 of the Act is repealed and the following substituted:

Register

27.1 (1) The Society shall establish and maintain a register of persons who have been issued licences.

Contents of register

(2) Subject to any by-law respecting the removal of information from the register, the register shall contain the following information:

Fr

1. The name of each licensee.

2. The class of licence issued to each licensee.

3. For each licensee, all terms, conditions, limitations and restrictions that are imposed on the licensee under this Act, other than terms, conditions, limitations and restrictions that are imposed by the by-laws on all licences of that class.

4. An indication of every suspension, revocation, abeyance or surrender of a licence.

5. Any other information required by the by-laws.

Availability to public

(3) The Society shall make the register available for public inspection in accordance with the by-laws.

25. The heading immediately preceding section 28 and sections 28 and 28.1 of the Act are repealed.

26. Sections 29 and 30 of the Act are repealed and the following substituted:

Officers of the courts

29. Every person who is licensed to practise law in Ontario as a barrister and solicitor is an officer of every court of record in Ontario.

Surrender of licence

30. (1) A licensee may apply to the Society in accordance with the by-laws to surrender his or her licence.

Acceptance of surrender

(2) A licence is surrendered when the application to surrender the licence is accepted by the Society in accordance with the by-laws.

27. (1) Subsection 31 (1) of the Act is amended by striking out "The membership" at the beginning and substituting "The licence".

(2) Subsection 31 (2) of the Act is repealed and the following substituted:

Restoration

(2) Upon ceasing to hold an office described in subsection (1), a person whose licence is in abeyance may apply to the Society to have the licence restored and, subject to subsection (3), the Society shall restore it.

Fr

(3) Subsection 31 (3) of the Act is amended by striking out "the membership of a person whose membership is in abeyance" in the portion before clause (a) and substituting "the licence of a person whose licence is in abeyance".

(4) Clause 31 (3) (c) of the Act is repealed and the following substituted:

(c) conduct that, if done by a licensee, would be professional misconduct or conduct unbecoming a licensee.

(5) Subsection 31 (4) of the Act is amended by striking out "membership" and substituting "licence".

(6) Section 31 of the Act is amended by adding the following subsection:

Deemed surrender of licence

(5) If the Hearing Panel refuses to restore a person's licence, the person's licence shall be deemed to have been surrendered.

28. Section 32 of the Act is repealed.

29. Section 33 of the Act is repealed and the following substituted:

Prohibited conduct

33. A licensee shall not engage in professional misconduct or conduct unbecoming a licensee.

30. (1) Subsection 34 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(2) Subsection 34 (2) of the Act is amended by striking out "member or student member" and substituting "licensee".

31. (1) Subsection 35 (1) of the Act is amended by striking out "member or student member" in the portion before paragraph 1 and substituting "licensee".

(2) Paragraphs 1, 2 and 3 of subsection 35 (1) of the Act are repealed and the following substituted:

1. An order revoking the licensee's licence.

2. An order permitting the licensee to surrender his or her licence.

Fr

3. An order suspending the licensee's licence,

i. for a definite period,

ii. until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society, or

iii. for a definite period and, after that, until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society.

(3) Paragraph 4 of subsection 35 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(4) Paragraph 5 of subsection 35 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(5) Paragraph 6 of subsection 35 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(6) Paragraph 7 of subsection 35 (1) of the Act is repealed and the following substituted:

7. An order restricting the areas of law that the licensee may practise or in which the licensee may provide legal services.

7.1 An order restricting the legal services that the licensee may provide.

(7) Paragraphs 8 to 17 of subsection 35 (1) of the Act are repealed and the following substituted:

8. An order that the licensee practise law or provide legal services only,

i. as an employee of a person approved by the Society,

ii. as an employee or partner, and under the supervision, of a licensee approved by the Society, or

iii. under the supervision of a licensee approved by the Society.

9. An order that the licensee co-operate in a review of the licensee's professional business under section 42 and implement the recommendations made by the Society.

10. An order that the licensee maintain a specified type of trust account.

11. An order that the licensee accept specified co-signing controls on the operation of his or her trust accounts.

12. An order that the licensee not maintain any trust accou[illegible]nection with his or her professional business without leave of the Society.

Fr

13. An order requiring the licensee to refund to a client all or a portion of the fees and disbursements paid to the licensee by the client.

14. An order requiring the licensee to pay to the Society, for the Compensation Fund, such amount as the Hearing Panel may fix that does not exceed the total amount of grants made from the Fund as a result of dishonesty on the part of the licensee.

15. An order that the licensee give notice of any order made under this section to such of the following persons as the order may specify:

i. The licensee's partners or employers.

ii. Other licensees working for the same firm or employer as the licensee.

iii. Clients affected by the conduct giving rise to the order.

(8) Paragraph 18 of subsection 35 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(9) Paragraph 19 of subsection 35 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(10) Paragraph 20 of subsection 35 (1) of the Act is repealed.

(11) Subsections 35 (3) and (4) of the Act are repealed and the following substituted:

Test results

(3) If the Hearing Panel makes an order under paragraph 18 of subsection (1), specific results of tests performed in the course of treatment or counselling of the licensee shall be reported pursuant to the order only to a physician or psychologist selected by the Society.

Report to Society

(4) If test results reported to a physician or psychologist under subsection (3) relate to an order made under paragraph 5 of subsection (1), the Society may require the physician or psychologist to promptly report to it his or her opinion on the licensee's compliance with the order, but the report shall not disclose the specific test results.

32. (1) Subsection 36 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(2) Subsection 36 (2) of the Act is amended by striking out "member or student member" and substituting "licensee".

Fr

33. (1) Subsections 37 (1) and (2) of the Act are repealed and the following substituted:

Interpretation – "incapacitated"

(1) A licensee is incapacitated for the purposes of this Act if, by reason of physical or mental illness, other infirmity or addiction to or excessive use of alcohol or drugs, he or she is incapable of meeting any of his or her obligations as a licensee.

(2) Subsections 37 (3), (4) and (5) of the Act are repealed and the following substituted:

Determinations under other Acts

(3) Subject to subsection (4), the Hearing Panel may determine that a licensee is incapacitated for the purposes of this Act if the licensee has been found under any other Act to be incapacitated within the meaning of that Act.

Conditions controlled by treatment or device

(4) The Hearing Panel shall not determine that a licensee is incapacitated for the purposes of this Act if, through compliance with a continuing course of treatment or the continuing use of an assistive device, the licensee is capable of meeting his or her obligations as a licensee.

(3) Subsection 37 (6) of the Act is repealed and the following substituted:

Same

(6) Despite subsection (4), the Hearing Panel may determine that a licensee who is the subject of an application under section 38 is incapacitated for the purposes of this Act if,

(a) the licensee suffers from a condition that would render the licensee incapacitated were it not for compliance with a continuing course of treatment or the continuing use of an assistive device; and

(b) the licensee has not complied with the continuing course of treatment or used the assistive device on one or more occasions in the year preceding the commencement of the application.

34. (1) Subsection 38 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(2) Subsection 38 (2) of the Act is amended by striking out "member or student member" and substituting "licensee".

Fr

35. (1) Subsection 39 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(2) Clause 39 (3) (a) of the Act is amended by striking out "member or student member" and substituting "licensee".

(3) Subsection 39 (4) of the Act is amended by striking out "member or student member" and substituting "licensee".

(4) Subsection 39 (6) of the Act is repealed and the following substituted:

Failure to comply

(6) If the licensee fails to comply with an order under this section, the Hearing Panel may make an order suspending his or her licence until he or she complies.

36. (1) Subsection 40 (1) of the Act is amended by striking out "member or student member" in the portion before paragraph 1 and substituting "licensee".

(2) Paragraph 1 of subsection 40 (1) of the Act is repealed and the following substituted:

1. An order suspending the licensee's licence,

   i. for a definite period,

   ii. until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society, or

   iii. for a definite period and, after that, until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society.

(3) Paragraph 2 of subsection 40 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(4) Paragraphs 3 and 4 of subsection 40 (1) of the Act are repealed and the following substituted:

3. An order restricting the areas of law that the licensee may practise or in which the licensee may provide legal services.

3.1 An order restricting the legal services that the licensee may provide.

4. An order that the licensee practise law or provide legal services,

   i. as an employee of a person approved by the Society,

Fr

ii. as an employee or partner, and under the supervision, of a licensee approved by the Society, or

iii. under the supervision of a licensee approved by the Society.

(5) Paragraph 5 of subsection 40 (1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(6) Subsections 40 (3) and (4) of the Act are repealed and the following substituted:

Test results

(3) If the Hearing Panel makes an order under paragraph 5 of subsection (1), specific results of tests performed in the course of treatment or counselling of the licensee shall be reported pursuant to the order only to a physician or psychologist selected by the Society.

Report to Society

(4) If test results reported to a physician or psychologist under subsection (3) relate to an order made under paragraph 2 of subsection (1), the Society may require the physician or psychologist to promptly report to it his or her opinion on the licensee's compliance with the order, but the report shall not disclose the specific test results.

37. Section 41 of the Act is repealed and the following substituted:

Interpretation – standards of professional competence

41. A licensee fails to meet standards of professional competence for the purposes of this Act if,

(a) there are deficiencies in,

(i) the licensee's knowledge, skill or judgment,

(ii) the licensee's attention to the interests of clients,

(iii) the records, systems or procedures of the licensee's professional business, or

(iv) other aspects of the licensee's professional business; and

(b) the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

38. (1) Subsections 42 (1), (2) and (3) of the Act are repealed and the following substituted:

Review: professional competence

Fr

(1) The Society may conduct a review of a licensee's professional business in accordance with the by-laws for the purpose of determining if the licensee is failing or has failed to meet standards of professional competence, if,

(a) the circumstances prescribed by the by-laws exist; or

(b) the licensee is required by an order under section 35 to co-operate in a review under this section.

Powers

(2) A person conducting a review under this section may,

(a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;

(b) require the production of and examine documents that relate to the matters under review, including client files, and examine systems and procedures of the licensee's professional business; and

(c) require the licensee and people who work with the licensee to provide information that relates to the matters under review.

Recommendations

(3) On completion of the review, the Society may make recommendations to the licensee.

(2) Subsection 42 (4) of the Act is amended by striking out "Secretary" and substituting "Society".

(3) Subsection 42 (5) of the Act is amended by striking out "Secretary" and substituting "Society".

(4) Subsections 42 (6), (7), (8) and (9) of the Act are repealed and the following substituted:

Acceptance by licensee

(6) If the Society makes a proposal for an order to the licensee and the licensee accepts the proposal within the time prescribed by the by-laws, the Society shall notify the chair or a vice-chair of the standing committee of Convocation responsible for professional competence and the chair or vice-chair shall appoint a member of the Hearing Panel to review the proposal.

Approval by member of Hearing Panel

Fr

(7) The member of the Hearing Panel who reviews the proposal may make an order giving effect to the proposal, if he or she is of the opinion that it is appropriate to do so.

Modifications to proposal

(8) The member of the Hearing Panel may include modifications to the proposal in an order under subsection (7), if the licensee and the Society consent in writing to the modifications.

Application of subss. (4) to (8)

(9) Subsections (4) to (8) do not apply if the licensee is required by an order under section 35 to co-operate in a review of the licensee's professional business under this section and to implement the recommendations made by the Society.

39. (1) Subsection 43 (1) of the Act is amended by striking out "member" and substituting "licensee".

(2) Subsection 43 (2) of the Act is amended by striking out "member" and substituting "licensee".

40. (1) Subsection 44 (1) of the Act is amended by striking out the portion before paragraph 1 and substituting the following:

Professional competence orders

(1) Subject to the rules of practice and procedure, if an application is made under section 43 and the Hearing Panel determines that the licensee is failing or has failed to meet standards of professional competence, the Panel may make one or more of the following orders:

. . . . .

(2) Paragraphs 1, 2, 3 and 4 of subsection 44 (1) of the Act are repealed and the following substituted:

1. An order suspending the licensee's licence,

   i. for a definite period,

   ii. until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society, or

   iii. for a definite period and, after that, until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society.

2. An order that the licensee institute new records, systems or procedures in his or her professional business.

3. An order that the licensee obtain professional advice with respect to the management of his or her professional business.

Fr

4. An order that the licensee retain the services of a person qualified to assist in the administration of his or her professional business.

(3) Paragraph 5 of subsection 44 (1) of the Act is amended by striking out "member" and substituting "licensee".

(4) Paragraph 6 of subsection 44 (1) of the Act is amended by striking out "member" and substituting "licensee".

(5) Paragraphs 7 and 8 of subsection 44 (1) of the Act are repealed and the following substituted:

7. An order restricting the areas of law that the licensee may practise or in which the licensee may provide legal services.

7.1 An order restricting the legal services that the licensee may provide.

8. An order that the licensee practise law or provide legal services only,

i. as an employee of a person approved by the Society,

ii. as an employee or partner, and under the supervision, of a licensee approved by the Society, or

iii. under the supervision of a licensee approved by the Society.

(6) Paragraph 9 of subsection 44 (1) of the Act is amended by striking out "member" and substituting "licensee".

(7) Subsections 44 (3) and (4) of the Act are repealed and the following substituted:

Test results

(3) If the Hearing Panel makes an order under paragraph 9 of subsection (1), specific results of tests performed in the course of treatment or counselling of the licensee shall be reported pursuant to the order only to a physician or psychologist selected by the Society.

Report to Society

(4) If test results reported to a physician or psychologist under subsection (3) relate to an order made under paragraph 5 of subsection (1), the Society may require the physician or psychologist to promptly report to it his or her opinion on the licensee's compliance with the order, but the report shall not disclose the specific test results.

41. Sections 45, 46 and 47 of the Act are repeal Fr **the following substituted:**

Failure to Comply with Order

Suspension for failure to comply with order

45. (1) On application by the Society, the Hearing Panel may make an order suspending a licensee's licence if the Panel determines that the licensee has failed to comply with an order under this Part.

Parties

(2) The parties to the application are the Society, the licensee who is the subject of the application, and any other person added as a party by the Hearing Panel.

Nature of suspension

(3) An order under this section may suspend the licensee's licence,

(a) for a definite period;

(b) until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society; or

(c) for a definite period and, after that, until terms and conditions specified by the Hearing Panel are met to the satisfaction of the Society.

Summary Orders

Summary suspension for non-payment

46. (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if, for the period prescribed by the by-laws, the licensee has been in default for failure to pay a fee or levy payable to the Society.

Eligibility for appointment

(2) Convocation shall not appoint a person for the purpose of subsection (1) unless the person is,

(a) a bencher; or

(b) an employee of the Society holding an office prescribed by the by-laws for the purpose of this section.

Length of suspension

(3) A suspension under this section remains in effect until the licensee pays the amount owing in accordance with the by-laws to the satisfaction of the So

Fr

Discharge from bankruptcy

(4) A suspension under this section is not terminated by the licensee's discharge from bankruptcy, but the licensee may apply to the Hearing Panel under subsection 49.42 (3).

Summary suspension for failure to complete or file

47. (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if, for the period prescribed by the by-laws,

(a) the licensee has been in default for failure to complete or file with the Society any certificate, report or other document that the licensee is required to file under the by-laws; or

(b) the licensee has been in default for failure to complete or file with the Society, or with an insurer through which indemnity for professional liability is provided under section 61, any certificate, report or other document that the licensee is required to file under a policy for indemnity for professional liability.

Eligibility for appointment

(2) Convocation shall not appoint a person for the purpose of subsection (1) unless the person is,

(a) a bencher; or

(b) an employee of the Society holding an office prescribed by the by-laws for the purpose of this section.

Length of suspension

(3) A suspension under this section remains in effect until the licensee completes and files the required document in accordance with the by-laws to the satisfaction of the Society.

Summary suspension for failure to comply with indemnity requirements

47.1 (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if the licensee has failed to comply with the requirements of the by-laws with respect to indemnity for professional liability.

Eligibility for appointment

(2) Convocation shall not appoint a person for the purpose of subsection (1) unless the person is,

(a) a bencher; or

(b) an employee of the Society holding an office prescrib e by-laws for the purpose of this section.

Fr

Length of suspension

(3) A suspension under this section remains in effect until the licensee complies with the requirements of the by-laws with respect to indemnity for professional liability to the satisfaction of the Society.

42. Sections 48, 49 and 49.1 of the Act are repealed and the following substituted:

Summary revocation

48. (1) A person appointed for the purpose by Convocation may make an order revoking a licensee's licence if an order under section 46, clause 47 (1) (a) or section 47.1 is still in effect more than 12 months after it was made.

Eligibility for appointment

(2) Convocation shall not appoint a person for the purpose of subsection (1) unless the person is,

(a) a bencher; or

(b) an employee of the Society holding an office prescribed by the by-laws for the purpose of this section.

Summary suspension relating to continuing legal education

49. (1) A person appointed for the purpose by Convocation may make an order suspending a licensee's licence if the licensee has failed to comply with the requirements of the by-laws with respect to continuing legal education.

Eligibility for appointment

(2) Convocation shall not appoint a person for the purpose of subsection (1) unless the person is,

(a) a bencher; or

(b) an employee of the Society holding an office prescribed by the by-laws for the purpose of this section.

Length of suspension

(3) A suspension under this section remains in effect until the licensee complies with the requirements of the by-laws with respect to continuing legal education to the satisfaction of the Society.

Fr

43. Sections 49.2, 49.3, 49.4, 49.5, 49.6 and 49.7 of the Act are repealed and the following substituted:

AUDITS, INVESTIGATIONS, ETC.

Audit of financial records

49.2 (1) The Society may conduct an audit of the financial records of a licensee or group of licensees for the purpose of determining whether the financial records comply with the requirements of the by-laws.

Powers

(2) A person conducting an audit under this section may,

(a) enter the business premises of the licensee or group of licensees between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee or by any licensee in the group of licensees;

(b) require the production of and examine the financial records maintained in connection with the professional business of the licensee or group of licensees and, for the purpose of understanding or substantiating those records, require the production of and examine any other documents in the possession or control of the licensee or group of licensees, including client files; and

(c) require the licensee or group of licensees, and people who work with the licensee or group of licensees, to provide information to explain the financial records and other documents examined under clause (b) and the transactions recorded in those financial records and other documents.

Investigations

Conduct

49.3 (1) The Society may conduct an investigation into a licensee's conduct if the Society receives information suggesting that the licensee may have engaged in professional misconduct or conduct unbecoming a licensee.

Powers

(2) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section has a reasonable suspicion that a licensee being investigated under subsection (1) may have engaged in professional misconduct or conduct unbecoming a licensee, the person conducting the investigation may,

Fr

(a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;

(b) require the production of and examine any documents that relate to the matters under investigation, including client files; and

(c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation.

Capacity

(3) The Society may conduct an investigation into a licensee's capacity if the Society receives information suggesting that the licensee may be, or may have been, incapacitated.

Powers

(4) If an employee of the Society holding an office prescribed by the by-laws for the purpose of this section is satisfied that there are reasonable grounds for believing that a licensee being investigated under subsection (3) may be, or may have been, incapacitated, the person conducting the investigation may,

(a) enter the business premises of the licensee between the hours of 9 a.m. and 5 p.m. from Monday to Friday or at such other time as may be agreed to by the licensee;

(b) require the production of and examine any documents that relate to the matters under investigation, including client files; and

(c) require the licensee and people who work with the licensee to provide information that relates to the matters under investigation.

44. (1) Subsection 49.8 (1) of the Act is amended by striking out "section 49.2, 49.3, 49.4 or 49.15" and substituting "section 42, 49.2, 49.3 or 49.15".

(2) Subsection 49.8 (2) of the Act is amended by striking out "section 49.2, 49.3, 49.4 or 49.15" and substituting "section 42, 49.2, 49.3 or 49.15".

(3) Section 49.8 of the Act is amended by adding the following subsection:

Transition

(2.1) Despite clause 15 (2) (a) and section 32 of the *Statutory Powers Procedure Act*, information that was provided and documents that were produced under section 49.4 of this Act, before its repeal by section 43 of Schedule C to the *Acc tice Act, 2006*, are admissible in a proceeding under this Act even if the infor r documents are privileged or confidential.

Fr

(4) Subsection 49.8 (3) of the Act is repealed and the following substituted:

Privilege preserved for other purposes

(3) Subsections (1), (2) and (2.1) do not negate or constitute a waiver of any privilege and, even though information or documents that are privileged must be disclosed under subsection (1) and are admissible in a proceeding under subsections (2) and (2.1), the privilege continues for all other purposes.

45. Subsection 49.9 (1) of the Act is amended by striking out "section 49.2, 49.3, 49.4 or 49.15" in the portion before clause (a) and substituting "section 42, 49.2, 49.3 or 49.15".

46. (1) Subsection 49.10 (1) of the Act is repealed and the following substituted:

Order for search and seizure

(1) On application by the Society, the Superior Court of Justice may make an order under subsection (2) if the court is satisfied that there are reasonable grounds for believing,

(a) that one of the following circumstances exists:

(i) a review of a licensee's professional business under section 42 is authorized,

(ii) an investigation into a licensee's conduct under subsection 49.3 (1) is authorized, or

(iii) a licensee whose capacity is being investigated under subsection 49.3 (3) may be, or may have been, incapacitated;

(b) that there are documents or other things that relate to the matters under review or investigation in a building, dwelling or other premises specified in the application or in a vehicle or other place specified in the application, whether the building, dwelling, premises, vehicle or place is under the control of the licensee or another person; and

(c) that an order under subsection (2) is necessary,

(i) because of urgency,

(ii) because use of the authority in subsection 42 (2) or 49.3 (2) or (4) is not possible, is not likely to be effective or has been ineffective, or

(iii) because subsection 42 (2) or 49.3 (2) or (4) does n[illegible]ize entry into the building, dwelling or other premises specified in the a[illegible] or the vehicle or other place specified in the application.

Fr

(2) Clause 49.10 (2) (a) of the Act is repealed and the following substituted:

(a) to enter, by force if necessary, any building, dwelling or other premises specified in the order or any vehicle or other place specified in the order, whether the building, dwelling, premises, vehicle or place is under the control of the licensee or another person;

47. Subsection 49.12 (2) of the Act is amended by striking out "or" at the end of clause (d), by adding "or" at the end of clause (e) and by adding the following clause:

(f) disclosure, if there are reasonable grounds for believing that,

(i) if the disclosure is not made, there is a significant risk of harm to the person who was the subject of the audit, investigation, review, search, seizure or proceeding or to another person, and

(ii) making the disclosure is likely to reduce the risk.

48. (1) Subsection 49.15 (2) of the Act is amended by striking out "the Secretary" and substituting "an employee of the Society holding an office prescribed by the by-laws".

(2) Clause 49.15 (3) (a) of the Act is amended by striking out "member or student member" and substituting "licensee".

49. Sections 49.21 and 49.22 of the Act are repealed and the following substituted:

Hearing Panel

49.21 (1) The Law Society Hearing Panel is continued under the name Law Society Hearing Panel in English and Comité d'audition du Barreau in French.

Composition

(2) The Hearing Panel shall consist of at least three persons appointed by Convocation, of whom at least one shall be a person who is not a licensee.

Eligibility for appointment

(3) A person is not eligible to be appointed to the Hearing Panel u… …r she is,

(a) a bencher;

(b) a licensee; or

Fr

(c) a person approved by the Attorney General for Ontario.

Term of office

(4) Subject to subsections (5) and (6), an appointment as a member of the Hearing Panel shall be for such term, not exceeding four years, as Convocation may fix.

Cessation of eligibility

(5) A person ceases to be a member of the Hearing Panel if he or she ceases to meet the eligibility requirements in subsection (3).

Appointment at pleasure

(6) A person appointed as a member of the Hearing Panel holds office at the pleasure of Convocation.

Reappointment

(7) A person appointed as a member of the Hearing Panel is eligible for reappointment if he or she meets the eligibility requirements in subsection (3).

Transition

(8) The persons who are members of the Hearing Panel immediately before the day section 49 of Schedule C to the *Access to Justice Act, 2006* comes into force cease to be members on that day, unless they are reappointed under this section.

Same

(9) A person who ceases to be a member of the Hearing Panel under subsection (8) may continue to act as a member of the Hearing Panel with respect to any proceeding commenced before he or she ceases to be a member of the Hearing Panel.

Chair and vice-chair

49.22 (1) Convocation shall appoint one of the members of the Hearing Panel as chair, and another as vice-chair, of the Hearing Panel.

Term of office

(2) Subject to subsections (3) and (4), an appointment as chair or vice-chair of the Hearing Panel shall be for such term, not exceeding four years, as Convocation may fix.

Cessation of membership

(3) A person ceases to be the chair or vice-chair of the Hearing Pa[illegible]r she ceases to be a member of the Hearing Panel.

Fr

Appointment at pleasure

(4) A person appointed as chair or vice-chair of the Hearing Panel holds office at the pleasure of Convocation.

Reappointment

(5) A person appointed as chair or vice-chair of the Hearing Panel is eligible for reappointment.

Transition

(6) The person who is the chair of the Hearing Panel immediately before the day section 49 of Schedule C to the *Access to Justice Act, 2006* comes into force ceases to be the chair on that day, unless he or she is reappointed under this section.

50. Subsection 49.23 (2) of the Act is repealed and the following substituted:

Assignment of members

(2) The chair or, in the absence of the chair, the vice-chair shall assign members of the Hearing Panel to hearings.

51. Subsection 49.24 (2) of the Act is repealed.

52. The Act is amended by adding the following section:

Temporary panelists

49.24.1 (1) If, in the opinion of the chair or, in the absence of the chair, the vice-chair, it is not possible or practical to assign members of the Hearing Panel to a hearing in compliance with a requirement of this Act or of the regulations or in compliance with a requirement made under subsection 49.24 (1), the chair or vice-chair may appoint one or more persons as temporary members of the Hearing Panel for the purposes of that hearing in order to comply with such requirement, and temporary members of the Hearing Panel shall be deemed to be members of the Hearing Panel for the purposes of compliance with such requirement.

Eligibility for appointment

(2) The chair or vice-chair shall not appoint a person as a temporary member of the Hearing Panel under subsection (1) unless the person is,

(a) a bencher;

(b) a licensee; or

(c) a person approved by the Attorney General for Ontario.

Fr

53. Section 49.27 of the Act is repealed and the following substituted:

Interlocutory orders

49.27 (1) The Hearing Panel may make an interlocutory order authorized by the rules of practice and procedure, subject to subsection (2).

Exception

(2) The Hearing Panel shall not make an interlocutory order suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services, unless there are reasonable grounds for believing that there is a significant risk of harm to members of the public, or to the public interest in the administration of justice, if the order is not made and that making the order is likely to reduce the risk.

54. Sections 49.29 and 49.30 of the Act are repealed and the following substituted:

Appeal Panel

49.29 (1) The Law Society Appeal Panel is continued under the name Law Society Appeal Panel in English and Comité d'appel du Barreau in French.

Composition

(2) The Appeal Panel shall consist of at least five persons appointed by Convocation, of whom at least one shall be a person who is not a licensee.

Eligibility for appointment

(3) A person is not eligible to be appointed to the Appeal Panel unless he or she is,

(a) a bencher;

(b) a licensee; or

(c) a person approved by the Attorney General for Ontario.

Term of office

(4) Subject to subsections (5) and (6), an appointment as a member of the Appeal Panel shall be for such term, not exceeding four years, as Convocation may fix.

Cessation of eligibility

(5) A person ceases to be a member of the Appeal Panel if he or she ceases to meet the eligibility requirements in subsection (3).

Fr

Appointment at pleasure

(6) A person appointed as a member of the Appeal Panel holds office at the pleasure of Convocation.

Reappointment

(7) A person appointed as a member of the Appeal Panel is eligible for reappointment if he or she meets the eligibility requirements in subsection (3).

Transition

(8) The persons who are members of the Appeal Panel immediately before the day section 54 of Schedule C to the *Access to Justice Act, 2006* comes into force cease to be members on that day, unless they are reappointed under this section.

Same

(9) A person who ceases to be a member of the Appeal Panel under subsection (8) may continue to act as a member of the Appeal Panel with respect to any proceeding commenced before he or she ceases to be a member of the Appeal Panel.

Chair and vice-chair

49.30 (1) Convocation shall appoint one of the members of the Appeal Panel as chair, and another as vice-chair, of the Appeal Panel.

Term of office

(2) Subject to subsections (3) and (4), an appointment as chair or vice-chair of the Appeal Panel shall be for such term, not exceeding four years, as Convocation may fix.

Cessation of membership

(3) A person ceases to be the chair or vice-chair of the Appeal Panel if he or she ceases to be a member of the Appeal Panel.

Appointment at pleasure

(4) A person appointed as chair or vice-chair of the Appeal Panel holds office at the pleasure of Convocation.

Reappointment

(5) A person appointed as chair or vice-chair of the Appeal Panel is eligible for reappointment.

Transition

(6) The person who is the chair of the Appeal Panel immediately [illegible] day section 54 of Schedule C to the *Access to Justice Act, 2006* comes into force ceases to be the chair on that

Fr

day, unless he or she is reappointed under this section.

55. Subsections 49.31 (2), (3), (4) and (5) of the Act are repealed and the following substituted:

Assignment of members

(2) The chair or, in the absence of the chair, the vice-chair shall assign members of the Appeal Panel to hearings.

Composition at hearings

(3) An appeal to the Appeal Panel shall be heard and determined by such number of members of the Panel as is prescribed by the regulations.

56. Subsection 49.32 (3) of the Act is repealed and the following substituted:

Appeal from summary orders

(3) A person who is subject to an order under section 46, 47, 47.1, 48 or 49 may appeal the order to the Appeal Panel.

57. Subsection 49.36 (2) of the Act is amended by striking out "rights and privileges" and substituting "licence".

58. Subsections 49.37 (1) and (2) of the Act are repealed and the following substituted:

Application of other provisions

(1) Sections 49.24, 49.24.1, 49.26, 49.27 and 49.28 apply, with necessary modifications, to the Appeal Panel.

59. Clause 49.38 (b) of the Act is repealed and the following substituted:

(b) the proceeding was commenced under section 34 or 38.

60. Subsection 49.41 (2) of the Act is amended by striking out "rights and privileges" and substituting "licence".

61. The heading immediately preceding section 49.42 and section 49.42 of the Act are repealed and the following substituted:

REINSTATEMENT

Fr

Application for reinstatement

49.42 (1) If an order made under this Act suspended a licensee's licence or restricted the manner in which a licensee may practise law or provide legal services, the Hearing Panel may, on application by the licensee, make an order discharging or varying the order on the basis of fresh evidence or a material change in circumstances.

Exceptions

(2) Subsection (1) does not apply to an interlocutory order or an order made under section 46, 47, 47.1 or 49.

Discharge from bankruptcy

(3) If an order made under section 46 suspended a licensee's licence, the Hearing Panel may, on application by the licensee, make an order discharging or varying the order on the basis that the licensee has been discharged from bankruptcy.

Parties

(4) The parties to an application under this section are the applicant, the Society and any other person added as a party by the Hearing Panel.

62. Subsections 49.43 (1) and (2) of the Act are repealed and the following substituted:

Dispute over satisfaction of terms and conditions

(1) A licensee may apply to the Hearing Panel for a determination of whether terms and conditions specified in an order under this Part have been met if,

(a) the order suspended the licensee's licence until the terms and conditions were met to the satisfaction of the Society; and

(b) the Society is not satisfied that the terms and conditions have been met.

Powers

(2) The Hearing Panel shall,

(a) if it determines that the terms and conditions have been met, order that the order suspending the licensee's licence cease to have effect; or

(b) if it determines that the terms and conditions have not been met, order that the order suspending the licensee's licence continue in effect.

63. (1) Subsection 49.44 (1) of the Act is repealed and the following substituted:

Fr

Application

(1) Sections 49.45 to 49.52 apply to property that is or should be in the possession or control of a licensee in connection with,

(a) the professional business of the licensee;

(b) the business or affairs of a client or former client of the licensee;

(c) an estate for which the licensee is or was executor, administrator or administrator with the will annexed;

(d) a trust of which the licensee is or was a trustee;

(e) a power of attorney under which the licensee is or was the attorney; or

(f) a guardianship under which the licensee is or was the guardian.

(2) Subsection 49.44 (3) of the Act is amended by striking out "member" and substituting "licensee".

64. Section 49.45 of the Act is repealed and the following substituted:

Grounds for order

49.45 An order may be made under section 49.46 or 49.47 with respect to property that is or should be in the possession or control of a licensee only if,

(a) the licensee's licence has been revoked;

(b) the licensee's licence is under suspension or the manner in which the licensee may practise law or provide legal services has been restricted;

(c) the licensee has died or has disappeared;

(d) the licensee has neglected or abandoned his or her professional business without making adequate provision for the protection of clients' interests;

(e) there are reasonable grounds for believing that the licensee has or may have dealt improperly with property that may be subject to an order under section 49.46 or 49.47 or with any other property; or

(f) there are reasonable grounds for believing that other circumstances exist in respect of the licensee or the licensee's professional business that make an order under section 49.46 or 49.47 necessary for the protection of the public.

65. Section 49.46 of the Act is amended by striking out "member" and substituting "licensee".

66. (1) Subsection 49.47 (1) of the Act is amended by striking out "member" and substituting "licensee".

Fr

(2) Paragraphs 3 and 4 of subsection 49.47 (2) of the Act are repealed and the following substituted:

3. Preserving or carrying on the licensee's professional business.

4. Winding up the licensee's professional business.

(3) Clause 49.47 (5) (a) of the Act is amended by striking out "member" and substituting "licensee".

(4) Clause 49.47 (5) (d) of the Act is amended by striking out "member" and substituting "licensee".

(5) Subsection 49.47 (7) of the Act is amended by striking out "member" and substituting "licensee".

67. Section 49.50 of the Act is amended by striking out "member" and substituting "licensee".

68. Subsection 49.51 (1) of the Act is amended by striking out "member" and substituting "licensee".

69. Section 49.52 of the Act is repealed and the following substituted:

Former licensees or members

49.52 (1) Sections 49.44 to 49.51 also apply, with necessary modifications, in respect of,

(a) a person who was and has ceased to be a licensee; and

(b) a person who was and has ceased to be a member and has never become a licensee.

Same

(2) Sections 49.44 to 49.51 apply to property that is or should be in the possession or control of,

(a) a person described in clause (1) (a), before or after the person ceases to practise law or provide legal services; or

(b) a person described in clause (1) (b), before or after the person ceases to practise law.

Same

(3) In applying sections 49.44, 49.45 and 49.47 to a person described in clause (1) (b),

(a) a reference to a professional business shall be deemed a reference to a law practice;

Fr

(b) a reference to a licence having been revoked shall be deemed to be a reference to a membership having been revoked; and

(c) a reference to a licence being under suspension shall be deemed to be a reference to rights and privileges as a member being under suspension.

Definitions

(4) In this section,

"amendment day" means the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* came into force; ("jour de la modification")

"member" means a member as defined in section 1, as it read immediately before the amendment day. ("membre")

70. The headings immediately preceding section 50 and sections 50, 50.1 and 50.2 of the Act are repealed and the following substituted:

PART III

71. (1) The heading immediately preceding section 51 and subsection 51 (1) of the Act are repealed and the following substituted:

Compensation Fund

Compensation Fund

(1) The Lawyers Fund for Client Compensation is continued as the Compensation Fund in English and Fonds d'indemnisation in French.

(2) Subsection 51 (2) of the Act is repealed and the following substituted:

Derivation of funds

(2) The following shall be paid into the Fund:

1. All money paid to the Society under subsection (3).
2. All money recovered by the Society under subsection (7).
3. All money contributed to the Fund by any person.
4. All money earned from the investment of money in the Fund.

(3) Subsection 51 (3) of the Act is amended by striking out "member" and substituting "licensee".

(4) Subsection 51 (5) of the Act is repealed and the following substituted:

Fr

Grants

(5) Convocation in its absolute discretion may make grants from the Fund in order to relieve or mitigate loss sustained by a person in consequence of,

(a) dishonesty on the part of a person, while a licensee, in connection with his or her professional business or in connection with any trust of which he or she was or is a trustee; or

(b) dishonesty, before the amendment day, on the part of a person, while a member, in connection with his or her law practice or in connection with any trust of which he or she was or is a trustee.

Same

(5.1) Subsection (5) applies even if after the commission of the act of dishonesty, the dishonest person has died, has ceased to administer his or her affairs or has ceased to be a licensee or member.

Limitation on grants

(5.2) Without limiting the discretion of Convocation under subsection (5),

(a) if, at the time of the commission of the act of dishonesty, the dishonest person was a member or was licensed to practise law in Ontario as a barrister and solicitor, Convocation may decide not to make a grant under subsection (5) except out of the following money in the Fund,

(i) money paid to the Society under subsection (3),

(A) after the amendment day, by persons licensed to practise law in Ontario as barristers and solicitors, and

(B) before the amendment day, by members,

(ii) money recovered by the Society under subsection (7), whether before or after the amendment day, on account of losses sustained by persons in consequence of,

(A) dishonesty, before the amendment day, on the part of members, and

(B) dishonesty, after the amendment day, on the part of persons licensed to practise law in Ontario as barristers and solicitors,

(iii) money contributed to the Fund, whether before or after the amendment day, that is not money paid to the Society under subsection (3) or money recovered by the Society under subsection (7), and

(iv) regarding money earned, whether before or after the amendment day, from the investment of money in the Fund, the proportion of the earned money that is

Fr

attributable to the investment of the money referred to in subclauses (i), (ii) and (iii); and

(b) if, at the time of the commission of the act of dishonesty, the dishonest person was licensed to provide legal services in Ontario, Convocation may decide not to make a grant under subsection (5) except out of the following money in the Fund,

(i) money paid to the Society under subsection (3) by persons licensed to provide legal services in Ontario,

(ii) money recovered by the Society under subsection (7) on account of losses sustained by persons in consequence of dishonesty on the part of persons licensed to provide legal services in Ontario,

(iii) money contributed to the Fund that is not money paid to the Society under subsection (3) or money recovered by the Society under subsection (7), and

(iv) regarding money earned from the investment of money in the Fund, the proportion of the earned money that is attributable to the investment of the money referred to in subclauses (i), (ii) and (iii).

(5) Subsection 51 (6) of the Act is amended by striking out "Secretary" and substituting "Society".

(6) Subsections 51 (7), (8) and (9) of the Act are repealed and the following substituted:

Subrogation

(7) If a grant is made under this section, the Society is subrogated, to the extent of the amount of the grant, to all rights and remedies to which the grantee was entitled on account of the loss in respect of which the grant was made,

(a) against the dishonest person or any other person; or

(b) in the event of the death, insolvency or other disability of the dishonest person or other person, against the personal representative or other person administering the estate.

Grantees' rights conditionally limited

(8) A grantee or, in the event of the death, insolvency or other disability of a grantee, the personal representative or other person administering the estate of the grantee, has no right to receive anything from the dishonest person or the dishonest p[illegible]state, in respect of the loss in respect of which the grant was made, until the Societ[illegible]en reimbursed the full amount of the grant.

Fr

Reimbursement from bankrupt's estate

(9) If a grant is made under this section and the dishonest person is or becomes bankrupt, the Society is entitled,

(a) to assert and prove a claim in the bankruptcy for the amount of the grant; and

(b) to receive all dividends on the Society's claim until the Society has been reimbursed the full amount of the grant.

(7) Subsection 51 (10) of the Act is amended by striking out "member" wherever it appears and substituting in each case "licensee".

(8) Subsection 51 (11.1) of the Act is repealed and the following substituted:

Summons

(11.1) For the purposes of this section, an employee of the Society holding an office prescribed by the by-laws for the purpose of this section may require any person, by summons,

(a) to give evidence on oath or affirmation at a hearing before Convocation, a committee or a referee; and

(b) to produce in evidence at a hearing before Convocation, a committee or a referee documents and things specified by the employee.

(9) Section 51 of the Act is amended by adding the following subsection:

Definitions

(13) In this section,

"amendment day" means the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* came into force; ("jour de la modification")

"member" means a member as defined in section 1, as it read immediately before the amendment day. ("membre")

72. (1) Subsection 55 (2) of the Act is repealed and the following substituted:

Derivation of funds

(2) The funds of the Foundation shall be derived from,

(a) gifts, bequests and devises received by the Foundation under subsection 56 (2);

(b) money remitted to the Foundation under subsection 57 (3);

Fr

(c) money received by the Foundation as interest or other gain on joint accounts maintained under section 57.1;

(d) money paid to the Foundation under subsection 59.7 (3); and

(e) money resulting from the use, disposal or investment of money and other property mentioned in clause (a), (b), (c) or (d).

(2) Subsection 55 (3) of the Act is amended by striking out "clauses (2) (a), (b.1) and (b.2)" and substituting "clauses (2) (b), (c) and (d)".

73. (1) Paragraph 2 of subsection 56 (3.1) of the Act is amended by striking out "member" at the end and substituting "licensee".

(2) Paragraph 3 of subsection 56 (3.1) of the Act is amended by striking out "member" at the end and substituting "licensee".

(3) Subsection 56 (3.2) of the Act is repealed and the following substituted:

Accounting

(3.2) All interest and other profits under the investments and agreements authorized under clauses (1) (d) and (e) accrue to, and become funds of, the Foundation and not a licensee or a client of a licensee or a person claiming through a licensee or client of a licensee.

(4) Subsection 56 (3.3) of the Act is amended by striking out "member" at the end and substituting "licensee".

(5) Subsection 56 (3.4) of the Act is repealed and the following substituted:

Licensee's responsibility

(3.4) A licensee is responsible to his or her clients for the operation of a joint account maintained by the licensee under section 57.1 as if it were a trust account held solely by the licensee, and the Foundation is not responsible to any person in respect of the joint account except to the extent that its exercise of its powers under clause (1) (d) or (e) has caused a loss to the person.

74. (1) Subsection 57 (1) of the Act is repealed and the following substituted:

Interest on trust funds

Fr

Trust funds to bear interest

(1) Every licensee who holds money in trust for or on account of more than one client in one fund shall hold the money in an account at a bank listed in Schedule I or II to the *Bank Act* (Canada), a credit union or league to which the *Credit Unions and Caisses Populaires Act, 1994* applies or a registered trust corporation, bearing interest at a rate approved by the trustees.

(2) Subsection 57 (3) of the Act is amended by striking out "member" in the portion before clause (a) and substituting "licensee".

(3) Subsections 57 (4) and (5) of the Act are repealed and the following substituted:

Immunity

(4) Subject to subsection (5), a licensee is not liable, whether as a person practising law or providing legal services or as trustee, to account to any person, whether as client or as settlor or beneficiary of the trust, other than the Foundation, for interest on money held under subsection (1).

Exceptions

(5) Nothing in this section affects,

(a) any arrangement in writing between a licensee and the person for whom the licensee holds money in trust as to the disposition of the interest accruing on the money; or

(b) any entitlement of a client to the interest accruing on money held in trust in an account separate from any other money.

75. (1) Subsection 57.1 (1) of the Act is repealed and the following substituted:

Joint trust accounts

(1) A licensee who maintains an account to which subsection 57 (1) applies at a financial institution designated by the regulations shall establish and maintain it as a joint account in the name of the licensee and the Foundation, and shall immediately notify the Foundation that the account has been established and provide such details as may be required by the regulations and by the Foundation.

(2) Subsection 57.1 (2) of the Act is amended by striking out "member" in the portion before clause (a) and substituting "licensee".

Fr

(3) Subsection 57.1 (3) of the Act is amended by striking out "member" wherever it appears and substituting in each case "licensee".

76. (1) Subsection 57.2 (1) of the Act is repealed and the following substituted:

Immunity

(1) The Foundation is not liable to any person, and no proceeding shall be commenced against the Foundation, in respect of,

(a) a dealing by a licensee with trust funds or a failure of a licensee to fulfil his or her obligations under section 57 or 57.1; or

(b) a dealing by a member with trust funds, or a failure of a member to fulfil his or her obligations under section 57, before the amendment day.

(2) Section 57.2 of the Act is amended by adding the following subsection:

Definitions

(3) In this section,

"amendment day" means the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* came into force; ("jour de la modification")

"member" means a member as defined in section 1, as it read immediately before the amendment day. ("membre")

77. (1) Subsection 58 (1) of the Act is repealed and the following substituted:

Report by Society

(1) The Society shall in each year report to the Foundation the name and the office or residence address shown by the records of the Society of every licensee who files a report with the Society that shows the licensee holds money on deposit in a trust account for or on account of clients.

(2) Subsection 58 (2) of the Act is amended by striking out "member" wherever it appears and substituting in each case "licensee".

78. Clause 59 (b.1) of the Act is amended by striki 'member" and substituting "licensee".

Fr

79. Subsection 59.3 (2) of the Act is repealed and the following substituted:

Same

(2) An application under subsection (1) shall not include a claim in respect of the fees of a person practising law or providing legal services.

80. (1) Subsection 59.6 (1) of the Act is amended by striking out "member" wherever it appears and substituting in each case "licensee".

(2) Subsections 59.6 (2) and (3) of the Act are repealed and the following substituted:

Approval of application

(2) If the Society approves an application under subsection (1), the licensee may pay the money to the Society, subject to such terms and conditions as the Society may impose.

Financial records

(3) A licensee who pays money to the Society under subsection (2) shall provide the Society with copies of financial records relating to the money that are in the licensee's possession or control.

(3) Subsection 59.6 (4) of the Act is amended by striking out "member's" and substituting "licensee's".

81. (1) Subsection 59.8 (1) of the Act is repealed and the following substituted:

Transfer to trust fund

(1) Despite section 59.6, the Society may transfer to the trust established by section 59.7 any money received in trust by the Society after February 1, 1999 from a member as defined in section 1, as it read immediately before the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* came into force, or from a licensee, if,

(a) immediately before the money was received by the Society, the member or licensee was holding the money in trust for or on account of a person; and

(b) the Society is unable to locate the person entitled to the money or to determine who is entitled to the money.

(2) Subsection 59.8 (3) of the Act is repealed and the following substituted:

Fr

Money held before February 1, 1999

(3) The Society may transfer to the trust established by section 59.7 any money held in trust by the Society immediately before February 1, 1999, if,

(a) the money was received by the Society from a member as defined in section 1, as it read immediately before the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* came into force, who held the money in trust for or on account of a person; and

(b) the Society is unable to locate the person entitled to the money or to determine who is entitled to the money.

(3) Subsection 59.8 (5) of the Act is repealed and the following substituted:

Liability extinguished

(5) The transfer by the Society under this section, to the trust established by section 59.7, of money received from a person extinguishes the liability of the person as trustee or fiduciary with respect to the amount transferred.

82. (1) Subsection 59.9 (1) of the Act is amended by striking out "The Secretary" at the beginning and substituting "The Society".

(2) Subsection 59.9 (2) of the Act is repealed and the following substituted:

Exception

(2) Subsection (1) does not require publication of,

(a) a name or an address of which the Society is not aware; or

(b) a name or an address of which the Society is aware, if,

(i) publication of the name or address would breach a duty of confidentiality owed by a person who was practising law or providing legal services, or

(ii) there are reasonable grounds for believing that publication of the name or address will result in a significant risk of physical or psychological harm to the person whose name or address is published or to another person.

83. Subsection 59.13 (1) of the Act is repealed and the following substituted:

Fr

Limit on payments

(1) The total of all payments made to claimants under sections 59.10 and 59.11 in respect of money paid to the Society under section 59.6 by a particular person shall not exceed the amount paid to the Society under section 59.6 by that person.

84. Section 59.14 of the Act is repealed and the following substituted:

Former licensees and members

59.14 Sections 59.6 to 59.13 also apply, with necessary modifications, in respect of money held in trust by,

(a) a person who was and has ceased to be a licensee; and

(b) a person who was and has ceased to be a member, as defined in section 1 as it read immediately before the day subsection 2 (6) of Schedule C to the *Access to Justice Act, 2006* came into force, and has never become a licensee.

85. Subsection 60 (1) of the Act is repealed and the following substituted:

Education programs and law degrees

Education programs

(1) The Society may operate programs of pre-licensing education or training and programs of continuing legal education.

86. Section 61 of the Act is repealed and the following substituted:

Indemnity for professional liability

61. The Society,

(a) may make arrangements for licensees respecting indemnity for professional liability and respecting the payment and remission of premiums in connection with such indemnity; and

(b) may require that licensees or one or more classes of licensees pay levies to the Society in connection with such indemnity and may exempt licensees or one or more classes of licensees from the requirement to pay all or any part of the levies.

87. (1) The Act is amended by adding the following heading immediately before section 61.0.1:

PROFESSIONAL CORPORATIONS

Fr

(2) Section 61.0.1 of the Act is repealed and the following substituted:

Professional corporations

61.0.1 (1) Subject to the by-laws,

(a) one or more persons who are licensed to practise law in Ontario as barristers and solicitors may establish a professional corporation for the purpose of practising law in Ontario;

(b) one or more persons who are licensed to provide legal services in Ontario may establish a professional corporation for the purpose of providing legal services in Ontario;

(c) one or more persons who are licensed to practise law in Ontario as barristers and solicitors and one or more persons who are licensed to provide legal services in Ontario may together establish a professional corporation for the purpose of practising law and providing legal services in Ontario.

Professions governed by this Act

(2) For the purposes of section 3.1 of the *Business Corporations Act*, the following professions are governed by this Act and are permitted by this Act to be carried out by a corporation:

1. The practice of law.

2. The provision of legal services.

Application of *Business Corporations Act*

(3) If provisions of the *Business Corporations Act* or of the regulations made under that Act apply to a professional corporation within the meaning of that Act, those provisions apply for the purposes of this Act, subject to subsections (4) and (5).

Shareholders

(4) For the purposes of subsection 3.2 (2) of the *Business Corporations Act*, in the case of a professional corporation described in subsection (1) of this section, the following conditions apply instead of the condition set out in paragraph 1 of subsection 3.2 (2) of the *Business Corporations Act*, despite subsection 3.2 (1) of that Act:

1. All of the issued and outstanding shares of a professional corporation described in clause (1) (a) shall be legally and beneficially owned, directly or indirectly, by one or more persons who are licensed to practise law in Ontario.

2. All of the issued and outstanding shares of a professional corporation described in clause (1) (b) shall be legally and beneficially owned, dire[illegible]irectly, by one or more persons who are licensed to provide legal services in O[illegible]

Fr

3. All of the issued and outstanding shares of a professional corporation described in clause (1) (c) shall be legally and beneficially owned, directly or indirectly, by one or more persons who are licensed to practise law in Ontario or licensed to provide legal services in Ontario.

Articles of incorporation

(5) For the purposes of subsection 3.2 (2) of the *Business Corporations Act*, in the case of a professional corporation described in subsection (1) of this section, the following conditions apply instead of the condition set out in paragraph 5 of subsection 3.2 (2) of the *Business Corporations Act*, despite subsection 3.2 (1) of that Act:

1. The articles of incorporation of a professional corporation described in clause (1) (a) shall provide that the corporation may not carry on a business other than the practice of law, but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to the practice of law, including the investment of surplus funds earned by the corporation.

2. The articles of incorporation of a professional corporation described in clause (1) (b) shall provide that the corporation may not carry on a business other than the provision of legal services, but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to the provision of legal services, including the investment of surplus funds earned by the corporation.

3. The articles of incorporation of a professional corporation described in clause (1) (c) shall provide that the corporation may not carry on a business other than the practice of law and the provision of legal services, but this paragraph shall not be construed to prevent the corporation from carrying on activities related to or ancillary to the practice of law and the provision of legal services, including the investment of surplus funds earned by the corporation.

88. (1) Subsection 61.0.2 (1) of the Act is repealed and the following substituted:

Register

(1) The Society shall establish and maintain a register of corporations that have been issued certificates of authorization.

(2) Section 61.0.2 of the Act is amended by adding the following subsection:

Availability to public

Fr

(3) The Society shall make the register available for public inspection in accordance with the by-laws.

89. Section 61.0.3 of the Act is amended by striking out "Secretary" and substituting "Society".

90. Sections 61.0.4, 61.0.5, 61.0.6 and 61.0.7 of the Act are repealed and the following substituted:

Application of Act, etc.

61.0.4 (1) Any provision of this Act, the regulations, the by-laws or the rules of practice and procedure that applies to a person who is authorized to practise law in Ontario or a person who is authorized to provide legal services in Ontario continues to apply to such person even if his or her practice of law or provision of legal services is carried on through a professional corporation.

Exercise of powers of Society against corporation

(2) Sections 33, 34, 35, 36, 45 to 48 and 49.2, subsections 49.3 (1) and (2) and sections 49.8 to 49.10, 49.44 to 49.52, 57 to 59 and 61 apply with necessary modifications to professional corporations,

(a) as if a reference in those provisions to a licensee were a reference to a professional corporation, except in the expression "conduct unbecoming a licensee", which shall be read as it is and shall not be considered to be a reference to "conduct unbecoming a professional corporation"; and

(b) as if a reference in those provisions to a licence were a reference to a certificate of authorization.

Professional, fiduciary and ethical obligations to clients

61.0.5 (1) The professional, fiduciary and ethical obligations of a person practising law or providing legal services, to a person on whose behalf he or she is practising law or providing legal services,

(a) are not diminished by the fact that he or she is practising law or providing legal services through a professional corporation; and

(b) apply equally to the corporation and to its directors, officers, shareholders, agents and employees.

Audit, etc.

Fr

(2) If an action or the conduct of a person practising law or providing legal services through a professional corporation is the subject of an audit, investigation or review,

(a) any power that may be exercised under this Act in respect of the person in the course, or as a result, of the audit, investigation or review may be exercised in respect of the corporation; and

(b) the corporation is jointly and severally liable with the person for,

(i) all costs that he or she is required by the by-laws to pay in relation to the audit, investigation or review, and

(ii) all fines and costs that he or she is ordered by the Hearing Panel, the Appeal Panel or a court to pay as a result of the audit, investigation or review.

Terms, conditions, etc.

61.0.6 (1) A term, condition, limitation or restriction imposed under this Act on a person practising law or providing legal services through a professional corporation applies to the certificate of authorization of the corporation in relation to the practice of law or provision of legal services by the person.

Same

(2) A term, condition, limitation or restriction imposed under this Act on a professional corporation applies to the persons practising law or providing legal services through the corporation.

Prohibitions and offences, corporations

Requirement to be professional corporation

61.0.7 (1) No corporation, other than a corporation that has been incorporated or continued under the *Business Corporations Act* and holds a valid certificate of authorization, shall practise law in Ontario or provide legal services in Ontario.

Holding out, etc.

(2) No corporation, other than a corporation that has been incorporated or continued under the *Business Corporations Act* and holds a valid certificate of authorization, shall hold out or represent that it is a professional corporation, that it may practise law in Ontario or that it may provide legal services in Ontario.

Compliance with certificate of authorization

(3) No corporation shall practise law in Ontario or provide legal services in Ontario except to the extent permitted by the corporation's certificate of authorization.

Holding out, etc.

Fr

(4) No corporation shall hold out or represent that it may practise law in Ontario or that it may provide legal services in Ontario, without specifying, in the course of the holding out or representation, the restrictions, if any,

(a) on the areas of law that the corporation is authorized to practise or in which the corporation is authorized to provide legal services; and

(b) on the legal services that the corporation is authorized to provide.

Satisfaction of conditions

(5) No corporation shall practise law in Ontario or provide legal services in Ontario when it does not satisfy the conditions set out in paragraphs 2, 3 and 4 of subsection 3.2 (2) of the *Business Corporations Act* and subsections 61.0.1 (4) and (5) of this Act.

Offence, corporation

(6) Every corporation that contravenes this section is guilty of an offence and on conviction is liable to a fine of,

(a) not more than $25,000 for a first offence; and

(b) not more than $50,000 for each subsequent offence.

Offence, directors and officers

(7) If a corporation is guilty of an offence under subsection (6), every director or officer of the corporation who authorized, permitted or acquiesced in the commission of the offence is guilty of an offence and on conviction is liable to a fine of not more than $50,000.

Condition of probation order: compensation or restitution

(8) The court that convicts a person of an offence under subsection (7) may prescribe as a condition of a probation order that the person pay compensation or make restitution to any person who suffered a loss as a result of the offence.

Order for costs

(9) Despite any other Act, the court that convicts a corporation or person of an offence under this section may order the corporation or person to pay the prosecutor costs toward fees and expenses reasonably incurred by the prosecutor in the prosecution.

Deemed order

(10) A certified copy of an order for costs made under subsection (9) may be filed in the Superior Court of Justice by the prosecutor and, on filing, shall b[illegible] to be an order of that court for the purposes of enforcement.

Fr

Limitation

(11) A prosecution for an offence under this section shall not be commenced more than two years after the date on which the offence was alleged to have been committed.

91. Section 61.0.8 of the Act is amended by striking out “members” at the end and substituting “licensees”.

92. Section 61.0.9 of the Act is repealed and the following substituted:

Reference to corporation included

61.0.9 A reference in any other Act or any regulation, rule or order made under any other Act to an individual who practises law, an individual who provides legal services or an individual who is licensed under this Act shall be deemed to include a reference to a professional corporation, if any, through which the individual practises law or provides legal services.

93. Section 61.1 of the Act is repealed and the following substituted:

Limited liability partnerships

61.1 (1) Subject to the by-laws,

(a) two or more persons who are licensed to practise law in Ontario as barristers and solicitors may form a limited liability partnership, or continue a partnership as a limited liability partnership, for the purpose of practising law in Ontario;

(b) two or more persons who are licensed to provide legal services in Ontario may form a limited liability partnership, or continue a partnership as a limited liability partnership, for the purpose of providing legal services in Ontario;

(c) one or more persons who are licensed to practise law in Ontario as barristers and solicitors and one or more persons who are licensed to provide legal services in Ontario may together form a limited liability partnership, or continue a partnership as a limited liability partnership, for the purpose of practising law and providing legal services in Ontario;

(d) two or more professional corporations may form a limited liability partnership, or continue a partnership as a limited liability partnership, for the purpose of practising law in Ontario, providing legal services in Ontario or doing both, as authorized by their certificates of authorization.

Definition

(2) In this section,

“limited liability partnership” means a limited liability part[Fr]s defined in the *Partnerships Act*.

94. (1) Subsection 61.2 (1) of the Act is amended by striking out "sections 46, 47, 48, 49 and 49.1" at the end and substituting "sections 46, 47, 47.1, 48 and 49".

(2) Clause 61.2 (2) (b) of the Act is repealed and the following substituted:

(b) authorizing and governing interlocutory orders in a proceeding or intended proceeding, including interlocutory orders suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services;

(3) Clause 61.2 (2) (d) of the Act is repealed and the following substituted:

(d) prescribing circumstances in which an interlocutory order suspending a licensee's licence may be deemed to be a final order if the licensee does not appear at the hearing of an application;

(4) Clause 61.2 (2) (h) of the Act is amended by striking out "and admonitions" at the end.

95. (1) Subsection 62 (0.1) of the Act is amended by adding the following paragraph:

3.1 for the purposes of paragraph 5 of subsection 1 (8), prescribing persons or classes of persons who shall be deemed not to be practising law or providing legal services and the circumstances in which each such person or class of persons shall be deemed not to be practising law or providing legal services;

(2) Paragraph 4 of subsection 62 (0.1) of the Act is repealed and the following substituted:

4. prescribing the classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence;

4.1 governing the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence;

(3) Paragraph 5 of subsection 62 (0.1) of the Act is amended by striking out "members and student members" at the end and substituting

Fr

"licensees".

(4) Paragraph 6 of subsection 62 (0.1) of the Act is amended by striking out "members" wherever it appears and substituting in each case "licensees".

(5) Paragraph 7 of subsection 62 (0.1) of the Act is repealed and the following substituted:

7. requiring and providing for the examination or audit of licensees' financial records and transactions and for the filing with the Society of reports with respect to such records and transactions;

(6) Paragraph 8 of subsection 62 (0.1) of the Act is amended by striking out "members and student members" and substituting "licensees".

(7) Paragraphs 9, 13 and 14 of subsection 62 (0.1) of the Act are repealed and the following substituted:

9. requiring licensees or any class of licensees, or authorizing the Society to require licensees or any class of licensees, to provide the Society with information or to file certificates, reports or other documents with the Society, relating to the Society's functions under this Act;

. . . . .

13. prescribing offices of the Society, the holders of which may exercise a power or perform a duty under this Act, the regulations, the by-laws or the rules of practice and procedure, or the holders of which may be appointed by Convocation to exercise a power or perform a duty under this Act, the regulations, the by-laws or the rules of practice and procedure, and specifying the powers they may exercise or be appointed to exercise and the duties they may perform or be appointed to perform;

14. prescribing fees and levies relating to the functions of the Society, including fees for late compliance with any obligation, that must be paid to the Society by,

i. licensees or any class of licensees,

ii. applicants for a licence or any class of applicants for a licence,

iii. limited liability partnerships that practise law or provide legal services, and applicants for a permit for a limited liability partnership[illegible]ise law or provide legal services,

Fr

iv. professional corporations and applicants for a certificate of authorization for a corporation,

v. persons who give legal advice respecting the law of a jurisdiction outside Canada, and applicants for a permit to give such advice,

vi. persons authorized to practise law or provide legal services outside Ontario who are permitted to represent one or more other persons in a specific proceeding before an adjudicative body in Ontario, and applicants for such permission,

vii. persons authorized to practise law or provide legal services in another province or territory of Canada who are permitted to engage in the occasional practice of law or provision of legal services in Ontario, and applicants for such permission,

viii. partnerships, corporations and other organizations that practise law or provide legal services and that maintain one or more offices outside Ontario and one or more offices in Ontario, and applicants for a permit to engage in such practice of law or provision of legal services, and

ix. persons, partnerships, corporations and other organizations that practise law or provide legal services and that also practise another profession or provide other services, and applicants for a permit to engage in such activities;

(8) Paragraph 16 of subsection 62 (0.1) of the Act is amended by striking out "member or student member" and substituting "licensee".

(9) Paragraphs 18, 19, 20 and 23 of subsection 62 (0.1) of the Act are repealed and the following substituted:

18. providing for and governing meetings of members of the Society, as set out in subsection 2 (2), or their representatives;

19. defining who is a student, prescribing classes of students and describing each class, and governing students, including,

i. governing the employment of students,

ii. making any provision of this Act, the regulations, the by-laws or the rules of practice and procedure apply to students with necessary modifications or subject to such modifications as may be specified by the by-laws, and

iii. specifying provisions of this Act, the regulations, the by-laws or the rules of practice and procedure that do not apply to students;

20. defining who is a clerk and governing the employment o y persons licensed to practise law in Ontario as barristers and solicitors;

Fr

. . . . .

23. respecting legal education, including programs of pre-licensing education or training;

(10) Paragraph 24 of subsection 62 (0.1) of the Act is amended by striking out "members" and substituting "licensees".

(11) Paragraphs 25 and 26 of subsection 62 (0.1) of the Act are repealed and the following substituted:

25. prescribing, for the purposes of section 26.1, persons or classes of persons who are permitted to practise law in Ontario without being licensed to do so and persons or classes of persons who are permitted to provide legal services in Ontario without being licensed to do so, prescribing the circumstances in which persons who are not licensees are permitted to practise law or to provide legal services in Ontario, and prescribing the extent to which persons who are not licensees are permitted to practise law or to provide legal services in Ontario, including specifying the areas of law that such persons may practise or in which such persons may provide legal services and the legal services that such persons may provide;

26. prescribing oaths and affirmations for applicants for a licence or any class of applicants for a licence;

(12) Paragraph 28 of subsection 62 (0.1) of the Act is repealed and the following substituted:

28. governing the practice of law and the provision of legal services by limited liability partnerships, including requiring those partnerships to maintain a minimum amount of liability insurance for the purposes of clause 44.2 (b) of the *Partnerships Act*, requiring that those partnerships hold a permit to practise law or provide legal services, governing the issuance, renewal, suspension and revocation of such permits and governing the terms and conditions that may be imposed on such permits;

(13) Paragraph 28.1 of subsection 62 (0.1) of the Act is amended by striking out "governing the practice of law" at the beginning and substituting "governing the practice of law and the provision of legal services".

(14) Paragraphs 29, 30, 31, 32 and 33 of subsection of the Act are repealed and the following substituted:

Fr

29. providing for persons authorized to practise law or provide legal services outside Ontario to be permitted to represent one or more other persons in a specific proceeding before an adjudicative body in Ontario, subject to the approval of the adjudicative body, governing the granting of permission and the terms and conditions to which the permission may be subject, and making any provision of this Act, the regulations, the by-laws or the rules of practice and procedure apply to those persons with necessary modifications or subject to such modifications as may be specified by the by-laws;

30. providing for persons authorized to practise law or provide legal services in another province or territory of Canada to be permitted to engage in the occasional practice of law or provision of legal services in Ontario, governing the granting of permission and the terms and conditions to which the permission may be subject, and making any provision of this Act, the regulations, the by-laws or the rules of practice and procedure apply to those persons with necessary modifications or subject to such modifications as may be specified by the by-laws;

31. governing the practice of law and the provision of legal services by any partnership, corporation or other organization that maintains one or more offices outside Ontario and one or more offices in Ontario, including requiring that those partnerships, corporations and other organizations hold a permit to practise law or provide legal services, governing the issuance, renewal, suspension and revocation of such permits and governing the terms and conditions that may be imposed on such permits;

32. governing the practice of law and the provision of legal services by any person, partnership, corporation or other organization that also practises another profession or provides other services, including requiring that those persons, partnerships, corporations and other organizations hold a permit to engage in such activities, governing the issuance, renewal, suspension and revocation of such permits and governing the terms and conditions that may be imposed on such permits;

33. regulating the giving of legal advice respecting the law of a jurisdiction outside Canada, including requiring a permit issued by the Society, governing the issuance, renewal, suspension and revocation of such permits and governing the terms and conditions that may be imposed on such permits;

(15) Paragraph 34 of subsection 62 (0.1) of the Act is amended by striking out “members” wherever it appears and substituting in each case “licensees”.

(16) Paragraphs 35, 36 and 37 of subsection 62 (0.1) of the Act are repealed and the following substituted:

Fr

35. governing applications to surrender a licence under section 30 and the acceptance by the Society of such applications;

36. respecting the Compensation Fund;

37. governing applications to pay trust money to the Society under section 59.6 and the approval by the Society of such applications;

37.1 governing the making of claims under section 59.10 and the determination and payment by the Society of such claims;

(17) Paragraphs 40 and 41 of subsection 62 (0.1) of the Act are repealed and the following substituted:

40. governing reviews under section 42, including,

i. prescribing, for the purpose of clause 42 (1) (a), circumstances in which the Society may conduct a review under section 42, and

ii. prescribing, for the purpose of subsection 42 (6), the time within which a licensee may accept a proposal for an order;

(18) Paragraphs 45 and 46 of subsection 62 (0.1) of the Act are repealed.

(19) Paragraph 47 of subsection 62 (0.1) of the Act is amended by adding at the end "or the provision of legal services".

(20) Subsection 62 (0.1) of the Act is amended by adding the following paragraphs:

49. governing the register that the Society is required to establish and maintain under section 27.1, including prescribing information that the register must contain in addition to the information required under section 27.1, governing the removal of information from the register and governing the Society's duty under section 27.1 to make the register available for public inspection;

50. governing the register that the Society is required to establish and maintain under section 61.0.2, including prescribing information that the register must contain, governing the removal of information from the register and governing the Society's duty under section 61.0.2 to make the register available for public inspection;

51. prescribing requirements to be met by licensees with respect to indemnity for professional liability;

52. providing for such transitional matters as Convocation considers necessary or advisable in connection with the implementation of the amendments to this Act made by Schedule C to the *Access to Justice Act, 2006*.

Fr

(21) Paragraph 6.1 of subsection 62 (1) of the Act is repealed and the following substituted:

6.1 governing the election of benchers under subsection 16 (1), including prescribing the day on which the first election of such benchers must take place, requiring such benchers to be elected for regions and prescribing the regions, prescribing the terms of office of elected benchers, governing the qualifications required to be a candidate or vote in elections and providing for challenges of election results;

6.2 governing the filling of vacancies under subsection 15 (3) and the filling of vacancies under subsection 16 (3);

(22) Paragraph 8 of subsection 62 (1) of the Act is repealed and the following substituted:

8. providing for the appointment of and prescribing the duties of the Chief Executive Officer and such other officers as are considered appropriate;

(23) Subsection 62 (1) of the Act is amended by adding the following paragraph:

10.1 providing for the establishment, jurisdiction, operation, duties and powers of the Paralegal Standing Committee, including,

i. specifying the matters for which the Committee is responsible and the matters for which it is not responsible,

ii. governing the election of five persons who are licensed to provide legal services in Ontario as members of the Committee, prescribing the day on which the first election of such members must take place, prescribing their term of office and governing the filling of vacancies in their offices,

iii. governing the appointment of five elected benchers who are licensed to practise law in Ontario and three lay benchers as members of the Committee, prescribing their term of office and governing their reappointment, and

iv. governing the appointment and reappointment of the chair of the Committee;

(24) Subsection 62 (3) of the Act is repealed and the following substituted:

Availability of copies of by-laws

(3) The Society shall,

Fr

(a) file a copy of the by-laws, as amended from time to time, in the office of the Attorney General for Ontario; and

(b) make a copy of the by-laws, as amended from time to time, available for public inspection.

96. (1) Subparagraph 12 iii of subsection 63 (1) of the Act is repealed.

(2) Paragraph 14 of subsection 63 (1) of the Act is amended by adding "and members of the Appeal Panel" after "members of the Hearing Panel".

97. The Act is amended by adding the following section:

Reports Regarding Regulation of Persons Licensed to Provide Legal Services

Report after two years

Definition

63.0.1 (1) In this section,

"review period" means the period beginning on the day on which the *Access to Justice Act, 2006* receives Royal Assent and ending on the second anniversary of that day.

Report by Society

(2) The Society shall,

(a) assess the extent to which the by-laws made by Convocation during the review period in relation to persons who provide legal services in Ontario are consistent with the principles set out in the document titled "Task Force on Paralegal Regulation Report to Convocation" dated September 23, 2004, available from the Society;

(b) prepare a report of the assessment; and

(c) give the report to the Attorney General for Ontario within three months after the end of the review period.

Tabling in Assembly

(3) The Attorney General shall submit the report to the Lieutenant Governor in Council and shall then lay the report before the Assembly if it is in session or, if not, at the next session.

98. The Act is amended by adding the following section:

Reports after five years

Definition

Fr

63.1 (1) In this section,

"review period" means the period beginning on the day on which all of the amendments to this Act made by Schedule C to the *Access to Justice Act, 2006* have come into force and ending on the fifth anniversary of that day.

Review and report by Society

(2) The Society shall,

(a) review the manner in which persons who provide legal services in Ontario have been regulated under this Act during the review period and the effect that such regulation has had on those persons and on members of the public;

(b) prepare a report of the review, ensuring that a portion of the report is authored by the Paralegal Standing Committee; and

(c) give the report to the Attorney General for Ontario within three months after the end of the review period.

Appointment by Attorney General

(3) The Attorney General for Ontario shall appoint a person, other than a person who is authorized to practise law in Ontario or a person who is authorized to provide legal services in Ontario, to review the manner in which persons who provide legal services in Ontario have been regulated under this Act during the review period and the effect that such regulation has had on those persons and on members of the public.

Review and report by appointee

(4) The person appointed under subsection (3) shall,

(a) review the manner in which persons who provide legal services in Ontario have been regulated under this Act during the review period and the effect that such regulation has had on those persons and on members of the public; and

(b) prepare a report of the review and give the report to the Attorney General for Ontario within six months after the end of the review period.

Application

(5) This section does not require a review respecting persons who are licensed to practise law in Ontario as barristers and solicitors or persons who are permitted by the by-laws to practise law in Ontario as barristers and solicitors without a licence.

Related Amendments to Other Acts Fr

Barristers Act

99. (1) Section 1 of the *Barristers Act* is amended by striking out "admission" and substituting "licensing".

(2) Subsection 2 (2) of the Act is repealed and the following substituted:

Licence revocation revokes Q.C. appointment

(2) If a barrister holds an appointment as a Queen's counsel for Ontario, the revocation of his or her licence under the *Law Society Act* has the effect of revoking the appointment.

Child and Family Services Act

100. (1) Clause 151 (2) (b) of the *Child and Family Services Act* is amended by striking out "their solicitors and agents" and substituting "the persons representing them under the authority of the *Law Society Act*".

(2) Subsection 172 (8) of the Act is repealed and the following substituted:

Representative not to be excluded

(8) When the Board acts under subsection (6) or (7), the person authorized under the *Law Society Act* to represent the person who requested the review is nevertheless entitled to examine the information and to be present, to cross-examine witnesses and to make submissions, or to examine the evidence and submissions and respond to them, as the case may be, on condition that the representative undertakes not to reveal the information, evidence and submissions to his or her client.

Bill 183 — *Adoption Information Disclosure Act, 2005*

101. (1) This section applies only if Bill 183 (*Adoption Information Disclosure Act, 2005*, introduced on March 29, 2005) receives Royal Assent.

(2) References in this section to provisions of Bill 183 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) On the later of the day subsection 100 (2) of this Schedule comes into force and the day section 24 of Bill 183 comes into force, subsection 172 (8) of the *Child and Family Services Act*, as re-enacted by subsection 100 (2) of this Schedule and repealed by section 24 of Bill 183, is repealed.

Fr

Construction Lien Act

102. (1) Subsection 39 (6) of the *Construction Lien Act* is amended by striking out "solicitor-and-client" and substituting "substantial indemnity".

(2) Subsection 67 (5) of the Act is repealed and the following substituted:

Representation

(5) A lien claimant whose claim is for an amount within the monetary jurisdiction of the Small Claims Court may be represented by a person authorized under the *Law Society Act* to represent the claimant.

(3) Subsection 86 (1) of the Act is repealed and the following substituted:

Costs

(1) Subject to subsection (2), any order as to the costs in an action, application, motion or settlement meeting is in the discretion of the court, and an order as to costs may be made against,

(a) a party to the action or motion; or

(b) a person who represented a party to the action, application or motion, where the person,

(i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for a lien is without foundation or is for a grossly excessive amount, or that the lien has expired, or

(ii) prejudiced or delayed the conduct of the action,

and the order may be made on a substantial indemnity basis, including where the motion is heard by, or the action has been referred under section 58 to, a master, case management master or commissioner.

Co-operative Corporations Act

103. (1) Clause 66 (2) (c) of the *Co-operative Corporations Act* is amended by striking out "by an agent or counsel" and substituting "by a person authorized under the *Law Society Act* to represent the member".

(2) Paragraphs 6 and 13 of subsection 171.8 (2) of [illegible] are amended by striking out "by agent or counsel" where[illegible] appears and

Fr

substituting in each case "by a person authorized under the *Law Society Act* to represent the member".

(3) Section 171.18 of the Act is repealed and the following substituted:

Party may be represented

171.18 (1) A party to an application under section 171.13 or 171.14 may be represented by a person authorized under the *Law Society Act* to represent the party.

Exclusion of representatives

(2) A judge of the Superior Court of Justice may exclude from a hearing anyone, other than a person who is licensed under the *Law Society Act*, appearing on behalf of a party if the judge finds that such person is not competent properly to represent or to advise the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

Coroners Act

104. (1) Clause 41 (2) (a) of the *Coroners Act* is amended by striking out "by counsel or an agent" at the end and substituting "by a person authorized under the *Law Society Act* to represent the person with standing".

(2) Section 43 of the Act is repealed and the following substituted:

Rights of witnesses to representation

43. (1) A witness at an inquest is entitled to be advised as to his or her rights by a person authorized under the *Law Society Act* to advise him or her, but such person may take no other part in the inquest without leave of the coroner.

Same

(2) Where an inquest is held in the absence of the public, a person advising a witness under subsection (1) is not entitled to be present except when that witness is giving evidence.

(3) Subsection 50 (3) of the Act is repealed and the following substituted:

Exclusion of representatives

(3) A coroner may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, advising a witness if the coroner finds that such person is not competent properly to advise the witness, or does not understand and comply at the inquest with the duties and responsibilities of an adviser.

Fr

Courts of Justice Act

105. (1) Section 26 of the *Courts of Justice Act* is repealed and the following substituted:

Representation

26. A party may be represented in a proceeding in the Small Claims Court by a person authorized under the *Law Society Act* to represent the party, but the court may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of the party if it finds that such person is not competent properly to represent the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate.

(2) Section 29 of the Act is amended by striking out "a party, counsel or agent" and substituting "a party or a party's representative".

(3) Subsection 51.6 (4) of the Act is repealed and the following substituted:

Communication re subject-matter of hearing

(4) The members of the Judicial Council participating in the hearing shall not communicate directly or indirectly in relation to the subject-matter of the hearing with any person, unless all the parties and the persons representing the parties under the authority of the *Law Society Act* receive notice and have an opportunity to participate.

(4) Clauses 66 (2) (c) and (r) of the Act are repealed and the following substituted:

(c) commencement of proceedings, representation of parties and service of process in or outside Ontario;

. . . . .

(r) costs of proceedings, including security for costs and, in the case of a person representing a party or other person, the representative's liability for, or disentitlement to, costs;

Credit Unions and Caisses Populaires Act, 1994

106. (1) Clause 47 (2) (b) of the *Credit Unions and Caisses Populaires Act, 1994* is amended by striking out "by counsel or ag d substituting

Fr

"by a person authorized under the *Law Society Act* to represent the member".

(2) Subsection 100 (5) of the Act is repealed and the following substituted:

Right to representation

(5) The director may be represented at the meeting by a person authorized under the *Law Society Act* to represent him or her.

(3) Subsection 118 (5) of the Act is repealed and the following substituted:

Right to representation

(5) The committee member may be represented at the meeting by a person authorized under the *Law Society Act* to represent him or her.

(4) Subsection 136 (5) of the Act is repealed and the following substituted:

Right to representation

(5) The committee member may be represented at the meeting by a person authorized under the *Law Society Act* to represent him or her.

Drainage Act

107. Subsection 52 (1) of the *Drainage Act* is amended by striking out "personally, or by agent".

Environmental Protection Act

108. (1) Section 185 of the *Environmental Protection Act* is amended by striking out "The counsel or agent acting on behalf of the Crown" at the beginning and substituting "The Crown".

(2) Subsection 190 (3) of the Act is repealed and the following substituted:

Variation of order

(3) The court that made an order under subsection (1) may make changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances,

Fr

(a) on its own initiative at any time; or

(b) on application by counsel for the prosecutor, by the person convicted or by the person authorized under the *Law Society Act* to represent the person convicted, with notice to the other party, after a hearing or, with the consent of the parties, without a hearing.

Expropriations Act

109. Clause 7 (9) (b) of the *Expropriations Act* is amended by striking out "by counsel or agent" at the end and substituting "by a person authorized under the *Law Society Act* to represent the party".

Freedom of Information and Protection of Privacy Act

110. Subsection 52 (14) of the *Freedom of Information and Protection of Privacy Act* is repealed and the following substituted:

Right to representation

(14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by a person authorized under the *Law Society Act* to represent him or her.

Health Care Consent Act, 1996

111. (1) Clause 73 (2) (b) of the *Health Care Consent Act, 1996* is repealed and the following substituted:

(b) he or she is a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor and, throughout the 10-year period immediately preceding the assignment, he or she has been,

(i) a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor, or

(ii) a member of the Law Society of Upper Canada and, subsequently, a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor;

(2) Subsections 75 (3) and (4) of the Act are repealed and the following substituted:

Decision

Fr

(3) The Board shall render its decision and provide a copy of the decision to each party or the person who represented the party within one day after the day the hearing ends.

Reasons

(4) If, within 30 days after the day the hearing ends, the Board receives a request from any of the parties for reasons for its decision, the Board shall, within two business days after the day the request is received,

(a) issue written reasons for its decision; and

(b) provide a copy of the reasons to each person who received a copy of the decision under subsection (3).

(3) Subsection 76 (2) of the Act is amended by striking out "his or her counsel or agent" and substituting "the person authorized under the *Law Society Act* to represent him or her".

(4) Subsection 77 (1) of the Act is repealed and the following substituted:

Communication re subject-matter of hearing

(1) The member or members of the Board conducting a hearing shall not communicate about the subject-matter of the hearing directly or indirectly with any person, unless all the parties and the persons representing the parties under the authority of the *Law Society Act* receive notice and have an opportunity to participate.

(5) Subsection 77 (2) of the Act is amended by striking out "their counsel or agents" and substituting "the persons representing the parties under the authority of the *Law Society Act*".

Health Facilities Special Orders Act

112. Subsection 11 (3) of the *Health Facilities Special Orders Act* is amended by striking out "through an agent" at the end and substituting "through a person authorized under the *Law Society Act* to represent the non-party".

Independent Health Facilities Act

113. Subsection 21 (2) of the *Independent Health Facilities Act* is amended by striking out "through an agent" at the end and substituting "through a person authorized under the *Law Society Act* to represent the non-party".

Fr

Juries Act

114. Subsection 40 (2) of the *Juries Act* is repealed and the following substituted:

Revocation or suspension of licence, etc.

(2) A solicitor, barrister or student-at-law who is guilty of such offence may, in addition to any other penalty, have his or her licence under the *Law Society Act* to practise law or provide legal services revoked or suspended, or his or her name may be erased from the register of the Law Society or removed from the register for a limited time, by the Superior Court of Justice upon motion at the instance and in the name of the Attorney General.

Legal Aid Services Act, 1998

115. (1) The definitions of "lawyer" and "student" in section 2 of the *Legal Aid Services Act, 1998* are repealed and the following substituted:

"lawyer" means a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor; ("avocat")

"student" means a person enrolled in a program of pre-licensing education or training under the *Law Society Act* or in any law course approved by the Law Society. ("étudiant")

(2) Subsection 22 (3) of the Act is amended by striking out "who must be a member of the Law Society" at the end and substituting "who must be a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor".

Licence Appeal Tribunal Act, 1999

116. Section 10 of the *Licence Appeal Tribunal Act, 1999* is repealed and the following substituted:

Service of decisions and orders

10. The Tribunal shall send a copy of its final decision or order, including any reasons, to each party to a hearing, or to the person who represented the party, by,

(a) regular mail;

(b) electronic transmission of a facsimile; or

(c) such other method that the Tribunal specifies in its rules.

Fr

Ministry of Health Appeal and Review Boards Act, 1998

117. (1) Subsection 7.1 (4) of the *Ministry of Health Appeal and Review Boards Act, 1998* is repealed and the following substituted:

Appointment, lawyers

(4) On the recommendation of the Minister of Health and Long-Term Care, the Lieutenant Governor in Council shall appoint to the Board, to serve as members of the Transitional Physician Audit Panel, no fewer than three persons who are licensed under the *Law Society Act* to practise law in Ontario as barristers and solicitors.

(2) Paragraph 2 of subsection 7.1 (6) of the Act is repealed and the following substituted:

2. Two of the three members shall be legally qualified medical practitioners, and one shall be a person licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor.

Municipal Act, 2001

118. (1) Section 386.3 of the *Municipal Act, 2001* is amended by adding the following subsection:

Inspection warrant

Definition

(0.1) In this section,

"representative" means, in respect of a proceeding under this section, a person authorized under the *Law Society Act* to represent an owner or occupant in that proceeding.

(2) The English version of clauses 386.3 (2) (d) and (e) of the Act is repealed and the following substituted:

(d) the right of an owner or occupant or a representative of an owner or occupant to appear and make representations; and

(e) the fact that if the owner, occupant or representative fails to appear, the judge or justice of the peace may issue or extend the warrant in their absence.

(3) The English version of subsection 386.3 (3) of the Act is amended by striking out "an agent of that person" and substituting "that person's representative".

Municipal Freedom of Information and Protection of Privacy Act

Fr

119. Subsection 41 (14) of the *Municipal Freedom of Information and Protection of Privacy Act* is repealed and the following substituted:

Right to representation

(14) The person who requested access to the record, the head of the institution concerned and any affected party may be represented by a person authorized under the *Law Society Act* to represent him or her.

Notaries Act

120. Subsection 7 (1) of the *Notaries Act* is repealed and the following substituted:

Suspension

(1) If a notary public who is licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor ceases for any reason to be so licensed or if his or her licence is under suspension or in abeyance, his or her appointment as a notary public is suspended until such time as he or she is relicensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor or until such time as his or her licence is no longer under suspension or in abeyance.

Nursing Homes Act

121. Subsection 16 (2) of the *Nursing Homes Act* is amended by striking out "through an agent" at the end and substituting "through a person authorized under the *Law Society Act* to represent the non-party".

Nutrient Management Act, 2002

122. (1) Section 47 of the *Nutrient Management Act, 2002* is amended by striking out "The counsel or agent acting on behalf of the Crown" at the beginning and substituting "The Crown".

(2) Clause 50 (3) (b) of the Act is amended by striking out "or by the counsel or agent for the person convicted" and substituting "or by the person authorized under the *Law Society Act* to represent the person convicted".

Ontario Home Ownership Savings Plan Act

Fr

123. The definition of "solicitor" in subsection 1 (1) of the *Ontario Home Ownership Savings Plan Act* is repealed and the following substituted:

"solicitor" means a person who is licensed under the *Law Society Act* to practise law in Ontario as a barrister and solicitor and who maintains all insurance coverage that may be required by the Law Society of Upper Canada from time to time in connection with and for the purposes of carrying on the private practice of law in Ontario; ("procureur")

Ontario Society for the Prevention of Cruelty to Animals Act

124. Subsection 17 (5) of the *Ontario Society for the Prevention of Cruelty to Animals Act* is amended by striking out "by counsel or an agent" at the end and substituting "by persons authorized under the *Law Society Act* to represent them".

Ontario Water Resources Act

125. (1) Subsection 48 (3) of the *Ontario Water Resources Act* is repealed and the following substituted:

Appearance by respondent

(3) The respondent to an application under subsection (1) may,

(a) appear in person or by a person authorized under the *Law Society Act* to represent the respondent at the hearing of the application; or

(b) make submissions to the Tribunal by telephone or other means for consideration at the hearing.

(2) Section 105 of the Act is amended by striking out "The counsel or agent acting on behalf of the Crown" at the beginning and substituting "The Crown".

(3) Subsection 112 (3) of the Act is repealed and the following substituted:

Variation of order

(3) The court that made an order under subsection (1) may make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances,

(a) on its own initiative at any time; or

Fr

(b) on application by counsel for the prosecutor, by the person convicted or by the person authorized under the *Law Society Act* to represent the person convicted, with notice to the other party, after a hearing or, with the consent of the parties, without a hearing.

Parental Responsibility Act, 2000

126. (1) The French version of the definition of "parent" in section 1 of the *Parental Responsibility Act, 2000* is amended by adding "Le terme «parents» a un sens correspondant." after clause (e).

(2) Subsection 3 (1) of the Act is amended by adding the following definition:

"representative" means, in respect of a proceeding under this Act, a person authorized under the *Law Society Act* to represent the claimant, the child, or the child's parents in that proceeding. ("représentant")

(3) Clause 3 (5) (a) of the Act is repealed and the following substituted:

(a) the court file shall not be disclosed to any person except,

(i) the court and authorized court employees,

(ii) the claimant and the claimant's representative, and

(iii) the child, his or her parents and their representatives; and

Pay Equity Act

127. (1) Section 32 of the *Pay Equity Act* is amended by adding the following subsection:

Parties to proceedings

Definition

(0.1) In this section,

"representative" means, in respect of a proceeding under this Act, a person authorized under the *Law Society Act* to represent a person or persons in that proceeding.

(2) Subsection 32 (3) of the Act is repealed and the following substituted:

Representation

(3) An employee or a group of employees may appoint a repr[Fr]e to represent the employee or group of employees before the Hearings Tribunal or before a review officer.

(3) Subsection 32 (4) of the Act is amended by striking out "the agent" and substituting "the representative".

(4) Subsection 32 (5) of the Act is amended by striking out "the agent, in the agent's name" and substituting "the representative, in the representative's name".

Personal Health Information Protection Act, 2004

128. Subsection 72 (5) of the *Personal Health Information Protection Act, 2004* is amended by striking out "a counsel or agent acting on behalf of" and substituting "an agent for".

Pesticides Act

129. (1) Subsection 13 (10) of the *Pesticides Act* is amended by striking out "by an agent" and substituting "by a person authorized under the *Law Society Act* to represent the applicant or permittee".

(2) Subsection 27 (2) of the Act is amended by striking out "by an agent" and substituting "by a person authorized under the *Law Society Act* to represent the person affected".

(3) Section 41 of the Act is amended by striking out "The counsel or agent acting on behalf of the Crown" at the beginning and substituting "The Crown".

(4) Subsection 46 (3) of the Act is repealed and the following substituted:

Variation of order

(3) The court that made an order under subsection (1) may make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances,

(a) on its own initiative at any time; or

(b) on application by counsel for the prosecutor, by the person convicted or by the person authorized under the *Law Society Act* to represent the person convicted, with notice to the other party, after a hearing or, with the consent of the parties, without a hearing.

Fr

Police Services Act

130. (1) Clause 64 (8) (b) of the *Police Services Act* is repealed and the following substituted:

(b) a person authorized under the *Law Society Act* to be a prosecutor at the hearing.

(2) Subsection 65 (10) of the Act is repealed and the following substituted:

Prosecutor at hearing

(10) The board or Commission, as the case may be, shall designate as the prosecutor at the hearing a person authorized under the *Law Society Act* to be a prosecutor at the hearing.

(3) Subsection 69 (4) of the Act is repealed and the following substituted:

Notice to parties and right to representation

(4) The parties to the hearing shall be given reasonable notice of the hearing, and each party may be represented by a person authorized under the *Law Society Act* to represent the party.

(4) Subsection 69 (13) of the Act is amended by striking out "or person's counsel or agent".

Provincial Offences Act

131. (1) The definition of "prosecutor" in subsection 1 (1) of the *Provincial Offences Act* is amended by striking out "counsel or agent" and substituting "an agent".

(2) Subsection 1 (1) of the Act is amended by adding the following definition:

"representative" means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding; ("représentant")

(3) The English version of subsections 5.1 (3), 17.1 (3) and 18.1.1 (3) of the Act are amended by striking out "by agent" wherever it appears and substituting in each case "by representative".

(4) The French version of subsection 21 (2) of the Act is amended by striking out "son représentant" and substituting "s dataire".

(5) The French version of subsection 32 (1) of th s amended by striking out "son représentant" and substituting "son mandataire".

Fr

(6) Subsection 43 (3) of the Act is amended by striking out "by counsel or agent" wherever it appears and substituting in each case "by representative".

(7) Subsections 50 (1) and (2) of the Act are amended by striking out "by counsel or agent" wherever it appears and substituting in each case "by representative".

(8) Subsection 50 (3) of the Act is repealed and the following substituted:

Exclusion of representatives

(3) The court may bar any person, other than a person who is licensed under the *Law Society Act*, from appearing as a representative if the court finds that the person is not competent properly to represent or advise the person for whom he or she appears, or does not understand and comply with the duties and responsibilities of a representative.

(9) Section 51 of the Act is amended by striking out "by counsel or agent" and substituting "by representative".

(10) The French version of subsection 54 (2) of the Act is amended by striking out "son représentant" at the end and substituting "son mandataire".

(11) Subsection 56 (2) of the Act is amended by striking out "or the defendant's counsel or agent" and substituting "or the defendant's representative".

(12) Subsection 57 (1) of the Act is repealed and the following substituted:

Submissions as to sentence

(1) Where a defendant who appears is convicted of an offence, the court shall give the prosecutor and the defendant's representative an opportunity to make submissions as to sentence and, where the defendant has no representative, the court shall ask the defendant if he or she has anything to say before sentence is passed.

(13) The French version of section 62 of the Act is amended by striking out "son représentant" and substituting "de son m re".

(14) Section 82 of the Act is repealed and the following substituted:

Fr

Representation

82. A defendant may act by representative.

(15) Subsection 91 (7) of the Act is repealed and the following substituted:

Barring representative in contempt

(7) Where the offender is appearing before the court as a representative and the offender is not licensed under the *Law Society Act*, the court may order that he or she be barred from acting as representative in the proceeding in addition to any other punishment to which he or she is liable.

(16) Subsection 100 (2) of the Act is amended by striking out "his or her counsel or agent" and substituting "his or her representative".

(17) The definition of "counsel" in section 109 of the Act is repealed.

(18) Subsection 117 (2) of the Act is amended by striking out "their counsel" and substituting "their representatives".

(19) Subsection 118 (1) of the Act is repealed and the following substituted:

Right to representation

(1) An appellant or respondent may appear and act personally or by representative.

(20) The French version of subsection 153 (1) of the Act is amended by striking out "à titre de représentant" and substituting "à titre de mandataire".

(21) The definition of "prosecutor" in subsection 167 (2) of the Act is amended by striking out "counsel or agent" and substituting "an agent".

Public Authorities Protection Act

132. Subsection 6 (1) of the *Public Authorities Protection Act* is amended by striking out "by his or her solicitor or agent" and substituting "by a person authorized under the *Law Society Act* to rep him or her".

Safe Drinking Water Act, 2002

Fr

133. Subsection 146 (3) of the *Safe Drinking Water Act, 2002* is repealed and the following substituted:

Variation of order

(3) The court that made an order under subsection (1) may make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in circumstances,

(a) on its own initiative at any time; or

(b) on application by counsel for the prosecutor, by the person convicted or by a person authorized under the *Law Society Act* to represent the person convicted, with notice to the other party, after a hearing or, with the consent of the parties, without a hearing.

Statutory Powers Procedure Act

134. (1) The definition of "oral hearing" in subsection 1 (1) of the *Statutory Powers Procedure Act* is amended by striking out "their counsel or agents" and substituting "their representatives".

(2) Subsection 1 (1) of the Act is amended by adding the following definition:

"representative" means, in respect of a proceeding to which this Act applies, a person authorized under the *Law Society Act* to represent a person in that proceeding; ("représentant")

(3) Section 10 of the Act is repealed and the following substituted:

Right to representation

10. A party to a proceeding may be represented by a representative.

(4) Subsection 11 (1) of the Act is repealed and the following substituted:

Rights of witnesses to representation

(1) A witness at an oral or electronic hearing is entitled to be advised by a representative as to his or her rights, but such representative may take no other part in the hearing without leave of the tribunal.

(5) Subsection 11 (2) of the Act is amended by striking out "the counsel or agent for a witness" and substituting "the witne resentative".

Fr

(6) Subsection 18 (1) of the Act is amended by striking out "counsel or agent" in the portion before clause (a) and substituting "representative".

(7) Subsection 23 (3) of the Act is repealed and the following substituted:

Exclusion of representatives

(3) A tribunal may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of a party or as an adviser to a witness if it finds that such person is not competent properly to represent or to advise the party or witness, or does not understand and comply at the hearing with the duties and responsibilities of an advocate or adviser.

Succession Law Reform Act

135. Subsection 42 (3) of the *Succession Law Reform Act* is repealed and the following substituted:

Persons authorized under convention

(3) All persons licensed under the *Law Society Act* to practise law in Ontario as barristers and solicitors are designated as persons authorized to act in connection with international wills.

Tenant Protection Act, 1997

136. (1) Subsection 172 (2) of the *Tenant Protection Act, 1997* is repealed and the following substituted:

Application filed by representative

(2) An applicant may give written authorization to sign an application to a person representing the applicant under the authority of the *Law Society Act* and, if the applicant does so, the Tribunal may require such representative to file a copy of the authorization.

(2) Subsection 190 (3) of the Act is amended by striking out "a paid agent or counsel to a party" and substituting "the party's paid representative".

(3) Subsection 194 (1) of the Act is amended by striking out "the party's counsel or agent" and substituting "the person who represented the party".

Fr

Waste Management Act, 1992

137. (1) Section 10 of the *Waste Management Act*, *1992* is amended by adding the following subsection:

Inspection warrant

Definition

(0.1) In this section,

"representative" means, in respect of a proceeding under this section, a person authorized under the *Law Society Act* to represent an owner or occupant in that proceeding.

(2) The English version of clause 10 (2) (d) of the Act is amended by striking out "an agent of an owner or occupant" and substituting "an owner's or occupant's representative".

(3) The English version of clause 10 (2) (e) of the Act is amended by striking out "or agent" and substituting "or owner's or occupant's representative".

(4) The English version of subsection 10 (3) of the Act is amended by striking out "an agent of that person" and substituting "that person's representative".

COMMENCEMENT

Commencement

138. (1) Sections 16 and 19, subsection 95 (23) and this section come into force on the day the *Access to Justice Act*, *2006* receives Royal Assent.

Same

(2) Sections 1 to 15, 17, 18 and 20 to 94, subsections 95 (1) to (22) and (24) and sections 96 to 137 come into force on the first day of the seventh month after the month in which the *Access to Justice Act*, *2006* receives Royal Assent.

Fr

SCHEDULE D
AMENDMENTS TO THE LIMITATIONS ACT, 2002

1. Section 11 of the *Limitations Act*, *2002* is amended by adding the following subsection:

Same

(2) For greater certainty, a person or entity that provides resolution of claims or assistance in resolving claims, on an impartial basis, is an independent third party no matter how it is funded.

2. Section 22 of the Act is repealed and the following substituted:

Limitation periods apply despite agreements

22. (1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6).

Exception

(2) A limitation period under this Act may be varied or excluded by an agreement made before January 1, 2004.

Same

(3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after the effective date.

Same

(4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after the effective date, but only if the relevant claim has been discovered.

Same

(5) The following exceptions apply only in respect of business agreements:

1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after the effective date.

2. A limitation period established by section 15 may be varied by an agreement made on or after the effective date, except that it may be suspended or extended only in accordance with subsection (4).

Fr

Definitions

(6) In this section,

"business agreement" means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*; ("accord commercial")

"effective date" means the day the *Access to Justice Act, 2006* receives Royal Assent; ("date d'entrée en vigueur")

"vary" includes extend, shorten and suspend. ("modifier")

Commencement

3. This Schedule comes into force on the day the *Access to Justice Act, 2006* receives Royal Assent.

SCHEDULE E
AMENDMENTS TO THE PROVINCIAL OFFENCES ACT

1. The *Provincial Offences Act* is amended by adding the following section:

Video and audio conferencing, etc.

83.1 (1) A witness may give evidence by video conference, audio conference, telephone conference or another electronic means prescribed by the regulations, in the circumstances and under the conditions prescribed by the regulations.

Applicable proceedings

(2) Subsection (1) applies to a proceeding under this Act prescribed by the regulations or a step, prescribed by the regulations, in a proceeding under this Act.

Procedures

(3) The procedures prescribed by the regulations relating to the use of video conference, audio conference, telephone conference or other electronic means under subsection (1), including the procedures prescribed by the regulations relating to the determination of whether such means is to be used, shall be complied with.

Oaths

(4) If evidence under oath is to be given by video conference, audio conference, telephone conference or other electronic means under subsection (1), the oath may be administered by the same means, despite the *Commissioners for taking Affidavits Act*.

Regulations

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

Fr

(a) prescribing the proceedings, or the steps in proceedings, to which subsection (1) applies;

(b) prescribing additional electronic means for the purposes of subsection (1);

(c) prescribing, for the purposes of subsection (1), the circumstances in which and the conditions under which a witness may give evidence by video conference, audio conference, telephone conference or other electronic means;

(d) prescribing the procedures that apply in relation to the use of video conference, audio conference, telephone conference or other electronic means under subsection (1);

(e) prescribing the procedures that apply in relation to the determination of whether video conference, audio conference, telephone conference or other electronic means is to be used under subsection (1);

(f) requiring the payment of fees in relation to the use of video conference, audio conference, telephone conference or other electronic means under subsection (1), fixing the amounts of the fees, and prescribing the circumstances in which and the conditions under which a justice or another person designated in the regulation may waive the payment of a fee.

Commencement

2. (1) This section comes into force on the day the *Access to Justice Act, 2006* receives Royal Assent.

Same

(2) Section 1 comes into force on a day to be named by proclamation of the Lieutenant Governor.

SCHEDULE F
LEGISLATION ACT, 2006

CONTENTS

PART I
GENERAL

1. Definitions

Fr

2. Role of Attorney General
3. Designation by Chief Legislative Counsel
4. Duty, obsolete Acts

PART II
STATUTES

5. Citation of Acts
6. Enacting clause
7. Power to amend or repeal
8. Commencement of Acts
9. Time of commencement and repeal
10. Exercise of delegated power before commencement
11. Endorsements on Acts
12. Reserved bills
13. Judicial notice
14. Copies for publication
15. Publication
16. Regulations

PART III
REGULATIONS

17. Definitions
18. Filing of regulations
19. Filing date
20. Registrar’s discretion not to file
21. Registrar’s duty not to file
22. When regulation effective
23. Time of commencement and revocation
24. Proof of making, approval, filing and publication
25. When published
26. Pre-publication corrections
27. Post-publication corrections
28. No validation
29. Judicial notice
30. Citation of regulations
31. Registrar

Fr

32. Regulations
33. Standing committee

PART IV
PROOF OF LEGISLATION

34. Official law
35. Official copy
36. Presumption, printed by Queen's Printer
37. Presumption, accessed from e-Laws
38. Official copies of source law as evidence
39. Official copies of consolidated law as evidence
40. e-Laws, provisions not in force
41. Regulations

PART V
CHANGE POWERS

42. Editorial and other changes
43. Notice of change
44. Date of change
45. Interpretation

PART VI
INTERPRETATION

Application

46. Application to Acts and regulations
47. Contrary intention or context requiring otherwise
48. Existing and future legislation
49. Other documents
50. Interpretation and definition provisions

Legislative Changes

51. Effect of repeal and revocation
52. Effect of amendment and replacement

Fr

53. Effect of repeal and revocation on amendments
54. Regulations – power to make, amend, etc.
55. Obsolete regulations
56. No implication
57. No revival

References

58. Reference to Act or regulation includes reference to individual provisions
59. Rolling incorporation of Ontario legislation
60. Rolling incorporation of other Canadian legislation
61. Static incorporation of foreign legislation
62. Incorporation of documents by reference

General Rules of Construction

63. Law always speaking
64. Rule of liberal interpretation
65. Bilingual texts
66. Bilingual names
67. Number
68. Gender

Preambles and Reference Aids

69. Preambles
70. Reference aids

Crown

71. Crown not bound, exception
72. Succession

Proclamations

73. How proclamations issued
74. Judicial notice
75. Amendment and revocation – restriction

Fr

Appointments, Powers and Delegation

76. Appointments
77. Implied powers
78. Incidental powers
79. Performance when occasion requires
80. Powers and duties remain despite delegation
81. Survival of delegation

Regulations and Forms

82. General or particular
83. Fee regulations
84. Deviations from required form

Definitions

85. Different forms of defined terms
86. Terms used in regulations
87. Definitions

Time

88. Holidays
89. Computation of time
90. Age

Miscellaneous

91. Private Acts
92. Corporations, implied provisions
93. Majority
94. Reference to series
95. Oaths, affirmations and declarations
96. Requirements for security and sureties
97. Immunity provisions

Fr

PART VII
UNCONSOLIDATED ACTS AND REGULATIONS

Repeal of Unconsolidated Acts

98. Unconsolidated Acts

Revocation of Unconsolidated Regulations

99. Unconsolidated regulations

Resolution of Uncertainty or Transition

100. Resolution of uncertainty or transition

PART VIII
AMENDMENTS AND REPEALS

101. Age of Majority and Accountability Act
102. Agricultural and Horticultural Organizations Act
103. Art Gallery of Ontario Act
104. Building Code Act, 1992
105. Conservation Authorities Act
106. Courts of Justice Act
107. Education Act
108. Election Act
109. Environmental Bill of Rights, 1993
110. Evidence Act
111. Executive Council Act
112. Funeral, Burial and Cremation Services Act, 2002
113. George R. Gardiner Museum of Ceramic Art Act
114. Highway 407 East Completion Act, 2001
115. Highway Traffic Act
116. Land Titles Act
117. Law Society Act
118. Lobbyists Registration Act, 1998
119. Motor Vehicle Dealers Act, 2002

Fr

120. Municipal Act, 2001
121. Municipal Affairs Act
122. Oak Ridges Moraine Conservation Act, 2001
123. Ontario College of Teachers Act, 1996
124. Proceedings Against the Crown Act
125. Public Accounting Act, 2004
126. Public Hospitals Act
127. Public Service Act
128. Public Transportation and Highway Improvement Act
Real Estate and Business Brokers Act, 2002
129. Registry Act
130. Royal Ontario Museum Act
131. Safe Drinking Water Act, 2002
132. Teaching Profession Act
133. Repeal of Acts
134. Revocation of regulation
135. Amendments in table form
136. Bill 107 — Human Rights Code Amendment Act, 2006
137. Bill 159 — Private Security and Investigative Services Act, 2005
Bill 169 — Transportation Statute Law Amendment Act, 2005
138. Bill 190 — Good Government Act, 2006
Bill 197 — Budget Measures Act, 2005
139. Bill 214 — Election Statute Law Amendment Act, 2005

140.
141.
142.

Table 1/Tableau 1
Table 2/Tableau 2

PART IX
COMMENCEMENT AND SHORT TITLE

143. Commencement
144. Short title

Fr

PART I
GENERAL

Definitions

1. (1) In this Act,

"consolidated law" means a source law into which are incorporated,

(a) amendments, if any, that are enacted by the Legislature or filed with the Registrar of Regulations under Part III or under a predecessor of that Part, and

(b) changes, if any, that are made under Part V; ("texte législatif codifié")

"e-Laws website" means the website of the Government of Ontario for statutes, regulations and related materials that is available on the Internet at www.e-laws.gov.on.ca or at another website address specified by a regulation made under subsection (3); ("site Web Lois-en-ligne")

"legislation" means Acts and regulations; ("législation")

"source law" means,

(a) in the case of an Act, the Act as enacted by the Legislature, and

(b) in the case of a regulation, the regulation as filed with the Registrar of Regulations under Part III or under a predecessor of that Part. ("texte législatif source")

Reference to amendment includes reference to repeal, revocation

(2) A reference in this Act to amendment in relation to legislation is also a reference to repeal or revocation, unless a contrary intention appears.

Regulations re e-Laws website

(3) The Attorney General may, by regulation, specify another website address for the purpose of the definition of "e-Laws website" in subsection (1).

Role of Attorney General

2. The Attorney General shall,

(a) maintain the electronic database of source law and cons aw for the e-Laws website so as to facilitate convenient and reliable public access to Ontario legislation;

Fr

(b) safeguard the accuracy and integrity of the electronic database of source law and consolidated law that appears on the e-Laws website; and

(c) safeguard the accuracy and integrity of publications of source law and consolidated law printed by the Queen's Printer or by an entity prescribed under clause 41 (1) (a).

Designation by Chief Legislative Counsel

3. The Chief Legislative Counsel may designate one or more lawyers employed in the Office of Legislative Counsel to exercise the powers and perform the duties of the Chief Legislative Counsel in his or her place.

Duty, obsolete Acts

4. The Chief Legislative Counsel shall, from time to time, provide to the Attorney General a list of Acts, or any parts, portions or sections of Acts, that have been rendered obsolete by events or the passage of time.

PART II
STATUTES

Citation of Acts

5. (1) An Act may be cited,

(a) by its long or short title;

(b) in English as "Statutes of Ontario" or "S.O." and in French as "Lois de l'Ontario" or "L.O.", followed by its year of enactment and its chapter number.

Same

(2) An Act set out in the Revised Statutes of Ontario may be cited in English as "Revised Statutes of Ontario, (*year*)" or "R.S.O. (*year*)" and in French as "Lois refondues de l'Ontario de (*year*)" or "L.R.O. (*year*)", followed by its chapter number.

Same

(3) An Act may also be cited in accordance with a method prescribed under clause 16 (a) or in accordance with accepted legislation citation practices.

Enacting clause

6. An Act shall contain, at the beginning, the following words to indicate the authority by virtue of which it is passed: "Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:"

Fr

Power to amend or repeal

7. (1) Every Act reserves to the Legislature power to repeal or amend it and to revoke or modify any power or advantage that it confers.

Same

(2) Any Act may be amended or repealed by an Act passed in the same session of the Legislature.

Commencement of Acts

8. (1) Unless otherwise provided, an Act comes into force on the day it receives Royal Assent.

Same

(2) Commencement and short title provisions in an Act and the long title of the Act are deemed to come into force on the day the Act receives Royal Assent, regardless of when the Act is specified to come into force.

Selective proclamation

(3) If an Act provides that it is to come into force on a day to be named by proclamation, proclamations may be issued at different times for different parts, portions or sections of the Act.

Time of commencement and repeal

Commencement

9. (1) Unless otherwise provided, an Act comes into force at the first instant of the day on which it comes into force.

Limitation

(2) Unless otherwise provided, an Act that comes into force on Royal Assent is not effective against a person before the earlier of the following times:

1. When the person has actual notice of it.
2. The last instant of the day on which it comes into force.

Repeal

(3) Unless otherwise provided, the repeal of an Act takes effect at the first instant of the day of repeal.

Exercise of delegated power before commencement

10. (1) A power conferred by an Act to make regulations or appoint[illegible]s or do any other thing may be exercised at any time after Royal Assent even if the Act is not yet in force.

Fr

Same

(2) Until the Act comes into force, the exercise of a power in accordance with subsection (1) has no effect except as may be necessary to make the Act effective when it comes into force.

Endorsements on Acts

11. (1) The Clerk of the Assembly shall indicate on every Act, after the title, the date on which it receives Royal Assent.

Same

(2) The date of assent forms part of the Act.

Reserved bills

12. (1) In this Part, a reference to the day or date on which an Act receives Royal Assent is, in the case of a bill reserved by the Lieutenant Governor, a reference to the day on which the Lieutenant Governor signifies, by speech or message to the Assembly or by proclamation, that the bill was laid before the Governor General in Council and that the Governor General was pleased to assent to it.

Endorsement, date of reservation

(2) The Clerk of the Assembly shall indicate, on every bill that is reserved, the date of reservation.

Judicial notice

13. Judicial notice shall be taken of the enactment and contents of an Act.

Copies for publication

14. The Clerk of the Assembly shall provide a certified copy of each Act of the Legislature, as soon as it has been assented to, for the purpose of publication on the e-Laws website and print publication.

Publication

15. (1) Every Act of the Legislature shall be published on the e-Laws website and in print.

Corrections

(2) If the Chief Legislative Counsel discovers that an Act published on the e-Laws website differs from the Act as assented to, he or she shall ensure that a corrected Act is published on the e-Laws website.

Fr

Same

(3) If the Chief Legislative Counsel discovers that an Act published in print under subsection (1) differs from the Act as assented to, he or she may cause the corrected Act to be published in print, if he or she considers it appropriate in the circumstances.

Same

(4) Where subsection (2) or (3) applies, the Chief Legislative Counsel may publish a notice of a correction, on the e-Laws website or in print, in such manner as the Chief Legislative Counsel considers appropriate.

Regulations

16. The Attorney General may make regulations,

(a) prescribing methods of citing Acts to supplement or provide alternatives to the methods set out in section 5;

(b) prescribing the manner of publishing Acts on the e-Laws website and in print for the purposes of subsection 15 (1).

PART III
REGULATIONS

Definitions

17. In this Part,

"Registrar" means the Registrar of Regulations appointed under section 31; ("registrateur")

"regulation" means a regulation, rule, order or by-law of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,

(a) a by-law of a municipality or local board as defined in the *Municipal Affairs Act*, or

(b) an order of the Ontario Municipal Board. ("règlement")

Filing of regulations

18. (1) Every regulation shall be filed with the Registrar, except as provided in sections 19 to 21.

Regulations made or approved by Lieutenant Governor in Council

(2) If a regulation is made or approved by the Lieutenant Governor in Council, a copy of the regulation certified to be a true copy by the Clerk or Deputy Clerk of the Executive Council shall be filed.

Fr

Other regulations

(3) If a regulation is not made or approved by the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation, shall be filed.

Same

(4) If a regulation described in subsection (3) requires the approval of a person or entity other than the Lieutenant Governor in Council, the original regulation, signed by the person or entity authorized to make the regulation and by the person or entity whose approval is required, shall be filed.

Corporation or other entity

(5) If a corporation or other entity makes or approves a regulation, the signature of an officer or agent who has authority to sign on behalf of the corporation or entity is deemed to be the signature of the corporation or entity for the purposes of subsections (3) and (4).

Proof of office not required

(6) A regulation signed by an officer or agent under subsection (5) may be filed without proof of the authority, office or signature of the person signing on behalf of the corporation or entity, but the signed regulation shall show his or her office or title.

Other requirement

(7) A regulation presented for filing shall show the date on which it was made and, if approval is required, the date on which it was approved.

Public inspection

(8) A filed regulation shall be made available for public inspection.

Filing date

19. (1) A regulation shall not be filed on a date that is later than four months after the date on which it was made or, if approval of the regulation is required, the date it is approved.

Consent to extend filing date

(2) Despite subsection (1), a regulation may be filed on a date that is later than that described in subsection (1) if consent to do so has been obtained from the person or entity authorized to make the regulation and, if the regulation requires approval, from the person or entity authorized to approve the regulation.

Date to be specified

Fr

(3) The consent shall specify a date after the four-month period described in subsection (1) by which the regulation shall be filed.

Timing of consent

(4) A consent to extend the filing date and any subsequent consents may be given at any time,

(a) whether before or after the four-month period described in subsection (1) has expired; and

(b) whether or not a date set out in an earlier consent has expired.

Filing restriction

(5) The regulation shall not be filed after the date specified in the consent.

Consent to be filed

(6) The consent extending the filing date shall be filed with the Registrar at the same time as the regulation is filed, and the rules for signing and certifying the regulation set out in section 18 apply to the consent, with necessary modifications.

Same

(7) A consent filed under this section need not be published.

Transition

(8) This section does not apply to a regulation made on or before the coming into force of this section, even if approval, if required, was given after the coming into force of this section.

Registrar's discretion not to file

20. The Registrar may refuse to file a regulation if the rules for filing set out in section 18 or prescribed under clause 32 (a) have not been complied with.

Registrar's duty not to file

21. (1) The Registrar shall refuse to file a regulation if the regulation is not bilingual but purports to amend a bilingual regulation.

Same

(2) The Registrar shall refuse to file a regulation if section 19 has not been complied with.

Deemed validity of filing

(3) If a regulation that fails to meet the requirements of this section is inadvertently accepted for filing, the regulation is deemed to be validly filed despite that

Fr

Same

(4) Subsection (3) shall be interpreted only as validating a procedural irregularity.

When regulation effective

22. (1) A regulation that is not filed has no effect.

Same

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed.

No retroactivity authorized

(3) Nothing in this section authorizes the making of a regulation that is effective with respect to a period before its filing.

Time of commencement and revocation

Commencement

23. (1) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force at the first instant of the day on which it comes into force.

Limitation

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation is not effective against a person before the earliest of the following times:

1. When the person has actual notice of it.
2. The last instant of the day on which it is published on the e-Laws website.
3. The last instant of the day on which it is published in the print version of ***The Ontario Gazette***.

Revocation

(3) Unless a regulation or an Act provides otherwise, the revocation of a regulation takes effect at the first instant of the day of revocation.

Proof of making, approval, filing and publication

When made

24. (1) Unless the contrary is proved, the date indicated on the e-Laws website or in the print version of *The Ontario Gazette* as the date on which a regulation was made is proof that the regulation was made on that date.

Fr

When approved

(2) Unless the contrary is proved, if approval is required for the making of a regulation, the date indicated on the e-Laws website or in the print version of *The Ontario Gazette* as the date on which approval was given is proof that the regulation was approved on that date.

When filed

(3) Unless the contrary is proved, the date indicated on the e-Laws website or in the print version of *The Ontario Gazette* as the date on which a regulation was filed is proof that the regulation was filed on that date.

When published on e-Laws

(4) Unless the contrary is proved, the date of publication indicated for a regulation on the e-Laws website is proof that the regulation was published on the e-Laws website on that date.

When published in *The Ontario Gazette*

(5) Unless the contrary is proved, the date of publication indicated for a regulation in the print version of *The Ontario Gazette* is proof that the regulation was published in the print version of *The Ontario Gazette* on that date.

When published

25. (1) Every regulation shall be published,

(a) on the e-Laws website promptly after its filing; and

(b) in the print version of *The Ontario Gazette* within one month after its filing or in accordance with such other timelines as may be specified in a regulation made under clause 32 (c).

Date of filing, publication, etc.

(2) A published regulation shall show the date of its filing, the date of its publication on the e-Laws website and the date of its publication in the print version of *The Ontario Gazette*, in the manner directed by the Registrar.

Publication in order of filing

(3) Regulations shall be published in the order in which they are filed unless, in the opinion of the Registrar, for practical or technical reasons related to the publication process, it is impossible, impractical or unreasonably difficult or costly to do so.

Numbering

(4) Regulations shall be numbered in the order in which they are a new series shall be commenced each year.

Fr

Same, e-Laws publication

(5) For the purposes of subsection (3), regulations that are published on the e-Laws website simultaneously or as a batch are deemed to be published in the order in which they are filed.

Pre-publication corrections

26. (1) At any time before a filed regulation is first published under subsection 25 (1), the Registrar may,

(a) correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature;

(b) alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation; and

(c) correct errors in the numbering of provisions and make any changes in cross-references that are required as a result.

Same

(2) Corrections and alterations made under this section are deemed to be part of the regulation as filed with the Registrar under this Part.

Post-publication corrections

27. (1) If the Registrar discovers that a regulation published on the e-Laws website differs from the filed regulation, the Registrar shall promptly publish a corrected regulation on the e-Laws website.

Same

(2) A corrected regulation published under subsection (1) shall be accompanied by a notice of correction, if the Registrar considers it appropriate, having regard to the nature of the correction.

Same

(3) If the Registrar discovers that a regulation published in the print version of *The Ontario Gazette* differs from the filed regulation, the Registrar shall, as soon as possible, publish a notice of correction in the print version of *The Ontario Gazette*.

Same

(4) The Registrar need not publish a notice of correction under subsection (3) if, in his or her opinion, the difference between the filed regulation and the printed regulation is so insignificant that the notice is not warranted.

Same

Fr

(5) A notice of correction published under subsection (3) shall include a corrected regulation, if the Registrar considers it appropriate, having regard to the nature of the correction.

No validation

28. The filing, publication or correction of a regulation under this Act does not validate the regulation if it is otherwise invalid.

Judicial notice

29. Judicial notice shall be taken of the making, approval where required, filing, contents and publication of a regulation that is published on the e-Laws website or in the print version of *The Ontario Gazette*.

Citation of regulations

30. (1) A regulation may be cited in English as "Ontario Regulation" or "O. Reg." and in French as "Règlement de l'Ontario" or "Règl. de l'Ont." followed by its filing number, a forward slash and the year of its filing.

Same

(2) The year of filing of a regulation may be indicated in full or by the last two figures in the year.

Same

(3) A regulation set out in the Revised Regulations of Ontario may be cited,

(a) in English as "Revised Regulations of Ontario, (*year*) , Regulation (*number*)" or as "R.R.O. (*year*), Reg. (*number*)"; and

(b) in French as "Règlements refondus de l'Ontario de (*year*), Règlement (*number*)" or as "R.R.O. (*year*), Règl. (*number*)".

Same

(4) A regulation may also be cited in accordance with a method prescribed under clause 32 (b) or in accordance with accepted legislation citation practices.

Registrar

31. (1) A lawyer employed in the Office of Legislative Counsel shall be appointed by the Lieutenant Governor in Council as Registrar of Regulations.

Duty, preparation of regulations

(2) The Registrar shall advise on and assist in the preparation of r s.

Fr

Other duties

(3) The Registrar shall,

(a) be responsible for the numbering, indexing and publication of all regulations filed under this Part;

(b) set standards respecting the format in which regulations shall be submitted for filing;

(c) exercise the powers given and perform the duties assigned under this Part.

Assistant Registrars

(4) The Registrar may designate one or more lawyers employed in the Office of Legislative Counsel as Assistant Registrar to exercise the powers and perform the duties of the Registrar in his or her place.

Regulations

32. The Attorney General may make regulations,

(a) prescribing methods and rules for filing regulations that supplement or provide alternatives to the rules described in section 18, to permit the establishment of an electronic regulations filing system or otherwise address technological change;

(b) prescribing methods of citing regulations to supplement or provide alternatives to the methods set out in section 30;

(c) prescribing timelines for the purposes of clause 25 (1) (b);

(d) respecting the powers and duties of the Registrar.

Standing committee

33. (1) At the commencement of each session of the Legislature, a standing committee of the Assembly shall be appointed under this section with authority to sit during the session.

Regulations referred

(2) Every regulation stands permanently referred to the standing committee for the purposes of subsection (3).

Terms of reference

(3) The standing committee shall examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power but without reference to the merits of the policy or objectives to be effected by the regulations or enabling Acts, and shall deal with such other matters as are referred to it by the Assembly.

Authority to call persons

Fr

(4) The standing committee may examine any member of the Executive Council or any public servant designated by the member respecting any regulation made under an Act that is

under his or her administration.

Report

(5) The standing committee shall, from time to time, report to the Assembly its observations, opinions and recommendations.

PART IV
PROOF OF LEGISLATION

Official law

34. (1) A bill that receives Royal Assent and is endorsed by the Clerk of the Assembly as having received Royal Assent is official law.

Same

(2) A regulation that is filed with the Registrar of Regulations under Part III (Regulations) or a predecessor of that Part is official law.

Official copy

35. (1) A copy of a source law or a consolidated law is an official copy of that law if,

(a) it is printed by the Queen's Printer or by an entity that is prescribed under clause 41 (1) (a);

(b) it is accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b); or

(c) it is prescribed under clause 41 (1) (c) as an official copy.

Disclaimer

(2) Subsection (1) does not apply to a copy that is accompanied by a disclaimer to the effect that it is not intended as official.

Same

(3) In the case of a copy referred to in clause (1) (b), the copy is accompanied by a disclaimer if the disclaimer is on the e-Laws website when the copy is accessed.

Presumption, printed by Queen's Printer

36. Unless the contrary is proved, a copy of a source law or consolidated law purporting to be printed by the Queen's Printer or other prescribed entity was so printed.

Presumption, accessed from e-Laws

Fr

37. Unless the contrary is proved, a copy of a source law or consolidated law submitted with an oral or written statement to the effect that it was accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b) was so accessed.

Official copies of source law as evidence

38. Unless the contrary is proved, an official copy of a source law is an accurate statement of that law.

Official copies of consolidated law as evidence

39. Unless the contrary is proved, an official copy of a consolidated law is an accurate statement of that law,

(a) in the case of an official copy described in clause 35 (1) (a), on the consolidation date shown on the copy;

(b) in the case of an official copy accessed from the e-Laws website in a form or format prescribed under clause 41 (1) (b), during the period indicated on the e-Laws website in respect of the copy when the copy is accessed;

(c) in the case of an official copy prescribed under clause 41 (1) (c), on the date or during the period prescribed under clause 41 (1) (d).

e-Laws, provisions not in force

40. (1) A source law or consolidated law published on the e-Laws website shall include provisions that have been enacted by the Legislature or filed under Part III (Regulations) or a predecessor of that Part, as the case may be, but that are not yet in force.

Same

(2) Where a provision that is not yet in force is included in a law published on the e-Laws website, the fact that it is not yet in force shall be indicated on the website, in the manner and to the extent directed by the Chief Legislative Counsel.

Regulations

41. (1) The Attorney General may make regulations,

(a) prescribing an entity for the purposes of clause 35 (1) (a);

(b) prescribing forms or formats, including print-outs, on-screen displays or other output of electronic data, for the purposes of clause 35 (1) (b);

(c) prescribing official copies for the purposes of clause 35 (1) (c);

(d) prescribing the date on or period during which a copy prescribed under clause (c) is an accurate statement of a consolidated law.

Fr

Same

(2) A regulation made under clause (1) (b), (c) or (d) may be made with respect to,

(a) the manner in which a copy is created, recorded, transmitted, stored, authenticated, received, displayed or perceived;

(b) the person, body or thing that created, recorded, transmitted, stored, authenticated, received, displayed or perceived the copy; and

(c) any statement, mark or certification associated with the creation, recording, transmission, storage, authentication, reception, display or perception of the copy.

PART V
CHANGE POWERS

Editorial and other changes

42. (1) This Part does not authorize any change that alters the legal effect of any Act or regulation.

Same

(2) The Chief Legislative Counsel may make the following changes to consolidated laws:

1. Correct spelling, punctuation or grammatical errors, or errors that are of a clerical, typographical or similar nature.

2. Alter the style or presentation of text or graphics to be consistent with the editorial or drafting practices of Ontario, or to improve electronic or print presentation.

3. Replace a form of reference to an Act or regulation, or a provision or other portion of an Act or regulation, with a different form of reference, in accordance with Ontario drafting practices.

4. Replace a description of a date or time with the actual date or time.

5. After a bill has been enacted, replace a reference to the bill or a provision or other portion of the bill with a reference to the Act or provision or other portion of the Act.

6. If a provision provides that it is contingent on the occurrence of a future event and the event occurs, remove text referring to the contingency and make any other changes that are required as a result.

7. Make such changes to the title of an Act or regulation, including but not limited to omitting the year from the title of an Act, as are required to deal with changes in methods of citing Acts or regulations or changes in the electronic or print presentation of Acts or regulations, and make any other changes that are required as a result.

Fr

8. If an Act or regulation provides that references to a body, office, person, place or thing are deemed or considered to be references to another body, office, person, place or thing, replace a reference to the original body, office, person, place or thing with a reference to the other.

9. When the name, title, location or address of a body, office, person, place or thing has been altered, change references to the name, title, location or address to reflect the alteration, if the body, office, person, place or thing continues under the new name or title or at the new location or address.

10. Correct errors in the numbering of provisions or other portions of an Act or regulation and make any changes in cross-references that are required as a result.

11. If a provision of a transitional nature is contained in an amending Act or regulation, incorporate it as a provision of the relevant consolidated law and make any other changes that are required as a result.

12. Make a correction, if it is patent both that an error has been made and what the correction should be.

Exception, par. 9 of subs. (2)

(3) Paragraph 9 of subsection (2) does not apply to alterations to the name or title of,

(a) a Minister or Ministry of the Government of Ontario;

(b) a municipality, as defined in the *Municipal Act, 2001*;

(c) a non-legislative document incorporated by reference into an Act or regulation; or

(d) an Act or regulation.

Error in consolidation

(4) If the Chief Legislative Counsel discovers that an error was made in the process of publishing or consolidating a consolidated law,

(a) in the case of a consolidated law published on the e-Laws website, he or she shall ensure that a corrected consolidated law is published on the e-Laws website; and

(b) in the case of a consolidated law printed by the Queen's Printer or by an entity that is prescribed under clause 41 (1) (a), he or she may cause a corrected consolidated law to be published in print, if he or she considers it appropriate in the circumstances.

Notice of change

43. (1) The Chief Legislative Counsel may provide notice of changes made under paragraphs 1 to 3 of subsection 42 (2) and of corrections made under subsection 42 (4), in the manner that he or she considers appropriate.

Fr

Same

(2) The Chief Legislative Counsel shall provide notice of the changes made under paragraphs 4 to 12 of subsection 42 (2), in the manner that he or she considers appropriate.

Same

(3) In determining whether to provide notice of a change made under paragraphs 1 to 3 of subsection 42 (2), the Chief Legislative Counsel shall consider,

(a) the nature of the change; and

(b) the extent to which notice, and the information provided in it, would provide assistance in understanding the relevant legislative history.

Same

(4) In providing notice under subsection (1) or (2), the Chief Legislative Counsel shall state the change or the nature of the change.

Date of change

44. No legal significance shall be inferred from the timing of the exercise of a power under this Part.

Interpretation

45. Regardless of when a change is made to a consolidated law under this Part, the change may be read, if it is appropriate to do so,

(a) into the source law as of the date it was enacted or filed; or

(b) into earlier consolidations of the Act or regulation.

PART VI
INTERPRETATION

Application

Application to Acts and regulations

46. Every provision of this Part applies to every Act and regulation.

Contrary intention or context requiring otherwise

47. Section 46 applies unless,

(a) a contrary intention appears; or

(b) its application would give to a term or provision a meaning that is inconsistent with the context.

Fr

Existing and future legislation

48. Section 46 applies whether the Act or regulation was enacted or made before, on or after the day the *Access to Justice Act, 2006* receives Royal Assent.

Other documents

49. The following provisions also apply, in the same way as to a regulation, to every document that is made under an Act but is not a regulation:

1. Subsection 52 (6) (regulation continues).

2. Section 54 (regulations – power to make, amend, etc.).

3. Section 58 (reference to Act or regulation includes reference to individual provisions).

4. Section 59 (rolling incorporation of Ontario legislation), but only with respect to the document that contains the reference.

5. Section 86 (terms used in regulations).

6. Section 89 (computation of time).

Interpretation and definition provisions

50. The interpretation and definition provisions in every Act and regulation are subject to the exceptions contained in section 47.

Legislative Changes

Effect of repeal and revocation

51. (1) The repeal of an Act or the revocation of a regulation does not,

(a) affect the previous operation of the repealed or revoked Act or regulation;

(b) affect a right, privilege, obligation or liability that came into existence under the repealed or revoked Act or regulation;

(c) affect an offence committed against the repealed or revoked Act or regulation, or any penalty, forfeiture or punishment incurred in connection with the offence;

(d) affect an investigation, proceeding or remedy in respect of,

(i) a right, privilege, obligation or liability described in clause (b), or

(ii) a penalty, forfeiture or punishment described in clause (c).

Same

(2) An investigation, proceeding or remedy described in clause (1) (d) may be commenced, continued and enforced as if the Act or regulation had not been repealed or revoked.

Fr

Same

(3) A penalty, forfeiture or punishment described in clause (1) (c) may be imposed as if the Act or regulation had not been repealed or revoked.

Effect of amendment and replacement

Application

52. (1) This section applies,

(a) if an Act is repealed and replaced;

(b) if a regulation is revoked and replaced;

(c) if an Act or regulation is amended.

Authorized persons continue to act

(2) A person authorized to act under the former Act or regulation has authority to act under the corresponding provisions, if any, of the new or amended one until another person becomes authorized to do so.

Proceedings continued

(3) Proceedings commenced under the former Act or regulation shall be continued under the new or amended one, in conformity with the new or amended one as much as possible.

New procedure

(4) The procedure established by the new or amended Act or regulation shall be followed, with necessary modifications, in proceedings in relation to matters that happened before the replacement or amendment.

Reduction of penalty

(5) If the new or amended Act or regulation provides for a lesser penalty, forfeiture or punishment, the lesser one applies when a sanction is imposed, after the replacement or amendment, in respect of matters that happened before that time.

Regulation continues

(6) If an Act under which a regulation has been made is replaced or amended, the regulation remains in force to the extent that it is authorized by the new or amended Act.

Effect of repeal and revocation on amendments

53. The repeal or revocation of an Act or regulation includes the revocation of any amendment to the Act or regulation.

Fr

Regulations – power to make, amend, etc.

54. (1) Power to make regulations includes power to amend, revoke or replace them from time to time.

Survival of power to revoke

(2) Power to revoke a regulation remains even if the provision conferring power to make it has been repealed.

New regulation-maker

(3) If a provision conferring power on a person or entity to make a regulation is amended, or repealed and replaced, so as to confer the power or substantially the same power on a different person or entity, the second person or entity has power to revoke, amend or replace the regulation made by the first one.

Obsolete regulations

55. (1) If a provision of an Act under which a regulation is made is repealed and not replaced, the regulation ceases to have effect, subject to section 51 and subsection 59 (3).

Same

(2) The Lieutenant Governor in Council may, by regulation, revoke a regulation,

(a) that has ceased to have effect under subsection (1); or

(b) that has been rendered obsolete by events or the passage of time.

No implication

56. (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force.

Same

(2) The amendment of an Act or regulation does not imply that the previous state of the law was different.

Same

(3) The re-enactment, remaking, amendment or changing under Part V (Change Powers) of an Act or regulation does not imply an adoption of any judicial or other interpretation of the language used in the Act or regulation, or of similar language.

No revival

Fr

57. The repeal or revocation of an Act or regulation does not imply the revival of an Act or regulation that is not in force or another thing that is not in existence at the time the repeal

or revocation takes effect.

References

Reference to Act or regulation includes reference to individual provisions

58. A reference to an Act or regulation is also a reference to each provision of the Act or regulation.

Rolling incorporation of Ontario legislation

59. (1) A reference in an Act or regulation to a provision of another Act or regulation is a reference to the provision,

(a) as amended, re-enacted or remade; or

(b) as changed under Part V (Change Powers).

Same

(2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed under Part V before or after the commencement of the provision containing the reference.

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced,

(a) the repealed or revoked provision continues to have effect, but only to the extent that is necessary to give effect to the Act or regulation that contains the reference; and

(b) the reference is to the provision as it read immediately before the repeal or revocation.

Rolling incorporation of other Canadian legislation

60. (1) A reference in an Act or regulation to a provision of an Act or regulation of Canada or of another province or territory of Canada is a reference to the provision,

(a) as amended, re-enacted or remade; or

(b) as changed in the exercise of a statutory power to make non-substantive changes.

Same

(2) Subsection (1) applies whether the provision is amended, re-enacted, remade or changed as described in clause (1) (b) before or after the commencement of the provision containing the reference.

Fr

Reference to repealed and unreplaced provision

(3) If the provision referred to is repealed or revoked, without being replaced, the reference is to the provision as it read immediately before the repeal or revocation.

Static incorporation of foreign legislation

61. A reference in an Act or regulation to a provision of an Act or regulation of a jurisdiction outside Canada is a reference to the provision as it read when the Ontario provision containing the reference was most recently enacted, made or amended.

Incorporation of documents by reference

62. (1) The power to make a regulation may be exercised by incorporating an existing document by reference, in whole or in part.

Changes

(2) The document may be incorporated subject to such changes as the maker of the regulation considers necessary.

Static incorporation

(3) The reference to the document is a reference to it as it read when the provision containing the reference was most recently enacted, made or amended.

Access to incorporated document and earlier versions

(4) When a document is incorporated by reference as described in subsection (1), the Minister responsible for the administration of the Act under which the regulation is made shall take steps to ensure that,

(a) the incorporated document is readily available to the public, on and after the day the provision containing the reference comes into force; and

(b) the incorporated document and any earlier versions of it that were previously incorporated into the regulation or into a predecessor of the regulation remain readily available to the public.

Transition

(5) Subsection (4) applies with respect to documents incorporated by reference as described in subsection (1) on and after the day the *Access to Justice Act, 2006* receives Royal Assent.

General Rules of Construction

Law always speaking

63. The law is always speaking, and the present tense shall be a circumstances as they arise.

Fr

Rule of liberal interpretation

64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

Same

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

Bilingual texts

65. The English and French versions of Acts and regulations that are enacted or made in both languages are equally authoritative.

Bilingual names

66. If the Act or regulation that creates or continues an entity refers to it by both an English and a French name, or if the English and French versions of the Act or regulation refer to the entity by different names, it may be referred to for any purpose by either name or by both names.

Number

67. Words in the singular include the plural and words in the plural include the singular.

Gender

68. Gender-specific terms include both sexes and include corporations.

Preambles and Reference Aids

Preambles

69. (1) A preamble to a new Act is part of that Act and may be used to help explain its purpose.

Same

(2) A preamble to an Act that amends one or more other Acts is part of the amending Act and may be used to help explain the purpose of the amendments.

Reference aids

70. Tables of contents, marginal notes, information included to provide legislative history, headnotes and headings are inserted in an Act or regulation for convenience of reference only and do not form part of it.

Fr

Crown

Crown not bound, exception

71. No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so.

Succession

72. Anything begun under a reigning sovereign continues under his or her successor as if no succession had taken place.

Proclamations

How proclamations issued

73. When an Act authorizes the Lieutenant Governor to do anything by proclamation, the proclamation,

(a) shall be issued under an order of the Lieutenant Governor in Council recommending that the proclamation be issued; and

(b) need not refer to the order in council.

Judicial notice

74. Judicial notice shall be taken of the issuing and contents of every proclamation.

Amendment and revocation – restriction

75. (1) A proclamation that brings an Act into force may be amended or revoked by a further proclamation before the commencement date specified in the original proclamation, but not on or after that date.

Same

(2) A proclamation that specifies different commencement dates for different provisions may be amended or revoked with respect to a particular provision before the commencement date specified for that provision, but not on or after that date.

Appointments, Powers and Delegation

Appointments

76. (1) A provision authorizing the Lieutenant Governor in Council, the Lieutenant Governor or a minister of the Crown to appoint a person to an office authorizes an appointment for a fixed term or an appointment during pleasure, and if the appointment is during pleasure, it may be revoked at any time, without cause and without giving notice.

Fr

Remuneration and expenses

(2) A provision described in subsection (1) authorizes the Lieutenant Governor in Council to determine the remuneration and expenses of the person who is appointed.

Implied powers

77. Power to appoint a person to a public office includes power to,

(a) reappoint or remove the person;

(b) appoint a deputy with the same powers as the holder of the office, subject to specified conditions, or with limited powers as specified; and

(c) temporarily appoint another person to the office if it is vacant or if the holder of the office is absent or unable to act.

Incidental powers

78. If power to do or to enforce the doing of a thing is conferred on a person, all necessary incidental powers are included.

Performance when occasion requires

79. Powers that are conferred on a person may be exercised, and duties that are imposed on a person shall be performed, whenever the occasion requires.

Powers and duties remain despite delegation

80. A person on whom an Act confers a power or imposes a duty may exercise it even if it has been delegated to another person.

Survival of delegation

81. The delegation of a power or duty remains valid until it is revoked or amended, even if the author of the delegation is no longer in office.

Regulations and Forms

General or particular

82. (1) A regulation may be general or particular in its application.

Classes

(2) The power to make a regulation includes the power to prescribe a class.

Same

(3) For the purposes of subsection (2), a class may be defined,

Fr

(a) in terms of any attribute or combination of attributes; or

(b) as consisting of, including or excluding a specified member.

Fee regulations

83. This Act authorizes the Lieutenant Governor in Council to make regulations under an Act, prescribing fees to be charged by persons whom the Act or a regulation made under the Act requires or authorizes to do anything, if the Act itself does not provide for such regulations.

Deviations from required form

84. Deviations from a form whose use is required under an Act do not invalidate the form if,

(a) they do not affect the substance and are unlikely to mislead; and

(b) the form is organized in the same or substantially the same way as the form whose use is required.

Definitions

Different forms of defined terms

85. If a term is defined, other forms of the same term have corresponding meanings.

Terms used in regulations

86. Terms used in regulations have the same meaning as in the Act under whose authority they are made.

Definitions

87. In every Act and regulation,

"Act" means an Act of the Legislature, and "statute" has the same meaning; ("loi")

"Assembly" and "Legislative Assembly" mean the Legislative Assembly of Ontario; ("Assemblée", "Assemblée législative")

"Court of Appeal" means the Court of Appeal for Ontario; ("Cour d'appel")

"Divisional Court" means the Divisional Court of the Superior Court of Justice; ("Cour divisionnaire")

"Her Majesty", "His Majesty", "the Queen", "the King" or "the Crown" means the Sovereign of the United Kingdom, Canada and Her other Realms and Territories, and Head of the Commonwealth; ("Sa Majesté", "la Reine", "le Roi", "la Couronne")

"holiday" means a holiday as described in section 88; ("jour férié")

"individual" means a natural person; ("particulier")

"legally qualified medical practitioner" and similar expressions indicating legal recognition of a person as a member of the medical profession mean a member of the College of

Fr

Physicians and Surgeons of Ontario; (“médecin dûment qualifié”)

“Legislature” means the Lieutenant Governor acting by and with the advice and consent of the Assembly; (“Législature”)

“Lieutenant Governor” means the Lieutenant Governor of Ontario, or the person administering the Government of Ontario for the time being in Her Majesty’s name, by whatever title he or she is designated; (“lieutenant-gouverneur”)

“Lieutenant Governor in Council” means the Lieutenant Governor acting by and with the advice of the Executive Council of Ontario; (“lieutenant-gouverneur en conseil”)

“mentally ill”, when used in reference to a person, means suffering from such a disorder of the mind that he or she requires care, supervision and control for his or her own protection or welfare, or for the protection of others; (“mentalement malade”)

“mentally incompetent”, when used in reference to a person, means,

(a) having such a condition of arrested or incomplete development of the mind, whether arising from inherent causes or induced by disease or injury, or

(b) suffering from such a disorder of the mind,

that the person requires care, supervision and control for his or her protection and the protection of his or her property; (“mentalement incapable”, “frappé d’incapacité mentale”)

“newspaper”, in a provision requiring publication, means a document that,

(a) is printed in sheet form, published at regular intervals of a week or less and circulated to the general public, and

(b) consists primarily of news of current events of general interest; (“journal”)

“now”, “next”, “heretofore” and “hereafter” relate to the date of coming into force of the provision in which they are used; (“maintenant”, “prochainement”, “jusqu’ici”, “dorénavant”)

“peace officer” includes,

(a) a person employed to serve or execute civil process, including a sheriff, deputy sheriff and sheriff’s officer, and a bailiff of the Small Claims Court,

(b) a justice of the peace,

(c) an officer or permanent employee of a correctional institution, or of a place of detention or custody, and

(d) a person employed to maintain the public peace, including a police officer and constable; (“agent de la paix”)

“person” includes a corporation; (“personne”)

Fr

"proclamation" means a proclamation issued by the Lieutenant Governor under the Great Seal; ("proclamation")

"regulation" means a regulation as defined in Part III; ("règlement")

"rules of court" means rules that are made by a rules committee established under the *Courts of Justice Act*. ("règles de pratique")

TIME

Holidays

88. (1) This section applies for the purposes of the definition of "holiday" in section 87.

Same

(2) The following days are holidays:

1. Sunday.
2. New Year's Day.
3. Good Friday.
4. Easter Monday.
5. Victoria Day.
6. Canada Day.
7. Labour Day.
8. Thanksgiving Day.
9. Remembrance Day.
10. Christmas Day.
11. Boxing Day.
12. Any day fixed as a holiday by proclamation of the Governor General or Lieutenant Governor.

Same

(3) When New Year's Day falls on a Sunday, the following Monday is also a holiday.

Same

(4) In accordance with the *Holidays Act* (Canada), when July 1 is a Sunday, Canada Day falls on July 2.

Fr

Same

(5) When Christmas Day falls on a Saturday, the following Monday is also a holiday, and when it falls on a Sunday, the following Tuesday is also a holiday.

Computation of time

Holidays

89. (1) Time limits that would otherwise expire on a holiday are extended to include the next day that is not a holiday.

Days on which offices closed

(2) Time limits for registering or filing documents or for doing anything else that expire on a day when the place for doing so is not open during its regular hours of business are extended to include the next day the place is open during its regular hours of business.

Number of days between events

(3) A reference to a number of days between two events excludes the day on which the first event happens and includes the day on which the second event happens, even if the reference is to "at least" or "not less than" a number of days.

Specified day included

(4) A period of time described as beginning or ending on, at or with a specified day includes that day.

Specified day excluded

(5) A period of time described as beginning before or after a specified day excludes that day.

Months

(6) If a period of time is described as a number of months before or after a specified day, the following rules apply:

1. The number of months are counted from the specified day, excluding the month in which the specified day falls.

2. The specified day is excluded.

3. The period includes the day in the last month counted that has the same calendar number as the specified day or, if that month has no day with that number, its last day.

Leap years

(7) The anniversary of an event that took place on February 29 fa ruary 28, except in a leap year.

Fr

Age

90. A person attains an age specified as a number of years at the first instant of the corresponding anniversary of his or her birth.

MISCELLANEOUS

Private Acts

91. (1) A private Act does not affect the rights of a person or entity except as mentioned in the Act.

Same

(2) Subsection (1) does not apply to a private Act respecting the powers or duties of a municipality.

Corporations, implied provisions

92. (1) A provision of an Act that creates a corporation,

(a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;

(b) gives a majority of the members of the corporation power to bind the others by their acts; and

(c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them.

Restricted application

(2) Subsection (1) applies to a corporation only if the provision creating it is in force on the day before the day the *Access to Justice Act, 2006* receives Royal Assent.

Majority

93. If something is required or authorized to be done by more than two persons, a majority of them may do it.

Reference to series

94. If reference is made to a series, the first and last items are included.

Oaths, affirmations and declarations

95. A requirement that a person take an oath or be sworn is satisfied by an affirmation or a declaration.

Fr

Requirements for security and sureties

Security

96. (1) A requirement to give security is a requirement to give security that is sufficient for the purpose.

Sureties

(2) Subsection (1) also applies, with necessary modifications, to a surety, and if the provision refers to sureties without specifying the number of persons, one is sufficient.

Immunity provisions

97. (1) Where words referring to actions or other proceedings for damages are used in a provision excluding or limiting the liability of the Crown or any other person, third or subsequent party proceedings and proceedings for contribution and indemnity or restitution are included.

Transition

(2) Subsection (1) applies in respect of proceedings commenced on or after October 4, 2000.

PART VII
UNCONSOLIDATED ACTS AND REGULATIONS

Repeal of Unconsolidated Acts

Unconsolidated Acts

98. (1) The Acts listed in Column 1 of the Table to this section, which were left unconsolidated and unrepealed by the Revised Statutes of Ontario, 1990, continue to be unconsolidated and unrepealed in whole or in part to the extent provided in subsection (2).

Same

(2) The sections, subsections or parts of the Acts that continue to be unconsolidated and unrepealed are listed in Column 3 of the Table to this section.

Same

(3) Every Act listed in Schedule C (Table of Unconsolidated and Unrepealed Acts) to the Revised Statutes of Ontario, 1990, as set out in volume 12 of the Revised Statutes of Ontario, 1990, other than the Acts

Fr

listed in Column 1 of the Table to this section, is repealed if it has not previously been repealed.

Same

(4) The Chief Legislative Counsel may at any time cause an Act listed in the Table to this section to be consolidated and published on the e-Laws website as consolidated law.

TABLE OF UNCONSOLIDATED AND UNREPEALED ACTS
TABLE DES LOIS NON ABROGÉES ET NON CODIFIÉES

Column/Colonne 1	Column/Colonne 2	Column/Colonne 3	Column/Colonne 4
Name of Act *Titre de la loi*	Citation *Citation*	Part Remaining Unconsolidated and Unrepealed *Partie toujours non abrogée et non codifiée*	Amendments *Modifications*
Academy of Medicine, Toronto Act, 1946	1946, c. 1	Total/*La totalité*	
An Act concerning Monopolies, and Dispensation with penal laws, etc.	R.S.O. 1897, c. 323	See/*voir* R.S.O. 1980, Appendix A	
An Act for the settlement of questions between the Governments of Canada and	1891, c. 3	Total/*La totalité*	

Fr

Ontario respecting Indian Lands			
An Act relating to the Avenues and Approaches to Queen's Park, Toronto	1913, c. 75	Total/*La totalité*	
An Act relating to the Municipality of Shuniah, and the tax imposed on lands in the District of Algoma	1875-76, c. 37	s. 1, 4, 6-9, 11-14 (in so far as not inconsistent with 1936, c. 83; *sauf incompatibilité avec 1936, chap. 83*)	
An Act respecting a certain Agreement between the University of Toronto and the City of Toronto	1907, c. 54	Total/*La totalité*	
An Act respecting Certain Rights and Liberties of the People	R.S.O. 1897, c. 322	See/*voir* R.S.O. 1980, Appendix A	
An Act respecting Champerty	R.S.O. 1897, c. 327	See/*voir* R.S.O. 1980, Appendix A	
An Act respecting Law Fees and Trust Funds	1869, c. 9	s. 3	
An Act respecting Municipalities in Algoma, Muskoka,	1885, c. 41	s. 3	

Fr

Parry Sound, Nipissing and Thunder Bay			
An Act respecting Real Property	R.S.O. 1897, c. 330	See/*voir* R.S.O. 1980, Appendix A	
An Act respecting Rectories	R.S.O. 1897, c. 306	s. 2-4	
An Act respecting the Boundary between the Provinces of Ontario and Manitoba	1899, c. 2	See/*voir* R.S.O. 1980, Appendix A	
An Act respecting the District of Rainy River	1885, c. 20	s. 12	
An Act respecting the Imperial Statutes relating to property and civil rights incorporated into the Statute Law of Ontario	1902, c. 13	Total/*La totalité*	
An Act respecting the Municipality of Shuniah	1877, c. 31	s. 1-8 (in so far as not inconsistent with 1936, c. 83; *sauf incompatibilité avec 1936, chap. 83*)	
An Act respecting The Ontario and	1911, c. 7	Total/*La totalité*	

Fr

Minnesota Power Company			
An Act respecting the Operation of Statutes of Ontario	1874, c. 4	s. 2	
An Act respecting the settlement by arbitration, of accounts between the Dominion of Canada and the Provinces of Ontario and Quebec, and between the said two provinces	1891, c. 2	Total/*La totalité*	
An Act respecting the site of the new Legislative and Departmental Buildings	1894, c. 12	Total/*La totalité*	
An Act respecting Tithes	R.S.O. 1897, c. 305	Total/*La totalité*	
An Act to amend the Act respecting the settlement by Arbitration of Accounts between the Dominion of Canada and the Provinces of Ontario and Quebec and	1901, c. 5	Total/*La totalité*	

Fr

between the said two Provinces			
An Act to apply the Municipal Law to certain Townships in the District of Nipissing	1877, c. 30	Total/*La totalité*	
An Act to confirm the title of the Government of Canada to certain lands and Indian Lands	1915, c. 12	Total/*La totalité*	
An Act to create The Provisional Judicial District of Fort Frances	1908, c. 36	s. 2, 16-25	1909, c. 26, s. 11
An Act to create the Provisional Judicial District of Sudbury	1907, c. 25	s. 2, 10, 22-24	1909, c. 26, s. 10
An Act to express the Consent of the Legislative Assembly of the Province of Ontario to an Extension of the Limits of the Province	1912, c. 3	Total/*La totalité*	
An Act to incorporate the	1921, c. 36	Total/*La totalité*	

Fr

Town of Kapuskasing			
An Act to incorporate the University Residence Trustees	1905, c. 35	Total/*La totalité*	
An Act to make provision for payment of Law Fees in territorial and judicial districts by means of stamps and to amend the Act respecting Law Fees and Trust Funds	1871-72, c. 20	s. 3	
An Act to organize the Municipality of Shuniah and to amend the Acts for establishing Municipal Institutions in unorganized districts	1873, c. 50	s. 1-3 (in so far as not inconsistent with 1936, c. 83; *sauf incompatibilité avec 1936, chap. 83*)	
An Act to provide for Development of Water Power at Dog Lake	1908, c. 24	Total/*La totalité*	
An Act validating a certain agreement between the	1889, c. 53	Total/*La totalité*	

Fr

University of Toronto and the Corporation of the City of Toronto			
Anglican Church of Canada Act, 1979	1979, c. 46	Total/*La totalité*	
Apprenticeship and Tradesmen's Qualification Act	R.S.O. 1970, c. 24	s. 19 (1)	
Architects Act	R.S.O. 1960, c. 20	s. 4, 6	
Architects Act, 1984	1984, c. 12	s. 27 (4)	
Assessment Amendment Act, 1954	1954, c. 3	s. 13	
Boards of Trade General Arbitration Act	R.S.O. 1914, c. 66	Total/*La totalité*	
Cemeteries Act, 1989	1989, c. 50	s. 88	
Central Trust Company Act, 1983	1983, c. 64	Total/*La totalité*	
Chartered Accountants Act, 1956	1956, c. 7	Total/*La totalité*	1998, c./*chap.* 2, s./*art.* 10; 2000, c./*chap.* 26, Sch./*Ann.* A, s./*art.* 3; 2000, c./*chap.* , Sch./*Ann.*, *art.* 7-11

Fr

Chartered Shorthand Reporters Act	R.S.O. 1937, c. 234	Total/*La totalité*	
City of Hamilton Act, 1970	1970, c. 78	Total/*La totalité*	
City of Kingston Act, 1970	1970, c. 76	Total/*La totalité*	
Conveyancing and Law of Property Amendment Act, 1956	1956, c. 10	s. 3	
County of Middlesex Act, 1979	1979, c. 1	Total/*La totalité*	
Crown Administration of Estates Act	R.S.O. 1970, c. 99	s. 5 (2)	
Crown Trust Company Act, 1983	1983, c. 7	Total/*La totalité*	
Debentures Guarantee Act, 1919	1919, c. 4	Total/*La totalité*	
Don Valley Improvement Act, 1933	1933, c. 12	Total/*La totalité*	
Education Amendment Act, 1986 (No. 1)	1986, c. 21	s. 4	

Fr

English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986	1986, c. 23	Total/*La totalité*	
Environmental Protection Act, 1971	1971, c. 86	s. 27 (2, 3, 5)	
Essex County French-language Secondary School Act, 1977	1977, c. 5	Total/*La totalité*	1986, c. 21, s. 4
Family Law Reform Act, 1978	1978, c. 2	s. 70 (4, 5)	
Federal District Commission Act	R.S.O. 1950, c. 133	Total/*La totalité*	
Greater Winnipeg Water District Act (Ontario), 1916	1916, c. 17	Total/*La totalité*	
Health Department Amendment Act, 1925	1925, c. 68	s. 2	
Income Tax Agreement Act, 1962-63	1962-63, c. 62	Total/*La totalité*	
Income Tax Amendment Act, 1962-63	1962-63, c. 61	s. 8, 9	

Fr

Indian Lands Act, 1924	1924, c. 15	Total/*La totalité*	
Jack Miner Migratory Bird Foundation Act, 1936	1936, c. 36	Total/*La totalité*	
Jurors Act	R.S.O. 1937, c. 108	s. 90	
Lakehead University Act, 1965	1965, c. 54	Total/*La totalité*	
Lake of the Woods Control Board Act, 1922	1922, c. 21	Total/*La totalité*	1958, c. 48
Lake Superior Board of Education Act, 1976	1976, c. 59	Total/*La totalité*	
Land Titles Amendment Act, 1954	1954, c. 43	s. 2	
Lieutenant-Governor's Act	R.S.O. 1914, c. 12	s. 4	
Manitoulin, Barrie and Cockburn Islands Land Act, 1990	1990, c. 27	Total/*La totalité*	
Marriage Act, 1950	1950, c. 42	s. 51	
Married Women's Property Act	R.S.O. 1914, c. 149	s. 4 (4, 5), 6, 8, 1 15	

Fr

Master and Fellows of Massey College Act, 1960-61	1960-61, c. 53	Total/*La totalité*	1974, c. 13
Mortmain and Charitable Uses Repeal Act, 1982	1982, c. 12	Total/*La totalité*	
Mortgages Act	R.S.O. 1914, c. 112	s. 15	
Mortgages Amendment Act, 1964	1964, c. 64	s. 8	
Municipal Amendment Act, 1944	1944, c. 39	s. 37 (1)	
Municipality of Metropolitan Toronto Amendment Act (No. 2), 1977	1977, c. 68	s. 2	
Niagara Development Act, 1951	1951, c. 55	Total/*La totalité*	
Niagara Development Agreement Act, 1951	1951, c. 56	Total/*La totalité*	
North Georgian Bay Recreational Reserve Act, 1962-63	1962-63, c. 68	Total/*La totalité*	

Fr

The North Pickering Development Corporation Act, 1974	1974, c. 124	Total/*La totalité*	1989, c. 71, s. 4
Ontario-Manitoba Boundary Line Act, 1953	1953, c. 76	Total/*La totalité*	1955, c. 56
Ontario Niagara Development Act	1916, c. 20	Total/*La totalité*	
Ontario Niagara Development Act, 1917	1917, c. 21	Total/*La totalité*	
Ontario School Trustees' Council Act	R.S.O. 1980, c. 355	Total/*La totalité*	
Ontario Transportation Development Corporation Act	R.S.O. 1980, c. 358	Total/*La totalité*	
Osgoode Hall Law School Scholarships Act, 1968-69	1968-69, c. 90	Total/*La totalité*	1972, c. 70; 1973, c. 140
Ottawa River Water Powers Act, 1943	1943, c. 21	Total/*La totalité*	
Petroleum Products Price Freeze Act, 1975	1975, c. 66	Total/*La totalité*	

Fr

Planning Amendment Act, 1960	1960, c. 83	s. 5	
Planning Amendment Act, 1971	1971, c. 2	s. 3 (2)	
Planning Amendment Act, 1979	1979, c. 59	s. 2, 3	
Power Commission Amendment Act, 1949	1949, c. 73	the part of subsection 4 (1) relating to subsection 17 (8)/*la partie du paragraphe 4 (1) relative au paragraphe* 17 (8), s. 6 (2)	
Power Commission Amendment Act, 1973	1973, c. 57	the part of section 4 relating to subsection 2 (2)/*la partie de l'article 4 relative au paragraphe 2 (2)*	
Powers of Attorney Act, 1979	1979, c. 107	s. 11 (2)	
Proceedings Against the Crown Act	R.S.O. 1970, c. 365	s. 28, 29	
Professional Engineers Act, 1984	1984, c. 13	s. 22	

Fr

Public Lands Amendment Act, 1956	1956, c. 72	s. 9, 10	
Public Lands Amendment Act, 1960	1960, c. 94	s. 5	
Public Service Pension Act, 1989	1989, c. 73	Sch. 1, 2	
Public Works Creditors Payment Repeal Act, 1975	1975, c. 45	s. 2 (2)	
Railways Act	R.S.O. 1950, c. 331	Total/*La totalité*	1968, c. 113; 1979, c. 44; 1986, c. 64, s. 61; 2002, c./*chap.* 24, Sch./*Ann.* B, s./*art.* 25
Registry Act	R.S.O. 1897, c. 136	s. 117	
Registry Act	R.S.O. 1960, c. 348	s. 3 (2)	
Registry Amendment Act, 1954	1954, c. 83	s. 11	
Regulations Revision Act, 1989/*Loi de 1989 sur la refonte des règlements*	1989, c./*chap.* 82	Total/*La totalité*	
Religious Institutions Act	R.S.O. 1914, c. 286	s. 3-6	

Fr

Religious Institutions Amendment Act, 1957	1957, c. 108	s. 2	
Religious Organizations' Lands Act, 1979	1979, c. 45	s. 29	
Residential Tenancies Act	R.S.O. 1980, c. 452	s. 1-59, 62-69, 74, 111-113, 116, 119, 135 (1), 135 (3), 136, Sch.	
Royal Conservatory of Music of Toronto Act, 1954	1954, c. 85	Total/*La totalité*	
Ryerson University Act, 1977 (formerly Ryerson Polytechnical Institute Act, 1977)	1977, c. 47	Total/*La totalité*	1989, c. 13; 1993, c./*chap.* 1, s./*art.* 1-20; 2002, c./*chap.* 8, Sch./*Ann.* P, s./*art.* 5
Sandwich, Windsor and Amherstburg Railway Act, 1930	1930, c. 17	Total/*La totalité*	1932, c. 56; 1933, c. 59, s. 32 (2); 1939, c. 43, s. 1-7; 1968, c. 120; 1970, c. 68, s. 1, 2, 5-7
Sandwich, Windsor and Amherstburg Railway Act, 1939	1939, c. 43	s. 8, 9	1957, c. 109
Sandwich, Windsor and	1949, c. 91	Total/*La totalité*	60, c. 105

Fr

Amherstburg Railway Act, 1949			
Sandwich, Windsor and Amherstburg Railway Act, 1970	1970, c. 68	s. 3, 4, 8-11	
Sandwich, Windsor and Amherstburg Railway Act, 1977	1977, c. 57	Total/*La totalité*	
Sault Ste. Marie Bridge Act, 1960	1960, c. 106	Total/*La totalité*	
Seine River Diversion Act, 1952	1952, c. 98	Total/*La totalité*	
Sheriffs Amendment Act, 1941	1941, c. 54	s. 2	
Short Forms of Conveyances Act	R.S.O. 1980, c. 472	Total/*La totalité*	1984, c. 32, s. 23
Short Forms of Mortgages Act	R.S.O. 1980, c. 474	s. 1-5, Sch. A, B	1984, c. 32, s. 24
Small Business Development Corporations Amendment Act, 1980	1980, c. 21	s. 12 (2)	
Soldiers' Aid Commission Act	R.S.O. 1960, c. 377	Total/*La totalité*	1970, c. 83
Statute Law Amendment Act,	1903, c. 7	s. 63	

Fr

1903			
Statute Law Amendment Act, 1906	1906, c. 19	s. 34, 43	
Statute Law Amendment Act, 1909	1909, c. 26	s. 19	
Statute Law Amendment Act, 1917	1917, c. 27	s. 71	
Statute Law Amendment Act, 1918	1918, c. 20	s. 59	
Statute Law Amendment Act, 1928	1928, c. 21	s. 25	
Statute Law Amendment Act, 1939	1939, c. 47	s. 36	
Statute Law Amendment Act, 1941	1941, c. 55	s. 44	
Statute of Uses	R.S.O. 1897, c. 331	See/*voir* R.S.O. 1980, Appendix A	
Statutes Revision Act, 1989/*Loi de 1989 sur la refonte des lois*	1989, c./*chap.* 81	Total/*La totalité*	

Fr

Steep Rock Iron Ore Development Act, 1949	1949, c. 97	Total/*La totalité*	
St. Lawrence Development Act, 1952 (No. 2)	1952, c. 3	Total/*La totalité*	
Succession Duty Act Supplementary Provisions Act, 1980	1980, c. 28	Total/*La totalité*	
Succession Duty Amendment Act, 1961-62	1961-62, c. 133	s. 5	
Succession Duty Repeal Act, 1979	1979, c. 20	s. 1	
Succession Law Reform Act, 1977	1977, c. 40	s. 43 (2), 52, 62 (2), 87 (2), 89 (3)	
Teachers' Pension Act, 1989	1989, c. 92	Sch. 1, 2	
Toronto District Heating Corporation Act, 1980	1980, c. 73	Total/*La totalité*	1998, c./*chap.* 15, Sch./*Ann.* C, s./*art.* 14
Toronto Power and Railway Purchase Act, 1921	1921, c. 23	Total/*La totalité*	
Toronto Radial Railway Act, 1921	1921, c. 24	Total/*La totalité*	

Fr

Township of Marathon Land Act, 1984	1984, c. 53	Total/*La totalité*	
Unemployment Insurance Act, 1939	1939, c. 52	Total/*La totalité*	
University Act, 1922	1922, c. 101	Total/*La totalité*	
University Avenue Extension Act, 1928	1928, c. 17	Total/*La totalité*	1929, c. 23, s. 19; 1948, c. 95
University of Guelph Act, 1964	1964, c. 120	Total/*La totalité*	1965, c. 136; 1971, c. 56, s. 21
University of Ottawa Act, 1965	1965, c. 137	Total/*La totalité*	
University of Toronto Act, 1971	1971, c. 56	Total/*La totalité*	1978, c. 88
Upper Canada College Act	R.S.O. 1937, c. 373	Total/*La totalité*	1958, c. 120
Urban Transportation Development Corporation Ltd. Act	R.S.O. 1980, c. 518	Total/*La totalité*	
Wilfrid Laurier University Act, 1973	1973, c. 87	Total/*La totalité*	
York University Act, 1965	1965, c. 143	Total/*La totalité*	

Fr

Revocation of Unconsolidated Regulations

Unconsolidated regulations

99. (1) Every regulation listed in the Table to this section is revoked if it has not previously been revoked.

Same

(2) The Table to this section comprises a portion of the regulations listed in the Schedule to the Revised Regulations of Ontario, 1990, which is set out in volume 9 of the Revised Regulations of Ontario, 1990 and lists the regulations that were left unrevoked and unconsolidated by the Revised Regulations of Ontario, 1990.

Same

(3) The Chief Legislative Counsel may at any time cause a regulation that is unrevoked and unconsolidated to be consolidated and published on the e-Laws website as consolidated law.

TABLE OF UNCONSOLIDATED REGULATIONS TO BE REVOKED
TABLE DES RÈGLEMENTS NON CODIFIÉS À ABROGER

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Agricultural Societies Act	General	130/88
Assessment Act	Equalization of Assessment	82/79
	Equalization of Assessment	133/79
	Equalization of Assessment	19/80

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Canadian Insurance Exchange Act, 1986	General	751/86
Consolidated Hearings Act, 1981	Pits and Quarries Control Act	173/89
County Courts Act	Sittings of the County and District Courts	1125/80
	Summary Conviction Appeal Rules	801/77
Education Act	Apportionment, 1978 Requisitions	63/78
	Apportionment, 1979 Requisitions	109/79
	Apportionment, 1980 Requisitions	230/80
	Apportionment, 1987 Requisitions	99/87
	Apportionment, 1988 Requisitions	162/88
	Apportionment, 1989 Requisitions	156/89
	Apportionment, 1990 Requisitions	143/90
	Assessment and Tax Adjustments	724/89
	Payment Transfer Between Coterminous Boards — 1990	144/90
Environmental Assessment Act	City of Toronto — TOR-2	256/81
	City of Toronto and the City of Tor… Non-Profit Housing Corporation —	126/81

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	City of Toronto and the City of Toronto Non-Profit Housing Corporation — TOR-3	434/81
	Compliance Order — Ministry of Natural Resources — MNR-C-1	3/90
	The Corporation of the City of Mississauga — MISS-C-1	32/84
	The Corporation of the City of Owen Sound — OWEN-C-1	680/82
	The Corporation of the City of Toronto — TOR-C-4	446/88
	The Corporation of the County of Essex — ESSE-CT-2	119/88
	The Corporation of the Improvement District of Dubreuilville — DUBR-1D-2	653/83
	The Corporation of The Regional Municipality of Waterloo — WATE-RG-2	243/90
	The Corporation of the Town of Grimsby — GRIM-T-1/1	598/89
	The Corporation of the Town of Kapuskasing — MUN-TWN-KAP-1	367/83
	The Corporation of the Town of Kenora — KENO-T-1	270/90

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	The Corporation of the Town of Kirkland Lake, Community of Swastika — KIRK-T-1	601/84
	The Corporation of the Town of Smooth Rock Falls — MSRF-1	1001/80
	The Corporation of the Town of Port Hope — PHOP-T-1	788/81
	The Corporation of the Township of Dysart et al — DYSA-TWP-1	494/86
	The Corporation of the Township of Syndenham — SYDE-TP-1	600/84
	The Corporation of the Township of Tiny — TINY-TP-1	599/84
	County of Oxford — OXFO-CT-1	410/82
	County of Oxford — OXFO-CT-2	443/84
	Credit Valley Conservation Authority — CDV-01	484/83
	Credit Valley Conservation Authority — CDV-02	324/84
	Essex Region Conservation Authority — ESR-01	115/85
	Ganaraska Region Conservation Authority and The Corporation of the Town of Port Hope — PHOP-2	483/83

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Handling of Dangerous Goods at Morton Terminal	244/90
	Highway No. 404	352/81
	La Cité collégiale — PR-CC-04	312/90
	Laidlaw Waste Systems — Storrington Township — LAL-ST-01	702/90
	Malvern Waste	710/83
	The Metropolitan Toronto Housing Company Limited — METR-M-1	50/82
	Ministry of Citizenship and Culture — MCC-1	279/82
	Ministry of Natural Resources — MNR-19/2	342/80
	Ministry of Natural Resources — MNR-35/2	10/83
	Ministry of Natural Resources — MNR-28/2	654/83
	Ministry of Natural Resources — MNR-29/2	656/83
	Ministry of Natural Resources — MNR-54	597/89
	Ministry of Northern Affairs — MNA-3	608/80
	Ministry of Northern Development and Mines and Ministry of Natural Resources — MNDM/MNR-1	15/87
	Ministry of the Environment — MOE-20	558/80

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Ministry of the Environment — MOE-21	659/81
	Ministry of the Environment — MOE-22	762/81
	Ministry of the Environment — MOE-23	880/81
	Ministry of the Environment — MOE-26	664/83
	Ministry of the Environment — MOE-28	358/85
	Ministry of the Environment — MOE-34	497/88
	Ministry of the Environment — MOE-35	547/88
	Ministry of the Environment — MOE-38	475/89
	Ministry of the Environment — MOE-39	627/89
	Ministry of the Environment — MOE-40	668/89
	Ministry of the Environment — MOE-42	102/90
	Ministry of Transportation — MTC-21/2	755/80
	Ministry of Transportation — MTC-31	776/80
	Ministry of Transportation — MTC-30	777/80
	Ministry of Transportation — MTC-41	657/81
	Ministry of Transportation — MTC-45	735/81
	Ministry of Transportation — MTC-46	737/81
	Ministry of Transportation — MTC	739/81
	Ministry of Transportation — MTC-56	148/87

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Ministry of Transportation — MTC-56	311/90
	Ministry of Transportation — MTC-58	407/90
	Municipalities of Ontario — MUNI-1	300/84
	Municipalities of Ontario — MUNI-1/2	333/86
	Municipality of Metropolitan Toronto — MERO-1	881/81
	Municipality of Metropolitan Toronto — MERO-1/2	215/83
	Municipality of Metropolitan Toronto — METRO-M-2	578/87
	Municipality of Metropolitan Toronto — METR-M-3	613/87
	Ontario Development Corporation — ODC-1	518/80
	Ontario Energy Corporation — OEC-1	778/80
	Ontario Energy Corporation — OEC-2	779/80
	Ontario Energy Corporation — OEC-3	859/80
	Ontario Energy Corporation — OEC-4	1031/80
	Ontario Energy Corporation — OEC-2/2	656/81
	Ontario Hydro — OH-34	392/89
	Ontario Hydro — OH-13/3	409/89

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Ontario Northland Transportation Commission — MNA-5	106/82
	Ontario Northland Transportation Commission — MNA-6	107/82
	Ontario Northland Transportation Commission — MNA-7	54/83
	Reclamation Systems Inc.	17/89
	The Regional Municipality of Haldimand-Norfolk — RMHN-1	432/86
	The Regional Municipality of Halton — HALT-RG-01	240/84
	The Regional Municipality of Ottawa-Carleton — RMOC-RG-1	194/87
	The Regional Municipality of Waterloo and The Corporation of the City of Cambridge — WATE-RG-1	387/86
	St. Clair College of Applied Arts and Technology — MCU-2	19/81
	Toronto Area Transit Operating Authority — MTC-49	532/82
	Toronto Area Transit Operating Authority — MTC-57	337/90

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Town of Ingersoll, Township of South-West Oxford — ING-1	762/86
	Township of Huron — HUR-1	407/81
	Township of Owens, Williamson and Idington — OWEN-TP-1	365/83
	TSI Trintek Systems Inc.	710/87
	Urban Transportation Development Corporation Ltd. Metro Canada Limited — UTDC-2	405/81
	Victoria Hospital Corporation — VHC-1	74/88
	Waterloo North Hydro — WATE-C-1	23/90
Environmental Protection Act	Algoma Sinter Operation — 1986/94	663/85
	Designation of Waste — Locality of Dowling	362/80
Executive Council Act	Assignment of Powers and Duties — Minister of Citizenship and Culture	134/82
	Assignment of Powers and Duties — Minister of Community and Social Services	660/83
	Assignment of Powers and Duties — Minister of Health	671/83
	Assignment of Powers and Duties — Minister of Industry and Trade	135/82

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Development	
	Assignment of Powers and Duties — Minister of Industry, Trade and Technology	388/85
	Assignment of Powers and Duties — Minister of Intergovernmental Affairs	400/82
	Assignment of Powers and Duties — Minister of Municipal Affairs	375/85
	Assignment of Powers and Duties — Minister of Tourism and Recreation	136/82
	Assignment or Transfer of Administration of Acts — Athletics Control Act to the Minister of Consumer and Commercial Relations	258/79
	Assignment or Transfer of Administration of Acts — Ministry of Government Services Act — approving authority for expropriations on request of Ontario Hydro shall be the Minister of Energy	924/75
	Assignment or Transfer of Administration of Acts — Ontario Northland Transportation Commission to the Minister of Northern Affairs	627/77
	Assignment or Transfer of Administration of Acts — Pounds Act to the Minis Agriculture and Food	55/76

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Assignment or Transfer of Administration of Acts — Power Corporation Act (Subsection 5 (4) of the Expropriations Act) to the Minister of Energy	504/75
	Assignment or Transfer of Administration of Acts — School Boards and Teachers Collective Negotiations Act to the Minister of Education	56/76
	Transfer of Administration — Administration and Control of the Council (Conseil des Affaires Franco-Ontariennes) transferred to the Minister of Intergovernmental Affairs	620/81
	Transfer of Administration of Act — Administration of sections 161 and 162 of the Mining Act transferred to the Minister of Natural Resources	57/81
	Transfer of Administration of Act — Apprenticeship and Tradesmen's Qualification Act transferred to Minister of Skills Development	170/85
	Transfer of Administration of Act — Metropolitan Police Force Complaints Project Act, 1981 transferred from Solicitor General to Attorney General	133/82
	Transfer of Administration of Act — Mining Act (part)	505/85

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Transfer of Administration of Act — Mining Tax Act	418/86
	Transfer of Administration of Act — Municipal Conflict of Interest Act transferred from Attorney General to Ministry of Intergovernmental Affairs	150/81
	Transfer of Administration of Act — Niagara Escarpment Planning and Development Act transferred to Minister of Municipal Affairs	422/85
	Transfer of Administration of Act — Niagara Escarpment Planning and Development Act transferred to Minister of the Environment	408/90
	Transfer of Administration of Act — Parks Assistance Act transferred to Minister of Tourism and Recreation	579/88
	Transfer of Administration of Act — Partnerships Act transferred from Attorney General to Minister of Consumer and Commercial Relations	56/81
	Transfer of Administration of Act — Public Service Superannuation Act	616/85
	Transfer of Administration of Acts — Building Code Act and part of Ont Water Resources Act transferred from	82/83

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Minister of Consumer and Commercial Relations to Minister of Municipal Affairs and Housing	
	Transfer of Administration of Acts — Minister of Citizenship	565/87
	Transfer of Administration of Acts — Minister of Consumer and Commercial Relations	181/87
	Transfer of Administration of Acts — Minister of Culture and Communications	563/87
	Transfer of Administration of Acts — Minister of Culture and Communications	564/87
	Transfer of Administration of Acts — Minister of Education	202/87
	Transfer of Administration of Acts — Minister of Financial Institutions	417/86
	Transfer of Administration of Acts — Minister of Government Services	166/87
	Transfer of Administration of Acts — Minister of Housing	374/85
	Transfer of Administration of Acts — Minister of Municipal Affairs	536/87

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Transfer of Administration of Acts — Minister of Northern Development and Minister of Mines	571/87
	Transfer of Administration of Program — Ministry of Skills Development	572/87
	Transfer of Administration of Acts — Minister of Transportation	566/87
	Transfer of Administration of Acts — Residential Tenancies Act and Residential Complexes Financing Costs Restraint Act, 1982 transferred to Minister of Municipal Affairs and Housing	264/85
Farm Income Stabilization Act	Apple Stabilization, 1983-1987 — Plan	431/83
	Corn Stabilization Plan, 1978-1980	508/78
	Enrolment in Plans and Transfer of Credits	292/81
	Fresh Market Potato Stabilization, 1989-92 — Plan	585/86
	Grain Stabilization, 1985-1988 — Plan	509/85
	Soybean Stabilization, 1982-1984 — Plan	672/82
	Soybean Stabilization, 1978-1980 — Plan	509/78
	White Bean Stabilization Plan, 197	510/78

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Farm Products Marketing Act	Onions — Dissolution of Local Board	306/79
	Onions — Marketing	R.R.O. 1970, Reg. 331
	Onions — Plan	R.R.O. 1970, Reg. 330
	Rutabagas — Dissolution of Local Board	650/84
	Sugar Beets — Dissolution of Local Board	474/82
	Sugar Beets — Marketing	R.R.O. 1970, Reg. 337
	Sugar Beets — Plan	R.R.O. 1970, Reg. 336
General Sessions Act	Sittings of Courts of General Sessions of the Peace	1125/80
Gift Tax Act, 1972, c. 12	Charitable Organizations	523/74
	Delegation of Authority	590/77
	Forms	96/78
	General	54/73
	Rate of Interest	799/75
Highway Traffic Act	Gross Weight on the Kaministikwi Bridge	524/83

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
IDEA Corporation Act, 1981	Termination of IDEA Corporation	203/86
Income Tax Act	Ontario Tax Credit System	49/78
	Ontario Tax Credit System	39/79
	Ontario Tax Credit System	64/80
	Taxable Income – Amount Prescribed	50/78
	Taxable Income – Amount Prescribed	48/79
	Taxable Income – Amount Prescribed	65/80
Land Speculation Tax Act, 1974, c. 17	Delegation of Authority by Minister	191/75
	Forms	707/74
	Rates of Interest	331/75
Land Transfer Tax Act	Conditional Exemption — 380613 Ontario Limited	502/78
	Exemption — For Certain Final Orders of Foreclosure and for Inter-corporate Transfers of Land	R.R.O. 1980, Reg. 559
	Exemption — S. S. Kresge Company Limited and Francesco	1021/75
	Exemption — Trefann Homes Corp	142/77
Metropolitan Toronto Police Force	General	495/85

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Complaints Act, 1984		
Mining Act	Lands Open for Prospecting, Staking Out or Leasing	515/71
Ministry of Health Act	Grant — Special	R.R.O. 1980, Reg. 657
	Special Grant	R.R.O. 1980, Reg. 659
	Special Grant	R.R.O. 1980, Reg. 660
Ministry of Natural Resources Act	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: B. Bisaro against The South Lake Simcoe Conservation Authority; Frank Morriello against The South Lake Simcoe Conservation Authority; Sugarbush Holdings Limited against The Grand River Conservation Authority	448/81
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Donald J. Rashotte against The Moira River Conservation Authority; Tadeusz Trynda against The Rideau Valley Conservation Authority; Amadale Company Limited against The Sou Simcoe Conservation Authority; Reg Prince	622/81

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	against The South Lake Simcoe Conservation Authority	
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Edith and Rita Martin against The Rideau Valley Conservation Authority; W. Takahashi against The Metropolitan Toronto and Region Conservation Authority	368/81
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Frank Moreano against The South Lake Simcoe Conservation Authority	4/82
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: George W. Aregers against The Metropolitan Toronto and Region Conservation Authority	695/81
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Graham Double against The South Lake Simcoe Conservation Authority	204/82
	Assignment of Powers and Duties of Minister — Mining and Lands	744/81

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Commissioner to Hear and Determine the appeal of: Harold and Jacqueline Zavitz against the Upper Thames River Conservation Authority; Hans Snippe against The Rideau Valley Conservation Authority; Lionel Edwards against The Otonabee Region Conservation Authority	
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of Margaret Lonsdale against the Otonabee Region Conservation Authority	24/81
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Michael Hosinec against The Credit Valley Conservation Authority; Leon G. Laroche against The Rideau Valley Conservation Authority	609/81
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Mr. E. Bauman against The Grand River Conservation Authority; Edith and Rita Martin against The Rideau Valley Conservation Authority	389/81
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the	114/81

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	appeal of: Mr. Milton A. Chomyn against The South Lake Simcoe Conservation Authority; Mr. A. Evans against The Lakehead Region Conservation Authority; Mr. Guy E. Muschett against The Credit Valley Conservation Authority; Mr. Roger Ross against The Metropolitan Toronto and Region Conservation Authority	
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Polish Army Veterans Association against Metropolitan Toronto and Region Conservation Authority	128/82
	Assignment of Powers and Duties of Minister — Mining and Lands Commissioner to Hear and Determine the appeal of: Steven Ruddy against The Halton Region Conservation Authority; Michele Recchia against The Halton Region Conservation Authority	129/82
	Assignment of Powers and Duties of Minister — (to the Mining and Lands Commissioner to hear and determine appeals against decisions of certain conservation authorities)	100/80

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Ministry of the Environment Act	Assignment of Administration of Consolidated Hearings Act, 1981 to the Minister of the Environment	511/81
	Assignment of Administration of Ontario Waste Management Corporation Act, 1981 to the Minister of the Environment	510/81
Ontario Energy Board Act	Uniform System of Accounts for Gas Utilities Class A	R.R.O. 1980, Reg. 702
Ontario Universities Capital Aid Corporation Act	Designated Universities	R.R.O. 1980, Reg. 735
Ontario Water Resources Act	Honda Sewage Works	332/85
	St. Thomas Aquinas School Sewage Works	531/85
Ottawa-Carleton French-Language School Board Act, 1988/*Loi de 1988 sur le Conseil scolaire de langue française d'Ottawa-Carleton*	Order Under Subsection 36 (2)/*Arrêté pris en vertu du paragraphe 36 (2)*	514/88
	Order Under Subsection 36 (3)/*Arrêté pris en vertu du paragraphe 36 (3)*	515/88
	Proportions of Assessment — 199	723/89

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Provincial Offences Act	Approval of Part II By-laws	429/87
	Approval of Part II By-laws	475/87
	Approval of Part II By-laws	568/87
	Approval of Part II By-laws	697/87
	Approval of Part II By-laws	698/87
	Approval of Part II By-laws	94/88
	Approval of Part II By-laws	347/88
	Approval of Part II By-laws	435/88
	Approval of Part II By-laws	500/88
	Approval of Part II By-laws	534/88
	Approval of Part II By-laws	647/88
	Approval of Part II By-laws	705/88
	Approval of Part II By-laws	739/88
	Approval of Part II By-laws	51/89
	Approval of Part II By-laws	93/89
	Approval of Part II By-laws	214/89
	Approval of Part II By-laws	241/89

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
Public Hospitals Act	Special Grant — Hawkesbury and District General Hospital	43/81
	Special Grant — James Bay General Hospital	793/80
	Special Grant — James Bay General Hospital	445/83
	Special Grant — Salvation Army Grace Hospital	574/80
	Special Grant — Timiskaming Hospital Board	457/79
Public Service Superannuation Act	Designations — Re Subsection 29 (2) of the Act	490/88
	Designations under Section 31 of the Act	R.R.O. 1980, Reg. 882
	Salary	248/85
	Supplementary Benefit — Ontario Provincial Police Force Early Retirement	38/85
	Supplementary Benefit for Retiring Employees	223/87
Retail Sales Tax Act	Tax Rebates for New Light Trucks or Vans	1010/80
Superannuation Adjustment Benefits Act	Chairman of Management Board of Cabinet designated as Minister to Administer Act	131/76

Fr

Act under which Regulation Made *Loi en application de laquelle le règlement est pris*	Title of Regulation *Titre du règlement*	Regulation Number *Numéro du règlement*
	Retirement Pension Plan of Ryerson Polytechnical Institute	R.R.O. 1980, Reg. 923
	Teachers' Superannuation Fund	R.R.O. 1980, Reg. 924

Resolution of Uncertainty or Transition

Resolution of uncertainty or transition

100. (1) The Lieutenant Governor in Council may make regulations in respect of an Act repealed by section 98 or a regulation revoked by section 99,

(a) to resolve any uncertainty in respect of,

(i) any right, privilege, obligation or liability related to the Act or regulation, or

(ii) the effect of the repeal of the Act or the revocation of the regulation;

(b) to resolve any transitional matters that may arise in relation to the repeal or revocation.

Same

(2) For greater certainty, a regulation under subsection (1) may address any uncertainty or transitional matter that arises before the day the regulation is filed.

PART VIII
AMENDMENTS AND REPEALS

Age of Majority and Accountability Act

101. Section 5 of the *Age of Majority and Accountability Act* is repealed and the following substituted:

Fr

Age

5. (1) A person attains an age specified as a number of years at the first instant of the corresponding anniversary of his or her birth.

Exceptions in documents

(2) Subsection (1) does not apply in respect of a document that provides for a different method of calculating a person's age.

Agricultural and Horticultural Organizations Act

102. Section 9 of the *Agricultural and Horticultural Organizations Act* is amended by adding the following subsection:

Legislation Act, 2006

(2) A by-law made under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

Art Gallery of Ontario Act

103. Section 8 of the *Art Gallery of Ontario Act* is amended by striking out "section 27 of the *Interpretation Act*" and substituting "section 92 of Part VI (Interpretation) of the *Legislation Act, 2006*".

Building Code Act, 1992

104. (1) The definition of "change certificate" in subsection 1 (1) of the *Building Code Act, 1992* is amended by adding "or approved by the Minister" after "prescribed under the building code".

(2) The definition of "final certificate" in subsection 1 (1) of the Act is amended by adding "or approved by the Minister" after "prescribed under the building code".

(3) The definition of "plans review certificate" in subsection 1 (1) of the Act is amended by adding "or approved by the Minister" after "prescribed under the building code".

(4) Subsection 7 (9) of the Act is amended by adding at the end "or approved by the Minister".

(5) Subsection 8 (1.1) of the Act is amended by Fr **"or the form approved by the Minister" after "prescribed form".**

(6) Subsection 12 (4) of the Act is amended by adding "or the form approved by the Minister" after "prescribed form".

(7) Subsection 13 (1.1) of the Act is amended by adding "or the form approved by the Minister" after "prescribed form".

(8) Subsection 14 (1.1) of the Act is amended by adding "or the form approved by the Minister" after "prescribed form".

(9) Subsection 15.18 (3) of the Act is amended by adding at the end "or the form approved by the Minister".

(10) Subsection 18 (6) of the Act is amended by adding "or the form approved by the Minister" after "prescribed form".

Conservation Authorities Act

105. Section 30 of the *Conservation Authorities Act* is amended by adding the following subsection:

Legislation Act, 2006

(3) Part III (Regulations) of the *Legislation Act, 2006* does not apply to regulations made under this section.

Courts of Justice Act

106. Section 1 of the *Courts of Justice Act* is amended by adding the following subsection:

Application to other Acts

(2) This section applies to all other Acts affecting or relating to the courts and the administration of justice.

Education Act

107. (1) Subsection 171 (4) of the *Education Act* is repealed and the following substituted:

Same

(4) For the purposes of subsections (2) and (3), a working day is a[illegible]r than Saturday or a holiday as defined in Part VI (Interpretation) of the *Legislation Ac*

Fr

(2) Subsection 287.6 (3) of the Act is amended by striking out "The *Regulations Act*" at the beginning and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Election Act

108. Clause 9 (b) of the *Election Act* is amended by striking out "the *Interpretation Act*" and substituting "Part VI (Interpretation) of the *Legislation Act, 2006*".

Environmental Bill of Rights, 1993

109. Clause 1 (6) (c) of the *Environmental Bill of Rights, 1993* is amended by striking out "the *Regulations Act* or, if that Act does not apply" and substituting "Part III (Regulations) of the *Legislation Act, 2006* or, if that Part does not apply".

Evidence Act

110. Sections 24.1 and 24.2 of the *Evidence Act* are repealed.

Executive Council Act

111. (1) Subsection 5 (1) of the *Executive Council Act* is amended by striking out "Despite the *Legislative Assembly Act*" at the beginning.

(2) Section 6 of the Act is repealed and the following substituted:

Execution of contracts with Crown

6. No deed or contract in respect of any matter under the control or direction of a minister is binding on Her Majesty or shall be deemed to be the act of the minister unless it is,

(a) signed by the minister, the deputy minister of the ministry or an authorized delegate; or

(b) approved by the Lieutenant Governor in Council.

(3) The Act is amended by adding the following sections:

Assignment and transfer of ministers' powers, etc.

8. (1) Despite any other Act, the authority of the Lieutenant G under this Act to prescribe duties of a minister of the Crown or to assign and tran ers and duties that

Fr

have been assigned by law to a minister of the Crown to any other minister includes authority, by order in council, to,

(a) assign responsibility for the administration of an Act or a part of an Act to a minister of the Crown;

(b) transfer responsibility for the administration of an Act or a part of an Act from a minister of the Crown to another minister of the Crown;

(c) assign a power, duty, function or responsibility of a minister of the Crown under an Act to a minister of the Crown;

(d) transfer a power, duty, function or responsibility of a minister of the Crown under an Act to another minister of the Crown;

(e) direct that two or more ministers share responsibility for the administration of an Act or a part of an Act;

(f) specify how the ministers are to share responsibility for the administration of an Act or a part of an Act;

(g) direct that two or more ministers share a power, duty, function or responsibility under an Act; and

(h) specify how the ministers are to share a power, duty, function or responsibility under an Act.

Shared responsibilities

(2) Where the Lieutenant Governor, by order in council under this Act, directs that two or more ministers share responsibility for the administration of an Act or part of an Act without specifying how the responsibility is to be shared, each minister shall exercise those aspects of the responsibility that most closely relate to the minister's other responsibilities.

Same

(3) Where the Lieutenant Governor, by order in council under this Act, directs that two or more ministers share a power, duty, function or responsibility under any Act without specifying how it is to be shared, each minister shall exercise or fulfil those aspects of the power, duty, function or responsibility that most closely relate to the minister's other responsibilities.

Effect of orders in council

9. (1) Where a provision of an Act or regulation is affected by an order in council made under this Act, the provision shall be read in a manner that accords with the order in council.

Fr

Regulations

(2) The Lieutenant Governor in Council may, without making other substantive changes, make a regulation amending a reference to a minister or ministry in an Act or regulation to align the Act or regulation with an order in council made under this Act.

Ministries and public servants

10. Sections 8 and 9 apply, with necessary modifications, to ministries over which a minister of the Crown presides and to the public servants under the jurisdiction of a minister of the Crown.

Transition

11. Sections 8 to 10 apply, with necessary modifications, to orders in council made under this Act before the day on which the *Access to Justice Act, 2006* receives Royal Assent.

Funeral, Burial and Cremation Services Act, 2002

112. Subsection 108 (2) of the *Funeral, Burial and Cremation Services Act, 2002* is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

George R. Gardiner Museum of Ceramic Art Act

113. Section 8 of the *George R. Gardiner Museum of Ceramic Art Act* is amended by striking out "section 27 of the *Interpretation Act*" and substituting "section 92 of Part VI (Interpretation) of the *Legislation Act, 2006*".

Highway 407 East Completion Act, 2001

114. (1) Subsection 10 (6) of the *Highway 407 East Completion Act, 2001* is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

(2) Subsection 29 (8) of the Act is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Highway Traffic Act

115. Subsection 128 (9) of the *Highway Traffic Act* is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Fr

Land Titles Act

116. Subsection 18 (2) of the *Land Titles Act* is repealed and the following substituted:

Extension of time

(2) For the purposes of subsection 89 (2) of Part VI (Interpretation) of the *Legislation Act, 2006*, a day described in clause (1) (a), (b), (c) or (d) is a day when the land registry office is not open during its regular hours of business.

Law Society Act

117. Subsection 56 (1) of the *Law Society Act* is amended by striking out "section 27 of the *Interpretation Act*" in the portion before clause (a), and substituting "section 92 of Part VI (Interpretation) of the *Legislation Act, 2006*".

Lobbyists Registration Act, 1998

118. Subclause (a) (iii) of the definition of "lobby" in subsection 1 (1) of the *Lobbyists Registration Act, 1998* is amended by striking out "section 1 of the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Motor Vehicle Dealers Act, 2002

119. Subsection 38 (3) of the *Motor Vehicle Dealers Act, 2002* is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Municipal Act, 2001

120. (1) Section 108 of the *Municipal Act, 2001* is amended by adding the following subsection:

Legislation Act, 2006

(12) Part III (Regulations) of the *Legislation Act, 2006* does not apply to matters approved under subsection (2) or (3).

(2) Section 177 of the Act is amended by a Fr **the following subsection:**

Legislation Act, 2006

(2) Part III (Regulations) of the *Legislation Act, 2006* does not apply to procedures established by the Minister under subsection (1).

(3) Section 232 of the Act is amended by adding the following subsection:

Legislation Act, 2006

(2.1) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a form established by the Minister under subsection (1).

(4) Section 266 of the Act is amended by adding the following subsection:

Not regulation

(4) An order of the Minister under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(5) Section 278 of the Act is amended by adding the following subsection:

Not regulation

(2) A designation by the Minister under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(6) Section 289 of the Act is amended by adding the following subsection:

Legislation Act, 2006

(6) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a requirement of the Minister under clause (2) (a).

(7) Section 290 of the Act is amended by adding the following subsection:

Legislation Act, 2006

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a requirement of the Minister under clause (2) (a).

(8) Section 294 of the Act is amended by a the following subsection:

Fr

Not regulation

(4) A designation by the Minister under subsection (1) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(9) Section 296 of the Act is amended by adding the following subsection:

Not regulation

(2.1) A designation by the Minister under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006.*

(10) Section 299 of the Act is amended by adding the following subsection:

Not regulation

(7) A designation by the Minister under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006.*

(11) Section 300 of the Act is amended by adding the following subsection:

Not regulation

(3) A designation by the Minister under subsection (2) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006.*

(12) Section 303 of the Act is amended by adding the following subsection:

Not regulation

(5) An order made under subsection (2) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006.*

(13) Section 323 of the Act is amended by adding the following subsection:

Not regulation

(9.1) A direction by the Minister under subsection (7) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006.*

(14) Section 474.18 of the Act is amended by adding the following subsection:

Fr

Legislation Act, 2006

(5) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a matter approved under subsection (4).

Municipal Affairs Act

121. The *Municipal Affairs Act* is amended by adding the following section:

Legislation Act, 2006

2. Part III (Regulations) of the *Legislation Act, 2006* does not apply to anything done by the Minister or the Ministry under this Act.

Oak Ridges Moraine Conservation Act, 2001

122. Subsection 9 (1) of the *Oak Ridges Moraine Conservation Act, 2001* is amended by striking out "is filed" and substituting "was filed".

Ontario College of Teachers Act, 1996

123. Section 58 of the *Ontario College of Teachers Act, 1996* is amended by adding the following subsection:

Legislation Act, 2006

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a regulation made under subsection (2).

Proceedings Against the Crown Act

124. Subsection 5 (1) of the *Proceedings Against the Crown Act* is amended by striking out "section 11 of the *Interpretation Act*" in the portion before clause (a), and substituting "section 71 of Part VI (Interpretation) of the *Legislation Act, 2006*".

Public Accounting Act, 2004

125. Subsection 19 (7) of the *Public Accounting Act, 2004* is deemed to have been repealed on November 1, 2005.

Public Hospitals Act

126. Section 12 of the *Public Hospitals Act* is amended by adding the following subsection:

Fr

Not a regulation

(12) A by-law approved under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

Public Service Act

127. Section 29 of the *Public Service Act* is amended by adding the following subsection:

Legislation Act, 2006

(1.1) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a regulation made under clause (1) (b).

Public Transportation and Highway Improvement Act

128. (1) Section 7 of the *Public Transportation and Highway Improvement Act* is amended by adding the following subsection:

Designation not regulation

(3) A designation under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(2) Section 20 of the Act is amended by adding the following subsection:

Designation not regulation

(3) A designation by the Lieutenant Governor in Council under subsection (1) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(3) Section 21 of the Act is amended by adding the following subsection:

Designation not regulation

(3) A designation by the Minister under subsection (1) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(4) Subsection 24 (5) of the Act is amended by striking out "within the meaning of the *Regulations Act*" at the end and substituting "as defined in Part III (Regulations) of the *Legislation Act, 2006* or in a predecessor of that Part".

(5) Section 29 of the Act is amended by adding the f g subsection:

Direction not regulation

Fr

(8) A direction made by the Lieutenant Governor in Council or Minister under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(6) Section 34 of the Act is amended by adding the following subsection:

Order not regulation

(5.1) An order made by the Minister under subsection (5) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(7) Section 38 of the Act is amended by adding the following subsection:

Order not regulation

(4.1) An order made by the Minister under subsection (4) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006.*

(8) Section 40 of the Act is amended by adding the following subsection:

Designation not regulation

(2) A designation under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(9) Section 41 of the Act is amended by adding the following subsection:

Designation not regulation

(6) A designation under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(10) Section 42 of the Act is amended by adding the following subsection:

Designation not regulation

(3) A designation under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(11) Section 43 of the Act is amended by adding the following subsection:

Designation not regulation

(4) A designation under this section is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(12) Section 91 of the Act is amended by adding the following subsection:

Fr

Designation not regulation

(3) A designation by the Minister under subsection (1) is not a regulation within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

Real Estate and Business Brokers Act, 2002

129. Subsection 46 (3) of the *Real Estate and Business Brokers Act, 2002* is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Registry Act

130. Subsection 13 (2) of the *Registry Act* is repealed and the following substituted:

Extension of time

(2) For the purposes of subsection 89 (2) of Part VI (Interpretation) of the *Legislation Act, 2006*, a day described in clause (1) (a), (b), (c) or (d) is a day when the land registry office is not open during its regular hours of business.

Royal Ontario Museum Act

131. Section 8 of the *Royal Ontario Museum Act* is amended by striking out "section 27 of the *Interpretation Act*" and substituting "section 92 of Part VI (Interpretation) of the *Legislation Act, 2006*".

Safe Drinking Water Act, 2002

132. (1) Subsection 15 (7) of the *Safe Drinking Water Act, 2002* is amended by striking out "The *Regulations Act*" at the beginning and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

(2) Subsection 21 (9) of the Act is amended by striking out "The *Regulations Act*" at the beginning and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Teaching Profession Act

133. (1) Section 12 of the *Teaching Profession Act* is amended by adding the following subsection:

Fr

Legislation Act, 2006

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a regulation made under subsection (1).

(2) Section 13 of the Act is amended by adding the following subsection:

Legislation Act, 2006

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to a regulation made under subsection (3).

Repeal of Acts

134. The following Acts are repealed:

1. ***Interpretation Act*.**
2. ***Regulations Act*.**
3. ***Statute and Regulation Revision Act, 1998*.**
4. ***Statutes Act*.**

Revocation of regulation

135. Regulation 999 of the Revised Regulations of Ontario, 1990 made under the *Regulations Act* is revoked.

Amendments in table form

Table 1

136. (1) The provisions referred to in Table 1 to this Part are amended by striking out "the *Regulations Act*" wherever it appears and substituting in each case "Part III (Regulations) of the *Legislation Act, 2006*".

Table 2

(2) The provisions referred to in Table 2 to this Part are amended by striking out "the *Interpretation Act*" wherever it appears and substituting in each case "Part VI (Interpretation) of the *Legislation Act, 2006*".

Bill 107 — *Human Rights Code Amendment Act, 2006*

137. (1) This section applies only if Bill 107 (*Human Rights Code Amendment Act, 2006*, introduced on April 26, 2006) receives Royal

Fr

Assent.

(2) References in this section to provisions of Bill 107 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) If section 6 of Bill 107 comes into force on or before the day subsection 136 (1) of this Schedule comes into force, the amendment to subsection 35 (5) of the *Human Rights Code* made by subsection 136 (1) of this Schedule does not apply.

Bill 159 — *Private Security and Investigative Services Act, 2005*

138. (1) This section applies only if Bill 159 (*Private Security and Investigative Services Act, 2005*, introduced on December 9, 2004) receives Royal Assent.

(2) References in this section to provisions of Bill 159 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) On the later of the day this section comes into force and the day subsection 51 (2) of Bill 159 comes into force, subsection 51 (2) of the *Private Security and Investigative Services Act, 2005* is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Bill 169 — *Transportation Statute Law Amendment Act, 2005*

139. (1) This section applies only if Bill 169 (*Transportation Statute Law Amendment Act, 2005*, introduced on February 21, 2005) receives Royal Assent.

(2) References in this section to provisions of Bill 169 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) On the later of the day section 115 of this Sche mes into force and the day subsection 17 (4) of Schedule A to Bill 169 comes into force,

Fr

subsection 128 (9) of the *Highway Traffic Act*, as amended by section 115 of this Schedule and re-enacted by subsection 17 (4) of Schedule A to Bill 169, is repealed and the following substituted:

Legislation Act, 2006

(9) A designation under subsection (8) or (8.1) and the setting of a speed limit under subsection (10) are not regulations within the meaning of Part III (Regulations) of the *Legislation Act, 2006*.

(4) On the later of the day this section comes into force and the day section 18 of Schedule A to Bill 169 comes into force, subsection 128.0.1 (7) of the *Highway Traffic Act*, as enacted by section 18 of Schedule A to Bill 169, is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Bill 190 — *Good Government Act, 2006*

140. (1) This section applies only if Bill 190 (*Good Government Act, 2006*, introduced on April 27, 2005) receives Royal Assent.

(2) References in this section to provisions of Bill 190 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) On the later of the day this section comes into force and the day section 4 of Schedule O to Bill 190 comes into force, subsection 4 (3.4) of the *Municipal Tax Assistance Act*, as enacted by section 4 of Schedule O to Bill 190, is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

(4) If section 11 of Schedule T to Bill 190 comes into force on or before the day subsection 128 (12) of this Schedule comes into force, subsection 128 (12) of this Schedule does not apply.

Bill 197 — *Budget Measures Act, 2005*

141. (1) This section applies only if Bill 197 (*Budge[illegible]ures Act, 2005*, introduced on May 11, 2005) receives Royal Assent.

Fr

(2) References in this section to provisions of Bill 197 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) On the later of the day this section comes into force and the day subsection 53 (5) of the *Private Career Colleges Act, 2005*, as enacted by Schedule L to Bill 197, comes into force, subsection 53 (5) of the *Private Career Colleges Act, 2005*, as enacted by Schedule L to Bill 197, is amended by striking out "the *Regulations Act*" at the end and substituting "Part III (Regulations) of the *Legislation Act, 2006*".

Bill 214 — *Election Statute Law Amendment Act, 2005*

142. (1) This section applies only if Bill 214 (*Election Statute Law Amendment Act, 2005*, introduced on June 9, 2005) receives Royal Assent.

(2) References in this section to provisions of Bill 214 are references to those provisions as they were numbered in the first reading version of the Bill.

(3) If subsection 1 (3) of Bill 214 comes into force on or before the day section 108 of this Schedule comes into force, section 108 of this Schedule does not apply.

TABLE 1/TABLEAU 1

Act *Loi*	Provision *Disposition*
Ambulance Act/*Loi sur les ambulances*	6.7 (4)
Ambulance Services Collective Bargaining Act, 2001/*Loi de 2001 sur la négociation collective dans les services d'ambulance*	23 (6)
Assessment Act/*Loi sur l'évaluation foncière*	2 (3) par. 1 disp. 3

Fr

Act *Loi*	Provision *Disposition*
	2 (7)
	19.2 (4)
Back to School Act, 1998/*Loi de 1998 sur le retour à l'école*	20 (14)
Bailiffs Act/*Loi sur les huissiers*	4 (3)
Building Code Act, 1992/*Loi de 1992 sur le code du bâtiment*	28.1 (3)
	29 (3)
	35.1
Business Regulation Reform Act, 1994/*Loi de 1994 portant réforme de la réglementation des entreprises*	17
Cabinet Ministers' and Opposition Leaders' Expenses Review and Accountability Act, 2002/*Loi de 2002 sur l'examen des dépenses des ministres et des chefs d'un parti de l'opposition et l'obligation de rendre compte*	5 (4)
Commodity Board Members Act/*Loi sur les membres de commissions de produits agricoles*	5 (4)
Commodity Futures Act/*Loi sur les contrats à terme sur marchandises*	65 (12)
	65 (13)
Community Care Access Corporations Act, 2001/*Loi de 2001 sur les sociétés d'accès aux soins communautaires*	*11 (3)*
Consolidated Hearings Act/*Loi sur la jonction des audiences*	19

Fr

Act *Loi*	Provision *Disposition*
Consumer Protection Act, 2002/*Loi de 2002 sur la protection du consommateur*	104 (2)
Courts of Justice Act/*Loi sur les tribunaux judiciaires*	51.1 (2)
Crown Employees Collective Bargaining Act, 1993/*Loi de 1993 sur la négociation collective des employés de la Couronne*	48 (3)
Education Act/*Loi sur l'éducation*	8 (4)
	17.1 (4)
	170 (2.9)
	230.18 (1)
	231 (12)
	234 (9)
	252 (4)
	257.51 (1)
	277.33 (3)
	277.34 (4)
	277.45 (4)
	301 (10)
	302 (10)
	303 (4)
	344
	351 (6)

Fr

Act *Loi*	Provision *Disposition*
Education Quality and Accountability Office Act, 1996/*Loi de 1996 sur l'Office de la qualité et de la responsabilité en éducation*	4 (4)
	6 (3)
Electricity Act, 1998/*Loi de 1998 sur l'électricité*	16 (10)
	25.16 (10)
	32 (4)
	61 (4)
	116 (6)
	161.2 (4)
Employer Health Tax Act/*Loi sur l'impôt-santé des employeurs*	38 (3)
Employment Standards Act, 2000/*Loi de 2000 sur les normes d'emploi*	88 (6)
	118 (5)
Environmental Assessment Act/*Loi sur les évaluations environnementales*	3.2 (2)
Environmental Bill of Rights, 1993/*Charte des droits environnementaux de 1993*	1 (1), definition of "regulation"/définition de «règlement»
Fairness for Parents and Employees Act (Teachers' Withdrawal of Services), 1997/*Loi de 1997 sur le traitement équitable des parents et des employés (retrait de services par les enseignants)*	3 (14)

Fr

Act *Loi*	Provision *Disposition*
	6 (6)
Farm Products Marketing Act/*Loi sur la commercialisation des produits agricoles*	7 (5)
Film Classification Act, 2005/*Loi de 2005 sur le classement des films*	46 (4)
Forest Fires Prevention Act/*Loi sur la prévention des incendies de forêt*	23 (2)
	37 (2)
Fuel Tax Act/*Loi de la taxe sur les carburants*	28.3 (4)
Greenbelt Act, 2005/*Loi de 2005 sur la ceinture de verdure*	3 (4)
	18 (3)
Health Insurance Act/*Loi sur l'assurance-santé*	45 (2.4)
Health Protection and Promotion Act/*Loi sur la protection et la promotion de la santé*	7 (3)
Highway Traffic Act/*Code de la route*	119 (3)
	122 (6)
Highway 407 Act, 1998/*Loi de 1998 sur l'autoroute 407*	12 (7)
	30 (8)
Human Rights Code/*Code des droits de la personne*	35 (5)
Independent Health Facilities Act/*Loi sur les établissements de santé autonomes*	4 (4)
Insurance Act/*Loi sur les assurances*	43 (1.1)

Fr

Act *Loi*	Provision *Disposition*
Labour Relations Act, 1995/*Loi de 1995 sur les relations de travail*	110 (22)
	133 (17)
	151 (4)
	153 (6)
Land Registration Reform Act/*Loi portant réforme de l'enregistrement immobilier*	16 (2)
Land Titles Act/*Loi sur l'enregistrement des droits immobiliers*	18 (7)
	32 (5)
	163.1 (2)
Legal Aid Services Act, 1998/*Loi de 1998 sur les services d'aide juridique*	63 (4)
Licence Appeal Tribunal Act, 1999/*Loi de 1999 sur le Tribunal d'appel en matière de permis*	6 (5)
McMichael Canadian Art Collection Act/*Loi sur la Collection McMichael d'art canadien*	*4 (4)*
	4 (7)
	5 (7)
Milk Act/*Loi sur le lait*	*7 (5)*
Mining Act/*Loi sur les mines*	35 (6)
	176

Fr

Act *Loi*	Provision *Disposition*
Ministry of Correctional Services Act/*Loi sur le ministère des Services correctionnels*	11 (2)
Municipal Act, 2001/*Loi de 2001 sur les municipalités*	173 (13)
	175 (7)
	454 (2)
Municipal Property Assessment Corporation Act, 1997/*Loi de 1997 sur la Société d'évaluation foncière des municipalités*	10 (7)
Northern Services Boards Act/*Loi sur les régies des services publics du Nord*	38 (7)
Oak Ridges Moraine Conservation Act, 2001/*Loi de 2001 sur la conservation de la moraine d'Oak Ridges*	*9 (11)*
	18 (3)
Occupational Health and Safety Act/*Loi sur la santé et la sécurité au travail*	32.2 (3)
	61 (3.11)
Oil, Gas and Salt Resources Act/*Loi sur les ressources en pétrole, en gaz et en sel*	7.1 (2)
Ombudsman Act/*Loi sur l'ombudsman*	15 (2)
Ontarians with Disabilities Act, 2001/*Loi de 2001 sur les personnes handicapées de l'Ontario*	4 (6)
	18 (4)
Ontario College of Teachers Act, 1996/*Loi de 1996 sur l'Ordre des enseignantes et des enseignants de l'Ontario*	56

Fr

Act *Loi*	Provision *Disposition*
Ontario Energy Board Act, 1998/*Loi de 1998 sur la Commission de l'énergie de l'Ontario*	4.10 (9)
	15 (4)
	44 (7)
	70.1 (6)
Ontario Heritage Act/*Loi sur le patrimoine de l'Ontario*	25.2 (7)
Ontario Highway Transport Board Act/*Loi sur la Commission des transports routiers de l'Ontario*	13
Ontario New Home Warranties Plan Act/*Loi sur le régime de garanties des logements neufs de l'Ontario*	23 (2)
Ontario Planning and Development Act, 1994/*Loi de 1994 sur la planification et l'aménagement du territoire de l'Ontario*	2 (2)
	15 (4)
Pension Benefits Act/*Loi sur les régimes de retraite*	93 (10)
Personal Property Security Act/*Loi sur les sûretés mobilières*	73.1 (2)
Places to Grow Act, 2005/*Loi de 2005 sur les zones de croissance*	17 (3)
Public Lands Act/*Loi sur les terres publiques*	51 (2)
Public Sector Labour Relations Transition Act, 1997/*Loi de 1997 sur les relations de travail liées à la transition dans le secteur public*	37 (6)
Public Service Act/*Loi sur la fonction publique*	29 (5)

Fr

Act *Loi*	Provision *Disposition*
Public Service Pension Act/*Loi sur le Régime de retraite des fonctionnaires*	6 (6)
Public Transportation and Highway Improvement Act/*Loi sur l'aménagement des voies publiques et des transports en commun*	36 (4)
Registry Act/*Loi sur l'enregistrement des actes*	13 (7)
	100 (2)
	101.1 (2)
Repair and Storage Liens Act/*Loi sur le privilège des réparateurs et des entreposeurs*	31.1 (2)
Safe Drinking Water Act, 2002/*Loi de 2002 sur la salubrité de l'eau potable*	9 (5)
	157 (3)
Securities Act/*Loi sur les valeurs mobilières*	3.2 (11)
	143 (11)
	143 (12)
Social Housing Reform Act, 2000/*Loi de 2000 sur la réforme du logement social*	*34 (6)*
Statutory Powers Procedure Act/*Loi sur l'exercice des compétences légales*	25.1 (5)
Technical Standards and Safety Act, 2000/*Loi de 2000 sur les normes techniques et la sécurité*	36 (4)
Travel Industry Act, 2002/*Loi de 2002 sur le secteur du voyage*	37

Fr

Act *Loi*	Provision *Disposition*
Trillium Gift of Life Network Act/*Loi sur le Réseau Trillium pour le don de vie*	8.12 (3)
Vintners Quality Alliance Act, 1999/*Loi de 1999 sur la société appelée Vintners Quality Alliance*	5 (3)
Vital Statistics Act/*Loi sur les statistiques de l'état civil*	37 (4)
Waste Diversion Act, 2002/*Loi de 2002 sur le réacheminement des déchets*	30 (9)

TABLE 2/TABLEAU 2

Act *Loi*	Provision *Disposition*
Human Rights Code/*Code des droits de la personne*	46, definition of "person"/définition de «personne»
Retail Sales Tax Act/*Loi sur la taxe de vente au détail*	1 (1), definition of "person"/définition de «personne»
Statistics Act/*Loi sur la statistique*	1, definition of "person"/définition de «personne»

PART IX
COMMENCEMENT AND SHORT TITLE

Commencement

143. (1) Subject to subsections (2) and (3), the provisions set out in this Schedule comes into force on,

Fr

(a) the first anniversary of the day the *Access to Justice Act, 2006* receives Royal Assent; or

(b) an earlier day to be named by proclamation of the Lieutenant Governor.

Same

(2) Sections 111 and 125, this section and section 144 come into force on the day the *Access to Justice Act, 2006* receives Royal Assent.

Same

(3) The provision in each line of Column 1 of the Table to this subsection comes into force on the later of the following days:

1. The day section 134 comes into force.

2. The day the provision described in the corresponding line of Column 2 of the Table to this subsection comes into force.

TABLE/TABLEAU

Column 1/Colonne 1	Column 2/Colonne 2
subsection 107 (2)/paragraphe 107 (2)	subsection 287.6 (3) of the *Education Act*/paragraphe 287.6 (3) de la *Loi sur l'éducation*
section 112/article 112	subsection 108 (2) of the *Funeral, Burial and Cremation Services Act, 2002*/paragraphe 108 (2) de la *Loi de 2002 sur les services funéraires et les services d'enterrement et de crémation*
subsection 114 (1)/paragraphe 114 (1)	subsection 10 (6) of the *Highway 407 East Completion Act, 2001*/paragraphe 10 (6) de la *Loi de 2001 sur le tronçon final est de l'autoroute 407*
subsection 114 (2)/paragraphe 114 (2)	subsection 29 (8) of the *Highway 407 East Completion Act, 2001*/paragraphe 29 (8) de la *Loi de le tronçon final est de l'autoroute 407*

Fr

section 119/article 119	subsection 38 (3) of the *Motor Vehicle Dealers Act, 2002*/paragraphe 38 (3) de la *Loi de 2002 sur le commerce des véhicules automobiles*
section 129/article 129	subsection 46 (3) of the *Real Estate and Business Brokers Act, 2002*/paragraphe 46 (3) de la *Loi de 2002 sur le courtage commercial et immobilier*
subsection 132 (1)/paragraphe 132 (1)	subsection 15 (7) of the *Safe Drinking Water Act, 2002*/paragraphe 15 (7) de la *Loi de 2002 sur la salubrité de l'eau potable*
subsection 132 (2)/paragraphe 132 (2)	subsection 21 (9) of the *Safe Drinking Water Act, 2002*/paragraphe 21 (9) de la *Loi de 2002 sur la salubrité de l'eau potable*

Short title

144. The short title of the Act set out in this Schedule is the *Legislation Act, 2006*.

Fr

1910

Fr

TAB 56

Tab A

O. Reg. 284/01: RULES OF CIVIL PROCEDURE

Filed July 20, 2001 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 284/01

COURTS OF JUSTICE ACT

Made: May 14, 2001

Approved: July 19, 2001

Filed: July 20, 2001

Printed in *The Ontario Gazette:* August 4, 2001

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

Note: Since the end of 2000, Regulation 194 has been amended by Ontario Regulations 113/01, 243/01 and 244/01. Previous amendments are listed in the Table of Regulations published in *The Ontario Gazette* dated January 20, 2001.

1. Clause 1.01 (2) (a) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by striking out "rules 1.01 to 1.06" and substituting "rules 1.01 to 1.08".

2. Rule 1.03 of the Regulation is amended by adding the following definitions:

"partial indemnity costs" mean costs awarded under the partial indemnity scale of a costs grid established by Part I of Tariff A, and "on a partial indemnity basis" has a corresponding meaning; ("dépens d'indemnisation partielle")

"substantial indemnity costs" mean costs awarded under the substantial indemnity scale of a costs grid established by Part I of Tariff A, and "on a substantial indemnity basis" has a corresponding meaning. ("dépens d'indemnisation substantielle")

3. Rule 1.04 of the Regulation is amended by adding the following subrules:

"Party and Party" Costs

(4) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs.

Fr

"Solicitor and Client" Costs

4. Rule 14.03.1 of the Regulation is amended by striking out "subrule 76.02 (2)" and substituting "subrule 76.02 (3)".

5. Subrule 14.08 (3) of the Regulation is revoked and the following substituted:

Dismissal by Registrar

(3) Subrules (1) and (2) are subject to rules 76.06 and 77.08, which provide that in certain circumstances the registrar shall make an order dismissing the action as abandoned.

6. Subrule 20.04 (2) of the Regulation is revoked and the following substituted:

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

7. (1) Subrule 20.06 (1) of the Regulation is amended by striking out "on a solicitor and client basis" and substituting "on a substantial indemnity basis".

(2) Subrule 20.06 (2) of the Regulation is amended by striking out "on a solicitor and client basis" and substituting "on a substantial indemnity basis".

8. Subrule 34.02 (3) of the Regulation is amended by striking out "on a solicitor and client basis" and substituting "on a substantial indemnity basis".

9. Subrule 37.03 (5) of the Regulation is amended by striking out "on a solicitor and client basis" and substituting "on a substantial indemnity basis".

10. Clause 39.02 (4) (b) of the Regulation is amer striking out "party and party costs" and substituting "partial indemnity costs".

Fr

(a) by striking out "party and party costs" and substituting "partial indemnity costs"; and

(b) by striking out "solicitor and client costs" and substituting "substantial indemnity costs".

(2) Subrule 49.10 (2) of the Regulation is amended by striking out "party and party costs" wherever it appears and substituting in each case "partial indemnity costs".

12. Rule 50.07 of the Regulation is amended by striking out "Subrule 50.04 (1)" and substituting "Rule 50.04".

13. Rule 53.08 of the Regulation is revoked and the following substituted:

EVIDENCE ADMISSIBLE ONLY WITH LEAVE

53.08 (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

(2) Subrule (1) applies with respect to the following provisions:

1. Subrule 30.08 (1) (failure to disclose document).
2. Rule 30.09 (failure to abandon claim of privilege).
3. Rule 31.07 (refusal to disclose information on discovery).
4. Subrule 31.09 (3) (failure to correct answers on discovery).
5. Subrule 53.03 (3) (failure to serve expert's report).
6. Subrule 76.03 (3) (failure to disclose witness).

14. The heading of Rule 57 of the Regulation is revoked and the following substituted:

RULE 57 COSTS OF PROCEEDINGS

15. (1) Subrule 57.01 (3) of the Regulation is revoke[d] [a]nd the following substituted:

Fr

Tariffs.

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

(2) Clause 57.01 (4) (c) of the Regulation is amended by striking out "solicitor and client" and substituting "substantial indemnity".

(3) Rule 57.01 of the Regulation is amended by adding the following subrule:

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service.

16. Subrule 57.03 (1) of the Regulation is revoked and the following substituted:

Contested Motion

(1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.

17. Rule 58.01 of the Regulation is amended by striking out "between party and party".

18. Subrules 58.05 (1) and (2) of the Regulation are revoked and the following substituted:

Generally

(1) If costs are to be assessed, the assessment officer shall asses[illegible]w,

(a) lawyers' fees and disbursements in accordance with subrule 57.01 (1) and the Tariffs; and

Fr

(2) No other fees, disbursements or charges shall be assessed or allowed unless the court orders otherwise.

19. Rule 58.09 of the Regulation is amended by striking out "party and party costs" and substituting "costs".

20. Subrule 58.12 (3) of the Regulation is amended by striking out "between party and party" and substituting "between parties".

21. Clause 61.10 (1) (a) of the Regulation is revoked and the following substituted:

(a) a table of contents describing each document by its nature and date;

22. Subrule 61.10.1 (2) of the Regulation is revoked.

23. (1) Subrule 61.12.1 (3) of the Regulation is amended by striking out "at least 60 days before the date scheduled for the hearing" and substituting "at least 10 days before the date scheduled for the hearing".

(2) Subrule 61.12.1 (5) of the Regulation is revoked and the following substituted:

(5) A compendium or joint compendium shall contain the following, in consecutively numbered pages arranged in the following order:

1. A table of contents describing each excerpt from the transcript of evidence and each exhibit included in the compendium by its nature, date and exhibit number or letter.

2. The excerpts from the transcript of evidence referred to in the factum of the party filing the compendium (or in the factums of the parties, in the case of a joint compendium), and any additional excerpts from the transcript of evidence to which the party filing the compendium intends to refer during the hearing of the appeal (or to which the parties intend to refer, in the case of a joint compendium).

3. The exhibits referred to in the factum of the party filing the compendium (or in the factums of the parties, in the case of a joint compend[illegible] any additional exhibits to which the party filing the compendium intends to refer during the hearing of the appeal (or to which the parties intend to refer, in the case of a joint

Fr

not by exhibit number.

(6) A party who intends to refer at the hearing of an appeal to an excerpt from the transcript of evidence or to an exhibit that is not contained in a compendium or joint compendium shall,

(a) serve a supplementary compendium containing the relevant material on every other party and on any person entitled by statute or under rule 13.03 (intervention in appeal) to be heard on the appeal; and

(b) file with proof of service, no later than two days before the hearing, three copies of the supplementary compendium, or five copies if the appeal is heard by five judges.

Relief from Compliance

(7) Where compliance with this rule would cause undue expense or delay, a judge of the appellate court may give special directions.

24. Subrule 69.24 (6.6) of the Regulation is amended by striking out "solicitor and client costs" and substituting "substantial indemnity costs".

25. Rule 76 of the Regulation is revoked and the following substituted:

RULE 76 SIMPLIFIED PROCEDURE

APPLICATION OF RULE

76.01 (1) The simplified procedure set out in this Rule does not apply to actions under,

(a) the *Class Proceedings Act, 1992*;

(b) the *Construction Lien Act*;

(c) Rule 69, 70 or 77.

Application of Other Rules

(2) The rules that apply to an action apply to an action that is proceeding under this Rule, unless this Rule provides otherwise.

AVAILABILITY OF SIMPLIFIED PROCEDURE

Fr

When Mandatory

1. The plaintiff's claim is exclusively for one or more of the following:

i. Money.

ii. Real property.

iii. Personal property.

2. The total of the following amounts is $50,000 or less, exclusive of interest and costs:

i. The amount of money claimed, if any.

ii. The fair market value of any real property and of any personal property, as at the date the action is commenced.

(2) If there are two or more plaintiffs, the procedure set out in this Rule shall be used if each plaintiff's claim, considered separately, meets the requirements of subrule (1).

When Optional

(3) The procedure set out in this Rule may be used in any other action at the option of the plaintiff, subject to subrules (4) to (9).

Originating Process

(4) The statement of claim (Form 14A, 14B or 14D) or notice of action (Form 14C) shall indicate that the action is being brought under this Rule.

Action Continues to Proceed Under Rule

(5) An action commenced under this Rule continues to proceed under this Rule unless,

(a) the defendant objects in the statement of defence to the action proceeding under this Rule because the plaintiff's claim does not comply with subrule (1), and the plaintiff does not abandon in the reply the claims or parts of claims that do not comply; or

(b) a defendant by counterclaim, crossclaim or third party claim objects in the statement of defence to the counterclaim, crossclaim or third party claim proceeding under this Rule because the counterclaim, crossclaim or third party claim does not comply with subrule (1), and the defendant does not abandon in the reply to the counterclaim, crossclaim or third party claim the claims or p aims that do not comply.

Fr

Continuance Under Ordinary Procedure — Where Notice Required

(a) the action is continued under the ordinary procedure or under Rule 77, as the case may be; and

(b) the plaintiff shall deliver, after all the pleadings have been delivered or at the time of amending the pleadings, as the case may be, a notice (Form 76A) stating that the action and any related proceedings are continued as an ordinary action or under Rule 77, as the case may be.

Continuance Under Simplified Procedure — Where Notice Required

(7) An action that was not commenced under this Rule is continued under this Rule if,

(a) a party's pleading is amended;

(b) the amended pleading complies with subrule (1);

(c) all other claims, counterclaims, crossclaims or third party claims comply with this Rule; and

(d) the consent of all the parties is filed.

(8) The plaintiff shall deliver a notice (Form 76A) stating that the action and any related proceedings are continued under this Rule.

Effect of Abandonment

(9) A party who abandons a claim or part of a claim or amends a pleading so that the claim, counterclaim, crossclaim or third party claim complies with subrule (1) may not bring the claim or part in any other proceeding.

AFFIDAVIT OF DOCUMENTS

Copies of Documents

76.03 (1) A party to an action under this Rule shall, within 10 days after the close of pleadings, serve on every other party,

(a) an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relating to any matter in issue in the action that are or have been in the party's possession, control or power; and

(b) copies of the documents referred to in Schedule A of the of documents.

Fr

List of Potential Witnesses

unless the court orders otherwise.

Effect of Failure to Disclose

(3) At the trial of the action, a party may not call as a witness a person whose name has not been disclosed in the party's affidavit of documents or any supplementary affidavit of documents, unless the court orders otherwise.

Lawyer's Certificate

(4) The lawyer's certificate under subrule 30.03 (4) (full disclosure in affidavit) shall include a statement that the lawyer has explained to the deponent the necessity of complying with subrules (1) and (2).

NO DISCOVERY, CROSS-EXAMINATION ON AN AFFIDAVIT OR EXAMINATION OF A WITNESS

76.04 The following are not permitted in an action under this Rule:

1. Examination for discovery under rule 31.03 or 31.10.
2. Examination for discovery by written questions and answers under Rule 35.
3. Cross-examination of a deponent on an affidavit under rule 39.02.
4. Examination of a witness on a motion under rule 39.03.

MOTIONS

Motion Form

76.05 (1) The moving party shall serve a motion form (Form 76B) in accordance with rule 37.07 and shall submit it to the court before the motion is heard.

Place of Hearing

(2) Unless the parties agree otherwise or the court orders otherwise, the motion shall be heard in the county where the action was commenced.

Procedure

(3) Depending on the practical requirements of the situation, the motion may be made,

(a) with or without supporting material or a motion record;

(b) by attendance, in writing, by fax or under rule 1.0[illegible]hone and video conferences).

Fr

registrar shall make an order granting the relief sought:

1. The motion is for an order on consent, the consent of all parties is filed and the consent states that no party affected by the order is under disability.

2. No responding material is filed and the notice of motion or the motion form states that no party affected by the order is under disability.

(5) Subrule (4) applies to a motion for,

(a) amendment of a pleading or notice of motion;

(b) addition, deletion or substitution of a party whose consent is filed;

(c) removal of a solicitor as solicitor of record;

(d) setting aside the noting of a party in default;

(e) setting aside a default judgment;

(f) discharge of a certificate of pending litigation;

(g) security for costs in a specified amount; or

(h) dismissal of a proceeding with or without costs.

Disposition

(6) The court or registrar shall record the disposition of the motion on the motion form.

(7) No formal order is required unless,

(a) the court or registrar orders otherwise;

(b) an appeal is made to a judge; or

(c) an appeal or motion for leave to appeal is made to an appellate court.

DISMISSAL BY REGISTRAR

If No Defence Filed

76.06 (1) The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

1. More than 180 days have passed since the date the originating process was issued.

2. No statement of defence has been filed.

3. The action has not been disposed of by final order or judgment.

4. The action has not been set down for trial or summary trial.

Fr

If Defence Filed

(2) The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

1. More than 150 days have passed since the filing of the first statement of defence or notice of intent to defend.

2. The action has not been disposed of by final order or judgment.

3. The action has not been set down for trial or summary trial.

4. The registrar has given 45 days notice that the action will be dismissed as abandoned.

Service on Parties

(3) The registrar shall serve a copy of the order made under subrule (1) or (2) on the parties.

Effect on Subsequent Action

(4) The dismissal of an action as abandoned has the same effect as a dismissal for delay under rule 24.05.

SUMMARY JUDGMENT

Where Available

76.07 (1) After the close of pleadings, a party may move before a judge with supporting affidavit material for summary judgment.

Place of Hearing

(2) Unless the parties agree otherwise or the court orders otherwise, the motion shall be heard in the county where the action was commenced.

Application of Summary Judgment Procedure

(3) Rules 20.05, 20.07, 20.08 and 20.09 (summary judgment procedure) apply to the motion, but rules 20.01 to 20.04 (availability, affidavits, factums, disposition of motion) and rule 20.06 (costs) do not apply.

Responding Party's Material

Fr

in affidavit material, specific facts to show that judgment ought not to be granted.

Contents of Affidavit

(5) An affidavit for use on the motion may be made on information and belief as permitted by subrule 39.01 (4), but on the hearing of the motion an adverse inference may be drawn, if appropriate, from a party's failure to provide the evidence of persons having personal knowledge of contested facts.

Motion Record Required

(6) The moving party shall serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing of the motion.

Contents of Motion Record

(7) The motion record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the notice of motion;

(c) a copy of all affidavits served by any party for use on the motion; and

(d) a copy of the pleadings, including those relating to any counterclaim, crossclaim or third party claim.

Factums Required

(8) Every party to the motion shall serve on every other party a factum consisting of a concise statement of the facts and law relied upon by the party and file it, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing of the motion.

Test for Summary Judgment

(9) The presiding judge shall grant judgment on the motion unless,

(a) he or she is unable to decide the issues in the action without cross-examination; or

(b) it would be otherwise unjust to decide the issues on the motion.

Fr

determine the mode of trial that is appropriate in all the circumstances.

SETTLEMENT DISCUSSION AND DOCUMENTARY DISCLOSURE

76.08 Within 60 days after the filing of the first statement of defence or notice of intent to defend, the parties shall, in a meeting or telephone call, consider whether,

(a) all documents relating to any matter at issue have been disclosed; and

(b) settlement of any or all issues is possible.

HOW DEFENDED ACTION IS SET DOWN FOR TRIAL OR SUMMARY TRIAL

Notice of Readiness for Pre-Trial Conference

76.09 (1) Despite rule 48.02 (how action set down for trial), the plaintiff shall, within 90 days after the first statement of defence or notice of intent to defend is filed, set the action down for trial by serving a notice of readiness for pre-trial conference (Form 76C) on every party to the action and any counterclaim, crossclaim or third party claim and forthwith filing the notice with proof of service.

(2) If the plaintiff does not act under subrule (1), any other party may do so.

Certificate

(3) The party who sets the action down for trial shall certify in the notice of readiness for pre-trial conference that there was a settlement discussion.

PRE-TRIAL CONFERENCE

Notice

76.10 (1) The registrar shall serve notice of a pre-trial conference at least 45 days before the scheduled date.

Attendance

(2) A party and his or her lawyer shall, unless the court orders otherwise, participate in the pre-trial conference,

(a) by personal attendance; or

(b) under rule 1.08 (telephone and video conferences) if personal attendance would require undue amounts of travel time or expense.

Fr

Authority to Settle

person throughout the conference, whether it takes place during or after regular business hours.

Documents

(4) At least five days before the pre-trial conference, each party shall,

(a) file,

(i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,

(ii) a copy of any expert report, and

(iii) any other material necessary for the conference; and

(b) deliver,

(i) a two-page statement setting out the issues and the party's position with respect to them, and

(ii) a trial management checklist (Form 76D).

Trial Date

(5) The pre-trial conference judge or master shall fix a date for trial, subject to the direction of the regional senior judge.

Mode of Trial

(6) The parties may agree that the trial shall be an ordinary trial or a summary trial under rule 76.12; if they do not agree, the pre-trial conference judge or master shall determine the mode of trial that is appropriate in all the circumstances.

(7) If the trial is to be a summary trial under rule 76.12, the pre-trial conference judge or master may vary the order and time of presentation.

PLACING DEFENDED ACTION ON TRIAL LIST

Registrar

76.11 (1) The registrar shall place a defended action on the appropriate trial list immediately after the pre-trial conference.

Trial Record

Fr

(2) At least 10 days before the date fixed for trial, the party who set the action down for trial shall serve a trial record on every party to the action and any counterclaim,

rule 48.03.

(4) In the case of a summary trial under rule 76.12, the trial record shall contain, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;

(b) a copy of the pleadings, including those relating to any counterclaim, crossclaim or third party claim;

(c) a copy of any demand or order for particulars of a pleading and the particulars delivered in response;

(d) a copy of any order respecting the trial;

(e) a copy of all the affidavits served by all the parties for use on the summary trial; and

(f) a certificate signed by the solicitor of the party filing the trial record, stating that it contains the documents described in clauses (a) to (e).

SUMMARY TRIAL

Procedure

76.12 (1) At a summary trial, the evidence and argument shall be presented as follows, subject to any direction under subrule 76.10 (7):

1. The plaintiff shall adduce evidence by affidavit.

2. A party who is adverse in interest may cross-examine the deponent of any affidavit served by the plaintiff.

3. The plaintiff may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.

4. When any cross-examinations and re-examinations of the plaintiff's deponents are concluded, the defendant shall adduce evidence by affidavit.

5. A party who is adverse in interest may cross-examine the deponent of any affidavit served by a defendant.

6. A party shall complete all of the party's cross-examinations [illegible]60 minutes.

7. A defendant may re-examine any deponent who is cross-examined under this subrule for not more than 10 minutes.

Fr

evidence.

9. After the presentation of evidence, each party may make oral argument for not more than 45 minutes.

(2) The trial judge may extend a time provided in subrule (1).

(3) A party who intends to cross-examine the deponent of an affidavit at the summary trial shall, at least 10 days before the date fixed for trial, give notice of that intention to the party who filed the affidavit, who shall arrange for the deponent's attendance at the trial.

Judgment after Summary Trial

(4) The judge shall grant judgment after the conclusion of the summary trial.

COSTS CONSEQUENCES

Opting In

76.13 (1) Regardless of the outcome of the action, if this Rule applies as the result of amendment of the pleadings under subrule 76.02 (7), the party whose pleadings are amended shall pay, on a substantial indemnity basis, the costs incurred by the opposing party up to the date of the amendment that would not have been incurred had the claim originally complied with subrule 76.02 (1), unless the court orders otherwise.

Plaintiff Denied Costs

(2) Subrules (3) to (10) apply to a plaintiff who obtains a judgment that satisfies the following conditions:

1. The judgment awards exclusively one or more of the following:

   i. Money.

   ii. Real property.

   iii. Personal property.

2. The total of the following amounts is $50,000 or less, exclusive of interest and costs:

   i. The amount of money awarded, if any.

   ii. The fair market value of any real property and of any personal property awarded, as at the date the action is commenced.

Fr

(3) The plaintiff shall not recover any costs unless,

and continued the action under the ordinary procedure.

(4) Subrule (3) applies despite subrule 49.10 (1) (plaintiff's offer to settle).

(5) Subrule (3) does not apply if this Rule was unavailable because of the counterclaim, crossclaim or third party claim of another party.

Plaintiff may be Ordered to Pay Defendant's Costs

(6) The plaintiff may, in the trial judge's discretion, be ordered to pay all or part of the defendant's costs, including substantial indemnity costs, in addition to any costs the plaintiff is required to pay under subrule 49.10 (2) (defendant's offer to settle).

Defendant Objecting to Simplified Procedure

(7) In an action that includes a claim for real or personal property, if the defendant objected to proceeding under this Rule on the ground that the property's fair market value exceeded $50,000 at the date the action was commenced and the court finds the value did not exceed that amount at that date, the defendant shall pay, on a substantial indemnity basis, the costs incurred by the plaintiff that would not have been incurred had the claim originally complied with subrule 76.02 (1), unless the court orders otherwise.

Burden of Proof

(8) The burden of proving that the fair market value of the real or personal property at the date of commencement of the action was $50,000 or less is on the plaintiff.

Counterclaims, Crossclaims and Third Party Claims

(9) Subrules (1) to (8) apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Transition

(10) In the case of an action that was commenced before January 1, 2002, subrules (2), (7) and (8) apply as if "$50,000" read "$25,000".

26. Subrules 77.06 (3), (4), (4.1), (8), (9) and (10) of the Regulation are revoked.

27. Rule 77.09 of the Regulation is revoked and the following substituted:

Fr

DEFENCE OF PROCEEDING

(Form 77B).

Assignment to Case Management

(2) On the filing of a defence, the proceeding shall be assigned to a case management judge or team for management in accordance with rules 77.10 to 77.17.

28. Subrule 77.13 (7) of the Regulation is revoked.

29. (1) Subrule 77.14 (4) of the Regulation is amended by striking out "Except in actions to which Rule 76 applies".

(2) Subrule 77.14 (5) of the Regulation is amended by striking out "Except in actions to which Rule 76 applies".

(3) Subrule 77.14 (9) of the Regulation is revoked.

30. Subrule 77.15 (4) of the Regulation is revoked.

31. Form 14B of the Regulation is amended by striking out "*(*on a solicitor and client basis *if the mortgage so provides)*" in paragraph 1 (e) under the heading "CLAIM" and substituting "*(*on a substantial indemnity basis *if the mortgage so provides, or if it provides for costs on a solicitor and client basis)*".

32. The Regulation is amended by adding the following Form:

Fr

Courts of Justice Act

Insert regs\Graphics\Source Law\2001\284\284057Aae.tif

FORM 57A

Courts of Justice Act

BILL OF COSTS
(General heading)

BILL OF COSTS

AMOUNTS CLAIMED FOR FEES AND DISBURSEMENTS

(Following the items set out in Tariff A, itemize the claim for fees and disbursements. Indicate the names of the lawyers, students-at-law and law clerks who provided services in connection with each item.

In support of the claim for fees, attach copies of the dockets or other evidence.

In support of the claim for disbursements, attach copies of invoices or other evidence.)

STATEMENT OF EXPERIENCE

A claim for fees is being made with respect to the following lawyers:

Name of lawyer Years of experience

TO: *(name and address of lawyer or party)*

33. Form 58C of the Regulation is amended by striking out "party and party costs" and substituting "costs".

34. Form 74.4.1 of the Regulation is amended by striking out "VALUE OF ASSETS OF ESTATE" and substituting "VALUE OF ASSETS REFERRED TO IN ATTACHED WILL".

35. Form 74.5.1 of the Regulation is amended by striking out "VALUE OF ASSETS OF ESTATE" and substituting "VALUE OF ASSETS REFERRED TO IN ATTACHED WILL".

36. Form 76A of the Regulation is revoked and the following substituted:

Fr

Insert regs\Graphics\Source Law\2001\284\284076Aae.tif

FORM 76A

Courts of Justice Act

NOTICE WHETHER ACTION UNDER RULE 76
(General heading)

NOTICE WHETHER ACTION UNDER RULE 76

The plaintiff states that this action and any related proceedings are:

(select one of the following:)

( ) continuing under Rule 76

( ) continuing under Rule 77 — fast track

( ) continuing under Rule 77 — standard track

( ) continuing as an ordinary procedure.

(Name, address and telephone and fax numbers of lawyer or plaintiff)

Fr

Insert regs\Graphics\Source Law\2001\284\284076Bae.tif

FORM 76B

Courts of Justice Act
SIMPLIFIED PROCEDURE MOTION FORM

Court File No.....

(General heading)

SIMPLIFIED PROCEDURE MOTION FORM

JURISDICTION ( ) Judge
( ) Master
( ) Registrar

THIS FORM IS FILED BY *(Check appropriate boxes to identify the party filing this form as a moving/responding party on this motion AND to identify this party as plaintiff, defendant, etc. in the action)*

[ ] moving party
[ ] plaintiff
.....
[ ] responding party
[ ] defendant
.....
[ ] Other — specify kind of party and name
.....

MOTION MADE

[ ] on consent of all parties
[ ] without notice
[ ] on notice to all parties and unopposed
[ ] on notice to all parties and expected to be opposed

Notice of this motion was served on (date): .....

by means of:
.....

METHOD OF HEARING REQUESTED

[ ] by attendance
[ ] in writing only, no attendance
[ ] by fax
[ ] by telephone conference under rule 1.08
[ ] by video conference under rule 1.08

Date, time and place for conference call, telephone call or appearances

....
(date) *(time)* *(place)*

Fr

[ ] Extension of time — until *(give specific date)*: .....
[ ] serve claim
[ ] file or deliver statement of defence
[ ] Other relief — be specific

.....
.....

MATERIAL RELIED ON BY THIS PARTY

[ ] this form
[ ] pleadings
[ ] affidavits — specify
[ ] other — specify

.....
.....

GROUNDS IN SUPPORT OF/IN OPPOSITION TO MOTION (INCLUDING RULE AND STATUTORY PROVISIONS RELIED ON)

.....
.....

CERTIFICATION BY LAWYER

I certify that the above information is correct, to the best of my knowledge.
Signature of lawyer *(If no lawyer, party must sign)*

.....
Date
.....

THIS PARTY'S LAWYER *(If no lawyer, give party's name, address for service, telephone and fax number.)*

Name and firm:

Address:

Telephone: Fax:

OTHER LAWYER *(If no lawyer, give other party's name, address for service, telephone and fax number.)*

Name and firm:

Address:

Telephone: Fax:

THIS PARTY'S LAWYER *(If no lawyer, give party's name, address for service, telephone and fax number.)*

Name and firm:

Address:

Telephone: Fax:

OTHER LAWYER *(If no lawyer, give other party's name, address for service, telephone and fax number.)*

Name and firm:

Address:

Telephone: Fax:

DISPOSITION

[ ] order to go as asked
[ ] adjourned to
[ ] order refused
[ ] order to go as follows:

.....
.....

Fr

Heard in: [ ] courtroom [ ] office

[ ] Successful party MUST prepare formal order for signature

[ ] No copy of disposition to be sent to parties

[ ] Other directions — specify

.....

.....

Date ..... Name ..... Signature .....
Judge/Master/Registrar

FORM 76C

Courts of Justice Act

Insert regs\Graphics\Source Law\2001\284\284076Cae.tif

FORM 76C

Courts of Justice Act

NOTICE OF READINESS FOR PRE-TRIAL CONFERENCE
(General heading)

NOTICE OF READINESS FOR PRE-TRIAL CONFERENCE

The *(identify party)* is ready for a pre-trial conference and is setting this action down for trial. A pre-trial conference in the action will proceed as scheduled and the trial will proceed when the action is reached on the trial list, unless the court orders otherwise.

CERTIFICATE

I CERTIFY that there was a settlement discussion under rule 76.08.

Date *(Signature)*

(Name, address and telephone and fax numbers of lawyer or party giving notice)

TO *(Name and address of lawyer or party receiving notice)*

Fr

Insert regs\Graphics\Source Law\2001\284\284076Dae.tif

FORM 76D

Courts of Justice Act

TRIAL MANAGEMENT CHECKLIST

(General heading)

(Insert name of party filing this form)

TRIAL MANAGEMENT CHECKLIST

Trial Lawyer — Plaintiff (s):

Trial Lawyer — Defendant (s):

Filed by Plaintiff
Filed by Defendant
Filed by Subsequent Party

1. Issues Outstanding

   (a) liability: .....

   (b) damages: .....

   (c) other
   .....

2. Names of Plaintiff's Witnesses
   .....

3. Names of Defendant's Witnesses
   .....

4. Admissions
   .....

   Are the parties prepared to admit any facts for the purposes of the trial or summary trial? yes ☐ no ☐

5. Document Brief

   Will there be a document brief? yes ☐ no ☐

6. Request to Admit

   Will there be a request to admit? yes ☐ no ☐

   If so, have the parties agreed to a timetable? yes ☐ no ☐

7. Expert's Reports

   Are any expert's reports anticipated? yes ☐ no ☐

8. Amendments to Pleadings

   Are any amendments likely to be sought? yes ☐ no ☐

Fr

Have the parties agreed to a summary trial? yes ☐ no ☐

Have the parties agreed to an ordinary trial? yes ☐ no ☐

If the parties have not agreed about the mode of trial, what mode of trial is being requested by the party filing this checklist?

.....

10. Factum of Law

Will the parties be submitting factums of law? yes ☐ no ☐

37. Form 77A of the Regulation is amended by striking out "*WARNING: In accordance with rule 77.06 (2), this form must be given to the plaintiff.*"

38. (1) Part I of Tariff A to the Regulation is revoked and the following substituted:

PART I — COSTS GRID

Where students-at-law or law clerks have provided services of a nature that the Law Society of Upper Canada authorizes them to provide, the fees for those services may be assessed and allowed under this costs grid.

Where counsel has special expertise, his or her hourly rate classification may be varied accordingly.

1. Fees other than Counsel Fee

Hourly rates for pleadings, mediation under Rule 24.1 or Rule 75.1, financial statements, discovery of documents, drawing and settling issues on special case, setting down for trial, pre-motion conference, examination, pre-trial conference, settlement conference, notice or offer, preparation for hearing, attendance at assignment court, order, issuing or renewing a writ of execution or notice of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notice of garnishment, or for any other procedure authorized by the *Rules of Civil Procedure* and not provided for elsewhere in th rid.

Fr

Law Clerks	Up to $80.00 per hour	Up to $125.00 per hour
Student-at-law	Up to $60.00 per hour	Up to $90.00 per hour
Lawyer (less than 10 years)	Up to $225.00 per hour	Up to $300.00 per hour
Lawyer (10 or more but less than 20 years)	Up to $300.00 per hour	Up to $400.00 per hour
Lawyer (20 years and over)	Up to $350.00 per hour	Up to $450.00 per hour

2. Counsel Fee — Motion or Application

	Partial Indemnity Scale	Substantial Indemnity Scale
0.25 hour	Up to $400.00	Up to $800.00
1.00 hour	Up to $1,000.00	Up to $1,500.00
2.00 hours (half day)	Up to $1,400.00	Up to $2,400.00
1 day	Up to $2,100.00	Up to $3,500.00

3. Counsel Fee — Trial or Reference

	Partial Indemnity Scale	Substantial Indemnity Scale
Half Day	Up to $1,500.00	Up to $2,500.00
Day	Up to $2,300.00	Up to $4,000.00
Week	Up to $9,500.00	U 500.00

4. Counsel Fee — Appeal

Fr

1.00 hour	Up to $1,000.00	Up to $1,500.00
2.00 hours (half day)	Up to $1,250.00	Up to $2,000.00
1 day	Up to $2,000.00	Up to $4,000.00

(2) On July 3, 2004, Part I of Tariff A to the Regulation is amended by striking out “mediation under Rule 24.1 or Rule 75.1” and substituting “mediation under Rule 24.1”.

39. This Regulation comes into force on January 1, 2002.

Fr

Tab B

O. Reg. 14/04: RULES OF CIVIL PROCEDURE

Filed February 10, 2004 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 14/04

COURTS OF JUSTICE ACT

Made: October 1, 2003

Approved: February 4, 2004

Filed: February 10, 2004

Printed in *The Ontario Gazette:* February 28, 2004

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. (1) The definition of "information technology" in subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is revoked.

(2) Subrule 1.03 (2) of the Regulation is revoked.

2. Subrules 4.01 (3) to (11) of the Regulation are revoked and the following substituted:

Standards — Electronic Documents

(3) A document mentioned in rule 4.05.1 is sufficient, despite subrule (1), if it meets the standards of the software authorized by the Ministry of the Attorney General.

3. Subrules 4.04 (2) and (3) of the Regulation are revoked.

4. (1) Subrules 4.05 (1.1), (1.2) (1.2.1) and (1.2.2) of the Regulation are revoked and the following substituted:

Electronic Issuing

(1.1) A document mentioned in rule 4.05.1 may be issued electronically by using the authorized software.

Deemed Issuing

(1.2) A document issued under subrule (1.1) shall be deemed to have been issued by the Superior Court of Justice.

(2) Subrules 4.05 (2) and (3) of the Regulation are revoked and the following substituted:

Fr

Place of Filing

otherwise:

1. All documents required to be filed in a proceeding shall be filed in the court office in which the proceeding was commenced, subject to paragraphs 2 and 3.

2. If the proceeding has been transferred to another county in accordance with rule 13.1.02, the documents shall be filed in the court office in the new county, subject to paragraph 3.

3. An affidavit, transcript, record or factum to be used at a hearing shall be filed in the court office in the county where the hearing is to be held.

(3) Subrules 4.05 (4.1), (4.1.1) and (4.1.2) of the Regulation are revoked and the following substituted:

Electronic Filing

(4.1) A document mentioned in rule 4.05.1 may be filed electronically by using the authorized software.

5. (1) Subrule 4.05.1 (1) of the Regulation is revoked.

(2) Paragraph 7 of subrule 4.05.1 (2) of the Regulation is amended by striking out "subrule 60.15 (2.1)" and substituting "subrule 60.15 (4)".

(3) Paragraph 4 of subrule 4.05.1 (3) of the Regulation is amended by striking out "subrule 60.15 (2.1)" and substituting "subrule 60.15 (4)".

6. Rule 4.05.2 of the Regulation is revoked.

7. Subrules 7.02 (2) and (3) of the Regulation are revoked and the following substituted:

Affidavit to be Filed

(2) No person except the Children's Lawyer or the Public Guardian and Trustee shall act as litigation guardian for a plaintiff or applicant who is under disability until the person has filed an affidavit in which the person,

(a) consents to act as litigation guardian in the proceeding;

(b) confirms that he or she has given written authority to lawyer to act in the proceeding;

Fr

(c) provides evidence concerning the nature and extent of the disability;

Ontario;

(f) sets out his or her relationship, if any, to the person under disability;

(g) states that he or she has no interest in the proceeding adverse to that of the person under disability; and

(h) acknowledges that he or she has been informed of his or her liability to pay personally any costs awarded against him or her or against the person under disability.

8. Subrules 7.03 (2.2) and (2.3) of the Regulation are revoked and the following substituted:

Affidavit by Guardian or Attorney

(2.2) A person who has authority under subrule (2.1) to act as litigation guardian shall, before acting in that capacity in a proceeding, file an affidavit containing the information referred to in subrule (10).

9. Rule 11.01 of the Regulation is amended by striking out "the proceeding shall be stayed" and substituting "the proceeding shall be stayed with respect to the party whose interest or liability has been transferred or transmitted".

10. The Regulation is amended by adding after the heading "COMMENCEMENT OF PROCEEDINGS" the following Rule:

RULE 13.1 PLACE OF COMMENCEMENT AND HEARING OR TRIAL

PLACE OF COMMENCEMENT

Statute or Rule Governing Place of Commencement, Trial or Hearing

13.1.01 (1) If a statute or rule requires a proceeding to be commenced, brought, tried or heard in a particular county, the proceeding shall be commenced at a court office in that county and the county shall be named in the originating process.

Choice of Place

(2) If subrule (1) does not apply, the proceeding may be comme Fr ny court office in any county named in the originating process.

Motion to Transfer to Another County

13.1.02 (1) If subrule 13.1.01 (1) applies to a proceeding but a plaintiff or applicant commences it in another place, the court may, on its own initiative or on any party's motion, order that the proceeding be transferred to the county where it should have been commenced.

(2) If subrule (1) does not apply, the court may, on any party's motion, make an order to transfer the proceeding to a county other than the one where it was commenced, if the court is satisfied,

(a) that it is likely that a fair hearing cannot be held in the county where the proceeding was commenced; or

(b) that a transfer is desirable in the interest of justice, having regard to,

(i) where a substantial part of the events or omissions that gave rise to the claim occurred,

(ii) where a substantial part of the damages were sustained,

(iii) where the subject-matter of the proceeding is or was located,

(iv) any local community's interest in the subject-matter of the proceeding,

(v) the convenience of the parties, the witnesses and the court,

(vi) whether there are counterclaims, crossclaims, or third or subsequent party claims,

(vii) any advantages or disadvantages of a particular place with respect to securing the just, most expeditious and least expensive determination of the proceeding on its merits,

(viii) whether judges and court facilities are available at the other county, and

(ix) any other relevant matter.

(3) If an order has previously been made under subrule (2), any party may make a further motion, and in that case subrule (2) applies with necessary modifications.

Transfer on Initiative of Regional Senior Judge

(4) If subrule (1) does not apply, the regional senior judge in whose region the proceeding was commenced may, on his or her own initiative and subject to subrules (5) and (6), make an order to transfer the proceeding to another county in the region.

Fr

and video conference), to consider whether the order should be made.

(6) An order under subrule (4) may be made only if the regional senior judge is satisfied that the transfer is desirable in the interest of justice, having regard to the factors listed in subclauses (2) (b) (i) to (ix).

(7) If an order has previously been made under subrule (4), a further order may be made, and in that case subrule (4) applies with necessary modifications.

Effect of Order

(8) If an order is made under subrule (1), (2) or (4),

(a) the court file shall be transferred to the court office in the county to which the proceeding has been transferred; and

(b) all further documents required to be filed in the proceeding shall be filed there.

Transition

(9) Subrules (1), (2) and (3) apply only to proceedings commenced on or after July 1, 2004.

(10) Subrules (4), (5), (6) and (7) apply to proceedings whether they were commenced before, on or after July 1, 2004.

(11) In the case of a proceeding commenced before July 1, 2004, the court may order, on a party's motion, that the trial be held at a place other than that named in the statement of claim if the court is satisfied that,

(a) the balance of convenience substantially favours the holding of the trial at another place; or

(b) it is likely that a fair trial cannot be had at the place named in the statement of claim.

Revocation

(12) Subrules (9), (10) and (11) are revoked on July 1, 2005.

11. Subrule 14.01 (1) of the Regulation is revoked and the following substituted:

By Issuing Originating Process

(1) A proceeding shall be commenced by the issuing of an origina ess.

Fr

12. Subrule 14.07 (3) of the Regulation is revoked.

14. Rule 20.03 of the Regulation is revoked and the following substituted:

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served at least four days before the hearing.

(3) The responding party's factum shall be served at least two days before the hearing.

(4) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

15. Rule 21.03 of the Regulation is revoked and the following substituted:

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served at least four days before the hearing.

(3) The responding party's factum shall be served at least two days before the hearing.

(4) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

16. Rule 22.02 of the Regulation is revoked and the following substituted:

FACTUMS REQUIRED

22.02 (1) On a motion under rule 22.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served at least four days before the hearing.

(3) The responding party's factum shall be served at least two days before the hearing.

(4) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

Fr

PLACE OF HEARING OF MOTIONS

37.03 (1) All motions shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.

(2) Subrule (1) applies to a proceeding whether it was commenced before, on or after July 1, 2004.

Revocation

(3) Subrule (2) is revoked on July 1, 2005.

18. Subrule 37.10 (6) of the Regulation is revoked and the following substituted:

Factum

(6) A party may serve on every other party a factum consisting of a concise argument stating the facts and law relied on by the party.

(7) The moving party's factum, if any, shall be served at least four days before the hearing.

(8) The responding party's factum, if any, shall be served at least two days before the hearing.

(9) Each party's factum, if any, shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

19. Rule 37 of the Regulation is amended by adding the following rule:

CONFIRMATION OF MOTION

Confirmation of Motion

37.10.1 (1) A party who makes a motion on notice to another party shall,

(a) confer or attempt to confer with the other party;

(b) not later than 2 p.m. two days before the hearing date, give the registrar a confirmation of motion (Form 37B) by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(c) send a copy of the confirmation of motion to the other party by fax or e-mail.

Fr

Duty to Update

(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of motion (Form 37B) by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of motion to the other party by fax or e-mail.

20. (1) Subrule 38.03 (1) of the Regulation is revoked and the following substituted:

Place of Commencement

(1) The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01, and the application shall be heard there.

(2) Subrule 38.03 (1.1) of the Regulation is revoked.

(3) Subrule 38.03 (4) of the Regulation is revoked and the following substituted:

Counter-Application

(4) If a notice of application has been served and the respondent wishes to make an application against the applicant, or against the applicant and another person, the respondent shall make the application at the same place and time to the same judge, unless the court orders otherwise.

21. Subrule 38.09 (3) of the Regulation is amended by striking out "at least four days before the hearing" and substituting "at least two days before the hearing".

22. Rule 38 of the Regulation is amended by adding the following rule:

CONFIRMATION OF APPLICATION

Fr

Confirmation of Application

(b) not later than 2 p.m. two days before the hearing date, give the registrar a confirmation of application (Form 38B) by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(c) send a copy of the confirmation of application to the other party by fax or e-mail.

Effect of Failure to Confirm

(2) If no confirmation is given, the application shall not be heard, except by order of the court.

Duty to Update

(3) A party who has given a confirmation of application and later determines that the confirmation is no longer correct shall immediately,

(a) give the registrar a corrected confirmation of application (Form 38B), by,

(i) sending it by fax, or by e-mail if available in the court office, or

(ii) leaving it at the court office; and

(b) send a copy of the corrected confirmation of application to the other party by fax or e-mail.

23. Rule 40.04 of the Regulation is revoked and the following substituted:

FACTUMS REQUIRED

40.04 (1) On a motion under rule 40.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(2) The moving party's factum shall be served at least four days before the hearing.

(3) The responding party's factum shall be served at least two days before the hearing.

(4) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

24. Subrule 42.02 (2) of the Regulation is revoke[d] [Fr] [t]he following substituted:

serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(3) The moving party's factum, if any, shall be served at least four days before the hearing.

(4) The responding party's factum, if any, shall be served at least two days before the hearing.

(5) Each party's factum, if any, shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

25. Rule 46 of the Regulation is revoked and the following substituted:

RULE 46 PLACE OF TRIAL

COUNTY WHERE PROCEEDING COMMENCED OR TRANSFERRED

46.01 The trial of an action shall be held in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.

26. Rule 60.08 of the Regulation is amended by adding the following subrules:

Renewal

(3.1) A notice of renewal of garnishment may be issued under subrule (6.4) without leave of the court before the original notice of garnishment or any subsequent notice of renewal of garnishment expires.

. . . . .

Duration and Renewal

(6.2) A notice of garnishment remains in force for six years from the date of its issue and for a further six years from each renewal.

(6.3) A notice of garnishment may be renewed before its expiration by filing with the registrar where the proceeding was commenced a requisition for renewal of garnishment (Form 60G.1) together with the affidavit required by subrule (4).

(6.4) On the filing of the requisition and affidavit required by s .3), the registrar shall issue notices of renewal of garnishment (Form 60H.1) n garnishees the persons named in the affidavit and shall send a copy of each notice of renewal of

Fr

commenced.

(6.5) The provisions of these rules that apply with respect to notices of garnishment also apply with respect to notices of renewal of garnishment.

27. Rule 60.15 of the Regulation is revoked and the following substituted:

REMOVAL OR WITHDRAWAL OF WRIT FROM SHERIFF'S FILE

Sheriff's Procedure — Executed and Expired Writs

60.15 (1) When a writ has been fully executed or has expired, the sheriff shall so indicate in his or her file, and the writ shall be removed from the active file, transferred to a separate file of executed, expired and withdrawn writs and retained there.

Sheriff's Procedure — Withdrawn Writs

(2) When a writ is withdrawn, the sheriff shall record the date and time of the withdrawal, and if the writ is withdrawn as against all the debtors named in it, it shall be removed from the active file, transferred to a separate file of executed, expired and withdrawn writs and retained there.

Withdrawal of Writ by Person Who Filed It

(3) A party or lawyer who has filed a writ with a sheriff may withdraw it as against one or more of the debtors named in it by giving the sheriff written instructions to that effect.

(4) A party who has filed a writ with a sheriff may withdraw it as against one or more of the debtors named in it by filing a withdrawal of writ electronically under subrule 4.05.1 (2).

Withdrawal of Writ on Debtor's Request

(5) When a judgment debt has been released by an order of discharge under the *Bankruptcy and Insolvency Act* (Canada), the debtor may request that the writ be withdrawn by giving the sheriff,

(a) a written request to withdraw the writ (Form 60O); and

(b) a certified copy of the order of discharge.

(6) On receiving the documents described in subrule (5), the sh[Fr]l forthwith send the creditor, by mail addressed to the creditor at the address shown on the writ, a copy of the documents and a notice that the writ will be withdrawn unless the creditor,

(b) within 30 days after the date of the sheriff's notice, serves the sheriff with a copy of the notice of motion and a copy of all affidavits and other material served for use on the motion.

(7) The sheriff shall withdraw the writ after the day that is 30 days after the date of the notice to the creditor, unless the creditor has taken the steps described in clause (6) (b).

(8) If the creditor takes the steps described in clause (6) (b), the sheriff shall not withdraw the writ at the debtor's request unless the court orders otherwise.

28. Rule 61.01 of the Regulation is amended by striking out "clause 62.01 (1) (b), rule 62.02 or rule 71.03" and substituting "clause 62.01 (1) (b) or rule 62.02".

29. (1) Clause 61.03 (1) (b) of the Regulation is revoked and the following substituted:

(b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(2) Clause 61.03 (7) (a) of the Regulation is revoked and the following substituted:

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(3) Clause 61.03 (8) (a) of the Regulation is revoked and the following substituted:

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

30. (1) Clause 61.03.1 (3) (a) of the Regulation is revoked and the following substituted:

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(2) Clause 61.03.1 (17) (a) of the Regulation is revoked and the following substituted:

Fr

(3) Clause 61.03.1 (18) (a) of the Regulation is revoked and the following substituted:

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

31. Subrule 61.04 (1) of the Regulation is revoked and the following substituted:

Time for Appeal and Service of Notice

(1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A) together with the certificate required by subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

(a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and

(b) on any person entitled by statute to be heard on the appeal.

(1.1) The notice of appeal and certificate need not be served on,

(a) a defendant who was noted in default; or

(b) a respondent who has not delivered a notice of appearance, unless the respondent was heard at the hearing with leave.

32. Subrule 61.07 (1.2) of the Regulation is amended by striking out "before serving the notice of cross-appeal".

33. (1) Subrule 62.01 (2) of the Regulation is amended by striking out "within seven days after the date of the order or certificate appealed from" and substituting "within seven days after the making of the order or certificate appealed from".

(2) Subrule 62.01 (8) of the Regulation is revoked and the following substituted:

(8) The respondent shall serve on every other party, at least two [illegible] re the hearing,

(a) a factum consisting of a concise argument stating the facts and law relied on by the respondent; and

Fr

34. (1) Subrule 62.02 (2) of the Regulation is amended by striking out "within seven days after the date of the order from which leave to appeal is sought" and substituting "within seven days after the making of the order from which leave to appeal is sought".

(2) Subrule 62.02 (6) of the Regulation is revoked and the following substituted:

Factums Required

(6) On a motion for leave, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party.

(6.1) The moving party's factum shall be served at least four days before the hearing.

(6.2) The responding party's factum shall be served at least two days before the hearing.

(6.3) Each party's factum shall be filed, with proof of service, in the court office where the motion is to be heard, at least two days before the hearing.

35. Rule 69.17 of the Regulation is revoked and the following substituted:

PLACE OF COMMENCEMENT AND OTHER STEPS

Commencement Generally

69.17 (1) The petitioner shall commence the proceeding,

(a) in the county where a party resides;

(b) if the proceeding deals with custody of or access to a child who resides in Ontario, in the county where the child ordinarily resides; or

(c) in a county chosen by all the parties, but only with the court's permission, given in advance in that county.

Danger to Child or Party

(2) If there is immediate danger that a child may be removed from Ontario or immediate danger to a child's or party's health or safety, a party may commence the proceeding in any county and a motion may be heard in that county, but the proceeding shall be transferred to a county referred to in subrule (1) immediately after the motion is heard, unless the court orders otherwise.

Fr

(a) the proceeding is commenced in the county where a party resides;

(b) the proceeding deals with custody of or access to a child who resides in Ontario and is commenced in the county where the child ordinarily resides;

(c) the proceeding is commenced in a county chosen by all the parties, and the order permitting it to be commenced there is filed with the petition; or

(d) the lawyer or party asking to file the petition says in writing that the proceeding is one that may be commenced in that county under clause (1) (b) or subrule (2).

Steps Other Than Enforcement

(4) All steps in the proceeding, other than enforcement, shall take place in the county where the proceeding is commenced or to which it is transferred.

Enforcement — Payment Orders

(5) All steps in the enforcement of an order for the payment of money, including a motion to suspend a support deduction order, shall take place,

(a) in the county where the recipient resides;

(b) if the recipient does not reside in Ontario, in the county where the order is filed with the court for enforcement;

(c) if the person enforcing the order consents, in the county where the payor resides; or

(d) in the case of a motion under section 26 (income source dispute) of the *Family Responsibility and Support Arrears Enforcement Act, 1996*, in the county where the income source resides.

Enforcement — Other Orders

(6) All steps in the enforcement of an order other than an order for the payment of money shall take place,

(a) if the order involves custody of or access to a child,

(i) in the county where the child ordinarily resides, or

(ii) if the child does not ordinarily reside in Ontario, in the county to which the child has the closest connection;

Fr

(c) in a county chosen by all the parties, but only with the court's permission, given in advance in that county.

Alternative Place — Order Enforced by Contempt Motion

(7) An order, other than an order for payment of money, that is being enforced by a contempt motion may also be enforced in the county in which the order was made.

Filing Documents

(8) When a step in the enforcement of an order takes place in a county described in subrule (5), (6) or (7), all related documents shall be filed there as well.

Transfer

(9) If it is substantially more convenient to deal with a proceeding or any step in the proceeding in another county, the court may, on motion, order that the proceeding or step be transferred there.

36. Rule 70.05 of the Regulation is revoked and the following substituted:

PLACE OF COMMENCEMENT AND OTHER STEPS

70.05 The place of commencement and of other steps in a proceeding shall be determined in accordance with rule 69.17, which applies with necessary modifications.

37. Subrule 70.10.1 (6) of the Regulation is amended by striking out "subrule 37.03 (2) (place of hearing of motion made on notice)" in the portion before clause (a) and substituting "rule 37.03 (place of hearing of motions)".

38. Subrule 75.1.14 (5) of the Regulation is revoked.

39. (1) Subrule 76.02 (5) of the Regulation is amended by striking out "or" at the end of clause (a), by adding "or" at the end of clause (b) and by adding the following clause:

(c) the defendant makes a counterclaim, crossclaim or third party claim that does not comply with subrule (1) and states in the defendant's plead[illegible]e counterclaim, crossclaim or third party claim is to proceed under the ordinary procedure.

Fr

substituting "an amendment to the pleadings under Rule 26".

(3) Subclause 76.02 (7) (b) (i) of the Regulation is amended by striking out "amended" and substituting "amended under Rule 26".

40. Subrule 76.05 (2) of the Regulation is revoked and the following substituted:

Place of Hearing

(2) Unless the parties agree otherwise or the court orders otherwise, the motion shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02.

41. Subrule 77.01 (5) of the Regulation is revoked and the following substituted:

Place of Hearing of Motions

(5) Unless the court orders otherwise, all motions shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02.

42. (1) Form 11A of the Regulation is amended by striking out "section 69 of the *Bankruptcy Act* (Canada)" and substituting "section 69.4 of the *Bankruptcy and Insolvency Act* (Canada)".

(2) Form 14A of the Regulation is amended by striking out "The plaintiff proposes that this action be tried at *(place)*".

(3) Form 14B of the Regulation is amended by striking out "The plaintiff proposes that this action be tried at *(place)*".

(4) Form 14D of the Regulation is amended by striking out "The plaintiff proposes that this action be tried at *(place)*".

(5) Form 34A of the Regulation is amended by striking out the paragraph beginning with "YOU ARE REQUIRED TO ATTEND FOR AN EXAMINATION" and substituting the following:

Fr

[ ] Cross-examination on your affidavit dated *(date)*
[ ] Examination for discovery
[ ] Examination for discovery on behalf of or in place of *(identify party)*
[ ] Examination in aid of execution
[ ] Examination in aid of execution on behalf of or in place of *(identify party)*

(6) Form 34B of the Regulation is amended by striking out the paragraph beginning with "YOU ARE REQUIRED TO ATTEND FOR AN EXAMINATION" and substituting the following:

YOU ARE REQUIRED TO ATTEND, on *(day)*, *(date)*, at *(time)*, at the office of *(name, address and telephone number of examiner)*, for *(choose one of the following)*:

[ ] Cross-examination on your affidavit dated *(date)*
[ ] Examination for discovery with leave of the court
[ ] Examination out of court as witness before hearing
[ ] Examination in aid of execution
[ ] Taking evidence before trial

(7) The Regulation is amended by adding the following Forms:

Fr

Courts of Justice Act
(General heading)

CONFIRMATION OF MOTION

Insert regs\Graphics\Source Law\2004\14\14037Bae.tif

I, ... *(name)*, counsel for the moving party, confirm that the motion to be heard on ..... *(date)* will proceed on the following basis:

[ ] for an adjournment on consent to ..... *(date)*

[ ] for a contested adjournment to ..... *(date)*, for the following reason: *(specify who is requesting the adjournment and why, and who is opposing it and why)*

[ ] for a consent order

[ ] for hearing of all the issues

[ ] for hearing of the following issues only *(specify)*

I estimate that the time required for the motion will be: ..... minutes for the moving party *(ies)* and .....minutes for the responding party *(ies)* for a total of ..... minutes.

(Date)

TO *(Name and address of responding party's lawyer or responding party)*

. . . . .

Fr

Courts of Justice Act

(General heading)

CONFIRMATION OF APPLICATION

Insert regs\Graphics\Source Law\2004\14\14038Bae.tif

I, …….. *(name)*, counsel for the applicant, confirm that the application to be heard on …….. *(date)* will proceed on the following basis:

[ ] for an adjournment on consent to …….. *(date)*

[ ] for a contested adjournment to …….. *(date)*, for the following reason: *(specify who is requesting the adjournment and why, and who is opposing it and why)*

[ ] for a consent order

[ ] for hearing of all the issues

[ ] for hearing of the following issues only *(specify)*

I estimate that the time required for the application will be: …….. minutes for the applicant*(s)* and ……..minutes for the respondent*(s)* for a total of …….. minutes.

(Date)

TO *(Name and address of respondent's lawyer or respondent)*

(8) The Regulation is amended by adding the following Forms:

Fr

Courts of Justice Act

(General heading)

REQUISITION FOR RENEWAL OF GARNISHMENT

Insert regs\Graphics\Source Law\2004\14\1460G1ae.tif

TO: the local registrar at *(place)*

I REQUIRE a notice of renewal of garnishment to be issued in this proceeding, in accordance with the attached draft Form 60H.1. The total amount to be shown in the notice of renewal of garnishment is $....., made up as follows:

1. $ ..... for principal owing under the judgment or order, including prejudgment interest.

2. $ ..... for the costs of the action.

3. $ ..... in accordance with the regulations under the *Administration of Justice Act* and Tariff A, for issuing, renewing and filing with the sheriff a writ of execution or notice of garnishment.

4. $ ..... for disbursements paid to a sheriff, registrar, official examiner, court reporter or other public officer and to which the creditor is entitled under subrule 60.19 (1). *(Attach copies of all receipts.)*

5. $ ..... for an amount determined in accordance with the costs grid established by Part I of Tariff A for conducting an examination in aid of execution. *(Attach affidavit confirming that examination was conducted.)*

6. $ ..... for any other costs to which the creditor is entitled under subrule 60.19 (1). *(Attach certificate of assessment.)*

7. $ ..... for postjudgment interest to today's date. *(Calculate by counting the number of days that the principal sum has been owing, multiplying that number by the annual rate of interest, then multiplying by the principal sum owing and dividing by 365.)*

Date..... Signature .....
(Name, address and telephone number of creditor or creditor's lawyer)

. . . . .

Fr

Courts of Justice Act

Insert regs\Graphics\Source Law\2004\14\1460H1ae.tif

(Court file no.)

(Court)

BETWEEN *(name)*

Creditor

(Court seal) *(and)*

(name)

Debtor

(and)

(name)

Garnishee

NOTICE OF RENEWAL OF GARNISHMENT

TO *(name and address of garnishee)*

A LEGAL PROCEEDING in this court between the creditor and the debtor has resulted in an order that the debtor pay a sum of money to the creditor. The creditor claims that you owe a debt to the debtor. A debt to the debtor includes both a debt payable to the debtor and a debt payable to the debtor and one or more co-owners. The creditor has had this notice of renewal of garnishment directed to you as garnishee in order to seize any debt that you owe or will owe to the debtor. Where the debt is payable to the debtor and to one or more co-owners, you must pay one-half of the indebtedness or the greater or lesser amount specified in an order made under subrule 60.08 (16).

(Where appropriate, add: This notice of renewal of garnishment enforces an order for support.*)*

YOU ARE REQUIRED TO PAY to the Sheriff of the *(name of county or district),*

(a) within 10 days after this notice is served on you, all debts now payable by you to the debtor; and

(b) within 10 days after they become payable, all debts that become payable by you to the debtor within 6 years after this notice is served on you,

subject to the exemptions provided by section 7 of the *Wages Act.* The total amount of all your payments to the sheriff is not to exceed $.....less $10 for your costs of making each payment.

EACH PAYMENT MUST BE SENT with a copy of the attached garnishee's payment notice to the sheriff at the address shown below.

IF YOU DO NOT PAY THE TOTAL AMOUNT OF $..... LESS $10 FOR YOUR COSTS OF MAKING EACH PAYMENT WITHIN 10 DAYS after this notice is served on you, because the debt is owed to the debtor and to one or more co-owners or for any other reason, you must within that time serve on the creditor and the debtor and file with the court a garnishee's statement in Form 60I attached to this notice.

Fr

IF YOU FAIL TO OBEY THIS NOTICE, THE COURT MAY MAKE AND ENFORCE AN ORDER AGAINST YOU for payment of the amount set out above and the costs of the creditor.

IF YOU MAKE PAYMENT TO ANYONE OTHER THAN THE SHERIFF, YOU MAY BE LIABLE TO PAY AGAIN.

TO THE CREDITOR, THE DEBTOR AND THE GARNISHEE.

Any party may make a motion to the court to determine any matter in relation to this notice of renewal of garnishment.

Date..... Issued by .....
Local registrar

Address of
court office .....

.....

Creditor's address | Debtor's address | Sheriff's address

....

....

telephone no. . .....

.....

(The top portion of the garnishee's payment notice is to be completed by the creditor before the notice of renewal of garnishment is issued. Where it is anticipated that more than one payment will be made by the garnishee, the creditor should provide extra copies of the payment notice.)

GARNISHEE'S PAYMENT NOTICE

Make payment by cheque or money order payable to the Sheriff of the *(the name of county or district)* and send it, along with a copy of this payment notice, to the *(address)*.

Court ..... File no. .....

Office at ....

Creditor .....

Debtor .....

Garnishee .....

TO BE COMPLETED BY GARNISHEE FOR EACH PAYMENT

Date of payment .....

Amount enclosed $ .....

. . . . .

Fr

Courts of Justice Act
(General heading)

REQUEST TO WITHDRAW A WRIT

Insert regs\Graphics\Source Law\2004\14\14060Oae.tif

TO: the sheriff of the *(name of county)*

Under an order of this court in favour of .....*(name of creditor)* made on .....*(date)*, ... *(name of debtor)* was ordered to pay the sum of $..... *(where applicable, add* each month *or as may be)* with interest at the rate of ..... per cent per year commencing on ..... *(date)* and costs of $..... *(as fixed or assessed)* with interest at the rate of ..... per cent per year commencing on ..... *(date)*.

..... *(name of debtor)* states as follows:

1. The order has been released by an order of discharge under the *Bankruptcy and Insolvency Act* (Canada). A certified copy of the order is attached.

2. The debtor has no debts under section 178 of that Act.

..... *(name of debtor)* requests that the writ of seizure and sale issued with respect to the order be withdrawn under rule 60.15 of the *Rules of Civil Procedure*.

Date .....

_____
Signature of debtor

(Name, address and telephone and fax numbers of debtor or debtor's lawyer)

43. (1) Subject to subsection (2), this Regulation comes into force on filing.

(2) Subsection 4 (2), sections 10, 11 and 14 to 25, subsections 33 (2) and 34 (2), sections 35, 36, 37, 40 and 41, and subsections 42 (2), (3), (4) and (7) come into force on July 1, 2004.

Fr

1967

Fr

1968

Tab C

O. Reg. 131/04: RULES OF CIVIL PROCEDURE

Filed May 14, 2004 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 131/04

COURTS OF JUSTICE ACT

Made: March 31, 2004

Approved: May 12, 2004

Filed: May 14, 2004

Printed in *The Ontario Gazette*: May 29, 2004

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. (1) Paragraph 2 of subrule 1.02 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is revoked and the following substituted:

2. They do not apply to proceedings governed by Ontario Regulation 114/99 (Family Law Rules), except as provided in those rules.

(2) The Schedule to subrule 1.02 (1) of the Regulation is revoked.

(3) Subrule 1.02 (1.1) of the Regulation is revoked and the following substituted:

(1.1) Where a proceeding combines a matter to which the Family Law Rules apply with a matter to which these rules would ordinarily apply, the parties may agree, or the court on motion may order, that the Family Law Rules apply to the combined proceeding or part of it.

2. The definitions of "action", "originating process" and "respondent" in subrule 1.03 (1) of the Regulation are revoked and the following substituted:

"action" means a proceeding that is not an application and includes a proceeding commenced by,

(a) statement of claim,

(b) notice of action,

(c) counterclaim,

Fr

"originating process" means a document whose issuing commences a proceeding under these rules, and includes,

(a) a statement of claim,

(b) a notice of action,

(c) a notice of application,

(d) an application for a certificate of appointment of an estate trustee,

(e) a counterclaim against a person who is not already a party to the main action, and

(f) a third or subsequent party claim,

but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion; ("acte introductif d'instance")

"respondent" means a person against whom an application is made or an appeal is brought, as the circumstances require; ("intimé")

3. Clause 4.02 (1) (b) of the Regulation is amended by striking out "or subrule 69.03 (3) (divorce action)".

4. Subrule 14.01 (2) of the Regulation is revoked and the following substituted:

Exceptions

(2) A counterclaim that is only against persons who are already parties to the main action, and a crossclaim, shall be commenced by the delivery of the pleading containing the counterclaim or crossclaim, and the pleading need not be issued.

5. (1) Clause 14.03 (1) (b) of the Regulation is revoked.

(2) Clause 14.03 (2) of the Regulation is amended by striking out "other than a divorce action".

6. Rule 14.04 of the Regulation is revoked.

7. Subrule 14.06 (2) of the Regulation is amended by striking out "other than a divorce action".

8. Subrule 16.01 (1) of the Regulation is amended by striking out "except in the case of a divorce petition".

Fr

amended by adding "and" at the end.

(2) Clauses 19.02 (3) (o) and (p) of the Regulation are revoked.

11. Subrule 19.05 (2) of the Regulation is amended by striking out "a divorce or a declaration of the invalidity of a marriage".

12. (1) Clause 48.03 (1) (d) of the Regulation is revoked.

(2) Clause 48.03 (1) (e) of the Regulation is amended by striking out "or financial statement".

(3) Clauses 48.03 (2) (c), (d), (e) and (f) of the Regulation are revoked and the following substituted:

(c) any memorandum signed by counsel, or any order made by the court, following a pre-trial conference; and

(d) in an undefended action, any affidavit to be used in evidence.

13. Subclause 48.04 (2) (b) (vii) of the Regulation is revoked.

14. Subrule 59.03 (8) of the Regulation is revoked.

15. Subrule 59.04 (7) of the Regulation is revoked.

16. (1) Subrule 60.08 (10) of the Regulation is amended by striking out "unless subrule (10.1) applies" at the end.

(2) Subrule 60.08 (10.1) of the Regulation is revoked.

17. Rules 69 and 70 of the Regulation are revoked.

18. Clause 76.01 (1) (c) of the Regulation is revoked and the following substituted:

(c) Rule 77.

19. Form 4A of the Regulation is amended by adding "or" at the end of clause (c) and by striking out clauses (e), (f) and (g).

20. Form 59A of the Regulation is amended by s out "*(In an order that provides for payment of support, set out the last known*

Fr

21. Form 60B of the Regulation is amended by striking out "*(in a judgment that provides for payment of support, set out the last known address of the support creditor and debtor)*" at the end.

22. Form 60A of the Regulation is amended by striking out in the left column "*(where appropriate, add:* This writ enforces an order for support.*)*".

23. Form 60B of the Regulation is amended by striking out "*(Where appropriate, add:* This writ enforces an order for support.*)*".

24. Form 60H of the Regulation is amended by striking out "*(Where appropriate, add:* This notice of garnishment enforces an order for support.*)*" after the paragraph beginning with "A LEGAL PROCEEDING".

25. The following forms to the Regulation are revoked:

1. **Form 69A.**
2. **Form 69B.**
3. **Form 69C.**
4. **Form 69D.**
5. **Form 69E.**
6. **Form 69F.**
7. **Form 69G.**
8. **Form 69H.**
9. **Form 69I.**
10. **Form 69J.**
11. **Form 69K.**
12. **Form 69L.**
13. **Form 69M.**

Fr

16. Form 69P.

17. Form 69Q.

18. Form 69R.

19. Form 69S.

20. Form 69T.

21. Form 69U.

22. Form 69V.

23. Form 69W.

24. Form 69X.

25. Form 69Y.

26. Form 69Z.

27. Form 69Z.1.

28. Form 69Z.2.

29. Form 70A.2.

30. Form 70A.3.

31. Form 70B.

32. Form 70C.

33. Form 70D.

26. Form 77C of the Regulation is amended by striking out

"[ ] plaintiff/petitioner/applicant

....."

and substituting,

"[ ] plaintiff/applicant ....."

Fr

than Counsel Fee".

28. Tariff B of the Regulation is revoked.

29. This Regulation comes into force on July 1, 2004.

Fr

1976

Tab D

O. Reg. 42/05: RULES OF CIVIL PROCEDURE

Filed February 18, 2005 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 42/05

COURTS OF JUSTICE ACT

Made: December 15, 2004

Approved: February 16, 2005

Filed: February 18, 2005

Printed in *The Ontario Gazette*: March 5, 2005

AMENDING REG. 194 OF R.R.O. 1990 (RULES OF CIVIL PROCEDURE)

1. The definitions of "partial indemnity costs" and "substantial indemnity costs" in subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 are revoked and the following substituted:

"partial indemnity costs" mean costs awarded in accordance with Part I of Tariff A, and "on a partial indemnity basis" has a corresponding meaning; ("dépens d'indemnisation partielle")

. . . . .

"substantial indemnity costs" mean costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A, and "on a substantial indemnity basis" has a corresponding meaning. ("dépens d'indemnisation substantielle")

2. (1) Subrule 15.04 (2) of the Regulation is revoked and the following substituted:

(2) Service of a notice of motion for the removal of a solicitor from the record and service of the order shall be made on the client,

(a) personally or by an alternative to personal service under rule 16.03; or

(b) by mailing a copy to the client at,

(i) the client's last known address, and

(ii) another address, if any, where the solicitor believes is likely to come to the client's attention.

Fr

Contents of Order

(4) The order removing a solicitor from the record shall include,

(a) the client's last known address, or the address for service if different;

(b) another address, if any, where the solicitor believes the copy is likely to come to the client's attention;

(c) the client's telephone number and fax number, if any, unless the court orders otherwise;

(d) if the client is a corporation, the text of subrules (6) and (7); and

(e) if the client is not a corporation, the text of subrules (8) and (9).

(3) Rule 15.04 of the Regulation is amended by adding the following subrules:

Clients Other Than Corporations

(8) A client who is not a corporation shall, within 30 days after being served with the order removing the solicitor from the record,

(a) appoint a new solicitor of record by serving a notice under subrule 15.03 (2); or

(b) serve a notice of intention to act in person under subrule 15.03 (2).

(9) If the client fails to comply with subrule (8),

(a) the court may dismiss the client's proceeding or strike out his or her defence; and

(b) in an appeal,

(i) a judge of the appellate court may, on motion, dismiss the client's appeal, or

(ii) the court hearing the appeal may deny the client the right to be heard.

3. Rule 43 of the Regulation is revoked and the following substituted:

RULE 43 INTERPLEADER

GENERAL

Definition

Fr

43.01 (1) In rules 43.02 to 43.04,

"property" means personal property and includes a debt.

1. In the case of an application or motion for an interpleader order under subrule 43.02 (1), each person who makes a claim in respect of the property.

2. In the case of an application or motion for an interpleader order under subrule 43.02 (2),

i. the judgment debtor against whom the enforcement process has been filed,

ii. every creditor who has filed with the sheriff an enforcement process against the judgment debtor, and

iii. each person who makes a claim in respect of the property.

WHERE AVAILABLE

Person Claiming No Beneficial Interest

43.02 (1) A person may seek an interpleader order (Form 43A) in respect of property if,

(a) two or more other persons have made adverse claims in respect of the property; and

(b) the first-named person,

(i) claims no beneficial interest in the property, other than a lien for costs, fees or expenses, and

(ii) is willing to deposit the property with the court or dispose of it as the court directs.

Claims Under Rule 60.13

(2) A claimant who is entitled to do so under subrule 60.13 (4) or (5) may seek an interpleader order (Form 43A).

HOW OBTAINED

Application or Motion under Subrule 43.02 (1)

43.03 (1) The following requirements apply when a person seeks an interpleader order under subrule 43.02 (1):

1. If no proceeding has been commenced in respect of the property, the person shall make an application naming the claimants as respondents.

2. If a proceeding has been commenced in respect of the property, the person shall make a motion in the proceeding on notice to the claimants.

Fr

4. The application or motion shall be supported by an affidavit identifying the property, containing the names and addresses of every claimant of whom the deponent has knowledge, and stating that the applicant or moving party,

i. claims no beneficial interest in the property, other than a lien for costs, fees or expenses,

ii. does not collude with any of the claimants, and

iii. is willing to deposit the property with the court or dispose of it as the court directs.

Motion under Subrule 43.02 (2)

(2) The following requirements apply when a claimant seeks an interpleader order under subrule 43.02 (2):

1. The claimant shall make a motion, on notice to the other claimants, in the proceeding in which the writ of execution was issued against the debtor.

2. The notice of motion shall require the other claimants to attend the hearing to substantiate their claims.

DISPOSITION

Powers of Court

43.04 (1) On the hearing of an application or motion for an interpleader order, the court may,

(a) order that the applicant or moving party deposit the property with an officer of the court, sell it as the court directs or, in the case of money, pay it into court to await the outcome of a specified proceeding;

(b) declare that, on compliance with an order under clause (a), the liability of the applicant or moving party in respect of the property or its proceeds is extinguished; and

(c) order that the costs of the applicant or moving party be paid out of the property or its proceeds.

(2) In an order under subrule (1), the court may,

(a) order a claimant to be made a party to a proceedin commenced in substitution for or in addition to the moving party;

Fr

(c) where the question is one of law and the facts are not in dispute, decide the question without directing the trial of an issue;

(d) on the request of a claimant, determine the rights of the claimants in a summary manner, if, having regard to the value of the property and the nature of the issues in dispute, it seems desirable to do so;

(e) where a claimant fails to attend the hearing, or attends and fails to comply with an order made in the course of the proceeding, make an order declaring that the claimant and all persons claiming under the claimant are forever barred from making a claim against the applicant or moving party and all persons claiming under the applicant or moving party, without affecting the rights of the claimants as between themselves;

(f) stay any further step in a proceeding in respect of the property; and

(g) make such other order as is just.

Certain Motions to be Heard by Judge

(3) A motion for an interpleader order that is made to a master and raises a genuine issue of fact or of law shall be adjourned to be heard by a judge.

4. (1) Subrule 57.01 (1) of the Regulation is amended by adding the following clauses:

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(2) Subrule 57.01 (4) of the Regulation is amended by striking out "or" at the end of clause (b) and by adding the following clauses:

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to an unrepresented party.

(3) Rule 57.01 of the Regulation is amended by adding the following subrules:

Fr

Costs Outline

every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length.

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties.

5. Form 15B of the Regulation is amended by striking out "formerly acting in person".

6. The Regulation is amended by adding the following Form:

Fr

1984

Fr

Courts of Justice Act

Insert regs\Graphics\Source Law\2005\42\042057Bae.tif

Fr

1986

COSTS OUTLINE

ONTARIO

SUPERIOR COURT OF JUSTICE

COSTS OUTLINE

The *(identify party)* provides the following outline of the submissions to be made at the hearing in support of the costs the party will seek if successful:

Fees (as detailed below)		$
Estimated counsel fee for appearance		$
Disbursements (as detailed in the attached appendix)		$ _____
	Total	$

The following points are made in support of the costs sought with reference to the factors set out in subrule 57.01(1):

- the amount claimed and the amount recovered in the proceeding

- the complexity of the proceeding

- the importance of the issues

- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding

- whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution

- a party's denial of or refusal to admit anything that should have been admitted

- the experience of the party's lawyer

- the hours spent, the rates sought for costs and the rate actually charged by the party's lawyer

FEE ITEMS *(e.g. pleadings, affidavits, cross-examinations, preparation, hearing, etc.)*	PERSONS *(identify the lawyers, students and law clerks who provided services in connection with each item together with their year of call, if applicable)*	HOURS *(specify the hours claimed for each person identified in column 2)*	PARTIAL INDEMNITY RATE *(specify the rate being sought for each person identified in column 2)*	ACTUAL RATE*

Fr

* Specify the rate being charged to the client for each person identified in column 2. If there is a contingency fee arrangement, state the rate that would have been charged absent such arrangement.

- any other matter relevant to the question of costs

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: _____ _____

Signature of lawyer

7. (1) The title to Tariff A to the Regulation is revoked and the following substituted:

TARIFF A

LAWYERS' FEES AND DISBURSEMENTS ALLOWABLE UNDER RULES 57.01 AND 58.05

(2) Part I of Tariff A to the Regulation is revoked and the following substituted:

PART I — FEES

The fee for any step in a proceeding authorized by the Rules of Civil Procedure and the counsel fee for motions, applications, trials, references and appeals shall be determined in accordance with section 131 of the *Courts of Justice Act* and the factors set out in subrule 57.01 (1).

Where students-at-law or law clerks have provided services of a nature that the Law Society of Upper Canada authorizes them to provide, fees for those services may be allowed.

8. This Regulation comes into force on July 1, 2005.

Fr

1988

Fr

1989

Tab E

O. Reg. 575/07: RULES OF CIVIL PROCEDURE

Filed December 20, 2007 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 575/07

COURTS OF JUSTICE ACT

Made: December 14, 2007
Approved: December 19, 2007
Filed: December 20, 2007
Published on e-Laws: December 21, 2007
Printed in *The Ontario Gazette*: January 5, 2008

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. The following provisions of Regulation 194 of the Revised Regulations of Ontario, 1990 are amended by striking out "solicitor" wherever it appears and substituting in each case "lawyer":

1. Subrule 1.04 (3).

2. Clause 1.08 (5) (e).

3. Clauses 4.02 (2) (c) and (3) (f) and (g).

4. Clauses 4.06 (1) (c) and (3) (b).

5. Subrule 7.05 (3).

6. Clause 12.05 (1) (b).

7. Rule 15.01.

8. Rule 15.02.

9. Subrules 15.04 (2), (3) and (4).

10. Clause 16.02 (1) (b).

11. Subrule 16.03 (3).

12. Clause 16.05 (3) (b).

13. Subrule 30.04 (3).

Fr

15. Subrule 34.07 (7).

16. Clause 48.03 (1) (h), in the portion before subclause (i).

17. Subrules 48.14 (2), (4.1) and (7).

18. Subrules 52.04 (1) and (2).

19. Subrule 53.04 (2).

20. Clause 53.07 (2) (a).

21. Subrules 55.02 (8) and (9).

22. Subrule 55.05 (3).

23. Subrule 55.06 (9) and clause (14) (a).

24. Rule 56.02.

25. Subclause 57.01 (1) (h) (ii).

26. Subrules 57.07 (2) and (3).

27. Subrule 58.05 (3).

28. Subrule 59.03 (6).

29. Subrules 60.07 (12), (12.1) and clauses (16) (a) and (19) (a).

30. Subrule 60.14 (1).

31. Subrule 60.18 (7).

32. Clause 64.06 (5) (a).

33. Subrules 72.03 (8) and (13).

34. Clause 74.11 (1) (b).

35. Subclauses 74.18 (9) (a) (iii) and (v).

36. Subrules 75.03 (1) and (3).

37. Clause 76.11 (4) (f).

38. Subrule 77.12 (3).

Fr

4. Subrule 74.14 (3).

2. The following provisions of the Regulation are amended by striking out "solicitors" wherever it appears and substituting in each case "lawyers":

1. Clause 22.04 (d).

2. Subrule 52.04 (4).

3. Clause 72.03 (4) (b).

4. Subrule 74.18 (13).

3. Each provision of the Regulation referred to in Column 1 of the Table to this section is amended by striking out "counsel" wherever it appears and substituting in each case the text set out in the corresponding row of Column 2 of the Table:

TABLE

Column 1	Column 2
34.11 (1)	lawyer
34.11 (2)	lawyer
37.05 (2)	a lawyer
37.05 (3)	a lawyer
38.03 (3)	a lawyer
38.03 (3.1)	a lawyer
52.06 (2)	the lawyer

4. The English version of each provision of the R[illegible]on referred to in Column 1 of the Table to this section is amended by striking

Fr

TABLE

Column 1	Column 2
30.1.01 (3)	lawyers
31.08	lawyer
50.02 (1) (a)	the lawyers
52.05	lawyers
53.07 (4) (b)	lawyer
59.03 (3) (c)	a lawyer
61.03.1 (1)	lawyers
61.11 (1) (e) (ii)	the lawyer
61.12 (3) (f) (ii)	the lawyer
61.16 (3.2)	the lawyer
77.13 (4)	The lawyers
77.14 (3)	lawyers
77.15 (3) (d)	the lawyers

5. The French version of the heading to Rule 1 of the Regulation is revoked and the following substituted:

RÈGLE 1 MENTION, CHAMP D'APPLICATION ET INTERPRÉTATION

6. (1) Subrule 1.01 (1) of the Regulation is revoked and the following substituted:

Fr

Title

(1) These rules may be cited as the Rules of Civil Procedure.

(2) Clause 1.01 (2) (a) of the Regulation is amended by striking out "rules 1.01 to 1.08"at the end and substituting "rules 1.01 to 1.09".

7. (1) The definition of "holiday" in subrule 1.03 (1) of the Regulation is amended by adding the following clause:

(b.1) Family Day,

(2) Subrule 1.03 (1) of the Regulation is amended by adding the following definitions:

"lawyer" means a person authorized under the *Law Society Act* to practise law in Ontario; ("avocat")

"lawyer's office" means the office of the lawyer of record as set out in the last document filed by him or her; ("bureau de l'avocat")

(3) The definition of "solicitor's office" in subrule 1.03 (1) of the Regulation is revoked.

8. Subclause 4.09 (11) (a) (vi) of the Regulation is revoked and the following substituted:

(vi) the names of the lawyers representing the parties; and

9. Subrule 5.02 (1) of the Regulation is amended by striking out "solicitor of record" in the portion before clause (a) and substituting "lawyer of record".

10. Clause 7.08 (4) (b) of the Regulation is revoked and the following substituted:

(b) an affidavit of the lawyer acting for the litigation guardian setting out the lawyer's position in respect of the proposed settlement;

11. The heading to Rule 15 of the Regulation is revoked and the following substituted:

Fr

RULE 15 REPRESENTATION BY LAWYER

Notice of Change of Lawyer

(1) A party who has a lawyer of record may change the lawyer of record by serving on the lawyer and every other party and filing, with proof of service, a notice of change of lawyer (Form 15A) giving the name, address and telephone number of the new lawyer.

Notice of Appointment of Lawyer

(2) A party acting in person may appoint a lawyer of record by serving on every other party and filing, with proof of service, a notice of appointment of lawyer (Form 15B) giving the name, address and telephone number of the lawyer of record.

Notice of Intention to Act in Person

(3) Subject to subrule 15.01 (1) or (2), a party who has a lawyer of record may elect to act in person by serving on the lawyer and every other party and filing, with proof of service, a notice of intention to act in person (Form 15C) that sets out the party's address for service and telephone number.

Claim for Lawyer's Lien

(4) A party may move, on notice to the party's former lawyer of record, for an order determining whether and to what extent the lawyer has a right to a lawyer's lien.

13. (1) Subrule 15.04 (1) of the Regulation is revoked and the following substituted:

MOTION BY LAWYER FOR REMOVAL AS LAWYER OF RECORD

Client to be Served

(1) A lawyer may move, on notice to his or her client, for an order removing him or her as lawyer of record.

(2) Subrule 15.04 (6) of the Regulation is revoked and the following substituted:

Corporations

(6) A client that is a corporation shall, within 30 days after being [illegible] with the order removing the lawyer from the record,

(a) appoint a new lawyer of record by serving a notice under subrule 15.03 (2); or

Fr

(3) Subrule 15.04 (8) of the Regulation is revoked and the following substituted:

Clients Other Than Corporations

(8) A client who is not a corporation shall, within 30 days after being served with the order removing the lawyer from the record,

(a) appoint a new lawyer of record by serving a notice under subrule 15.03 (2); or

(b) serve a notice of intention to act in person under subrule 15.03 (3).

14. Rules 15.05 to 15.07 of the Regulation are revoked and the following substituted:

DUTY OF LAWYER OF RECORD

15.05 A lawyer of record shall act as and remains the lawyer of record for his or her client until,

(a) the client delivers a notice under rule 15.03; or

(b) an order removing the lawyer from the record has been entered, served on the client and every other party and, where required by subrule 15.04 (3), in accordance with that subrule, and filed with proof of service.

WHERE A LAWYER OF RECORD HAS CEASED TO PRACTISE

15.06 Where the lawyer of record for a party has ceased to practise law, and the party for whom the lawyer acted has not served a notice under rule 15.03, any other party may serve a document on the party by mailing a copy to the party at the party's last known address, or may move for directions.

LAWYER FROM ANOTHER PROVINCE

15.07 If a lawyer from another province represents a party to a proceeding, any party to the proceeding may move for directions for the conduct of the proceeding.

15. Clause 16.01 (4) (a) of the Regulation is revoked and the following substituted:

(a) shall be served on a party who has a lawyer of record by [Fr] ne lawyer, and service may be made in a manner provided in rule 16.05;

Attorney General

(h) on the Attorney General of Ontario, by leaving a copy of the document with a lawyer in the Crown Law Office (Civil Law) of the Ministry of the Attorney General;

17. Subrule 16.03 (2) of the Regulation is revoked and the following substituted:

Acceptance of Service by Lawyer

(2) Service on a party who has a lawyer may be made by leaving a copy of the document with the lawyer or an employee in the lawyer's office, but service under this subrule is effective only if the lawyer endorses on the document or a copy of it an acceptance of service and the date of the acceptance.

18. Subrule 16.05 (1) of the Regulation is revoked and the following substituted:

SERVICE ON LAWYER OF RECORD

(1) Service of a document on the lawyer of record of a party may be made,

(a) by mailing a copy to the lawyer's office;

(b) by leaving a copy with a lawyer or employee in the lawyer's office;

(c) by depositing a copy at a document exchange of which the lawyer is a member or subscriber, but service under this clause is effective only if the document or a copy of it and the copy deposited are date stamped by the document exchange in the presence of the person depositing the copy;

(d) by faxing a copy to the lawyer's office in accordance with subrules (3), (3.1) and (3.2) but, where service is made under this clause between 4 p.m. and midnight, it shall be deemed to have been made on the following day;

(e) by sending a copy to the lawyer's office by courier; or

(f) by e-mailing a copy to the lawyer's office in accordance with subrule (4), but service under this rule is effective only if the lawyer of record provides by e-mail an acceptance of service and the date of the acceptance, and where the e-mail acceptance is received between 4 p.m. and midnight, serv[illegible]e deemed to have been made on the following day.

Fr

Lawyer's Admission or Acceptance

(3) A lawyer's written admission or acceptance of service is sufficient proof of service and need not be verified by affidavit.

20. (1) Clause 34.04 (1) (a) of the Regulation is revoked and the following substituted:

(a) on the party's lawyer of record; or

(2) Clause 34.04 (2) (a) of the Regulation is revoked and the following substituted:

(a) on the party's lawyer of record; or

21. Subclause 37.02 (3) (c) (iii) of the Regulation is revoked and the following substituted:

(iii) removal of a lawyer as lawyer of record;

22. Clause 48.03 (2) (c) of the Regulation is amended by striking out "counsel" and substituting "lawyers".

23. Subrule 48.14 (6) of the Regulation is revoked and the following substituted:

(6) The lawyers of record shall attend, and the parties may attend, the status hearing.

24. Rule 50.01 of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

WHERE AVAILABLE

50.01 In an action or application, a judge may, at the request of a party or on his or her own initiative, direct the lawyers for the parties, either with or without the parties, and any party not represented by a lawyer, to appear before a judge or officer for a pre-trial conference to consider,

. . . . .

25. (1) The French version of subrule 52.07 (3) of the Regulation is amended by striking out "procureurs" and substituting "avocats".

Fr

(4) Where a party is represented by a lawyer, the right to address the jury shall be exercised by the lawyer.

26. Subrule 57.07 (1) of the Regulation is revoked and the following substituted:

LIABILITY OF LAWYER FOR COSTS

(1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;

(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) requiring the lawyer personally to pay the costs of any party.

27. The English version of subrule 61.11 (1) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

APPELLANT'S FACTUM

(1) The appellant's factum shall be signed by the appellant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

. . . . .

28. The English version of subrule 61.12 (3) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Contents of Respondent's Factum

(3) The respondent's factum shall be signed by the respondent's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

. . . . .

Fr

WHERE CONSENT REQUIRED

(1) Approval of the sale, mortgage, lease or other disposition of property of a minor over the age of sixteen years shall not be given unless the consent of the minor has been filed, together with a lawyer's affidavit stating the lawyer's belief that the minor understood the consent when the lawyer read and explained it.

(2) A judge hearing an application referred to in subrule (1) may dispense with the necessity of filing the minor's consent and lawyer's affidavit.

30. (1) The English version of subrule 68.04 (3) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

(3) The applicant's factum shall be signed by the applicant's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

. . . . .

(2) The English version of subrule 68.04 (6) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

(6) The respondent's factum shall be signed by the respondent's lawyer, or on the lawyer's behalf by someone he or she has specifically authorized, and shall consist of,

. . . . .

31. Clauses 74.02 (1) (c) and (d) of the Regulation are revoked and the following substituted:

(c) a lawyer who held the will or codicil at the time of retirement from practice;

(d) the estate trustee of a lawyer who held the will or codicil at the time of the lawyer's death;

32. Subclause 75.07.1 (c) (ii) of the Regulation is amended by striking out "solicitor of record" and substituting "lawyer of record".

33. Subrule 75.09 (1) of the Regulation is amend striking out the portion before paragraph 1 and substituting the following:

Fr

lawyer of record:

. . . . .

34. Clause 76.05 (5) (c) of the Regulation is revoked and the following substituted:

(c) removal of a lawyer as lawyer of record;

35. Subparagraph 1 iii of subrule 77.12 (5) of the Regulation is revoked and the following substituted:

iii. removal of a lawyer as lawyer of record,

36. The Table of Forms to the Regulation is revoked and the following substituted:

TABLE OF FORMS

Form Number	Form Title	Date of Form
4A	General Heading of Documents — Actions	November 1, 2005
4B	General Heading of Documents — Applications	November 1, 2005
4C	Backsheet	July 1, 2007
4D	Affidavit	July 1, 2007
4E	Requisition	July 1, 2007
4F	Notice of Constitutional Question	July 1, 2007
7A	Request for Appointment of Litigation Guardian	July 1, 2007
7B	Order to Continue (Minor Reaching Age of Majority)	November 1, 2005

Fr

11A	Order to Continue (Transfer or Transmission of Interest)	November 1, 2005
14A	Statement of Claim (General)	July 1, 2007
14B	Statement of Claim (Mortgage Action — Foreclosure)	July 1, 2007
14C	Notice of Action	July 1, 2007
14D	Statement of Claim (Action Commenced by Notice of Action)	July 1, 2007
14E	Notice of Application	July 1, 2007
14F	Information for Court Use	November 1, 2005
15A	Notice of Change of Lawyer	July 1, 2007
15B	Notice of Appointment of Lawyer	July 1, 2007
15C	Notice of Intention to Act in Person	July 1, 2007
16A	Acknowledgment of Receipt Card	November 1, 2005
16B	Affidavit of Service	July 1, 2007
16C	Certificate of Service by Sheriff	November 1, 2005
17A	Request for Service Abroad of Judicial or Extrajudicial Documents	November 1, 2005
17B	Summary of the Document to be Served	November 1, 2005
17C	Notice and Summary of Document	November 1, 2005

Fr

18B	Notice of Intent to Defend	July 1, 2007
19A	Default Judgment (Debt or Liquidated Demand)	November 1, 2005
19B	Default Judgment (Recovery of Possession of Land)	November 1, 2005
19C	Default Judgment (Recovery of Possession of Personal Property)	November 1, 2005
19D	Requisition for Default Judgment	July 1, 2007
22A	Special Case	July 1, 2007
23A	Notice of Discontinuance	July 1, 2007
23B	Notice of Election to Proceed with Counterclaim	July 1, 2007
23C	Notice of Withdrawal of Defence	July 1, 2007
24.1A	Notice of Name of Mediator and Date of Session	November 1, 2005
24.1B	Notice by Assigned Mediator	November 1, 2005
24.1C	Statement of Issues	November 1, 2005
24.1D	Certificate of Non-Compliance	November 1, 2005
25A	Reply	July 1, 2007
27A	Counterclaim (Against Parties to Main Action Only)	July 1, 2007
27B	Counterclaim (Against Plaintiff and Person not Already Party to Main Action)	July 1, 2007

Fr

27D	Reply to Defence to Counterclaim	July 1, 2007
28A	Crossclaim	July 1, 2007
28B	Defence to Crossclaim	July 1, 2007
28C	Reply to Defence to Crossclaim	July 1, 2007
29A	Third Party Claim	July 1, 2007
29B	Third Party Defence	July 1, 2007
29C	Reply to Third Party Defence	July 1, 2007
30A	Affidavit of Documents (Individual)	November 1, 2005
30B	Affidavit of Documents (Corporation or Partnership)	November 1, 2005
30C	Request to Inspect Documents	July 1, 2007
34A	Notice of Examination	July 1, 2007
34B	Summons to Witness (Examination out of Court)	July 1, 2007
34C	Commission	November 1, 2005
34D	Letter of Request	November 1, 2005
34E	Order for Commission and Letter of Request	November 1, 2005
35A	Questions on Written Examination for Discovery	July 1, 2007
35B	Answers on Written Examination for Discovery	November 1, 2005

Fr

37B	Confirmation of Motion	July 1, 2007
37C	Refusals and Undertakings Chart	November 1, 2005
38A	Notice of Appearance	July 1, 2007
38B	Confirmation of Application	July 1, 2007
42A	Certificate of Pending Litigation	November 1, 2005
43A	Interpleader Order — General	November 1, 2005
44A	Bond — Interim Recovery of Personal Property	November 1, 2005
47A	Jury Notice	July 1, 2007
48C	Status Notice	July 1, 2007
48D	Order Dismissing Action for Delay	November 1, 2005
49A	Offer to Settle	July 1, 2007
49B	Notice of Withdrawal of Offer	July 1, 2007
49C	Acceptance of Offer	July 1, 2007
49D	Offer to Contribute	July 1, 2007
51A	Request to Admit	July 1, 2007
51B	Response to Request to Admit	July 1, 2007
53A	Summons to Witness (at Hearing)	uly 1, 2007

Fr

53C	Summons to a Witness Outside Ontario	July 1, 2007
53D	Order for Attendance of Witness in Custody	November 1, 2005
55A	Notice of Hearing for Directions	July 1, 2007
55B	Notice to Party Added on Reference	July 1, 2007
55C	Report on Reference (Administration of Estate)	November 1, 2005
55D	Notice of Contested Claim	July 1, 2007
55E	Notice to Creditor	July 1, 2007
55F	Conditions of Sale	July 1, 2007
55G	Interim Report on Sale	November 1, 2005
56A	Order for Security for Costs	November 1, 2005
57A	Bill of Costs	November 1, 2005
57B	Costs Outline	July 1, 2007
58A	Notice of Appointment for Assessment of Costs	July 1, 2007
58B	Notice to Deliver a Bill of Costs for Assessment	July 1, 2007
58C	Certificate of Assessment of Costs	November 1, 2005
59A	Order	uly 1, 2007
59B	Judgment	July 1, 2007

Fr

60A	Writ of Seizure and Sale	July 1, 2007
60B	Writ of Sequestration	November 1, 2005
60C	Writ of Possession	November 1, 2005
60D	Writ of Delivery	November 1, 2005
60E	Request to Renew	July 1, 2007
60F	Direction to Enforce Writ of Seizure and Sale	November 1, 2005
60G	Requisition for Garnishment	November 1, 2005
60G.1	Requisition for Renewal of Garnishment	November 1, 2005
60H	Notice of Garnishment	November 1, 2005
60H.1	Notice of Renewal of Garnishment	November 1, 2005
60I	Garnishee’s Statement	November 1, 2005
60I.1	Notice to Co-owner of the Debt	November 1, 2005
60J	Notice of Termination of Garnishment	July 1, 2007
60K	Warrant for Arrest (Contempt)	November 1, 2005

Fr

60M	Notice of Claim	July 1, 2007
60N	Sheriff's Report	July 1, 2007
60O	Request to Withdraw a Writ	November 1, 2005
61A	Notice of Appeal to an Appellate Court	November 1, 2005
61B	General Heading in Proceedings in Appellate Courts	November 1, 2005
61C	Appellant's Certificate Respecting Evidence	November 1, 2005
61D	Respondent's Certificate Respecting Evidence	November 1, 2005
61E	Notice of Cross-Appeal	July 1, 2007
61F	Supplementary Notice of Appeal or Cross-Appeal	July 1, 2007
61G	Notice of Listing for Hearing (Appeal)	November 1, 2005
61H	Certificate of Completeness of Appeal Book and Compendium	July 1, 2007
61I	Order Dismissing Appeal or Cross-Appeal for Delay	November 1, 2005
61J	Order Dismissing Motion for Leave to Appeal for Delay	November 1, 2005
61J.1	Order Dismissing Motion for Delay	November 1, 2005

Fr

61L	Notice of Election to Proceed with Cross-Appeal	July 1, 2007
62A	Notice of Appeal to a Judge	July 1, 2007
63A	Certificate of Stay	November 1, 2005
63B	Certificate of Stay	November 1, 2005
64A	Request to Redeem	July 1, 2007
64B	Default Judgment for Foreclosure with a Reference	November 1, 2005
64C	Default Judgment for Immediate Foreclosure	November 1, 2005
64D	Default Judgment for Foreclosure without a Reference	July 1, 2007
64E	Final Order of Foreclosure	July 1, 2007
64F	Request for Sale	July 1, 2007
64G	Default Judgment for Sale with a Redemption Period (Action Converted from Foreclosure to Sale)	November 1, 2005
64H	Default Judgment for Immediate Sale (Action Converted from Foreclosure to Sale)	November 1, 2005
64I	Default Judgment for Sale Conditional on Proof of Claim (Action Converted from Foreclosure to Sale)	November 1, 2005
64J	Default Judgment for Immediate Sale	November 1, 2005
64K	Default Judgment for Sale with a Redemption Period	November 1, 2005

Fr

64M	Default Judgment for Redemption	November 1, 2005
64N	Notice of Reference to Subsequent Encumbrancer Added on Reference	November 1, 2005
64O	Notice of Reference to Subsequent Encumbrancer Named as Original Party	November 1, 2005
64P	Notice of Reference to Original Defendants	November 1, 2005
64Q	Notice to Added Defendant Having Interest in Equity	November 1, 2005
65A	Judgment for Administration of Estate	November 1, 2005
66A	Judgment for Partition or Sale	November 1, 2005
68A	Notice of Application to Divisional Court for Judicial Review	July 1, 2007
68B	Notice of Listing for Hearing (Judicial Review)	November 1, 2005
68C	Order Dismissing Application for Judicial Review	November 1, 2005
72A	Notice of Payment into Court	July 1, 2007
72B	Affidavit (Motion for Payment Out of Court)	July 1, 2007
72C	Stop Order	July 1, 2007
73A	Notice of Application for Registration of United Kingdom Judgment	July 1, 2007

Fr

74.2	Notice to Estate Registrar of Withdrawal of Will or Codicil	November 1, 2005
74.3	Request for Notice of Commencement of Proceeding	November 1, 2005
74.4	Application for Certificate of Appointment of Estate Trustee with a Will (Individual Applicant)	November 1, 2005
74.4.1	Application for Certificate of Appointment of Estate Trustee with a Will (Individual Applicant) Limited to Assets Referred to In the Will	November 1, 2005
74.5	Application for Certificate of Appointment of Estate Trustee with a Will (Corporate Applicant)	November 1, 2005
74.5.1	Application for Certificate of Appointment of Estate Trustee with a Will (Corporate Applicant) Limited to Assets Referred to in the Will	November 1, 2005
74.6	Affidavit of Service of Notice	November 1, 2005
74.7	Notice of an Application for a Certificate of Appointment of Estate Trustee with a Will	November 1, 2005
74.8	Affidavit of Execution of Will or Codicil	November 1, 2005
74.9	Affidavit Attesting to the Handwriting and Signature of a Holograph Will or Codicil	November 1, 2005
74.10	Affidavit of Condition of Will or Codicil	November 1, 2005

Fr

	Estate Trustee) with a Will	
74.12	Consent to Applicant's Appointment as Estate Trustee with a Will	November 1, 2005
74.13	Certificate of Appointment of Estate Trustee with a Will	November 1, 2005
74.13.1	Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will	November 1, 2005
74.14	Application for Certificate of Appointment of Estate Trustee without a Will (Individual Applicant)	November 1, 2005
74.15	Application for Certificate of Appointment of Estate Trustee without a Will (Corporate Applicant)	November 1, 2005
74.16	Affidavit of Service of Notice	November 1, 2005
74.17	Notice of an Application for a Certificate of Appointment of Estate Trustee without a Will	November 1, 2005
74.18	Renunciation of Prior Right to a Certificate of Appointment of Estate Trustee without a Will	November 1, 2005
74.19	Consent to Applicant's Appointment as Estate Trustee without a Will	November 1, 2005
74.20	Certificate of Appointment of Estate Trustee without a Will	November 1, 2005
74.20.1	Application for Certificate of Appointment of a Foreign Estate Trustee's Nominee as Estate Trustee without a Will	November 1, 2005
74.20.2	Nomination of Applicant by Foreign Estate Tru	November 1, 2005

Fr

74.21	Application for Certificate of Appointment as Succeeding Estate Trustee with a Will	November 1, 2005
74.22	Consent to Applicant's Appointment as Succeeding Estate Trustee with a Will	November 1, 2005
74.23	Certificate of Appointment of Succeeding Estate Trustee with a Will	November 1, 2005
74.24	Application for Certificate of Appointment as Succeeding Estate Trustee without a Will	November 1, 2005
74.25	Consent to Applicant's Appointment as Succeeding Estate Trustee without a Will	November 1, 2005
74.26	Certificate of Appointment of Succeeding Estate Trustee without a Will	November 1, 2005
74.27	Application for Confirmation by Resealing of Appointment or Certificate of Ancillary Appointment of Estate Trustee	November 1, 2005
74.28	Confirmation by Resealing of Appointment of Estate Trustee	November 1, 2005
74.29	Certificate of Ancillary Appointment of Estate Trustee with a Will	November 1, 2005
74.30	Application for Certificate of Appointment of Estate Trustee During Litigation	November 1, 2005
74.31	Certificate of Appointment of Estate Trustee During Litigation	November 1, 2005
74.32	Bond — Insurance or Guarantee Company	November 1, 2005

Fr

74.34	Registrar’s Notice to Estate Trustee Named in a Deposited Will of Application for Certificate of Appointment of Estate Trustee with a Will	November 1, 2005
74.35	Registrar’s Notice to Estate Trustee Named in a Deposited Will of Application for Certificate of Appointment of Estate Trustee without a Will	November 1, 2005
74.36	Order to Accept or Refuse Appointment as Estate Trustee with a Will	November 1, 2005
74.37	Order to Accept or Refuse Appointment as Estate Trustee without a Will	November 1, 2005
74.38	Order to Consent or Object to a Proposed Appointment of an Estate Trustee with or without a Will	July 1, 2007
74.39	Order to File a Statement of Assets of the Estate	November 1, 2005
74.40	Order to Beneficiary Witness	November 1, 2005
74.41	Order to Former Spouse	November 1, 2005
74.42	Order to Pass Accounts	November 1, 2005
74.43	Affidavit Verifying Estate Accounts	November 1, 2005
74.44	Notice of Application to Pass Accounts	July 1, 2007
74.45	Notice of Objection to Accounts	uly 1, 2007
74.46	Notice of No Objection to Accounts	July 1, 2007

Fr

74.47	Affidavit in Support of Unopposed Judgment on Passing of Accounts	November 1, 2005
74.48	Notice of Withdrawal of Objection	July 1, 2007
74.49	Request for Costs (Person other than Children's Lawyer or Public Guardian and Trustee)	July 1, 2007
74.49.1	Request for Costs (Children's Lawyer or Public Guardian and Trustee)	July 1, 2007
74.49.2	Request for Increased Costs (Estate Trustee)	July 1, 2007
74.49.3	Request for Increased Costs (Person other than Estate Trustee)	July 1, 2007
74.50	Judgment on Unopposed Passing of Accounts	November 1, 2005
74.51	Judgment on Contested Passing of Accounts	July 1, 2007
75.1	Notice of Objection	July 1, 2007
75.1A	Request for Assignment of Mediator	November 1, 2005
75.1B	Notice by Mediator	November 1, 2005
75.1C	Statement of Issues	November 1, 2005
75.1D	Certificate of Non-Compliance	November 1, 2005
75.2	Notice that Objection has been Filed	July 1, 2007
75.3	Notice to Objector	uly 1, 2007
75.4	Notice of Appearance	July 1, 2007

Fr

75.6	Notice of Motion for Directions	July 1, 2007
75.7	Statement of Claim Pursuant to Order Giving Directions	November 1, 2005
75.8	Order Giving Directions Where Pleadings Directed	July 1, 2007
75.9	Order Giving Directions Where Trial of Issues Directed	July 1, 2007
75.10	Statement of Submission of Rights to the Court	July 1, 2007
75.11	Notice of Settlement	July 1, 2007
75.12	Rejection of Settlement	July 1, 2007
75.13	Notice of Contestation	July 1, 2007
75.14	Claim Against Estate	November 1, 2005
76A	Notice Whether Action under Rule 76	November 1, 2005
76B	Simplified Procedure Motion Form	November 1, 2005
76C	Notice of Readiness for Pre-Trial Conference	November 1, 2005
76D	Trial Management Checklist	November 1, 2005
77C	Case Management Motion Form	November 1, 2005
77D	Trial Management Conference Form	November 1, 2005

Fr

37. Item 36 of Part II of Tariff A of the Regulation is amended by striking out "solicitor's" and substituting "lawyer's".

38. (1) The heading to Tariff C of the Regulation is revoked and the following substituted:

TARIFF C LAWYERS' COSTS ALLOWED ON PASSING OF ACCOUNTS WITHOUT A HEARING

(2) Item (2) of Tariff C of the Regulation is amended by striking out "solicitor" and substituting "lawyer".

(3) The first note to Tariff C of the Regulation is amended by striking out "solicitor" and substituting "lawyer".

39. (1) Subject to subsection (2), this Regulation comes into force on July 1, 2008.

(2) Subsection 7 (1) comes into force on January 1, 2008.

Fr

2019

Fr

2020

Tab F

O. Reg. 438/08: RULES OF CIVIL PROCEDURE

Filed December 10, 2008 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 438/08

2022

made under the

COURTS OF JUSTICE ACT

Made: December 3, 2008

Approved: December 10, 2008

Filed: December 10, 2008

Published on e-Laws: December 12, 2008

Printed in *The Ontario Gazette*: December 27, 2008

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. Subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding the following definition:

"timetable" means a schedule for the completion of one or more steps required to advance the proceeding (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by order of the court or by written agreement of the parties that is not contrary to an order. ("calendrier")

2. Rule 1.04 of the Regulation is amended by adding the following subrule:

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

3. (1) Paragraph 8 of subrule 1.08 (1) of the Regulation is revoked and the following substituted:

8. A pre-trial conference or case conference.

(2) Subrule 1.08 (3) of the Regulation is amended by striking out "the court on motion may make an order" and substituting "the court may, on motion or on its own initiative, make an o

Fr

4. Clause 3.01 (1) (b) of the Regulation is amended by striking out "less than seven days" and substituting "seven days or less".

5. Subrule 3.02 (4) of the Regulation is amended by striking out "except as provided in subrule 77.01 (4) (no extension by consent in case management)" at the end.

6. Rule 3 of the Regulation is amended by adding the following rule:

TIMETABLES

Amendment

3.04 (1) Parties may, by written agreement, amend a timetable established by order of a judge or case management master, unless the order expressly prohibits amendment by the parties.

Same

(2) Parties may, by written agreement, amend a timetable established by written agreement of the parties and amended by the order of a judge or case management master, unless the order expressly prohibits amendment by the parties.

Limitation

(3) Despite subrules (1) and (2), in the case of an action, an agreement to amend a timetable shall not amend the date before which the action shall be set down for trial or restored to a trial list, as the case may be.

Non-Compliance

(4) If a party fails to comply with a timetable, a judge or case management master may, on any other party's motion,

(a) stay the party's proceeding;

(b) dismiss the party's proceeding or strike out the party's defence; or

(c) make such other order as is just.

7. (1) Paragraph 1 of subrule 4.05 (2) of the Regulation is amended by striking out "paragraphs 2 and 3" at the end and substituting "paragraphs 2, 3 and 4".

(2) Subrule 4.05 (2) of the Regulation is amended by adding the following paragraph:

Fr

4. Documents relating to a motion to transfer a proceeding to another county under rule 13.1.02 shall be filed in the court office of the county to which the transfer is sought, if subrule 13.1.02 (3.1) applies.

8. The Regulation is amended by adding the following Rule:

RULE 4.1 DUTY OF EXPERT

DUTY OF EXPERT

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

Duty Prevails

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

9. The Regulation is amended by adding the following Rule:

RULE 6.1 SEPARATE HEARINGS

SEPARATE HEARINGS

6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

10. Rule 13.1.02 of the Regulation is amended by adding the following subrule:

(3.1) Despite subrules 37.03 (1) and 76.05 (2) (place of hearing motions), a motion under subrule (1), (2) or (3) may be brought and heard in the county to which the transfer of the proceeding is sought.

11. (1) Subrule 14.08 (3) of the Regulation is amended by striking out "rules 76.06 and 77.08, which provide" and substi 'rule 48.15, which provides".

Fr

(2) Subrule 14.08 (5) of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

12. Rule 20.02 of the Regulation is revoked and the following substituted:

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

13. (1) Subrule 20.04 (1) of the Regulation is revoked.

(2) Clause 20.04 (2) (a) of the Regulation is amended by striking out "no genuine issue for trial" and substituting "no genuine issue requiring a trial".

(3) Rule 20.04 of the Regulation is amended by adding the following subrules:

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

Fr

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(4) The French version of subrules 20.04 (3) and (4) of the Regulation is amended by striking out "seule question litigieuse" wherever it appears and substituting in each case "seule véritable question litigieuse".

14. Rules 20.05 and 20.06 of the Regulation are revoked and the following substituted:

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the [Fr] nd any cross-examinations on them may be used at trial in the same ma[illegible]n examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the depon[illegible]ial for cross-examination is a relevant consideration.

Fr

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

15. Rule 24.1.01 of the Regulation is amended by striking out "in case managed actions" and substituting "in specified actions".

16. (1) Subrules 24.1.04 (1), (2) and (2.1) of the Regulation are revoked and the following substituted:

Scope

(1) This Rule applies to the following actions:

1. Actions that were governed by this Rule immediately before January 1, 2010.

2. Actions that are commenced in one of the following counties on or after January 1, 2010:

i. The City of Ottawa.

ii. The City of Toronto.

iii. The County of Essex.

Exceptions

(2) Despite subrule (1), this Rule does not apply to,

(a) actions to which Rule 75.1 (Mandatory Mediation – [illegible]s, Trusts and Substitute Decisions) applies;

Fr

(b) actions in relation to a matter that was the subject of a mediation under section 258.6 of the *Insurance Act*, if the mediation was conducted less than a year before the delivery of the first defence in the action;

(c) actions placed on the Commercial List established by practice direction in the Toronto Region;

(d) actions under Rule 64 (Mortgage Actions);

(e) actions under the *Construction Lien Act*, except trust claims; and

(f) actions under the *Bankruptcy and Insolvency Act* (Canada).

Exceptions, Class Proceedings Act, 1992

(2.1) Despite subrule (1), this Rule,

(a) applies to an action commenced under the *Class Proceedings Act, 1992* only if certification as a class proceeding has been denied; and

(b) does not apply to actions certified as class proceedings under the *Class Proceedings Act, 1992*.

(2) Subrule 24.1.04 (4) of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

17. Rule 24.1.06 of the Regulation is amended by striking out "the Schedule to".

18. (1) Subrule 24.1.07 (1) of the Regulation is amended by striking out "the Schedule to".

(2) Subrule 24.1.07 (3) of the Regulation is amended by striking out "a judge" and substituting "a judge or a case management master".

19. Clause 24.1.08 (2) (b) of the Regulation is amended by striking out "subrule 24.1.09 (6)" and substituting "subrule 24.1.09 (6) or (6.1)".

20. (1) Subrule 24.1.09 (1) of the Regulation is amended by striking out "90 days" and substituting "180 days".

(2) Clauses 24.1.09 (2) (c) and (d) of the Regulation are amended by striking out "90-day period" wherever it appears and substituting in each case "180-day period".

Fr

(3) Rule 24.1.09 of the Regulation is amended by adding the following subrule:

Transition

(2.1) Despite subrule (1), in the case of an action described in paragraph 1 of subrule 24.1.04 (1), the 180-day period begins to run on January 1, 2010.

(4) Subrule 24.1.09 (3) of the Regulation is revoked and the following substituted:

Postponement

(3) Despite subrule (1), the mediation session may be postponed to a later date if,

(a) the parties consent to the date in writing; and

(b) the consent is filed with the mediation co-ordinator.

(5) Subrules 24.1.09 (5) and (6) of the Regulation are revoked and the following substituted:

(5) Before setting the action down for trial, one of the parties shall file with the mediation co-ordinator,

(a) a notice (Form 24.1A) stating the mediator's name and the date of the mediation session; or

(b) a mediator's report under subrule 24.1.15 (1) indicating that the mediation has been concluded.

Assignment of Mediator

(6) If the mediation co-ordinator does not, within 180 days after the first defence has been filed, receive an order under subrule (1), a consent under subrule (3), a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, he or she shall immediately assign a mediator from the list, unless the court orders otherwise.

(6.1) If the mediation co-ordinator does not, within the time provided by an order under subrule (1) or a consent under subrule (3), receive a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, and the action is set down for trial, he or she shall immediately assign a mediator from the list, unless the court orders otherwise.

Fr

(6) Rule 24.1.09 of the Regulation is amended by adding the following subrule:

(7.1) The date fixed for the mediation session shall be within 90 days after the appointment of the mediator, unless the court orders otherwise.

21. Subrule 24.1.09.1 (3) of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

22. Subrule 24.1.11 (1.1) of the Regulation is revoked and the following substituted:

Representative of Insurer

(1.1) Unless the court orders otherwise, if an insurer may be liable to satisfy all or part of a judgment in the action or to indemnify or reimburse an insured party for money paid in satisfaction of all or part of a judgment in the action,

(a) a representative of the insurer shall attend the mediation session; and

(b) despite subrule (1), the insured party is not required to attend the mediation session.

23. (1) Subrule 24.1.13 (1) of the Regulation is amended by striking out "a case management master or case management judge" at the end and substituting "a judge or case management master".

(2) Subrule 24.1.13 (2) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

(2) The judge or case management master may convene a case conference under rule 77.08, and may,

. . . . .

24. Rule 29 of the Regulation is amended by adding the following rule:

FILE NUMBER

29.14 Third and subsequent party claims shall be given the same file number as the main action, followed by a suffix letter.

25. The Regulation is amended by adding the following Rules immediately after the heading "Discovery":

Fr

RULE 29.1 DISCOVERY PLAN

NON-APPLICATION OF RULE

29.1.01 This Rule does not apply to parties who are subject to a discovery plan established by the court under clause 20.05 (2) (d).

DEFINITION

29.1.02 In this Rule,

"document" has the same meaning as in clause 30.01 (1) (a).

DISCOVERY PLAN

Requirement for Plan

29.1.03 (1) Where a party to an action intends to obtain evidence under any of the following Rules, the parties to the action shall agree to a discovery plan in accordance with this rule:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 32 (Inspection of Property).
4. Rule 33 (Medical Examination).
5. Rule 35 (Examination for Discovery by Written Questions).

Timing

(2) The discovery plan shall be agreed to before the earlier of,

(a) 60 days after the close of pleadings or such longer period as the parties may agree to; and

(b) attempting to obtain the evidence.

Contents

(3) The discovery plan shall be in writing, and shall include,

(a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;

(b) dates for the service of each party's affidavit of docum n 30A or 30B) under rule 30.03;

Fr

(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

(d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and

(e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

Principles re Electronic Discovery

(4) In preparing the discovery plan, the parties shall consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery" developed by and available from The Sedona Conference.

DUTY TO UPDATE PLAN

29.1.04 The parties shall ensure that the discovery plan is updated to reflect any changes in the information listed in subrule 29.1.03 (3).

FAILURE TO AGREE TO PLAN

29.1.05 On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.

RULE 29.2 PROPORTIONALITY IN DISCOVERY

DEFINITION

29.2.01 In this Rule,

"document" has the same meaning as in clause 30.01 (1) (a).

APPLICATION

29.2.02 This Rule applies to any determination by the court under any of the following Rules as to whether a party or other person must answer a question or produce a document:

1. Rule 30 (Discovery of Documents).
2. Rule 31 (Examination for Discovery).
3. Rule 34 (Procedure on Oral Examinations).
4. Rule 35 (Examination for Discovery by Written Questions).

Fr

CONSIDERATIONS

General

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

(e) the information or the document is readily available to the party requesting it from another source.

Overall Volume of Documents

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

26. Subrules 30.02 (1) and (2) of the Regulation are amended by striking out "relating to any matter in issue" wherever it appears and substituting in each case "relevant to any matter in issue".

27. (1) Subrule 30.03 (1) of the Regulation is revoked and the following substituted:

Party to Serve Affidavit

(1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

(2) Subrule 30.03 (2) of the Regulation is amend[illegible] striking out "relating to any matter in issue" in the portion before clause (a) and

Fr

substituting "relevant to any matter in issue".

(3) Subrule 30.03 (3) of the Regulation is amended by striking out "relating to any matter in issue" and substituting "relevant to any matter in issue".

(4) Clause 30.03 (4) (a) of the Regulation is amended by striking out "relating to any matter in issue" and substituting "relevant to any matter in issue".

28. (1) Subrule 31.03 (1) of the Regulation is amended by striking out "(3) to (8)" at the end and substituting "(2) to (8)".

(2) Rule 31.03 of the Regulation is amended by adding the following subrule:

Requirements for Leave

(4) Before making an order under clause (2) (b) or (3) (b), the court shall satisfy itself that,

(a) satisfactory answers respecting all of the issues raised cannot be obtained from only one person without undue expense and inconvenience; and

(b) examination of more than one person would likely expedite the conduct of the action.

29. Rule 31 of the Regulation is amended by adding the following rule:

TIME LIMIT

Not to Exceed Seven Hours

31.05.1 (1) No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court.

Considerations for Leave

(2) In determining whether leave should be granted under subrule (1), the court shall consider,

(a) the amount of money in issue;

(b) the complexity of the issues of fact or law;

Fr

(c) the amount of time that ought reasonably to be required in the action for oral examinations;

(d) the financial position of each party;

(e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;

(f) a party's denial or refusal to admit anything that should have been admitted; and

(g) any other reason that should be considered in the interest of justice.

30. (1) Subrule 31.06 (1) of the Regulation is amended by striking out "relating to any matter in issue" in the portion before clause (a) and substituting "relevant to any matter in issue".

(2) Clause 31.06 (3) (a) of the Regulation is amended by striking out "relating to any matter in issue" and substituting "relevant to any matter in issue".

31. Clause 34.10 (3) (a) of the Regulation is amended by striking out "relating to any matter in issue" and substituting "relevant to any matter in issue".

32. Subrule 37.03 (1) of the Regulation is amended by striking out "heard" and substituting "brought and heard".

33. Subrule 37.07 (6) of the Regulation is amended by striking out "four" and substituting "seven".

34. Subrule 37.08 (1) of the Regulation is amended by striking out "three" and substituting "seven".

35. (1) Subrule 37.10 (1) of the Regulation is amended by striking out "three" and substituting "seven".

(2) Subrule 37.10 (3) of the Regulation is amend striking out "two" in the portion before clause (a) and substitut four".

Fr

(3) Subrule 37.10 (7) of the Regulation is amended by striking out "four" and substituting "seven".

(4) Subrule 37.10 (8) of the Regulation is amended by striking out "two" and substituting "four".

(5) Clause 37.10 (10) (a) of the Regulation is amended by striking out "three" in the portion before subclause (i) and substituting "seven".

(6) Clause 37.10 (10) (b) of the Regulation is amended by striking out "two" in the portion before subclause (i) and substituting "four".

36. Clause 37.10.1 (1) (b) of the Regulation is amended by striking out "two" in the portion before subclause (i) and substituting "three".

37. (1) Rule 37.15 of the Regulation is amended by adding the following subrule:

(1.2) A judge who is directed to hear all motions under subrule (1) and a master to whom a motion is referred under subrule (1.1) may, in respect of the motions, give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding.

(2) Subrule 37.15 (2) of the Regulation is amended by adding "except with the written consent of all parties" at the end.

38. Subrule 38.03 (1) of the Regulation is revoked and the following substituted:

Place of Commencement

(1) The applicant shall, in the notice of application, name the place of commencement in accordance with rule 13.1.01.

Place of Hearing

(1.1) The application shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.

39. Subrule 38.06 (4) of the Regulation is amend striking out "four" and substituting "seven".

Fr

40. (1) Clause 38.09 (1) (a) of the Regulation is amended by striking out "four" and substituting "seven".

(2) Clause 38.09 (1) (b) of the Regulation is amended by striking out "two" and substituting "seven".

(3) Subrule 38.09 (3) of the Regulation is amended by striking out "two" and substituting "four".

(4) Subrule 38.09 (3.1) of the Regulation is amended by striking out "two" in the portion before clause (a) and substituting "four".

(5) Subrule 38.09 (3.2) of the Regulation is amended by striking out "two" and substituting "four".

41. Clause 38.09.1 (1) (b) of the Regulation is amended by striking out "two" in the portion before subclause (i) and substituting "three".

42. (1) Clause 48.03 (1) (g) of the Regulation is revoked and the following substituted:

(g) a copy of any order respecting the trial, including an order made under Rule 6.1; and

(2) Clause 48.03 (2) (c) of the Regulation is revoked and the following substituted:

(c) any order under rule 50.07 or pre-trial conference report under rule 50.08; and

43. Clause 48.04 (2) (b) of the Regulation is amended by adding the following subclause:

(0.i) rule 29.1.03 (requirement for discovery plan),

44. Rule 48.07 of the Regulation is amended by adding "and" at the end of clause (a) and by revoking clause (b).

45. Subrule 48.14 (3.1) of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

46. Rule 48.14 of the Regulation is revoked a following substituted:

Fr

ACTION NOT ON TRIAL LIST

Status Notice

48.14 (1) Unless the court orders otherwise, if an action in which a statement of defence has been filed has not been placed on a trial list or terminated by any means within two years after the filing of a statement of defence, the registrar shall serve on the parties a status notice in Form 48C.1 that the action will be dismissed for delay unless, within 90 days after service of the notice, the action is set down for trial or terminated, or documents are filed in accordance with subrule (10).

(2) Unless the court orders otherwise, if an action that was placed on a trial list and was subsequently struck off is not restored to a trial list within 180 days after being struck off, the registrar shall serve on the parties a status notice in Form 48C.2 that the action will be dismissed for delay unless, within 90 days after service of the notice, the action is restored to a trial list or terminated, or documents are filed in accordance with subrule (10).

Notice to Client

(3) A lawyer who receives a status notice shall forthwith give a copy of the notice to his or her client.

Dismissal by Registrar

(4) The registrar shall dismiss the action for delay, with costs, 90 days after service of the status notice, unless,

(a) the action has been set down for trial or restored to a trial list, as the case may be;

(b) the action has been terminated by any means;

(c) documents have been filed in accordance with subrule (10); or

(d) the judge or case management master presiding at a status hearing has ordered otherwise.

(5) If an action is not set down for trial, restored to a trial list or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs.

Dismissal Order to be Served

(6) The registrar shall serve an order made under subrule (4) o n 48D) on the parties.

Fr

Dismissal Order to Client

(7) A lawyer who is served with an order dismissing the action for delay shall forthwith give a copy of the order to his or her client.

Status Hearing

(8) Where a status notice has been served, any party may request that the registrar arrange a status hearing, in which case the registrar shall mail to the parties a notice of the status hearing, and the hearing shall be held before a judge or case management master.

Notice to Client

(9) A lawyer who receives a notice of status hearing shall forthwith give a copy of the notice to his or her client.

When Hearing in Writing

(10) Unless the presiding judge or case management master orders otherwise, the status hearing shall be held in writing and without the attendance of the parties if a party files the following documents at least seven days before the date of the status hearing:

1. A timetable, signed by all the parties, containing the information set out in subrule (11).

2. A draft order establishing the timetable.

Timetable

(11) The timetable shall,

(a) identify the steps to be completed before the action may be set down for trial or restored to a trial list;

(b) show the date or dates by which the steps will be completed; and

(c) show a date, which shall be no more than 12 months after the date of the status hearing, before which the action shall be set down for trial or restored to a trial list.

Status Hearing in Person

(12) In the case of a status hearing that is not to be held in writing, the lawyers of record shall attend, and the parties may attend, the status hearing.

Fr

Disposition at Status Hearing

(13) At the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay and,

(a) if the presiding judge or case management master is satisfied that the action should proceed, the judge or case management master may,

(i) set time periods for the completion of the remaining steps necessary to have the action placed on or restored to a trial list and order that it be placed on or restored to a trial list within a specified time,

(ii) adjourn the status hearing to a specified date on such terms as are just, or

(iii) if the action is an action to which Rule 77 may apply under rule 77.02, assign the action for case management under that Rule, subject to the direction of the regional senior judge,

(iv) make such other order as is just; or

(b) if the presiding judge or case management master is not satisfied that the action should proceed, the judge or case management master may dismiss the action for delay.

Plaintiff under Disability

(14) Unless the court orders otherwise, where the plaintiff is under a disability, an action may be dismissed for delay under this rule only if the defendant gives notice to the Children's Lawyer or, if the Public Guardian and Trustee is litigation guardian of the plaintiff, to the Public Guardian and Trustee.

Effect of Dismissal

(15) Rules 24.03 to 24.05 (effect of dismissal for delay) apply to an action dismissed for delay under subrule (4), (5) or (14).

Setting Aside Dismissal

(16) An order under this rule dismissing an action may be set aside under rule 37.14.

ACTION ABANDONED

Dismissal

48.15 (1) The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

1. More than 180 days have passed since the date the c g process was issued.

2. No statement of defence has been filed.

Fr

3. The action has not been disposed of by final order or judgment.

4. The action has not been set down for trial.

5. The registrar has given 45 days notice in Form 48E that the action will be dismissed as abandoned.

Service on Parties

(2) The registrar shall serve a copy of the order made under subrule (1) (Form 48F) on the parties.

Effect on Subsequent Action

(3) The dismissal of an action as abandoned has the same effect as a dismissal for delay under rule 24.05.

Plaintiff under Disability

(4) Unless the court orders otherwise, where the plaintiff is under a disability, an action may be dismissed as abandoned under this rule only if the defendant gives notice to the Children's Lawyer or, if the Public Guardian and Trustee is litigation guardian of the plaintiff, to the Public Guardian and Trustee.

Setting Aside Dismissal

(5) An order under this rule dismissing an action may be set aside under rule 37.14.

47. Rule 50 of the Regulation is revoked and the following substituted:

RULE 50 PRE-TRIAL CONFERENCE

PURPOSE

50.01 The purpose of this Rule is to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing and, with respect to any issues that are not settled, to obtain from the court orders or directions to assist in the just, most expeditious and least expensive disposition of the proceeding, including orders or directions to ensure that any hearing proceeds in an orderly and efficient manner.

PRE-TRIAL CONFERENCES FOR ACTIONS

50.02 The registrar shall, within 90 days after an action is set down for trial, give the parties notice to appear before a judge or case management [illegible] for a pre-trial conference under this Rule, unless the court orders otherwise.

Fr

PRE-TRIAL CONFERENCES FOR APPLICATIONS

50.03 In an application, a judge may direct that a pre-trial conference under this Rule be held before a judge or case management master.

MATERIALS TO BE FILED

50.04 At least five days before a pre-trial conference, each party shall file with proof of service a pre-trial conference brief containing concise statements, without argument, of the following matters:

1. The nature of the proceeding.

2. The issues raised and the party's position.

3. In the case of an action, the names of the witnesses that the party is likely to call at the trial and the length of time that the evidence of each of those witnesses is estimated to take.

4. The steps that need to be completed before the action is ready for trial or the application is ready to be heard, and the length of time that it is estimated that the completion of those steps will take.

ATTENDANCE

50.05 (1) The lawyers for the parties shall appear at the pre-trial conference and, unless the presiding judge or case management master orders otherwise, the parties shall participate,

(a) by personal attendance; or

(b) under rule 1.08 (telephone and video conferences), if personal attendance would require undue amounts of travel time or expense.

Authority to Settle

(2) A party who requires another person's approval before agreeing to a settlement shall, before the pre-trial conference, arrange to have ready telephone access to the other person throughout the conference, whether it takes place during or after regular business hours.

MATTERS TO BE CONSIDERED

50.06 The following matters shall be considered at a pre-trial conference:

1. The possibility of settlement of any or all of the issues in the proceeding.

2. Simplification of the issues.

3. The possibility of obtaining admissions that may facilitate the hearing.

4. The question of liability.

Fr

5. The amount of damages, if damages are claimed.

6. The estimated duration of the trial or hearing.

7. The advisability of having the court appoint an expert.

8. In the case of an action, the number of expert witnesses and other witnesses that may be called by each party, and dates for the service of any outstanding or supplementary experts' reports.

9. The advisability of fixing a date for the trial or hearing.

10. The advisability of directing a reference.

11. Any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding.

POWERS

50.07 (1) If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may,

(a) establish a timetable and, subject to the direction of the regional senior judge or a judge designated by him or her, fix a date for the trial or hearing;

(b) in the case of a proceeding governed by Rule 77, order a case conference under rule 77.08 if it is impractical to establish a timetable; and

(c) make such order as the judge or case management master considers necessary or advisable with respect to the conduct of the proceeding, including any order under subrule 20.05 (1) or (2).

Order Binds Parties

(2) An order made under this rule binds the parties unless the judge or officer presiding at the hearing of the proceeding orders otherwise to prevent injustice.

Copy of Order

(3) A copy of any order made under this rule shall be placed with the trial or application record.

PRE-TRIAL CONFERENCE REPORT

Requirement

50.08 (1) If a date for a trial or hearing is fixed under clause 50. the presiding judge or case management master shall complete a pre-trial con eport,

Fr

(a) stating what steps need to be completed before the action is ready for the trial or hearing, and how much time is needed to complete those steps;

(b) stating the anticipated length of the trial or hearing; and

(c) setting out any other matter relevant to scheduling the trial or hearing.

Copy of Report

(2) A copy of the pre-trial conference report shall be placed with the trial or application record.

Certificate

(3) Each party or the party's lawyer shall certify on the copy of the pre-trial conference report that is to be placed with the trial or application record that he or she understands the contents of the report and acknowledges the obligation to be ready to proceed on the date fixed for the trial or hearing.

Duty of Lawyer

(4) Each lawyer who represents a party shall, in addition to giving the certificate described in subrule (3), undertake to the court to advise the party of,

(a) the contents of the pre-trial conference report; and

(b) the obligation to be ready to proceed on the date fixed for the trial or hearing.

NO DISCLOSURE

50.09 No communication shall be made to the judge or officer presiding at the hearing of the proceeding or a motion or reference in the proceeding with respect to any statement made at a pre-trial conference, except as disclosed in an order under rule 50.07 or in a pre-trial conference report under rule 50.08.

PRE-TRIAL JUDGE NOT TO PRESIDE AT HEARING

50.10 (1) A judge who conducts a pre-trial conference shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties.

Conference Before Trial Judge

(2) Subrule (1) does not prevent a judge before whom a proceeding has been called for hearing from holding a conference either before or during the hearing to consider any matter that may assist in the just, most expeditious and least expensive disposition of the proceeding without disqualifying himself or herself from presiding at the hearing.

Fr

DOCUMENTS TO BE MADE AVAILABLE

50.11 All documents intended to be used at the trial or hearing that may be of assistance in achieving the purposes of a pre-trial conference, such as any medical reports and reports of experts, shall be provided to the presiding judge or case management master at the conference.

COSTS OF PRE-TRIAL CONFERENCE

50.12 At the pre-trial conference, the presiding judge or case management master may make an order for costs of the conference, but in the absence of such an order the costs shall be assessed as part of the costs of the proceeding.

48. Subrules 53.03 (1) and (2) of the Regulation are revoked and the following substituted:

(1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.

5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.

6. The expert's reasons for his or her opinion, including,

i. a description of the factual assumptions on which the [illegible] based,

ii. a description of any research conducted by the exper[illegible] him or her to form the opinion, and

Fr

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Schedule for Service of Reports

(2.2) Within 60 days after an action is set down for trial, the parties shall agree to a schedule setting out dates for the service of experts' reports in order to meet the requirements of subrules (1) and (2), unless the court orders otherwise.

49. (1) Clause 62.01 (1) (a) of the Regulation is amended by striking out "master" and substituting "master or case management master".

(2) Subrule 62.01 (5) of the Regulation is amended by striking out "four" and substituting "seven".

(3) Subrule 62.01 (7) of the Regulation is amended by striking out "four" in the portion before clause (a) and substituting "seven".

(4) Subrule 62.01 (8) of the Regulation is amended by striking out "two" in the portion before clause (a) and substituting "four".

(5) Subrule 62.01 (8.1) of the Regulation is amended by striking out "two" and substituting "four".

50. (1) Subrule 62.02 (6.1) of the Regulation is amended by striking out "four" and substituting "seven".

(2) Subrule 62.02 (6.2) of the Regulation is amended by striking out "two" and substituting "four".

51. (1) Paragraph 2 of subrule 76.02 (1) of the Regulation is amended by striking out "$50,000" in the portion before subparagraph i and substituting "$100,000".

(2) Subrule 76.02 (6) of the Regulation is amended by striking out "or under Rule 77, as the case may be" wherever it appears.

52. Clause 76.03 (1) (a) of the Regulation is amend striking out "relating to any matter in issue" and substituting "relevant to any matter in issue".

Fr

53. Rule 76.04 of the Regulation is revoked and the following substituted:

NO WRITTEN DISCOVERY, CROSS-EXAMINATION ON AN AFFIDAVIT OR EXAMINATION OF A WITNESS

76.04 (1) The following are not permitted in an action under this Rule:

1. Examination for discovery by written questions and answers under Rule 35.
2. Cross-examination of a deponent on an affidavit under rule 39.02.
3. Examination of a witness on a motion under rule 39.03.

LIMITATION ON ORAL DISCOVERY

(2) Despite rule 31.05.1 (time limit on discovery), no party shall, in conducting oral examinations for discovery in relation to an action proceeding under this Rule, exceed a total of two hours of examination, regardless of the number of parties or other persons to be examined.

54. Subrule 76.05 (1) of the Regulation is amended by striking out "heard" at the end and substituting "brought and heard".

55. Rules 76.06 and 76.07 of the Regulation are revoked.

56. Clause 76.08 (a) of the Regulation is amended by striking out "relating to any matter at issue" and substituting "relevant to any matter in issue".

57. Subrule 76.09 (1) of the Regulation is amended by striking out "90 days" and substituting "180 days".

58. (1) Subrules 76.10 (2) and (3) of the Regulation are revoked.

(2) Subrule 76.10 (4) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

(4) Despite rule 50.04 (materials to be filed before pre-trial conference), at least five days before the pre-trial conference, each party shall,

. . . . .

(3) Subrules 76.10 (5), (6) and (7) of the Regulation are amended by striking out "master" wherever it appears and substituting in each

Fr

case "case management master".

(4) Clause 76.10 (7) (a) of the Regulation is amended by striking out "set a timetable" and substituting "fix a date".

59. (1) Subrule 76.12 (1) of the Regulation is amended by adding the following paragraphs:

1.1 The plaintiff may examine the deponent of any affidavit served by the plaintiff for not more than 10 minutes.

. . . . .

4.1 The defendant may examine the deponent of any affidavit served by the defendant for not more than 10 minutes.

(2) Subrule 76.12 (3) of the Regulation is amended by striking out "cross-examine" and substituting "examine or cross-examine".

60. (1) Paragraph 2 of subrule 76.13 (2) of the Regulation is amended by striking out "$50,000" in the portion before subparagraph i and substituting "$100,000".

(2) Clause 76.13 (3) (b) of the Regulation is amended by striking out "or under Rule 77, as the case may be" wherever it appears.

(3) Subrule 76.13 (7) of the Regulation is amended by striking out "$50,000" and substituting "$100,000".

(4) Subrule 76.13 (8) of the Regulation is amended by striking out "$50,000" and substituting "$100,000".

(5) Rule 76.13 of the Regulation is amended by adding the following subrule:

(11) In the case of an action that was commenced on or after January 1, 2002 and before January 1, 2010, subrules (2), (7) and (8) apply as if "$100,000" read "$50,000".

61. Subrule 77.01 (1.3) of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

62. Subrule 77.11 (1.4) of the Regulation is amend striking out "July 1, 2009" at the end and substituting "January 1, 2010".

Fr

63. Subrule 77.14 (12) of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

64. Rule 77 of the Regulation is revoked and the following substituted:

RULE 77 CIVIL CASE MANAGEMENT

PURPOSE AND GENERAL PRINCIPLES

Purpose

77.01 (1) The purpose of this Rule is to establish a case management system that provides case management only of those proceedings for which a need for the court's intervention is demonstrated and only to the degree that is appropriate, as determined in reliance on the criteria set out in this Rule.

General Principles

(2) This Rule shall be construed in accordance with the following principles:

1. Despite the application of case management under this Rule to a proceeding, the greater share of the responsibility for managing the proceeding and moving it expeditiously to a trial, hearing or other resolution remains with the parties.

2. The nature and extent of the case management provided by a judge or case management master under this Rule in respect of a proceeding shall be informed by any relevant practices, traditions, customs or judicial resource issues that apply locally in the region in which the proceeding is commenced or to which it is transferred.

APPLICATION

Scope

77.02 (1) This Rule applies to actions and applications commenced in or transferred to one of the following counties on or after January 1, 2010 and assigned to case management by an order under these rules:

1. The City of Ottawa.

2. The City of Toronto.

3. The County of Essex.

Fr

Exceptions

(2) Despite subrule (1), this Rule does not apply to,

(a) actions or applications placed on the Commercial List established by practice direction in the Toronto Region;

(b) actions or applications under Rules 74 and 75 (Estates);

(c) applications for the removal or replacement of personal representatives under the *Trustee Act*;

(d) applications under Part V of the *Succession Law Reform Act*;

(e) applications for guardianship of property or persons under the *Substitute Decisions Act, 1992*;

(f) actions under Rule 64 (Mortgage Actions);

(g) actions under Rule 76 (Simplified Procedure);

(h) actions or applications under the *Construction Lien Act*, except trust claims; and

(i) actions or applications under the *Bankruptcy and Insolvency Act* (Canada).

Exceptions, Class Proceedings Act, 1992

(3) Despite subrule (1), this Rule,

(a) applies to an action or application commenced under the *Class Proceedings Act, 1992* only if certification as a class proceeding has been denied; and

(b) does not apply to actions or applications certified as class proceedings under the *Class Proceedings Act, 1992*.

Conflict with Other Rules

(4) In the event of a conflict between a provision in this Rule and a provision in any other Rule, the provision in this Rule prevails.

DEFINITIONS

77.03 In this Rule,

"defence" includes a notice of intent to defend, a statement of defence, a notice of appearance and a notice of motion in response to a proceeding; ("défense")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur")

CASE MANAGEMENT POWERS

Fr

77.04 (1) A judge or case management master may,

(a) extend or abridge a time prescribed by an order or the rules;

(b) adjourn a case conference;

(c) set aside an order made by the registrar;

(d) establish or amend a timetable; and

(e) make orders, impose terms, give directions and award costs as necessary to carry out the purpose of this Rule.

(2) A judge or case management master may, on his or her own initiative, require the parties to appear before him or her or to participate in a conference call to deal with any matter arising in connection with the case management of the proceeding, including a failure to comply with an order or the rules.

(3) For greater certainty, the powers set out in subrules (1) and (2) are in addition to any other powers set out in this Rule.

ASSIGNMENT FOR CASE MANAGEMENT

On Consent of Parties

77.05 (1) A regional senior judge or, subject to the direction of a regional senior judge, any judge or case management master may, with the consent of all parties, assign a proceeding to which this Rule may apply for case management under this Rule.

No Consent

(2) At any time on or after the filing of the first defence in a proceeding to which this Rule may apply, a regional senior judge or, subject to the direction of a regional senior judge, any judge or case management master may assign the proceeding for case management under this Rule,

(a) on his or her own initiative; or

(b) on the request of a party or on motion if the court requires it.

Multiple Proceedings

(3) Two or more proceedings may be assigned under subrule (1) or (2) for case management together.

Criteria

(4) In considering whether to assign a proceeding for case management, the regional senior judge, other judge or case management master shall have regard to all the relevant circumstances, including any or all of the following:

Fr

1. The purpose set out in subrule 77.01 (1).

2. The complexity of the issues of fact or law.

3. The importance to the public of the issues of fact or law.

4. The number and type of parties or prospective parties, and whether they are represented.

5. The number of proceedings involving the same or similar parties or causes of action.

6. The amount of intervention by the court that the proceeding is likely to require.

7. The time required for discovery, if applicable, and for preparation for trial or hearing.

8. In the case of an action, the number of expert witnesses and other witnesses.

9. The time required for the trial or hearing.

10. Whether there has been substantial delay in the conduct of the proceeding.

ASSIGNMENT TO INDIVIDUAL MANAGEMENT BY A JUDGE

Assignment to Particular Judge

77.06 (1) The Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge, or a judge designated by any of them may direct that all steps in a proceeding that is assigned for case management under this Rule be heard and conducted by a particular judge.

Limitation

(2) A judge who is directed under subrule (1) to hear all steps in a proceeding shall not preside at the trial of the action or the hearing of the application, except with the written consent of all parties.

MOTIONS

To Whom Made

77.07 (1) A motion may be made only to a judge or case management master.

Same, Particular Judge

(2) If a direction is made under subrule 77.06 (1) for all steps in a proceeding to be heard by a particular judge, then any motions in the proceeding shall be made to that judge.

Fr

Referral by Particular Judge

(3) A judge who is directed under subrule 77.06 (1) to hear all steps in a proceeding may refer to a case management master any motion within the jurisdiction of a master under subrule 37.02 (2), unless the judge who made the direction directs otherwise.

Procedure

(4) Depending on the practical requirements of the situation, the motion may be made,

(a) with or without supporting material or a motion record; and

(b) by attendance, in writing, by fax or under rule 1.08 (telephone and video conferences).

Costs on Motion

(5) The judge or case management master shall address the issue of costs at the conclusion of each motion in accordance with rule 57.03, regardless of whether the motion is contested.

Formal Order Not Required

(6) The judge or case management master may provide that no formal order need be prepared, signed or entered if the order has been recorded in writing, unless an appeal of the disposition of the motion or a motion for leave to appeal is made to a judge or an appellate court.

CASE CONFERENCE

How Convened

77.08 (1) A judge or case management master may at any time convene a case conference, on his or her own initiative or at a party's request.

Attendance

(2) The judge or case management master may direct that the parties, or a representative of the parties responsible for making decisions regarding the proceeding and instructing the lawyer, attend the conference personally or be available by telephone.

Matters to be Dealt With

(3) At the conference, the judge or case management master ma

Fr

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable.

Lawyers

(4) The lawyers attending the conference shall have the authority to deal with the matters referred to in subrule (3) and shall be fully acquainted with the facts and legal issues in the proceeding.

Powers

(5) At the conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,

(a) make a procedural order;

(b) convene a pre-trial conference;

(c) give directions; and

(d) in the case of a judge,

(i) make an order for interlocutory relief, or

(ii) convene a hearing.

TRANSITION

Definition

77.09 (1) In this rule,

"former case management rules" means one or both of Rule 77 and Rule 78, as they read immediately before January 1, 2010.

Proceedings Under Former Case Management Rules

(2) Despite anything to the contrary in this Rule, every proceeding to which the former case management rules applied immediately before January 1, 2010 shall, on and after that day, continue under this Rule.

Power to Make Orders, Give Directions

(3) A judge or case management master may make orders or [illegible]tions that are necessary to address any procedural issues that arise in a proce[illegible]a result of the transition from the application of the former case management rules to the proceeding to the application of this Rule.

Fr

Existing Orders, Directions, Timetables

(4) All orders, directions and timetables in a proceeding described in subrule (2) that are in force immediately before January 1, 2010 shall remain in force on and after that day, unless a judge or case management master orders otherwise.

65. Rule 78.14 of the Regulation is amended by striking out "July 1, 2009" at the end and substituting "January 1, 2010".

66. The French version of the Regulation is amended by striking out "protonotaire responsable de la gestion de la cause" wherever it appears and substituting in each case "protonotaire chargé de la gestion des causes" in the following provisions:

1. **Subrule 1.03 (1), clause (b) of the definition of "tribunal".**
2. **Rule 1.09, in the portion before clause (a).**
3. **Clause 75.1.05 (6) (b).**
4. **Clause 75.1.10 (1) (c).**
5. **Subrule 75.1.10 (2), in the portion before clause (a).**

67. (1) The Table of Forms to the Regulation is amended by striking out,

14F	**Information for Court Use**	**November 1, 2005**

. . . . .

30A	**Affidavit of Documents (Individual)**	**November 1, 2005**
30B	**Affidavit of Documents (Corporation or Partnership)**	**November 1, 2005**

. . . . .

Fr

48C	**Status Notice**	**July 1, 2007**

and substituting the following:

14F	Information for Court Use	November 1, 2008

. . . . .

30A	Affidavit of Documents (Individual)	November 1, 2008
30B	Affidavit of Documents (Corporation or Partnership)	November 1, 2008

. . . . .

48C.1	Status Notice: Action Not on a Trial List	November 1, 2008
48C.2	Status Notice: Action Struck from Trial List	November 1, 2008

(2) The Table of Forms to the Regulation is amended by adding the following:

48E	Notice that Action will be Dismissed	November 1, 2008
48F	Order Dismissing Action as Abandoned	November 1, 2008

. . . . .

53	Acknowledgement of Expert's Duty	No , 2008

Fr

(3) The Table of Forms to the Regulation is amended by striking out,

76A	**Notice Whether Action under Rule 76**	**November 1, 2005**

and substituting the following:

76A	Notice Whether Action under Rule 76	November 1, 2008

(4) The Table of Forms to the Regulation is amended by striking out the following:

77C	**Case Management Motion Form**	**November 1, 2005**
77D	**Trial Management Conference Form**	**November 1, 2005**
78A	**Timetable**	**November 1, 2005**

68. (1) Subject to subsection (2), this Regulation comes into force on January 1, 2010.

(2) Subsections 11 (2) and 16 (2) and sections 21, 45, 61 to 63, 65 and this section come into force on the day this Regulation is filed.

Fr

2059

Fr

Tab G

O. Reg. 231/13: RULES OF CIVIL PROCEDURE

Filed July 31, 2013 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 231/13

COURTS OF JUSTICE ACT

Made: June 18, 2013

Approved: July 30, 2013

Filed: July 31, 2013

Published on e-Laws: July 31, 2013

Printed in *The Ontario Gazette*: August 17, 2013

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. Subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding the following definition:

"limited scope retainer" means the provision of legal services by a lawyer for part, but not all, of a client's legal matter by agreement between the lawyer and the client; ("mandat à portée limitée")

2. Subrule 1.04 (3) of the Regulation is revoked.

3. Rule 15.01 of the Regulation is amended by adding the following subrule:

(4) Subrule (3) permits a party to be represented by a lawyer acting under a limited scope retainer, but a limited scope retainer does not, in itself, make a lawyer the lawyer of record for the party.

4. Rule 15 of the Regulation is amended by adding the following rule:

INTERPRETATION

Party Acting in Person

15.01.1 (1) Where a party to a proceeding is not represented by a lawyer but acts in person, anything these rules require or permit a lawyer to do shall be done by the party.

Party Represented under Limited Scope Retainer

Fr

and, to that end,

(a) a reference in these rules to a party acting in person includes a reference to a party who is represented in this manner; and

(b) anything these rules require or permit a party to do shall be done by the party.

Exception, Lawyer of Record

(3) Subsection (2) does not apply if the lawyer acting under the limited scope retainer is the party's lawyer of record.

5. Clause 17.02 (h) of the Regulation is revoked.

6. Clause 17.05 (3) (b) of the Regulation is amended by striking out "by Article 10 of the Convention" and substituting "by the Convention".

7. Subrule 24.1.04 (1) of the Regulation is amended by adding the following paragraph:

3. Actions that are transferred to a county listed in paragraph 2 on or after January 1, 2014, unless the court orders otherwise.

8. (1) Subrule 24.1.09 (2.1) of the Regulation is revoked and the following substituted:

Transfer

(2.1) In the case of an action described in paragraph 3 of subrule 24.1.04 (1),

(a) subrules (1) and (6) do not apply; and

(b) the court may make an order, on motion or otherwise, specifying the date by which a mediation session must take place.

(2) Subrule 24.1.09 (3) of the Regulation is amended by adding "and clause (2.1) (b)" after "subrule (1)" in the portion before clause (a).

(3) Subrule 24.1.09 (6.1) of the Regulation is amended by adding "or clause (2.1) (b)" after "subrule (1)".

(4) Rule 24.1.09 of the Regulation is amende[Fr]dding the following subrule:

without the mediation co-ordinator having received a notice under clause (5) (a), a mediator's report or a notice that the action has been settled, he or she shall immediately assign a mediator from the list, unless the court orders otherwise.

9. (1) Clauses 53.09 (1) (a) and (b) of the Regulation are revoked and the following substituted:

(a) for the 15-year period that follows the start of the trial, the greater of,

(i) the average of the value for the last Wednesday in each month of the real rate of interest on long-term Government of Canada real return bonds (Series V121808, formerly Series B113911), as published in the Bank of Canada's *Weekly Financial Statistics* for the period starting on March 1 and ending on August 31 in the year before the year in which the trial begins, less ½ per cent and rounded to the nearest 1/10 per cent, and

(ii) zero; and

(b) for any later period covered by the award, 2.5 per cent per year for each year in that period.

(2) Clause 53.09 (2) (b) of the Regulation is revoked and the following substituted:

(b) determine the rate to be assumed for future inflation in accordance with the following formula:

g rounded to the nearest 1/10 per cent where,

$$g = \left(\frac{1+i}{1+d}\right) - 1$$

"i" is the average of the value for the last Wednesday in each month of the nominal rate of interest on long-term Government of Canada bonds (Series V121758, formerly Series B113867), as published in the Bank of Canada's *Weekly Financial Statistics* for the period starting on March 1 and ending on August 31 in the year before the year in which the trial begins;

"d" is,

(a) for the 15-year period that follows the start of the trial, the greater of,

(i) the average of the value for the last Wednesday in each month of the real rate of interest on long-term Government of Canada real return bonds (Series V121808,

Fr

the year in which the trial begins, less ½ per cent, and

(ii) zero, and

(b) for any later period covered by the award, 2.5 per cent per year for each year in that period.

(3) Rule 53.09 of the Regulation is amended by adding the following subrule:

Transition

(3) This rule, as it read on December 31, 2013, continues to apply with respect to actions in which the trial commenced before January 1, 2014.

10. The French version of subrule 59.03 (1) of the Regulation is amended by striking out "sur laquelle une ordonnance a une incidence" and substituting "concernée par une ordonnance".

11. Rule 59 of the Regulation is amended by adding the following rule:

LIMITED SCOPE RETAINER

59.08 (1) Despite subrule 15.01.1 (2), if an order arises from a hearing at which a lawyer who is not a party's lawyer of record appeared under a limited scope retainer for the party, that lawyer shall act in the place of the party for the purposes of this Rule.

(2) Subrule (1) does not apply if,

(a) the agreement governing the limited scope retainer provides otherwise; and

(b) the lawyer acting under the limited scope retainer provides written notice of the fact to the other parties and to the registrar.

O. Reg. 488/99

12. Section 4 of Ontario Regulation 488/99 is revoked.

Commencement

Fr

2066

Fr

Tab H

O. Reg. 584/17: RULES OF CIVIL PROCEDURE

Filed December 22, 2017 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 584/17

COURTS OF JUSTICE ACT

Made: November 29, 2017

Approved: December 20, 2017

Filed: December 22, 2017

Published on e-Laws: December 22, 2017

Printed in *The Ontario Gazette*: January 6, 2018

AMENDING REG. 194 OF R.R.O. 1990 (RULES OF CIVIL PROCEDURE)

1. Rule 4.02.1 of Regulation 194 of the Revised Regulations of Ontario, 1990 is revoked and the following substituted:

BILINGUAL DOCUMENTS

4.02.1 A pleading or any other document written in French that may be filed under section 126 of the *Courts of Justice Act* may also include a version of all or part of the text written in English.

2. (1) Subrule 4.05 (4.2) of the Regulation is revoked and the following substituted:

Confirmation of Filing

(4.2) The electronic filing of a document in accordance with this rule shall be confirmed by way of a notice of accepted filing given through the authorized software.

(2) Subrules 4.05 (9), (10) and (11) of the Regulation are revoked and the following substituted:

Requirement to Keep Original

(10) A person who electronically files a document that was originally signed, certified or commissioned in paper format shall,

(a) retain the original document in paper format until the day after the expiry of the period for an appeal in the proceeding; and

Fr

proceeding to do so.

3. (1) Rule 4 of the Regulation is amended by adding the following rule:

CIVIL CLAIMS ONLINE PORTAL

4.05.1 (1) In this rule,

"Civil Claims Online Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Civil Claims Online Portal" in English and "Portail en ligne pour les actions civiles" in French.

Documents That May be Filed Through Portal

(2) Subject to subrule (3), the following documents may be filed electronically through the Civil Claims Online Portal:

1. A statement of claim in Form 14A or 14B.

2. A notice of action (Form 14C).

3. An affidavit for the purposes of subrule 7.02 (2).

4. A requisition or written statement under clause 5 (1) (a) of Ontario Regulation 53/01 (Bilingual Proceedings) made under the *Courts of Justice Act*.

5. A consent filed for the purposes of paragraph 7 of subsection 126 (2) of the *Courts of Justice Act*.

Agreement

(3) Subrule (2) does not apply unless the party filing the document through the Civil Claims Online Portal agrees to its terms of use, including providing an e-mail address at which he or she agrees to accept documents from the court electronically.

Electronic Filing of Originating Process

(4) If a statement of claim in Form 14A or 14B or a notice of action (Form 14C) is filed electronically through the Civil Claims Online Portal,

(a) Form 14F (Information for court use) is not required to be filed, despite subrule 14.03 (4.1); and

(b) subrule 14.07 (2) does not apply if the statement of claim or notice of action is issued electronically under subrule (7) of this rule, provided that the statement of

Fr

process.

Inconsistencies

(5) In the event of an inconsistency between information provided in a document filed electronically by a person through the Civil Claims Online Portal and information provided by the person through the Civil Claims Online Portal that is not in the electronically filed document,

(a) the information in the electronically filed document prevails, except with respect to the county specified by the person for the purposes of Rule 13.1 where the information provided through the Civil Claims Online Portal prevails; and

(b) the registrar may request from the person written clarification, in the manner specified by the registrar, respecting the inconsistency, and the person shall promptly provide it.

When Paper Copy to be Given to Registrar

(6) A statement of claim or notice of action that has been filed electronically through the Civil Claims Online Portal shall be given to the registrar by the plaintiff in paper format,

(a) on the filing by the plaintiff of any other document in the action in paper format, other than a document filed under subrule 19.01 (1) or (2); or

(b) on the request of the registrar.

Documents That May be Issued Through Portal

(7) The following documents may be issued electronically through the Civil Claims Online Portal:

1. A statement of claim in Form 14A or 14B.

2. A notice of action (Form 14C).

(2) Paragraph 1 of subrule 4.05.1 (2) of the Regulation, as made by subsection (1), is amended by striking out "in Form 14A or 14B" at the end and substituting "(Form 14A, 14B or 14D)".

(3) Subrule 4.05.1 (2) of the Regulation, as made by subsection (1), is amended by adding the following paragraphs:

Fr

2.1 A statement of defence (Form 18A).

2.2 A notice of intend to defend (Form 18B).

referred to in this subrule.

7. Proof of service under rule 16.09 or in Form 17A, 17B or 17C of a document that is filed electronically under this subrule.

(4) Subrule 4.05.1 (6) of the Regulation, as made by subsection (1), is revoked and the following substituted:

Requirement to Include Paper Copy

(6) A party who electronically files a document through the Civil Claims Online Portal and intends to rely on the document in a hearing or conference shall include the document in paper format together with any documents required to be filed by the party for the purposes of the hearing or conference.

4. Subrule 7.02 (3) of the Regulation is revoked.

5. Subrule 14.03 (4.1) of the Regulation is amended by striking out "subject to subrule 14.04 (3)" at the end.

6. Rule 14.04 of the Regulation is revoked.

7. Subrule 14.07 (3) of the Regulation is revoked.

8. Clauses 74.04 (1) (c), (d) and (e) of the Regulation are revoked and the following substituted:

(c) if the will or a codicil is not in holograph form,

(i) an affidavit of execution (Form 74.8) of the will and of every codicil or, if the will or a codicil contains an alteration, erasure, obliteration or interlineation that has not been attested, an affidavit as to the condition of the will or codicil at the time of execution (Form 74.10), or

(ii) if each of the witnesses to the will or the codicil has died or cannot be found, such other evidence of due execution as the court may require;

(d) if the will or a codicil is in holograph form, an affidavit attesting that the handwriting and signature in the will or codicil are those of the deceased (Form 74.9);

Fr

9. The row for Form 74.10 in the Table of Forms to [illegible]egulation is amended by striking out the date in the column titled "Date of

Commencement

10. (1) Subject to subsection (2), this Regulation comes into force on the later of January 1, 2018 and the day it is filed.

(2) Subsections 3 (2) to (4) come into force on May 28, 2018.

Made by:
Pris par :

Civil Rules Committee:
Le Comité des règles en matière civile :

falguni debnath
Senior Legal Officer / Avocate Principale
Secretary / Secrétaire

Date made:November 29, 2017
Pris le : 29 novembre 2017

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Yasir Naqvi
Attorney General

Date approved: December 20, 2017
Approuvé le : 20 décembre 2017

Fr

2074

Fr

Tab I

O. Reg. 689/20: RULES OF CIVIL PROCEDURE

Filed November 30, 2020 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 689/20

COURTS OF JUSTICE ACT

Made: November 23, 2020
Approved: November 26, 2020
Filed: November 30, 2020
Published on e-Laws: November 30, 2020
Printed in *The Ontario Gazette*: December 19, 2020

AMENDING REG. 194 OF R.R.O. 1990 (RULES OF CIVIL PROCEDURE)

1. Rules 1.08 and 1.08.1 of Regulation 194 of the Revised Regulations of Ontario, 1990 are revoked and the following substituted:

METHOD OF ATTENDANCE AT HEARINGS, ETC.

1.08 (1) A party seeking a hearing or other step in a proceeding that permits or requires the attendance of parties shall, in the forms or other documents required under these rules to be filed in advance of the hearing or step, specify by which of the following methods the party proposes that the parties attend at the hearing or step:

1. In person.
2. By telephone conference.
3. By video conference.

Exception, Court of Appeal

(2) This rule does not apply with respect to proceedings in the Court of Appeal, which may be heard as directed by the court.

Exception, Case Conferences

(3) This rule does not apply with respect to case conferences, which shall be held by telephone conference unless the court specifies a different method of attendance.

Objection

(4) A party who wishes to oppose the proposed method of attendance shall deliver a notice of objection in Form 1A before the earlier of,

Fr

(b) seven days before the hearing or step.

Objection to be Dealt with at Case Conference

(5) If a notice of objection is delivered, the court shall direct that a case conference be held to deal with the objection.

Method to be Determined by Order

(6) At the case conference referred to in subrule (5), the court shall make an order directing the method of attendance at the hearing or step and, in doing so, the court shall consider,

(a) the availability of telephone conference or video conference facilities;

(b) the general principle that evidence and argument should be presented orally in open court;

(c) the importance of the evidence to the determination of the issues in the case;

(d) the effect of a telephone conference or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(e) the importance in the circumstances of the case of observing the demeanour of a witness;

(f) whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;

(g) the balance of convenience between any party wishing the telephone conference or video conference and any party or parties opposing; and

(h) any other relevant matter.

No Objection

(7) If no notice of objection is filed, the parties are deemed to have agreed to attendance by the proposed method and, unless the court directs otherwise, the hearing or step shall proceed by that method.

Mandatory Mediations, Oral Examinations for Discovery

(8) This rule applies with the following modifications to mandatory mediations (Rules 24.1 and 75.1) and oral examinations for discovery (Rule 31):

Fr

1. One of the parties shall propose the method of attendance by notice to the other parties.

3. The factors in clauses (6) (b) to (e) do not apply.

4. If the court makes an order under subrule (6) directing a telephone conference or video conference, the court shall,

i. direct a party to make the necessary arrangements and to give notice of those arrangements to the other parties, and

ii. make any other direction respecting the telephone conference or video conference, including any related requirements or procedures, that the court considers appropriate in the circumstances.

5. If no notice of objection is filed and the parties are to proceed by telephone conference or video conference, one of the parties shall make the necessary arrangements and give notice of those arrangements to the other parties.

Transition, References under the Solicitors Act

(9) Rule 1.08.1, as it read immediately before it was revoked, continues to apply with respect to a reference under the *Solicitors Act* of a lawyer's bill for assessment, if a party to the reference made a request under that rule before the day section 1 of Ontario Regulation 689/20 came into force.

2. Rule 4.01 of the Regulation is revoked and the following substituted:

DOCUMENT STANDARDS

4.01 A document in writing in a proceeding shall meet the following standards:

1. In the case of a document in paper format,

i. the text shall be printed, typed, written or reproduced legibly, with double spaces between the lines and a margin of approximately 40 millimetres on the left-hand side,

ii. the characters used shall be of at least 12 point or 10 pitch size,

iii. good quality white paper or good quality near white recycled paper 216 millimetres by 279 millimetres shall be used, and

iv. text may appear on one side or on both sides of the p

Fr

2. In the case of a document that is filed or submitted in format using software authorized by the Ministry of the Attorney General for the purpose, the

ii. any requirements specified by the authorized software.

3. The Regulation is amended by adding the following rule:

ELECTRONIC SIGNATURES

4.01.1 (1) In this rule,

"electronic signature" means electronic information that a person creates or adopts in order to sign a document and that is in, attached to or associated with the document.

Electronic Signatures Permitted

(2) A document that may or must be signed by the court, a registrar, a judge or an officer under these rules may be signed with an electronic signature.

4. (1) Clause 4.02 (3) (f) of the Regulation is amended by striking out "fax number (if any), e-mail address (if any)" and substituting "e-mail address".

(2) Clause 4.02 (3) (g) of the Regulation is amended by striking out "fax number (if any)".

(3) Clause 4.02 (3) (h) of the Regulation is amended by striking out "the fax number and e-mail address" and substituting "the e-mail address".

5. Rule 4.03 of the Regulation is revoked and the following substituted:

CERTIFIED COPIES OF COURT DOCUMENTS

4.03 (1) The registrar shall provide a certified copy of a document that is in the court file to a person who is entitled to see the document under section 137 of the *Courts of Justice Act*, if the person files a requisition (Form 4E) and pays the prescribed fee, if any.

Certified Copy in Electronic Format

(2) The registrar may provide a certified copy in electronic format of a document that is in the court file.

Fr

Valid Certification

(a) the copy bears the registrar's signature and the date of certification; and

(b) in the case of a copy that is provided in electronic format, the copy accurately reproduces the information set out in the document, even if the way in which information is displayed in the document and in the copy differs.

Printed Version of Electronic Certified Copy may be Used

(4) If a certified copy of a document is provided by the registrar in electronic format, a requirement under these rules that a person provide a certified copy of a document to another person in paper format may be satisfied by printing the electronic certified copy by any means that produces the document in paper format and providing the printed version of the certified copy.

6. (1) Subrule 4.05 (1.1) of the Regulation is revoked and the following substituted:

Electronic Issuing

(1.1) Any document to be issued under these rules may be issued electronically,

(a) by the registrar dating, signing and sealing with an electronic version of the seal of the court a copy of the document in electronic format; or

(b) by use of the software authorized by the Ministry of the Attorney General for the purpose.

(2) Subrules 4.05 (7) and (8) of the Regulation are revoked and the following substituted:

Date of Electronic Issuance, Filing

(7) A document that is issued or filed electronically is considered to have been issued or filed, as the case may be, on the date indicated on the document by the registrar or the authorized software.

Issuance, Filing Outside of Business Hours

(8) If a document is issued or filed electronically outside of regular business hours, the registrar or the authorized software shall indicate that the document was issued or filed, as the case may be, on the next day that is not a holiday.

Fr

7. The Regulation is amended by adding the following rule:

"CaseLines" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "CaseLines".

Application

(2) This rule applies to all or part of any hearing, pre-trial conference or case conference under these rules, except in a proceeding in the Court of Appeal.

Requirement to Use CaseLines

(3) A party shall provide the following documents to the court by submitting them to CaseLines in accordance with this rule, if the court requires the party to do so:

1. Every document the party files or has filed with the court in respect of the hearing or conference.

2. Subject to subrule (5), any other document in the court file that the party intends to rely on at the hearing or conference and that has not already been submitted to CaseLines by another party.

3. A compendium containing the excerpted portions of the cases and of the evidence to which the party intends to refer during the hearing or conference.

Deadline

(4) Subject to subrule (5), the documents listed in subrule (3) must be submitted to CaseLines by the following deadline:

1. In the case of the hearing of a motion or application where the party is required to give the registrar a confirmation of motion (Form 37B) or confirmation of application (Form 38B), the deadline is the date and time by which the confirmation is required to be given.

2. In any other case, the deadline is five days before the date of the hearing or conference, unless the court orders otherwise.

Transcripts

(5) A transcript for use at a trial shall not be submitted to CaseLines until a party refers to the transcript at trial and files a copy of it in accordance with 34.18 (4), and, for greater certainty, that subrule also applies with respect to submitted to CaseLines.

Fr

following requirements:

1. The document must be submitted in the following formats:

   i. A draft order or factum must be submitted in both Portable Document Format (PDF) and Word format.

   ii. Any other document must be submitted only in Portable Document Format (PDF) or, if appropriate, in Excel format, except that an exhibit may be submitted in any format accepted by CaseLines.

2. The document name, as submitted to CaseLines, must indicate,

   i. the document type,

   ii. the type of party submitting the document,

   iii. the date on which the document was created or signed, in the format DD-MM-YYYY.

Compendium and Factums

(7) The compendium required by paragraph 3 of subrule (3) and any factums that are submitted to CaseLines must,

(a) be in Portable Document Format (PDF), with bookmarks as appropriate for each document and section heading within each document;

(b) contain,

(i) hyperlinks at which copies of the cited authorities may be viewed without charge, such as hyperlinks to the Canadian Legal Information Institute website (CanLii), e-Laws, the federal Justice Laws website or other similar sites, or

(ii) relevant excerpts of any cited authority for which copies are not available on a website without charge; and

(c) be named in accordance with paragraph 2 of subrule (6).

Document Must be Identical to Document in Court File

(8) The party shall ensure that every document that the party submits to CaseLines is identical to that document as contained in the court file, subject to any modifications required by this rule or the court.

Fr

Requirement to Keep Original

an appeal in the proceeding; and

(b) on the request of the court, the registrar or another party, make the original document available to the court, registrar or party for inspection no later than five days after the request is made.

Document in Court File Prevails

(10) In the event of an inconsistency between information provided in a document in the court file and information provided in a document submitted to CaseLines, the information in the document in the court file prevails.

Does Not Amount to Filing or Service

(11) For greater certainty, submitting documents to CaseLines does not amount to the filing or service of those documents under these rules.

8. Clause 4.06 (1) (e) of the Regulation is amended by striking out "before a person authorized to administer oaths or affirmations" at the end and substituting "in accordance with the *Commissioners for Taking Affidavits Act*".

9. Subrule 4.07 (7) of the Regulation is revoked and the following substituted:

Electronic Documents

(7) This rule does not apply to a document that is filed electronically in accordance with these rules or submitted to CaseLines under rule 4.05.3; however, if the same document is filed or provided to the court in paper format, this rule applies to the paper version of the document.

10. (1) Subrule 4.09 (3) of the Regulation is amended by striking out "typewritten" and substituting "typed".

(2) Rule 4.09 of the Regulation is amended by adding the following subrules:

Transcripts to be Provided in Electronic Format

Fr

(12) Unless the court orders otherwise, a transcript that is served, filed, sent or otherwise provided under these rules shall be served, filed, sent or provided in

(13) Subrule (12) applies to proceedings commenced on or after the day on which subsection 10 (2) of Ontario Regulation 689/20 came into force.

11. The Regulation is amended by adding the following rule:

E-MAILING OF DOCUMENTS, COMMUNICATIONS BY REGISTRAR

Documents

4.12 (1) Any document that the court or registrar may or must send, give or otherwise provide to a person under these rules may be sent to the person in electronic format by e-mail to,

(a) the e-mail address most recently indicated for the person in the applicable court file, if any; or

(b) in the case of a lawyer whose e-mail address is not indicated in the court file, the e-mail address for the lawyer as published on the Law Society of Ontario's website.

Communications

(2) Any communication that the court or registrar may or must send to a person in connection with a proceeding under these rules may be sent to the person in electronic format by e-mail to,

(a) the e-mail address most recently indicated for the person in the applicable court file, if any; or

(b) in the case of a lawyer whose e-mail address is not indicated in the court file, the e-mail address for the lawyer as published on the Law Society of Ontario's website.

Application

(3) This rule applies despite anything to the contrary in these rules.

12. (1) Subrule 13.1.02 (3.1) of the Regulation is revoked and the following substituted:

Where Motion may be Brought

(3.1) Despite rule 37.03 (where motions to be brought) and subrule 76.05 (2) (place of in-person hearings), a motion under subrule (1), (2) or (3) may be brought in the county

Fr

(2) Subrule 13.1.02 (5) of the Regulation is amended by striking out "under rule 1.08 (telephone and video conference)" and substituting "by telephone conference or video conference".

13. Clause 15.04 (4) (c) of the Regulation is revoked and the following substituted:

(c) the telephone number and any e-mail address of the client;

14. Subclause 16.01 (4) (b) (iv) of the Regulation is amended by striking out "if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the party or person" at the beginning and substituting "by e-mailing a copy to the last e-mail address for service provided by the party or other person or, if no such e-mail address has been provided, to the party's or person's last known e-mail address".

15. (1) Clause 16.05 (1) (d) of the Regulation is revoked.

(2) Clause 16.05 (1) (f) of the Regulation is amended by striking out "if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the lawyer's office" at the beginning and substituting "by e-mailing a copy to the last e-mail address for service provided by the lawyer or, if no such e-mail address has been provided, to the lawyer's last known e-mail address".

(3) Subrules 16.05 (2.1), (3) and (3.2) of the Regulation are revoked.

16. (1) Subrule 16.06.1 (1) of the Regulation is amended by striking out "served under subclause 16.01 (4) (b) (iv) or clause 16.05 (1) (f)" in the portion before clause (a) and substituting "served by e-mail in accordance with these rules".

(2) Clause 16.06.1 (1) (a) of the Regulation is amended by striking out "fax number, if any".

(3) Subrule 16.06.1 (2) of the Regulation is revoked.

Fr

SERVICE BY COURIER

16.06.2 Service of a document by courier in accordance with these rules is effective on the second day following the day the courier was given the document, or, if the second day is a holiday, on the next day that is not a holiday.

18. Subrule 16.09 (6) of the Regulation is revoked.

19. Subrule 20.05 (2) of the Regulation is amended by adding the following clause:

(j.1) that any oral examination of a person or witness proceed by video conference;

20. Rule 34.16 of the Regulation is amended by striking out "typewritten" and substituting "typed".

21. Rule 34.17 of the Regulation is revoked and the following substituted:

TYPED TRANSCRIPT

34.17 (1) The official examiner or person who recorded an examination shall, on the request of a party, have a typed transcript of the examination prepared and completed within four weeks after receipt of the request.

Certification

(2) The transcript shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined.

Copy to be Provided

(3) As soon as the transcript is prepared, the official examiner or person who recorded the examination shall send a copy of the transcript to the party who requested it.

22. Rule 37.03 of the Regulation is revoked and the following substituted:

WHERE MOTIONS TO BE BROUGHT

37.03 Unless the court orders otherwise, all motions shall be [Fr] in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02 and, if a motion is to be heard in person, it shall be heard in that county.

(2) Clause 37.10.1 (2) (b) of the Regulation is amended by striking out "by fax or e-mail" at the end and substituting "by e-mail".

(3) Clause 37.10.1 (3) (b) of the Regulation is amended by striking out "by fax or e-mail" at the end and substituting "by e-mail".

24. Subrule 37.11 (2) of the Regulation is revoked and the following substituted:

(2) The hearing of all other motions shall be open to the public, except as provided in section 135 of the *Courts of Justice Act*, in which case the presiding judge, case management master or officer shall endorse,

(a) on the notice of motion leave for a hearing in the absence of the public; or

(b) on a separate document in accordance with subrule 59.02 (2), with necessary modifications.

25. Subrule 37.12.1 (4) of the Regulation is amended by striking out "Where the issues of fact and law are not complex, the moving party" at the beginning and substituting "The moving party".

26. Subrules 37.14 (3), (4) and (5) of the Regulation are amended by striking out "(place of hearing of motions)" wherever it appears and substituting in each case "(where motions to be brought)".

27. Subrule 37.15 (1) of the Regulation is amended by striking out "(place of hearing of motions)" and substituting "(where motions to be brought)".

28. Subrule 38.03 (1.1) of the Regulation is revoked and the following substituted:

Place of In-Person Hearings

(1.1) If the application is to be heard in person, it shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise.

Fr

(2) Clause 38.09.1 (3) (b) of the Regulation is amended by striking out "by fax or e-mail" at the end and substituting "by e-mail".

30. Clause 38.11 (2) (b) of the Regulation is amended by striking out "(place of hearing of motions)" and substituting "(where motions to be brought)".

31. Subrule 48.14 (1.2) of the Regulation is amended by striking out "and may be issued electronically" at the end.

32. Subrule 50.05 (1) of the Regulation is revoked and the following substituted:

ATTENDANCE

(1) The lawyers for the parties shall appear at the pre-trial conference and, unless the presiding judge or case management master orders otherwise, the parties shall also participate.

33. Subrule 50.13 (2) of the Regulation is revoked and the following substituted:

Attendance

(2) The lawyers for the parties shall appear at the case conference and, unless the judge or case management master orders otherwise, the parties shall also participate.

34. Clause (c) of the definition of "authenticity" in rule 51.01 of the Regulation is amended by striking out "a letter, telegram or telecommunication" and substituting "a letter or e-mail or other telecommunication".

35. Rule 52.09 of the Regulation is revoked and the following substituted:

RECORDING JURY VERDICT

52.09 The verdict of a jury shall be endorsed on the trial record or on a separate document in accordance with subrule 59.02 (2), with necessary modifications.

Fr

be brought)".

37. Subrule 57.01 (1) of the Regulation is amended by striking out "and" at the end of subclause (h) (ii) and by adding the following clause:

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

38. Rule 59.02 of the Regulation is revoked and the following substituted:

ENDORSEMENT OF ORDERS

59.02 (1) An endorsement of an order shall be made on the appeal book, compendium, record, notice of motion, notice of application or on a separate document by the judge, case management master or officer making the order.

Requirements if Separate Document

(2) A separate document on which an endorsement is made,

(a) may be in paper or electronic format;

(b) may include the reasons for the decision; and

(c) shall include,

(i) the name and signature of the judge, case management master or officer making the order,

(ii) the date on which the endorsement is made,

(iii) the date of the hearing or conference,

(iv) the nature of the hearing or conference,

(v) the relief requested,

(vi) the disposition made at the hearing or conference, and

(vii) a list of the parties and lawyers who participated in the hearing or conference and a list of any parties or lawyers who did not participate in the hearing or conference.

Fr

Court File

following substituted:

PREPARATION AND FORM OF ORDER

Preparation of Draft Order

(1) Any party or person affected by an order may prepare a draft order and send it to all parties who participated in the hearing or conference for approval of its form and content.

Approval

(2) If all the parties who participated in the hearing or conference approve the draft order, the party or other person who prepared the draft order may request that it be issued by the registrar by filing,

(a) the draft order; and

(b) evidence that the parties have approved the draft order.

General Form of Order

(3) A draft order must be in Form 59A (order), 59B (judgment) or 59C (order or certificate on appeal) and must contain,

(a) the name of the judge, case management master or officer who made the order;

(b) the date on which the order was made;

(c) a recital of the particulars necessary to understand the order, including the date of the hearing or conference, the parties who participated in the hearing or conference and those who did not, and any undertaking given by a party as a condition of the order; and

(d) if the order is for the payment of money on which postjudgment interest is payable, the rate of interest and the date from which interest is payable.

40. Rule 59.04 of the Regulation is revoked and the following substituted:

ISSUING ORDERS

Fr

Issuance

1. The signing of the order,

   i. by the judge, case management master or officer making the order, or

   ii. by the registrar in accordance with subrule (3).

2. The registrar's dating and sealing of the order with the seal of the court.

Electronic Issuance

(2) If an order is issued electronically,

(a) subrule (1) applies instead of subrule 4.05 (1.1); and

(b) for greater certainty, the order may be sealed by use of an electronic version of the seal.

Registrar's Signature

(3) A registrar where the hearing or conference was held or where the proceeding was commenced may sign a draft order filed under subrule 59.03 (2), if the registrar is satisfied that the draft order,

(a) is in proper form; and

(b) complies with and reflects the terms of an endorsement or decision made by the person indicated in the draft order.

Provision of Issued Order

(4) An issued order shall be provided to the person who filed the draft order by,

(a) having the order e-mailed to,

(i) the e-mail address most recently indicated for the person in the applicable court file, or

(ii) the e-mail address most recently indicated for the person's lawyer in the applicable court file or, if no e-mail address is indicated in the court file, the e-mail address for the lawyer as published on the Law Society of Ontario's website;

(b) providing the order through CaseLines, if CaseLines is being used for the hearing or conference; or

(c) making the order available for pickup at the court c[illegible] the person's request or if e-mail or CaseLines is not available.

Fr

subrule (3), the registrar shall provide notice using a method set out in subrule (4) to the person who filed the draft order that it does not comply with the requirements.

(6) If the person receives a notice from the registrar under subrule (5), the person may,

(a) file a revised draft order and, if required by the registrar, file the approval of the parties to the order in that form; or

(b) obtain an appointment to have the order settled by the person who made the order, in which case notice of the appointment (Form 59D) shall be served on all parties who participated in the hearing or conference and filed, with proof of service, at least seven days before the appointment date.

Appointment to Settle Where Form of Draft Order not Approved

(7) If approval of the draft order by the parties who participated in the hearing or conference is not received, the person may obtain an appointment to have the order settled by the registrar or, if the registrar considers it necessary, by the person who made the order, and notice of the appointment (Form 59D) shall be served on all other parties who participated in the hearing or conference and filed, with proof of service, at least seven days before the appointment date.

Urgent Cases

(8) In a case of urgency, the order may be settled and signed by the person who made it without the approval of any of the parties who participated in the hearing or conference.

Appointment to Settle Disputed Order

(9) If an objection is taken to the proposed form of the order in the course of its settlement before a registrar, the registrar shall settle the order in the form the registrar considers proper and the objecting party may obtain an appointment with the person who made the order to settle the part of the order to which objection has been taken, in which case the objecting party shall serve notice of the appointment (Form 59D) on all other parties who participated in the hearing or conference and file it, with proof of service, at least seven days before the appointment date.

(10) If the order was made by a court that consisted of more than one judge, the appointment shall be with the judge who presided at the hearing where that judge is unavailable, any other judge who participated in the hearing.

Fr

(12) If an appointment is not obtained under subrule (9) or (10) within seven days after the registrar settles the order, the person who filed the draft order or any party may require the registrar to issue the order as settled by the registrar.

(13) After an order has been settled under subrule (9) by the person who made it, or under subrule (10) or (11), the registrar shall issue the order.

Ceasing to Hold Office or Incapacity

(14) If a judge ceases to hold office or becomes incapacitated after making an order but before it is signed, another judge may settle and sign it.

(15) If a case management master ceases to hold office or becomes incapacitated after making an order but before it is signed, another case management master or a judge may settle and sign it.

Transition

(16) This rule, as it read immediately before the day section 40 of Ontario Regulation 689/20 came into force, continues to apply with respect to any orders that were issued before that day and any draft orders that were filed before that day.

41. Rule 59.05 of the Regulation is revoked and the following substituted:

ENTERING ORDERS

Order to be Entered and Filed

59.05 (1) On the issuance of an order, the registrar shall,

(a) enter the issued order in accordance with subrule (2) at the place where the hearing or conference was held or where the proceeding was commenced; and

(b) file it in the court file.

(2) The registrar shall enter the issued order by saving a copy of the order in electronic format in the court's case tracking system and entering details about the order as required by the case tracking system.

(3) An order of the Court of Appeal shall be entered not only by the registrar referred to in subrule (1) but also by the Registrar of the Court of Appeal.

(4) The certificate of the Registrar of the Supreme Court of Canada in respect of an order made on an appeal to that court shall be entered by the local registrar at Toronto

Fr

which the appeal was taken.

Transition

(5) This rule, as it read immediately before the day section 41 of Ontario Regulation 689/20 came into force, continues to apply with respect to any orders that were issued before that day.

42. Clause 60.17 (b) of the Regulation is amended by striking out "(place of hearing of motions)" and substituting "(where motions to be brought)".

43. Rule 61.03 of the Regulation is amended by adding the following subrules:

(2.1) Despite subrule (2), only one copy of a motion record, factum or transcript needs to be filed if the filing is done electronically.

. . . . .

(3.1) Despite subrule (3), only one copy of a motion record or factum needs to be filed if the filing is done electronically.

44. (1) Subclause 61.09 (3) (a) (iii) of the Regulation is revoked and the following substituted:

(iii) in the case of a proceeding in the Court of Appeal or if ordered by the court, a typed or printed copy of the transcript of evidence,

(2) Subclause 61.09 (3) (b) (iii) of the Regulation is revoked and the following substituted:

(iii) in the case of a proceeding in the Court of Appeal or if ordered by the court, a typed or printed copy of the transcript of evidence,

45. Subrule 61.13.0.1 (3) of the Regulation is amended by striking out "and may be issued electronically" at the end.

46. Subrule 62.01 (6) of the Regulation is amended by striking out "(place of hearing of motions)" at the end and su ng "(where motions to be brought)".

Fr

48. Subrules 76.05 (2) and (3) of the Regulation are revoked and the following substituted:

Place of In-Person Hearings

(2) If the motion is to be heard in person, it shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the parties agree otherwise or the court orders otherwise.

Materials

(3) Depending on the practical requirements of the situation, the motion may be made with or without supporting material or a motion record.

49. Subrule 77.07 (4) of the Regulation is revoked and the following substituted:

Materials

(4) Depending on the practical requirements of the situation, the motion may be made with or without supporting material or a motion record.

50. (1) The Table of Forms to the Regulation is amended by adding the following row:

1A	Notice of Objection to Proposed Method of Attendance	September 1, 2020

(2) The Table of Forms to the Regulation is amended by striking out the row for Form 59D and substituting the following:

59D	Notice of Appointment to Settle Order	September 1, 2020

(3) The rows for Forms 4C, 4D, 14E, 16B, 30A, 30B, [illegible]B, 37A, 53A, 53C, 55A, 55B, 55D, 58A, 58B, 59A, 59B, 59C, 61G, 62A, 64A, 64F, 64N,

Fr

Forms to the Regulation are amended by striking out the date in the Column titled "Date of Form" and substituting "September 1, 2020".

Commencement

51. This Regulation comes into force on the later of January 1, 2021 and the day this Regulation is filed.

Made by:
Pris par :

Civil Rules Committee:
Le Comité des règles en matière civile :

Alison Warner
Senior Legal Officer / Avocate Principale,
Court of Appeal of Ontario

Date made: November 23, 2020
Pris le : 23 novembre 2020

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Doug Downey
Attorney General

Date approved: November 26, 2020
Approuvé le : 26 novembre 2020

Fr

2098

Fr

Tab J

O. Reg. 441/20: RULES OF CIVIL PROCEDURE

Filed August 5, 2020 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 441/20

made under the

COURTS OF JUSTICE ACT

Made: July 8, 2020
Approved: July 14, 2020
Filed: August 5, 2020
Published on e-Laws: August 5, 2020
Printed in *The Ontario Gazette*: August 22, 2020

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. Subrule 4.05.1 (6) of Regulation 194 of the Revised Regulations of Ontario, 1990 is revoked.

2. Rule 4 of the Regulation is amended by adding the following rule:

CIVIL SUBMISSIONS ONLINE PORTAL

4.05.2 (1) In this rule,

"Civil Submissions Online Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Civil Submissions Online Portal" in English and "Portail en ligne pour soumettre des documents dans les actions civiles" in French.

Documents That May be Filed

(2) Any document that may or must be filed under these rules, other than a document listed under subrule 4.05.1 (2) or that is filed for the purposes of rule 60.07, may be filed electronically by using the Civil Submissions Online Portal in accordance with this rule, if the Civil Submissions Online Portal provides for the electronic filing of the document.

Required Steps for Filing

(3) A document to which subrule (2) applies may be filed electronically by using the Civil Submissions Online Portal if,

(a) the document is submitted through the Civil Submissions Online Portal; and

Fr

(b) the registrar accepts the document for filing.

Confirmation

(4) If the registrar accepts the document for filing, the registrar shall send confirmation of the filing by e-mail.

Filing Date

(5) A document filed under subrule (3) is considered to have been filed on the day indicated in the confirmation sent by the registrar.

Documents That May be Issued

(6) Any document that may or must be issued under these rules, other than a document listed under subrule 4.05.1 (7) or that is issued for the purposes of rule 60.07, may be issued electronically by using the Civil Submissions Online Portal in accordance with this rule, if the Civil Submissions Online Portal provides for the electronic issuance of the document.

Required Steps for Issuance

(7) A document to which subrule (6) applies may be issued electronically by using the Civil Submissions Online Portal if,

(a) the document is submitted through the Civil Submissions Online Portal; and

(b) the registrar accepts the document for issuance.

Confirmation

(8) If the registrar accepts the document for issuance, the registrar shall issue the document and send confirmation of the issuance by e-mail, together with the issued document.

Issuance Date

(9) A document issued by the registrar under subrule (8) is considered to have been issued on the day indicated in the confirmation sent by the registrar.

Filing, Issuance of Other Documents

(10) Despite subrules (2) and (6), a document listed under subrule 4.05.1 (2) or (7) may be filed or issued, as the case may be, electronically by using the Civil Submissions Online Portal in accordance with this rule, if a prescribed fee is ...red to be paid for the filing or issuance of the document.

Fr

If Clarification Needed

(11) The registrar may request from a person written clarification with respect to a document that is requested to be filed or issued electronically in accordance with this rule, and the person shall provide the clarification in the manner specified by the registrar.

No Filing or Issuance Without Confirmation

(12) For greater certainty, a document that is submitted through the Civil Submissions Online Portal is not filed or issued unless the filing or issuance is confirmed by the registrar in accordance with subrule (4) or (8), as the case may be.

Requirement to Agree to Terms of Use

(13) Despite subrules (2) and (6), a document may not be filed or issued electronically by using the Civil Submissions Online Portal unless the person requesting the filing or issuance agrees to its terms of use, including providing an e-mail address at which the person agrees to accept documents from the court electronically.

Non-Application of Certain Subrules

(14) Subrules 4.05 (4.2), (7) and (8) do not apply with respect to a document filed or issued electronically by using the Civil Submissions Online Portal.

Commencement

3. This Regulation comes into force on the later of July 27, 2020 and the day this Regulation is filed.

Fr

Made by:
Pris par :

Civil Rules Committee:
Le Comité des règles en matière civile :

Falguni Debnath
Senior Legal Officer / Avocate principale, Court of Appeal of Ontario

Date made: July 8, 2020
Pris le : 8 juillet 2020

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Doug Downey
Attorney General

Date approved: July 14, 2020
Approuvé le : 14 juillet 2020

Fr

2105

Fr

Tab K

O. Reg. 711/20: RULES OF CIVIL PROCEDURE

Filed December 8, 2020 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 711/20

COURTS OF JUSTICE ACT

Made: December 2, 2020
Approved: December 7, 2020
Filed: December 8, 2020
Published on e-Laws: December 8, 2020
Printed in *The Ontario Gazette*: December 26, 2020

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. The definition of "court" in subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is revoked and the following substituted:

"court" means the court in which a proceeding is pending and, in the case of a proceeding in the Superior Court of Justice, includes a case management master; ("tribunal")

2. Rule 1.09 of the Regulation is amended by striking out "a judge, master or case management master" in the portion before clause (a) and substituting "a judge or case management master".

3. Subparagraph 2 iii of subrule 4.05.3 (6) is revoked and the following substituted:

iii. the name of the party submitting the document, and

iv. the date on which the document was created or signed, in the format DD-MMM-YYYY (e.g. 12-JAN-2021).

4. Clause 62.01 (1) (a) of the Regulation is amended by striking out "master or".

5. The English version of subrule 77.07 (3) of the Regulation is amended by striking out "jurisdiction of a master" and substituting "jurisdiction of a case management master".

Fr

amended by striking out the date in the column titled "Date of Form" and substituting "November 1, 2020".

7. The following provisions of the Regulation are amended by striking out "master" wherever it appears and substituting in each case "case management master":

1. **Subrule 3.03 (2).**
2. **Rule 13.02.**
3. **Subrule 20.04 (4).**
4. **Subrule 37.02 (2).**
5. **Rule 37.04.**
6. **Subrules 37.05 (1) and (3).**
7. **Subrule 37.10 (1).**
8. **Subrules 37.14 (3) and (5)**
9. **Subrules 37.15 (1.1) and (1.2).**
10. **Rule 37.16.**
11. **Subrule 43.04 (3).**
12. **Subrule 54.04 (2).**
13. **Subrule 54.05 (1).**
14. **Subrule 60.08 (16).**
15. **Rule 64.02.**

Commencement

8. (1) Subject to subsection (2), this Regulation comes into force on the later of January 1, 2021 and the day it is filed.

(2) Sections 1, 2 and 4 to 7 come into force on the January 8, 2021 and the day this Regulation is filed.

Fr

Civil Rules Committee:
Le Comité des règles en matière civile :

Alison Warner
SeniorLegal Officer / Avocate Principale
Secretary of the Civil Rules Committee / Secrétaire du Comité des règles civiles

Court of Appeal of Ontario

Date made: December 2, 2020
Pris le : 2 décembre 2020

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Doug Downey
Attorney General

Date approved: December 7, 2020
Approuvé le : 7 décembre 2020

Fr

2111

Fr

Tab L

O. Reg. 383/21: RULES OF CIVIL PROCEDURE

Filed May 28, 2021 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 383/21

COURTS OF JUSTICE ACT

Made: May 25, 2021

Approved: May 27, 2021

Filed: May 28, 2021

Published on e-Laws: May 31, 2021

Printed in *The Ontario Gazette*: June 12, 2021

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. (1) Subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding the following definition:

"certificate of appointment of estate trustee" means letters probate, letters of administration or letters of administration with the will annexed, and includes a small estate certificate or amended small estate certificate (74.13, 74.13.1, 74.20, 74.20.3, 74.23, 74.23.1, 74.26, 74.31, 74.1C or 74.1F); ("certificat de nomination à titre de fiduciaire de la succession")

(2) The definition of "judge" in subrule 1.03 (1) of the Regulation is amended by adding "but does not include an associate judge" at the end.

(3) The English version of the definition of "originating process" in subrule 1.03 (1) of the Regulation is amended by striking out "whose issuing commences" in the portion before clause (a) and substituting "that commences".

(4) Clause (d) of the definition of "originating process" in subrule 1.03 (1) of the Regulation is revoked and the following substituted:

(d) an application for a certificate of appointment of estate trustee, a small estate certificate or an amended small estate certificate,

Fr

"will" includes any testamentary instrument of which probate or administration may be granted. ("testament")

2. Subrule 14.01 (2.1) of the Regulation is amended by striking out "or 74.1" and substituting "or for a small estate certificate or amended small estate certificate under Rule 74.1".

3. Subrule 14.05 (1) of the Regulation is revoked and the following substituted:

APPLICATIONS — BY NOTICE OF APPLICATION OR APPLICATION FOR CERTIFICATE

(1) The originating process for the commencement of an application is, as applicable,

(a) a notice of application (Form 14E, 14E.1, 68A or 73A); or

(b) an application for a certificate of appointment of estate trustee (Form 74.4, 74.4.1, 74.5, 74.5.1, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30), small estate certificate (Form 74.1A) or amended small estate certificate (Form 74.1E).

4. Rules 37.10.1 and 38.09.1 of the Regulation are amended by striking out "by fax, or" wherever it appears.

5. Clause 62.01 (1) (a) of the Regulation is amended by striking out "of a case management master, under" and substituting "referred to in".

6. The definitions of "certificate of appointment of estate trustee" and "will" in rule 74.01 of the Regulation are revoked.

7. Clause 74.18 (1) (b) of the Regulation is amended by striking out "certificate of appointment of the applicant as estate trustee" and substituting "certificate of appointment of estate trustee".

8. Rule 74.1.01 of the Regulation is amended by striking out "and in Rules 75, 75.1 and 75.2" in the portion before the d n of "small estate".

Fr

APPLICATION OF RULE

74.1.02 (1) In the case of an estate that is a small estate, a person may apply for a small estate certificate under this Rule, in which case this Rule applies instead of rules 74.04 to 74.10 and 74.14.

Continued Application of Rule 74

(2) For greater certainty, Rule 74, other than rules 74.04 to 74.10 and 74.14, continues to apply with respect to small estate certificates, amended small estate certificates and applications for either certificate.

10. Rule 75.01.1 of the Regulation is revoked.

11. Rule 75.04 of the Regulation is amended by striking out "certificate of appointment of the estate trustee" in the portion before clause (a) and substituting "certificate of appointment of estate trustee".

12. Subclauses 75.1.02 (1) (b) (i) and (ii) of the Regulation are amended by striking out "including in respect of a small estate" wherever it appears.

13. Rule 75.2.01 of the Regulation is amended by striking out "including in respect of a small estate" at the end.

14. Clause 76.10 (5) (d) of the Regulation is amended by striking out "the pre-trial conference judge or case management master" and substituting "the pre-trial conference judge or associate judge".

15. The Regulation is amended by striking out "case management master" and "a case management master", as the case may be, wherever they appear and substituting in each case "associate judge" and "an associate judge" respectively.

16. The English version of the Regulation is amend striking out "certificate of appointment of an estate trus herever it

Fr

17. The rows for Forms 53D, 56A, 64B, 64E, 64G, 64H, 64I, 64J, 64K, 64L, 64M, 65A, 66A and 76B in the Table of Forms to the Regulation is amended by striking out the date in the column titled "Date of Form" and substituting "April 1, 2021".

Commencement

18. (1) Subject to subsections (2) and (3), this Regulation comes into force on the day it is filed.

(2) Section 4 comes into force on the later of July 1, 2021 and the day this Regulation is filed.

(3) Subsection 1 (2) and sections 5, 14, 15 and 17 come into force on the later of the day subsection 11 (1) of Schedule 3 to the *Accelerating Access to Justice Act, 2021* comes into force and the day this Regulation is filed.

Made by:
Pris par :

Civil Rules Committee:
Le Comité des règles en matière civile :

Shannon Chace
Executive Legal Officer/Avocate Directrice
Secretary of the Civil Rules Committee/

Fr

Date made: May 25, 2021
Pris le : 25 mai 2021

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Doug Downey
Attorney General

Date approved: May 27, 2021
Approuvé le : 27 mai 2021

Tab M

O. Reg. 709/21: RULES OF CIVIL PROCEDURE

Filed October 15, 2021 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 709/21

COURTS OF JUSTICE ACT

Made: October 7, 2021
Approved: October 13, 2021
Filed: October 15, 2021
Published on e-Laws: October 15, 2021
Printed in *The Ontario Gazette*: October 30, 2021

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. The definition of "certificate of appointment of estate trustee" in subrule 1.03 (1) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by striking out "74.13, 74.13.1, 74.20, 74.20.3, 74.23, 74.23.1, 74.26, 74.31" and substituting "74C".

2. Clause 14.05 (1) (b) of the Regulation is amended by striking out "(Form 74.4, 74.4.1, 74.5, 74.5.1, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30)" and substituting "(Form 74A or 74J)".

3. Subrule 74.02 (2) of the Regulation is amended by striking out "74.8" and substituting "74D".

4. Subrule 74.03 (1) of the Regulation is amended by striking out "74.3" and substituting "74P".

5. Rules 74.04 and 74.05 of the Regulation are revoked and the following substituted:

Certificate of Appointment of Estate Trustee

Application

74.04 (1) A person may seek a certificate of appointment of estate trustee by filing an application for a certificate of appointment of estate trustee (For[illegible] together with,

Fr

(b) proof of death;

(c) a draft certificate of appointment of estate trustee (Form 74C);

(d) if there is a will, the original of the will and of any codicils, together with the following evidence of due execution of the will and each codicil,

(i) if the will or codicil is not in holograph form,

(A) an affidavit of execution (Form 74D) of the will or codicil,

(B) if the will or codicil contains an alteration, erasure, obliteration or interlineation that has not been attested, an affidavit as to the condition of the will or codicil at the time of execution (Form 74E), or

(C) if each of the witnesses to the will or codicil has died or cannot be found, such other evidence of due execution as the court may require, or

(ii) if the will or codicil is in holograph form, an affidavit attesting that the handwriting and signature in the will or codicil are those of the deceased (Form 74F);

(e) a renunciation (Form 74G), from the following persons:

(i) if there is a will, from every living person who is named in the will or codicil as estate trustee who has not joined in the application and is entitled to do so, or

(ii) if there is no will, from every person who is entitled in priority or is in equal right to be named as estate trustee and who has not joined in the application;

(f) if there is no will, or if there is a will but the applicant is not named as an estate trustee in the will or a codicil, a consent to the applicant's appointment (Form 74H) by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

(g) in the case of an application for a certificate of appointment of estate trustee with a will limited to the assets referred to in the will, a draft order in Form 74I granting the certificate of appointment;

(h) any security required by the *Estates Act*; and

(i) such additional or other material as the court directs.

Fr

in the distribution of the estate, including charities and contingent beneficiaries:

1. The application for a certificate of appointment of estate trustee (Form 74A), including any attachments.

2. If there is a will,

i. in the case of a person entitled only to a specified item of property or a stated or determinable amount of money, a copy of the will and of any codicils, or of the applicable portion of the will or codicils, or

ii. in the case of any other beneficiary, a copy of the will and of any codicils.

Minors

(3) If a person who is entitled to share in the distribution of the estate is less than 18 years of age, the documents listed in subrule (2) shall not be served on the person but shall instead be served on a parent or guardian and on the Children's Lawyer.

Unborn or Unascertained Persons

(4) If there may be unborn or unascertained beneficiaries, the documents listed in subrule (2) shall also be served on the Children's Lawyer.

Mentally Incapable Person

(5) If a person who is entitled to share in the distribution of the estate is mentally incapable within the meaning of section 6 of the *Substitute Decisions Act, 1992* in respect of an issue in the proceeding, the documents listed in subrule (2) shall also be served on,

(a) if there is a guardian with authority to act in the proceeding, the guardian;

(b) if there is no guardian with authority to act in the proceeding but there is an attorney under a power of attorney with authority to act in the proceeding, the attorney; or

(c) if there is neither a guardian nor an attorney with authority to act in the proceeding, the Public Guardian and Trustee.

Children's Lawyer, Public Guardian and Trustee

(6) If under subrule (3), (4) or (5), the documents listed in subrul[Fr]required to be served on the Children's Lawyer or the Public Guardian and Tru[Fr]there is a will, the applicant will serve, in addition to a copy of the will and of any codicils, a statement

disclosed in the application.

Method of Service

(7) Documents to be served on a person under this rule shall be served by,

(a) personal service;

(b) e-mail, to the last e-mail address for service provided by the person or, if no such e-mail address has been provided, to the person's last known e-mail address; or

(c) mail or courier, to the person's last known address.

6. (1) Subrule 74.05.1 (1) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Certificate of Appointment of Foreign Estate Trustee's Nominee as Estate Trustee without a Will

Application

(1) An application for a certificate of appointment of foreign estate trustee's nominee as estate trustee without a will shall be in Form 74J and shall be accompanied by,

. . . . .

(2) Clause 74.05.1 (1) (a) of the Regulation is amended by striking out "74.20.2" and substituting "74K".

(3) Subrule 74.05.1 (2) of the Regulation is revoked and the following substituted:

Certificate

(2) The certificate of appointment of foreign estate trustee's nominee as estate trustee without a will shall be in Form 74C.

7. Rule 74.06 of the Regulation is revoked and the following substituted:

Certificate of Appointment of Succeeding Estate T[illegible]with a Will

Application

Fr

an estate trustee with a will limited to the assets referred to in the will shall be in Form 74J, and shall be accompanied by,

(a) the original certificate of appointment or, if the original certificate has been lost, a copy of it certified by the court;

(b) a renunciation (Form 74G) from every living person who is named in the will or codicil as an estate trustee and who has not joined in the application and is entitled to do so;

(c) if the applicant is not named as an estate trustee in the will or codicil, a consent (Form 74H) to the application by persons who are entitled to share in the distribution of the remaining estate and who together have a majority interest in the value of the assets remaining in the estate at the date of the application;

(d) in the case of an application for a certificate of appointment of succeeding estate trustee with a will limited to the assets referred to in the will, a draft order (Form 74I) granting the certificate of appointment;

(e) any security required by the *Estates Act*; and

(f) such additional or other material as the court directs.

Certificate

(2) A certificate of appointment of succeeding estate trustee with a will or certificate of appointment of succeeding estate trustee with a will limited to the assets referred to in the will shall be in Form 74C.

8. (1) Subrule 74.07 (1) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Certificate of Appointment of Succeeding Estate Trustee without a Will

(1) An application for a certificate of appointment of estate trustee to succeed an estate trustee without a will shall be in Form 74J, and shall be accompanied by,

. . . . .

(2) Clause 74.07 (1) (b) of the Regulation is amended by striking out "74.25" and substituting "74H".

Fr

9. (1) Subrule 74.08 (1) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Confirmation by Resealing of Appointment of Estate Trustee with or without a Will

(1) An application for confirmation by resealing of the appointment of an estate trustee with or without a will that was granted by a court of competent jurisdiction in the United Kingdom, in a province or territory of Canada or in any British possession shall be in Form 74J, and shall be accompanied by,

. . . . .

(2) Subrule 74.08 (2) of the Regulation is amended by striking out "74.28" at the end and substituting "74C".

10. (1) Subrule 74.09 (1) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Certificate of Ancillary Appointment of Estate Trustee with a Will

(1) An application for a certificate of ancillary appointment of estate trustee with a will where the applicant has been appointed by a court having jurisdiction outside Ontario, other than a jurisdiction referred to in rule 74.08, shall be in Form 74J, and shall be accompanied by,

. . . . .

(2) Subrule 74.09 (2) of the Regulation is revoked and the following substituted:

(2) A certificate of ancillary appointment of estate trustee with a will shall be in Form 74C.

11. (1) Subrule 74.10 (1) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Certificate of Appointment of Estate Trustee during Litigation

(1) An application for a certificate of appointment of estate trustee during litigation shall be in Form 74J, and shall be accompanied by,

Fr

(2) Subrule 74.10 (2) of the Regulation is amended by striking out "74.31" at the end and substituting "74C".

12. Subrule 74.11 (1) of the Regulation is amended by,

(a) striking out "74.32" and substituting "74L"; and

(b) striking out "74.33" and substituting "74M".

13. Subrule 74.12 (1) of the Regulation is amended by striking out "74.34" and substituting "74N".

14. (1) Subrule 74.14 (1) of the Regulation is amended by adding "(Form 74C)" at the end of the portion before clause (a).

(2) Subrule 74.14 (5) of the Regulation is amended by striking out "74.35" in the portion before clause (a) and substituting "74O".

15. (1) Clause 74.15 (1) (a) of the Regulation is amended by striking out "(Form 74.36)".

(2) Clause 74.15 (1) (b) of the Regulation is amended by striking out "(Form 74.37)".

(3) Clause 74.15 (1) (c) of the Regulation is amended by striking out "(Form 74.38)".

(4) Clause 74.15 (1) (d) of the Regulation is amended by striking out "(Form 74.39)".

(5) Clause 74.15 (1) (f) of the Regulation is amended by striking out "(Form 74.40)".

(6) Clause 74.15 (1) (g) of the Regulation is amended by striking out "(Form 74.41)".

(7) Clause 74.15 (1) (h) of the Regulation is amended by striking out "(Form 74.42)".

(8) Rule 74.15 of the Regulation is amended by adding the following subrule:

Fr

16. (1) Sub-subclause 74.1.03 (1) (d) (i) (A) of the Regulation is amended by striking out "74.8" and substituting "74D".

(2) Sub-subclause 74.1.03 (1) (d) (i) (B) of the Regulation is amended by striking out "74.10" and substituting "74E".

(3) Subclause 74.1.03 (1) (d) (ii) of the Regulation is amended by striking out "74.9" and substituting "74F".

(4) Subrule 74.1.03 (3) of the Regulation is revoked and the following substituted:

Notification Requirements

(3) The applicant shall send or give the following documents to every person entitled to share in the distribution of the estate, including charities and contingent beneficiaries:

1. The application for a small estate certificate (Form 74.1A), including any attachments.

2. If there is a will,

i. in the case of a person entitled only to a specified item of property or a stated or determinable amount of money, a copy of the will and of any codicils, or of the applicable portion of the will or codicil, or

ii. in the case of any other beneficiary, a copy of the will and of any codicils.

(5) Rule 74.1.03 of the Regulation is amended by adding the following subrule:

Children's Lawyer, Public Guardian and Trustee

(6.1) If under subrule (4), (5) or (6), the documents listed in subrule (3) are required to be sent or given to the Children's Lawyer or the Public Guardian and Trustee and there is a will, the applicant will send or give, in addition to a copy of the will and of any codicils, a statement of the estimated value of the interest in the estate of the adult described in the application as lacking capacity or the minor, as the case may be, if that value is not disclosed in the application.

Fr

(6) Subrule 74.1.03 (7) of the Regulation is revoked and the following substituted:

e-mail to the person's last known e-mail address or by mail or courier to the person's last known address.

17. Subrule 75.06 (4) of the Regulation is amended by striking out "or 75.9" at the end.

18. (1) The Table of Forms to the Regulation is amended by striking out the rows for Forms 74.3 to 74.42 and 75.9.

(2) The Table of Forms to the Regulation is amended by adding the following rows:

74A	Application for a Certificate of Appointment of Estate Trustee	September 1, 2021
74B	Affidavit of Service of Application for a Certificate of Appointment of Estate Trustee	September 1, 2021
74C	Certificate of Appointment of Estate Trustee	September 1, 2021
74D	Affidavit of Execution of Will or Codicil	September 1, 2021
74E	Affidavit of Condition of Will or Codicil	September 1, 2021
74F	Affidavit Attesting to the Handwriting and Signature of a Holograph Will or Codicil	September 1, 2021
74G	Renunciation	September 1, 2021
74H	Consent	September 1, 2021

Fr

74J	Application for Certificate or Confirmation of Appointment	September 1, 2021
74K	Nomination of Applicant by Foreign Estate Trustee	September 1, 2021
74L	Bond — Insurance or Guarantee Company	September 1, 2021
74M	Bond — Personal Sureties	September 1, 2021
74N	Registrar's Notice to Estate Trustee Named in a Will or Codicil Deposited with the Court	September 1, 2021
74O	Registrar's Notice to Applicant in an Application for a Certificate of Appointment of Estate Trustee	September 1, 2021
74P	Request for Notice of Commencement of Proceeding	September 1, 2021

(3) The rows for Forms 74.1A, 74.1B, 74.1C, 74.1E, 74.1F and 75.1 in the Table of Forms to the Regulation are amended by striking out the date in the column titled "Date of Form" and substituting "September 1, 2021".

(4) The row for Form 75.8 in the Table of Forms to the Regulation is struck out and the following substituted:

75.8	Order Giving Directions	September 1, 2021

Commencement

19. This Regulation comes into force on the later Fr **day section 2 to Schedule 9 to the *Accelerating Access to Justice Act, 2021* comes**

Made by:
Pris par :

Civil Rules Committee:
Le Comité des règles en matière civile :

Shannon Chace
Executive Legal Officer / Advocate Directrice
Secretary of the Civil Rules Committee / Secrétaire du Comité des règles en matière Civile
Court of Appeal for Ontario

Date made: October 7, 2021
Pris le : 7 octobre 2021

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Doug Downey
Attorney General

Date approved: October 13, 2021
Approuvé le : 13 octobre 2021

Fr

2132

Fr

Tab N

O. Reg. 322/24: RULES OF CIVIL PROCEDURE

Filed August 2, 2024 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 322/24

made under the

COURTS OF JUSTICE ACT

Made: July 9, 2024
Approved: August 1, 2024
Filed: August 2, 2024
Published on e-Laws: August 2, 2024
Published in *The Ontario Gazette*: August 17, 2024

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. Rule 2.1 of Regulation 194 of the Revised Regulations of Ontario, 1990 is revoked and the following substituted:

RULE 2.1 FRIVOLOUS, VEXATIOUS OR ABUSIVE PROCEEDINGS

Stay or Dismissal of Proceedings

Court May Stay, Dismiss

2.1.01 (1) The court may make an order staying or dismissing a proceeding that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

Summary Determination

(2) The court may make a determination under subrule (1) in a summary manner, subject to the procedures set out in this rule.

On Own Initiative or On Request

(3) An order under subrule (1) may be made by the court on its own initiative or on the request of a party to the proceeding under subrule (4).

How to Request

(4) A party may seek an order under subrule (1) by serving a request in Form 2.1A on every other party and filing it with proof of service.

Fr

Registrar May Notify Court

(5) If, in the registrar's opinion, there is reason to believe that a proceeding may be frivolous or vexatious or otherwise an abuse of the process of the court, the registrar may, in the absence of a request under subrule (4), notify the court.

Notice to Parties

(6) If, on review of a request under subrule (4) or on its own initiative, the court determines that it may be appropriate to make an order under subrule (1), the court shall direct the registrar to give notice to the parties in Form 2.1B that the proceeding may be stayed or dismissed.

Effect of Notice

(7) Once the registrar gives notice to the parties,

(a) the proceeding is automatically stayed until the court either makes an order under subrule (1) or an order declining to stay or dismiss the proceeding; and

(b) no party may take any step in the proceeding other than the steps in this rule, unless the court orders otherwise.

Procedures

(8) Unless the court orders otherwise, an order under subrule (1) shall be made on the basis of written submissions, if any, in accordance with the following procedures:

1. The plaintiff or applicant may, within 15 days after receiving the notice, file with the court a written submission, no more than 10 pages in length, responding to the notice.

2. If the plaintiff or applicant does not file a written submission that complies with paragraph 1, the court may make the order without any further notice to the plaintiff or applicant or to any other party.

3. If the plaintiff or applicant files a written submission that complies with paragraph 1, the court may direct the registrar to give a copy of the submission to any other party.

4. A party who receives a copy of the plaintiff's or applicant's submission may, within 10 days after receiving the copy, file with the court a written submission, no more than 10 pages in length, responding to the plaintiff's or applicant's submission.

5. A party who files a responding submission shall give a c to the plaintiff or applicant and to any other party who requests a copy.

Fr

(9) A document required to be given to a party under subrule (8),

(a) shall be given to the party's lawyer in a manner listed in rule 16.05; or

(b) if the party is acting in person, shall be mailed to the party in the manner described in subclause 16.01 (4) (b) (i).

(10) Rule 16 applies with necessary modifications to the determination of when a document given or mailed to a person under subrule (9) is considered to have been received.

Copy of Order

(11) After the court makes an order under subrule (1) or an order declining to stay or dismiss the proceeding, the registrar shall promptly provide a copy of the order to each of the parties in a manner listed in subrule 59.04 (4).

Stay or Dismissal of Motions

Court May Stay, Dismiss

2.1.02 (1) The court may make an order staying or dismissing a motion that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

Procedures, etc.

(2) Subrules 2.1.01 (2) to (11), other than subrule (7), apply for the purposes of subrule (1), with the following and any other necessary modifications:

1. A reference to a proceeding shall be read as a reference to the motion.

2. A reference to the plaintiff or applicant shall be read as a reference to the moving party.

Restriction on Further Motions

(3) In making an order under subrule (1), the court may also make an order under rule 37.16 prohibiting the moving party from making further motions in the proceeding without leave.

RULE 2.2 VEXATIOUS LITIGANT ORDERS

Interpretation

2.2.01 In this Rule,

"notified person" means a person, other than the potential subject of a vexatious litigant order, who receives a notice under rule 2.2.03 or 2.2.04 [illegible]ne avisée")

"participant" means, as the case may be,

(a) the person who is the potential subject of a vexatious litigant order,

Fr

(b) a notified person who serves and files a reply in accordance with subrule 2.2.05 (2), or

(c) the moving party or applicant under rule 2.2.03, if any; ("participant")

"vexatious litigant order" means an order under subsection 140 (1) of the *Courts of Justice Act*. ("ordonnance de déclaration de plaideur quérulent")

Vexatious Litigant Order

2.2.02 A vexatious litigant order may be made,

(a) on a person's motion or application, commenced in accordance with rule 2.2.03; or

(b) on a judge's initiative, initiated in accordance with rule 2.2.04.

Order Sought by Person

By Motion or Application

2.2.03 (1) A vexatious litigant order against a person may be sought,

(a) by motion in accordance with subrule (2), if the person is a party to an ongoing proceeding and the order is sought by another party in the proceeding; or

(b) in any other case, by application made in the Superior Court of Justice in accordance with subrule (3).

If by Motion

(2) For the purposes of clause (1) (a), the moving party shall serve on the persons listed in subrule (5) and file with proof of service a notice of motion for a vexatious litigant order (Form 2.2A).

If by Application

(3) For the purposes of clause (1) (b), following issuance of a notice of application for a vexatious litigant order (Form 2.2B) as provided by rule 14.07, the applicant shall serve the notice on the persons listed in subrule (5) and file it with proof of service.

Notice Requirements

(4) A notice in Form 2.2A or 2.2B shall set out,

(a) the grounds on which the vexatious litigant order is sought; and

(b) the following information, to the extent that it can be determined by the moving party or applicant using their best efforts:

Fr

(i) The file number, location and title of any ongoing proceeding in any court in Ontario to which the person against whom the vexatious litigant order is sought is a party, and the address for service of every other party to any such proceeding.

(ii) The file number, location and title of any proceeding that was finally disposed of in any court in Ontario to which the person against whom the vexatious litigant order is sought was a party.

(iii) The citation of every reported decision made in the course of a proceeding referred to in subclause (i) or (ii).

Service

(5) A notice in Form 2.2A or 2.2B shall be served on,

(a) the person against whom the order is sought; and

(b) every party to a proceeding set out in the notice under subclause (4) (b) (i).

(6) Rule 16.04 applies with respect to service under this rule, except that a judge may not make an order dispensing with service on the person against whom the vexatious litigant order is sought.

Non-Application of Certain Rules

(7) Unless this Rule or a court order provides otherwise, Rules 37, 38 and 39 do not apply with respect to a motion or application under this rule.

On Judge's Own Initiative

Registrar's Notice

2.2.04 (1) If it appears to a judge of a court that a vexatious litigant order against a party to an ongoing proceeding in that court may be warranted, the judge may give written direction to the registrar to prepare a registrar's notice proposing consideration of a vexatious litigant order (Form 2.2C).

(2) The written direction shall,

(a) specify the information the registrar is required to include in the notice, which shall either be the information listed in subrule 2.2.03 (4), with necessary modifications, or such other information as the judge may specify in the direction; and

(b) be attached to the notice.

Fr

No Review

(3) The written direction may not be set aside or varied.

Registrar to Send, File Notice

(4) The registrar shall,

(a) subject to subrule (5), send the notice by mail or e-mail to the persons referred to in subrule 2.2.03 (5), with necessary modifications; and

(b) file a copy of the notice, and a list of the persons to whom it was sent, in the court file.

(5) The judge may give directions to the registrar respecting how to send the notice and to whom, but shall not direct the registrar to dispense with sending the notice to the person who is the potential subject of a vexatious litigant order.

(6) Rule 16 applies with necessary modifications to the determination of whether and when the notice is considered to have been received, unless any directions given under subrule (5) require otherwise.

Response and Reply

Response

2.2.05 (1) The person who is the potential subject of a vexatious litigant order may, within 20 days after receiving a notice in Form 2.2A, 2.2B or 2.2C,

(a) serve a response in Form 2.2D on every notified person and, if applicable, the moving party or applicant; and

(b) file the response with proof of service.

Reply

(2) A moving party, applicant or notified person may serve and file with proof of service a reply in Form 2.2E, within,

(a) 20 days after receiving a response; or

(b) if no response is served, 30 days after serving or receiving the notice, as the case may be.

(3) A reply shall be served on the person who is the potential subject of a vexatious litigant order, on every notified person and, if applicable, on the moving party or applicant.

Effect of Not Replying

Fr

(4) A notified person who does not file a reply is not entitled to be heard at any hearing of the matter under rule 2.2.07 without leave of a judge.

(5) Subrule (4) does not affect any entitlement under rule 2.2.06 or 2.2.07 of a person to receive or obtain a copy of an order, decision or reasons.

Initial Review and Order

2.2.06 (1) After the time for filing a response and any replies has passed, a judge shall conduct an initial review of the notice and submissions, following which the judge shall make an order in Form 2.2F,

(a) directing that a hearing of the matter be held under rule 2.2.07; or

(b) dismissing the matter, with reasons.

(2) Without limiting the generality of rule 1.05, the judge may, in making an order under subrule (1),

(a) direct that a participant serve and file a motion record in accordance with Rule 37 or application record in accordance with Rule 38, with such modifications as the judge may specify;

(b) direct a participant to file supplementary arguments or further evidence;

(c) direct the person who is the potential subject of a vexatious litigant order to confirm every ongoing proceeding to which they are a party, and the name and address for service of every other party to any such proceeding;

(d) direct a participant to conduct a search to confirm every ongoing proceeding to which the person who is the potential subject of a vexatious litigant order is a party, and the name and address for service of every other party to any such proceeding;

(e) direct a participant to prepare a draft order in Form 2.2G;

(f) if notice was given in respect of an ongoing proceeding (Form 2.2A or 2.2C) and the judge is directing a hearing under rule 2.2.07, order a stay of the ongoing proceeding pending the determination of the matter; or

(g) establish a timetable.

Issuance of Order

(3) The registrar shall issue the order, as signed by the judge, and subrules 59.04 (1) and (2) apply with necessary modifications with respect to the issuance.

Copy of Order

(4) A copy of the order shall promptly be provided, by a method set out in subrule 59.04 (4), to each of the participants and any other person a judge may order.

Fr

No Review

(5) An order under subrule (1) directing a hearing of the matter or dismissing it may not be set aside or varied.

Hearing and Disposition

Powers of Judge

2.2.07 (1) The judge presiding at the hearing to determine whether to make a vexatious litigant order may make such orders and give such directions as the judge considers appropriate in the interest of justice.

Determination Following Hearing

(2) Following the hearing, the judge shall,

(a) make a vexatious litigant order in Form 2.2G, with reasons; or

(b) decline to make a vexatious litigant order, with reasons.

(3) For greater certainty, rule 1.05 applies with respect to an order made under subrule (2).

If Vexatious Litigant Order is Made

(4) If making a vexatious litigant order, the judge shall specify the details of any limitations in the order's application.

(5) A vexatious litigant order shall include reference to the right of appeal or review under subsection 140 (2.3) of the *Courts of Justice Act*.

Issuance of Order

(6) The registrar shall issue the vexatious litigant order, as signed by the judge, and subrules 59.04 (1) and (2) apply with necessary modifications with respect to the issuance.

Copy of Order

(7) The issued vexatious litigant order and reasons shall promptly be provided, by a method listed in subrule 59.04 (4), to each of the participants, any other notified person and any other person a judge may order.

(8) The registrar shall provide a copy of every issued vexatious litigant order and reasons to the Court Services Division of the Ministry of the A[illegible]eneral for the purposes of inclusion in the index of vexatious litigant orde[illegible]stered by the Division.

Fr

If Vexatious Litigant Order is Not Made

(9) If the judge makes an order under clause (2) (b) declining to make a vexatious litigant order, any participant may require the registrar to issue and enter an order reflecting the judge's decision by filing a requisition (Form 4E) and draft order (Form 59A or 59B).

Leave Despite Order

2.2.08 A person who is the subject of a vexatious litigant order may, in the manner provided for under subrule 38.01 (3), seek leave under subsection 140 (3) of the *Courts of Justice Act* to institute or continue a proceeding.

Proceeding Instituted, Continued without Leave

Court Shall Order Stay, Dismissal

2.2.09 (1) If a proceeding is instituted or continued without leave by a plaintiff, applicant or appellant who is the subject of a vexatious litigant order, and the court determines that the proceeding is subject to the vexatious litigant order, the court shall make an order staying or dismissing the proceeding.

Request for Order

(2) A party to the proceeding may file a request with the court for an order under subrule (1).

Notice Not Required

(3) The order may be made without notice.

Copy of Order

(4) Once the order has been made, a copy of it shall promptly be provided to every party to the proceeding by a method listed in subrule 59.04 (4).

Refusal by Registrar

(5) Nothing in this rule prevents a registrar from refusing to issue an originating process or accept a document for filing in a proceeding if the registrar has determined that,

(a) the plaintiff, applicant or appellant is the subject of a vexatious litigant order;

(b) the proceeding is subject to the vexatious litigant order; and

(c) the plaintiff, applicant or appellant has not obtained leave to institute or continue the proceeding.

Fr

2. Subsection 14.01.1 (1) of the Regulation is amended by adding "except where a statute or these rules provide otherwise" at the

end.

3. (1) Clause 14.05 (1) (a) of the Regulation is amended by striking out "Form 14E" and substituting "Form 2.2B, 14E".

(2) Subrule 14.05 (1.1) of the Regulation is amended by striking out "Form 14E" and substituting "Form 2.2B, 14E".

4. Rule 37.01 of the Regulation is amended by adding "or these rules provide otherwise" at the end.

5. (1) Subrule 38.01 (1) of the Regulation is amended by striking out "subject to subrules (2) and (3)" at the end and substituting "except as otherwise provided by this rule".

(2) Rule 38.01 of the Regulation is amended by adding the following subrule:

(4) Rules 38.02 to 38.12 do not apply to an application made under rule 2.2.03, unless Rule 2.2 or a court order provides otherwise.

6. Subrule 38.13 (10) of the Regulation is amended by striking out "an order made under subsection 140 (1) of that Act" and substituting "a vexatious litigant order as defined in Rule 2.2".

7. Subrule 77.02 (2) of the Regulation is amended by adding the following clause:

(a.1) applications under Rule 2.2 (Vexatious Litigant Orders);

8. (1) The row for Form 2.1A in the Table of Forms to the Regulation is revoked and the following substituted:

2.1A	Request for Stay or Dismissal Under Rule 2.1	June 1, 2024
2.1B	Notice that Proceeding (or Motion) May be Stayed or Dismissed Under Rule 2.1	June 1, 2024

Fr

(2) The Table of Forms to the Regulation is amended by adding the following rows:

2.2A	Notice of Motion for Vexatious Litigant Order	June 1, 2024
2.2B	Notice of Application for Vexatious Litigant Order	June 1, 2024
2.2C	Registrar's Notice Proposing Consideration of Vexatious Litigant Order	June 1, 2024
2.2D	Response from Potential Subject of Vexatious Litigant Order	June 1, 2024
2.2E	Reply Respecting Potential Vexatious Litigant Order	June 1, 2024
2.2F	Order Following Initial Review Under Rule 2.2	June 1, 2024
2.2G	Vexatious Litigant Order	June 1, 2024

Commencement

9. (1) Except as otherwise provided in this section, this Regulation comes into force on the day it is filed.

(2) Section 2 comes into force on the latest of the following days:

1. **The day section 1 of Schedule 3 to the *Strengthening Safety and Modernizing Justice Act, 2023* comes into force.**
2. **The day subsection 7 (1) of Schedule 6 to the *Enhancing Access to Justice Act, 2024* comes into force.**
3. **The day this Regulation is filed.**

Fr

(3) Sections 1 and 3 to 8 come into force on the later of the day subsection 7 (1) of Schedule 6 to the *Enhancing Access to Justice Act, 2024* comes into force and the day this Regulation is filed.

Made by:
Pris par :

Civil Rules Committee:
Le Comité des règles en matière civile :

Shannon Chace
Executive Legal Officer / Avocate Directrice
Secretary of the Civil Rules Committee / Secrétaire du Comité des règles en matière civile
Court of Appeal for Ontario

Date made: July 9, 2024
Pris le : 9 juillet 2024

I approve this Regulation.
J'approuve le présent règlement.

Le procureur général,

Doug Downey
Attorney General

Date approved: August 1, 2024
Approuvé le : 1er août 2024

Fr

2147

Fr

Tab O

O. Reg. 226/25: RULES OF CIVIL PROCEDURE

Filed October 1, 2025 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 226/25

COURTS OF JUSTICE ACT

Made: September 29, 2025
Filed: October 1, 2025
Published on e-Laws: October 1, 2025
Published in *The Ontario Gazette*: October 18, 2025

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. Rule 4.05 of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by adding the following subrules:

Conversion from Paper Format

(11) In the case of a proceeding that is commenced or continued in the City of Toronto, the registrar may prepare an electronic copy of any document that was filed or issued in the proceeding in paper format and include it in the court file.

(12) If the registrar prepares an electronic copy of a paper document, the registrar may return the paper document to the person who filed it or to whom it was issued, in which case subrule (10) applies with necessary modifications to the returned document.

(13) Subrules (11) and (12) apply with necessary modifications with respect to documents filed with the sheriff in the City of Toronto, in which case a reference in those subrules to the registrar shall be read as a reference to the sheriff.

(14) An electronic copy of a filed or issued document that is prepared under subrule (11) shall be considered to be the document as it was filed or issued in the proceeding.

2. Rule 4.05.1 of the Regulation is amended by adding the following subrule:

Non-Application, City of Toronto

(1.1) This rule does not apply with respect to proceedings comm[illegible]r continued in the City of Toronto.

Fr

Non-Application, City of Toronto

(1.1) This rule does not apply with respect to proceedings commenced or continued in the City of Toronto.

4. The Regulation is amended by adding the following rule:

Ontario Courts Public Portal

4.05.2.1 (1) In this rule,

"Ontario Courts Public Portal" means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name "Ontario Courts Public Portal" in English and "Portail public des tribunaux de l'Ontario" in French.

Application, City of Toronto

(2) This rule applies with respect to,

(a) the filing and issuance of documents in proceedings commenced or continued in the City of Toronto; and

(b) the filing of documents with the sheriff in the City of Toronto.

Permitted Use

(3) Any document that, under these rules, may or must be filed with the registrar or sheriff or issued may be submitted for filing or issuance electronically through the Ontario Courts Public Portal if,

(a) the Portal provides for the electronic filing or issuance of the document; and

(b) the person requesting the filing or issuance of the document has agreed to the Portal's terms of use and submitted, through the Portal, an e-mail address at which the person agrees to accept documents electronically.

Subject to Confirmation

(4) A document submitted for filing or issuance through the Ontario Courts Public Portal is considered to have been filed or issued only if the registrar or sheriff sends confirmation of the filing or issuance by e-mail.

Fr

Filing or Issuance Date

in the confirmation.

Inconsistencies

(6) In the event of an inconsistency between information provided in a document submitted and accepted for filing or issuance electronically through the Ontario Courts Public Portal and information provided through the Portal by the person submitting the document,

(a) the information in the document as accepted for filing or issuance prevails, except with respect to the county specified by the person for the purposes of Rule 13.1, if applicable, where the information provided through the Portal prevails; and

(b) the registrar or sheriff may request from the person written clarification, in the manner specified by the registrar or sheriff, respecting the inconsistency, and the person shall promptly provide it.

Non-Application of Certain Subrules

(7) Subrules 4.05 (4.2), (7) and (8) do not apply with respect to a document filed or issued electronically by using the Ontario Courts Public Portal.

5. (1) Rule 4.05.3 of the Regulation is amended by adding the following subrule:

Modification, City of Toronto

(3.0.1) In the case of a proceeding that is commenced or continued in the City of Toronto, the documents referred to in paragraphs 1 and 2 of subrule (3) in respect of each party shall be uploaded to Case Center by the registrar and not by the party.

(2) Subrule 4.05.3 (4) of the Regulation is amended by striking out "subrule (5)" in the portion before paragraph 1 and substituting "subrules (4.1) and (5)".

(3) Rule 4.05.3 of the Regulation is amended by adding the following subrule:

(4.1) Subrule (4) does not apply to the registrar.

(4) Subrule 4.05.3 (8) of the Regulation is amended by striking out "The party shall ensure that every document that the party uploads to Case Center" at the beginning and substituting "A party who

Fr

(5) Subrule 4.05.3 (9) of the Regulation is amended by striking out the portion before clause (a) and substituting the following:

Requirement to Keep Original

(9) If a party uploads a document to Case Center that is not in the court file, the party shall,

. . . . .

6. Subrule 14.03 (4.1) of the Regulation is amended by striking out "the Civil Claims Online Portal under rule 4.05.1 or the Civil Submissions Online Portal under rule 4.05.2" at the end and substituting "the Civil Claims Online Portal under rule 4.05.1, the Civil Submissions Online Portal under rule 4.05.2 or the Ontario Courts Public Portal under rule 4.05.2.1".

7. Subrule 14.05 (1.1) of the Regulation is amended by adding "or the Ontario Courts Public Portal under rule 4.05.2.1" at the end.

Commencement

8. (1) Except as otherwise provided in this section, this Regulation comes into force on the later of October 4, 2025 and the day this Regulation is filed.

(2) Sections 4 to 7 come into force on the later of October 14, 2025 and the day this Regulation is filed.

Fr

Le procureur général,

DOUG DOWNEY
Attorney General

Date made: September 29, 2025
Pris le : 29 septembre 2025

Fr

Tab 57

while preserving the harmony, coherence and consistency of the legislative scheme (*Bell ExpressVu*, at para. 27; see also *Interpretation Act*, R.S.A. 2000, c. I-8, s. 10 (in Appendix)). "[S]tatutory interpretation is the art of finding the legislative spirit embodied in enactments": *Bristol-Myers Squibb Co.*, at para. 102.

50 Consequently, a grant of authority to exercise a discretion as found in s. 15(3) of the AEUBA and s. 37 of the PUBA does not confer unlimited discretion to the Board. As submitted by ATCO, the Board's discretion is to be exercised within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation (see Sullivan, at pp. 154-55). In the same vein, it is useful to refer to the following passage from *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722, at p. 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

51 The mandate of this Court is to determine and apply the intention of the legislature (*Bell ExpressVu*, at para. 62) without crossing the line between judicial interpretation and legislative drafting (see *R. v. McIntosh*, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, at para. 26; *Bristol-Myers Squibb Co.*, at para. 174). That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the

statutory regime created by the legislature (see Brown, at p. 2-16.2; *Bell Canada*, at p. 1756). Canadian courts have in the past applied the doctrine to ensure that administrative bodies have the necessary jurisdiction to accomplish their statutory mandate:

> When legislation attempts to create a comprehensive regulatory framework, the tribunal must have the powers which by practical necessity and necessary implication flow from the regulatory authority explicitly conferred upon it.

Re Dow Chemical Canada Inc. and Union Gas Ltd. (1982), 1982 CanLII 3238 (ON SCDC), 141 D.L.R. (3d) 641 (Ont. H.C.), at pp. 658-59, aff'd (1983), 1983 CanLII 1879 (ON CA), 42 O.R. (2d) 731 (C.A.) (see also *Interprovincial Pipe Line Ltd. v. National Energy Board*, 1977 CanLII 3163 (FCA), [1978] 1 F.C. 601 (C.A.); *Canadian Broadcasting League v. Canadian Radio-television and Telecommunications Commission*, 1982 CanLII 5204 (FCA), [1983] 1 F.C. 182 (C.A.), aff'd 1985 CanLII 63 (SCC), [1985] 1 S.C.R. 174).

52 I understand the City's arguments to be as follows: (1) the customers acquire a right to the property of the owner of the utility when they pay for the service and are therefore entitled to a return on the profits made at the time of the sale of the property; and (2) the Board has, by necessity, because of its jurisdiction to approve or refuse to approve the sale of utility assets, the power to allocate the proceeds of the sale as a condition of its order. The doctrine of jurisdiction by necessary implication is at the heart of the City's second argument. I cannot accept either of these arguments which are, in my view, diametrically contrary to the state of the law. This is revealed when we scrutinize the entire context which I will now endeavour to do.

53 After a brief review of a few historical facts, I will probe into the main function of the Board, rate setting, and I will then explore the incidental powers which can be derived from the context.

TAB 58

CanLII

Green v. Law Society of Manitoba, 2017 SCC 20 (CanLII), [2017] 1 SCR 360

Source:	Supreme Court of Canada
Date:	2017-03-30
File number:	36583
Other citations:	407 DLR (4th) 573 — 276 ACWS (3d) 728 — [2017] 5 WWR 1 — [2017] EXP 1007 — 18 Admin LR (6th) 107 — 6 CPC (8th) 225 — EYB 2017-277812 — [2017] SCJ No 20 (QL) — [2017] ACS no 20
Citation:	Green v. Law Society of Manitoba, 2017 SCC 20 (CanLII), [2017] 1 SCR 360, <https://canlii.ca/t/h2wx1>, retrieved on 2026-01-07

SUPREME COURT OF CANADA

CITATION: Green *v.* Law Society of Manitoba, 2017 SCC 20, [2017] 1 S.C.R. 360

APPEAL HEARD: November 9, 2016
JUDGMENT RENDERED: March 30, 2017
DOCKET: 36583

BETWEEN:

Sidney Green
Appellant

and

The Law Society of Manitoba
Respondent

- and -

Federation of Law Societies of Canada
Intervener

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

REASONS FOR JUDGMENT: (paras. 1 to 69)	Wagner J. (McLachlin C.J. and Moldaver, Karakatsanis and Gascon JJ. concurring)
DISSENTING REASONS: (paras. 70 to 98)	Abella J. (Côté J. concurring)

Green *v.* Law Society of Manitoba, 2017 SCC 20, [2017] 1 S.C.R. 360

Sidney Green *Appellant*

v.

The Law Society of Manitoba *Respondent*

and

Federation of Law Societies of Canada *Intervener*

Indexed as: Green *v.* Law Society of Manitoba

2017 SCC 20

File No.: 36583.

2016: November 9; 2017: March 30.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Law of professions — Barristers and solicitors — Continuing professional development — Law Society suspending lawyer for failing to comply with Rules of the Law Society of Manitoba imposing mandatory professional development — Lawyer seeking declaration that impugned rules invalid because they impose suspension for non-compliance without right to hearing or right of appeal — Whether rules valid in light of Law Society's mandate under The Legal Profession Act, C.C.S.M., c. L107.

Law of professions — Barristers and solicitors — Law society — Rules — Standard of review — Statute governing legal profession empowering benchers of Law Society of Manitoba to make rules of general application to profession — Standard of review applicable to rules made by Law Society.

G was called to the Bar in 1955 and has been a practising lawyer and member of The Law Society of Manitoba ("Law Society") for over 60 years. Despite the Law Society's mandatory rules requiring all practising lawyers to complete 12 hours of continuing professional development ("CPD") a year, G did not report any CPD activities for 2012 or 2013. Over a year after G's failure to report the completion of any CPD hours, the Law Society notified him that if he did not comply with the rules within 60 days, he would be suspended from practising law. G was also invited to correct any errors in his CPD record and was informed that it was possible for the 60-day delay to be extended. G did not reply, nor did he apply for judicial review of the decision to suspend him. Rather, he challenged the validity of certain provisions of the *Rules of the Law Society of Manitoba* ("Rules") with respect to CPD, by applying for declaratory relief. The application judge dismissed G's application, concluding that the impugned rules fell squarely within the Law Society's legislative mandate. The Court of Appeal dismissed the appeal for similar reasons.

Held (Abella and Côté JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner and Gascon JJ.: The standard applicable to the review of a law society rule is reasonableness. A rule will be set aside only if it is one no reasonable body informed by the relevant factors could have enacted. This means that the substance of the rule must conform to the rationale of the statutory regime set up by the legislature. Reasonableness is the appropriate standard for several reasons. First, in making rules of general application to the profession, the benchers of a law society act in a legislative capacity. The standard of review must reflect a law society's broad discretion to regulate the legal profession on the basis of policy considerations related to the public interest. Second, many benchers of a law society are also elected by and accountable to members of the legal profession, and applying the reasonableness standard ensures that the courts will respect the benchers' responsibility to serve those members. Third, a law society acts pursuant to its home statute in making rules such as those challenged by G, and as a result, there is a presumption that the appropriate standard is reasonableness. A law society must be afforded considerable latitude in making rules based on its interpretation of the "public interest" in the context of its enabling statute. Finally, a law society is a self-governing professional body with expertise in regulating the legal profession at an institutional level.

To determine whether the impugned rules are reasonable, the scope of the Law Society's statutory mandate must first be construed. The purpose, words and scheme of *The Legal Profession Act* ("Act"), support an expansive construction of the Law Society's rule-making authority. The Law Society was given a broad public interest mandate and broad regulatory powers to accomplish its mandate — a mandate which must be interpreted using a broad and purposive approach. The wording and scheme of the Act are also indicative of the breadth of the Law Society's authority and rule-making power. In particular, it is empowered to establish consequences for contravening the Act or the Rules, such as a suspension, for failing to meet the educational standards it is statutorily required to put in place. Since the Law Society has the power to create a CPD scheme, it necessarily has the power to enforce the scheme's standards.

In this case, the impugned rules are reasonable in light of the Law Society's statutory mandate. It is reasonable for the Rules to expose a lawyer to a suspension as a consequence for

non-compliance with the CPD program. The Act provides clear authority for the Law Society to create a CPD program that can be enforced by means of a suspension, and the overall purpose of the Act, the words used in it and the scheme of the Act show that the impugned rules are reasonable in light of the Law Society's statutory mandate. A suspension, the purpose of which relates to compliance, not to punishment or professional competence, is a reasonable and effective way to ensure consistency of legal service across the province and to guarantee that even lawyers who are not interested in meeting the educational standards will comply. The right to practise law is not a common law right or a property right, but a statutory right that depends on the principles set out in the Act and the Rules.

Moreover, imposing a suspension on members for failing to comply with the impugned rules without giving such members a right to a hearing or a right of appeal is not unreasonable in light of the Law Society's statutory powers. Rather, it is entirely consistent with the Law Society's duty to establish and enforce educational standards. The suspension at issue is administrative in nature, and the impugned rules reasonably include no right to a hearing or right of appeal because lawyers are solely in control of complying with the rules in question at their leisure. Only they can end the suspension by complying with the requirements. Further, the rules permitting a suspension are not self-applying. In addition to a lawyer's common law procedural rights, the rules permitting a suspension expressly vest the chief executive officer of the Law Society with discretion to ensure that the effect of the Rules is not overly harsh. A lawyer's failure to comply with the impugned educational rules, even after having been warned and given an opportunity to seek an extension, provides clear justification for the Law Society to impose a temporary suspension.

Per Abella and Côté JJ. (dissenting): The issue in this appeal is *not* whether the Law Society can impose a suspension for failing to complete the 12 annual hours of mandatory education courses, but whether it can impose an *automatic* one.

A law society can only enact rules that are consistent with the purposes, scope and objectives of its enabling statute, and its authority to do so must be exercised in a reasonable manner. However, the fact that deference is owed does not mean that a law society has *carte*

blanche; there are several grounds for finding delegated legislation to be unreasonable, such as where it is manifestly unjust.

In Manitoba, the Law Society's purpose is to "uphold and protect the public interest in the delivery of legal services with competence, integrity and independence". Those are the core values of a lawyer's professionalism. Protecting the public interest necessarily involves not only ensuring that a lawyer delivers legal services in accordance with those core values, but also protecting the public's *perception* in the professionalism of the delivery. While the primary goal of the Law Society is the protection of the public interest, it cannot do so without also protecting the ability of its members to practise law professionally. A law society must, as a result, exercise its mandate in a way that not only protects the ability of lawyers to act professionally, but that also reinforces the public's perception that lawyers are *behaving* professionally. The flip side is that a law society cannot enact rules which unreasonably undermine public confidence in lawyers.

In this case, the Law Society's rule that members who fail to complete 12 mandatory hours of continuing professional development activities in a calendar year are automatically suspended is unreasonable, because it is inconsistent with the Law Society's mandate to protect the public's confidence in the legal profession. When a lawyer is suspended, so is public confidence in him or her. That is why the Law Society takes such care in its investigation of complaints regarding professional misconduct or incompetence — it helps ensure that a suspension is imposed only after at least some minimal procedural protections have been provided, and then only after a range of lesser penalties has been considered. When a suspension is the result of such a process, the loss of public confidence is warranted. Where, however, a suspension is imposed automatically for the *least* serious disciplinary breach possible — failing to attend 12 hours of classes — the Law Society is in breach of its duty to protect the public from the needless erosion of trust in the professionalism of lawyers.

The economic costs of the suspension are manifest, as are the reputational ones, especially since the rules require the chief executive officer to notify every member of the Law Society and each of the chief justices of the courts in Manitoba of the name of a member who is

suspended. This is the only competence matter regulated by the Law Society that has no procedural protections, no range of remedies, and no discretionary leeway on the part of the chief executive officer, and it alone attracts an automatic suspension, regardless of justificatory circumstances. This makes it arbitrary. The absence of discretion, procedural fairness or remedial options stands in stark contrast to other provisions of the Act or Rules furthering the Law Society's mandate to establish standards for the competence of lawyers. It also stands in stark contrast to the regulations, policies and by-laws of the continuing professional development requirements of most other Canadian provinces and territories.

The lack of discretion in this case is fatal. A rule that leads to an *automatic* suspension for failing to attend 12 hours of continuing professional development is so far removed from ensuring the public's confidence in lawyers that it is manifestly unjust, and therefore, unreasonable.

Cases Cited

By Wagner J.

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; **referred to:** *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 CanLII 26 (SCC), [1991] 2 S.C.R. 869; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39, [2013] 2 S.C.R. 649; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1

TAB 59

CanLII

Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2007-07-04
File number:	C45055
Other citations:	86 OR (3d) 401 — 158 ACWS (3d) 1003 — 226 OAC 104 — 67 Admin LR (4th) 103 — [2007] OJ No 2613 (QL) — 35 MPLR (4th) 161
Citation:	Cash Converters Canada Inc. v. Oshawa (City), 2007 ONCA 502 (CanLII), <https://canlii.ca/t/1rxpx>, retrieved on 2026-01-07

Cash Converters Canada Inc. et al. v. The Corporation of The City of Oshawa, and The Attorney General of Ontario and Information and Privacy Commissioner of Ontario, Intervenors [Indexed as: Cash Converters Canada Inc. v. Oshawa (City)]

86 O.R. (3d) 401

Court of Appeal for Ontario, O'Connor A.C.J.O., Feldman and Rouleau JJ.A. July 4, 2007

Municipal law -- By-laws -- Validity -- Licensing by-law requiring dealers of second-hand goods to submit daily reports to police including detailed personal information about vendors of each item -- By-law being authorized under s. 150(2) of Municipal Act as "consumer protection" legislation -- By-law conflicting with s. 28(2) of Municipal Freedom of Information and Privacy Protection Act -- Impugned sections of by-law being of no force or effect -- Municipal Act, 2001, S.O. 2001, c. 25, s. 150 -- Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, s. 28(2).

In 2004, the City replaced its licensing by-law for second- hand goods dealers with a new by-law which requires dealers of second-hand goods to submit daily reports to the police, electronically, which include detailed personal information about the vendors of each item. The applicants

brought an application attacking the validity of the by-law. The application was dismissed. The applicants appealed.

Held, the appeal should be allowed.

The by-law was enacted under s. 150(1) of the Municipal Act, 2001. Section 150(2) of the Act provides that a municipality may only exercise its licensing powers for one or more of three purposes, namely, health and safety, nuisance control and consumer protection. The City submitted that collecting information about goods and vendors may deter unscrupulous vendors from attempting to sell stolen goods and that this can be seen as a form of consumer protection by helping to keep stolen goods out of the marketplace.

Under s. 14 of the Municipal Act, 2001, to the extent of any conflict with a provincial or federal Act or regulation, a by- law is "without effect". Section 28(2) of the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA") provides that no person shall collect information on behalf of an institution (which includes a municipality) unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity. The application judge erred in finding that the collection of personal information was "expressly authorized by statute" on the basis that the by-law itself was authorized under s. 150(2) of the Municipal Act, 2001. The phrase "expressly authorized by statute" means that the specific types of personal information collected must be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. It was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected. Although some of the information collected might ultimately be used for law enforcement, the purpose of the by-law was consumer protection, not law enforcement. In order to show that the collection of personal information is "necessary to the proper administration of a lawfully authorized activity", an institution is required to show that each item or [page402] class of personal information that is to be collected is necessary to properly administer that activity. Where the personal information would merely be helpful to the activity, it is not "necessary" within the meaning of the MFIPPA. Similarly, where the purpose could be accomplished another way, the institution is obliged to choose the other route. In this case, the City failed to demonstrate that the impugned provisions of the new by-law were necessary for an effective consumer protection regime to license second-hand dealers. The impugned provisions did not come within the exceptions in s. 28(2) of the MFIPPA. The provisions were of no force or effect.

APPEAL from the judgment of Belobaba J., [2006] O.J. No. 490, [2006] O.T.C. 120 (S.C.J.), dismissing an application for declaration that parts of a municipal by-law were invalid.

Cases referred to Toronto Taxi Alliance Inc. v. Toronto (City) (2005), 2005 CanLII 47232 (ON CA), 77 O.R. (3d) 721, [2005] O.J. No. 5460, 205 O.A.C. 160, 18 M.P.L.R. (4th) 89 (C.A.), affg (2005), 2005 CanLII 2324 (ON SC), 74 O.R. (3d) 447, [2005] O.J. No. 320 (S.C.J.), consd Other cases referred to 114957 Canada Ltée (Spraytech, Société d'arossage) v. Hudson (Town), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42, 200 D.L.R. (4th) 419, 171 N.R. 201, 19 M.P.L.R. (3d) 1, 2001 SCC 40; Croplife Canada v. Toronto (City) (2005), 2005 CanLII 15709 (ON CA), 75 O.R. (3d) 357, [2005] O.J. No. 1896, 198 O.A.C. 35, 254 D.L.R. (4th) 40, 14 C.E.L.R. (3d) 207, 10 M.P.L.R. (4th) 1 (C.A.) [Leave to apeeal to S.C.C. denied [2005] S.C.C.A. No. 329]; Dagg v. Canada (Minister of Finance), 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63, 148 D.L.R. (4th) 385, 213 N.R. 161; H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General), 2006 SCC 13 (CanLII), [2006] 1 S.C.R. 441, [2006] S.C.J. No. 13, 266 D.L.R. (4th) 675; Institution: A Board of Education, [1996] O.I.P.C. No. 449; Institution: A College of Applied Arts and Technology, [1995] O.I.P.C. No. 546; Institution: A Municipality, [1993] O.I.P.C. No. 381; Institution: A Public School Board, [1994] O.I.P.C. No. 457; Institution: Ministry of Community

Tab 60

CanLII

Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790 (CanLII)

Source:	Divisional Court
Date:	2018-06-20
File number:	334/17
Other citation:	[2018] OJ No 3294 (QL)
Citation:	Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790 (CanLII), <https://canlii.ca/t/hsm3q>, retrieved on 2026-01-07

CITATION: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790
DIVISIONAL COURT FILE NO.: 334/17
DATE: 20180620

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THORBURN, MCKELVEY and MYERS JJ.

BETWEEN:	)	
	)	
MARY SHUTTLEWORTH Applicant	)	*Gary Mazin and Paulina Munroe*, for the Applicant, Mary Shuttleworth
	)	
– and –	)	
	)	
SAFETY, LICENSING APPEALS AND STANDARDS TRIBUNAL ONTARIO and LICENCE APPEAL TRIBUNAL	)	*Trevor Guy and Kathryn Chung*, for the Respondent Licence Appeal Tribunal
	)	
and	)	
	)	*Cynthia Verconich*, for the Respondent Peel Mutual insurance Company

PEEL MUTUAL INSURANCE CO)
MPANY)
)
Respondents)
)
)
)

HEARD at Toronto: April 4th, 2018

THORBURN J.

AMENDED REASONS FOR DECISION

OVERVIEW

[1] On September 28, 2012, the Applicant, Mary Shuttleworth, was sitting in the front passenger seat of a motor vehicle when it was hit head-on by another vehicle. She suffered physical and psychological injuries as a result of the accident.

[2] The Licence Appeal Tribunal ("LAT") adjudicator decided that the Applicant was not sufficiently badly injured to be entitled to benefits for catastrophic impairment under the applicable *Statutory Accident Benefits Schedule*.

[3] Several months after the adjudicator rendered her decision, the Applicant's legal counsel received an anonymous note. The author of the note said that after the adjudicator wrote her decision, the decision was reviewed by the executive chair of the umbrella organization, the Safety, Licensing Appeals and Standards Ontario ("SLASTO") who "changed the decision to make the applicant not catastrophically impaired." The note contains *indicia* including the file number and the name of counsel that would suggest the author was familiar with some of the circumstances of this case.

[4] The Applicant then sought further information from the LAT about how the adjudicator arrived at her decision. She discovered that, pursuant to an unwritten review process imposed by the executive chair, the legal department sent the adjudicator's draft decision to the executive chair for her review and comments. The executive chair provided comments to the adjudicator. The adjudicator thanked the executive chair for her helpful review of the decision and advised that she was working on revising it. Further revisions were made and the decision was released.

[5] The Applicant claims the process followed does not meet the requirements established by the Supreme Court of Canada to allow for consultation in the decision-making process while protecting the independence of the decision-maker. In particular, the Applicant says that the process followed by the LAT was deficient in the following ways:

a. Consultation was imposed on the adjudicator by the executive chair, a "superior level of authority within the administrative hierarchy"; and

b. There is reason to believe the executive chair changed the adjudicator's decision. The Respondents have refused to provide evidence to confirm the nature of the revisions made by the executive chair so there is no way of knowing whether the executive chair changed the decision as suggested in the anonymous note.

(*Ellis-Don Ltd. v. Ontario (Labour Relations Board*), 2001 SCC 4 (CanLII), [2001] 1 SCR 221.)

[6] The Applicant claims there is reason to believe the adjudicator's decision was influenced by the executive chair and does not represent the adjudicator's independent decision. She seeks to

quash the decision and order a rehearing or reconsideration without input from the executive chair. Alternatively, she seeks an adjournment of this proceeding to allow her to examine the adjudicator and executive chair for discovery, and/or obtain further documentation and an extension of time to file such evidence.

[7] The Respondents submit that the anonymous letter is not admissible as it is double hearsay. In any event, decision-making is a consultative process. This was the first decision to determine whether someone suffered a catastrophic impairment under the recently implemented administrative structure at the LAT. Counsel for the LAT advised that where an LAT decision involves a novel, contentious, precedent-setting or high-profile issue, the executive chair reviews the decision as a second peer reviewer. The review is not intended to question the facts and evidence or to comment on the ultimate result. It is intended to offer suggestions to improve clarity, reasoning, readability, and ensure the correct legal test has been applied. Counsel for the LAT submits that adjudicators cannot be compelled to participate in the review process. The Respondents submit there is no credible evidence to challenge the adjudicator's independence and the Application for judicial review must therefore fail.

[8] For the reasons that follow, I allow the application and set aside the adjudicator's decision. As discussed below, I make no finding of any actual impropriety having occurred on the facts of this case. The applicant did not prove that the executive chair did anything to force the adjudicator to change her decision. Rather, the consultative decision-making process followed by the LAT in this case did not meet the minimum standards required to ensure both the existence and the appearance of adjudicative independence of the adjudicator's decision. Justice must not only be done; it must be seen to be done. In the absence of a properly limited, voluntary consultative process, an informed, cautious observer would have a reasonable basis to believe that the decision did not reflect the independent decision of the adjudicator. It must therefore be set aside.

BACKGROUND

The Role of SLASTO and LAT

[9] Before 1990, compensation for those who were injured in a motor vehicle accident was left largely to the tort system.

[10] On June 1, 1990, Ontario enacted the *Insurance Statute Law Amendment Act, 1990*. S.O. 1990, c. 2. This new regime for motor vehicle accident compensation in Ontario is premised on an "exchange of rights" principle under that the legislature restricted the rights of innocent accident victims to maintain a tort actions against the wrongdoers in exchange for payment of enhanced no-fault accident benefits from their own insurers under the *Statutory Accident Benefits Schedule* (the "*SABS"*). (*Meyer v. Bright* (1993), 1993 CanLII 3389 (ONCA), 15 O.R. (3d) 129, 110 D.L.R. (4th) 354 (C.A.) and *Sullivan Estate v. Bond* (2001), 2001 CanLII 8584 (ON CA), 55 O.R. (3d) 97, 202 D.L.R. (4th) 193 (C.A.)).

[11] Section 268(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 provides that,

> 268(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the Statutory Accident Benefits Schedule is made or amended, shall be deemed to provide for the statutory accident benefits set out in the Schedule and any amendments to the Schedule, subject to the terms, conditions, provisions, exclusions and limits set out in that Schedule.

[12] Pursuant to this system, every automobile insurance policy in Ontario provides its own insured with access to prescribed benefits in the event of a motor vehicle accident regardless of fault.

[13] Section 280 of the *Insurance Act* grants the LAT the jurisdiction to resolve disputes "in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled."

[14] This is new jurisdiction for the LAT. Under the *Adjudicative Tribunals Accountability, Governance and Appointments Act,* 2009, SO 2009, c 33, Sch 5, (the "ATAGAA") the LAT has been designated as part of the SLASTO cluster of tribunals. The executive chair of SLASTO is a member of the LAT and has the powers and authority as its chair under s. 17 (1) of ATAGAA. Section 14 (4) of ATAGAA provides as follows:

> Chair to recommend appointments, reappointments
>
> (4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.

[15] In so doing, the executive chair of SLASTO exercises a "superior level of authority within the administrative hierarchy."

Accident Benefits and Catastrophic Impairment Regime

[16] The Applicant applied for and received statutory accident benefits from her insurer, the Respondent Peel, payable under the *SABS*.

[17] There is a $50,000 limit on the amount of medical and rehabilitation benefits, and a $36,000 limit on the amount of attendant care benefits an insured person is to be paid, under the *SABS Schedule*. These limits are increased to one million dollars if the insured is found to have suffered a "catastrophic impairment" as a result of a motor vehicle accident. (*Statutory Accident Benefits Schedule – Effective September 1, 2010*, Ont. Reg. 34/10 of the *Insurance Act,* RSO 1990, c I.8.)

[18] In December 2014, the Applicant submitted that her injuries resulted in "catastrophic impairment".

[19] As outlined in the *SABS*, "catastrophic impairment" is a 55% impairment of the whole person. There are several factors used to calculate whole person impairment. Physical and neurological impairments are rated under the appropriate chapter and are each assigned a percentage impairment rating. Individual percentages are then combined according to a formula in the *Guides to the Evaluation of Permanent Impairment*, arriving at a total whole person impairment ("WPI"). Psychological and mental impairments are assigned a class of impairment based on how seriously they affect a person's useful functioning in four domains of daily life, according to the *Guides*. To arrive at a total WPI, the psychological impairments must be converted to percentage values and then combined with the other ratings. (American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. (Chicago: American Medical Association, 1993.).

[20] The *Guides* allow for the final estimated WPI to be rounded to the nearest values ending in 0 or 5, meaning a WPI of 53% will be rounded up to 55%.

[21] The Applicant and the Respondent Peel both commissioned assessments to determine whether she met the catastrophic impairment threshold.

[22] The Applicant's assessors found her catastrophically impaired, as her physical and neurological impairments, when combined with her mental or psychological impairments met or exceeded the 55% WPI threshold. The Respondent Peel's assessors found the Applicant to have a 40% WPI, falling short of the 55% threshold. The following chart shows the respective positions of the parties and where the parties differed in their assessments:

IMPAIRMENT	**GUIDE CHAPTER**	**OMEGA's WPI**	**DIRECT IME's WPI**
Cervico-thoracic	3	5%	5%
Medication side-effec ts	2	3%	3%
Sleep and arousal dis order	4	1-9%	0%
Mental status impair ment	4	1-14%	7-8% (not included in th e physical & neurologic al WPI subtotal)
Vertigo	4	1-9%	10%
Headaches		0%	0%
Lower back pain		0%	0%
WPI physical/neurol ogical subtotal		**11-35%**	**17%**
WPI mental/behavio ral (psychological) s ubtotal	14	27-34% (revised to at least **29%**)	**26%** (18% psychologic al impairment including sleep and + 7-8% menta l status above)
TOTAL COMBINE D WPI		35 - 57% (later revi sed to 54, round up to 55%)	39% (round up to 40%)

[23] The parties were unable to resolve their dispute and the matter was brought to a hearing before the LAT to resolve the issue.

The Decision Review Process

[24] In-house counsel for the LAT swore an affidavit explaining that the executive chair implemented a decision review process at the LAT. The stated reason was to maximize the quality of the tribunal's decisions. The peer review process has not been adopted formally. No written policy was provided but counsel swore that, "generally, the LAT decision review process for final decisions is, and at all material times in this case was" as follows:

> First, there is peer review: After drafting a decision, an adjudicator ***is expected to send the decision for peer review by the Duty Vice-Chair***. The Duty Chair offers suggestions to improve clarity, reasoning and readability and might also evaluate, for example, whether the correct legal test has been applied and whether any related case law that was not mentioned might be helpful.
>
> Second, there is legal review: The SLASTO Legal Services Unit reviews the decision to ensure that the correct legal test has been applied and to identify any related case law that was not mentioned that might be helpful.

> Third, there is a second peer review by the executive chair: "In some rare instances – such as when a decision involves a novel, contentious, precedent-setting, or high profile issue – ***the Legal Services Unit will send the decision to the Executive chair for her review***. In these instances, the Executive chair serves, in essence, as a second peer reviewer and accordingly will order the same kinds of comments that the author would typically receive during the initial peer review."
>
> Fourth, there is a review by the file's case management officer: The case management officer acts as an intake officer and primary point of contact for the parties. This review involves examining the decision's format, correcting grammatical and spelling errors, and ensuring that the template and parties' names are correct. [Emphasis added.]

[25] The absence of a written policy is significant. The ATAGAA contains a very formal process to ensure the accountability of tribunal members and officers both internally and to the public. Sections 7 and 8 of ATAGAA read as follows:

> Member accountability framework
>
> **7** (1) Every adjudicative tribunal shall develop a member accountability framework.
>
> Contents
>
> (2) The member accountability framework must contain,
>
> (a) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
>
> (b) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
>
> (c) a code of conduct for the members of the tribunal; and
>
> (d) any other matter specified in the regulations or in a directive of the Management Board of Cabinet. 2009, c. 33, Sched. 5, s. 7 (2).
>
> Approval
>
> (3) The member accountability framework must be approved by the tribunal's responsible minister.
>
> Publication, Amendment and Review of Public Accountability Documents
>
> Publication of public accountability documents
>
> **8** Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.

[26] No documents were provided to outline LAT's review process nor were we advised that the process had been adopted and published in accordance with the statutory process designed to protect and enhance accountability as provided by the statute.

[27] According to counsel for the LAT,

> … those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. To the extent that a reviewer's comments might relate to the facts or evidence, they are simply intended to clarify the author's findings. The reviewer functions simply as an editor. Likewise, those who review a draft decision do not comment on the decision's policy choice(s) or ultimate result. In this sense, the LAT's decision review process recognizes that an adjudicator assigned to hear and determine a matter is completely independent to render whatever determination he or she sees fit. Again, the reviewer functions simply as an editor. The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it. If an adjudicator declined to participate in process, there is no means to prevent him or her from releasing the decisions without further comment or discussion.

[28] By contrast, the graphic presentation of the peer review algorithm disclosed to the court makes no reference to the voluntariness of the peer review process. Moreover, according to counsel, adjudicators "are expected" to subject their decisions for review and decisions get sent to the executive chair by the legal department without any assent or input from adjudicators. When comments come back to adjudicators from the executive chair, they are being made by a person with authority over the adjudicator's reappointment.

The Tribunal Hearing

[29] The adjudicator heard the catastrophic impairment issue on September 7 and 8, 2016.

[30] The adjudicator submitted her decision for peer review by the Duty Vice-Chair, after which she sent her decision for legal review. After legal review was completed, the SLASTO's Head of Legal Services provided a copy of the decision to the executive chair as the decision was the first of its kind for the LAT and, as such, was viewed as highly significant. The executive chair then offered her comments to the adjudicator.

[31] On April 11, 2017, the adjudicator thanked the executive chair for her comments and indicated that she would further revise her draft. The adjudicator rendered her decision on April 21, 2017. She held that the Applicant had a WPI of 51% and that, accordingly, the Applicant was not catastrophically impaired.

[32] The Applicant did not request reconsideration of the decision nor did she appeal the decision. It is agreed that if she had received a WPI of 53% (rather than the 51% she received), this would have been rounded up to 55% and she would have been entitled to benefits for catastrophic injury. That is, a small change of any one finding on any single input into the WPI calculation would have changed the outcome of the decision.

The Anonymous Letter

[33] Almost two months after she received the Tribunal's decision, the Applicant's lawyer received an anonymous letter with no return address dated June 16, 2017. The note reads as follows:

> I have heard from [sic] reliable source that the [adjudicator] Sapin's initial decision was that this was a catastrophic impairment. This decision then went up for review and the [executive chair] Linda Lamoureux changed the decision to make the applicant not catastrophically impaired.
>
> Thought you should know that the decision was not made by an independent decision maker who heard the evidence.
>
> I was also told that [the adjudicator] Sapin hesitated to sign this order.

The Results of the FOI request made by the Applicant

[34] After receiving the anonymous letter and being denied further information by the LAT, the Applicant's counsel made an access to information request to the LAT for "any/or all documents, notes and records relating to" the applicant and/or the adjudicator's decision, along with a second request for any "documents, emails, notes, letters, and all communications" between the executive chair and the adjudicator from September 7, 2016 to April 21, 2017.

[35] In response, the LAT disclosed, among other things, two emails. The first, dated April 11, 2017, was from the adjudicator to the executive chair. The email reads as follows:

> I just wanted to thank you for your helpful review of this decision and to let you know that I have met with [legal counsel] and am working on revising it (for the umpteenth time, this was *not* a *first* draft!) to re-organize it a bit, tighten it up and clarify some points in keeping with your suggestions. And try to make it shorter.
>
> I also wanted to point out that this will take more time, and although I will do my best to meet recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.
>
> I look forward to discussing this decision with you.

[36] The executive chair responded as follows:

> Susan thank you for your note. This is a complex case. I had the benefit of reading it after a great deal of work on your part and after legal review. I recall stopping by your desk on a few occasions where you indicated you were struggling with a CAT [catastrophic injury] case – no wonder given the issues at play. I do appreciate your understanding and willingness to work with legal and myself to ensure the best possible decision. You must be a fan of Justice Laskin's as he takes a similar approach. This is an important decision, one that will be referenced. I suspect it will receive a great deal of attention.
>
> Although I am concerned about the delay already experienced by the applicant and the further delay that will ensue because of my comments, I do appreciate your understanding of the importance of ensuring quality decision writing, and your willingness to accept constructive feedback. At the end of the day, the people we serve benefit.

[37] The Applicant filed her application for judicial review on June 21, 2017.

STANDARD OF REVIEW

[38] The Court is "required to evaluate whether the rules of procedural fairness or the duty of fairness have been adhered to. The court does this by assessing the specific circumstances giving

rise to the allegation and by determining what procedures and safeguards were required in those circumstances in order to comply with the duty to act fairly." (*London (City) v. Ayerswood Development Corp* (2005), 2002 CanLII 3225 (ON CA), 167 O.A.C. 120 at para 10.)

[39] This involves a review of the nature of the decision, the process followed; the statutory scheme pursuant to which the body operates; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision; and the choice of procedure selected by the agency. (See *Baker v Canada* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.)

THE ISSUES

[40] The issues are as follows:

1. May the Applicant seek judicial review prior to reconsideration and/or appeal of the decision?
2. Should the anonymous letter be admitted and if so, for what purpose?
3. Is there a reasonable apprehension that the decision was not made by an independent decision-maker and if so, what is the appropriate remedy?

1. MAY THE APPLICANT SEEK JUDICIAL REVIEW PRIOR TO RECONSIDERATION OR APPEAL?

[41] The Applicant has not sought reconsideration nor has she appealed the Adjudicator's decision.

[42] Section 18.1 of the *Licence Appeal Tribunal Rules of Practice and Procedure* permits reconsideration by the executive chair of the SLASTO within 21 days of the date of the decision. Section 11(1) of the *Licence Appeal Tribunal Act, 1999,* S.O. 1999, c. 12, Sch. G ("the Act") provides that the Divisional Court may hear appeals from decisions relating to matters under the *Insurance Act* on questions of law that are brought within 30 days of the order appealed from.

[43] Reconsideration is not an absolute prerequisite to judicial review. (*Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4 (CanLII), [2001] 1 SCR 221, 52 OR (3d) 160; 194 DLR (4th) 385.)

[44] The Applicant claims it would not have been appropriate to proceed by way of reconsideration or appeal because:

a. the deadline to apply for an internal review of the decision and appeal had passed by the time she received the anonymous letter which forms the basis for application for judicial review;

b. the whistleblower alleges that the executive chair changed the decision to deny her benefits for catastrophic injury; and

c. the executive chair is in charge of the reconsideration process.

[45] The Respondents do not object to the Applicant's filing outside the usual timeframe.

[46] This Application for judicial review may proceed notwithstanding that there has been no reconsideration or appeal of the decision because:

a. There is no prerequisite that a party must seek reconsideration before an application for judicial review;

b. The Applicant did not receive the new information upon which this review is based until after the timeframe for reconsideration or appeal had expired; and

c. Reconsideration is effected by the executive chair who is also the person who edited the draft decision.

2.

[47] The anonymous letter should be admitted into evidence.

[48] It is not admitted for the truth of its contents (that the executive chair changed the outcome) but for the purpose of narrative: to explain why the Applicant became concerned about the decision after the time for reconsideration and appeal had expired, and why she sought further information from the respondents regarding the decision and the process of decision-making.

3. WAS THERE A REASONABLE APPREHENSION THAT THE ADJUDICATOR DID NOT ARRIVE AT HER DECISION INDEPENDENTLY?

Is there a reasonable apprehension that the decision was not made independently by the adjudicator?

[49] The Applicant claims there is reason to believe the adjudicator's decision was not decided by an impartial decision-maker. The Applicant relies on the information obtained from the Tribunal.

[50] It is important to the administration of justice that*Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 and *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20.)

[51] An administrative decision-maker's discussion of a draft decision with colleagues does not, in and of itself, breach the rules of natural justice. (*IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 SCR 282 and *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952.)

[52] "Contemporary reason-writing is very much a consultative process during which the writer of the reasons resorts to many sources" and "[t]o hold that any 'outside' influence vitiates the validity of … the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing." (*Khan v. College of Physicians & Surgeons of Ontario*, 1992 CanLII 2784 (ON CA))

[53] The implementation of an institutional consultation procedure does not create an apprehension of bias or lack of independence provided the system is designed to safeguard the ability of the decision-maker to decide the facts and the law to be applied, independently. The basic principles that must be followed to ensure compliance with the rules of natural justice are as follows:

> First, the consultation proceeding cannot be imposed by a superior level of authority within the administrative hierarchy, but can be requested only by the adjudicators themselves.

> Second, the consultation must be limited to questions of policy and law. Members of the organization who have not heard the evidence cannot be allowed to re-assess it. The consultation must proceed on the basis of the facts as stated by the members who heard the evidence.
>
> Finally, even on questions of law and policy, decision-makers must remain free to take whatever decision they deem right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal.

(*Ellis-Don Ltd. (supra)* at para 29 per Lebel J. for the majority, citing *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282 per Gonthier J.; and *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles*), 1993 CanLII 106 (SCC) 2 S.C.R. 756. at p. 798.)

[54] As long as these rules are followed, decision-makers may change their minds as a result of discussions with colleagues or because they have further reflected on the matter. (*IWA v. Consolidated-Bathurst* (supra))

[55] The information provided by the Respondent Tribunal in this case must be considered to determine whether there is a reasonable apprehension that the adjudicator's decision was not made independently.

[56] We recognize that there is a presumption of regularity of the administrative process and that establishing some form of decision review process to ensure consistency in style and form is accepted practice. (*Ellis-Don* at para 55.)

[57] The legal department sent the draft decision to the executive chair because the decision was the first of its kind for the Tribunal and thus significant. The draft was reviewed by the executive chair, the executive chair offered her comments and further changes were made by the adjudicator. There is no evidence as to the nature of those changes.

[58] It would appear from the email exchange between the adjudicator and the executive chair that the adjudicator was informed of the review after it had taken place.

[59] The Applicant did not cross-examine the affiant for the Respondent Tribunal. There is therefore no evidence to refute the affiant's assertion that,

> … those who review a draft decision accept, and do not question, the facts and evidence as presented in the draft. … Likewise, those who review a draft decision do not comment on the decision's policy choice(s) or ultimate result.
>
> … The adjudicator has complete discretion to accept or reject any suggested revisions offered as part of the decision review process, as well as complete discretion over the extent to which he or she shows a reviewer any further drafts or revisions before releasing the decision to the parties; and while SLASTO has a formal process for peer and legal review as described above, there is no means to compel adjudicators to participate in it.

[60] Therefore, on the evidence before us and given the presumption of regularity of an administrative process, we are unable to conclude that the adjudicator did not make her decision independently.

[61] However, an important rule of consultation set out in *Ellis-Don* was contravened. Review was imposed by the executive chair; a person at a supervisory level of authority within the

administrative hierarchy. Consultation was not requested by the Adjudicator. There was no formal or written policy protecting the adjudicator's right to decline to participate in review by the executive chair or to decline to make changes proposed by the executive chair. In their emails, the adjudicator and executive chair discussed the fact that the changes proposed would take time to draft but the executive chair indicated that the changes were important enough to justify further delay in the finalization of the decision.

[62] This failure to comply with the rules for consultation laid out in *Consolidated Bathurst* and applied in *Ellis-Don*, creates a reasonable apprehension of lack of independence.

CONCLUSION AND REMEDY

[63] The Applicant had a legitimate concern about the basis for the decision that she was not catastrophically injured. She therefore sought further information and was provided an affidavit from Board counsel that set out the process for editing decisions.

[65] consultation cannot be imposed by a superior level of authority within the administrative hierarchy, but can only be requested by the adjudicator herself. This breach creates a reasonable apprehension of lack of independence.

[66] Deliberative privilege is meant to ensure that any peer review or consultative process has robust protections to safeguard adjudicative independence. Absent bad faith, the formality and express limits set out in a formal peer review process will usually be the last and best protection that the parties and the public have against improper interference and to safeguard the appearance of propriety of the decision-making process.

[67] There is no formal and voluntary process, despite the statutory accountability process that calls for one. As the decision in this case was subjected to a peer review process that did not contain the required safeguards of adjudicative independence, decision of the adjudicator is set aside and referred back to the LAT for a new hearing.

[68] On the agreement of the parties as to the quantum, costs of this Application are awarded to the Applicant in the amount of $12,000 inclusive of HST and disbursements.

Thorburn J.

McKelvey J.

Myers J.

Date of Release: June 20, 2018

CORRECTION NOTICE

Corrected decision: the text of the original judgment was corrected on June 25, 2018, and the description of the correction is appended.

In the style of proceedings counsel for the applicant has been corrected as Gary Mazin.

Corrected decision: the text of the original judgment was corrected on July 12, 2018, and the description of the correction is appended.

Paulina Munroe has been added as counsel for the applicant in the style of proceedings.

CITATION: Mary Shuttleworth v. Licence Appeal Tribunal, 2018 ONSC 3790
DIVISIONAL COURT FILE NO.: 334/17
DATE: 20180620

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

THORBURN, MCKELVEY and MYERS JJ.

BETWEEN:

MARY SHUTTLEWORTH

Applicant

– and –

SAFETY, LICENSING APPEALS AND S
TANDARDS TRIBUNAL ONTARIO and
LICENCE APPEAL TRIBUNAL

and

PEEL MUTUAL INSURANCE COMPAN
Y

Respondents

REASONS FOR DECISION

THORBURN J.

Date of Release: June 20, 2018

Tab 61

CanLII

Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2019-06-21
File number:	C65995; C65981
Other citations:	146 OR (3d) 369 — 90 CCLI (5th) 179 — 52 Admin LR (6th) 332 — [2019] OJ No 3278 (QL)
Citation:	Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals), 2019 ONCA 518 (CanLII), <https://canlii.ca/t/j140m>, retrieved on 2026-01-07

Shuttleworth v. Safety, Licensing Appeals and Standards Tribunals Ontario et al.

[Indexed as: Shuttleworth v. Ontario (Safety, Licensing Appeals and Standards Tribunals)]

Ontario Reports

Court of Appeal for Ontario

Tulloch, Hourigan and Fairburn JJ.A.

June 21, 2019

146 O.R. (3d) 369 | 2019 ONCA 518

Case Summary

Administrative law — Bias — Reasonable apprehension of bias — Executive chair of Safety, Licensing Appeals and Standards Tribunals Ontario reviewing draft decision of Licence Appeal Tribunal adjudicator — Adjudicator making significant changes to draft decision as result — Adjudicator not requesting review — Adjudicator's right to decline to participate in review or make proposed changes not being protected by any formal or written policy — Executive chair having power over reappointment of adjudicators — Divisional Court not erring in finding that circumstances gave rise to reasonable apprehension of lack of adjudicative independence.

The applicant sought a hearing before the Licence Appeal Tribunal ("LAT") on whether she met the statutory threshold for a "catastrophic impairment" as defined in the *Statutory Accident Benefits Schedule*, O. Reg. 34/10. At the time, the LAT was a part of a cluster of tribunals known as the Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO"). The adjudicator released a decision determining that the threshold was not met. The applicant's counsel later received an anonymous letter stating that, before the decision was released, it was reviewed by the executive chair of SLASTO, who reversed the adjudicator's determination that the applicant's injuries qualified as a catastrophic impairment. As a result, the applicant brought an application for judicial review of the adjudicator's decision. The Divisional Court found that: the SLASTO Legal Services Unit generally sent decisions to the executive chair without assent or input from the adjudicator; the adjudicator in this case did not request the review and was unaware of it until it had taken place; there was no formal or written policy protecting the adjudicator's right to decline to participate in the review or to decline to make changes proposed by the executive chair; a manual describing the tribunal's procedure made no reference to the voluntariness of peer review; and the executive chair had power over the reappointment of adjudicators. The Divisional Court concluded that the circumstances gave rise to a reasonable apprehension of a lack of adjudicative independence. The application was allowed. The respondents appealed.

Held, the appeal should be dismissed.

A superior level of authority imposed consultation on the adjudicator. Evidence that the LAT lacked the legal power to force an adjudicator to participate in the peer review process did not mean that consultation was not imposed. The adjudicator was never given the opportunity to decline the review and was instead presented with the executive chair's review as a *fait accompli*. The Lieutenant Governor in Council could not reappoint the adjudicator without the executive chair's recommendation. The review process lacked the appropriate procedural safeguards. As the Divisional Court noted, the procedural manual made no reference to the voluntariness of the peer review process. There was no evidence that adjudicators were ever told that they were free to decline to participate in a review by [page370] the executive chair, and considerable evidence tending to show that adjudicators were expected to participate in such a review. The adjudicator in this case made significant changes following the executive chair's comments. The Divisional Court did not err in its conclusion that there was a reasonable apprehension of a lack of independence on the facts of this case.

Ellis-Don Ltd. v. Ontario (Labour Relations Board), [2001] 1 S.C.R. 221, [2001] S.C.J. No. 5, 2001 SCC 4, 194 D.L.R. (4th) 385, 66 C.L.R.B.R. (2d) 216, 265 N.R. 2, J.E. 2001-315, 140 O.A.C. 201, 26 Admin. L.R. (3d) 171, [2001] CLLC Â220-028, [2001] OLRB Rep. January/February 236, 102 A.C.W.S. (3d) 733, REJB 2001-22165, D.T.E. 2001T-138; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, 68 D.L.R. (4th) 524, 105 N.R. 161, J.E. 90-472, 38 O.A.C. 321, 42 Admin. L.R. 1, 90 CLLC Â14,007, [1990] OLRB Rep. March 369, EYB 1990-67694, D.T.E. 90T-444; *Khan v. College of Physicians & Surgeons Ontario* (1992), 1992 CanLII 2784 (ON CA), 9 O.R. (3d) 641, [1992] O.J. No. 1725, 94 D.L.R. (4th) 193, 57 O.A.C. 115, 11 Admin. L.R. (2d) 147, 76 C.C.C. (3d) 10, 35 A.C.W.S. (3d) 322 (C.A.), **consd**

Other cases referred to

Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777, REJB 1999-13279; *Bovbel v. Canada (Minister of Employment and Immigration)*, 1994 CanLII 3465 (FCA), [1994] F.C.J. No. 190, [1994] 2 F.C. 563, 113 D.L.R. (4th) 415, 167 N.R. 10, 18 Admin. L.R. (2d) 169, 46 A.C.W.S. (3d) 1122 (C.A.);

Chipman Wood Products (1973) Ltd. v. Thompson, 1996 CanLII 12488 (NB CA), [1996] N.B.J. No. 395, 138 D.L.R. (4th) 761, 181 N.B.R. (2d) 386, 42 Admin. L.R. (2d) 259, 65 A.C.W.S. (3d) 102 (C.A.); *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2009] N.B.J. No. 41, 2009 NBCA 13, 90 Admin. L.R. (4th) 243, 308 D.L.R. (4th) 53, 341 N.B.R. (2d) 286; *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77, 24 D.L.R. (4th) 161, 64 N.R. 1, 14 O.A.C. 79, 23 C.C.C. (3d) 193, 49 C.R. (3d) 97, 19 C.R.R. 354, 37 M.V.R. 9, 15 W.C.B. 326, 1985 CCAN Â10,032; *Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952, [1992] S.C.J. No. 20, 90 D.L.R. (4th) 609, 136 N.R. 5, J.E. 92-679, 47 Q.A.C. 169, 3 Admin. L.R. (2d) 173, 32 A.C.W.S. (3d) 864; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282, [2015] S.C.J. No. 25, 2015 SCC 25, 383 D.L.R. (4th) 579, 471 N.R. 206, [2015] 11 W.W.R. 217, J.E. 2015-825, 370 B.C.A.C. 1, 75 B.C.L.R. (5th) 1, 336 C.R.R. (2d) 137, 252 A.C.W.S. (3d) 247, EYB 2015-252077, 2015EXP-1501, 84 Admin. L.R. (5th) 185

Statutes referred to

Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009, S.O. 2009, c. 33, Sch. 5, ss. 7, (2), 8, 14(4), 15, 16, 20(1)

Insurance Act, R.S.O. 1990, c. I.8, s. 280 [as am.]

Rules and regulations referred to

Adjudicative Tribunals and Clusters, O. Reg. 126/10

Statutory Accident Benefits Schedule, O. Reg. 34/10

Authorities referred to

Blake, Sara, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis, 2017)

Mullan, David, *Administrative Law* (Toronto: Irwin Law, 2001)

Van Harten, Gus, et al., *Administrative Law: Cases, Text, and Materials*, 7th ed. (Toronto: Emond Publishing, 2015) [page371]

APPEAL from the order of the Divisional Court (Thorburn, McKelvey and F.L. Myers JJ.), [2018] O.J. No. 3294, 2018 ONSC 3790 (Div. Ct.) allowing an application for judicial review of a decision of the Licence Appeal Tribunal.

Sunil Mathai and *Domenico Polla*, for Safety, Licensing Appeals and Standards Tribunals Ontario and Licence Appeal Tribunal.

Cynthia Verconich, for Peel Mutual Insurance Company.

Gary Mazin and *Vasiola Bibolli*, for Mary Shuttleworth.

The judgment of the court was delivered by
HOURIGAN J.A.: **--**

Introduction

[1] Mary Shuttleworth was injured in a car accident on September 28, 2012. In December 2014, she applied to her insurer, Peel Mutual Insurance Company ("Peel"), for a determination that her accident injuries resulted in impairments that met the statutory threshold for a "catastrophic impairment" as defined in the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 (the "*SABS*"). When the parties were unable to agree whether the threshold was met, she sought a hearing before the Licence Appeal Tribunal (the "LAT"). At the time, the LAT was a part of a cluster of tribunals known as the Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO"). On April 21, 2017, LAT vice-chair Susan Sapin released a decision determining that the threshold was not met.

[2] Approximately two months later, Ms. Shuttleworth's counsel received an anonymous letter stating that, before the decision was released, it was reviewed and changed by Linda Lamoureux, the executive chair of SLASTO. The letter claimed that in Ms. Sapin's initial decision, Ms. Shuttleworth's injuries qualified as a catastrophic impairment, but when Ms. Lamoureux reviewed the decision, she altered it and determined that Ms. Shuttleworth did not meet the threshold. The letter also indicated that Ms. Sapin was reluctant to sign the decision.

[3] Ms. Shuttleworth attempted to obtain information about the process followed in her case. This was met by a broad claim of adjudicative privilege asserted by the LAT. However, the LAT did produce some e-mails without attachments, which it relied on in support of its position that there was no interference with Ms. Sapin's decision. Having obtained no meaningful information regarding the serious charges in the anonymous letter, Ms. Shuttleworth brought an application for judicial review. [page372]

[4] The Divisional Court granted Ms. Shuttleworth's application for judicial review and set aside the LAT's decision. While it made no finding of any actual impropriety, the court held that the LAT's decision-making process did not meet the minimum standards required to ensure both the existence and appearance of adjudicative independence.

[5] The LAT and SLATSO appeal the order of the Divisional Court, as does Peel (the "appellants"). They assert that the court erred in law in finding that there was a reasonable apprehension of lack of independence in relation to Ms. Sapin. As I will explain below, I do not accept this submission and would dismiss the appeal.

Facts

[6] Ms. Shuttleworth suffered physical and psychological injuries as a result of her motor vehicle accident. A finding that she was catastrophically impaired would entitle her to enhanced benefits. Peel's assessments determined that Ms. Shuttleworth's impairment of the whole person ("WPI") fell below the 55 per cent threshold for catastrophic impairment provided in the *SABS*, while an assessment that Ms. Shuttleworth commissioned confirmed that she met the threshold. She applied to the LAT under s. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8 to resolve the dispute.

[7] To promote efficiency, the *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sch. 5, s. 15 ("*ATAGAA*") allows two or more adjudicative tribunals to be designated as a "cluster" by regulation. Until January 1, 2019, the LAT was part of SLASTO.[1] Ms. Lamoureux was appointed as executive chair of SLASTO, pursuant to s. 16 of *ATAGAA*. The LAT acquired jurisdiction over disputes in respect of the *SABS* on April 1, 2016. Ms. Shuttleworth's case was the first catastrophic impairment decision that the LAT was to release.

[8] On April 21, 2017, Ms. Sapin ruled that Ms. Shuttleworth's WPI was 51 per cent and that Ms. Shuttleworth was, therefore, not catastrophically impaired. If Ms. Shuttleworth's WPI was assessed at 53 per cent, it would have been rounded up to 55 per cent and she would have been found catastrophically impaired. Ms. Shuttleworth did not request a reconsideration of the decision and did not appeal.

[9] Approximately two months after the decision was released, Ms. Shuttleworth's counsel received an anonymous letter advising [page373] that the decision was reviewed and changed by Ms. Lamoureux before its release. The letter stated:

> I have heard from reliable source that Sapin's initial decision was that this was a catastrophic impairment. This decision then went up for review and the ED Linda Lamoureux changed the decision to make the applicant not catastrophically impaired.
>
> Thought you should know that the decision was not made by an independent decision maker who heard the evidence.
> I was also told that Sapin hesitated to sign this order.

[10] After receiving the anonymous letter and being denied further information by the LAT, Ms. Shuttleworth's counsel made an access to information request. In response to that request, the LAT refused to produce the drafts of the decision, which could have resolved the issue. Instead, it made limited disclosure, including of internal e-mails. The respondent did not pursue further disclosure. In one e-mail of particular note, dated April 11, 2017, Ms. Sapin wrote to Ms. Lamoureux as follows:

> I just wanted to thank you for your helpful review of this decision and to let you know that I have met with Liz and am working on revising it (for the umpteenth time, this was *not* a *first* draft!) to re-organize it a bit, tighten it up and clarify some points in keeping with your suggestions. And try to make it shorter.
>
> I also wanted to point out that this will take more time, and although I will do my best to meet Karen's recent deadlines for this and my three other decisions, I just wanted to advise in advance that the deadlines may be affected somewhat.

[11] Ms. Lamoureux responded the same day, she wrote:

> Susan thank you for your note. This is a complex case. I had the benefit of reading it after a great deal of work on your part and after legal review. I recall stopping by your desk on a few occasions where you indicated you were struggling with a CAT case -- no wonder given the issues at play. I do appreciate your understanding and willingness to work with legal and myself to ensure the best possible decision. You must be a fan of Justice Laskin's as he takes a similar approach. This is an important decision, one that will be referenced. I suspect it will receive a great deal of attention.
> Although I am concerned about the delay already experienced by the applicant and the further delay that will ensue because of my comments, I do appreciate your understanding of the importance of ensuring quality decision writing, and your willingness to accept constructive feedback. At the end of the day, the people we serve benefit.

[12] On June 21, 2017, Ms. Shuttleworth filed an application for judicial review. She argued that the LAT had failed to remain neutral in its decision-making process and sought an order reversing the decision or referring the matter back to the LAT for a rehearing. [page374]

[13] On the application for judicial review, Benson Cowan, head of legal services for SLASTO, affirmed an affidavit explaining the LAT's decision review process. His uncontested evidence was that an adjudicator "is expected to send the decision for peer review" upon completing the draft. However, there was "no means to compel adjudicators to participate" and no means to prevent an adjudicator who declined to participate from releasing the decision. According to Mr. Cowan, in some situations, the review proceeds through a total of four phases: (1) peer review by the duty vice-chair; (2) legal review by the SLASTO Legal Services Unit; (3) a second peer review by the executive chair; and (4) a review by the file's case management officer. The Legal Services Unit would only send the decision to the executive chair in "rare instances" such as when a decision involved a "novel, contentious, precedent-setting, or high profile issue".

[14] Finally, Mr. Cowan provided some evidence about the operation of the peer review process in the case at bar. He stated that the adjudicator submitted her decision for peer review by the duty vice-chair and then to the Legal Services Unit for legal review. Mr. Cowan sent the decision to the executive chair for review because it was the first catastrophic impairment decision that the LAT was going to release.

Decision of the Divisional Court

[15] The Divisional Court accepted that an adjudicator's discussion of a draft decision with colleagues does not in and of itself breach the rules of natural justice. It relied on *Khan v. College of Physicians & Surgeons of Ontario* (1992), 1992 CanLII 2784 (ON CA), 9 O.R. (3d) 641, [1992] O.J. No. 1725 (C.A.), for the principle that some "outside" influence on reason writing is permissible and accepted. However, the court emphasized that the institutional consultation procedure must be designed to safeguard a decision-maker's ability to independently decide the facts and the law. It relied on *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, [2001] S.C.J. No. 5, 2001 SCC 4, at para. 29, for the propositions that the consultation procedure cannot be imposed by a superior level of authority, consultation must be limited to questions of policy and law, and decision-makers must remain free to decide independently even on questions of policy and law.

[16] The Divisional Court was unable to find that the adjudicator lacked actual independence. It held that, as Ms. Shuttleworth elected not to cross-examine Mr. Cowan, there was no evidence to refute his evidence that the reviewers do not question the facts and evidence and do not comment on the policy choices or outcome, that there is no means to compel adjudicators to participate [page375] in peer review, or that the adjudicator has complete discretion to accept or reject any suggested revisions. This evidence, coupled with the presumption of regularity that applies to administrative proceedings, meant that Ms. Shuttleworth failed to prove a lack of actual independence.

[17] Notwithstanding the foregoing, the Divisional Court concluded that there was a reasonable apprehension of a lack of independence. The LAT breached the rule of consultation from *Ellis-Don* because the executive chair imposed a review that was not requested by the adjudicator. The court emphasized that peer review or other consultative processes must be accompanied by robust protections to safeguard adjudicative independence. It stressed that there was no formal or written policy protecting the adjudicator's right to decline to participate in a review by the executive chair or make changes proposed by the executive chair. The court found the absence of this policy "significant" because ss. 7-8 of *ATAGAA* required it and because its existence would safeguard the appearance of propriety. Accordingly, it concluded that the LAT subjected the decision to a peer review process that lacked the required safeguards of adjudicative independence.

[18] It is important to note that, in reaching its conclusion, the Divisional Court made a number of factual findings about the review process, none of which are challenged on appeal:

(1) the SLASTO Legal Services Unit generally sent decisions to the executive chair without assent or input from the adjudicators;

(2) in this particular case, the adjudicator did not request the consultation with the executive chair and the executive chair only informed the adjudicator of her review after it had already taken place;

(3) there was no formal or written policy protecting the adjudicator's right to decline to participate in the review by the executive chair or to decline to make changes proposed by the executive chair;

(4) a manual describing the tribunal's procedure made no reference to the voluntariness of the peer review process; and

(5) by virtue of reappointment powers granted to the executive chair under s. 14(4) of *ATAGAA*, she exercised a superior level of authority within the administrative hierarchy.

[19] In the result, the Divisional Court granted Ms. Shuttleworth's application, set aside the adjudicator's decision and referred the matter back to the LAT for a new hearing. [page376]

Analysis

[20] The appellants submit that the Divisional Court erred by (a) incorrectly articulating and applying the test for reasonable apprehension of bias; (b) wrongly applying the trilogy of Supreme Court of Canada cases involving the preparation of reasons by administrative tribunals; (c) mistakenly finding that ss. 7 and 8 of the *ATAGAA* required SLATSO to have written consultation procedures; (d) failing to conduct a holistic analysis as mandated by *Khan*; and (e) conducting an incorrect analysis regarding reasonable apprehension of lack of adjudicative independence in relation to Ms. Sapin. These issues will be considered below.

(a) *Test for a reasonable apprehension of bias*

[21] In the overview section of its reasons, the Divisional Court stated [at para. 8], "Justice must not only be done; it must be seen to be done. In the absence of a properly limited, voluntary consultative process, an informed, cautious observer would have a reasonable basis to believe that the decision did not reflect the independent decision of the adjudicator."

[22] The appellants submit that the Divisional Court misapplied the test for reasonable apprehension of bias by introducing the concept of a "cautious observer". This, they argue, is novel and inconsistent with the test for reasonable apprehension of bias articulated in *R. v. Valente*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77, which *Ellis-Don* confirms applies to the tribunal context.

[23] The test for a reasonable apprehension of bias or lack of independence in respect of an administrative tribunal is whether the apprehension is "a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information": *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, at p. 334 S.C.R. The question is thus whether "an informed person, viewing the matter realistically and practically -- and having thought the matter through" would think that it is more likely than not that the decision-maker would decide fairly: *Consolidated-Bathurst*, at p. 334 S.C.R. The Supreme Court recently confirmed this test in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 S.C.R. 282, [2015] S.C.J. No. 25, 2015 SCC 25.

[24] I would not give effect to the appellants' submission that the Divisional Court applied the incorrect test. The appellants seize on the Divisional Court's passing reference to a "cautious [page377] observer". It is unfortunate that the term was used, as it may appear to introduce an unknown element to the test. However, on a review of the court's reasons as a whole, it is plain that it correctly articulated the test for a reasonable apprehension of a lack of independence, at para. 50 of its reasons, and cited the relevant authorities on the issue. At paras. 62 and 65, the court applied that test and found a reasonable apprehension of a lack of independence without making reference to a "cautious observer".

[25] In my view, the Divisional Court did not apply a novel test for reasonable apprehension of a lack of independence. Accordingly, this ground of appeal should fail.

(b) *Application of the trilogy*

[26] The Supreme Court's trilogy of cases on consultations in the course of preparing reasons for a decision -- *Consolidated-Bathurst, Tremblay v. Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952, [1992] S.C.J. No. 20 and *Ellis-Don* -- sets out a

framework of considerations for assessing whether there is a reasonable apprehension of bias or lack of independence.

[27] The guiding principle from the trilogy is that the decision-maker must be free to decide cases "in accordance with his own conscience and opinions": *Consolidated-Bathurst*, at p. 332 S.C.R. *Consolidated-Bathurst* establishes that discussions with colleagues are permissible even though they raise the possibility of "moral suasion", and that adjudicators are entitled to consider the opinion of their colleagues in the interest of adjudicative coherence: at pp. 331-33 S.C.R. The court also recognized that consultation could allow the adjudicator to benefit from the acquired experience of the entire board and foster coherence in the board's jurisprudence: at pp. 326-28 S.C.R. At the same time, the court concluded that any procedure or practice that unduly restricted independence would be contrary to the rules of natural justice: at p. 323 S.C.R. Accordingly, procedures that "effectively compel or induce" decision-makers to decide against their own conscience and opinions are impermissible: at p. 333 S.C.R.

[28] To reconcile the demands of decision-making by administrative tribunals with procedural fairness, the court held that full-board consultation was permissible if accompanied by appropriate safeguards. As Gonthier J. stated, the question is whether the "safeguards attached to this consultation process are . . . sufficient to allay any fear of violations of the rules of natural justice": *Consolidated-Bathurst*, at para. 96. *Consolidated-Bathurst* establishes that the fact that the board's chair or other board members lack any *de jure* power to impose their opinion on other [page378] board members is not a sufficient safeguard, as procedures may still "effectively compel or induce" members to decide against their conscience and opinions: at p. 333 S.C.R. Accordingly, the court must examine the "actual structure of the machinery created to promote collegiality" and "determine the *actual situation* prevailing in the body in question": *Tremblay*, at pp. 968 and 973 S.C.R. (emphasis in original).

[29] The Supreme Court also outlined specific rules that govern the practice of full-board consultation. In *Consolidated-Bathurst*, the court found it "obvious" that "no outside interference may be used to compel or pressure a decision maker to participate in discussions on policy issues raised by a case on which he must render a decision": at p. 332 S.C.R. Likewise, in *Tremblay*, the court found that the tribunal president's ability to refer a matter for plenary discussion without the permission of the adjudicator was a sufficient basis to find an appearance of a lack of independence: at p. 974 S.C.R. As a result, *Ellis-Don* held that it was a basic principle that only the adjudicators could request consultation and that their superiors in the administrative hierarchy could not impose it on them: at para. 29. This conclusion is consistent with leading treatises. As Sara Blake states in *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis, 2017), at pp. 116-17:

> A process for compulsory consultation . . . is not acceptable. The decision to consult must be up to the decision makers. It should not be imposed on them. If they do not wish to consult, they must be truly free to choose not to do so. Compulsory consultation creates an appearance [of] constraint on their freedom to decide the case.

[30] The appellants attempt to distinguish the LAT's review process from the full-board meetings the trilogy considered on two bases. First, they submit that the review process was purely focused on the quality of the written decision, unlike the full-board meetings that involved reviewing policy choices and the ultimate result. Second, they submit that the same moral suasion concerns are not present in the review process because only a maximum of four reviewers are involved and it is a simple editorial exercise. I would reject these submissions for the following reasons.

[31] First, it is inaccurate to characterize the review process as a purely qualitative or editorial exercise. Mr. Cowan's evidence was that reviewers did comment on whether the correct legal test and jurisprudence has been identified and applied. *Ellis-Don* emphasized that the procedural safeguards were required to protect a decision-maker's ability to decide questions of law independently from compulsion by other members of the tribunal: at para. 29. [page379]

[32] Second, the fact that fewer people were involved in the review than in the full-board consultations the trilogy considered does not assist the appellants. The fact remains that the executive chair occupies the most superior level of authority within the LAT and SLATSO. It should be recalled that the executive chair undertakes any reconsideration of the LAT adjudicators' decisions and holds power over the reappointment of individual adjudicators under s. 14(4) of *ATAGAA*. That subsection provides:

> *Chair to recommend appointments, reappointments*
> 14(4) No person shall be appointed or reappointed to an adjudicative tribunal unless the chair of the tribunal, after being consulted as to his or her assessment of the person's qualifications under subsections (1) and (2) and, in the case of a reappointment, of the member's performance of his or her duties on the tribunal, recommends that the person be appointed or reappointed.

[33] The appellants submit that the moral suasion concern related to the executive chair's power over reappointment would be equally strong even if the adjudicator requested review by the executive chair. This submission should be rejected. As *Tremblay* and *Consolidated-Bathurst* recognize, adjudicators are more likely to feel free to decide according to their own conscience and opinions if the consultation occurs at their own request: *Consolidated-Bathurst*, at pp. 334-35 S.C.R.; and *Tremblay*, at p. 974 S.C.R.

[34] Third, it is also important to note that this court and other courts have found the principles from the trilogy on full-board consultation relevant to cases dealing with other review processes for draft decisions. In the context of review of draft reasons by counsel to a disciplinary committee, this court in *Khan* relied on *Tremblay* for the principle that compulsion to consult with others may cause the appearance of independence to be lost: *Khan*, at pp. 673-74 O.R. Similarly, in *Bovbel v. Canada (Minister of Employment and Immigration)*, 1994 CanLII 3465 (FCA), [1994] F.C.J. No. 190, [1994] 2 F.C. 563 (C.A.), the Federal Court of Appeal relied on *Consolidated-Bathurst* and *Tremblay* to evaluate whether the Immigration and Refugee Board's practice of encouraging board members to submit their reasons for review by staff lawyers gave rise to a reasonable apprehension of bias.

[35] I would therefore reject the submission that the Divisional Court erred in its application of the trilogy.

(c) *Written procedures*

[36] The appellants submit that the Divisional Court erred in holding that the absence of a written peer-review policy was [page380] "significant" on the basis that ss. 7-8 of *ATAGAA* required such a policy. These sections provide as follows:

> *Member accountability framework*
>
> 7(1) Every adjudicative tribunal shall develop a member accountability framework.
>
> *Contents*
>
> (2) The member accountability framework must contain,
>
> (*a*) a description of the functions of the members, the chair and the vice-chairs, if any, of the tribunal;
>
> (*b*) a description of the skills, knowledge, experience, other attributes and specific qualifications required of a person to be appointed as a member of the tribunal;
>
> (*c*) a code of conduct for the members of the tribunal; and
>
> (*d*) any other matter specified in the regulations or in a directive of the Management Board of Cabinet.
>
> *Approval*

(3) The member accountability framework must be approved by the tribunal's responsible minister.

PUBLICATION, AMENDMENT AND REVIEW OF PUBLIC ACCOUNTABILITY DOCUMENTS

Publication of public accountability documents
8. Every adjudicative tribunal shall make its public accountability documents, approved as required by section 3, 4, 5, 6 or 7, as the case may be, available to the public.

[37] The appellants argue that the text of s. 7 of *ATAGAA* does not include a requirement for a written peer-review policy and that SLASTO has adopted all the required documents. Their position is that the documents codify the principle of adjudicative independence and address the roles of members and vice-chairs in the peer-review process. Nor, they argue, does the case law demand a written peer-review policy. They note that in *Consolidated-Bathurst* and *Ellis-Don*, the Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultation even though the board lacked a written policy codifying the procedural safeguards in that process.

[38] I accept that ss. 7-8 of *ATAGAA* do not require SLATSO to publish a written peer review policy. Section 7(2) of *ATAGAA* only requires a tribunal to describe the functions of the members, the skills and qualifications required to be appointed a member, and a member code of conduct. SLATSO did publish a code of conduct, as well as descriptions of the vice-chair and member positions. [page381] The appellants are also correct that the Supreme Court upheld the Ontario Labour Relations Board's practice of full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* despite the board's lack of a written policy governing those consultations, and that the Supreme Court found a reasonable apprehension of bias in *Tremblay* even though there was a written policy that protected adjudicative independence.

[39] Despite the foregoing, the Divisional Court was still entitled to find the absence of such a policy significant when it considered the adequacy of LAT's procedural safeguards. The absence of a formal policy protecting the adjudicator's right to decline to participate was significant in an environment where the procedure manual made no reference to the voluntariness of review by the executive chair and Mr. Cowan's own evidence was that adjudicators were expected to participate in the review process. While Mr. Cowan's evidence was that there was no means to compel adjudicators to participate, he did not give evidence that SLATSO communicated to adjudicators that they were free not to have their drafts reviewed by the executive chair. The principal safeguard the appellants point to is the executive chair's inability to lawfully compel the adjudicator to change her mind. However, *Consolidated-Bathurst* establishes that this is not a sufficient safeguard: at p. 333 S.C.R.

[40] Further, the absence of a written policy on full-board consultations in *Consolidated-Bathurst* and *Ellis-Don* and its presence of such a policy in *Tremblay* do not assist the appellants. The Ontario Labour Relations Board's practice of full-board consultations was well-known to board members and litigants before the board, as it was described in a 1971 government report and in legal treatises: *Consolidated-Bathurst*, Sopinka J., dissenting (but not on this point), at pp. 290-91 S.C.R. In particular, both board members and litigants knew that only the hearing panel could request a full-board meeting and it could not be centrally imposed: Gonthier J., writing for the majority, at pp. 316-17 S.C.R.

[41] In contrast, in this case, the Divisional Court found there was no evidence that adjudicators were aware that they had the right to refuse a review by the executive chair and that the process gave them no opportunity to refuse: at para. 28. The absence of a written policy was thus significant because it confirmed that the LAT had not communicated to adjudicators that they had the right to refuse. As for *Tremblay*, all it establishes is that a formal policy that protects adjudicative independence will not be an adequate safeguard if it is disregarded in practice: at pp.

972-73 S.C.R. The presence of the formal policy likely would have been [page382] a relevant consideration in *Tremblay* but for the evidence that the tribunal was disregarding it in practice.

[42] The SLASTO code of conduct and the position descriptions for the member and vice-chair positions undermine the appellants' position. The appellants point to the guarantee of adjudicative independence in these documents. However, the code of conduct simply states that "[m]embers should be independent in decision-making" and makes no mention of a member's right to refuse a review by the executive chair. This provides no evidence to undermine the Divisional Court's finding that members were not advised of their right to refuse. Moreover, the member position description confirms the Divisional Court's finding that members were expected to submit their decisions for peer review and were not advised of their right to refuse. Under the heading "Key Duties," the description states "A Member, where appropriate . . . submits draft decisions for, and participates in, peer and other decision reviews before they are issued in accordance with SLASTO policy."

(d) *Holistic analysis*

[43] The appellants' submission that the Divisional Court failed to apply the holistic approach from *Khan* is unfounded. It is important to recognize that the court in *Khan* did not purport to undermine the holding in *Tremblay* that imposed consultation is generally inappropriate and did not suggest that it is merely one factor among others. To the contrary, Doherty J.A. found *Tremblay* "an appropriate starting place", quoted from it, and relied on it for the proposition that the result of compulsory consultation is that "the appearance of independence may be lost": *Khan*, at pp. 673-74 O.R.

[44] In *Khan* the court considered all of the factual circumstances of the case. Similarly, the Divisional Court recognized the need to look at all the circumstances. At paras. 38-39, it stated it was necessary to assess the "specific circumstances" and review the five factors from *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, to determine the level of procedural fairness required.

[45] In addition, the review process in this case lacked the guarantees that led Doherty J.A. to find in *Khan* that the discipline committee's use of counsel in the drafting process did not give rise to a reasonable apprehension of lack of independence. Doherty J.A. stressed that counsel's involvement "could not have had any coercive effect" because counsel was the "servant of the Committee" and his involvement "was not mandatory, and was entirely under the control of the Committee": *Khan*, at [page383] p. 674 O.R. In contrast, the executive chair was the superior of the adjudicator with power over her reappointment, not the adjudicator's servant.

[46] In summary, I would reject this ground of appeal on the basis that the Divisional Court conducted an analysis of all of the circumstances of the case. I will consider in the next section of my reasons the adequacy of that analysis.

(e) *Overall analysis*

[47] The appellants' position is that the case before the LAT was an important, precedent-setting matter, and that it was thus an appropriate case for the executive chair's limited decision review role, which is consistent with her statutory responsibility in s. 20(1) of *ATAGAA* to ensure the LAT performs its duties and functions. The appellants submit that the Divisional Court's finding that there was no evidence that the adjudicator did not make her decision independently should have led the court to conclude that the executive chair's review of the draft decision did not raise a reasonable apprehension of a lack of independence. They argue that the uncontested evidence was that peer reviewers do not question the facts, evidence, policy choices, or result in a decision, and that adjudicators have complete discretion to accept or reject any suggested revisions. As a result, there is no danger of moral suasion of the kind discussed in *Ellis-Don*. Had the Divisional Court properly examined the facts of this case, the appellants submit, it would have found that a

reasonable observer would conclude that the peer review adequately safeguards adjudicative independence.

[48] I am not persuaded that the Divisional Court erred in its conclusion that there was a reasonable apprehension of a lack of independence on the facts of this case. I reach this conclusion for the following reasons.

[49] First, the Divisional Court correctly found that the executive chair's imposition of the review on the adjudicator breached the rules set out in the trilogy. The Divisional Court found as a fact that the adjudicator was expected to send the decision for peer review: at para. 28. It also found that, as was the general practice, the legal department sent the decision to the executive chair without the adjudicator's prior knowledge or assent. The adjudicator was only informed of the review after it had taken place: at paras. 28, 57-58. The Divisional Court thus correctly concluded that the tribunal violated the rule from the trilogy because a superior level of authority imposed consultation on the adjudicator. [page384]

[50] I do not agree with the appellants' arguments that the Divisional Court erred in fact by finding that consultation was imposed. The appellants submit that the executive chair did not impose the review on the adjudicator because it was staff counsel that forwarded the decision to the executive chair. The fact remains that, by deciding to provide comments on the decision without seeking the adjudicator's permission, the executive chair imposed the review on the adjudicator. I likewise disagree with the argument that Mr. Cowan's evidence that the LAT lacked the legal power to force an adjudicator to participate in the peer review process meant that consultation was not imposed. Mr. Cowan forwarded the decision to the executive chair and the executive chair provided comments without seeking the adjudicator's consent. As Ms. Shuttleworth submits, the adjudicator's freedom to decline the review does not assist her because she was never given the opportunity to decline and was instead presented with the executive chair's review as a *fait accompli*.

[51] Second, the Divisional Court found that the breach was significant because of the power of the SLATSO executive chair. *Consolidated-Bathurst* recognized the possibility that a tribunal chair could exert moral suasion over tribunal members: at p. 333 S.C.R. Similarly, *Tremblay* stressed the control the tribunal president exercised over the consultation process in finding a reasonable apprehension of bias: at p. 973-74 S.C.R.; see, also, David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 344.

[52] The Lieutenant Governor in Council could not reappoint the adjudicator without the executive chair's recommendation: *ATAGAA*, s. 14(4). This power over reappointment is significant, as the Divisional Court found: at paras. 14-15, 28. The New Brunswick Court of Appeal has twice held that Ministers or Members of the Legislative Assembly should not be permitted to represent a claimant before a tribunal because the tribunal's members owe their re-appointment to the provincial cabinet: *Chipman Wood Products (1973) Ltd. v. Thompson*, 1996 CanLII 12488 (NB CA), [1996] N.B.J. No. 395, 181 N.B.R. (2d) 386 (C.A.); *Fundy Linen Service Inc. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, [2009] N.B.J. No. 41, 2009 NBCA 13, 341 N.B.R. (2d) 286. Legal commentators have also recognized the power of the executive chair and the potential danger the chair's control over reappointments poses to the independence of individual adjudicators: Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials*, 7th ed. (Toronto: Emond Publishing, 2015), at p. 529; Mullan, at pp. 343-44.

[53] Third, the Divisional Court correctly concluded that the review process lacked the appropriate procedural safeguards. The [page385] court stated that peer review processes must be accompanied by "robust protections to safeguard adjudicative independence": at para. 66. This is consistent with the trilogy: see *Consolidated-Bathurst*, at p. 341 S.C.R. One of the factors the court considered in this regard was the lack of a written policy protecting the adjudicator's right to decline a review. However, the Divisional Court considered other relevant factors in drawing its conclusion. At para. 28, it stressed that the procedure manual made no reference to the

voluntariness of the peer review process and that there was an expectation that adjudicators subject their decisions to review. There was thus no evidence that the Tribunal had ever communicated to adjudicators that they were free to decline to participate in a review by the executive chair and considerable evidence tending to show that adjudicators were expected to participate in such a review.

[54] The Divisional Court's finding of a reasonable apprehension of a lack of independence was supported by the facts of this case. The Divisional Court found, based on the e-mails, that the adjudicator did make changes following the executive chair's comments: at para. 57. The Divisional Court further found that those changes were significant, as the executive chair believed they were important enough to justify further delay: at para. 61.

[55] In addition, the executive chair became involved without the adjudicator's consent. The Divisional Court appropriately gave weight to the fact that the executive chair imposed the review and the adjudicator was only informed of it after it took place. It considered this evidence cumulatively with the lack of a formal written policy to protect the adjudicator's right to decline to participate and the lack of evidence as to the nature of the changes stemming from the review.

[56] In summary, there is no basis for appellate interference with the Divisional Court's analysis of the issue of a reasonable apprehension of a lack of independence. In my view, that analysis is correct.

Disposition

[57] For the foregoing reasons, I would dismiss the appeal. On a new hearing before the LAT, Ms. Shuttleworth and Peel have agreed to rely only on evidence available at the time of the original hearing so no party would be in a better position.

[58] The parties have agreed on costs in the event Ms. Shuttleworth is successful. Those costs are fixed in the all-inclusive total sums of $2,500 against the LAT and SLASTO, and $6,250 against Peel.

Appeal dismissed.

Notes

1 All the tribunals formerly in SLASTO now belong to a larger cluster entitled "Tribunals Ontario": Adjudicative Tribunals and Clusters, O. Reg. 126/10.

End of Document

Tab 62

CanLII

R. v. Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631

Source:	Supreme Court of Canada
Date:	2016-07-08
File number:	36068
Other citations:	398 DLR (4th) 381 — AZ-51302609 — [2016] EXP 2173 — 29 CR (7th) 235 — 335 CCC (3d) 403 — 388 BCAC 111 — 130 WCB (2d) 596 — 358 CRR (2d) 97 — [2016] CarswellBC 1864 — EYB 2016-267713 — JE 2016-1212 — [2016] SCJ No 27 (QL) — [2016] ACS no 27
Citation:	R. v. Jordan, 2016 SCC 27 (CanLII), [2016] 1 SCR 631, <https://canlii.ca/t/gsds3>, retrieved on 2026-01-07
Most recent unfavourable mention	R v Tai Nguyen, 2025 ABCJ 211 (CanLII) [...] The Court also suggests there are discrete events which may arise during a trial, such as: a witness recanting or scheduling miscalculations, **despite best efforts to predict timing: R v Jordan** at 72-73. [...]

SUPREME COURT OF CANADA

CITATION: R. *v.* Jordan, 2016 SCC 27, [2016] 1 S. C.R. 631

APPEAL HEARD: October 7, 2015
JUDGMENT RENDERED: July 8, 2016
DOCKET: 36068

BETWEEN:

Barrett Richard Jordan
Appellant

and

Her Majesty The Queen
Respondent

- and -

Attorney General of Alberta,
British Columbia Civil Liberties Association and
Criminal Lawyers' Association (Ontario)
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 141)	Moldaver, Karakatsanis and Brown JJ. (Abella and Côté JJ. concurring)
REASONS CONCURRING IN THE RESULT: (paras. 142 to 303)	Cromwell J. (McLachlin C.J. and Wagner and Gasco n JJ. concurring)

R. *v.* Jordan, 2016 SCC 27, [2016] 1 S.C.R. 631

Barrett Richard Jordan *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Alberta,
British Columbia Civil Liberties Association and
Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Jordan

2016 SCC 27

File No.: 36068.

2015: October 7; 2016: July 8.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to be tried within reasonable time — Delay of more than four years between charges and end of trial — Whether accused's right to be tried within reasonable time under s. 11(b) of Canadian Charter of Rights and Freedoms infringed — New framework for applying s. 11(b).

J was charged in December 2008 for his role in a dial-a-dope operation. His trial ended in February 2013. J brought an application under s. 11(*b*) of the *Canadian Charter of Rights and Freedoms*, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the framework set out in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771. Ultimately, J was convicted. The Court of Appeal dismissed the appeal.

Held: The appeal should be allowed, the convictions set aside and a stay of proceedings entered.

Per Abella, Moldaver, Karakatsanis, Côté and Brown JJ.: The delay was unreasonable and J's s. 11(*b*) *Charter* right was infringed. The *Morin* framework for applying s. 11(*b*) has given rise to both doctrinal and practical problems, contributing to a culture of delay and complacency towards it. Doctrinally, the *Morin* framework is too unpredictable, too confusing, and too complex. It has itself become a burden on already over-burdened trial courts. From a practical perspective, the *Morin* framework's after-the-fact rationalization of delay does not encourage participants in the justice system to take preventative measures to address inefficient practices and resourcing problems.

A new framework is therefore required for applying s. 11(*b*). This framework is intended to focus the s. 11(*b*) analysis on the issues that matter and encourage all participants in the criminal justice

system to cooperate in achieving reasonably prompt justice, with a view to fulfilling s. 11(*b*)'s important objectives.

At the heart of this new framework is a presumptive ceiling beyond which delay — from the charge to the actual or anticipated end of trial — is presumed to be unreasonable, unless exceptional circumstances justify it. The presumptive ceiling is 18 months for cases tried in the provincial court, and 30 months for cases in the superior court (or cases tried in the provincial court after a preliminary inquiry). Delay attributable to or waived by the defence does not count towards the presumptive ceiling.

Once the presumptive ceiling is exceeded, the burden is on the Crown to rebut the presumption of unreasonableness on the basis of exceptional circumstances. If the Crown cannot do so, a stay will follow. Exceptional circumstances lie outside the Crown's control in that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) they cannot reasonably be remedied.

It is obviously impossible to identify in advance all circumstances that may qualify as exceptional for the purposes of adjudicating a s. 11(*b*) application. Ultimately, the determination of whether circumstances are exceptional will depend on the trial judge's good sense and experience. The list is not closed. However, in general, exceptional circumstances fall under two categories: discrete events and particularly complex cases.

If the exceptional circumstance relates to a discrete event (such as an illness or unexpected event at trial), the delay reasonably attributable to that event is subtracted from the total delay. If the exceptional circumstance arises from the case's complexity, the delay is reasonable and no further analysis is required.

An exceptional circumstance is the only basis upon which the Crown can discharge its burden to justify a delay that exceeds the ceiling. The seriousness or gravity of the offence cannot be relied on, nor can chronic institutional delay. Most significantly, the absence of prejudice can in no circumstances be used to justify delays after the presumptive ceiling is breached. Once so much time has elapsed, only circumstances that are genuinely outside the Crown's control and ability to remedy may furnish a sufficient excuse for the prolonged delay.

Below the presumptive ceiling, however, the burden is on the defence to show that the delay is unreasonable. To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, and (2) the case took markedly longer than it reasonably should have. Absent these two factors, the s. 11(*b*) application must fail. Stays beneath the presumptive ceiling should only be granted in clear cases.

As to the first factor, while the defence might not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.

Turning to the second factor, the defence must show that the time the case has taken markedly exceeds the reasonable time requirements of the case. These requirements derive from a variety of factors, including the complexity of the case and local considerations. Determining the time the case reasonably should have taken is not a matter of precise calculation, as has been the practice under the *Morin* framework.

For cases currently in the system, a contextual application of the new framework is required to avoid repeating the post-*Askov* situation, where tens of thousands of charges were stayed as a result of the abrupt change in the law. Therefore, for those cases, the new framework applies, subject to two qualifications. First, for cases in which the delay exceeds the ceiling, a transitional exceptional circumstance may arise where the charges were brought prior to the release of this decision. This transitional exceptional circumstance will apply when the Crown satisfies the court that the time the case has taken is justified based on the parties' reasonable reliance on the law as it previously existed. This requires a contextual assessment, sensitive to the manner in which the previous framework was applied, and the fact that the parties' behaviour cannot be judged strictly, against a standard of which they had no notice.

The second qualification applies to cases currently in the system in which the total delay (minus defence delay) falls below the ceiling. For these cases, the two criteria — defence initiative and whether the time the case has taken markedly exceeds what was reasonably required — must also be applied contextually, sensitive to the parties' reliance on the previous state of the law. Specifically, the defence need not demonstrate having taken initiative to expedite matters for the period of delay preceding this decision. Since defence initiative was not expressly required by the *Morin* framework, it would be unfair to require it for the period of time before the release of this decision. Further, if the delay was occasioned by an institutional delay that was, before this decision was released, reasonably acceptable in the relevant jurisdiction under the *Morin* framework, that institutional delay will be a component of the reasonable time requirements of the case for cases currently in the system.

In this case, the total delay between the charges and the end of trial was 49.5 months. As the trial judge found, four months of this delay were waived by J when he changed counsel shortly before the trial was set to begin, necessitating an adjournment. In addition, one and a half months of the delay were caused solely by J for the adjournment of the preliminary inquiry because his counsel was unavailable for closing submissions on the last day. This leaves a remaining delay of 44 months, an amount that vastly exceeds the presumptive ceiling of 30 months in the superior court. The Crown has failed to discharge its burden of demonstrating that the delay of 44 months (excluding defence delay) was reasonable. While the case against J may have been moderately complex given the amount of evidence and the number of co-accused, it was not so exceptionally complex that it would justify such a delay.

Nor does the transitional exceptional circumstance justify the delay in this case. Since J's charges were brought prior to the release of this decision, the Crown was operating without notice of the new framework within a jurisdiction with some systemic delay issues. But a total delay of 44 months (excluding defence delay), of which the vast majority was either Crown or institutional delay, in an ordinary dial-a-dope trafficking prosecution is simply unreasonable regardless of the framework under which the Crown was operating. Therefore, it cannot be said that the Crown's reliance on the previous state of the law was reasonable. While the Crown did make some efforts to bring the matter to trial more quickly, these efforts were too little and too late. And the systemic delay problems that existed at the time cannot justify the delay either. Much of the institutional delay could have been avoided had the

Crown proceeded on the basis of a more reasonable plan by more accurately estimating the amount of time needed to present its case. To the extent that the trial judge held that this delay was reasonable, he erred.

All the parties were operating within the culture of complacency towards delay that has pervaded the criminal justice system in recent years. Broader structural and procedural changes, in addition to day-to-day efforts, are required to maintain the public's confidence by delivering justice in a timely manner. Ultimately, all participants in the justice system must work in concert to achieve speedier trials. After all, everyone stands to benefit from these efforts. Timely trials are possible. More than that, they are constitutionally required.

Per McLachlin C.J. and Cromwell, Wagner and Gascon JJ.: This Court's jurisprudence for dealing with alleged breaches of s. 11(*b*) of the *Canadian Charter of Rights and Freedoms* over the last 30 years supplies a clear answer to this appeal. Striking out in the completely new direction adopted by the majority is unnecessary. A reasonable time for trial under s. 11(*b*) cannot and should not be defined by numerical ceilings, as the majority concludes.

The right to be tried in a reasonable time is multi-factored, fact-sensitive, and case-specific; its application to specific cases is unavoidably complex. The relevant factors and general approach set out in *R. v. Morin*, 1992 CanLII 89 (SCC), [1992] 1 S.C.R. 771, respond to these complexities. With modest adjustments to make the analysis more straightforward and with some additional clarification, a revised *Morin* framework will continue to ensure that the constitutional right of accused persons to be tried in a reasonable time is defined and applied in a way that appropriately balances the many relevant considerations. In order to do so, the *Morin* considerations should be regrouped under four main analytical steps.

First, the accused must establish that there is a basis for the s. 11(*b*) inquiry. The court should look to the overall period between the charge and the completion of the trial to determine whether its length merits further inquiry.

Second, the court must determine on an objective basis what would be a reasonable time for the disposition of a case like the one under review — that is, how long a case of this nature should reasonably take. The objective standard of reasonableness has two components: institutional delay and inherent time requirements of the case. Both of these periods of time are to be determined objectively. The acceptable period of institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed, and is determined in accordance with the administrative guidelines for institutional delay set out by this Court in *Morin*: eight to ten months before the provincial courts and six to eight months before the superior courts. These guidelines set some rough limits on the point at which inadequacy of state resources will be accepted as an excuse. The guidelines should not be understood as precluding allowance for any sudden and temporary strain on resources that causes a temporary congestion in the courts. The inherent time requirements of a case, on the other hand, represent the period of time that is reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court, and are to be determined on the basis of judicial experience, supplemented by submissions of counsel and evidence. In estimating a reasonable time period, the court should also take into account the liberty interests of the accused.

Third, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay. When the accused consents to a date for trial offered by the court or to an adjournment sought by the Crown, that consent, without more, does not amount to waiver. The onus is on the Crown to demonstrate that this period is waived, that is, that the accused's conduct reveals something more than mere acquiescence in the inevitable, and that it meets the high bar of being clear, unequivocal, and informed acceptance. Delay resulting from unreasonable actions solely attributable to the accused must also be subtracted from the period for which the state is responsible, such as last-minute changes in counsel or adjournments flowing from a lack of diligence. It is also necessary to subtract from the actual delay any periods that, although not fairly attributable to the defence, are nonetheless not fairly counted against the state, including unavoidable delays due to inclement weather or illness of a trial participant.

Fourth, the court must determine whether the actual period of time that fairly counts against the state exceeds the reasonable time by more than can be justified on any acceptable basis. Where the actual time exceeds what would have been reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can show that the delay was justified. Even substantial excess delay may be justified and therefore reasonable where, for example, there is a particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, it does not follow that in these conditions the excess period is invariably justified. The accused still may be able to demonstrate actual prejudice. Although actual prejudice need not be proved to find an infringement of s. 11(*b*), its presence would make unreasonable (in the particular circumstances of the case) a delay that might otherwise be objectively viewed as reasonable. As a result, justification may be found to be lacking.

Under this revised *Morin* framework, any delay in excess of the reasonable time requirements and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment and prompt trial of accused persons and, on the other, determination of cases on their merits. If there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an acceptable basis upon which exceeding the inherent and institutional requirements of a case can be justified.

This approach is a slight reorientation of the *Morin* framework because the focus is more explicitly on the period of delay which exceeds what would have been reasonable. But there is no change in principle.

Applying these four steps of the revised *Morin* framework in this case, J's constitutional right to be tried within a reasonable time was violated. The 49.5-month delay from the charges to the end of the scheduled trial date is sufficient to trigger an inquiry into whether the delay is unreasonable. There were 10.5 months of inherent delay and 18 months of institutional delay. These findings make it appropriate to conclude that the reasonable time requirements for a case of this nature were 28.5 months. The case in fact took 49.5 months. The difference is 21 months. Of that, 4 months are attributable to the defence. The rest — a period of 17 months — counts against the state. In other words, this case took

almost a year and a half longer than what would be a reasonable period to prosecute a case of this nature. This is not a close case. The time to the end of trial greatly exceeds what would be a reasonable time to prosecute a similar case. While there are societal interests in the trial on the merits of the serious drug crimes alleged against J, these cannot make reasonable the grossly excessive time that it took society to bring him to trial.

In contrast, the majority's new framework is not an appropriate approach to interpreting and applying the s. 11(*b*) right, for several reasons. First, the new approach reduces reasonableness to numerical ceilings. Reasonableness cannot be judicially defined with precision or captured by a number. As well, the majority's judicially created ceilings largely uncouple the right to be tried within a reasonable time from the bedrock constitutional requirement of reasonableness, which is the core of the right.

Moreover, this approach unjustifiably diminishes the right to be tried within a reasonable time. When the elapsed time is below the ceiling, an accused would have to show not only that the case took markedly longer than it reasonably should have but also that he or she took meaningful steps that demonstrate a sustained effort to expedite the proceedings. This requirement has no bearing on whether the delay was unreasonable.

The majority's approach also exceeds the proper role of the Court. Creating fixed or presumptive ceilings is a task better left to legislatures. The ceilings place new limits on the exercise of the s. 11(*b*) right to a trial within a reasonable time for reasons of administrative efficiency that have nothing to do with whether the delay in a given case was or was not excessive. This is inconsistent with the judicial role.

As well, the ceilings have no support in the record in this case. What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist and are more likely to feed such a culture.

Tab 63

the Attorney General and Minister of Justice (or a person authorized by him or her) to make decisions which infringe upon the administrative independence of the Alberta Provincial Court.

266 Section 13(1)(a) confers the power to "designate the place at which a judge shall have his residence". Counsel for the appellant rightly points out that it is reasonable (although not necessary) to vest responsibility for designating the residence of judges with the executive, because that decision concerns the proper allocation of court resources. However, my concern is that, as it is presently worded, s. 13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. The appellant tried to demonstrate that s. 13(1)(a), when properly interpreted, was so confined. However, the words of the provision are not qualified in the manner in which the appellant suggests. Section 13(1)(a) authorizes the Minister of Justice and the Attorney General to designate a judge's place of residence at any time, including his initial appointment or afterward. It therefore violates s. 11(*d*) of the *Charter*.

267 Section 13(1)(b) is also unconstitutional. It confers the power to "designate the day or days on which the Court shall hold sittings". This provision violates s. 11(*d*) because it flies in the face of explicit language in *Valente*, *supra*, at p. 709, which held that the administrative independence of the judiciary, encompasses, *inter alia*, "sittings of the court".

268 I do, however, wish to make one further comment in respect of this issue. The strongest argument made by the appellant in favour of the constitutionality of s. 13(1)(b) is that giving the executive control over sitting days enables the executive to give specific dates to defendants for their first appearance in criminal proceedings. The implication of this argument is that judicial control of the dates of court sittings would preclude the establishment of a system to

inform defendants when they must first appear. This argument, however, is incorrect, because it ignores the fact that the courts can and should coordinate their sitting days with the relevant government authorities.

C. *Manitoba: The Closing of the Provincial Court*

269 One of the issues raised at trial in the Manitoba case, and pursued on appeal, is whether the Government of Manitoba infringed the administrative independence of the Manitoba Provincial Court by effectively shutting down those courts on a number of days known as "Filmon Fridays". The trial judge made a specific finding of fact that control over sitting days had remained with the judiciary, largely because the Chief Judge had been consulted on the withdrawal of court staff, and because the government had assured the Chief Judge that had she decided that the Provincial Court would remain open on those days, adequate staff would have been provided.

270 However, a careful perusal of the record has led me to conclude that Scollin J. made an overriding and palpable error in making this factual finding. The record shows that the government effectively shut down the Manitoba Provincial Court by ordering the withdrawal of court staff several days before the Chief Judge announced the closing of the Manitoba Provincial Court. As well, the government also shut down the courts by rescheduling trials involving accused persons who had already been remanded by the court. These acts constituted a violation of the administrative independence of the Manitoba Provincial Court. Moreover, even if Scollin J. were correct in finding that the Chief Judge had retained control throughout, I would nevertheless find that there had been a violation of s. 11(*d*), because it was not within her constitutional authority unilaterally to shut down the Manitoba Provincial Court.

271 The chronology of events illustrates how it was the executive, not the judiciary, that shut down the Manitoba Provincial Court. Bill 22 was enacted on July 27, 1993. Section 4 of the Bill conferred the power on public sector employers, including the province of Manitoba, to require employees to take days of leave without pay. It appears that the government used s. 4 to order its employees to take 10 unpaid days of leave in 1993, and on these days, the Provincial Court of Manitoba, with the exception of one adult custody docket court and one youth custody docket court, was closed down.

272 However, the events which concern me here transpired in the spring of 1994. On March 1, 1994, letters were sent from the Manitoba Civil Service Commission to the Crown Attorneys of Manitoba Association, the Legal Aid Lawyers' Association, and the Manitoba Government Employees' Union. These letters gave these groups notice that they would be required to take 10 unpaid days of leave, pursuant to Bill 22. The dates for the unpaid days of leave were announced by the Assistant Deputy Minister, Marvin Bruce, on March 24, 1994:

> 2. Office closures will be on 7 Fridays in the summer months commencing July 8, 1994 to and including August 19, 1994 and 3 days during Christmas time, that is, December 28, 29 and 30th, 1994.

Almost two weeks passed before a memorandum was sent from Chief Judge Webster to all members of the Manitoba Provincial Court on April 6, 1994. Her memorandum states in full:

> Further to my memo of March 24th, the following 10 days have been designated as reduced work week days:
>
> July 8, 15, 22, 29; August 5, 12, 19; December 28, 29, 30.
>
> During the 10 days on which the government offices are closed ALL PROVINCIAL COURTS will be closed with the exception of the two custody courts:
>
> -One at 408 York
> -One at the Manitoba Youth Centre.
>
> (Signature)

The days on which the Provincial Court were closed was identical to the days on which the Manitoba government required its employees to take unpaid days of leave.

273 These facts clearly demonstrate that the decision to withdraw court staff was taken almost two weeks before the Chief Judge ordered the closure of the Manitoba Provincial Court. As well, the court was closed on the same days as the unpaid days of leave for court staff. Moreover, it is the uncontroverted evidence of Judge Linda Giesbrecht, which was presented at trial, that the Manitoba Provincial Court could not function "without the assistance and presence of Courts' staff including Court clerks, Crown Attorneys, Legal Aid lawyers and Sheriff's officers and other administrative personnel". The only conclusion I can draw is that the government, through its decision of March 24, 1994, effectively forced Chief Judge Webster to close the Manitoba Provincial Court by her decision of April 6, 1994.

274 I reject the argument that the government would have provided the necessary staff to keep the Manitoba Provincial Court open if the Chief Judge had so requested. Although it had apparently made this offer in conversations with the Chief Judge before the closure was announced, the letter from Marvin Bruce announcing the dates of closure makes no reference to the possibility of staff being required on days designated as unpaid days of leave. Moreover, this conclusion is strengthened by the fact that Crown attorneys rescheduled trials that were set to be held on "Filmon Fridays" before Chief Judge Webster announced the closure of the Manitoba Provincial Court. In particular, the record indicates that on March 22, 1994, a trial scheduled for Friday, July 8, 1994, was moved to September 28, 1994, on the motion of a Crown attorney.

275 Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Manitoba Provincial Court throughout, there would

nevertheless have been a violation of s. 11(*d*), because the Chief Judge would have exceeded her constitutional authority when she made that decision. As this Court held in *Valente*, control over the sittings of the court falls within the administrative independence of the judiciary. And as I indicated above, administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "*primus inter pares*": *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision.

276 In conclusion, the closure of the Manitoba Provincial Court on "Filmon Fridays" violated s. 11(*d*) of the *Charter*. Since s. 4 of Bill 22 authorized the withdrawal of court staff on "Filmon Fridays", and hence enabled the government to close the Manitoba Provincial Court on those days, that provision is therefore unconstitutional. It is worth emphasizing that s. 4 cannot be read down in such a precise way so as not to authorize conduct which violates the *Charter*. Although reading down the impugned legislation to the extent strictly necessary would be the normal solution in a case like this (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038), this is very difficult in relation to violations of s. 11(*d*) because, unlike other *Charter* provisions, it requires that judicial independence be secured by "objective conditions or guarantees" (*Valente*, *supra*, at p. 685). Objective guarantees are the means by which the reasonable perception of independence is secured and, hence, any legislative provision which does not contain those objective guarantees is unconstitutional. In effect, then, to read down the legislation to its proper scope would amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. On the other hand, if the Court were to strike down the legislation in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. In the circumstances, the best solution would be to read down the legislation so that it

Tab 64

CanLII

Ruffo v. Conseil de la magistrature, 1995 CanLII 49 (SCC), [1995] 4 SCR 267

Source:	Supreme Court of Canada
Date:	1995-12-14
File number:	23127
Other citations:	130 DLR (4th) 1 — 190 NR 1 — 59 ACWS (3d) 159 — 33 CRR (2d) 269 — 35 Admin LR (2d) 1 — JE 96-50 — [1995] SCJ No 100 (QL)
Citation:	Ruffo v. Conseil de la magistrature, 1995 CanLII 49 (SCC), [1995] 4 SCR 267, <https://canlii.ca/t/1frgm>, retrieved on 2026-01-07
Most recent unfavourable mention	Currie v. Alberta (Edmonton Remand Centre), 2006 ABQB 858 (CanLII) [...] **Despite the Conseil's reprimand Ruffo** continued her public activities and statements. [...]

Ruffo *v.* Conseil de la magistrature, [1995] 4 S.C.R. 267

The Honourable Andrée Ruffo *Appellant*

v.

The Conseil de la magistrature,
the Comité d'enquête,
the Honourable Huguette St-Louis,
the Honourable Roch St-Germain,
the Honourable André Bilodeau,
the Honourable Pierre Brassard
and Paul Laflamme *Respondents*

and

The Honourable Albert Gobeil *Mis en cause*

and

The Attorney General of Quebec *Mis en cause*

and

The Attorney General for Ontario *Intervener*

Indexed as: Ruffo *v.* Conseil de la magistrature

File No.: 23127.

1995: March 23; 1995: December 14.

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

on appeal from the court of appeal for quebec

Constitutional law -- Charter of Rights -- Fundamental justice -- Independent and impartial tribunal -- Institutional impartiality -- Conseil de la magistrature -- Comité d'enquête -- Chief Judge of Court of Québec also chairman of Conseil de la magistrature -- Whether Chief Judge's authority to file complaint against judge of Court of Québec with Conseil de la magistrature violates principles of judicial impartiality and independence guaranteed by s. 7 of Canadian Charter of Rights and Freedoms -- Whether Chief Judge has influence on members of Conseil de la magistrature and

Comité d'enquête that might compromise their impartiality -- Courts of Justice Act, R.S.Q., c. T-16, ss. 96, 263, 265.

Civil rights -- Impartial hearing by independent tribunal -- Institutional impartiality -- Conseil de la magistrature -- Comité d'enquête -- Chief Judge of Court of Québec also chairman of Conseil de la magistrature -- Whether Chief Judge's authority to file complaint against judge of Court of Québec with Conseil de la magistrature violates principles of judicial impartiality and independence guaranteed by s. 23 of Charter of Human Rights and Freedoms -- Courts of Justice Act, R.S.Q., c. T-16, ss. 96, 263, 265.

Administrative law -- Bias -- Reasonable apprehension of bias -- Conseil de la magistrature -- Comité d'enquête -- Chief Judge of Court of Québec also chairman of Conseil de la magistrature -- Chief Judge filing complaint against judge of Court of Québec with Conseil de la magistrature -- Vindictive tone in wording of complaint -- Proceedings against judge referred to in complaint conducted with diligence -- Whether specific circumstances of case might give rise to reasonable apprehension of bias.

Courts -- Judges -- Judicial ethics -- Whether Chief Judge of Court of Québec has authority to file complaint against judge of that court with Conseil de la magistrature -- Courts of Justice Act, R.S.Q., c. T-16, ss. 96, 263, 265.

Courts -- Judges -- Judicial ethics -- Duty to act in a reserved manner -- Vagueness in constitutional sense -- Judicial Code of Ethics, (1982) 114 G.O. II, 1253, s. 8.

The appellant is a judge of the Court of Québec, Youth Division, noted for her many public statements. In 1988, the director general of a social services centre filed a complaint against her with the Conseil de la magistrature (the "Conseil") alleging that she had committed a number of breaches of the *Judicial Code of Ethics.* The Conseil designated one of its members to examine the complaint. After hearing the appellant's and the complainant's versions of the events, he recommended that the Conseil hold an inquiry into the complaint. The Conseil set up a Comité d'enquête. At the conclusion

of its inquiry, this Comité concluded that the *Code of Ethics* had been breached and a majority of the members recommended that the Conseil reprimand the appellant. Despite the Conseil's reprimand, the appellant continued her public activities and statements. The Chief Judge of the Court of Québec then laid his own complaint against the appellant with the Conseil, in which he alleged that the appellant had acted in a manner inconsistent with the *Code of Ethics*, in particular by breaching her duty to act in a reserved manner and uphold the independence of the judiciary. The Conseil itself ruled on the admissibility of this complaint without hearing the parties and set up a Comité d'enquête made up of five members, including three Court of Québec judges. The Chief Judge did not participate in this session, at the conclusion of which the Conseil called the appellant to a subsequent meeting in order to hear her views on whether she should be suspended for the duration of the inquiry. At that meeting the Conseil denied the appellant's request for an adjournment in order to urge preliminary exceptions asking for the dismissal of the complaint and raising the lack of jurisdiction of the Conseil and the Comité over the case, concluding that it did not have to reconsider jurisdictional issues on which it had already ruled at its meeting on the admissibility of the complaint. The appellant then filed a motion in evocation with the Superior Court, in which she argued that the Conseil and Comité members did not have the necessary impartiality to make a fair and equitable decision concerning her. She further argued that ss. 263 and 265 of the *Courts of Justice Act* ("*CJA*"), if they are to be interpreted as authorizing the Chief Judge of the Court of Québec to lodge a complaint with the Conseil, violate the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* and s. 23 of the Quebec *Charter of Human Rights and Freedoms*. The Superior Court dismissed the motion. The Court of Appeal affirmed this judgment in a majority decision. Before this Court, the appellant made the same arguments. She also argued that s. 8 of the *Code of Ethics*, which provides that judges of the Court of Québec should act in a reserved manner, violates s. 2(*b*) of the Canadian *Charter* and is void on the ground of vagueness.

Held (Sopinka J. dissenting): The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ.: The right to be tried by an independent and impartial tribunal is an integral part of the principles of fundamental justice protected by s. 7 of the Canadian *Charter*, and the constitutional guarantee of an independent

and impartial tribunal includes the concept of institutional impartiality. The protection provided by s. 7 is essentially the same as is provided by s. 23 of the Quebec *Charter*. In the present case, ss. 263 and 265 *CJA* do not violate the rights guaranteed by ss. 7 and 23.

Sections 263 and 265 *CJA* authorize the Chief Judge of the Court of Québec to lay a complaint with the Conseil against a judge of his court. Under s. 248(*a*) *CJA* the Chief Judge is the chairman of the Conseil, and ss. 263 and 265 provide that any person may lodge a complaint with the Conseil, including a member of the Conseil, although a member cannot participate in the examination of the complaint in such a case. The key role given to the Chief Judge in ethical matters under s. 96(3) *CJA* is simply the expression of a reality that is consistent with general practice and gradual developments over time. The supervisory powers of chief judges over ethics are inherent in the exercise of their functions. In view of the Chief Judge's preferred position, the power to lay a complaint for a breach of the *Code of Ethics* is therefore an intrinsic part of his responsibility as Chief Judge.

As regards institutional impartiality, it cannot be concluded from an examination of the powers conferred on the Chief Judge of the Court of Québec by the *CJA* that they might compromise the impartiality of members of the Conseil or the Comité d'enquête in dealing with a complaint lodged by the Chief Judge. These powers are largely administrative in nature and as such are not liable to compromise the impartiality of Conseil or Comité members in dealing with a complaint.

The Conseil is responsible for receiving and examining complaints lodged by any person against a judge for failure to comply with the *Code of Ethics* and, if an inquiry is necessary, it establishes a Comité d'enquête for that purpose consisting of five persons chosen from among its members. Under the *Code of Ethics*, these members must perform this function in an impartial manner. When the inquiry is completed, the Comité submits its recommendations to the Conseil. Proceedings before the Comité are not similar to an adversarial trial. The complainant is not a prosecutor on whom the burden of proof lies. Rather, the Comité's inquiry is intended to be the expression of purely investigative functions and, in light of this, the actual conduct of the case is the responsibility not of the parties but of the Comité itself. The complaint is merely what sets the

process in motion. It does not initiate litigation, which means that, where the Conseil decides to conduct an inquiry after examining a complaint lodged by one of its members, the Comité does not thereby become both judge and party: its primary role is to search for the truth. The concept of "party" at a Comité hearing does not change the essence of the institution in question. Where the Chief Judge makes use of the disciplinary process by taking the initiative of laying a complaint, there is therefore no reason to think that the Conseil and its Comité do not, in the eyes of a reasonable and well-informed observer, have the impartiality required to carry out their duties. The Chief Judge's authority under the *CJA* is essentially administrative and his moral authority, which is naturally associated with his status and functions, is not restrictive and is part of the context in which all judges perform their duties. This moral authority does not in itself affect the capacity of a judge to decide to the best of his or her knowledge and belief and on the basis of the relevant factors. Finally, the existence of a friendly relationship between the Chief Judge and the members of the Conseil and the Comité d'enquête is not liable to compromise their impartiality. Such an assertion has no legal basis and challenges the dignity and professionalism of the judiciary and its Conseil.

With respect to case-by-case impartiality, a reasonable and well-informed observer would not apprehend in this case that the Conseil was unable to make an impartial decision. The main reason for the Chief Judge's complaint was a general concern with the threat that the appellant's overall conduct represented to judicial institutions and the public's respect for them. The fact that the Chief Judge chose to rely on documents from the same "media monitoring services" agency that had already provided documents to support the first complaint laid against the appellant does not indicate any sort of collusion. There is no reason that the same documents could not be used for separate purposes. The appellant's general conduct was not in issue in the context of the first complaint.

As regards the issue of the Conseil's precipitous conduct, its decision to depart from the usual procedure by not appointing an examiner at the initial stage of examining the complaint cannot be seen as evidence of bias. The purpose of appointing an examiner, which is not mandatory, is solely to assess whether there are grounds for an inquiry. In the present case, such an assessment was made possible not only by the extensive information provided by the Chief Judge in support of his complaint, but also by the fact that most of the information submitted to the Conseil was already in

the public domain. Moreover, in this case the duty to act fairly did not mean the appellant had to be given the opportunity to express her views during the initial examination of the complaint, despite the possible consequences of the decision to hold an inquiry concerning her. The appointment of an examiner is the first step in a procedure that can itself be described as preliminary, since after the formal inquiry the Conseil and the Comité can of their own initiative only reprimand the judge concerned or recommend that removal proceedings be initiated. Finally, the hearing on the suspension of the appellant did not indicate any precipitous conduct that might give rise to a reasonable apprehension of bias on the part of the Conseil members. The Conseil was already aware of certain facts that could *prima facie* have justified a suspension during the proceedings, and the nature of the complaint put directly in issue the appellant's ability to act with the confidence of the parties and to continue to carry out her duties in a manner consistent with public order. By inviting the appellant within the 30-day period provided for by the *CJA* for beginning the inquiry, the Conseil gave itself enough time to make an informed decision on suspension before the inquiry began.

The complaint's tone and language must be assessed on the basis of the specific nature of the complaint, which focuses on an overall situation involving both a judge's conduct and the public's possible perception thereof. Because of the general nature of the duty to act in a reserved manner, it was necessary for the complainant to specify and explain the relevant aspects that he felt might impair the appellant's ability to perform her duties. Although the complaint resembles an indictment because of its categorical tone, the complainant cannot be criticized for setting out facts and conduct that were the matter to be assessed by the Comité d'enquête. The complaint could have been worded more neutrally, but it cannot be said that it made accusations based on supposed intentions. The Chief Judge's concerns related not to illegitimate intentions but to activities and the public's perception of them. There is accordingly no reason to fear that Comité members would be influenced by the language of the complaint or the particular status of its author. The Chief Judge's position carries with it no, or very little, direct authority and his moral authority would be harmful only if it led the decision maker to adopt opinions it did not share. The Comité is for the most part made up of judicial professionals who are bound by an oath and whose functions essentially require them to be able to decide dispassionately between positions that are opposed and fervently defended.

Since the Comité d'enquête has not yet had an opportunity to hear the merits of the case, it appears premature for this Court to rule on the constitutionality of s. 8 of the *Code of Ethics*, which establishes the duty of judges appointed under the *CJA* to act in a reserved manner, under s. 2(*b*) of the Canadian *Charter* in a context in which no evidence has been adduced and no light can be shed on the issue by lower court judgments. There is no reason, however, to find that the duty to act in a reserved manner is void on the ground of vagueness. More precision cannot be required of ethical rules than their subject matter allows. The general nature of the duty to act in a reserved manner as it is worded does not, as far as substance is concerned, mean that an area of risk is not sufficiently delineated or that there is no adequate basis for legal debate.

Per Sopinka J. (dissenting): For the reasons given by Gonthier J., ss. 263 and 265 *CJA* do not violate the principles of judicial impartiality and independence guaranteed by s. 7 of the Canadian *Charter*. It is also premature for the Court to rule at this stage on the constitutionality of s. 8 of the *Code of Ethics*. Although this section is not void for vagueness, it is open to very broad interpretation. Before determining whether it imposes an unreasonable limitation on freedom of expression, it would be preferable to know how it will be interpreted by the Conseil or the Comité d'enquête.

Under the *CJA*, the Conseil receives and deals with complaints made against judges. Although the legislative framework does not violate the principle of judicial independence and in this sense has no inherent bias, the situation is one which approaches the threshold of tolerance. An appearance of bias may result in some circumstances even though the process followed is consistent with the statutory rules. The Chief Judge's power to file a complaint places the Conseil and the Comité d'enquête close to the edge of the fine line that separates impartiality and partiality.

When the Chief Judge's complaint in this case is analysed in a general context, a number of factors, including the tone and language of the complaint, when taken together raise a reasonable apprehension of bias. The chairman of the Conseil for the second complaint was the dissenting member of the Comité d'enquête formed to examine the first complaint, who had recommended that removal proceedings be initiated. A significant part of the Chief Judge's complaint referred to the

appellant's disregard of this Comité's decision recommending that she be reprimanded: all the members of the Comité d'enquête set up to hear the second complaint were members of the Conseil which approved this decision. A majority of this new Comité was also made up of judges of the Court of Québec. Although the Comité d'enquête agreed to appoint counsel to handle the presentation of evidence against the appellant, this placed the parties in a rather unusual situation where the opponent of the person defending herself against the complaint was the tribunal's counsel. Moreover, the proceedings which followed the filing of the second complaint indicate unwarranted haste. Whether or not the stage of preliminary examination of a complaint is mandatory, the Conseil's decision to bypass it gives the impression that it dealt with the Chief Judge's complaint as evidence and not merely as an allegation. At the hearing to determine whether the appellant should be suspended during the inquiry, the Conseil refused to hear her on such a serious matter as the jurisdiction of the Conseil and Comité on the ground that it had already ruled on this matter *ex parte* and *proprio motu* at the meeting of the Conseil at which it had ruled on the admissibility of the complaint. The 30-day period set out in the *CJA* for beginning the inquiry cannot explain this precipitous conduct, since this period relates simply to the calling of the parties and not the presentation of evidence. Finally, the Chief Judge's complaint is more in the nature of a judgment. It contains both opinions and conclusions expressed with considerable vehemence. The Comité's proceedings are not primarily in the nature of an inquiry, since it may make an official reprimand and may even recommend that removal proceedings be instituted. In short, although the members of the Comité harboured no prejudices against the appellant, when all the circumstances surrounding this matter are considered a well-informed person would have a reasonable apprehension of bias.

Cases Cited

By Gonthier J.

Referred to: *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; *R. v. Beauregard*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56; *Pearlman v. Manitoba Law Society Judicial Committee*, 1991 CanLII 26 (SCC), [1991] 2 S.C.R. 869; *R. v. Généreux*, 1992 CanLII 117 (SCC), [1992] 1 S.C.R. 259; *Valente v. The Queen*, 1985 CanLII 25

(SCC), [1985] 2 S.C.R. 673; *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *R. v. Bain*, 1992 CanLII 111 (SCC), [1992] 1 S.C.R. 91; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623; *Idziak v. Canada (Minister of Justice)*, 1992 CanLII 51 (SCC), [1992] 3 S.C.R. 631; *Irvine v. Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81 (SCC), [1987] 1 S.C.R. 181; Eur. Court H. R., *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A No. 43; Eur. Court H. R., *Albert and Le Compte* judgment of 10 February 1983, Series A No. 58; *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282; *Mackay v. Manitoba*, 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357; *Danson v. Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 S.C.R. 1086; *Hy and Zel's Inc. v. Ontario (Attorney General)*, 1993 CanLII 30 (SCC), [1993] 3 S.C.R. 675; *Ruffo v. Conseil de la magistrature*, [1989] R.J.Q. 2432 (Sup. Ct.), aff'd (1992), 1992 CanLII 3258 (QC CA), 98 D.L.R. (4th) 202 (Que. C.A.); *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031.

By Sopinka J. (dissenting)

MacDonald Estate v. Martin, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369.

Statutes and Regulations Cited

An Act to amend the Courts of Justice Act, S.Q. 1945, c. 18, s. 6.

An Act to amend the Courts of Justice Act and other legislation to establish the Court of Québec, S.Q. 1988, c. 21, s. 30.

An Act to amend the Courts of Justice Act and the Code of Civil Procedure and to establish the Conseil de la magistrature, S.Q. 1978, c. 19, s. 6.

An Act to amend the Revised Statutes, 1909, respecting district magistrates, S.Q. 1922, c. 64, s. 1.

Canadian Charter of Rights and Freedoms, preamble, ss. 1, 2(*b*), 7, 11(*d*).

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 23 [am. 1982, c. 17, s. 42; am. 1993, c. 30, s. 17].

Tab 65

CanLII

Canadian Judicial Council v. Girouard, 2019 FCA 148 (CanLII), [2019] 3 FCR 503

Source:	Federal Court of Appeal
Date:	2019-05-16
File number:	A-269-18
Other citation:	52 Admin LR (6th) 24
Citation:	Canadian Judicial Council v. Girouard, 2019 FCA 148 (CanLII), [2019] 3 FCR 503, <https://canlii.ca/t/j131p>, retrieved on 2026-01-19
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

A-269-18

2019 FCA 148

The Canadian Judicial Council (*appellant*)

v.

The Honourable Michel Girouard, the Attorney General of Canada, the Attorney General of Quebec (*respondents*)

and

The Canadian Superior Court Judges Association, the Honourable Patrick Smith (*interveners*)

INDEXED AS: CANADIAN JUDICIAL COUNCIL V. GIROUARD

Federal Court of Appeal, Pelletier, de Montigny and Gleason JJ.A.—Ottawa, May 3 and 16, 2019.

Judges and Courts — Appeal from Federal Court decision dismissing Canadian Judicial Council's (Council or appellant) motions to strike applications for judicial review filed by respondent Honourable Justice Michel Girouard (Justice Girouard) — Underlying applications covering various decisions made by Council during inquiries conducted under Judges Act (Act), ss. 63 et seq. regarding Justice Girouard's conduct, particularly Council's report recommending removal thereof to Minister of Justice (Minister) — Council essentially arguing Council's reports, recommendations, decisions made in course of inquiry by inquiry committee not subject to judicial review under Federal Courts Act (FCA), s. 18.1, Council simply not "federal board, commission or other tribunal" within meaning of FCA, s. 2 — Justice Girouard appointed to Superior Court of Quebec in 2010 — In 2012, complaint filed with Council against Justice Girouard — Review Committee established to consider complaint, then, inquiry committee established for considering complaint — First inquiry committee rejecting all allegations against Justice Girouard — Then, joint complaint filed with Council regarding Justice Girouard's conduct in first disciplinary proceeding — Complaint triggering mandatory inquiry, leading to establishment of new inquiry committee — Second inquiry committee concluding Justice Girouard incapacitated or disabled from due execution of office of judge by reason of misconduct during first disciplinary process, Council adopting findings of second inquiry committee — Justice Girouard applying for judicial review of recommendation made by Council — Council filing motion to strike application as well as number of other applications filed in course of two inquiries — Federal Court dismissing Council's motions to strike — Federal Court concluding Council, its inquiry committees federal boards, commissions or other tribunals under FCA, s. 2 — Federal Court also rejecting idea Act, ss. 63(4)(a), (b) grant Council superior court status, Council's claims its reports, recommendations not reviewable decisions under FCA, s. 18 — Whether Council, its inquiry committees federal boards, commissions or other tribunals subject to Federal Court's jurisdiction with respect to judicial review, whether Council's reports, recommendations reviewable decisions — Two-step test to determine whether body "federal board, commission or other tribunal" within meaning of FCA, s. 2 applied — Federal Court correct to conclude only source of powers of Council, its committees Act, at ss. 60(2)(c), (d), 63(1), (4) — Had Parliament not adopted Act, Council would simply not exist — Council's investigative power strictly statutory — Federal Court correct in concluding power exercised by Council "over the conduct of judges and certain public servants holding office during good behaviour is investigative in nature", "power of inquiry" — Appellant's argument its members exercise judicial functions rejected — Mere fact procedural safeguards required in specific process does not mean process necessarily results from exercise by decision maker of judicial power immune from review under FCA, s. 18.1 — With respect to exception relating to Constitution Act, 1867, s. 96, Federal Court correct in concluding judges sit on Council in their capacity as chief justices, role "administrative in nature", rather than as judges drawing their powers from Constitution Act, 1867, s. 96 — As for Act, s. 63(4), deeming provision, Federal Court coming to well-founded conclusion appellant's interpretation of provision could not be accepted — In case at hand, every indication Act provides Council, its committees "deemed" superior court strictly for purposes of inquiry or investigation — Regarding independence, efficiency, rule of law, since Council administrative decision maker exercising powers conferred on Council by ordinary statute, not surprising Federal Court can review legality of Council's decisions on judicial review — In short, clear Council, its inquiry committees included in definition of "federal board, commission or other tribunal" in FCA, s. 2 — Neither Council nor its committees among persons or bodies expressly excluded from scope of definition — With respect to whether Council's reports, recommendations reviewable decisions, appellant's argument involving general principle that application for judicial review cannot be brought where conduct attacked fails to affect legal rights, impose legal obligations or cause prejudicial effects — Federal Court holding finding "a judge has become incapacitated or disabled from the due execution of his or her office amounting to 'capital punishment' for that judge's career" — Insofar as Minister of Justice cannot, under Act, ask Parliament to remove judge without inquiry by Council, its inquiry committee, Federal Court determining report, its conclusions have major impact on rights, interests of judge under investigation — Full agreement herein with Federal Court's findings in this regard — Appeal dismissed.

This was an appeal from a Federal Court decision dismissing the Canadian Judicial Council's (the Council or the appellant) motions to strike the applications for judicial review filed by the respondent, the Honourable Justice Michel Girouard (Justice Girouard). The underlying applications covered various decisions made by the Council during inquiries conducted under sections 63 et seq. of the *Judges Act* (the Act), regarding Justice Girouard's conduct, particularly the Council's report recommending his removal to the Minister of Justice (the Minister). The Council essentially argued that its reports and recommendations, as well as decisions made in the course of an inquiry by an inquiry committee, are not subject to judicial review under section 18.1 of the *Federal Courts Act* (FCA). It

claimed that it simply is not a “federal board, commission or other tribunal” within the meaning of section 2 of the FCA.

Justice Girouard was appointed to the Superior Court of Quebec in September 2010. In November 2012, a complaint was filed with the Council after a video was sent to the Chief Justice of the Superior Court at the time. According to the complaint, the video showed a transaction involving an illicit substance between Justice Girouard, then a lawyer, and one of his clients at the time. In 2013, the Council established a review committee to consider the complaint and have a preliminary inquiry conducted by outside counsel. The review committee concluded that, if the allegations were substantiated, they would be serious enough to warrant the removal of Justice Girouard. In 2014, the Council constituted, in accordance with subsection 63(3) of the Act, an inquiry committee responsible for considering the complaint received. The first inquiry committee said it was unable to conclude that the exchange captured on video involved an illicit substance and therefore rejected all of the allegations against Justice Girouard. The Council subsequently accepted the recommendations of the first inquiry committee in that regard. In 2016, the Minister and the Minister of Justice of Quebec filed a joint complaint to the Council regarding Justice Girouard’s conduct in the first disciplinary proceeding. This complaint triggered the mandatory inquiry under subsection 63(1) of the Act. It also consequently led to the establishment of a new inquiry committee. The second inquiry committee submitted its report, which concluded that Justice Girouard had become incapacitated or disabled from the due execution of the office of judge by reason of the misconduct of which he had been found guilty during the inquiry of the first inquiry committee. Then, a majority of the Council judges adopted the findings of the second inquiry committee and concluded that Justice Girouard had become incapacitated or disabled from the due execution of the office of judge. Justice Girouard applied for judicial review of the recommendation made by the majority of the Council. This proceeding was in addition to a number of other applications filed over the course of the two inquiries against various decisions made by inquiry committees and the decision of the two ministers of Justice to file a complaint with the Council. In response, the Council filed a motion to strike the applications for judicial review in question.

The Federal Court dismissed the Council’s motions to strike. It found that the Council and its inquiry committee were federal boards, commissions or other tribunals under section 2 of the FCA. According to the Court, the Council’s investigative powers do not derive from the Constitution, but from the Act. In addition, these powers belong to the Council as an institution, not to the chief justices individually because of their status. The Federal Court also rejected the idea that paragraphs 63(4)(a) and (b) of the Act grant the Council superior court status. Finally, the Court rejected the Council’s claims that the Council’s reports and recommendations are not reviewable decisions under section 18 of the FCA.

The issues in the appeal were whether the Council and its inquiry committees are federal boards, commissions or other tribunals subject to the Federal Court’s jurisdiction with respect to judicial review and whether the Council’s reports and recommendations are reviewable decisions.

Held, the appeal should be dismissed.

To determine whether a body is a “federal board, commission or other tribunal” within the meaning of section 2 of the FCA, the Court developed a two-step test. According to *Anisman v. Canada (Border Services Agency)*, the Court must determine “what jurisdiction or power” the body seeks to exercise and then “what is the source or the origin” of that jurisdiction or power. The Federal Court was quite correct to conclude that the only source of the powers of the Council and its committees is the Act, notably paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4). Had the Act not been adopted by Parliament, the Council would simply not exist. In summary, the Council’s investigative power is strictly statutory. This means that if the Act were to be repealed, the Council and, certainly, the chief justices would not be empowered to conduct inquiries or investigations, summon witnesses and compel them to give evidence during these investigations or inquiries.

As to the nature of the powers, the Federal Court was right to conclude that the power exercised by the Council “over the conduct of judges and certain public servants holding office during good behaviour is investigative in nature”, that it is a “power of inquiry”. Paragraph 60(2)(c) of the Act, from which the Council derives its jurisdiction in this case, very clearly grants it the power to “make the inquiries and the investigation of complaints or allegations described in section 63 [of the Act]”. The arguments put forth by the appellant did not show that the Federal Court was mistaken in concluding, as it did, that the role given to the Council by the Act is dissimilar to the role that a judge can play in a

court of law. It follows that the appellant's position that its members' powers are "judicial in nature" and that, as such, the exercise of such powers is not subject to judicial review must be rejected.

The appellant's argument that its members exercise judicial functions was rejected. The mere fact that procedural safeguards are required in a specific process does not mean that the process necessarily results from the exercise by the decision maker of a judicial power immune from a review under section 18.1 of the FCA.

With respect to the exception relating to section 96 of the *Constitution Act, 1867*, the Federal Court was correct in concluding that judges sit on the Council in their capacity as chief justices, a role that is "administrative in nature", rather than as judges drawing their powers from section 96 of the *Constitution Act, 1867*. The Council's jurisdiction and powers concerning judicial ethics are conferred on it by the Act.

As for subsection 63(4) of the Act, the deeming provision, the Federal Court came to the well-founded conclusion that the appellant's interpretation of this provision could not be accepted. In the case at hand, there was every indication that it is strictly for the purposes of inquiry or investigation that the Act provides that the Council and its committees are "deemed" to be a superior court. This section must not be interpreted in a manner that transforms the Council into a superior court or grants it all the attributes of a superior court.

Regarding independence, efficiency and the rule of law, since the Council is an administrative decision maker exercising powers conferred on it by an ordinary statute, it is not surprising that the legality of its decisions can be reviewed by the Federal Court on judicial review. The issue of whether a superior court judge should be removed is, and will remain, within the jurisdiction of the Council and, ultimately, of the Senate and the House of Commons. The sole task of the Federal Court, on judicial review, will be to verify the legality of the decisions made by the Council and respect for procedural fairness. In doing so, it has to accord the Council all the deference that its status as a specialized decision maker requires.

In short, it is clear that the Council and its inquiry committees are included in the definition of "federal board, commission or other tribunal" in section 2 of the FCA. They are the creation of an Act of Parliament, that is, the *Judges Act*, and neither the Council nor its committees is among the persons or bodies expressly excluded from the scope of the definition. While some members of the Council are judges appointed under section 96 of the *Constitution Act, 1867*, they do not exercise a judicial function when they sit on the Council; they therefore do not fall within the express exclusion set out in section 2 of the FCA.

With respect to whether the Council's reports and recommendations are reviewable decisions, the appellant's argument involved the general principle that an application for judicial review cannot be brought where the conduct attacked fails to affect legal rights, impose legal obligations or cause prejudicial effects. The Federal Court held that a finding that "a judge has become incapacitated or disabled from the due execution of his or her office amounts to 'capital punishment' for that judge's career". Insofar as the Minister of Justice cannot, under the Act, ask Parliament to remove a judge without an inquiry by the Council and its inquiry committee, the Federal Court determined that the report and its conclusions have a major impact on the rights and interests of the judge under investigation. The mere fact that the decision takes the form of a recommendation is not determinative, especially since the case law clearly acknowledges that a matter other than a decision or order may be reviewed under section 18.1 of the FCA. There was full agreement herein with the Federal Court's findings in this regard.

STATUTES AND REGULATIONS CITED

Canada Labour Code, R.S.C., 1985, c. L-2, s. 58(3).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 11(*d*).

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, ss. 8, 10, 11.

Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19, s. 8(2).

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 96, 99(1), 101.

Courts of Justice Act, C.Q.L.R., c. T-16.

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 2 “federal board, commission or other tribunal”, 3, 4, 18, 18.1, 28.

Federal Courts Rules, SOR/98-106, r. 351.

Indian Act, R.S.C. 1970, c. I-6, s. 9(4).

Inquiries Act, R.S.C., 1985, c. I-11.

Interpretation Act, R.S.C., 1985, c. I-21, s. 35(1).

Judges Act, R.S.C. 1970, c. J-1, s. 32(4) (enacted by S.C. 1970-71-72, c. 55, s. 11).

Judges Act, R.S.C., 1985, c. J-1, ss. 59(1)(b),(d)(4), 60(2)(c),(d), 63, 64, 65.

National Defence Act, R.S.C., 1985, c. N-5, s. 236(1).

Parliament of Canada Act, R.S.C., 1985, c. P-1.

Public Servants Disclosure Protection Act, S.C. 2005, c. 46, s. 20.7(1).

Specific Claims Tribunal Act, S.C. 2008, c. 22, s. 6(2).

CASES CITED

NOT FOLLOWED:

R. v. Campbell (1994), 1994 CanLII 5258 (AB KB), 160 A.R. 81, [1995] 2 W.W.R. 469 (Q.B.) revd. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, (1997), 150 D.L.R. (4th) 577.

APPLIED:

Anisman v. Canada (Border Services Agency), 2010 FCA 52, 400 N.R. 137; *Sero v. Canada*, 2004 FCA 6, [2004] 2 F.C.R. 613, leave to appeal to S.C.C. refused, [2004] 2 S.C.R. vii.

DISTINGUISHED:

Minister of Indian Affairs and Northern Development v. Ranville et al., 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518.

CONSIDERED:

Brace v. Canada, 2014 FCA 92, 68 C.P.C. (7th) 81; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765; *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, (1995), 130 D.L.R. (4th) 1; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, 1997 CanLII 6346 (FCA), [1997] 2 F.C. 527 (C.A.); *Gagliano v. Gomery*, 2011 FCA 217, 336 D.L.R. (4th) 216; *Douglas v. Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911; *Alex Couture Inc. c. Canada (Procureur général)*, 1991 CanLII 3120 (QC CA), [1991] R.J.Q. 2534 (C.A.); *R. v. Verrette*, 1978 CanLII 208 (SCC), [1978] 2 S.C.R. 838, (1978), 85 D.L.R. (3d) 1; *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796, (1989), 61 D.L.R. (4th) 688;

Canada (Attorney General) v. Slansky, 2013 FCA 199, [2015] 1 F.C.R. 81, leave to appeal to S.C.C. refused, [2014] 1 S.C.R. xii; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

REFERRED TO:

Wewaykum Indian Band v. Canada, 2003 SCC 45, [2003] 2 S.C.R. 259; *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270; *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311, [2017] 3 F.C.R. 298, affd 2018 SCC 40, [2018] 2 S.C.R. 765; *Spike Marks Inc. v. Canada (Attorney General)*, 2008 FCA 406, 386 N.R. 194, leave to appeal to S.C.C. refused, [2009] 1 S.C.R. xiii; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, (1997), 151 D.L.R. (4th) 119; *Québec (Conseil de la magistrature) c. Québec (Commission d'accès à l'information)*, 2000 CanLII 11305 (QC CA), [2000] R.J.Q. 638 (C.A.); *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193; *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, 1997 CanLII 6327 (FCA), [1997] 2 F.C. 36, (1997), 142 D.L.R. (4th) 237 (C.A.); *Murphy v. Welsh; Stoddard v. Watson*, 1993 CanLII 59 (SCC), [1993] 2 S.C.R. 1069, (1993), 106 D.L.R. (4th) 404; *Re Diamond and The Ontario Municipal Board*, 1962 CanLII 132 (ON CA), [1962] O.R. 328, [1962] O.J. No. 554 (QL) (C.A.); *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3 F.C. 91, affd 2003 FCA 55, [2003] 3 F.C. 3, leave to appeal to S.C.C. refused, [2003] 2 S.C.R. xi; *Gratton v. Canadian Judicial Council*, 1994 CanLII 3495 (FC), [1994] 2 F.C. 769 (T.D.); *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, [2007] 4 F.C.R. 714, leave to appeal to the S.C.C. refused, [2007] 3 S.C.R. x; *Cosgrove v. Canada (Attorney General)*, 2008 FC 941, 331 F.T.R. 271; *Akladyous v. Canadian Judicial Council*, 2008 FC 50, 325 F.T.R. 240; *Democracy Watch v. Canada (Attorney General)*, 2018 FCA 194, 428 D.L.R. (4th) 739, leave to appeal to the S.C.C. refused, May 2, 2019; *Sganos v. Canada (Attorney General)*, 2018 FCA 84; *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605.

AUTHORS CITED

Brown, Donald J. M. and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf ed., Toronto: Thomson Reuters Canada Limited, 2018.

Canadian Judicial Council. *Review of the Judicial Conduct Process of the Canadian Judicial Council: Background Paper*, Ottawa: Canadian Judicial Council, March 2014.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 4th ed. Toronto: Carswell, 2011.

Parliament. House of Commons. Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, 28th Parl., 3rd Sess. (June 16, 1971).

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ontario: LexisNexis, 2014.

APPEAL from a Federal Court decision (2018 FC 865, [2019] 1 F.C.R. 404) dismissing the Canadian Judicial Council's motions to strike the applications for judicial review filed by the Honourable Justice Michel Girouard, which covered various decisions made by the Council during inquiries conducted under sections 63 et seq. of the *Judges Act* regarding Justice Girouard's conduct. Appeal dismissed.

APPEARANCES

Ronald F. Caza, *Alyssa Tomkins* and *Gabriel Poliquin* for appellant.

Gérald R. Tremblay, *Louis Masson, Ad. E.*, and *Guillaume Renauld* for respondent Honourable Justice Michel Girouard.

Claude Joyal, *Pascale-Catherine Guay* and *Lindy Rouillard-Labbé* for respondent Attorney General of Canada.

No one appearing for respondent Attorney General of Quebec.

Michel Décary for intervener Canadian Superior Court Judges Association.

Andrea Gonsalves for intervener Honourable Patrick Smith.

SOLICITORS OF RECORD

Caza Saikaley LLP, Ottawa, for appellant.

McCarthy Tétrault LLP, Montréal, and *Joli-Cœur Lacasse Avocats*, Québec, for respondent Honourable Justice Michel Girouard.

Deputy Attorney General of Canada for respondent Attorney General of Canada.

Deputy Attorney General of Quebec for respondent Attorney General of Quebec.

BCF, Montréal, for intervener Canadian Superior Court Judges Association.

Stockwoods LLP, Toronto, for intervener Honourable Patrick Smith.

The following is the English version of the reasons for judgment rendered by

THE COURT:

I. OVERVIEW

[1] The Canadian Judicial Council (the Council or the appellant) is appealing the Federal Court judgment (the Honourable Justice Noël), rendered on August 29, 2018, [*Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404] (the Decision), dismissing its motions to strike the applications for judicial review filed by the Honourable Justice Michel Girouard (Justice Girouard). The underlying applications cover various decisions made by the Council during inquiries conducted under sections 63 et seq. of the *Judges Act*, R.S.C., 1985, c. J-1 (the Act), regarding Justice Girouard's conduct, particularly the Council's report recommending his removal to the Minister of Justice (the Minister).

[2] The Council essentially argues that its reports and recommendations, as well as decisions made in the course of an inquiry by an inquiry committee, are not subject to judicial review under section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (FCA). It claims that it simply is not a "federal board, commission or other tribunal" within the meaning of section 2 of that statute.

[3] For the reasons set out below, the appeal will be dismissed, without costs.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *General legal framework*

[4] Subsection 99(1) of the *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5] (CA 1867) provides that the judges of the superior courts shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons. In 1971, Parliament created the Council through amendments to the Act and conferred on it the power to investigate complaints against federally appointed judges.

[5] Section 63 of the Act provides two circumstances in which the Council can investigate the conduct of a federally appointed judge: at the request of the Minister of Justice or the attorney general of a province (subsection 63(1) of the Act), or following receipt of any complaint or allegation made in respect of a judge of a superior court (subsection 63(2) of the Act). The procedure differs somewhat depending on the subsection under which the process is initiated.

[6] In both cases, an inquiry committee, composed of an uneven number of members, can be called to look into the conduct of a given judge. If the committee includes members of the bar of a province appointed by the Minister, the majority of the members of the committee must be Council members (see subsection 63(3) of the Act and section 3 of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203 (the By-laws)). The powers of an inquiry committee are set out in subsection 63(4) of the Act. The inquiry committee hears the evidence concerning the complaints or allegations and, under section 8 of the By-laws, submits to the Council a report in which it sets out the findings of the inquiry. This report contains findings of fact and conclusions of the committee as to whether or not a recommendation should be made for the judge's removal.

[7] The Council then examines the allegations and makes a decision on their merit. In order to perform this task, sections 10 and 11 of the By-laws provide that the Council shall be made up of at least 17 members of the Council who did not participate in the inquiry process and who are not of the same court as that of the judge who is the subject of the inquiry or investigation. It is then up to the Committee to determine whether the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge. In that respect, it should be noted that the Chairperson of the Council, that is, the Chief Justice of Canada, does not participate in deliberations in matters involving the conduct of judges.

[8] Section 65 of the Act states that, after an inquiry or investigation has been completed, the Council shall report its conclusions and submit the record of the inquiry or investigation to the Minister. The Council's inquiry report contains a recommendation as to whether or not the judge should be removed from office.

B. *Factual background*

[9] Justice Girouard was appointed to the Superior Court of Quebec on September 30, 2010.

[10] On November 30, 2012, a complaint was filed with the Council after a video was sent by the Director of Criminal and Penal Prosecutions to the Honourable François Rolland, then Chief Justice of the Superior Court. According to the complaint, the video showed a transaction involving an illicit substance between the respondent Girouard, then a lawyer, and one of his clients at the time.

[11] In October 2013, the Council established a review committee to consider the complaint and have a preliminary inquiry conducted by outside counsel. The review committee concluded that, if the allegations were substantiated, they would be serious enough to warrant the removal of the judge.

[12] In February 2014, the Council constituted, in accordance with subsection 63(3) of the Act, an inquiry committee responsible for considering the complaint received. The first inquiry committee said it was unable to conclude that the exchange captured on video involved an illicit substance despite the fact that a majority of its members questioned the reliability and credibility of Justice Girouard's testimony. The committee therefore rejected all of the allegations against him. The Council subsequently accepted the recommendations of the first inquiry committee in that regard.

[13] In June 2016, the Minister and the Minister of Justice of Quebec filed a joint complaint to the Council regarding Justice Girouard's conduct in the first disciplinary proceeding. This complaint triggered the mandatory inquiry under subsection 63(1) of the Act. It also consequently led to the establishment of a new inquiry committee, as stipulated in subsection 63(3) of the Act.

[14] On November 6, 2017, the second inquiry committee submitted its report. It concluded that Justice Girouard had become incapacitated or disabled from the due execution of the office of judge by reason of the misconduct of which he had been found guilty during the inquiry of the first inquiry committee.

[15] On February 20, 2018, 20 of the 23 Council judges adopted the findings of the second inquiry committee and concluded that Justice Girouard had become incapacitated or disabled from the due execution of the office of judge. The three dissenting judges suggested that he not be removed as they were of the opinion that he did not have a fair hearing to the extent that some of the Council members could not understand and evaluate the entire record by reason of their unilingualism.

[16] Justice Girouard applied for judicial review of the recommendation made by the majority of the Council. This proceeding was in addition to a number of other applications filed over the course of the two inquiries against various decisions made by inquiry committees and the decision of the two ministers of Justice to file a complaint with the Council.

[17] In response, the Council filed a motion to strike the applications for judicial review in question on the ground that the Federal Court does not have jurisdiction to hear the case under sections 2 and 18 of the FCA since the Council is not a "federal board, commission or other tribunal".

III. FEDERAL COURT DECISION

[18] On August 29, 2018, Federal Court Justice Simon Noël dismissed the Council's motions to strike. After his analysis, he reached the conclusion that the Council and its inquiry committee are federal boards, commissions or other tribunals under section 2 of the FCA (Decision, at paragraph 61–111). According to him, the Council's investigative powers do not derive from the Constitution, but from the Act (at paragraph 81). In addition, he stated that these powers belong to the Council as an institution, not to the chief justices individually because of their status (at paragraph 81). He also rejected the idea that paragraphs 63(4)(a) and (b) of the Act grant the Council superior court status. In his opinion, the purpose of these paragraphs is only to recognize the immunity of the Council and the inquiry judges, to grant them powers to summon witnesses and compel them to give evidence and to grant to the judges subject to inquiry protection with respect to their testimony (at paragraph 156). The Judge also rejected the Council's claims that the Council's reports and recommendations are not reviewable decisions under section 18 of the FCA (at paragraph 172).

IV. ISSUES

[19] The following issues arise in this appeal:

1. Are the Council and its inquiry committees federal boards, commissions or other tribunals subject to the Federal Court's jurisdiction with respect to judicial review?

2. Are the Council's reports and recommendations reviewable decisions?

[20] The Council's notice of appeal and memorandum of fact and law raise another issue, that is, a reasonable apprehension of bias on the part of the Judge. The Council did not mention this issue during the hearing of the appeal and did not rely on its memorandum on this matter. There was no mention of this issue by counsel for Justice Girouard or the Attorney General of Canada (AGC). In the circumstances, this

Court considers this ground of appeal to be abandoned. Moreover, nothing in the appellant's written submissions rebutted the strong presumption of the Judge's impartiality, as established in *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at paragraph 59.

[21] The two issues will be dealt with in turn.

V. PRELIMINARY ISSUES

[22] Before dealing with the merits, there are two preliminary issues to examine. Two motions were made at the beginning of the appeal hearing. The first, filed by Justice Girouard, requests the addition to the appeal book of a copy of the application for judicial review amended with the permission of Justice Simon Noël as the case management judge. As the other parties did not object, the motion was granted from the bench.

[23] However, there was no unanimity on the second motion. In that motion, the appellant asked the Court to grant it leave to present new evidence on a question of fact under rule 351 of the *Federal Courts Rules*, SOR/98-106. The evidence in question is the minutes of the annual conference of the chief justices of Canada, which took place when Parliament was considering the amendments to the Act that established the Council. The minutes reveal that during that meeting, the Honourable Justice Fauteux, then Chief Justice of Canada, apparently explained that subsection 32(4) [R.S.C. 1970, c. J-1], now subsection 63(4) of the Act, was amended to prevent the possibility of the Council being subject to the Federal Court's power of review.

[24] The appellant argues that that evidence meets the criteria applicable to the admissibility of new evidence under rule 351, as set out in *Brace v. Canada*, 2014 FCA 92, 63 C.P.C. (7th) 81, at paragraph 11:

> (1) *The evidence should not be admitted if, by due diligence, it could have been adduced at trial….*
>
> (2) *The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial….*
>
> (3) *The evidence must be credible in the sense that it is reasonably capable of belief….*
>
> (4) *The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result….* [Emphasis in original.]

(See also *Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270.)

[25] Since all of these criteria must be met, the failure to meet one of them is enough for the motion to be dismissed.

[26] On the basis of this evidence, the appellant wants to show that the intention of Parliament, when it amended subsection 63(4) of the Act to include the expression "shall be deemed to be a superior court", was to insulate the appellant from the Federal Court's jurisdiction as concerns judicial review.

[27] Yet, as the Judge aptly noted in paragraphs 138 and 140 of his reasons, a public servant from the Department of Justice who testified before the parliamentary committee during the debates regarding this amendment explained that the purpose of amending the bill to insert the phrase "shall be deemed to be a superior court" was "[t]o give the judges … the usual judicial protection that they would need", that is, immunity from prosecution (Standing Committee on Justice and Legal Affairs, House of Commons, *Minutes of Proceedings and Evidence*, 28th Parl., 3rd Sess. (16 June 1971), at page 27:27). The new evidence that the appellant wishes to present contradicts this testimony. First, the appellant did not demonstrate that the minutes are authentic and accurately reflect the comments of Justice Fauteux; second, the comments attributed to Justice Fauteux would only be his opinion and can in no way be considered Parliament's intent. It is therefore difficult to say that this new evidence could "be expected to have affected the result".

[28] It should also be noted that the document in question contradicts the main argument put forward by the appellant before this Court, that is, that the Council's members derive their immunity from the Constitution. In fact, it suggests instead that in the absence of the current subsection 63(4) of the Act, the Council's decisions would indeed be subject to the supervisory authority of the Federal Court. It is therefore difficult to conclude, as required by the case law, that if believed, the new evidence could be expected to have affected the result in favour of the appellant.

[29] In short, the criteria for the admission of the new evidence were not met. The appellant's motion will therefore be dismissed.

VI. STANDARD OF REVIEW

[30] The issue of whether the Federal Court had jurisdiction to rule on the applications for judicial review in dispute is a question of law that must be reviewed on a standard of correctness (*Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311, [2017] 3 F.C.R. 298 (*Mikisew FCA*), at paragraph 18, affd by 2018 SCC 40, [2018] 2 S.C.R. 765; *Spike Marks Inc. v. Canada (Attorney General)*, 2008 FCA 406, 386 N.R. 194, at paragraph 11, leave to appeal to the S.C.C. refused, April 30, 2009 (33023) [[2009] 1 S.C.R. xiii]; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8).

VII. ANALYSIS

A. *Is the Council a federal board, commission or other tribunal subject to the Federal Court's jurisdiction with respect to judicial review?*

(1) General legal framework

[31] The Federal Court's jurisdiction is not inherent; it is statutory. It follows that, in order for the Court to hear and decide a case, Parliament must have conferred on it the necessary jurisdiction (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (*TeleZone*), at paragraph 43). By adopting section 18 of the FCA, Parliament granted the Federal Court exclusive jurisdiction to review the actions taken or decisions made by a "federal board, commission or other tribunal", except for those in respect of which the Federal Court of Appeal has express jurisdiction under section 28. Section 18.1 of the FCA sets out the scope of the remedies available on an application for judicial review by the Attorney General or by an interested party.

[32] The term "federal board, commission or other tribunal" generally means a "body exercising statutory powers or powers under an order made pursuant to a prerogative of the Crown" (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 (*Mikisew SCC*), at paragraph 18). More specifically, section 2 of the FCA defines this notion as follows:

> **Definitions**
>
> **2 (1)** In this Act,
>
> …
>
> ***federal board, commission or other tribunal*** means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*.

[33] With respect to this definition, the Supreme Court of Canada stated that it is "sweeping" and that it "goes well beyond what are usually thought of as 'boards and commissions'" (*Telezone*, at paragraphs 3 and 50).

[34] To determine whether a body is a "federal board, commission or other tribunal" within the meaning of section 2 of the FCA, this Court developed a two-step test. According to *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52, 400 N.R. 137 (*Anisman*), the Court must determine "what jurisdiction or power" the body seeks to exercise and then "what is the source or the origin" of that jurisdiction or power (at paragraph 29; *Mikisew SCC*, at paragraph 109).

[35] It should also be noted that Parliament amended the definition of "federal board, commission or other tribunal" several times to explicitly exclude bodies that could

otherwise be included. This is notably the case with the Senate, the House of Commons, any committee or member of either House, and the ethics commissioners of these institutions with respect to the exercise of their powers pursuant to the *Parliament of Canada Act*, R.S.C., 1985, c. P-1 (see subsection 2(2) of the FCA).

(2) Discussion

(a) Anisman *criteria*

[36] The Federal Court Judge set out the *Anisman* test in paragraph 96 of his reasons. Examining the statutory scheme at issue in light of the criteria established in the case law, he concluded that the Council and its committees exercise powers that are investigative in nature (at paragraph 97), similar to those of a commissioner of inquiry under the *Inquiries Act*, R.S.C., 1985, c. I-11 (*Inquiries Act*) (at paragraph 83). He also found that the source of these powers can only be found in paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4) of the Act, that is, an "Act of Parliament" within the meaning of section 2 of the FCA (at paragraph 97).

[37] The appellant is challenging the Judge's conclusions in relation to (i) the source of the powers exercised and (ii) the nature of those powers. These criticisms will be considered in turn. As the "source" of the powers is the "principal determinant" of whether a decision maker falls within the definition of a "federal board, commission or other tribunal", this question will be dealt with first (*Mikisew SCC*, at paragraph 109; Donald J. M. Brown and the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 2018), at pages 2-50 and 2-51).

(i) The source of powers

[38] Relying on *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267 (*Ruffo*), the appellant argues that the powers in dispute here are "inherent" in its members' exercise of their functions. According to the appellant, the result is that these powers are constitutional and that they are therefore not conferred by or under an "Act of Parliament" within the meaning of section 2 of the FCA.

[39] These arguments do not withstand scrutiny.

[40] The Judge was quite correct to conclude that the only source of the powers of the Council and its committees is the Act, notably paragraphs 60(2)(c) and (d) and subsections 63(1) and 63(4). Had the Act not been adopted by Parliament, the Council would simply not exist. Furthermore, it should be noted that it has only been in existence since 1971; before that date, judicial discipline was entrusted to *ad hoc* commissions of inquiry established by the Governor in Council. In addition, there is every reason to believe that if the roles and composition of the Council were to be modified, it would be up

to Parliament and not the Council itself to make such changes through legislation. The only power granted to the Council in that respect, under subsection 61(3) of the Act, is that of making by-laws to regulate the procedure in regard to its meetings and its inquiries and investigations.

[41] As rightly noted by the respondent the AGC, the *Anisman* analysis implies that this Court must focus on the source of the powers conferred on the *body* that exercises them —in this case, the Council, not its members. In any event, even if the powers conferred on chief justices were to be taken into account, the same conclusion applies in this case.

[42] The appellant's argument that its powers are constitutional since they are inherent to the office of chief justice is based on the following passage from *Ruffo* [at paragraphs 57 and 58]:

> … It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents. Many aspects of this role derived from judicial tradition without being transferred to legislation. Therefore, the fact that there was no explicit legislation on ethics until quite recently does not mean we can doubt the continuity that marked the development of the chief judge's responsibilities in this regard. It accordingly cannot be argued that the supervisory powers conferred on the chief judge by … s. 96 [of the *Courts of Justice Act*, R.S.Q., c T-16 then in force] were assigned spontaneously by the legislature; in my view, they must rather be seen as the expression of a reality that is consistent with general practice and gradual developments over time.
>
> This opinion is shared by the American author … Geyh, who asserts that the chief judge's supervisory powers over ethics are inherent in the exercise of his or her functions and need not be conferred by specific statutory provisions …. I agree. [Emphasis in original.]

[43] However, to understand its real import, this excerpt from *Ruffo* should be put in its original context. Those comments were made by Justice Gonthier, on behalf of the majority, in response to the argument that the chief judge of the Court of Québec should not be allowed to lay a complaint with the *Conseil de la magistrature* against a judge of his court because it would go against the principles of judicial impartiality and independence. It is in this very specific context that the comments reproduced above were made and should be understood. This is clear from the paragraph that follows [at paragraph 59]:

> We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard. [Emphasis added.]

[44] What we understand from this passage is that the only inherent power of a chief justice identified by the Supreme Court in *Ruffo* with respect to judicial discipline is that of

Tab 66

CanLII

R. v. Siwicki, 2021 MBQB 42 (CanLII)

Source:	Court of King's Bench of Manitoba
Date:	2021-03-01
File number:	CR 19-01-37609
Citation:	R. v. Siwicki, 2021 MBQB 42 (CanLII), <https://canlii.ca/t/jdl3t>, retrieved on 2026-01-07

Date: 20210301
Docket: CR 19-01-37609
(Winnipeg Centre)
Indexed as: R. v. Siwicki
Cited as: 2021 MBQB 42

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:	**COUNSEL:**
HER MAJESTY THE QUEEN,	DEBORAH L. CARLSON and PAUL R. GIRDLESTONE
respondent,	for the respondent
- and -	B. SCOTT NEWMAN
	for the accused/applicant
TAMARA LEE SIWICKI,	SUSAN DAWES and DEVON C. MAZUR
(accused) applicant,	

	)	for Provincial Judges' Association
- and -	)	of Manitoba, Intervener
	)	
PROVINCIAL JUDGES' ASSOCIATION	)	SARAH A. INNESS and
OF MANITOBA and CRIMINAL DEFENCE	)	SARAH D. McNAMARA
LAWYERS ASSOCIATION OF MANITOBA,	)	for Criminal Defence Lawyers Asso
	)	ciation of Manitoba, Intervener
Interveners.	)	
	)	A. BLAIR GRAHAM, Q.C.
	)	as Amicus Curiae
	)	
	)	WILLIAM S. GANGE and
	)	THOMAS K. REIMER
	)	on watching brief for
	)	Chief Judge Wiebe
	)	
	)	Judgment delivered:
	)	March 1, 2021

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] The applicant applies for an order of *certiorari* quashing the decision of the Provincial Court judge denying a request to transfer a matter from the St. Boniface Judicial Centre to the Winnipeg Judicial Centre (for a guilty plea and sentencing). The applicant says that in doing so, the Provincial Court judge improperly interpreted his jurisdiction such that he acted outside of his jurisdiction. In denying this transfer, the Provincial Court judge referred to the following notice of practice directive, dated July 25, 2019, issued by the Chief Judge of the Provincial Court:

> **Re: Transferring Matters between Judicial Court Centres**
>
> There is a general presumption, based on principles of access to justice, matters will be heard in the community in which the incident is alleged to have occurred. It is in the public interest to have matters heard in the community or the closest judicial centre so that members of the affected community can participate fully in the proceedings and see that justice is done.
>
> There may be extenuating circumstances where the above principles should not apply. If that is the case and counsel are seeking to have any matter heard in a judicial centre other than the judicial centre closest to where the incident is alleged to have occurred, counsel shall bring an application before the presiding judge, in

Tab 67

CanLII

Smith v. Canada (Attorney General), 2020 FC 629 (CanLII), [2020] 4 FCR 3

Source:	Federal Court
Date:	2020-05-21
File number:	T-1713-18
Citation:	Smith v. Canada (Attorney General), 2020 FC 629 (CanLII), [2020] 4 FCR 3, <https://canlii.ca/t/j7v4k>, retrieved on 2026-01-07
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

T-1713-18

T-2055-18

2020 FC 629

The Honourable Justice Patrick Smith (*Applicant*)

v.

The Attorney General of Canada (*Respondent*)

and

The Canadian Judicial Council, the Canadian Superior Court Judges Association and **the Ontario Superior Court Judges' Association** (*Interveners*)

INDEXED AS: SMITH V. CANADA (ATTORNEY GENERAL)

Federal Court, Zinn J.—Toronto, January 21; Ottawa, May 21, 2020.

Judges and Courts — Judicial review of Canadian Judicial Council's (CJC) decision to constitute Judicial Conduct Review Panel (Review Panel), Review Panel's conclusion that applicant contravening Judges Act, s. 55 — Applicant, Ontario Superior Court of Justice judge, accepting appointment to position of Interim Dean of law school — Chief Justice granting applicant special leave pursuant to Judges Act, s. 54(1)(a) after obtaining approval from Minister of Justice — Executive Director of CJC of view that in light of Judges Act, ss. 54, 55, general duties, ethical obligations of Judges, acceptance

by applicant of Interim Dean role may warrant consideration by Council — Referring matter to Judicial Conduct Committee Vice-Chairperson — Matter referred to Review Panel — Review Panel concluding that leave of absence granted under Judges Act, s. 54 not removing prohibition under s. 55 — Finding applicant breaching ethical obligations, impermissibly using prestige of judicial office — Vice-Chairperson endorsing Review Panel's decision — Whether Review Panel decision reasonable, CJC proceedings procedurally unfair or abuse of process — Review Panel's interpretation of Judges Act, s. 55 unreasonable — "Prohibition" identified by Review Panel not "on judges carrying on extra-judicial activities" but rather on judges engaging "in any occupation or business other than his or her judicial duties" — Review Committee's broad interpretation exhibiting neither justification nor intelligibility — Applicant not breaching s. 55 when accepting appointment — S. 55 not complete ban on judges taking on non-judicial roles — S. 54 allowing for leave from judicial duties for reasons not inconsistent with those duties — Review Panel's decision as to ethical breach by applicant unreasonable — Review Panel failing to examine applicant's conduct on basis of informed public exercising mature judgment — CJC process involving applicant unfair, contrary to interests of justice — Constituting abuse of process — Nothing in record explaining how, on what basis Executive Director concluding that referral to Judicial Conduct Committee in public interest, due administration of justice — Applicant also denied procedural fairness by Executive Director — Not receiving fundamental procedural right to know case to be met — Initial referral to Judicial Conduct Committee failing to accord with CJC procedures — Executive Director raising matter on his own in absence of public complaint — In such circumstances, Executive Director ought to weight conduct against test set out in Baker v. Canada (Minister of Citizenship and Immigration) for conduct worthy of removal from bench, be convinced that conduct could result in such a finding — Here, removal of applicant by Minister of Justice inconceivable — Applications allowed.

These were applications for judicial review of the Canadian Judicial Council's (CJC) decision to constitute a Judicial Conduct Review Panel (Review Panel) and of the Review Panel's conclusion that the applicant contravened section 55 of the *Judges Act*.

The applicant, an Ontario Superior Court of Justice judge, accepted an appointment as Interim Dean of the Bora Laskin Faculty of Law at Lakehead University (the Law School). After obtaining the approval of the Minister of Justice, the Chief Justice granted the applicant special leave pursuant to paragraph 54(1)(a) of the *Judges Act* to accept the assignment, subject to certain parameters, including that his role be confined to "academic leadership". The Executive Director of the CJC subsequently wrote to the applicant informing him that "in light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges," acceptance of the Interim Dean role "brings me to the view that the situation may warrant consideration by Council." The Chief Justice informed the Executive Director of the CJC that the appointment would attract no remuneration, that the applicant's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future litigation. The Executive Director nevertheless referred the matter to the Vice-Chairperson of the Judicial Conduct Committee (Vice-Chairperson). The applicant responded that he did not view section 55 of the *Judges Act* as a bar to his acceptance of the position at the Law School. The applicant later signed a written agreement setting out the limitations of his appointment with Lakehead University. In August 2018, the Executive Director advised the applicant that the Vice-Chairperson had decided to constitute a review panel in respect of the appointment. The CJC later issued a press release stating that the applicant's decision to become Interim Dean raised some questions about whether such duties were compatible with judicial office. The Vice-Chairperson's reasons for referral rested on his view that the applicant accepted the role without considering the reaction from First Nations chiefs or the potential effect on the prestige of judicial office. Following notice that the matter had been referred to the Review Panel, the applicant advised the Executive Director that he had resigned from his position at the Law School in September 2018 and would return to his judicial duties with the Superior Court of Justice. The Review Panel concluded that section 55 of the *Judges Act* "requires judges … to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that the applicant had breached an ethical obligation to avoid becoming involved in public controversy, and he had impermissibly used the prestige of judicial office to bolster the Law School, but his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an inquiry committee. The Vice-Chairperson endorsed the decision of the Review Panel and concluded that in light of the applicant's resignation from the position, no further measures were needed. The applicant sought a declaration that he did not contravene section 55 of the Judges Act.

The main issues were whether the decision of the Review Panel was reasonable, and whether the CJC proceedings were procedurally unfair or an abuse of process.

Held, the applications should be allowed.

The interpretation given by the Review Panel to section 55 of the *Judges Act* was unreasonable. The "prohibition" identified by the Review Panel is set out in clear and explicit terms in the English version. However, the prohibition is not "on judges carrying on extra-judicial activities". Rather, it is on judges engaging "in any occupation or business other than his or her judicial duties". The Review Committee interpreted the phrase "occupation or business" in isolation from its context. Properly read, the phrase says that judicial duties are an occupation or business. By failing to include and examine this critical qualifier in its initial summary of the section, the Review Panel may have engaged in "reverse engineering" to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. In ignoring the context, the Review Panel's reasoning failed to properly apply the modern principle of statutory construction. The Review Panel's conclusion that the phrase "occupation or business" is to be broadly interpreted exhibited neither justification nor intelligibility. It was problematic in several respects, including the failure to consider the entire phrase. When considering the legislative history of section 55, the Review Panel did not address or consider the original wording of the provision. In neither official language do the words of section 55 support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge's regular remuneration. The Review Panel's reasoning was flawed and led to an unreasonable conclusion on interpretation. The applicant did not breach section 55 of the *Judges Act* when he accepted the appointment of Interim Dean. There is nothing in the language of section 54 of the *Judges Act,* suggesting that leaves of absence may not be granted to enable judges to take on responsibilities outside of their judicial duties. This leave provision was not enacted to be used exclusively for absences "such as an illness, a period of recovery from accident or parental leave" as the Review Panel suggested. Leaves under section 54 are not restricted to maternity or parental leaves. Section 55 is not a complete ban on judges taking on non-judicial roles. Parliament's intention was that judges are able to assume non-judicial roles in certain circumstances and section 54 of the Act allows for a leave from judicial duties for a variety of reasons that are not inconsistent with those duties. The decision of the Review Panel as to the ethical breach of the applicant in accepting the appointment was unreasonable and could not stand. The Review Panel failed to examine whether the applicant's conduct unnecessarily exposed him to criticism or attack on the basis of an informed public exercising mature judgment.

The CJC process involving the applicant was unfair to the point that it was contrary to the interests of justice. It was an abuse of process. The CJC disciplinary procedure was misused from the beginning, i.e. when the Executive Director determined that the applicant accepting the appointment to the Law School was a matter that "warrants consideration." There was nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The Executive Director placed no weight on the Minister's approval of the applicant's appointment. The Minister's approval could not reasonably be said to be "unofficial" simply because she did not expressly use the word "approved." In addition to the improper decision of the Executive Director that the matter "warrants consideration" there was evidence in the record that the applicant was also denied procedural fairness by the Executive Director. Specifically, the applicant was not informed of the Executive Director's concerns about the call for him to resign, nor was he provided with any of the "public comments" made in response to statements made by First Nations chiefs, nor those statements. The Executive Director failed to give to the applicant the fundamental procedural right to know the case to be met. If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then the applicant was entitled to know that and respond to it. Accordingly, the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner. In raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so. The Executive Director ought to weigh conduct against the test set by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* for conduct worthy of removal from the

bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

The declarations sought by the applicant were appropriate. The Court declared that the applicant, in accepting the appointment of Interim Dean, did not breach section 55 of the *Judges Act*, nor did he breach his judicial ethics.

STATUTES AND REGULATIONS CITED

An Act to amend the Act respecting the Judges of Provincial Courts, S.C. 1905, 4-5 Edward VII, c. 31, s. 7.

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, s. 2(1).

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 99.

Federal Courts Rules, SOR/98-106, rr. 109, 303(2).

Judges Act, R.S.C. 1906, c. 138, s. 33.

Judges Act, R.S.C., 1985, c. J-1, ss. 54 to 56.1, 54, 55, 56, 56.1, 57.

Judges Act, 1946 (The), S.C. 1946, c. 56, s. 34.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3.

CONSIDERED:

Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67, 441 D.L.R. (4th) 269; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, (1995), 130 D.L.R. (4th) 1; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *Cosgrove v. Canadian Judicial Council,* 2007 FCA 103, [2007] 4 F.C.R. 714.

REFERRED TO:

Girouard v. Canada (Attorney General), 2018 FC 865, [2019] 1 F.C.R. 404, affd 2019 FCA 148, [2019] 3 F.C.R. 503, leave to appeal to the S.C.C. refused December 12, 2019; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *Girouard v. Canada (Attorney General)*, 2019 FC 434; *Girouard v. Canada (Attorney General)*, 2019 FC 1282; *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4; *Ebrahimshani v. Canada (Citizenship and Immigration)*, 2020 FC 89; *Ennis v. Canada (Attorney General)*, 2020 FC 43; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501, 122 C.P.R. (4th) 195.

AUTHORS CITED

Canada. Parliament. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996).

Review Panel fails to note that unlike Justice Fauteux, Justice Smith's deanship was limited to academic matters —an area that can hardly be said to be a wellspring of "controversial and highly public topical issues".

[118] With respect to Justice Gillese, the Review Panel notes [at paragraph 62] that the CJC agreed to her appointment as Chancellor because "of the strict limitations" agreed to by the university and the judge, and because "of the ceremonial nature of the post." This fails to reference the view of Pidgeon A.C.J. that the limitations agreed to by Justice Smith and the Law School limited his role to a ceremonial one. As to the conditions, it writes [at paragraph 74], "the use of such conditions may be an imperfect attempt to address unknowable contingencies arising in a dynamic environment". Nonetheless, significant conditions were agreed upon that removed Justice Smith from the administration of the Law School and the university. Most importantly, he had undertaken to inform and seek guidance from his Chief Justice if circumstances changed or "any issues arise which may raise new ethical implications, or [possibly] lead to public controversy" [at paragraph 72]. A condition not mentioned by the Review Panel.

[119] Moreover, and critically, his acceptance of the Interim Dean (Academic) role with these conditions was approved by his Chief Justice. If his decision was ill-advised, what does that say of the decisions of his Chief Justice and the Minister of Justice?

[120] The role of his Chief Justice both in terms of consenting to the appointment and her subsequent role should any public controversy arise was worthy of consideration and weight. In *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at paragraph 59, Justice Gonthier for the majority, notes the important role a chief justice plays in ethical decisions:

> We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.

[121] The underpinning for the conclusion the Review Panel reaches on its consideration of the judicial ethics question is: (1) media reports that the former Dean had threatened litigation; (2) the possibility of litigation should the Law Society of Ontario remove the Law School's accreditation; (3) "extensive" media reports "which included allegations of a failure on the part of Lakehead to fulfill the Faculty of Law's Indigenous mandate and some criticism of Justice Smith's appointment from Indigenous leaders" [at paragraph 27]; and (4) that prior to accepting the appointment, the CJC Executive Director informed Justice Smith that it could be a matter for the CJC's consideration.

Tab 68

CanLII

Dugré c. Canada (Attorney General), 2019 FC 1604 (CanLII)

Source:	Federal Court
Date:	2019-12-13
File number:	T-1637-19; T-1622-19
Quote:	Dugré c. Canada (Attorney General), 2019 FC 1604 (CanLII), < https://canlii.ca/t/j45d4 >, retrieved on 2026-01-19

Date: 20191213

Files: T-1622-19
T-1637-19

Reference: 2019 CF 1604

Ottawa, Ontario, December 13, 2019

In the presence of Judge Martineau

File: T-1622-19

BETWEEN :

THE HONORABLE GÉRARD DUGRÉ

applicant

And

THE ATTORNEY GENERAL OF CANADA

respondent

And

THE CANADIAN JUDICIARY COUNCIL

Accused

File: T-1637-19

AND BETWEEN:

THE HONORABLE GÉRARD DUGRÉ

applicant

And

THE ATTORNEY GENERAL OF CANADA

respondent

And

THE CANADIAN JUDICIARY COUNCIL

Accused

ORDER AND REASONS

[1] The applicant, the Honourable Gérard Dugré, a judge of the Superior Court of Quebec, is the subject of two ethics complaints filed in 2018 with the Canadian Judicial Council [Council], the respondent. The defendant, the Attorney General of Canada, is now seeking the summary striking of the two notices of application for judicial review (files T-1622-19 and T-1637-19) filed by the applicant.

[2] The facts alleged in the applicant's proceedings were found to be true by the Court.

[3] In January 2009, the applicant was appointed to the federal judiciary after an exemplary career as a lawyer and member of the Quebec Bar, since November 1981, in a large law firm in Montreal.

[4] The first ethics complaint (file T-1622-19) concerns the failure to render a timely judgment in a divorce, child custody, and related matters case, and the failure to respond to emails from the lawyer for one of the parties. The second (file T-1637-19) concerns comments made during conciliation proceedings prior to the adjudication of a family law application for a school change.

[5] When an ethics complaint is filed with the Council, an administrative process that may include six steps is then initiated:

> 1) The Executive Director of the Council examines the complaint and decides whether it justifies opening a case;
>
> 2) If a case is opened, the chairperson (or vice-chairperson) of the Committee on Judicial Conduct examines the complaint and may close the case or request additional information;
>
> 3) If the case is not closed, a Judicial Conduct Review Committee examines the complaint and the judge's written observations and decides whether the complaint can be resolved at this stage or whether it is serious enough to be referred to a Committee of Inquiry;
>
> 4) If the matter is referred, the Inquiry Committee holds a hearing, hears the evidence concerning the complaint and submits a report to the Council in which it records the results of the inquiry, including the conclusion as to whether the removal of the judge should be recommended;
>
> 5) The Council examines the complaint and decides on its merits; and
>
> 6) The Council submits to the Minister of Justice a report on its findings, including the conclusion as to whether the removal of the judge is recommended, and provides him with the file.

See the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations Concerning Federally Appointed Judges* , effective July 29, 2015; *Girouard v Review Committee*

established under the Procedures for the Review of Complaints Filed with the Canadian Judicial Council Concerning Federally Appointed Judges , 2014 FC 1175 at para. 8 [*Girouard*] .

[6] In this case, pursuant to subsection 2(1) of *the Canadian Judicial Council's Administrative Regulations Respecting Investigations (2015)* , SOR/2015-203 [Regulations], the Vice-Chair of the Council's Judicial Conduct Committee, the Honourable Glenn Joyal, reviewed the two files. On March 14, 2019, he decided to establish two Review Panels, each composed of four judges, including three Chief Justices, and one person who is not a judge or a member of the bar of a province, to examine the two complaints. In practice, the same individuals served on both Review Panels.

[7] On August 30, 2019, the Review Committees made two decisions to establish a Committee of Inquiry for each of the complaints under subsection 63(3) of the *Judges Act* , RSC 1985, c J-1 [Act], on the grounds in each case that the matter could prove to be serious enough to justify the removal of the applicant as a judge, hence the two applications for judicial review initiated last October by the applicant.

[8] In essence, the applicant sets out three main grounds of attack against the contested decisions, which he considers null and void *ab initio* , unlawful or otherwise unreasonable:

> a) Chief Justice Joyal and the Review Panel exceeded their powers and failed to comply with the Rules by not limiting themselves to a "first-eye" analysis, but instead rendering a "reasoned decision" and issuing "factual findings" regarding the merits of the two complaints. On their merits, the complaints should have been dismissed;
>
> (b) Chief Justice Joyal and the Review Committee also failed to provide procedural fairness. In particular, the applicant was not given the opportunity to respond to the letters from the Chief Justice of the Superior Court of Quebec during Chief Justice Joyal's review. Furthermore, the same individuals sat on both Review Committees, which invalidated the entire

process because the complaints were analyzed through a "distorting lens"; and

(c) The contested decisions are otherwise unreasonable. On the one hand, a delay of nine months and eleven days in rendering a judgment, which is indeed understandable, does not justify the revocation of the applicant's privileges (Case T-1622-19). On the other hand, listening to the recording of the hearing in which the statements in question were made necessarily leads to the conclusion that there is no ground for revocation in this case (Case T-1637-19).

[9] In file T-1622-19, the applicant adds a question of constitutional law, namely whether the failure to respect the maximum deliberation period of 6 months under article 324 of the *Code of Civil Procedure* , CQLR c C-25.01, can be considered as derogatory ethical conduct under section 99 of the *Constitution Act, 1867* , 30 & 31 Victoria, c 3 – and therefore within the jurisdiction of the Council – or whether it is simply a question of the administration of justice within the exclusive jurisdiction of the provinces under subsection 92(4).

[10] Nevertheless, the defendant now requests that the Court summarily strike out, in their entirety, both applications for judicial review, since they are premature from the outset and therefore have no chance of success. Indeed, the challenged decisions are interlocutory in nature. The applicant is required to exhaust all effective remedies available to him within the Council's administrative inquiry process before applying to the Court.

[11] The applicant replies that the applications for judicial review concern the Council's failure to comply with the administrative process it itself adopted. However, when there is a requirement for a multi-stage review, there can be no "prematureness" regarding the fact that the process was not followed at one stage, since the subsequent decision will not allow for a resumption of the review process that was flawed from the outset. In this sense, the decisions of the Vice-President and the two Review Committees are "final."

[12] Subsection 18.4(1) of the *Federal Courts Act* , RSC 1985, c F-7 , requires that the Court "decide applications for judicial review expeditiously and summarily." As a general rule, motions to strike are therefore not appropriate in such matters. However, the Court may strike an application for judicial review if it is "devoid of any prospect of success" (*Turp v. Canada (Foreign Affairs)* , 2018 FC 12 at para. 19). This is a very heavy burden (see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc* , 2013 CAF 250 ; *Odynsky v B'Nai Brith Human Rights League Canada* , 2009 CAF 82 at para . 5 citing *David Bull Laboratories (Canada) Inc v Pharmacia Inc* , 1994 CanLII 3529 (CAF) , [1995] 1 RCF 588, 176 NR 48 (CA)).

[13] The issue of whether an application for judicial review is premature has given rise to extensive case law. As a general rule, an applicant cannot obtain a judicial remedy until the administrative process is complete and all effective remedies have been exhausted (*Canada (Border Services Agency) v. C.B. Powell Limited* , 2010 FCA 61 at paras. 30-33 [*C.B. Powell*]). Exceptionally, a court may agree to intervene in judicial review at a preliminary stage (*C.B. Powell* at para. 33 ; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* , 2012 SCC 10 at para. 35 ; *Douglas v. Canada (Attorney General)* , 2014 FC 299 at para. 128 [*Douglas*]).

[14] In *Wilson v Atomic Energy of Canada Limited* , 2015 FCA 17 (overturned on appeal, but upheld on this issue), the Federal Court of Appeal noted:

> Because of the strength and pervasiveness of the general principle prohibiting premature applications for judicial review, and the need to discourage premature incursions into review tribunals, exceptions to this general principle are rare, and courts readily grant preliminary applications for striking out. As the Court explained in the aforementioned C.B. Powell decision, the exceptions recognized to this principle take into account the specific facts of each case. In rare instances, the values derived from public law may not be clearly apparent from the particular circumstances of a case, or they may be neutralized by competing values, or both. For example, in rare situations, the consequences of an interlocutory decision for the applicant are so immediate and radical that the court is led to question whether the principle of the rule of law has been respected (*Dunsmuir v. New Brunswick* , 2008 SCC 9 (CanLII) , [2008] 1 SCR 190, at paragraphs 27 to 30). In such cases—where there is often an opening for a writ of prohibition—the values underlying the general

> principle prohibiting premature judicial review become less important.
>
> [Emphasis added.]

[15] In *Budlakoti* , the Federal Court of Appeal defined what it means by “exceptional circumstances” permitting judicial review of a preliminary decision: “ it is possible to relax the general rule when the judge is called upon to consider compliance with the rule of law or when the public law values arising from the circumstances of a case favour the right to apply immediately to the reforming court.” To these two notable exceptions, the Federal Court of Appeal adds certain emergency situations (*Okwuobi v. Lester B. Pearson School Board* ; *Casimir v. Quebec (Attorney General)* ; *Zorrilla v. Quebec (Attorney General)* , 2005 SCC 16 at para. 50). Note that in *the aforementioned Douglas* case , the Federal Court intervened in a preliminary manner because there was a concern about bias on the part of the Committee of Inquiry, and this at a stage of the proceedings much more advanced than the contested decisions that the applicant wishes to have overturned by the Court.

[16] In the case under consideration, both applications for judicial review are premature, while no exceptional circumstances justify this Court intervening at a preliminary stage.

[17] In support of its claim that a multi-stage investigative process can be controlled at a preliminary stage, the applicant relies on the fact that decisions of the Canadian Human Rights Commission are subject to review, even though the Canadian Human Rights Tribunal has not yet ruled on the merits of a discrimination complaint. With all due respect, this comparison strikes me as flawed. We are talking about a completely different legislative environment. The Canadian Human Rights Commission is a separate and independent federal body from the Canadian Human Rights Tribunal. The rules for investigating discrimination complaints are codified in legislation, and there is no parallel with the judicial ethics jurisdiction conferred on the Council under sections 63 to 65 of the Act .

[18] On the other hand, the present judicial review proceedings are similar to the *Girouard* case , where I summarily struck out the application for judicial review of the Judicial Conduct Review Board's decision to establish a Panel of Inquiry. The same reasoning and considerations of judicial economy must apply, *mutatis mutandis,* in the present case. That said, in his written submissions, the applicant also invited me to consider *Whalen v. Fort McMurray First Nation No. 468* , 2019 FC 732 , where my colleague, Justice Grammond, emphasizes that the best approach to excluding judicial review is a holistic one that takes into account the following relevant factors: (1) the prejudice suffered by the applicant; (2) waste; (3) delay; (4) division; (5) the merits of the claims; and (6) the legislative context. Although the plaintiff's counsel did not really elaborate in their oral arguments on how each of these factors might apply in the exercise of my discretion, the following should be mentioned.

[19] The applicant invokes his irremovability. This strongly supports the continuation of these judicial review proceedings, since he is currently unable to sit as a judge, which he now claims contravenes the constitutional principle of judicial irremovability. This argument does not appear convincing to me. The continuation of the ethics process initiated before the Council is not likely to jeopardize the rule of law. The Council's investigative power is expressly provided for in sections 63 to 65 of the Act , and no convincing argument put forward at this stage by the applicant allows me to dismiss the presumption of constitutionality of a validly adopted Act of Parliament.

[20] Furthermore, the applicant appears to be indirectly challenging the Chief Justice of the Superior Court's decision not to have him sit as a judge during the investigation. The Chief Justice has broad authority to coordinate, allocate, and supervise the work of judges. The applicant is undoubtedly suffering some inconvenience, including any prejudice arising from the ongoing investigation. While the applicant cannot sit on new cases at this time, he continues to be a judge and to receive his salary and other benefits associated with his judicial status. And, as the Federal Court of Appeal noted in *Newbould v. Canada (Attorney General)* , 2017 FCA 106 , this prejudice is "inherent in the process in which [the applicant] is engaged."

[21] Moreover, the directive to no longer assign cases to Justice Dugré is not subject to review by the Federal Court. It should be recalled that, according to the teachings of the Supreme Court of Canada, the supervisory powers of a chief justice with respect to professional conduct are inherent in the exercise of his judicial functions and do not require any specific legislative authority, whereas, as *primus inter pares* , he therefore occupies a privileged position to ensure compliance with judicial ethics within the Court (*Ruffo v. Conseil de la magistrature* , 1995 CanLII 49 (SCC) , [1995] 4 SCR 267 at paras. 58-59). In any event, when a Committee of Inquiry has been established under subsection 63(3) of the Act , the Chief Justice has the implied power to relieve, in whole or in part, a judge of certain judicial functions, pending the outcome of the investigation into a disciplinary complaint, to the extent that this may appear necessary in the best interests of justice and its administration, and to preserve public confidence in the courts and the judges who are part of them.

[22] Furthermore, without diminishing any harm the applicant may suffer, allowing the continuation of these judicial review proceedings would necessarily lead to a multiplication of proceedings, which would not serve the interests of justice and its administration, while also causing significant delays in the processing of ethics complaints. As for the applicant's reputation, it should be noted that concrete measures have already been taken to protect it. To date, all elements of the Council's file have remained confidential. Moreover, the personal details and names of the individuals involved in the family law matters are confidential. Although the Inquiry Committee holds its hearings in public, it may nevertheless order a full or partial closed session and prohibit the publication of any information or document submitted to it.

[23] Because of the current administrative compartmentalization, the multi-stage procedure before the Council is designed to protect the applicant's rights. It is not appropriate to intervene before the initiated process has at least passed the fourth stage, namely the Inquiry Committees, where the applicant will have the opportunity to present all preliminary and substantive arguments justifying the dismissal of the complaints in question. Moreover, as I noted in *Girouard* , the Inquiry Committee will also have the power to rule on any question of fact or law, including any constitutional argument or statutory interpretation, and will be able to decide on the merits of any

"Boilard motion" that the applicant might present in the event (see also *Alexion* at para. 48; *Forest Ethics Advocacy Association v. Canada (National Energy Board)* , 2014 FCA 245 at paras. 40-45 ; on the Inquiry Committee's ability to decide constitutional questions, see the *Inquiry Committee's Report on its Jurisdiction to Conduct an Inquiry Concerning Justice Gratton of the Ontario Court of Justice, Ottawa, January 26, 1994* ; on the "Boilard motion", see *Cosgrove v. Canada (Attorney General)* , 2008 FC 941).

[24] In conclusion, the present applications for judicial review are premature. There are no exceptional circumstances in this case that would justify departing from the general rule of non-intervention by the Court at a preliminary stage. The Attorney General's motions to strike the case are therefore granted, without costs.

ORDER in case T-1622-19 and T-1637-19

THE COURT ORDERS that:

1. The notice of application for judicial review dated October 4, 2019 in file T-1622-19 is struck off without possibility of amendment;
2. The notice of application for judicial review dated October 7, 2019, in file T-1637-19 is struck off without possibility of amendment; and
3. All at no cost.

"Luc Martineau"

Judge

FEDERAL COURT
LAWYERS LISTED IN THE CASE FILE

CASE :	T-1622-19
TITLED :	The Honourable Gérard Dugré, Attorney General of Can ada
AND FILE:	T-1637-19

ITTLED :	The Honourable Gérard Dugré, Attorney General of Can ada
HEARING LOCATION:	MONTREAL (QUEBEC)
HEARING DATE:	DECEMBER 11, 2019
ORDER AND REASONS:	JUDGE MARTINEAU
DATE OF REASONS:	DECEMBER 13, 2019

COMPARISONS :

Ms. Magali Fournier, Ad. E. The president of the bar association, Gé rald R. Tremblay Ad. E. Ariane Vanasse, Esq.	FOR THE APPLICANT
Bernard Letarte, Esq. Liliane Bruneau, Esq. Pascale Guay, Esq.	FOR THE DEFENDANT

LAWYERS LISTED IN THE CASE FILE :

Brouillette Légal inc. Montreal (Quebec)	FOR THE APPLICANT
McCarthy Tétrault sencrl, srl Montreal (Quebec)	FOR THE APPLICANT
Attorney General of Canada Montreal (Quebec)	FOR THE DEFENDANT

Tab 69

Date: 20160506
Docket: CR 15-01-34478
(Winnipeg Centre)
Indexed as: R. v. Baldovi et al
Cited as: 2016 MBQB 90

2016 MBQB 90 (CanLII)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**COUNSEL:**
HER MAJESTY THE QUEEN	Anne Turner and Janna Hyman for the Crown
	Wally Oppal, Q.C. for all accused (on joint motion)
- and -	Sheldon Pinx, Q.C. for R. Baldovi
	Richard Wolson for C. Dhaliwal
RONALD BALDOVI, CAROL BANAYOS, OLIVER BANAYOS, CHANDEEP DHALIWAL, CARA SMITH AND JASDEEP WARRAICH,	Saul Simmonds For J. Warraich
(Accused) Applicants.	Evan Roitenberg For O. Banayos
	David Walker for C. Smith
	Katherine Smith for C. Banayos
	Judgment delivered: May 6, 2016

2016 MBQB 90 (CanLII)

JOYAL, C.J.Q.B.

I. INTRODUCTION

[1] This case comes before me as a set of joint motions consented to by all accused (hereinafter referred to as the "accused").

[2] This case has received considerable media attention, not only because of the serious crimes alleged to have been committed (drug, proceeds, firearm and conspiracy offences), but also, because of allegations made by the accused about their inability to receive impartial and unbiased pre-trial and trial determinations in this, the Manitoba Court of Queen's Bench.

[3] The Manitoba Court of Queen's Bench is the province's highest trial court. It is where the province's most serious criminal offences eventually appear and are adjudicated. As with any court, allegations of bias, real or apprehended, valid or invalid, are by definition serious and they can have an insidious effect on the integrity of a court's reputation for administering impartial justice. Any suggestion of bias need be addressed by a judge and a court quickly, directly and with the safeguarding assistance and rigour of the governing legal test.

[4] These reasons address the accused's motion for my recusal. These reasons also address the order that the accused originally sought for the prohibition and disqualification of each and every judge of the Court of Queen's Bench on the basis of what the accused publicly asserted was a reasonable apprehension of bias. That particular motion was eventually and abruptly

abandoned, but in my view still requires and will receive comment later in this judgment.

[5] These reasons will also explain my decision on the accused's earlier and connected motion for disclosure. I dismissed that motion for disclosure by way of an oral disposition following the hearing. At the time of that oral disposition, I indicated written reasons might follow. Those reasons are now included in this judgment.

[6] I set out immediately below the issues raised by the three original motions brought by the accused.

II. ISSUES

(1) On the accused's motion for "disclosure", should the materials and items stipulated in the notice of motion be provided to counsel for the accused as relevant to the allegations of bias?

(2) Are the background circumstances in the present case such that any judge of the Court of Queen's Bench of Manitoba ought to be disqualified and prohibited from adjudicating the matters to be considered in a joint motion to quash the wiretap authorizations?

(3) Do the circumstances of this case and the role of the Chief Justice create a reasonable apprehension of bias with respect to the Chief Justice's adjudication of the matters to be considered on the joint motion to quash the wiretap authorizations?

2016 MBQB 90 (CanLII)

III. BACKGROUND AND CONTEXT

[7] The accused were arrested in February of 2014 following a lengthy investigation conducted by members of the Winnipeg Police Service. The investigation was designated as "Project Sideshow". This investigation utilized a series of authorizations to intercept private communications.

[8] The first *ex parte* application for an authorization was granted by Mr. Justice Mainella, then a judge of the Court of Queen's Bench, on January 18, 2013. He had been appointed to the Court of Queen's Bench of Manitoba on October 5, 2012. Prior to his initial appointment, Justice Mainella had been employed at the Winnipeg office of the Public Prosecution Service of Canada. He now sits as a judge of the Manitoba Court of Appeal.

[9] Prior to issuing the authorization on January 18, 2013, Justice Mainella would have had before him the approximately 250-page supporting affidavit of Detective Graham Grafton sworn on January 17, 2013. Detective Grafton's 250-page affidavit would have included – as such documents routinely do – supporting information respecting the criminal records or previous convictions of any of the targets who possess such criminal records. That same information about any previous criminal convictions possessed by any of the targets would have been before any other judge involved in the issuance of any subsequent authorization in connection to Project Sideshow.

[10] The supporting material for the first authorization would have been compendious and would have detailed a lengthy investigation which began in

2016 MBQB 90 (CanLII)

April of 2012 and which relied upon warrants which were sought and granted during the timeframe when Justice Mainella was still employed by the Winnipeg office of the Public Prosecution Service of Canada. Three of the primary targets of the Project Sideshow authorizations were individuals that Justice Mainella had jointly prosecuted for similar offences less than four years earlier. Those prosecutions involved Justice Mainella working with Ms. Judy Kliewer of the Public Prosecution Service of Canada, who also was the coordinating prosecutor or "police agent" for the applications for wiretap authorizations in the present case.

[11] As a result of the Winnipeg Police Service investigation, which would have included the wiretap interceptions obtained as a result of the court authorizations, 23 individuals (including the six joint applicants in the present case) were arrested and charged with serious drug, proceeds, firearm and conspiracy offences. The six joint applicants in this case have given notice of their intention to challenge the issuance of the wiretap authorizations based on, amongst other things, an alleged reasonable apprehension of bias on the part of Justice Mainella. As I explain later, that challenge to the issuance of the wiretap authorization will take place September 26-30, 2016.

[12] Following the conclusion of the police investigation and the direct indictment of all of the accused, I was asked to designate this matter as one deserving of case management pursuant to s. 551.7 of the ***Criminal Code***.

2016 MBQB 90 (CanLII)

[13] Given the nature of some of the identified motions that would require determination prior to trial (particularly the motion in relation to the alleged reasonable apprehension of bias on the part of all judges of the Manitoba Court of Queen's Bench), I acceded to the request for case management and I also assigned myself to the role of the case management judge. In that role, I would preside over not only the foundational challenge respecting bias (on the part of all judges of the Court of Queen's Bench), but also, I would preside over any other adjudication of issues relating to the granting of the wiretap authorizations. Following notification of my assigned role as case management judge, the accused proceeded to advise that they would also be seeking my recusal, again, on the basis of a reasonable apprehension of bias.

[14] The application for my recusal arises in connection to my current role as the case management judge and the above motions that I am set to decide. In seeking my recusal, the accused seem to base their application on the speculative assumption that I had specifically assigned Justice Mainella to be the "duty judge" who in turn, would preside over the *ex parte* application leading to the wiretap authorization. The accused also contend that the mere fact of my role and duties as Chief Justice of the Court of Queen's Bench creates the impression of an institutional protectiveness in relation to the Court of Queen's Bench judges and the system of assigning judges. The accused suggest that the assignment of Justice Mainella in this case, whether done knowingly or unknowingly by me or my office, can be perceived as having been endorsed by

2016 MBQB 90 (CanLII)

me and the court as a whole. The accused say that even an indirect role in the assignment or in the endorsement of the assignment creates a reasonable apprehension of bias.

[15] As I will explain later, the accused also seek my recusal based on a written public explanation provided by me to the Winnipeg Free Press in response to a journalist's questions posed in the context of an article written and appearing on May 5, 2014 in relation to this case. That article itself flows from comments made to a journalist by at least one of the accused respecting Justice Mainella's involvement in the issuance of the wiretap authorization. The comment was made by one of the accused as he awaited a decision on his application for bail in Provincial Court. The resulting headline of the May 5, 2014 article was "*Man Arrested in Huge Undercover Operation Raises Troubling Questions*."

[16] As mentioned, apart from their concerns respecting my impartiality in the context of my role as case management judge, the accused also initially moved for the disqualification and prohibition of any and all judges of the Court of Queen's Bench from hearing this matter. That motion was based on what the accused said was the judges' "privity to the issue being decided and the potential that they [the judges of the Court of Queen's Bench] are possessed of information regarding the internal policies of the Court of Queen's Bench that are not before the court." The accused summarized their position even more starkly at para. 37 of their brief:

2016 MBQB 90 (CanLII)

> In summation, the Applicants submit that the circumstances surrounding the challenge to the Authorizations in this case creates a situation where the need for fairness and impartiality, and the appearance thereof, requires that no member of the Court of Queen's Bench be tasked with adjudicating and pronouncing on the propriety of the conduct of their former colleague who is now a sitting Justice of the Court of Appeal for Manitoba, the Chief Justice of the Court of Queen's Bench, or the collective administration of the court of which they are a member.

[17] In the lead-up to the motions explained above, the accused brought a separate motion for what they said was "the production of disclosure" from the Court of Queen's Bench. In that regard, the accused enumerated a number of items which they argue are "relevant" in relation to the motion for my recusal and the motion for prohibition and disqualification of all other Court of Queen's judges. The accused submitted that the "disclosure" was also relevant in respect of the future motion in connection to the challenge of the authorization granted by Justice Mainella. In short, all of the disclosure/production sought in the items stipulated in the accused's notice of motion relate to that aspect of the accused's argument wherein they contend a reasonable apprehension of bias on the part of Justice Mainella, myself and all judges of the Court of Queen's Bench. Notwithstanding what I will explain is "the third party nature" of the records sought by the accused, the accused formulated and argued that motion on the basis of what they said was an application for disclosure pursuant to ***R. v. Stinchcombe***, [1991] 3 S.C.R. 326.

[18] In the course of the case management discussions with all counsel, timelines were set for the bringing of the identified motions (and supporting materials) in respect of the bias related recusal and prohibition issues. Those

2016 MBQB 90 (CanLII)

timelines were not complied with by accused's counsel. Counsel for the accused explained the delay by submitting that they were seeking out-of-province counsel who they sought to have argue the motions on behalf of all of the accused's counsel of record.

[19] Following the court's insistence and in an effort to minimize any further delay flowing from the accused's motions and inaction in respect of the bias issue, a date for the actual hearing of the recusal and prohibition motions was finally fixed. Dates could then also be set in relation to the accused's application for leave to cross-examine the affiant (May 26, 2016), and the ***Garofoli*** motion (September 26-30, 2016) in which the issuance of the authorization itself will be challenged on the basis of ss. 7 and 8 of the ***Charter***, which arguments now include the specific issue of Justice Mainella's involvement and the alleged apprehension of bias. See ***R. v. Garofoli***, [1990] 2 S.C.R. 1421. Trial dates have been set for January 2017 and following.

IV. ANALYSIS

The accused's motion for "disclosure"

[20] The accused explain that what they seek is "relevant" material/information which they say might be of use to support the bias aspect of their overall challenge to the wiretap authorization. That motion is to proceed in September 2016 in the context of arguments with respect to ss. 7 and 8. Those arguments will be based in part on the alleged reasonable apprehension of bias on the part of the issuing judge, Justice Mainella.

2016 MBQB 90 (CanLII)

[21] The accused also seek any relevant material/information in relation to the arguments they make respecting the need for my recusal based on a similar allegation of apprehended bias.

[22] It must be noted that on most motions where recusal is raised in relation to an issue of bias, the initial and often only evidentiary basis or record upon which counsel's position is taken and argued, and upon which the court's determination is made, is that which results from the information provided "on the record" by counsel and the judge in question as "officers" or "representatives" of the court. In other words, a typical scenario is one where prior to the commencement of a matter, counsel or the judge will themselves raise the issue of a prior association, involvement or action that may give rise to a question about the court's real or perceived impartiality. Whether in relation to real bias or a reasonable apprehension of bias, the issue is raised if for nothing else, "to clear the air". Sometimes the issue is raised in the context of the other party (or the court) having no knowledge or recollection of the now identified or impugned previous association, involvement or action by the judge. In some instances, the information raised by the court or one or both of the parties may lead to an argument for recusal which the court must then address. However the scenario plays out, it is noteworthy that in almost all instances the issue is raised by one or both of the parties and/or the court in a way that provides an easy and agreed evidentiary basis, context or record for any argument the court is required to hear and any recusal determination that it is required to make.

2016 MBQB 90 (CanLII)

That said, there may be cases such as this one where the moving party for the recusal, given its onus, seeks additional information and evidence relevant to the legal test. Needless to say, those efforts cannot involve nor should they contemplate a judge giving formal evidence. Despite the somewhat vague and indirect suggestion by the accused in the present case that the joint motion may have required the presiding judge to hear evidence from other judges or myself, the law in that regard is clear. Testimony from any judge in a context like this one is prevented by judicial immunity, which is in place in order to protect the judiciary as an institution and the public confidence in it. Judicial immunity is not something that can be waived by the parties or the judge. See ***Kosko v. Bijimine***, 2006 QCCA 671 at para. 43, [2006] R.J.Q. 1539. That includes any testimony in respect of the assignment of judges to particular cases or roles. See ***MacKeigan v. Hickman***, [1989] 2 S.C.R. 796 at para. 71.

[23] As it relates to an accused's efforts to obtain more documentary information or evidence from the court, it should also be clear that a mere request for "disclosure" cannot result in automatic or perfunctory provision of court records (assuming they exist) to a moving party. In those rare situations involving a recusal application where more relevant and clearly identifiable information is needed and sought from a court (and where not provided as earlier described), a rigorous process for the production of third party records need be followed. I repeat, such scenarios will be rare as in most instances the background and context for a potential recusal application will be provided in the

2016 MBQB 90 (CanLII)

course of the interaction between the parties and the court, which interaction takes place "on the record".

[24] I will address in a moment the manner in which the accused's motion has been, in my view, erroneously formulated as a motion for disclosure pursuant to ***R. v. Stinchcombe***. However formulated, the question of "relevance" on any motion for production, disclosure or discovery is key. Needless to say, relevance requires a reference point.

[25] In order to properly contextualize the issue on this motion and to provide a reference point for the "relevance" of the material/information the accused seek, it is instructive to set out the governing legal test. When determining whether he or she should recuse, the judge must address the following question:

> …. what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would decide fairly?
>
> [See ***Committee for Justice and Liberty v. Canada (National Energy Board***), [1978] 1 S.C.R. 369]

[26] In examining the above test, it is important to note that it is a purely objective test. It is also important to note the well-known legal proposition that judges are assumed to know the law. Accordingly, it should be assumed that judges know the test for recusal and are cognizant that the test is an objective one. The nature of the legal test and the assumed knowledge of it on the part of the judiciary are – as will be seen – significant considerations when one reviews the particular and stipulated items sought on the accused's motion for more material/information.

2016 MBQB 90 (CanLII)

[27] Although judges must ensure that they themselves feel free from the sort of genuine discomfort and inhibition that could come from previous or current associations, engagements or activity that might reasonably affect their ability to decide impartially, it is nonetheless clear that the governing test sets forth a reference point that is objective, not subjective. Accordingly, idiosyncratic squeamishness or excessive personal scrupulousness on the part of an individual judge should not displace a test which uses, as a reference point, the objective notion of "an informed person". The test itself has been informed by subsequent jurisprudence which in turn has implicitly confirmed and clarified not only the objective nature of the test itself, but also, the presumption of judicial impartiality. See ***Wewaykum Indian Band v. Canada***, [2003] 2 S.C.R. 259; and ***R. v. R.D.S.***, [1997] 3 S.C.R. 484. The presumption of judicial impartiality can only be displaced where there are serious and convincing grounds to support recusal. A real likelihood or probability of bias must be demonstrated. See ***R. v. R.D.S.*** at paras. 112-113.

[28] The inquiry into bias (real or apprehended) is inherently contextual and fact-specific and there is a correspondingly high burden that rests on the applicants to prove the claim of bias. See ***Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)***, 2015 SCC 25 at paras. 25-26, [2015] 2 S.C.R. 282. Informing the objective test is the recognition that the "informed person" who is reviewing the matter "realistically and practically" is not only informed of the relevant circumstances of the case, but also "the

2016 MBQB 90 (CanLII)

tradition of integrity and impartiality that are the backdrop of our judicial system and which are reflected and reinforced by the judicial oath." See ***Kalo v. Manitoba (Human Rights Commission)***, 2008 MBQB 92 at para. 18, 226 Man.R. (2d) 139. It is in the context of the above objective test, legal presumption and legal burden, that the accused in the present case seek material/information that will assist in providing a more fact-specific basis to prove their claim of bias.

[29] Before I set out what specifically the accused are seeking and what should have been the proper characterization of their motion, I will pause to note what is currently "on the record" as information upon which the accused can argue respecting their claim of bias. Consistent with what I have already mentioned typically occurs where motions for recusal are brought, the participants themselves, in the present case, have provided some information which constitutes a backdrop, specific and/or general, against which the accused's arguments can be made. While the accused are in no way pre-empted from bringing the present application in which they attempt to seek more information, it need be noted that part of the current "record" on which the parties can address the issue of bias, includes the Crown's endorsement of the accused's presentation of the factual history of Justice Mainella's past involvement with the accused, both while a judge, and earlier, as a prosecutor. The record also includes my categorical clarification respecting my non-involvement in the assignment of Justice Mainella as the duty judge on the day the authorization

2016 MBQB 90 (CanLII)

was granted. In that regard, I stipulated for counsel that I had no direct or indirect involvement in the assignment of Justice Mainella respecting his functions as duty judge and respecting his role in the issuance of the wiretap authorization. It was explained to counsel that it is the duty judge who typically receives applications for authorizations like the application in the present case. It was also explained to counsel that the "duty judge" is assigned that role by the trial coordinator. That assignment by the trial coordinator of the duty judge is in turn done arbitrarily and randomly based upon the availability of the judge and the general exigencies and vagaries of the Court of Queen's Bench rota. Accordingly, where there is an initial application for something such as a wiretap authorization, the supporting materials are brought to the court after they are prepared and without prior knowledge of the identity of the assigned duty judge.

[30] Notwithstanding the above background provided to counsel respecting my involvement (or non-involvement) in the assignment of Justice Mainella, and the general factual agreement provided by the Crown respecting the past involvement of Justice Mainella with the accused, the accused on this motion seek the following additional material and/or information:

(a) policies of the court on "cooling off periods" and the duty to avoid conflicts of interest;

(b) whether new judges are directed to the Canadian Judicial Council Publication on Ethical Principles;

(c) what guidance or education judges receive on conflicts of interest;

2016 MBQB 90 (CanLII)

(d) what guidance or manuals may exist on the role of the Chief Justice;

(e) whether Chief Justice Joyal attended any meetings of the Canadian Judicial Council and if he did not, the member who was sent in as substitution;

(f) the date on which the application for authorization 1/213 was made;

(g) the date on which Justice Mainella was assigned to review the application;

(h) the process by which Justice Mainella was assigned to review the application;

(i) any meetings between the court, affiant and/or Ms. Kliewer;

(j) policies of the Chief Justice to prevent conflicts of interest in case assignments;

(k) whether Justice Mainella or any other justice of the court reported a potential conflict of interest to the Chief Justice.

[31] When one examines the nature of the materials, documents and/or information the accused seek on this motion, it becomes apparent that except in a couple of instances, those documents, materials and information, if they exist, are assumed to be in the possession or control of the court. As such, the accused's application which has been framed pursuant to the Crown's first party disclosure obligation under ***Stinchcombe***, is erroneously framed.

2016 MBQB 90 (CanLII)

[32] As this should properly be characterized as a motion for third party records thereby triggering the process in ***R. v. O'Connor***, [1995] 4 S.C.R. 411, the Crown takes no position on the ultimate order that should be made, although it does agree that any determination granting or dismissing production should be made in the context of a third party records application under ***O'Connor***. In that regard, the Crown asserts the now well-known demarcated scope of its own disclosure obligation. The obligation on the Crown is to disclose all relevant information in its possession relating to the charges against the accused. The law does not impose an obligation on the Crown to disclose material which it does not have and cannot obtain. In reminding the court of the necessary limitation to its obligation respecting the provision of information, the Crown invokes ***R. v. McNeil***, 2009 SCC 3, [2009] 1 S.C.R. 66, wherein the Supreme Court made clear that the Crown does not encompass other state authorities. The Crown concedes that the concept of "the Crown" does not encompass the court with its constitutionally enshrined independence from other branches of government. This seemingly obvious point is underscored in ***R. v. Levin***, 2014 ABQB 113, 585 A.R. 176, wherein an accused charged with attempting to bribe a jury member sought disclosure of the names of the other jury members. A similar point was made in ***R. v. Kokopenace***, 2011 ONCA 759, 108 O.R. (3d) 284, where jury rules were sought as part of a challenge to the process of jury selection.

2016 MBQB 90 (CanLII)

[33] Although the accused's notice of motion did not properly plead for third party records, it was agreed at the hearing of this motion that for reasons of expediency (where the pre-trial motions have been already too long delayed), the accused's counsel would be permitted to transform their motion into one brought under the process in ***O'Connor***. The motion would, in turn, still rely upon the November 30, 2015 affidavit of Chantale Carriere which had been filed on the incorrectly framed disclosure motion.

[34] The process for an ***O'Connor*** application where third party record documents are sought, was summarized at para. 27 of ***McNeil***, *supra*:

> 27 Stated briefly, the procedure to be followed on an *O'Connor* application is the following.
>
> (1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the *Criminal Code* and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
>
> (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.
>
> (3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.
>
> (4) If the record holder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are therefore best resolved at the outset of the *O'Connor* process.

2016 MBQB 90 (CanLII)

> (5) Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.
>
> (emphasis added)

[35] While some modification may be required in applying the ***O'Connor*** process in circumstances involving records sought from a court, in the present case, no such modification is required as it is possible to dispose of the accused's motion with simple reference to the first stage of the test set out in ***O'Connor***. Although some of the materials and documents sought by the accused may not even exist, most of that which is sought by the accused fails to meet the test of relevance ("likely relevant") as properly understood in the context of ***O'Connor*** and ***McNeil*** and with reference to the earlier identified governing test for recusal.

[36] Subject to what might sometimes be more or less complicated preliminary matters in the ***O'Connor*** process, the ultimate substantive step in any application for production of documents in the possession of a third party is for an applicant to satisfy the court that the documents are "likely relevant" to the proceedings. The threshold burden of "likely relevance" in the case of third party records, unlike first party disclosure in the context of ***Stinchcombe***, carries no presumption of relevance. The somewhat distinct threshold of "likely relevance" for third party records underscores the important fact that for the effective

2016 MBQB 90 (CanLII)

administration of justice, criminal trials must remain focused on the issues to be tried and that scarce judicial resources not be diverted to or expended in "fishing expeditions" for possibly relevant evidence. Simply put, the likely relevant threshold reflects a gatekeeper function. Yet as part of that gatekeeper function, a balance need be sought. It is a balance which recognizes what I just identified as the importance of preventing unnecessary applications for production from consuming scarce judicial resources which could unduly protract criminal proceedings. At the same time, it must be a balance which also recognizes that an accused person cannot be required, as a condition to accessing information that may assist in making full answer and defence, "to demonstrate the specific use to which they might put information which they have not even seen". See ***O'Connor*** at para. 25. Mindful of the need for that balance, the phrase "likely relevant" is meant to ensure that there is a reasonable possibility that the information is logically probative of an issue at trial or in a given proceeding. See ***McNeil*** at para. 33.

[37] With the above threshold in mind, I have examined the accused's specific requests for production based upon their somewhat vague and bald assertions that such production is relevant and required.

[38] Amongst the requests made by the accused are those in relation to material and/or information respecting the date on which the application or authorization 1/213 was made. The accused also seek to know whether there were any meetings between the court (Justice Mainella or other judges) and the

2016 MBQB 90 (CanLII)

affiant and/or the police agent, Ms. Kliewer. The information surrounding those two questions was conceded by the Crown to be within the proper ambit for Crown disclosure. Accordingly, those inquiries, although part of the itemized list on this motion, have been answered by the Crown and will not be addressed by the court.

[39] I have examined all of the other stipulated requests made by the accused on this motion. A rather large number of those items do not exist or if they do exist, they exist outside of the court's knowledge or outside of its exclusive possession and control. More fundamentally, given the applicable test on questions of recusal and given the threshold of "likely relevance" regarding third party records, I have determined that the accused have not satisfied their onus. Put simply, even if I had determined that the items stipulated did exist, or if they were in the exclusive possession, control or knowledge of the court, there is no reasonable possibility that they are logically probative of any issue respecting a test which I have already identified is purely objective and which is assumed to be known by the judges in question.

[40] The overall approach and focus of the accused fails to establish any basis for determining that much of the production sought even exists. The Crown is correct to suggest that many of the requests appear to be "fishing expeditions". Although discussed in the context of first party applications, it is worth noting that the Supreme Court of Canada has made clear that there is some obligation on the defence to establish a basis to believe that the material sought in a

2016 MBQB 90 (CanLII)

disclosure motion actually exists. See ***R. v. Chaplin***, [1995] 1 S.C.R. 727 at paras. 30-32.

[41] Just as the submissions of the accused fail to establish the actual existence of much of what they seek, their submissions and supporting materials similarly fail to satisfy the significant burden to show "likely relevance". The accused baldly assert relevance without any compelling or persuasive explanation. Their brief in this regard consisted in its entirety of the following written submission:

. . .

> 2. The landmark case of *R. v. Stinchcombe* … holds that the defence is entitled to all disclosure that could possibly be relevant to the case, regardless of whether the Crown plans to call that evidence at trial or not.
>
> 3. The Applicants say that the materials detailed in the Notice of Motion are relevant to their Motion for Recusal, Motion for an Order of Disqualification and Prohibition, and the substantive motion yet to be filed challenging the Authorizations granted by Justice Mainella and are thus subject to the disclosure requirement.

[42] The accused have requested that they be provided policies of the court on "cooling off periods" and the duty to avoid conflicts of interest. Nothing was provided by the accused to suggest that such policies exist or that any such policies or guidelines would go beyond those published by the Canadian Judicial Council. It is those published principles and commentaries which provide some of what the accused may be seeking. Assuming without deciding that such information may be relevant, that information is available elsewhere and is not a document which the court controls.

2016 MBQB 90 (CanLII)

[43] The accused have requested information answering whether new judges are directed to the Canadian Judicial Council Publication on Ethical Principles. Respecting this request, I agree with the Crown that there is no possible relevance to this question. The publication itself may have some limited relevance in informing the discussion as to the existence of an apprehension of bias, but whether a new judge was directed to the policy or not is indeed immaterial to the question of whether a reasonably informed observer would believe that the presiding judge could not decide the case fairly. The reference point is clearly an objective standard which makes the subjective knowledge of any judge as to the policies irrelevant. To the extent that a publication such as the one referred to informs any issue in this case, it can be stated that just as a judge is assumed to know the law, so too is a judge assumed to know the ethical parameters (broadly speaking) within which he or she must work. The Crown put it succinctly and accurately when it stated:

> It does not matter what a judge is taught about avoiding conflicts or the apprehension of bias; what matters is whether the informed person would perceive [in the particular circumstances] that there was a conflict of interest or an appearance of bias.

[44] The accused have requested to know what guidance or education judges receive on conflicts of interest. As with an earlier request, there is no evidence to support the existence of any policies beyond the published policy of the Canadian Judicial Council. Even if something further did exist, it would not satisfy the test of "likely relevance" in relation to the issue before the court. Such policies would only go to the subjective knowledge of the judge.

2016 MBQB 90 (CanLII)

[45] The accused have requested information about what guidance or manuals may exist respecting the role of the Chief Justice. It should be noted that most information about the role of Chief Justice is public information. The role of the Chief Justice is legislatively set out in s. 24 of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280. The section notes that he or she shall "be responsible for the judicial functions of the court, including direction over sittings of the court and the assignment of judicial duties, and may assign to the judges of the court other duties relating to the administration of justice or for the purposes of an Act of the Legislature." If further information respecting the role of the Chief Justice is required, such information/material is not within the exclusive control, possession or knowledge of the court and it can be obtained by consulting, amongst other sources, various scholarly commentary. See, for example, Professor Peter W. Hogg, ***The Role of the Chief Justice in Canada*** (1993), 19 Queen's Law Journal 248 at 249. Irrespective of legislative provisions, scholarly comment or manuals that may or may not exist on the role of the Chief Justice, there is in my view little if any relevance to those materials or information in respect of the court's determinations on bias or recusal. In other words, irrespective of the role of the Chief Justice, what is relevant is not the mere existence of the office of the Chief Justice or the potential role of that office, but rather, whether any acts, associations or engagements on the part of the Chief Justice could give rise to a reasonable apprehension of bias in the particular circumstances of the present case.

2016 MBQB 90 (CanLII)

[46] The accused have also requested information as to whether I attended any meetings of the Canadian Judicial Council. I will spend little time on this point as in my view, my attendance at meetings of the Canadian Judicial Council has no bearing on the test that need be applied to the issues of bias and recusal as they arise in these proceedings.

[47] The accused have requested the date on which Justice Mainella was assigned to review the application. The Crown has responded accurately in its brief when it says that it is part of the public policy of the court that there is always available a duty judge, emergency or otherwise (see Notice to the Profession, October 1, 2001). I have already stipulated that the duty judges are randomly assigned by the trial coordinator. The accused are also already aware that Justice Mainella received the application for wiretap authorization in the context of his role as a duty judge and that he was not "assigned" to the application *per se*. Indeed, counsel for the accused Baldovi acknowledged as much at Mr. Baldovi's bail application:

> The agent in this case was Ms. Judy Kliewer of the federal Crown's office. And the application process, as I understand it, involves the application being dropped at the coordinator's office for the judges. There's a motions coordinator who will then take the file up, as I understand it, to whoever the duty judge is at that time, provide [it] to the duty judge, leave it with them and then wait to hear back.

[48] The accused request information about the process by which Justice Mainella was assigned to review the application. As noted in my stipulated clarification to counsel and as can be observed from the previous paragraph, applications such as the one in question are reviewed by the duty judge. The

2016 MBQB 90 (CanLII)

duty judge is assigned randomly subject to the exigencies and vagaries of the Queen's Bench rota.

[49] The accused seek to know the policies of the Chief Justice as they exist to prevent conflicts of interest in case assignments. In response to this request, it is important to note that the accused know - because they have been advised - that Justice Mainella was not specifically assigned to this matter, but rather, received the application as the randomly assigned duty judge. For that reason, it is not relevant to know the policies of the court for avoiding assignments that might give rise to issues of apprehended bias. Irrespective of the random nature of the assignment, to the extent that such identified policies exist, they are not relevant to nor will they assist in the application of the objective test to the particular facts of this case. In this case, Justice Mainella did not recuse himself from the application for the authorization. What matters in that context is whether an informed person – viewing the matter realistically and practically – mindful of the presumption of judicial impartiality and the sanctity of the judicial oath, perceives an appearance of bias.

[50] The accused have requested to know whether Justice Mainella or any other judge of the court reported a potential conflict of interest to the Chief Justice. That question posed by the accused, even if it uses the conditional language of "a potential conflict of interest", seeks irrelevant information as the information would again (as explained above) have no role or application in the consideration of the governing objective test. In any event, I repeat my earlier

2016 MBQB 90 (CanLII)

stipulation that I had no involvement, direct or indirect, with the assignment of Justice Mainella.

[51] For the foregoing reasons, the accused's motion seeking the identified materials and information from the court is dismissed.

The accused's motion for the prohibition and disqualification of all judges of the Court of Queen's Bench

[52] This motion was filed by the accused on October 30, 2015. It was a motion for which written submissions were also filed.

[53] When, on the basis of an allegation of bias, a litigant seeks the prohibition or disqualification of an entire court, that is, each and every judge of that court, the relief itself speaks to and suggests a perceived loss of confidence in the entire court's capacity to decide impartially. Whatever the context or circumstance, and however it is framed, no allegation goes more directly to the heart of the service a judge and a court are expected to provide. Any such allegation, however isolated and unique, can have long-lasting effects on the reputation of the court as it relates to its own institutional integrity, the integrity of its individual members and, as well, the integrity of the entire administration of justice. See ***R. v. R.D.S.***, *supra*, at para. 113.

[54] Motions such as this one brought by the accused are extremely rare. They are rare because most members of the legal profession accept that to seek to prohibit or disqualify an entire bench would require factual circumstances that create, in the clearest of ways, a perception of bias that could not but negate the presumption of impartiality and marginalize the significance and sanctity (for the

2016 MBQB 90 (CanLII)

member judges) of the judicial oath. The breadth and scope of a motion such as this one seem not to be directed at an "informed person" – aware of the rigours of the applicable test – but rather, the cynical onlooker whose reactions will be reflexive and not moored to legal concepts and understandings that tend to complicate outrage with nuance.

[55] Whoever the citizen (informed or uninformed) that hears or reads about the supposed need for the extreme relief contemplated on this motion, the reaction will likely be one of serious concern regarding the fairness and objectivity of those who sit as judges in the impugned Court of Queen's Bench. As a result, where a motion such as this one is not responsibly brought with the required full care and reflection, the motion's supposed goal of ensuring and reinforcing public confidence will be compromised. In fact, paradoxically, where such extraordinary and comprehensive relief is sought, it is the superficially formulated motions themselves which could lead to a loss of public confidence.

[56] Not surprisingly, given the extraordinary relief sought and given what was implied in the requested relief, this motion for prohibition and disqualification received considerable attention in the media. I note, for example, that The Winnipeg Free Press published an additional article on December 16, 2015, with the accompanying headline "*Judges on Trial in Drug Case*".

[57] The motion for the disqualification and prohibition of each and every judge of the Court of Queen's Bench remained "alive" until January 11, 2016. It was on that morning, in the comparative quiet of a one-hour 9:00 a.m. hearing

2016 MBQB 90 (CanLII)

intended for argument on the accused's initially framed disclosure motion, in the media's absence, that the accused's counsel advised that they would be abandoning this particular motion. They stated that they were doing so because the motion "had no merit". That advice and admission came casually but abruptly in the course of argument in response to a specific question that I raised in relation to my concerns respecting the relevance of the items sought in light of the applicable test for recusal. Had I not rooted my specific question in relation to the prohibition and disqualification motion, it was not clear when all of the counsel involved intended to share and advise the court of their realization that this particular motion had no merit and was to be abandoned. I note that there has been no subsequent media coverage of this case informing the public that this extraordinary motion and the extreme relief it sought has been abandoned because of counsel's own recognition that it "had no merit".

[58] When considering the possible need to bring a motion for recusal, counsel should never feel an inhibition or a "chill" such that it might prevent them or their clients from bringing any motion designed to ensure that they receive an impartial and unbiased hearing in any court in which they seek relief. Recusal motions, when properly grounded in at least arguable fact and law, are legitimate and counsel need not apologize for bringing such motions. However delicate, it can be assumed that in most cases where motions for recusal are brought, there are reasonable and genuine issues which require a determination.

2016 MBQB 90 (CanLII)

Indeed, in that regard, some of the motions brought in the case at bar present such genuine issues requiring determination.

[59] Given the acknowledgement by the accused that their argument "had no merit" and given the abrupt and casual manner in which such a motion was abandoned, questions can be legitimately asked about the ethical appropriateness of bringing such a motion in the first place. However indirectly framed in the language of apprehended bias, the motion has nonetheless the effect of calling into question the impartiality (or the capacity to be impartial) of members of an entire court. Questions can be asked about whether a motion as categorically and provocatively pled as one which seeks the disqualification and prohibition of an entire court was properly researched, where in the end it was determined by counsel themselves to possess no merit. Questions might also be asked as to whether counsel – prior to making an allegation which impugns the perceived impartiality of all the members of a court – bear some special and particular responsibility to ensure that such arguments are grounded in fact and law.

[60] One could be forgiven for saying that in a case where the integrity of a court has been challenged, anything but well-researched arguments based on supporting fact and law will be, at the very least, imprudent and ill-considered. Indeed, if this were a civil case, in light of the public and reputational implications arising from the ill-considered and later, casually abandoned allegations, the moving party would be facing the prospect of punitive costs.

2016 MBQB 90 (CanLII)

The accused's motion for my recusal

[61] The accused seek my recusal in respect of my role as case management judge and in any connected role in the adjudication of matters to be considered on the joint motion to quash the wiretap authorization.

[62] The accused allege, on my part, a reasonable apprehension of bias based on what can be summarized as the following three grounds:

(1) speculation around my role in the assignment of Justice Mainella as the judge who reviewed the application for the wiretap authorization;

(2) my role as Chief Justice generally in the court in which Justice Mainella was assigned to and performed his responsibilities as duty judge on June 18, 2013;

(3) my written comments to The Winnipeg Free Press in the context of the May 5, 2014 article in which questions were raised about Justice Mainella and the Court of Queen's Bench as a result of comments made to a journalist by one of the accused.

[63] The governing test in respect of recusal applications flowing from allegations of bias (real or apprehended) has already been set out at para. 25 of this judgment. The refinement, amplification and clarification of the governing test has been reported in various decisions encompassing distinct and diverse scenarios. That relevant jurisprudence has been discussed and supplemented by this court in, amongst other cases, ***Kalo v. Manitoba***, *supra*; ***R. v. Trunzo***,

2016 MBQB 90 (CanLII)

2012 MBQB 211, 282 Man.R. (2d) 18; and more recently, in ***R. v. Amsel***, 2016 MBQB 43, [2016] M.J. No. 68 (QL). Those cases were decided in ways consistent with the application of an objective test and with what the Supreme Court of Canada had reaffirmed in ***R. v. R.D.S.***, *supra*, was the stringent requirement for a demonstration of a real likelihood or probability of bias. Mere suspicion will never be enough. That requirement and caution is particularly important given the presumption of impartiality and the significance of the judicial oath. About the judicial oath, Cory J. had the following to say:

> 116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

[64] For the reasons that follow, based on the facts, the submissions of the parties and on an application of the governing law, I have determined that there is no cogent evidence establishing a real likelihood of any sort of bias, apprehended, institutional or otherwise, as it relates to my role in either the purported assignment of Justice Mainella, my general role as Chief Justice of the Court of Queen's Bench, or as it relates to my written comments to The Winnipeg Free Press as appearing in the article of May 5, 2014.

[65] The threshold for finding a real or perceived bias is high. The accused's onus in this case has not been satisfied.

2016 MBQB 90 (CanLII)

(i) My role in the assignment of Justice Mainella

[66] This ground for alleging reasonable apprehension of bias on my part can be disposed of quickly. I have already stipulated that I had no involvement, direct or indirect, with Justice Mainella's assignment either as the duty judge on the day in question or with his assignment on the application *per se*.

[67] Any duty judge, in the course of his or her responsibilities as the duty judge, may decide that a case or an issue before him/her gives rise to an issue of bias (real or apprehended) that might lead to his/her recusal. Any decision in that regard, taken or not taken by a judge in relation to a given matter, may subsequently be reviewed (as is occurring in the present case) on the basis of the governing objective test set out in, amongst other places, ***Committee for Justice and Liberty v. Canada***, *supra*.

[68] Given my non-involvement with any aspect of the assignment of Justice Mainella, I am not persuaded that an informed person with knowledge of all of the relevant circumstances, including the significance of the judicial oath and the traditions of integrity and impartiality that form a part of the background of this and all cases, would determine that it is more likely that I would not (consciously or unconsciously) decide the matter fairly.

(ii) My role as Chief Justice generally

[69] As I identified at para. 14 of this judgment, separate and apart from my non-involvement with the assignment of Justice Mainella, the accused contend that the mere fact of my role and duties as Chief Justice of the Court of Queen's

2016 MBQB 90 (CanLII)

Bench, creates the impression of an institutional protectiveness in relation to the Court of Queen's Bench judges themselves and the system of assigning judges.

[70] The fact of my role as Chief Justice, along with the many responsibilities that accompany that role, cannot by itself, in the absence of cogent evidence, be seen to displace the well-understood duty that flows from the judicial oath to decide matters impartially. Similarly, to the extent that the office of the Chief Justice is, broadly speaking and in part, associated with the scheduling and assignment of judges, it does not inexorably follow that with respect to any legal controversy involving the scheduling or assigning of judges, the Chief Justice cannot be impartial in his or her review concerning any potential allegation of bias flowing from a given assignment. In the absence of cogent evidence, for an informed person to believe or perceive that the person holding the office of Chief Justice could not so impartially decide such questions, is tantamount to suggesting that the Chief Justice would have difficulty complying with his or her judicial oath. Any such suggestion, without compelling evidence, represents the sort of intellectual shortcut that the Supreme Court of Canada has specifically warned against. It also represents a conclusion that de-emphasizes the importance of the presumption of impartiality which in turn is connected to the perceived sanctity of the judicial oath.

[71] I acknowledge that aspect of the accused's argument that emphasizes the fact that as the case management judge in this instance, I will be adjudicating the motions in question not only as the Chief Justice of the court from which

2016 MBQB 90 (CanLII)

these issues arose, but also, as the Chief Justice of the court in which the impugned judge (Justice Mainella) had been sitting. While I acknowledge the argument, it too presents a logic that constitutes a superficial "shortcut". It is also a logic which is irreconcilable with the presumption of impartiality, the importance of the judicial oath and a rigorous application of the objective test. The reality is that as it relates to the accused's now scheduled September 26-30 challenge to the issuance of the wiretap authorization (which in this case includes the bias argument), that challenge involves the sort of review and adjudication routinely performed by the trial judge or case management judge who is, in the case of wiretap authorizations, a member of the same court as the issuing judge.

[72] In addition to the practical reality discussed above, it can also be said that from time to time, a case presents as "a Chief's case". Such a case may be defined by its challenges, its controversy and/or its high profile nature. Such a case may also present as one whose circumstances place the focus on the integrity of the court. Even if an ultimate adjudication (concerning initial questions that touch the integrity of a court's process) proves not to be determinative in a legal sense, there is in most cases – given the stakes – no one more appropriately positioned to conduct such adjudications than the Chief Justice. While not all judicial decisions to recuse or not recuse can or should be reduced to an ethical issue, to the extent that a potential link does exist, the Chief Justice as *primus inter pares* is often in a preferred position to comment.

2016 MBQB 90 (CanLII)

No less so in the context of a formal adjudication. See ***Ruffo v. Conseil de la magistrature***, [1995] 4 S.C.R. 267 at paras. 58-59. That is not to say that any Chief Justice can or should consider him or herself in court or in chambers as the final arbiter of ethical questions. Yet, as the face of the court, the Chief Justice is uniquely placed to present for his colleagues, the legal profession and the public generally, a leadership that will address potential legal/ethical issues that require administrative or adjudicative clarification so as to ensure public confidence not only in his or her own court, but the judiciary generally.

[73] Finally, it is instructive to take note of a judgment that addresses many of the concerns raised by the accused in respect of my potential involvement in this case. In ***Bossé v. Lavigne***, 2015 NBCA 54 at para. 4, 440 N.B.R. (2d) 118, the New Brunswick Court of Appeal heard a recusal motion where the party being sued had since been appointed to the New Brunswick Court of Queen's Bench. According to the appellant in that case, the judge's appointment and his involvement in the already existing litigation raised an apprehension of bias on the part of the New Brunswick Court of Appeal. In dismissing that argument, the court said:

> 8. … The argument we should recuse because the respondent is now a judge of the Court of Queen's Bench is untenable. It should go without saying that a litigant who is now a judge is not isolated from the application of the law, either for events that occurred while that litigant was a lawyer, or those occurring after his or her appointment to the bench. To suggest we would let the current status of a litigant interfere with the fulfillment of our oath of office is an argument devoid of any merit. In this appeal, we simply have to determine a question of law: whether the judge who determined the motion for summary judgment erred in finding that all of the appellants' claims are prescribed. We will not be called upon to pass judgment on anything the respondent is

2016 MBQB 90 (CanLII)

> alleged to have done as a lawyer, since those allegations have not been adjudicated. More importantly though, the argument would still have no merit if we had to pass judgment on the actions of the respondent. While litigation involving a judge is not a common occurrence, instances of judges adjudicating a matter in which one of the parties happens to be a judge are not unknown. In those cases, like all others, the judicial oath rises to the occasion.
>
> (emphasis added)

[74] In the circumstances, notwithstanding their arguments concerning my institutional role as Chief Justice, the accused have not satisfied me that an informed person, viewing the matter realistically and practically, would conclude that I would not decide this matter fairly or be perceived to decide this matter fairly mindful of the facts and applicable law.

(iii) My comments to The Winnipeg Free Press

[75] Leading up to and resulting in what was to be a Winnipeg Free Press article, published on May 5, 2014, one of the accused made comments to the journalist about Justice Mainella's involvement in the issuance of the wiretap authorization in the investigation known as Project Sideshow. Those comments were made while he awaited the Provincial Court judge's decision on his pending bail. The article when it appeared was headlined as "*Man Arrested in Huge Undercover Operation Raises Troubling Questions*". In the context of inquiries to my office from the same journalist with The Winnipeg Free Press who authored the May 5, 2014 article, I provided certain written comments. Those written comments appeared verbatim in the May 5, 2014 article. For the purposes of completeness and precision, I reproduce that written statement immediately below:

2016 MBQB 90 (CanLII)

The specific Project Sideshow prosecution identified in Mr. McIntyre's email and the related questions he poses, relate to ongoing cases currently before the Court of Queen's Bench. Accordingly, it would not be appropriate for me as chief justice, or indeed for any judge of this or any other court, to comment upon any aspect of any judicial determination made at any stage of these cases.

Without commenting upon the specific details concerning the case involving Ronald Baldovi now proceeding in the Court of Queen's Bench, it would appear that a concern has been raised by an unidentified accused involved in Project Sideshow respecting Justice Mainella's judicial involvement and by extension, Justice Mainella's impartiality, as it relates to his granting of a judicial authorization in connection to Project Sideshow.

While the press has every right to explore those matters it believes touch upon the public interest, an accused person, especially one represented by counsel, should know that rather than raise a legal issue in the media (where it is known, because of the principle of judicial restraint and the ongoing nature of the proceeding, that the judge in question and the court cannot comment), an aggrieved accused person may challenge and have adjudicated at trial, the validity of an earlier granted authorization. That challenge and adjudication takes place before a trial judge who is not the same judge who granted the authorization. Such a challenge and adjudication respecting the validity of the authorization, would take place in open court where the governing legal principles will be applied. If there is any foundation to an allegation of bias, real or apprehended, the accused person will argue for the appropriate remedy. Any decision by the trial judge is also subject to review in the ordinary course by the Manitoba Court of Appeal.

The questions that Mr. McIntyre poses in his email and the concerns that were raised by the unidentified accused touch directly or indirectly on the issue of a judge's impartiality. A concern about a judge's impartiality, if it has any basis, must find connection in the legal concept of judicial bias, real or apprehended. As a matter of general public information, where a judge's impartiality is challenged on the basis of bias, real or apprehended, certain governing principles apply.

The criterion for judicial disqualification that an accused may argue should, or should have occurred, is the concept of reasonable apprehension of bias. The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. A reasonable person must be informed not only of the relevant circumstances of the particular case, but also of the tradition of integrity and impartiality that are the backdrop for our judicial system and which are reflected in and reinforced by the judicial oath.

2016 MBQB 90 (CanLII)

> There are no 'textbook' cases of bias and in each case, the inquiry is highly fact-specific. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.
>
> One of the shortcuts that the courts have identified and rejected is that shortcut which flows from the proposition that apprehended bias will inexorably follow from a judge's prior involvement in proceedings involving the same litigant. For example, the mere fact that a judge had previously decided adversely a case involving an accused does not create a reasonable apprehension of bias. The presumption of judicial impartiality prevails in the absence of cogent evidence to the contrary.

2016 MBQB 90 (CanLII)

[76] When one reviews my published comments, it should be clear that I offered no comment or opinion whatsoever on Project Sideshow or any of the legal issues that might arise therefrom. My comments were limited to nothing more than an explanation respecting how, where an accused has concerns about a judge's real or apprehended bias, a challenge to the issuance of a court order (in this case a wiretap authorization) can occur. My comments do nothing more than review the general legal principles relating to the sort of relief that is available in a court of law for an accused seeking a determination arising from concerns in relation to a judge's impartiality. To repeat, nothing whatever was said, directly or indirectly, that would express an opinion regarding the issues to be adjudicated in this matter. The focus and scope of my comments provided - in the context of a very provocative article which could be seen to raise questions about the integrity of certain judges and the Court of Queen's Bench - important public information about the dispassionate legal process that can be followed where an accused citizen believes he or she has been aggrieved

because of an issue of a real or apprehended bias on the part of a member of the judiciary.

[77] The written comments that I provided to The Winnipeg Free Press are consistent with the role that the Chief Justice must occasionally play in ensuring the provision of important but objective public information, especially in a context where questions are being raised in respect of the integrity of certain judges, the court generally and the process by which such questions can be addressed. Part of such public education involves ensuring that the public is aware of the indispensability of an impartial judiciary and that the public is aware as well, that the governing legal test will be applied in a process that exists so as to ensure that any concerns about impartiality are addressed in an identifiable and transparent legal forum. Animating the public role of a Chief Justice and the focused public information provided in a case like the present, is the knowledge that the constitutional importance and legitimacy of judicial independence is premised upon a public confidence which, in turn, assumes a judiciary that can and will ensure impartial decision-making.

[78] In the circumstances and based upon the application of the governing test, I have concluded that there is nothing in the nature or content of my written comments to The Winnipeg Free Press that would cause an informed person, viewing the matter realistically and practically, to conclude that I could not adjudicate the matters in the present case fairly or impartially.

2016 MBQB 90 (CanLII)

V. CONCLUSION

[79] Having abandoned their motion for the disqualification and prohibition of all judges of the Court of Queen's Bench, the accused's two remaining motions were in respect of third party production and my recusal. As explained, the two remaining motions are dismissed.

_____

C.J.Q.B.

2016 MBQB 90 (CanLII)

Tab 70

CanLII

R. v. Swaine, 2025 ONCA 614 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2025-09-05
File number:	COA-24-CR-0394; M55730
Citation:	R. v. Swaine, 2025 ONCA 614 (CanLII), <https://canlii.ca/t/kf8nw>, retrieved on 2026-01-19

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Swaine, 2025 ONCA 614
DATE: 20250905
DOCKET: M55730 (COA-24-CR-0394)

Fairburn A.C.J.O., Trotter and Copeland JJ.A.

BETWEEN

His Majesty the King

Responding Party (Appellant)

and

David Swaine

Applicant (Respondent)

Alan D. Gold and Ellen C. Williams, for the applicant

Andreea Baiasu, for the responding party

Brian Gover and Sarah Fooks, for the Office of the Chief Justice of the Superior Court of Justice

Tom Curry and Derek Knoke, for the Ontario Superior Court Judges' Association

Heard: August 7, 2025

By the Court:

[1] These reasons address the outstanding issues in the motion brought by the respondent, Mr. Swaine, seeking various orders pursuant to ss. 683(1)(a) and (b) of the *Criminal Code*, R.S.C. 1985, c. C-46, in support of an anticipated fresh evidence application. The factual background to the motion is set out in the court's previous decisions of February 18, 2025 and June 27, 2025: *R. v. Swaine*, 2025 ONCA 117, at paras. 2-7; *R. v. Swaine*, 2025 ONCA 471. Because of the issues raised in relation to judicial immunity/privilege, the court granted leave to intervene to the Office of the Chief Justice of the Superior Court of Justice (the "Office of the Chief Justice") and the Ontario Superior Court Judges' Association (the "OSCJA"): *R. v. Swaine*, 2025 ONCA 313.

[2] Two issues remain to be decided. First, Mr. Swaine requests a will-say statement from the Executive Legal Officer of the Superior Court (the "ELO") about any communications with the trial Crowns in this matter and that the ELO submit to cross-examination about any such communications. As noted at para. 11 of our June 27, 2025 decision, Mr. Swaine limits this request to the ELO's "outward-looking communications" – i.e., any communications with the trial Crowns. He has abandoned his request for the ELO's communications with the Regional Senior Judge (the "RSJ") or any other communications within the Superior Court about this case. Second, although not contained in Mr. Swaine's Notice of Motion or Amended Notice of Motion to Resume, Mr. Swaine seeks direction on whether his counsel may communicate with the now retired trial judge to inquire about issues raised in the trial judge's emails of October 25 and November 2, 2024, "to fill in any necessary details".

(1) The request for a will-say from the ELO of the Superior Court and to cross-examine on her communications with either of the trial Crowns

[3] Mr. Swaine seeks a will-say from the ELO, along with any texts, emails, and correspondence about any communications she had with the trial Crowns in this matter and to cross-examine the ELO about any such communications. Mr. Swaine submits that the ELO's version of the same communications about which this court directed cross-examination of the trial Crowns is relevant for the same reasons that the trial Crowns' evidence about the communications is relevant. In particular, Mr. Swaine anticipates challenging the credibility of the version of events provided by the trial Crown who communicated with the ELO, and argues that the ELO's version of events will assist him in that endeavour. Mr. Swaine argues that his abandonment of the request for information about the ELO's communications about this case within the Superior Court obviates any concerns about judicial immunity. He further submits that any risk that cross-examination would lead to disclosure of matters subject to judicial immunity can be managed by the supervision of the examination by a retired judge, as has been ordered for the examinations of the trial Crowns, as well as the presence of counsel for the Office of the Chief Justice to raise objections as necessary.

[4] The Crown initially took the position that evidence about any communications between the trial Crowns and the ELO was not relevant to the only issue in the appeal – the adequacy of the trial judge's reasons – and therefore could not meet the admissibility test for fresh evidence and ground an order for production and cross-examination. However, in light of this court's decision of February 18, 2025 regarding the relevance of the trial Crowns' accounts of these communications, the Crown concedes that the ELO's account is relevant. The Crown submits that the ELO's communications with trial Crown counsel (i.e., outward-facing only) are not privileged and do not engage judicial immunity. However, the Crown maintains that

judicial immunity and solicitor-client privilege protect inward-facing communications between the ELO and the Chief Justice and the RSJ. In the event the court orders a will-say and cross-examination of the ELO about any communications with the trial Crowns, the Crown seeks permission to cross-examine the ELO on whether she was aware of any other issues or concerns about the trial judge at the time of, or after, her communications with trial Crown counsel. The Crown limits this request to information that is not subject to judicial immunity or other privilege and also does not seek to elicit specific details regarding any other issues or concerns about the trial judge that the ELO was aware of.

[5] Mr. Gover, on behalf of the Office of the Chief Justice, acknowledges the potential relevance of the ELO's account of any communications with the trial Crowns in this matter. He also acknowledges that the narrow area of any communications by the ELO with the trial Crowns is not itself subject to judicial immunity or any other privilege. However, he argues that it would be contrary to the interests of justice to order the ELO to provide a will-say and be cross-examined in light of the broader constitutional and institutional values at stake. In particular, ordering the ELO to provide evidence risks undermining the institutional independence afforded to courts over administrative matters – an essential component of judicial independence with constitutional dimensions. He also raises the concern that if the court orders the ELO to provide evidence, even if limited to the narrow area of her communications with trial Crown counsel, cross-examination can be difficult to control and raises the risk of unintentional disclosure of matters subject to judicial immunity.

[6] The OSCJA made no submissions on this issue.

[7] In the court's decision of June 27, 2025, we granted the motion of the Office of the Chief Justice to file for "judicial inspection only" the unredacted communications in possession of the ELO relating to this matter, communications

over which judicial immunity or other privilege is asserted. These records were filed in sealed format, along with an index to the communications and the position of the Office of the Chief Justice on the nature of privilege applicable to each communication and a summary of the communications for the benefit of the panel. Those materials were delivered to the court as directed and the panel has reviewed them. As we explain below, we have come to the view that there is no need to rely on the content of the sealed records and do not take them into account in reaching our decision.

[8] Judicial immunity[1] is central to both issues the court must decide in this motion. Thus, we begin by summarizing the key aspects of judicial immunity. Judicial immunity is grounded in the principle of judicial independence. Judicial immunity prevents the compulsion of judges to testify about judicial proceedings in which they have played a role: *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796, at pp. 828-33. The purpose of judicial immunity is not to protect the interests of individual judges, but rather is to ensure public confidence in an impartial and independent judicial system: *Kosko c. Bijimine*, 2006 QCCA 671, [2006] R.J.Q. 1539, at paras. 39-41. Judicial immunity has constitutional dimensions because it is an essential attribute of an independent and impartial judiciary: *MacKeigan*, at pp. 826, 830-32; *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at p. 708-9; and *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 57.

[9] Without attempting a comprehensive definition of judicial immunity, it includes both deliberative immunity, which prevents a judge from being compelled to testify about their deliberations or to justify their judgment (outside of reasons for judgment), and judicial administrative immunity, which protects the administrative or institutional aspect of judicial independence: *MacKeigan*, at pp. 830-33. Judicial

administrative immunity protects the need for courts to control administrative matters without interference from the other branches of government. Judicial administrative immunity encompasses "judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function": *Valente*, at p. 712. These include the "assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions": *Valente*, at p. 709; *MacKeigan*, at pp. 832-33; and *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 40. Judicial immunity prevents compulsion to answer questions about how these judicial administrative functions have been exercised: *MacKeigan*, at p. 833.

[10] Relying only on the public record on this motion, in particular, the comments of the RSJ in court on April 10 and May 27, 2024, there can be no question that the decisions made within the Superior Court in relation to whether, when, and why the trial judge in this case was or was not assigned to sit and was on medical leave in the spring of 2024 are within the scope of judicial administrative privilege. They involve the authority of the court over the assignment of judges.

[11] The trial judge reserved judgment in this trial, and on October 25, 2023, put the matter over to January 24, 2024 for reasons. On January 24, 2024, his reasons were not ready and the trial judge put the matter over to February 21, 2024. This happened several more times, with the reasons not being ready on February 21, March 1, and March 15, 2024. We note that this pattern of the reasons for judgment not being ready on multiple occasions is, on its face, unusual. On March 19, 2024, the trial judge advised that he would provide the verdict, but provide reasons at a later date. He acquitted the respondent, giving very brief reasons, and put the matter over to April 10, 2024 to "read [his] reasons into the record".

[12] On April 10, 2024, the RSJ appeared in place of the trial judge. The RSJ noted on the record that April 25, 2024 would be six months from when the trial decision was taken under reserve, the deadline to provide reasons, pursuant to s. 123(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The RSJ advised that due to "medical reasons" he was exercising his discretion as the Chief Justice's designate to grant a 30-day extension for the trial judge to provide his reasons. The matter was put over to be spoken to on May 27, 2024.

[13] On May 27, 2024, the RSJ again appeared. He advised the parties that the trial judge was still "unwell". The RSJ further advised that he was not granting a further extension of time for the trial judge to prepare reasons for judgment because he was of the view that even if a further extension were granted, it "would not result in reasons being released." As a result, the RSJ advised the parties that: "[w]hatever the reasons were on the record [i.e., on March 19, 2024], will effectively become the reasons. There will not be any written reasons provided."

[14] Order-in-Council P.C. 2024-1038, dated September 20, 2024, documents the acceptance by the Governor General in Council of the trial judge's resignation. The Order-in-Council confirms the impact of medical issues on the trial judge's exercise of his judicial functions by providing for his retirement annuity pursuant to s. 42(1.1)(b) of the *Judges Act*, R.S.C. 1985, c. J-1. Section 42(1.1)(b) of the *Judges Act* provides for a retirement annuity to be provided to a judge who resigns from office because the judge "has become afflicted with a permanent infirmity disabling him or her from the due execution of the office of judge".

[15] The nature of the ELO's role within the Office of the Chief Justice dictates that she would be involved in internal communications within the court – in particular with the Chief Justice and the RSJ – regarding medical issues of a judge that impact their ability to exercise their judicial functions. The Office of the Chief Justice filed evidence on the motion regarding the ELO's role within the Superior

Court. The ELO is the direct reporting officer for all staff of the Office of the Chief Justice across the province and is the principal advisor to the Chief Justice. The ELO provides legal, strategic, and policy advice to the Chief Justice, and, among others, the Regional Senior Judges. The ELO operates as the "right hand" of the Chief Justice. A key aspect of her role is to protect judicial independence by acting as the principal liaison between the judicial and executive branches of government (both provincial and federal). Given these functions, the ELO's responsibilities form an integral part of the Superior Court's management of its own affairs.

[16] Of particular relevance to this motion, the ELO provides the Chief Justice and the Regional Senior Judges with privileged advice regarding issues brought to her attention, including issues that engage the obligation of judges to provide timely decisions, as required by the *Courts of Justice Act* and the *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2021). The advice the ELO provides on these types of issues involves not only privileged advice, but also confidential information relating to judges including about complaints to the Canadian Judicial Council and medical information related to medical leave requests.

[17] As noted above, Mr. Swaine has abandoned his request for evidence from the ELO about her communications with the RSJ or anyone else inside the Superior Court about this matter. Thus, his request does not directly implicate information subject to judicial immunity. However, given the ELO's role within the Office of the Chief Justice, concerns about judicial immunity are important considerations in whether ordering her to provide a will-say about any communications with the trial Crowns and submit to cross-examination about the same is in the interests of justice.

[18] Pursuant to ss. 683(1)(a) and (b) of the *Criminal Code*, this court may order the production of "any writing, exhibit or other thing connected with the proceedings" and order a witness to be examined where the court "considers it in

the interests of justice" to do so. In *R. v. Trotta* (2004), 2004 CanLII 60014 (ON CA), 23 C.R. (6th) 261 (Ont. C.A.), at para. 25, this court held that a two-part test is to be applied where a party seeks production of records and testimonial evidence in aid of a fresh evidence motion. The applicant must demonstrate that:

- There is a reasonable possibility that the order for production or testimony could assist on the motion to produce fresh evidence; and
- There is a reasonable possibility that the order for production or testimony may be received as fresh evidence on appeal.

[19] In *R. v. Jaser*, 2023 ONCA 24, at para. 17, this court modified the test enunciated in *Trotta* to account for the privacy interests of a third party in records for which production was sought, incorporating the factors relevant to a third-party records application.

[20] Mr. Swaine does not seek privileged material but, as we explain below, the material he does seek creates a risk of exposing matters subject to judicial immunity. Pursuant to *Trotta* as modified in *Jaser*, this risk must be weighed with the potential probative value of the evidence sought in assessing whether it is in the interests of justice to order the ELO to provide evidence about her communications with trial Crown counsel in this matter.

[21] We have outlined above well-established principles that judicial administrative immunity is an essential aspect of judicial independence with constitutional dimensions. These principles protect the vital public interest in an independent and impartial judiciary.

[22] Mr. Swaine has already been provided with will-says from both trial Crowns regarding any communications with the ELO about this matter. In addition, as outlined in our endorsement of June 27, 2025, during case management of this motion, the Office of the Chief Justice agreed to provide all electronic communications (texts and emails) between the ELO and trial Crown counsel in

this matter. These were provided on May 30, 2025. The electronic communications provided by the Office of the Chief Justice and with the will-say of one of the trial Crowns confirm that on March 14, 15, and 19, 2024, one of the trial Crowns communicated with the ELO by text message and email to register concern about the delay in the trial judge providing reasons.

[23] The will-says from the trial Crowns also reference two phone conversations, which could be potential subjects of evidence from the ELO – March 15 and March 19, 2024. The record does not support a reasonable possibility that the second conversation will assist Mr. Swaine with his fresh evidence application. In their will-says, both trial Crowns describe the March 19, 2024 conversation as one of the Crowns placing a call to the ELO during their drive back from court after the trial judge had acquitted Mr. Swaine. The ELO answered the phone, but as one of the trial Crowns began to describe what had happened in court that day, the ELO said she couldn't speak at the moment and would call him back. She never called back.

[24] The March 15, 2024 conversation potentially has more substance. The one trial Crown who was a party to that conversation with the ELO describes it in his will-say as lasting approximately 15 minutes and describes the concerns he says he raised with the ELO about the trial judge's delay in providing judgment (recall, this was a few days before the trial judge acquitted Mr. Swaine).

[25] The question we must grapple with is whether, given the risk of exposing matters subject to judicial immunity if the ELO is required to provide evidence, there is a basis to conclude that evidence from the ELO about her version of the telephone call is of such potential evidentiary value that it justifies the risk to judicial immunity and judicial independence?

[26] On the information provided to Mr. Swaine to date, there is no dispute that the communications took place between one of the trial Crowns and the ELO.

There is no dispute about the dates of the communications. There is no dispute that the communications concerned the delay in the trial judge providing judgment. The parties have been provided with the full record of the electronically documented portions of the communications. Mr. Swaine has been provided will-says from both Crown counsel about the communications and the right, not yet exercised, to cross-examine the trial Crowns.

[27] Given the information already provided about the communications between one of the trial Crowns and the ELO, the limits imposed by judicial immunity, and the resulting decision of Mr. Swaine to limit his request for evidence from the ELO to her outward-facing communications with the trial Crowns, the potential evidence that Mr. Swaine could obtain from the ELO is narrow. In substance, all that she could provide is her version of the March 15, 2024 phone conversation with one of the trial Crowns.

[28] But weighed against this is the risk that this narrow area of cross-examination could lead to disclosure of matters subject to judicial immunity or solicitor-client privilege. Anything apart from the actual words of the conversation inevitably leads into prohibited areas of judicial immunity – what steps did the ELO take as a result of the communication with Crown counsel? Privileged. What information, if any, did she pass on to the RSJ? Privileged. Was she aware of prior issues or concerns about the trial judge? Privileged.

[29] In light of the ELO's role within the Superior Court and her participation in and knowledge of internal communications and decisions of the Superior Court which are cloaked with judicial immunity, the request that she be required to produce a will-say about any communications with the trial Crowns and submit to cross-examination raises issues somewhat analogous to those considered in *R. v. Pires; R. v. Lising*, 2005 SCC 66 (CanLII), [2005] 3 S.C.R. 343.

[30] *Pires* concerned the threshold to be met for leave to cross-examine the affiant on a wiretap authorization. The threshold test for cross-examination of an affiant is grounded not only in concerns about the relevance and materiality of anticipated evidence, but also about the need to protect the identity of informants (a public interest privilege) and concerns about the prolixity of proceedings: *Pires*, at para. 33. In particular, at para. 36, the court identified the concern that cross-examination may inadvertently risk identifying confidential informants as a factor justifying a threshold showing before leave to cross-examine is granted.

[31] Balancing the very limited scope of potentially relevant evidence that the ELO could provide against the real risk of disclosure of matters subject to judicial administrative immunity if she is ordered to provide evidence, we are not satisfied that it is in the interests of justice to direct that she be ordered to provide a will-say or be cross-examined about any communication with the trial Crowns in this matter.

[32] For these reasons, Mr. Swaine's motion for a will-say from the ELO about any communications with the trial Crowns and that she submit to cross-examination is dismissed. As a result, it is not necessary to consider the Crown's request that if cross-examination of the ELO were ordered, it be permitted to examine the ELO about any other issues or concerns she was aware of about the trial judge. We would add that, in any event, it is clear such questions would be barred by judicial immunity because they seek information within the scope of the judicial administrative immunity. The Crown's proposal not to ask for detail or specifics does not remove the judicial immunity concern.

[33] As mentioned above, we reach the conclusion that it is not in the interests of justice to order the ELO to provide a will-say and submit to cross-examination without reliance on the content of the sealed records filed by the Office of the Chief Justice. Because it was unnecessary for the panel to rely on the sealed materials,

we deny the request that a summary of them be provided to the parties. The records remain under seal with the court.

(2) The request to communicate with the trial judge

[34] During case management of this appeal, the case management judge directed that counsel not communicate with the trial judge. The Crown has raised issues about the admissibility of the trial judge's emails to trial counsel dated October 25 and November 2, 2024 in Mr. Swaine's anticipated fresh evidence application – in particular, hearsay concerns and whether they are inadmissible due to judicial immunity. Although Mr. Swaine maintains that the October 25 and November 2, 2024 emails from the trial judge are admissible, he requests that his counsel be permitted to communicate with the trial judge to flesh out the details in the trial judge's emails. While not expressly stated by Mr. Gold, it appears that the request to communicate with the trial judge is made with a view to inquiring whether he would be prepared to provide evidence in support of Mr. Swaine's fresh evidence application.

[35] The ultimate admissibility of the emails from the trial judge to trial counsel as part of Mr. Swaine's anticipated fresh evidence application on the appeal is not before the court on this motion. That issue properly forms part of the fresh evidence admissibility analysis: *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at p. 775; *R. v. Manasseri*, 2016 ONCA 703, 344 C.C.C. (3d) 281, at paras. 198-225, leave to appeal refused, [2016] S.C.C.A. No. 513.

[36] We direct that neither counsel for Mr. Swaine nor Crown counsel may communicate with the now retired trial judge about this trial and appeal. The subject matter that Mr. Swaine wishes to inquire about – what were the reasons for, and any direction given by the RSJ that led to, the trial judge not sitting and not providing reasons; and whether the trial judge had draft reasons for judgment

prepared or would have been able to provide reasons for judgment – are the subject of judicial administrative immunity and deliberative privilege.

[37] Mr. Swaine's request to communicate directly with the trial judge about these issues presupposes that the trial judge would be permitted to waive these immunities. We do not accept that proposition.

[38] The law is clear that judges are not compellable to testify about their involvement in judicial proceedings on matters within the scope of deliberative privilege and judicial administrative immunity: *MacKeigan*, at pp. 830-33. In Ontario, there is no binding authority on whether a judge can waive[2] judicial immunity and choose to testify about their involvement in judicial proceedings. In *R. v. Moran* (1987), 1987 CanLII 124 (ON CA), 36 C.C.C. (3d) 225 (Ont. C.A.), at p. 244, leave to appeal refused, [1988] S.C.C.A. No. 213,[3] Martin J.A. expressly declined to decide whether a justice of the peace was competent or compellable to testify as to their mental process in granting a warrant. In declining to decide this issue, Martin J.A. expressed doubt that a judicial official would be competent to testify about their involvement in an adjudicative matter:

> I do not wish, however, to be thought in any way to accept the proposition that the justice of the peace was compellable, or even competent, to testify as to his mental processes in deciding to grant the warrant. [Emphasis added.]

[39] In our view, the purposes underlying judicial immunity and the weight of authority support the conclusion that individual judges cannot waive judicial immunity.

[40] The constitutional principle of judicial independence, from which judicial immunity derives, exists for the benefit of the public, not for individual judges: *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 33; *Ell v. Alberta*, 2003 SCC

35, [2003] 1 S.C.R. 857, at para. 29. Similarly, judicial immunity exists to protect the independence of the judiciary and the public's confidence in it. It is not for the benefit of individual judges: *Kosko*, at para. 40; *Morier and Boily v. Rivard*, 1985 CanLII 26 (SCC), [1985] 2 S.C.R. 716, at p. 737.

[41] In our view, because the purpose of judicial immunity is to protect the independence of the judiciary and public confidence in the administration of justice – for the benefit of the public – it follows that an individual judge is not permitted to waive judicial immunity. Because the purpose of judicial immunity is not to protect individual judges, the privilege is not theirs to waive.

[42] This conclusion is consistent with appellate authority from other provinces, as well as some trial level authority. We agree with the conclusion of the Court of Appeal of Quebec in *Kosko*, at paras. 43-44:

> Judges may not voluntarily waive this immunity and agree to testify. Immunity belongs neither to judges nor to the parties before them. Rather, it exists to protect the institution of the judiciary and the public's confidence in it. Consequently, it may not be waived by either the judges or the parties. [Translation.]

[43] This holding in *Kosko* was recently followed by the Nova Scotia Court of Appeal in *K.J.M.J.*, at para. 44. It has also been adopted by various trial courts: *R. v. Hahn*, 2013 SKQB 295, at para. 24, aff'd (but not specifically on this issue) 2018 SKCA 73; *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835, 24 C.E.L.R. (4th) 214, at para. 158; and *R. v. Baldovi et al.*, 2016 MBQB 90, 328 Man. R. (2d) 155, at para. 22.

[44] Also of assistance on this issue is the trial level holding of Glube C.J.T.D. in *MacKeigan* (1988), 1988 CanLII 7124 (NS SC), 43 C.C.C. (3d) 287 (N.S.S.C.), at pp. 336-337, where she held that judges are not competent to testify about judicial matters they were involved in, even if they want to testify:

> A judge must not testify before a commission or court on matters which came before the judge in his or her judicial capacity, even if the judge would like to respond to one or more of the questions which have been publicly raised. It would be wrong to do so. One question could not be asked in isolation and there is an obligation to preserve the judicial immunity for the benefit of the public. For this immunity, in the performance of judicial duties, is not for a judge personally, it is for the benefit of the public "to protect the judicial system against interference or influence which might pervert the course of justice" (*Morier*, p. 737).

Glube C.J.T.D. was affirmed on the testimonial competence issue by the Nova Scotia Court of Appeal: (1988), 1988 CanLII 7144 (NS CA), 46 C.C.C. (3d) 191. The Supreme Court affirmed the result, but did not address the issue of competence to testify.

[45] Finally, we note the comments of Gascon J. in *obiter* in *Commission scolaire de Laval*. That case considered whether deliberative secrecy attached to discussions leading to a decision by a school board to dismiss a teacher. Ultimately, the court held that deliberative secrecy did not attach because the board was not performing a public adjudicative function; rather, its decision was of a private nature in the context of an employment relationship: at paras. 61, 65. In discussing deliberative secrecy, Gascon J., writing for the majority of the Supreme Court, stated, at para. 64: "Judges cannot of course choose to lift deliberative secrecy to explain the reasoning behind their conclusions whenever it suits them to do so."

[46] Based on these authorities, we conclude that the trial judge cannot waive judicial immunity. Because the inquiries that Mr. Swaine wishes to pursue with the trial judge necessarily would disclose matters covered by judicial immunity they ought not to be permitted.

[47] Counsel are directed not to communicate with the trial judge about this trial or appeal.

(3) Next steps

[48] This ruling disposes of all of the issues in Mr. Swaine's motion. The parties shall proceed with the cross-examinations of the trial Crowns as directed in the court's decision of February 18, 2025. As previously directed pursuant to s. 683 of the *Criminal Code*, the cross-examinations will be conducted before the Honourable Robert J. Sharpe. The parties are directed to confer and propose a schedule for the filing of Mr. Swaine's fresh evidence application and the Crown's responding materials, which should be provided to the court's Executive Legal Officer by September 22, 2025.

Released: September 5, 2025 "J.M.F."

"Fairburn A.C.J.O."
"Gary Trotter J.A."
"J. Copeland J.A."

---

[1] Judicial immunity is sometimes referred to as "judicial privilege": *R. v. K.J.M.J.*, 2023 NSCA 84, at paras. 43-44.
[2] Some of the jurisprudence characterizes this issue in terms of competence to testify.
[3] In *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at paras. 24-27, the Supreme Court overruled the s. 9 *Charter* analysis from *Moran*. However, this has no impact on the comments in *Moran* in relation to judicial immunity.

Tab 71

CanLII

High-Crest Enterprises Limited v. Canada, 2017 FCA 88 (CanLII), [2018] 2 FCR 3

Source:	Federal Court of Appeal
Date:	2017-04-28
File number:	A-473-15
Other citations:	278 ACWS (3d) 209 — [2017] DTC 5057
Citation:	High-Crest Enterprises Limited v. Canada, 2017 FCA 88 (CanLII), [2018] 2 FCR 3, <https://canlii.ca/t/h3hsh>, retrieved on 2026-01-07
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

[2018] 2 F.C.R. 3

A-473-15

2017 FCA 88

High-Crest Enterprises Limited (*Appellant*)

v.

Her Majesty the Queen (*Respondent*)

INDEXED AS: HIGH-CREST ENTERPRISES LIMITED V. CANADA

Federal Court of Appeal, Pelletier, Stratas and Webb JJ.A.—Halifax, November 9, 2016; Ottawa, April 28, 2017.

Judges and Courts — Power of Chief Justice to reassign — Appeal from Tax Court of Canada (T.C.C.) decision rendered by judge who did not hear appeal before T.C.C. — Appellant successful bidder in proposal to construct addition to nursing home facility — Appealing assessment of HST by Canada Revenue Agency — With consent of parties, Chief Justice removing appeal file from presiding judge after matter heard for purpose of having judgment rendered as soon as possible — Assigning appeal to judge of his choosing — As a result, decision rendered by another judge — Respondent arguing, inter alia, power of Chief Justice to remove file from presiding judge, assign it to another resulting from Courts Administration Service Act, ss. 8(1),(2), Tax Court of Canada Act, s. 14(2) — Main issue whether Chief Justice having power to remove file from presiding judge, assign it

to another judge; whether second judge having authority to render judgment in this matter — Per Webb J.A (Pelletier J.A. concurring): Chief Justice not having power to unilaterally remove judge from case with which judge seized — Doing so not allowed by Courts Administration Service Act, ss. 8(1), (2), Tax Court of Canada Act, s. 14(2) — Clearer language required if Parliament intending to alter rule that judge seized of matter is only one having jurisdiction to continue with that matter — Removal also not justified under implied jurisdiction of T.C.C. to carry out its functions as a court — No indication herein that removal of judge necessary — That judge still seized with the matter — Matter referred back to judge who heard case to render decision — Appeal allowed — Per Stratas J.A. (dissenting): Power of Chief Justice to reassign confirmed by context, purpose of Tax Court of Canada Act, s. 14 — Question herein whether Chief Justice's power to reassign extending to situations beyond death or incapacity of original judge assigned to case — Power to reassign must extend to situations beyond death or incapacity — Factors guiding Chief Justice to use his discretion to reassign is a question distinct from the question of jurisdiction — Courts Administration Service Act, s. 8, Tax Court of Canada Act, s. 14 not giving Chief Justice blank cheque — Parliament intending that Chief Justice should exercise power to reassign only after carefully considering all circumstances — Protection of mission of court prevailing in certain circumstances — Here, Court not bound to deal with Chief Justice's exercise of discretion — Procedural unfairness in this case — However, appellant not objecting in timely way, could not succeed — Matter should have been remitted to Chief Justice for assignment of a judge in accordance with principles herein.

Customs and Excise — Excise Tax Act — Appellant successful bidder in proposal to construct addition to nursing home facility — Self-supply rule under Excise Tax Act, s. 191(4) resulting in deemed supply of addition — Canada Revenue Agency determining that Excise Tax Act, s. 191.1 applying, assessing appellant HST — Issue before Tax Court of Canada whether s. 191.1 applicable — Per Webb J.A (Pelletier J.A. concurring): Excise Tax act, s. 191.1(2)(c) in dispute herein — Question whether necessary to determine primary purpose of total amount builder may reasonably expect to receive from a grantor, or whether only necessary that builder may reasonably expect to receive an amount for required purpose from a grantor — Condition in s. 191.1(2)(c) one that, if satisfied, having certain consequences under Act — Amount of tax payable under Act not affected by amount of funding provided or expected to be provided.

This was an appeal from a Tax Court of Canada (T.C.C.) decision rendered by a judge who did not hear the appeal before that Court.

The Province of Nova Scotia issued a request for proposals to increase the number of nursing home beds and residential care facility beds. The appellant was one of the successful bidders in proposing to construct an addition to its existing nursing home facility. The self-supply rule under subsection 191(4) of the *Excise Tax Act* (ETA) resulted in a deemed supply of the addition. The Canada Revenue Agency determined that section 191.1 was applicable. The appellant was assessed HST based on the amount of HST paid in relation to the cost of the addition and not on the fair market value of the addition. The issue before the T.C.C. was whether section 191.1 of the ETA was applicable. The matter was heard on February 26, 2014. On June 23, 2015 a post-hearing discussion conference call was held during which the Chief Justice of the T.C.C. stated that he had removed the appeal file from the presiding judge of this appeal for the purpose of having a judgement rendered as soon as possible. With the consent of the parties, it was decided that the matter would be determined by another judge, chosen by the Chief Justice, based on the record and transcripts. As a result, a decision was rendered by another judge of the T.C.C., dismissing the appellant's appeal.

The respondent argued, *inter alia*, that the Chief Justice has the authority to remove the file from the presiding judge and assign it to another judge as a result of the provisions of subsections 8(1) and (2) of the *Courts Administration Service Act*, and subsection 14(2) of the *Tax Court of Canada Act*.

The main issue was whether the Chief Justice had the power to remove the file from the presiding judge and assign it to another judge, and whether the second judge had the authority to render judgment in this matter.

Held (Stratas J.A. dissenting), the appeal should be allowed.

Per Webb J.A (Pelletier J.A. concurring): The Chief Justice of the T.C.C. did not have the power to unilaterally remove the judge from the case with which he was seized. Parliament did not intend to grant the Chief Justice the power to remove a case from a judge who has been seized with that matter. Reassigning a case that has not been heard is not the same as removing a judge who is seized with a case from that case. As a result, subsections 8(1) and (2) of the *Courts Administration Service Act* and subsection 14(2) of the *Tax Court of Canada Act* do not allow a Chief Justice to unilaterally remove a case from a judge who is seized with that case. The general rule is that a judge who is seized of a matter is the one who has the jurisdiction to continue with that matter. If Parliament intended to alter this rule to provide the Chief Justice with the power to remove a file from a judge who was seized of this matter, clearer language would be required. The removal could also not be justified under the implied jurisdiction of the T.C.C. to carry out its functions as a court. This implied jurisdiction does not give the Chief Justice the power to unilaterally remove a case from a judge who has heard the matter and who is not incapacitated. There was no indication in this case that the removal of the judge from this matter was necessary. As a result, that judge was still seized with the matter and all of the proceedings that occurred after the file was removed were annulled. The matter was referred back to the judge who heard the case to render a decision.

Some matters were raised that should be addressed by the presiding judge in deciding how to interpret section 191.1 of the ETA. The ETA provides that generally a builder of an addition to a residential complex is deemed to have made a self-supply of that addition when the conditions as set out in paragraphs 191(4)(a) to (c) of the ETA are satisfied. The builder, subject to certain exceptions, is deemed to have collected tax on the supply based on the fair market value of the addition. Section 191.1 of the ETA provides an exception to this general rule if the conditions set out thereunder are satisfied. The condition in paragraph 191.1(2)(c) was the only condition in dispute herein. A question to be addressed is whether it is necessary to determine the primary purpose of the total amount that a builder may reasonably expect to receive from a grantor or whether it is only necessary that the builder may reasonably expect to receive an amount from a grantor and that amount is for the required purpose. Paragraph 191.1(2)(c) is a condition that, if satisfied, will result in certain consequences under the ETA. The amount of tax payable under the ETA is not affected by the amount of the funding that is provided or that is expected to be provided by the grantor.

Per Stratas J.A. (dissenting): The context and purpose of section 14 of the *Tax Court of Canada Act* confirms that the Chief Justice has the power to reassign. The central question in this case was whether the Chief Justice's power to reassign potentially extends to situations beyond the death or incapacity of the original judge assigned to determine the case. The power to reassign is coextensive with the need to advance the mission of the courts. Situations beyond death and incapacity can undercut the mission of the courts. Consistent with its purpose, the power to reassign must extend to those situations. What factors will guide the Chief Justice to use his discretion to reassign is a question distinct from the question of jurisdiction. In enacting section 14 of the *Tax Court of Canada Act* and section 8 of the *Courts Administration Service Act*, Parliament did not give the Chief Justice a blank cheque. Instead, Parliament intended that the Chief Justice should exercise the power to reassign only after carefully considering all of the circumstances, both for and against reassignment. The precise circumstances matter. After the judge has heard the matter and is writing reasons, a Chief Justice will be much more constrained. A judge must be allowed to decide a case without any interference. However, there are circumstances where the need to protect the mission of the court must prevail. Here, the Court was not bound to deal with the Chief Justice's exercise of discretion. There was procedural unfairness in this case. The exercise of discretion by the Chief Justice mattered to the parties: they had already argued the case before the original judge and justifiably expected it would be decided by that judge. They should have been asked to make submissions. However, the appellant did not object in a timely way and could not succeed. This was a textbook case of waiver. The matter should have been remitted to the Chief Justice for assignment of a judge to this case in accordance with the principles in these reasons. Further, the Court should not gratuitously pronounce law at this time and tie the hands of a future panel of this Court that may consider this same case.

STATUTES AND REGULATIONS CITED

Courts Administration Service Act, S.C. 2002, c. 8, s. 8.

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 14, 123.

Criminal Code, R.S.C., 1985, c. C-46, s. 499(1).

Excise Tax Act, R.S.C., 1985, c. E-15, ss. 191(4), 191.1.

Income Tax Act, R.S.C., 1985 (5th Supp.), c.1.

Interpretation Act, R.S.C., 1985, c. I-21, ss. 12, 31(3).

Legislation Act, 2006, S.O. 2006, c. 21, Sch. F, s. 79.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 46.1.

Tax Court of Canada Act, R.S.C., 1985, c. T-2, s. 14.

CASES CITED

APPLIED:

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. MacDougall*, 1998 CanLII 763 (SCC), [1998] 3 S.C.R. 45, (1998), 165 D.L.R. (4th) 193; *R. v. Gallant*, 1998 CanLII 764 (SCC), [1998] 3 S.C.R. 80, (1998), 168 Nfld. & P.E.I.R. 126; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601.

CONSIDERED:

Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans), 1997 CanLII 399 (SCC), [1997] 1 S.C.R. 12, (1997), 142 D.L.R. (4th) 193; *Re Ramsey* (1972), 1972 CanLII 1409 (NB CA), 4 N.B.R. (2d) 809, 8 C.C.C. (2d) 188; *Clarke v. Trask* (1901), 1 O.L.R. 207, [1901] O.J. No. 42 (QL) (H.C.J.); *Coleshill v. Manchester Corporation*, [1928] 1 K.B. 776, 97 L.J.K.B. 229 (C.A.); *Re Application of British Reinforced Concrete Engineering Co. Limited* (1929), 45 T.L.R. 186, 20 Ry. & Can. Tr. Cas. 78 (Railway and Canal Commission); *Royal Bank of Canada v. Nichols* (1985), 1985 CanLII 5164 (PE SCTD), 56 Nfld. & P.E.I.R. 340, [1985] P.E.I.J. No. 12 (QL) (S.C.); *Bolton v. Bolton*, [1949] 2 All E.R. 908, (1950), 47 L.G.R. 730 (H.C.J.); *Liszkay v. Robinson*, 2003 BCCA 506, 232 D.L.R. (4th) 276; *D'Amico v. Wiemken*, 2010 ABQB 785, 497 A.R. 360; *R. v. Lochard* (1973), 1973 CanLII 1346 (ON CA), 12 C.C.C. (2d) 445, 22 C.R.N.S. 196 (Ont. C.A.); *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Lawrie v. Lees* (1881), 51 L.J. Ch. 209, 7 A.C. 19 (H.L.); *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, (1959), 16 D.L.R. (2d) 689.

REFERRED TO:

IWA v. Consolidated-Bathurst Packaging Ltd., 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, (1990), 68 D.L.R. (4th) 524; *Doyle v. Restrictive Trade Practices Commission,* 1985 CanLII 5573 (FCA), [1985] 1 F.C. 362, (1985), 21 D.L.R. (4th) 366 (C.A.); *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140; *BP Canada v. Canada (National Revenue)*, 2017 FCA 61, [2017] 4 F.C.R. 355; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, (1998), 154 D.L.R. (4th) 193; *Provincial Secretary of Prince Edward Island v. Egan*, 1941 CanLII 1 (SCC), [1941] S.C.R. 396, [1941] 3 D.L.R. 305; *Canadian National Railway v. BNSF Railway Company*, 2016 FCA 284; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 218, 141 C.P.R. (4th) 165; *Brooke v. Toronto Belt Line Railway Co.* (1891), 21 O.R. 401; *Canadian National Railway Co. v. Lewis*, 1930 CanLII 309 (CA EXC), [1930] Ex. C.R. 145, [1930] 4 D.L.R. 537; *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304; *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 (H.L.); *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796, (1989), 61 D.L.R. (4th) 688; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Parmar v. Bayley,* 2001 BCSC

Tab 72

Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters | Faculty Scholarship

1993

The Role of a Chief Justice in Canada

Peter W. Hogg
Osgoode Hall Law School of York University

Source Publication:
(1993-94) 19:1 Queen's Law Journal 248-260

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works

Part of the Judges Commons, Legal Ethics and Professional Responsibility Commons, and the Legal Profession Commons

Recommended Citation
Peter W. Hogg, "The Role of a Chief Justice in Canada" (1993-94) 19:1 Queen's Law Journal 248-260.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

The Role of a Chief Justice in Canada

*Peter W. Hogg**

Professor Hogg describes the duties of Chief Justices in Canadian courts, and explains that the effective discharge of their many administrative functions plays a significant role in maintaining the independence of the judiciary.

Introduction
I. Appointment
II. Tenure
III. Payment
IV. Administration of Court
V. Protection of Institutional Independence
Conclusion

Introduction

Professor William R. Lederman, in the course of his long, productive, and brilliant career, influenced the way we think about most areas of Canadian constitutional law. His influence on scholarship, practice, and doctrine has been immense. One of his early contributions was a massive two-part article entitled "The Independence of the Judiciary," which appeared in the *Canadian Bar Review* in 1956.[1] That article is still universally recognized as the seminal work on the topic. It continues to be cited frequently, and later writers have had to be content to nibble at the edges of the topic. This article is one of those nibbles.

---

* Professor of Law, Osgoode Hall Law School, York University, Toronto. I acknowledge the research assistance of Margot Ferguson, LL.B. 1993. I also acknowledge the help of my colleague, Garry Watson, and of Jeannie Thomas, Executive Director of the Canadian Judicial Council, both of whom made useful comments on an earlier version of the paper. An earlier version was delivered at a seminar for the Canadian Judicial Council on 24 March 1993, and I benefitted from discussions that took place there.

1. W.R. Lederman, "The Independence of the Judiciary" (1956) 34 Can. Bar Rev. 769 (Part 1) and 1139 (Part 2).

Professor Lederman never turned his attention to the role of a Chief Justice in the maintenance of the independence of the judiciary. Indeed, very little has been written on the topic by anyone.[2] And yet it is the Chief Justice of each superior court who manages the relationship between the court and the government which is responsible for the administration of justice in that jurisdiction. It is that relationship which carries the most obvious risks to the independence of the judiciary. The Chief Justice, therefore, has a unique responsibility, which is not shared with the puisne judges, for safeguarding the independence of the judiciary. In this article, I will first describe the office of Chief Justice of a superior court,[3] and then I will address the issue of judicial independence.

I. Appointment

The Chief Justice of Canada,[4] the Chief Justice of the Federal Court of Canada,[5] and the Chief Justices of the superior courts of the provinces[6] are all appointed by the Governor in Council — that is, by the federal Cabinet. In law, the appointment process for a Chief Justice is the same as for a puisne judge of the same court. It is often claimed, however, that in practice there is a slight difference in the process; the recommendation to Cabinet for the appointment of a Chief Justice is made by the Prime Minister,

2. The only study that I could find was A. Linden, *et al.*, "The Status and Role of the Chief Justice in Canada" (Study commissioned by the Canadian Institute for the Administration of Justice, 1981) [unpublished]. This proved to be a very useful source.

3. The scope of this article is confined to Chief Justices of the superior courts in Canada. I do not deal with Associate Chief Justices that exist in most of the superior courts, or with Chief Judges of the Provincial Courts. However, most of what I have to say is applicable to them.

4. *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4(2) [hereinafter *Supreme Court Act*].

5. *Federal Court Act*, R.S.C. 1985, c. F-7, s. 5(4) [hereinafter *Federal Court Act*].

6. The mode of appointment of the judges of the superior, district, and county courts of the provinces is stipulated by the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 96 [hereinafter *Constitution Act, 1867*].

while the recommendation for the appointment of a puisne judge is made by the Minister of Justice.[7]

The qualifications for appointment as a Chief Justice are, in law, no different from those for a puisne judge of the same court. In the case of the Supreme Court of Canada, the appointee must be either a judge of the superior court of a province or a member of the bar of a province of at least ten years' standing.[8] In the case of the Federal Court of Canada, the requirement is the same.[9] In the case of the superior courts of the provinces, the appointee must be a member of the bar of the province of at least ten years' standing.[10] In practice, however, Chief Justices are rarely appointed directly from the bar, but usually from the ranks of the puisne judges.[11] As well, of course, in practice, a Chief Justice must possess qualities of leadership, organization, and diplomacy that are not always essential to the task of being a judge.[12]

As will be elaborated later in this article, the Chief Justice of each superior court has the power to assign judges to particular cases. This includes the power to assign himself or herself to a particular case. The Chief Justice also controls the list of cases, including the order in which they are to be tried or heard and the courtrooms in which they are to be tried or heard. As will be elaborated later, it is a constitutional prerequisite of judicial

---

7 P. H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) at 112.

8 *Supreme Court Act*, s. 5

9. *Federal Court Act*, s. 5(3).

10. *Judges Act*, R.S.C. 1985, c. J-1, s. 3 [hereinafter *Judges Act*]. The statutory requirement of ten years' standing supplements the constitutional requirement that judges be selected from the bar of the province. See *Constitution Act, 1867*, ss. 97 and 98.

11. In the case of the Supreme Court of Canada, all but the first of the Chief Justices have been appointed from within the Court.

12 It goes without saying that Chief Justices have no power to select the new judges to fill vacancies on their courts. These vacancies are filled by the Governor in Council, acting under the powers referred to above, *supra* notes 4-6. The federal Minister of Justice normally consults a Chief Justice before making an appointment to the court of the Chief Justice.

independence that these functions be carried out by or under the control of judges and not of the government.[13]

II. Tenure

Chief Justices hold office on the same basis as puisne judges, that is, they hold office "during good behaviour," and are subject to removal only by a joint address of the Senate and House of Commons.[14] There is mandatory retirement at age 75.[15] However, the Chief Justice of a provincial superior court may relinquish the office after five years and revert to being a puisne judge.[16]

Chief Justices play a unique role in securing the tenure of superior court judges through their membership in the Canadian Judicial Council. The Canadian Judicial Council is chaired by the Chief Justice of Canada, and comprises all Chief Justices and Associate Chief Justices of the superior courts.[17] As well as certain coordinating and educative functions, the duty of the Council is to inquire into complaints against superior court judges and to report to the federal Minister of Justice. If the Council recommends that a judge be removed from office and Cabinet agrees, then (if the judge does not resign), a joint address of the

---

13. See *Valente* v. *R.*, [1985] 2 S.C.R. 673 [hereinafter *Valente*] at 708-709. See also text accompanying notes 20-22, below. The constitutional requirement applies to all courts of criminal jurisdiction and stems from s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [hereinafter *Charter*].

14. *Supreme Court Act*, s. 9(1); *Federal Court Act*, s. 8(3). The tenure of judges of the superior courts of the provinces is stipulated by the *Constitution Act, 1867*, s. 99. For analysis, see P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at s. 7.1(c).

15. *Supreme Court Act*, s. 9(2); *Federal Court Act*, s. 8(2), as am. by S.C. 1987, c. 21, s. 7. The retirement age of judges of the superior courts of the provinces is stipulated by the *Constitution Act, 1867*, s. 99.

16. *Judges Act*, s. 32.

17. *Ibid.* at Part II. All provinces except Prince Edward Island have established provincial 'judicial' councils, with power to investigate complaints of judicial misbehaviour against judges appointed by the province. The composition of these bodies varies considerably from province to province.

two Houses of Parliament is required under the *Constitution*[18] in order to carry out the recommendation.

III. Payment

The salaries of superior court judges, including Chief Justices, are "fixed and provided" by the federal *Judges Act*.[19] Each Chief Justice is paid more than the puisne judges on the same court.

IV. Administration of Court

The most obvious way in which a Chief Justice differs from other judges is that the Chief Justice is responsible for administering the operations of his or her court.

In carrying out this function, a Chief Justice is subject to external constraints. The most obvious and important of them is lack of access to public funds. The Chief Justice can only request funds from the Minister of Justice (or Attorney General), and hope that the Minister will succeed in persuading his or her Cabinet colleagues, including the Minister of Finance (or Treasurer), that the full amount requested should be included in the estimates for the Department of Justice (or Attorney General). The estimates have to be approved by the Parliament (or Legislature), of course, and they will have to be defended from Opposition criticism by the Minister of Justice.

Once funds have been appropriated, the ability of a Chief Justice to spend them is severely constrained. The buildings, equipment, books, and other physical requirements of the court are all supplied by the Minister of Justice, who must obey the same procurement rules that bind other departments of govern-

18. *Supra* note 10.

19. *Judges Act*, ss. 9 ff. Section 100 of the *Constitution Act, 1867* provides that the salaries of superior, district, and county court judges must be "fixed and provided by the Parliament of Canada."

ment. The personnel of the court are public servants within the Department of Justice. Their appointment, job descriptions, and other terms and conditions of employment are all governed by the same rules as apply to the public service generally, including, in many cases, the provisions of collective agreements. Their career prospects are not confined to the courts, and their ultimate loyalty may be owed to Ministers and senior officials in government rather than to the Chief Justice in whose courts they are serving for the time being.

In summary, the Chief Justice may be unable to obtain the resources that he or she is convinced are required for the efficient operation of the court. With the resources that are available, the Chief Justice may be unable to secure the personnel, facilities, and services that he or she is convinced would be best for the efficient operation of the court. An analogy may be drawn to the dean of the law faculty of a university, who must endure the same absence of power to carry out his or her responsibilities. This does not mean that a Chief Justice (or a law dean) is necessarily an ineffective administrator. But it does mean that the ability of the Chief Justice to engage the sympathetic cooperation of the Minister of Justice and the Deputy Minister is of critical importance. This is the part of the work of the Chief Justice that carries risks to the independence of the judiciary.

V. Protection of Institutional Independence

In *Valente*,[19] the Supreme Court of Canada held that "institutional independence" was an essential element of the independence of the judiciary. This required that a court be independent of government "with respect to matters of administration bearing directly on the exercise of its judicial function."[20] These matters of administration included the "assignment of judges, sittings of

19 *Supra* note 15.
20 *Ibid.* at 708

the court, and court lists."[22] According to *Valente*, the management of the docket of a court is essential to judicial independence. The Chief Justice, or other judges or officials acting under his or her supervision, must prepare court lists, determine the order in which cases are to be tried or heard, and assign judges and courtrooms to the cases.

These tasks require resources. These resources must be obtained by the Chief Justice from the Minister of Justice. The problem which the Chief Justice has is that the judiciary has nothing to give in return. The most obvious and valuable consideration for government funding and cooperation would be the rendering of decisions that are pleasing to the government. That cannot be promised or delivered by the Chief Justice, because it would be the most serious breach of the independence of the judiciary imaginable. Any partiality to government would involve an abandonment of the rule of law, which requires (among other things) that judges be even-handed in resolving disputes between Crown and subject. Thus, the Chief Justice must deal with the Minister and the Deputy at the same time as the judges of the court of the Chief Justice (including the Chief Justice himself or herself, of course) are doing things that are displeasing to the government. Judges acquit defendants who are charged with crime by the Crown; they award damages and other civil remedies against the Crown; and they strike down legislation, regulations, and administrative acts that were drafted, made, or performed by the Crown. Some of these things are bound to be resented by some ministers and officials in the government. Therefore, when the Chief Justice of the court meets with representatives of the government, the Chief Justice does not occupy a position of tangible strength.

The relationship between the Chief Justice and the Minister of Justice (or Attorney General) is further complicated by the fact that the Minister of Justice is the Minister who is responsible for conducting litigation on behalf of the Crown. This means that the Minister of Justice, acting through his or her Crown attorneys (or

22 *Ibid.* at 709

prosecutors) and his or her civil counsel, is far and away the principal litigant in every jurisdiction. It is anomalous that the Minister who is the principal litigant in the courts is also the Minister who provides the courts with their support staff and services and who presents and defends the budget for the courts in the Parliament or Legislature.

Within a system of responsible, parliamentary government, there are serious limits to the degree of financial and administrative independence that can be accorded the judiciary. Obviously, only the Parliament or Legislature can authorize the expenditure of money, and a Minister of the Crown must be responsible for defending the budget of the courts in the legislative chamber. In principle, as well, a Minister should be responsible for the funding of the courts, because it is the government that is accountable to the electorate for problems in the court system caused by underfunding. Nor is it reasonable to demand that the courts should always receive every cent that the Chief Justice believes is necessary. It is right and proper that the government should ration the available funds among many worthy objects, and the courts cannot be immune from that process.

A Chief Justice is not a member of the Parliament or Legislature or a member of the Cabinet, and is not accountable to the electorate for problems in the court system. Nor could a Chief Justice make direct representations to the Parliament or Legislature (as occurs in many jurisdictions of the United States) without becoming involved in the political process, which would give rise to serious perceptions of a lack of independence from political parties and from government. It seems to be both unavoidable and desirable that the Chief Justice should have to persuade a Minister of the fiscal requirements of the court, because the Minister is then able to carry the brief in Cabinet and in the Parliament or Legislature.

One possible reform would be to confer responsibility over the courts on a minister other than the Minister of Justice (or Attorney General). In this way, the role of funding and staffing the courts would be separated from the role of prosecuting criminal and civil cases before the courts. Here, however, it is important to balance practical concerns with theoretical concerns

about judicial independence. I say theoretical concerns because there is no evidence that the Minister of Justice (or Attorney General) uses his or her position to pressure the courts to favour the government side in criminal or civil cases. The practical concerns that arise in my mind are that a minister other than the Minister of Justice (or Attorney General) is likely to be less senior, less influential, and less committed to the rule of law than the Minister of Justice (or Attorney General). A shift to another portfolio might leave the courts with a weaker champion in Cabinet and in Parliament or the Legislature. The courts would be more exposed to competing claims on public funds, and their own level of funding might suffer.

In the federal jurisdiction, an attempt has been made to give the courts a greater degree of institutional independence. The Minister of Justice remains responsible for the courts. But the *Judges Act* establishes an official called the Commissioner for Federal Judicial Affairs, who has "the rank and status of a deputy head of a department" and who is responsible for preparing budgetary submissions for the Federal Court, the Tax Court, and the Canadian Judicial Council, and for providing premises, equipment, and other supplies and services to those courts and the Council.[23] In the case of the Supreme Court of Canada, the *Judges Act* confers these functions on the Registrar of the Court, who also has the status of a deputy head.[24] In this way, the officials who provide support services to the federal courts are separated from those in the Department of Justice who conduct the litigation of the government.[25] As well, the *Supreme Court Act* confers on the Registrar of the Court the duty to "superintend the officers, clerks and employees appointed to the Court," and the *Act* makes this duty "[s]ubject to the direction of the Chief Justice."[26] In this way, the *Act* seeks to locate the legal authority over the staff of the Supreme Court of Canada within the Court

23. *Judges Act*, ss. 71 and 74.

24. *Ibid.*, s. 75.

25. Both the Commissioner for Federal Judicial Affairs and the Registrar of the Supreme Court report to the Minister of Justice.

26. *Supreme Court Act*, s. 15.

A few provinces have established a separate division of court administration within their departments of justice,[27] and some provincial statutes also require court staff to work under the direction of the Chief Justice.[28] These measures, like the federal measures, do reinforce the institutional independence of the judiciary. However, no Canadian jurisdiction has removed the funding of the courts from the budgetary responsibility of the Minister of Justice or exempted the funding of the courts from the regular governmental process of budgetary control. Nor has any Canadian jurisdiction excluded the personnel of the courts from the rules of the public service on recruitment, classification, promotion, remuneration, and like matters. Thus, in no Canadian jurisdiction can it be said that the theoretical concerns about judicial independence have been eliminated. In every jurisdiction, the Chief Justice is dependent upon the Minister of Justice (or Attorney General) for the funding of the courts of the Chief Justices, and in some degree upon the Minister of Justice or other Government Ministers or officials for the courtrooms, equipment, supplies, and services that are needed to operate the courts.

In 1981, Jules Deschênes, who was then Chief Justice of the Superior Court of Québec, wrote a report entitled *Masters in their Own House*,[29] which proposed a series of radical reforms to fully secure the independence of the judiciary. Relying on American models, Deschênes C.J. recommended that the courts should present their own budgetary estimates directly to the Speaker of the House of Commons or Legislative Assembly. The estimates would be examined by a legislative committee on judicial affairs before which the Chief Justices (or other spokespersons for the

---

27. See P.S. Millar and C. Baar, *Judicial Administration in Canada* (Kingston: McGill-Queen's Press, 1981) at 59.

28. See E. Colvin, "The Executive and the Independence of the Judiciary" (1986) 51 Sask. L. Rev. 239 at 245.

29. J. Deschênes, *Masters in their Own House* (Ottawa: Canadian Judicial Council, 1981). The report proposed three stages of reform — consultation, decision sharing, and independence — of which only the final stage is described here. The *Report of the Canadian Bar Association Committee on the Independence of the Judiciary* (Ottawa: Canadian Bar Foundation, 1985) at 40, stopped short of endorsing the final stage of the Deschênes proposals.

judiciary] would appear. Upon approval by the committee, the judicial estimates would be automatically included in the budget of the Minister of Justice. In this way, the funding of the courts would be exempt from treasury board constraints and all other internal governmental rules of financial management. The funding of the courts would not be compared with the funding of other areas of government until all the estimates were presented to the Parliament or Legislature for approval.

As I indicated earlier in this article, in my view such a system would be an abdication by government of its responsibility for an important part of the administration of justice. In the United States, a real debate on spending estimates takes place within the Congress or Legislature, and the appropriations that emerge from the legislative process, as well as any related taxing proposals, may well differ from what was initially proposed. But this is not the case in Canada, where the conventions of responsible parliamentary government virtually preclude the Parliament or Legislature from modifying the fiscal measures proposed by the government. In Canada, the effective review of spending proposals takes place within the government *before* the estimates are placed before the Parliament or Legislature. To exempt the funding of the courts from the Treasury Board or other internal governmental controls would place the administration of the courts in a privileged position enjoyed by no other part of government.

That privileged position was the goal of the Deschênes proposals, which were premised on the proposition that the independence of the judiciary was a value to which competing fiscal considerations should yield. That is obviously a tenable position, but I do not share it. In my view, since only elected Ministers can be politically accountable for problems caused by the underfunding of the courts, it is elected Ministers who ought to determine funding levels. The funding of the courts has a powerful political constituency in the organized legal profession. There is also the interest of the press and the Opposition in the administration of justice, especially criminal justice. And the requirement in the *Charter* that a person charged with an offence must be tried

within a reasonable time[30] adds legal weight to the political forces at play.[31] The democratic process thus seems unlikely to produce major problems of underfunding for the courts.

However, even if that conclusion is too optimistic, it seems wrong in principle to me that the courts alone should be exempt from the competition among worthy claimants for their share of scarce public revenues. It is the task of an elected government to assign priorities to the various claims on the public purse, and to take political responsibility for those priorities. The administration of the courts should not be exempt from that process.

Conclusion

A Chief Justice is unlike a puisne judge, not only because of membership in the Canadian Judicial Council, but also because of his or her responsibility for the administration of the court. That responsibility is not accompanied by control over the amount of funding that the court receives. The Chief Justice must persuade the Minister of Justice (or Attorney General) of the requirements of the court, and must hope that the Minister will succeed in obtaining desired funds through the internal budgetary process of the government and through the legislative process. Once funds have been obtained, the Chief Justice must rely upon government procedures regarding recruitment and procurement to obtain the personnel, premises, equipment, and services that are needed to operate the court. These are all constraints on the institutional independence of the court of the Chief Justice, but they are constraints that are difficult to remove without fundamental changes to the system of parliamentary government in Canada.

---

30. *Charter*, s. 11(*b*).

31. *See R. v. Askov*, [1990] 2 S.C.R. 1199, which held that a trial must be held within six to eight months of committal. It was followed by the staying or withdrawing of 47,200 criminal charges in Ontario alone. The publicity that was given to this virtual amnesty for many persons accused of crime was followed by prompt increases by the Attorney General in the resources available to the courts. The case and its aftermath are discussed in Hogg, *supra* note 14 at s. 49.8(e).

It is realistic to acknowledge that a Chief Justice is inescapably dependent upon government for the resources needed to operate the court. Within those important constraints, however, the Chief Justice must be independent of government "with respect to matters of administration bearing directly on the exercise of [the Court's] judicial function."[52] The most important role of the Chief Justice is to make sure that the ineluctable reliance upon government for resources does not infect the independence of the judicial function.

52. See *Valente*, supra note 13.

Tab 72

CanLII

Lepp v Toronto Star Newspapers Limited, 2022 CanLII 39874 (ON SCSM)

Source:	Small Claims Court
Date:	2022-05-03
File number:	SC-20-00000668-0000
Citation:	Lepp v Toronto Star Newspapers Limited, 2022 CanLII 39874 (ON SCSM), <https://canlii.ca/t/jp7vc>, retrieved on 2026-01-07

COURT FILE NO: SC-20-00000668-0000

DATE: 2022-05-03

ONTARIO

SUPERIOR COURT OF JUSTICE

(NEWMARKET SMALL CLAIMS COURT)

B E T W E E N:

ROBERT LEPP	)	
	)	
Plaintiff	)	*Self-represented*
	)	
– and –	)	
	)	
	)	
	)	
	)	
TORONTO STAR NEWSPAPERS LIMITED	)	
and BOB AARON	)	
Defendants	)	***Emma Carver*** *for Toronto Star Newspapersd ance, Ex parte Motion*

Lepp was ordered to pay Duncan $50,000 in general damages, $10,000 in aggravated damages for conduct which was high-handed and oppressive, and $10,000 in punitive damages for actions that were malicious and unfounded.

Lepp has appealed the decision.

---

[10] For completeness, the online version was edited on October 26th, 2020, such that the first nine words, "A decision from Superior Court in Newmarket in May" were replaced with "A recent decision from the Ontario Superior Court of Justice in Toronto."

The Words Complained Of (in the order that they appear)

[11] To succeed in defamation, Mr. Lepp must establish, amongst other things, that the words complained of refer to him, and that those words would tend to lower his reputation in the eyes of a reasonable person (*Skafco*, supra, at paragraph 15). For the Defendants to succeed with their absolute or qualified privilege defence to publish a report on a court proceeding, the Column must, amongst other things, be a fair and accurate representation of the contents of the Decision. For each portion of the Column complained of, I will address these factors at the same time. What follows in the italicized bulleted headings are Mr. Lepp's assertions:

- *The Column inaccurately stated that the trial was held in Newmarket.*

[12] Mr. Lepp correctly points out that the trial referenced in the Decision was held in Toronto: not Newmarket. Citing the wrong court location does not defame Mr. Lepp. This misnomer, however, is of no consequence since the law in Ontario is the same, regardless of the courthouse location where the decision was rendered.

- *The Column inaccurately stated that Mr. Lepp "interfered" in the dispute."*

[13] Mr. Lepp asserts that the Decision never described him in this way, and it is defamatory of his character because he did not "interfere," but rather he was hired, or at least invited to advocate, on behalf of Buckles. The parties debated this issue at length: each providing a different dictionary definition of the term *"interfere."* The Defendants relied on the following definition: *"to enter into or take a part in the concerns of others,"* which they say is an accurate description of Mr. Lepp's involvement. Mr. Lepp, relied on the following definition: *"to involve yourself in a situation when your involvement is not wanted or is not helpful,"* which Mr. Lepp argues, portrays him very unfavourably, like a meddler or interloper when this was furthest from the truth.

[14] Black's Law Dictionary®, Ninth Edition does not have a definition for the word "interfere," but it does define "interference" as: *"1. The act of meddling in another's affairs. 2. An obstruction or hindrance."*

[15] Allegedly defamatory comments must be read in context, and not in isolation (*Frank v. Legate*, 2015 ONCA 631 at para 48). In isolation, the term "interfered" would in my opinion inappropriately suggests that Mr. Lepp was interloping; however, the Column read as a whole makes it abundantly clear that this was not the case, explaining that "in January 2018, Buckles engaged Robert Lepp to assist in her dispute when he considered her in need of that assistance."

Tab 74

CanLII

Regina v. Spezzano, 1977 CanLII 1371 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1977-01-05
Other citations:	15 OR (2d) 489 — 76 DLR (3d) 160 — 34 CCC (2d) 87
Citation:	Regina v. Spezzano, 1977 CanLII 1371 (ON CA), <https://canlii.ca/t/g13ft>, retrieved on 2026-01-18

Regina v. Spezzano

15 O.R. (2d) 489
76 D.L.R. (3d) 160

ONTARIO
COURT OF APPEAL
ARNUP, DUBIN AND MARTIN, JJ.A.
5TH JANUARY 1977.

Criminal Law -- Obstructing justice -- Elements of offence -- Accused giving false name to police to avoid charge of driving while disqualified -- Meaning of "course of justice" -- Whether offence limited to judicial proceedings existing or proposed -- Whether includes proceedings which accused apprehends may be taken -- Cr. Code, s. 127(2).

Statutes -- Interpretation -- Ejusdem generis rule -- Charge of obstructing justice -- Subsections referring to "judicial proceeding" and to judicial proceeding "existing or proposed" -- Third subsection merely referring to "course of justice" -- Whether ejusdem generis rule applies to limit course of justice to judicial proceedings existing or proposed -- Cr. Code, s. 127.

Civil rights -- Self-incrimination -- Charge of obstructing justice -- Accused giving false name to police to avoid charge of driving while disqualified -- Whether constitutes offence -- Whether accused protected from prosecution by right to remain silent -- Cr. Code, s. 127(2).

The expression "the course of justice" in s. 127(2) (rep. & sub. 1972, c. 13, s. 8) of the Criminal Code which provides that everyone who "wilfully attempts in any manner ... to obstruct, pervert or defeat the course of justice is guilty of an indictable offence" includes judicial proceedings existing or proposed but is not limited to such proceedings and includes an attempt to obstruct, pervert or defeat a prosecution which the accused contemplates may take place, notwithstanding that no decision to prosecute has been made. Although s. 127(1), which deals with obstructing justice through indemnifying sureties, and s. 127(3), which deems certain acts to constitute obstructing justice, both use the words "in a judicial proceeding" and s. 127(3) provides that the proceeding may be "existing or proposed" the ejusdem generis rule should not be applied to similarly limit the offence in s. 127(2). Accordingly, where an accused gives a police officer a false name in order to avoid a charge of driving while disqualified and to thus escape a prosecution which he apprehends may ensue, the "course of justice" has commenced and the accused may be convicted of the offence contrary to s. 127(2) of the Criminal Code. The accused's common law right to remain silent cannot protect him in such circumstances. Although not every false statement to the police, such as a false denial of guilt, will be capable of supporting a charge of wilfully attempting to obstruct, pervert or defeat the course of justice, whatever protection is afforded the accused by his right to remain silent cannot shield him from prosecution where he makes false statements to the police and misleads the police by giving a false name in order to protect himself.

APPEAL by the accused from his conviction on a charge of attempting to obstruct justice contrary to s. 127(2) of the Criminal Code.

[Kalick v. The King (1920), 1920 CanLII 488 (SCC), 35 C.C.C. 159, 61 S.C.R. 175, 55 D.L.R. 104, [1920] 3 W.W.R. 750, apld; R. v. Balsdon, 1967 CanLII 226 (ON SC), [1968] 2 C.C.C. 164, [1967] 2 O.R. 653; Rice v. Connolly, [1966] 2 Q.B. 414, consd; R. v. Coneybear et al., [1966] N.Z.L.R. 52; R. v. Kane, [1967] N.Z.L.R. 60; R. v. Morin (1968), 5 C.R.N.S. 297; R. v. Sharpe and Stringer (1937), 26 Cr.App.R. 122; R. v. Robinson et al., Journal of Criminal Law, vol. II (1938), p. 62; Dalton v. H.M. Advocate, [1951] S.C. (J.) 76; R. v. Whalen et al. (1974), 1974 CanLII 1581 (ON SC), 17 C.C.C. (2d) 217; R. v. Kataja, [1943] V.L.R. 145; R. v. Manley, [1933] 1 K.B. 529; R. v. Field et al. (1964), 48 Cr.App.R. 335, refd to]

H. M. Kelly, for accused, appellant.

J. D. Ewart, for the Crown, respondent.

The judgment of the Court was delivered by

MARTIN, J.A.:-- The appellant appeals from his conviction after a trial by a Provincial Court Judge under Part XVI of the Code and from the sentence of 30 days' imprisonment imposed upon him, on a charge as follows:

> ... on or about the 8th day of January 1976, at the Municipality of Metropolitan Toronto in the Judicial District of York, unlawfully did wilfully attempt to obstruct, pervert or defeat the course of justice, by identifying himself to a police officer as Vito Miceli, while he was disqualified from driving, and his driver's licence in the name of Frank Spezzano was suspended.

The material facts are these: On January 8, 1976, Police Constable Hoover had set up a radar location on Wilson Ave. At approximately 9:45 p.m., he observed a truck leaving a nearby plaza. The truck pulled into the eastbound curb lane of Wilson Ave. and cut off an eastbound vehicle. The officer followed the truck and stopped it. The appellant was the driver of the truck, which was a delivery truck for a pizzeria. The officer asked the appellant for his licence and he stated "that he had none". He was then requested to produce evidence of identification but was unable to do so. The appellant identified himself verbally to the officer as Vito Miceli, 62 Langstaffe Ave., Thornhill. He also gave the officer the date of his birth, and told him that he had left his licence at home.

The officer was familiar with the name, Vito Miceli, having stopped a person by that name earlier that month. In the meantime another officer had arrived on the scene. Constable Hoover told the appellant that he was not the person he claimed to be, but the appellant maintained that he was. Constable Hoover then left the appellant with the other officer and went to the store of the appellant's employer who was also the owner of the vehicle in question. When Constable Hoover returned with the appellant's employer the appellant was again asked what his name was; whereupon he admitted that he had lied to the officer, and said that "he was under suspension, he needed a job, and that's why he was driving." The appellant then gave the officer his correct name and address.

The appellant did not testify at his trial. The trial Judge in his reasons for judgment said:

> In this case on the evidence I find that the Crown has shown that this man did identify himself in the name of some other living person. The Crown on the statement which was given by the accused has proved that the man was driving under suspension, he was disqualified, the accused admitted that, and the evidence which he admitted to the officer is prima facie evidence that he is driving under suspension, and that in fact he used the name of Vito Miceli in order to avoid being prosecuted.
>
> There are cases on this particular section. One case that comes to mind is where the accused denies that he was in fact himself, denies that he was the person that the officer was looking for, and it was held in that case that that was not the purpose of the section, the whole purpose of this section is to prevent people from identifying themselves as some other particular living person, and for that purpose only. It is not an obstruction of justice to deny that you are a particular person, nor is it obstruction of justice to remain silent, but once you step past that mark and identify yourself as some other living person then you are in breach of this section. I find this accused did in fact breach this section and there will in fact be a conviction.

Counsel for the appellant contended before us that there was no evidence that Vito Miceli was a living person. I am disposed to think there was some evidence in support of the trial Judge's finding on this point, although I do not consider that proof that Vito Miceli was a living person was essential to support a conviction of the offence charged against the appellant. I am also of the view that there was evidence which warranted the trial Judge's finding, which is implicit in his reasons for judgment, that the appellant gave a false name to avoid a prosecution under the Code for driving while disqualified, although, for the reasons which I will develop later, it is immaterial whether the appellant's intention was to avoid a prosecution for a criminal offence in the strict sense as distinct from an offence created by provincial enactment, if his conduct otherwise fell within s. 127(2) of the Code.

Two separate but related questions are presented by this appeal:

(a) Is the offence of wilfully attempting to obstruct, pervert or defeat the course of justice under s. 127(2) of the Code confined to attempts to interfere with judicial proceedings, instituted or proposed, or does the section extend to attempts to obstruct police investigation which may lead to the detection of an offence or the offender's connection with it

(b) If the offence is not confined to interference with existing or proposed judicial proceedings, did the appellant, in making the particular false statement, commit the offence

Section 127 reads:

127(1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

(a) by indemnifying or agreeing to indemify a surety, in any way and either in whole or in part, or

(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

is guilty of

(c) an indictable offence and is liable to imprisonment for two years, or

(d) an offence punishable on summary conviction.

(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for ten years.

(3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;

(b) influences or attempts to influence by threats, bribes or other corrupt means, a person in his conduct as a juror; or

(c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

Counsel for the appellant contended before us that s. 127(2) must be read ejusdem generis with s-ss. (1) and (3), and that the words "in any manner other than a manner described in subsection (1)" are confined to wilfully attempting to obstruct, pervert, or defeat the course of justice in a judicial proceeding existing or proposed in a manner other than that specified in s. 127(1). He also contended that there is no evidence that the constable intended to charge the accused with an offence at the time the appellant gave the false name.

I am unable to accept this submission. In my view, notwithstanding the way in which the section is now cast, s. 127(2) creates a separate offence of wilfully attempting to obstruct, pervert or defeat the course of justice and is not limited by the language of s-ss. (1) and (3). The expression "the course of justice" in s. 127(2) includes judicial proceedings existed or proposed but is not limited to such proceedings. The offence under s. 127(2) also includes attempts by a person to obstruct, pervert or defeat a prosecution which he contemplates may take place, notwithstanding that no decision to prosecute has been made.

The legislative history of s. 127(2) as well as the decided cases make it clear that this is the proper construction to be placed on s. 127(2). The predecessor of s. 127 was s. 119 in the Criminal Code that came into force on April 1, 1955. Section 119 read:

119(1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Without restricting the generality of subsection (1), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

(a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence,

(b) influences or attempts to influence by threats, bribes or other corrupt means, a person in his conduct as a juror,

(c) accepts a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror,

(d) before or after being released from custody under recognizance, indemnifies or agrees to indemnify in any way, in whole or in part, his bondsman, or

(e) being a bondsman, accepts or agrees to accept indemnity, in whole or in part, from a person who is released or is to be released from custody under a recognizance.

Section 119 was renumbered s. 127 in R.S.C. 1970, c. C-34, but the wording of the section remained unchanged. Paragraphs (d) and (e) of s-s. (2) of s. 127 were re-enacted and reworded by the Bail Reform Act, 1970-71-72, c. 37, s. 3. The entire section was then re-enacted by 1972, c. 13, s. 8, in its present form. The manifest purpose of the re-casting of the section was to leave the penalty imposed for offences in relation to the indemnification or payment of bondsmen at two years and to increase the penalty for the other offences created by the section to 10 years. Unquestionably, Parliament did not thereby intend to narrow the scope of s. 127(2) as it previously existed.

The predecessor of the present s. 127 was s. 180 in the Code, 1927, c. 36. The wording of s. 180 in the 1927 Code was identical to that of s. 154 in the Code, 1892, c. 29; s. 154 of the 1892 Code was derived from s. 128 and 129 of the English Draft Code, para. (d) of s. 154 of the 1892 Code being derived from s. 128 of the Draft Code which read [Report of Royal Commission, Law Relating to Indictable Offences (1879)]:

128. Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to two years' imprisonment with hard labour, who wilfully attempts in any way not otherwise criminal to obstruct prevent pervert or defeat the course of justice or the administration of the law.

Section 154 of the 1892 Code read:

154. Every one is guilty of an indictable offence and liable to two years' imprisonment who--

(a.) dissuades or attempts to dissuade any person by threats, bribes or other corrupt means from giving evidence in any cause or matter, civil or criminal; or

(b.) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or

(c.) accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or

(d.) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice.

I observe that s. 117 of the New Zealand Crimes Act, 1961 No. 43, is virtually identical to that of s. 154 of the Canadian Criminal Code of 1892, being also derived from the English Draft Code. The New Zealand Court of Appeal has held that the ejusdem generis rule should not be applied to the section; that para. (d) of s. 117 of that Act (the counterpart of para. (d) of s. 154 in the 1892 Canadian Criminal Code) includes all attempts to obstruct, prevent, pervert or defeat the course of justice not covered by paras. (a), (b) and (c), and that the expression "the course of justice" in s. 117(d) of the Crimes Act is not restricted to the process of adjudication but encompasses the investigation of offences and the arrest of suspected persons: see R. v. Coneybear et al., [1966] N.Z.L.R. 52; R. v. Kane, [1967] N.Z.L.R. 60.

In my view, the reasoning of the majority judgments of the Supreme Court of Canada in Kalick v. The King (1920), 1920 CanLII 488 (SCC), 35 C.C.C. 159, 61 S.C.R. 175, 55 D.L.R. 104, is conclusive against the contention of the appellant as to what is encompassed by the words "the course of justice" in s. 127(2), although the Court in that case was dealing with a different section of the Code. The appellant in that case was convicted under s. 157 of the Code [now s. 109] on a charge that with intent to interfere corruptly with "the due administration of justice" he corruptly gave a police officer a sum of money in order to induce such officer not to proceed against him for a violation of the Saskatchewan Temperance Act. The Supreme Court upheld the conviction. The Court held that the words "the due administration of justice" were not limited to apprehended proceedings in respect of crimes in the strict sense, that is to say, crimes created by Parliament under its exclusive power to legislate in relation to criminal law but extended to proceedings in respect of provincial offences. The Court also held that it was immaterial whether the police officer actually intended to institute a prosecution; it sufficed if the accused was apprehensive of a prosecution and gave the bribe to prevent it.

Anglin, J., said at p. 164 C.C.C., p. 183 S.C.R., p. 109 D.L.R.:

It is quite immaterial whether the police officer actually intended or contemplated instituting a prosecution. It suffices that the appellant gave the bribe with intent to head off such a proceeding. The due administration of justice is interfered with quite as much by improperly preventing the institution of a prosecution as by corruptly burking one already begun.

Brodeur, J., said at pp. 166-7 C.C.C., p. 186 S.C.R., p. 112 D.L.R.:

> I am of opinion that the "administration of justice" mentioned in sec. 157 of the Crim. Code should not be restricted to what takes place after an information had been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal and punished for his offence.

Mignault, J., said at p. 167 C.C.C., p. 187 S.C.R., p. 112 D.L.R.:

> To give a bribe to a police officer with this intent is a corrupt interference with the administration of justice within the terms of sec. 157. It is, in my opinion, immaterial whether proceedings were then pending or merely likely to be taken, and I do not think that the fact that these proceedings were to be instituted under the Saskatchewan Temperance Act takes the case out of the operation of this section of the Criminal Code.

In R. v. Morin (1968), 5 C.R.N.S. 297, Rinfret, J. (with whom Casey and Salvas, JJ., concurred), after referring to the judgment of the Supreme Court of Canada in Kalick v. The King, supra, and the broad meaning given in that case to the words "the administration of justice", held that the expression "the course of justice" must be interpreted in the same way:
see also R. v. Sharpe and Stringer (1937), 26 Cr.App.R. 122; R. v. Robinson et al., Journal of Criminal Law, vol. II (1938), p. 62; Dalton v. H.M. Advocate, [1951] S.C. (J.) 76; R. v. Whalen et al. (1974), 1974 CanLII 1581 (ON SC), 17 C.C.C. (2d) 217.

I am of the view, as previously indicated, that there was evidence to support the finding of the trial Judge that the appellant made the false statement to the constable during an investigation by the latter of a suspected offence and that it was made by the appellant to escape prosecution for an offence which the appellant apprehended might ensue. In those circumstances the "course of justice" had commenced.

The appellant contended, however, that a false statement made by a person to a police officer investigating an offence, in order to escape prosecution of himself, does not constitute an offence under s. 127(2). Appellant's counsel said that since an accused has a common law right to remain silent and has no obligation to assist the police in establishing that he has committed an offence, the making of a false statement to a police officer in order to circumvent prosecution of himself for an offence is not proscribed by s. 127(2), whatever the position may be with respect to false statements made to a police officer in order to assist a third person to escape detection or prosecution.

In support of his submission counsel for the appellant relied upon the judgment of Judge Waisberg in R. v. Balsdon, 1967 CanLII 226 (ON SC), [1968] 2 C.C.C. 164, [1967] 2 O.R. 653, acquitting the accused of a charge under s. 119(1) (the predecessor of s. 127(2)) of wilfully obstructing the course of justice by informing two police officers that he was not Garnet Balsdon. In that case a police officer had attended at a book store to execute warrants issued against the accused following convictions for unlawful parking, and requiring the accused in default of payment of the fines imposed to be imprisoned. The "clerk" in attendance at the store (who was, in fact, Balsdon) told the officer that Balsdon was not there. Subsequently, another police officer entered the store to serve the warrants previously issued as well as additional warrants. The officer was not satisfied with the "clerk's" answer that he was not Balsdon; upon further investigation the "clerk" admitted that he was, in fact, Balsdon. Judge Waisberg in his reasons for judgment considered a number of authorities, including the Australian case of R. v. Kataja, [1943] V.L.R. 145 at p. 147, in which Mann, C.J., in acquitting the accused of the common law offence of effecting a public mischief (as declared by the Court of Criminal Appeal in R. v. Manley, [1933] 1 K.B. 529) said:

> He told lies in order to cover up the further fact that he himself was the offender. In so doing he acted in a very usual and every-day manner, having regard to the methods of wrongdoers.

In acquitting the accused Judge Waisberg said at p. 169 C.C.C., p. 658 O.R.:

> The principle to be gleaned from the cases is that while a third party may commit an offence by lying on behalf of an offender, the offender himself has no obligation to be truthful about his own criminal conduct. The doctrines nemo tenetur seipsum accusare -- no man can be compelled to criminate himself -- and nemo tenetur prodere seipsum -- no one is bound to betray himself -- have been carefully safeguarded and preserved.

In R. v. Balsdon, supra, the accused confined himself to denying his identity, unlike the appellant in the present case, who falsely stated that he was Vito Miceli. Moreover, the right of the appellant to remain silent in the circumstances has been encroached upon by s. 14(2) of the Highway Traffic Act, R.S.O. 1970, c. 202, which reads:

> 14(1) Every operator of a motor vehicle shall carry his licence with him at all times while he is in charge of a motor vehicle and shall produce it when demanded by a constable or by an officer appointed for carrying out the Provisions of this Act:

> (2) Every person who is unable or refuses to produce his licence in accordance with subsection 1 shall, when requested by a constable, give reasonable identification of himself and, for the purposes of this subsection, the correct name and address of such person shall be deemed to be reasonable identification.

R. v. Balsdon, supra, is clearly distinguishable from the present case and it is, therefore, unnecessary to express a concluded opinion whether it was correctly decided on its facts. (See the interesting and critical examination of that case by Professor Ed. Ratushny in an article "Is There Right Against Self-Incrimination In Canada", 19 McGill L.J. 1 (1973), at pp. 16-21.)

I feel bound to say, however, that the right to remain silent does not also confer a right to mislead a police officer investigating a crime by false information simply because the false statements are made by a person to shield himself from prosecution.

In Rice v. Connolly, [1966] 2 Q.B. 414, the appellant was observed by a constable to be acting in a suspicious manner in a neighbourhood where there had been a number of break-ins that night. He refused to give his correct name and address when requested to do so by the constable. He did not, however, make any false statements. In allowing the appellant's appeal from his conviction on a charge of wilfully obstructing a constable in the execution of his duty, Lord Parker said at pp. 419-20:

> Accordingly, the sole question here is whether the defendant had a lawful excuse for refusing to answer the questions put to him. In my judgment he had. It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.
>
> Mr. Skinner [counsel for the prosecutor respondent] has pointed out that it is undoubtedly an obstruction, and has been so held, for a person questioned by the police to tell a "cock-and-bull" story; to put the police off by giving them false information, and I think he would say: well, what is the real distinction It is a very little way from giving false information to giving no information at all. If that does in fact make it more difficult for the police to carry out their duties, then there is a wilful obstruction.
>
> In my judgment there is all the difference in the world between deliberately telling a false story--something which on no view a citizen has a right to do--and preserving silence or refusing to answer--something which he has every right to do.

Lord Parker in the above passage does not suggest that a person who by false information misleads a police officer investigating a crime in order to protect himself from detection or prosecution stands in any different position with respect to criminal liability than one who misleads such officer with the motive of protecting another.

In R. v. Field et al. (1964), 48 Cr.App.R. 355, the appellants were convicted of conspiracy to obstruct the course of justice by making false statements to the police in order to conceal the identity of one of the alleged conspirators. Lawton, L.J., delivering the judgment of the Court of Criminal Appeal, rejected the argument of the appellants that the offence committed was merely that of acting in concert to obstruct the police and stated that a conspiracy to obstruct the course of justice is different in nature from a conspiracy to obstruct the police in the execution of their duty, but that the obstruction of the police may be the means by which the object of obstructing the course of justice is sought to be achieved.

I do not wish to be taken as holding that all false statements to the police during the investigation of a crime, made by a suspect in order to circumvent a prosecution of himself, are capable of supporting a charge of wilfully attempting to obstruct, pervert, or defeat the course of justice. Clearly, a false denial of guilt would not constitute the offence; to hold otherwise would be indirectly to require the suspected person to admit that he was guilty and nullify the great principle of the common law that an accused has the right to remain silent.

Whether a particular false statement to a police officer investigating a crime made by a suspect from motives of self- protection will attract criminal liability depends on the nature of the false statement and the particular circumstances in which it was made. I limit my judgment to the precise facts of this case. I am of the opinion that in the circumstances the appellant's false statement that he was Vito Miceli supports his conviction on the charge.

I would therefore dismiss the appeal from conviction. The sentence imposed does not reflect any error. I would also dismiss the appeal against the sentence.

Tab 75

1980 CanLII 2849 (ON CA)

REGINA v. ZECK

Ontario Court of Appeal, Houlden, C.J.O., Martin and Houlden, JJ.A.
May 13, 1980

1980 CanLII 2849 (ON CA)

J. J. Grosberg, for accused, appellant.
M. A. MacDonald, for the Crown, respondent.

The judgment of the Court was delivered orally by

HOWLAND, C.J.O.:—This is an appeal from the conviction of the appellant on December 28, 1979, of attempting to obstruct the course of justice, and also from the sentence which was imposed on that date of imprisonment for a term of 45 days.

The appellant was charged that on or about September 7, 1979, at the Municipality of Metropolitan Toronto in the Judicial District of York, he unlawfully did wilfully attempt to obstruct or pervert the course of justice by removing and destroying parking tags from automobiles previously tagged by police officers on St. Thomas St. contrary to the *Criminal Code*.

During the late evening of September 7, 1979, Sergeant Jack Lewis of the Metropolitan Toronto Police Force, was driving north on St. Thomas St. when he saw four or five cars on the west side with tags for being illegally parked. He observed the appellant, who was walking north on St. Thomas St., reach out and take a parking tag off a Chevrolet automobile and crumple it up. He then walked to the car behind, which was a Toyota, and again took off the parking tag and made a crunching movement. He had both tickets in his right hand, and when he was asked by the police officer what he was doing he put them back beneath the windshield wiper of the Toyota and made a half-hearted attempt to straighten them out. He gave his name as John Howlett. Constable John Garrow confirmed that he had issued the parking tag in respect of the Chevrolet for parking in a prohibited area. Sergeant David Bowen also gave evidence that when the tags had been removed the owners of the cars would not know that they had been given tags, and would receive summonses in the mail at a slightly increased cost.

Section 127(2) [rep. & sub. 1972, c. 13, s. 8] of the *Criminal Code* provides that:

> 127(2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and is liable to imprisonment for ten years.

The proper interpretation to be given to the words "the course of justice" were considered by this Court in *R. v. Spezzano* (1977), 34 C.C.C. (2d) 87, 76 D.L.R. (3d) 160, 15 O.R. (2d) 489. There the appellant had given a police officer a false name in order to avoid a charge of driving while disqualified. Martin, J. A., in delivering the judgment of the Court pointed out at p. 91 that the expression "the course of justice" included existing or proposed judicial proceedings, but was not limited to such proceedings, and that it also included attempts by a person to obstruct, pervert or defeat a prosecution which the person contemplates may take place, notwithstanding that no decision to prosecute has been made. In that case Martin, J. A., also drew attention to the broad interpretation that had been given by the Supreme Court of Canada in *Kalick v. The King* (1920), 35 C.C.C. 159, 65 D.L.R. 104, 61 S.C.R. 175, to the words "the due administration of justice" in connection with a prosecution under s. 157 of the *Code*. Referring to that decision he stated at p. 92:

> The Court held that the words "the due administration of justice" were not limited to apprehended proceedings in respect of crimes in the strict sense, that is to say, crimes created by Parliament under its exclusive power to legislate in relation to criminal law but extended to proceedings in respect of provincial offences

He then went on to point out at p. 93 that in *R. v. Morin* (1968), 5 C.R.N.S. 297, Rinfret, J., of the Quebec Queen's Bench (Appeal Side) (with whom Casey and Salvas, JJ., concurred) had held that the same broad meaning must be given to the words "the course of justice" in interpreting the predecessor of s. 127 of the *Code* as had been given by the Supreme Court of Canada in *Kalick v. The King* to the words "the administration of justice". In reaching his conclusion Rinfret, J., at p. 303 cited with approval the dicta of Brodeur, J., in *Kalick v. The King* that the " 'administration of justice' " " 'includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal, and punished for his offence. It is a very wide term covering the detection, prosecution and punishment of offenders' ".

We are in agreement that a broad interpretation should be given to the words "the course of justice" in s. 127(2). In our opinion, s. 127(2) applies to steps which are taken to obstruct the

1980 CanLII 2849 (ON CA)

normal enforcement by the police of the contravention of a municipal by-law, such as the parking by-law which is in question in this appeal. Accordingly, the appeal as to conviction is dismissed.

With respect to the appeal as to sentence, it should be noted that the appellant is 41 years of age. He is a dentist, who is married and has four children. There was one previous incident in which the appellant had received two convictions for assaulting the police, and a conviction for mischief in respect of private property. In our opinion, there was no error on the part of the trial Judge in imposing a custodial term. The appellant had been dealt with on the previous occasion in a lenient manner and was on probation at the time of the commission of this offence. Counsel for the Crown conceded that the offence which was committed was in the low range for offences involving the obstruction of justice. However, it was a flagrant interference with the police who were carrying out their normal duties. We consider that the sentence of 45 days was too long in the circumstances, and that a sentence of imprisonment for 14 days would be appropriate.

Accordingly, the appeal as to sentence is allowed and the sentence is varied from a term of 45 days to a term of 14 days.

Appeal from conviction dismissed;
appeal from sentence allowed.

1980 CanLII 2849 (ON CA)

Tab 76

CanLII

Toronto Star v. AG Ontario, 2018 ONSC 2586 (CanLII)

Source:	Superior Court of Justice
Date:	2018-04-27
File number:	CV-17-569061
Other citations:	142 OR (3d) 266 — 421 DLR (4th) 687 — 291 ACWS (3d) 650 — 410 CRR (2d) 1 — [2018] CarswellOnt 6712 — [2018] OJ No 2256 (QL)
Citation:	Toronto Star v. AG Ontario, 2018 ONSC 2586 (CanLII), <https://canlii.ca/t/hrq6s>, retrieved on 2026-01-18
Most recent unfavourable mention	Fraser v. Canada (Public Safety and Emergency Preparedness), 2021 FC 821 (CanLII) [...] **I am not bound by Toronto Star** 2018 and, in any event, it is distinguishable since it addressed the application of the FIPPA to tribunals that "preside over adversarial processes... and act judicially or quasi-judicially" (Toronto Star 2018, at para 2). [...]

Toronto Star Newspapers Ltd. v. Attorney General of Ontario; ARCH Disability Law Centre et al., Intervenors

[Indexed as: Toronto Star Newspapers Ltd. v. Ontario (Attorney General)]

Ontario Reports

Ontario Superior Court of Justice

E.M. Morgan J.

April 27, 2018

142 O.R. (3d) 266 | 2018 ONSC 2586

Case Summary

Charter of Rights and Freedoms — Freedom of expression — Open court principle — Freedom of information — Freedom of Information and Protection of Privacy Act violating

s. 2(b) of Charter substantively by presuming non-disclosure of adjudicative records held by administrative tribunals under "personal information" exemption and procedurally by occasioning delay in accessing adjudicative records — Procedural infringement justified under s. 1 of Charter — Substantive infringement not justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

The applicant brought an application challenging the constitutionality of certain provisions of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*") insofar as those provisions apply to "adjudicative records" held by 13 administrative tribunals which hold adjudicative hearings. In particular, the applicant submitted that the presumption of non-disclosure of records under the "personal information" exemption in s. 21(1) of *FIPPA* violates the open court principle under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* when applied to adjudicative records held by those tribunals. "Adjudicative records", in the context of this application, meant records that are part of the actual record of the tribunal hearing, not documents that were part of the pre-hearing discovery but that did not get introduced at the hearing itself.

Held, the application should be allowed.

The applicant had public interest standing to bring this application, and was not required to mount its constitutional challenge by applying for judicial review of individual Information and Privacy Commission decisions.

Of the 13 tribunals identified by the applicant, eight did not use the *FIPPA* process at all. Unless and until the applicant's (or anyone else's) rights were infringed by those eight non-*FIPPA* applying tribunals, there was nothing further to analyze in respect of them.

The open court principle, which is inextricably tied to the rights guaranteed by s. 2(*b*) of the *Charter*, applies to administrative tribunals as well as to courts. *FIPPA* violates s. 2(*b*) of the *Charter* in two respect -- substantively by imposing a reverse onus on a request for adjudicative records to which the "personal information" exemption is said to apply; and procedurally by occasioning delay in accessing adjudicative records. The multiple objectives of *FIPPA* are sufficiently important to warrant overriding a *Charter*-protected right. There is a rational connection between those objectives and the inclusion of adjudicative tribunals in the Schedule to *FIPPA*. The substantive violation of s. 2(*b*) is not justified under s. 1 of the *Charter*. The reverse onus on requests for personal information does not minimally impair s. 2(*b*). The deleterious effects of the presumption against disclosure are real and substantial, and outweigh the purely speculative advantage of encouraging access to justice by individuals who might stop using the relevant tribunals if their identities were exposed to the public. A declaration of invalidity [page267] was granted. As for *FIPPA*'s procedural limitations on s. 2(*b*), the notice requirements, timelines, etc. minimally impair s. 2(*b*). While those procedural factors may be subject to extension and abuse in individual cases, they are, in their own terms, justifiable as minimal intrusions on the open court principle. That conclusion effectively rendered the proportionality analysis redundant: a minimal impairment of a *Charter* right is already proportionate to that right.

Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23, 2010 SCC 23, 212 C.R.R. (2d) 300, 84 C.P.R. (4th) 81, 255 C.C.C. (3d) 545, 76 C.R. (6th) 283, 402 N.R. 350, 319 D.L.R. (4th) 385, EYB 2010-175469, 2010EXP-1990, 262 O.A.C. 258, J.E. 2010-1089, 1 Admin. L.R. (5th) 235, 88 W.C.B. (2d) 628, 189 A.C.W.S. (3d) 675, **consd**

Other cases referred to

Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, 2009

SCC 37, 310 D.L.R. (4th) 193, [2009] 9 W.W.R. 189, J.E. 2009-1407, EYB 2009-161892, 390 N.R. 202, 9 Alta. L.R. (5th) 1, 81 M.V.R. (5th) 1, 460 A.R. 1, 179 A.C.W.S. (3d) 327; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] 3 S.C.R. 733, [2013] S.C.J. No. 62, 2013 SCC 62, 451 N.R. 253, 2013EXP-3621, 2013EXPT-2096, J.E. 2013-1964, 239 L.A.C. (4th) 317, D.T.E. 2013T-775, EYB 2013-229254, 297 C.R.R. (2d) 71, 60 Admin. L.R. (5th) 173, 88 Alta. L.R. (5th) 1, [2014] CLLC Â210-003, 365 D.L.R. (4th) 257, [2014] 2 W.W.R. 1, 561 A.R. 359, 235 A.C.W.S. (3d) 375; *ARPA Canada v. Ontario* (2017), 138 O.R. (3d) 253, [2017] O.J. No. 2969, 2017 ONSC 3285, 383 C.R.R. (2d) 25 (S.C.J.); *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22, J.E. 99-1412, REJB 1999-13279, 14 Admin. L.R. (3d) 173, 1 Imm. L.R. (3d) 1, 89 A.C.W.S. (3d) 777; *Batty v. Toronto (City)* (2011), 108 O.R. (3d) 571, [2011] O.J. No. 5158, 2011 ONSC 6862, 248 C.R.R. (2d) 175, 12 R.P.R. (5th) 26, 90 M.P.L.R. (4th) 250, 342 D.L.R. (4th) 129, 209 A.C.W.S. (3d) 542 (S.C.J.); *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36, 2003 SCC 36, [2003] 1 S.C.R. 884, 227 D.L.R. (4th) 193, 306 N.R. 34, [2004] 1 W.W.R. 1, J.E. 2003-1227, 3 Admin. L.R. (4th) 163, [2003] CLLC Â230-021, 109 C.R.R. (2d) 65, 123 A.C.W.S. (3d) 531, 46 C.H.R.R. D/495; *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, [2013] S.C.J. No. 72, 2013 SCC 72, 366 D.L.R. (4th) 237, 452 N.R. 1, 312 O.A.C. 53, 2014EXP-30, J.E. 2014-21, 303 C.C.C. (3d) 146, 7 C.R. (7th) 1, 297 C.R.R. (2d) 334, 110 W.C.B. (2d) 753; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, 2012 SCC 45, 325 B.C.A.C. 1, 434 N.R. 257, 34 B.C.L.R. (5th) 1, 2012EXP-3353, J.E. 2012-1793, EYB 2012-211411, [2012] 10 W.W.R. 423, 95 C.R. (6th) 1, 267 C.R.R. (2d) 1, 290 C.C.C. (3d) 1, 352 D.L.R. (4th) 587, 220 A.C.W.S. (3d) 536, 103 W.C.B. (2d) 625; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, [2007] S.C.J. No. 30, 2007 SCC 30, 281 D.L.R. (4th) 589, 364 N.R. 89, J.E. 2007-1276, 158 C.R.R. (2d) 127, 158 A.C.W.S. (3d) 919, EYB 2007-121233; *Canadian Broadcasting Corp. v. Manitoba (Attorney General)*, [2008] M.J. No. 286, 2008 MBCA 94, [2008] 10 W.W.R. 19, 58 C.P.C. (6th) 5, 296 D.L.R. (4th) 724, 228 Man. R. (2d) 312, 168 A.C.W.S. (3d) 94; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, 139 D.L.R. (4th) 385, 203 N.R. 169, 182 N.B.R. (2d) 81, 110 C.C.C. (3d) 193, 2 C.R. (5th) 1, 39 C.R.R. (2d) 189, EYB 1996-67336, J.E. 96-2090, 66 A.C.W.S. (3d) 444, 32 W.C.B. (2d) 273; *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65, [2011] S.C.J. No. 3, 2011 SCC 3, 227 C.R.R. (2d) 121, 2011EXP-380, 411 N.R. 75, 264 C.C.C. (3d) 311, 328 D.L.R. (4th) 651, J.E. 2011-207, 199 A.C.W.S. (3d) 1161, 92 W.C.B. (2d) 791; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, 122 [page268] D.L.R. (4th) 129, 177 N.R. 325, J.E. 95-232, 26 Admin. L.R. (2d) 1, [1995] 2 C.N.L.R. 92, 52 A.C.W.S. (3d) 1185; *C.B. Powell Ltd. v. Canada (Border Services Agency)*, [2010] F.C.J. No. 274, 2010 FCA 61, [2011] 2 F.C.R. 332, 400 N.R. 367, 2011EXP-3678, 185 A.C.W.S. (3d) 914; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35, 254 D.L.R. (4th) 577, 335 N.R. 25, J.E. 2005-1144, 130 C.R.R. (2d) 99, 53 C.H.R.R. D/1, 139 A.C.W.S. (3d) 1080, EYB 2005-91328; *City of Toronto (Re)*, 2016 CanLII 31964 (Ont. IPC); *Cooper v. Canada (Canadian Human Rights Commission)*, 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, 140 D.L.R. (4th) 193, 204 N.R. 1, J.E. 96-2213, 43 Admin. L.R. (2d) 155, 26 C.C.E.L. (2d) 1, 96 CLLC Â230-056, 40 C.R.R. (2d) 81, 27 C.H.R.R. D/173; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42, 81 D.L.R. (4th) 121, 122 N.R. 361, J.E. 91-935, 47 O.A.C. 271, 50 Admin. L.R. 44, [1991] OLRB Rep. June 790, 91 CLLC Â14,024 at 12217, 4 C.R.R. (2d) 1, 27 A.C.W.S. (3d) 35; *CUPE, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, 97 D.L.R. (3d) 417, 26 N.R. 341, 25 N.B.R. (2d) 237, 79 CLLC Â14,209 at 111, [1979] 2 A.C.W.S. 108; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104, 120 D.L.R. (4th) 12, 175 N.R. 1, J.E. 95-30, 76 O.A.C. 81, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269, 25 C.R.R. (2d) 1, 51 A.C.W.S. (3d) 1045, 25 W.C.B. (2d) 304, EYB 1994-67668; *Doré v. Barreau du Québec*, [2012] 1 S.C.R.

395, [2012] S.C.J. No. 12, 2012 SCC 12, 428 N.R. 146, 2012EXP-1231, J.E. 2012-672, EYB 2012-203967, 255 C.R.R. (2d) 289, 34 Admin. L.R. (5th) 1, 343 D.L.R. (4th) 193, 211 A.C.W.S. (3d) 852; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, 2003 SCC 62, 232 D.L.R. (4th) 577, 312 N.R. 1, J.E. 2003-2076, 218 N.S.R. (2d) 311, 45 C.P.C. (5th) 1, 112 C.R.R. (2d) 202; *Doyle v. Ontario (Ministry of Municipal Affairs)*, 2017 CanLII 52705 (Ont. PSGB); *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, EYB 2008-130674, J.E. 2008-547, [2008] CLLC Â220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223, 164 A.C.W.S. (3d) 727; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, 64 D.L.R. (4th) 577, 102 N.R. 321, [1990] 1 W.W.R. 577, J.E. 90-47, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 18 A.C.W.S. (3d) 894, EYB 1989-66926; *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, 33 D.L.R. (4th) 321, 71 N.R. 338, [1987] 1 W.W.R. 603, J.E. 87-100, 23 Admin. L.R. 197, 17 C.P.C. (2d) 289, 2 A.C.W.S. (3d) 277, 8 C.H.R.R. D/3789; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, 10 C.H.R.R. D/5559, 36 C.R.R. 1, 54 D.L.R. (4th) 577, 90 N.R. 84, 13 A.C.W.S. (3d) 7, 6 W.C.B. (2d) 186; *Gazette Printing Co. v. Shallow* (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339, [1909] S.C.J. No. 7; *Guardian News v. Westminster Magistrates' Court*, [2012] EWCA Civ. 420; *H. (M.E.) v. Williams* (2012), 108 O.R. (3d) 321, [2012] O.J. No. 525, 2012 ONCA 35, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37, 212 A.C.W.S. (3d) 735; *Hanif v. Ontario College of Pharmacists*, [2014] O.J. No. 2137, 2014 ONSC 2598 (Div. Ct.); *Hill v. Church of Scientology of Toronto* (1995), 1995 CanLII 59 (SCC), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, 126 D.L.R. (4th) 129, 184 N.R. 1, J.E. 95-1495, 84 O.A.C. 1, 25 C.C.L.T. (2d) 89, 30 C.R.R. (2d) 189, 56 A.C.W.S. (3d) 495, REJB 1995-68609; *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, 1952 CanLII 16 (ON CA), [1952] O.R. 366, [1952] O.J. No. 439, [1952] 3 D.L.R. 162 (C.A.); *Hunte v. Ontario (Superintendent of Financial Services)*, 2013 ONFST 3, 2013 LNOFST 3; *International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, 68 D.L.R. (4th) 524, 105 N.R. 161, J.E. 90-472, 38 O.A.C. 321, 42 Admin. L.R. 1, [1990] OLRB Rep. March 369, 90 CLLC Â14,007 at 12041, EYB 1990-67694, D.T.E. 90T-444; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, 58 D.L.R. (4th) 577, 94 N.R. 167, J.E. 89-772, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, [page269] 15 A.C.W.S. (3d) 121; *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 1993 CanLII 3388 (ON SCDC), 13 O.R. (3d) 767, [1993] O.J. No. 1527, 106 D.L.R. (4th) 140, 64 O.A.C. 248, 19 Admin. L.R. (2d) 251, 41 A.C.W.S. (3d) 1089 (Div. Ct.); *Kadia v. Gonzales*, 501 F.3d 817 (7th Cir. 2007); *Law Society of Upper Canada v. Xynnis*, [2014] L.S.D.D. No. 38, 2014 ONLSAP 9; *Loutchansky v. Times Newspapers Ltd.*, [2002] 2 W.L.R. 640, [2002] 1 All E.R. 652 (C.A.); *Lukacs v. Canada (Canadian Transportation Agency)*, [2015] F.C.J. No. 707, 2015 FCA 140, 386 D.L.R. (4th) 163, 88 Admin. L.R. (5th) 24, 473 N.R. 263, 253 A.C.W.S. (3d) 751 (C.A.); *McPherson v. McPherson*, 1935 CanLII 276 (UK JCPC), [1936] A.C. 177; *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, 2007 SCC 43, 285 D.L.R. (4th) 193, 368 N.R. 112, [2008] 1 W.W.R. 223, J.E. 2007-1909, 247 B.C.A.C. 1, 73 B.C.L.R. (4th) 34, 224 C.C.C. (3d) 1, 51 C.R. (6th) 262, 162 C.R.R. (2d) 104, EYB 2007-124673, 75 W.C.B. (2d) 103; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21, 89 D.L.R. (4th) 289, 134 N.R. 241, J.E. 92-380, 95 Nfld. & P.E.I.R. 271, 4 Admin. L.R. (2d) 121, 31 A.C.W.S. (3d) 1124; *Nova Scotia (Attorney General) v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, 132 D.L.R. (3d) 385, 40 N.R. 181, 49 N.S.R. (2d) 609, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, 7 W.C.B. 154, EYB 1982-149378; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54, 2003 SCC 54, 231 D.L.R. (4th) 385, 310 N.R. 22, J.E. 2003-1843, 217 N.S.R. (2d) 301, 4 Admin. L.R. (4th) 1, 28 C.C.E.L. (3d) 1, 110 C.R.R. (2d) 233, 125 A.C.W.S. (3d) 542; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control*

and Licensing Branch), [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, 2001 SCC 52, 204 D.L.R. (4th) 33, 274 N.R. 116, [2001] 10 W.W.R. 1, 155 B.C.A.C. 193, 93 B.C.L.R. (3d) 1, 34 Admin. L.R. (3d) 1, J.E. 2001-1709, REJB

2001-25683, 2001 SCC 52 (CanLII), 108 A.C.W.S. (3d) 3; *Ontario (Attorney General) v. Pascoe*, 2002 CanLII 30891 (ON CA), [2002] O.J. No. 4300, 166 O.A.C. 88, 22 C.P.R. (4th) 447, 118 A.C.W.S. (3d) 1 (C.A.); *Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45, 82 D.L.R. (4th) 321, 125 N.R. 241, J.E. 91-1000, 37 C.C.E.L. 135, 91 CLLC Â14,026 at 12231, 4 C.R.R. (2d) 30, 27 A.C.W.S. (3d) 601; *R. v. Brint*, 1979 ALTASCAD 17 (CanLII), [1979] A.J. No. 57, [1979] 2 W.W.R. 369, 14 A.R. 183, 45 C.C.C. (2d) 560, 6 C.R. (3d) 377, 3 W.C.B. 152 (C.A.); *R. v. Canadian Broadcasting Corp*. (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, 221 C.R.R. (2d) 242, 271 O.A.C. 7, 262 C.C.C. (3d) 455, 327 D.L.R. (4th) 470, 91 W.C.B. (2d) 175; *R. v. Conway*, [2010] 1 S.C.R. 765, [2010] S.C.J. No. 22, 2010 SCC 22, 75 C.R. (6th) 201, 320 D.L.R. (4th) 25, 255 C.C.C. (3d) 506, 402 N.R. 255, 263 O.A.C. 61, 211 C.R.R. (2d) 326, 2010EXP-1926, J.E. 2010-1051, EYB 2010-175167, 1 Admin. L.R. (5th) 163, 88 W.C.B. (2d) 441; *R. v. Domm* (1996), 1996 CanLII 1331 (ON CA), 31 O.R. (3d) 540, [1996] O.J. No. 4300, 95 O.A.C. 262, 111 C.C.C. (3d) 449, 4 C.R. (5th) 61, 40 C.R.R. (2d) 289, 33 W.C.B. (2d) 108 (C.A.); *R. v. Eurocopter Canada Ltd*., [2001] O.J. No. 1591, [2001] O.T.C. 310, 49 W.C.B. (2d) 603 (S.C.J.); *R. v. Eurocopter Canada Ltd*. (2003), 2003 CanLII 32308 (ON SC), 67 O.R. (3d) 763, [2003] O.J. No. 4238, 233 D.L.R. (4th) 114, 180 C.C.C. (3d) 15, 112 C.R.R. (2d) 261, 59 W.C.B. (2d) 278 (S.C.J.); *R. v. Ferguson*, [2008] 1 S.C.R. 96, [2008] S.C.J. No. 6, 2008 SCC 6, 228 C.C.C. (3d) 385, EYB 2008-130228, [2008] 5 W.W.R. 387, J.E. 2008-514, 371 N.R. 231, 290 D.L.R. (4th) 17, 425 A.R. 79, 54 C.R. (6th) 197, 87 Alta. L.R. (4th) 203, 168 C.R.R. (2d) 34, 78 W.C.B. (2d) 303; *R. v. Jordan*, [2016] 1 S.C.R. 631, [2016] S.C.J. No. 27, 2016 SCC 27, 335 C.C.C. (3d) 403, 398 D.L.R. (4th) 381, 29 C.R. (7th) 235, 388 B.C.A.C. 111, 358 C.R.R. (2d) 97, 2016EXP-2173, J.E. 2016-1212, EYB 2016-267713, 130 W.C.B. (2d) 596; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131, 117 N.R. 1, [1991] 2 W.W.R. 1, J.E. 91-42, 77 Alta. L.R. (2d) 193, 114 A.R. 81, 61 C.C.C. (3d) 1, 1 C.R. (4th) 129, 3 C.R.R. (2d) 193, 11 W.C.B. (2d) 352; *R. v. Kossyrine*, [2011] O.J. No. 4495, 2011 ONSC 6081, 249 C.R.R. (2d) 17, 97 W.C.B. (2d) 476 (S.C.J.); *R. v. Laba*, 1994 CanLII 41 (SCC), [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106, 120 D.L.R. (4th) 175, 174 N.R. 321, J.E. 95-27, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360, 25 C.R.R. (2d) 92, 25 W.C.B. (2d) 300; *R. v. Leipert*, 1997 CanLII 367 (SCC), [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14, 143 D.L.R. (4th) 38, 207 N.R. 145, [1997] [page270] 3 W.W.R. 457, J.E. 97-357, 112 C.C.C. (3d) 385, 4 C.R. (5th) 259, 41 C.R.R. (2d) 266, 85 B.C.A.C. 162, 33 W.C.B. (2d) 229; *R. v. Lefebvre*, 1984 CanLII 3601 (QC CA), [1984] J.Q. no 247, 17 C.C.C. (3d) 277, J.E. 84-633 (C.A.); *R. v. Mentuck*, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73, 2001 SCC 76, 205 D.L.R. (4th) 512, 277 N.R. 160, [2002] 2 W.W.R. 409, J.E. 2001-2142, 163 Man. R. (2d) 1, 158 C.C.C. (3d) 449, 47 C.R. (5th) 63, 51 W.C.B. (2d) 349; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73; *R. v. Quesnel*, 1979 CanLII 2883 (ON CA), [1979] O.J. No. 116, 51 C.C.C. (2d) 270 (C.A.); *R. v. Vandevelde*, 1994 CanLII 3862 (SK CA), [1994] S.J. No. 156, [1994] 7 W.W.R. 370, 120 Sask. R. 51, 89 C.C.C. (3d) 161, 23 W.C.B. (2d) 297 (C.A.); *R. v. White*, [2005] A.J. No. 1727, 2005 ABCA 435, 56 Alta. L.R. (4th) 255, 376 A.R. 63, 68 W.C.B. (2d) 70; *Rasanen v. Rosemount Instruments Ltd*. (1994), 1994 CanLII 608 (ON CA), 17 O.R. (3d) 267, [1994] O.J. No. 200, 112 D.L.R. (4th) 683, 68 O.A.C. 284, 1 C.C.E.L. (2d) 161, 94 CLLC Â14,024 at 12110, 45 A.C.W.S. (3d) 666 (C.A.); *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, [2013] S.C.J. No. 11, 2013 SCC 11, 276 C.R.R. (2d) 270, 441 N.R. 1, 2013EXP-629, J.E. 2013-335, [2013] 4 W.W.R. 429, EYB 2013-218564, 355 D.L.R. (4th) 383, 76 C.H.R.R. D/1, 409 Sask. R. 75, 223 A.C.W.S. (3d) 1004; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68, 93 D.L.R. (4th) 1, 139 N.R. 1, J.E. 92-1054, 92 CLLC Â14,036 at 12221, 10 C.R.R. (2d) 1, 34 A.C.W.S. (3d) 1090; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 2002 SCC 41,

211 D.L.R. (4th) 193, 287 N.R. 203, J.E. 2002-803, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 20 C.P.C. (5th) 1, 18 C.P.R. (4th) 1, 93 C.R.R. (2d) 219, 113 A.C.W.S. (3d) 36; *Southam Inc. v. Canada (Minister of Employment and Immigration)*, 1987 CanLII 9001 (FC), [1987] F.C.J. No. 658, [1987] 3 F.C. 329, 13 F.T.R. 138, 33 C.R.R. 376, 3 Imm. L.R. (2d) 226 (T.D.); *Stepanova v. Ontario (Human Rights Tribunal)*, [2017] O.J. No. 2689, 2017 ONSC 2386 (Div. Ct.); *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)* (1998), 1998 CanLII 829 (SCC), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, 159 D.L.R. (4th) 385, 226 N.R. 1, J.E. 98-1224, 109 O.A.C. 201, 51 C.R.R. (2d) 189, 79 A.C.W.S. (3d) 921; *Thorson v. Canada (Attorney General)*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, [1974] S.C.J. No. 45, 43 D.L.R. (3d) 1, 1 N.R. 225; *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721, [2010] S.C.J. No. 21, 2010 SCC 21, 212 C.R.R. (2d) 30, [2010] 8 W.W.R. 193, 320 D.L.R. (4th) 64, 402 N.R. 206, 263 O.A.C. 4, EYB 2010-175067, 2010EXP-1937, J.E. 2010-1061, 75 C.R. (6th) 1, 23 Alta. L.R. (5th) 242, 482 A.R. 66, 255 C.C.C. (3d) 473; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, 2005 SCC 41, 253 D.L.R. (4th) 577, 335 N.R. 201, J.E. 2005-1234, 200 O.A.C. 348, 197 C.C.C. (3d) 1, 29 C.R. (6th) 251, 132 C.R.R. (2d) 178, 65 W.C.B. (2d) 621; *University of Ottawa (Re)*, 2017 CanLII 2024 (Ont. IPC); *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, 2004 SCC 43, 240 D.L.R. (4th) 147, 322 N.R. 161, [2005] 2 W.W.R. 671, 199 B.C.A.C. 1, 33 B.C.L.R. (4th) 261, 184 C.C.C. (3d) 515, 21 C.R. (6th) 142, 120 C.R.R. (2d) 203, 61 W.C.B. (2d) 216, REJB 2004-66287, J.E. 2004-1332

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 24(1)

Constitution Act, *1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1)

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 2(1), (*e*), (*g*), Part II [as am.], ss. 10(1) [as am.], 21 [as am.], (1), (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (2)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (*i*), (3), (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), 23 [as am.], 24(1) [as am.], (1.1), (2), 25, 27, 28(1), (2)(*c*) [as am.], (4) [as am.], (*b*), (*c*) [as am.], (8.1), Part III [as am.], ss. 42(1) [as am.], 50(1), (3) [as am.], 51, 52 [as am.], (1) [as am.], (13) [as am.], 54(1), (4)

Health Insurance Act, C.Q.L.R., c. A-29 [page271]

Hospital Insurance Act, C.Q.L.R., c. A-28

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, ss. 9(1) [as am.], 20

Rules and regulations referred to

General, R.R.O. 1990, Reg. 460 [as am.], s. 1(1), Schedule [as am.]

Authorities referred to

Akhavan, Payam, "Justice delayed is better than justice denied", *The Globe and Mail*, March 30, 2016

Barak, Aharon, *Proportionality, Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012)

Blackstone, William, *Commentaries on the Laws of England*

Dyzenhaus, David, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997)

Hale, Matthew, *The History of the Common Law of England*, Charles M. Gray, ed. (University of Chicago Press, 1971)

Hogg, Peter W., *Constitutional Law of Canada*, 5th ed. (Supp.) (Toronto: Carswell, 2007), vol. 2

Hurwitz, Mark S., "Ideology and Deference in U.S. Courts of Appeals Decision Making on Administrative Law", Buffalo Legal Studies Research Paper (2006, No. 2006-003, University at Buffalo Law School, 2005)

McKechnie, William Sharp, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. (Glasgow: James Maclehose and Sons, 1914)

Oliver, Peter, Patrick Macklem and Natalie Des Rosiers, "Introduction", in *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017)

Ontario Commission on Freedom of Information and Individual Privacy, Public Government for Private People — The Report of the Ontario Commission on Freedom of Information and Individual Privacy (Toronto: Ministry of Government Services, 1980), Vol. 2

Reidinger, Paul, "Will Roe v. Wade Be Overruled?", ABA Journal Vol. 74, No. 7 (July 1, 1988)

Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Administrative Tribunals and the Courts: An Evolutionary Relationship", <https:// www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>

Roach, Kent, and David Schneiderman, "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429

Stern, Simon, "Legal Fictions and Exclusionary Rules" in Maksymilian Del Mar and William Twining, eds., *Legal Fictions in Theory and Practice* (New York: Springer International Publishing, 2015)

Wasserman, Herman, "Reflecting on Journalism Research: A quarter century of *Ecquid Novi*" (2004), 25(1) South African Journal for Journalism Research 179

Weinrib, Ernest J., "Private Law and Public Right" (2011), 61 UTLJ 191

Weinrib, Lorraine E., "Canada's Charter of Rights: Paradigm Lost?" (2002), 6 Review of Constitutional Studies 119

APPLICATION for a declaration of invalidity.

Paul Schabas, *Iris Fischer* and *Jessica Lam*, for applicant.

Daniel Guttman, *Yashoda Ranganathan* and *Audra Ranalli*, for respondent. [page272]

Niiti Simmonds, *Mariam Shanouda* and *Marie Chen*, for HIV and AIDS Legal Clinic Ontario, ARCH Disability Law Centre and Income Security Advocacy Centre.

Paul Cavalluzzo, *Adrienne Telford* and *Tyler Boggs*, for Laborers' International Union of North

America and LIUNA Local 183.

William Challis, for Information and Privacy Commissioner of Ontario.

Julia Lefebvre and *Abbas Kassam*, for Canadian Journalists for Free Expression.

Linda Rothstein and *Andrew Lokan*, for Ontario Judicial Council.

Mary Birdsell and *Jesse Mark*, for Justice for Children and Youth.

E.M. MORGAN J.: —

I. *The Constitutional Challenge*

[1] This case challenges the application of the *Freedom of Information and Protection of Privacy Act* ("*FIPPA*")[1] to 13 administrative tribunals,[2] all of which are designated as "institutions" in the Schedule to the *FIPPA* General Regulation.[3] The claim originally included the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") as a named respondent, but the Toronto Star has abandoned its claim against WSIAT and the application against it is accordingly dismissed.

[2] Among other things, *FIPPA* sets out terms on which access is granted to documents held by government and wider public sector institutions. The Toronto Star contends that by applying to tribunals that preside over adversarial processes, adjudicate disputes and act judicially or quasi-judicially, *FIPPA* violates the open courts [page273] principle embedded in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[4]

[3] The venerability of the open courts, or openness principle is not in doubt. In the 13th century, *Magna Carta* confirmed the prohibition against selling writs, or admission tickets to trials, in favour of open public access to court proceedings.[5] The openness principle was reiterated by Sir Matthew Hale in the 17th century, who noted that witnesses must be examined "in the open court, and in the presence of the parties, their attorneys, counsel and all bystanders".[6] In the 18th century, William Blackstone understatedly observed that "the open examination of witnesses . . . is much more conducive to the clearing up of the truth".[7]

[4] The concept of open justice easily made the crossing from England; accordingly, Canadian courts have historically recognized that, "it is of vast importance to the public that the proceedings of courts of justice should be universally known".[8] This has been reinforced in the post-*Charter* era, with the Supreme Court of Canada emphasizing that public access to legal proceedings includes access by the press:

> Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.[9]

[5] The question in this application is whether and how this judicial principle applies to contemporary administrative law proceedings. In many ways the 13 tribunals at issue here are stand-ins for a large number of adjudicative tribunals across the province.[10] As former Chief Justice McLachlin describes it, "vast and [page274] unlimited stretches of law and conduct that formerly fell under the jurisdiction of common law courts were swallowed up by these new schemes. . . . More and more, administrative tribunals regulated the problems created by modern society."[11]

[6] All parties acknowledge that administrative hearings governed by the *Statutory Powers Procedure Act* ("*SPPA*") are required to be open to the public.[12] In principle, therefore, it is uncontroversial that "[t]he 'open court' principle" -- at least in *some* version -- "is a cornerstone of accountability for decision-making tribunals and courts".[13]

[7] The present controversy arises with respect to documents filed with administrative tribunals that hold adjudicative hearings. More specifically, the issue posed in this Application challenges the means by which such documents are accessed by the press outside of the adjudicative hearing itself.

[8] The application is restricted even further to those documents that qualify as records of tribunal proceedings. The *SPPA* contains a list of "records" for the purposes of hearings by tribunals covered by that Act. This list provides a ready definition of the documents to which the present application applies ("Adjudicative Records"). These include:

> (a) any application, complaint, reference or other document, if any, by which the proceeding was commenced;
>
> (b) the notice of any hearing;
>
> (c) any interlocutory orders made by the tribunal;
>
> (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
>
> (e) the transcript, if any, of the oral evidence given at the hearing; and
>
> (f) the decision of the tribunal and the reasons therefor,
>
> where reasons have been given.[14]

[9] To this definition I would add tribunal dockets or schedules of hearings and registers of actions or proceedings kept by the [page275] adjudicative tribunals. These are included in a similar list of Adjudicative Records published by the Canadian Judicial Council. That list is accompanied by an advisory, which is equally applicable here, as to a number of items that are not included as Adjudicative Records, as follows:

> This definition does not include other records that might be maintained by court staff, but that are not connected with court proceedings, such as license and public land records. It does not include any information that merely pertains to management and administration of the court, such as judicial training programs, scheduling of judges and trials and statistics of judicial activity. Neither does it include any personal note, memorandum, draft and similar document or information that is prepared and used by judges, court officials and other court personnel.[15]

[10] I would also clarify that Adjudicative Records do not include documents exchanged between the parties to a hearing and filed with the tribunal in the pre-hearing stage of proceedings. Counsel for the Attorney General and a number of the intervenors advise that some adjudicative tribunals require parties to file with the tribunal all relevant documents in their possession prior to the hearing. In those situations, the tribunal's file in the given matter may resemble the full pre-trial documentary discovery in civil litigation.

[11] Counsel for the Toronto Star states that the challenge posed here is for access to Adjudicative Records that are part of the actual record of the tribunal hearing. It does not include documents that were part of pre-hearing discovery but that did not get introduced at the hearing itself. The open court principle includes access to "anything that has been made part of the record",[16] but it does not cover documents that did not make it to open court.

[12] While most of the tribunals in issue hold open hearings and make their Adjudicative Records available for inspection during the hearing itself, the Toronto Star has documented the difficulties in obtaining access to tribunal schedules before the hearing has taken place and inspecting or copying Adjudicative Records after the hearing has ended. Many, although not all, of the tribunals in issue take the position that access to those documents is governed by *FIPPA*.

[13] The Toronto Star submits that *FIPPA*, which sets out statutory terms on which members of the press or public can obtain copies of all documents held by government, burdens the [page276] right of access and is thereby contrary to the requirement of open hearings. In response, the Attorney General submits that *FIPPA* is itself a tool to promote access to information held by public and administrative bodies, including tribunals, and in doing so thereby fosters openness.

[14] The Supreme Court of Canada has stated that "[a]ll law and law-makers that touch the people must conform to [the *Charter*]. Tribunals and commissions charged with deciding legal issues are no exception."[17] What needs to be determined is the effect of *FIPPA* in this regard. Do its substantive terms that weigh access to documents against privacy protection, and its procedural regime by which documents are requested, vetted and withheld or produced, conform with or undermine the requirement of openness? As the English Court of Appeal has said in its inimitable way, "The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed?"[18]

II. *The FIPPA Process*

[15] In raising its constitutional challenge, the Toronto Star identifies a series of issues that are occasioned by the terms of *FIPPA* as applied to administrative tribunals. These include procedural issues which are alleged to lead to undue delay in obtaining Adjudicative Records, and substantive issues which are alleged to exempt many Adjudicative Records (or much of the information contained in Adjudicative Records) from production at all.

a) *Procedural issues in FIPPA*

[16] The *FIPPA* process is, as counsel for the Toronto Star describes it, a bureaucratic one. To make a relatively long piece of legislation short, under s. 24(1) a person seeking access to a record -- *i.e.*, a document or information, including an Adjudicative Record -- from an applicable institution must make a formal request, pay a minimal prescribed fee and provide sufficient information for the record to be identified.

[17] The head of the institution has authority to determine whether the request is frivolous (s. 24(1.1)), whether there is sufficient detail (s. 24(2)), forward the request to the relevant agency [page277] holding the record and give written notice thereof (s. 25). Further, the head of the institution is mandated to within 30 days advise the applicant whether or not the request will be granted, or to extend the 30-day time period if necessary (s. 27). Before making a decision, an institution head must give written notice to any person effected by the record requested (s. 28(1)) and give a copy of that notice to the requester (s. 28(4)), then allow representations to be made by each (s. 28(2)(*c*), 28(4) (*b*)), and within ten days make a decision about disclosing the record in issue (s. 28(4)(*c*)). Like all of the timelines under *FIPPA*, this period can also be extended as the head of the institution deems necessary (s. 28(8.1)).

[18] A person requesting the record or a person affected by the disclosure has a right of appeal to the Information and Privacy Commission ("IPC") (s. 50(1)). The IPC then provides notice of the appeal to the head of the institution from which the record was requested (s. 50(3)). There are time periods set aside for potential mediation of the dispute (s. 51) and the IPC may conduct a review of the head of institution's initial decision (s. 52). After that, the "person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal" has an opportunity to make submissions to the IPC (s. 52(13)). Finally, after

receiving all applicable submissions, the IPC is authorized to make a decision disposing of the issues on appeal (s. 54(1)) and provide notice of the decision to all relevant parties (s. 54(4)).

[19] The *FIPPA* process is a potentially lengthy one when played out in full. Although the above is a capsulized summary, counsel for the Toronto Star points out that in all there are some six different notice periods that can become relevant in a given record request, all of which add to the time that it takes for a request to be processed and answered. The evidence in the record of the Toronto Star's specific access requests to different administrative institutions varies from a few days to many months or even years, depending on the nature of the tribunal and the records being sought.

[20] Since the timelines vary greatly from request to request, it is possible to overstate both the expediency and the delay of the process. The Toronto Star understandably stresses the journalistic imperative of timely disclosure and the newsworthiness of the documents sought. It recounts the experiences of one of its reporters, who sought Adjudicative Records from the OLRB but who gave up his appeal to the IPC after eight months without a final decision on what would be produced. It also recounts experiences of its reporters with the CICB, in which one request for Adjudicative Records took 12 weeks to be answered. [page278]

[21] The Attorney General stresses the need to accurately balance the competing imperatives of privacy rights and public access under *FIPPA*. It emphasizes the experience related by a Toronto Star reporter in which the HRTO responded to a disclosure request within 45 days of its submission. Other incidents narrated in the affidavit material filed before the court reveal a seven-week process for a reporter to obtain Adjudicative Records from the CICB, 32 days from the PEHT and ten days for a reporter to be provided with Adjudicative Records from the LTB. Counsel for the Attorney General concedes that many disclosure packages come with notable redactions and withheld material, but contends that the time lines are generally significantly shorter than the more egregious delays cited by counsel for the Toronto Star.

[22] It is noteworthy that both sides agree that there are a number of tribunals included in this application whose process entails no delay at all. As discussed further below, these tend to be the institutions that have fashioned their own method of handling document requests outside of the *FIPPA* process. Thus, for example, the OSC posts its docket lists and its unredacted decisions on its website, and allows public access to Adjudicative Records without requiring any *FIPPA* request at all. The ERT and the OMB do the same, as do the FST and the OCPC except that the names of individuals are typically anonymized (with the exception of police officers, whose names are disclosed by the OCPC).

b) *Substantive issues in FIPPA*

[23] Separate from the cumbersome procedures, the other aspect of *FIPPA* emphasized by counsel for the Toronto Star is that it contains a presumption of non-disclosure of many records. That is, it protects privacy by placing the onus on the party seeking disclosure of records, including Adjudicative Records, to justify why they should be disclosed.

[24] The *FIPPA* regime commences on a premise that simultaneously embraces openness and closure. Section 10(1) provides that "every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless, (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22 . . .". Although the provision is phrased in terms of transparency, the exemptions are anything but minor. Counsel for the Toronto Star identifies one exemption in particular that is so broad as to swallow up the initial mandate to disclose records upon request -- the personal privacy exemption: "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates" (s. 21(1)). [page279]

[25] This prohibition on disclosure of personal information is repeated in Part III of the *FIPPA*, entitled "Protection of Individual Privacy". Under that general heading, s. 42(1) provides that "[a]n

institution shall not disclose personal information in its custody or under its control", except in accordance with a number of listed exceptions. It is fair to say that none of the exceptions to the non-disclosure of personal information exemption in s. 21(1) or s. 42(1), or any of their follow-up sections, pertain to access to Adjudicative Records as a general category.

[26] The trigger phrase "personal information" is described very broadly in s. 2(1) of *FIPPA*:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly orexplicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[27] As indicated above, there are exceptions to the exemption from disclosure of any record containing "personal information"; and, again, an institution's head at first appears to maintain wide discretion to decide whether the sought-for document falls within the exceptions to the exemption. Section 21(1)(*c*) provides that the record can be disclosed where it contains "personal information collected and maintained specifically for the purpose of creating a record available to the general public", while s. 21(1) (*f*) provides more generally that the record may be disclosed "if the disclosure does not constitute an unjustified invasion of personal privacy". This discretion, however, is circumscribed by a further [page280] list of statutory presumptions that narrow the exceptions to the personal information exemption:

21(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(*a*) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(*b*) was compiled and is identifiable as part of an investigation into a possibleviolation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(*c*) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

(*d*) relates to employment or educational history;

(*e*) was obtained on a tax return or gathered for the purpose of collecting a tax;

(*f*) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(*g*) consists of personal recommendations or evaluations, character references or personnel evaluations; or

(*h*) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[28] The evidence collected by the Toronto Star and, indeed, the reported decisions by the IPC regarding production of records, suggests that the personal information exemption is so widely invoked that it has become the rule rather than an exemption to the rule. In effect, decisions about production of records under *FIPPA* start from the s. 21(1) premise of non-production rather than from the s. 10(1) premise of production.

[29] Adjudicative Records, in particular, are likely to fall within the definition of "personal information", since they almost inevitably contain personal information identifying the parties, were most often compiled in respect of an investigation into a regulatory breach or other violation of the law, and frequently relate to either welfare benefits, employment, education finances, race or sexuality, etc. Moreover, complaints to regulators, pleadings and other primary documents filed with tribunals invariably contain opinions by one person about the issue at hand or the opinion of one person about another, making them "personal information" under s. 2(1) (*e*) and (*g*). Differences of opinion are what adjudicated disputes are virtually always about, but their effect is to bring the Adjudicative Records into the s. 21 exemption.

[30] It is worth noting that one potentially important exception to the personal information exemption, s. 23 of *FIPPA*, appears to [page281] be rarely invoked. A typical comment in IPC decisions is to the effect that "[t]he appellant has not claimed that section 23 [the public interest override] applies in this case, and in my view, it would not apply in any event".[19] That section provides that "[a]n exemption from disclosure of a record . . . does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

[31] Despite its seeming importance to the issues here, the IPC does not consider it to override the s. 21(1) exemption of personal information from disclosure. The reason for this, and presumably for the paucity of cases invoking it, is that s. 23 has been given a very strict reading and narrow ambit of operation. The Divisional Court has interpreted s. 23 as applying where the "public interest" is not only more important than the personal information found in the specific Adjudicative Record, but more important than the protection of personal information at all:

> The two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": there must be a *compelling* public interest in disclosure; and this compelling interest must *clearly* outweigh the *purpose* of the exemption, as distinct from the value of disclosure of the particular record in question.
>
> (Emphasis in the original)[20]

[32] As the IPC generally puts it, in order to fall within the s. 23 exception to the non-disclosure rule, the requester must establish that there is a "rousing strong interest and attention"[21] in the record sought -- again, an interest that goes beyond an interest in reporting on a case before the administrative body but that "add[s] in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices".[22] In other words, a requester must demonstrate to the IPC's satisfaction that there is a public interest in the Adjudicative Record not simply to inform the public about the particular case, but for the larger societal purpose of aiding the public in making political choices. [page282]

[33] Even in theory this would eliminate all but the largest and most politically prominent of cases from media access to Adjudicative Records and the details contained therein; in practice, it seems to have reduced the section to negligible use. The minimization of s. 23 is, of course, part and parcel of the expansion of s. 21 and its accompanying sections. Much like an expansive use of exclusionary rules in the law of evidence or deeming provisions in defining "constructive

liability", the "personal information" exemption stands as an adaptable device -- a "legal artifice" that "brand[s] as legally irrelevant, information that might otherwise figure significantly in determining a person's [right of access]".[23] With the contraction of s. 23, many decisions under *FIPPA* embody the idea that the public almost never has a compelling interest in the records, and all that is not already public is kept private.

[34] As a result of *FIPPA*'s aversion to allowing any "personal information" to be disclosed, the LTB (and its predecessor, the Ontario Rental Housing Tribunal),[24] the HRTO[25] and other similar institutions either refuse to produce Adjudicative Records or heavily redact them. This includes dockets and other types of agendas that would help identify the cases in advance of their being heard.[26] Furthermore, the IPC has stated that the requester does not satisfied its onus of proving that the request falls within the s. 21(1)(*c*) exception for documents collected for the purpose of making them available to the public where "the personal information . . . is collected . . . from the [parties] filing the form for the purpose of adjudicating disputes".[27] Thus, Adjudicative Records do not fit within any exception to the personal information exemption by virtue of having been filed in a public hearing.

[35] In other words, the presumption of non-disclosure, or the reverse onus in respect of the production of the broadly framed definition of "personal information", presents a serious obstacle to disclosure of Adjudicative Records. As counsel for the IPC acknowledged at the hearing of this application, this statutory [page283] approach has led the HRTO and certain other of the 13 tribunals in issue here to refuse most if not all requests for production of records filed with it, including Adjudicative Records, where those records have identifying information. All that is required for a requested record to fall into the non-disclosable category is that the decision maker -- either the head of the institution in the first instance or the IPC on appeal -- be satisfied that the record passes a test set at a rather low bar: "If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information."[28]

III. *Application of FIPPA*

[36] *FIPPA* applies to all branches of provincial government and to all of the 182 public institutions listed in the Schedule thereto.[29] This includes, but is obviously not limited to, a great many adjudicative tribunals. Indeed, a cursory glance at the governing legislation and General Regulation thereunder reveals that *FIPPA* applies to an exceptionally diverse range of institutions. These span all government ministries, government service providers, universities, hospitals, agencies, boards, commissions, corporations and tribunals. Given the variety of functions carried out by these institutions, it is little wonder that the process established under *FIPPA* functions well with some and seems dysfunctional with others.

[37] As already discussed, it is important to note that the Toronto Star challenges access to Adjudicative Records only, and not to all documents held by the institutions to which *FIPPA* applies. This distinction, of course, eliminates Ontario's many non-adjudicative bodies from the ambit of the present analysis. In this application, the Toronto Star does not seek or challenge any records (or the process by which records can be obtained) from public institutions such as government ministries, hospitals, universities, etc. Its focus is strictly on those institutions that act in an adjudicative capacity.

[38] The very fact that on its face *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records is indicative of the difficulties inherent in fashioning an all-embracing disclosure regime. As suggested by the Canadian Judicial Council's qualification on the definition of Adjudicative Records set out earlier, there is a significant difference between [page284] granting access to documents introduced by parties to hearings and entered into the evidentiary record and granting access to a given institution's management records.

[39] To take a simple illustration, a media request for access to educational records filed by the parties in a professional negligence case must be analyzed one way, while a media request for access to the educational records of the judge presiding over that trial must be analyzed in an entirely different way. Both types of records may well be in the hands of the court or tribunal *qua* public institution, but one set of records are Adjudicative Records that form part of an open court record while the other are administrative or personnel records that ordinarily would play no role in the specific judicial process to which the request relates.

[40] This debate -- *i.e.*, whether administrative bodies are part and parcel of government and the information and documents they hold must be treated as part of government business, or are independent decision-makers and the information and documents they hold must be treated as Adjudicative Records -- highlights a dichotomy that lies at the core of the issues in the application. As the House of Lords put it some eight decades ago, openness to the public is the "authentic hallmark of judicial as distinct from administrative procedure".[30] A government personnel committee contemplating hiring a lawyer is not required by the open courts concept to meet in public; a Law Society discipline committee contemplating sanctions against a lawyer is.[31] The former is a public institution conducting its business or administration, while the latter is a public institution conducting an adjudication.

[41] The duality of being an administrative arm of the executive and an independent adjudicative body characterizes many of the institutions at issue here and poses an interpretive problem in applying *FIPPA*. Counsel for the IPC, which, as noted above, is the body to which *FIPPA* disclosure decisions can be appealed, concedes that while *FIPPA* on its face does not address the different character traits of administrative institutions, there is an open question of interpretation as to how and where its privacy mandate applies. Thus, the IPC itself has yet to determine whether the privacy protections contained in Part III of *FIPPA* apply to Adjudicative Records. That said, institution heads and the IPC routinely apply the s. 21 exemption in response to specific applications for access. [page285]

[42] The Supreme Court of Canada has observed that "[administrative institutions] may be seen as spanning the constitutional divide between the executive and judicial branches of government".[32] Thus, on one hand, it has been said that "[i]t is unrealistic to expect an administrative tribunal such as the [Ontario Labour Relations] Board to abide strictly by the rules applicable to courts of law."[33] On the other hand, it has been observed that the very same board -- the OLRB -- "does not carry on any business", but has the power to "exercise certain functions of a judicial nature".[34] Former Chief Justice Lamer has pointed out that characterizing administrative bodies depends on their function in the circumstances: "the principles for judicial independence . . . are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties".[35]

[43] As indicated, the express terms of *FIPPA* draw no distinction between the administrative or "business" functions of governmental bodies and the adjudicative functions of administrative tribunals. Some institutions covered by *FIPPA* conceive of themselves as part of government and thus "lack [a] constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy".[36] Others conceive of themselves as adjudicators rather than administrators and adhere to the notion that they are "expressly created as independent bodies for the purpose of being an alternative to the judicial process".[37]

[44] This distinction, then, translates into the varying approach to openness and other aspects of procedure that is discernable among the large array of institutions named in the schedule to *FIPPA*. The Supreme Court has indicated that this variety of procedures is an inevitable incident of administrative law: [page286]

> Some administrative tribunals are closer to the executive end of the spectrum: their primary purpose is to develop, or supervise the implementation of, particular government policies. Such tribunals may require little by way of procedural protections. Other tribunals, however, are closer to the judicial end of the spectrum: their primary purpose is to adjudicate disputes through some form of hearing. Tribunals at this end of the spectrum may possess court-like powers and procedures. These powers may bring with them stringent requirements of procedural fairness, including a higher requirement of independence.[38]

[45] Of the 13 institutions specifically put in issue by the Toronto Star, eight do not appear to use the *FIPPA* process at all.[39] That is, post-hearing requests for access to and copies of Adjudicative Records are handled directly by the tribunal itself without the mechanism of a *FIPPA* application. Those tribunals have devised their own methodology for assessing the requests. Counsel for the Attorney General and counsel for the IPC support this diversity of approaches. It is their view that *FIPPA* applies where a person has made an application thereunder, but it does not require any given institution to embrace it as the sole mechanism for access to documents.

[46] This view is similar to that taken by the Federal Court of Appeal, where the decision as to whether to apply the federal equivalent to *FIPPA*, the *Privacy Act*, has been left to the institution itself. As the court put it: ". . . once the Agency placed the documents . . . on its Public Record . . . those documents became Publicly Available. As such, the limitation on their disclosure, contained in subsection 8(1) of the *Privacy Act* was no longer applicable".[40] *FIPPA*, like the *Privacy Act*, does not explicitly state under what circumstances it applies to any given institution; the reason for this may well be that the answer eludes any overarching definition.

[47] Simply put, it is inherent to administrative law that procedures -- including the procedures for accessing documents -- invariably "depend upon the nature and the function of the particular tribunal".[41] It is the administrative institution itself that is left to assess not only its own overall character, but the circumstances in which the request arises. [page287]

[48] Leaving it to the institutions to determine whether a *FIPPA* application for Adjudicative Records is necessary is viewed by the Attorney General and the IPC to be in compliance with *FIPPA*. Since many agencies "act[page288] in an administrative capacity, when carrying out its . . . regulatory mandate, and in a quasi-judicial, or court-like capacity, when carrying out its adjudicative dispute resolution mandate",[42] the procedures for documentary access may vary not only between institutions but within them, depending on the function at play. As former Chief Justice McLachlin stated in a speech to the Council of Canadian Administrative Tribunals:"We understand . . . that the rule of law does not always call for one right answer in every case."[43]

[49] Accordingly, to the extent that some of the institutions named in the Toronto Star's notice of application bypass the *FIPPA* regime, there is little more to be said about them here. It is certainly the case that their ability to fashion their own mechanism for public access to Adjudicative Records, and to make their own fine-tuned determinations of the correct balance between openness and privacy, fall within the power of those adjudicative institutions to control their own processes.[44] Like other requirements of natural justice implemented by administrative tribunals, these document access procedures attract deference. This deference arises not just as an acknowledgment of legislative authority,[45] but as an acknowledgment of the constitutionally different roles assigned to courts and administrative bodies.[46]

[50] Of course, any tribunal implementing its own mechanism for access to Adjudicative Records may deny access in response to a request. In the event of a challenge, there would have to be a case-specific analysis of whether the openness principle and s. 2(*b*) of the *Charter* was breached and whether a remedy, whether under s. 24(1) of the *Charter* or otherwise, was applicable under the circumstances. However, the fact that a given tribunal ignores *FIPPA* in making such a decision on its own raises no larger issue.

[51] I note that counsel for the Attorney General makes the point that the Toronto Star's challenge is, in effect, moot with [page289] respect to the eight tribunals that require no formal application under *FIPPA* for a request for Adjudicative Records. It is the Attorney General's position that since no *FIPPA* application was made and denied, there is no evidentiary basis for the present application and the constitutional analysis it demands. Counsel for the Toronto Star, on the other hand, makes the point that the voluntary compliance of the eight tribunals in the face of *FIPPA*'s apparent applicability to those tribunals is not good enough to end the case against them. It is the Toronto Star's position that its constitutional rights, and the constitutional requirement of openness, cannot turn on the discretionary choice of those who administer the specific tribunals from time to time.

[52] Neither side has got it exactly right. The Attorney General states in its factum that with respect to the eight tribunals that bypass *FIPPA*, "the evidence demonstrates that access to the Adjudicative Records of these tribunals was readily granted to the applicant without a formal FOI [freedom of information] request". The record before me accordingly establishes not that the controversy with respect to those tribunals is moot in the sense that there are insufficient adjudicative facts to consider the issue, and not that the conduct of those tribunals is discretionary and subject to unprompted change; rather, it shows that those tribunals are in compliance with the openness principle.

[53] The Supreme Court of Canada has left little doubt that administrative tribunals are competent to interpret and implement constitutional norms -- "We do not have one *Charter* for courts and another for administrative tribunals".[47] Unless and until the Toronto Star's (or anyone else's) rights are infringed by the eight non-*FIPPA* applying tribunals, there is nothing further to analyze in respect of them. One can assume that they have taken it on themselves to implement procedures which comply with their view of what the *Charter* requires. While it remains to be determined below whether the other tribunals that do apply the *FIPPA* procedure for post-hearing access to Adjudicative Records are in compliance with their constitutional obligations, there is no evidence (and no real argument) that the ready access to documents that the eight tribunals offer amounts to a breach.

IV. *Freedom of Expression*

[54] "The open court principle is one of the hallmarks of a democratic society . . . [and] is inextricably tied to the rights [page290] guaranteed by s. 2(b) of the *Charter*."[48] The Supreme Court has declared that this principle includes "guaranteed access to the courts in order to gather information", and that "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press".[49] Counsel for the Toronto Star correctly indicates that this includes the presumptive right to Adjudicative Records,[50] including exhibits entered into evidence,[51] photocopies of all such records[52] and the ability to disseminate those records by means of broadcast or other publication.[53]

[55] As discussed earlier in these reasons, these principles apply to administrative tribunals as well as to courts. While the source of administrative tribunals' authority is their enabling statute, "[t]he legitimacy of such tribunals' authority . . . can be effected only if their proceedings are open to the public".[54] This open access, and concomitant protection of freedom of the press, is in keeping with those tribunals' obligation "in exercising their statutory functions . . . [to] act consistently with the *Charter* and its values".[55] This is not optional or discretionary on the part of administrative tribunals. As the Supreme Court has stated, "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it".[56]

[56] The evidence in the record, and even a perusal of the terms of the statute itself, establishes that *FIPPA* burdens freedom of the press. In coming to this conclusion, it is important to keep in

mind that freedom of expression "protects listeners as well as speakers".[57] By extension, the Supreme Court has specifically held that [page291] "[a]ccess to exhibits is a corollary to the open court principle."[58] By further logical extension, the Supreme Court has also observed that "the open court principle gains importance from its clear association with free expression . . . [and that] s. 2(b) [of the *Charter*] provides that the state must not interfere with an individual's ability to 'inspect and copy public records and documents'".[59] And finally, in case it wasn't already obvious, the Court of Appeal has emphasized that "the right to access exhibits includes the right to make copies".[60]

a) *The reverse onus on "personal information"*

[57] The very structure of the process that *FIPPA* puts in place for obtaining records from its designated institutions impinges on the openness principle and s. 2(*b*) of the *Charter*, as elaborated by the courts. As reviewed earlier in these reasons, s. 2(1) of *FIPPA* defines "personal information" in the broadest possible terms, while s. 21(1) (which is reiterated in s. 42(1)) sets out a presumption of non-disclosure of personal information and imposes an onus on the requesting party to justify the disclosure of the record. The IPC in its rulings on disclosure has emphasized that, "In the case of information that qualifies as "personal information" under [*FIPPA*], there is a strong assumption against disclosure".[61]

[58] As also explained above, these provisions apply not only to records held by the listed institutions as a matter of the business or administration of the institutions but to Adjudicative Records as well -- including evidence filed before tribunals, complaints and other pleadings that form the originating processes before tribunals, dockets and schedules for hearings, transcripts of proceedings, etc. The upshot of these statutory provisions is that the openness principle does not apply as of right to the tribunals governed by the *FIPPA* process; rather, a person or the press that seeks access to Adjudicative Records bears the onus of establishing that an exception to the non-disclosure of personal information rule applies. Again, this is not an insubstantial onus.

[59] I pause here to note that it is the Attorney General's view that there is nothing inherently wrong with *FIPPA*'s stringent [page292] privacy protection and the reverse onus that ensures this protection. Counsel for the Attorney General submits that s. 2(*b*) of the *Charter* does not guarantee a general right of access to information; he observes that in *CLA*,[62] which he posits as the leading case on point, the Supreme Court held that "s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded".[63] The Attorney General cites a number of cases decided either in Superior Court[64] or by the IPC[65] that rely on *CLA* as demonstrating that the *CLA* test is now the accepted basis on which to measure government disclosure obligations.

[60] The cases cited by the Attorney General as following *CLA*, as well as *CLA* itself, illustrate that the Attorney General's position misses the mark here. In *CLA*, the records in question were not produced by the government due to a concern for, *inter alia*, personal privacy.[66] On the other hand, nothing in *CLA* contradicts the "general principle that the open court principle trumps desires for anonymity".[67] The key to unravelling this apparent contradiction is in the type of information being requested. As McLachlin C.J.C. described it in *CLA*, the Criminal Lawyers Association applied to obtain "a 318-page report looking into alleged police misconduct"[68] which contained "records prepared in the course of law enforcement investigations". The request was denied by the Minister of Public Safety and Security partly because the content of the document contained solicitor-client privileged material and partly because it was a law enforcement investigatory record.

[61] The *CLA* case, in other words, did not deal with Adjudicative Records such as those in issue here; and since the documents were investigative and were not part of a record before an adjudicative tribunal, the open court principle did not apply. The same is true of the other cases referred to by counsel for the Attorney [page293] General in this regard. One of those cases entails a request by a university employee for a psychological report contained in his personnel records held by the university;[69] another entails a request by a reporter for an Auditor General forensic report "directed at the detection of fraud, waste and wrongdoing involving city resources";[70] while a third entails a request for hospital records pertaining to the provision of abortion services.[71] None of them entails a request for Adjudicative Records.

[62] As already indicated, *FIPPA* does not distinguish between Adjudicative Records and non-adjudicative records. But the open court principle in s. 2(*b*) of the *Charter* only applies to Adjudicative Records. This very point lies at the core of the Supreme Court's reasoning in *CLA*: "Access to documents in government hands is constitutionally protected only where it is . . . compatible with the function of the institution concerned."[72] Government agencies and public administrative bodies that hold investigative reports, personnel records, business and accounting records, and the like other than in an Adjudicative Record, are not subject to the open court principle.[73] They are obliged under *CLA* to implement transparency only where disclosure of their records is necessary for democratic process.

[63] Adjudicative Records, on the other hand, like court records, are not only entirely compatible with transparency but require it for the sake of the integrity of the administration of justice.[74] The rationale for maintaining confidentiality over records accumulated by law enforcement and forensic examiners at the investigation stage of a complaint or dispute does not, absent some special circumstance, continue into the open hearing or post-hearing stage of proceedings.[75] Thus, while access to government business records, including the content of personnel and investigative audits, is granted or withheld subject to the *CLA* test of "meaningful public discussion", the question of access to [page294] documents filed in the Adjudicative Record before administrative tribunals must be answered in accordance with the *Charter*,[76] including s. 2(*b*) and the open court principle.

[64] Like most reverse onus provisions, one purpose and effect of s. 21(1) of *FIPPA* and the operation of the exceptions thereto is, simply put, to facilitate the government's case against the party arguing against it.[77] This obviously makes it more difficult for the press and other document requesters to exercise the rights which they otherwise have under the *Charter*.

[65] This statutory imposition of an onus on the requester to justify the disclosure of Adjudicative Records may or may not be justifiable, but it certainly amounts in the first instance to an infringement on the s. 2(*b*) *Charter* right of access to those documents. The Supreme Court has stated emphatically that when it comes to access of the press to Adjudicative Records, "covertness is the exception and openness the rule".[78] In fashioning a regime that prohibits the disclosure of "personal information" unless the press can establish its justification, *FIPPA* has it the wrong way around.

b) *Delay in accessing Adjudicative Records*

[66] Counsel for the Toronto Star submits that newsgathering inherently requires timeliness. Any newspaper reader would find it difficult to refute this observation. In fact, it takes only the most cursory understanding of the media to comprehend the adage that "old news is no news".[79] Since time is of the essence to effective journalism, the publication of "stale news . . . cannot rank in importance with the dissemination of contemporary material".[80]

[67] The Alberta Court of Appeal has observed that it is only "contemporaneous access" to relevant materials that "allows the media to fulfill their legitimate role as the eyes and ears of the public".[81] Generally speaking, it is essential in a system that [page295] protects free expression and the press that "the media . . . should not have their right to report on proceedings . . . delayed for any greater period of time than a court believes is absolutely necessary".[82] Just as justice delayed can be justice denied,[83] so reportage delayed can be reportage denied.

[68] The evidence adduced by the Toronto Star demonstrates varying amounts of delay in responding to requests for documents. As detailed earlier in these reasons, those tribunals who utilize the *FIPPA* process take from ten days to eight months and beyond to provide a requester with a final decision. The most typical time frame for the requests contained in the present evidentiary record are somewhere in the 30- to 45-day range. This is roughly in keeping with what one might expect from a review of the legislation itself, which allows for 30 days (with possible extensions) for a first decision by an institution head, with more time needed for an appeal to the IPC.

[69] Counsel for the Attorney General submits that there is no evidence that any of the delays (or redactions) actually impeded the writing of any stories or reporting on any of the cases mentioned in the record. However, it is the Toronto Star's evidence that for many of these incidents the newsworthiness of the reporter's story has faded by the time the documentary production was made by the given tribunal. In the more frequently litigated area of libel law, it is notoriously difficult to prove a negative such as libel chill or the number of articles *not* written,[84] and it stands to reason that the same applies with respect to delay. It may be difficult to calculate how many article ideas faded away as the days and weeks passed and the writer waited for a decision on whether an Adjudicative Record would be forthcoming.

[70] As Doherty J.A. has elsewhere put it, "The values promoted by s. 2(*b*) [of the *Charter*] are not served by publication when the speaker has lost his audience and the message to be conveyed has lost its purpose."[85] It must be the rare story that is still timely months after the event. Canadian readers, like Canadian voters, [page296] expect that "the most accurate and timely polls [and news reports] will be available".[86] Thus, even if a reporter were "ultimately successful in his challenge . . . the full exercise of his rights would have been compromised by the delay in publication while the challenge was being made".[87]

[71] As with the presumption of non-disclosure in s. 21(1), the delay occasioned by *FIPPA* procedures may or may not be justifiable -- "[a]n unreasonable delay denies justice",[88] but not all delay is unreasonable. That said, it certainly burdens freedom of the press and amounts in the first instance to an infringement on the s. 2(*b*) *Charter* right of free expression.

V. *Reasonable Limits on Openness and Expression*

[72] When it comes to fundamental *Charter* guarantees such as the openness principle, freedom of the press and freedom of expression, "any encroachment upon the guarantees demand[s] justification by the state on a stringent basis".[89] Having found that *FIPPA* violates s. 2(*b*) of the *Charte*r in two respects -- substantively by imposing a reverse onus on a request for Adjudicative Records, and procedurally by occasioning delay in accessing Adjudicative Records -- it is necessary to turn to s. 1 of the *Charter*. It is here that the analysis of *Charter* rights takes on "a more contextual approach and indicate[s] the harms that might be caused to other rights and interests".[90] These include, most notably, the privacy rights of litigants and the administration of justice in administrative tribunals.

[73] In considering whether *FIPPA*'s limits on freedom of expression are reasonable and justifiable in a free and democratic society, the analysis follows the *Oakes* test.[91] It will therefore

consider whether the legislative objective is pressing and substantial, whether the means chosen by the legislature is rationally connected to the objective, whether the legislation minimally impairs [page297] the right of free expression, and whether it is proportional considering the deleterious and salutary effects on the right.

a) *Pressing and substantial objective*

[74] Counsel for the Toronto Star submits that the Attorney General has difficulty in articulating any objective for *FIPPA*, let alone a pressing and substantial one. To put it another way, the Toronto Star contends that if there is an identifiable objective to this legislation it is an illegitimate one in that it aims at overriding the openness principle. That is, it is specifically designed to place obstacles in the way of disclosing Adjudicative Records.

[75] In response, counsel for the Attorney General stresses the *FIPPA* objectives as they apply to administrative tribunals: "to provide a right of access to information while at the same time protecting the privacy of individuals". It is the Attorney General's position that the objective of providing individuals a measure of control over information that is personal to them is itself pressing and substantial. To put it another way, "[t]he ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy."[92]

[76] Courts in other contexts have indicated that contemporary legislation and other state action often exhibits multiple objectives. These objectives, in turn, often take the form of a policy balance between the particular *Charter* rights of the individual and the rights and interests of others with whom the individual may interact.

[77] As an example, counsel for Justice for Children and Youth makes the forceful point that criminal justice legislation aimed at young persons has long reflected multiple objectives: ensuring privacy and other accommodation measures for youths while fostering fair sentencing and other criminal process measures for the community at large. As a further example, in the context of s. 2(*b*) of the *Charter*, a demonstration in a public park may be curtailed with the objective of preserving some use of the public resource for other residents;[93] likewise, hate speech may attract criminal sanctions with the objective of preventing distress to [page298] other individuals and discord in society.[94] All of these combine a rights-oriented objective with a community-oriented objective.

[78] This thinking has been applied by the Supreme Court of Canada to *FIPPA* itself. In *CLA*, the court identified the dual objectives of *FIPPA* by identifying its purpose and effect: "Both openness and confidentiality are protected by Ontario's freedom of information legislation."[95] The Williams Commission Report, on which *FIPPA* was originally based, endorsed the application of a freedom of information regime, with its built-in balance of the openness principle with privacy concerns, to administrative tribunals, with specific reference to the latitude to be given each tribunal to fashion its own access policy.[96]

[79] I have little hesitation in concluding that the multiple objectives of *FIPPA* are of sufficient importance, even considering that the law has the effect of infringing s. 2(*b*) of the *Charter*. The effort to prevent harm to some people is a pressing and substantial objective for a law that otherwise limits freedom of expression.[97]

b) *Rational connection*

[80] Neither the Toronto Star nor the Attorney General make much of an argument with respect to the question of whether means chosen by the legislature -- the application of *FIPPA* to adjudicative tribunals -- is rationally connected to its objectives. Counsel for the Toronto Star is somewhat dismissive of this question, given that he has concluded that there is no valid objective

to the legislation. He tacitly concedes that there might be a rational connection between the means and the objective, but since the objective is seen to contradict authoritative case law identifying the openness principle as a constitutional imperative he contends that the rational connection question is of no import.

[81] Counsel for the Attorney General gives the question equally short shrift. He maintains that the inclusion of adjudicative tribunals in the *FIPPA* regime is rationally connected to the purpose of balancing a right of access against a concern for privacy. Since the Attorney General has submitted that this balancing is [page299] itself a pressing and substantial objective, he submits that all that needs to be demonstrated at this stage is that that objective is logically furthered by the legislation.

[82] I tend to agree with counsel for the Attorney General on this point. Since I have found there to be a valid objective to *FIPPA*, the only question for the next stage of the *Oakes* test is to ask a question not of policy but of logic. As it was put originally in *Oakes*: is there a "rational connection between the fact proved and the ultimate fact presumed"?[98] The question here manifests as an inquiry into whether one can logically perceive a connection between the inclusion of adjudicative tribunals in the Schedule to *FIPPA* and the balancing that the statute aims to engage. The question virtually answers itself; the rational connection test is met.

c) *Minimal impairment*

[83] Counsel for the Attorney General observes that the minimal impairment requirement is the heart of a s. 1 analysis; it is here that challenged legislation most often rises and falls. The test is a rather stringent one in the sense that the legislative measure that has already been determined to impair *Charter* rights must now be seen to impair them minimally. When it comes to legislative measures with multiple, competing objectives that are balanced against each other, the minimal impairment test becomes a difficult one to meet. "[A] particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal."[99]

[84] As discussed earlier, the problem with *FIPPA* is twofold: it substantively infringes s. 2(*b*) by presuming non-disclosure of a broadly defined version of "personal information, and it procedurally infringes s. 2(*b*) by causing delay in accessing those Adjudicative Records that it does allow to be disclosed. Given the goal of balancing openness and access with privacy protection, the minimal impairment question must be asked in respect of both forms of rights violation. Does the reverse onus on producing personal information minimally impair the right, and do the timelines and wait periods built into the statute's access to information process minimally impair the right? [page300]

i) *Is there minimal impairment in substance?*

[85] Counsel for the Toronto Star submits that "[t]he exemptions in *FIPPA* and the broad definition of 'personal information' are often used to resist, and even prevent, disclosure of Tribunal Adjudicative Records." While this description may be accurate, it suggests that there is something improper about the way in which heads of institutions or the IPC are applying *FIPPA*. That, however, is not the case. The officials tasked with applying *FIPPA* are, on my reading of the statute, genuinely applying its terms as enacted. If there is a problem with the way records are disclosed by institutions to which *FIPPA* applies, the problem is with the statutory terms themselves and not with anyone's manipulation of them.

[86] By way of illustration, in 2005 the IPC had to consider a double request to the predecessor to the LTB for a schedule of "Cases in a Hearing Block". One of the pair of requests sought a pre-hearing schedule of upcoming cases, while the other sought a post-hearing list of cases that had been considered. For the pre-hearing schedule, the IPC cited privacy grounds in authorizing production of a list of cases with all identifying features -- names, addresses and unit numbers -- redacted. This, of course, made the disclosure meaningless in terms of knowing the actual

hearings on the upcoming schedule, although the IPC indicated that the identifying information would be available at the hearings themselves since they were required under s. 9(1) of the *SPPA* to be open to the public.[100]

[87] The IPC then turned its attention to the request for post-hearing information, and again declined to make meaningful production of the tribunal's records. In a key passage of its ruling, the IPC found there to be no distinction between pre-hearing and post-hearing records, despite the fact that the post-hearing records had already been made public during the course of the hearing itself:

> The appellant also argues that the record is not personal information because it is "public information". The fact that information may be contained in a document that is or was available to the public does not mean that it is not personal information. Rather, the issue of public availability arises in the analysis of whether any personal information the record may contain is exempt under section 21(1) of [*FIPPA*] . . . .[101] [page301]

[88] In other words, while the exemption for personal information was indeed invoked as a basis on which to refuse production of Adjudicative Records, the basis for the refusal was the operation of the statute itself. The presumption of non-disclosure, and the reverse onus on the requester to show that the request falls within an exception to the s. 21(1) personal information exemption, is a feature of *FIPPA* that must be confronted directly.

[89] In other, non-*FIPPA*-related contexts, the grounds for issuing a publication ban -- *i.e.*, for overriding the open court principle on a case by case basis -- are contained in what has become known as the *Dagenais/ Mentuck* test.[102] As the Supreme Court has explained, the openness principle is contained within s. 2(*b*) of the *Charter*, and so can only be limited in accordance with s. 1 of the *Charter*. Any test that seeks to limit a constitutionally entrenched principle must, therefore, incorporate the essential elements of the reasonable limitsanalysis within it.[103] The *Dagenais/Mentuck* test does this in a way that "mirror[s] the minimal impairment and proportionality steps in the s. 1 analysis set out in *R. v. Oakes*".[104]Under *Dagenais/Mentuck*, a publication ban may be issued if the following conditions are met:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[105]

[90] As the test states, the reasons for overriding the openness principle must pose a serious risk, and not just an inconvenience to the parties or the adjudicative body. That said, although the *Dagenais/Mentuck* analysis has been characterized as a "stringent test", it has also been observed that it should not be "applied mechanistically".[106] As it applies to judicial proceedings, the test has been [page302] "tailored . . . to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings and Crown-initiated applications for publication bans".[107] Thus, the names of police informants can be expunged from public accessibility,[108] and information contained in search warrants and other investigative instruments can be withheld from publication,[109] but only where the specific circumstances show that "the public interest in effective law enforcement and privacy" outweighs the principle of "accountability and the transparency of the legal system".[110]

[91] What is clear from the case law is that it is the openness of the system, and not the privacy or other concerns of law enforcement, regulators, or innocent parties, that takes primacy in this

balance. This, then, impacts directly on the onus of proof. In order for an adjudicative system to comply with s. 2(*b*) of the *Charter*, "The burden of displacing the general rule of openness lies on the party making the application."[111] As other courts across the country have stated, publicity is the order of things and "any exceptions" -- including those specifically provided by statute -- "must be substantiated on a case by case basis".[112] This onus is necessary "in light of the . . . *Charter* principles which inform the [*Dagenais/Mentuck*] test".[113]

[92] I acknowledge, as any court must, that the openness principle and the analysis that accompanies a request to override it, must "tak[e] into account the particular characteristics and circumstances of the . . . proceedings".[114] The judicial considerations of the *Dagenais/Mentuck* test have tended to arise in the course of criminal prosecutions, which raise unique factors that may not apply to the regulatory contexts of most administrative tribunals. [page303]

[93] A decision about a revealing a police informant's identity in a record supporting a search warrant will obviously entail very different considerations than a decision about revealing a tenant's identity in a record filed in evidence in LTB hearing. The decision-maker contemplating a limitation on the openness principle must take the differing contexts and the statutory objectives of the particular administrative body into account.[115] The particular institution and circumstances of the particular case may require the most stringent application of the *Dagenais/Mentuck* test or a modified and more relaxed version of the test. There is no "one size fits all" application of the openness principle.

[94] Varied though the contexts and considerations may be, however, the decision must always be a constitutionally justifiable one. That is, it "must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban . . . ; is authorized by statute . . . ; or under [civil] rules of court, for example, a confidentiality order".[116] This *Charter* requirement applies equally to "statutory tribunals exercising judicial or quasi-judicial functions involving adversarial type processes",[117] since "it is a basic principle that proceedings of . . . [such] administrative tribunals should be open to the public, with the ability to be . . . reported on".[118] It is therefore applicable to each of the adjudicative tribunals at issue in this application.

[95] An across-the-board presumption such as that embodied in s. 21 of *FIPPA*, in which privacy and non-disclosure rather than openness and disclosure is the presumptive rule, cannot qualify as a minimum impairment of s. 2(*b*) of the *Charter*. The open court principle is the fundamental one and the personal information and privacy concerns are secondary to it.[119] That principle directs administrative tribunals to protect confidentiality only where a party seeking it establishes that it is necessary to protect important interests.[120] Although the decision-maker may be exercising a statutory discretion taking into account the context on [page304] a case-by-case basis, the onus must remain on the party seeking to keep the information from the public rather than the other way around.

ii) *Is there minimal impairment in procedure?*

[96] As discussed earlier, the delay and bureaucracy inherent in the *FIPPA* regime also burdens the exercise of s. 2(*b*) *Charter* rights. As noted, freedom of the press is only operational when the press has timely enough access to information to publish to an audience. Untimely disclosure that loses the audience is akin to no disclosure at all.

[97] The question of whether *FIPPA* minimally impairs the right in this respect is a more difficult one. The Toronto Star contends that the statutory notice and other time periods, and the arrangement in which it is administrative personnel and the IPC rather than tribunal members make the disclosure decisions, violate the right to openness in an unjustifiable way. Counsel for the Toronto Star submits that the tribunals themselves can and often do make disclosure

decisions, and that this alternative is a more workable and minimally impairing one than the decision-making regime established by *FIPPA*.

[98] The Attorney General, on the other hand, views *FIPPA* as establishing a system that allows administrative tribunals to achieve the appropriate balance between openness and privacy in a manner that fully takes into account each tribunal's mandate and function. Counsel for the Attorney General indicates that administrative tribunals work differently from courts and operate in diverse socio-economic contexts -- specifically, they are less formal in their procedures, often collect large amounts of personal material from litigants in the pre-hearing stage of proceedings, tend to be sparsely staffed and under-resourced, and frequently deal with unrepresented and highly vulnerable litigants. It is the Attorney General's submission that *FIPPA*'s delegation of disclosure decisions to the head of each institution and to the IPC allows this reality to be taken into account.

[99] Moreover, counsel for the Attorney General argues that the result of the Toronto Star's proposal of unregulated access to tribunal records (except directly by each adjudicator) would result in an unwieldly burden on adjudicators. Since the Toronto Star's position closely analogizes adjudicative tribunals to courts, adjudicators in the tribunal system would have to add each disclosure application to their case load. *FIPPA*'s delegation of the task to institution heads and the IPC effectively relieves this pressure. It is the Attorney General's view that *FIPPA*'s structure is workable and sound, and that it establishes a decision-making expertise [page305] that deserves deference as a result of the accumulated knowledge about the privacy considerations at stake and the logistical support it provides to administrative tribunals.

[100] In terms of the expertise of the institution heads and, in particular, the IPC, it is fair to say that the jury is still out. Reading IPC decisions makes one keenly aware that *FIPPA* does not mandate the IPC to take s. 2(*b*) of the *Charter* into account in making disclosure decisions. Thus, one finds decisions made in review of the HRTO that opine: "While the Tribunal makes the argument that there is a compelling public interest in disclosure of the records, it goes on to recognize that this office has not accepted the 'open court principle' as a basis for overriding the exemption in section 21".[121] Similarly, IPC decisions in review of LTB rulings on disclosure tend to circle back onto the statutory requirements rather than to weigh them against a principle of openness:

> Although the appellant's analogy between open court processes and the transparent conduct of hearings by tribunals covered by the *SPPA* has some merit, they are not identical. For example, section 65(4) of the Act excludes documents prepared and filed for the purposes of proceedings before the Courts from coverage under Ontario's freedom of Information regime; while administrative tribunals, including the Tribunal, are subject to the Act and bound by its access and privacy requirements. Accordingly, while the Tribunal's hearings and procedures must comply with the *SPPA*, decisions regarding disclosure of personal information contained in records outside of the actual hearings process must be determined in accordance with the requirements of the Act.[122]

[101] I do agree, of course, that institution heads and the IPC have developed a sensitivity to the privacy concerns of litigants before adjudicative tribunals. They have certainly been adept at applying the existing statutory presumption against disclosure of any personal information to the end of protecting their privacy. Indeed, I would say that they have been fully committed to *FIPPA*'s policy of ensuring total privacy, holding back not only pleadings and evidentiary documents from public access, but even schedules of cases making those tribunals inscrutable by the press.

[102] It remains to be seen how this will be tempered once institution heads and the IPC turn their minds more fully to the paramount consideration of openness that the *Charter* requires. The legislature has delegated the decision-making task to them, but their decisions now must start taking the applicable *Charte*r principles into account. "Deference as respect" may be a formula [page306] embraced by the courts,[123] but this posture must not be driven by ideology.[124] Properly

understood, the point is to pay "respectful attention to the reasons offered or which could be offered in support of a decision".[125] Thus, it is equally accurate to say that "[d]eference is earned; it is not a birthright."[126]

[103] With all of that, I am mindful of the submission made at the hearing of this application by counsel for the Ontario Judicial Council. That institution is, of course, well versed in both the open court principle and the privacy interests that can be vested in sensitive adjudicative tribunal proceedings. Counsel admonished the court to be cognizant of the complex task of fashioning a disclosure system for a very diverse body of administrative institutions. Some of these institutions have full-time members that sit in formal hearings dealing with substantial commercial matters (*e.g.*, OSC, FST, OMLC, OMB), others sit in more informal proceedings dealing with highly sensitive matters going to personal autonomy of the participating individuals (*e.g.*, HRTO, CICB, OCPC), while still others hold hearings on social justice and welfare issues for unrepresented and often unsophisticated litigants (*e.g.*, LTB, WSIAT).

[104] In view of this complex and diverse picture, counsel for the Ontario Judicial Council warned me to pay heed to "the law of unintended consequences". That, I must say, is sage advice. Under the circumstances, the Toronto Star's proposal -- that the court strike down *FIPPA* insofar as it pertains to Adjudicative Records held by the listed quasi-judicial tribunals and replace it with direct access to the tribunals themselves -- might minimally impair the right of openness enshrined in s. 2(*b*) of the *Charter*. But I do not know how much collateral damage will be done to the tribunal system in the process. An under-resourced tribunal staffed with part-time adjudicators and little in the way of administrative assistance may find itself overwhelmed in a suddenly *FIPPA*-free procedural environment. [page307]

[105] Moreover, there is a sense that the Toronto Star is perhaps frustrated by having to deal with a cumbersome, bureaucratic system which can sometimes seem neither user-friendly nor prone to make document requests easy. I sympathize with the desire of journalists and others who make *FIPPA* applications on a regular basis to cut through the "red tape", as it were. But bureaucracy in and of itself is not a *Charter* violation. It's just annoying. Legal commentators in the United States have pointed out that, "We have to accept that there's a difference between laws that embody bad policy and laws that a state legislature lacks the power to enact. A law can be bad . . . without being unconstitutional."[127] That message is an apt one under Canada's constitutional system as well.

[106] In any case, the various timelines built into the *FIPPA* system appear designed to make the system operate fairly. One cannot act judicially in making an access determination without giving notice to affected parties and providing some amount of time for a response. The specific notice and other time periods provided for in *FIPPA* may or may not be ideal, but there is little evidence that the problems are with *FIPPA*'s terms on their face. Where the evidence in the record shows that there have been inordinate delays, the source of the problems may lie more with the particular administrators or decision makers who extend the *FIPPA* timelines than with the statutory system itself. Once the reverse onus on personal information is removed, those human delay factors will hopefully be reduced.

[107] The *Charter* requires public access to Adjudicative Records, which may be tempered on a case-by-case basis by other considerations -- integrity of the administration of justice, safety and security of informants and other third parties, privacy for complainants and other litigants, etc. For an unconstitutional law, "the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter*. . . .Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts".[128]

[108] To the extent that an applicant for Adjudicative Records has its rights undermined by an institution head or the IPC excessively extending the *FIPPA* timelines, the appropriate course of

action is not to declare the statute (or any of its provisions) of no [page308] force and effect under s. 52(1). Rather, the Superior Court retains jurisdiction to fashion an "appropriate and just" remedy for the aggrieved rights holder under s. 24(1) of the *Charter*,[129] or to impose an administrative law remedy.

[109] All of this is to say that much as *FIPPA*'s various notice periods, times for submissions, and potential extensions of those times burden the exercise of s. 2(*b*) rights when it comes to access to Adjudicative Records, on a systemic basis the impairment is minimal. While there may be individual cases of unjustifiable delay and impairment of rights which could lead to an individual remedy, those cases are left for another day.

d) *Proportionality*

[110] The final step in the *Oakes* analysis is to determine whether there is proportionality between the deleterious and the salutary effects of *FIPPA*'s infringing measures.

[111] The deleterious effects of the presumption against disclosure in s. 21(1) and related provisions of *FIPPA* are real and substantial. As counsel for the Toronto Star points out, emphasizing privacy over openness not only has a negative impact on the press but also affects other stakeholders. Regulators have no way of identifying chronic offenders, reference checks on tenants and others who come before the various tribunals are impossible to carry out. Problematic landlords, police and other actors, including repeat human rights offenders, vexatious litigants and the like cannot be discovered by members of the public who have to engage with them. The public cannot know about upcoming hearings for a number of the tribunals, and the media are unable to engage public debate about cases which they do not know are forthcoming and so do not attend or cover.

[112] In the seminal press freedom case under the *Charter*, Wilson J. noted that "we cannot ignore the fact that for every litigant concerned about the adverse impact of publicity upon his or her image in the community, there may be another equally concerned about public vindication and community support."[130] As indicated, eight of the tribunals in issue bypass the *FIPPA* process altogether, and make their documents presumptively available to the public. Other tribunals invoke *FIPPA* and make documents presumptively unavailable even in the face of parties who may not object to publication. [page309]

[113] Counsel for the Attorney General identifies a number of salutary effects of the reverse onus on disclosing personal information. These include the strong protection of privacy, the support for informality and efficiency by dispensing with the need for lawyers, and the encouragement of use of the administrative tribunal system by vulnerable individuals. While one can certainly appreciate the pragmatic advantages of the system as identified by the Attorney General, these must be seen as outweighed by a process that embodies substantial rather than minimal impairment.

[114] This is especially the case given that speech rights can be characterized as non-instrumental. McLachlin J. (as she then was) has made this point in reviewing the philosophical underpinnings of s. 2(*b*) of the *Charter*, to the effect that "freedom of expression may be viewed as more than a means to other ends. Many assert that free expression is an end in itself, a value essential to the sort of society we wish to preserve."[131] Where the *Charter* right "respect[s] each and every person as an end", it cannot be contested or measured by a law that "merely manipulate[es] them, or some of them, as means".[132] If there is no sociological goal or end to weigh against the salutary features of the impugned legislation, the contest between the deleterious effects and those salutary benefits is really no contest at all.

[115] Moreover, there is no real evidence to support the Attorney General's most strenuous point -- that tenants, human rights plaintiffs, complainants against medical professionals, etc. will likely cease using the relevant tribunals if their identities are exposed to the public. While there is affidavit evidence demonstrating that tribunal litigants are concerned about protecting their privacy,

there is little to establish that a change in the s. 21(1) presumption against disclosure would have a chilling effect on tribunal applications.

[116] As already indicated, in matters touching on free expression chilling effects are notoriously difficult to prove. Even taking this difficulty into account, however, it is not possible for me to conclude that the statute's infringement of the openness principle is somehow more than counterbalanced by its potential, if speculative support for access to justice. On the record before me, the salutary effects of the presumption of non-disclosure of personal information in s. 21 of *FIPPA* do not outweigh the deleterious effects of that measure on the *Charter* right to openness. [page310]

[117] As for *FIPPA*'s procedural limitations on s. 2(*b*), I have already found that the notice requirements, timelines and designation of institution heads and the IPC as decision-makers minimally impair the right. While these procedural factors may be subject to extension and abuse in individual cases, they are in their own terms justifiable as minimal intrusions on the openness principle.

[118] Professor Hogg states in his textbook, and the Supreme Court has confirmed, that this effectively renders the proportionality analysis redundant.[133] That is not to deny the overall importance of proportionality, which embodies an analytic approach that has made Canadian law "a global constitutional reference point".[134] But as a general matter, proportionality determines the conditions which make a limitation on a constitutional right justified and therefore permissible.[135] A minimal impairment of a *Charter* right is already proportionate to that right and is justifiable on those terms.

VI. *Standing and Factual Basis for the Application*

[119] As a final matter (or, perhaps, as a preliminary, threshold matter), counsel for the Attorney General submits that the Toronto Star has no standing to bring this application and that, in any case, the application should have proceeded by way of judicial review of an IPC decision. Both of these arguments mischaracterize the proceeding; they treat it as a challenge to a particular administrative decision rather than a challenge to a statutory regime authorizing all document access decisions in respect of 13 named tribunals. In my view, this approach has no merit.

[120] As it turns out, this application was really a challenge to the constitutionality of certain provisions of *FIPPA*. It was not a challenge to the constitutionality of any particular decision or set of decisions by administrative decision-makers implementing *FIPPA*. Accordingly, no applicant would be in a better position than the Toronto Star -- a newspaper with vast and ongoing [page311] experience in making access to information applications -- to bring the challenge. "[I]t would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."[136]

[121] Under current standing rules, the Toronto Star has public interest standing to bring this constitutional application. In considering this question, "the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts".[137] The Toronto Star easily passes all three steps in the analysis. It raises serious *Charter* issues, it has a real stake in that it is a constant user of the *FIPPA* process for the tribunals in issue and, for that matter, any number of other tribunals across Ontario. The present application is a convenient way to bring issues before the court that pertain to multiple administrative tribunals all authorized by the same piece of legislation.

[122] The Attorney General takes the position that the challenge to the 13 tribunals should be treated like 13 distinct applications, and the Toronto Star must prove that it has standing to

challenge each one. Thus, counsel for the Attorney General argues that the case against several of the tribunals be dismissed, since there is no evidence in the record that a Toronto Star reporter submitted a request to them under *FIPPA*. Counsel for the Toronto Star responds with the observation that requiring 13 different applications, with 13 records of evidence, would be "wasteful, unnecessary, and unproductive and not in the interests of justice to these litigants or the public".[138] It is hard to disagree with that common-sense proposition.

[123] Furthermore, the Toronto Star is a representative applicant for the entire public -- it is the public's right of access to Adjudicative Records that is in issue. In addition, the 13 named tribunals are, in effect, representatives for a large number of tribunals listed in the Schedule to *FIPPA* that act judicially. Whether at this moment the Toronto Star is seeking documents [page312] from the HRTO, the OLRB, the FST, or the HPARB (the last two of which the Attorney General argues should not be here due to a paucity of evidence) is immaterial. *FIPPA* applies to many tribunals that act judicially, and they all will be impacted by the present ruling with respect to the s. 21(1) reverse onus on personal information.

[124] By way of brief illustration of the type of standing that the Toronto Star enjoys, a doctor and his patient challenged the prohibition in Quebec's *Health Insurance Act*, C.Q.L.R., c. A-29 and *Hospital Insurance Act*, C.Q.L.R., c. A-28 on doctors billing their patients for private services. The Supreme Court of Canada described the standing of the two of them to bring the constitutional challenge, as follows:

> The validity of the prohibition is contested by the appellants, George Zeliotis and Jacques Chaoulli. Over the years, Mr. Zeliotis has experienced a number of health problems and has used medical services that were available in the public system, including heart surgery and a number of operations on his hip . . . Mr. Chaoulli is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital. Mr. Zeliotis and Mr. Chaoulli joined forces to apply to the court by way of motion for a declaration that s. 15 *HEIA* and s. 11 *HOIA* are unconstitutional and invalid.[139]

[125] Neither the doctor nor the patient had a current request for private service pending, although both had a history of making such requests. Likewise, the remedy sought by them did not pertain just to them; it pertained to all doctors and all patients seeking payment for private medical services. The Toronto Star and the 13 named tribunals are in parallel positions. The newspaper has a history of doing what it seeks to do with a number of the listed tribunals, and in any case the tribunals are representatives of all of the other similarly situated tribunals. Additionally, the Toronto Star itself is a representative applicant in the sense that its remedy will be every other similarly situated party's remedy.

[126] The Toronto Star may not, right at this moment, have a direct personal interest in obtaining specific Adjudicative Records from all 13 of the tribunals listed in its application (or, for that matter, from all 185 administrative agencies listed in the Schedule to *FIPPA*). But as a major news outlet, it is certainly not a "mere busybody" that needs to be screened out for the sake of judicial efficiency.[140] It has standing to bring this application. [page313]

[127] Along similar lines, counsel for the Attorney General also contends that the present constitutional challenge should have proceeded as a judicial review application. He submits that in failing to do so, the Toronto Star seeks to bypass the IPC. It is the Attorney General's submission that proceeding in this way violates the rule that parties must exhaust all administrative remedies before moving for a remedy in court.[141] Counsel argues that "only when the administrative process [*i.e.*, the IPC appeal process] has finished or when the administrative process affords no effective remedy can they proceed to court".[142]

[128] There is, in fact, no administrative process that is relevant here. The Toronto Star commenced its application in the way that it did because its challenge goes well beyond any one request for documents. Moreover, no administrative remedy could be forthcoming in this type of constitutional challenge. The Toronto Star seeks to invoke under s. 52(1) of the *Constitution Act, 1982* to strike down *FIPPA* as the enabling legislation under which the institutional heads and the IPC operate. Administrative decision-makers generally have power to apply the *Charter* and to implement *Charter* remedies under s. 24(1), depending upon whether they are expressly or impliedly authorized to do so by their governing legislation.[143] But striking down their own enabling statute, or part thereof, is another matter.

[129] There is no reason for the Toronto Star to have proceeded by way of judicial review. That would have been appropriate had the Toronto Star wished to challenge a decision with respect to any one tribunal's Adjudicative Records. A Superior Court application like the present one is the appropriate way to bring a challenge to the provisions of *FIPPA* itself.

VII. *Remedy*

[130] *FIPPA* infringes s. 2(*b*) of the *Charter* in two respects: (a) substantively in terms of s. 21 and related sections that contain the presumption of non-disclosure for producing Adjudicative Records containing "personal information" as defined in s. 2(1); and (b) procedurally in terms of the notice provisions, timelines, and authorization for institution heads and the IPC to make [page314] decisions about access to Adjudicative Records. The Attorney General bears the onus under s. 1 of the *Charter* to justify these infringements.[144] It has met this onus with respect to the procedural infringements, but has failed to meet the onus of justification with respect to the substantive breach.

[131] As the Supreme Court has long pointed out, the key to a *Charter* remedy is for the court to address the constitutional violation but to "refrain from intruding into the legislative sphere beyond what is necessary".[145] Given my finding that the presumption of non-disclosure, or reverse onus in s. 21 of *FIPPA* is unconstitutional insofar as it applies to requests for production of Adjudicative Records, *FIPPA*'s application to such requests from adjudicative tribunals is rendered inoperative under s. 52(1) of the *Constitution Act*, *1982*. This raises several follow-on questions, as set out by the Supreme Court:

> Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended?[146]

[132] As indicated, the extent of the inconsistency is limited within the overall scheme of *FIPPA*. The legislation, with its stringent protections of privacy built into s. 21 and other related sections, applies to government records of all sorts and to institutions that serve the public other than in an adjudicative function. This ruling does not apply to non-adjudicative institutions or to records held by adjudicative tribunals that are not within the definition of Adjudicative Records used throughout these reasons for judgment. The present ruling applies only to requests for Adjudicative Records from the 13 institutions named in this application and, by extension, any other analogous institution listed in the Schedule to *FIPPA* that operates in an adjudicative capacity and that holds Adjudicative Records.

[133] Since eight of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure [page315] that the presumption of openness and disclosure required by s. 2(*b*) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is otherwise impugned

by this ruling. Other tribunals may follow this model and bypass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.

[134] Counsel for the Toronto Star has argued throughout that the *Dagenais/Mentuck* test is the appropriate one for any tribunal to apply when a request for Adjudicative Records is submitted to it. Counsel for the Attorney General has responded throughout that *Dagenais/Mentuck* is too high a test and that while it is appropriate for court records it does not take the varying contexts of administrative tribunals sufficiently into account. The case law demonstrates, however, that there is not just one level of analysis applied under that test, and that *Dagenais/Mentuck* is indeed flexible enough to be adapted by the various adjudicative tribunals to their own particular contexts and needs. In the *Mentuck* case itself, Iacobucci J. acknowledged this flexibility. He specifically admonished that in applying the test "the purposes and effects invoked by the parties must be taken into account in a case-specific manner", and went on to comment that, "This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case."[147]

[135] As an example, the Manitoba Court of Appeal has held that the *Dagenais/Mentuck* test is flexible enough to protect certain Adjudicative Records in a coroner's inquest whose confidentiality was made necessary due to the child protection imperatives of the inquest.[148] The test likewise does not require production of Adjudicative Records submitted at any stage of a proceeding that fall under a category of privilege,[149] and can be applied in modification to "ensure certainty and timeliness, to conserve resources, and to avert the disclosure of untested prejudicial information" that may impact on further proceedings.[150] These concerns to protect the vulnerable, conserve scarce resources, make efficient and timely decisions, enforce privilege and ensure the fairness of [page316] all adjudicative hearings, are all relevant to adjudicative tribunals. Each can adapt the *Dagenais/ Mentuck* test to its own particular needs in respect of these concerns.

[136] For those tribunals that adhere to the *FIPPA* regime, the ruling here leaves intact the procedural system established under that legislation. That is, the decision-making authority of the institution heads and, on appeal, the IPC, is not rendered inoperative. Likewise, the various notice provisions and timelines contained in the legislation are upheld, provided they are not unduly extended for any given decision (which, as indicated earlier, would have to be challenged on a case-by-case basis). Once the legislature has the opportunity to re-work *FIPPA*'s substantive grounds for making disclosure decisions so that there is a presumption of openness rather than a presumption of confidentiality, the *FIPPA* procedures can be utilized.

[137] I would emphasize here what must be obvious to anyone perusing *FIPPA*: the statute is not a paragon of clarity. I say this not to disparage the drafters, but to point out that it contains numerous interrelated provisions scattered across its several parts, and that the privacy concerns that touch on the production of Adjudicative Records are not conveniently gathered in one provision. They can be found up front in the definition section, in Part II dealing with access to information applications, exemptions from access, and exceptions to the exemptions, and in Part III dealing with the protection of individual privacy. Reversing the s. 21(1) onus with respect to the disclosure of personal information in Adjudicative Records may require some revisiting of large portions of the entire statute.

[138] Again, as a brief example, s. 21(1) contains the basic reverse onus that exempts personal information from the information that an institution head is authorized to disclose. It is followed by a list of specific exceptions to the general exemption in s. 21(1)(*a*) to (*f*), which is in turn followed by a list of "criteria re invasion of privacy" in s. 21(2)(*a*) to (*i*), which is in turn followed by a list of specific instances in s. 21(3)(*a*) to (*h*) where disclosure of personal information is "presumed to constitute an unjustifiable invasion of privacy". Some of these would doubtless survive a s. 2(*b*) *Charter* analysis and others would not. Thus, the concern for protecting the very vulnerable and for

ensuring less formal and more efficient hearing processes where health matters -- and especially mental health matters -- are at stake would arguably justify the non-publication rule contained in s. 21(3) (*a*) (information that "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation"); similarly, the concern to safeguard pre-hearing investigative procedures would [page317] likely justify the non-publication rule contained in s. 21(3) (*b*) (information that "was compiled and is identifiable as part of an investigation into a possible violation of law").

[139] Other factors listed in s. 21(3) -- including the presumption against disclosing anything containing education and employment history (s. 21(3)(*d*)), personal finances (s. 21(3)(*f*)), personal recommendations and evaluations (s. 21(3)(*g*)), etc. -- appear more geared toward saving a person from embarrassment than furthering the objectives of the particular legal process. These would not survive a *Charter* analysis.[151] It is up to the legislature to re-work any statutory prohibitions on publication in a way that complies with the Supreme Court's analysis of the criteria for statutory publication bans. This will likely have to be done in a way which allows for tribunal-specific determinations of how the openness principle is balanced against privacy concerns. After all, "[t]he analysis under s. 1 of the *Charter* . . . can only be accomplished by canvassing the nature of the social problem which [a given measure] addresses".[152] In the Supreme Court's words, "Context is the key to understanding the scope and impact of a limit on a *Charter* right."[153]

[140] For those adjudicative tribunals that rely on the *FIPPA* process to determine access to Adjudicative Records, the need to revamp a relatively complex piece of legislation in order to make it *Charter* compliant presents practical difficulties. In effect, it leaves a procedural system intact but with a substantive void to be filled in on the fly by institution heads and the IPC. Requests for Adjudicative Records can continue to be dealt with procedurally in the way they have been until now, except that each institution head in the first instance, and the IPC on appeal, must make their decisions by applying the *Dagenais/ Mentuck* test in whatever modification the particular tribunal in the particular context of a given request requires.

[141] The concern is that this may put a difficult burden on decision makers to adapt overnight to a new task without substantive statutory guidance. As has been described in other legislative contexts, "moving abruptly from a situation where [the disclosure [page318] process] is regulated to a situation where it is entirely unregulated would be a matter of great concern".[154] The courts should be reluctant to place administrative decision-makers in that situation.

[142] This case therefore calls for some time period in which the invalidity of *FIPPA*'s application to Adjudicative Records is suspended. During oral submissions, counsel for the Attorney General suggested one year. That seems to me to be an appropriate length of time for the relevant portions of *FIPPA* to be re-worked should the legislature choose to do so. Alternatively, it will provide time for institution heads and the IPC to establish a principled, tribunal-specific and context-specific basis for adapting and implementing the *Dagenais/Mentuck* test in response to requests under *FIPPA* for access to Adjudicative Records.

VIII. *Disposition*

[143] There shall be a declaration that the application of s. 21(1) to (3) and related sections of *FIPPA* pertaining to the presumption of non-disclosure of "personal information" to Adjudicative Records held by the remaining institutions named in the notice of application infringes s. 2(*b*) of the *Charter* and is not justified under s. 1. It is therefore of no force or effect.

[144] The declaration of invalidity of this aspect of *FIPPA* is suspended for 12 months from the date of this judgment.

Application allowed.

Notes

1 R.S.O. 1990, c. F.31.

2 The tribunals named in the notice of application are Ontario Securities Commission ("OSC"), Environmental Review Tribunal ("ERT"), Ontario Civilian Police Commission ("OCPC"), Human Rights Tribunal of Ontario ("HRTO"), Ontario Municipal Board ("OMB"), Financial Services Tribunal ("FST"), Health Professions Appeal and Review Board ("HPARB"), Landlord and Tenant Board ("LTB"), Criminal Injuries Compensation Board ("CICB"), License Appeal Tribunal ("LAT"), Ontario Energy Board ("OEB"), Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), Ontario Mining and Lands Commissioner ("OMLC"), Ontario Labour Relations Board ("OLRB") and Pay Equity Hearings Tribunal ("PEHT").

3 R.R.O. 1990, Reg. 460.

4 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

5 William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John, 2nd ed. (Glasgow: James Maclehose and Sons, 1914), 395 (citing Magna Carta, 1215, ch. 40).

6 Matthew Hale, The History of the Common Law of England (Charles M. Gray, ed., Univ. Chicago Press 1971) (1670), ch. 12.

7 William Blackstone, Commentaries on the Laws of England 396.

8 Gazette Printing Co. v. Shallow (1909), 1909 CanLII 46 (SCC), 41 S.C.R. 339, [1909] S.C.J. No. 7, at p. 359 S.C.R.

9 Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, para. 10.

10 Ministry of the Attorney General, "Guidelines for Administrative Tribunals" (October 29, 2015), online: https://www.attorneygeneral.jus.gov.on.ca/english /justice-ont/ french language services/services/administrative_tribunals.php.

11 Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Administrative Tribunals and the Courts: An Evolutionary Relationship", available at https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx.

12 R.S.O. 1990, c. S.22, s. 9(1).

13 Stepanova v. Ontario (Human Rights Tribunal), [2017] O.J. No. 2689, 2017 ONSC 2386 (Div. Ct.), para. 36.

14 SPPA, s. 20.

15 Model Policy for Access to Court Records in Canada, Judges Technology Advisory Committee, Canadian Judicial Council, September 2005.

16 R. v. Canadian Broadcast Corp. (2010), 102 O.R. (3d) 673, [2010] O.J. No. 4615, 2010 ONCA 726, para. 44.

17 Cooper v. Canada (Canadian Human Rights Commission), 1996 CanLII 152 (SCC), [1996] 3 S.C.R. 854, [1996] S.C.J. No. 115, para. 70 (McLachlin J., dissenting), adopted by majority in Nova Scotia (Workers' Compensation Board) v. Martin, 2003 SCC 54 (CanLII), [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54, para. 29.

18 Guardian News v. Westminster Magistrates' Court, [2012] EWCA Civ. 420, para. 1.

19 Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2359, Appeal PA40163-109-451 (January 6, 2005).

20 John Doe v. Ontario (Information & Privacy Commissioner) (1993), 1993 CanLII 3388 (ON SCDC), 13 O.R. (3d) 767, [1993] O.J. No. 1527 (Div. Ct.).

21 Ministry of the Attorney General, Information and Privacy Commission of Ontario, Order P-984, Appeal P-9400823, August 28, 1995, p. 4.

22 Ibid.

23 Simon Stern, "Legal Fictions and Exclusionary Rules" in Maksymilian Del Mar and William Twining, eds., Legal Fictions in Theory and Practice (New York: Springer International Publishing, 2015), 157-73.

24 See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2544, Appeal PA-040312-1 (January 24, 2007).

25 See Human Rights Tribunal of Ontario, Information and Privacy Commission of Ontario, Order PO-2923, Appeal PA09-451 (October 21, 2010).

26 See Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2019, PA-020194-1 (February 7, 2003).

27 Ibid.

28 Ontario (Attorney General) v. Pascoe, 2002 CanLII 30891 (ON CA), [2002] O.J. No 4300, 166 O.A.C. 88 (C.A.), paras. 2, 6.

29 FIPPA, General Regulation, R.R.O. 1990, Reg. 460, s. 1(1) and Schedule.

30 McPherson v. McPherson, 1935 CanLII 276 (UK JCPC), [1936] A.C. 177.

31 Law Society of Upper Canada v. Xynnis, [2014] L.S.D.D. No. 38, 2014 ONLSAP 9.

32 Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing), 2001 SCC 52 (CanLII), [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, para. 24.

33 International Woodworkers of America, Local 2-69 v. Consolidated-Bathurst Packaging Ltd., 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, para. 69.

34 Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board, 1952 CanLII 16 (ON CA), [1952] O.R. 366, [1952] O.J. No. 439, [1952] 3 D.L.R. 162 (C.A.), paras. 15-16.

35 Canadian Pacific Ltd. v. Matsqui Indian Band, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, para. 80.

36 Ocean Port, supra, para. 24.

37 Rasanen v. Rosemount Instruments Ltd. (1994), 1994 CanLII 608 (ON CA), 17 O.R. (3d) 267, [1994] O.J. No. 200 (C.A.), para. 35.

38 Bell Canada v. Canadian Telephone Employees Assn., 2003 SCC 36 (CanLII), [2003] 1 S.C.R. 884, [2003] S.C.J. No. 36, para. 21.

39 The eight tribunals that bypass the FIPPA process for post-hearing access to Adjudicative Records are OEB, ERT, OMB, OMLC, OCPC, LAT, FST and OSC. See, supra, note 2.

40 Lukacs v. Canada (Canadian Transportation Agency), [2015] F.C.J. No. 707, 2015 FCA 140, para. 80.

41 Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21, at p. 636 S.C.R.

42 Lukacs, supra, para. 49.

43 Remarks of the Right Honourable Beverley McLachlin, supra.

44 Doyle v. Ontario (Ministry of Municipal Affairs), 2017 CanLII 52705 (Ont. PSGB), para. 71.

45 CUPE, Local 963 v. New Brunswick Liquor Corp., 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, at p. 236 S.C.R.

46 Dunsmuir v. New Brunswick, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, para. 49.

47 R. v. Conway, 2010 SCC 22 (CanLII), [2010] 1 S.C.R. 765, [2010] S.C.J. No. 22, para. 20.

48 Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, [1996] S.C.J. No. 38, headnote.

49 Ibid., at para. 26.

50 R. v. Canadian Broadcasting Corp., supra, para. 44.

51 Canadian Broadcasting Corp. v. The Queen, 2011 SCC 3 (CanLII), [2011] 1 S.C.R. 65, [2011] S.C.J. No. 3, para. 12.

52 Edmonton Journal v. Alberta (Attorney General), supra, at p. 1338 S.C.R.

53 R. v. Canadian Broadcasting Corp., 2010, supra, para. 50.

54 Southam Inc. v. Canada (Minister of Employment and Immigration), 1987 CanLII 9001 (FC), [1987] F.C.J. No. 658, [1987] 3 F.C. 329 (T.D.), para. 9.

55 Conway, supra, at headnote and para. 20.

56 Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, [2012] S.C.J. No. 12, para. 4.

57 Ford v. Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, para. 59.

58 Canadian Broadcasting Corp., 2011, supra, para. 12.

59 Named Person v. Vancouver Sun, 2007 SCC 43 (CanLII), [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, para. 33, citing Edmonton Journal, supra, at p. 1338 S.C.R.

60 Canadian Broadcasting Corp., 2010, supra, para. 33.

61 Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2265, Appeal PA-030192-1, April 28, 2004.

62 Ontario (Public Safety and Security) v. Criminal Lawyers' Assn., 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, [2010] S.C.J. No. 23 ("CLA").

63 Ibid., para. 37.

64 ARPA Canada v. Ontario (2017), 138 O.R. (3d) 253, [2017] O.J. No. 2969, 2017 ONSC 3285 (S.C.J.).

65 University of Ottawa (Re), 2017 CanLII 2024 (Ont. IPC); City of Toronto (Re), 2016 CanLII 31964 (Ont. IPC).

66 CLA, supra, para. 13.

67 Stepanova, supra, para. 36.

68 CLA, supra, paras. 3-4.

69 University of Ottawa (Re), supra, paras. 1-2, 4.

70 City of Toronto (Re), supra, para. 2.

71 ARPA Canada v. Ontario, supra, paras. 8-9.

72 CLA, supra, para. 5.

73 In the Matter of an Application Brought by the Toronto Star and the Criminal Lawyers Association, Ontario Judicial Council, October 14, 2015, online: http:// www.ontariocourts.ca/ocj/ojc/confidentiality/.

74 Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41 (CanLII), [2005] 2 S.C.R. 188, [2005] S.C.J. No. 41, paras. 1-3.

75 Ibid., para. 8.

76 Nova Scotia (Workers' Compensation Board) v. Martin, supra, paras. 29-31.

77 R. v. Laba, 1994 CanLII 41 (SCC), [1994] 3 S.C.R. 965, [1994] S.C.J. No. 106, para. 24; R. v. Keegstra, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131.

78 Nova Scotia (Attorney General) v. MacIntyre, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, [1982] S.CJ. No. 1, at p. 185 S.C.R.

79 Herman Wasserman, "Reflecting on Journalism Research: A quarter century of Ecquid Novi" (2004), 25(1) South African Journal for Journalism Research 179, at 199.

80 Loutchansky v. Times Newspapers Ltd., [2002] 2 W.L.R. 64, [2002] 1 All E.R. 652 (C.A.), para. 74.

81 R. v. White, [2005] A.J. No. 1727, 2005 ABCA 435, para. 6.

82 R. v. Kossyrine, [2011] O.J. No. 4495, 2011 ONSC 6081 (S.C.J.), para. 5.

83 R. v. Jordan, 2016 SCC 27 (CanLII), [2016] 1 S.C.R. 631, [2016] S.C.J. No. 27, para. 19; but see Payam Akhavan, "Justice delayed is better than justice denied", The Globe and Mail, March 30, 2016, online: <https://www.theglobeandmail.com/opinion/karadzic-verdict-justice-delayed-better-than-justic e-denied/article29425024/>.

84 Hill v. Church of Scientology of Toronto (1995), 1995 CanLII 59 (SCC), 24 O.R. (3d) 865, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, para. 203.

85 R. v. Domm (1996), 1996 CanLII 1331 (ON CA), 31 O.R. (3d) 540, [1996] O.J. No. 4300 (C.A.), para. 40.

86 Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General) (1998), 1998 CanLII 829 (SCC), 38 O.R. (3d) 735, [1998] 1 S.C.R. 877, [1998] S.C.J. No. 44, para. 114.

87 R. v. Domm, supra, para. 40.

88 R. v. Jordan, supra, para. 19.

89 Lorraine E. Weinrib, "Canada's Charter of Rights: Paradigm Lost?" (2002), 6 Review of Constitutional Studies 119, at 151.

90 Kent Roach and David Schneiderman, "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429, at 485.

91 R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7.

92 Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401, 2013 SCC 62 (CanLII), [2013] 3 S.C.R. 733, [2013] S.C.J. No. 62, para. 19.

93 Batty v. Toronto (City) (2011), 108 O.R. (3d) 571, [2011] O.J. No. 5158, 2011 ONSC 6862 (S.C.J.), para. 95.

94 Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 (CanLII), [2013] 1 S.C.R. 467, [2013] S.C.J. No. 11, paras. 73-74.

95 CLA, supra, para. 2.

96 Ontario Commission on Freedom of Information and Individual Privacy, Public Government for Private People - The Report of the Ontario Commission on Freedom of Information and Individual Privacy (Toronto: Ministry of Government Services, 1980), Vol. 2, at 195.

97 R. v. Keegstra, supra, pp. 746-47 S.C.R.

98 R. v. Oakes, supra, para. 51.

99 Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30 (CanLII), [2007] 2 S.C.R. 610, [2007] S.C.J. No. 30, para. 43.

100 Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2265, Appeal PA-030192-1 (April 28, 2004).

101 Ontario Rental Housing Tribunal, Information and Privacy Commission of Ontario, Order PO-2418, Appeal PA-040326-1 (September 27, 2005), at 4.

102 Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, [1994] S.C.J. No. 104; R. v. Mentuck, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73.

103 R. v. Mentuck, supra, para. 27.

104 Named Person v. Vancouver Sun, supra, para. 34.

105 Ibid., para. 32.

106 Toronto Star Newspapers Ltd. v. Ontario, supra, paras. 17, 31.

107 Ibid., para. 31.

108 Ibid.

109 R. v. Leipert, 1997 CanLII 367 (SCC), [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14.

110 R. v. Eurocopter Canada Ltd. (2003), 2003 CanLII 32308 (ON SC), 67 O.R. (3d) 763, [2003] O.J. No. 4238 (S.C.J.), para. 44.

111 Canadian Broadcasting Corp. v. New Brunswick, supra, para. 71.

112 R. v. Vandevelde, 1994 CanLII 3862 (SK CA), [1994] S.J. No. 156, 89 C.C.C. (3d) 161 (C.A.), at p. 171 C.C.C., citing R. v. Lefebvre, 1984 CanLII 3601 (QC CA), [1984] J.Q. no 247, 17 C.C.C. (3d) 277 (C.A.), at p. 282-83 C.C.C. See, also, R. v. Brint, 1979 ALTASCAD 17 (CanLII), [1979] A.J. No. 57, 45 C.C.C. (2d) 560 (C.A.); R. v. Quesnel, 1979 CanLII 2883 (ON CA), [1979] O.J. No. 116, 51 C.C.C. (2d) 270 (C.A.).

113 R. v. Eurocopter Canada Ltd., [2001] O.J. No. 1591, [2001] O.T.C. 310 (S.C.J.), para. 35.

114 Toronto Star Newspapers Ltd. v. Ontario, supra, para. 17.

115 Doré v. Barreau du Québec, supra, paras. 55-56.

116 Vancouver Sun (Re), 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, [2004] S.C.J. No. 41, para. 31.

117 Southam Inc. v. Canada (Minister of Employment and Immigration), supra, para. 9.

118 Law Society v. Xynnis, supra, para. 10.

119 Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, para. 56.

120 Hunte v. Ontario (Superintendent of Financial Services), 2013 ONFST 3, 2013 LNOTSF 3, para. 19.

121 Order PO-2923, supra, 10.

122 Order PO-2265, supra.

123 Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, para. 65; Dunsmuir, supra, para. 48.

124 See Mark S. Hurwitz, "Ideology and Deference in U.S. Courts of Appeals Decision Making on Administrative Law", Buffalo Legal Studies Research Paper No. 2006-003 (Buffalo: University at Buffalo Law School, 2005).

125 David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., The Province of Administrative Law (Oxford: Hart Publishing, 1997), at 286.

126 Kadia v. Gonzales, 501 F.3d 817 (7th Cir. 2007), at p. 821.

127 Paul Reidinger, "Will Roe v. Wade Be Overruled?", ABA Journal Vol. 74, No. 7 (July 1, 1988).

128 R. v. Ferguson, 2008 SCC 6 (CanLII), [2008] 1 S.C.R. 96, [2008] S.C.J. No. 6, paras. 59-60.

129 Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, para. 51.

130 Edmonton Journal, supra, para. 62.

131 R. v. Keegstra, supra, at p. 804 S.C.R.

132 Ernest J. Weinrib, "Private Law and Public Right" (2011), 61 UTLJ 191, at 196.

133 Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567, [2009] S.C.J. No. 37, para. 75, citing Peter W. Hogg, Constitutional Law of Canada, 5th ed. (Supp.) (Toronto: Carswell, 2007), Vol. 2, s. 38.12.

134 Peter Oliver, Patrick Macklem, Natalie Des Rosiers, "Introduction" in The Oxford Handbook of the Canadian Constitution (Oxford: Oxford University Press, 2017), at 5.

135 Aharon Barak, Proportionality, Constitutional Rights and their Limitations (Cambridge: Cambridge University Press, 2012), at 3.

136 Thorson v. Canada (Attorney General), 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138, [1974] S.C.J. No. 45, at p. 145 S.C.R.

137 Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 (CanLII), [2012] 2 S.C.R. 524, [2012] S.C.J. No. 45, para. 37.

138 Hanif v. Ontario College of Pharmacists, [2014] O.J. No. 2137, 2014 ONSC 2598 (Div. Ct.), para. 30.

139 Chaoulli v. Quebec (Attorney General), 2005 SCC 35 (CanLII), [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, para. 5.

140 Finlay v. Canada (Minister of Finance), 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, [1986] S.C.J. No. 73, para. 36.

141 C.B. Powell Ltd. v. Canada (Border Services Agency), [2010] F.C.J. No. 274, 2010 FCA 61, para. 30.

142 Ibid., para. 31.

143 Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5, [1991] S.C.J. No. 42, at pp. 14-15 S.C.R.

144 Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, para. 69.

145 Osborne v. Canada (Treasury Board), 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45, at p. 104 S.C.R.

146 Schachter v. Canada, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68, at p. 717 S.C.R.

147 R. v. Mentuck, supra, para. 37.

148 Canadian Broadcasting Corp. v. Manitoba (Attorney General), 2008 MBCA 94 (CanLII), [2008] M.J. No. 286, 228 Man. R. (2d) 312 (C.A.), para. 30.

149 Named Person v. Vancouver Sun, supra, para. 36.

150 Toronto Star Newspapers Ltd. v. Canada, 2010 SCC 21 (CanLII), [2010] 1 S.C.R. 721, [2010] S.C.J. No. 21, para. 60.

151 H. (M.E.) v. Williams (2012), 108 O.R. (3d) 321, [2012] O.J. No. 525, 2012 ONCA 35, para. 28.

152 Thomson Newspapers Co. v. Canada (Attorney General), 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877, para. 87.

153 Toronto Star Newspapers Ltd. v. Canada, supra, para. 3.

154 Canada (Attorney General) v. Bedford, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101, [2013] S.C.J. No. 72, para. 167.

End of Document

Tab 77

CanLII

Abara v. Registrar of Motor Vehicles, 2024 ONSC 7085 (CanLII)

Source:	Superior Court of Justice
Date:	2024-12-18
File number:	CV-24-00724766-0000
Citation:	Abara v. Registrar of Motor Vehicles, 2024 ONSC 7085 (CanLII), <https://canlii.ca/t/k8hfp>, retrieved on 2026-01-18

CITATION: Abara v. Registrar of Motor Vehicles, 2024 ONSC 7085
COURT FILE NO.: CV-24-00724766-0000
DATE: 20241218

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Uko Abara	Appellant	*Self-represented*
– and –		
Registrar of Motor Vehicles	Respondent	*Andrew Jin*, for the Respondent
		HEARD: October 8, 2024

REASONS FOR JUDGEMENT

MERRITT J.

Issue 1: Privacy

[23] At the LAT Appeal hearing, the Appellant brought a motion for a confidentiality order (the "Confidentiality Motion"). The Appellant sought to keep the record of the LAT Appeal confidential, an order anonymizing the LAT's decision, a publication ban and redaction of the Respondent's submissions. The Respondent took no position on this motion other than opposing the redaction of its submissions. The LAT dismissed the motion with reasons when also dismissing the LAT Appeal.

[24] At the hearing of this appeal, the Respondent again took no position, other than submitting that the dismissal of the Confidentiality Motion is irrelevant to the issue of driving eligibility.

[25] The Appellant submits that Section 204(3) of the *HTA* prohibits disclosure of his MCR. Section 204(3) provides:

> A report made under section 203 or made to the Registrar in good faith with the intention of reporting under that section, is privileged for the information of the Registrar only and shall not be open to public inspection.

[26] There is no evidence that the Registrar allowed the MCR to be made available to the public. Rather, once the Appellant appealed the Registrar's decision, the MCR and other documents became part of the record before the LAT.

[27] The LAT denied the Appellant's Confidentiality Motion because it found that the Appellant's desire for privacy did not outweigh the public interest in openness in the case before it. The LAT also found that even if the Applicant's personal health information is sensitive, limiting public access to the information was not in the public interest.

[28] The LAT correctly stated that its adjudicative records are generally open to the public and cited *Toronto Star v. AG Ontario*, 2018 ONSC 2586, 142 O.R. (3d) 266. The LAT also correctly identified that ss. 2(1) of the *Tribunal Adjudicative Records Act*, 2019, S.O. 2019, c. 7, Sched. 60 (the "*TARA*") provides that the LAT's adjudicative records be made available to the public. The LAT's adjudicative records include the evidence and submissions in the proceeding: *TARA*, s. 1(2).

[29] The LAT correctly identified the legal test under s. 2(2) of the *TARA* which provides that the LAT may order that part or all of an adjudicative record be treated as confidential and not disclosed to the public if intimate financial or personal matters contained in the record are of such a nature that the interest of a person served by avoiding disclosure outweighs the desirability of adhering to the principle that the record be publicly available.

[30] The LAT correctly stated that r. 13.1 of the *Licence Appeal Tribunal Rules*, 2023 (the "*Rules*") is consistent with *TARA* and allows the LAT to restrict public access to the adjudicative record on the same grounds.

[31] The LAT correctly identified the proper legal test under *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, and that the test is discretionary.

[32] The LAT was correct and made no legal errors in identifying and applying the law on the Confidentiality Motion.

[33] The LAT found that the Appellant's human dignity was not at risk because the Appellant led no evidence that the appeal involved intimate personal matters of such a nature that his interest in avoiding disclosure outweighed the openness principle. The LAT found that there was nothing sensitive about the Appellant or who he is as a person, other than the episode about which his doctors were concerned and the doctor's concern that he should not drive at that time. There was

Tab 78

CanLII

Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al., 1975 CanLII 164 (SCC), [1976] 2 SCR 475

Source:	Supreme Court of Canada
Date:	1975-06-26
Other citations:	57 DLR (3d) 1 — 5 NR 515 — [1976] 1 WWR 1 — 20 CBR (ns) 240 — [1975] SCJ No 84 (QL) — [1975] ACS no 84
Citation:	Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al., 1975 CanLII 164 (SCC), [1976] 2 SCR 475, <https://canlii.ca/t/1z6gt>, retrieved on 2026-01-18

Supreme Court of Canada
Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al., [1976] 2 S.C.R. 475
Date: 1975-06-26

Baxter Student Housing Ltd. and R.C. Baxter Ltd. *(Defendants) Appellants;*

and

College Housing Co-operative Limited and College Housing Holdings Incorporated *(Plaintiffs) Respondents.*

1975: May 12; 1975: June 26.

Present: Martland, Judson, Spence, Pigeon and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Mechanics' liens—Appointment of receiver to draw upon and borrow undrawn balance of proceeds under a mortgage—Whether judge exceeded jurisdiction in ordering that mortgagee, in respect of any moneys advanced by mortgagee to receiver, should have priority over any other registered or unregistered charges or encumbrances—The Mechanics' Liens Act, R.S.M. 1970, c. M80, s. 11(1)—The Queen's Bench Act, R.S.M. 1970, c. C280, s. 59.

The respondent housing co-operative and the respondent holding company (both non-profit corporations, without funds) entered into a contractual relationship with the appellants whereby, *inter alia,* the first appellant was to construct a student housing project. Title to the project was in the name of the holding company; the housing co-operative was to be the head tenant; the second appellant was to be property manager. In

the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/73 a moisture problem developed in the building, which recurred during the winter of 1973/74, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building sought advice of experts who recommended remedial measures, the estimated cost of which amounted to $135,000. The contractor refused to authorize that the work be done at its expense. Proceedings subsequently commenced between the parties but little progress was made.

The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation first mortgage in the principal amount of $1,988,831, all of which had been advanced except for a holdback of $228,897, and from a second mortage in the amount of $220,959, all of which had been advanced. On June 22, 1973, the contractor caused a mechanics' lien to be filed against the

[Page 476]

property in the amount of $310,440, claimed to be due to it under the contract.

In the summer of 1974, the owner of the property applied to a Queen's Bench judge in chambers for an order appointing a receiver of the balance of the proceeds of the C.M.H.C. mortgage. The order was granted and contained a provision that any moneys paid by the mortgagee "shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands." An appeal was dismissed by the Court of Appeal, and the appellants, with leave, then appealed to this Court. The question to be decided was whether the judge exceeded his jurisdiction in making the said order.

Held: The appeal should be allowed and the application for the order dismissed.

The appointment of the receiver was wrong in law because the provision ordering that any moneys paid by C.M.H.C. to the receiver would have priority over any other registered or unregistered charges or encumbrances ran contrary to s. 11(1) of *The Mechanics' Liens Act,* R.S.M. 1970, c. M80. Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. The inherent jurisdiction of the Court of Queen's Bench, under s. 59 of *The Queen s Bench Act,* R.S.M. 1970, c. C280, is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of this order was to alter the statutory priorities which a court simply cannot do.

Boake v. Guild, 1932 CanLII 17 (ON CA), [1932] O.R. 617, aff'd. 1933 CanLII 16 (SCC), [1934] S.C.R. 10, *sub nom. Carrel v. Hart; Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.,* 1958 CanLII 46 (SCC), [1958] S.C.R. 361; *Montreal Trust Co. et al., v. Churchill Forest Industries (Manitoba) Ltd.,* 1971 CanLII 960 (MB CA), [1971] 4 W.W.R. 542; *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.,* 1971 CanLII 1156 (MB CA), [1972] 1 W.W.R. 651, referred to.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], dismissing an appeal from an order of Nitikman J. appointing a receiver. Appeal allowed.

[Page 477]

K.B. Foster and C.R. MacArthur, for the defendants, appellants.

K.G. Houston, for the plaintiffs, respondents.

The judgment of the Court was delivered by

DICKSON J.—This is an appeal from a judgment of the Court of Appeal for Manitoba affirming an order of Nitikman J. appointing a receiver to draw upon and borrow the undrawn balance of proceeds under a mortgage. The question to be decided is whether the judge exceeded his jurisdiction in ordering that the mortgagee, in respect of any moneys advanced by the mortgagee to the receiver, should have priority over other charges or encumbrances registered or unregistered affecting the lands.

The facts are unusual. In late 1971 College Housing Co-operative Limited (the Housing Cooperative) and College Housing Holdings Incorporated (the Holding Company) entered into contractual relationship whereby *inter alia* Baxter Student Housing Ltd. (Baxter Housing) was to construct on a "turnkey" basis a four-storey, 192-suite apartment building, known as "Dalhousie Drive Project", to provide housing for students at the University of Manitoba. Title to the project was in the name of the Holding Company; the Housing Co-operative, a students' co-operative, was to be the head tenant; R.C. Baxter Ltd. (R.C. Baxter) was to be property manager. In the late summer of 1972 construction was substantially completed, and the first tenants moved into the building. During the winter of 1972/1973 a moisture problem developed in the building, which recurred during the winter of 1973/1974, resulting in accumulation of ice, water and mould in some of the suites. The owner of the building, the Housing Co-operative, sought advice of experts who recommended certain remedial measures, the estimated cost of which amounted to $135,000. Baxter Housing refused to authorize that the work be done at its expense. Two questions therefore became crucial (i) who would pay for the remedial work and (ii) where would the money come from. On point (i) I should say that in September 1973 the Housing Co-operative and the Holding Com-

[Page 478]

pany issued a statement of claim against Baxter Housing and R.C. Baxter seeking damages and other relief to which the defendants responded with a counterclaim for $310,440 for balance of construction cost and the defence, in brief, that the project had been completed in accordance with the plans and specifications in a good and workmanlike manner. Those proceedings have not yet been litigated and little progress has been made. The facts material on point (ii) I take to be the following. The Housing Co-operative and the Holding Company are non-profit corporations, without funds. The construction cost of the building, $2,209,790, was to have been provided from the proceeds of a Central Housing and Mortgage Corporation (C.M.H.C.) first mortgage in the principal amount of $1,988,831, all of which has been advanced except for a holdback of $228,897, and from a second mortgage in the principal amount of $220,959, all of which

has been advanced. On June 22, 1973, Baxter Housing caused a mechanics' lien to be filed against the property in the amount of $310,440 claimed to be due to it under the contract.

In the summer of 1974, almost a year ago, the plaintiff owner of the property moved before Nitikman J. for an order appointing W.E. Shields or some other fit and proper person as receiver of the balance of the proceeds of the C.M.H.C. mortgage. The notice of motion referred to (i) the dispute between the parties as to the adequacy of the design and construction of the student housing project, (ii) the recommendations of the experts, (iii) the likelihood that if the repairs were not carried out forthwith there was every probability they would not be able to be done before freeze-up, with the result the project would suffer another winter with the moisture problem in the suites with an anticipated loss of goodwill and an increased vacancy rate, (iv) the filing by the defendants of the mechanics' lien and (v) the refusal by C.M.H.C., by reason of the lien, to advance further moneys under the mortgage. Affidavits were filed in support of the motion and the affiants cross-examined, following which Nitikman J. made the order called into question in these proceedings. That order contained the following provision, inserted no doubt in the hope that C.M.H.C.,

[Page 479]

relying thereon, would advance the holdback moneys notwithstanding the mechanics' lien filed:

> 2. AND IT IS FURTHER ORDERED AND DECLARED that any monies paid by the said Central Mortgage & Housing Corporation shall upon payment from time to time to the receiver have priority over any and all other charges or encumbrances registered or unregistered affecting the said lands.

Did the learned chambers judge exceed his jurisdiction in making the order? However politic and expedient the appointment of a receiver may have appeared as a means of tapping the only available source of funds and preventing a stalemate, I am of opinion that the judge had no proper ground in law for making the appointment. The appointment was wrong in law because provision 2 above quoted runs contrary to s. 11(1) of *The Mechanics' Liens Act* of Manitoba, R.S.M. 1970, c. M80, reading:

> 11(1) The lien created by this Act has priority over all judgments, executions, assignments, attachments, garnishments, and receiving orders, recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making those payments or after registration of the lien as hereinafter provided.

Section 11(1) goes a long way in ensuring that once a lien claimant has protected his rights by filing a lien in accordance with the provisions of the Act, the lien is a paramount legal charge not subject to being defeated or eroded in any manner. See *Boake v.*

Guild[2], and Rand J. in *Earl F. Wakefield Co. v. Oil City Petroleums (Leduc) Ltd. et al.*[3], at p. 364. Section 59 of *The Queen's Bench Act,* R.S.M. 1970, c. C280, it is to be observed, empowers the Court to appoint a receiver "in all cases in which it appears to the Court to be just and convenient so to do" and further provides that "any such order may be made either unconditionally or upon such terms and conditions as the Court thinks fit"; but this cannot afford comfort to the owner because s. 11 of *The Mechanics' Liens*

[Page 480]

Act, in terms, gives a lien created by the Act priority over all receiving orders made after the lien arises. The question whether the receiving order here in question is a receiving order of the kind contemplated in s. 11(1) need not detain us because even if this question be resolved in favour of the validity of the appointment, the closing words of the subsection, in clearest language, give a mechanics' lien priority over all payments or advances made on account of any mortgage. One may escape the first part of the subsection only to be impaled on the second part of the subsection and Mr. Houston, counsel for the owner, concedes as much.

In my opinion the inherent jurisdiction of the Court of Queen's Bench is not such as to empower a judge of that Court to make an order negating the unambiguous expression of the legislative will. The effect of the order made in this case was to alter the statutory priorities which a court simply cannot do.

In the Court of Appeal Matas J.A. *per curiam* said:

> In any event, I am of the opinion that sec. 11(1), *supra,* cannot be interpreted, under the circumstances before us, so as to frustrate the jurisdiction of Court of Queen's Bench to appoint a receiver with effective power to carry out his mandate. (*Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited,* 1971 CanLII 960 (MB CA), [1971] 4 W.W.R. 542 at p. 546 *et seq.*) In my view, the order appealed from is not in conflict with *The Mechanics' Liens Act, supra,* and is in accordance with its intent.

Montreal Trust Company et al. v. Churchill Forest Industries (Manitoba) Limited may well be cited as a paradigm of the exercise of judicial discretion but Chief Justice Freedman, speaking for all his colleagues, was careful to state, p. 547:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

[Page 481]

The case does not stand for the proposition that the Court has a discretion in the application of a statutory imperative, such as that residing in s. 11(1) of *The Mechanics'*

Liens Act, in circumstances of the nature of those upon which Matas J.A. lays emphasis in the following extracts from his judgment:

> In the case at bar the receiver has been given control of the only money available as a means of breaking the stalemate which has been created by filing of the lien. The objective in having a receiver appointed was not to prevent dissipation of the fund, but to utilize the fund as a sensible and practical way of getting the necessary work done.
>
> …
>
> There is ample evidence to support a finding that if plaintiffs are prevented from using the only available funds, and are thus prevented from doing the work, there will be an adverse effect on the building and the financial viability of the project will be in jeopardy. It would be fruitless to require plaintiffs to await the result of mechanics' lien or other court action, which would take place some time in the future while the property deteriorated and the financial viability of the project was being seriously affected.

These would be compelling reasons for the appointment of a receiver in the absence of s. 11(1) but, given that subsection, it would seem to me they are considerations which the Court is not entitled to bring into account. Parenthetically, events have proven, as so often appears to be the case, that peripheral skirmishing is wasteful of time and money and justice is better served by getting ahead with trial of substantial issue in the proceedings. Reference was made by Matas J.A. to the case of *Winnipeg Supply & Fuel Co. Ltd. v. Genevieve Mortgage Corp. Ltd.*[4] In that case the Court of Appeal for Manitoba held that, on an appeal from a judgment at trial in a mechanics' liens action, where a subcontractor's steel shoring supports for a building were essential to hold the building in place and to avoid serious damage, the cost of continuing supply of the supports and of removal would rank in priority to lien claimants. The priority given to the expenditure for an urgent and necessary purpose for the benefit of others was recognized in that case.

[Page 482]

It is commonplace to appoint a receiver at the instance of a creditor in order to preserve property pending litigation. We have here the novel situation of an owner of property applying for the appointment of a receiver. The *res* is not the property but a sum of money to which the owner wishes to have recourse for the purpose of effecting improvements to the property. Until the main litigation has been concluded, it will not be known whether the cost of such improvements will fall upon the owner or upon the contractor and in the meantime the effect of the order of Nitikman J. would be to subordinate the lien of the contractor to any advances under the mortgage made by C.M.H.C. to the receiver. The appointment would permit the receiver to borrow and expend moneys which, in the absence of the moisture difficulties and the litigation ensuing by reason thereof, would be payable to the contractor. None of the authorities to which we have been referred touches upon the appointment of a receiver in such circumstances and with such powers.

Mr. Houston advanced an argument based upon s. 4(1) of *The Mechanics Liens Act* which reads in part:

> 4.(1) Unless he signs an express agreement to the contrary, any person who performs any work or service upon or in respect of, …a lien for the price of that work, service, …upon the… building, …and the lands occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, …*limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (excepting as herein provided) by the owner;* but no such lien exists under this Act for any claim for less than twenty dollars.

(The italics are mine.)

It was contended that the lien of the contractor cannot go beyond the fair value of the work done, and that although the Manitoba Courts have not made an ultimate finding they have implicitly found that no amount is justly due to the lien claimant. I do not think the record before us bears this out. Explicit in the order of Nitikman J. was a finding of a moisture problem affecting the student housing project but there was no finding,

[Page 483]

express or implicit, in either of the lower Courts as to responsibility for the problem. An order directing payment to a receiver at this time of the holdback fund with C.M.H.C. would be tantamount to a finding in favour of the owner on the major issue not yet litigated. Mr. Houston contends that s. 4(1) limits the right to lien. In my opinion its only effect is to limit the amount which the lienholder can recover. Unless and until the main action has been tried, the amount, if any, justly due to the contractor will not be known. The interlocutory proceeding taken for the appointment of the receiver was not intended to have, and did not have, the effect of making any determination of this outstanding issue.

The appellant contractor submitted that the order of Nitikman J. was by its nature hypothetical and unenforceable in that C.M.H.C. did not appear in the proceedings and was known not to release funds except on assurance of priority and furthermore was not bound or directed by the order to advance funds to the receiver appointed. The effect which I would give to the express statutory provision, namely, s. 11(1) of *The Mechanics' Liens Act* makes it unnecessary to consider this additional ground of attack upon the validity of the order.

I would allow the appeal, reverse the decision of the Court of Appeal for Manitoba affirming the order of Nitikman J. and direct that the motion be dismissed with costs in this Court and in the Courts below.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Aikins, MacAulay & Thorvaldson, Winnipeg.

Solicitors for the plaintiffs, respondents: Arpin & Co., Winnipeg.

---

[1] 1974 CanLII 1112 (MB CA), [1975] 1 W.W.R. 311, 50 D.L.R. (3d) 122.
[2] 1932 CanLII 17 (ON CA), [1932] O.R. 617, aff'd, [1934] S.C.R. *sub nom. Carrel v. Hart.*
[3] 1958 CanLII 46 (SCC), [1958] S.C.R. 361.
[4] 1971 CanLII 1156 (MB CA), [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160.

Tab 79

1903
*Dec. 4.
1904
*Feb. 26.

ARTHUR DRYSDALE (DEFENDANT).....APPELLANT

AND

THE DOMINION COAL COMPANY (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Commissioner of mines—Appeal from decision—Quashing appeal—Final judgment—Estoppel—Mandamus.

Where an appeal from a decision of the Commissioner of Mines for Nova Scotia on an application for a lease of mining land is quashed by the Supreme Court of the province on the ground that it was not a decision from which an appeal could be asserted the judgment of the Supreme Court is final and binding on the applicant and also on the commissioner even if he is not a party to it.

The quashing of the appeal would not, necessarily, be a determination that the decision was not appealable if the grounds stated had not shewn it to be so.

In the present case the quashing of the appeal precluded the commissioner or his successor in office from afterwards claiming that the decision was appealable.

If the commissioner, after such appeal is quashed, refuses to decide upon the application for a lease the applicant may compel him to do so by writ of mandamus.

APPEAL from an order of the Supreme Court of Nova Scotia, dismissing an appeal from the judgment of Mr. Justice Ritchie ordering the issue of a writ of mandamus commanding the Commissioner of Public Works and Mines of the Province to "take into consideration" an application of the respondent company for a lease of certain lands for mining purposes.

In October, 1893, a lease of certain lands for coal mining purposes was granted by the province to one

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

1904 CanLII 57 (SCC)

John Murray. In October, 1894, a license to search for minerals was granted to the Dominion Coal Co. over lands in the neighbourhood of those leased to Murray and was alleged by the appellant to include a portion of such leased lands. In July, 1897, the company applied for a lease for coal mining of a portion of the lands covered by its license to search, including the parts said to have been leased to Murray. The contention on the part of the company was that the commissioner had never given any decision upon this application, and that he was bound by law to do so. It was this application which the court in Nova Scotia had commanded the commissioner to "take into consideration."

The proceedings on the application of the respondent company are fully set out in the judgment of Mr. Justice Davies.

W. B. A. Ritchie K.C. and *Mackay* for the appellant. The appellant decided that the application had been disposed of and could not be re-opened. Such decision could have been appealed from and such decision as the commissioner should have given obtained. No appeal having been taken, mandamus will not lie. See *Rex* v. *Justices of Middlesex* (1)

Mandamus sets the machinery of the courts in motion but will not direct the performance of any judicial act. High on Extraordinary Legal Remedies, sec. 152. *The Queen* v. *Justices of Middlesex* (2).

The following cases were also cited. *Mott* v. *Lockhart* (3); *Williamson* v. *Bryans* (4); *Meyers* v. *Baker* (5); *Fielding* v. *Mott* (6).

(1) 4 B. & Ald. 298.
(2) 9 A. & E. 340.
(3) 8 App. Cas. 568.
(4) 12 C. C. C. P. 275.
(5) 26 U. C. Q. B. 16.
(6) 19 N. S. Rep. 339, 14 Can. S. C. R. 254

1904 CanLII 57 (SCC)

1903

DOMINION COAL CO. v. DOMINION COAL CO.

Lovett for the respondents. Mandamus is the proper remedy. *The Queen* v. *Adamson* (1); *The Queen* v. *Boteler* (2).

The decision of the commissioner must not be uncertain nor doubtful. *The King* v. *Archbishop of Canterbury* (3).

THE CHIEF JUSTICE.—I am of opinion that the appeal should be dismissed with costs.

SEDGEWICK J.—I concur in the opinion of Mr. Justice Killam.

DAVIES J.—I reluctantly yield to the conclusion that this appeal must be dismissed. I do so reluctantly because, in my opinion, while the decision given by the commissioner in the first instance was defective and uncertain in neglecting to decide expressly upon the application of the respondents for a lease it was rendered certain by the commissioner's second decision of the 21st April, 1900. In this latter decision he affirmed the validity of the lease to Rev. Mr. Murray, and the fact that it was considered by him as the evidence of the contract made by the department with Murray leasing to the latter a piece of land described in the lease. It further decided that the coal company's application could not be granted in its entirety but that the department was

prepared to grant to the Dominion Coal Company a lease of so much of the ground described in said application, dated as above (covering respondent's application), as is not covered by the lease granted to said John Murray.

This decision seems to me to have covered everything which, on the application before him, the commissioner was called upon to decide. Of course it might have been couched in more formal language

(1) 1 Q. B. D. 201. (2) 4 B. & S. 964.
(3) [1902] 2 K. B. 503.

1904 CanLII 57 (SCC)

1904

DOMINION COAL CO. v. DOMINION COAL CO.

Davies J.

but in view of the questions of overlapping as between Murray's existing lease and respondents' application for one, which were raised on the investigation held by the commissioner, and of the definite and emphatic statement made in his evidence by Mr. Gilpin, the deputy-commissioner, that the only objection to granting the application was the one of its overlapping Murray's lease, I think it was quite clear and definite. I am not therefore surprised that with the evidence of this decision of his predecessor standing as part of the records of his department the present commissioner should have declined re-opening a case which as far as his records showed he was quite justified in considering as closed and settled by his predecessor. I am quite at a loss to understand how this decision came to be set aside by the Supreme Court of Nova Scotia. Of course its validity depends upon the conclusion being reached that the first attempted decision of the commissioner was invalid for uncertainty and a nullity. That being conceded I do not understand the grounds upon which the court acted in setting aside the decision of the 21st April. No reasons were given by the learned judges and the assumption in the formal rule quashing the appeal of the Dominion Coal Company on the ground that the decision

> was signed by the deputy commissioner and is not a decision of said commissioner from which an appeal can be asserted

was, as I understand, admitted in the argument at Bar to be a mistake as the document in question was signed by the commissioner's own name and by himself. Of course the holding of the Supreme Court of Nova Scotia that the decision of the commissioner of the 21st of April, 1903, "was not one from which an appeal could be asserted," could be supported on the ground that the commissioner

1904 CanLII 57 (SCC)

1904

DAVIS & SON
v.
DOMINION
COAL CO.

Davies J.

was at the time *functus officio* having already given his decision. But I do not understand this reason is advanced by either of the litigants or by the court itself and in the absence of any reasons for the judgment we are left in the dark as to the grounds on which it was based. I gather from the judgment of Mr. Justice Townshend in the present appeal that the court looked upon the decision in question merely as an explanation of his first attempted decision and not as a substantive decision. But in view of the fact that the second decision incorporated the first one in its very words and then went on to supply its deficiencies I cannot think that the suggested reason would be held a good one. However the decision setting aside this last decision of the commissioner is final and I feel myself bound by it as did the trial judge in this action. I do not agree with either the trial judge or with Mr. Justice Townshend, who delivered the judgment of the court *in banco*, that the commissioner was to say yes or no to the application simply. From the evidence before the commissioner it appeared that Murray's lease granted some years before the Dominion Coal Company's application was made might overlap the lands applied for in the latter. Whether it would do so or not depended largely upon the construction of the lease and other facts to be determined. Were the posts and specific distances in the description of the lands leased to control and the reference to the original application for a license to search to be treated as *falsa demonstratio*, or was the latter line to control the specific distances? These were legal questions on which the commissioner I think had no right to pass. What lands were legally covered by Murray's lease was a question to be determined afterwards by the court in a proper action. No decision of the commissioner could either contract or expand the legal

1904 CanLII 57 (SCC)

1901

DOMINION COAL CO. v. DOMINION COAL CO.

Davies J.

boundaries of Murray's lease. But a simple affirmative answer might well land the department in the position of having granted the same lands to different parties and possibly involve it in an expensive litigation. I conceive therefore that the commissioner might well grant the Dominion Coal Company's application subject to and excepting thereout such lands as might be found and determined to be included in the Murray lease; in other words, bounding it by the lands, whatever they were, described in the Murray lease. Such a decision would leave the respective claims of the parties for adjudication by the proper tribunals and such a decision I would have supposed but for the judgment of the Supreme Court of Nova Scotia had been reached and expressed in the document signed by Mr. Commissioner Church of the 21st April, 1900.

I was at first inclined to adopt the appellant's contention that the respondents in applying for a mandamus had mistaken their remedy which was by way of writ of *scire facias*. But further consideration has convinced me that this is not so. The questions to be determined between the parties here, as I understand them, depend not so much upon whether Murray's lease should have been granted or not as upon the meaning of the description in the lease. What respondents want is a determination of their application for a lease. That they are entitled to have. We are all of opinion that what is called the first decision of Commissioner Church was void for uncertainty. The Supreme Court of Nova Scotia has held, and its decision on the point is final and binding, that the second decision of the commissioner was "not one from which an appeal would lie" and therefore was not a decision at all. There is no other remedy is it appears to me open to the respondents under the circumstances than the one they have taken, and that being the controlling test as to whether an

1904 CanLII 57 (SCC)

1904

DEVLIN
v.
DOMINION
COAL CO.

Davies J.

action for a mandamus will lie the question must, I think, be decided in favour of the action lying.

NESBITT J.—I agree with Mr. Justice Killam.

KILLAM J.—The principal contention on the part of the commissioner is that his predecessor in office, long ago, considered the company's application and gave his decision with reference thereto, and that another commissioner is not bound to re-open the matter and decide upon it anew.

Three written documents are relied upon as constituting the decision of the former commissioner.

The document of the 7th April, 1899, purported to express a decision upon a dispute between the Dominion Coal Co. and the Rev. John Murray, relative to the overlapping of Murray's lease by the company's application for a lease. The decision was that Murray's lease was not void or uncertain, and that it be and remain the evidence of the contract between Murray and the Crown.

This did not, upon its face, determine anything regarding the company's application. A reference to the notice of investigation and to the full record does not seem to extend its effect in this respect. It is argued that the necessary result of adjudging Murray's lease good was to preclude the commissioner from granting a lease to the company of the common ground. But it does not appear whether the commissioner found that there was any overlapping, or what he considered he ought to do with reference to the company's application.

The second document was a copy of a letter signed by the deputy-commissioner and sent by him to the company's solicitor, purporting to express what the commissioner considered to be the effect of the prior

1904 CanLII 57 (SCC)

1901

Dominion Investors' Syndicate Co.

Killam J.

decision. The company's appeal from a decision of the commissioner as of the date of that letter was quashed, on Murray's motion, upon the ground, as stated in the rule or order of the court, that

the letter of February 1st, 1900, signed by the deputy-commissioner is not a decision of said commissioner from which an appeal can be asserted.

The third document was also made the subject of an appeal, which, again, was quashed, on Murray's motion, upon the ground, as set out in the rule or order of the court,

that the document of April 21st, 1900, signed by the deputy-commissioner, is not a decision of said commissioner from which an appeal can be asserted.

The appellant, in his factum, states that the reference to the document as signed by the deputy commissioner was an error.

The service upon the commissioner of the statutory notice required for the purpose of initiating the appeal does not appear to me to have the effect of making the commissioner a party to the appeal. It is a notice to the tribunal being appealed from for the purpose of informing it of the appeal and of procuring the transmission of the requisite material. It is a step in carrying the matter from the original tribunal to the appellate court.

But it appears to me that the inferior tribunal must be bound by the judgment of the appellate court in the matter, without being a party thereto.

The quashing of the appeals would not necessarily have determined that there was no appealable decision, were it not for the statement of the grounds. This statement, however, is a binding adjudication which works an estoppel between the parties. See *Atkison's Case* (1).

(1) 9 Ch. App. 1.

1904 CanLII 57 (SCC)

1904

DOYLE &c. v. PROVINCIAL COAL CO.

Kelly J.

It was adjudged by the Supreme Court of Nova Scotia, as between the parties to the appeal, that the commissioner had not given an appealable decision in the matter. On this ground the company was precluded from exercising its statutory right to appeal from what the commissioner's successor now says was an appealable decision. In that matter, and as between those parties, he should not be permitted to take that position.

The statute did not, in express terms, command the commissioner to give an appealable decision. But it appears to me to have given to the holder of a license to search a right to acquire a lease of a portion of the area covered by the license, upon duly making his application to the commissioner. The commissioner is given jurisdiction to inquire into and decide upon the application, and his decision is subject to appeal to the highest legal tribunal of the province.

It was imperative upon him to exercise the jurisdiction when called upon to do so by a party interested and having the right to make the application. *Rex* v. *Hereford Alts Bower* (1); *Macdougall* v. *Paterson* (2); *Julius* v. *The Lord Bishop of Oxford* (3).

Although the Commissioner is a member of the Executive Council of the Province the Act gave him jurisdiction to decide upon a question of right, and made his decision subject to review by a legal tribunal. It appears to me that, in such a matter, he was not to act as a member of the executive or as the agent of the Crown, but he was given jurisdiction to exercise a judicial function, which a party in the position of the respondent company had a right to call upon him, and the court the power to command him, to exercise.

(1) 5 B. & Ald. 691. (2) 11 C. B., 755; 2 L. M. & P. 681.
(3) 5 App. Cas. 214.

1904 CanLII 57 (SCC)

1904

PRITCHARD v. DOMINION COAL CO.

Killam J.

It is true that, when the decision is given, the remedy is by way of appeal. But until there is a decision there can be no appeal.

I express no opinion upon the questions of the correctness of the decisions in the Nova Scotia court that the documents mentioned were not appealable decisions.

By virtue of the conclusions of the court, the company was not allowed to appeal from them and could not now do so if we considered that the conclusions upon this point were erroneous.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. A. Mackay.*

Solicitor for the respondents: *W. B. Ross.*

1904 CanLII 57 (SCC)

Tab 80

Re Superior Separator Company of Canada Limited

[1954] O.R. 1-13

1953 CanLII 146 (ON CA)

ONTARIO
[COURT OF APPEAL]
PICKUP C.J.O. LAIDLAW and ROACH JJ.A.
2nd NOVEMBER 1953.

Customs -- "Review" of Entries by Deputy Minister -- The Customs Act, R.S.C. 1927, c. 42, s. 48(2), as re-enacted by 1948, c. 41, s. 5 -- Whether Amendment Retrospective -- Entries Made before Amendment -- Rights of Importers before Amendment of Statute -- The Interpretation Act, R.S.C. 1952, c. 158, s. 19(2)(b).

The provisions of s. 48(2) of The Customs Act, as re-enacted in 1948, do not give an importer a right to have the Deputy Minister review an entry made by the importer before the coming into force of the section in its new form. An importer had no right, before the 1948 re-enactment of the group of sections including s. 48, to appeal on a question of the proper classification of goods already imported into Canada, and the subsection in its new form, if its effect is to give an importer a right of appeal in respect of an erroneous decision of an appraiser as to the classification of goods for duty purposes, gives a wholly new right of appeal, and is therefore not retroactive in operation.

Judgment of CHEVRIER J., [1953] O.R. 546, affirmed.

AN APPEAL by Superior Separator Company of Canada Limited from the judgment of Chevrier J., [1953] O.R. 546, dismissing an application for a mandatory order.

2nd November 1953. The appeal was heard by PICKUP C.J.O. and

LAIDLAW and ROACH JJ.A.

G.F. Henderson, for the appellant: Two problems ordinarily arise in customs matters, (1) value for duty purposes, and (2) classification. In this case we are concerned only with the second question. If the units imported by us come under item 409(f) of the tariff there is no duty payable; if, on the other hand, they come under item 427(a) there is a duty of 10 per cent. The customs appraiser classified them under item 427(a), and we consequently paid duty of about $100,000. We now seek a review of this classification by the Deputy Minister under s. 48(2) of The Customs Act, R.S.C. 1927, c. 42, as re-enacted by 1948, c. 41, s. 5. [LAIDLAW J.A.: When was the classification made?] Between 17th April 1947 and 14th June 1948--wholly before the 1948 amendment came into force on 30th June 1948.

[PICKUP C.J.O.: Is not this matter properly within the jurisdiction of the Exchequer Court?] I submit not, because no jurisdiction in such a matter is given to it by The Exchequer Court Act, now R.S.C. 1952, c. 98, or any other statute. Even if it has jurisdiction, the granting of an order is discretionary. We seek only an opportunity of being heard by the Tariff Board.

The procedure for correcting an erroneous classification is clearly set out in s. 48 of The Customs Act, as re-enacted in 1948. [ROACH J.A.: What was the procedure before the 1948 legislation?] It was contained in s. 54 of the Act, which provided that the rate fixed by the appraiser was subject to appeal to the Tariff Board (then called the Board of Customs), whose decision was subject to approval by the Minister, with a further right of appeal to the Governor in Council. Section 48(2), as re-enacted, provides for a review of the classification by the Deputy Minister, from whom an appeal lies to the Tariff Board. [LAIDLAW J.A.: What part of the old s. 54 enabled an importer to have a ruling by the Board of Customs as to goods already imported?] A prior importation would fall within the wording of subs. 1.

1953 CanLII 146 (ON CA)

Even if it is to be held, because of the language of s. 54(2), that there was no right of appeal as such, the new s. 48 is clearly intended to be retrospective. There was a right in existence before the 1948 amendment, and numerous appeals were heard and determined (see Appeals 159 and 160, 81 Can. Gaz. 819, and 83 Can. Gaz. 1940). [PICKUP C.J.O.: Does not the fact that the Tariff Board has refused to act in this case possibly indicate that it has come to the conclusion that it was wrong in the earlier cases?] No, because that was not the ground on which the Board refused; it ruled that it could not act because there was no ruling of the Deputy Minister for it to consider.

Although the old s. 54 primarily contemplated declarations as to the future, there is nothing in the wording of subs. 2 that made it obligatory for the Board to act in respect only of future importations. Regardless of this, however, we had a pre-existing right of appeal under s. 125. If the Tariff Board decided that the classification made by an appraiser was wrong this would be a decision that there had been "an erroneous construction of the law" within the meaning of s. 125, and would entitle us to apply for a refund under s. 54; s. 125 by implication contemplates an application for a refund at any time within three years, but not later.

In any event, I rely on the wording of s. 48, and submit that it is clearly retrospective in its terms. As to the word "may" in subs. 2, I refer to s. 35(28) of The Interpretation Act, now R.S.C. 1952, c. 158. Where there is a power coupled with a duty, the word "may" becomes imperative: Julius v. The Lord Bishop of Oxford (1880), 5 App. Cas. 214. The Deputy Minister acts under s. 48 in a judicial capacity, and it cannot have been intended by Parliament that he could refuse to decide, and thereby prevent the Tariff Board from considering the question. I refer also to Rex v. Mitchell et al.; Ex parte Livesey, [1913] 1 K.B. 561 at 566; Canadian Pacific Railway v. The Province of Alberta et al., [1950] S.C.R. 25 at 31, [1950] 2 D.L.R. 405, 64 C.R.T.C. 129. The rights of importers are in question here, and the Deputy Minister is bound to perform his duty. Section 48 must be read with s. 49(1). The Deputy Minister's refusal to review the entries does not constitute a decision, and therefore he has not done what the statute

1953 CanLII 146 (ON CA)

contemplates.

As to the right to an order of mandamus against an administrative officer, I refer to Rex ex rel. Lee v. Workmen's Compensation Board, 57 B.C.R. 412, [1942] 2 W.W.R. 129, [1942] 2 D.L.R. 665 at 677; Rex v. Electricty Commissioners; Ex parte London Electricity Joint Company (1920), Limited et al., [1924] 1 K.B. 171 at 194.

As to both retroactivity and the word "may", I rely on Cameron et ex. v. Wait (1873), 3 O.A.R. 175 at 193, followed by O'Halloran J.A. in Rex ex rel. Lee v. Workmen's Compensation Board, supra. I also refer to 31 Halsbury, 2nd ed. 1938, p. 529; Maxwell on the Interpretation of Statutes, 9th ed. 1946, p. 249; Regina v. Thomas et al., [1892] 1 Q.B. 426; Minister of National Revenue v. Wrights' Canadian Ropes, Limited, [1947] A.C. 109 at 123, [1947] 1 D.L.R. 721, [1947] 1 W.W.R. 214, [1947] C.T.C. 1; Rex v. The Justices of the North Riding of Yorkshire (1823), 2 B. & C. 286 at 291, 107 E.R. 390; Regina v. The Mayor, etc., of Monmouth; Regina v. The Mayor, etc., of Bolton (1870), L.R. 5 Q.B. 251 at 256.

[PICKUP C.J.O.: Would not your argument mean that any importer could say he wanted to go before the Deputy Minister?] I submit that is the meaning of the legislation. [ROACH J.A.: I suppose one purpose of the amendment was to limit the number of appeals to the Tariff Board.] My submission is that the Deputy Minister, in exercising his powers under s. 48(2), acts in a judicial capacity, that he has no right to refuse to decide, and that mandamus will therefore lie to him if he refuses to perform his duty: The Minister of Finance of British Columbia v. The King, [1935] S.C.R. 278 at 284, [1935] 3 D.L.R. 316; Drysdale v. The Dominion Coal Company (1903), 34 S.C.R. 328 at 336.

Since we had, before the 1948 amendment, a right to appeal to the Tariff Board, the amendment should not be so construed as to deprive is of that right. All rules of construction are merely presumptions, and not inflexible rules of law, and all

1953 CanLII 146 (ON CA)

must give way to the intention of the legislature, if that intention is apparent. If it can be avoided, a statute will not be construed so as to take away existing rights: Craies on Statute Law, 5th ed. 1952, p. 8; Moon v. Durden (1848), 2 Exch. 22 at 43, 154 E.R. 389; Pardo v. Bingham (1868), L.R. 4 Ch. 735 at 739; Gardner v. Lucas et al. (1878), 3 App. Cas. 582; Attorney-General v. Theobald (1890), 24 Q.B.D. 557 at 560.

[LAIDLAW J.A.: I cannot see that s. 54, as it was before the amendment, gave you any right to go to the Tariff Board in such circumstances as these.] I submit it did. In any event, apart altogether from the wording of the section, the actual practice established by the Board is shown in Appeals 159 and 160, referred to earlier. If the practice established before the enactment of s. 48(2) gave us a right, it is reasonable to infer that Parliament did not intend to deprive us of that right, and s. 48(2) should be so construed: The Interpretation Act, R.S.C. 1952, c. 158, s. 19(1)(c), (2)(b).

W.R. Jackett, Q.C. (D.S. Maxwell, with him), for the Attorney General of Canada, respondent: A great deal of the appellant's argument is based on a misconception of The Customs Act. These rights of appeal are not conditions precedent to obtaining refunds. Not every classification problem comes before the Tariff Board. Nothing in the Act deprives the ordinary Courts of jurisdiction to deal with these questions, except in some isolated cases which the statute specifies.

There are Dominion customs appraisers, appraisers who have jurisdiction in all ports, and appraisers with jurisdiction in one port only: s. 22 of the Act. The usual practice is that goods cannot be brought into Canada unless the duty is first paid. If there is any question at the time of importation the duty should be paid under protest and appropriate steps should be taken to get a refund. The Exchequer Court and the Supreme Court of Canada have jurisdiction and a petition of right would lie, and this would be a more expeditious procedure. In this case, however, the appellant would be met with the argument that it paid the duties voluntarily.

1953 CanLII 146 (ON CA)

The Act as it was before 1948 contained no provision for review of a specific decision of an appraiser in respect of classification, except by the Court. Under s. 41 of the Act goods could be revalued after importation and payment of duty: Weddel Limited v. The King; Watt & Scott (Toronto) Limited v. The King; Tees & Persse Limited v. The King, [1946] S.C.R. 499, [1946] 3 D.L.R. 145. I refer also to ss. 43, 48, 52 and 54(1). The effect of the Act is to impose taxation, and taxes are not usually imposed retroactively. [ROACH J.A.: If the Tariff Board could exercise its powers under s. 54 so as to affect goods already imported the Minister of Finance would never know the state of the country's finances.] No; such an interpretation would be contrary to our whole system of budgets. Section 125 merely imposes a limit on the refunds that can be obtained I refer also to s. 112. My submission is that except in special cases, where there were express provisions making the appraiser's decision final, it was for the Courts to decide as to both classification and the amount of duty.

The provision for review in the amended s. 48(2) was in effect provision for a new right of appeal, and could have no application to importations made before the coming into force of the amendment: Re the Jurisdiction of the Tariff Board of Canada, [1934] S.C.R. 538, [1934] 4 D.L.R. 193. Even if the review does not constitute a new right of appeal, the ordinary rule is against interpreting statutes as retrospective: Upper Canada College v. Smith, 61 S.C.R. 413, 57 D.L.R. 648, [1921] 1 W.W.R. 1154. If the appellant had had any right of appeal before the amendment, it would not have been taken away by the change in the statute: The Colonial Sugar Refining Company, Limited v. Irving, [1905] A.C. 369.

The new s. 48(2) does not impose a duty on the Deputy Minister to review. No duty can be implied unless the power is conferred to be used for the benefit of persons specifically pointed out and with regard to whom the legislature has supplied a definition of the conditions under which they are entitled to call for the exercise of the power: Julius v. The Lord Bishop of Oxford (1880), 5 App. Cas. 214. There is here no definition of the circumstances in which an importer is

1953 CanLII 146 (ON CA)

entitled to ask the Deputy Minister to exercise his power; compare s. 47 as it was before 1948. No duty has been expressly imposed on the Deputy Minister to exercise his power of review under the subsection: McHugh v. Union Bank of Canada, [1913] A.C. 299, 10 D.L.R. 562, 3 W.W.R. 1052, C.R. [1913] A.C. 179. The Deputy Minister has a discretion to enable an importer to go to the Tariff Board (by exercising his power of review) or to leave the matter to be decided by the Courts. The jurisdiction of the Courts to determine questions of liability to tax is not ousted by the provision for an appeal or series of appeals to other tribunals: Municipal District of Sugar City No. 5 v. Bennett & White (Calgary) Limited, [1950] S.C.R. 450, [1950] 3 D.L.R. 81, [1950] C.T.C. 410, and on appeal sub nom. Bennett & White (Calgary) Ld. v. Municipal District of Sugar City No. 5, [1951] A.C. 786, [1951] 4 D.L.R. 129, [1951] C.T.C. 219, 3 W.W.R. (N.S.) 111.

Mandamus will not lie in this case. It is well settled that mandamus will not be granted if there is any other appropriate remedy.

G.F. Henderson, in reply: The respondent says that the Exchequer Court has jurisdiction, but does not point to any provision giving it that jurisdiction. Until the Tariff Board adjudicates the Exchequer Court will not act, because until then there is no debt owing: Wilson v. The King (1952), 13 Fox Pat. C. 19, 17 C.P.R. 71. The Crown is expressly given a right to sue for duties payable by s. 112 of The Customs Act, but there is no corresponding section for importers. The jurisdiction, if it exists at all, must be found in s. 18 of The Exchequer Court Act, and I submit that section is not wide enough to apply.

The granting of a mandamus is not obligatory but discretionary, and if it is the expeditious way of dealing with the matter the writ will be granted: Regina v. Thomas et al., [1892] 1 Q.B. 426 at 430; Rex en rel. Lee v. Workmen's Compensation Board, 57 B.C.R. 412, [1942] 2 W.W.R. 129, [1942] 2 D.L.R. 665 at 678.

1953 CanLII 146 (ON CA)

The rule laid down in Julius v. The Lord Bishop of Oxford (1880), 5 App. Cas. 214, should be read in the light of the decision in Rex v. Mitchell et al.; Ex parte Livesey, [1913] 1 K.B. 561.

Cur. adv. vult.

27th November 1953. The judgment of the Court was delivered by

PICKUP C.J.O.:-- This is an appeal by Superior Separator Company of Canada Limited from an order of Chevrier J. dated 14th May 1953, whereby he dismissed an application made to him by the appellant in Weekly Court at Ottawa for an order of mandamus requiring the Deputy Minister of National Revenue for Customs and Excise to review the decision of an appraiser of the Department of National Revenue for Customs and Excise in respect of the entry into Canada of certain farmhand hydraulic loaders and attachments which entered Canada in 1947 and 1948, the last entry in question being on 14th June 1948.

The Customs Act R.S.C. 1927, c. 42, was amended in 1948 by c. 41 of the statutes of that year which came into force on 30th June 1948, after the latest of the importations in question. Sections 48 and 49 of the statute as so amended read:

"48. (1) If, upon any entry or in connection with any entry, it appears to any Dominion Customs Appraiser that any goods have been erroneously classified or appraised or allowed entry at an erroneous rate or valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the classification or value at which goods shall be entered for duty have not been complied with, such appraiser may make a fresh appraisal or valuation, and may direct an amended entry and payment of additional duty on such goods, or a refund of the whole or a part of the duty paid, as the case requires, subject to review by the Deputy Minister.

1953 CanLII 146 (ON CA)

"(2) The Deputy Minister may review the decision of any appraiser as to the tariff classification of any goods or the value for duty of any goods.

"49. (1) An importer may, by notice in writing filed with the Secretary of the Board, within sixty days of the decision, appeal to the Tariff Board from any decision of the Deputy Minister "(i) as to tariff classification or value for duty;

"(ii) under subsection three of section forty-seven; or

"(iii) as to whether any drawback of Customs duties is payable under section twelve of the Customs Tariff or as to the rate of drawback so payable.

"(2) On any such appeal the Tariff Board may make any such order, or finding of fact, as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare

"(i) the rate of duty that shall be applicable to the class of goods respecting which appeal has been made, or applicable to the specific goods only;

"(ii) the value for duty of the class of goods or of the specific goods; or

"(iii) that such goods are exempt from duty; and any such order, finding or declaration of the Board shall have force and effect as if the same had been sanctioned by statute, unless appeal be taken as hereinafter provided.

"(3) An importer or the Deputy Minister may, upon leave being obtained from the Exchequer Court of Canada or a judge thereof upon application made within thirty days after the making of the finding or order sought to be appealed (or within such further time as the court or judge may allow), appeal to the said court upon any question which in the opinion of the said court or judge is a question of law.

1953 CanLII 146 (ON CA)

"(4) The appellant shall give seven clear day's notice of his application for leave to appeal to the Board and to the respondent, and the Board and the respondent shall have the right to be heard by counsel or otherwise, upon the application or upon the appeal, or both.

"(5) Where leave to appeal is granted, the appellant shall, within sixty days of the granting of the leave, deposit with the Registrar of the said Court the sum of one hundred and fifty dollars as security for costs, and thereupon the Registrar shall set the appeal down for hearing at such time and place as the court may direct, and shall notify the Board, the appellant and the respondent accordingly.

"(6) Any order or judgment of the Exchequer Court made on any such appeal may be appealed to the Supreme Court of Canada in like manner as a judgment of the said court, and the provisions of the Exchequer Court Act as to appeals shall apply." The application made by the appellant to the learned judge in Weekly Court was to require the Deputy Minister to exercise the power of review conferred upon him by s. 48(2) as amended in 1948. The learned judge appealed from refused so to order on the ground that the importations were prior to the effective date of the amendment and no order for mandamus should issue in respect of matters which had arisen anteriorly. He expressed no opinion as to whether or not mandamus would lie against the Deputy Minister in respect of decisions made by an appraiser since the effective date of the amendment.

After the amendment to s. 48 the appellant applied to the Deputy Minister to review the classification of the loaders in question, claiming that they had been wrongly classified for duty purposes by the appraiser and that if they had been correctly classified they would not have been subject to duty. The Deputy Minister declined to review the decision of the appraiser. The appellant claims that by refusing a review under s. 48(2) the Deputy Minister has deprived the appellant of an appeal to the Tariff Board, under s. 49, from the decision of the Deputy Minister, contemplated by s. 48(2).

Counsel for the appellant contends that the learned judge in

1953 CanLII 146 (ON CA)

Weekly Court erred in law in not interpreting the amendment made in 1948 as being retroactive so as to permit the appellant to exercise a right of appeal under ss. 48 and 49, as amended, in respect of importations prior to the effective date of the amendment. He argues that before the amendment the appellant had a right of appeal in respect of an erroneous classification for duty purposes decided by an appraiser, and that the new sections relate to a procedural matter and not to substantive matter. He contends that the interpretation given to these sections by the learned judge in Weekly Court has the effect of depriving the appellant of an existing right of appeal, and that the statute should not be so construed. These contentions on behalf of the appellant require consideration of what rights the appellant had, before the amendment, in respect of error in classification of goods for duty purposes.

The statute of 1948 repealed ss. 46 to 54 of The Customs Act as they previously existed, and substituted therefor new sections numbered 46 to 50.

Section 46 so repealed need not be considered. Section 47 related to standards of qualities for sugar and made the decision of the appraiser final and conclusive "unless upon appeal to the Deputy Minister of National Revenue for Customs and Excise within thirty days, such decision is, with the approval of the Minister, changed". This section further provided that the decision of the Deputy Minister, with the approval of the Minister, should be final.

Section 48, prior to the amendment of 1948, read as follows: "If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods, or a refund of a part of the duty paid, as the case

1953 CanLII 146 (ON CA)

requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for."

Sections 49, 50 and 51 related to powers conferred upon appraisers and do not affect the question under consideration.

Section 52 provided as follows:

"Except as in this Act otherwise provided, if the importer, owner, consignee or agent, having complied with the requirements of this Act, is dissatisfied with the appraisement made of any such goods by the appraiser, hereinbefore mentioned he may, within six days, give notice in writing to the collector of such dissatisfaction; on the receipt of which notice the collector shall at once notify such importer, owner, consignee or agent, to select one disinterested and experienced person familiar with the character and value of the goods in question, and the collector shall select a second person of similar knowledge, and notify such importer, owner, consignee or agent of such appointment.

"2. The persons so selected, together with a third selected by the Minister from among the Dominion appraiser, shall examine and appraise the goods in accordance with the provisions of this Act, and the decision of such persons, or of a majority of them if they are not unanimous, shall be reported to the collector and shall be final and conclusive, and the duty shall be levied and collected accordingly.

"3. Such decision shall in no way apply to any case, except that submitted for the consideration of such appraisers.

"4. Every person who acts as an appraiser under this section, except a Dominion appraiser selected by the Minister as aforesaid, shall take an oath, before a collector or a justice of the peace, to act without fear, favour or partiality, and to appraise the goods with reference to which he is called on to act, in accordance with the laws imposing duties of Customs in Canada."

1953 CanLII 146 (ON CA)

It will be observed that ss. 48 and 52 related only to appraisement or valuation and not to classification of goods for duty purposes.

Section 53 related to remuneration of valuators and need not be considered here, but s. 54 requires consideration. It read as follows:

"Whenever any difference arises or whenever any doubt exists as to whether any or what rate of duty is payable on any class of goods, and there is no previous decision upon the question by any competent tribunal, binding throughout Canada, the Board of Customs may declare the rate payable on the class of goods in question, or that such goods are exempt from duty, subject in each case to an appeal within sixty days from the date of such declaration, by any person interested, to the Governor in Council; and any such declaration of the Board of Customs when approved by the Minister after the expiration of sixty days from the date thereof, or any such declaration when made by any order in council upon appeal, shall have force and effect as if the same had been sanctioned by statute.

"2. Such declaration or order in council may state a day upon which it is to come into effect, and shall in that case only have effect upon and after the day so named: Provided that no such declaration or order in council shall be deemed to affect the liability for duty of, or the rate of duty applicable to, any goods imported previous to the time when it comes into effect.

"3. Every order in council made under this section shall be published in the Canada Gazette."

From these sections counsel for the appellant argues that prior to the amendment in 1948 an importer had a right of appeal to the Board of Customs under s. 54 where a difference arose or doubt existed as to whether or what rate of duty was payable on any class of goods, and that the amendment in 1948 merely changed the procedure in relation to that right of appeal. He relies upon the general principle of law that a statute relating to procedure only, as distinct from a statute

1953 CanLII 146 (ON CA)

dealing with a substantive right, should be construed as having retroactive effect. He also relies upon s. 19(2) of The Interpretation Act, now R.S.C. 1952, c. 158, which provides:

"Where other provisions are substituted for those so repealed or revoked, then, unless a contrary intention appears, ...

"(b) all proceedings taken under the Act, enactment or regulation so repealed or revoked, shall be taken up and continued under and in conformity with the provisions so substituted, so far as consistently may be."

In agreement with the view expressed by the learned judge in Weekly Court, I am of the opinion that immediately prior to the amendment in 1948 the appellant had no right of appeal to the Board of Customs on a question of classification, with regard to the importations in question. The appellant could have asked the Board of Customs to act under s. 54, as it then stood, on the basis of a difference having arisen or a doubt existing as to whether any or what duty was payable on the class of goods in question, but I do not think any declaration made by the Board of Customs under s. 54 could have affected past importations in respect of which duty had been paid. Subsection 2 of s. 54 expressly provided that a declaration contemplated by that section "may state a day upon which it is to come into effect and shall in that case only have effect upon and after the day so named". The section, in my opinion, contemplated a declaration which was to have the force of statute but which would have future effect only. It would, I think, be contrary to the general scheme of The Customs Act to interpret s. 54 as opening up past classifications of goods for customs purposes. The duties must be paid an importation, and while there were provisions in the nature of a right of appeal in relation to appraisement or valuation for duty, there was no provision in the statute providing for an appeal or any other remedy, in respect of past importations, where a collector of customs collected on importation duties based upon an erroneous classification of the goods. This does not mean that an importer had no remedy if the Crown had collected duties which it had no legal right to collect, but I do not think the remedy was provided for by The Customs Act. I am therefore of the

1953 CanLII 146 (ON CA)

opinion that the construction placed upon the amendment in question by the learned judge in Weekly Court has not the effect of extinguishing an existing right of the appellant, and if its effect is to give to an importer an appeal in respect of an erroneous decision of an appraiser as to the classification of goods for duty purposes, such appeal is one which did not exist before, and the amendment is not an amendment relating to a procedural matter.

I am not intending to express any opinion as to whether the amended ss. 48 and 49 give any right of appeal at all to an importer in respect of an erroneous classification of goods, except an appeal to the Tariff Board from the decision of the Deputy Minister, where he sees fit to review a decision of an appraiser. The appellant contends that in s. 48(2) the word "may" should be construed as "shall", so as to constitute by ss. 48 and 49 a chain of procedure under which an appeal is given to an importer from any erroneous classification or valuation for duty determined by an appraiser. I leave that question for determination by the Court when it is necessary to decide it. I do not consider it necessary in this case.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1953 CanLII 146 (ON CA)

Tab 81

CanLII

Saskatchewan Crop Insurance Corporation v Work Smarter Systems Ltd., 2025 SKKB 133 (CanLII)

Source:	Court of King's Bench for Saskatchewan
Date:	2025-08-21
File number:	QBG-SA-00361-2021
Citation:	Saskatchewan Crop Insurance Corporation v Work Smarter Systems Ltd., 2025 SKKB 133 (CanLII), <https://canlii.ca/t/kf11t>, retrieved on 2026-01-18

KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 133**

Date: **2025 08 21**
File No.: QBG-SA-00361-2021
Judicial Centre: Saskatoon

BETWEEN:

SASKATCHEWAN CROP INSURANCE CORPORATION

PLAINTIFF

- and -

WORK SMARTER SYSTEMS LTD. and
STEPHEN KENNETH BURKHOLDER

DEFENDANTS

Counsel:

Randy T. Klein, K.C.	for the plaintiff
Glenn Wright	for the defendants

> 1. The applicant has statutorily been constituted as an agent of the Crown; and
>
> 2. Its powers under the *Crop Insurance Act* [SS 1983-84, c C-47.2] may only be exercised as an agent of the Crown; and
>
> 3. All of its property, both real and personal, including all monies acquired and administered by it are by the *Crop Insurance Act* deemed to be the property of the *Crown;* and
>
> 4. Where, by virtue of the express provisions of s. 19(6) of said the *Proceedings against the Crown Act* [RSS 1978, c P-27], no attachment "shall be issued out of any court for enforcing payment by the Crown of money";

then, in my view, if the Crown is not subject to attachment, it follows that an agent of the Crown whose powers may only be exercised as an agent of the Crown and whose property, both real and personal, is, as noted, deemed to be the property of the Crown, is also not subject to having the monies acquired and administered by it, as such agent attached.

[28] As observed by Mr. Justice Addy of the Federal Court (Trial Division) in *Re Public Service Alliance of Canada, Local 660 and Canadian Broadcasting Corporation,* [1975 CanLII 2254 (FC), [1976] 2 FC 145, 66 DLR (3d) 760 (FCTD)] at p. 761:

> "It seems clear that corporations that are, in the performance of their duties, acting solely as delegates or agents of the Crown enjoy as such the same prerogatives and immunities as the Crown itself. See ..."
>
> [Emphasis in original]

[38] The defendants rely on *Canada (Attorney General) v Saskatchewan Water Corp.*, 1993 CanLII 9138 (SK CA), [1993] 7 WWR 1 (Sask CA), for the proposition that Crown immunity does not attach to agents of the Crown. However, the case does not stand for that proposition. In particular, the Court at para. 11 indicated:

> [11] ... *Wittal* [(1988), 1988 CanLII 5072 (SK CA), 51 DLR (4th) 641] (as now elucidated by Professor Wade's commentary) holds that **to determine whether the Crown immunity preserved by s. 17 attaches to a particular governmental person or agency one looks not only at who the person or agency is but at what function or power the person or agency is exercising at the critical time. If it is a function or power of the Crown, immunity attaches. If it is a function or power conferred by statute upon the person himself or the agency itself, immunity does not attach**.
>
> [Emphasis added]

[39] The proper approach to determining whether Crown immunity attaches is explained in the text by Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of*

the Crown, 4th ed (Toronto: Thomson Reuters, 2011). The relevant selections from that book indicate:

> At common law, a prohibitory injunction is available against a Crown servant to restrain an unlawful act. For example, in *Nireaha Tamaki v. Baker* (1901) [[1901] AC 561 (PC, NZ)], the Privy Council held that an injunction would lie to restrain a Crown officer from acting outside his statutory powers in selling land to which the plaintiff claimed title. In *Rattenbury v. Land Settlement Board* (1929) [1928 CanLII 42 (SCC), [1929] SCR 52], the Supreme Court of Canada held that an injunction would lie against the Land Settlement Board, although it was an agent of the Crown, to restrain the Board from levying an ultra vires tax on the plaintiff. In *Conseil des Ports Nationaux v. Langelier* (1969) [1968 CanLII 51 (SCC), [1969] SCR 60], the Supreme Court of Canada held that an injunction would lie against the National Harbours Board, although it was an agent of the Crown, to restrain the Board from committing a tort.
>
> **The principle underlying these cases is that an individual Crown servant or a corporate Crown agent whose act is unauthorized by statute or the prerogative is personally liable for that act to the same extent as a private individual would be liable**. When an injunction is sought against a Crown servant (or a corporate Crown agent) no issue is raised as to whether the Crown itself can be enjoined, for the Crown servant is personally liable when he or she acts without legal justification. That is why, at common law, an injunction may be obtained against a Crown servant in those jurisdictions where the Crown itself is not liable to be enjoined.
>
> [Emphasis added]

[40] Looking at the proposed counterclaim, the defendants do not allege that SCIC was unauthorized by statute to act as it has. The defendants, likewise, do not plead that SCIC has acted outside of its statutory powers or that the claim is brought to restrain SCIC from committing a tort. The acts complained of by the defendants are that SCIC should operate their programs in a different manner than it does.

[41] In short, I find that the defendants' requested relief that the Court order SCIC to process the defendants' SCIC benefits for the years 2020-2024, the related relief of set-off regarding the 2020-2024 processing of SCIC benefits and the request that the Court direct SCIC to take certain actions regarding reinstatement of crop insurance are barred by s. 17 of the *PAC Act*.

[42] As for the defendants' request for a writ of *mandamus*, it is unclear why the defendants bring this request through a counterclaim, as opposed to seeking to judicially review the plaintiff's decision not to consider the defendants' internal AgriStability appeal.

[43] The Court of Appeal in *MacPhee v Box*, 1936 CanLII 141 (SK CA), [1936] 2 WWR 129 (CanLII) (Sask CA) [*MacPhee*], indicated:

> [18] In the second place it is doubtful to my mind if relief by way of *mandamus* can properly be granted against the mining recorder in an action of this kind, for what the plaintiffs are really seeking in the portion of their prayer quoted above is an order against him as a public official to compel him to do what they allege to be his duty. The usual and proper way to obtain such a form of relief is through application to a competent Court for a prerogative writ of *mandamus* as was done in *Seguin's* [1922 CanLII 749 (UK JCPC), [1922] 1 WWR 1169 case [PC]]. See also 9 *Halsbury*, 2nd ed., p. 752; *Robertson's Civil Proceedings by and against the Crown* (1908), pp. 111 *et seq.; Reg. v. Holt* (1890) 24 Q.B.D. 178, 59 L.J.Q.B. 113; *Drysdale v. Dominion Coal Co.* (1904) 1904 CanLII 57 (SCC), 34 S.C.R. 328. In this province such an application may be made either to a Judge of the Court of King's Bench or to this Court under Crown Practice Rules numbers 20 to 31 inclusive.
>
> [19] The kind of *mandamus* obtainable in an action is, according to modern authority, altogether distinguishable from that which must be pursued by a prerogative writ. The former was first made available to litigants under sec. 68 of *The Common Law Procedure Act, 1854*, ch. 128, which has since been superseded in England by Marginal Rule 719, the counterpart of which is to be found in our King's Bench Rules, numbers 494, 495 and 496. It has been held repeatedly in England that the *mandamus* spoken of in Marginal Rule 719 "is not the prerogative *mandamus* but only a *mandamus* which may be granted to direct the performance of some act, of something to be done which is the result of an action where an action will lie." *Glossop v. Heston & Isleworth Local Board* (1879) 12 Ch. D. 102, 49 L.J. Ch. 89, per Brett, L.J., at 122. The same view was taken in *Baxter v. London County Council* (1890) 63 L.T. 767; *Smith v. Chorley District Council*, [1897] 1 Q.B. 678, 66 L.J.Q.B. 427; and *Rex v. Wilts and Berks Canal Co.; Ex parte Berkshire County Council*, [1912] 3 K.B. 623, 82 L.J.K.B. 3.
>
> [20] The same has also been held by the Courts in Ontario in respect of the corresponding provisions and the practice in that province. Thus in *Rich v. Melancthon Board of Health* (1912), 1912 CanLII 573 (ON SCDC), 26 O.L.R. 48 (Ont. Div. Ct.), Middleton, J., after distinguishing the *mandamus* referred to in the rules from the prerogative writ of that name, goes on to say at p. 53:
>
> > "The *mandamus* which may be awarded in an action is either in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law."

Tab 82

T-1040-80

Fred Steiner (*Plaintiff*)

v.

The Queen, the Postmaster General, Lawrence F. Reid, A. E. Green and Marc Savoie (*Defendants*)

Trial Division, Decary J.—Campbellton, January 14; Ottawa, July 17, 1981.

Prerogative writs — Declaration — Postmaster decided that flyers submitted by the plaintiff for delivery were non-mailable matter on account of the text which was critical of the Post Office — Post Office Act gives the Postmaster General the power to decide what is non-mailable matter and the right to delegate such power — Whether such discretionary power is restricted to mail that is the object of a regulation issued under the Act — Application for a declaration that the defendants have a public duty to accept for delivery all mail which complies with the Act and Regulations, and a declaration that the defendants have a duty to accept for delivery the particular flyer, is allowed — Post Office Act, R.S.C. 1970, c. P-14, ss. 2, 3(1), 5(1)(e),(p), 5(4), 6(e),(h),(j),(g), 7(1)(a),(b) — Third Class Mail Regulations, SOR/78-899, ss. 2, 3(1) — Prohibited Mail Regulations, C.R.C. 1978, Vol. XIV, c. 1259, ss. 2, 3 — Canadian Bill of Rights, S.C. 1960, c. 44 [R.S.C. 1970, Appendix III], ss. 1, 2.

The plaintiff seeks a declaration that the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations and a further declaration that the defendants have a duty to accept for delivery the particular item which the plaintiff submitted to the defendants for mailing. The plaintiff wished to mail a flyer which met all physical requirements of the Regulations, but its text was critical of the Post Office. The Postmaster exercised his discretion and decided that the flyers were non-mailable matter on account of their text. Paragraph 5(1)(*p*) of the *Post Office Act* gives the Postmaster General the power to decide what is non-mailable matter and subsection 5(4) gives the Postmaster General the right to delegate such power to assistant deputy postmasters general. Mailable matter is defined as any thing that by the Act or Regulations may be sent by post. The question is whether the flyers could be the object of the exercise of discretion under section 5 of the Act on account of their text, or whether such an exercise of discretion was unreasonable or a breach of the duty to act fairly.

Held, the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations. Further, the defendants have a duty to accept for delivery the particular item which the plaintiff submitted for

T-1040-80

Fred Steiner (*Demandeur*)

c.

La Reine, le ministre des Postes, Lawrence F. Reid, A. E. Green et Marc Savoie (*Défendeurs*)

Division de première instance, le juge Decary—Campbellton, 14 janvier; Ottawa, 17 juillet 1981.

Brefs de prérogative — Jugement déclaratoire — Le maître de poste a décidé que les circulaires d'annonce que le demandeur avait présentées pour être transmises par la poste étaient des objets non transmissibles en raison du texte qui critiquait le bureau de poste — La Loi sur les postes confère au ministre des Postes le pouvoir de décider ce qui n'est pas transmissible et le droit de déléguer ce pouvoir — Il échet d'examiner si ce pouvoir discrétionnaire se limite aux envois qui font l'objet de règlements pris en application de la Loi — Est accueillie la demande visant à l'obtention d'un jugement déclaratoire portant que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la Loi et à ses Règlements d'application, et d'un autre jugement déclaratoire portant que les défendeurs ont le devoir d'accepter, pour être transmise par la poste, la circulaire d'annonce particulière — Loi sur les postes, S.R.C. 1970, c. P-14, art. 2, 3(1), 5(1)(e),(p), 5(4), 6(e),(h),(j),(g), 7(1)(a),(b) — Règlement sur les objets de la troisième classe, DORS/78-899, art. 2, 3(1) — Règlement sur les objets interdits, C.R.C. 1978, Vol. XIV, c. 1259, art. 2, 3 — Déclaration canadienne des droits, S.C. 1960, c. 44 [S.R.C. 1970, Appendice III], art. 1, 2.

Le demandeur sollicite un jugement déclaratoire portant que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la *Loi sur les postes* et à ses Règlements d'application ainsi qu'un autre jugement déclaratoire portant que les défendeurs ont le devoir d'accepter l'envoi particulier que le demandeur a présenté aux défendeurs pour expédition par la poste. Le demandeur désirait envoyer par la poste une circulaire d'annonce qui remplissait toutes les conditions matérielles des Règlements, mais dont le texte critiquait le bureau de poste. Se prévalant de son pouvoir discrétionnaire, le maître de poste a décidé que les circulaires d'annonce étaient des objets non transmissibles en raison de leur contenu. L'alinéa 5(1)*p*) de la *Loi sur les postes* confère au ministre des Postes le pouvoir de décider de ce qu'est un objet non transmissible, et le paragraphe 5(4) l'autorise à déléguer ce pouvoir aux sous-ministres adjoints des Postes. L'expression objet transmissible est définie comme comprenant tout ce qui, d'après la Loi et les Règlements, peut être envoyé par la poste. Il échet d'examiner si les circulaires d'annonce peuvent faire l'objet de l'exercice du pouvoir discrétionnaire prévu à l'article 5 de la Loi en raison de leur contenu, ou si un tel exercice était déraisonnable ou constituait un manquement au devoir d'agir équitablement.

Arrêt: les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la *Loi sur les postes* et à ses Règlements d'application. En outre, les défendeurs ont le devoir d'accepter, pour être

1981 CanLII 4581 (FC)

mailing. The definition of "mailable matter" indicates that it is only the Act or the Regulations that should define what is mailable, not the discretion of the Postmaster General or his designate. The legislator having enumerated in the definition and in the regulation section what is a mailable and a non-mailable matter, has in so doing fettered the discretion as it cannot be exercised except if it relates to items in the Act or in the Regulations. Had Parliament intended for the Postmaster General to have an absolute unfettered discretion to interrupt the mails or to refuse to accept mail because he did not agree with the contents of the mail, there would have been provided specific legislation permitting such actions. There being no such specific authority, it does appear that the legislator intended that all matters were mailable unless there were specific restrictions by way of regulation. Through the passage of the *Prohibited Mail Regulations* these have defined what is a non-mailable matter for the Act as well as the Regulations. Nowhere in the Act or Regulations is there the authority to refuse to accept mail because the Postmaster General or his designate does not approve of the purport of the mailing. Unless there is a specific regulation permitting the Postmaster General to refuse to permit the mail to go through, it is not to be inferred from the language that it is permitted to refuse the use of the mails. There are enabling words which permit the plaintiff to mail the flyer in question and, as a result, those words must be read as being compulsory. The Regulations in no way provide authority for the Postmaster General to refuse to accept third class mail because of the contents. The power to decide what is a letter given the Postmaster General at paragraph 5(1)(*p*) of the Act is only one of making a regulation as to what is a letter, a mailable matter and a non mailable matter, and cannot be exercised unless through the medium of regulations.

Re Fisheries Act, 1914 [1930] 1 D.L.R. 194 (P.C.), applied. *Labour Relations Board of Saskatchewan v The Queen* [1956] S.C.R. 82, applied. *R. v Drybones* [1970] S.C.R. 282, applied. *Re Pacific Press and The Queen* (1977) 37 C.C.C. (2d) 487 (B.C.S.C.), agreed with. *Roncarelli v Duplessis* [1959] S.C.R. 121, referred to.

ACTION.

COUNSEL:

Ronald A. Pink for plaintiff.
A. R. Pringle for defendants.

SOLICITORS:

Kitz, Matheson, Green & MacIsaac, Halifax, for plaintiff.
Deputy Attorney General of Canada for defendants.

transmis par la poste. L'envoi particulier que le demandeur a présenté pour expédition par la poste. Il ressort de la définition d'«objet transmissible» qu'il appartient exclusivement à la Loi ou aux Règlements de définir ce qui est transmissible, et que cette définition ne relève pas du pouvoir discrétionnaire du ministre des Postes ni de la personne qu'il désigne. En prévoyant, dans la définition et dans l'article portant autorisation d'établir des règlements, ce qu'est un objet transmissible et ce qu'est un objet non transmissible, le législateur a limité le pouvoir discrétionnaire puisqu'il ne peut être exercé que relativement à des envois prévus par la Loi ou les Règlements. Si le Parlement avait voulu donner au ministre des Postes la liberté absolue d'interrompre l'acheminement du courrier ou de refuser d'accepter des envois parce qu'il n'était pas d'accord avec leur contenu, une autorisation expresse de le faire aurait été prévue dans la législation. Étant donné qu'il n'existe aucun pouvoir précis à ce sujet, il semblerait que le législateur ait voulu que tous les envois soient transmissibles, à moins de restrictions précises prévues par règlement. Le *Règlement sur les objets interdits* définit ce qu'est un objet non transmissible aux fins de la Loi ainsi que du Règlement. Nulle part dans la Loi ni dans le Règlement est prévu le pouvoir de refuser d'accepter des envois parce que le ministre des Postes ou la personne qu'il a désignée n'est pas d'accord avec le motif de l'envoi. A moins d'un règlement précis permettant au ministre des Postes de refuser de permettre à un envoi d'être acheminé par la poste, on ne doit pas interpréter le texte comme permettant de refuser à quelqu'un de se servir de la poste. Il existe des dispositions autorisant le demandeur à envoyer par la poste la circulaire d'annonce en question et, par conséquent, ces dispositions doivent être interprétées comme obligatoires. Aucune disposition des Règlements n'autorise le ministre des Postes à refuser d'accepter des objets de la troisième classe à cause de leur contenu. Le pouvoir de décider ce qu'est une lettre, conféré au ministre des Postes à l'alinéa 5(1)*p*) de la Loi, est seulement le pouvoir d'établir un règlement relativement à ce qu'est une lettre, un objet transmissible et un objet non transmissible, et ce pouvoir ne peut être exercé que par règlements.

Arrêts appliqués: *Re Fisheries Act, 1914* [1930] 1 D.L.R. 194 (C.P.); *Labour Relations Board of Saskatchewan c. La Reine* [1956] R.C.S. 82; *R. c. Drybones* [1970] R.C.S. 282. Arrêt approuvé: *Re Pacific Press et La Reine* (1977) 37 C.C.C. (2d) 487 (C.S.C.-B.). Arrêt mentionné: *Roncarelli c. Duplessis* [1959] R.C.S. 121.

ACTION.

AVOCATS:

Ronald A. Pink pour le demandeur.
A. R. Pringle pour les défendeurs.

PROCUREURS:

Kitz, Matheson, Green & MacIsaac, Halifax, pour le demandeur.
Le sous-procureur général du Canada pour les défendeurs.

1981 CanLII 4581 (FC)

The following are the reasons for judgment rendered in English by

DECARY J.: The issue as I understand this matter*, is whether the exercise of discretionary power given the Postmaster General by the provisions of the *Post Office Act*, R.S.C. 1970, c. P-14, is restricted or not to the mail that is the object of a regulation issued under the authority of the Act and to the mail that is unlawful by virtue of the Act itself.

Before stating the facts that gave rise to the action seeking a declaration that the defendants have a public duty to accept for delivery all mail which complies with the *Post Office Act* and Regulations and a further declaration that the defendant, the Queen, and her servants have a duty to accept for delivery the particular item which the plaintiff submitted to the defendants for mailing, I believe that the pivotal sections of the Act and of the Regulations should be quoted and commented upon.

First, subsection 3(1) of the *Post Office Act* states:

3. (1) There shall be a department of the Government of Canada called the Post Office Department over which the Postmaster General shall preside

The purpose of this clause is patent: there shall exist a Post Office and an overall manager

The next section to consider is, in my view, this one:

5. (1) Subject to this Act, the Postmaster General shall administer, superintend and manage the Canada Post Office, and, without restricting the generality of the foregoing, may

. . .

(p) decide in any particular case what is a letter, mailable matter or non-mailable matter;

If there were no Regulations, only these provisions of the Act, then the Postmaster General would be vested with an unfettered discretion to decide what is mailable and unmailable matter.

* The notes submitted by counsel for plaintiff, Mr. Pink, have been used to a great extent

Ce qui suit est la version française des motifs du jugement rendus par

LE JUGE DECARY: Si je comprends bien, la question qui se pose en l'espèce* est de savoir si l'exercice du pouvoir discrétionnaire conféré au ministre des Postes par les dispositions de la *Loi sur les postes*, S.R.C. 1970, c. P-14, se limite ou non aux envois qui font l'objet d'un règlement pris en application de la Loi et aux envois que la Loi déclare illégaux.

Avant d'énoncer les faits qui ont donné naissance à la présente action qui tend à obtenir un jugement déclaratoire portant que les défendeurs ont le devoir, d'ordre public, d'accepter, pour être transmis par la poste, tous les envois qui sont conformes à la *Loi sur les postes* et à ses Règlements d'application ainsi qu'à obtenir un autre jugement déclaratoire portant que la défenderesse, la Reine, et ses employés ont le devoir d'accepter, pour être transmis par la poste, l'envoi particulier que le demandeur a présenté aux défendeurs pour expédition par la poste, je crois qu'il convient de citer et de commenter les articles importants de la Loi et des Règlements.

Premièrement, le paragraphe 3(1) de la *Loi sur les postes* prévoit:

3. (1) Est établi un ministère du gouvernement du Canada, appelé ministère des Postes, ayant à sa tête le ministre des Postes.

L'objet de cet article est évident: on crée un ministère des Postes avec un directeur général.

Le prochain article qu'il convient d'examiner est, selon moi, le suivant:

5. (1) Sous réserve de la présente loi, le ministre des Postes doit administrer, surveiller et gérer le poste au Canada et, sans restreindre la généralité de ce qui précède, peut

. . .

p) décider, dans tout cas particulier, ce qu'est une lettre, un objet transmissible ou un objet non transmissible,

S'il y avait seulement ces dispositions de la Loi, sans Règlements d'application, alors le ministre des Postes aurait la liberté absolue de décider ce qui est transmissible et ce qui ne l'est pas.

* J'ai employé en grande partie les notes soumises par l'avocat du demandeur, Me Pink.

1981 CanLII 4581 (FC)

Tab 83

RE UNION CANADIENNE DE L'INDUSTRIE DES PECHES ET DES TRAVAILLEURS, LOCAL 140
(6/81/CA)

New Brunswick Court of Appeal
Hughes, C.J.N.B., Ryan and Stratton, JJ.A.
April 16, 1981.

1981 CanLII 3556 (NB CA)

1981 CanLII 3556 (NB CA)

COUNSEL:
ERIC L. TEED, Q.C., for the applicant;
DAVID NORMAN, Q.C., and RAY DIXON (Third Party Counsel), for the respondent.

This case was heard on February 19, 1981, at Fredericton, N.B., before HUGHES, C.J.N.B., RYAN and STRATTON, JJ.A., of the New Brunswick Court of Appeal.

On April 16, 1981, HUGHES, C.J.N.B., delivered the following judgment for the Court of Appeal:

1 HUGHES, C.J.N.B.: By an order of certification dated June 14, 1974, the appellant (Local 140), was certified by the respondent (the Board), under the *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 (the Act), as the bargaining agent for a unit of employees of La Co-operative de Caraquet Ltee, the third party in this appeal. In June 1980, Local 140 applied to the Board for an order amending the order of certification dated June 14, 1974, to have office staff added to the bargaining unit. The Board held a hearing with respect to the application and by an order dated June 20, 1980, amended the bargaining unit as described in the original order of certification to include office staff, but expected therefrom a manager, an assistant manager, an accountant/secretary and those excluded by the *Industrial Relations Act*.

2 Local 140, being dissatisfied with the exclusion of the accountant/secretary from the bargaining unit, applied to the Board on September 4, 1980, pursuant to s. 131(1) of the Act, to reconsider its decision with the objective of having struck from the exclusions from the bargaining unit the position of accountant/secretary. The application submitted by Local 140 set forth the grounds upon which it relied in support of a reconsideration, requested a hearing of the application by the Board, and undertook to attend a hearing for this purpose.

3 The Board, without holding a hearing, issued its decision on the application, which is dated September 18, 1980, which, after reciting the nature of the application for reconsideration, states:

And WHEREAS the Board having considered the representations made in the said application by the applicant;

Now, therefore, pursuant to section 64(2)(d) of the regulations under the Industrial Relations Act, the Industrial Relations Board does hereby dismiss the application for reconsideration of a decision and does hereby confirm its decision dated June 20, 1980, granting the application of Local 140, Union Canadienne de L'Industrie des Pêches et des Travailleurs Affiliés, to include the classification of "Office Staff" in the bargaining unit. The certification order I.R.B. 1-89, dated the 14th day of June, 1974, would now read ALL PERSONS EMPLOYED BY LA COOPERATIVE DE CARAQUET LIMITEE, CARAQUET, NEW BRUNSWICK, SAVE AND EXCEPT THE MANAGER, ASSISTANT MANAGER, AN ACCOUNTANT/SECRETARY AND THOSE EXCLUDED BY THE INDUSTRIAL RELATIONS ACT.

4 Local 140 then applied to a judge of the Court of Queen's Bench under order 62 of the Rules of Court for an order of certiorari to quash the Board's decision or order dated September 18, 1980, as well as for an order of mandamus to compel the Board to reconsider its application on the following grounds:

1. There was a denial of natural justice in that the Board did not give the applicant an opportunity to present evidence with respect to its application.

2. There was a violation of the Industrial Relations Act section 121(3) which gives a party to an application the right to present evidence.

3. The Board rule 63 is ultra vires of the Board insofar as it purports to confer on the Board the jurisdiction to dismiss an application without giving the parties an opportunity to call evidence.

4. If the Board rules are effective the decision of the Board dismissing the application is a nullity in that it did not set forth reasons for its decision contrary to its own rules.

5 The learned judge of the court of Queen's Bench dismissed the application, [See 33 N.B.R.(2d) 656; 80 A.P.R. 656.] and from that decision Local 140 has appealed to this court against such dismissal on the same grounds as were relied upon in the court of first instance.

1981 CanLII 3556 (NB CA)

6 Section 131(1) of the Act empowers the Board to reconsider its own decisions. It reads as follows:

> 131(1) Nothing in section 128 or 129 shall be deemed to preclude the Board from reconsidering any decision, determination, interim order, order, direction, declaration or ruling made by it and the Board may at any time, *if it considers it advisable to do so, upon application made by any* employee, employer, employers' organization, *trade union*, council of trade unions, or other person, or of its own motion, *reconsider any decision*, determination, interim order, order, direction, declaration or ruling made by it and vary or revoke any such decision, determination, interim order, order, direction, declaration or ruling.

7 The regulations made under the Act include sections dealing with applications or complaints and reconsideration of decisions. These are sections 63 and 64 which read as follows:

> Dismissal without a hearing
>
> 63.(1) Where an application or complaint does not, in the opinion of the Board, make out a prima facie case for the remedy requested, *the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.*
>
> (2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision in form 39.
>
> (3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.
>
> (4) Upon a request for review being filed, the Board may,
>
> (a) direct that the application or complaint be reopened and proceeded with by the Board in accordance with the provisions applicable thereto;
>
> (b) direct the Chief Executive Officer to serve the applicant and any other person who in the opin-

1981 CanLII 3556 (NB CA)

ion of the Board may be affected by the application or complaint with a notice of hearing in form 81 to show cause why the application or complaint should be re-opened; or

(c) confirm its decision dismissing the application or complaint.

Reconsideration of a decision

64.(1) An application made under section 132 [now 131] of the Act other than an application within section 37(4) or section 63 of these rules, shall be made in quadruplicate in form 39.

(2) Upon an application being filed under subsection (1), the Board may

(a) direct the Chief Executive Officer to serve the applicant and any other person who in the opinion of the Board may be affected by the application with a notice of hearing in form 81 to show cause why the matter of the application should be re-opened; or

(b) direct that the matter be proceeded with in the manner and form prescribed in section 34 and 35 so far as the provisions may be applicable thereto; or

(c) direct that the matter be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto; or

(d) confirm its decision dismissing the application.

8 On this appeal, counsel for Local 140 relies almost entirely on s. 121(3) of the Act to support his contention that the Board exceeded or abused its jurisdiction in dismissing the application for reconsideration by Local 140 without giving it an opportunity to present evidence and to make representations to the Board. The subsection reads as follows:

121.(3) The Board shall determine its own procedure but shall in every case, except as otherwise provided in this Act, give full opportunity to all interested

1981 CanLII 3556 (NB CA)

parties to any proceeding to present evidence and to make representations, and the Board may make rules governing its procedure and the exercise of its powers and prescribing such forms as are deemed advisable.

9 It was submitted by counsel for Local 140 that both s. 63 and s. 64 of the rules were applicable where the Board confirmed its decision and dismissed its application and that the Board was required by s. 63 to state in its decision the reasons for dismissing the application, which it did not do.

10 In my opinion s. 63 and s. 64 of the rules deal with different situations and are mutually exclusive. Section 63 has no application to a reconsideration of a decision made by the Board. Section 64, on the other hand, is concerned with the reconsideration of decisions made by the Board under s. 131 of the Act and has no application to jurisdictional disputes under s. 47(4) of the rules or to applications or complaints under s. 63.

11 In the instant case the application by Local 140 was made under s. 64, being an application for the reconsideration of a decision of the Board contained in an order of certification dated June 20, 1980.

12 The question raised on this appeal is whether the Board, in dismissing the application for reconsideration, denied Local 140 natural justice by not affording it a hearing of the application to enable it to adduce evidence and made further submissions.

13 Counsel for Local 140 in effect contends that the Board is required by s. 121(3) of the Act to give full opportunity to all parties to present evidence and make representations to the Board, not only where the Board considers it advisable to reconsider a previous decision, but also before the Board decides whether "it is desirable to do so", and that failure on the part of the Board to give an applicant a full opportunity to present evidence and make representations in both situations deprives the applicant of a legal right given by s. 121(3) of the Act and thereby deprives the applicant of natural justice.

14 In my opinion, the legislature did not intend such a result. Had it done so it would not have included in s. 131(1) of the Act the words *"if it considers it advisable to do so"*. That section empowers the Board to reconsider any decision it

1981 CanLII 3556 (NB CA)

has made "if it considers it advisable to do so, upon application made by any ... trade union, ... or on its own motion, reconsider any decision ... made by it and vary ... any such decision ...".

15 Where the Board receives an application for reconsideration of one of its decisions, it is empowered to deal with it. The Board presumably knows from its records of the previous proceedings why it decided as it did and would first decide from the application whether there were adequate grounds for reconsideration and then decide whether it was advisable to proceed further with the application. It is only "if it considers it advisable to do so" that it would conduct a proceeding which might lead to a variation or a revocation of its decision. If it decides to proceed with the matter, it is required to direct service on "the applicant and any other person who in the opinion of the Board may be affected by the application with a notice of the hearing" as required by s. 64(2)(a) of the rule.

16 Where the Board, having received an application to reconsider a decision does not consider it advisable to do so, it may "confirm its decision dismissing the application", as an alternative to reconsidering it.

17 Counsel for Local 140 submitted that while the language of s. 131(1) of the Act is permissive, it imposes a duty upon the Board to exercise the power of reconsideration when called upon to do so. In support of that submission he cited *Drysdale v. Dominion Coal Co.* (1904), 34 S.C.R. 328; *Julius v. The Lord Bishop of Oxford* (1880), 5 App. Cas. 214; and *Labour Relations Board v. The Queen on rel. of F. W. Woolworth Co. Ltd. et al.*, [1956] S.C.R. 82. In the last mentioned case Locke, J., who delivered the judgment of the court, commented at p. 86:

> The language of s. 5, in so far as it affects this aspect of the matter, reads:-
>
> 5. The Board shall have power to make orders: - ...
>
> (i) rescinding or amending any order or decision of the Board.
>
> While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do sdo by a party interested and having the right to make the application (Drysdale

1981 CanLII 3556 (NB CA)

v. Dominion Coal Company: Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right (Julius v. Lord Bishop of Oxford: Lord Blackburn).

18 In my opinion s. 131(1) does not confer a legal right on anyone to require the Board to reconsider one of its decisions. Rather it confers a power on the Board to do so "if it considers it advisable to do so". Those words would not have been inserted in the section if the legislature intended to confer a legal right to a reconsideration since they are inconsistent with the conferring of such a right.

19 In *R. v. O.L.R.B., Ex. parte Mok Mapney Hotels Ltd.* (1970), 13 D.L.R.(3d) 289 (Ont. C.A.), the Ontario Labour Relations Board had proceeded with a hearing of an application of a trade union and certified it. The Board later entertained, but refused, an application for reconsideration made by objecting employees and by the employer. It was held that a denial of natural justice would have to be brought home to the Board before there could be a successful resort to certiorari, or a case made out that the objecting employees had been misled by another party to that party's advantage. Neither position could be made out. Laskin, J., who delivered the judgment of the Court of Appeal reversing the decision of the trial judge, said at pp. 295, 296:

> This court therefore holds that neither the employer nor the objecting employees can successfully complain of the denial of natural justice in respect of the proceedings which culminated in the certification order of November 25, 1968. Nothing new of any untoward and compelling character occurred thereafter to oblige the Board in reconsidering its decision, as it did on the request of the objecting employees and the employer, to come to the conclusion that it should either revise it or set it aside and rehear the original application for certification. Section 79(1) of the Labour Relations Act, so far as relevant to the point under discussion, declares "the Board may at any time, *if it considers it advisable to do so*, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling". *This provision leaves the widest discretion to the Board on whether it will even agree to reconsider a previous decision;* it says nothing about the duty of the Board to come to a particular conclusion if it does

1981 CanLII 3556 (NB CA)

agree to reconsider.

No complaint is made in the present case of any denial of natural justice in dealing with the application for reconsideration. It does not appear that an oral hearing must be given on such an application, but whether or not it must be given if requested, no such request was made. The Board, as already pointed out, did entertain the applications for reconsideration and dealt with them but without favourable result to the applicants.

If, as is the case on the view taken both by Addy, J., and by this court, no proper objection on certiorari lies to the original certification proceeding, it is difficult to understand how, without any change of facts save that the Board has been made aware of certain matters which were previously unknown to it, the Board is chargeable with a denial of natural justice in refusing to accede to the request that it reopen a decision made in an unimpeachable proceeding. This court cannot review the merits of the Board's decision made upon a reconsideration application. Addy, J., appears to have been of the view that the court may supervise the exercise of the power given to the Board to reconsider previous decisions. If that be so, we do not agree with that view.

In the result, the appeal must be allowed and the order of Addy, J., must be set aside and in its place an order should go dismissing the application for certiorari.

20 The appellant did not produce for the court the record of the proceedings which resulted in the Board's order of certification dated June 20, 1980, nor of the meeting at which the Board dismissed the appellant's application to reconsider. Counsel for the Board, however, in his factum made the following statement which was not disputed on the hearing of this appeal.

13. The appellant's third ground is based again on its allegation that the appellant was not given the right to be heard on the matter in respect of which it applied to have the Board reconsider.

14. In response, it is reiterated that the appellant was at the hearing of June 20, 1980, given the oppor-

1981 CanLII 3556 (NB CA)

tunity to adduce evidence on the matter, and that it took full advantage of this opportunity. It is certainly not accurate or fair for the appellant to say it was not given the opportunity to be heard. In substance, the appellant is really complaining that it did not receive a second opportunity to be heard. There was therefore no failure to apply any principle contained in the *Gill Lumber* case cited by the appellant.

21 The *Nick Mooney Hotels Ltd.* decision (supra), did not actually deal with the issue raised in the instant case since in that case there was no application for a hearing as there was here. Such a request does not, however, in my opinion, preclude the Board from disposing of the application "if it considers it advisable to do so", such being an exception within s. 121(3) of the Act.

22 In my opinion the Board in the instant case acted within its jurisdiction when, after deciding it was not advisable to reconsider its decision, dismissed the application.

23 Since I think no right of the applicant has been violated, I would dismiss the appeal, but as this is a new issue on the interpretation of the Act, I would make no order as to costs.

Appeal dismissed.

1981 CanLII 3556 (NB CA)

TAB 84

T-276-85

Information Commissioner (*Applicant*)

v.

Minister of Employment and Immigration (*Respondent*)

INDEXED AS: INFORMATION COMMISSIONER (CANADA) v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

Trial Division, Jerome A.C.J.—Ottawa, November 27, 1985 and May 2, 1986.

Access to information — Applicant for permanent residence denied access to immigration file and record on ground neither Canadian citizen nor permanent resident — Access to same record requested by applicant for permanent residence's husband, Canadian citizen and sponsor of permanent residence application, with signed consent of wife to release to husband of documents and information about her relating to immigration matters — Only 5 of 200 pages released — Application under Act s. 42(1)(a) for review of refusal — Act s. 19(2) not conferring discretion to refuse disclosure where, as here, all conditions met — Applicable construction rule: enabling words always compulsory where effectuating legal right — Purpose of legislation to confer public right to access to information held by government — Exemptions should be exceptional and restricted to those set out in statute — Application allowed.

Access to Information Act, S.C. 1980-81-82-83, c. 111, Schedule I, ss. 4, 19, 42(1)(a), 48, 49 — Privacy Act, S.C. 1980-81-82-83, c. 111, Schedule II, s. 3.

Immigration — Applicant for permanent residence denied access to immigration file as neither Canadian citizen nor permanent resident — Husband a Canadian citizen — Wife giving signed consent for release of information to husband — Only 5 of 200 pages released — Whether head of government institution having discretion not to disclose personal information — Purpose of legislation considered — Minister ordered to disclose records upon application under Access to Information Act S.C. 1980-81-82-83, c. 111, Schedule I, s. 42(1)(a).

CASES JUDICIALLY CONSIDERED

APPLIED:

Maple Lodge Farms Ltd. v. R., [1981] 1 F.C. 500 (C.A.), affirmed [1982] 2 S.C.R. 2; *Julius v. Oxford (Bishop of)* (1880), 5 App. Cas. 214 (H.L.); *Labour Relations Board v. The Queen ex rel. F.W. Woolworth Company Limited and Agnes Slabick and Saskatchewan*

T-276-85

Commissaire à l'information (*requérant*)

c.

Ministre de l'Emploi et de l'Immigration (*intimé*)

RÉPERTORIÉ: COMMISSAIRE À L'INFORMATION (CANADA) c. CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

Division de première instance, juge en chef adjoint Jerome—Ottawa, 27 novembre 1985 et 2 mai 1986.

Accès à l'information — La requérante qui a présenté une demande de résidence permanente s'est vu refuser l'accès à son dossier et à ses documents d'immigration au motif qu'elle n'était ni citoyenne canadienne ni résidente permanente — Accès au même dossier demandé par son époux, qui est de citoyenneté canadienne et qui a parrainé la demande de résidence permanente, l'épouse ayant signé un document en vertu duquel elle consentait à ce que les documents et renseignements relatifs à ses affaires d'immigration lui soient communiqués — Accès à seulement 5 des 200 pages — Demande de révision du refus fondée sur l'art. 42(1)a) de la Loi — L'art. 19(2) de la Loi ne confère pas le pouvoir discrétionnaire de refuser de communiquer lorsque, comme en l'espèce, toutes les conditions ont été remplies — Règle d'interprétation applicable: les dispositions portant autorisation sont toujours obligatoires lorsqu'elles ont pour objet de reconnaître un droit — La Loi vise à codifier le droit du public d'avoir accès aux renseignements détenus par le gouvernement — Les exemptions qui constituent l'exception doivent être prévues par la loi — Demande accueillie — Loi sur l'accès à l'information, S.C. 1980-81-82-83, chap. 111, annexe I, art. 4, 19, 42(1)a), 48, 49 — Loi sur la protection des renseignements personnels, S.C. 1980-81-82-83, chap. 111, annexe II, art. 3.

Immigration — La requérante qui a présenté une demande de résidence permanente s'est vue refuser l'accès à son dossier d'immigration au motif qu'elle n'était ni citoyenne canadienne ni résidente permanente — Son époux est de citoyenneté canadienne — L'épouse a signé un document en vertu duquel elle consentait à ce que des renseignements soient communiqués à son époux — Accès à seulement 5 des 200 pages — Le responsable d'une institution fédérale a-t-il le pouvoir discrétionnaire de refuser de communiquer des renseignements personnels? — Examen du but de la Loi — Il est ordonné au Ministre de communiquer les documents demandés en vertu de la Loi sur l'accès à l'information, S.C. 1980-81-82-83, chap. 111, annexe I, art. 42(1)a).

JURISPRUDENCE

DÉCISIONS APPLIQUÉES:

Maple Lodge Farms Ltd. c. R., [1981] 1 C.F. 500 (C.A.), confirmé par [1982] 2 R.C.S. 2; *Julius v. Oxford (Bishop of)* (1880), 5 App. Cas. 214 (H.L.); *Labour Relations Board v. The Queen ex rel. F.W. Woolworth Company Limited and Agnes Slabick and Saskatchewan*

1986 CanLII 6836 (FC)

Joint Board, Retail, Wholesale and Department Store Union, [1956] S.C.R. 82; *Matsiin Industries Limited v Minister for Industry, Trade and Commerce*, [1984] 1 F.C. 939 (T.D.).

COUNSEL:

Bruce Mann for applicant.
Barbara A. McIsaac for respondent.

SOLICITORS:

Legal Counsel, Information Commissioner of Canada for applicant.
Deputy Attorney General of Canada for respondent.

The following are the reasons for order rendered in English by

JEROME A.C.J.: This application under paragraph 42(1)(*a*) of the *Access to Information Act* [S.C. 1980-81-82-83, c. 111, Schedule 1] came on for hearing at Ottawa, Ontario, on November 27, 1985. The facts are not in dispute and are contained in a Statement of Agreed Facts dated July 15, 1985, which reads, in part:

1. On May 23, 1984, the Employment and Immigration Commission received a request pursuant to the *Privacy Act* from D.F., a Canadian Citizen, requesting as follows:

"I request full access to and disclosure of the immigration file relating to my sponsorship of my wife's application for permanent residence status in Canada. The Canadian Immigration Commission file number at the Vancouver office for the part of this file held there is 5133-15-6763. The Canadian Consulate General, Immigration Affairs, file number for that part of this file held in Seattle is 6054-B0138-5657. My wife's name is P.F."

2. By letter dated July 13, 1984, the said D.F. was given all personal information relating to him. Personal information relating to P.F. was exempted from disclosure pursuant to section 26 of the *Privacy Act*.

3. On May 23, 1984, the Employment and Immigration Commission received a request pursuant to the *Privacy Act* from P.F. requesting as follows:

"I request full access to and disclosure of the immigration file and record. The Canadian Immigration Commission file number at the Vancouver office for the part of this file held there is 5133-15-6763. The Canadian Consulate General, Immigration Affairs, file number for the part of this file held in Seattle is 6054-B0138-5657. Access is requested to the whole of the records and files at these offices, including all correspondence, memoranda, and all other documentary material relating to myself, my immigration matters, my

Joint Board, Retail, Wholesale and Department Store Union, [1956] R.C.S. 82; *Matsiin Industries Limited c. Ministère de l'Industrie et du Commerce*, [1984] 1 C.F. 939 (1re inst.).

AVOCATS:

Bruce Mann pour le requérant.
Barbara A. McIsaac pour l'intimé.

PROCUREURS:

Avocat, Commissaire à l'information du Canada pour le requérant.
Le sous-procureur général du Canada pour l'intimé.

Ce qui suit est la version française des motifs de l'ordonnance rendus par

LE JUGE EN CHEF ADJOINT JEROME: La présente demande, fondée sur l'alinéa 42(1)*a*) de la *Loi sur l'accès à l'information* [S.C. 1980-81-82-83, chap. 111, annexe 1], a été entendue à Ottawa (Ontario), le 27 novembre 1985. Les faits non contestés sont décrits dans un exposé conjoint des faits en date du 15 juillet 1985 qui indique notamment:

[TRADUCTION] 1. Le 23 mai 1984, la Commission de l'emploi et de l'immigration a reçu de D.F., citoyen canadien, une demande fondée sur la *Loi sur la protection des renseignements personnels* et énonçant ce qui suit:

«Je demande que l'on me communique tout le dossier d'immigration concernant mon parrainage de la demande de résidence permanente au Canada présentée par ma femme. La partie du dossier de la Commission de l'immigration du Canada conservée au bureau de Vancouver porte le numéro 5133-15-6763. La partie du dossier du Consulat général du Canada, Affaires de l'immigration, conservés à Seattle porte le numéro 6054-B0138-5657. Le nom de ma femme est P.F.»

2. Par lettre en date du 13 juillet 1984, on a communiqué audit D.F. tous les renseignements personnels le concernant. En vertu de l'article 26 de la *Loi sur la protection des renseignements personnels*, on a refusé de communiquer les renseignements personnels concernant P.F.

3. Le 23 mai 1984, la Commission de l'emploi et de l'immigration a reçu de P.F. la demande suivante fondée sur la *Loi sur la protection des renseignements personnels*:

«Je demande que l'on me communique tout le dossier d'immigration. La partie du dossier de la Commission de l'immigration du Canada conservés au bureau de Vancouver porte le numéro 5133-15-6763. La partie du dossier du Consulat général du Canada, Affaires de l'immigration, conservée à Seattle porte le numéro 6054-B0138-5657. Je demande qu'on me communique tous les documents et dossiers se trouvant à ces bureaux, y compris la correspondance, les notes de service et tout autre document relatif à moi-même, à mes affaires

1986 CanLII 6836 (FC)

application for permanent residence, and the issues of my marital status in Canada, and whether I have been previously married in the Philippines."

4. By letter dated July 13, 1984, P.F. was denied access to the personal information requested by her on the basis that she was not a Canadian Citizen or Permanent Resident as required by subsection 12(1) of the *Privacy Act*.

5. On May 23, 1984, the Employment and Immigration Commission received a request pursuant to the *Access to Information Act* from D.F. requesting as follows:

"The record of which and to which access is requested is the immigration file relating to my sponsorship of the application for permanent residence by my wife, P.F. The Canadian Immigration Commission file number at the Vancouver office for the part of the record there is 5133-15-6763. The Canadian Consulate General, Immigration Affairs, file number for the part of the record being held by that office in Seattle is 6054-B0138-5657. Access is requested to the whole of the record at these offices, including all correspondence, memoranda, and all other documentary material relating to myself, my sponsorship of my wife's application, the related immigration matters, and the allegation being made by the Canadian Immigration Commission that my marriage to my wife is defective or void in some way due to her alleged previous marriage."

6. By letter dated July 13, 1984, the said D.F. was notified that the information he requested constituted personal information which should be accessed under the *Privacy Act*, and that, since he had submitted a request under the *Privacy Act*, he would receive all personal information to which he was entitled in response to his *Privacy Act* request.

7. On may 23, 1984, the Employment and Immigration Commission received a request pursuant to the *Access to Information Act* from the Complainant, Gerald G. Goldstein. That request is the request referred to in the Affidavit of Douglas W. McGibbon.

8. The said Gerald G. Goldstein is a Barrister and Solicitor practicing in the Province of British Columbia who represents the said P.F.

Together with his request for access, the complainant submitted a document signed by P.F. consenting to the release to the complainant of documents and information relating to her immigration matters. On July 13, 1984 the respondent informed the complainant that the information which he sought could not be obtained under the *Access to Information Act* because it was personal information about another person. A complaint was lodged with the Information Commissioner who, following an investigation, recommended that the information be released. The respondent subsequently provided the complainant with access to documents consisting of 5 pages, but refused to

d'immigration, à ma demande de résidente permanente, à ma situation familiale au Canada, et à la question de savoir si j'ai été auparavant mariée aux Philippines."

4. Par lettre en date du 13 juillet 1984, P.F. s'est vu refuser la communication des renseignements personnels qu'elle avait demandés pour le motif qu'elle n'était ni citoyenne canadienne ni résidente permanente comme l'exige le paragraphe 12(1) de la *Loi sur la protection des renseignements personnels*.

5. Le 23 mai 1984, la Commission de l'emploi et de l'immigration a reçu de D.F. la demande suivante fondée sur la *Loi sur l'accès à l'information*:

"Le document auquel on veut avoir accès est le dossier d'immigration concernant mon parrainage de la demande de résidence permanente présentée par ma femme, P.F. La partie du dossier de la Commission de l'immigration du Canada conservée au bureau de Vancouver porte le numéro 5133-15-6763. La partie du dossier du Consulat général du Canada, Affaires de l'immigration, conservée par ce bureau à Seattle porte le numéro 6054-B0138-5657. Je demande qu'on me communique tout le dossier se trouvant à ces bureaux, y compris la correspondance, les notes de service et tout autre document relatif à moi-même, à mon parrainage de la demande de ma femme, aux questions d'immigration connexes et à l'allégation de la Commission de l'immigration du Canada selon laquelle mon mariage avec ma femme est entaché de nullité en raison de son présumé mariage antérieur."

6. Par lettre en date du 13 juillet 1984, on a informé ledit D.F. que les renseignements qu'il avait demandés constituaient des renseignements personnels qui devraient lui être communiqués en vertu de la *Loi sur la protection des renseignements personnels* et que, puisqu'il avait soumis une demande en vertu de celle-ci, il recevrait tous les renseignements personnels auxquels il avait droit en réponse à sa demande fondée sur ladite Loi.

7. Le 23 mai 1984, la Commission de l'emploi et de l'immigration a reçu du plaignant Gerald G. Goldstein une demande fondée sur la *Loi sur l'accès à l'information*. Cette demande est mentionnée dans l'affidavit de Douglas W. McGibbon.

8. Ledit Gerald G. Goldstein est un avocat qui exerce sa profession en Colombie-Britannique et qui représente ladite P.F.

En même temps que sa demande de communication, le plaignant a soumis un document signé par P.F. aux termes duquel celle-ci consent à ce que les documents et renseignements relatifs à ses affaires d'immigration lui soient communiqués. Le 13 juillet 1984, l'intimé a informé le plaignant qu'il ne pouvait, sur le fondement de la *Loi sur l'accès à l'information*, obtenir les renseignements qu'il avait demandés parce qu'il s'agissait de renseignements personnels concernant une autre personne. Une plainte a été déposée auprès du Commissaire à l'information qui, à l'issue d'une enquête, a recommandé que les renseignements soient communiqués. L'intimé a par la suite permis au plai-

1986 CanLII 6836 (FC)

disclose in excess of 200 pages of documents. The applicant seeks a review of that refusal under paragraph 42(1)(*a*) of the *Access to Information Act*:

> **42.** (1) The Information Commissioner may
>
> (*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;
>
> (*b*) appear before the Court on behalf of any person who has applied for a review under section 41; or
>
> (*c*) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

Section 48 of the *Access to Information Act* places upon the respondent the burden of establishing that she is authorized to refuse to disclose the record requested.

> **48.** In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

Counsel for the respondent argues that such authority exists under section 19 of the Act:

> **19.** (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.
>
> (2) The head of a government institution may disclose any record requested under this Act that contains personal information if
>
> (*a*) the individual to whom it relates consents to the disclosure;
>
> (*b*) the information is publicly available; or
>
> (*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.

It is not disputed that the record in issue contains personal information as defined in section 3 of the *Privacy Act* [S.C. 1980-81-82-83, c. 111, Schedule II] nor that the individual to whom that information relates has consented to its disclosure. Nevertheless, counsel contends that since subsection 19(2) provides that the head of a government institution <u>may</u> disclose personal information, it establishes with equal force a discretion not to disclose even though the conditions of subsection 19(2) have been met.

gnant d'avoir accès à des documents comprenant 5 pages, mais il a refusé de lui communiquer plus de 200 autres pages. Le requérant se fonde sur l'alinéa 42(1)*a*) de la *Loi sur l'accès à l'information* pour exercer un recours en révision de ce refus:

> **42.** (1) Le Commissaire à l'information a qualité pour:
>
> *a*) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;
>
> *b*) comparaître devant la Cour au nom de la personne qui a exercé un recours devant la Cour en vertu de l'article 41;
>
> *c*) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

En vertu de l'article 48 de la *Loi sur l'accès à l'information*, il incombe à l'intimé d'établir le bien-fondé du refus de communication du document demandé:

> **48.** Dans les procédures découlant des recours prévus aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

L'avocate de l'intimé fait valoir qu'une telle autorisation existe en vertu de l'article 19 de la Loi:

> **19.** (1) *Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la Loi sur la protection des renseignements personnels.*
>
> (2) Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où:
>
> *a*) l'individu qu'ils concernent y consent;
>
> *b*) le public y a accès;
>
> *c*) la communication est conforme à l'article 8 de la *Loi sur la protection des renseignements personnels*.

Il n'est pas contesté que le document litigieux contient des renseignements personnels au sens de l'article 3 de la *Loi sur la protection des renseignements personnels* [S.C. 1980-81-82-83, chap. 111, annexe II], ni que l'individu qu'ils concernent a consenti à leur communication. L'avocate de l'intimé soutient toutefois que puisque le paragraphe 19(2) prévoit que le responsable d'une institution fédérale <u>peut</u> donner communication de renseignements personnels, il établit du même coup le pouvoir discrétionnaire de refuser de communiquer lors même que les conditions du paragraphe 19(2) seraient remplies.

1986 CanLII 6836 (FC)

I reject the argument for two reasons: first, as a question of law, it is contrary to principles of statutory interpretation; second, it represents an approach that runs directly against the very purpose for which this legislation was enacted, as stated in the express provisions of the statute and confirmed in jurisprudence.

In terms of statutory interpretation, when legislators intend to create an obligation to do something, they use the word "shall". When they intend instead to establish a discretion or a right to do it, they use the word "may". Had the legislators intended here to repose residual discretion in the head of the government institution not to disclose information, even though the conditions of section 19(2) had been met, that appropriate and precise language would have been used. Of course, the Act does not establish the discretion not to disclose in such circumstances (in which case the respondent's argument might have had merit). The language chosen expresses the intent to establish a discretion to release personal information under certain circumstances. Those conditions having been fulfilled, it becomes tantamount to an obligation upon the head of the government institution to do so, especially where the purpose for which the statute was enacted is, as here, to create a right of access in the public. In support of the argument to the contrary, counsel for the respondent relied upon the decision of the Supreme Court of Canada in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2. However, in the judgment in the Federal Court of Appeal [[1981] 1 F.C. 500], delivered by Le Dain J., and affirmed in the Supreme Court of Canada, the following significant passage appears [at page 508]:

> This is not a case for application of the principle recognized in *Julius v. The Righ Rev. the Lord Bishop of Oxford* (1879-80) 5 App. Cas. 214 and referred to in *The Labour Relations Board of Saskatchewan v. The Queen on the relation of F.W. Woolworth Co. Ltd.*, [1956] S.C.R. 82 at page 87, that permissive words may be construed as creating a duty where they confer a power the exercise of which is necessary to effectuate a right.

It is my view, of course, that the present matter is precisely such a case and I therefore turn to the following passages of the two decisions referred to above. In *Julius v. Oxford (Bishop of)* (1880), 5

Je rejette cet argument pour deux raisons: premièrement, du point du droit, il va à l'encontre des principes d'interprétation des lois; deuxièmement, il contredit le but même pour lequel la législation a été édictée, ainsi qu'il est dit dans les dispositions expresses de la Loi et confirmé dans la jurisprudence.

Pour ce qui est de l'interprétation des lois, lorsque le législateur a l'intention de créer une obligation de faire, il emploie le mot «*shall*» (doit). Par contre, s'il veut établir un pouvoir discrétionnaire ou un droit de faire, il emploie le mot «*may*» (peut). Si le législateur avait voulu en l'espèce investir le responsable d'une institution fédérale du pouvoir discrétionnaire de ne pas donner communication de renseignements, même si les conditions du paragraphe 19(2) ont été remplies, il aurait employé ce langage approprié et explicite. Bien entendu, la Loi n'établit pas le pouvoir discrétionnaire de ne pas communiquer de renseignements dans ces circonstances (auquel cas l'argument de l'intimé pourrait être fondé). Il ressort du langage choisi l'intention d'établir le pouvoir discrétionnaire de donner, dans certains cas, communication de renseignements personnels. C'est dire que, une fois ces conditions remplies, le responsable de l'institution fédérale est tenu de communiquer ces renseignements surtout lorsque le but pour lequel la Loi a été édictée est, comme en l'espèce, de conférer au public le droit d'y avoir accès. A l'appui de l'argument contraire, l'avocate de l'intimé s'est appuyée sur l'arrêt de la Cour suprême du Canada *Maple Lodge Farms Ltd c. Gouvernement du Canada*, [1982] 2 R.C.S. 2. Voici toutefois un passage important qui figure dans l'arrêt de la Cour d'appel fédérale [[1981] 1 C.F. 500, à la page 508] rendu par le juge Le Dain et confirmé par la Cour suprême du Canada:

> La présente affaire ne donne pas lieu à l'application du principe reconnu dans l'affaire *Julius c. The Right Rev. the Lord Bishop of Oxford* (1879-80) 5 App. Cas. 214, et mentionné dans l'affaire *The Labour Relations Board of Saskatchewan c. La Reine ex rel. F.W. Woolworth Co. Ltd.*, [1956] R.C.S. 82, à la page 87, selon lequel des termes accordant une faculté peuvent s'interpréter comme créant un devoir s'ils confèrent un pouvoir dont l'exercice est nécessaire pour donner effet à un droit.

Bien entendu, j'estime que c'est précisément le cas en l'espèce, et j'aborde donc les passages suivants des deux décisions mentionnées ci-dessus. Dans *Julius v. Oxford (Bishop of)* (1880), 5 App. Cas.

1986 CanLII 6836 (FC)

App. Cas. 214 (H.L.), Lord Blackburn states at pages 242-243:

> But there are cases in which the authority or power given is not to do a judicial act, and yet there is a duty on the donee to exercise the power if it appears to be given to the donee for the purpose of making good a right, and he is called upon by those who have that right to exercise the power for their benefit.

And in *Labour Relations Board v. The Queen ex rel. F.W. Woolworth Company Limited and Agnes Slabick and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1956] S.C.R. 82, Locke J. states at page 86:

> The language of s. 5, in so far as it affects this aspect of the matter, reads:
>
> 5. The board shall have power to make orders
>
> .....
>
> (i) rescinding or amending any order or decision of the board.
>
> While this language is permissive in form, it imposes, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application (*Drysdale v. Dominion Coal Company* ((1904) 34 Can. S.C.R. 328 at 336); Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right (*Julius v. Lord Bishop of Oxford* ((1880) 5 A.C. 214 at 243); Lord Blackburn).

Turning then to the purpose of the legislation, it is perhaps appropriate to return once again to the language I used in *Maislin Industries Limited v. Minister for Industry, Trade and Commerce*, [1984] 1 F.C. 939 [at pages 942 and 943]:

> It should be emphasized however, that since the basic principle of these statutes is to codify the right of public access to Government information two things follow: first, that such public access ought not be frustrated by the courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, the burden of persuasion must rest upon the party resisting disclosure whether, as in this case, it is the private corporation or citizen, or in other circumstances, the Government. It is appropriate to quote subsection 2(1):
>
> 2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

That interpretation is reinforced on the specific language of section 4:

214 (H.L.), lord Blackburn s'est prononcé en ces termes aux pages 242 et 243:

> [TRADUCTION] Mais il existe des cas où il ne s'agit pas d'exercer un acte judiciaire en vertu de l'autorité ou du pouvoir conféré, et pourtant la personne désignée est tenue d'exercer ce pouvoir s'il appert qu'elle en est investie dans le but de faire valoir un droit et que les titulaires de ce droit lui demandent de l'exercer dans leur intérêt.

Et dans l'affaire *Labour Relations Board v. The Queen ex rel. F.W. Woolworth Company Limited and Agnes Slabick and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union*, [1956] R.C.S. 82, le juge Locke a déclaré à la page 86:

> [TRADUCTION] La partie de l'art. 5 qui concerne cet aspect de la question est ainsi rédigée:—
>
> 5. La Commission a le pouvoir de rendre des ordonnances
>
> .....
>
> (i) annulant ou modifiant toute ordonnance ou décision du Conseil.
>
> Bien que le texte soit rédigé dans une forme qui comporte autorisation, à mon avis il impose à la commission l'obligation d'exercer ce pouvoir lorsqu'une partie intéressée et ayant le droit de faire la requête le lui en fait la demande (*Drysdale v. Dominion Coal Company* (1904) 34 Can. R.C.S. 328, à la p. 336); le juge Killam). Les dispositions portant autorisation sont toujours obligatoires lorsqu'elles ont pour objet de reconnaître un droit (*Julius c. Lord Bishop of Oxford* ((1880) 5 A.C. 214, à la p. 243); le lord Blackburn).

Pour ce qui est du but de la Loi, il convient peut-être de revenir encore une fois aux propos que j'ai tenus dans l'affaire *Maislin Industries Limited c. Ministre de l'Industrie et du Commerce*, [1984] 1 C.F. 939 [aux pages 942 et 943]:

> Il faut cependant souligner que, puisque le principe de base de ces lois est de codifier le droit du public à l'accès aux documents du gouvernement, deux conséquences en découlent d'abord, les tribunaux ne doivent pas entraver ce droit sauf pour les motifs les plus évidents, de sorte qu'en cas de doute, il faut permettre la communication, deuxièmement, le fardeau de convaincre la cour doit incomber à la partie qui s'oppose à la communication, qu'il s'agisse, comme en l'espèce, d'une société privée ou d'un citoyen ou, dans d'autres cas, du gouvernement. Il convient de citer le paragraphe 2(1):
>
> 2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif.

Cette interprétation se trouve renforcée par la disposition expresse de l'article 4:

1986 CanLII 6836 (FC)

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of the *Immigration Act, 1976*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

To repeat, the purpose of the *Access to Information Act* is to codify the right of access to information held by the government. It is not to codify the government's right of refusal. Access should be the normal course. Exemptions should be exceptional and must be confined to those specifically set out in the statute. In the present case, the applicant was quite properly informed that the information sought could not be obtained except by a Canadian citizen or a resident and could not involve disclosure of personal information about another person without their consent. Once these conditions were met, and they were here, the information should have been disclosed.

The application must therefore succeed. An order will go pursuant to section 49 of the Act ordering the respondent to disclose the records in issue to the complainant, Gerald G. Goldstein. The applicant should have her costs of this application.

4. (1) Sous réserve de la présente loi mais nonobstant toute autre loi du Parlement, ont droit à l'accès aux documents des institutions fédérales et peuvent se les faire communiquer sur demande

a) les citoyens canadiens, ou

b) les résidents permanents au sens de la *Loi sur l'immigration de 1976*.

Je le répète, la *Loi sur l'accès à l'information* vise à codifier le droit d'accès aux renseignements détenus par le gouvernement. Il ne s'agit pas de codifier le droit du gouvernement de refuser cet accès. L'accès devrait être la règle, et les exemptions qui constituent l'exception doivent être expressément prévues par la Loi. En l'espèce, c'est à juste titre qu'on a informé le requérant que les renseignements demandés ne pouvaient être obtenus que par un citoyen canadien ou un résident, et ne pouvaient donner lieu à la communication de renseignements personnels concernant une autre personne sans son consentement. Une fois ces conditions remplies, et c'est le cas en l'espèce, on aurait dû communiquer les renseignements en question.

La demande doit donc être accueillie. Il sera rendu, en vertu de l'article 49 de la Loi, une ordonnance enjoignant à l'intimé de communiquer les documents litigieux au plaignant Gerald G. Goldstein. Le requérant devrait avoir droit à ses dépens de la présente requête.

1986 CanLII 6836 (FC)

Tab 85

CanLII

Valente v. The Queen, 1985 CanLII 25 (SCC), [1985] 2 SCR 673

Source:	Supreme Court of Canada
Date:	1985-12-19
File number:	17583
Other citations:	52 OR (2d) 779 — 24 DLR (4th) 161 — 64 NR 1 — 14 OAC 79 — 23 CCC (3d) 193 — 49 CR (3d) 97 — 15 WCB 326 — 19 CRR 354 — [1985] CarswellOnt 129 — [1985] FCJ No 77 (QL) — [1985] SCJ No 77 (QL) — 37 MVR 9
Citation:	Valente v. The Queen, 1985 CanLII 25 (SCC), [1985] 2 SCR 673, <https://canlii.ca/t/1ftzs>, retrieved on 2026-01-18

Valente *v.* The Queen, [1985] 2 S.C.R. 673

Walter Valente *Appellant*;

and

Her Majesty The Queen *Respondent*;

and

Attorney General of Canada, Attorney General of Quebec, Attorney General for Saskatchewan, Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association *Interveners*.

File No.: 17583.

1984: October 9, 10; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

on appeal from the court of appeal for ontario

Courts -- Charter of Rights -- Independent tribunal -- Provincial Court judge declined jurisdiction on ground Provincial Court (Criminal Division) not an independent tribunal -- Whether or not judge of Provincial Court (Criminal Division) an independent tribunal.

Constitutional law -- Charter of Rights -- Courts -- Independent tribunal -- Jurisdiction declined on ground Provincial Court (Criminal Division) not an independent tribunal -- Whether or not judge of Provincial Court (Criminal Division) an independent tribunal -- Canadian Charter of Rights and Freedoms, s. 11(d) -- Constitution Act, 1982, s. 52(1) -- Provincial Courts Act, R.S.O. 1980, c. 398 -- Public Service Act, R.S.O. 1980, c. 418 -- Public Service Superannuation Act, R.S.O. 1980, c. 419 -- Provincial Courts Amendment Act, 1983, 1983 (Ont.), c. 18, s. 1 -- Provincial Judges and Masters Statute Law Amendment Act, 1983, 1983 (Ont.), c. 78, s. 2(2) -- Courts of Justice Act, 1984, 1984 (Ont.), c. 11.

A judge of the Provincial Court (Criminal Division), sitting on the Crown's appeal against the sentence imposed on the appellant following conviction for careless driving, declined to hear the appeal pending determination by a superior court as to whether the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. Among the several reasons advanced by counsel in support of the contention that the Provincial Court (Criminal Division) was not an independent tribunal were the nature of the

tenure of provincial court judges, particularly those holding office under a post-retirement reappointment, the manner in which their salaries and pensions were fixed and provided for, and the extent to which they were dependent for certain advantages and benefits on the discretion of the executive government. The Ontario Court of Appeal proceeded on the basis that the provincial court judge had in effect decided that as a matter of law the Provincial Court (Criminal Division) as an institution was not independent. It allowed the appeal, holding that both the Provincial Court Judge and the Provincial Court (Criminal Division) were independent, and remitted the matter to the Provincial Court Judge to determine whether the sentence imposed was a fit and proper sentence.

Held: The appeal should be dismissed and the constitutional question answered as follows: A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

The concepts of "independence" and "impartiality" found in s. 11(*d*) of the *Charter*, although obviously related, are separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. "Independence" reflects or embodies the traditional constitutional value of judicial independence and connotes not only a state of mind but also a status or relationship to others--particularly to the executive branch of government--that rests on objective conditions or guarantees. Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.

The test for independence for purposes of s. 11(*d*) of the *Charter* should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. This perception must be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of

judicial independence and not a perception of how it will in fact act regardless of whether it enjoys such conditions or guarantees.

It would not be feasible to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(*d*) of the *Charter*, which may have to be applied to a variety of tribunals. The essential conditions of judicial independence for purposes of s. 11(*d*) must bear some reasonable relationship to the variety of legislative and constitutional provisions in Canada governing matters which bear on the judicial independence of tribunals trying persons charged with an offence. It is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(*d*) of the *Charter* and not any particular legislative or constitutional formula by which it may be provided or guaranteed. Section 11(*d*) cannot be construed and applied so as to accord provincial court judges the same constitutional guarantees of security of tenure and security of salary and pension as superior court judges for that construction would, in effect, amend the judicature provisions of the Constitution. The standard of judicial independence cannot be a standard of uniform provisions but rather must reflect what is common to the various approaches to the essential conditions of judicial independence in Canada.

Security of tenure, because of the importance traditionally attached to it, is the first of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. The essentials of such security are that a judge be removable only for cause, and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

Notwithstanding the importance of tradition as an objective condition tending to ensure the independence in fact of a tribunal, a provincial court judge who held office during pleasure under a

post-retirement reappointment prior to the amendment in 1983 to s. 5(4) of the *Provincial Courts Act* was not an independent tribunal. The reasonable perception was that by providing for two classes of tenure the Legislature had deliberately, in the case of one category of judges, reserved to the Executive the right to terminate the holding of office without the necessity of any particular jurisdiction and without any inhibition or restraint arising from perceived tradition.

The Provincial Court Judge who declined jurisdiction did not hold office under a post-retirement reappointment. The fact that certain judges may have held office during pleasure at that time could not impair or destroy the independence of the Provincial Court (Criminal Division) as a whole. The objection would have to be taken to the status of the particular judge constituting the tribunal.

The second essential condition of judicial independence for purposes of s. 11(*d*) of the *Charter* is financial security--security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to pension and a pension that depends on the grace or favour of the Executive. Although it may be theoretically preferable that judicial salaries should be fixed by the legislature rather than the executive government and should be made a charge on the consolidated revenue fund rather than requiring annual appropriation, neither of these features should be regarded as essential to the financial security that may be reasonably perceived as sufficient for independence under s. 11(*d*) of the *Charter*. The right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge. It is impossible that the legislature would refuse to vote the annual appropriation in order to attempt to exercise some control or influence over a class of judges as a whole. The fact that the provisions respecting the pensions and other benefits of civil servants were made applicable to provincial court judges did not impair the independence of the latter. The provisions established a

right to pension and other benefits which could not be interfered with by the Executive on a discretionary or arbitrary basis.

The third essential condition of judicial independence is the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. Judicial control over such matters as assignment of judges, sittings of the court and court lists has been considered the essential or minimum requirement for institutional independence. Although an increased measure of administrative autonomy or independence for the courts may be desirable it cannot be regarded as essential for purposes of s. 11(*d*) of the *Charter*.

While it may be desirable that discretionary benefits or advantages such as leave of absence with pay and permission to engage in extra-judicial employment, to the extent they should exist at all, should be under the control of the judiciary rather than the Executive, their control by the Executive does not touch one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. It would not, moreover, be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

Cases Cited

MacKay v. The Queen, 1980 CanLII 217 (SCC), [1980] 2 S.C.R. 370, considered; *Re Evans and Milton* (1979), 1979 CanLII 1820 (ON CA), 46 C.C.C. (2d) 129; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, referred to.

Statutes and Regulations Cited

Act of Settlement, 12 & 13 Will. 3, c. 2.

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*f*).

Tab 86

CanLII

Chandrarajah vs. Economical Insurance, 2024 CanLII 10566 (ON LAT)

Source:	Ontario Licence Appeal Tribunal
Date:	2024-02-13
File number:	22-002287/AABS
Citation:	Chandrarajah vs. Economical Insurance, 2024 CanLII 10566 (ON LAT), <https://canlii.ca/t/k2tj3>, retrieved on 2026-01-18

Citation: Chandrarajah vs. Economical Insurance, 2024 ONLAT 22-002287/AABS

Licence Appeal Tribunal File Number: 22-002287/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Dilipkanth Chandrarajah

Applicant

and

Economical Insurance

Respondent

DECISION

ADJUDICATOR: **Ludmilla Jarda**

APPEARANCES:

For the Applicant: Erin Neal, Counsel

For the Respondent: Ryland MacDonald, Counsel

HEARD: **By Written Submissions**

OVERVIEW

[1] Dilipkanth Chandrarajah (the "applicant") was involved in an automobile accident on August 24, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (the "*Schedule*"). The applicant was denied benefits by Economical Insurance (the "respondent").

[2] The applicant passed away on June 3, 2020 due to causes unrelated to the accident.

[3] On February 25, 2022, the applicant's counsel applied to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute. There is no indication on the Application by an Injured Person for Auto Insurance Dispute Resolution under the Insurance Act that the applicant is deceased.

[4] At the start of the case conference held on December 20, 2022, the applicant's counsel informed the respondent and the Tribunal that the applicant is deceased and that the applicant's spouse would be in attendance on behalf of the applicant. Neither the applicant's counsel nor the respondent had any documentation in their possession regarding the applicant's will, estate, or named beneficiary.

[5] The applicant's counsel requested to adjourn the case conference to allow time to gather the necessary documentation. The Tribunal denied the adjournment request as the applicant passed away on June 3, 2020, and the application was submitted on February 25, 2022, which means that the applicant's counsel had had more than nine (9) months to request the documentation from the applicant's family.

[6] The application was subsequently scheduled to proceed to a written hearing on September 8, 2023. Although no estate trustee was appointed to act on behalf of the deceased applicant, the applicant's counsel filed written submissions and evidence as well as reply submissions for the hearing. The respondent filed responding submissions and evidence.

ISSUES

[7] The issues in dispute are:

1. Is the applicant entitled to physiotherapy services proposed by Gibson Wellness Centre, as follows:

    i. $7,041.67, in a treatment plan/OCF-18 ("treatment plan") submitted January 8, 2020 and denied February 26, 2020;

ii. $6,141.80, in a treatment plan submitted January 15, 2020 and denied February 26, 2020; and

iii. $6,702.67, in a treatment plan submitted May 7, 2020 and denied May 26, 2020?

2. Is the respondent liable to pay an award under s. 10 of Regulation 664 because it unreasonably withheld or delayed payments to the applicant?

3. Is the applicant entitled to interest on any overdue payment of benefits?

[8] The respondent also introduced in its written hearing submissions a claim for costs against the applicant.

RESULT

[9] For the reasons that follow, I find that:

1. The application was not properly constituted and is an irremediable nullity.

2. It is unnecessary for me to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award as neither the applicant nor an estate trustee acting on his behalf pursued this claim for accident benefits. To continue the application in the circumstances would be an abuse of process.

3. The respondent is not entitled to costs.

[10] The application is dismissed.

ANALYSIS

Procedural Issue

[11] In its written hearing submissions, the respondent raised a procedural issue. The respondent submits that since the applicant is deceased and that no estate trustee has been appointed, the application is not legally viable as there is no authority on which it can proceed. Further, the respondent argues that, in the circumstances, the application was not properly commenced. As such, the respondent requests that the application be dismissed on the basis that it is vexatious.

[12] The respondent relies on *Kanthasamy Karthigesu v. Wawanesa Mutual Insurance Company*, 2016 ONFSCDRS 269 (CanLII), *Jamil Toma v. State Farm Mutual Automobile Insurance Co.*, 2014 ONFSCDRS 171 (CanLII) [*Toma*], *The Estate of Delia Arnold v. Cumis General Insurance Company*, 2017 ONFSCDRS 336 (CanLII), and *Paata Chechelashvili v. Jevco Insurance Company*, 2016 ONFSCDRS 189 (CanLII).

[13] In response, the applicant's counsel submits that this issue cannot be considered as it was not addressed at the case conference, and that raising this issue at this stage is indicative that the respondent is acting in bad faith. The applicant's counsel further submits that dismissing the application would be highly prejudicial to the deceased applicant and asserts that this is a very sensitive matter for the applicant's surviving spouse. The applicant's counsel also denies that the

application was not properly commenced and submits that it was filed to protect the limitation period.

[14] In the circumstances, I am prepared to consider the procedural issue raised by the respondent. I find that it falls within my discretion to determine whether to consider the procedural issue raised by the respondent. It is well established that the Tribunal has the power to determine its own procedures and practices and may for that purpose make orders with respect to the procedures and practices in a particular proceeding. Further, the Tribunal may make such orders or gives such direction in proceedings before it as it considers proper to prevent abuse of its processes [see: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"), ss. 23(1) and s. 25.0.1].

The application was not properly constituted, and it is an irremediable nullity

[15] I find that the respondent has demonstrated, on a balance of probabilities, that the application was not properly constituted, and that it is an irremediable nullity.

[16] In *Toma*, an application for arbitration was commenced by a deceased insured's counsel. While the insured's widow attended the pre-hearing discussion, it was agreed that the arbitration process could not go forward until an administrator or representative of the insured's estate was appointed. The insured's counsel later advised that the insured's family had not taken any steps to have an estate trustee appointed and that they had no plans to do so. The insurer sought to have the application dismissed.

[17] The arbitrator found that the insured's claims had become vexatious as there was no legally viable way of pursuing them, and he indicated as follows on page 2 of the decision:

> Mr. Toma has been deceased for more than two years. A deceased person cannot pursue accident benefits. A legally appointed representative, either an executor or an estate trustee can "stand in the shoes" of the deceased and pursue a claim for accident benefits. No such person exists in this claim, nor, apparently, are there any plans to appoint a trustee. There is some question in my mind as to whether the dispute resolution process was properly commenced, given the lack of an executor or estate trustee.

[18] Similarly, in *Michael Wentzel v. RBC General Insurance Company*, 2013 ONFSCDRS 33 (CanLII) [*Wentzel*], an application was commenced by the insured's representative after the insured passed away, without an estate trustee having been appointed. The insurer moved to dismiss the application as a nullity because of the insured's death and sought costs against the insured's representative for commencing an unauthorized proceeding. There was no evidence that anyone had undertaken to administer the insured's estate. The arbitrator concluded that the application had not properly been constituted and was an irremediable nullity and dismissed the application. The arbitrator also awarded costs against the insured's representative, which was upheld on appeal.

[19] While I am not bound by decisions rendered by arbitrators of the Financial Services Commission of Ontario, I find the *Toma* and *Wentzel* decisions to be persuasive, and I subscribe to the same opinion.

[20] In the present case, I find that the applicant's counsel commenced the application without the applicant's authority. It is well established that a deceased person has no authority to pursue a claim for accident benefits. Rather, a lawfully authorized representative must be appointed to act on behalf of the deceased person. While it is unclear who, if anyone has been instructing the applicant's counsel with respect to this application, given that the applicant passed away prior to the commencement of this application, in the absence of a lawfully authorized representative such as an estate trustee, there is no legally viable way for pursuing this application.

[21] Although the applicant's counsel argues that she commenced the application to protect the limitation period, no explanation was provided as to why no estate trustee was appointed between June 3, 2020 (date of death) and February 25, 2022 (date of application). Further, there is no evidence that any steps were taken during this 632-day period to appoint an estate trustee to act on behalf of the applicant. Considering that the applicant passed away prior to the commencement of this application, in the absence of an estate trustee, the applicant's counsel has not demonstrated that she was authorized to commence the application.

[22] I further find that the applicant's counsel has failed to demonstrate that any person is authorized to pursue this application and to act on behalf of the deceased applicant. As previously indicated, at the case conference, an issue was raised regarding whether the applicant's spouse was lawfully authorized to act on behalf of the deceased applicant. Despite discussions to that effect, no explanation has been provided regarding the steps taken, if any, to appoint an estate trustee to represent the applicant in this application between December 20, 2022 (date of case conference) and September 8, 2023 (date of written hearing). Further, there is no evidence to support that during this 262-day period that the applicant's spouse, or any person, has been appointed to be an estate trustee and to represent the applicant in this application.

[23] I am also satisfied that the applicant's spouse opted not to pursue appointment as an estate trustee. While I appreciate the applicant's counsel's comment that this application is a very sensitive matter for the applicant's surviving spouse, I cannot ignore the fact that the applicant's spouse had 1192 days, specifically from June 3, 2020 to September 8, 2023, to take steps to seek appointment as an estate trustee. Despite having the opportunity to do so, there is no evidence that she took any steps to pursue the appointment.

[24] Accordingly, I find that the application was not properly constituted and that it is an irremediable nullity.

Disputed Treatment Plans, Interest, and Award

[25] I find that it is unnecessary for me to consider the disputed treatment plans, interest, and an award as the respondent has demonstrated, on a balance of probabilities, that there is no authority on which this application can proceed. I further find that to continue the application would be an abuse of process.

[26] Pursuant to s. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8, an insured person may apply to the Tribunal to resolve a dispute in respect to their entitlement to statutory accident benefits.

[27] Further, in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), the Supreme Court of Canada relied on *Canam Enterprises Inc. v. Coles (2000)*, 2000 CanLII 8514 (ONCA) approved by 2002 SCC 63, and held as follows at paragraph 37:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.

[28] Here, neither the deceased applicant nor an estate trustee caused the application to be commenced, and no person has standing before the Tribunal to move the application forward. While I appreciate that the applicant's counsel filed written hearing submissions and evidence on the applicant's behalf, there is no evidence to support that the applicant's counsel had standing to do so.

[29] Accordingly, it is unnecessary for me to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award. As no estate trustee has been appointed, no person is authorized to pursue the deceased applicant's claim for accident benefits at the Tribunal. To continue the application in the circumstances would be an abuse of process.

Costs

[30] Pursuant to Rule 19.1 of the *Licence Appeal Tribunal Rules, 2023*, costs may be ordered where a party has acted unreasonably, frivolously, vexatiously, or in bad faith.

[31] In its written hearing submissions, the respondent sought costs against the deceased applicant in the amount of $1,000.00. The respondent submits that the application is vexatious and should never had been commenced given that no estate trustee was appointed. The respondent argues that at the very least, the application should have been withdrawn. The respondent indicates that it has incurred legal costs to defend the application against a party that does not have any legal standing or existence.

[32] The applicant's counsel did not respond to the respondent's request for costs in the reply submissions, despite having the opportunity to do so. As such, the applicant's counsel's position is unknown.

[33] It is well established that the test to award costs represents a high bar. I find that the respondent has not demonstrated that the applicant's conduct attracts costs and I note that neither the deceased applicant nor an estate trustee acting on his behalf pursued this application. While I acknowledge that the respondent has been inconvenienced as a result of the applicant's counsel's actions, I have not been directed to any authority to support that the Tribunal has the power to make an order for costs against a legal representative.

[34] Accordingly, I decline to make an order for costs against the deceased applicant.

ORDER

[35] For the reasons outlined above, I find that:

1. The application was not properly constituted and is an irremediable nullity.

2. It is unnecessary for me to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award as neither the applicant nor an estate trustee acting on his behalf pursued this claim for accident benefits. To continue the application in the circumstances would be an abuse of process.

3. The respondent is not entitled to costs.

[36] The application is dismissed.

Released: February 13, 2024

_____

Ludmilla Jarda
Adjudicator

Tab 87

CanLII

Halton (Regional Municipality) v. Rezaizadeh, 2004 CanLII 6236 (ON SC)

Source:	Superior Court of Justice
Date:	2004-08-10
File number:	928/04
Other citation:	[2004] OTC 704
Citation:	Halton (Regional Municipality) v. Rezaizadeh, 2004 CanLII 6236 (ON SC), <https://canlii.ca/t/1hn36>, retrieved on 2026-01-18

COURT FILE NO.: 928/04
DATE: 20040810

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE REGIONAL MUNICIPALITY OF HALTON v. DAVOOD REZAIZADEH, FARGOL REZAIZADEH, FARNOOSH REZAIZADEH, FARNEZ REZAIZADEH and KOBRA FATHI

BEFORE: MURRAY J.

COUNSEL: Carolyn A. Calwell, for the Plaintiff

No one appearing for the Defendants

HEARD: August 4, 2004

AMENDED

REASONS FOR JUDGMENT

and, provided the facts entitle the plaintiff to judgment, judgment can be obtained. But it is to the pleading that one must look for the facts to establish liability.

[18] In the claim, the plaintiff states that Farnoosh was present at "various meetings" where her mother, the defendant Kobra Fathi declared herself to be the sole support parent and where she (Farnoosh) remained silent and failed to correct the misinformation provided to the Region and to the Halton Housing Authority by the mother. The "failure to correct" is stated to be the equivalent of making a false representation to the plaintiff. I disagree. The plaintiff's counsel relied on the case of *Sidhu Estate v. Bains*, 1996 CanLII 3332 (BC CA), [1996] B.C.J. No. 1246 to establish that silence in the face of a false representation can lead to liability for deceit. In the *Sidhu Estate* case, the B.C. Court of Appeal found that all the elements of a successful claim in deceit were proven against the defendant Bains who had remained silent at the time false information had been communicated to induce an executor to invest estate monies in a company in which the defendant had an interest. Bains was a director, shareholder and president of the company. The directors and shareholders intended the company to be listed on the VSE. The defendant attended a meeting with the estate executor where false statements were made particularly with respect to the extent of Bain's investment in the company. Bains remained silent when these false representations, designed to induce investment by the executor, were made. Liability was found.

[19] While I do not dispute that silence in the face of a false representation by another (as in the *Sidhu Estate* case) can lead to liability for deceit, it is not clear in this case that the silence of the daughter, Farnoosh, at meetings when her mother made false representations would be tantamount to misrepresentation by Farnoosh because of a failure to correct. As a practical matter, her situation as a child (albeit an adult child) is very different from a person who as shareholder, director and president of a corporation stays silent in the face of false

representations designed to induce investment by an investor. I am not prepared to find that the silence of the defendant Farnoosh Rezaizadeh is sufficient to amount to false or negligent misrepresentation. There would have to be facts asserted (other than the relationship of mother and daughter) that would establish that the plaintiff could reasonably construe silence as a misrepresentation. Secondly, the times and dates of the meetings at which Farnoosh attended and remained silent are not pleaded. If the meetings happened after the plaintiff had set the level of income and rent subsidy, how can there be detrimental reliance? An essential component of the tort of deceit is that the false representation occurs before the reliance. The pleading does not establish that the dates of Farnoosh's failure to correct preceded the decision to grant relief.

[20] I have concluded that the statement of claim does not entitle the plaintiff to judgment against the defendant Farnoosh Rezaizadeh.

[21] With respect to the defendant Farnez Rezaizadeh, although the plaintiff alleges in the statement of claim that Farnez was present at various meetings where Kobra Fathi describes herself as the sole support parent, silence by Farnez is not enough to make her liable for deceit for the reasons stated above re Farnoosh. Secondly, the times and dates of the meetings at which Farnez attended and remained silent are not pleaded. If the meetings happened after the plaintiff had set the level of income and rent subsidy, there can be no detrimental reliance. The pleading does not establish that the dates of Farnez's failure to correct preceded the decision to grant rent and income subsidy.

[22] I have concluded that the statement of claim does not entitle the plaintiff to judgment against the defendant Farnez Rezaizadeh.

[23] With respect to the defendant Fargol, in the statement of claim, the plaintiff alleges her presence at meetings where she was silent during her mother's

Tab 88

CanLII

TD General Insurance Company v Julian Bennett, 2024 CanLII 895 (ON LAT)

Source:	Ontario Licence Appeal Tribunal
Date:	2024-01-11
File number:	22-001767/AABS
Citation:	TD General Insurance Company v Julian Bennett, 2024 CanLII 895 (ON LAT), <https://canlii.ca/t/k26d1>, retrieved on 2026-01-18

Citation: TD General Insurance Company v Julian Bennett, 2024 ONLAT 22-001767/AABS

Licence Appeal Tribunal File Number: 22-001767/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

TD General Insurance Company

Applicant

and

Julien Bennett

Respondent

DECISION

ADJUDICATOR: **Mary Henein Thorn**

APPEARANCES:

For the Applicant:	TD General Insurance Company, Applicant Peggy Moore, ADR Claims Specialist Harkamal Hehar, Counsel

the insured person, or any other person, or as a result of wilful misrepresentation or fraud.

[4] The insurer must give notice within 12 months after the payment is made otherwise the person ceases to be liable. The 12-month requirement does not apply if the benefit was paid as a result of wilful misrepresentation or fraud.

[5] The Tribunal has adopted the Black's Law Dictionary definition of "misrepresentation" as "any manifestation of words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts." The Tribunal has held that remaining silent or failing to report can constitute wilful misrepresentation. I agree with this interpretation and apply it here.

[6] The onus is on the applicant to establish that the respondent obtained an IRB by wilful misrepresentation or fraud. I find it has failed to meet its onus.

[7] It submits that the respondent received IRB payments from July 6, 2018 to May 19, 2019, but returned to work in September 2018 and did not notify the applicant of his return to work. The applicant submits it only discovered that the respondent had returned to work when he attended for an IE Assessment in August 2019 and reported same to the assessor.

[8] On August 20, 2019, the applicant advised the respondent that he was not entitled to IRB's based on the conclusions from the multidisciplinary reports that stated the respondent did not suffer a substantial inability to perform the essential task of this pre-accident employment. The applicant submits it sent five notices for repayment from August 20, 2019 to December 7, 2020, but it is unclear whether they were sent to the respondent's previous address, the respondent's prior counsel or where they were directed to.

[9] The applicant testified it acknowledges that the respondent sent his former counsel his first paystub, dated September 22, 2018, on September 27, 2018. However, it asserts that the paystub and work information were not forwarded to the applicant by the respondent's counsel. Therefore, by continuing to accept IRB payments and by not directly sending the applicant the respondent's paystub, this inaction constitutes misrepresentation by way of silence or a failure to report.

[10] The respondent argues that at the time of the accident he hired a lawyer to represent him with his case. Once he started working on DATE, he immediately notified his lawyer and submitted his first paystub to his counsel to be sent over to the applicant in order to stop IRB payments.

[11] As payments continued to be direct deposited into his bank account after he returned to work, the respondent testified that he contacted his lawyer regarding the payments and was told, "…it was fine and not to worry about it." He further testified that he also called Kristy Lynne, the adjuster on file from TD General Insurance Company ("TD") to see why he was continuing to receive payments and was told that, "I could not speak directly to them, as we signed a contract with Diamond and Diamond". The respondent testified that he was told Kristy Lynne the is only authorized to speak to the respondent's counsel from Diamond and Diamond directly.

Tab 89

CanLII

Mundulai v. Law Society of Ontario, 2018 ONSC 6965 (CanLII)

Source:	Divisional Court
Date:	2018-11-22
File number:	117/18
Citation:	Mundulai v. Law Society of Ontario, 2018 ONSC 6965 (CanLII), <https://canlii.ca/t/hw6gh>, retrieved on 2026-01-18

CITATION: Mundulai v. Law Society of Ontario, 2018 ONSC 6965
DIVISIONAL COURT FILE NO.: 117/18
DATE: 20181122

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

LOCOCO, TRIMBLE, and MYERS JJ.

BETWEEN:	)	
	)	
ALIAMISSE MUNDULAI	)	Aliamisse Mundulai, acting in person
	)	
	)	
Applicant	)	
	)	
– **and** –	)	
	)	
LAW SOCIETY OF ONTARIO	)	*Leslie Maunder*, for the Respondent
	)	
	)	
Respondent	)	
	)	
	)	**HEARD at Toronto:** November 20, 2018

TRIMBLE, J.

despite his or her prior misconduct, he or she now meets the good character requirement. The applicable law concerning the process was discussed before the Tribunal below.

[34] Mr. Mundulai simply does not accept this approach. He insisted upon acting on his own view of the applicable law and procedure despite very clear efforts by the Society and the Tribunal to bring home to Mr. Mundulai the impact of the steps that he proposed. The Society fulfilled its duty to consider Mr. Mundulai's application. The hearing of Mr. Mundulai's motion to quash the Notice of Referral ended in a consent to dismissal of his licence application, the consequences of which were brought home to Mr. Mundulai in clear and plain language. Until Mr. Mundulai applies again, there is no duty on the Society to conduct a further hearing into Mr. Mundulai's application. It had been dismissed.

[35] For the reasons above, Mr. Mundulai's Application for judicial review and an order in the nature of *mandamus* is dismissed.

LOCOCO J.

[36] I have endorsed the Appeal Book as follows: "For the reasons given in writing today by Trimble J., the Application for judicial review and an order in the nature of *mandamus* is dismissed. The applicant shall pay costs of $5,000 inclusive of disbursements and taxes to the respondent."

_____
TRIMBLE J.

I agree

_____
LOCOCO J.

I agree

_____
MYERS J.

Date of Release: November 22, 2018

CITATION: Mundulai v. Law Society of Ontario, 2018 ONSC 6965
DIVISIONAL COURT FILE NO.: 117/18
DATE: 20181122

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LOCOCO, TRIMBLE, and MYERS JJ.

BETWEEN:

ALIAMISSE MUNDULAI

Applicant

– and –

LAW SOCIETY OF ONTARIO

Respondent

REASONS FOR JUDGMENT

TRIMBLE J.

Date of Release: November 22, 2018

Tab 90

Tab 91

CanLII

D'Errico v. Canada (Attorney General), 2014 FCA 95 (CanLII)

Source:	Federal Court of Appeal
Date:	2014-04-10
File number:	A-47-13
Other citations:	459 NR 167 — 239 ACWS (3d) 532 — [2014] CarswellNat 2661 — [2014] FCJ No 370 (QL)
Citation:	D'Errico v. Canada (Attorney General), 2014 FCA 95 (CanLII), <https://canlii.ca/t/g6hpg>, retrieved on 2026-01-18

Date: 20140410

Docket:
A-47-13

Citation: 2014 FCA 95

CORAM: **BLAIS C.J.**
SHARLOW J.A.
STRATAS J.A.

BETWEEN:

BIANCA TERESA D'ERRICO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

the Board's reasons do not allow this Court to understand why the Board made the decision it did on the basis of the medical evidence before it.

[12] In support of her submission that the reasons of the Board showed adequate justification, counsel for the Attorney General cited *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708. In that case, a labour arbitrator simply offered a conclusion with little, if any, analysis on the basis of a limited record.

[13] In my view, in these circumstances *Newfoundland Nurses* is distinguishable. It is one thing for an administrative decision-maker to issue sparse reasons to sophisticated parties who regularly engage in labour arbitration and, thus, are familiar with the legal and factual landscape. It is quite another to issue adverse reasons of this sort to a person like Ms. D'Errico, on a record that calls for explanation.

F. Remedy

[14] Ms. D'Errico asks this Court to quash the Board's decision and grant her disability benefits. In effect, this is the remedy of *certiorari* and *mandamus*.

[15] Normally, in situations such as these, the Court grants *certiorari* and remits the matter to the Board for reconsideration. It is for the Board to decide the merits of cases, not this Court.

[16] Normally, this Court awards *mandamus* only where the outcome of the case on the merits is a foregone conclusion – in other words the evidence can lead only to one result. However, there are exceptions in the authorities: *LeBon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55 and the so-called "directed verdict" cases referred to; see also *Wihksne v. Canada (Attorney General)*, 2002 FCA 356, *Canada (Attorney General) v. Richard*, 2008 FCA 69 and *Canada (Minister of Human Resources Development) v. Tait*, 2006 FCA 380

where this Court has issued directions on particular issues in conjunction with a remittal for re-decision. One recognized exception is where there has been substantial delay and the additional delay caused by remitting the matter to the administrative decision-maker for re-decision threatens to bring the administration of justice into disrepute: *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516; *Norgard v. Anmore (Village)*, 2009 BCSC 823 at paragraph 46; *LeBon*, *supra* at paragraph 14. In such circumstances, the Court exceptionally may direct that a certain result be reached.

[17] The word "exceptionally" recognizes that administrative tribunals should be allowed another chance to decide the merits of the matter and not have the reviewing court do it for them. But in certain cases, the circumstances support resort to the latter option.

[18] Here, the threshold of exceptionality is met. The delay is substantial – despite the fact that this is an administrative regime intended to provide rapid determinations, Ms. D'Errico applied for benefits some six years ago. If we remit this matter for re-decision and if a party then applies for judicial review, a further two years could pass, bringing the total to eight years. As we shall see, the record shows the prejudice that would be caused by further delay and there is sparse evidence in support of the outcome reached by the Board. Finally, Ms. D'Errico is not guilty of any unreasonable delay.

[19] In my view, the nature of the benefits within this regulatory scheme also factors into our discretion. These are benefits meant to address a very serious condition, one that prevents the earning of meaningful income to sustain oneself. Parliament could not have intended the final disposition of disability benefits in these circumstances to take eight years.

[20] Overall, as a majority of the Supreme Court recognized in a different context, "remitting the issue to the tribunal may undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers' Association*, *supra* at paragraph 55.

Tab 92

CanLII

Apotex Inc. v. Canada (Attorney General) (C.A.), 1993 CanLII 3004 (FCA), [1994] 1 FC 742

Source:	Federal Court of Appeal
Date:	1993-10-22
File number:	A-457-93
Other citations:	162 NR 177 — 69 FTR 152 — 44 ACWS (3d) 349 — AZ-94112069 — 18 Admin LR (2d) 122 — 51 CPR (3d) 339 — [1993] CarswellNat 820 — [1993] FCJ No 1098 (QL)
Citation:	Apotex Inc. v. Canada (Attorney General) (C.A.), 1993 CanLII 3004 (FCA), [1994] 1 FC 742, <https://canlii.ca/t/4nmr>, retrieved on 2026-01-18
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

[1994] 1 F.C. 742

A-457-93

Merck & Co., Inc. and **Merck Frosst Canada Inc.** (*Appellants*) (*Respondents*)

v.

Apotex Inc. (*Respondent*) (*Applicant*)

and

Attorney General of Canada and **The Minister of National Health and Welfare** (*Respondents*) (*Respondents*)

Indexed as: Apotex Inc. v. Canada (Attorney General) (C.A.)

Court of Appeal, Mahoney, Robertson and McDonald JJ.A.—Ottawa, August 31, September 1 and October 22, 1993.

Food and drugs — Appeal and cross-appeal from Trial Division decision granting mandamus and denying prohibition with respect to generic drug notice of compliance (NOC) — Under Food and Drugs Act, "new drugs" must meet health and safety requirements — NOC granted if drug found effective, safe — Scientific safety and efficacy conditions met — Apotex having vested right to NOC despite Minister's failure to render decision pending enactment of Patent Act Amendment Act, 1992 (Bill C-91) — Narrow scope of ministerial discretion — Pending legislative policy irrelevant consideration.

Patents — Bill C-91 enacted to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs — Patented Medicines Regulations prohibiting issuance of NOCs in respect of patent-linked drugs — NOCs, patent rights linked, not mutually dependent — Mandamus not intended to facilitate patent infringement — Regulations not procedural per se — Generic drug manufacturer's vested right to NOC not divested by Bill C-91, Regulations, ss. 5(1),(2).

Judicial review — Prerogative writs — Mandamus — Generic drug manufacturer seeking mandamus to compel Minister to issue notice of compliance — Case law on requirements for mandamus — Available where duty to act not owing at time application filed — Delay for seeking legal advice not bar to mandamus — Court having discretion to invoke balance of convenience test as ground for refusing mandamus — Criteria for exercise of discretion — No legal basis to deny mandamus herein on ground of balance of convenience.

Federal Court jurisdiction — Appeal Division — Jurisdiction under Federal Court Act, s. 18 not ousted by paramountcy provision in Bill C-91 (Patent Act Amendment Act, 1992) — Patent Act, s. 55.2(5) not privative clause insulating Minister, legislation from judicial review.

These were an appeal and a cross-appeal from a decision by Dubé J. allowing an application for *mandamus* to issue a notice of compliance (NOC) with respect to Apotex's generic version of the drug enalapril and denying the appellants' application for prohibition. The *Patent Act Amendment Act, 1992* (Bill C-91), which was given Royal Assent on February 4, 1993, was enacted in order to protect innovator pharmaceutical companies' distribution and sales rights to patented drugs. Bill C-91 came into force on February 15, 1993 with the exception of the new section 55.2 of the *Patent Act* which, together with the *Patented Medicines Regulations*, were not brought into effect until March 12, 1993. Under the *Food and Drugs Act* (FDA), the Minister of National Health and Welfare must ensure that new drugs meet health and safety requirements. The manufacturer of a new drug must file a New Drug Submission (NDS) setting out the drug's qualities, ingredients and methods of manufacture and purification. The respondent, Apotex, after filing a NDS in respect of its generic drug Apo-Enalapril, sought an order of *mandamus* to compel the Minister to issue a notice of compliance with respect to that drug. Apotex's NDS was incomplete when it filed its *mandamus* application; nevertheless, by February 3, 1993, the new drug met all of the scientific safety and efficacy conditions required for a NOC to issue.

Although the NDS had cleared the scientific and regulatory review process, the Department's ADM and DM decided to seek legal advice regarding the authority of the Minister or his ADM to issue the NOC in view of the impending passage of Bill C-91. The appellant, Merck, also forwarded a number of legal opinions to the Minister and then sought prohibition to prevent the Minister from issuing the notice of compliance. The Trial Judge ruled that the Minister did not possess the broad discretion to justify his refusal to issue the NOC and that the delay in issuing it was not warranted. He also rejected the argument that to issue *mandamus* when a new regulatory regime was pending would "frustrate the will of Parliament". This appeal raised a number of issues, namely: 1) the principles governing *mandamus* and the question of prematurity; 2) whether Apotex had a vested right to a NOC by March 12, 1993; 3) the balance of convenience; 4) whether Apotex's vested right to a NOC was divested by Bill C-91 and the *Patented Medicines Regulations* and 5) the jurisdiction of the Court. By cross-appeal, the Minister argued that the Trial Judge erred in finding the delay in issuing the NOC to be unwarranted.

Held, the appeal and cross-appeal should be dismissed.

1) Several principal requirements must be satisfied before *mandamus* will issue. First, there must be a public legal duty to act owed to the applicant. Generally, *mandamus* cannot issue with respect to a duty owed to the Crown. The Minister had a duty to act which was owed to Apotex. Merck's submission, that the Minister owed no duty to Apotex at the time it commenced its judicial review application on December 22, 1992 or on the hearing date, was partly correct. An order of *mandamus* will not lie to compel an officer to act in a specified manner if he is under no obligation to act as of the hearing date, but that rule was not valid if applied as of the date that the application for *mandamus* was filed. While it is open to a respondent to pursue dismissal of an application where the duty to perform has yet to arise, in the absence of compelling reasons, an application for *mandamus* should not be defeated on the ground that it was initiated prematurely. Provided that the conditions precedent to the exercise of the duty have been satisfied at the time of the hearing, the application should be assessed on its merits.

2) If a decision-maker has an unfettered discretion which he has not exercised as of the date a new law takes effect, the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision. A "vested right" must be distinguished from a "mere hope or expectation". The scope of a decision-maker's discretion is directly contingent upon the characterization of various considerations as "relevant or irrelevant" to its exercise. The *Food and Drug Regulations* restrict the factors to be considered by the Minister in the proper exercise of his discretion to those concerning a drug's safety and efficacy. They neither expressly nor implicitly contemplate the broad scope of ministerial discretion advocated by Merck. It cannot be said that the time needed to enable a decision-maker to seek and obtain legal advice in any decision-making process is of itself a basis for denying *mandamus*. That self-imposed obligation cannot of itself deprive Apotex of its right to *mandamus*. In the absence of intervening legislation, the "legal advice" issue would not have arisen. The legal advice sought herein had no bearing on the exercise of the Minister's narrowly circumscribed discretion. Moreover, to deny *mandamus* because of legal concerns generated by a party adverse in interest (Merck)

would be to judicially condone what might be regarded as a tactical manoeuvre intended to obfuscate and delay the decision-making process. Pending legislative policy was not a consideration relevant to the exercise of the Minister's discretion. It could not be said that, in the exercise of his statutory power under the *Food and Drug Regulations*, the Minister was entitled to have regard to the provisions of Bill C-91 after enactment but prior to proclamation. Apotex had a vested right to the NOC notwithstanding the Minister's failure to render a decision by March 12, 1993.

3) The case law on *mandamus* reveals a number of techniques resorted to by courts in balancing competing interests. Any inclination to engage in a balancing of interests must be measured strictly against the rule of law. Having regard to the relevant jurisprudence, it had to be concluded that this Court possesses discretion to refuse *mandamus* on the ground of balance of convenience. The cases demonstrate three factual patterns in which the balance of convenience test has been implicitly acknowledged. First, there are those cases where the administrative cost or chaos that would result from granting such relief is obvious and unacceptable. The second ground for denying *mandamus* appears to arise in instances where potential public health and safety risks are perceived to outweigh an individual's right to pursue personal or economic interests. In this case, there was no issue with respect to administrative chaos or public health and safety. The third line of authority attempts to establish a principle by which it can be determined whether a property owner has acquired a vested right to a building permit pending approval of a by-law amendment. That principle is of no relevance to this case nor to the issue of the Court's discretion to refuse *mandamus* on the ground of balance of convenience. There was no legal basis upon which the "balance of convenience" test could be applied to deny Apotex the relief sought.

4) The *Patented Medicines Regulations* prohibit the issuance of NOCs in respect of "patent-linked" drugs. Subsections 5(1) and (2) thereof refer to NDSs filed before March 12, 1993. While NOCs and patent rights are linked, they have never been mutually dependent. Practically speaking, Merck is seeking an interlocutory injunction against Apotex with respect to possible patent infringement without having to satisfy the conditions precedent imposed at law to the granting of such relief. An order in the nature of *mandamus* cannot be viewed as an instrument which "facilitates" patent infringement. The *Patented Medicines Regulations* are not procedural regulations *per se*. The imposition of a criterion that a NOC cannot issue with respect to a patent-linked NDS is clearly a substantive change in the law and hence subject to the rules of statutory construction applicable to legislation purporting to affect vested rights. Subsections 5(1) and (2) do not manifestly seek to divest persons of acquired rights; they are at best ambiguous. While Parliament has the authority to pass retroactive legislation, thereby divesting persons of an acquired right, vested rights could not be divested by the *Patented Medicines Regulations* unless the enabling legislation, that is the *Patent Act* or Bill C-91, implicitly or explicitly authorize such encroachments. Bill C-91 contains no provision specifically authorizing regulations to interfere with existing or vested rights except as to compulsory licences granted after December 20, 1991.

5) The jurisdiction of this Court was not "ousted" by the paramountcy provision in Bill C-91. Subsection 55.2(5) of the *Patent Act* could not be said to be paramount to

section 18 of the *Federal Court Act* and could not be construed as a privative clause insulating the Minister and the relevant legislation from judicial review.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Clean Water Act, R.S.A. 1980, c. C-13, s. 3.

Criminal Code, R.S.C. 1970, c. C-34.

Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.

Federal Court Act, R.S.C., 1985, c. F-7, s. 18 (as am. by S.C. 1990, c. 8, s. 4).

Food and Drug Regulations, C.R.C., c. 870, ss. C.08.002 (as am. by SOR/85-143, s. 1), C.08.004 (as am. *idem*, s. 3, SOR/88-257, s. 1).

Food and Drugs Act, R.S.C., 1985, c. F-27.

Interpretation Act, R.S.C. 1952, c. 158.

Interpretation Act, S.C. 1967-68, c. 7, ss. 36(*c*), 37(*c*).

Interpretation Act, R.S.C., 1985, c. I-21, s. 44(*c*).

Orders and Regulations respecting Patents of Invention made under *The War Measures Act, 1914*, (1914), 48 *The Canada Gazette* 1107.

Patent Act, S.C. 1923, c. 23, s. 17.

Patent Act, R.S.C. 1952, c. 203, s. 41(3) (as am. by S.C. 1968-69, c. 49, s. 1).

Patent Act, R.S.C., 1985, c. P-4, ss. 39(4),(14), 55.2 (as enacted by S.C. 1993, c. 2, s. 4).

Patent Act Amendment Act, 1992, S.C. 1993, c. 2, ss. 3, 4, 12(1).

Patented Medicines (Notice of Compliance) Regulations, SOR/93-133, ss. 5, 6, 7(1).

War Measures Act, 1914 (The), S.C. 1914 (2nd Sess.), c. 2.

CASES JUDICIALLY CONSIDERED

APPLIED:

Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, *Intervenant* (1971), 1982 CanLII 19 (SCC), 65 C.P.R. 1 (Ex. Ct.); appeal to S.C.C. dismissed [1972] S.C.R. vi; *Director of Public Works v. Ho Po Sang*, [1961] A.C. 901 (P.C.); *A.G. for British Columbia et al. v. Parklane Private Hospital Ltd.*, 1974 CanLII 158 (SCC), [1975] 2 S.C.R. 47; (1974), 47 D.L.R. (3d) 57; [1974] 6 W.W.R. 72; 2 N.R. 305.

DISTINGUISHED:

Ottawa, City of v. Boyd Builders Ltd., 1965 CanLII 1 (SCC), [1965] S.C.R. 408; (1965), 50 D.L.R. (2d) 704; *Engineers' and Managers' Association v. Advisory,*

TAB 93

CanLII

Bidal v Ontario (Natural Resources), 2015 ONSC 506 (CanLII)

Source:	Superior Court of Justice
Date:	2015-04-07
File number:	CV-14-512454
Citation:	Bidal v Ontario (Natural Resources), 2015 ONSC 506 (CanLII), <https://canlii.ca/t/gh5qm>, retrieved on 2026-01-18

CITATION: Bidal v. Ontario (Natural Resources), 2015 ONSC 506
COURT FILE NO: CV-14-512454
DATE: 20150407

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)

Michael Bidal, Robert Bidal, Gilles Bigras, Marc Bigras, Martin Bigras, Serge Bigras, Guy Brazeau, Rheal Bureau, Natasha Cormier, Mona Denomme, Leonide Ducharme, Claude Dupuis, Clifford Landry, Edmond Landry, Ghyslaine Landry, Kenneth Landry, Luc Landry, Andrew Larabie, Gerald Larabie, Jean Larabie, John G. Larabie, Roland Larabie, Renee Latreille, Jean-Guy Levesque, Alain Plante, Daniel Plante, Francois Plante, Jean-Luc Plante, Rodrique Plante, Eugene Serre, Gerard Serre	)	*Michael Swinwood,* for the Applicants
- and -		
Merv Sarazin, Dan Lynden Sarazin, Thomas Kohoko, Bruce Menes, Joseph Chartrand, Robert Lavalley, Vincent Lavallee, Shawn Johnson		
- and -		
Gaetan Gauthier, Ruth Gauthier, Sharon Gauthier, Denis Lefebvre, Wilmer Noganosh, Sharon Noganosh Applicants		*Brian Wilkie,* for the Respondent
- and -		
Ministry of Natural Resources Respondent		
	)	**HEARD**: December 5, 2014

Application Under S. 140 of the *Provincial Offences Act*

WHITAKER J.

Nature of the Proceeding

[1] The applicants are the subject of prosecutions for provincial regulatory offences. In response they assert aboriginal title over lands in which the offences were committed.

[2] The applicants seek a writ of *prohibition* to stay the proceedings in the inferior courts, and directing that the constitutional question be litigated with the representative action styled as *Amikwabi et al. v. Attorney General of Canada, Ontario et al.*

[3] The applicants seek an order in the nature of *mandamus* directing the consultation and accommodation be carried out between the Crown and the applicants.

Background

[4] The applicants are all charged with various hunting and fishing offences arising from activity in various parts of the province.

[5] The applicants known as the Sarazin applicants, those being Daniel Sarazin, Thomas Kohoko, Bruce Meness, Joseph Chartrand, Robert Lavalley, Vincent Lavallee and Shawn Johnson, were all charged in Pembroke, Ontario on various dates from 2001 to 2011. The Bidal applicants, of which there were 31, were charged in North Bay, Sudbury and Sturgeon Falls between 2005 and 2011.

[6] The Gauthier applicants were charged in Sudbury in May 2013.

[7] The Gauthier trial was scheduled to begin on September 18, 2014; however, the hearing date was adjourned at the request of the applicants on September 3, 2014, with the service of constitutional question. The Gauthier applicants asserted that they would be bringing an application for a writ of *prohibition* in the Superior Court.

[8] The Supreme Court of Canada issued a decision in *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44, [2014] 2 S.C.R. 257 ("*Tsilhqot'in*"), on June 26, 2014. On September 19, 2014, counsel for the applicants served a notice of application dated September 13, 2014, returnable on December 5, 2014. The notice of application indicated that the applicants were bringing a representative action asserting Algonquin aboriginal title based on *Tsilhqot'in*. On the basis of this title claim, the applicants seek an interim order staying the Sarazin, Bidal and Gauthier prosecutions in order that an application dealing with all of these matters is brought to the Superior Court. The applicants also seek an order mandating that the province consult with them and accommodate their concerns about their claim for title.

Courts Jurisdiction

[9] The writ of *prohibition* and the *mandamus* order are prerogative remedies within the jurisdiction of the Superior Court. The applicants seek these remedies for the purpose of compelling the Ontario Court of Justice to refrain from attempting to exercise jurisdiction. The writ of *prohibition* is to compel courts generally entrusted with judicial duties, to keep within the limits of their jurisdiction. See *Clifford and O'Sullivan* (1921), 2 A.C. 570 (U.K. H.O.L.), and *McDonald (Re)* (1957), 1957 CanLII 374 (ON SC), 11 D.L.R. (2d) 655.

[10] A writ of *prohibition* is an extreme measure, a remedy that is sparingly applied: *R. v. Hamlink (Re)* (1910), 1912 CanLII 705 (ON SC), 26 O.L.R. 381, and *Canada Metal Co. Ltd. v. The Queen* (1976), 1975 CanLII 531 (ON CA), 8 O.R. 2d 773.

[11] A writ of *mandamus* is a command issued by the Superior Court directing the fulfillment of some statutory or other public duty to which the applicant has a strict legal right. See: *Apotex Inc. v. Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 F.C. 742 ("*Apotex*").

[12] The applicants bring their application pursuant to s. 140(1) of the *Provincial Offences Act*, R.S.O. 1990, Ch. P.33, which states:

> 140(1) On application, the Superior Court of Justice may by order grant any relief in respect of matters arising under this Act, that the applicant would be entitled to in an application for an order in the nature of *mandamus*, *prohibition* or *certiorari*.

Positions of the Parties

[13] The applicants argue that the Superior Court exercises exclusive jurisdiction over the provision of declaratory relief and, for this reason, has the authority to declare indigenous title.

Inferior courts have no inherent or statutory jurisdiction to declare indigenous title. The applicants rely on *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, for this proposition. They submit that judicial economy would not be served if they must mount the same constitutional challenge in each separate case. For this submission, the applicants rely on the comment of Perell J. at para. 105 in *Kelly v. Canada (Attorney General)*, 2013 ONSC 1220, [2013] 3 C.N.L.R. 333:

> Claims to constitutional aboriginal rights may be adjudicated in the context of a defence to prosecutions for regulatory offences: [citations omitted], but the preferable way to adjudicate claims to aboriginal rights is in civil proceedings where all the proper and necessary parties are before the court.

[14] The respondent Crown argues that the Ontario Court of Justice does have the jurisdiction to consider and determine aboriginal rights issues and, for this reason, a writ of *prohibition* is unwarranted. As noted earlier, *prohibition* and *mandamus* are discretionary remedies which should be awarded in extraordinary circumstances where an inferior court has exceeded its jurisdiction or breached procedural fairness: *London (City) v. Young*, 64 Admin. L.R. (4th) 149, paras. 14 and 41. This is not the case here.

[15] The Ontario Court of Justice has not, at this point, declined jurisdiction at the request of the applicants. For this reason, there is no basis upon which this Court should exercise its discretion to issue *prohibition* and *mandamus*.

[16] In *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075 ("*Sparrow*"), the Supreme Court set out an analysis for the consideration of aboriginal rights in the context of regulatory prosecutions.

[17] Under *Sparrow*, unless the Crown is able to prove the elements of an offence, the onus then falls on the defendants to prove that they were exercising their community's aboriginal or treaty rights, and that the legislation under which they were charged infringes that right.

[18] In this case, the onus switches back to the Crown to justify the infringement - which is a relevant factor at this stage.

[19] In *Paul v. British Columbia,* 2003 SCC 55, [2003] 2 S.C.R. 585, Bastarache J. held at para. 36 that s. 35 "is not, any more than the *Charter*, 'some holy grail which only judicial initiates of the superior courts may touch.'"

[20] Generally speaking, constitutional arguments are better served when seen to be properly considered during a trial, rather than an application. The Superior Court has on a number of occasions refused to determine applications for extraordinary remedies and has instead returned the matters to the Provincial Court for adjudication, for purposes of building a record. In *R v. Sarazin*, 2010 ONCA 439 ("*Sarazin*"), the Sarazin defendants in this case appealed a decision refusing their application for a *prohibition* order staying the prosecutions against them at the Ontario Court of Justice on similar grounds. The Court of Appeal held at para. 4:

> It is well established in Canadian law that where an accused person raises constitutional issues, claims of aboriginal right; inter-jurisdictional immunity or rule of law issues by way of defence to a charge, the proper place to advance those defences is in the court having jurisdiction to entertain the charges. If there is any merit to grounds 1 to 4, they are matters properly raised by way of defence to the charges against the appellants in the court having jurisdiction to entertain those charges, namely, the Ontario Court of Justice. If the appellants are dissatisfied with the result in the Ontario Court of Justice, they have recourse to any statutory rights of appeal afforded from conviction.

[21] The Crown opposes the applicants' claim for title and points out that the applicants are not members of a single aboriginal community, but are instead individuals of diverse origins. For this reason, even if the applicants succeeded in their title claim, the provincial laws still apply to them subject to the *Sparrow* justification analysis. In the applicants' submission, the *Apotex* requirements for an order in the nature of *mandamus* are fulfilled here. The Crown is under a public legal duty to consult in good faith with any aboriginal groups asserting title to the land about the proposed uses of the land. In the present case, the applicants have asserted indigenous title where the hunt took place, and have styled themselves as a hunting party.

[22] Prior to the establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any aboriginal groups asserting title to the land. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out. See *Tsilhqot'in* and *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650.

[23] As noted earlier, the applicants for a *mandamus* order must establish that they have demanded very specifically the things sought - and that their demands have been refused.

[24] With respect to the issue of the *mandamus* order, *the applicants come from diverse backgrounds* which is inconsistent with the assertion of aboriginal title. There has been no demand made to the Ontario Court of Justice. There has been no refusal of any command that might have been made.

[25] The Crown takes the position that this application is malicious and vexatious, is the latest in a series of applications which have led to delays, and the applicants have planned to bring an Algonquin title claim since 2004. The abandoned 2012 class action asserted both a title claim and a breach of the Crown's duty to consult. In *Sarazin*, the Ontario Court of Appeal told counsel for the applicants that the Ontario Court of Justice is the proper forum in which to determine the applicants' aboriginal rights and that *prohibition* is not available in this case. Notwithstanding this direction, the applicants have brought this application.

[26] In conclusion, the prerogative writs that are being sought by the applicants in this matter are extraordinary remedies and should only be granted in exceptional circumstances. With respect to the first issue, whether the regulatory offences should be stayed pending resolution on the aboriginal claim for title, the Ontario Court of Appeal in *R. v. Cook*, 2010 ONSC 675, [2010] 2 C.N.L.R. 251, and other authorities, have made it very clear that the appropriate place to bring these applications is the Ontario Court of Justice. Secondly, with respect to the request for a writ of *mandamus*, there has been no request made of the Ontario Court of Justice to deal with these matters that has been refused by that court. This means that any duty to consult has not yet been engaged and, for that reason, the request fails.

[27] The applications are dismissed.

[28] The parties may make submissions as to costs on no more than two sheets of paper within 14 days of the date of this decision.

WHITAKER J.

DATE: April 7, 2015

COURT FILE NO: CV-14-512454
DATE: 20150407

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

BIDAL ET AL

- and -

MINISTRY OF NATURAL RESOURCES

REASONS FOR DECISION

WHITAKER J.

Released: April 7, 2015

Tab 94

1957 CanLII 374 (ON SC)

RE McDONALD AND THE COURT OF GENERAL SESSIONS OF THE PEACE FOR THE COUNTY OF YORK

Ontario High Court, Ferguson J. May 31, 1957.

Malcolm Robb, Q.C., for applicant.

Walter M. Martin, Q.C., for His Honour the County Court Judge.

FERGUSON J.:—This is a motion to prohibit His Honour Judge Ian Macdonell or any other Judge of the County Court of the County of York from proceeding further with the trial of the accused upon an indictment, charging the accused with the possession of drugs, until at least 10 days following the delivery to him or his counsel of the notes of evidence of the trial of the accused on a charge of conspiracy which, in part at least, involved the same circumstances out of which the charge of possession arises.

The prisoner, Edwin McDonald, was acquitted on the indictment for conspiracy on April 17th. The trial on the indictment for possession came on before Macdonell Co.Ct.J. in the Court of General Sessions of the Peace on May 8th. Counsel for the prisoner requested an adjournment until after he obtained a transcript of evidence taken on the conspiracy trial. This was refused, His Honour directing the trial to proceed on the afternoon of the same day. Before the afternoon sittings His Honour was served with the notice of motion for prohibition. When Court opened counsel for the prisoner did not appear. The Judge then proceeded to characterize the prohibition proceeding in language which, presumably, he thought it deserved.

In *Re Holmes & Rex* (1912), 21 Can. C.C. 11, 9 D.L.R. 284, 27 O.L.R. 492, it was held that it was improper for an inferior Court to proceed further knowing that a motion to prohibit it had been launched. The judgment in that case was brought to His Honour's attention whereupon the trial was adjourned and the accused remanded in custody.

That a County Court Judge may be prohibited by order of the superior Court whenever he exceeds jurisdiction when sitting in the County Court or Division Court or Court of General Sessions of the Peace is too plain to need authority. There are innumerable cases of prohibition of County Court Judges. An example of the prohibition of a County Court Judge is to be found in *Petrie Mfg. Co. v. Wright* (1920), 57 D.L.R. 562, 49 O.L.R. 481, and an example of the prohibition of a Judge of the Court of General Sessions in *Belgo-Canadian Pulp & Paper*

1957 CanLII 374 (ON SC)

Co. v. Court of Sessions of the Peace of Three Rivers (1919), 33 Can. C.C. 310, 54 D.L.R. 597, *per* Lemieux C.J. at p. 318 Can. C.C., p. 604 D.L.R.

Prohibition is not only the means whereby a superior Court prevents inferior Courts that is Courts of limited jurisdiction, from exercising or attempting to assert a jurisdiction which they do not possess, but it is also the means whereby a superior Court prevents such Courts from proceeding in a manner so vicious as to violate some fundamental principle of justice: *Gross v. Allan* (1806), 26 U.C.Q.B. 123 at p. 126; *Mayor of London v. Cox* (1867), L.R. 2 H.L. 239 at p. 276. In 1 Hale, 3rd ed., p. 69, the principle is stated. "An order of prohibition may be granted to restrain, and an order of certiorari may be granted to bring up and quash the decision of, a person or body exercising judicial or quasi-judicial functions if he or it fails in its duty to act in good faith, and to listen fairly to both sides, and to give fair opportunity to the parties in the controversy adequately to present their case and to correct or contradict any relevant statement prejudicial to their view."

Having regard to the fact that the Crown, having failed on its first attempt to convict the accused, has decided to proceed with a substantive charge which was pending against the accused when the charge of conspiracy was tried and that the substantive charge arises out of the same circumstances and it involves very serious consequences for the accused if he is convicted; and having regard to the fact that Crown counsel seems to have thought that there was some merit in the request for an adjournment and did not press for the case to proceed, and had himself thought it necessary to procure substantial extracts from the evidence from the conspiracy trial, the proposition urged by defence counsel that his client was being deprived of the right to make full answer and defence was not beyond the range of controversy. The applicant does not contend that the County Court Judge did not have jurisdiction to enter upon the trial. He urges, however, that the Judge proceeded in a manner which violated the prisoner's fundamental right to make full answer and defence and therefore seeks to invoke the second branch of the principle I have mentioned. He argues with great force that the refusal of the adjournment amounted to a denial of natural justice — a refusal to make full answer and defence and cites the judgment of Gale J. in *Re Ontario Labour Relations Bd., Re Toronto Newspaper Guild, Local 87 & American Newspaper Guild (C.I.O.) & Globe Printing Co.*, 100 Can. C.C. 301, [1951], 3 D.L.R. 162, O.R. 135; [affd] [1952], 2 D.L.R. 302

1957 CanLII 374 (ON SC)

O.R. 345, 102 Can. C.C. 318; affd [1953], 3 D.L.R. 561, 2 S.C.R. 18, 106 Can. C.C. 225]. That was an application for an order of *certiorari* involving the Labour Relations Board and the question was whether the Board had disregarded the essentials of justice. Cole J. said (p. 310 Can. C.C., p. 170 D.L.R.): "That a person who has been deprived of what is vaguely described as 'natural justice' is entitled to relief by way of *certiorari* is established in authorities too numerous to mention."

In that case Cole J. quashed the certificate of the Labour Relations Board on *certiorari* because of its refusal to permit cross-examination of a Union official on a statement made by him.

In *R. v. Forgell* (1907), 12 Can. C.C. 324, 15 O.L.R. 300, a motion for *habeas corpus* with *certiorari* in aid, Anglin J., when he was a Judge of this Court, expressed in emphatic language his disapproval of a Magistrate's conduct in forcing an accused on without giving him an opportunity to prepare his defence. The Magistrate in that case exercised his authority arbitrarily and unfairly by going on with the case the day after the charge was laid. Anglin J. held the accused was entitled to an adjournment, in those circumstances as of right — not upon terms, unconditionally. He said (at p. 332 Can. C.C., p. 307 O.L.R.): "To refuse to grant such adjournment was in fact and deed to deny him that opportunity to make full answer and defence' which the Code says he shall have. The distinction between pressing on proceedings so that the defendant has no reasonable opportunity to make his defence and refusing to hear a defence which he offers to make is more apparent than real."

In *R. v. Hains*, 114 Can. C.C. 244, [1956] O.W.N. 170, Spence J. on *certiorari* quashed a conviction on the ground that a County Court Judge had deprived himself of jurisdiction by reason of bias and what obviously was a refusal to grant a fair opportunity to defend.

In considering the position of the County Court Judge when the case, which was admittedly within his jurisdiction at the outset, came before him, one must start with fundamentals. The first of these laid down in varying language in many cases, is cogently stated in the dissenting judgment of Osler J.A. in *St. Louis Point Co. v. Anderson* (1891), 18 O.A.R. 401 at p. 409: The Judge of an inferior Court (who has jurisdiction) may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other Judge". In the same case he

1957 CanLII 374 (ON SC)

pointed out that a question of fact is not reviewable on a motion for prohibition, except perhaps on very strong grounds. Although this was said in a dissenting judgment, the soundness of this excerpt has never been doubted.

If an inferior Court has jurisdiction, prohibition will not be granted for irregularities in practice: *R. v. Hendink* (1912), 19 Can. C.C. 403 at p. 512, 5 D.L.R. 733 at p. 747, 26 O.L.R. 351 at p. 399; and where the Judge of an inferior Court is given a discretion, he will not be restrained by prohibition from exercising his discretion: *Green v. Elliot* (1860), 26 E.C.Q.B. 123.

The argument of counsel for the accused is that the refusal of the adjournment amounted to a denial of natural justice, a denial of the statutory right to make full answer and defence, that what was done goes beyond a mere matter of irregularity of practice, but, in any case, His Honour has not exercised his discretion judicially.

On a motion for prohibition the applicant must make it clearly to appear that the inferior Court has lost jurisdiction. It has been said that prohibition will not be granted unless it is made clearly to appear that the inferior Court, in no view of the facts, has jurisdiction: *Re English v. Mulholland* (1882), 9 P.R. (Ont.) 146 at p. 148, and where the superior Court is in doubt prohibition may be refused: *R. v. Hendink*, 19 Can. C.C. at p. 514, 5 D.L.R. at pp. 748-9, 26 O.L.R. at p. 401.

I am by no means sure that Judge Macdonell was denying the accused opportunity to make full answer and defence. I should have thought that all His Honour was doing was saying: "You can make your full answer and defence now without prejudice to your case." His Honour made it clear that he was not convinced that counsel could derive any benefit from the transcript of the evidence in the conspiracy case which was not then available to the accused beyond that obtainable from sources then available to him. That was a matter for His Honour to decide in his discretion. In deciding on an application for adjournment a Judge is not deciding a point of law on which his jurisdiction depends, but deciding a point of fact and exercising his discretion accordingly. To show error in his conclusion is to retry the case. Where jurisdiction depends on a question of fact it has been held not to be competent for a superior Court Judge to interfere on a motion for prohibition: *Re Jenkins v. Miller* (1883), 10 P.R. (Ont.) 95.

As I have pointed out, in *Long Point v. Anderson*, Osler J.A. suggested that the superior Court might interfere with the find-

1957 CanLII 374 (ON SC)

ing of fact "on very strong grounds", and it seems to me that Anglin J. proceeded on that basis to quash the Magistrate's decision in *R. v. Parrell*, and Spence J. did the same thing in *R. v. Heins*. I cannot agree that strong grounds exist in this case.

I must, therefore, dismiss this motion.

Firstly, the question of whether there should be an adjournment was within the jurisdiction of the County Court Judge to decide. It was a question of fact whether the accused's case would be prejudiced if the case then proceeded.

Secondly, the ruling made was discretionary.

Thirdly, I am not satisfied that the trial Judge deprived himself of jurisdiction or that the accused was deprived of the opportunity to make full answer and defence.

The motion will be dismissed with costs, if demanded.

Motion dismissed.

1957 CanLII 374 (ON SC)

Tab 95

CanLII

Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York), 2020 ONSC 469 (CanLII)

Source:	Divisional Court
Date:	2020-01-23
File number:	257/19
Other citation:	443 DLR (4th) 458
Citation:	Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York), 2020 ONSC 469 (CanLII), <https://canlii.ca/t/j4vgz>, retrieved on 2026-01-18

CITATION: Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York), 2020 ONSC 469
DIVISIONAL COURT FILE NO.: 257/19
DATE: 20200123

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
M.G.J. Quigley, Conway and Favreau JJ.

B E T W E E N :	
SUNRISE NORTH SENIOR LIVING LTD. (C.O.B. SUNRISE OF RICHMOND HILL) Applicant	*Robyn Grant* for the Applicant
– and –	
THE SHERIFF OF THE REGIONAL MUNICIPALITY OF YORK, ENFORCEMENT OFFICE OF THE SUPERIOR COURT OF JUSTICE (NEWMARKET) AND ROHAN SALMON	*Robert B. Lawson* and *Chantelle Blom* for the Respondent The Sheriff of the Regional Municipality of York *Melissa Miller* for the Respondent Rohan Salmon

Respondents))))) **HEARD:** July 2, 2019 and January 14, 2020

BY THE COURT:

Introduction

[1] The applicant, Sunrise North Senior Living Ltd ("Sunrise"), seeks an order in the nature of *mandamus* compelling the Sheriff of the Regional Municipality of York (the "Sheriff") to comply with an order requiring the eviction of the respondent Rohan Salmon from a unit in a retirement home operated by Sunrise.

[2] In November 2017, the Landlord and Tenant Board (the "Board") made an eviction order that was to take effect on May 31, 2018. To date, Mr. Salmon has not moved out and the Sheriff has refused to enforce the eviction order because of health and safety concerns.

[3] For the reasons below, we grant an order in the nature of *mandamus* requiring the Sheriff to deliver vacant possession to Sunrise of the unit occupied by Mr. Salmon. However, given the unique circumstances of this case, the Sheriff is given until March 31, 2020 to comply with the order.

Background facts and procedural history

The parties

[4] Sunrise operates a retirement home located in Richmond Hill. Retirement homes in Ontario are governed by the *Retirement Homes Act*, 2010, S.O. 2010, c. 11.

[5] Mr. Salmon is 50 years old. Mr. Salmon has been living at the Sunrise retirement home for over 15 years. He was seriously injured in a car accident over 16 years ago. There is some dispute in the evidence over whether he is paraplegic or quadriplegic, but there is no dispute that the accident has left him with significant physical impairments. Mr. Salmon is also morbidly obese. He requires extensive care and assistance in his daily life, including a lift for his transfers, personal support workers for his personal care and hygiene needs, and assistance with all household tasks. There is no issue about Mr. Salmon's capacity to make decisions about his own care; he is capable and has no difficulties communicating verbally and in writing.

[6] As detailed below, the Sheriff is responsible for enforcing eviction orders made under the *Residential Tenancies Act, 2006,* S.O. 2006, c. 17. As explained in the Sheriff's evidence on this application, in Ontario the Sheriff is no longer a specific person. Instead, duties assigned to the "Sheriff" in various statutes are performed by authorized Enforcement Officers within Court Enforcement Offices of the Ministry of the Attorney General.

Proceedings before the Landlord and Tenant Board

[7] In July 2017, Sunrise applied to the Board to terminate Mr. Salmon's tenancy due to the non-payment of rent. According to Sunrise, up to that point Mr. Salmon had a long history of not paying his rent and Sunrise made the application to the Board as a "last resort" after years of attempting to negotiate a resolution.

[8] Mr. Salmon was represented by counsel throughout the Board proceedings and these proceedings.

[9] Before the matter went to a hearing before the Board, Mr. Salmon and Sunrise reached a settlement. On November 3, 2017, the Board issued a consent order reflecting the terms of the

settlement, which were as follows:

a. The tenancy between Sunrise and Mr. Salmon was terminated;

b. Mr. Salmon was to move out of his unit by May 31, 2018;

c. Sunrise would not seek payment of Mr. Salmon's unpaid arrears, which at that point exceeded $18,000;

d. Mr. Salmon was to pay a daily rate of $202.96 for the remainder of the tenancy on the 15th of every month. If Mr. Salmon failed to make these payments, Sunrise could move without notice to the Board for an earlier eviction;

e. The Sheriff was to give vacant possession of the unit to Sunrise on or after June 1, 2018;

f. If the unit was not vacated on or before May 31, 2018, starting on June 1, 2018, Sunrise could file the Board's order with the Sheriff for enforcement; and

g. Sunrise was to undertake good faith efforts to assist Mr. Salmon in identifying adequate alternative housing.

[10] It appears that Mr. Salmon did not initially pay the daily rate agreed to under the Board's consent order. In December 2017, Sunrise applied to the Board for relief. On March 7, 2018, the Board issued an order in which it found that Mr. Salmon did not meet his payment obligations and required him to move out on April 23, 2018.

[11] Mr. Salmon and Sunrise then reached an agreement to reinstate the consent order that required Mr. Salmon to move out of his unit by May 31, 2018. The Board issued an order on April 23, 2018, that reflects this agreement.

[12] Mr. Salmon never appealed the Board's eviction order.

[13] Mr. Salmon did not move out of his unit at Sunrise on May 31, 2018, as required under the eviction order.

Sunrise's efforts to enforce the eviction order and the Sheriff's response

[14] Given that Mr. Salmon did not move out of the unit, on June 11, 2018, Sunrise filed the Board's eviction order with the Newmarket Court Enforcement Office for enforcement by the Sheriff. As part of the process, Sunrise was required to provide information about any special circumstances relevant to the eviction. Sunrise advised the Court Enforcement Office about Mr. Salmon's health circumstances, including that he is a paraplegic with severe obesity, that he requires a mechanical lift to be transferred from his bed, and that he requires the ongoing care of service providers.

[15] Following Sunrise's filing of the eviction order with the Court Enforcement Office, Enforcement Officers took a number of steps to assess how they would conduct the eviction. They attended Mr. Salmon's unit to serve him with the eviction order. At that time, Mr. Salmon advised that he would not willingly leave his unit and that he had no place to go. Enforcement Officers also met with the York Regional Police who advised that their role "would be limited to keeping the peace, and that they would not forcibly remove or apprehend Mr. Salmon … if he refused to leave". Based on these consultations with the police and its own internal assessment, the Court Enforcement Office concluded that "there was no safe place for Mr. Salmon to be moved in light of his underlying physical challenges and associated daily care needs".

[16] In the circumstances, the Court Enforcement Office requested that Sunrise apply to the Superior Court of Justice to obtain directions on how to carry out the eviction pursuant to Rule 60.17 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Justice Bale's decisions

[17] Sunrise brought an application for directions to the Superior Court in Newmarket on September 21, 2018. The application was before Bale J. The Sheriff and Mr. Salmon were respondents on the application.

[18] On September 21, 2018, the application judge made an order based on the consent of the parties that included the following terms:

a. The Sheriff "is authorized to take such steps as are reasonably required to evict" Mr. Salmon "and provide vacant possession" of the unit to Sunrise on November 30, 2018.

b. The parties could re-apply to the application judge if they required further directions on four days notice.

c. The March of Dimes, Centre for Independent Living and A Place for Mom were to provide information to Mr. Salmon's lawyer about when Mr. Salmon placed his name on their waiting lists and when he could reasonably expect to be accommodated. This information was then to be provided to Sunrise and the Sheriff.

d. The Local Health Integration Network (the "LHIN") was to provide Mr. Salmon with "information relating to the options available for patients with the needs of Mr. Salmon", and that information was to be shared with Sunrise and the Sheriff.

[19] In his brief endorsement, the application judge also stated that "it is the expectation of the court that Mr. Salmon, through counsel, will pursue alternate accommodations, over and above that available through the organizations" listed in the order.

[20] Despite this order, Mr. Salmon did not identify a place where he was to be moved to and the Sheriff did not enforce the eviction order by November 30, 2018.

[21] On January 8, 2019, Bale J. issued a further endorsement in this matter based on the written submissions of the parties. In his decision, he found that he did not have jurisdiction to make the order sought by Sunrise because Rule 60.17 of the *Rules of Civil Procedure* does not contemplate a freestanding application for directions but, rather, a “motion” for directions in the proceeding in which the order was originally made. He also held that a motion for directions was not the appropriate procedure for Sunrise to seek the enforcement of the eviction order.

[22] Despite finding that he did not have jurisdiction over this matter, the motion judge made findings in relation to the efforts made by Mr. Salmon to comply with the September 21, 2018 order to find alternative housing:

> [11] In response to my request for further submissions, Ms. Miller, on behalf of Mr. Salmon, advised that she had been informed by each facility to which he has applied that they are unable to provide information with respect to his place on their list. They have no way of knowing when a place will become available, and when one does, they have to interview the next person on the list to determine whether the placement is appropriate. Ms. Miller also advised that she had spoken with the Central LHIN manager and had been told that they could not provide any information as to what facilities may be available and appropriate for Mr. Salmon, because he has not applied for long-term care. The reason that he has not applied is

that he believes long-term care facilities to be inappropriate for him, given his relative youth, and mental acuity. She reports that Mr. Salmon is frustrated and depressed at his inability to find an appropriate placement.

[23] The motion judge went on to describe the Sheriff's responsibilities:

> [20] The law applying in this case is clear. Sunrise is entitled to possession of the rental unit, and has been so entitled since June 1, 2018. Pursuant to s. 141(1) of the *Courts of Justice Act* and s. 85 of the *Residential Tenancies Act, 2006*, the sheriff is required to enforce the eviction order, in the same manner as a writ of possession, and has been required to do so since the order was filed with her on June 11, 2018.
>
> [21] With absolutely no disrespect to Mr. Salmon, and while I have sympathy for the position in which he finds himself, having no right to remain at Sunrise and nowhere to go (he says), he is, in effect, a homeless paraplegic. I am confident that in Ontario in 2018 (and now 2019) there is some place, or places, to which the sheriff may safely take such a person, upon carrying out an eviction order. It is, in my view, the public duty of the sheriff to determine what that place or places are, and to carry out the eviction.

[24] Finally, the motion judge held that an application to enforce the eviction order should be brought to the Divisional Court by way of an application for judicial review:

> [22] Sunrise has not asked the court to order the sheriff to fulfill her public duty by enforcing the eviction order, and in any event, my view is that such an order is not available on a motion for directions under rule 60.17. If the sheriff continues to delay in enforcing the order, Sunrise's remedy would be an application to the Divisional Court for judicial review, pursuant to s. 2 of the *Judicial Review Procedure Act*. However, it is my expectation that the sheriff will now proceed to enforce the eviction order, without requiring the applicant to engage in further, and unnecessary, litigation.

Justice Charney's decision

[25] Following Bale J.'s January 8, 2019 decision, the Court Enforcement Office took additional steps to find a suitable place to which Mr. Salmon could be taken upon his eviction. They contacted a number of organizations and shelters in the York Region and the Greater Toronto Area, and concluded that there was nowhere they could take him because Mr. Salmon's consent would be needed for admission or because the places they had contacted were not able to accommodate Mr. Salmon's medical needs.

[26] The Court Enforcement Office also contacted the LHIN, which informed them that it could facilitate Mr. Salmon's admission to a long-term care home, even on a temporary or urgent basis, but that Mr. Salmon's consent would be required for admission. In addition, the Enforcement Office identified a number of retirement homes that had vacancies and that could accommodate Mr. Salmon. Again, admission to a retirement home would require Mr. Salmon's consent.

[27] The Enforcement Office shared the information it obtained about the availability of long-term care homes and retirement homes with Mr. Salmon. In response, his counsel advised that Mr. Salmon would never consent to placement in a long-term care home and that the retirement homes identified were "not appropriate".

[28] On March 12, 2019, the Enforcement Office ultimately advised Sunrise that they would not carry out the eviction unless Mr. Salmon consented to be moved to alternative accommodations. The Sheriff also raised an issue about the eviction order expiring on the one-year anniversary of its being filed with the Court, which was June 11, 2018.

[29] Sunrise then brought an urgent application for judicial review before a single judge in Newmarket. The application was heard by Charney J. on April 26, 2019.

[30] In a decision released on April 29, 2019, Charney J. granted a one-year extension of the eviction order, starting from the date of his decision. The extension was without prejudice to Sunrise's ability at a later date to argue that the order does not expire. Having renewed the eviction order, the application judge went on to find that the matter was no longer urgent, and that it should be heard by a full panel of the Divisional Court. The matter was transferred to Toronto so that it could be heard more expeditiously.

Adjournment of July 2, 2019 hearing

[31] The application for judicial review came before this panel on July 2, 2019.

[32] At the beginning of the hearing, the panel heard initial submissions from Ms. Miller, counsel for Mr. Salmon, and from Sunrise. However, rather than continuing with the full hearing of the application, the panel then encouraged the parties to try to resolve the matter. The parties were then able to reach agreement on a process that was meant to lead Mr. Salmon to identify and move to suitable alternative accommodations, failing which the matter was to come back for a hearing before the panel at a later date. The agreement of the parties was reflected in an order of this Court, which included the following terms:

a. By July 16, 2019, Mr. Salmon was to provide consent to Sunrise and the Sheriff disclosing his personal health information for purposes of inquiring into potential new accommodations on his behalf.

b. By July 16, 2019, Mr. Salmon was to provide Sunrise and the Sheriff with copies of his applications to The March of Dimes, Centre for Independent Living and A Place for Mom.

c. By July 16, 2019, Mr. Salmon was to serve Sunrise and the Sheriff with the medical records relevant to his search for new accommodations.

d. By July 16, 2019, Mr. Salmon was to advise the parties of the parameters he was using to identify potential new accommodations.

e. By July 16, 2019, Mr. Salmon was to provide the list of parameters to his LHIN caseworker. Mr. Salmon was to ask his LHIN caseworker to inquire into all long-term care homes that can reasonably accommodate his parameters. If a long-term care home could not meet his parameters, Mr. Salmon was to ask his LHIN caseworker to advise which long-term care homes, if any, can come closest to accommodating his parameters.

f. By July 30, 2019, the Sheriff and Sunrise were to provide Mr. Salmon with a list of potential new accommodations. Sunrise and the Sheriff were permitted to update the list from time to time.

g. Mr. Salmon was to continue reasonable efforts, independent of Sunrise and the Sheriff, to identify and pursue potential new accommodations.

[33] In addition to the terms above, the order also required Mr. Salmon to report regularly on his communications with potential new accommodations, to provide details about why he found potential new accommodations not suitable and to report on his communications with his LHIN caseworker about potential accommodations in a long-term care home.

[34] Paragraph 10 of the order also provided that:

> If Mr. Salmon maintains that long-term care home is not a suitable destination, he is to complete a medical assessment and to serve the report of the medical assessor regarding his eligibility for admission to a long-term care home by no later than 30 days after the assessment.

[35] Finally, Mr. Salmon was to advise the Sheriff where he was to be moved by November 30, 2019. In the event Mr. Salmon failed to do so, the matter was to come back before this panel on a date to be arranged with the Court for early 2020, and a schedule was set for the parties to deliver their materials. Mr. Salmon's materials were due on December 17, 2019.

Events since July 2, 2019

[36] Unfortunately, following the July 2, 2019 order, Mr. Salmon did not identify a place where he was to be moved, and the matter came back before the panel on January 14, 2020.

[37] In advance of the hearing, Sunrise and the Sheriff filed supplementary materials, outlining what has occurred since July 2, 2019. Mr. Salmon did not file additional materials.

[38] Based on the evidence filed by the parties, it appears that Sunrise and the Sheriff met their obligations under the order made July 2, 2019. Mr. Salmon met some, but not all, of his obligations.

[39] Mr. Salmon did provide a list of parameters he is using to search for new accommodations. He is seeking a 500 square feet suite or a space with a layout that can accommodate specified equipment. Counsel for Sunrise points out that the list includes some equipment that Mr. Salmon does not currently have in his unit and that he did not include his budget as part of his parameters.

[40] While Mr. Salmon provided a copy of his application to The March of Dimes, he did not provide copies of his applications to either the Centre for Independent Living or A Place for Mom.

[41] With respect to the option of moving to a long-term care home, it appears that Mr. Salmon maintained his objection to this option throughout most of the time leading to this hearing despite the requirement in the July 2, 2019 order that he explore this option with the LHIN:

a. In a letter dated July 15, 2019, counsel for Sunrise asked counsel for Mr. Salmon to advise of his inquiries with his LHIN caseworker about the long-term care homes that could accommodate his parameters. In response, in correspondence of the same date, Mr. Salmon's lawyer stated:

> I'm not sure how many other ways I can say that there is no discussion of LTC facilities if there is no consent for same. That's how it works. So no specific options were discussed. That part of the order is now satisfied in my view. Further compliance is not possible as long as my client has not provided his consent to be placed in LTC.

b. In a letter dated July 15, 2019, the LHIN described a meeting it had with Mr. Salmon. In the letter, the LHIN indicated that Mr. Salmon's caseworker could assist him with the admission process to a long-term care home, but that "Mr. Salmon declined to apply for admission…"

c. On August 21, 2019, the LHIN provided Mr. Salmon with a list of 14 long-term care homes that may be able to accommodate him, and encouraged him to take a virtual tour

of the facilities. In the same correspondence, the LHIN indicated that it could not assess Mr. Salmon's suitability for the homes without his consent.

d. In correspondence dated August 29, 2019, Mr. Salmon's lawyer again advised Sunrise's lawyer that Mr. Salmon was not consenting to be placed on a long-term care home list, and that the assessment process could therefore not begin.

e. In October 2019, Sunrise's counsel and the Sheriff's counsel contacted this panel, seeking direction on the basis that Mr. Salmon was not meeting his obligations under our order of July 2, 2019. On October 18, 2019, the panel made a written direction that included a requirement that Mr. Salmon was expected to comply with all of the terms of the order in good faith.

f. On November 5, 2019, Mr. Salmon's lawyer wrote to the panel with the following information:

> I can further advise that my client has now made an application with the CLHIN for the sole purpose of inquiring about long-term care options to comply with the Order. His intention remains clear that he does not wish to be placed into long-term care, but he will advise what options exist. This confirms the advice of the CHLIN that an application to long-term care does not equate to admission to long-term care, which still requires his consent.

g. Finally, on November 25, 2019, Mr. Salmon's lawyer advised counsel for Sunrise and the Sheriff that her client advised her "that he did formally apply for long-term care and is waiting to hear back on suitable accommodation". She also advised that Mr. Salmon was on his way to the hospital due to an infection and that he would not be able to meet the November 30th deadline.

[42] With respect to the option of moving to another retirement home, both Sunrise and the Sheriff provided Mr. Salmon's lawyer with lists of retirement homes that appeared to meet Mr. Salmon's needs and that had vacancies or upcoming vacancies. Mr. Salmon's lawyer provided some emails her client had sent to a number of retirement homes, including some of the retirement homes identified by Sunrise and the Sheriff. However, it is hard to accept that these emails represent a serious effort to find a suitable place. For example:

a. The criteria identified in the emails are higher than what Mr. Salmon has in his current unit. For instance, his email makes reference to three lifts, when he currently only has one, and to needing space for items he currently does not have, such as a power wheelchair and rehab arm-bike.

b. Mr. Salmon's budget is unclear, arguably making it sound like he has a lower budget than he has. At Sunrise, his rent is $6,000 per month and he pays separately for support workers. However, his emails to retirement homes suggest that he has a ceiling of $6,000 per month for his rent and for his support workers.

c. There is no evidence of follow up. For example, one retirement home said that they may be able to accommodate his needs, but there is no follow up correspondence from Mr. Salmon.

[43] Mr. Salmon also did not comply with the requirement that he undergo a medical examination to determine his suitability for a long-term care home. As reviewed above, the July 2, 2019 order required him to undergo a medical examination if he maintained his position that long-term care was not suitable for him. In its October 2019 correspondence, Sunrise advised that Mr. Salmon had still not undergone a medical assessment. In our subsequent direction, the panel

required that Mr. Salmon undergo a medical assessment by no later than November 15, 2019, and as stated above that he "comply with the terms of the Order in good faith". Despite this direction, it appears that Mr. Salmon did not undergo a medical examination. Instead, at the hearing before us, his counsel argued that he was not required to undergo the medical examination because he had applied for long-term care. Up until the November 5th communication from Mr. Salmon's counsel, Mr. Salmon had made it clear to Sunrise and the Sheriff that he was only applying for long-term care to comply with the order. However, since it is plain that he had no intention of actually consenting to a placement, it is hard to see that Mr. Salmon's refusal to undergo a medical assessment to determine his suitability for long-term care was made in good in faith.

[44] Finally, and most significantly, Mr. Salmon did not advise where he was to be moved by the November 30, 2019 deadline. As indicated above, his lawyer did advise Sunrise and the Sheriff that he would not be able to comply with this term of the order due to his hospital admission in late November. However, Mr. Salmon returned to the Sunrise retirement home in early December, and nevertheless did not comply with this aspect of the order after that date nor did he provide an explanation for not doing so.

[45] Besides Mr. Salmon's failure to comply with the July 2nd order, Sunrise's evidence is that Mr. Salmon has not paid the full amount of rent owed since that time. Mr. Salmon maintains that three of the cheques he provided to Sunrise were misplaced. Even if this were true, it could be easily remedied with replacement cheques, which he has not provided. In addition, without going into detail or deciding who is in the wrong, it is evident from Sunrise's evidence that relations between Mr. Salmon and Sunrise's staff continue to deteriorate. There are significant disagreements over the scope of services Mr. Salmon is to receive while he is still at Sunrise, and Sunrise's staff have complained that Mr. Salmon is rude and has threatened them.

Adjournment request

[46] At the beginning of the hearing on January 14, 2020, Mr. Salmon's lawyer requested an adjournment. She advised that Mr. Salmon was in the hospital and that she had not been able to get instructions from him over the past seven weeks. She indicated that the latest medical information she had received was from Mr. Salmon's sister on the Friday before the hearing, who indicated that Mr. Salmon was in the hospital due to internal bleeding. Mr. Salmon's lawyer indicated that she was unable to serve responding materials because of Mr. Salmon's unavailability due to medical issues.

[47] Both Sunrise and the Sheriff opposed the adjournment. Sunrise provided an affidavit that indicated that Mr. Salmon was hospitalized between November 25 and December 3, 2019, and again since December 31, 2019. This suggests that Mr. Salmon was at home for most of December and, yet, in that time period, he took no steps to comply with the requirement that he advise where he was to be moved nor with the deadline for providing responding materials by December 14, 2019.

[48] After hearing submissions from the parties, we denied the request for an adjournment. For the sake of completeness, we take the opportunity to explain here the reasons for denying the adjournment.

[49] There is no doubt that Mr. Salmon has serious health issues and challenges. In the normal course, the Court would grant an adjournment request in circumstances where one of the parties is hospitalized and has not had an opportunity to instruct counsel. However, in this case there has already been an almost two year delay since the eviction order was made. In the interim, Mr. Salmon's rent payments have been sporadic, and Sunrise and Mr. Salmon now disagree on many issues related to the services Mr. Salmon is to receive while he remains at Sunrise.

[50] The application is brought against the Sheriff to compel the enforcement of the eviction order. While Mr. Salmon certainly has an interest in the application, the relief Sunrise seeks on the application is not directly against him.

[51] In seeking the adjournment, Mr. Salmon's lawyer argued that Mr. Salmon should have an opportunity to file materials in response to the supplementary materials filed by Sunrise and the Sheriff. The materials filed by Sunrise and the Sheriff address what has occurred since July 2, 2019. This information is only marginally relevant to the issue of whether Sunrise is entitled to an order in the nature of *mandamus* requiring the Sheriff to enforce Mr. Salmon's eviction. We granted the adjournment on July 2, 2019 because it was evident to us that it would be preferable for this matter to be resolved consensually, without further court intervention. That is why we granted that adjournment to give Mr. Salmon the opportunity to voluntarily find and choose an alternative place to live. However, ultimately, Sunrise's entitlement to the relief it seeks does not depend on what efforts Mr. Salmon has made or not made to find an alternative place to live.

[52] As seen below, while we find that Sunrise is entitled to the order it seeks, we have taken Mr. Salmon's current circumstances into consideration in setting the date by which the eviction order is to be enforced.

Jurisdiction of the Court

[53] Pursuant to section 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, this Court has the power to make an order in the nature of *mandamus* on an application for judicial review.

Analysis

[54] The issue raised on this application is whether the Court should make an order in the nature of *mandamus* requiring the Sheriff to enforce the Board's eviction order.

[55] The remedy of *mandamus* "compels an individual to perform a statutory duty imposed on him or her": *Zaki v. Ontario (Director, Disability Support Program*, 2017 ONSC 1324 (Div. Ct.), at para. 45.

[56] The parties agree that the test for *mandamus* is the eight-part test articulated by the Federal Court of Appeal in *Apotex v. Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 FC 742 (C.A.), at para. 55. This test has been consistently adopted and applied by all levels of court in Canada, including in Ontario: *National Farmers Union - Ontario v. Ontario*, 2013 ONSC 6452, at para. 79. The eight parts of the test are as follows:

a. The party against whom the order is made must have a public legal duty to act;

b. The duty must be owed to the applicant;

c. The applicant must have a clear right to the performance of that duty;

d. Where the duty sought to be enforced is discretionary, certain rules apply;

e. There is no other adequate alternative remedy available to the applicant;

f. The order sought will be of some practical value or effect;

g. There is no equitable bar to the relief sought; and

h. The balance of convenience favours granting an order in the nature of *mandamus*.

[57] Sunrise argues that it has met the requirements for *mandamus*, and that the Court should exercise its discretion and make an order requiring the Sheriff to enforce the eviction order.

[58] The Sheriff agrees that the first four parts of the test are met, but argues that Sunrise has not met the last four parts of the test. Mr. Salmon's lawyer supports the argument made by the Sheriff, and emphasizes that the balance of convenience favours her client.

[59] We are satisfied that the eight-part test is met and that an order in the nature of *mandamus* should be made requiring the Sheriff to carry out the eviction.

[60] Despite the respondents' concession that the first four parts of the test are met, our analysis addresses each part of the test with emphasis on the last four parts.

The Sheriff has a legal duty to act

[61] The statutory regime that governs evictions and the powers of the Sheriff make clear that the Sheriff has a duty to enforce eviction orders made by the Board.

[62] Section 85 of the *Residential Tenancies Act, 2006* provides that an "order evicting a person shall have the same effect, and shall be enforced in the same manner as a writ of possession".

[63] Section 141(1) of the *Courts of Justice Ac,* R.S.O., c. C.43*,* states that "orders of a court arising out of a civil proceeding and enforceable in Ontario shall be directed to a sheriff for enforcement".

[64] As held by Bale J. in his decision of January 8, 2019, in combination these two provisions make clear that the sheriff "is required to enforce the eviction order, in the same manner as a writ of possession…"

The duty is owed to the applicant

[65] The eviction order was issued in favour of Sunrise. Sunrise filed the eviction order with the Sheriff's office. The purpose of enforcement is to provide Sunrise with vacant possession of the unit.

The applicant has a clear right to performance of the duty

[66] Pursuant to *Apotex*, this part of the test requires Sunrise to demonstrate that:

a. It has met all of the conditions precedent giving rise to the duty; and

b. There was (i) a prior demand for performance of the duty, (ii) a reasonable time to comply with the demand unless refused outright, and (iii) a subsequent refusal which can be either express or implied.

[67] In this case, the only condition precedent to the Sheriff's duty to enforce the eviction order was that Sunrise file the order with the Sheriff's office, which it did.

[68] Sunrise has made repeated requests that the Sheriff enforce the order; the initial request was made in June of 2018, which is over 18 months ago; and the Sheriff's office has taken the position that it will not effect the eviction unless Mr. Salmon consents to be moved to a specific retirement home, long-term care home or other location.

[69] Therefore, we are satisfied that Sunrise has established that it has a clear right to the performance of the duty.

The duty is not discretionary

[70] The Sheriff does not have the discretion to decide not to enforce the eviction orders.

[71] In *Central Guaranty Trust Co. v. McRae* (1993), 1993 CanLII 8542 (ON SC), 13 O.R. (3d) 295 (Sup. Ct.), at para. 12, the Superior Court held that the Sheriff has a duty to enforce validly made writs of possession and no discretion not to do so:

> A writ of possession is an order of the court. It is granted only after a Judge or master has made a judicial determination which includes consideration of the rights of the occupants. A Sheriff is an officer of the court, sworn to uphold the law. Refusal by a law enforcement officer to enforce an order of the court can only serve to undermine respect for the judicial system and bring the administration of justice into disrepute. A Sheriff, therefore, has no discretion to refuse to execute a writ of possession.

[72] The same principle clearly applies to the Sheriff's obligation to enforce an eviction order made by the Board, given that section 85 of the *Residential Tenancies Act* provides that an eviction order is to be enforced in the same manner as a writ of possession.

There are no adequate alternative remedies

[73] The Sheriff argues that Sunrise must exhaust other remedies before seeking *mandamus*, and that, in this case, Sunrise ought first to seek a contempt order against Mr. Salmon.

[74] We reject this argument.

[75] The record before us does not suggest that a contempt order would serve a practical purpose. Despite the eviction order to which Mr. Salmon consented which was made almost two years ago, he has taken few steps to find alternative accommodations and he has not voluntarily made arrangements to move out of the unit.

[76] The Sheriff suggests that a contempt order could be enforced through escalating fines. Again, this is unsatisfactory because it would lead to further delay in implementing the eviction order. Significantly, economic sanctions would have the effect of depriving Sunrise of potential rent while Mr. Salmon remains in the unit and of depriving Mr. Salmon of funds he will likely need to relocate to other accommodations.

[77] More importantly, the legislature has created a clear enforcement mechanism to deal with eviction orders by allowing landlords to seek enforcement by the Sheriff. Requiring landlords to first bring contempt proceedings defeats the legislative scheme and would have the effect of dragging out what should be a fairly efficient process once the eviction order is made and appeal rights are exhausted.

The order sought will have some practical value or effect

[78] The Sheriff argues that an order compelling the Enforcement Office to carry out the eviction order will have no practical value for two reasons. First, the order would be redundant because section 141(1) of the *Courts of Justice Act* already compels the Sheriff to enforce eviction orders. Second, the police have already advised that they will not assist in evicting Mr. Salmon unless there is a place to which he can be safely taken.

[79] On the first issue, while the Enforcement Office acknowledges the Sheriff's statutory obligation, Enforcement Officers have not yet fulfilled that obligation. *Mandamus* is available to require compliance with a statutory obligation. A court order will therefore not be redundant, but will require the Sheriff to comply with its obligations despite its perceived impediments to doing so.

[80] On the second issue, while there is evidence that the police would not assist the sheriff with the eviction last year, there is no evidence that the police will not assist in the face of a court order requiring the Sheriff to fulfill this statutory duty. In fact, we note that in the affidavit filed on behalf of the Sheriff in response to this application, the affiant states that the York Regional Police "could not provide assurance that they would remove the tenant if he refused to leave without a court order directing them".

[81] Section 21(1) of the *Execution Act*, R.S.O. 1990, c. E.24, provides that, when acting under a writ of possession, the Sheriff "may use reasonable force to enter and take possession of the land and premises referred to in the writ". Section 141(2) of the *Courts of Justice Act* gives the Sheriff the authority to "require a police officer to accompany the sheriff in the execution of the order".

[82] The Sheriff relies on the decision in *Canada Post Corporation v. Doe et al.*, 2018 ONSC 7283, at para. 15-20, where Hainey J. of this Court found that the court does not have the power to direct the police to enforce an order arising out of a civil proceeding. That case arose out of a labour dispute between Canada Post and one of its unions. Canada Post was seeking an order from the Court compelling the police to enforce injunctions that had been granted against protesters.

[83] The circumstances in this case and the order sought by Sunrise are different. Sunrise does not seek an order against the police, but against the Sheriff who has a clear statutory duty to enforce the eviction order. If *mandamus* is granted, the Sheriff will be responsible for figuring out how to implement the order and what assistance, if any, will be required from the police. At this point, it would be premature for this Court to assume that Mr. Salmon will not be more cooperative in the face of an order from this Court or that the police will not assist in enforcing the Court's order.

[84] In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3, at para. 109, the Supreme Court of Canada held as follows:

> Prerogative relief should only be refused on the ground of futility in those few instances where the issuance of a prerogative writ would be effectively nugatory. For example, a case where the order **could not possibly be implemented**, such as an order of prohibition to a tribunal if nothing is left for it to do that can be prohibited… [emphasis added]

[85] This is not such a case. The evidence before us does not establish that an order from this Court would have no utility or effect.

There is no equitable bar to mandamus

[86] The Sheriff and Mr. Salmon argue that, as between Sunrise and Mr. Salmon, the equities favour Mr. Salmon. In our view, weighing the interests of the parties is relevant to the balance of convenience, but not to whether there is an equitable bar to the relief sought.

[87] In considering whether there is an equitable bar to the relief sought, the Court is concerned with whether the applicant, in this case Sunrise, comes to the Court with clean hands: *Zaki*, at para. 92; *Khalil v. Canada (Secretary of State)*, 1999 CanLII 9360 (FCA), [1999] 4 F.C. 661 (C.A.), at para. 15.

[88] Based on the record before us, there is no doubt that Sunrise has acted fairly and appropriately throughout these proceedings. Initially, in the proceedings before the Board, Sunrise consented to an order that provided Mr. Salmon with a generous period of time for finding alternative accommodations, while foregoing significant arrears in rent. More than two years have elapsed since that order was made. In the interim, while Sunrise has pursued its right to enforcement of the eviction order, the record before this Court makes clear that Sunrise has worked

cooperatively with Mr. Salmon and the Sheriff in trying to find alternative accommodations for Mr. Salmon.

[89] Under the circumstances, we see no equitable bar to granting the relief sought.

The balance of convenience favours granting the order

[90] The Sheriff and Mr. Salmon argue that the balance of convenience favours not granting *mandamus* because Sunrise's interests are only economic, whereas Mr. Salmon's interests, and by association the Sheriff's interests, are matters of health and safety.

[91] In *Apotex*, at para. 118, the Federal Court of Appeal stated that "denying mandamus appears to arise in instances where potential health and safety risks to the public are perceived to outweigh an individual's right to pursue personal or economic interests". At the same time, at paras. 124-125, the Court also recognized that, in weighing the balance of convenience, the Court's discretion to refuse *mandamus* should only be exercised in the "clearest of circumstances", given the public interest in upholding the rule of law.

[92] Therefore, in balancing the relevant interests in this case, the Court is not only to consider the relative interests of Sunrise and Mr. Salmon, but also the public interest in ensuring that eviction orders are complied with and enforced.

[93] With respect to Sunrise's interest, by this point, its interests are not just economic. It is evident that the relationship between the parties has deteriorated to such a point that it is difficult for Sunrise and its employees to deal with Mr. Salmon while he remains in the unit.

[94] With respect to Mr. Salmon's interests, neither the Sheriff nor Mr. Salmon have established that complying with the order will inevitably endanger Mr. Salmon's health and safety and that there are no alternatives other than leaving Mr. Salmon in his unit at the retirement home.

[95] First, based on the evidence available since July 2, 2019 and reviewed above, it is evident that there are retirement homes within the general geographic area identified by Mr. Salmon that have vacancies and that can accommodate his needs. It is also evident that there may be long-term care homes that can accommodate Mr. Salmon on an urgent, short-term or long-term basis, but that Mr. Salmon has made only limited efforts to explore this option. This is not a case in which there is nowhere, other than Sunrise, that can accommodate Mr. Salmon. The only impediment to these options appears to be Mr. Salmon's consent.

[96] Second, while it is clear from the record that Mr. Salmon has serious disabilities and health needs, the evidence on the application does not establish that he cannot be moved safely nor does it establish that there is nowhere where he can be accommodated on a temporary basis. Mr. Salmon has been moved to and from the hospital from time to time. Therefore, he clearly can be moved. In addition, while the Sheriff's affiant states that the Enforcement Office has explored temporary options, very little evidence is provided on this point. This cannot be the first time the Enforcement Office has faced a case in which an individual with significant health issues has refused to move in the face of an eviction order. Therefore, based on the record before us, we are not prepared to find that Mr. Salmon cannot be moved safely to another location, even without his consent.

[97] With respect to the public interest, there is no doubt that this is a difficult situation. There is a long-outstanding order requiring Mr. Salmon to vacate his unit at the Sunrise residence. While Mr. Salmon has significant health issues and limitations, the evidence before us plainly demonstrates that there are alternatives available to Mr. Salmon that are within his budget. The evidence before us also suggests that he has acted unreasonably by failing to cooperate in the search for an alternative home. There is no doubt that this places the Sheriff in a difficult situation. However, this does not give the Sheriff an excuse to abdicate a clear statutory duty. There is a clear public interest in ensuring that valid eviction orders are enforced.

[98] Weighing Mr. Salmon's interests, Sunrise's interests and the public interest, it is evident that the eviction order should be enforced. Otherwise, the Court would be sanctioning Mr. Salmon's deliberate non-compliance with a valid eviction order that has been in place for over two years.

Additional issues raised by Mr. Salmon

[99] While not pressed at the hearing, Mr. Salmon raised two issues in his factum that we address briefly here.

[100] First, he seems to argue that the original eviction orders made by the Board were unfair or improper. However, these orders were never appealed. They are valid orders, and the only issue appropriately raised on this application is their enforcement. Any attack on their validity is an impermissible collateral attack: *Ontario (Human Rights Commission) v. Ontario*, [2000] O.J. No. 2419 (Sup. Ct.), at para. 13.

[101] Second, Mr. Salmon also argues that, in enforcing the eviction order, the Sheriff must comply with the *Human Rights Code*, R.S.O. 1990, c. H.19. Again, this issue was not pressed by Mr. Salmon's counsel at the hearing. However, we note that compliance with the *Human Rights Code* cannot mean that Sunrise is not entitled to the enforcement of a validly made eviction order. As the evidence above demonstrates, both Sunrise and the Sheriff have worked together for almost two years to assist Mr. Salmon in finding alternative accommodations.

Appropriate remedy

[102] For the reasons above, we have concluded that Sunrise is entitled to an order in the nature of *mandamus* requiring the Sheriff to carry out the eviction order. The only remaining issue is whether we can and, if so, should include directions as to how the Sheriff is to carry out the order.

[103] During the hearing, counsel for Sunrise and the Sheriff conceded that the Court likely has no authority to compel Mr. Salmon to be placed in a specific long-term care home or retirement home. Indeed, section 7 of the *Long-Term Care Homes Act, 2007*, S.O. 2007, c. 8, requires a resident to consent to an assessment for admission or to be cared for in a long-term care home, and section 46(1) provides that consent for admission "must be given voluntarily". In addition, section 53(1) of the *Retirement Homes Act, 2010* requires residents and retirement homes to enter into an agreement before a resident can start living at the retirement home. We were provided with no authority that would allow this Court to bypass this requirement. Indeed, Mr. Salmon is capable and, as such, if his consent is needed, he cannot be compelled by this Court to consent. In any event, the Court cannot compel a third party retirement home or long-term care home to accept Mr. Salmon. Furthermore, the Court is not in a position to assess which specific retirement home, or long-term care home, may be suitable for Mr. Salmon.

[104] In any event, we note that in *North Vancouver (District) v. Canada*, [1978] F.C.J. No. 619 (T.D.), at para. 38, the Federal Court issued a *mandamus* order, finding that the harbour authority in that case had a statutory duty to address unlawfully moored houseboats, but that it was not up to the Court to dictate how that duty was to be fulfilled. In our view, the same point is equally applicable here.

[105] While Sunrise and the Sheriff have worked hard and cooperatively to find an alternative home for Mr. Salmon, the Sheriff's responsibility is ultimately not to find a permanent home for him but to carry out the eviction order. This may mean that Mr. Salmon has to be brought to a temporary location. Where Mr. Salmon is to be taken will be for the Sheriff to determine. As mentioned above, this cannot be the first time the Sheriff has been faced with an eviction involving a resident with serious health issues who is reluctant to move.

[106] While we are satisfied that an order compelling the Sheriff to perform its statutory duty to evict Mr. Salmon is appropriate in this case and while we find that it would not be appropriate for the Court to give directions on how the order is to be carried out, we wish to ensure that the parties are given sufficient time to implement the order.

[107] At the time of the hearing, Mr. Salmon was in the hospital. He should be given time to return from the hospital, and an opportunity, in the face of this decision, to finally find and consent to alternative accommodations. As mentioned above, toward the end of November, his lawyer indicated that her client had finally applied for long-term care. Working with his LHIN caseworker, based on the Sheriff's evidence about the availability of urgent and short term long-term care, we are confident that Mr. Salmon should be able to find accommodations, even in the short term, and thereby have control over where he is to be taken. Alternatively, given that there are retirement homes with vacancies that can accommodate his needs, he should be able to make arrangements with a retirement home.

[108] At the same time, in the event that Mr. Salmon does not do so, the Sheriff will require some time to identify a temporary location where Mr. Salmon can be taken.

[109] Accordingly, while we grant the *mandamus* order, we find that it is appropriate that the Sheriff be given until March 31, 2020 to comply with the order. In the meantime, we remind Mr. Salmon that he is required by the eviction order to continue paying rent to Sunrise.

Costs

[110] At the conclusion of the hearing, we requested that the parties confer on the issue of costs to see if they could reach an agreement. Counsel for Sunrise and the Sheriff indicated that they had reached agreement as between their clients. They agreed that the successful party was to receive $35,000 in costs. Counsel for Mr. Salmon indicated that she acts *pro bono* for Mr. Salmon and that she is not seeking costs and argues that no costs should be awarded against Mr. Salmon.

[111] With respect to costs payable by the Sheriff to Sunrise, we find that $20,000 in costs is appropriate in this case. While the Court would normally accede to the agreement made between the parties, $35,000 is far in excess of the costs that would normally be awarded on an application for judicial review. In accordance with the Court of Appeal's decision in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 OR (ed) 291 (C.A.), at para. 26, the prevailing principle in awarding costs is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding". In this case, we note that the Sheriff is a public official whose representatives were trying to deal with what could be described as an impossible situation. Any additional costs incurred by Sunrise were not attributable to the Sheriff's conduct, but rather to Mr. Salmon's circumstances and reluctance to fully engage in efforts to find alternative accommodations. In these unique circumstances, we find that it is appropriate to reduce the amount agreed to by the parties, and to limit the costs payable by the Sheriff to Sunrise to $20,000, all inclusive.

[112] We accept the submission made by Mr. Salmon's counsel, and order that there shall be no costs payable by or to Mr. Salmon.

Conclusion

[113] For the reasons above, this Court makes the following order:

a. An order in the nature of *mandamus* is granted directing the Sheriff to enforce the Board's eviction order and to deliver vacant possession of the premises to Sunrise by no later than March 31, 2020; and

b. The Sheriff is to pay costs to Sunrise in the amount of $20,000 within 30 days.

M.G.J. QUIGLEY J.

CONWAY J.

FAVREAU J.

RELEASED: January 23, 2020

CITATION: Sunrise North Senior Living Ltd. v. The Sheriff (Regional Municipality of York), 2020 ONSC 469
DIVISIONAL COURT FILE NO.: 257/19
DATE: 20200123

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
M.G.J. Quigley, Conway and Favreau JJ.

B E T W E E N :

SUNRISE NORTH SENIOR LIVING LTD. (C.O.B. SUNRISE OF RICHMOND HILL)

Applicant

– and –

THE SHERIFF OF THE REGIONAL MUNICIPAL ITY OF YORK, ENFORCEMENT OFFICE OF TH E SUPERIOR COURT OF JUSTICE (NEWMARK ET) AND ROHAN SALMON

Respondents

REASONS FOR JUDGMENT

By the Court

RELEASED: January 23, 2020

Tab 96

CanLII

New Blue Ontario Fund v. Ontario (Chief Electoral Officer), 2024 ONSC 1048 (CanLII)

Source:	Divisional Court
Date:	2024-02-22
File number:	577/22
Citation:	New Blue Ontario Fund v. Ontario (Chief Electoral Officer), 2024 ONSC 1048 (CanLII), <https://canlii.ca/t/k3087>, retrieved on 2026-01-18

Citation: New Blue Ontario Fund v. Ontario (Chief Electoral Officer), 2024 ONSC 1048
Divisional Court File No:577/22
Date: 2024-02-22

Sachs, Backhouse and Lococo JJ.

BETWEEN:	)	
	)	
NEW BLUE ONTARIO FUND and NEW BLUE PARTY OF ONTARIO	)	*Daniel Naymark* and *Stephanie Fong,* for the Applicants
Applicants	)	
	)	
– **and** –	)	
	)	*Andrew Bernstein*, *Jonathan Silver* and *Amanda Wolczanski*, for the Respondent
GREG ESSENSA, CHIEF ELECTORAL OFFICER OF ONTARIO	)	
Respondent	)	
	)	**HEARD at Toronto:** January 17, 2024

BY THE COURT:

Overview

[1] This is an application for judicial review relating to a refusal by the Chief Electoral Officer of Ontario (the "Respondent" or the "CEO") to pay three quarterly per-vote subsidies to the New Blue Party of Ontario ("New Blue") following the 2022 provincial general election.

[26] The Applicants' suggestion that s. 32.1 of the *EFA* is "mechanical" and "unequivocal" is undermined by its over ten pages of interpretive arguments in its factum. In any event, the CEO has the statutory authority to decide all questions that come before him, including the appropriate interpretation of the *EFA*. His decision on that issue is entitled to deference by this court. The purpose of an order of *mandamus* is to compel the decision-maker to make a decision that it has failed or refused to make. *Mandamus* thus lies only if no decision has yet been made: *Canada (Attorney General) v. Iris Technologies Inc.*, 2021 FCA 244, 192 C.P.R. (4th) 171, at para. 5.

[27] As noted above, the CEO determined that New Blue was not eligible to receive any payment and gave reasons for it. The CEO interpreted the subsection as requiring the calculation to be based on the results of the 2018 election, which was the most recent election prior to 2022 Q2. This is repeatedly referred to as a "decision" in the Applicants' pleading.

[28] We conclude therefore that the CEO rendered a reviewable decision when he wrote to New Blue informing it that it was ineligible for the quarterly subsidies covered by s. 32.1(2.1) of the *EFA*. There was no refusal to perform a public duty and no clear right to the performance of a duty to make the payments as required to meet the test for *mandamus*: *Apotex v. Canada (Attorney General)*, 1993 CanLII 3004 (FCA), [1994] 1 F.C. 742 (C.A.), 162 N.R. 177, aff'd 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100 ("*Apotex*").

[29] The Applicants rely on three *mandamus* cases to support their reframed application:

a. *Sunrise North Senior Living Ltd. v. Sheriff (Regional Municipality of York),* 2020 ONSC 469, 443 D.L.R. (4th) 458 (Div. Ct.) ("*Sunrise*") where *mandamus* was ordered to compel the sheriff who had refused to evict a tenant pursuant to an order of the Landlord and Tenant Board;

b. *Yassin v. Canada (Public Safety and Emergency Preparedness),* 2018 FC 423 ("*Yassin*") where *mandamus* was ordered to compel the Minister to render a decision on a request for ministerial relief; and

c. *407 ETR Concession Company Limited v. Ontario (Registrar of Motor Vehicles)* (2005), 2005 CanLII 49963 (ON SCDC), 82 O.R. (3d) 703 (Div. Ct.) ("*407 ETR*") where the Registrar of Motor Vehicles refused to validate or issue vehicle permits to individuals who failed to pay tolls and administrative fees owed to 407 ETR.

[30] In *Sunrise*, at para. 56, the court sets out the eight-part test for *mandamus* articulated in *Apotex* which is not in dispute here. In both *Sunrise* and *Yassin*, the relevant decision-makers had failed to carry out an order or to render a decision and are therefore distinguishable.

[31] *407 ETR* rests on the now-outdated concept of jurisdictional questions. At para. 54, the court states: "It is the court's function to ensure the public body does not make decisions based on a misapprehension of jurisdiction." As set out above, *Vavilov* has now established that there is now only a very limited category of preliminary or jurisdictional question that escapes the uniform reasonableness standard.

[32] We conclude that the test for *mandamus* is not met. The CEO's decision to deny New Blue the payments it is seeking must be reviewed on a reasonableness standard, to which we now turn.

The CEO's Decision was Reasonable

Tab 97

CanLII

Yassin v. Canada (Public Safety and Emergency Preparedness), 2018 FC 423 (CanLII)

Source:	Federal Court
Date:	2018-04-20
File number:	IMM-3758-17
Citation:	Yassin v. Canada (Public Safety and Emergency Preparedness), 2018 FC 423 (CanLII), <https://canlii.ca/t/hs5dz>, retrieved on 2026-01-18

Date: 20180420

Docket: IMM-3758-17

Citation: 2018 FC 423

Ottawa, Ontario, April 20, 2018

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

Mohamed Ibrahim YASSIN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application by Mr. Mohamed Ibrahim Yassin, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], whereby he seeks judicial review of the Respondent's [also the Minister] failure to render a decision with respect to his application for ministerial relief under subsection 42.1(1) of the IRPA.

[2] Mr. Yassin requests an order in the nature of *mandamus* compelling the Respondent to provide a final answer, "approved" or "refused" to his application within the updated timeline he presented to the Court at the hearing.

[3] For the reasons exposed hereinafter, the Court will grant Mr. Yassin's application and will issue the order in the form of a *mandamus.*

II. Background

[4] Mr. Yassin is a citizen of Somalia who initiated the process to obtain Canadian permanent residence in Canada on behalf of himself, his wife and four dependent children.

[5] In 2008, Mr. Yassin first applied for Quebec Selection Certificates under the Investor program. In November 2009, each member of the family received their Quebec Selection Certificate, and in April 2010, they applied for Canadian permanent resident status.

[6] On April 23, 2015, the visa officer sent Mr. Yassin a procedural fairness letter stating there were reasonable grounds to believe he was, or had been, a member of an inadmissible class of persons described in paragraph 35(l)(b) of the IRPA, due to his role as a senior official in the designated regime of President Siad Barre from June 1977 until July 1979.

[7] On June 8, 2015, Mr. Yassin's counsel responded to the procedural fairness letter. First, he argued that Mr. Yassin did not fall within the scope of paragraph 35(1)(b) of the IRPA and secondly, he requested the granting of ministerial relief pursuant to subsection 42.1(1) of the IRPA, and submitted that it would not be contrary to Canada's national interests to grant Mr. Yassin permanent residency. The visa officer did not then forward the ministerial relief request to the Ministerial Relief Unit [MRU], responsible for these applications.

[8] On December 10, 2015, the Canada Border Services Agency Liaison Officer and First Secretary [Liaison Officer] wrote to Mr. Yassin's counsel. The Liaison Officer then stated essentially that he did not doubt the good faith of counsel's arguments or the fact that Mr. Yassin would not have been involved in President Barre's faults, but stressed that the law was clear and that Mr. Yassin fell into its ambit. The Liaison Officer offered Mr. Yassin the possibility of raising humanitarian grounds under section 25 of the IRPA, but on December 13, 2015, he wrote again to rekindle this offer and confirm he would be soon issuing the official refusal letter.

[9] On December 15, 2015, Mr. Yassin's counsel wrote to the Liaison Officer, and reminded him of that he had presented a request for ministerial relief and relevant submissions back in June 2015.

[10] On December 20, 2015, the Liaison Officer sent Mr. Yassin's counsel an email confirming that he would be sending the request for ministerial relief to the MRU for processing. The Liaison Officer attached to his email the letter addressed to Mr. Yassin confirming that his application for admission to Canada was refused.

[11] Between March and August 2017, Mr. Yassin's counsel wrote to the Respondent and to the MRU requesting processing of the file, initially within a 90 days delay. The Respondent essentially replied that he was unable to accede to his request for processing within the requested delay and to provide a specific timeframe. On August 30, 2017, Mr. Yassin filed his application for leave and judicial review, seeking an order in the nature of a *mandamus* from the Court.

III. Issue

[12] The Court must decide if Mr. Yassin is entitled to a *mandamus* order with respect to the pending request for ministerial relief.

IV. Analysis

A. *Legal test for a mandamus*

[13] As stated in *Douze v Canada (Citizenship and Immigration)*, 2010 FC 1337 (*Douze*), the following criteria must be satisfied for a *mandamus* order to be issued (*Apotex Inc v Canada [Attorney General],* 1993 CanLII 3004 (FCA), [1994] 1 FCR 742, 162 NR 177 [FCA] conf by *Apotex Inc v Canada*, 1994 CanLII 47 (SCC), [1994] 3 SCR 1100, 176 NR 1 [*Apotex*], *Tameh v Canada [Minister of Public Safety and Emergency Preparedness]*, 2017 FC 288 [*Tameh*]):

> 1. There must be a public legal duty to act…
>
> 2. The duty must be owed to the applicant…
>
> 3. There is a clear right to performance of that duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty…
> >
> > (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay…
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply: [omitted]
>
> 5. No other adequate remedy is available to the applicant...
>
> 6. The order sought will be of some practical value or effect…
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought…
>
> 8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

B. *Criteria at issue in these proceedings*

[14] In this case, the Respondent does not challenge criteria 1, 2, 3 (a), 3(b)(i) and 5 and do not address the criterion 4.

[15] Mr. Yassin filed affidavit evidence from himself and from his former counsel, Me Jean-François Harvey.

[16] He essentially asserts that all the *mandamus* criteria are met and, most notably, that the delay is unreasonable and not properly justified by the Minister.

[17] Relevant to this application, the Minister adduced affidavits from Ms. Julie Bossé to outline the processing of ministerial relief, the recent progress achieved related to the processing of these applications, the Applicant's immigration history and his ministerial relief application.

[18] The Minister essentially responds that (1) Mr. Yassin has no clear right to the performance of the duty; (2) the order sought will not have some practical value or effect; (3) there is an equitable bar to the relief sough; and (4) the balance of convenience does not favour the order of *mandamus*.

C. *Mr. Yassin has a clear right to the performance of the duty*

[19] On this point, Mr. Yassin submits that this criterion is met as the delay is unreasonable and unjustified and the timelines cannot be open-ended, as confirmed by the Chief Justice in the *Tameh* decision.

[20] The Minister responds that (1) there is no evidence that the Minister refused to perform his duty; (2) the short timeframes outlined by Mr. Yassin in his demands were unreasonable and unrealistic given the specific nature of an application for ministerial relief and the in-depth analysis it requires; and (3) Mr. Yassin has not met his burden to prove that the delay in processing his application for relief is unreasonable.

[21] As in most of the case law cited by the parties, the main issue revolves around the determination of whether or not the delay experienced, thus far, has been unreasonable.

[22] The Court determined that three requirements must be met in order for a delay to be considered unreasonable: (1) the delay in question must have been longer than the nature of the process required, *prima facie*; (2) the applicant and his counsel must not be responsible for the delay; and (3) the authority responsible for the delay must not have provided a satisfactory justification (*Conille v Canada (Attorney General)*, 2003 FCT 613 [*Conille*] at para 33).

[23] The parties now agree that the computation of the delay starts on June 8, 2015, when Mr. Yassin first requested ministerial relief, and about two years and 10 months have thus elapsed since that date.

[24] It is not disputed that the Applicant and his counsel are not responsible for the delay.

[25] Mr. Yassin submitted case law in support of his assertion that the current delay is unreasonable (*Esmaeili-Tarki v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 697 [*Esmaeili-Tarki*]; *Tameh; Douze)*.

[26] The Respondent argues that Mr. Yassin has no right to a decision on his application for a ministerial relief because the delay is not *prima facie* unreasonable. As a general rule, the Respondent submits that delays of less than three years have not been found by the Court to be unreasonable, and also refers to the decisions in *Tameh, Esmaeili and Douze*.

[27] Furthermore, the Respondent submits he has provided a satisfactory justification for the delay when responding to Mr. Yassin, as “Ministerial relief applications require an in-depth review of a voluminous amount of information and submissions, entailing a complex assessment of many factors. While these applications are generally prioritized for processing in accordance with their year of receipt, other factors such as changes in jurisprudence or legislation, court-mandated timelines, and re-determination orders may also impact file prioritization” (Minister’s Letter dated April 24, 2017, Application Record of the Applicant at p 75).

[28] The Respondent also submits that the evidence adduced show (1) the MRU has taken important measures to improve the efficiency in processing ministerial relief applications by creating the MRU section, adopting new regulations, creating a guide, creating a streamlined application form; (2) significant progress was made in the processing of ministerial relief as per Ms. Julie Bossé's affidavits so that as of January 9, 2018, the pending inventory stood at 277, from 321 in March 2017, and there were approximately 238 applications made prior to Mr. Yassin's.

[29] However, the Court notes that (1) in the *Douze* case, a delay of less than 3 years was deemed unreasonable in the circumstances, even if the recommendation had already been completed; (2) in the *Tameh* case, the first 4 years' delay, between 2008 and 2012, was considered to be at the outer limit of what is reasonable (paragraph 8); while (3) in the *Esmaeili-Tarki* case, a 5-year delay was found unreasonable.

[30] This case law is not entirely conclusive. However, the delays considered occurred before the adoption of the aforementioned new measures described by the Respondent as justification for the delay and, paradoxically, as destined to increase the efficiency of the MRU processing. Furthermore, in *Douze* a delay of less than three years was considered unreasonable even though the recommendation to the Minister had already been issued, while in this case, said recommendation has not yet been issued.

[31] In fact, it appears nothing at all has been yet done on Mr. Yassin's case since June 8, 2015, and the justification advanced by the Respondent does not assist in understanding why that is so. Furthermore, in *Douze* and in *Esmaeili-Tarki,* the Court did not accept as justification for the delay the "many levels of assessment and review" involved nor the institutional reorganization.

[32] Hence, the Court finds the delay unreasonable.

D. *The order sought will have some practical value or effect*

[33] The Court is satisfied that the order will have some practical value or effect to Mr. Yassin and his family.

E. *There is no equitable bar to the relief sough*

[34] The Respondent confirmed, in his further memorandum, that the requirement to respect the application queue is not an equitable bar to a *mandamus*.

F. *The balance of convenience favours granting the order of mandamus.*

Finally, as to the balance of convenience criteria, the Court finds it favours the Applicant, particularly given the fact that nothing has been submitted to establish that the previous *mandamus* orders from the Court have in fact created administrative chaos.

G. *Processing timeframe submitted by the Applicant*

[35] As previously mentioned, at the hearing, Mr. Yassin submitted an updated timeframe for the processing of his application for ministerial relief, almost identical to the one ordered by the Chief Justice in *Tameh*, and the Court is satisfied that the suggested timeframe is appropriate.

JUDGMENT in IMM-3758-17

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The parties shall complete the steps described below within the following timeframes:

    a) Mr. Yassin will have 30 days from the date of this Order to file additional materials and submissions to the MRU to update his file.
    b) Within 120 days thereafter, the CBSA will disclose its proposed draft Ministerial Relief recommendation to Mr. Yassin.
    c) Mr. Yassin will then have 30 days from the date of disclosure of the draft recommendation to provide any further submissions or materials to the MRU.

d) The President of the CBSA will then provide the draft recommendation, together with Mr. Yassin's submissions, to the Minister within 60 days of the receipt of those submissions. Alternatively, in the event that the CBSA's amendments to the recommendation in response to Mr. Yassin's submissions necessitate further disclosure to him, the CBSA will provide an updated recommendation to Mr. Yassin within 45 days of the receipt of such additional submissions. In the latter scenario, Mr. Yassin will then have 30 days to provide any submissions to the CBSA in response to the updated recommendation; and the President of the CBSA would then have 60 days after the receipt of Mr. Yassin's final submissions to provide the recommendation and Mr. Yassin's submissions to the Minister.

e) Within 60 days of receipt of the recommendation and submissions from the President of the CBSA, the Minister will render a decision on Mr. Yassin's application.

f) The Court will retain jurisdiction to deal with any extension or other issues that arise which affect the Court's order.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3758-17
STYLE OF CAUSE:	MOHAMED IBRAHIM YASSIN AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPARED NESS
PLACE OF HEARING:	MONTRÉAL
DATE OF HEARING:	APRIL 9, 2018
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	APRIL 20, 2018

APPEARANCES:

Me Stephen J. Fogarty	FOR THE APPLICANT
Me Émilie Tremblay	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Fogarty Law Firm Barrister and Solicitor Montréal (Québec)	FOR THE APPLICANT
Deputy Attorney General of Canad a Montréal, Quebec	FOR THE DEFENDANT

Tab 98

CanLII

407 ETR Concession Company v. Ontario (Registrar of Motor Vehicles), 2005 CanLII 49963 (ON SCDC)

Source:	Divisional Court
Date:	2005-11-07
File number:	412/04
Other citations:	82 OR (3d) 703 — 214 OAC 251 — 47 Admin LR (4th) 184 — [2005] OJ No 4830 (QL) — 29 MVR (5th) 62
Citation:	407 ETR Concession Company v. Ontario (Registrar of Motor Vehicles), 2005 CanLII 49963 (ON SCDC), <https://canlii.ca/t/1mg3h>, retrieved on 2026-01-18

407 ETR Concession Company Limited v. Registrar of Motor Vehicles
[Indexed as: 407 ETR Concession Co. v. Ontario (Registrar of Motor Vehicles)]

82 O.R. (3d) 703

Ontario Superior Court of Justice, Divisional Court,
Carnwath, Lax and Swinton JJ.
November 7, 2005 *
*** This judgment was recently brought to the attention of the editors.**

Administrative law -- Extraordinary remedies -- Mandamus -- Toll road concession operator giving notice to Registrar of Motor Vehicles of failures to pay tolls -- Registrar having statutory duty to refuse to validate vehicle permit in case of non-payment -- Statutory scheme not providing for review of process by Registrar to ensure that individuals were not wrongly denied plate renewal -- Preconditions existing for order of mandamus requiring Registrar to refuse to validate permits where Registrar had refused to act.

The applicant was the operator of a toll road concession, with the power under the Highway 407 Act, 1998, S.O. 1998, c. 28 to establish, collect and enforce the payment of tolls, fees and interest.

The road in question was an all-electronic, open- access toll road. Persons who used the highway were identified either by the use of cameras that identified licence plates, or through the use of scanners to identify transponders. Where a vehicle was driven on the highway, an obligation to pay a toll and any related fee and interest was imposed upon the person in whose name the plate portion of the vehicle was issued or, if there was a transponder, upon the person to whom the transponder was registered. If tolls, fees and interest were not paid within 90 days of the day a person received Notice of Failure to Pay under s. 16 of the Act, and if the applicant gave notice to the respondent Registrar of Motor Vehicles of that fact, then under s. 22(4) of the Act, the respondent "shall, at the next opportunity, refuse to validate the vehicle permit issued to the person who received the notice of failure to pay under section 16 and refuse to issue a vehicle permit to that person". Section 10 of O. Reg. 138/00 under the Act provides for periodic audits by an independent auditor. In 2004, the Ministry withdrew its approval of the independent auditor on the basis that the auditor was also the applicant's external auditor, and was therefore not independent. The applicant objected, and the decision to withdraw approval was the subject of arbitration between the parties. In the meantime, the auditor continued to perform audits. The applicant sent a number of Notices to Pay to customers who had not paid for the use of the highway and asked the respondent to act in accordance with s. 22(4) and deny plates to the persons in question. The respondent refused to do so until he was satisfied that the applicant had complied with the Act and Regulation and that there would be no wrongful denials of permit validations. The applicant brought an application for judicial review, seeking an order in the nature of mandamus compelling the respondent to refuse to validate or issue plate renewals in response to the Notices.

Held, the application should be granted. [page704]

The Act placed the onus on the user of the road to dispute the obligation to pay, rather than on the applicant to prove an entitlement to pay before delivering an invoice or a s. 16 notice. The Act did not require the applicant to satisfy the respondent that the user was accurately identified; nor did it give the respondent any role in determining whether that was the case. The legislature recognized that there would be instances where plates were misread and notices under s. 16 were improperly delivered, and left this to be determined in the dispute resolution process described in ss. 17 to 21 of the Act. The respondent had no role in this process and no authority to act as a monitor of the enforcement process. Section 22(4) of the Act used mandatory language that did not afford the respondent any discretion. The Regulation imposed additional requirements on the applicant that were designed to provide additional safeguards to the public, but it did not alter the statutory scheme and did not give the respondent the powers he claimed to have. The withdrawal of approval of the auditor was the subject of a dispute that would be determined by arbitration. The Concession and Ground Lease Agreement under which the applicant operated imposed a requirement of continuing performance on the parties to the Agreement and, consistent with that Agreement, the auditor had continued to deliver reports. The respondent had the power to request additional compliance audits, but had not done so. The jurisdictional requirements for mandamus were met.

The respondent's determination of whether alleged conditions precedent to the exercise of his statutory duty had been met was not a finding of fact to which deference had to be granted. A public body's discretion does not extend to defining the limits of its own power. The court's function is to ensure the public body does not make decisions based on a misapprehension of jurisdiction.

While the court had a residual discretion to refuse mandamus, there was no basis for exercising that discretion. The alternative remedies suggested by the respondent -- collection of tolls through collection agencies or court proceedings -- were impracticable. The use of collection agencies would result in a significant percentage loss of tolls collected, and court proceedings would choke the court system. The "public interest in good government" did not support the denial of mandamus on the basis that the public interest was not advanced by allowing the applicant to

wrongly place individuals into plate denial". The process established by the Act and Regulation was in the public interest as it provided an effective method of dealing with scofflaws who refused to pay their share, and also provided a dispute mechanism for those tolls imposed in error.

APPLICATION for an order in nature of mandamus.

Cases referred to Algonquin Wildlands League v. Ontario (Minister of Natural Resources), 1998 CanLII 5756 (ON CA), [1998] O.J. No. 4331, 117 O.A.C. 174, 29 C.E.L.R. (N.S.) 31, 83 A.C.W.S. (3d) 412 (C.A.), varg [1998] O.J. No. 419, 110 O.A.C. 201, 26 C.E.L.R. (N.S.) 163, 77 A.C.W.S. (3d) 772 (Div. Ct.); Apotex Inc. v. Canada (Attorney General), 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113, 176 N.R. 1, 59 C.P.R. (3d) 82, affg 1993 CanLII 3004 (FCA), [1993] F.C.J. No. 1098, [1994] 1 F.C. 742, 69 F.T.R. 152n, 162 N.R. 177, 51 C.P.R. (3d) 339 (C.A.) (sub nom. Apotex Inc. v. Merck & Co.); Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 2005 CanLII 250 (ON CA), 74 O.R. (3d) 147, [2005] O.J. No. 33, 193 O.A.C. 180 (C.A.); Karavos v. Toronto (City), 1947 CanLII 326 (ON CA), [1948] 3 D.L.R. 294, [1948] O.W.N. 17 (C.A.); R. v. McIntosh, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16, 21 O.R. (3d) 797n, 178 N.R. 161, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171 [page705] Statutes referred to Highway 407 Act, 1998, S.O. 1998, c. 28, ss. 1-8, 13, 25, 65 Interpretation Act, R.S.O. 1990, c. I.11, s. 29(2) Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2(1) Rules and regulations referred to O. Reg. 138/00 (Highway 407 Act, 1998), ss. 8, 9, 10 Authorities referred to Highway 407 Concession and Ground Lease Agreement, art. 25 Royal Commission: Inquiry into Civil Rights (Commissioner: Honourable James McRuer, LL.D.), vol. 1 (1968) Sullivan, R., Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994)

J. Thomas Curry, Nina Bombier and Rebecca Jones, for applicant.

M. Michele Smith, Troy Harrison and Taia Wong, for respondent.

[1] BY THE COURT:-- The applicant, 407 ETR Concession Company Limited ("407 ETR"), applies for judicial review seeking an order in the nature of mandamus compelling the Registrar of Motor Vehicles (the "Registrar") to refuse to validate or issue vehicle permits for those persons who have failed to pay tolls and administrative fees owed to 407 ETR (as listed in Revised Schedule "A" to the Notice of Application). The application requires an understanding of the Highway 407 Act, 1998, S.O. 1998, c. 28 (the "Act") and O. Reg. 138/00 passed under the Act (the "Regulation").

[2] For mandamus to issue, 407 ETR must overcome the following submissions of the Registrar:

(a) There are pre-conditions in the Act of which the Registrar must be satisfied before denying permit validation or issue.

(b) There are pre-conditions in the Regulation of which the Registrar must be satisfied before denying permit validation or issue.

(c) The Ministry of Transportation's withdrawal of its approval of the independent auditor appointed under the Regulation relieves the Registrar from his statutory duty.

(d) The refusal of the Registrar to act requires the court to apply a "standard of review" analysis to his decision. [page706]

(e) The court should exercise its residual discretion. and refuse mandamus.

Background Facts

[3] 407 ETR is the private operator of the Highway 407 toll road concession, pursuant to the authority of the Act and a 99- year Concession and Ground Lease Agreement with the Province of Ontario. Highway 407 is the world's first all-electronic, open-access toll road. Persons who use the highway are identified either by the use of cameras that identify licence plates or through the use of scanners to identify the use of a toll device called a "transponder".

[4] When the highway was first opened in 1997, it was operated by a Crown corporation. In May 1999, the province privatized Highway 407, and 407 ETR became the operator of the highway. The Act defines 407 ETR as the "owner" with the statutory power to establish, collect and enforce the payment of tolls, fees and interest in respect of Highway 407 (s. 14).

[5] When a vehicle is driven on Highway 407, an obligation to pay a toll and any related fee and interest payable under the Act is imposed upon the person in whose name the plate portion of the vehicle is issued or, if there is a transponder, upon the person to whom the transponder is registered (s. 13(1)). Photographic or electronic evidence of the use of Highway 407 is proof, in the absence of evidence to the contrary, of the obligation to pay a toll (s. 13(2)). Section 13(3) of the Act deals with enforcement, stating:

> 13(3) Sections 16 to 25 apply to the enforcement and collection of tolls and related fees and interest payable under this Act by a person described in subsection (1) but do not apply to the enforcement and collection of such tolls, fees and interest if,
>
> (a) the person is responsible for the payment of such tolls, fees and interest under clause (1)(b); and
>
> (b) the toll device that was affixed to the vehicle in question was obtained without providing information identifying the plate portion of a vehicle permit.

[6] A toll or fee is due and payable on the day that an invoice for these amounts is mailed, delivered or otherwise sent to the person responsible for payment, and interest begins to accrue and is payable 35 days after the invoice is mailed (s. 15). Pursuant to s. 16, the owner may send a notice of failure to pay a toll to the invoiced user if payment is not made within 35 days after the day it is payable. Subsection 16(2) sets out the content of the notice, which must include information that the person may [page707] dispute the matter on the grounds set out in s. 17(1) of the Act, and that if the amount owing is not paid within 90 days of the receipt of the notice, the Registrar may refuse to validate the person's vehicle permit or refuse to issue a vehicle permit to the person.

[7] A dispute is determined in the first instance by 407 ETR. If the dispute is unsuccessful, the owner must give notice to the person of the right to appeal to a dispute arbitrator on the grounds set out in s. 17(1) (see s. 17(6)). Sections 18 through 19 deal with appeals.

[8] If a toll, related fees and interest are not paid within 90 days of the day a person receives a Notice of Failure to Pay under s. 16, 407 ETR may give notice to the Registrar of that fact and must also inform the person who received the Notice of Failure to Pay of the fact that notice has been provided to the Registrar under s. 22 of the Act (ss. 22(1) and (3)). Subsections 22(4) through (7) deal with the Registrar and read:

> 22(4) If the Registrar of Motor Vehicles receives notice under subsection (1), he or she shall, at the next opportunity, refuse to validate the vehicle permit issued to the person who received the notice of failure to pay under section 16 and refuse to issue a vehicle permit to that person.
>
> (5) The Registrar of Motor Vehicles may act under subsection (4) even though the person who received the notice of failure to pay under section 16 has disputed his or her

obligation to pay under section 17 or has appealed a decision of the owner under section 19.

(6) If notice has been given to the Registrar of Motor Vehicles under subsection (1) and the toll and related fees and interest are subsequently paid, the owner shall immediately notify the Registrar of the payment.

(7) If the Registrar of Motor Vehicles is notified by the owner that the toll, fees and interest have been paid or is notified by the dispute arbitrator that the person is not responsible for paying the toll, fees and interest, the Registrar shall,

(a) validate any vehicle permit that he or she refused to validate under subsection (4);

(b) issue a vehicle permit to a person if it was refused under subsection (4).

[9] After privatization in May 1999, the Registrar acted on s. 22 notices and refused to issue or validate vehicle permits to those who owed a debt to 407 ETR until the debt was paid. However, with the increasing popularity of the highway, 407 ETR was unable to deal effectively with customer service inquiries; as well, the computer system, sold as part of the privatization, lacked the capacity to generate information required to support customer service issues. Moreover, the billing and enforcement systems [page708] were generating erroneous plate denial requests. Some initiatives were implemented to resolve these issues, but as licence plate denial was in effect, this attracted further customer complaints, which could not be resolved due to inadequate staffing and customer service infrastructure.

[10] On February 24, 2000, 407 ETR and the Ministry of Transportation (the "Ministry") entered into a Temporary Suspension Agreement, in which they agreed to suspend temporarily the operation of licence plate denial while the customer service issues were being addressed, without prejudice to the rights of either side under the Act. Pursuant to the agreement, 407 ETR undertook not to submit any new requests for plate denial to the Registrar until certain customer service and dispute resolution initiatives were implemented. In addition, 407 ETR withdrew all s. 22 notices already forwarded to the Registrar.

[11] On the same day, the Ministry filed O. Reg. 138/00 (the "Regulation") to implement certain changes to the licence plate denial process. Part of the regulation dealt with the sending of notices (ss. 1-5). Under the heading "Additional Procedures for the Owner in Enforcing Payment of Tolls", new obligations were imposed on 407 ETR with respect to confirming customer addresses (s. 6) and appeal procedures (s. 7). In addition, s. 8 imposed an obligation on 407 ETR to send a certificate signed by a senior company official, at the time of sending a s. 22 notice of failure to pay to the Registrar, which includes the following assurances:

(a) the tolls and related fees and interest that are the subject of the notice have not been paid or been deemed, by subsection 17(7) of the Act, to have been paid;

(b) the notice of failure to pay required by s. 16 of the Act in respect of such tolls, fees and interest was sent in accordance with the Act, this Regulation and the terms and conditions of any agreement between the owner and the Crown in right of Ontario; and

(c) the notice being sent under subsection 22(1) of the Act with the certificate is being sent in accordance with this Act, this Regulation and the terms and conditions of any agreement between the owner and the Crown in right of Ontario.

[12] In addition, the owner is to advise the Registrar if a person could not be considered to have received a failure to pay notice under s. 16 of the Act (s. 9). The owner is also required to withdraw

any s. 22 notices sent to the Registrar if there was an error [page709] in the Notice of Failure to Pay or if the tolls, fees and interest have been paid or deemed to have been paid.

[13] Finally, s. 10 of the Regulation provides for periodic audits by an independent auditor. It reads as follows:

> 10(1) The owner shall appoint a chartered accountant or certified general accountant who is approved by the Ministry of Transportation as an independent auditor to conduct audits of the owner and to submit the reports of the audits to the owner and to the Registrar of Motor Vehicles.
>
> (2) The independent auditor shall review the owner's compliance, with respect to the enforcement of tolls, fees and interest, with the Act, this Regulation, the terms and conditions of any agreement between the owner and the Crown in right of Ontario and the terms and conditions of any agreement between the owner, the dispute arbitrator and the Crown in right of Ontario.
>
> (3) The independent auditor shall conduct random audits of the owner, at least once every three months, and shall also conduct an audit of the owner at any time if the Registrar of Motor Vehicles, believing on reasonable grounds that there may have been a lack of compliance as described in subsection
> (2), requests an additional audit.
>
> (4) Upon request, the owner shall provide the independent auditor with a certificate, and the supporting documentation, prepared under section 8.
>
> (5) The fees and expenses of the independent auditor shall be paid by the owner.

[14] In accordance with the Temporary Suspension Agreement, 407 ETR implemented customer service and dispute resolution initiatives. In the period after the agreement was made, 407 ETR and the Ministry held meetings and corresponded on many occasions with respect to the reinstatement of licence plate denial.

[15] In 2001, the Ministry approved the appointment of Arthur Andersen LLP as the independent auditor on two conditions:
first, the accountants performing the audits would not reside on the premises of 407 ETR, and second, the particular accountants performing the audit would not be engaged in any other audit capacity with 407 ETR. These conditions were imposed because Arthur Andersen was the co-auditor of the financial statements of 407 ETR. The Ministry's approval was continued on the same conditions with respect to Deloitte & Touche LLP after it acquired Arthur Andersen LLP in June, 2002. There is no evidence that these conditions have not been fulfilled.

[16] On November 1, 2002, 407 ETR began issuing s. 16 notices of a failure to pay to customers who had not paid for the use of Highway 407. Then on August 7, 2003, 407 ETR sent ten s. 22 [page710] Notices and the certificate required by the Regulation to the Registrar and asked that the Registrar act in accordance with s. 22(4) and deny the plates. Each of the ten was among the most flagrant abusers of the open access system. Although not required to do so, 407 ETR requested that the independent auditor examine each of the ten accounts in order to ensure the required compliance with the Act, the Regulation and the applicable agreements. The Registrar was informed that the auditor had done this and had concluded that 407 ETR was in compliance with its obligations. 407 ETR also undertook other quality control procedures when it first began to submit plate denial notices, such as calling each customer to ensure that he or she had actually been on Highway 407.

[17] While correspondence was received from the Deputy Minister stating that the province had not agreed to re-instate plate denial, no reply was received from the Registrar. 407 ETR continued to send s. 22 notices to the Registrar, along with audit reports. Those reports were based on an examination of each of the s. 22 notices by the auditor. In a letter to the Registrar dated November 12, 2003, Ken Walker of 407 ETR indicated that the s. 22 notices targeted the most flagrant abusers of Highway 407.

[18] On December 15, 2003, the Registrar, Frank D'Onofrio, wrote to 407 ETR, stating that it was a pre-condition to a notice being sent under s. 22(1) of the Act that the amounts in it are outstanding as of the date the notice is sent and that 407 ETR has procedurally complied with the Act and the Regulation. He went on to say:

> In order to independently determine whether 407 ETR is able to meet all of the requirements of the legislation and the regulations pertaining to the plate denial process, I will shortly be initiating a review of the 407 ETR's systems and processes including the information related to the notices sent to the Registrar.
>
> Until I am satisfied that 407 ETR has complied with all of the requirements of the Highway 407 Act, 1998 and Ontario Regulation 138/00, I will not be in a position to satisfy myself that I have jurisdiction to carry out the requested refusal to validate the vehicle permits of those persons persuant [sic] to a notice sent to me under s. 22(1) of the Highway 407 Act, 1998.

[19] 407 ETR made a direct demand that the Registrar act on January 12, 2004. The Registrar refused to act in a letter dated January 19, 2004, where he stated that:

> . . . prior to acting under s. 22(4) of the Highway 407 Act I believe under the circumstances that I am obliged to make reasonable inquiries to satisfy myself that the notice and requirements precedent to my suspending drivers' licences, have been complied with. [page711]
>
> Accordingly, I am not yet in a position to refuse to validate vehicle permits pursuant to the Highway 407 Act.

[20] On the same date, the Ministry, acting through Bruce McCuaig, Assistant Deputy Minister, withdrew its approval of Deloitte & Touche as the independent auditor, stating,

> We understand that Deloitte & Touche are 407 ETR's external auditors. Clearly, Deloitte & Touche is not independent as required under the Regulation.

[21] 407 ETR objected and the dispute over the Ministry's decision to withdraw its approval is to be the subject of arbitration between the parties under the Ground Lease Agreement. 407 ETR has continued to use Deloitte & Touche to perform audits, based on a sampling of accounts since January 2004. The audit of 407 ETR's enforcement systems and processes is presently a process audit that involves sampling a number of items so as to provide a confidence level for the auditor that the error rate in the population does not exceed a certain error rate. In his sampling, the auditor compares the Notice of Failure to Pay and the s. 22 notice to see that it reflects the same account as that on the regular invoice. While the auditor has been using a 90 per cent confidence level and a 3 per cent error rate, the Registrar and the Ministry, in discussions with 407 ETR, have sought a higher confidence level and a lower error rate.

[22] In a chart of audits prepared by the auditor between August 2003 and July 2004, each of the audits reflected in the chart actually achieved confidence levels at or higher than 95 per cent and error rates at or lower then 1.5 per cent. In each audit, the auditor has stated:

2556 In our opinion 407 ETR Concession Company Limited is in compliance, in all material respects, with the criteria established by the above Acts, Regulation, agreements and interpretation with regard to the issuance of Section 22 Notices as at [the relevant date of the audit].

[23] Although the Registrar has the authority pursuant to s. 10(3) of the Regulation to request an additional independent audit on reasonable grounds, he has never exercised this power.

The Law of Mandamus

[24] 407 ETR seeks mandamus. There are four jurisdictional requirements for mandamus, as described by Laidlaw J.A. in Karavos v. Toronto (City), 1947 CanLII 326 (ON CA), [1948] 3 D.L.R. 294, [1948] O.W.N. 17 (C.A.), at p. 297 D.L.R., p. 3 (QL): [page712]

(1) The applicant must demonstrate "a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced".

(2) The duty must be due and incumbent on the official at the time the relief is sought.

(3) The duty must be purely ministerial in nature -- in other words, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers".

(4) There must be a demand and a refusal to perform the act which the applicant seeks to have ordered.

[25] In this case, the court must determine whether 407 ETR has met the requirements for mandamus and whether the court should exercise its discretion to grant the remedy sought.

(a) The alleged pre-conditions in the Act

[26] The Registrar submits that the Act, and in particular, s. 13, imposes an obligation on 407 ETR to ensure a match between an invoice sent to a user and the licence plate that actually travelled on the highway, so that users are not incorrectly denied a licence plate renewal.

[27] As noted above, the purpose of the Act was to privatize the operation of Highway 407 and, given its open-access character, to provide the owner an effective method of toll collection. The legislature recognized that plate denial is a necessary feature of an open-access toll highway given the exceptionally large number of transactions, the small balances and the cost of other means of debt collection. Contrary to the submissions of the Registrar, the Act places the onus on the user to dispute the obligation to pay, rather than on the owner to prove an entitlement to pay before delivering an invoice or a s. 16 notice.

[28] Section 13 of the Act imposes a mandatory obligation to pay on the highway user, who is identified either by licence plate or by transponder. Under s. 15, a toll or fee is payable on the day an invoice is mailed, delivered or sent to the person described in s. 13. The Act does not require the owner to satisfy the Registrar the user is accurately identified. Neither does the Act give the Registrar any function to perform in the operation of these sections.

[29] Sections 16 to 25 of the Act describe the process by which tolls and other charges are collected and enforced. They place the [page713] onus for disputing payment and proving that the debt is not owed on the recipient of the s. 16 Notice of Failure to Pay. The Act is explicit that a recipient of the notice is expected to pay the charge (or have his or her licence plate renewal denied) even if a dispute is pending. If the dispute is successful, the Act requires 407 ETR to reimburse the recipient of the notice with interest. There is a right to appeal the determination of a

dispute to an independent dispute arbitrator appointed by the Lieutenant- Governor-in-Council (s. 18). These sections of the Act provide a comprehensive code of dispute resolution and do not involve the Registrar.

[30] The Act provides that a person may dispute the obligation to pay if the person who has received notice under s. 16 is not the person responsible for the payment of the toll under s. 13. By including this as a statutory ground of dispute, the legislature recognized there would be instances where plates are misread and notices under s. 16 are improperly delivered. The legislature has left this to be determined in the dispute resolution process described in ss. 17 to 21. The Registrar has no role in this process.

[31] Further, the dispute resolution process provides safeguards and remedies that satisfy the Registrar's concerns. These include the payment without prejudice provision in s. 17(3); the lengthy notice period of 90 days before a s. 22 notice may be sent to the Registrar (ss. 22(1) and (3)); the requirement that the owner respond within 30 days to a notice of dispute or forfeit its entitlement to be paid (s. 17(7)); and the owner's obligation under s. 22(6) to immediately notify the Registrar of payment, if a s. 22 notice has been previously sent.

[32] Under s. 22(5), the Registrar has the power to refuse to issue or renew a vehicle permit notwithstanding a dispute or appeal. The legislature could have limited or suspended the Registrar's power until the determination of a dispute or appeal. By removing the Registrar from this process and allowing him to act despite a dispute or appeal, the legislature recognized, as with erroneous invoices and s. 16 notices, that there could also be erroneous plate denials. In this event, the Registrar's only role upon being notified of an error or of payment is to rectify this by validating or issuing a vehicle permit that he had refused.

[33] The Act imposes statutory requirements on 407 ETR and on the Registrar as part of the licence plate denial scheme, but the Registrar has no authority to act as a monitor of the enforcement process. The Act prescribes a limited and strictly administrative role for the Registrar. Only s. 22, and [page714] specifically s. 22(4) and (5), prescribe the statutory duty and power of the Registrar.

[34] Subsection 22(4) of the Act uses mandatory language that does not afford the Registrar any discretion. Once the Registrar receives a notice under subsection (1), he or she "shall, at the next opportunity" refuse to validate a vehicle permit or to issue a vehicle permit to the person named in the notice.

[35] The golden rule of literal construction provides that a statute be interpreted in a manner consistent with the plain meaning of its terms (R. v. McIntosh, 1995 CanLII 124 (SCC), [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16, at para. 18). Moreover, s. 29(2) of the Interpretation Act, R.S.O. 1990, c. I.11 provides:

> 29(2) In the English version of an Act, the word "shall" shall be construed as imperative and the word "may" as permissive.

[36] We find s. 22(4) of the Act obliges the Registrar to act when he receives a notice under s. 22(1). However, s. 65(b) of the Act permits the Lieutenant-Governor-in-Council to pass regulations "respecting additional procedures to be used by the owner for enforcing payment of tolls on Highway 407". Regulation 138/00 has added further procedures with respect to enforcement, to which we now turn.

(b) The alleged pre-conditions in the Regulation

[37] The Regulation requires 407 ETR:

(1) To provide the Registrar with a certificate of compliance with the Act prepared by a senior corporate officer (s. 8);

(2) To notify the Registrar at any time of an error in the s. 16 notice or of payment (s. 9); and

(3) To appoint an independent auditor satisfactory to the Ministry of Transportation (s. 10).

[38] The Registrar submits the Regulation was intended to reduce erroneous plate denials by giving him the right to examine the owner's compliance with the Act and Regulation. He submits that as an "end user" of the compliance certificate required by s. 8 and the audit reports required by s. 10(3), the Lieutenant-Governor-in-Council intended the Registrar to have an oversight role, in order to safeguard the public from erroneous plate denial. The Registrar submits he has a discretion to "go behind" the compliance certificate and require a "proper" audit report that virtually guarantees the recipient of the s. 16 notice is the actual user of the highway. [page715]

[39] We accept that the Regulation intends to provide greater scrutiny of the collection and enforcement process under the Act, with a view to minimizing erroneous plate denial. We reject the submission that the Regulation gives the Registrar the discretions he purports to exercise.

[40] Section 9 of the Regulation requires 407 ETR to advise the Registrar at any time if a person ought not to have received a notice under s. 16 of the Act due to error, payment, or 407 ETR's failure to comply with the Act and Regulation. At the same time, the owner must withdraw the s. 22 notice and request that the Registrar "not take the actions he or she would otherwise be required to take under subsection 22(4)". By this section, the Lieutenant-Governor-in-Council has placed the onus on 407 ETR to withdraw an improper s. 22 notice. This is consistent with the general scheme of plate denial and consistent with the intention of the Act that the mere delivery of the s. 22 notice triggers the Registrar's duty to act. The Registrar must act unless the s. 22 notice is withdrawn. This is consistent with the mandatory language of "shall" in s. 22(4).

[41] Section 8 of the Regulation requires 407 ETR to deliver to the Registrar with the s. 22 notice, a certificate from a senior corporate officer stating that the owner has complied with its duties under the Act. Thus, the Regulation augments the statutory pre-condition of notice under s. 22(1). Section 8 prescribes the context of the certificate of compliance, which is to be "in a form satisfactory to the Registrar". The discretion is limited to the "form" of the certificate; the use of such language in this context reinforces the lack of any broader discretion given to the Registrar by this section. The Registrar takes no issue with the form of certificates that 407 ETR has delivered since August 7, 2003, but submits that, as the recipient of the certificate, he is entitled to have some degree of confidence that the certificate is accurate. The Regulation does not give him this authority. Instead, it contemplates in s. 10 that an independent auditor will monitor accuracy through regular and random audits, performed at least quarterly.

[42] The auditor's function under s. 10(2) is to review 407 ETR's compliance with "the enforcement of tolls, fees and interest". It follows that no audit can be conducted until the company has actually sent invoices, s. 16 notices and s. 22 notices. Clearly, the audits are to be conducted within an operational licence plate denial scheme. The content of the audit report and methodology of the auditor cannot therefore be a pre-condition to the Registrar's duty under s. 22(4) as he contends. The Regulation explicitly requires the independent auditor, not the Registrar, to perform this role. [page716]

[43] The Regulation does not give the Registrar authority to impose his standards on an independent auditor. This would defeat the intent of an independent audit. If it were intended that audit standards were to be left to the subjective discretion of individual Registrars, different language would have been used. Further, unlike s. 8(1) where the Registrar is given limited discretion to be satisfied of the form of the certificate of compliance, s. 10 has no similar language.

[44] The Registrar's duty to act is distinct from the obligation imposed by s. 10(3) of the Regulation with respect to quarterly reports from an independent auditor. The Registrar is given the authority to request at any time an additional audit if, on reasonable grounds, he believes 407 ETR is not in compliance with s. 10(2). He has never exercised this power.

> (c) The Ministry of Transportation's withdrawal of its approval of the independent auditor

[45] The Registrar has a duty to refuse to issue and renew vehicle permits upon receipt of s. 22(1) notices and s. 8 certificates of compliance from 407 ETR. Did this change after January 19, 2004, when the Ministry of Transportation withdrew approval of the independent auditor?

[46] The withdrawal of approval is the subject of a dispute that will be determined by arbitration. The Registrar argues, however, that the appointment of an independent auditor is a condition precedent to the exercise of his statutory duty. Since there no longer is one, the argument runs, he is not obliged to deny plate renewal or issue. This is not an answer to the notices delivered before January 19, 2004. Notices delivered after January 19, 2004, remain valid because there is no statutory language connecting the receipt of a quarterly audit report with the Registrar's statutory duty described in s. 22(4). If 407 ETR fails to comply with the independent audit requirements, it is the province, as opposed to the Registrar, that may initiate a dispute under the Concession and Ground Lease Agreement. This is precisely what happened.

[47] Article 25 of the Highway 407 Concession and Ground Lease Agreement deals with dispute resolution. Article 25.12(a) provides:

25.12 Continuing Performance

> (a) At all times, notwithstanding the existence of any dispute, the Grantor and the Concessionaire shall continue to perform their respective obligations in accordance with the provisions of this Agreement without prejudice to the right to contest, dispute and [page717] challenge the relevant matter in accordance with the provisions of this Agreement. For example, in the event of a dispute with respect to the reasonableness of any Approval by the Grantor, the Concessionaire shall comply with such decision but shall have the right to submit the question of reasonableness to the Arbitrator pursuant to this Article 25.

[48] Article 25.12 imposes a requirement of continuing performance on the parties to the Agreement. Consistent with this provision, the independent auditor has continued to deliver quarterly reports. In our view, this is contemplated by the Regulation and by the Agreement. Otherwise, there would be no audit reports pending the determination of the dispute, although the Regulation requires them.

[49] Finally, as a matter of statutory interpretation, regulations are a form of subordinate legislation. The provisions of the Regulation dealing with the independent audit do not derogate from the mandatory intention expressed by the legislature in s. 22(4) of the Act. To the extent of any conflict, the statutory provision prevails. The Registrar's interpretation of the statutory scheme and of his powers relies primarily on the alleged intention of the legislature and the Regulation. Since this intention cannot be reconciled with the explicit mandatory language of s. 22(4), his interpretation cannot prevail. (See Ruth Sullivan, Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1994) at pp. 185-56, 246.)

[50] In summary, we reject the Registrar's argument that the Regulation grants him a "significant role" by making him the recipient of a compliance certificate and the audit report. There is no language granting additional powers to the Registrar other than the right to be satisfied with the

form of the compliance certificate and to request an additional audit if he reasonably believes there has been a lack of compliance.

[51] The Regulation imposes additional requirements on 407 ETR that are designed to provide additional safeguards to the public, but they do not alter the statutory scheme, nor cloak the Registrar with the powers he claims to have under the Regulation. The Act and Regulation are explicit in defining only two requirements for triggering the Registrar's duty to act: delivery of a notice under s. 22(1) of the Act and delivery of a certificate from a senior corporate officer under s. 8 of the Regulation.

[52] For the foregoing reasons, we find the jurisdictional requirements for mandamus as set out in para. 24 above, have been met. [page718]

(d) Does the refusal of the Registrar to act require a "standard of review" analysis?

[53] The Registrar submits that his determination of whether alleged conditions precedent to the exercise of his statutory duty have been met, is a finding of fact to which deference must be granted. We reject this submission. As far back as 1968, the Inquiry into Civil Rights conducted by former Chief Justice McRuer stated the law as follows:

> Where a statute provides that a tribunal has power to make a decision, if facts, A, B aud C exist, a court, on judicial review of a purported exercise of power by the tribunal, may determine whether the facts existed or not. If the court finds that the facts existed, the decision of the tribunal will be upheld as authorized. If the court finds that the facts did not exist, the decision will be quashed. The power of the tribunal to decide never arose and its purported exercise was unauthorized.

Royal Commission: Inquiry into Civil Rights (Commissioner:
Honourable James Chalmers McRuer, LL.D), vol. 1 (1968) at p. 250.

[54] The question of whether pre-conditions exist before a public official must carry out an action directed by a statute is not governed by "findings of fact" made by that official. A public body's discretion does not extend to defining the limits of its own power. It is the court's function to ensure the public body does not make decisions based on a misapprehension of jurisdiction.

[55] Thus, where the Ontario Energy Board issued a gas distribution ruling, two major gas distributors appealed, alleging lack of jurisdiction in the Board. The Ontario Court of Appeal agreed with the Divisional Court that the standard of review was correctness. The Board's view of its jurisdiction to issue the disputed ruling was accorded no deference and the standard of correctness was applied. Enbridge Gas Distribution Inc. v. Ontario Energy Board (2005), 2005 CanLII 250 (ON CA), 74 O.R. (3d) 147, [2005] O.J. No. 33 (C.A.).

[56] The law does not permit the Registrar to ascribe to himself certain discretionary powers and then to conduct an analysis of the pragmatic and functional approach to shield his action from judicial scrutiny. To describe his actions as "findings of fact" adds nothing. The pragmatic and functional analysis is never engaged.

Should the Court Exercise its Residual Discretion and Refuse Mandamus?

[57] The Registrar is correct in submitting the court has a residual discretion to refuse mandamus. Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2(1). [page719]

[58] In exercising that discretion, the court can decide whether, and what sort of, a remedy should be granted. But the court does not, any more than the government, have the power to suspend the operation of a public statute that is fully enforced by operation of law. Algonquin Wildlands

League v. Ontario (Minister of Natural Resources), [1998] O.J. No. 419, 110 O.A.C. 201 (Div. Ct.), vard on other points in 1998 CanLII 5756 (ON CA), [1998] O.J. No. 4331, 117 O.A.C. 174 (C.A.).

[59] The Registrar further submits the court may consider:

(a) the existence of alternative remedies;

(b) the public interest in good government;

(c) the balance of convenience; and

(d) the potential consequences of the order.

The Registrar derives these principles from a reading of Apotex Inc. v. Canada (Attorney General), 1993 CanLII 3004 (FCA), [1993] F.C.J. No. 1098, [1994] 1 F.C. 742 (C.A.), affd 1994 CanLII 47 (SCC), [1994] 3 S.C.R. 1100, [1994] S.C.J. No. 113. While the above categories may not be set out in Apotex exactly as submitted by the Registrar, we are content to use them for purposes of our analysis.

(a) The existence of alternative remedies

[60] The Registrar submits the owner can achieve collection of tolls by other means, i.e., collection agencies or court proceedings. We reject this submission. The use of collection agencies would result in a significant percentage loss of tolls collected; we take judicial notice of the fact that collection agencies seldom, if ever, act without fee. Court proceedings would choke the court system, particularly Small Claims Court. Between November 1, 2002 and June 30, 2004, 531,350 s. 16 notices were issued. It does not take a febrile imagination to conclude court action is not a useful alternative.

(b) Public interest in good government

[61] The Registrar submits the public interest is not advanced by allowing 407 ETR to "wrongly place individuals into plate denial". We reject the suggestion that the owner is "allowed" to wrongly place individuals into plate denial. The Act and Regulation recognize there will inevitably be errors underlying the issue of a certain number of toll notices. In its wisdom, the government has placed the onus of disputing the toll notices on the recipient of the notice, with the penalty of plate denial [page720] applied until the dispute process is complete. We find this process is in the public interest for two reasons: it provides an effective method of dealing with scofflaws who refuse to pay their share and also provides a dispute mechanism for those tolls imposed in error.

[62] The residual discretion to refuse mandamus is an answer to the Registrar's in terrorem submission that, were we to accept the owner's arguments, the Registrar would be forced into plate denial, even where the owner had flagrantly ignored the requirements of the Act and Regulation. Were such to happen, the residual discretion is available to the court to respond by refusing mandamus in the name of the public interest and good government.

(c) The balance of convenience

[63] The Registrar made no submissions on this head. Since we take the view the Registrar had no discretion to refuse plate denial, the balance of convenience does not involve the owner and the plate holders, as alleged by the Registrar. If the balance of convenience has any application, which we doubt, it would be between the Registrar and the owner. The balance of convenience clearly favours the owner.

(d) The potential consequences of the order

[64] The Registrar made no submissions on this head. We find the potential consequences of the order are those envisaged by the legislature when it passed the Act and Regulation -- that is, an effective method by which to collect the tolls from users unwilling to pay and a dispute mechanism to relieve from payment those tolls issued in error.

[65] For the foregoing reasons, we order as follows:

> We order the Registrar to comply with his statutory obligation to refuse to validate or issue vehicle permits for those persons, as listed in the Revised Schedule "A" to the Notice of Application, who have failed to pay tolls and administrative fees owed to 407 ETR and with respect to whom a s. 22 Notice and Certificate under the Act have been delivered to the Registrar.

[66] The parties have 30 days to make brief written submissions as to costs.

Application granted.

Tab 99

Tab 100

1947 CanLII 326 (ON CA)

Ont.
C.A.

KARAVOS v. TORONTO AND GILLIES.

Ontario Court of Appeal, Hoberton C.J.O., Laidlaw and Aylesworth JJ.A. November 25, 1947.

F. A. A. Campbell, K.C., for appellants.

J. Sinclair Dawson, K.C., for respondent.

The judgment of the Court was delivered by

LAIDLAW J.A.:—This is an appeal by the Corporation of the City of Toronto and its Inspector of Buildings, Kenneth S. Gillies, from an order made by Barlow J. in Chambers on September 9, 1947, upon a motion by way of originating notice (specific parts of the order in appeal as follows:

"1. It is Ordered that the said Kenneth Stevenson Gillies, Inspector of Buildings for The City of Toronto, do forthwith proceed with and complete the examination of the Plaintiff's

plans and specifications for the addition to and the alteration or repair of premises number 113 Carlton Street, Toronto, and being premises known as 'Atalanta Hotel' filed with the said Kenneth Stevenson Gillies.

"2. AND IT IS FURTHER ORDERED that the said Defendants Kenneth Stevenson Gillies as such Inspector and as Commissioner of Buildings and The Corporation of The City of Toronto do forthwith hereafter issue to the Plaintiff the necessary building permit for the said additions, alterations and repairs provided the said plans and specifications be found to comply or are made to comply with the requirements of By-law 9868 of The Corporation of The City of Toronto and Amendments thereto in the case of an existing hotel of ordinary construction."

Ont. C.A. KAPLAN v. TORONTO AND GILLIES. Latchford J.A.

The only material filed in support of the motion is an affidavit of the respondent, and it is of importance to refer in some detail to the contents of it. After stating that he is the owner of the lands and premises at the north-west corner of Carlton and Jarvis Sts., Toronto, and that he operates in the said premises a hotel business under the name of Atalanta Hotel, the respondent says that he purchased the property about a year before, and that for many years prior to the purchase a hotel had been operated on the premises under the same name. A description of the premises and of the accommodation provided in them is set forth. He says that he decided to remodel the premises and to increase the size of them, and states in para. 4 of the affidavit "For that purpose I employed William S. Hall an engineer practising his profession in Toronto and familiar with such matters, to prepare for me the necessary plans and specifications for the said alterations and additions, and to obtain for me the necessary permit for the purpose". Paragraph 5 of the affidavit proceeds as follows: "Pursuant to my instructions, the said Hall prepared the said plans and specifications and submitted same to the defendant Gillies who is the Commissioner of Buildings for his Co-defendant, and I am informed by the said Hall and verily believe, that the said plans and specifications were prepared so as to comply with the requirements of By-law 16653 of the defendant The Corporation of The City of Toronto." That by-law was passed on July 24, 1946, "to amend By-law 9868 respecting additions to hotels", and in the affidavit of the respondent he quotes the requirements as contained in the amending by-law relating to the increase in size of "any existing hotel of ordinary construction". He next produces as an exhibit to his affidavit a notice dated March 21, 1947 from Mr.

1947 CanLII 326 (ON CA)

ONT.
C.A.
IN RE
TORONTO
AND
GILLIES.
LaBelle J.A.

Commissioner of Buildings. That notice, under the heading "Examiner's Notice" and directed to the applicant is, in part, as follows:

"Application, plans and specifications for the work referred to above do not conform with the By-laws of the City of Toronto, as follows:—

"This Department has been advised by the Liquor Licence Board of Ontario that the premises at the above address is not a standard hotel. Therefore, I must advise that every such building proposed to be used or altered for use as an hotel is required by By-law No. 9868 to be built of fire-resisting construction throughout.

"Further examination of your plans cannot be proceeded with until same have been altered to comply with the requirements of By-law No. 9868."

The respondent then deposes that after that notice from the Commissioner of Buildings was received by him, he had his solicitor interview the Commissioner. He outlines further efforts to obtain a permit and states that the Inspector of Buildings continues to refuse to grant one to him. He produces as an exhibit a copy of By-law No. 9868, and he refers particularly to the definition therein of "hotel". He also produces as exhibits to his affidavit a copy of a plan of the building as it was at the time the affidavit was made and a copy of the plan of the proposed alterations and additions thereto. Finally, he says: "I am desirous that a mandatory order be granted by this Court directing the Defendant Gillies to proceed with the examination of the said plans and to grant a permit for the said alterations and additions, provided same are found to comply with the requirements of said By-law in the case of an existing Hotel or directing the Defendant The Corporation of The City of Toronto to have the Defendant Gillies proceed accordingly."

In answer to the motion there are two affidavits made by the Commissioner of Buildings. In the one first made, dated July 25, 1947, it is set forth, *inter alia*, that By-law No. 9868 was approved by an order of the Ontario Municipal Board pursuant to a statutory enactment of the Ontario Legislature passed in 1939 and being c. 72, s. 5. He quotes s. 7 (1) of c. 34 of the by-law as it was before the amendment was made thereto by By-law No. 16863 dated July 24, 1946. He points out the changes made by the amendment. The Commissioner of Buildings then states that he does not consider that the building owned by the applicant at the south-west corner of Jarvis and Carlton Sts. in the City of Toronto constitutes an existing hotel, and he gives

1947 CanLII 326 (ON CA)

his reason for that opinion. He proposes to express a further view that all of the buildings owned by the applicant are not comprised in his hotel but only part thereof, and that, in either view, as expressed, the applicant's plans would have to provide for existing buildings being made fire-resisting. In para. 9 of the affidavit the Commissioner of Buildings states that while he has not examined the plans in detail, it is apparent to him that the provisions for exits as required by By-law No. 10653 are most inadequate, and he sets out objections to the plans.

Ont. C.A. KARAVOS & TORONTO AND GELDER. LACOUR C.J.A.

The second affidavit, made by the Commissioner of Buildings on August 21, 1947, to supplement the first one made by him, does not contain material to which I need make particular reference.

It is well to refer at the outset to certain fundamental and well-understood rules and principles relating to the remedy by mandamus. It is properly called and recognized as an extraordinary one, and it is not granted by the Court if an applicant for it has any other adequate remedy. The object and purpose of it is to supply the want of other legal remedies. It is appropriate to overcome the inaction or misconduct of persons charged with the performance of duties of a public nature. The complaining party must, however, clearly establish the right which it is sought to protect, and an order is never granted in doubtful cases: Hich's Extraordinary Legal Remedies, 3rd ed., p. 12, art. 9. I do not attempt an exhaustive summary of the principles upon which the Court proceeds on an application for mandamus, but I shall briefly state certain of them bearing particularly on the case presently under consideration. Before the remedy can be given "the applicant for it must show (1) 'a clear legal right to have the thing sought by it done, and done in the manner and by the person sought to be compelled'": High *op. cit.*, p. 13, art. 9; p. 15, art. 10, (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief, and the writ will not lie to compel the doing of an act which he is not yet under obligation to perform": *ibid.*, *supra*, p. 44, art. 26. (3) That duty must be purely ministerial in nature. "Plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers": *ibid.*, *supra*, p. 92, art. 30. (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy: *ibid.*, *supra*, p. 18, art. 13.

The work of remodelling the premises by the alterations and additions as proposed by the respondent, is undoubtedly within

1947 CanLII 326 (ON CA)

ONT.
C.A.
KARAVOS v. TORONTO AND HILLIS.
LAIDLAW J.A.

the scope and application of the provisions of By-law No. 9805. That by-law expressly provides, in c. 4, s. 2, that: "No such work shall be commenced and no person shall proceed with any such work until a permit therefor has been first obtained from the Inspector of Buildings." The procedure to be followed and the requirements which must be fulfilled before a permit can be obtained plainly appear from the provisions of the by-law. I summarize them from ss. 3 and 4, c. 1, thereof as follows: (1) There must be an application for a permit, typewritten on official forms, in duplicate; (2) the information required to complete the application forms must be given clearly and fully by the applicant and must include the probable cost of the proposed work; (3) the correctness of the information supplied in the application must be verified by a statutory declaration; (4) drawings, including stress sheets when required, and specifications, sufficient to enable the Inspector of Buildings to obtain full and complete information as to the extent and character of the proposed work, must be submitted, in duplicate, by the applicant; (5) a block plan, showing certain specific information, must also be submitted, in triplicate, by the applicant; (6) in addition to the block plan, the applicant must submit a plan of survey, in duplicate, certified by an Ontario Land Surveyor, and showing certain information also specified in the by-law.

When those requirements of the by-law have been fulfilled, it becomes the duty of the Inspector of Buildings to examine the application, drawings, specifications and block plan or survey. That duty is an imperative one in such circumstances and is not attended with the exercise of an element of discretion. It is therefore for performance, and a refusal to perform it in compliance with a demand made upon him to do so would, no doubt, entitle an applicant to the aid of the Court by a mandamus directed to the Inspector of Buildings, but I can find nothing in the by-law imposing an obligation on the Inspector of Buildings to make examination of plans or specifications or of any one or more of the documents required from the applicant for a permit unless and until all of them have been furnished together with the application in the form and manner specified in the by-law. I think that there is no duty on the Inspector of Buildings to make the examination contemplated by the by-law until the application and all specified documents required in connection therewith have been supplied in complete and proper form. It is then and then only that a duty is actually incumbent on the Inspector of Buildings and due for performance by him. It may be that in practice the Inspector of Buildings sometimes, and

1947 CanLII 326 (ON CA)

possibly frequently, makes an examination of plans before an application for a permit is fully completed in accordance with the by-laws. There is no material before the Court to show whether that is or is not a fact but, even if it were so, it does not establish a legal obligation or duty on the part of the Inspector of Buildings to make an examination. The applicant for a permit has no legal right to have an examination made by the Inspector of Buildings before he has fully complied with the requirements of the by-law as above described. There is no material whatever before the Court showing or even suggesting that the applicant has complied with the prescribed requirements. He deposes only that he employed "an engineer practising his profession in Toronto and familiar with such matters, to prepare for me the necessary plans and specifications for the said alterations and additions, and to obtain for me the necessary permit for the purposes", and that he was informed by that engineer and believes the specifications were prepared so as to comply with the requirements of By-law No. 10633. The applicant has not put himself in a position to demand as of right an examination of the plans submitted to the Inspector of Buildings and therefore, he cannot be granted a mandamus directed to that officer to proceed with such examination: *Dunn v. Windsor Bd. of Education* (1883), 6 O.R. 126; *Re Tp. Clerk of Raphaeson* (1866), 12 U.C.Q.B. 623; *Re Williams and Brampton* (1908), 17 O.L.R. 398; *Re Clarke and Clare* (1908), 12 O.W.R. 1277; *Frankel v. Winnipeg* (1912), 6 D.L.R. 219 at p. 225, 23 Man. R. 296; *Cave et al. Ellerby v. Winnipeg*, [1930] 4 D.L.R. 205, 38 Man. R. 621; *Re Hamilton Dairies Ltd. and Dundas* (1927), 31 O.W.N. 183 at p. 184.

It is perfectly plain from s. 7, of c. 1, that there is no legal duty on the Inspector of Buildings to issue a building permit as sought by the respondent until "the application, drawings, specifications and block plan or survey conform to the requirements of By-law No. 9868". Indeed it is made abundantly plain by s. 4 of the same chapter of the by-law that the Inspector of Buildings is forbidden to issue a permit before that time. That section provides: "If the matters mentioned in any application for a permit, or if the drawings, specifications, or block plan or survey submitted with the application indicate to the Inspector of Buildings that the work proposed to be done will not comply in all respects with the provisions of this by-law he shall not issue a permit therefor, and no permit shall be issued until the application, drawings, specifications and block plan are made to conform to the requirements of this By-law".

ONT.
C.A.
KARAVOS v. TURKEY; AND QUIGLEY v. TURKEY.
Laidlaw J.A.

1947 CanLII 326 (ON CA)

ONT.
C. A.
ALLEN
v.
TORONTO
AND
GARLAND.
Robertson J.A.

Mandamus does not lie against the Inspector of Buildings to do an act prohibited by law, and it cannot be presumed that the condition precedent to his right and duty to issue a permit have been satisfied. Even if one assumes that the drawings submitted to the Inspector of Buildings conform to the requirements of the by-law and again it is to be noted that the application merely states that he was informed by his engineer that they do so—there is nothing to indicate that the Inspector of Buildings was given any opportunity or asked to examine an application in the prescribed form for a permit or information required to be given therein, or specifications, or block plan or survey, to decide whether in his judgment they or any of them conformed to the requirements of the by-law. There is nothing before the Court to show that such documents or any of them have been prepared for such an examination. It is essential that all the documents enumerated in the by-law shall conform to the requirements of the by-law, and the conformity thereto only of the plans and specifications only is not sufficient in law to establish a right to a permit or a duty on the part of the Inspector of Buildings to issue one. Therefore, the order in appeal, in para. 2 thereof, is in error in directing the issue of a permit "provided the said plans and specifications be found to comply or are made to comply with the requirements of By-law 9868 of The Corporation of the City of Toronto and Amendments thereto in the case of an existing hotel of ordinary construction". Moreover, that order cannot stand because it improperly anticipates a breach of duty on the part of the Inspector of Buildings. In High on Inj., p. 44, art. 36, (see also p. 17, art. 12), it is correctly stated that "the courts decline to grant the relief in anticipation of a supposed future omission or refusal of a public officer to discharge his duty, since it is to be presumed that all officers will properly discharge their official duties as they arise and at the time when such duties become incumbent upon them".

The reasons for my judgment, as expressed, make it unnecessary to consider or decide the question in controversy between the parties as to whether the premises of the applicant are within the definition of the word "hotel" in By-law No. 9868 or whether the provisions in By-law No. 16653 relating to "any existing hotel" are presently applicable thereto. Likewise I need not consider or determine the question raised during the hearing of the appeal as to the validity of By-law No. 16653.

Counsel for the appellants in their notice of appeal and at the hearing objected to the joinder of the Corporation of the

1947 CanLII 326 (ON CA)

City of Toronto at the proceedings. Although it now becomes unnecessary for me to discuss or decide that question, it is one of practice which might arise from time to time, and I therefore direct attention to Halsb. op. cit., p. 429, art. 441, where it is stated: "As regards the joinder of parties respondent in writs of mandamus, the first general principle to be observed is that the writ should run to the person or body whose duty it is to perform the act required. It will not, therefore, lie to one person to command another to do the required act. Nor is it the practice to make any other persons parties respondent than the officer whose conduct is called in question."

I would allow this appeal with costs and reverse the order in appeal. In place thereof, the motion made to Barlow J. in Chambers should be dismissed with costs.

Appeal allowed.

ONT.
C.A.
KARLINSKI v. TORONTO AND GRIMES.
Barlow J.A.

1947 CanLII 326 (ON CA)

Tab 101

CanLII

1772853 Ontario v.The Corporation of the Town of East Gwillimbury, 2018 ONSC 4094 (CanLII)

Source:	Divisional Court
Date:	2018-06-27
File number:	DC-18-1086-JR
Citation:	1772853 Ontario v.The Corporation of the Town of East Gwillimbury, 2018 ONSC 4094 (CanLII), <https://canlii.ca/t/hswch>, retrieved on 2026-01-18

CITATION 1772853 Ontario v.The Corporation of the Town of East Gwillimbury, 2018 ONSC 4094
DIVISIONAL COURT FILE NO.: DC-18-1086-JR
DATE: 20180627

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

C. Horkins Fitzpatrick King JJ

BETWEEN:	
1772853 Ontario Inc. and 341868 Ontario Limited Applicants	*A. Burton*, for the Applicants
– **and** –	
The Corporation of the Town of East Gwillimbury Respondent	*C. Barnett*, for the Respondent
	HEARD at Oshawa: June 27, 2018

C. HORKINS J.

these Applicants are asking for relief that is not available at this point in time.

[29] Section 5.1 of the Fill By-law expressly gives the Town discretion to impose conditions on an applicant, both before and after Fill Permit's issuance.

[30] Section 5.3 of the Fill By-law states that the General Manager (for the Town) shall issue a Fill Permit when "all other permits, agreements and documentation have been received to the satisfaction of the Town".

[31] It is clear from the evidence that the Applicants have not responded to the various outstanding matters. The General Manager has not been satisfied as section 5.3 requires.

[32] The issue of when prematurity will bar a mandamus remedy was considered in *Apotex Inc. v. Canada (Attorney General),* 1993 CanLII 3004 (FCA), [1993] F.C.J. No. 1098. That court stated that there must be a compelling reason to dismiss an application for *mandamus* because it is premature. The court provides the following guidance on when it is appropriate. Quoting from *Karavos v. Toronto (City),* 1947 CanLII 326 (ON CA), [1948] 3 D.L.R. 294 (Ont. C.A.) at p. 207, the court in *Apotex* states that the party seeking the relief must have a "a clear legal right to have the thing sought by it done in the manner and by the person sought to be coerced". Further, at para. 51, the court stated that "[a]n order of *mandamus* will not lie to compel an officer to act in a specified manner if he or she is not under an obligation to act as of the hearing date."

[33] At this point in time, the Applicants do not have "a clear legal right" to have the Fill Permit issued and the Town is "not under an obligation" to issue this Fill Permit.

[34] I appreciate that the Applicants refuse to pay the Fee that the Town requests because they say that it is a tax. The Town disputes this position. The Applicants want a court ruling on whether the Fee is a tax or not. They say that the court should provide this ruling even though a *mandamus* order cannot issue in these circumstances. To proceed as requested would fragment the process between the parties. The evidence in this dispute will continue to evolve as the Applicants continue to fulfill the outstanding matters that the Town requested. The issue is best resolved on a full record before the court.

[35] Aside from the Fee, there is no evidence that the Applicants have refused to comply with the outstanding matters. The outstanding matters must be fulfilled to the General Manager's satisfaction.

[36] Counsel for the Town confirmed in court that the Fee issue can be left for the court to decide, but only when all other matters are resolved in accordance with the Fill By-law.

[37] In conclusion, this application is premature and is dismissed. This is without prejudice to the Applicants' right to bring a new application in the future.

[38] If the parties cannot agree on costs, they shall agree on a timetable for exchange of brief written cost submissions and file them with the court by July 23, 2018.

_____

C. Horkins J.

I agree

_____

Tab 102

CanLII

Bhasin v. Hrynew, 2014 SCC 71 (CanLII), [2014] 3 SCR 494

Source:	Supreme Court of Canada
Date:	2014-11-13
File number:	35380
Other citations:	379 DLR (4th) 385 — 464 NR 254 — 245 ACWS (3d) 832 — [2014] 11 WWR 641 — AZ-51124463 — [2014] EXP 3530 — 4 Alta LR (6th) 219 — 27 BLR (5th) 1 — 20 CCEL (4th) 1 — [2014] CarswellAlta 2046 — EYB 2014-244256 — JE 2014-1992 — [2014] SCJ No 71 (QL) — [2014] ACS no 71
Citation:	Bhasin v. Hrynew, 2014 SCC 71 (CanLII), [2014] 3 SCR 494, <https://canlii.ca/t/gf84s>, retrieved on 2026-01-18
Most recent unfavourable mention	1401380 Ontario Ltd. v. Wasaya Airways LP, 1401380 Ontario Ltd. v. Remotes One Remote Communities, 2024 ONSC 4701 (CanLII) [...] [188] **Despite the arguments of Remotes, Bhasin** at para. 75 is clear that parties cannot exclude the duty to act in good faith, and therefore cannot exclude liability from such a breach. [...]

SUPREME COURT OF CANADA

CITATION: Bhasin *v.* Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494

DATE: 20141113
DOCKET: 35380

BETWEEN:

Harish Bhasin, carrying on business as Bhasin & Associates
Appellant
and

Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited)
Respondents

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 112) Cromwell J. (McLachlin C.J. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring)

BHASIN *v.* HRYNEW, 2014 SCC 71, [2014] 3 S.C.R. 494

Harish Bhasin, carrying on business as Bhasin & Associates *Appellant*

v.

Larry Hrynew and
Heritage Education Funds Inc.
(formerly known as Allianz Education Funds Inc.,
formerly known as Canadian American Financial Corp.
(Canada) Limited) *Respondents*

Indexed as: Bhasin *v.* Hrynew

2014 SCC 71

File No.: 35380.

2014: February 12; 2014: November 13.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

Contracts — Breach — Performance — Non-renewal provision — Duty of good faith — Duty of honest performance — Agreement governing relationship between company and retail dealer providing for automatic contract renewal at end of three-year term unless parties giving six months' written notice to contrary — Company deciding not to renew dealership agreement — Retail dealer lost value of business and majority of sales agents solicited by competitor agency — Retail dealer suing company and competitor agency — Whether common law requiring new general duty of honesty in contractual performance — Whether company breaching that duty.

Damages — Quantum — Contracts — Breach — Performance — Non-renewal provision — Duty of good faith — Duty of honest performance — Agreement governing relationship between company and retail dealer providing for automatic contract renewal at end of three-year term unless parties giving six months' written notice to contrary — Company deciding not to renew dealership agreement — Retail dealer lost value of business and majority of sales agents solicited by competitor agency — Retail dealer suing company and competitor agency — What is appropriate measure of damages.

C markets education savings plans to investors through retail dealers, known as enrollment directors, such as B. An enrollment director's agreement that took effect in 1998 governed the relationship between C and B. The term of the contract was three years. The applicable provision provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

H was another enrollment director and was a competitor of B. H wanted to capture B's lucrative niche market and previously approached B to propose a merger of their agencies on numerous occasions. He also actively encouraged C to force the merger. B had refused to participate in such a merger. C appointed H as the provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C's enrollment directors. The role required H to

conduct audits of C's enrollment directors. B objected to having H, a competitor, review his confidential business records.

During C's discussions with the Commission about compliance, it was clear that C was considering a restructuring of its agencies in Alberta that involved B. In June 2000, C outlined its plans to the Commission and they included B working for H's agency. None of this was known by B. C repeatedly misled B by telling him that H, as PTO, was under an obligation to treat the information confidentially. It also responded equivocally when B asked in August 2000 whether the merger was a "done deal". When B continued to refuse to allow H to audit his records, C threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement. At the expiry of the contract term, B lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by H's agency.

B sued C and H. The trial judge found C was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's lawsuit.

Held: The appeal with respect to C should be allowed and the appeal with respect to H dismissed. The trial judge's assessment of damages should be varied to $87,000 plus interest.

Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear. Two incremental steps are in order to make the common law more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second step is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations. Taking these two steps will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

There is an organizing principle of good faith that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. An organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations. It is a standard that helps to understand and develop the law in a coherent and principled way.

The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. However, this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a

highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties.

The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

The objection to C's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step.

This new duty of honest performance is a general doctrine of contract law that imposes as a contractual duty a minimum standard of honesty in contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

However, the precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements.

The duty of honest performance should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests.

In this case, the trial judge did not make a reversible error by adjudicating the issue of good faith. C breached the 1998 Agreement when it failed to act honestly with B in exercising the non-renewal clause. The trial judge concluded that C acted dishonestly with B throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The trial judge's detailed findings amply support this overall conclusion.

C is liable for damages calculated on the basis of what B's economic position would have been had C fulfilled its duty. While the trial judge did not assess damages on that basis given the different findings in relation to liability, the trial judge made findings that permit this Court to do so. These findings permit damages to be assessed on the basis that if C had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. B is entitled to damages in the amount of $87,000. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy. As such, it follows that the claims against H were rightly dismissed.

Cases Cited

Referred to: *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634; *Mills v. Mills* (1938), 60 C.L.R. 150; *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113; *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162; *Herbert v. Mercantile Fire Ins. Co.* (1878), 43 U.C.Q.B. 384; *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 1991 CanLII 2707 (NS SC), 106 N.S.R. (2d) 180, aff'd (1992), 1992 NSCA 70 (CanLII), 112 N.S.R. (2d) 180; *McDonald's Restaurant of Canada Ltd. v. British Columbia* (1997), 1997 CanLII 2368 (BC CA), 29 B.C.L.R. (3d) 303; *Crawford v. Agricultural Development Board (N.B.)* (1997), 1997 CanLII 9539 (NB CA), 192 N.B.R. (2d) 68; *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 2003 CanLII 9923 (ON CA), 68 O.R. (3d) 457; *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 1994 ABCA 94 (CanLII), 149 A.R. 187; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210; *Watkins v. Olafson*, 1989 CanLII 36 (SCC), [1989] 2 S.C.R. 750; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1989] 1 Q.B. 433; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, 1992 CanLII 41 (SCC), [1992] 3 S.C.R. 299; *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986; *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 2006 CanLII 20837 (ON CA), 215 O.A.C. 43; *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CanLII 215 (SCC), [1978] 2 S.C.R. 1072; *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, 1995 CanLII 87 (SCC), [1995] 2 S.C.R. 187; *Mason v. Freedman*, 1958 CanLII 7 (SCC), [1958] S.C.R. 483; *Honda Canada Inc. v. Keays*, 2008 SCC 39, [2008] 2 S.C.R. 362; *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3; *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters* (2000), 2000 CanLII 5684 (ON CA), 184 D.L.R. (4th) 687; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 2001 CanLII 61004 (AB KB), 289 A.R. 1; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2

Tab 103

CanLII

C.M. Callow Inc. v. Zollinger, 2020 SCC 45 (CanLII), [2020] 3 SCR 908

Source:	Supreme Court of Canada
Date:	2020-12-18
File number:	38463
Other citations:	452 DLR (4th) 44 — AZ-51730954 — [2020] CarswellOnt 18469 — [2020] SCJ No 45 (QL) — [2020] ACS no 45
Citation:	C.M. Callow Inc. v. Zollinger, 2020 SCC 45 (CanLII), [2020] 3 SCR 908, <https://canlii.ca/t/jc6vt>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

Citation: C.M. Callow Inc. *v.* Zollinger, 2020 SCC 45, [2020] 3 S.C.R. 908

Appeal Heard: December 6, 2019
Judgment Rendered: December 18, 2020
Docket: 38463

Between:

C.M. Callow Inc.
Appellant

and

Tammy Zollinger, Condominium Management Group, Carleton Condominium Corporation No. 703, Carleton Condominium Corporation No. 726, Carleton Condominium Corporation No. 742, Carleton Condominium Corporation No. 765, Carleton Condominium Corporation No. 783, Carleton Condominium Corporation No. 791, Carleton Condominium Corporation

No. 806, Carleton Condominium Corporation No. 826, Carleton Condominium Corporation No. 839 and Carleton Condominium Corporation No. 877
Respondents

- and -

Canadian Federation of Independent Business and Canadian Chamber of Commerce
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 120)	Kasirer J. (Wagner C.J. and Abella, Karakatsanis and Martin JJ. concurring)
CONCURRING REASONS: (paras. 121 to 182)	Brown J. (Moldaver and Rowe JJ. concurring)
DISSENTING REASONS: (paras. 183 to 238)	Côté J.

C.M. CALLOW INC. *v.* ZOLLINGER

C.M. Callow Inc. *Appellant*

v.

Tammy Zollinger,
Condominium Management Group,
Carleton Condominium Corporation No. 703,
Carleton Condominium Corporation No. 726,
Carleton Condominium Corporation No. 742,
Carleton Condominium Corporation No. 765,
Carleton Condominium Corporation No. 783,
Carleton Condominium Corporation No. 791,
Carleton Condominium Corporation No. 806,
Carleton Condominium Corporation No. 826,
Carleton Condominium Corporation No. 839 and
Carleton Condominium Corporation No. 877 *Respondents*

and

Canadian Federation of Independent Business and Canadian Chamber of Commerce *Interveners*

Indexed as: C.M. Callow Inc. *v.* Zollinger

2020 SCC 45

File No.: 38463.

2019: December 6; 2020: December 18.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts — Breach — Performance — Duty of honest performance — Clause in winter maintenance agreement permitting unilateral termination of contract without cause upon 10 days' notice — Contract terminated by condominium corporations with required notice to contractor — Contractor suing for breach of contract — Trial judge finding that statements and conduct by condominium corporations actively deceived contractor and led it to believe contract would not be terminated — Trial judge awarding damages for breach of contract — Whether exercise of termination clause constituted breach of duty of honest performance.

In 2012, a group of condominium corporations ("Baycrest") entered into a two-year winter maintenance contract and into a separate summer maintenance contract with C.M. Callow Inc. ("Callow"). Pursuant to clause 9 of the winter maintenance contract, Baycrest was entitled to terminate that agreement if Callow failed to give satisfactory service in accordance with its terms. Clause 9 also provided that if, for any other reason, Callow's services were no longer required, Baycrest could terminate the contract upon giving 10 days' written notice.

In early 2013, Baycrest decided to terminate the winter maintenance agreement but chose not to inform Callow of its decision at that time. Throughout the spring and summer of 2013, Callow had discussions with Baycrest regarding a renewal of the winter maintenance agreement. Following those discussions, Callow thought that it was likely to get a two-year renewal of the winter maintenance contract and that Baycrest was satisfied with its services. During the summer of 2013, Callow performed work above and beyond the summer maintenance contract at no charge, which it hoped would act as an incentive for Baycrest to renew the winter maintenance agreement.

Baycrest informed Callow of its decision to terminate the winter maintenance agreement in September 2013. Callow filed a statement of claim for breach of contract, alleging that Baycrest acted in bad faith. The trial judge held that the organizing principle of good faith performance and the duty of honest performance were engaged. She was satisfied that Baycrest actively deceived Callow from the time the termination decision was made to September 2013, and found that Baycrest acted in bad faith by withholding that information to ensure Callow performed the summer maintenance contract and by continuing to represent that the contract was not in danger despite knowing that Callow was taking on extra tasks to bolster the chances of the winter maintenance contract being renewed. She awarded damages to Callow in order to place it in the same position as if the breach had not occurred. The Court of Appeal set aside the judgment at first instance, holding that the trial judge erred by improperly expanding the duty of honest performance beyond the terms of the winter maintenance agreement. Further, it held that any deception in the communications during the summer of 2013 related to a new contract not yet in existence, namely the renewal that Callow hoped to negotiate, and therefore was not directly linked to the performance of the winter contract.

Held (Côté J. dissenting): The appeal should be allowed and the judgment of the trial judge reinstated.

Per Wagner C.J. and Abella, Karakatsanis, Martin and Kasirer JJ.: The duty to act honestly in the performance of the contract precluded the active deception by Baycrest by which it

knowingly misled Callow into believing that the winter maintenance agreement would not be terminated. By exercising the termination clause dishonestly, it breached the duty of honesty on a matter directly linked to the performance of the contract, even if the 10-day notice period was satisfied. Accordingly, the Court of Appeal should not have interfered with the conclusions of the trial judge.

The duty of honest performance in contract, formulated in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, applies to all contracts and requires that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. In determining whether dishonesty is connected to a given contract, the relevant question is whether a right under that contract was exercised, or an obligation under that contract was performed, dishonestly. While the duty of honest performance is not to be equated with a positive obligation of disclosure, in circumstances where a contracting party lies to or knowingly misleads another, a lack of a positive obligation of disclosure does not preclude an obligation to correct a false impression created through that party's own actions.

The organizing principle of good faith recognized in *Bhasin* is not a free-standing rule, but instead manifests itself through existing good faith doctrines. While the duty of honest performance and the duty to exercise discretionary powers in good faith are distinct, like each of the different manifestations of the organizing principle, they should not be thought of as disconnected from one another. The duty of honest performance shares a common methodology with the duty to exercise contractual discretionary powers in good faith by fixing on the wrongful exercise of a contractual prerogative. Each of the specific legal doctrines derived from the organizing principle rest on a requirement of justice that a contracting party have appropriate regard to the legitimate contractual interests of their counterparty. They need not subvert their own interests to those of the counterparty by acting as a fiduciary or in a selfless manner. This requirement of justice reflects the notion that the bargain, the rights and obligations agreed to, is the first source of fairness between parties to a contract. Those rights and obligations must be exercised and performed honestly and reasonably and not capriciously or arbitrarily where recognized by law.

The duty of honesty as contractual doctrine has a limiting function on the exercise of an otherwise complete and clear right since the duty, irrespective of the intention of the parties, applies to the performance of all contracts, and by extension, to all contractual obligations and rights. Instead of constraining the decision to terminate in and of itself, the duty of honest performance attracts damages where the manner in which the right was exercised was dishonest. This focus on the manner in which the termination right was exercised should not be confused with whether the right could be exercised. No contractual right, including a termination right, can be exercised dishonestly and, as such, contrary to the requirements of good faith.

The requirements of honesty in performance can go further than prohibiting outright lies. Whether or not a party has knowingly misled its counterparty is a highly fact-specific determination, and can include lies, half-truths, omissions, and even silence, depending on the circumstances. One can mislead through action, by saying something directly to its counterparty, or through inaction, by failing to correct a misapprehension caused by one's own misleading conduct.

The duty of honest performance is a contract law doctrine, not a tort and therefore a nexus with the contractual relationship is required. A breach must be directly linked to the performance of the contract. The framework for abuse of rights in Quebec is useful to illustrate the required direct link between dishonesty and performance from *Bhasin*. Authorities from Quebec serve as persuasive authority and comparison between the common law and civil law as they evolve in Canada is a particularly useful and familiar exercise for the Court. Like in the Quebec civil law, no contractual right may be exercised dishonestly and therefore contrary to the requirements of good faith. The direct link exists when the party performs their obligation or exercises their right under the contract dishonestly. While the duty of honest performance has similarities with civil fraud and estoppel, it is not subsumed by them. Unlike estoppel and civil fraud, the duty of honest performance does not require a defendant to intend that the plaintiff rely on their representation or false statement.

The duty of honest performance attracts damages according to the ordinary contractual measure. The ordinary approach is to award contractual damages corresponding to the expectation interest. That is, damages should put the injured party in the position that it would have been in had the duty been performed. Although reliance damages, which are the ordinary measure of damages in tort, and expectation damages will be the same in many if not most cases, they are conceptually distinct, and there is no basis to hold that a breach of the duty of honest performance should in general be compensated by way of reliance damages.

In the instant case, Baycrest knowingly misled Callow in the manner in which it exercised clause 9 of the winter maintenance agreement and this wrongful exercise of the termination clause amounts to a breach of contract. Even though Baycrest had what was, on its face, an unfettered right to terminate the winter maintenance agreement on 10 days' notice, the right had to be exercised in keeping with the duty to act honestly. Baycrest's deception was directly linked to this contract, because its exercise of the termination clause was dishonest. It may not have had a free-standing obligation to disclose its intention to terminate, but it nonetheless had an obligation to refrain from misleading Callow in the exercise of that clause. Baycrest had to refrain from false representations in anticipation of the notice period. If someone is led to believe that their counterparty is content with their work and their ongoing contract is likely to be renewed, it is reasonable for that person to infer that the ongoing contract is in good standing and will not be terminated early. Having failed to correct Callow's misapprehension that arose due to these false representations, Baycrest breached its duty of good faith in the exercise of its right of termination. Damages thus flow for the consequential loss of opportunity. While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter.

Per Moldaver, Brown and Rowe JJ.: As a universally applicable minimum standard, all contracts must be performed honestly. Contracting parties may therefore not lie to, or otherwise knowingly mislead, each other about matters directly linked to performance. If a plaintiff suffers

loss in reliance on its counterparty's misleading conduct, the duty of honest performance serves to make the plaintiff whole. It does not, however, impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract. The dividing line between (1) actively misleading conduct, and (2) permissible non-disclosure has been clearly demarcated by cases addressing misrepresentation and the same settled principles apply to the duty of honest performance, although it also applies (unlike misrepresentation) to representations made after contract formation.

There is, in the context of misrepresentation, a rich law accepting that sometimes silence or half-truths amount to a statement. Although contracting parties have no duty to disclose material information, a contracting party may not create a misleading picture about its contractual performance by relying on half-truths or partial disclosure. Representations need not take the form of an express statement. So long as it is clearly communicated, it may comprise other acts or conduct on the part of the defendant. The entire context, which includes the nature of the parties' relationship, is to be considered in determining, objectively, whether the defendant made a representation to the plaintiff. The question is whether the defendant's active conduct contributed to a misapprehension that could be corrected only by disclosing additional information. Contracting parties are required to correct representations that are subsequently rendered false, or which the representor later discovers were erroneous. The question of whether a representation has been made is a question of mixed fact and law, subject to appellate review only for palpable and overriding error.

The legal aim in remedying a breach of contract is to give the innocent party the full benefit of the bargain by placing it in the position it would have occupied had the contract been performed. But the justification for awarding expectation damages does not apply to breach of the duty of honest performance. In such cases, the issue is not that the defendant has failed to perform the contract, thereby defeating the plaintiff's expectations. It is, rather, that the defendant has performed the contract, but has also caused the plaintiff loss by making dishonest extra-contractual misrepresentations concerning that performance, upon which the plaintiff relied to its detriment. The plaintiff's complaint is not lost value of performance, but detrimental reliance on dishonest

misrepresentations. The interest being protected is not an expectation interest, but a reliance interest. And just as these are unrelated interests, an expectation measure of damage is unrelated to the breach of the duty of honest performance.

Much like estoppel and civil fraud, the duty of honest performance vindicates the plaintiff's reliance interest. A contracting party that breaches this duty will be liable to compensate its counterparty for any foreseeable losses suffered in reliance on the misleading representations. The duty of honest performance is not subsumed by estoppel and civil fraud; rather, it protects the reliance interest in a distinct and broader manner since the defendant may be held liable even where it does not intend for the plaintiff to rely on the misleading representation. Irrespective of the defendant's intention, all a plaintiff need show is that, but for its reliance on the misleading representation, it would not have sustained the loss.

Disposing of the present case is a simple matter of applying the Court's decision in *Bhasin*; Callow's claim should be resolved by applying only the duty of honest performance. There is no basis for disturbing the trial judge's conclusions. Baycrest's conduct did not fall on the side of innocent non-disclosure. The trial judge found that active communications between the parties deceived Callow. Baycrest identifies no palpable and overriding error to justify overturning these conclusions. The proper measure of damages represents the loss Callow suffered in reliance on Baycrest's misleading representations.

The majority relies on the civilian concept of "abuse of rights" in its analysis. In so doing, it departs from the Court's accepted practice in respect of comparative legal analysis. The principles that apply to this appeal are determinative and settled. Canada's common law and civil law systems have adopted very different approaches to the place of good faith in contract law. The majority's reliance on the civilian doctrine of abuse of a right distorts the analysis in *Bhasin* and elides the distinction between honest performance and good faith in the exercise of a contractual discretion.

Courts should draw on external legal concepts only where domestic law does not provide an answer or where it is necessary to modify or otherwise develop an existing legal rule. Courts may also look to the experience of other legal systems in considering whether a potential solution to a legal problem will result in negative consequences, or to observe that a domestic legal concept mirrors one found in another system. Even where comparative analysis is appropriate, it must be undertaken with care and circumspection. The golden rule in using concepts from one of Canada's legal systems to modify the other is that the proposed solution must be able to completely and coherently integrate into the adopting system's structure.

Per Côté J. (dissenting): The appeal should be dismissed. Callow's recourse cannot be based on a breach of the duty of honest performance. Although Baycrest's conduct may not be laudable, it does not fall within the category of active dishonesty prohibited by that duty.

The duty of honest performance is described in *Bhasin* as a simple requirement not to lie or knowingly mislead about matters directly linked to performance of the contract. The requirement that parties not lie is straightforward; however, the kind of conduct covered by the requirement that they not otherwise knowingly mislead each other is not. The law imposes neither a duty of loyalty or of disclosure nor a requirement to forego advantages flowing from the contract on a contracting party. Absent a duty to disclose, it is far from obvious when exactly one's silence will knowingly mislead the other contracting party or at what point a permissible silence turns into a non-permissible silence that may constitute a breach of contract. In any event, the duty of honest performance should remain clear and easy to apply.

The obligations flowing from the duty of honest performance are negative obligations. Extending the duty beyond that scope would detract from certainty in commercial dealings. Therefore, silence cannot be considered dishonest within the meaning of *Bhasin* unless there is a positive obligation to speak. Such an obligation does not arise simply because a party to a contract realizes that his counterparty is operating under a mistaken belief. Absent a duty of disclosure, a party to a contract has no obligation to correct his counterparty's mistaken belief unless the party's active conduct has materially contributed to it. What constitutes a material contribution will

obviously depend upon the context, which includes the nature of the parties' relationship as well as the relevant provisions of the contract. Parties that prefer not to disclose certain information — which they are entitled not to do — are not required to adopt a new line of conduct in their contractual relationship simply because they chose silence over speech.

In the context of a right to terminate a contract without cause, a party that intends to end an agreement does not have to convey hints in order to alert his counterparty that their business relationship is in danger. No obligation to speak arises when a party becomes aware of his counterparty's mistaken belief that the contract will not be terminated unless the party has taken positive action that materially contributed to that belief. If one party leads another to believe that their contract will be renewed, it follows that the other party can reasonably expect their business relationship to be extended rather than terminated. But an inference to that effect cannot be drawn in the abstract. In order to infer that one party, through discussions about renewal, led the other party to think that there was no risk their existing agreement would be terminated, the inference-drawing process must obviously take into account the nature of the risk at stake and what was actually communicated during those discussions. Otherwise, the inference would entail a palpable and overriding error that would be subject to appellate review.

In the present case, Baycrest bargained for a right to terminate its winter agreement for any reason and at any time upon giving 10 days' notice. In her assessment of Baycrest's conduct, the trial judge did not ask herself if Baycrest lied or otherwise knowingly misled Callow about the exercise of its right to terminate the winter agreement for any other reason than unsatisfactory services. She wrongfully insisted on addressing alleged performance issues despite the fact that the winter agreement could be terminated even if Callow's services were satisfactory. The trial judge also did not consider that the active deception had to be directly linked to the performance of the contract. It is clear that the representations she found had been made by Baycrest were not directly linked to the performance of the winter agreement. The trial judge's misunderstanding of the applicable legal principles vitiated the fact-finding process.

Cases Cited

Tab 104

CanLII

Grosvenor v. East Luther Grand Valley (Township), 2007 ONCA 55 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2007-01-29
File number:	C45197
Other citations:	84 OR (3d) 346 — 278 DLR (4th) 483 — 154 ACWS (3d) 959 — 219 OAC 381 — [2007] OJ No 241 (QL) — 32 MPLR (4th) 1
Citation:	Grosvenor v. East Luther Grand Valley (Township), 2007 ONCA 55 (CanLII), <https://canlii.ca/t/1qbn4>, retrieved on 2026-01-18

Grosvenor et al. v. The Corporation of the Township of East Luther Grand Valley
[Indexed as: Grosvenor v. East Luther Grand Valley (Township)]

84 O.R. (3d) 346

Court of Appeal for Ontario,
Sharpe, Blair and MacFarland JJ.A.
January 29, 2007

Municipal law -- By-laws -- Validity -- Bad faith -- Principle that generous deference should be accorded exercise of statutory powers by municipality not precluding judicial intervention where municipality acts in bad faith -- Good faith still constituting central foundation for validity of municipal by-law enacted in conformity with municipality's power -- Application judge finding that municipality passed by-law designating former railway right-of- way as "highway" in order to bring it within exception to municipality's obligation to fence under Line Fences Act and thus to avoid expense of fencing -- Application judge concluding that municipality acted in bad faith and that by-law was illegal -- Application judge not being improperly interventionist in quashing by-law û Line Fences Act, R.S.O. 1990, c. L.17.

The municipality purchased a stretch of abandoned railway right-of-way which was subsequently used and developed as a multi-purpose trailway. The respondents were concerned about the lack of fencing dividing and protecting their lands from the trailway, and submitted a demand for fencing to the municipality under the Line Fences Act. Section 20(1)(c) of that Act provides that a

municipality acquiring lands formerly used as part of a railway line is responsible for constructing, keeping up and repairing the fences that mark the lateral boundaries of the acquired land. The municipality responded by passing a by-law designating the trailway as a "highway", thus bringing it within an exception to a municipality's obligation to fence under the Line Fences Act. The by-law was passed without notice to anyone and given first, second and third reading at one sitting at the end of a Council meeting. The respondents applied to quash the by-law. The application was granted. The application judge found that the by-law was passed to avoid the municipality's obligation to fence and to pay the cost of fencing. He concluded that the by-law was enacted in bad faith and was therefore illegal. The municipality appealed.

Held, the appeal should be dismissed.

The principle that courts should afford generous deference to municipalities in the exercise of their statutory powers on behalf of electors does not preclude judicial intervention where a municipality acts in bad faith. Good faith remains a central foundation for the validity of a municipal by-law enacted in conformity with a municipality's power. A by-law is enacted in bad faith where the council acted unreasonably and arbitrarily and without the degree of fairness, openness and impartiality required of a municipal government. The application judge recognized that his role was not to second guess what the Council had done; rather, his findings led him to the conclusion that the municipality had acted for a collateral purpose and that the process followed had not been characterized by the frankness, openness, impartiality and regard for the rights of the respondents that was required of a municipality in the circumstances. His findings, and the inferences he drew from them, were all supportable on the record. [page347]

APPEAL from the judgment of O'Connell J. of the Superior Court of Justice, dated February 28, 2006, quashing a municipal by-law.

Cases referred to Associated Provinical Picture Houses Ltd. v. Wednesbury Corporation, [1948] 1 K.B. 223 (C.A.); Equity Waste Management of Canada v. Halton Hills (Town) (1997), 1997 CanLII 2742 (ON CA), 35 O.R. (3d) 321, [1997] O.J. No. 3921, 40 M.P.L.R. (2d) 107 (C.A.), revg [1994] O.J. NO. 2036, 22 M.P.L.R. (2d) 167 (Gen. Div.), supp. reasons (1995), 1995 CanLII 7182 (ON SC), 2 O.R. (3d) 796, [1995] O.J. No. 1028, 27 M.P.L.R. (2d) 123 (Gen. Div.); H.G. Winton Ltd. and Borough of North York (Re) (1978), 1978 CanLII 1566 (ON SC), 20 O.R. (2d) 737, [1978] O.J. No. 3488 (Div. Ct.); Pedwell v. Pelham (Town), 2003 CanLII 7488 (ON CA), [2003] O.J. No. 1774, 37 M.P.L.R. (3d) 161 (C.A.) [Leave to appeal to S.C.C. refused [2003] S.C.C.A. No. 355]; Shell Canada Products Ltd. v. Vancouver (City), 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, [1994] S.C.J. No. 15, 88 B.C.L.R. (2d) 145, 110 D.L.R. (4th) 1, 163 N.R. 81, [1994] 3 W.W.R. 609, 20 M.P.L.R. (2d) 1, consd Other cases referred to Barrick Gold Corp. v. Ontario (Minister of Municipal Affairs and Housing), [1999] O.J. No. 5015, [1999] O.T.C. 226 (S.C.J.), affd (2001), 2000 CanLII 16929 (ON CA), 51 O.R. (3d) 194, [2000] O.J. No. 4426, 193 D.L.R. (4th) 635, 15 M.P.L.R. (3d) 183, 138 O.A.C. 368 (C.A.); Casier v. The Corporation of the Municipality of Bayham and the Corporation of the Municipality of Tillsonburg (11 October 2002), London 1221 (Div. Ct.); Hamilton (City) v. Hamilton Distillery Co. (1907), 1907 CanLII 1 (SCC), 38 S.C.R. 239; Howard and Toronto (City) (Re) (1928), 1928 CanLII 427 (ON CA), 61 O.L.R. 563, [1928] O.J. No. 146 (C.A.); Immeubles Port Louis Ltée. v. Lafontaine (Village), 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, [1991] S.C.J. No. 14, 78 D.L.R. (4th) 175, 121 N.R. 323, 5 M.P.L.R. (2d) 1; Kruse v. Johnson, [1898] 2 Q.B. 91, [1895-1899] All E.R. Rep 105 (Div. Ct.); Nanaimo (City) v. Rascal Trucking Ltd., 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342, [2000] S.C.J. No. 14, 76 B.C.L.R. (3d) 201, 183 D.L.R. (4th) 1, 251 N.R. 42, [2000] 6 W.W.R. 403, 9 M.P.L.R. (3d) 1; Reference Re: Regulations in Relation to Chemicals, 1943 CanLII 1 (SCC), [1943] S.C.R. 1, [1943] 1 D.L.R. 248, 79 C.C.C. 1; Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, [1959] S.C.J. No. 1, 16 D.L.R. (2d) 689 Statutes referred to Highway Traffic Act, R.S.O. 1990, c. H.8 Line Fences Act, R.S.O. 1990, c. L.17, ss. 5, 20 [as am.], 20(1)

Tab 105

CanLII

Friends of the Oldman River Society v. Canada (Minister of Transport), 1992 CanLII 110 (SCC), [1992] 1 SCR 3

Source:	Supreme Court of Canada
Date:	1992-01-23
File number:	21890
Other citations:	132 NR 321 — 48 FTR 160 — 88 DLR (4th) 1 — 31 ACWS (3d) 250 — [1992] 2 WWR 193 — 84 Alta LR (2d) 129 — 7 CELR (NS) (2d) 1 — 3 Admin LR (2d) 1 — [1992] CarswellNat 1313 — EYB 1992-67211 — JE 92-180 — [1992] SCJ No 1 (QL) — [1992] ACS no 1
Citation:	Friends of the Oldman River Society v. Canada (Minister of Transport), 1992 CanLII 110 (SCC), [1992] 1 SCR 3, <https://canlii.ca/t/1bqn8>, retrieved on 2026-01-18
Most recent unfavourable mention	Alberta Wilderness Association v. Canada (Attorney General), 2008 FC 1061 (CanLII) [...] [20] The decision in Friends of the Oldman River Society v. Canada (Minister of Transport), **1992 CanLII 110 (SCC) , [1992] 1 S.C.R. 3, is not applicable** to these facts. [...]

Her Majesty the Queen in right of Alberta,
as represented by the Minister of
Public Works, Supply and Services *Appellant*

and

The Minister of Transport and
the Minister of Fisheries and Oceans *Appellants*

v.

Friends of the Oldman River Society *Respondent*

and

The Attorney General of Quebec,
the Attorney General for New Brunswick,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Attorney General for Saskatchewan,
the Attorney General of Newfoundland,
the Minister of Justice of the Northwest Territories,
the National Indian Brotherhood/Assembly of First Nations,
the Dene Nation and the Metis Association of the Northwest Territories,
the Native Council of Canada (Alberta),
the Sierra Legal Defence Fund,
the Canadian Environmental Law Association,
the Sierra Club of Western Canada,
the Cultural Survival (Canada),
the Friends of the Earth and
the Alberta Wilderness Association *Interveners*

Indexed as: Friends of the Oldman River Society v. Canada (Minister of Transport)

File No.: 21890.

1991: February 19, 20; 1992: January 23.

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

on appeal from the federal court of appeal

Constitutional law -- Distribution of legislative powers -- Environment -- Environmental assessment -- Whether federal environmental guidelines order intra vires Parliament -- Constitution Act, 1867, ss. 91, 92 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law -- Environmental assessment -- Statutory validity of federal environmental guidelines order -- Whether guidelines order authorized by s. 6 of Department of the Environment Act -- Whether guidelines order inconsistent with Navigable Waters Protection Act -- Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6 -- Navigable Waters Protection Act, R.S.C., 1985, c. N-22, ss. 5, 6 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

Environmental law -- Environmental assessment -- Applicability of federal environmental guidelines order -- Alberta building dam on Oldman River -- Dam affecting areas of federal responsibility such as navigable waters and fisheries -- Whether guidelines order applicable only to new federal projects -- Whether Minister of Transport and Minister of Fisheries and Oceans must comply with guidelines order -- Department of the Environment Act, R.S.C., 1985, c. E-10, ss. 4(1)(a), 5(a)(ii), 6 -- Environmental Assessment and Review Process Guidelines Order, SOR/84-467, ss. 2 "proposal", "initiating department", 6 -- Navigable Waters Protection Act, R.S.C., 1985, c. N-22, s. 5 -- Fisheries Act, R.S.C., 1985, c. F-14, ss. 35, 37.

Crown -- Immunity -- Provinces -- Whether Crown in right of province bound by provisions of Navigable Waters Protection Act, R.S.C., 1985, c. N-22 -- Interpretation Act, R.S.C., 1985, c. I-21, s. 17.

Administrative law -- Judicial review -- Remedies -- Discretion -- Alberta building dam on Oldman River -- Dam affecting areas of federal responsibility such as navigable waters and fisheries -- Environmental group applying for certiorari and mandamus in Federal Court to compel Minister of Transport and Minister of Fisheries and Oceans to comply with federal environmental guidelines order -- Applications dismissed on grounds of unreasonable delay and futility -- Whether Court of Appeal erred in interfering with motions judge's discretion not to grant remedy sought.

The respondent Society, an Alberta environmental group, brought applications for *certiorari* and mandamus in the Federal Court seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal *Environmental Assessment and Review Process Guidelines Order*, in respect of a dam constructed on the Oldman River by the province of Alberta -- a project which affects several federal interests, in particular navigable waters, fisheries, Indians and Indian lands. The Guidelines Order was established under s. 6 of the federal *Department of the Environment Act* and requires all federal departments and agencies that have a decision-making authority for any proposal (i.e., any initiative, undertaking or activity) that may have an environmental effect on an area of federal responsibility to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects. The province had itself conducted extensive environmental studies over the years which took into account public views, including the views of Indian bands and environmental groups, and, in September 1987, had obtained from the Minister of Transport an approval for the work under s. 5 of the *Navigable Waters Protection Act*. This section provides that no work is to be built in navigable waters without the prior approval of the Minister. In assessing Alberta's application, the Minister considered only the project's effect on navigation and no assessment under the Guidelines Order was made. Respondent's attempts to stop the project in the Alberta courts failed and both the federal Ministers of the Environment and of Fisheries and Oceans declined requests to subject the project to the Guidelines Order. The contract for the construction of the dam was awarded in 1988 and the project was 40 per cent complete when the respondent commenced its action in the Federal Court in April 1989. The Trial Division dismissed the applications. On appeal, the Court of Appeal reversed the judgment, quashed the approval under s. 5 of the *Navigable Waters Protection Act*, and ordered the Ministers of Transport and of Fisheries and Oceans to comply with the Guidelines Order. This appeal raises the constitutional and statutory validity of the Guidelines Order as well as its nature and applicability. It also raises the question whether the motions judge properly exercised his discretion in deciding not to grant the remedy sought on grounds of unreasonable delay and futility.

Held (Stevenson J. dissenting): The appeal should be dismissed, with the exception that there should be no order in the nature of mandamus directing the Minister of Fisheries and Oceans to comply with the Guidelines Order.

Statutory Validity of the Guidelines Order

The Guidelines Order was validly enacted pursuant to s. 6 of the *Department of the Environment Act*, and is mandatory in nature. When one reads s. 6 as a whole, rather than focusing on the word "guidelines" in isolation, it is clear that Parliament has elected to adopt a regulatory scheme that is "law", and amenable to enforcement through prerogative relief. The "guidelines" are not merely authorized by statute but must be formally enacted by "order" with the approval of the Governor in Council. That is in striking contrast with the usual internal ministerial policy guidelines intended for the control of public servants under the minister's authority.

The Guidelines Order, which requires the decision maker to take socio-economic considerations into account in the environmental impact assessment, does not go beyond what is authorized by the *Department of the Environment Act*. The concept of "environmental quality" in s. 6 of the Act is not confined to the biophysical environment alone. The environment is a diffuse subject matter and, subject to the constitutional imperatives, the potential consequences for a community's livelihood, health and other social matters from environmental change, are integral to decision making on matters affecting environmental quality.

The Guidelines Order is consistent with the *Navigable Waters Protection Act*. There is nothing in the Act which explicitly or implicitly precludes the Minister of Transport from taking into consideration any matters other than marine navigation in exercising his power of approval under s. 5 of the Act. The Minister's duty under the Order is supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the Order. There is also no conflict between the requirement for an initial assessment "as early in the planning process as possible and before irrevocable decisions are taken" in s. 3 of the Guidelines Order, and the remedial power under s. 6(4) of the Act to grant approval after the commencement of construction. That power is an exception to the general rule in s. 5 of the Act requiring approval prior to construction, and in exercising his

discretion to grant approval after commencement, the Minister is not precluded from applying the Order.

Applicability of the Guidelines Order

The scope of the Guidelines Order is not restricted to "new federal projects, programs and activities"; the Order is not engaged every time a project may have an environmental effect on an area of federal jurisdiction. However, there must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". The proper construction to be placed on the term "responsibility" is that the federal government, having entered the field in a subject matter assigned to it under s. 91 of the *Constitution Act, 1867*, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. "Responsibility" within the definition of "proposal" means a legal duty or obligation and should not be read as connoting matters falling generally within federal jurisdiction. Once such a duty exists, it is a matter of identifying the "initiating department" assigned responsibility for its performance, for it then becomes the "decision making authority" for the proposal and thus responsible for initiating the process under the Guidelines Order.

The Oldman River Dam project falls within the ambit of the Guidelines Order. The project qualifies as a proposal for which the Minister of Transport alone is the "initiating department" under s. 2 of the Order. The *Navigable Waters Protection Act*, in particular s. 5, places an affirmative regulatory duty on the Minister of Transport. Under that Act there is a legislatively entrenched regulatory scheme in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water.

The Guidelines Order does not apply to the Minister of Fisheries and Oceans, however, because there is no equivalent regulatory scheme under the *Fisheries Act* which is applicable to this project. The discretionary power to request or not to request information to assist a Minister in the exercise of a legislative function does not constitute a "decision making responsibility" within the

meaning of the Order. The Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has only been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty.

The scope of assessment under the Guidelines Order is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility within the meaning of the term "proposal". Under the Order, the initiating department which has been given authority to embark on an assessment must consider the environmental effect on all areas of federal jurisdiction. The Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, must thus consider the environmental impact of the dam on such areas of federal jurisdiction as navigable waters, fisheries, Indians and Indian lands.

Crown Immunity

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Crown in right of Alberta is bound by the *Navigable Waters Protection Act* by necessary implication. The proprietary right the province may have in the bed of the Oldman River is subject to the public right of navigation, legislative jurisdiction over which has been exclusively vested in Parliament. Alberta requires statutory authorization from Parliament to erect any obstruction that substantially interferes with navigation in the Oldman River, and the *Navigable Waters Protection Act* is the means by which it must be obtained. The Crown in right of Alberta is bound by the Act, for it is the only practicable procedure available for getting approval. The purpose of the Act would be wholly frustrated if the province was not bound by the Act. The provinces are among the bodies that are likely to engage in projects that may interfere with navigation. Were the Crown in right of a province permitted to undermine the integrity of the essential navigational networks in Canadian waters, the legislative purpose of the *Navigable Waters Protection Act* would effectively be emasculated.

Per Stevenson J. (dissenting): The province of Alberta is not bound by the *Navigable Waters Protection Act*. The Crown is not bound by legislation unless it is mentioned or referred to in

the legislation. Here, there are no words in the Act "expressly binding" the Crown and no clear intention to bind "is manifest from the very terms of the statute". As well, the failure to include the Crown would not wholly frustrate the purpose of the Act or produce an absurdity. There are many non-governmental agencies whose activities are subject to the Act and there is thus no emasculation of the Act. If the Crown interferes with a public right of navigation, that wrong is remediable by action. There is no significant benefit in approval under the Act. Tort actions may still lie.

Constitutional Validity of the Guidelines Order

The "environment" is not an independent matter of legislation under the *Constitution Act, 1867*. Understood in its generic sense, it encompasses the physical, economic and social environment and touches upon several of the heads of power assigned to the respective levels of government. While both levels may act in relation to the environment, the exercise of legislative power affecting environmental concerns must be linked to an appropriate head of power. Local projects will generally fall within provincial responsibility, but federal participation will be required if, as in this case, the project impinges on an area of federal jurisdiction.

The Guidelines Order is *intra vires* Parliament. The Order does not attempt to regulate the environmental effects of matters within the control of the province but merely makes environmental impact assessment an essential component of federal decision making. The Order is in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. In essence, the Order has two fundamental aspects. First, there is the substance of the Order dealing with environmental impact assessment to facilitate decision making under the federal head of power through which a proposal is regulated. This aspect of the Order can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in s. 91 of the *Constitution Act, 1867*. The second aspect of the Order is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker (the "initiating department"). This facet of the Order has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform

their administrative functions and duties. This is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in s. 91.

The Guidelines Order cannot be used as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. The "initiating department" is only given a mandate to examine matters directly related to the areas of federal responsibility potentially affected. Any intrusion under the Order into provincial matters is merely incidental to the pith and substance of the legislation.

Discretion

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: The Federal Court of Appeal did not err in interfering with the motions judge's discretion not to grant the remedies sought on the grounds of unreasonable delay and futility. Respondent made a sustained effort, through legal proceedings in the Alberta courts and through correspondence with federal departments, to challenge the legality of the process followed by the province to build the dam and the acquiescence of the appellant Ministers, and there is no evidence that Alberta has suffered any prejudice from any delay in taking the present action. Despite ongoing legal proceedings, the construction of the dam continued. The province was not prepared to accede to an environmental impact assessment under the Order until it had exhausted all legal avenues. The motions judge did not weigh these considerations adequately, giving the Court of Appeal no choice but to intervene. Futility was also not a proper ground to refuse a remedy in the present circumstances. Prerogative relief should only be refused on that ground in those few instances where the issuance of a prerogative writ would be effectively nugatory. It is not obvious in this case that the implementation of the Order even at this late stage will not have some influence over the mitigative measures that may be taken to ameliorate any deleterious environmental impact from the dam on an area of federal jurisdiction.

Per Stevenson J. (dissenting): The Federal Court of Appeal erred in interfering with the motions judge's discretion to refuse the prerogative remedy. The court was clearly wrong in overruling his conclusion on the question of delay. The common law has always imposed a duty on an applicant to act promptly in seeking prerogative relief. Given the enormity of the project and the interests at stake, it was unreasonable for the respondent Society to wait 14 months before challenging the Minister of Transport's approval. It is impossible to conclude that Alberta was not prejudiced by the delay. The legal proceedings in the Alberta courts brought by the respondent and others need not have been taken into account by the motions judge. These proceedings were separate and distinct from the relief sought in this case and were irrelevant to the issues at hand. The present action centres on the constitutionality and applicability of the Guidelines Order. It raises new and different issues. In determining whether he should exercise his discretion against the respondent, the motions judge was obliged to look only at those factors which he considered were directly connected to the application before him. Interference with his exercise of discretion is not warranted unless it can be said with certainty that he was wrong in doing what he did. The test has not been met in this case.

Costs

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.: It is a proper case for awarding costs on a solicitor-client basis to the respondent, given the Society's circumstances and the fact that the federal Ministers were joined as appellants even though they did earlier not seek leave to appeal to this Court.

Per Stevenson J. (dissenting): The appellants should not be called upon to pay costs on a solicitor and client basis. There is no justification in departing from our own general rule that a successful party should recover costs on the usual party and party basis. Public interest groups must be prepared to abide by the same principles as apply to other litigants and be prepared to accept some responsibility for the costs.

Cases Cited

Tab 106

CanLII

TD Insurance Home and Auto v. Sivakumar, 2006 CanLII 17246 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2006-05-25
File number:	C43991
Other citations:	80 OR (3d) 671 — 268 DLR (4th) 59 — 211 OAC 316 — 38 CCLI (4th) 27 — 29 CPC (6th) 359 — [2006] OJ No 2053 (QL)
Citation:	TD Insurance Home and Auto v. Sivakumar, 2006 CanLII 17246 (ON CA), <https://canlii.ca/t/1nc6h>, retrieved on 2026-01-18

TD Insurance Home and Auto, formerly Liberty Insurance Company of Canada, formerly Liberty Mutual Insurance Company v. Sivakumar, a Minor by his Litigation Guardian, Sivabalasingam et al.
[Indexed as: TD Insurance Home and Auto v. Sivakumar (Litigation Guardian of)]

80 O.R. (3d) 671

Court of Appeal for Ontario,
Laskin, Borins and Juriansz JJ.A.
May 25, 2006
*** Vous trouverez la traduction française de la décision ci-dessus à la p. 680, post.**

Civil procedure -- Evidence -- Preservation of evidence -- Insured claiming that infant was injured in motor vehicle accident -- Insurer denying that injury was caused by motor vehicle accident on basis of expert opinions -- Court not having jurisdiction to grant order under Rule 36 of Rules of Civil Procedure for videotaped examination of those experts under oath in order to preserve their evidence in case they were unable to testify in action which infant might commence when he reached his majority -- Rule 36.01 not conferring any power on court to order preservation of evidence prior to commencement of proceeding -- Section 146 of Courts of Justice Act not applying to confer such power -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 146 -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 36.01.

The father of a child who suffered a significant brain and skull injury put his automobile insurer on notice that the child was injured in a motor vehicle accident. The child's mother had originally claimed that the child was injured when he fell down a stairway while strapped in his car seat. The insurer retained three experts to opine on the cause of the child's injuries. The experts concluded that the injuries were probably caused by a fall down the stairs, and not by a motor vehicle accident. The two-year limitation period for a claim for the recovery of damages occasioned by a motor vehicle did not begin to run until the child reached his majority in 2019. Accordingly, in order to preserve the evidence of the three experts in case they were unable to testify in any action which the child might commence, the insurer brought an application for an order requiring the videotaped examination under oath of those experts. The application judge granted the application, relying on the combined effect of ss. 1, 95, 96, 101 and 146 of the Courts of Justice Act and Rules 14 and 36 of the Ontario Rules of Civil Procedure. The insured appealed. [page672]

Held, the appeal should be allowed.

Rule 14 of the Rules of Civil Procedure and ss. 1, 95, 96 and 101 of the Courts of Justice Act had no application to the circumstances of this case. Rule 36.01 does not confer any power on the court to order the preservation of evidence prior to the commencement of a proceeding, which is defined in rule 1.03(1) as an action or application. The use of the word "party" throughout Rule 36 clearly indicates that it applies only where an action has been commenced and one of the parties to the action wishes to preserve the evidence of a witness for use at trial, usually in circumstances where the proposed witness is ill or of advanced years. As no action had been commenced on behalf of the child, rule 36.01 conferred no power on the application judge to grant the impugned order. Section 146 of the Courts of Justice Act was of no assistance to the insurer. Section 146 does not confer jurisdiction, but refers to procedural lacunae where jurisdiction has otherwise been conferred. That rule 36.01 does not apply where no proceeding has been commenced is not a procedural gap. The absence of statutory authority enabling the court to act prior to the commencement of a proceeding is not a matter of procedure. It indicates the intention of the Civil Rules Committee to confine the application of the rule to situations where a proceeding has been commenced.

APPEAL from a judgment of Echlin J. of the Superior Court of Justice dated July 11, 2005, granting an order for the preservation of evidence.

Cases referred to Bisoukis v. Brampton (City) (1999), 1999 CanLII 3825 (ON CA), 46 O.R. (3d) 417, [1999] O.J. No. 4598, 180 D.L.R. (4th) 577, 7 M.P.L.R. (3d) 1, 1 M.V.R. (4th) 42 (C.A.) [Leave to appeal to S.C.C. denied [2000] S.C.C.A. No. 52]; Murphy v. Welsh, 1993 CanLII 59 (SCC), [1993] 2 S.C.R. 1069, [1993] S.C.J. No. 83, 14 O.R. (3d) 799n, 106 D.L.R. (4th) 404, 156 N.R. 263, 18 C.C.L.T. (2d) 101, 18 C.P.C. (3d) 137, 47 M.V.R. (2d) 1 (sub nom. Stoddard v. Watson); R. v. Sztuke (1993), 1993 CanLII 8494 (ON CA), 16 O.R. (3d) 559, [1993] O.J. No. 3038, 87 C.C.C. (3d) 50 (C.A.) Statutes referred to Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 1, 95, 96 [as am.], 101 [as am.], 146 Highway Traffic Act, R.S.O. 1990, c. H.8, s. 206(1) [rep.] Limitations Act, R.S.O. 1990, c. L.15, s. 47 [rep.] Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 1.03, 1.04(1), 1.04(2), 7.08(1), 14, 36, 36.01, 36.02, 36.04, 40.01

Charlia D. Von Buchwald, for appellant.

John P. Desjardins, for respondent.

The judgment of the court was delivered by

BORINS J.A.: -- I

[1] This appeal arises from what Echlin J. characterized as a "unique application". It raises the question of whether Rule 36 of [page673] the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which permits a party who intends to introduce transcript or videotape evidence of a person at trial may, with the leave of the court, examine the person under oath before the trial in circumstances where no proceeding has been commenced. The application judge found that it did. With respect, I disagree. For the reasons that follow, I would allow the appeal. II

[2] This appeal arises from rather unusual circumstances. On April 17, 2002, Ajeevan Sivakumar was rushed to hospital. He was five and a half months old. He had sustained significant injury to the right parieto-occipital region of his brain and skull that required surgical repair. When the child initially presented for medical care, his mother, Ahilaverni Sivakumar, gave the history that he had fallen down a stairway while strapped in his car seat. However, approximately six weeks later, she stated that this was not the way in which her son had been injured. Rather, she claimed the injuries occurred when he was restrained in his car seat in the rear of a vehicle she had been driving when she lost control of it and hit a tree.

[3] As the child's father, Murugesu Sivakumar, was the owner of the vehicle that was insured by the respondent, on June 6, 2002, the law firm representing the Sivakumar family put the insurer on notice. In part, its letter read:

Tab 107

CanLII

Cheong v. Ontario (Minister of Finance), 2004 CanLII 17750 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2004-02-11
File number:	C39640
Other citation:	183 OAC 160
Citation:	Cheong v. Ontario (Minister of Finance), 2004 CanLII 17750 (ON CA), <https://canlii.ca/t/1gd62>, retrieved on 2026-01-18

DATE: 20040211
DOCKET:
C39640

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., GOUDGE and GILLESE JJ.

B E T W E E N:	)	
	)	
PETER CHEONG	)	Osborne G. Barnwell
	)	for the appellant
Appellant	)	
	)	Lynn K. Tosolini
- and -	)	for the respondent
	)	
THE MINISTER OF FINANCE	)	Roger Taylor
	)	for the Intervener
Respondent	)	
	)	

) Heard: October 8 and 9, 2003

On appeal from the judgment of Justice Norman D. Dyson of the Superior Court of Justice dated January 30, 2003.

GOUDGE J.A.:

[1] Pursuant to the right given to him by s. 25 of the *Retail Sales Tax Act*, R.S.O. 1990, c. R.31 (the "*RSTA*"), the appellant Peter Cheong sought to appeal to the Superior Court of Justice from the assessment made against him for retail sales tax. Section 25(2) of the *RSTA* provides that the appeal is instituted by filing a notice of appeal with the court, paying the court fee, and serving a copy of the notice of appeal on the provincial Minister of Finance, who is responsible for administering the *RSTA*.

[2] Section 25(1) provides *inter alia* that no appeal shall be instituted after the expiration of ninety days from the day the Minister mailed the notice confirming the assessment to the person objecting to it. In this case, the appellant served the Minister with a copy of the notice of appeal on the ninety-first day. He then sought an order extending the time for service. For his part, the Minister brought a cross-motion to strike the appeal as being out of time. The motions judge dismissed the appellant's motion and allowed that of the Minister.

[3] This is the appeal from that order. The central issue is whether the court has jurisdiction to extend time in these circumstances. For the reasons that follow, I conclude that it does not. I would therefore dismiss the appeal.

BACKGROUND

[4] The relevant facts are not in dispute. The appellant was the president and a director and shareholder of a corporation which carried on business as Scarborough Town Hyundai from September 1, 1992 until July 7, 1995, when it filed for bankruptcy.

[5] In February 1995, the corporation received a notice of assessment for retail sales tax that it had collected but not remitted. It filed no notice of objection to this assessment but, because of its subsequent bankruptcy, the Minister recovered nothing from the corporation.

[6] As a result, by notice of assessment dated April 15, 1997, the appellant was assessed as director of the corporation for the retail sales tax collected by the corporation but not remitted during the period from September 1, 1992 to July 7, 1995. Including penalty and interest, the assessment totalled $138,234.45.

[7] The appellant's counsel filed a notice of objection to this assessment dated October 2, 1997 in which he raised the due diligence defence available to him under the *RSTA*.

[8] In a separate proceeding in the Ontario Court of Justice in August 1998, the appellant was found guilty under s. 42 of the *RSTA* of having "directed, authorized, assented to, acquiesced in or participated in" the corporation's failure to remit retail sales tax.

[9] Four years after he had filed his objection, and after his counsel had repeatedly sought to have the objection dealt with, the appellant received a letter from the Minister dated on October 17, 2001 confirming that no change would be made in his assessment. The letter, which was copied to counsel, advised the appellant that he had ninety days to appeal to the Superior Court of Justice and set out the steps required to institute that appeal.

[10] The appellant sought to exercise his right to appeal. He filed a notice of appeal with the Superior Court and paid the required fee on January 15, 2002. He served the copy of the notice of appeal by registered mail on the Minister on January 16, 2002, the ninety-first day after October 17, 2001.

[11] When the Minister refused to consent to an extension of time for service, the appellant brought his motion. The Minister then brought his cross-motion.

[12] The motions judge issued his reasons for dismissing the appeal on January 30, 2003. He found that the time for service should not be extended because the appellant had no reasonable chance of success on the appeal and, secondly, in any event, under the *RSTA* the court had no jurisdiction to extend time for service.

ANALYSIS

[13] The appellant contests both findings. He argues that, assuming the court can do so, this is a proper case to extend the time for service. The more important issue is whether the court has jurisdiction to extend the time for service and, on that score, the appellant says that the motions judge was wrong in his interpretation of the *RSTA*, most particularly in his failure to advert to s. 29. On this issue, the appellant was supported by the intervener, McKerlie-Millen Inc., whose submissions were helpful in addressing the legislative history of the relevant sections of the *RSTA*.

[14] Given my conclusion on jurisdiction, it is unnecessary to finally decide whether the motions judge should have extended the time for service of the notice of appeal if the court had the power to do so. Suffice it to say that the appellant has a sympathetic case. He has raised a detailed due diligence defence to the assessment. It is unclear whether that defence was adjudicated upon in the provincial court proceedings. Nothing suggests that the Minister would suffer any prejudice by extending the time for service by one day. The fact that the Minister took some four years to respond to the appellant's original objection, despite the prodding of counsel, takes the edge off any assertion that strict timeliness is an essential component of the process for contesting assessments.

[15] However, the primary issue in this appeal is not whether the court should extend the time for service of the notice of appeal, but whether it has the jurisdiction to do so.

[16] The relevant sections of the *RSTA* are central to the determination of this issue.

[17] The first of these are ss. 24(1) and (4), which provide for the initial objection to an assessment for retail sales tax and the Minister's obligation to respond. They read as follows:

> **24.** (1) A person who objects to an assessment made against the person under section 18, subsection 19(1) of section 20 or to a statement under section 20 that is served on the person may, within 180 days from the day of mailing of the statement or notice of assessment, serve on the Minister a notice of objection in the form approved by the Minister.
>
> ...
>
> (4) Upon receipt of the notice of objection, the Minister shall with all due dispatch reconsider the assessment or statement objected to and vacate, confirm or vary the assessment or statement, or reassess or serve a fresh statement, and the Minister shall thereupon notify the person making the objection of his or her action in writing.

[18] The provisions governing an appeal from the Minister's notification under s. 24(4) are ss. 25, 26 and 27. For the purposes of this case, the critical subsections, beginning with the cornerstone provided by s. 25(1), are the following:

> **25.** (1) When the Minister has given the notification required by subsection 24(4), the person who has served a notice of objection under that section may appeal to the Superior Court of Justice to have the assessment or statement so objected to vacated or varied, but no appeal under this section shall be instituted after the expiration of ninety days from the day notice has been mailed to such person under subsection 24 (4).
>
> (2) An appeal to the Superior Court of Justice shall be instituted by,
>
> (a) filing a notice of appeal with the court in the form approved by the Minister;
>
> (b) paying a fee to the court in the same amount and manner as the fee payable under regulations made under the *Administration of Justice Act* on the issue of a statement of claim; and
>
> (c) serving on the Minister a copy of the notice of appeal as filed.
>
> ...

(3) A notice of appeal shall be served on the Minister by being sent by registered mail addressed to the Minister.

…

(5) The time within which a notice of objection or a notice of appeal is to be served may be extended by the Minister if application for extension is made,

…

(b) in respect of a notice of appeal, before the expiration of the time allowed under subsection (1) of this section for the service of the notice of appeal.

26. The Minister shall with all due dispatch serve on the person appealing and file in the court a reply to the notice of appeal admitting or denying the facts alleged and containing a statement of such further allegations of fact and all statutory provisions and reasons as he or she intends to rely on, and where the Minister has failed to serve the reply within 180 days from the date of service upon him or her of the notice of appeal, the appellant may, upon twenty-one days notice to the Minister, bring a motion before a judge of the Superior Court of Justice for an order requiring the reply to be served within such time as the judge shall order, and the judge may, if he or she considers it proper in the circumstances, also order that, upon failure by the Minister to serve the reply in the time specified in the order, the assessment or statement with respect to which the appeal is taken shall be vacated and any tax paid pursuant to such assessment, or any refund disallowed pursuant to such statement, shall be repaid or refunded to the appellant, but nothing in this section revives an appeal that is void or affects a statement or assessment that has become valid and binding under subsection 18 (8), subsection 19(3) or subsection 20(9).

27. (1) Upon the filing of the material referred to in section 26 with the Superior Court of Justice, the matter shall be deemed to be an action in the court.

[19] Finally, the section relied on most heavily by the appellant is s. 29:

29. The practice and procedure of the Superior Court of Justice, including the right of appeal and the practice and procedure relating to appeals, apply to every matter deemed to be an action under section 25, and every judgment and order given or made in every such action may be enforced in the same manner and by the like process as a judgment or order given or made in an action commenced in the court.

[20] These various sections of the *RSTA* put a number of points beyond argument.

[21] First, s. 25(1) gives a right of appeal only if the appeal is instituted within ninety days of the mailing of the Minister's response under s. 24(4). Meeting this limitation period is a condition of the right of appeal. By seeking an extension of time, the appellant acknowledges as much.

[22] Second, s. 25(2) makes clear that serving a copy of the notice of appeal on the Minister is a part of instituting the appeal. The appeal cannot be instituted without that service. Section 25(3) provides that service is by registered mail. Hence, unless proper service is effected within ninety days, the appeal is not instituted within the ninety day limitation period and is barred.

[23] Third, the legislature has explicitly addressed the issue of extending time to serve a notice of appeal. Section 25(5)(b) gives the Minister the power to extend that time provided the extension is sought within the ninety days.

[24] There is no provision in the *RSTA* which expressly gives the court jurisdiction to extend the time for service after the ninety days have run. However, the appellant, supported by the intervener, argues that s. 29 does so implicitly. The argument has two steps. The appellant says that s. 29 engages the practice and procedure of the court as found in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and the *Courts of Justice Act*, R.S.O. 1990, c.C.43 once the appellant has taken the steps required by s. 25(2) to institute an appeal, even if those steps are taken after the ninety day limitation period has expired. The appellant then argues that the *Rules* and the *Courts of Justice Act* give the court the power to relieve against the statutory limitation period by extending the time for serving a notice of appeal.

[25] In my view, both steps in this argument are flawed.

[26] First, I think that when s. 29 is read in the context of ss. 25, 26 and 27 of the *RSTA*, it is clear that the practice and procedure of the Superior Court apply only upon completion of the steps called for by both ss. 25 and 26. That is, the appellant must file the notice of appeal, pay the necessary fee and serve the notice of appeal as required by s. 25. And the Minister must then serve and file his reply as required by s. 26. Short of this, the practice and procedure of the Superior Court can offer no help to the appellant.

[27] The logic of the statutory language mandates this result. Section 29 requires that a matter be deemed to be an action before the practice and procedure of the Superior Court can apply to it. Section 27 is the only provision under which a matter can be deemed an action. Section 27 states that this deeming can occur only on the filing of the Minister's reply. Indeed, the legislature amended this section of the *RSTA* in 1975 to delay the point at which a matter is deemed an action until the Minister has filed his reply under s. 26. Before this amendment, a matter was deemed an action upon the completion of the steps required of the appellant under s. 25.

[28] However, the appellant argues that because s. 29 makes the practice and procedure of the Superior Court applicable to every matter deemed to be an action *under s. 25*, only the steps to be taken by the appellant must occur before the remedial power in the *Rules*

and the *Courts of Justice Act* can be resorted to. The difficulty with this proposition is that s. 25 does not deem a matter to be an action. The legislature cannot therefore have intended that the phrase "under s. 25" in s. 29 be coupled with the deeming phrase that immediately precedes it. Rather, "under s. 25" must only identify the matter to which the practice and procedure of the Superior Court will apply once the matter is deemed to be an action. In other words, the court's practice and procedure applies to every matter under s. 25 once it is deemed to be an action. Because of s. 27, this necessitates that the steps required by both ss. 25 and 26 be completed before resort can be had to the court's practice and procedure.

[29] The appellant also argues that the explicit inclusion of "the right of appeal" in "the practice and procedure" made applicable by s. 29 must mean that the practice and procedure applies to the right of appeal itself, including its limitation period. However, the flaw in this proposition is that "the right of appeal" in s. 29 cannot refer to the right of appeal from an *RSTA* assessment. There is nothing in the practice and procedure of the Superior Court that provides for the right of appeal from an assessment. Rather, that right of appeal is accorded by s. 25(1) of the *RSTA* if the ninety day limitation period is complied with. Therefore, the right of appeal referred to in s. 29 must refer to the right of appeal from the Superior Court. Section 29's reference to "the right of appeal" thus has no bearing on the appellant's argument.

[30] The cases cited by the appellant do not support a conclusion that s. 29 of the *RSTA* allows the appellant access to the court's practices and procedure to extend the time to serve the notice of appeal after the statutory limitation period has expired. Unlike *Molson Ontario Breweries v. Ontario (Minister of Finance)*, [1985] O.J. No. 295 (S.C.O.) and *Helou (c.o.b Your Choice Pizza & Wings) v. Ontario (Minister of Finance)*, [2002] O.J. No. 3973 (S.C.), (leave to appeal to the Divisional Court granted [2002] O.J. No. 4556), this is not a case where *estoppel* can be raised against the Minister. And, unlike *K.C. v. College of Physical Therapists of Alberta*, 1998 ABCA 213 (CanLII), [1998] A.J. No. 99 (C.A) at para. 12 in this case, the statutory right of appeal in s. 25(1) of the *RSTA* is clearly conditional on the appeal being instituted within the ninety day limitation period.

[31] The inability of the court to relieve against the ninety day limitation period that results from this statutory interpretation may seem to carry draconian results. Indeed, as Iacobucci and Major JJ. wrote in their dissenting opinion in *Novak v. Bond*, 1999 CanLII 685 (SCC), [1999] 1 S.C.R. 808 at para. 8: "Almost all applications of limitations statutes will seem harsh. But their finality should not obscure their value."

[32] However, the circumstances of this particular limitation period may at least soften that sense of harshness. The ninety days provided by s. 25(1) of the *RSTA* are triggered by a clear event, namely the Minister's response under s. 24(4) to the objection to the assessment. The person required to comply with the limitation period will already have set out his or her concerns with the assessment in the objection previously filed pursuant to s. 24(1). And, as in this case, the person may well have legal assistance by the time the limitation period starts to run.

[33] Thus, I think that, taken in context, the meaning of s. 29 of the *RSTA* is clear. The practice and procedure of the Superior Court is available to an appellant only once the steps required by both ss. 25 and 26 are properly completed and the matter is therefore deemed an action. That practice and procedure is not available at the s. 25 stage to assist an appellant to extend the time for service of the notice of appeal after the ninety day limitation period in s. 25(1) has expired. At that point, the right to appeal is gone. Thus, the appellant in this case cannot look to the practice and procedure of the Superior Court for relief from the statutory limitation period set out in s. 25(1) of the *RSTA*.

[34] The second step in the appellant's argument is also flawed. Even if the practice and procedure of the Superior Court could be engaged prior to the filing of the Minister's reply under s. 26 of the *RSTA*, nothing in the *Rules of Civil Procedure* or the *Courts of Justice Act* empowers the court to extend the statutory limitation period clearly set out in s. 25(1).

[35] The rule dealing with extension of time is rule 3.02. It gives the court discretion to extend time, but only time prescribed by the *Rules*. This rule does not permit the court to extend a limitation period prescribed by statute. See *Murphy v. Welch; Stoddart v. Watson*, 1993 CanLII 59 (SCC), [1993] 2 S.C.R. 1069 at para. 15.

[36] Nor do ss. 11 or 146 of the *Courts of Justice Act* do so. Section 11 gives the Superior Court of Justice all the jurisdiction historically exercised by courts of common law and equity. Section 146 provides that any jurisdiction which the court has shall be exercised consistent with the due administration of justice in the absence of any express provision for its exercise. Neither section confers jurisdiction on the court to override a clearly expressed statutory limitation period such as that found in s. 25(1) of the *RSTA*. See Dickson J. in *College Housing Co-operative Ltd. v. Baxter Student Housing Ltd.*, 1975 CanLII 164 (SCC), [1976] 2 S.C.R. 475 at p. 480.

[37] Thus, I conclude that both steps in the appellant's argument are misconceived. Section 29 of the *RSTA* simply does not give the court jurisdiction to extend the time for service of the notice of appeal in the circumstances of this case. The court does not have the power to relieve against the limitation period in s. 25(1) of the *RSTA*.

[38] The motions judge was correct to find that he had no jurisdiction. The appeal is dismissed. However, we are unsympathetic to the Minister's request for costs given that his successful complaint about the appellant being one day late comes in a case where he took some four years to discharge his duty to respond "with all due dispatch" to the appellant's original objection. There will be no order as to costs.

Released: February 11, 2004 "RRM"

"S.T. Goudge J.A."
"I agree R.R. McMurtry C.J.O."

"I agree E.E. Gillese J.A."

2623

Tab 108

CanLII

Li v. Li, 2021 ONCA 669 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2021-09-29
File number:	C68703
Other citation:	159 OR (3d) 216
Citation:	Li v. Li, 2021 ONCA 669 (CanLII), <https://canlii.ca/t/jjj84>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Li v. Li, 2021 ONCA 669
DATE: 20210929
DOCKET: C68703

Feldman, Paciocco and Coroza JJ.A.

BETWEEN

Xiang Li

Applicant (Respondent)

and

Xiang-E Li

Respondent (Appellant)

Heng (Pandora) Du, for the appellant

Michael J. Stangarone and Stephen P. Kirby, for the respondent

Heard: March 12, 2021 by video conference

On appeal from the order of Justice E. Llana Nakonechny of the Superior Court of Justice, dated September 15, 2020, with reasons reported at 2020 ONSC 5552.

Coroza J.A.:

I. OVERVIEW

[1] The appellant appeals from the dismissal of her motion (the "Motion"), in which she sought an order dismissing, on jurisdictional grounds, the respondent's application for relief arising from the breakdown of their marriage (the "Application"). Before the motion judge, the appellant argued: i) that Ontario lacked jurisdiction to hear the Application and ii) in the alternative, that the city of Kunming, in the province of Yunnan, People's Republic of China was the more appropriate forum for the dispute. The motion judge rejected both arguments, concluding that Ontario had jurisdiction and that the appellant had not met her burden of showing that China was the "clearly more appropriate" forum for the case.

[2] For the reasons that follow, I would not interfere with the motion judge's finding that Ontario has jurisdiction to hear the dispute. However, I conclude that the motion judge erred in reaching the conclusion that China was not the "clearly more appropriate" forum for resolving the respondent's property and support claims.

[3] At its core, this litigation relates to assets located in China and the respondent's post-separation interest in them, if any. The respondent purportedly waived his interest in the assets by entering into three written agreements in China. These agreements have not been set aside. Since these documents were executed and witnessed in China, the Chinese courts are in a far better position to deal with their applicability. Respectfully, the motion judge ignored this very important factor in analyzing the doctrine of *forum non conveniens*.[1] Instead, the motion judge focused on the fact that the respondent was pursuing a trust claim

interest in a single property in Ontario: a property worth a small fraction of the appellant's overall assets. In my view, the failure to consider the parties' domestic agreements as central to the *forum non conveniens* analysis was an error in principle justifying intervention by this court.

II. BACKGROUND

[4] In 2003, the appellant and the respondent met in China. In 2012, they married in the city of Kunming, Yunnan Province, China.

[5] The appellant is a Chinese citizen. She previously held Canadian permanent resident status, until it expired in March 2019. This status was not renewed. The respondent is a Canadian citizen.

[6] The appellant provided evidence during the Motion demonstrating that, between the date of marriage in 2012 and the date of divorce in 2018 (approximately 6 years), she was in Canada for a total of approximately 300 days (less than 10 months in total). She conceded during questioning that some visits to Toronto, Ontario in 2015 may not have appeared in the evidence filed by the parties.

[7] Both parties were previously married and have children from those marriages. They do not have any children together.

[8] The parties do not agree on their date of separation. The appellant claims that the parties separated in April 2016, after a physical altercation in their home. For his part, the respondent claims that the parties continued to reside together as a couple both in China and Toronto until at least March 2018.

[9] In March 2018, the parties obtained a divorce certificate in China. As discussed in further detail below, the respondent disputes the validity of this divorce.

(1) The Parties' Assets and Debts

[10] The respondent claims that he and the appellant contributed work and resources to a series of family companies that are located in China. He suggests that the appellant leveraged assets from certain family businesses to borrow funds to purchase real estate in her name alone.

[11] The appellant states that she owned corporations and real property in China before and during the marriage. She denies that the respondent made any financial contributions to her assets.

[12] The respondent claims that the parties shared two matrimonial homes located in Toronto. In 2012, just prior to the marriage, the appellant purchased a property at 220 Elmwood Avenue (the "Elmwood Property"), in her name alone. She claims that she purchased the Elmwood Property for her son to reside in while he attended school in Canada. In May 2016, the Elmwood Property was sold, and the proceeds were used to purchase property at 33 Bevdale Road, Toronto (the "Bevdale Property"), also in the appellant's name alone. The respondent claims he found the Bevdale Property and worked with a real estate agent to arrange the purchase. He states that the parties were not separated at this time.

[13] The appellant has a Royal Bank of Canada account in Toronto, in her name alone, which she used to pay the expenses for the Elmwood and Bevdale Properties. The respondent argues that he made contributions to this account that were used to pay for the mortgage, taxes, utilities, and other expenses for the Bevdale Property.

(2) The Marital Assets Agreement, Letter of Commitment, and Repayment Agreement

[14] On March 11, 2014, the parties signed a Marital Assets Agreement addressing five Chinese properties the appellant purchased in her name alone. This Agreement confirms that the respondent has no entitlements to the properties.

[15] On May 12, 2015, the respondent also signed a Letter of Commitment clarifying that he lacked any interest in 41 specified investment properties. These properties are all located in China.

[16] In 2019, after the divorce, the parties negotiated the terms of a repayment agreement for a 2,000,000 RMB[2] loan made to the appellant by the respondent, his mother, sister, and brother-in-law. The repayment amount is 6,000,000 RMB, which the appellant claims includes interest and an "equitable voluntary payment" by her to the respondent, representing his "monetary interest" in their relationship. The respondent argues that the repayment agreement is unrelated to any division of marital property. The Marital Assets Agreement, Letter of Commitment, and loan repayment agreement were all executed and witnessed in China, in the Chinese language and in Chinese currency.

(3) The Divorce Agreement and the Supplementary Agreement

[17] On March 26, 2018, the parties applied for a divorce in Kunming. They attended together at the Kunming City Ministry of Civil Affairs Marriage Registry and brought a handwritten document stating their intention to divorce as well as their agreement that i) there will be no disputes in relation to the children and ii) all issues related to property, debts, and liabilities had been resolved through private negotiation.

[18] The registrar required a typed document, so the respondent typed a document with the same terms as the handwritten document (the "Divorce Agreement"). Both parties signed the document, added their fingerprints, and obtained a divorce certificate.

[19] The appellant claims this divorce certificate is valid and reflects the parties' agreement. The respondent states that the appellant misled him, assuring him that this was not a real divorce.

[20] The appellant states that on March 26, 2018, the parties signed a Supplementary Agreement to the Divorce Agreement. In this document, the respondent waived his rights to any of the appellant's assets. It states that all property in either party's name belongs to the appellant, except for a car and a debt owing by the respondent, which he would retain.

[21] The appellant argues that the Supplementary Agreement reflects the parties' negotiations and the fact that the respondent made no contributions to her corporations or real estate.

[22] The respondent asserts that he does not recall executing the Supplementary Agreement. He claims he was unaware of the Supplementary Agreement's existence until December 2019. He admits that the signature on the document resembles his but claims the appellant would ask him to sign blank documents in case his signature was needed while he was absent. The respondent contests the validity of the divorce obtained in China as well as the Supplementary Agreement.

III. PROCEDURAL HISTORY

(1) The Application

[23] In February 2020, the respondent commenced an Application for various relief, including: i) a declaration that the Chinese divorce not be recognized or enforced in Ontario; ii) a declaration setting aside the Supplementary Agreement; and iii) a declaration that Ontario has jurisdiction to determine the outstanding property and support issues between the parties. The outstanding property and support issues included claims for equalization, spousal support, and the respondent's claim of a resulting and/or constructive trust over the Bevdale Property, based on the allegation that the appellant was unjustly enriched by his contributions to the Bevdale Property.

[24] The appellant refused to attorn to the jurisdiction of the court. Instead, she brought a motion for an order: i) dismissing the respondent's Application and ii) declaring that the city of Kunming, in Yunnan Province, China, is the more appropriate forum to determine any outstanding issues between the parties arising from the breakdown of their marriage.

(2) The motion judge's reasons

[25] In her reasons, the motion judge framed the issues on the Motion as: i) whether an Ontario court had jurisdiction to determine the respondent's property and spousal support claims and ii) if the court had jurisdiction, whether Ontario was the appropriate forum to determine the issues.

(a) The motion judge finds Ontario has jurisdiction

[26] The motion judge noted that she was not asked to determine the validity of the Chinese divorce. She acknowledged that there is a presumption in favour of recognizing the validity of foreign divorces, and that it is rare for a Canadian court to refuse to recognize a divorce properly obtained under the laws of another jurisdiction. While the divorce's validity would impact the respondent's spousal support claim, it would not impact the equalization and trust claims made under s. 15 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), which the motion judge considered next. In considering these claims, the motion judge recognized that, absent a statutory rule, an Ontario court may take jurisdiction *simpliciter* over the case if there is a real and substantial connection between the forum and the subject matter or the parties to the dispute: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572.

[27] The motion judge concluded that Ontario had jurisdiction to hear the respondent's equalization and property division claims. In her view, the following factors provided Ontario with a real and substantial connection to the dispute:

- The respondent is a Canadian citizen who primarily resided in Canada during the marriage and since separation (on either separation date put forward by the parties);

- The respondent claims a beneficial interest in an Ontario property. The parties and their children resided in the Elmwood and Bevdale Properties as their family homes during the marriage;

- The appellant regularly visited Ontario each year and obtained permanent resident status. In her application for this status, she expressed a desire to make Canada her home;

- There may be unfairness to the respondent if Ontario does not assume jurisdiction. Expert evidence, adduced by the respondent yet untested by cross-examination, suggested that the respondent is out of time to make his claim for property division in China; and

- Although there are relevant documents and witnesses in both China and Ontario, the documents relevant to the trust claim would primarily be in Ontario, as would some evidence relevant to determining the date of separation.

(b) The motion judge finds Ontario is the more appropriate forum

[28] The motion judge then went on to address the appellant's argument that if the court found that Ontario had jurisdiction, it should nevertheless decline to exercise jurisdiction on grounds of *forum non conveniens* because China was clearly the more appropriate forum. The motion judge disagreed and referenced the following considerations:

- All the witnesses and evidence relating to the respondent's trust claim would be in Ontario, except for the appellant's evidence;

- The "natural forum" for a claim to an interest in an Ontario property is Ontario;

- The appellant would be able to present her case in Ontario without significant difficulty. While Chinese documents and currency values would need to be translated and converted for purposes of a claim in Ontario, the parties were able to do this for purposes of the Motion and the proceeding unfolded without disruption;

- If the respondent is successful in asking an Ontario court not to recognize or enforce the Chinese divorce, he could then proceed with his spousal support

claim. Certain relevant documents and witnesses would be in Ontario as the respondent spent more time here than in China; and

- If the court declined jurisdiction, the respondent may be out of time to pursue a claim for division of marital property in China, as demonstrated by the conflicting expert evidence. This would represent the loss of a legitimate juridical advantage.

[29] Accordingly, the motion judge dismissed the Motion, permitting the respondent to proceed with his claims in Ontario.

IV. GROUNDS OF APPEAL

[30] The appellant raises the following issues on appeal in her factum:

1. Is there a real and substantial connection between the parties, the matrimonial claims being litigated, and Ontario?

2. Is Yunnan Province, China the more appropriate forum to determine the claims raised in the respondent's Application?

3. Should this court strike out all or part of the respondent's Application, leaving only the trust claims concerning the Bevdale Property to proceed in Ontario?

V. THE LEGAL FRAMEWORK

[31] Both parties agree that in the absence of a statutory rule, the common law conflicts rule of Canadian private international law — the "real and substantial connection" test — determines whether jurisdiction exists in Ontario's courts. It is not disputed that the motion judge properly referenced *Van Breda* and identified that a real and substantial connection must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The parties also agree that the motion judge properly recognized that, even when an Ontario court assumes jurisdiction, if the defendant (or respondent in the Application) establishes that another forum is clearly more appropriate for disposing of the litigation, then the court can decline to exercise jurisdiction on the grounds of *forum non conveniens*: see *Van Breda,* at para. 108.

VI. DISCUSSION

(1) Is there a real and substantial connection between the parties, the matrimonial claims being litigated, and Ontario?

[32] The appellant argues that the motion judge erred in ignoring or misapprehending the facts in concluding that there was a real and substantial connection between this matter and Ontario.

[33] In her factum, the appellant contends that the material before the motion judge suggests that the respondent worked in China and that his affidavit did not establish that he lived in Canada. She, on the other hand, does not live in or carry on business in Ontario; the appellant's business is "based entirely in China", and the respondent's employment and business activities during the "material times" were entirely in China. Furthermore, the appellant argues that her only connection to Ontario is a single encumbered piece of real property (the Bevdale Property) and a bank account; by contrast, the appellant owns many assets and owes significant debts in China.

[34] Absent palpable and overriding error or an extricable error of law warranting correctness review, deference ought to be afforded to the motion judge. In my view, the appellant has not identified any extricable errors of law or palpable and overriding error in the motion judge's analysis on the question of whether Ontario has jurisdiction.

[35] The motion judge found that the respondent was a Canadian citizen and that he resided primarily in Canada during the marriage and post separation. I do not accept the appellant's submission that the motion judge misapprehended the evidence on this point and that there was not a "shred" of evidence that the respondent lived primarily in Canada. The respondent presented proof of Canadian citizenship and the respondent's passport and driver's licence all indicated that he lived at the Elmwood and Bevdale Properties. Furthermore, there

was evidence before the motion judge that he made payments towards the carrying costs of maintaining the properties in Ontario. In my view, the motion judge did not err in finding that the respondent resided primarily in Canada.

[36] In *Wang v. Lin*, 2013 ONCA 33, 358 D.L.R. (4th) 452, this court accepted that in the context of marriage breakdown the presumptive connecting factors are necessarily different from those identified in *Van Breda*, which was a tort case. This court noted that the list of presumptive connecting factors is not closed and the location of the "real home" or "ordinary residence" should be a presumptive connecting factor: *Wang,* at paras. 46-47; see also *Knowles v. Lindstrom*, 2014 ONCA 116, 118 O.R. (3d) 763, at para. 27, leave to appeal refused, [2014] S.C.C.A. No. 161. Therefore, the respondent's ordinary place of residence was a significant factor to consider in determining jurisdiction.

[37] Furthermore, the motion judge noted that part of the respondent's claim is an assertion that he has an equitable interest in the Bevdale Property. The location of that property is in Ontario. This court has held that the location of a property is also a presumptive connecting factor sufficient to establish jurisdiction *simpliciter*: *Knowles*, at paras. 21, 24.

[38] As this court explained in *Knowles*, a single presumptive connecting factor, in the absence of any rebuttal of that presumption by the appellant, is sufficient to establish jurisdiction under the *Van Breda* analysis: *Knowles*, at para. 24. In this case, the motion judge identified that the appellant was a Canadian citizen, ordinarily resident in Canada, and that he was advancing a claim on property located in Ontario.

[39] I would defer to the motion judge's conclusion that there was a sufficient connection to Ontario to establish jurisdiction *simpliciter*.

(2) Is Yunnan Province, China the more appropriate forum to determine the claims raised in the respondent's Application?

[40] After finding that the Ontario court had jurisdiction, the motion judge then considered the appellant's argument that she should decline to exercise that jurisdiction under the *forum non conveniens* doctrine because China was "clearly more appropriate" for determining the issues in the case. The burden was on the appellant to show why jurisdiction should not be exercised: *Van Breda*, at para. 103.

[41] The motion judge's conclusion on the *forum non conveniens* issue is properly viewed as an exercise in judicial discretion and this court will defer to that assessment, absent an error in principle, a material misapprehension of the evidence, or if, in the circumstances, the exercise of that discretion is unreasonable: *Knowles,* at para. 40.

[42] In essence, the doctrine focuses on the circumstances of the case, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient: *Van Breda*, at para. 105. The factors that come into play in considering the question of *forum non conveniens* depend on the context and may include the locations of parties and witnesses, the cost of transferring the case to another place, the impact of a transfer on the case or a related case, the possibility of conflicting judgments, problems relating to recognition or enforcement of judgments, and the relative strengths of the connections of the parties: *Van Breda*, at para. 110.

[43] Loss of juridical advantage to one or the other of the parties is also a relevant consideration: *Knowles*, at para. 43. Even then, however, comity and an attitude of respect for the courts and legal systems of other countries may be in order: *Van Breda*, at para. 112. A court must not lean too instinctively in favour of its own jurisdiction: *Van Breda*, at para. 112.

[44] In my view, the motion judge erred in principle in her analysis on the issue of *forum non conveniens*. I find this for several reasons.

[45] First, the motion judge ignored a very important factor – the existence of three signed agreements waiving the respondent's entitlement to the assets and properties in China. The Divorce Agreement, dated March 26, 2018 (translated), says, "the [appellant and respondent] acknowledged that issues pertaining to assets, financial claims and debts have been resolved on their own through negotiations." The appellant claims that several key agreements have come out of the parties' private negotiations, including:

- The Supplementary Agreement to the Divorce Agreement, dated March 26, 2018, which states that the respondent will "move out and waive rights to any property or assets" (English translation). It further stipulates that "[a]ll corporation or company's share's [sic] and personal assets" under either the respondent or appellant's name belong to the appellant, including the real estate property in Canada purchased by the appellant before the marriage (English translation).
- The Marital Assets Agreement, dated March 11, 2014, which states that the five properties in China being purchased are in the appellant's name and the parties agree that she alone owns them and the respondent has no interest in them.
- The Letter of Commitment, dated May 12, 2015, which states that the respondent makes the "sincere promise to forego ownership in 41 properties" he co-owned with the appellant (English translation).

[46] As this court stated recently in *Krebs v. Cote*, 2021 ONCA 467, 459 D.L.R. (4th) 730, at para. 19, "[p]arties should be encouraged to enter agreements to define their rights and obligations. Jurisprudential shoals upon which an agreement may founder unnecessarily do not advance that goal."

[47] To this end, under Ontario law, there is a high bar to set aside a domestic contract that complies with the enforceability requirements of s. 55(1) of the *FLA*: namely, that it is made in writing, signed by the parties and witnessed.

[48] In this case, to proceed with his claims for equalization or an interest in the properties covered by the agreements, the respondent would first have to seek to set those agreements aside. The respondent would also have to address the appellant's position that there was a loan repayment agreement executed in 2019 that settled some of the matrimonial claims. In Ontario, of course, a claim for equalization or support under the *FLA* would engage the factors set out at s. 56(4) of the Act for setting aside a domestic agreement.

[49] Section 56(4) of the *FLA* provides that,

> A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

[50] There was also evidence before the motion judge that similar provisions exist in China to set aside unfair contracts. The opinion letter tendered by the appellant on the Motion states that, according to Article 54 of the Contract Law of People's Republic of China, a valid contract can be set aside where there is a significant misunderstanding, or when one party uses fraudulent or coercive means or takes advantage of the other party while they are in a vulnerable state, not unlike Ontario.

[51] In this way, the preliminary question of whether the agreements could be set aside, was in my view central to assessing the more appropriate forum. Respectfully, the motion judge erred in considering the respondent's claims in the Bevdale Property – and his potential entitlements to share in some way (whether by way of equalization or a direct property interest) in the appellant's Chinese

properties – without considering the question of setting aside the divorce and/or the agreements about property. With the agreements as the proper focus, and given that the agreements were all executed and witnessed in China, in the Chinese language, it becomes clear that China is the most appropriate forum for the dispute.

[52] Second, the motion judge's reasons state that the natural forum for the claim to the Bevdale Property is here in Ontario. As set out above, the location of the property is a factor that carries considerable weight on the jurisdiction inquiry. However, the motion judge's focus on the Bevdale Property overwhelmed her analysis of *forum non conveniens*. In this case, the far more valuable property interests are in China and are governed by contracts in China; there are multiple agreements between the parties that are, as mentioned, written in the Chinese language and in Chinese currency. These agreements concern multi-million-dollar business interests and properties there. In contrast, the Bevdale Property is worth considerably less. The Bevdale Property should not have been the focal point of the analysis and it certainly was not the natural forum for the division of property claim viewed as a whole.

[53] Third, the motion judge held that the respondent was not claiming any property interest in properties or corporations located in China, only in the monetary payment that would occur after the equalization calculation based on properties or corporations in China. However, this factor assumes that an equalization payment would be the only remedy under Chinese law. There was no evidence that equalization rather than distribution of properties would be the remedy in China and the motion judge engaged in speculation that this would be the case.

[54] Finally, the motion judge erred in her analysis in terms of the respondent's loss of a legitimate juridical advantage. The motion judge identified the juridical

advantage as the respondent's ability to pursue his claim for property division in Ontario because he may be out of time in China. On the Motion, the respondent produced an opinion from a lawyer stating that, in China, where a man and woman are divorced by joint divorce and the parties have a change of mind over the issue of property division, they have one year from the date of the divorce to request to modify or revoke the property division agreement. The respondent's legal opinion concludes that, based on this rule, litigation concerning division of property by joint divorce needs to be filed within one year.

[55] For her part, the appellant disagreed that the respondent was out of time in China. She also produced an expert opinion that stated that the respondent could seek redress in a Chinese court to amend or void the Supplementary Agreement if he could demonstrate that he was under a serious misunderstanding, or there was an appearance of unfairness, or that he was defrauded, coerced or taken advantage of while in a vulnerable state that caused him to erroneously express his intention. Faced with this conflicting evidence, the motion judge nevertheless held that if Ontario declined jurisdiction, the respondent could lose a legitimate juridical advantage because he was out of time in China.

[56] I acknowledge that there is some support for the respondent's position that an expired limitation period in the other jurisdiction would make Ontario the more juridically advantageous forum for him as plaintiff, and that a juridical advantage to a plaintiff in Ontario weighs against staying the proceedings: see *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, 407 D.L.R. (4th) 651, at para. 91, leave to appeal refused, [2017] S.C.C.A. No. 94.

[57] However, some courts have ruled that the plaintiff's failure to bring a claim within the time limit "militates against attaching any weight to the juridical advantage factor because, in some circumstances, a plaintiff could successfully oppose a defendant's *forum non conveniens* application in one jurisdiction by

simply allowing the limitation period to expire in the other jurisdiction": *Tahoe*, at para. 91. It seems, then, that "the weight attached to the juridical advantage factor when considering the expiration of a limitation period in another jurisdiction is a case-specific inquiry that turns on the facts": *Tahoe*, at para. 92.

[58] In this case, the motion judge held that the limitation period weighed in the respondent's favour. There was no case-specific inquiry in reaching that conclusion. As noted, this case involves the potential expiry of a limitation period; the respondent's evidence on this point does not lead to this conclusion with any certainty. The motion judge did not resolve an inconsistency between the facts of the case and the facts relied upon by the respondent's expert opinion. The opinion regarding the one-year time limit concerned parties who "change their mind" over property division. The respondent's evidence, however, was that he was misled in terms of the Divorce Agreement and was not aware of the existence of a Supplementary Agreement. He did not argue that he had changed his mind about the agreements. On that evidence, it becomes less clear that the respondent is, in fact, out of time in China.

[59] Furthermore, the respondent testified during questioning that he has never thought of going to court in China to deal with property division. This fact does not help the respondent claim the juridical advantage of an Ontario action: see *Hurst v. Société Nationale de L'Amiante*, 2008 ONCA 573, 93 O.R. (3d) 338, at paras. 51-52.

[60] In summary, the motion judge erred in principle in her analysis under *forum non conveniens*. In my view, the appellant has demonstrated that the balance tips heavily in favour of China as the "clearly more appropriate" forum for resolving the parties' property issues and the motion judge should have declined to exercise jurisdiction. Accordingly, I would allow this ground of appeal.

(3) Should this court strike out all or part of the respondent's Application, leaving only the trust claims concerning the Bevdale

[61] The appellant also argued that this court should consider severing the respondent's trust claim over the Bevdale Property, allowing it to proceed in Ontario while striking the remainder of the claims.

[62] As I have already decided that China is the more appropriate forum to hear the claims arising from the parties' marital breakdown, this issue is now moot.

[63] However, I do make the following observations. Severing the specific claims in relation to the Bevdale Property appears to be contrary to some of the factors identified by the Supreme Court of Canada as relevant to the *forum non conveniens* analysis in *Van Breda*, at paras. 105, 110, including a desire to avoid a multiplicity of legal proceedings and avoiding conflicting decisions in different courts.

[64] Severance of the trust claim is also potentially problematic because this court has made clear that claims of unjust enrichment are rarely appropriate to address financial issues after the breakdown of a marriage and a court would, in all likelihood, find that equalization of all net family properties under the legislation would provide a full remedy to any unfairness that would otherwise arise from different contributions to family assets: *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 401, at para. 66; *Martin v. Sansome,* 2014 ONCA 14, 118 O.R. (3d) 522, at para. 64.

VII. CONCLUSION

[65] For these reasons, I would allow the appeal and stay the respondent's Application.

[66] I would award the appellant her costs of the appeal in the agreed amount of $13,000 inclusive of disbursements and applicable taxes.

Released: September 29, 2021 "K.F."

"S. Coroza J.A."
"I agree. K. Feldman J.A."
"I agree. David M. Paciocco J.A."

---

[1] I note that in a recent Superior Court decision, *Kore Meals LLC v. Freshii Development LLC*, 2021 ONSC 2896, 156 O.R. (3d) 311, E.M. Morgan J. observed that the world of videoconference hearings may have implications for the relevance of *forum non conveniens*. I leave that issue for another day. In the present case, where the competing forums involve different languages and different time zones, the choice of forum remains relevant.

[2] The evidence before the motion judge was that CAD$1 equals approximately 5.07 RMB.

Tab 109

CanLII

Children's Aid Society of the Niagara Region v. R. N., 2004 CanLII 29209 (ON SC)

Source:	Superior Court of Justice
Date:	2004-04-14
File number:	712/00
Other citations:	130 ACWS (3d) 546 — [2004] CarswellOnt 1638 — [2004] OJ No 1526 (QL)
Citation:	Children's Aid Society of the Niagara Region v. R. N., 2004 CanLII 29209 (ON SC), <https://canlii.ca/t/1h00n>, retrieved on 2026-01-18

Court File No.: 712/00

ONTARIO
SUPERIOR COURT OF JUSTICE
FAMILY COURT

BETWEEN:	
THE CHILDREN'S AID SOCIETY OF THE NIAGARA REGION Applicant	A.C. McGregor, for the applicant
- and -	
R.N. and G.N. Respondents	D.S. Hallett, for the respondent, G.N.
	HEARD: March 18, 2004,

) at St. Catharines

J.W. Quinn J.: -

Introduction

[1] Under what circumstances may a party in Family Court obtain transcripts of court proceedings? That is the issue raised by this motion.

Background

[2] The respondent, R.N., is the mother of three children in respect of whom the applicant ("Society") sought a protection finding. The respondent and moving party, G.N., is the husband of R.N. and the father of the children.

[3] In September 2000, the Society obtained a temporary supervision order pursuant to which the two youngest children were placed in the care and custody of R.N., and G.N. was not to reside with those children or have contact with them except as arranged and supervised by the Society in its discretion. According to paragraph 4 of a final order made in November 2000, the Society was concerned that G.N. address "outstanding issues of substance use and domestic violence which pose significant risk to the children."

[4] From what I am able to determine, the parties again were before the court a number of times in 2001 and 2002. In December 2001, a six-month supervision order was made. The concerns of the Society regarding G.N. were much the same. For example, paragraph 1(4) of the order required G.N. to "attend at group counselling to address anger management." In June 2002, this supervisory order was terminated and there have been no further protection proceedings.

[5] On March 9, 2004, G.N. brought the within motion. He asks for an order directing the preparation of two transcripts. The notice of motion states that he requires the following:

> (a) the transcripts of evidence heard in Family Court on October 11, 2000;
>
> (b) the transcripts of evidence[1] heard in Family Court on July 17, 2001.

[6] In his supporting affidavit, G.N. deposes that his request for the transcripts was denied. He explains his need for the transcripts in this way:

> I need these transcripts because I am preparing to file a lawsuit against the Children's Aid Society and they will be important for me to build my case. I need to prove to the court that my family has been wrongly accused and instead of helping to keep our family together, Children's Aid Society broke our family apart.

[7] The proceeding on October 11, 2000 was a case conference. All parties were present and represented by counsel. That case conference produced an order by which the protection application of the Society in respect of the third and oldest child was withdrawn on consent.

[8] The proceeding on July 17, 2001 was a case conference that, according to the endorsement of the presiding judge, "on the consent of all parties . . . was deemed to also be a settlement conference."

[9] Perhaps I should point out that Mr. Hallett is representing G.N. only as duty counsel and the respondent, R.N., is not involved in the motion.

Discussion

Courts of Justice Act

[10] The *Courts of Justice Act,* R.S.O. 1990, c. C.43 is silent on the matter of transcripts. However, the general jurisdiction found in s. 146 is relevant:

> 146. Jurisdiction conferred on a court, a judge or a justice of the peace shall, in the absence of express provision for procedures for its exercise in any Act, regulation or rule, be exercised in any manner consistent with the due administration of justice.

[11] I do not think it can be doubted that I have the inherent jurisdiction to order that transcripts be produced of any proceedings in this court. There being no statutory or other provision on point, the only requirement is that I must exercise this jurisdiction in a "manner consistent with the due administration of justice."

Child and Family Services Act

[12] The only references to transcripts in the *Child and Family Services Act*, R.S.O. 1990, c. C.11 are found in s. 45(10) and s. 50(1)(b) and they are not helpful. Section 45(10) reads:

> 45(10) No person except a party or a party's solicitor shall be given a copy of a transcript of the hearing, unless the court orders otherwise.

[13] "Hearing," in s. 45(10), means a hearing under Part III – Child Protection. The transcripts sought at bar are in respect of conferences, not a hearing.

[14] Section 50(1) provides, in part:

> 50(1) Despite anything in the *Evidence Act,* in any proceeding under this Part [Part III – Child Protection],
>
> (a) the court may consider the past conduct of a person toward any child . . .; and
>
> (b) any oral or written statement or report that the court considers relevant to the proceeding, including a transcript . . . in an earlier civil or criminal proceeding, is admissible into evidence.

[15] Section 50(1) is not applicable to this motion.

Family Law Rules – settlement and case conferences

[16] Rule 17 of the *Family Law Rules* deals with conferences. Regarding settlement conferences, rule 17(23) stipulates:

> 17(23) No brief or evidence prepared for a settlement conference and no statement made at a settlement conference shall be disclosed to any other judge, except in,
>
> (a) an agreement reached at a settlement conference; or
>
> (b) an order.

[17] "Any other judge," in rule 17(23), refers, I should think, to a judge in an ongoing protection proceeding. "Order," in rule 17(23)(b), is not restricted to one made at a settlement conference, otherwise it would say so, as it does in rule 17(23)(a) regarding "an agreement."

[18] Rule 17(22.1) addresses the destruction of settlement conference briefs:

> 17(22.1) A settlement conference brief that does not form part of the continuing record shall be returned, at the end of the conference, to the party who filed it, or shall be destroyed by the court staff immediately after the conference.[2]

[19] The confidentiality usually associated with settlement conferences is limited. It is directed towards preventing prejudice to a party in an ongoing proceeding. Many things filed or said at a settlement conference would lead to the appearance of prejudice if known to a judge presiding over a motion in, or a hearing of, the proceeding. This type of prejudice is not present here, for the child protection application is completed.

[20] As for case conferences, there is nothing in rule 17 which would make them immune from transcription at the request of a party to the case conference.

[21] Rule 17, therefore, is not a bar to the within motion.

may the relief sought be granted on a motion?

[22] Rule 14(1) of the *Family Law Rules* states:

> 14(1) A person who wants any of the following may make a motion:
>
> 1. A temporary order for a claim made in an application.
>
> 2. Directions on how to carry on the case.
>
> 3. A change in an order or agreement (but not a change in a final order in a child protection case that is reviewable under section 64 of the *Child and Family Services Act*).

[23] Ms. McGregor submits that the relief sought in this motion is not enumerated in rule 14(1) and, thus, is not available. I do not read rule 14(1) so restrictively. Instead, the rule sets out three situations in which one may bring a motion, without suggesting that they are a closed list.

is there a legitimate need for the transcripts?

[24] Ours is not a secretive justice system. Generally, those who need to know are entitled to know. Transcripts of proceedings in Family Court should be made available to anyone who was a party to those proceedings upon proof, firstly, of a legitimate need for them and, secondly, that their probative value outweighs their possible harm. Obviously, the cost of transcription must be borne by the requesting party.

[25] In this motion, I am unable to ascertain whether G.N. has a legitimate need for the transcripts. As he has not indicated how the transcripts will help him to “build”

his planned lawsuit against the Society (his bald statement that they will is not enough), I cannot ascertain their probative value or their possible harm, if any.

Conclusion

[26] The motion is lacking in proof of legitimate need, probative value and possible harm and, accordingly, is dismissed. If costs are a problem, I may be spoken to.

_____

The Honourable Mr. Justice J.W. Quinn

RELEASED: April 14, 2004

---

[1] I do not expect that evidence, in the true meaning of that term, was actually heard on October 11th or July 17th, because, as will soon be seen, those court attendances were conferences. I assume that what G.N. is referring to are the statements of the parties, the submissions of counsel and any comments by the presiding judge made on those occasions.

[2] Rule 17(22) provides that a settlement conference brief "does not form part of the continuing record unless the court orders otherwise at the settlement conference."

Tab 110

CanLII

Tobin v. Collings, 1996 CanLII 8671 (ON CJ)

Source:	Ontario Court of Justice
Date:	1996-07-15
File number:	FC 70-95
Other citations:	[1996] WDFL 2610 — [1996] OJ No 2579 (QL)
Citation:	Tobin v. Collings, 1996 CanLII 8671 (ON CJ), <https://canlii.ca/t/1wz5j>, retrieved on 2026-01-18

North Bay Registry No. FC 70-95
DATE: 1996·VII·15
CITATION: *Tobin v. Collings*

THE ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

B E T W E E N :

BARBARA TOBIN,
Applicant,

— AND —

DARYL COLLINGS,
Respondent,

— AND —

CHARLENE COLLINGS and ALBERT PLUME,
Third Parties (Moving Parties).

Before Provincial Judge Louisette Duchesneau-McLachlan

Heard on 28 June 1996
Reasons for Judgment released on 15 July 1996

CIVIL PROCEDURE — General — Procedure where rules are silent — Importation from rules of another court — Rules of another court may not ordinarily be imported, but statutory direction (in section 146 of *Courts of Justice Act*) to exercise power in manner consistent with due administration of justice may allow court to be guided by practice of other court.

CIVIL PROCEDURE — Pre-trial disclosure — Document disclosure — Access to documents — Relevance — Request for information about mother's long-gone former boyfriend was irrelevant to issues in current custody-and-access dispute.

CIVIL PROCEDURE — Pre-trial disclosure — Document disclosure — Disclosure from non-parties — Notice to non-parties and court's power to screen material before ordering disclosure — Principles in *The Queen v. O'Connor* (S.C.C., 1995) applied to civil proceedings (in particular, custody and access dispute in family law).

CIVIL PROCEDURE — Pre-trial disclosure — Medical examination — Grounds — Relevance — Analysis of hair samples to test for drug use — In dispute over custody of and access to children, drug habits of certain parties would be relevant to court's decision about children's best interests and would thus meet test of relevance in section 105 of *Courts of Justice Act*. — Court ordered relevant party to submit to test of hair samples.

EVIDENCE — Proof of parentage — Blood tests — Tissue testing — Testing hair samples for drug use — Where parties to custody and access dispute sought court order requiring submission to testing of hair samples, motions judge rules that parties could not invoke section 10 (blood testing) of *Children's Law Reform Act* because this provision was limited to (a) determinations of child's paternity, which was never in issue in this case; and (b) "blood" tests, which, by implication, excluded other types of tissue, such as hair samples.

In a custody and access dispute, the third parties made a motion for pre-trial disclosure

(a) to have the mother and former boyfriend submit hair samples for tests to d etermine the extent of their recent drug use;

(b) for production of the medical and youth court records of the boyfriend; an d

(c) for production of any information about the boyfriend in the control of the local children's aid society.

The applicant mother was not opposed to the test of hair samples, so long as the respondent also submitted to such testing and provided that the third parties paid for the tests.

The request for the test was originally framed in the context of the ordinary rule for pre-trial disclosure, with some analogy to the statutory provisions for blood tests in cases of disputed paternity. Despite an earlier report, the most recent evidence indicated that the mother's former boyfriend was no longer involved with the mother and would not be interacting with the children in any way.

Held:— Motion for hair tests allowed. Motion for disclosure of information about the mother's former boyfriend dismissed. The cost of the tests to be borne by the third parties, but otherwise, each party to bear own costs.

Rule 23 (pre-trial disclosure) of the *Rules of the Ontario Court (Provincial Division) in Family Matters* should not be used for such an intrusive procedure as blood testing or hair testing for drugs. And the provisions of the *Children's Law Reform Act*, with their specific mention of "blood" tests for the express purpose of determining paternity would be a proper instance of the application of the maxim "*Expressio unius exclusio alterius*", thereby precluding any extension to testing of hair samples.

Section 105 (medical examination) of the *Courts of Justice Act*, however, would be available for the purpose sought by the third parties. A corresponding provision in British Columbia (where there is no specific statutory authority for ordering blood tests) has been used not only for blood tests but tests of other tissue samples. In this case where all parties have claimed custody of the children or as much access as possible, the parents' drug habits would be relevant to a determination of the children's best interests and would thus meet the test of relevance in section 105.

The *Rules of the Ontario Court (Provincial Division) in Family Matters* say nothing of implementing section 105. The *Rules of Civil Procedure*, on the other hand, do cover medical examinations very adequately, but the importation of the rules of one court into those of another is ordinarily prohibited. Section 146 of the *Courts of Justice Act*, however, directs that, in the absence of express provision for procedures for the exercise a court's jurisdiction, the court may resort to a course of procedure that is consistent with the due administration of justice. Thus, for the limited purposes of this motion, the exercise of this court's jurisdiction under section 105 of the *Courts of Justice Act* in the manner provided in the *Rules of Civil Procedure* would in fact be consistent with the due administration of justice.

Pre-trial disclosure, as set out in the rules of court, must relate to the disclosure of facts relevant to the issues in the proceeding. In this case, the mother's former boyfriend was not to be involved with the children as a parent or with the mother and any information sought about him would therefore be irrelevant. Requests for information on him would amount to a fishing expedition into the life of a non-party and a non-participant. In addition, any information on his alleged youth court record was confidential under the *Young Offenders Act* and, to obtain such information, one had to follow the procedure specified under that Act. Even if a proper motion had been brought under that Act, it would be dismissed for the same reasons.

In a motion for disclosure from non-parties about non-parties, the procedure set out on *The Queen v. O'Connor* (S.C.C., 1995) should be followed, even in civil cases. Although non-parties may be summoned to appear at trial, they need not be summoned to appear at the motion. But the notice of motion and all materials in support of the motion should be served on those non-parties to give them a chance to appear and signify their opposition to any order for disclosure. And to guard against fishing expeditions, the notice of motion should be specific in terms of the information that is sought, including specific time periods and the relevance of the information.

STATUTES AND REGULATIONS CITED

Children's Law Reform Act, R.S.O. 1990, c. C-12 [as amended], section 10.
Courts of Justice Act, R.S.O. 1990, c. C-43 [as amended], section 105 and section 146.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194 [as amended], rule 33.
Rules of the Ontario Court (Provincial Division) in Family Matters, R.R.O. 1990, Reg. 199 [as amended], rule 23.

Tab 111

CanLII

9383859 Canada Ltd. v. The Court of Appeal for Ontario, 2023 ONSC 5344 (CanLII)

Source:	Divisional Court
Date:	2023-09-22
File number:	500/23
Citation:	9383859 Canada Ltd. v. The Court of Appeal for Ontario, 2023 ONSC 5344 (CanLII), <https://canlii.ca/t/k08vj>, retrieved on 2026-01-18

CITATION: 9383859 Canada Ltd. v. The Court of Appeal for Ontario, 2023 ONSC 5344
COURT FILE NO.: 500/23
DATE: 20230922

SUPERIOR COURT OF JUSTICE – ONTARIO

DIVISIONAL COURT

RE: 9383859 Canada Ltd, Applicant

AND:

The Court of Appeal for Ontario and the Attorney General of Ontario, Respondents

BEFORE: Schabas J.

COUNSEL: Sandeep Singh, acting in person for the Applicant.

Josh Hunter, counsel for the Ministry of the Attorney General

HEARD: In writing

ENDORSEMENT ON RULE 2.1.01

This proceeding

[1] On August 25, 2023, Sandeep Singh, on behalf of the applicant, filed an application for judicial review in this Court. In his email accompanying the notice, Mr. Singh accurately advised the Court that the applicant sought to review a decision by the Executive Legal

Officer ("ELO") of the Court of Appeal delisting the applicant's appeal in *9383859 Canada Ltd. v. Navartnam, Kubeskaram et al*., COA-22-CV-0453.

[2] Following receipt of the notice of application, on August 29, 2023, the Court notified the applicant that it was "considering making an order staying or dismissing this proceeding under Rule 2.1.01 of the *Rules of Civil Procedure* because it appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court" and required the applicant to provide written submissions.

[3] The applicant then provided a brief factum largely repeating what is contained in the notice of application for judicial review. The applicant also helpfully provided some additional information about the appeal, including correspondence relating to the delisting of the appeal. The court also received a brief submission from the Ministry of the Attorney General for Ontario.

Background

[4] On July 31, 2023, the parties to the appeal, including the appellant, received an email from a Records Coordinator at the Court of Appeal advising that the appeal listed to be heard on September 14 was "delisted, as security for costs has not been paid." That email also referred to a motion that had been scheduled to be heard on August 14, 2023, but had to be rescheduled to September 18, 2023, to allow Mr. Singh to file materials and attend as he was not available "due to a family emergency." An earlier email from the Records Coordinator discloses that the motion set for August 14, 2023, was brought by the respondent to have the appeal dismissed.

[5] Mr. Singh objected to his appeal, which had been perfected, being delisted. A counsel in the Office of the ELO of the Court of Appeal then confirmed, in a letter dated August 16, 2023, that the appeal had been delisted because Mr. Singh had "not complied with Justice Miller's order dated February 27, 2023, which required [him] to pay security for costs" by March 8, 2023. Miller J.A.'s order was upheld by a panel of the Court of Appeal in July, 2023. The letter also confirmed that the respondent's motion would proceed on September 18, 2023.

[6] The applicant, in the meantime, is now seeking leave to appeal the security for costs decision to the Supreme Court of Canada.

Analysis

[7] The dismissal of a proceeding under Rule 2.1.01 is a blunt instrument, which should not be used lightly. It is reserved for the "clearest of cases, where the hallmarks of frivolous, vexatious or abusive litigation are plainly evident on the face of the pleading": *Khan v. Krylov & Company LLP*, 2017 ONCA 625 at para. 12. A "frivolous" proceeding is one "lacking a legal basis or legal merit; not serious; not reasonably purposeful": *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815 (ON CA) at para. 14.

[8] In the notice of application for judicial review and the applicant's factum, the primary complaint of the applicant is that the ELO delisted the appeal in the absence of a judge's order. As the factum states, the ELO "violated the *Rules of Civil Procedure* and deny [sic] the constitutional rights of the Applicant, by de-listing the Appeal of the Applicant, without an Order from a Honourable Judge."

[9] I am satisfied that this complaint lacks a legal basis and legal merit, and is not reasonably purposeful, for several reasons.

[10] First, decisions of the Court of Appeal are not subject to judicial review by the Divisional Court. The Court of Appeal is a "superior court of record": *Courts of Justice Act*, RSO 1990, c. C.43, ss. 2(1). Any review of its conduct must be by way of appeal or a motion to reconsider, if available. The Divisional Court, over which the Court of Appeal exercises appellate jurisdiction, has no jurisdiction to judicially review decisions of a "superior court of record", but only those of an "inferior court": *Judicial Review Procedure Act*, RSO 1990, c. J.1, s. 1.

[11] Second, the applicant provides no authority in support of the proposition that the ELO does not have the power to "delist" and that only a judge can do so. This is not surprising as the law goes the other way. As was observed in *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673, at paras. 47-49, the "assignment of judges, sittings of the court, and court lists" is part of the administration of the court controlled by judges, not the executive branch of government. Indeed, control over lists is seen as a basic or "minimum requirement" of the institutional aspect of judicial independence.

[12] This control over lists by the judiciary is also found in s. 75(1) of the *Courts of Justice Act*. Section s. 76 of the *Courts of Justice Act* then provides that court staff "shall act at the direction of the chief justice of the court." There is no rule of court requiring a judge's order to list or delist an appeal for hearing. Scheduling of matters is usually delegated to administrative staff who may list and delist cases. If a litigant takes issue with the listing or delisting of their case by an administrator, their remedy is to seek direction from a judge of the court in which the proceeding is taking place. The applicant has not done so. The application to this court, therefore, is an inappropriate and collateral attack on proceedings that are ongoing in the Court of Appeal.

[13] Third, the decision to delist in this case follows directly from an order of the Court of Appeal, as the applicant was ordered to post security for costs by March 8, 2023. Rule 56.05 of the *Rules of Civil Procedure* provides that, until security for costs is posted, the party required to post those costs is not entitled to take any further step in the proceeding other than to appeal the order. The applicant appealed the order unsuccessfully to a panel and has now sought leave to appeal to the Supreme Court of Canada. However, his application for leave does not stay Miller J.A.'s order. Accordingly, as the applicant cannot proceed with the appeal because it has failed to comply with a court order, the matter was delisted. Viewed this way, the ELO's action delisting the appeal was required in order to comply with Justice Miller's order.

[14] Finally, the applicant, which is a corporation, alleges that the delisting of the appeal denies its constitutional rights. However, Mr. Singh has not specified any constitutional right that has been infringed by the delisting, nor has he provided any particulars of how any right was infringed.

[15] Pursuant to Rule 2.1.01, the application for judicial review is dismissed.

Paul B, Schabas J.

Date: September 22, 2023

Tab 112

Legal Update #170

March 21, 2025

2025 CanLIIDocs 1181

LEGAL UPDATE COMMITTEE

Editor's Note

In *Aroma Franchise Company Inc. v Aroma Espresso Bar Canada Inc*., an Ontario Superior Court judge set aside an award based on reasonable apprehension of bias because the arbitrator had not disclosed a subsequent retainer in an unrelated arbitration by the law firm acting for the successful party. The decision attracted significant scrutiny in Canadian arbitration circles. The underlying case is not a construction law matter but was of particular interest to the College given the relative prevalence of arbitration agreements in construction contracts and the relatively small pool of highly qualified and experienced Canadian construction law arbitrators. The Canadian construction law bar is also comparatively small, and one often encounters the same counsel on multiple matters. To what extent would these arbitrators and counsel be restricted from taking on multiple arbitration retainers? The temperature may have been taken down somewhat by the Ontario Court of Appeal's reversal of the application judge's decision to disqualify the arbitrator in *Aroma* as detailed in our first case comment by Catriona Otto-Johnston and Chase Salembier. However, the issue may not be settled as a leave application to the Supreme Court of Canada is pending.

Our second case comment also concerns an important decision in the world of arbitration from one of our provincial appellate courts. Corbin Devlin reviews the Alberta Court of Appeal's decision in *Husky v Technip*, where the court declined to compel a non-party beneficiary to a contract to arbitrate a dispute pursuant to an arbitration agreement to which they were not privy. As Corbin demonstrates, the Court's reasoning was based on lack of clarity in the contract as to whether the non-party beneficiary had bound themselves to arbitration and declined to deny their access to the courts in the face of this ambiguity. The author suggests that the result may have been different with more precise drafting, a suggestion which bears monitoring in future cases.

Our next case comment is also from the Alberta Court of Appeal and demonstrates the importance of understanding the specific requirements of provincial lien statutes and practices. Catriona Otto-Johnston reviews the history of a lengthy lien proceeding arising from an insolvency, *Chandos Construction Ltd. v Deloitte Restructuring Inc*. Briefly, the Court of Appeal ruled that in these circumstances where the lien had been vacated by posting of security with the court the *Prompt Payment and Construction Lien Act* permitted the lien to be perfected by the terms of a court order and that it was therefore unnecessary for the lien claimant to have issued a statement of claim within the limitation period provided by the

Alberta *Limitations Act*. Although the Court's decision turned on the specific wording of the court order at issue, which was not in the usual template form, it is interesting to contrast these requirements with other jurisdictions with more stringent requirements. Under Ontario's *Construction Act,* for example, a lien must always be perfected with a statement of claim (your own or by sheltering under someone else's) and the time periods to preserve and perfect liens are always governed by the *Construction Act* and not the general limitations statute. One of the lessons here is that there is no substitute for local knowledge and expertise, particularly when it comes to liens.

In our fourth case comment, Brendan Bowles and Isa Dookie discuss the potential for a lawyer's personal liability for costs when that lawyer has either subjective knowledge that a lien is improper or is reckless or wilfully blind to the defects of the lien yet preserves or perfects it anyway. While the Court declined to award costs against counsel personally in *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc* (which decision was appealed, with the Court holding leave was required to appeal and denying said leave in *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, this decision stands as a good reminder to construction counsel across the country that diligence must be exercised when representing clients with liens.

We conclude this issue with a "how to" guide for calling on a bond to satisfy judgment obtained for a lien. Dan Fridmar and Jacob McClelland provide a step-by-step reference for this seldom-used procedure. While the checklist is specific to Ontario rules and procedures, it provides a helpful starting point for other jurisdictions as well. We suggest readers make note of this commentary for future reference, when you or others in your office are asked: "How do I seek payment of my client's judgment from a lien bond?".

With these five comments, we conclude Legal Update #170, our first edition of 2025. Brendan, Catriona and the rest of the Legal Update Committee look forward to bringing you interesting and helpful content throughout the year. As always, we welcome submissions for the next issue and encourage you to reach out with any suggestions or pieces. In this respect, while this issue focuses on case comments, we also welcome noteworthy submissions on statutory developments or contract issues.

2025 CanLIIDocs 1181

LU#170
Primary Topic: XIV. Arbitration and Mediation
Jurisdiction: Ontario
Authors: Catriona Otto-Johnston, Partner, Rose LLP & Chase Salembier, Associate, Rose LLP

CanLii Reference:
https://www.canlii.org/en/on/onca/doc/2024/2024onca839/2024onca839.html?resultId=81733c828aa246beba6271dc874ceaf1&searchId=2025-01-27T08:14:19:224/b87edb4523554951afccfb480c2e2737

2025 CanLIIDocs 1181

The Aroma of Bias: Ontario Court of Appeal Clarifies an Arbitrator's Duty to Disclose New Mandates

In November 2024, the Ontario Court of Appeal released the eagerly awaited decision of *Aroma Franchise Company Inc. v Aroma Espresso Bar Canada Inc.*, 2024 ONCA 839 ("***Aroma***"), which dealt with the appeal of a decision setting aside an arbitral award on the basis of finding a reasonable apprehension of bias on the part of an arbitrator due to the arbitrator's failure to disclose his appointment by counsel on an unrelated matter.

In doing so, the Ontario Court of Appeal clarifies the duty of disclosure for arbitrators and discusses the relationship between disclosure and the existence of a reasonable apprehension of bias. This decision is significant to arbitrators and counsel with an arbitration practice, providing important guidance on the disclosure obligations of arbitrators who are appointed for multiple matters by the same party or counsel, as well as when a reasonable apprehension of bias may be found where an arbitrator does not disclose the fact that they have been retained for a separate and unrelated mandate.

We note that leave to appeal to the Supreme Court of Canada has been sought. Leave to appeal to Canada's highest court is granted sparingly, however this case has attracted intense national interest. The leave decision is eagerly anticipated by the Canadian arbitration bar, and if granted, the eventual Supreme Court of Canada decision will be closely scrutinized.

Background

The background of this decision involves a franchise dispute between a master franchisee, Aroma Espresso Bar Canada Inc. ("**Aroma Canada**") and the franchisor, Aroma Franchise Company Inc. ("**Aroma Franchise**") relating to an alleged wrongful termination of a Master Franchise Agreement (the "**Agreement**").

The Agreement contained an arbitration agreement requiring that the dispute be submitted to arbitration before a sole arbitrator. With respect to the appointment of the sole arbitrator, the parties were required to "jointly select one (1) neutral arbitrator" who "has no prior social, business or professional relationships with either party". The arbitration was governed by the *International Commercial Arbitration Act,* 2017 which incorporates the *UNCITRAL Model Law on International Arbitration* (the "**Model Law**").

Following the delivery of a notice of request to arbitrate, counsel for the parties engaged in dialogue to identify an arbitrator. The parties proposed and rejected three potential arbitrators, including on the basis that one of the candidates had a number of previous appointments by the law firm representing Aroma Canada. The parties ultimately agreed to an arbitrator (the "**Arbitrator**") who had not previously acted as a mediator or arbitrator for either party and who confirmed that he had no conflicts and met the criteria for appointment.

The arbitration between the parties (the "**Arbitration**") occurred over a period of more than two years and ultimately culminated in an award finding that Aroma Franchise had wrongfully terminated the Agreement and awarding substantial damages to Aroma Canada as a result. The Arbitrator issued the final award of the arbitration (the "**Final Award**") on January 12, 2022 via an email to counsel for the parties.

However, in sending out the Final Award to the parties, the Arbitrator inadvertently copied another lawyer from Aroma Canada's law firm who had not been involved in the Arbitration. In subsequent correspondence, Aroma Franchise learned that approximately 17 months after the Arbitration began, the lead lawyer for Aroma Canada had engaged the Arbitrator to serve as arbitrator for a separate dispute involving another client of their firm (the "**Second Arbitration**"). The Second Arbitration involved different parties and issues from those involved in the Arbitration. The Second Arbitration also involved the lawyer who had been inadvertently copied by the Arbitrator when sending out the Final Award. Throughout the Arbitration, Aroma Franchise had been unaware that the Arbitrator had been involved in the Second Arbitration as the Arbitrator had not disclosed that he been approached, or had agreed, to conduct the Second Arbitration.

Upon learning of the Arbitrator's involvement in the Second Arbitration, Aroma Franchise brought an application to the Superior Court to set aside the Final Award, as well as ancillary awards of interest and costs the Arbitrator made in October 2022, on the basis that there was a reasonable apprehension of bias on the part of the Arbitrator, the Arbitrator had exceeded his jurisdiction, and the Arbitrator gave inadequate reasons.

The Ontario Superior Court's Decision

In March 2023, the Ontario Superior Court of Justice granted Aroma Franchise's application to set aside the Final Award and costs and interest awards and directed a new arbitration be conducted before a different arbitrator. The lower court concluded that the Arbitrator was required to disclose that he had been engaged for the Second Arbitration and that the Arbitrator's failure to provide such disclosure gave rise to a reasonable apprehension of bias, fatally tainting the result of the Arbitration.

In reaching these conclusions, the lower court placed considerable emphasis on the parties' expectations regarding disclosure derived from the correspondence exchanged between counsel for the parties before the Arbitrator was approached and then appointed. In that correspondence, counsel explained their own relationships with potential arbitrators and asked certain questions about opposing counsel's relationships. This correspondence between the parties was never provided to the Arbitrator nor was he ever made aware of the

2025 CanLIIDocs 1181

expectations said to flow from it. Nevertheless, the lower court found that, based on this correspondence as well as the provisions of the arbitration agreement between the parties, it was clearly important to both parties that the selected arbitrator be neutral and not have a professional or personal relationship with either party or their counsel and that this would remain important throughout the Arbitration.

Although the parties did not adopt the *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "**IBA Guidelines**") to govern the disclosure regime for the Arbitration, the lower court cited and heavily relied on them in coming to its decision. The IBA Guidelines list specific situations which may warrant disclosure or disqualification of an arbitrator, including potentially disclosing appointments made by the same party or the same counsel appearing before an arbitrator while the case is ongoing.

In concluding that a reasonable apprehension of bias had tainted the Arbitration, the lower court emphasized the expectations of the parties and the relevant circumstances – including that the Second Arbitration was hidden from Aroma Franchise for approximately 15 months while the Arbitration was ongoing and that the Second Arbitration was only discovered due to the inadvertent copying of unrelated counsel on an email by the Arbitrator.

Aroma Canada appealed the decision to the Ontario Court of Appeal, challenging the finding that disclosure was required by the Arbitrator and that a reasonable apprehension of bias arose as a result of the Arbitrator's non-disclosure. In the meantime, the decision by the Ontario Superior Court of Justice was significant to the arbitration sphere by signalling that increased disclosure by arbitrators for unrelated mandates for the same lawyers or law firms may be necessary.

The Court of Appeal Decision

In a unanimous decision, the Court of Appeal set aside the decision and found that the lower court erred in law in finding that the Arbitrator had breached his duty to disclose that he was appointed to the Second Arbitration and that a reasonable apprehension of bias arose in the circumstances. In doing so, the Court of Appeal first considered the issue of whether disclosure was warranted, followed by an analysis of whether a reasonable apprehension of bias could be established.

The Duty to Disclose

In considering the issue of whether the Arbitrator should have disclosed the existence of the Second Arbitration, the Court of Appeal confirmed that required disclosure turns on the legal regime governing the arbitration. The Court considered the specific regime governing the Arbitration, being the Model Law. In particular, Article 12(1) of the Model Law sets out the applicable duty of disclosure by an arbitrator as follows:

> When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his

2025 CanLIIDocs 1181

> appointment and through the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

The Court agreed with persuasive UK common law authority that the Model Law test dictating when an arbitrator must make disclosure is an objective one – like the test for disclosure prescribed by the common law. The question is whether relevant circumstances would likely give rise to justifiable doubts about the impartiality of the arbitrator from the perspective of a "fair-minded and informed observer", rather than the subjective perspective of the parties.

The Court reasoned that, unlike the Model Law, the IBA Guidelines are not a legal standard, and while the parties easily could have, the parties did not adopt the IBA Guidelines as the governing disclosure regime for the Arbitration. While recognizing that the standard for disclosure in the IBA Guidelines may be instructive, the Court clarified that the IBA Guidelines are not determinative, and in fact, they differed from the Model Law by implementing a subjective framework.

The Court of Appeal determined that the lower court failed to apply an objective test, as required by the Model Law, and instead erroneously applied a subjective test pursuant to the IBA Guidelines. In doing so, the lower court improperly relied upon the parties' subjective expectations as derived from their pre-appointment correspondence, although such correspondence was never shared with the Arbitrator. The Court confirmed that the unshared expectations and views of the parties could not inform the question of whether the Arbitrator had a duty to disclose, as the applicable test is an objective one which requires consideration of what was communicated to and known by the Arbitrator.

In applying an objective test, the Court held that the Arbitrator did not have a duty to disclose the existence of the Second Arbitration given that the Second Arbitration did not involve either of the parties to the Arbitration nor did it have any meaningful overlap of issues. Accordingly, the Arbitrator had not breached the legal duty of disclosure.

It should be noted that in reaching this conclusion, the Court of Appeal also distinguished the circumstances from the UK decisions relied on by Aroma Franchise where the impugned arbitrators had accepted multiple appointments from the same party in relation to multiple claims concerning the same or overlapping subject matter, or where the arbitrator had accepted but not disclosed multiple appointments as arbitrator and multiple retainers as an expert or co-counsel to the law firm.

Reasonable Apprehension of Bias

The Court of Appeal then turned to the issue of bias and found that the lower court erred in determining that a reasonable apprehension of bias existed in the circumstances.

The Court of Appeal first discussed the relationship between a failure to disclose and reasonable apprehension of bias, holding that a finding that there was a breach of the legal duty of disclosure is germane to, although not determinative of, the inquiry of whether there

2025 CanLIIDocs 1181

is a reasonable apprehension of bias. The Court of Appeal observed that the test for disqualifying an arbitrator on grounds of bias imposed a higher threshold than the test for disclosure under the Model Law, given that Article 12(2) is limited to circumstances which "do" give rise to justifiable doubts, while the duty of disclosure under Article 12(1) of the Model Law applies to circumstances that are "likely" to give rise to justifiable doubts. The legal duty to disclose was said to cover a wider array of circumstances than those that, in the end, will justify disqualification of an arbitrator or setting aside an award for reasonable apprehension of bias. In the present case, given that the Court had determined that the Arbitrator's failure to disclose his appointment in the Second Arbitration did not breach the duty of disclosure, the path from the Arbitrator's non-disclosure to a reasonable apprehension of bias on the part of the Arbitrator disappeared.

The Court then considered whether any other basis could be established for finding a reasonable apprehension of bias, and in doing so, helpfully discussed the relevant tests and principles governing reasonable apprehension of bias. The Court emphasized that the test for disqualification of an arbitrator on the grounds of a reasonable apprehension of bias is an objective one and considers the relevant circumstances from the standpoint of a fair-minded and informed observer. The Court recognized that Article 12(2) of the Model Law permits a challenge to an arbitrator or an award that was made "if circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality or independence". The Court reasoned that "justifiable doubts" regarding an arbitrator's impartiality under Article 12(2) of the Model Law is equivalent to a reasonable apprehension of bias under the common law. The Court recognized that the appropriate test is: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that the [arbitrator], whether consciously or unconsciously, would not decide fairly" (paras 128-129).

The Court further determined that arbitrators benefitted from the same strong presumption of impartiality as judges in Canada. The Court recognized that failing to impose this presumption to privately appointed arbitrators would undermine the integrity of the arbitration system. Accordingly, it was held that the objective test for reasonable apprehension of bias must be applied against the backdrop of a strong presumption of impartiality.

The Court recognized that the objective nature of the test is context sensitive and fact-specific and reasoned that a fair-minded and informed person would consider the facts and circumstances which were objectively known and would therefore focus on what was communicated to the Arbitrator. In the circumstances, given that the correspondence between counsel for the parties regarding the selection of arbitrators was not shared with the Arbitrator, such information comprised the subjective views of the parties and was improper to consider. The Court determined that the lower court erred in considering the expectations of the parties which had not been shared with the Arbitrator in the analysis of reasonable apprehension of bias. In the Court of Appeal's view, the lower court not only treated the parties' subjective views as relevant, but as determinative, which was a change to the objective test and an error of law.

2025 CanLIIDocs 1181

The Court confirmed that a failure of an arbitrator to disclose according to an expectation of the parties that was not shared with the arbitrator does not raise or confirm the existence of a reasonable apprehension of bias. The Arbitrator's failure to disclose his selection in a subsequent matter therefore did not give rise to bias on his part. The Court concluded that, applying the standard of a reasonable apprehension of bias objectively, the presumption of impartiality on the part of the Arbitrator was not displaced by his acceptance of a retainer to arbitrate a second matter that did not involve any of the parties to the Arbitration nor any overlapping issues of significance. As a result, the Court of Appeal concluded there was no reasonable apprehension of bias in the circumstances.

The Court of Appeal allowed the appeal and set aside the lower court's decision quashing the Arbitrator's award on the basis of a reasonable apprehension of bias.

Takeaways

The Court of Appeal's decision in *Aroma* clarifies that multiple appointments of an arbitrator may not automatically give rise to a reasonable apprehension of bias, nor will it necessarily mandate disclosure by the arbitrator. The Court's conclusion is likely to be well-received by arbitrators and counsel in the construction law sphere, where a limited number of arbitrators with necessary expertise and experience may be able to adjudicate certain disputes and where multiple appointments of sought-after arbitrators by law firms is not uncommon. As aptly stated by the Court of Appeal: "High stakes arbitrations often involve arbitrators who are in high demand, sophisticated parties, and experienced lawyers. This gives rise to the prospect that an arbitrator might have had prior engagements or be asked to undertake future ones, in which the parties or lawyers have some involvement" (para 4).

The Ontario Court of Appeal's decision illustrates that the choice of rules governing the arbitration will inform the scope of the disclosure obligations. For international arbitrations using the Model Law, the Court of Appeal's decision can be relied on to ensure an objective test for disclosure and bias is implemented, thereby avoiding the problems and potential unfairness associated with relying on correspondence and expectations which are not communicated and are unknown to an arbitrator. A different result, such as the one reached by the lower court, may be determined where parties select the IBA Guidelines as the legal regime governing disclosure obligations for an arbitration.

It is cautioned that, even where objective tests are applied, the Court of Appeal's decision in *Aroma* does not establish that an arbitrator's failure to disclose subsequent appointments will never give rise to breach of the duty to disclose or to a reasonable apprehension of bias. Rather, the Court of Appeal's reasoning indicates that the facts and circumstances objectively known, including what is communicated to arbitrators, will inform the respective tests. Accordingly, if a party is concerned that an arbitrator may take on subsequent matters with one of the parties during the course of the arbitration, those concerns should be disclosed to the arbitrator and opposing counsel prior to the potential engagement, so as to objectively inform the duty to disclose and potentially give rise to a reasonable apprehension of bias in the absence of such disclosure. Practically, arbitrators may also remain well-advised to err on the side of disclosure, particularly where there are overlapping parties and issues.

2025 CanLIIDocs 1181

Finally, the Court of Appeal's decision in *Aroma* is notable for also clarifying that private arbitrators enjoy the same strong presumption of impartiality as judges. To establish a reasonable apprehension of bias on the part of an arbitrator, a party will need to rebut this strong presumption.

In closing, while arbitration counsel and arbitrators alike will no doubt be keeping a watchful eye to see whether the Supreme Court of Canada grants leave to appeal, in the meantime, prudent practice suggests that disclosure is always the safest course of action.

2025 CanLIIDocs 1181

March 21, 2025

LU#170
Primary Topic: XIV. Arbitration and Mediation
Jurisdiction: Alberta
Author: Corbin Devlin, Partner, McLennan Ross

CanLii Reference:

https://www.canlii.org/en/ab/abca/doc/2024/2024abca369/2024abca369.html?resultId=d1b63d2fc7634c30826f5841fddfb8dd&searchId=2025-03-10T12:12:12:851/de1a3848556147408e6e818a3e5594db

Case Comment – Update on Appeal of Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2024 ABCA 369

Can a third-party beneficiary of a contract litigate contractual warranties in its favour when the contract requires "all disputes" under the contract to be arbitrated? This topic was reviewed in Legal Update #165 in relation to the King's Bench decision in *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, 2023 ABKB 545. That decision was subsequently overturned, but the decision of the Alberta Court of Appeal has left open the possibility that a contract may indeed, with the right language, bind a non-party to mandatory arbitration.

Husky (the project owner) sued a subcontractor to enforce warranties contained in the subcontract between the general contractor and subcontractor. The warranties were for the express benefit of Husky as the owner of the property. The defendant subcontractor applied to strike Husky's claim based on a mandatory arbitration clause in the subcontract.

In the first instance, the applications judge agreed with Husky, concluding the contract could not impose an arbitration burden on a non-signatory. On appeal to the Court of King's Bench (a hearing de novo), Justice Lema allowed the appeal and struck the claims in contract. Interpreting the terms of the subcontract, Justice Lema found that Husky was bound to arbitrate, referencing the express subcontract provision that all warranties are for the benefit of both the general contractor and Husky, as well as a broad subcontract provision requiring "all disputes" to be resolved by arbitration. Justice Lema concluded that benefit of the warranty provisions came with the limitation that any related dispute must be resolved by arbitration ("…by seeking to enforce its warranty right, Husky effectively signed on to the accompanying arbitration mechanism and, by extension, became a party to it.")

The King's Bench decision resulted in Husky's contractual claims being struck from its Statement of Claim (i.e. the claims to enforce Husky's warranty rights under the subcontract). The limitation period to arbitrate had passed, so Husky was left with no contractual remedy.

On further appeal to the Alberta Court of Appeal, Husky argued in effect that "it never agreed to arbitrate and so should not be forced into arbitration and out of the courts." The Court of Appeal agreed with the chambers judge that whether Husky was "subject to the

2025 CanLIIDocs 1181

[sub]contract's arbitration judge's provisions" is a question of mixed law and fact, appropriate for determination on affidavit evidence upon a stay application.

The Court of Appeal emphasized "[t]he doctrine of privity stands for the proposition that a contract cannot, as a general rule, confer rights or impose obligations on any person except the parties to it," referencing *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299. However, the Court of Appeal recognized that a "principled exception" applies where non-parties seek to rely on contractual provisions made for their benefit.

In the result, Husky's appeal was allowed. The Court of Appeal found that a "required threshold" of clarity was not met in this case for the non-party to be bound by the subcontract; the requirement for Husky to arbitrate was not "manifest." As the subcontract did not expressly state that Husky must pursue the warranty claim by arbitration, it was inappropriate to deprive Husky of access to the courts. Relying on principles of contract interpretation to determine that a non-party is bound by an arbitration clause is not permissible because "contract interpretation considers in part 'circumstances known to the parties at the time of formation of the contract' and determines 'the intent of the parties and the scope of their understanding'," referencing *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53. A non-party cannot be bound by a contract interpretation that depends on circumstances, intentions and understandings of which the non-party is unaware.

This may not be the last word on the topic. The Court of Appeal expressly declined to decide "whether imposing an obligation to arbitrate, absent the advance consent of the affected party, is possible." Yet the Court's reasoning implies that a non-party can be bound to arbitrate with sufficiently "clear and explicit" language, including "at minimum" an express statement that (e.g.) the non-party beneficiary seeking to rely on subcontract warranty provisions is bound to arbitrate. We would expect that some parties will act on this decision by introducing or tightening provisions to expressly require non-party beneficiaries of warranty provisions to arbitrate any dispute.

2025 CanLIIDocs 1181

LU#170
Primary Topic: IX. Construction and Builders' Liens
Jurisdiction: Alberta
Author: Catriona Otto-Johnston, Partner, Rose LLP

CanLii Reference:
https://www.canlii.org/en/ab/abca/doc/2024/2024abca403/2024abca403.html

2025 CanLIIDocs 1181

A Statement of Claim by any Other Name...What Constitutes a Commencement Document in Lien Enforcement Proceedings? A Comment on Chandos Construction Ltd. v Deloitte Restructuring Inc., 2024 ABCA 403

Introduction

In December 2024, the Alberta Court of Appeal released its decision in *Chandos Construction Ltd. v Deloitte Restructuring Inc*., 2024 ABCA 403 [*Deloitte ABCA*], reversing the decision of the Chambers Justice, which affirmed, for different reasons, a decision of the Applications Judge finding that Deloitte, in its capacity as trustee for the insolvent contractor, Capital Steel ("CS"), failed to commence proceedings for a remedial order within the applicable limitation period.

While both lower courts found in favour of Chandos, meaning the lien registered on behalf of CS by Deloitte ceased to exist, the Court of Appeal allowed Deloitte's appeal, finding that Deloitte had sought a remedial order within the meaning of the *Limitations Act*, and that the consent order used to remove the lien on deposit of security constituted a commencement document for lien enforcement proceedings under the *Prompt Payment and Construction Lien Act* ("PPCLA"). As a result, Deloitte's lien did not expire, and the matter was remitted to the Applications Judge to determine validity and quantum of the lien.

This decision comes after years of protracted litigation between the parties over what amounts to a comparably small amount of money at issue. It is a reminder to all that attention to deadlines and proper calculation of limitation periods can avoid lengthy, expensive disputes over procedural issues.

Background

Chandos was the contractor on a condominium development, and CS was its subcontractor. In September 2016, CS became insolvent. Deloitte was appointed as bankruptcy trustee for CS. In October 2016, Deloitte filed a builders' lien on behalf of CS. In November 2016, Chandos obtained a s.48 Order, by consent, removing the lien and depositing security in its place, thereby commencing the "lien action". No further steps were taken in the lien action until September 2021, nearly five years later. In the meantime, much was taking place in the bankruptcy action.

2025 CanLIIDocs 1181

The Bankruptcy Proceedings

In March 2017, Deloitte applied in the bankruptcy action for a determination as to whether Chandos was entitled to rely on a provision of its subcontract with CS which provided that in the event CS went bankrupt, it forfeited 10% of the subcontract price to Chandos. Deloitte also sought a direction that if Chandos was not entitled to rely on this provision, the lien security be paid to Deloitte. Deloitte did not include a declaration of lien validity as part of its application.

The Justice in the bankruptcy proceedings found that Chandos was able to rely on the contractual provision in question. Deloitte appealed the decision, and in January 2019, the Court of Appeal reversed the Justice's decision.[1] Chandos appealed to the Supreme Court of Canada, and in 2020, the Supreme Court of Canada affirmed the Court of Appeal's decision.[2]

The Lien Action – Lower Court Decisions

In September 2021, Deloitte applied before an Applications Judge in the lien action to have its lien declared valid and for release of the security to Deloitte. Chandos cross-applied for return of its security, citing Deloitte's failure to commence an action to enforce the lien within the applicable limitation period. In response, Deloitte argued that its application in the bankruptcy proceeding constituted a "request for a remedial order" under the *Limitations Act* and stated that this application was brought within the corresponding limitation period. Deloitte also argued that the limitation period was suspended pending the Supreme Court of Canada's decision on the enforceability of the contractual set off provision, suggesting that Deloitte would not know whether it had suffered an injury until the Supreme Court of Canada handed down its decision.

Notably, the lien was secured off prior to implementation of the template s.48 Order, and the Consent Order at issue was silent on how, and when, the issues between the parties would be determined, simply saying "the determination of the issues between the parties is adjourned *sine die*". The Applications Judge said that the bankruptcy application might meet the definition of a remedial order under the *Limitations Act*, but the matter before him was not for a remedial order requested in the bankruptcy proceeding, and Deloitte did not pursue that application in the bankruptcy proceeding.[3] Rather, Deloitte filed a lien validity application in the lien action. Further, the Applications Judge disagreed that the limitation period was stayed pending release of the Supreme Court of Canada's decision, finding that Deloitte's limitation period began to run once the Court of Appeal issued its decision confirming Chandos' inability to rely on the subcontract provision at issue in the bankruptcy proceedings.

Deloitte appealed the Application Judge's decision to a Justice in Chambers, which was an appeal *de novo*. Deloitte attempted to introduce as evidence in the appeal certain

---

1 *Capital Steel Inc (Trustee of) v Chandos Construction Ltd*, 2019 ABCA 32.
2 *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2020 SCC 25.
3 *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2022 ABQB 78.

2025 CanLIIDocs 1181

statements that Chandos had made and positions it had taken in the bankruptcy proceedings, arguing these were relevant to the lien action. Chandos took the position that the bankruptcy proceedings were not properly before the court in the lien action and were irrelevant. The Chambers Justice agreed with Chandos on this point, finding that the lien action and the bankruptcy proceedings are legally and procedurally distinct. However, the Chambers Justice did say that if Deloitte had pointed to evidence it relied on when deciding when, how or whether to commence an action in accordance with the requirements of the lien legislation, that might be different. As it was, there was nothing before the Court to suggest Chandos did or said anything that influenced Deloitte's consideration of whether to comply with the *Builders' Lien Act* (the "BLA", as it then was). In fact, the Court pointed out that Deloitte had no intention of ever issuing pleadings in accordance with the BLA.

On appeal to the Chambers Justice, Deloitte argued that it was not required to commence any action at all in order to pursue its lien claim. In making this argument, Deloitte relied on the template s.48 Order, despite the fact that it was not used by the parties in the lien action. Deloitte argued that because the template order reflects a number of different ways to pursue a lien claim, not restricted to filing a Statement of Claim, it supports the argument that a Statement of Claim is not always necessary, and failing to file one is not necessarily fatal to a lien claim. The Chambers Justice was not persuaded by this argument, finding that the template s. 48 Order actually reflects how seriously the Order takes the requirements of the BLA, not that the BLA requirements do not strictly apply. The Chambers Justice dismissed Deloitte's appeal, finding that Deloitte was required to commence an action to preserve the lien, and having failed to do so, the lien was extinguished.[4] Given this conclusion, the Chambers Justice said it was unnecessary to determine when the limitation period had commenced.

The Lien Action – Court of Appeal Decision

In December 2024, the Court of Appeal released its decision allowing Deloitte's appeal of the Chambers Justice's decision. The issue before the Court was whether Deloitte, on behalf of CS, was barred from enforcing its lien due to expiration of the limitation period.

In coming to its conclusion, the Court of Appeal noted that under s.43 of the BLA (which remains the same in the PPCLA), a lien "ceases to exist unless…"an action is commenced under this Act" to realize on the lien" within 180 days of registration, but that where security is paid into court in place of the lien, s.44 expressly provides that "the limitation period in s.43 does not apply. Instead, the general limitation period in the *Limitations Act* comes into play".[5] Turning to s.3 of the *Limitations Act* and the test for when a limitation period commences, the Court of Appeal noted that the "first two components of the test are clear", since CS (Deloitte) "knew of its "injury", that is the amounts potentially unpaid on its subcontract, no later than the date it filed its lien. It also knew that Chandos was the party to

4 *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2023 ABKB 349.

5 *Deloitte ABCA* at para 12.

whom that injury was attributable. The remaining issue was when the injury, assuming liability, warranted bringing a proceeding."[6]

The Court of Appeal aptly noted that "…commencement of the limitation period does not depend on the plaintiff's assurance or belief that the claim will ultimately be successful", and as such, the dispute over the enforceability of the subcontract provision did not "delay commencement of the limitation period until that issue was resolved".[7] Deloitte also advanced arguments regarding its knowledge of the value of its claim vis a vis commencement of the limitation period, which were rejected by the Court of Appeal, given that "…limitation statutes are triggered by discoverability of facts, not knowledge about questions of law" and "…it is not necessary for the quantum of the claim to be crystallized before the limitation period starts to run".[8]

Ultimately, the Court of Appeal found that the limitation period for Deloitte to commence an action on the lien was "no later than the date the lien was filed", being October 26, 2016.[9] At that time, CS (Deloitte) knew it had suffered an injury that, assuming Chandos was liable, warranted proceedings. As a result, Deloitte was required to seek a remedial order no later than October 26, 2018. Deloitte argued it had done so by commencing the lien action by filing of the s.48 Consent Order on November 8, 2016, and also by bringing the application in the bankruptcy proceedings directing that the security be paid to Deloitte.

In response, Chandos cited s.49 of the BLA (which remains unchanged in the PPCLA), that says proceedings to enforce a lien "shall be commenced by a statement of claim", Chandos argued that this requirement is mandatory, and having failed to file a Statement of Claim, Deloitte's claim was statute-barred. The Court of Appeal disagreed, acknowledging that while s.49 of the BLA is mandatory, it does not necessarily follow that failure to comply with it is fatal or incurable. Instead, the Court said that the question is whether "any incurable prejudice arises from the defect".[10] The wording of the Consent Order at issue was important, since (unlike the template s.48 order) it specified that it would be the commencement document for the lien enforcement action. The Court held that the Consent Order went beyond simply depositing security in place of the lands, but actually "contemplated resolution in the action it started of all issues respecting the validity and quantum of the lien".[11]

The Court of Appeal went on to discuss the template s.48 Order and how it recognizes that when security is substituted in place of the lien, the commencement document might be something other than a Statement of Claim, such as a Statement of the Plaintiff's Claim or Originating Application. As noted by the Court of Appeal, "this provision of the order therefore appears to contemplate that lien enforcement proceedings could be commenced by a document other than a statement of claim, notwithstanding the requirement in s. 49

6 *Deloitte ABCA* at para 13.
7 *Deloitte ABCA* at para 14.
8 *Deloitte ABCA* at para 16.
9 *Deloitte ABCA* at para 18.
10 *Deloitte ABCA* at para 21.
11 *Deloitte ABCA* at para 31.

2025 CanLIIDocs 1181

that "Proceedings to enforce a lien shall be commenced by a statement of claim".[12] As a result, the Court found that the Consent Order was "effectively a proceeding for a remedial order that satisfied the requirements of the *Limitations Act*", and that using an Order to commence the action instead of a Statement of Claim was "at most a procedural irregularity but not a nullity".[13] Having reached this conclusion, it was not necessary for the Court of Appeal to decide whether Deloitte's application in the bankruptcy proceedings could be considered a proceeding in which a remedial order was sought.

Accordingly, the Court held that Deloitte's claim was commenced in time by filing of the s.48 Consent Order, and the matter was remitted to the lower court to determine the issues of lien validity and quantum.

Last but not Least: An Interesting Footnote Regarding the Template Section 48 Order

Although the template s.48 Order was not the form of Order at issue in *Deloitte ABCA*, the Court of Appeal included interesting commentary in obiter, which appears, without expressly saying so, to touch on the decision in *Lesenko v Wild Rose Ready Mix Ltd.*, 2024 ABKB 333 ("*Lesenko*"), which this author discussed in detail in Legal Update #168. Specifically, in the June 2024 decision of the Chambers Justice in *Lesenko*, the Court held that the 180-day deadline for a lien claimant to commence an action to enforce its lien, when included in a Consent Order, violated both the PPCLA and the *Limitations Act*, and as such was unenforceable. The *Lesenko* decision was somewhat confounding, given that the template s.48 Order, which includes the 180-day deadline, had been approved by the Courts and widely used throughout Alberta since 2017. In fact, not only was it "approved by" the Courts, the Court of Appeal in *Deloitte ABCA* refers to the template as being "published by the Court".[14]

Interestingly, in a footnote to its decision, the Court of Appeal says that including a deadline to commence an action to enforce a lien in a consent Order is entirely appropriate and enforceable, and that "a consent order is still an order of the court, not a contract".[15] These comments are in direct contrast to the findings of the Chambers Justice in *Lesenko*.

The *Lesenko* decision raised much discussion amongst construction lawyers in Alberta, causing some to strike the 180-day deadline from the template Order and ultimately leading to variances in practice when removing liens under s.48 of the PPCLA; one of the very things the template Order was designed to avoid. While the *Lesenko* decision was not appealed, the Court of Appeal's comments in obiter in *Deloitte ABCA* provide helpful guidance and comfort that use of the template Order, including the procedural deadline to commence an action, is acceptable and enforceable, even where the matter goes by consent. As per the Court of Appeal (and despite what the lower Court found in *Lesenko*), a consent Order is not

12 *Deloitte ABCA* at para 26.
13 *Deloitte ABCA* at para 32.
14 *Deloitte ABCA* at paras 20, 26 and 32.
15 *Deloitte ABCA* at footnote 4 to para 26.

2025 CanLIIDocs 1181

a contract and "…there is no reason why the court cannot make a procedural order setting a deadline within which steps must be taken".[16]

Takeaway

The Court of Appeal's discussion in *Deloitte ABCA*, together with the earlier decisions rendered in this litigation, are a good reminder that words matter, even when drafting what appear to be routine Consent Orders, and to keep limitation periods (and associated deadlines) front of mind. Further, it should not be assumed that an Order, whether by consent or otherwise, whereby security is deposited in place of a lien, and which technically commenced a court action, will negate the requirement to file a commencement document. Strictly speaking, the PPCLA requires lien enforcement proceedings to be commenced by way of Statement of Claim. Despite the Court of Appeal's decision in *Deloitte ABCA*, a lien claimant would be wise to commence its action by Statement of Claim within the applicable limitation period.

2025 CanLIIDocs 1181

16 *Deloitte ABCA* at footnote 4 to para 26.

LU#170
Primary Topic: IX. Construction and Builders' Liens
Jurisdiction: Ontario
Authors: Brendan Bowles, Partner, and Isa Dookie, Associate, at Glaholt Bowles LLP

CanLii References:
https://www.canlii.org/en/on/onsc/doc/2024/2024onsc1608/2024onsc1608.html
https://www.canlii.org/en/on/onscdc/doc/2024/2024onsc6519/2024onsc6519.html

2025 CanLIIDocs 1181

Lawyer liability and appealing costs orders under the *Construction Act*: *Viceroy Homes*

Ontario's *Construction Act* provides that a court can impose costs liability on a lawyer in certain circumstances. When are lawyers personally liable for preserving or perfecting a lien? Should a lawyer be liable if they register a lien which they objectively should have known was without foundation or wilfully exaggerated? Or must a lawyer subjectively know the lien was bad to be liable? Can a lawyer be liable where they recklessly, or with wilful blindness disregard facts establishing that they are preserving and perfecting a bad lien? Good questions, however, there is surprisingly little caselaw in Ontario addressing these issues.

These questions were recently answered by the Ontario Superior Court in *Viceroy Homes*.[1] In *Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, (the **"Superior Court Decision"**), Associate Justice Wiebe held that the test for lawyers' liability for preserving or perfecting a bad lien is subjective. The Superior Court Decision was appealed. In *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, 2024 ONSC 6519 (the **"Divisional Court Decision"**), the Divisional Court held that leave was required to appeal the Superior Court's decision on costs pursuant to s. 86(1) of the *Construction Act*. The Divisional Court denied leave.

KEY TAKEAWAYS

(1) For a lawyer (or other representative) who preserves or perfects a lien to be held personally liable for costs under s. 86(1)(b)(i) of the *Construction Act*, the lawyer must subjectively know that the lien is without foundation, frivolous, vexatious, an abuse of process or for a wilfully exaggerated amount at the time of preservation or perfection, or have been reckless or wilfully blind to the defects in the lien.

(2) Leave is required to appeal a costs order made under s. 86 of the *Construction Act*.

THE VICEROY HOMES CASES

The underlying lien claim

Viceroy Homes instructed their lawyers to register a claim for lien in the amount of $3,310,000 for 39 days of work. Viceroy's principal provided their lawyers with a copy of a signed contract for $20 million in work to be done within eight months in which Viceroy was

[1] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608.

exposed to liquidated damages of $50,000 per day of delay. But the contract also stated that construction costs were not to exceed $500,000 until a collateral transaction concerning the project lands was finalized; that transaction was never completed, so the condition remained unfulfilled.

Viceroy's lawyers received from Viceroy a breakdown of the $3.3 million in work it allegedly performed for the defendants. The lawyers questioned why the price of the work exceeded the $500,000 cap when the condition was not fulfilled, and Viceroy's principal explained that there had been a subsequent unsigned agreement for a higher cap and that Viceroy had been instructed by the defendants to perform the work. Viceroy did not supply any further supporting documents before the lien was preserved. Viceroy's principal only showed Viceroy's lawyers chat messages between him and the defendant's principal on his phone.

Viceroy's lawyers sent to Viceroy's principal an authorization and direction form with the draft lien attached. He signed and returned the form, and the lawyers registered the claim for lien.

After preserving Viceroy's lien, Viceroy's lawyers pursued Viceroy's principal for supporting documents to substantiate the lien before perfecting it. Viceroy's lawyers requested, amongst other documents, contracts, correspondence, invoices, pictures, and videos. Viceroy's principal repeatedly promised he would provide the supporting evidence but delayed in doing so. He met with one of Viceroy's lawyers at a coffee shop and showed her videos, pictures of the work, and chat messages with the defendant's principal on his phone. He promised to send these recordings and more, but he did not follow through.

Faced with the impending deadline to perfect the lien, Viceroy's lawyers proceeded to prepare a statement of claim and send the claim to Viceroy's principal who reviewed it and gave comments which were incorporated into the claim. The lawyers again asked for Viceroy's supporting documentation but Viceroy's principal failed to provide it. With time running out, the lawyers had the statement of claim issued and, at Viceroy's principal's instruction, served the claim on the defendants.

Shortly after, Viceroy's lawyers received a letter from one of the defendants' counsel saying that the work Viceroy claimed it had done had not been done at all. The defendants said Viceroy's claim for lien was frivolous, vexatious, and abusive. They demanded that the lien be discharged, otherwise the defendant would initiate a cross-examination under s. 40 of the *Act*.

Viceroy's lawyers sought Viceroy's instructions on the letter. Viceroy's principal denied the allegations, insisted that he would provide proof of the claim, and said he was willing to attend cross-examination. The lawyers again sought from Viceroy documentary corroboration of its claim. In response, Viceroy's principal sent materials receipts, a signed subcontract, and chat messages with a would-be project manager.

Viceroy's principal was eventually cross-examined, after the cross-examination had been postponed twice at his request. On cross-examination, it came to light that the defendants

2025 CanLIIDocs 1181

were right – Viceroy had not done large parts of the work described on Viceroy's claim for lien.

Viceroy's lawyers advised Viceroy that some of its lien, at the very least, was indefensible. The lawyers emphasized the importance of delivering corroborating evidence and answering the undertakings to support the remainder of the lien. Viceroy's principal promised to provide that.

The defendants then gave Viceroy's lawyers notice of a motion to discharge Viceroy's lien. After further attempts to obtain supporting documentation from Viceroy's principal, it became clear to Viceroy's lawyers that Viceroy could not substantiate its lien. The lawyers strongly advised Viceroy to voluntarily discharge the lien before the defendants' motion or they would take themselves off the record. Viceroy did not give instructions to voluntarily discharge the lien, so Viceroy's lawyers removed themselves from the record before the defendants' discharge motion was heard.

Associate Justice Wiebe heard the motion. Viceroy was now unrepresented and did not attend the hearing of the motion, which proceeded uncontested. The associate justice held that Viceroy's lien was indeed frivolous, vexatious and an abuse of process. He ordered that the lien be discharged. He then ordered that Viceroy's principal should pay the defendants' costs on a substantial indemnity basis along with Viceroy.

The defendants' motion for costs against the lien claimant's lawyers

The defendants then brought a motion for the court to order that Viceroy's lawyers pay costs to the defendants pursuant to s. 86 of the *Act*. They argued that Viceroy's lawyers should have known the lien was frivolous because of the high value of the lien for the short duration of work, because Viceroy exceeded the $500,000 cap stated in the signed contract, and because of the paucity of supporting documentary evidence provided by Viceroy to their lawyers at the time of preserving and perfecting the lien. The lawyers, the defendants argued, had a duty as a gatekeeper to avoid registering bad liens, and they failed in that duty.

The statutory language

The motion decision revolved around the language of s. 86(1)(b)(i) of the *Act*:

> **"Costs**
>
> **86** (1) Subject to subsection (2), any order as to the costs in an action, application, motion or any other step in a proceeding under this Act is in the discretion of the court, and an order as to costs may be made against,…
>
> (b) a person who represented a party to the action, application or motion, where the person,
>
> (i) knowingly participated in the preservation or perfection of a lien, or represented a party at the trial of an action, where it is clear that the claim for

2025 CanLIIDocs 1181

> a lien is without foundation, is frivolous, vexatious or an abuse of process, or is for a wilfully exaggerated amount, or that the lien has expired,…"
>
> (Underlining added)[2]

The Superior Court Decision

Associate Justice Wiebe held that no order for costs should be made against Viceroy's lawyers because:

(a) For costs to be ordered against the lawyers, they must have actual knowledge or be reckless or willfully blind to the baselessness of Viceroy's lien.[3]

(b) There was no evidence that the lawyers subjectively knew the Viceroy lien was baseless when it was preserved and perfected, and that point was not disputed.[4]

(c) There was simply nothing that indicated a high risk that the Viceroy lien was groundless.[5]

The Appeal to the Divisional Court

The defendants appealed. They argued that:

1. Leave was not required to appeal the Superior Court Decision on costs. They argued that s. 86 of the *Construction Act* made the entitlement to costs a substantive issue, not interlocutory. They relied on s. 71 of the *Construction Act*, which provides that an appeal lies to the Divisional Court from a judgment under that *Act,* to argue that they could appeal the decision as of right.

2. The lien claimant's lawyers had a duty as a gatekeeper to determine whether their client's lien was valid, and they failed to do so. They argued that Viceroy's lawyers ought to have known the lien was frivolous and without foundation and that Associate Justice Wiebe was wrong in holding that s. 86 required the lawyers to subjectively know the lien was bad to be personally liable for costs for registering a frivolous, baseless or exaggerated lien.

LawPro counsel argued for Viceroy's lawyers that leave was required to appeal the Superior Court Decision because s. 133(b) of the *Courts of Justice Act* stipulates that leave is required to appeal discretionary costs orders. By the express words of s. 86, the order was a discretionary costs order. Section 71 of the *Construction Act*, LawPro counsel argued, was not inconsistent with s. 133 of the *Courts of Justice Act* because s. 133 dealt specifically with costs orders while s. 71 related to appealing judgments to the Divisional Court, generally.

---

[2] Contrast the subjective language in the Ontario statute to section 40 of Alberta's Prompt Payment and Construction Lien Act, RSA 2000, c – P 26.4, which uses more objective language.
[3] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608 at para 56.
[4] *Ibid* at para 57.
[5] *Ibid* at para 64.

2025 CanLIIDocs 1181

On the substantive issue, LawPro counsel argued that the test for lien representatives' liability under s. 86(1)(b)(i) was subjective for three reasons:

1. The language "knowingly participated" in s. 86(1)(b)(i), in its entire context, could only be reasonably construed as subjective knowledge;

2. The caselaw on s. 86; and

3. Good policy and the wider law on balancing lawyers' duty to their clients and to the court.

The Divisional Court's decision

Justice O'Brien gave the judgment of the Divisional Court, with Justices McSweeny and Davies concurring.

The Divisional Court agreed with LawPro counsel – leave was required.

Section 133(b) requires leave to appeal the discretionary costs order and nothing in the *Construction Act* is inconsistent with that provision. Section 71 of the *Construction Act* relates to a "judgment" and Rule 1.03 of the *Rules of Civil Procedure* defines a judgment as "a decision that finally disposes of an application or action on its merits." The Divisional Court held that the costs order did not constitute a judgment because it was an order that followed the result in the lien proceeding and not a separate action or application.[6]

Further, s. 71 of the *Construction Act* does not address costs, whereas the *Courts of Justice Act* expressly requires leave be obtained from an order only as to costs that are in the discretion of the court. Subsection 86(1) of the Construction Act states that costs under that provision are "in the discretion of the court."[7]

COMMENTS

Lawyers' liability when registering liens

Associate Justice Wiebe's decision in *Viceroy Homes* expands upon Master Albert's decision in *Fletcher*,[8] heretofore the leading case on lien representatives' liability when preserving and perfecting liens.

The Superior Court Decision in *Viceroy Homes* makes it clear that the standard for liability of lien representatives when preserving and perfecting liens is not mere negligence. Negligence involves an objective standard, but s. 86(1)(b)(i) imports a subjective test.

Lawyers should take note, however, that while actual knowledge that a lien is baseless or wilfully exaggerated is an essential precondition to a costs order against a lawyer for

[6] *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, 2024 ONSC 6519 (CanLII), at para 6.
[7] *JIA Development Inc. v. 2708320 Ontario Ltd. (Viceroy Homes)*, 2024 ONSC 6519, at para 7.
[8] *Brian T. Fletcher Construction Co. Ltd. v. 1707583 Ontario Inc.*, 2009 CanLII 81402 (ON SC).

2025 CanLIIDocs 1181

preserving or perfecting that lien,[9] actual knowledge could be imputed if the lawyer is reckless or wilfully blind to major issues with the lien. Recklessness or wilful blindness requires a level of knowledge that is the moral equivalent of actual knowledge. While such conduct is well beyond mere negligence or laziness underlying a failure to inquire, Associate Justice Wiebe said recklessness and wilful blindness involves knowledge of an actual risk that is at the level of a "clear probability" and then a failure to act to avoid the risk or make inquiries.[10]

Associate Justice Wiebe's comments on recklessness and wilful blindness are the first commentary in Ontario jurisprudence on the applicability of the judicial concepts of recklessness and wilful blindness to a costs determination under section 86(1)(b)(i). Counsel undertaking a retainer for a lien claimant will need to be mindful that they do not "turn a blind eye" to facts that would lead the lawyer to understand that the lien is without foundation or exaggerated. Otherwise, counsel risk liability for costs due to such reckless or wilfully blind conduct.

The authors believe that the Superior Court Decision is consistent with good policy. It aligns with the general principle that an order of costs should be made against a lawyer rarely and only where serious misconduct has been shown.[11] As Master Albert observed previously, putting lawyers at risk of costs orders against them personally would have a chilling effect on the lawyer-client relationship; the presumption is that the lawyer followed the client's instructions.[12]

Lawyers could be liable to their clients for failing to preserve the client's lien rights in time. There are strict statutory deadlines for preserving and perfecting liens. To preserve their client's rights in time, lawyers may sometimes have to register liens without the benefit of perfect information.

However, it would be a mistake to conclude that *Viceroy Homes* had diminished the lawyer's gatekeeping role. Lawyers should require supporting documentation from their clients at the earliest opportunity, then assess the validity of the lien with reasonable diligence and promptness and advise their clients accordingly. If a client has misled their lawyer into registering a bad lien, the lawyer should advise the client that the lien may have to be voluntarily discharged, or the lawyer may have to take steps to remove themselves from the record. If a lawyer becomes aware of facts that, unless ignored, would lead them to conclude that their client has misled them into registering a bad lien, it is time to contact their insurer, or risk exposure to liability for costs arising from reckless disregard of a lien they would know to be without foundation but for their wilful blindness. These are all elements of the important gatekeeping role of a lawyer acting for a lien claimant.

[9] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, at para 47.
[10] *2708320 Ontario Ltd. cob Viceroy Homes v. Jia Development Inc*, 2024 ONSC 1608, at para 53.
[11] *Pierce v. Baynham*, 2015 BCCA 188, at para 41.
[12] *Brian T. Fletcher Construction Co. Ltd. v. 1707583 Ontario Inc.*, 2009 CanLII 81402 (ON SC) at para 38.

2025 CanLIIDocs 1181

2025 CanLIIDocs 1181

Leave to appeal costs orders

The Divisional Court Decision now makes it clear that leave is required to appeal costs orders made under s. 86 of the Act. Although only s. 86(1)(b)(i) was at issue in *Viceroy Homes*, the Divisional Court's ruling, in our view, will apply to all costs orders made under s. 86 because, by the express words of that section, s. 86 orders are in the discretion of the court. Section 133(b) of the *Courts of Justice Act* stipulates that leave is required to appeal all discretionary costs orders. The Divisional Court Decision also reinforces the position that a costs order is not a substantive "judgment".

In the authors' view the Divisional Court's ruling requiring leave to appeal is a reasonable limit on the right to appeal a discretionary costs order made under section 86 of the *Construction Act*. It would be odd if an action brought under the *Construction Act* was the only type of proceeding in Ontario Superior Court which allows discretionary costs orders to be appealed as of right. We believe this finding should be understood as confined to discretionary costs orders made under section 86, and that this decision does not undermine precedent where the Court of Appeal has applied a broader definition of "judgment" for the purposes of section 71 of the *Construction Act* in different context than a discretionary costs order.[13]

CONCLUSION

The Superior Court Decision and the Divisional Court Decision in *Viceroy Homes* will be useful precedent on making and appealing costs orders against lien representatives going forward. We can expect that in future cases the issue will be to what extent counsel has recklessly disregarded or wilfully blinded themselves to facts that show that they are preserving, perfecting, or representing a lien claimant at trial, with a bad lien. Even though *Viceroy Homes* solidifies a subjective standard for lawyer liability when registering liens, lawyers should remain vigilant – an ounce of prevention is better than a pound of the cure.

[13] *MGW-Homes Design Inc. v. Pasqualino*, 2024 ONCA 422, at para 3.

LU#170
Primary Topic: IX. Construction and Builders' Liens
Jurisdiction: Ontario
Authors: Dan Fridmar, Principal at Fridmar Professional Corporation, and Jacob McClelland, Partner at Glaholt Bowles LLP

2025 CanLIIDocs 1181

Calling on a Lien Bond – A Handy Reference Guide for Construction Lawyers in Ontario (and a helpful starting point for lawyers across Canada)

It is not uncommon for a construction lien to be vacated in accordance with Section 44 of the *Act* by the issuance and posting of a Financial Guarantee Bond – *Form 15.1* or equivalent form (a "**Lien Bond**"). This Lien Bond typically sets out the following information:

1) The surety who guarantees the bond;
2) The principal who issues the bond (*typically the party vacating the construction lien*); and
3) The obligee under the bond. If a Lien Bond is posted to vacate a construction lien, the form requires that the obligee under the bond be the Accountant of the Superior Court of Justice of Ontario (the "**Accountant**").

As one may recall, the purpose of vacating any construction lien is to replace the security attaching to the premises or holdback against which the lien is secured with the security posted in Court. The ultimate purpose in replacing this security is that – following a determination and judgment under the lien – the lien claimant may satisfy that judgment by looking to payment from said security. Where the security posted is cash, the procedure is simple: request release of the funds from the Court. Obtaining payment from a Lien Bond is a bit more complex. As a result, the authors have prepared a summary of the steps involved in calling on a Lien Bond, which can be used as a quick reference for anyone needing to do so:

1) **Obtain Judgment**: depending on whether the lien claimant secures judgment following a trial or other summary disposition, if you expect you might need to call on the Lien Bond to satisfy your judgment, the first step in receiving payment from a Lien Bond is ensuring that the draft Judgment to be signed by a Judge or Associate Judge (*as the case may be*) contains the following paragraphs directing payment from the Lien Bond:

> THIS COURT FURTHER ORDERS AND DIRECTS the Accountant of the Superior Court of Justice (the "**Accountant**") to make a demand for payment for [*the amount Ordered with respect to the principal judgment of the lien and any costs*] in the total sum of $_____ (the "**Principal and Costs**") from the Financial Guarantee Bond obtained by [*the principal*] from [*the surety*] (the "**Surety**") and issued as Bond No. _____in the sum of $_____ (the "**Bond**"), which was posted by [the principal] with the Accountant as permitted by the Order of the Honourable [Judge or Associate Judge], dated _____, 20__ into the Accountant's file no. _____ (the "**Bond Demand**").

> THIS COURT FURTHER ORDERS AND DIRECTS that, once the Surety remits payment of the Principal and Costs Judgment from the Bond to the Accountant pursuant to the Bond Demand, the Accountant shall release payment of such monies to [*the lien claimant or the lien claimant's legal representative in trust, as the case may be*].

Once the Judgment is signed by the respective Judge/Associate Judge, the lien claimant must ensure that the Judgment is issued and entered. If the lien claimant does not receive an original, wet-ink copy of Judgment and instead receives a digital copy by E-Mail or fax, they will have to obtain a notarial certificate that certifies: 1) that the Judgment is indeed a true copy of the Judgment issued by the Court; 2) by whom, when, and how the Judgment was received by the lien claimant; and 3) appending a copy of the E-Mail, CaseLines page, fax, or other method in which the electronic copy of the Judgment was received.

2) **Contacting the Accountant**: the next step will depend on whether the lien claimant obtained Judgment by consent or following a contested disposition (*trial, summary judgment, etc.*). If the Judgment was obtained by consent, the Judgment must contain language confirming that the provisions of Rule 72.03(2)(c)(ii) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "***Rules***") are struck. If, however, the Judgment was obtained following a contested disposition, in accordance with Rule 72.03(2)(c)(ii) of the *Rules*, the lien claimant must ensure that the time to appeal the Judgment has expired. In accordance with Sections 71(1) and (2) of the *Act*, an appeal under a Judgment for a construction lien lies to the Divisional Court and must be made within fifteen (15) days of the date of the Judgment (*unless the parties agree otherwise or the appealing party brings a motion to extend the time to a single judge of the Divisional Court*).

Once the appeal deadline is expired (*and if no motion to extend this deadline is brought by any party*), the lien claimant must prepare a package in accordance with Rule 72.03(2)(c)(ii) of the *Rules* to be filed with the Accountant containing the following:

> a) a Letter with a written request for payment out of court, detailing that the payment must be made in accordance with the Judgment and reflective of the inserted language pertaining to making a claim for payment from the Surety in accordance with the terms of the Lien Bond;
>
> b) the original or notarized copy of the Judgment as set out above; and
>
> c) an Affidavit confirming that the time prescribed for the appeal of the Judgment has expired and that no appeal is pending.

This package may be served delivered to the Accountant personally or by courier. The lien claimant would also benefit from contacting the Accountant simultaneously by E-

2025 CanLIIDocs 1181

Mail or fax with electronic copies of the documents enclosed in the package to ensure that the Accountant is expecting same and for ease of communication and coordination with the Accountant while payment is awaited.

If the Accountant takes issue with the wording of the Judgment and requires an amendment, the authors recommend moving for an Order to amend the Judgment, *nunc pro tunc*. The Court has the authority to issue such an Order under Rule 59.06 and Rule 54.05 of the *Rules*. Additionally, if the Court is willing to waive the need for the moving party to prepare and file motion materials, pursuant to Rule 37.01 and 2.03 of the *Rules*, the moving party may simply file a draft Order for the Court's consideration. It is also advisable to have the Accountant approve the draft Order amending the Judgment before proceeding with these steps.

3) Optional – Contacting the Surety: Pursuant to the terms of the Judgment and the Lien Bond, the Surety may only accept a demand of payment under the Judgment from the Accountant. However, it is prudent to assist the Accountant in expediting this process by contacting the Surety and letting them know that a request is imminent. To identify the contact person, you can search Government websites to identify the various sureties and their attorneys for service. Contacting the Surety may also assist in obtaining the precise contact person who deals with payment in such circumstances (*adjusters or otherwise*), whose contact information may then be shared with the Accountant to expedite payment from the Lien Bond.

4) Coordination between the Accountant and the Surety: Once the Accountant accepts the lien claimant's package as set out above, the Accountant will take direct steps in coordinating with the Surety in obtaining payment. The timing and duration of this process is entirely dependent on the Surety, and there is no limit or time as to how long it may take. It may be prudent to follow up every few days or once a week with the Accountant with a friendly reminder and request for an update/status of the Surety's payment. Politeness in communicating with the Accountant is strongly encouraged.

5) Receiving payment from the Accountant: Once the Accountant receives payment from the Surety, the Accountant will proceed to release said funds to the party identified in the Judgment. Presently, the Accountant's preferred form of payment is through wire transfer or electronic funds transfer. As such, if the lien claimant wishes to receive the funds directly, they must provide this information to the Accountant in the letter initially requesting the funds. Alternatively, if the lien claimant is agreeable to having their legal representative receive the funds in trust, the lien claimant must ensure that the Judgment clearly directs the Accountant to do so. If any portions of the Judgment are unclear to the Accountant, the lien claimant may have to return to the Judge/Associate Judge signing the Judgment to make such necessary revisions or amendments. Accordingly, it is important to have the correct information in the Judgment at the time it is obtained.

2025 CanLIIDocs 1181

The authors' intention in providing the above summary is to provide a helpful reference guide for lawyers who find themselves in the somewhat rare position of calling on a Lien Bond in Ontario.

2025 CanLIIDocs 1181

Tab 113

CanLII

RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573

Source:	Supreme Court of Canada
Date:	1986-12-18
File number:	18720
Other citations:	33 DLR (4th) 174 — 71 NR 83 — 2 ACWS (3d) 243 — [1987] 1 WWR 577 — 9 BCLR (2d) 273 — [1987] DLQ 69 — 25 CRR 321 — 38 CCLT 184 — JE 87-81 — [1986] SCJ No 75 (QL) — [1986] ACS no 75
Citation:	RWDSU v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 SCR 573, <https://canlii.ca/t/1ftpc>, retrieved on 2026-01-18
Most recent unfavourable mention	U.F.C.W., Local 1518, v. KMart Canada Ltd., 1999 CanLII 650 (SCC), [1999] 2 SCR 1083 [...] **Distinguished:** RWDSU v. Dolphin Delivery Ltd., **1986 CanLII 5 (SCC) , [1986] 2 S.C.R. 573** ; referred to: Libman v. Quebec (Attorney General), 1997 CanLII 326 (SCC) , [1997] 3 S.C.R. 569 ; Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC) , [1989] 2 S.C.R. 1326 ; Hunter v. Southam Inc., 1984 CanLII 33 (SCC) [...]

RWDSU *v.* Dolphin Delivery Ltd., [1986] 2 S.C.R. 573

Retail, Wholesale and Department Store Union, Local 580, Al Peterson and Donna Alexander

Appellants

v.

Dolphin Delivery Ltd. *Respondent*

and

Attorney General of Canada, Attorney General of British Columbia, Attorney General for Alberta and Attorney General of Newfoundland

Interveners

INDEXED AS: RWDSU *v.* DOLPHIN DELIVERY LTD.

File No.: 18720.

1984: December 6, 7; 1986: December 18.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Wilson and Le Dain JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Freedom of expression -- Interlocutory injunction against secondary picketing -- Application based on common law rule against inducing breach of contract -- Whether injunction offending Charter right to freedom of expression -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 32(1) -- Constitution Act, 1982, s. 52(1).

Appellant was the federally certified bargaining agent for the locked out employees of Purolator, an Ontario based courier. Prior to the lockout, respondent made deliveries for Purolator in its area and afterwards, for Supercourier, a company connected with Purolator. Appellant applied to the British Columbia Labour Relations Board for a declaration that respondent and Supercourier were

allies of Purolator in their dispute with appellant. Such a finding would have rendered the picketing of respondent's business premises lawful, and consequently would have affected its business in that its collective agreement provided that its employees' refusal to cross a lawful picket line was not a violation of the agreement or grounds for disciplinary action or discharge. When the Board declined to hear the application for want of jurisdiction, the labour relations of the appellant being within federal jurisdiction, the legality of appellant's proposed picketing then fell for determination under the common law because the *Canada Labour Code* was silent on the issue. No picketing occurred at respondent's premises as respondent was granted a *quia timet* injunction which was upheld on appeal. At issue here is whether secondary picketing in a labour dispute is protected as freedom of expression under s. 2(*b*) of the *Charter* and accordingly not the proper subject of an injunction to restrain it.

Held: The appeal should be dismissed.

Per Dickson C.J. and Estey, McIntyre, Chouinard and Le Dain JJ: All picketing involves some form of expression and enjoys *Charter* protection unless some action on the part of the picketers alters its nature and removes it from *Charter* protection. *Charter* protection of this freedom does not encompass violence, threats of violence or other unlawful acts. The picketing at issue, although intended to bring about economic pressure and to induce the common law tort of breach of contract, was protected by the *Charter*.

The *Charter* applies to the common law. The language of s. 52(1) of the *Constitution Act, 1982* clearly includes the common law and a construction of that section that would exclude the common law from the *Charter*'s application would be wholly unrealistic.

The *Charter* does not apply to private litigation completely divorced from any connection with government. Section 32 specifies that the *Charter* applies to the legislative, executive and administrative branches of government: their actions are subject to the *Charter* whether invoked in public or private litigation. An order of the Court, however, cannot be equated with government action

for the purposes of *Charter* application notwithstanding political theory. The Courts, while bound by the *Charter*, act as neutral arbiters and to regard a court order as an element of government action necessary to invoke the *Charter* would unduly widen the scope of the *Charter*'s application to virtually all litigation.

Although government action is generally dependant on statutory authority, it may rely as well on the common law as in the case of the prerogative. The *Charter* will apply to the common law where the common law is the basis for some governmental action which is alleged to have infringed a guaranteed right or freedom.

It is difficult and probably dangerous to attempt to define with narrow precision that element of government intervention necessary to bring the *Charter* into play by private litigants in private litigation. It would seem that the *Charter* would apply to delegated legislation such as regulations, orders in council, possibly municipal by-laws and by-laws and regulations of other creatures of Parliament and the legislatures. Where government action of such nature is present, and where a private litigant relies on it to cause an infringement of the *Charter* rights of another, the *Charter* applies. Where, however, a private party sues another relying on the common law and where no government action is relied upon to support the action, the *Charter* will not apply.

The *Charter* did not apply to the case at bar. This litigation was between purely private parties and did not involve any exercise of or reliance on governmental action which would invoke the *Charter*. The application for the injunction was supported in this Court solely on the basis of the common law tort of inducing a breach of contract. Had the *Charter* applied, s. 1 of the *Charter* would have been effective to justify the granting of the injunction.

Per Beetz J.: For reasons stated by the majority of the British Columbia Court of Appeal, the picketing enjoined here would not have been a form of expression and consequently no question

of infringement of s. 2(*b*) of the *Charter* could arise. The reasons of McIntyre J. were otherwise agreed with.

Per Wilson J.: On a s. 1 analysis the purpose and objectives of a common law principle must be ascertained through an objective approach in the same way as the purposes and objectives of an impugned piece of legislation are ascertained. Two distinct questions must be answered in this case. First, does the tort of inducing breach of contract represent a reasonable limit under s. 1 on freedom of expression in the labour relations context? Second, if the tort represents a reasonable limit under s. 1, should injunctive relief be granted in this case? If the tort does not survive the first question, the conduct is not wrongful and no injunction can issue. If the tort survives the first question, the facts must be considered to see whether the other requirements for the award of an interlocutory injunction are present, i.e., whether the balance of convenience favours the plaintiff. The reasons of McIntyre J. were otherwise agreed with.

Cases Cited

By McIntyre J.

Considered: *Re Blainey and Ontario Hockey Association* (1986), 1986 CanLII 145 (ON CA), 26 D.L.R. (4th) 728, 54 O.R. (2d) 513; **referred to**: *Abrams v. United States*, 250 U.S. 616 (1919); *Boucher v. The King*, 1950 CanLII 2 (SCC), [1951] S.C.R. 265; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Channel Seven Television Ltd. v. National Association of Broadcast Employees and Technicians*, 1971 CanLII 968 (MB CA), [1971] 5 W.W.R. 328; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Cat Productions Ltd. v. Macedo*, 1985 CanLII 5605 (FC), [1985] 1 F.C. 269.

By Wilson J.

Referred to: *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canada Labour Code, R.S.C. 1970, c. L-1.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), (*d*), 15(1), 32(1).

Constitution Act, 1867, ss. 12, 16, 132.

Constitution Act, 1982, s. 52(1).

Human Rights Code, 1981, S.O. 1981, c. 53, s. 19(2).

Labour Code, R.S.B.C. 1979, c. 212, ss. 85(3), 88.

Authors Cited

Gibson, Dale. "The Charter of Rights and the Private Sector" (1982), 12 *Man. L.J.* 213.

Gibson, Dale. "Distinguishing the Governors from the Governed: The Meaning of 'Government' under Section 32(1) of the Charter" (1983), 13 *Man. L.J.* 505.

Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswells, 1985.

Manning, Morris. *Rights, Freedoms and the Courts*. Toronto: Edmond-Montgomery, 1983.

McLellan, A. Anne and Bruce P. Elman. "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 *Alta. L. Rev.* 361.

Mill, John Stuart. "On Liberty". In *On Liberty and considerations on Representative Government*. Edited by R. B. McCallum. Oxford: Basil Blackwell, 1946.

Milton, John. *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England.* London: 1644.

Swinton, Katherine. "Application of the Canadian Charter of Rights and Freedoms". In W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and*

Tab 114

CanLII

Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3

Source:	Supreme Court of Canada
Date:	1993-10-21
File number:	22227
Other citations:	108 DLR (4th) 193 — 160 NR 1 — 43 ACWS (3d) 410 — [1993] 8 WWR 513 — 56 WAC 161 — AZ-93111122 — 84 BCLR (2d) 1 — 49 RFL (3d) 117 — 34 BCAC 161 — 18 CRR (2d) 41 — [1993] CarswellBC 264 — EYB 1993-67111 — JE 93-1766 — [1993] SCJ No 112 (QL) — [1993] ACS no 112 — [1993] RDF 703
Citation:	Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3, <https://canlii.ca/t/1frwv>, retrieved on 2026-01-18
Most recent unfavourable mention	A.L.J. v P.N.A.J., 2017 BCSC 1738 (CanLII) [...] While I appreciate the **Young case is distinguishable** in a number of ways, it is nevertheless of assistance in that the Court addresses the fundamental importance of the best interests of the child in the context of religious upbringing and observance. [...]

Young *v.* Young, [1993] 4 S.C.R. 3

Irene Helen Young *Appellant*

v.

James Kam Chen Young *Respondent*

and

W. Glen How *Respondent*

and

Watch Tower Bible and Tract Society of Canada *Respondent*

and

The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of Quebec,
the Attorney General of Manitoba,
the Attorney General of British Columbia,
the Law Society of British Columbia and
the Seventh-day Adventist Church in Canada *Interveners*

Indexed as: Young *v.* Young

File No.: 22227.

1993: January 25, 26; 1993: October 21.

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

on appeal from the court of appeal for british columbia

Family law -- Custody -- Access -- Best interests of the child -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Scope of "best interests of the child" -- Whether or not "best interests of the child" equivalent of absence of harm -- Whether or not restriction on access in best interests of the children.

Family law -- Children -- Best interests of the child -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Scope of "best interests of the child" -- Whether or not "best interests of the child" equivalent of absence of harm -- Whether or not restriction on access in best interests of the children.

Family law -- Property and financial awards -- Lump sum payment -- Family debts -- Principles governing reallocation of property.

Constitutional law -- Charter of Rights -- Freedom of religion -- Freedom of expression -- Divorce Act requiring that orders concerning children only take into account "the best interests of the child" -- Access parent insisting on instructing children on religion -- Custodial parent and children objecting to religious instruction -- Court ordering that access parent discontinue religious activities with children -- Whether or not access restriction infringing freedom of religion -- Whether or not access restriction infringing freedom of expression -- Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), ss. 16(8), 17(5) -- Canadian Charter of Rights and Freedoms, s. 2(a), (b).

Courts -- Costs -- Principles governing awards of costs on solicitor-client basis.

Torts -- Maintenance -- Religious society carrying cost of action -- Common religious action -- Whether or not tort of maintenance.

Appellant's and respondent's separation was marked by a protracted series of court battles. Appellant was awarded custody of the couple's three daughters and respondent was granted access subject to court imposed restrictions arising from appellant's objection to his religious activity with the children. Respondent was ordered not to discuss the Jehovah's Witness religion with the children, take them to any religious services, canvassing or meetings, or expose them to religious discussions with third parties without appellant's prior consent. Organized religion was not important to appellant although she wanted the children to be raised within the United Church.

The two older daughters liked their father but came to dislike his religious instruction to the extent that it was damaging his relationship with them and was contributing to the stress the children were experiencing in adjusting to their parents' separation.

The trial judge also made orders for the distribution of property and for costs. The respondent's interest in the matrimonial home was ordered transferred to the appellant because any remaining interest in the house, after respondent paid what was already owing to appellant, was to be transferred in the form of lump sum maintenance. Respondent was found responsible for debts incurred by the appellant for the support of herself and the children pending maintenance and for a debt made to a family corporation. Costs were awarded on a solicitor-client basis against respondent, his lawyer and a religious society not a party to the proceedings.

Respondent appealed. The Court of Appeal set aside the limitations on religious discussion and attendance, on the ground that it was in the best interests of the children that they come to know their non-custodial parent fully, including his religious beliefs, unless the evidence established the existence of or the potential for real harm or the child did not consent to being subject to the access parent's views or practices. The Court of Appeal also altered the division of property and the awards of costs made by the trial judge. Appellant appealed these rulings to this Court.

Four constitutional questions queried (1) whether ss. 16(8) and 17(5) of the *Divorce Act* (requiring that judicial decisions regarding custody and access be made "in the best interests of the child") denied the *Charter* guarantees of freedom of religion, of expression and of association (s. 2(*a*), (*b*), and (*d*)), and if so, (2) were they justified under s. 1; (3) whether ss. 16(8) and 17(5) violated the equality guarantee of the *Canadian Charter of Rights and Freedoms* (s. 15(1)), and (4) if so, were they justified under s. 1. The Court considered the requirements of the "best interests of the child" and whether this standard infringed the guarantees of freedom of religion and expression under the *Charter*. A main consideration was unrestricted access by a non-custodial parent and the conditions necessary to curtail that access.

Held (L'Heureux-Dubé J. dissenting in the result): The appeal should be allowed in part.

The issues should be decided as follows:

1. The test regarding access is the best interests of the child (L'Heureux-Dubé J., La Forest and Gonthier JJ., and Iacobucci and Cory JJ.). McLachlin J. suggests that in cases such as this harm is usually an important element in determining the best interests of the child. Sopinka J. would recognize a threshold element of harm.

2. Sections 16(8) and 17(5) of the *Divorce Act* do not violate ss. 2(*a*), (*b*), (*d*) or 15(1) of the *Charter*. L'Heureux-Dubé J. (and La Forest and Gonthier JJ.) found the *Charter* to be inapplicable. McLachlin J. found the impugned legislation did not violate the *Charter*. Cory and Iacobucci JJ. agreed that there was no *Charter* violation. Sopinka J. found that the *Charter* applied and could only be overridden in limited circumstances.

3. The restrictions on access should be removed (L'Heureux-Dubé J. and La Forest and Gonthier JJ. dissenting).

4. The judgment dealing with property and financial matters and the award of costs should be varied (L'Heureux-Dubé J. dissenting).

Best Interest of the Child, *Charter* Considerations and Access

Per L'Heureux-Dubé J.: The power of the custodial parent is not a "right" with independent value granted by courts for the benefit of the parent. Rather, the child has a right to a parent who will look after his or her best interests and the custodial parent a duty to ensure, protect and promote the child's best interests. That duty includes the sole and primary responsibility to oversee all aspects of day-to-day life and long-term well-being, as well as major decisions with

respect to education, religion, health and well-being. The non-custodial parent retains certain residual rights over the child as one of his or her two natural guardians.

Child placement decisions should safeguard the child's need for continuity of relationships, reflect the child's (not the adult's) sense of time, and take into account the law's inability to supervise interpersonal relationships and the limits of knowledge to make long-range predictions. This need for continuity generally requires that the custodial parent have the autonomy to raise the child as he or she sees fit without interference with that authority by the state or the non-custodial parent. A custody award is a matter of whose decisions to prefer, as opposed to which decisions to prefer. Courts cannot make the necessary day-to-day decisions which affect the best interests of the child. Once a court has determined who is the appropriate custodial parent, it must presume that that parent will act in the best interests of the child.

Decisions are made according to the best interests of the child without the benefit of a presumption in favour of either parent. The Act envisages contact between the child and each of his or her parents as a worthy goal which should be in the best interests of the child. Maximum contact, however, is not an unbridled objective and must be curtailed wherever the welfare of the child requires it.

The right to access is limited in scope and is conditioned and governed by the best interests of the child. The legislation makes it quite explicit that only the best interests of the child as it is comprehensively understood should be considered in custody and access orders. The role of the access parent is that of a very interested observer, giving love and support to the child in the background. He or she has the right to know but not the right to be consulted. Access rights recognize that the best interests of the child normally require that the relationship developed with both parents prior to the divorce or separation be continued and fostered. The right to access and the circumstances in which it takes place must be perceived from the vantage point of the child. Wherever the relationship to the non-custodial parent conflicts with the best interests of the child, the furtherance and protection of the child's best interests must take priority over the desires and interests of the parent.

As the ultimate goal of access is the continuation of a relationship which is of significance and support to the child, access must be crafted to preserve and promote that which is healthy and helpful in that relationship so that it may survive to achieve its purpose. Sources of ongoing conflict which threaten to damage or prevent the continuation of a meaningful relationship should be removed or mitigated. Notwithstanding a general concern about the vulnerability of access rights to the caprices of a vengeful custodial parent, courts should not be too quick to presume that the access concerns of the custodial parent are unrelated to the best interests of the child. Courts should also not be blind to issues, such as financial support, which form part of the broader context in which these rights are exercised. The access parent has no obligation to exercise those rights and cannot be forced to comply with such an order even if that contact has been determined to be in the child's best interest.

Where there is a genuine problem with access, the non-custodial parent is not without recourse in any case. This stems from the statutory directive to facilitate access where it is in the child's best interests and the role of the judge as the arbiter of those interests in the case of a dispute between the parents. Generally, courts will grant liberal access to the non-custodial parent and usually this is consistent with the best interests of the child. Parents will also normally respect their children's wishes and best interests with regard to access. When disagreements between parents do reach the courts, the judge must always draw the line in favour of the best interests of the child, from a child-centred perspective.

The best interests of the child cannot be equated with the mere absence of harm: it encompasses a myriad of considerations. Courts must attempt to balance such considerations as the age, physical and emotional constitution and psychology of both the child and his or her parents and the particular milieu in which the child will live. One of the most significant factors in many cases will be the relationship that the child entertains with his or her parents. Since custody and access decisions are pre-eminently exercises in discretion, the wide latitude under the best interests test permits courts to respond to the spectrum of factors which can both positively and negatively affect a child. What may constitute stressful or damaging circumstances for one child may not necessarily have the same effect on another.

The most common presumption now governing the best interests test is the primary caregiver presumption. It explicitly restores the values of commitment and demonstrated ability to nurture the child and recognizes the obligations and supports the authority of the parent engaged in day to day tasks of childrearing.

The order of the trial judge is not subject to the *Charter*. Even if it were, the best interests test is nevertheless value neutral and does not, on its face, violate any *Charter* right. Its objective, the protection of a vulnerable segment of society, is completely consonant with the *Charter*'s values. Broad judicial discretion is crucial to the proper implementation of the legislative objective of securing the best interests of the child. Such discretion in a legislative provision does not of itself give rise to an inference of *Charter* infringement. It cannot be considered in the absence of an examination of the legislative objectives and must be rationally tied to those objectives.

The standard for finding a legislative provision unconstitutional because of vagueness is high. The provisions need only permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation. The best interests test is not so uncertain as to be incapable of guiding a consideration of the factors relevant to custody and access determinations. The fact that it must be applied to the facts of each case does not militate in favour of its unconstitutionality.

The vagueness of a legislative provision cannot be examined in the abstract but must be considered within the context of the particular legislative objectives in question, bearing in mind that some objectives will require a panoply of judicial remedies for their meaningful fulfilment. Among the factors with which courts should be concerned when the vagueness of a law is at issue are: (a) the need for flexibility and the interpretive role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist.

The custodial parent need not show harm in order to restrict access to the children by the non-custodial parent. There is no rationale for defining the best interests of the child with the absence

of harm. Nothing in the Act mandates or even suggests that "real danger of significant harm to the child" be the sole consideration in matters of custody and access. Indeed, the harm test would require courts to ignore the very factors which are set out in the Act and invert the basic focus of the inquiry into custody and access. The welfare of children is put at considerable risk if the prospect of harm becomes the sole prerequisite for restrictions on access. The best interests of the child is not simply the right to be free of demonstrable harm; it is the positive right to the best possible arrangements in the circumstances of the parties. The harm test cannot meet the legal system's primary goal in divorce situations -- minimizing the adverse effects of children. This goal requires a vision of the best interests of the child that is more than neutral to the conditions under which custody and access occur. Judges must exercise their discretion to prevent harm to the child rather than merely identify or establish its presence after the damage is done.

Expert evidence should not be routinely required to establish the best interests of the child. Expert testimony, while helpful in some circumstances, is often inconclusive and contradictory because such assessments are both speculative and may be affected by the professional values and biases of the assessors themselves. Experts are not always better placed than parents to assess the needs of the child. The person involved in day to day care may observe changes in the child that could go unnoticed by anyone else and normally has the best vantage point from which to assess the interests of the child. The custodial parent, therefore, will often provide the most reliable and complete source of information to the judge on the needs and interests of that child. The importance of the evidence of children in custody and access disputes, too, must be emphasized.

Restrictions on access do not necessarily prevent children from coming to know their parents in meaningful ways. Interpreting the goal of maximum contact as requiring unrestricted access may defeat the Act's objective if the pre-eminence of unlimited "knowledge" results in the ultimate destruction of the relationship. In this case, the purpose of the restrictions was to ensure that the children will continue to know their father "at all".

Freedom of religion and freedom of expression are public in nature and encompass the freedom of the individual from state compulsion or restraints. The state's role in custody and access

decisions does not transform the essentially private character of parent-child interchanges into activity subject to *Charter* scrutiny. Legitimate questions may arise about the role of the state, and hence the application of the *Charter* in regulating other aspects of family law. A valid purpose can hardly be served, however, by importing the discourse of freedom of expression and religion into orders made in the resolution of custody and access disputes. Once the best interests test itself has been found to accord with *Charter* values, the trial judge's order itself is not subject to further constitutional review, as the necessary state infringement of religious rights required to sustain a *Charter* challenge is not present. The principles enunciated in *Dolphin Delivery* apply as custody and access matters are essentially private in nature and there exists no state action to be impugned.

Decisions regarding custody and access must not be based on the parents' faith. The religion of the parties, however, may be relevant as one of the circumstances to be assessed in the determination of the best interests of the child. Where there is conflict over religion, the court is not engaged in adjudicating a "war of religion" and the religious beliefs of the parties themselves are not on trial. Rather, it is the manner in which such beliefs are practised together with the impact and effect they have on the child which must be considered. In all cases where the effects of religious practices are at issue, the best interests of the child must prevail.

Ordinarily, the exposure of a child to different religions or beliefs may be of value to the child. Where religion becomes a source of conflict between the parents or is the very cause of the marriage breakdown, it is generally not in the best interests of the child and may in some circumstances be very detrimental for the child to be drawn into the controversy over religious matters. Where there is conflict over religion, courts must secure the longstanding authority of the custodial parent to make decisions over religious activities. This ensures that stress occasioned by such issues does not become a continuing and ultimately destructive feature in the life of the child after divorce.

Freedom of religion is not an absolute value. Here, powerful competing interests must also be recognized, not the least of which, in addition to the best interests of the children, are the freedoms of expression and religion of the children themselves.

Respondent's religious beliefs and practices and his general rights of access were not threatened. The restrictions were aimed at reducing the area of conflict which had arisen on account of the respondent's behaviour with his children during access and the effects of that behaviour on their best interests. Much of the stress the children were experiencing was related to their resistance to becoming involved in their father's religious practices. The restrictions were to further the best interests of these children by removing the source of conflict, particularly as the ultimate purpose of the restrictions was to preserve the relationship between the respondent and his children. Evidence supported the conclusion that the respondent would not respect the wishes of the children without an order to do so.

Per La Forest and Gonthier JJ.: Agreement was expressed for the reasons of L'Heureux-Dubé J. holding that access be determined on the basis of what is in the best interests of the child and for her resolution of the constitutional issue.

Per Iacobucci and Cory JJ.: The best interests of the child standard does not violate in ss. 2(*a*), (*b*), (*d*) and 15 of the *Canadian Charter of Rights and Freedoms* substantially for the reasons given by L'Heureux-Dubé and McLachlin JJ. No opinion was expressed on the questions of whether a *Charter* infringement, if found, would be so trivial as not to warrant *Charter* protection and of whether or not the *Charter* applies to judicial orders made in custody or access proceedings.

For many of the reasons advanced by L'Heureux-Dubé J., access to children should be determined on the basis of what is in the best interests of the child. Expert evidence, while sometimes helpful, is not always necessary to establish the best interests of the child; that question can be determined normally from the evidence of parties themselves and the testimony, where appropriate, of the children concerned.

The matters of the children's attending religious services with the respondent and accompanying him on his proselytizing activities were resolved by the respondent's undertaking to respect his children's wishes in this regard. The order forbidding the respondent from discussing his

religion was not supported by a proper application of the best interests of the child test. Indeed, curtailment of explanatory or discursive conversations between a parent and his or her child should only be rarely ordered.

Per McLachlin J.: The *Divorce Act* mandates that, on matters of access, the ultimate test in all cases is the best interest of the child. This is a positive test, encompassing a wide variety of factors, including the desirability of maximizing contact between the child and each parent if compatible with the best interests of the child. The custodial parent has no "right" to limit access. The judge must consider all factors relevant to determining what is in the child's best interests. The risk of harm to the child, while not the ultimate legal test, may also be a factor to be considered. This is particularly so where the issue is the quality of access -- what the access parent may say or do with the child. In such cases, it will generally be relevant to consider whether the conduct in question poses a risk of harm to the child which outweighs the benefits of a free and open relationship which permits the child to know the access parent as he or she is. The judge must act not on his or her personal views but on the evidence.

The legislative provision for the "best interests of the child" does not limit and therefore does not violate the *Charter* right to religious and expressive freedom. Religious expression not in the best interests of the child is not protected by the *Charter* because the guarantee of freedom of religion is not absolute and does not extend to religious activity which harms or interferes with the parallel rights of other people. Conduct not in the best interests of the child, even absent the risk of harm, amounts to an "injury" or intrusion on the rights of others and is clearly not protected by this *Charter* guarantee. "Injure" in this context is a broad concept. To deprive a child of what a court has found to be in his or her best interests is to "injure", in the sense of not doing what is best for the child. A child's vulnerability heightens the need for protection and any error should be made in favour of the child's best interests and not in favour of the exercise of the alleged parental right. An additional factor which may come into play in the case of older children is the "parallel right" of others to hold and manifest beliefs and opinions of their own.

The ambit of freedom of expression is broader than that of freedom of conscience and religion because even harmful expression may be protected. Some forms of harmful expression, however, are not constitutionally protected: violence or threats of violence or a direct attack on the physical integrity and liberty of another. Criminal conduct is an indication, although not a conclusive one, that expressive conduct is constitutionally unprotected.

A *prima facie* case for protection under the guarantee of freedom of expression can be made out here. The expression challenged does not take the form of the non-protected categories of expression. The harm done, if any, is of a psychological nature.

A purposive approach to *Charter* interpretation requires that associated rights -- religious freedom and freedom of expression -- be interpreted in a consistent and coherent manner. The ambit of a particular right or freedom, moreover, cannot be defined in the abstract but rather should be defined in the context of the particular activity in question.

The teaching of religious beliefs and practices to one's children, while it has an expressive aspect, is predominantly religious. In seeking to reconcile the rights of freedom of religion and freedom of expression in this context, it is the religious aspect which must dominate. Reading the two guarantees together, the limits of the guarantee of freedom of expression should govern in the context of religious instruction of children.

The custodial parent does not have the "right" to determine limits on access. The only question to be considered, where limitation of access is in issue, is what is in the best interests of the child. The custodial parent's obligation to make certain basic decisions as to how the child is educated (which may extend to religious matters) does not automatically mean that religious contacts with the access parent of a different faith are to be excluded. The failure of the child to consent to instruction on the part of the access parent does not necessarily preclude such instruction's being in the child's best interests.

The benefits which might enure to the children from coming to know their father as he was -- as a devoutly religious man devoted to the Jehovah's Witness faith -- were not considered at trial and no reference was made to Parliament's instruction that a child have as much contact with both parents as is compatible with his or her best interests. The question of whether there was any evidence of a risk of harm to the children which might offset the benefit of full access to their father's values, including those related to religion, was not adequately considered. While access may be limited in some circumstances on grounds unrelated to harm, where the issue is whether entirely lawful discussions and activities between the access parent and the child should be curtailed, the judge should enquire into whether the conduct poses a risk of harming the child. The evidence did not establish that harm was being caused to the children.

The order restricting respondent's access was unnecessary given his undertaking and the order enjoining him from preventing blood transfusions was unnecessary from a practical point of view. Parents should not make disparaging comments about the other parent's religion, but the matter might best be left to the parents' good sense.

Per Sopinka J.: While the "best interests of the child" test is the ultimate determination in deciding issues of custody and access, it must be reconciled with the *Charter*. General language in a statute which, in its breadth, potentially confers the power to override *Charter* values must be interpreted to respect those values. Here, the best interests test must be interpreted to allow the *Charter* right to freedom of religious expression to be overridden only if its exercise would occasion consequences that involve more than inconvenience, upset or disruption to the child and incidentally to the custodial parent.

The long-term value to a child of a meaningful relationship with both parents is a policy that is affirmed in the *Divorce Act*. Each parent, therefore, can engage in those activities which contribute to identify the parent for what he or she really is. The access parent is not expected to act out a part or assume a phony lifestyle during access periods. The policy favouring activities that promote a meaningful relationship is not displaced unless there is a substantial risk of harm to the child.

The best interests of a child are more aptly served by a law which recognizes the right of that child to a meaningful post-divorce relationship with both parents. The "rights" must be distributed between the custodial and the access parent so as to encourage such a relationship. The traditional notion of guardianship giving the custodial parent the absolute right to exercise full control over the child, even when the other parent is exercising his or her right of access, is at odds with this concept.

"Harm", in this context, connotes an adverse effect on the child's upbringing that is more than transitory. The impugned exercise by the access parent must be shown to create a substantial risk that the child's physical, psychological or moral well-being will be adversely affected. Exposure to new experiences and ideas may upset children and cause them considerable discomfort but these experiences are not necessarily in the long-term best interests of the child. Similarly, conflict between parents on many matters including religion is not uncommon, but in itself cannot be assumed to be harmful unless it produces a prolonged acrimonious atmosphere.

Risk of substantial harm must be shown if religious expression is to be restricted in applying the best interests of the child test. The statutory test in s. 16(10) of the *Divorce Act* does not constitute a limitation on freedom of religious expression. This freedom does not extend to protect conduct which is harmful to others. However, the concept of harm should not be expanded to reach the conclusion that anything which is not in the best interests of the children is injurious within the meaning of s. 2(*b*) and thus not protected by the *Charter*.

Financial Considerations and Costs

Per McLachlin J.: A judge, to fix lump sum maintenance, must fix it in a sum certain with reference to the principles applicable to such an award. The goal of conveying the entire interest in the matrimonial home to the wife did not support an award of lump sum maintenance; more was required. There was ample basis here for an order under s. 51 of the *Family Relations Act* awarding appellant a greater portion of the family assets because respondent, for a considerable time, paid little

or nothing for the support of the family. The debts incurred during this period can serve as a consideration supporting reduction of respondent's interest in the family property. The equity in the home was not substantial and respondent was permitted to retain other assets.

The trial judge, in effecting a *de facto* reapportionment of the interest in the family assets to do justice, as was permitted on the facts and the law, did not expressly allude to the factors for reallocation. This omission should not result in a new trial being ordered because of the length and cost of the current litigation. The result achieved by the trial judge should be endorsed because the evidence was capable of supporting an order for reallocation of the parties' interest in the family assets to the extent required to give the appellant the entire interest in the matrimonial home.

The money owed by the family's jewelry corporation was not, in law, a debt for which respondent was personally liable. Only the corporation was liable. The debt appellant incurred to support herself and the children before she applied for maintenance is similarly unenforceable against respondent as a debt, although it could be taken into consideration in an order for reduction of his interest in the family assets.

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties. The facts that an application has little merit and that part of the cost of the litigation may have been paid for by others do not justify awarding solicitor-client costs.

No order for costs should have been made against respondent's barrister. Costs are awarded as <u>compensation</u> for the successful party, not to punish a lawyer. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which he or she was involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. The courts have jurisdiction to make such an award, often under statute and as part of their inherent jurisdiction to control abuse of process and contempt of court. The proceedings here, despite their length and acrimonious progress, did not fall within these characterizations. Courts, moreover, must

be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her profession.

Since the Society did not appear as a party, the costs awarded against it must be taken to be the equivalent of an award for the tort of maintenance. A person must intervene "officiously or improperly" to be liable for the tort of maintenance. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife. The society's support was "out of charity and religious sympathy" and so did not constitute maintenance. It did not put forward respondent in an attempt to escape liability for costs. Its interest in the constitutional issue was insufficient to distinguish it from interveners who appear on constitutional cases and who have never been liable for costs.

Per La Forest and Gonthier JJ.: The reasons of McLachlin J. were agreed with on the property and monetary issues and on the principles governing costs.

Per Iacobucci and Cory JJ.: The reasons of McLachlin J. were agreed with on the property, monetary and costs issues.

Per L'Heureux-Dubé J. (dissenting): The reasons of the trial judge on the issues of maintenance, division of property and costs were agreed with.

Cases Cited

By L'Heureux-Dubé J.

Distinguished: *Hockey v. Hockey* (1989), 1989 CanLII 4299 (ON SC), 21 R.F.L. (3d) 105; **referred to**: *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357; *Andrews v. Andrews*, B.C.S.C., June

9, 1983, unreported; *Brown v. Brown* (1983), 1983 CanLII 2311 (SK CA), 39 R.F.L. (2d) 396; *DeLaurier v. Jackson*, 1934 CanLII 2 (SCC), [1934] S.C.R. 149; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *In re Agar-Ellis*, [1883] Ch. D. 317; *R. v. De Manneville* (1804), 5 East. 221, 102 E.R. 1054; *Re Orr*, 1933 CanLII 110 (ON CA), [1933] O.R. 212; *Talsky v. Talsky*, 1975 CanLII 29 (SCC), [1976] 2 S.C.R 292; *Re Moores and Feldstein*, 1973 CanLII 535 (ON CA), [1973] 3 O.R. 921; *Kruger v. Kruger* (1979), 1979 CanLII 1663 (ON CA), 25 O.R. (2d) 673; *Baker v. Baker* (1979), 1979 CanLII 1962 (ON CA), 8 R.F.L. (2d) 236; *C.(G). v. V.-F.(T.)*, 1987 CanLII 20 (SCC), [1987] 2 S.C.R. 244; *Dussault v. Ladouceur* (1987), 1987 CanLII 876 (QC CA), 14 R.F.L. (3d) 185; *Gunn v. Gunn* (1975), 1975 CanLII 1938 (PE PC), 24 R.F.L. 182; *Benoit v. Benoit* (1972), 1972 CanLII 1869 (ON CJ), 6 R.F.L. 180 (Ont. Prov. Ct.), rev'd (1972), 1972 CanLII 1936 (ON CA), 10 R.F.L. 282 (Ont. C.A.); *Charlton v. Charlton* (1980), 1980 CanLII 545 (BC SC), 15 R.F.L. (2d) 220; *Hewer v. Bryant*, [1970] 1 Q.B. 357; *Clarke v. Clarke* (1987), 1987 CanLII 2745 (BC SC), 7 R.F.L. (3d) 176; *McCahill v. Robertson* (1974), 1974 CanLII 2225 (ON SC), 17 R.F.L. 23; *Fougere v. Fougere* (1987), 1987 CanLII 7842 (NB CA), 77 N.B.R. (2d) 381; *Dipper v. Dipper*, [1980] 2 All E.R. 722; *Keyes v. Gordon* (1985), 1985 CanLII 123 (NS CA), 45 R.F.L. (2d) 177; *Droit de la famille -- 316*, [1986] R.D.F. 651; *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813; *Pierce v. Pierce*, 1977 CanLII 2206 (BC SC), [1977] 5 W.W.R. 572; *Gubody v. Gubody*, 1955 CanLII 405 (ON SC), [1955] O.W.N. 548; *Sudeyko v. Sudeyko* (1974), 1974 CanLII 2223 (BC SC), 18 R.F.L. 273; *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99; *Tocco v. Tocco* (1977), 1977 CanLII 2628 (ON CA), 4 R.F.L. (2d) 174; *Racine v. Woods,* 1983 CanLII 27 (SCC), [1983] 2 S.C.R. 173; *In re McGrath (Infants)*, [1893] 1 Ch. 143; *King v. Low*, 1985 CanLII 59 (SCC), [1985] 1 S.C.R. 87; *Beson v. Director of Child Welfare (Nfld.)*, 1982 CanLII 32 (SCC), [1982] 2 S.C.R. 716; *M. (B.P.) v. M. (B.L.D.E.)*, (1992), 1992 CanLII 8642 (ON CA), 97 D.L.R. (4th) 437; *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933; *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387; *Baron v. Canada*, 1993 CanLII 154 (SCC), [1993] 1 S.C.R. 416; *R. v. Morales*, 1992 CanLII 53 (SCC), [1992] 3 S.C.R. 711; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 S.C.R. 892; *Committee for the Commonwealth of Canada v.*

Tab 115

CanLII

Temoin v. Martin, 2012 BCCA 250 (CanLII)

Source:	Court of Appeal for British Columbia
Date:	2012-06-11
File number:	CA039611
Other citations:	350 DLR (4th) 558 — 216 ACWS (3d) 238 — [2012] 8 WWR 413 — 32 BCLR (5th) 1 — 323 BCAC 3 — 77 ETR (3d) 155 — [2012] BCJ No 1174 (QL)
Citation:	Temoin v. Martin, 2012 BCCA 250 (CanLII), <https://canlii.ca/t/frn9p>, retrieved on 2026-01-18

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Temoin v. Martin,* 2012 BCCA 250

Date: 20120611
Docket: CA039611

Between:

Lynn Temoin

Appellant
(Petitioner)

And

Llewellyn John Martin aka Pat Martin

Respondent
(Respondent)

Before: The Honourable Madam Justice Neilson
The Honourable Madam Justice Garson
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, December 16, 2011
(*Temoin v. Martin,* 2011 BCSC 1727, Vancouver Docket S116407)

Counsel for the Appellant: F. Lamer

evidence. Ms. Temoin submits that once a person's capacity is properly raised in a proceeding, an order for a medical examination is justified if the evidence supports a reasonable apprehension that the person lacks capacity. She also complains the threshold set by the chambers judge is impractical as it is circular. It requires the applicant to establish incompetence before an order for medical proof of that incompetence can be made.

[59] I do not find these arguments persuasive as they fail to recognize the significance of personal autonomy and the serious consequences of an order for committeeship or the intrusive nature of compelling an individual to undergo medical examination against his or her will. As well, a less onerous test has the potential to invite unwarranted harassment and abuse by individuals who bring proceedings under the *Patients Property Act* for self-serving motives.

[60] There is considerable support for a high evidentiary threshold in these circumstances. The analysis must begin with the premise that Mr. Martin enjoys the benefit of the presumption of capability. The decisions of this Court in *McNeal* and *Kartsonas* affirm the significance of losing personal autonomy to a committee. The Supreme Court in *Re Eve* advocated a cautionary approach to exercising *parens patriae* jurisdiction, and emphasized it must be used for the benefit of the person in need of protection, and not to benefit others. That Court has also repeatedly affirmed that the common law should be informed and guided by the values set out in the *Canadian Charter of Rights and Freedoms*: *R.W.D.S.U. v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573 at 603, 33 D.L.R. (4th) 174; *Hill v. Church of Scientology of Toronto* (1995), 1995 CanLII 59 (SCC), 126 D.L.R. (4th) 129 at 155 (S.C.C.); R.W.D.S.U., *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* 2002 SCC 8 at paras. 18 and 21, [2002] 1 S.C.R. 156. Ms. Temoin's application unquestionably implicates principles of liberty, autonomy and equality, and *Charter* values are thus inescapably engaged. Those values are given meaning by requiring a level of proof that is commensurate with both the importance of the individual interests and the seriousness of the intervention at stake.

[61] Ultimately, the exercise of the *parens patriae* power is discretionary, and will be governed by the facts of the individual case. Thus, flexibility is required and I decline to endorse one evidentiary standard for all cases of this nature. It is, however, beyond dispute that the applicant must present evidence establishing a serious question to be tried, both with respect to the individual's capacity and his or her need for protection. In this case, I am satisfied the chambers judge made no error in requiring *prima facie* evidence of incompetence and a compelling need for protection before she would exercise her *parens patriae* jurisdiction to make the order sought by Ms. Temoin.

[62] Ms. Temoin also argued the court's general inherent jurisdiction would permit the order she sought and would require a less stringent evidentiary test, since this jurisdiction is a "residual source of powers the court may draw upon as necessary whenever it is just or equitable to do so": *Caron* at para. 24. She pointed to several cases in which she maintained the courts have exercised inherent jurisdiction to order litigants to undergo medical examinations: *Kujawa v. Kujawa* (1990),

Tab 116

CanLII

Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038

Source:	Supreme Court of Canada
Date:	1989-05-04
File number:	19412
Other citations:	59 DLR (4th) 416 — 93 NR 183 — 15 ACWS (3d) 132 — 26 CCEL 85 — 40 CRR 100 — EYB 1989-67228 — JE 89-775 — [1989] SCJ No 45 (QL) — [1989] ACS no 45
Citation:	Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, <https://canlii.ca/t/1ft6r>, retrieved on 2026-01-18
Most recent unfavourable mention	Certain employees of Brandt Tractor Ltd v International Union of Operating Engineers, Local No 115, 2012 CanLII 53287 (BC LRB) [...] It submits that **Slaight Communications is distinguishable** from this case. [...]

Slaight Communications Inc. *v.* Davidson, [1989] 1 S.C.R. 1038

Slaight Communications Incorporated
(operating as Q107 FM Radio) *Appellant*

v.

Ron Davidson *Respondent*

indexed as: slaight communications inc. *v.* davidson

File No.: 19412.

1987: October 8; 1989: May 4.

Present: Dickson C.J. and Beetz, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Freedom of expression -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Labour relations -- Unjust dismissal -- Jurisdiction of adjudicator -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether s. 61.5(9)(c) of Canada Labour Code authorizes adjudicator to make such orders -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Whether orders unreasonable in administrative law sense.

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. Respondent filed a complaint and an adjudicator appointed by the Minister of Labour under s. 61.5(6) of the *Canada Labour Code* held that respondent had been unjustly dismissed. Based on s. 61.5(9)(*c*) of the Code, the adjudicator made an initial order imposing on appellant an obligation to give respondent a letter of recommendation certifying (1) that he had been employed by the radio station from June 1980 to January 20, 1984; (2) the sales quotas he had been set and the amount of sales he actually made

during this period; and (3) that an adjudicator had held that he was unjustly dismissed. The order specifically indicated the amounts to be shown as sales quotas and as sales actually made. A second order prohibited appellant from answering a request for information about respondent except by sending the letter of recommendation. The Federal Court of Appeal dismissed an application by appellant to review and set aside the adjudicator's decision. The purpose of the appeal at bar is to determine whether s. 61.5(9)(*c*) of the Code authorizes an adjudicator to make such orders; and in particular, whether the orders infringed appellant's freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

Held (Beetz J. dissenting and Lamer J. dissenting in part): The appeal should be dismissed. The orders infringe s. 2(*b*) of the *Charter* but are justifiable under s. 1.

The *Charter* applies to orders made by the adjudicator. The adjudicator is a creature of statute. He is appointed pursuant to a legislative provision and derives all his powers from statute. The Constitution is the supreme law of Canada, and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. It is thus impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require this Court to declare the legislation to be of no force or effect, unless it could be justified under s. 1 of the *Charter*. It follows that an adjudicator, who exercises delegated powers, does not have the power to make an order that would result in an infringement of the *Charter*.

The word "like" in the English version of s. 61.5(9)(*c*) of the *Canada Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (*a*) and (*b*) of that subsection. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. It is impossible to apply this rule in the case at bar since one of the conditions essential for its application -- the presence of a common characteristic or common genus -- has not been met. The interpretation according to which the word "like" in the English version of para. (*c*) does not have the effect of limiting the general power conferred on the adjudicator is also more consistent with the general scheme of the Code, and in

particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

Per Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ.: The adjudicator's orders were reasonable in the administrative law sense. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact, in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The adjudicator's first order infringed s. 2(*b*) of the *Charter* but is saved under s. 1.

The adjudicator's second order also infringed s. 2(*b*) of the *Charter*. It was an attempt to prevent the appellant from expressing its opinion as to the respondent's qualifications beyond the facts set out in the letter. But this order, too, was justifiable under s. 1. First, the objective was of sufficient importance to warrant overriding appellant's freedom of expression. Like the first order, the objective of the second order was to counteract the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. The adjudicator's remedy was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. The governmental objective, in a general sense, was that of protection of a particularly vulnerable group, or members thereof. To constitutionally protect freedom of expression in this case would be tantamount to condoning the continuation of an abuse of an already unequal relationship. Second, the means chosen were reasonable. Like the first order, the second order was rationally linked to the objective. With the proven history of promoting a fabricated version of the quality of respondent's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that the employer's representatives did not subvert the effect of the letter by unjustifiably maligning its

previous employee in the guise of giving a reference. Further, no less intrusive measure could have been taken and still achieved the objective with any likelihood. Monetary compensation would not have been an acceptable substitute because it would only have been compensation for the economic, not the personal, effects of unemployment. Labour should not be treated as a commodity and every day without work as exhaustively reducible to some pecuniary value. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not really contested. The appellant was not forced to state opinions which were not its own. The prohibition was also very circumscribed. It was triggered only in cases when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other then prospective employers. In short, the adjudicator went no further than was necessary to achieve the objective. Finally, the effects of the measures were not so deleterious as to outweigh the objective of the measures. The objective in this case was a very important one, especially in light of Canada's international treaty commitment to protect the right to work in its various dimensions. For purposes of this final stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part): The adjudicator did not exceed his jurisdiction by ordering appellant to give respondent a letter of recommendation with a specified content. Apart from the *Charter*, the only limitation imposed by s. 61.5(9)(*c*) is that the order must be designed to "remedy or counteract any consequence of the dismissal". That is the case here. The order prevents appellant's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute is not as such unreasonable and there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner.

However, the adjudicator exceeded his jurisdiction by prohibiting appellant from answering a request for information about respondent other than by sending the letter of recommendation. Though the order is also meant to remedy or counteract the consequences of the dismissal, its effect, by

prohibiting appellant from adding any comments whatever, is to create circumstances in which the letter could be seen as the expression of appellant's opinions. This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada. Parliament therefore cannot have intended to authorize such an unreasonable use of the discretion conferred by it. The adjudicator lost this jurisdiction when he made a patently unreasonable order.

The first order limits appellant's freedom of expression but this limitation, which is prescribed by law -- the order made by the adjudicator is only an exercise of the discretion conferred on him by statute -- can be justified under s. 1 of the *Charter*. The purpose of the order is clearly, as required by the Code, to counteract the consequences of the unjust dismissal. Such an objective is sufficiently important to warrant a limitation on freedom of expression. It is essential for the legislator to provide mechanisms to restore equilibrium in employer/employee relations so the employee will not be subject to arbitrary action by the employer. Additionally, the means chosen to attain the objective are reasonable in the circumstances. The order is fair and was carefully designed. The purpose of the letter of recommendation is to correct the false impression given by the fact of the dismissal and it contains only facts that are not in dispute. It is rationally connected to the dismissal since in certain cases it is the only way of effectively remedying the consequences of the dismissal. Finally, the consequences of the order are proportional to the objective sought. The latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance.

Per Beetz J. (dissenting): Except for the attestation relating to the unjust dismissal, the first order violated the appellant's freedoms of opinion and of expression and could not be justified under s. 1 of the *Charter*. This order forced the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In short, the order may force the appellant to lie. To order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them constitutes a *prima facie* violation of the freedoms of opinion and expression. Such a violation was totalitarian in nature and could never be justified under s. 1 of the *Charter*.

The second order, coupled with the first, also violated the former employer's freedoms of opinion and of expression in a manner which was not justified under s. 1 of the *Charter*. The sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer had no further comment to make upon the performance of the respondent and that, accordingly, the letter reflected the opinion of the former employer. In any event, the second order was disproportionate and unreasonable. One should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Further, in cases of unjust dismissal, the issuance by an adjudicator of a blanket and perpetual prohibition against a former employer to write or say anything to a prospective employer but what the adjudicator has dictated in the letter of recommendation can lead to absurd and even counter-productive results. The adjudicator cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal. If it is disproportionate and unreasonable from a practical point of view, then it has to be unreasonable from an administrative law point of view and it is difficult to conceive how it could be reasonable within the meaning of s. 1 of the *Charter*.

Cases Cited

By Dickson C.J.

Distinguished: *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269; **referred to**: *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713; *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313.

Tab 117

CanLII

The Queen v. Beauregard, 1986 CanLII 24 (SCC), [1986] 2 SCR 56

Source:	Supreme Court of Canada
Date:	1986-09-16
File number:	17884
Other citations:	30 DLR (4th) 481 — 70 NR 1 — 26 CRR 59 — [1986] CarswellNat 1004 — [1986] SCJ No 50 (QL)
Citation:	The Queen v. Beauregard, 1986 CanLII 24 (SCC), [1986] 2 SCR 56, <https://canlii.ca/t/1fts8>, retrieved on 2026-01-18

The Queen *v.* Beauregard, [1986] 2 S.C.R. 56

Her Majesty The Queen *Appellant*

v.

Marc Beauregard *Respondent*

INDEXED AS: BEAUREGARD *v.* CANADA

File No.: 17884.

1985: October 4; 1986: September 16.

Present: Dickson C.J. and Beetz, Estey, McIntyre and Lamer JJ.

on appeal from the federal court of appeal

Constitutional law -- Judicial independence -- Financial security of federally appointed judges -- Pensions -- Federal legislation requiring superior court judges to contribute to pension --Whether federal legislation plan violated s. 100 of the Constitution Act, 1867 -- Judges Act, R.S.C. 1970, c. J-1 as amended, s. 29.1.

Civil rights -- Equality before the law -- Federal legislation requiring superior court judges to contribute to pension plan -- Legislative distinction on the basis of the appointment date of judges -- Higher contributions required from judges appointed after the date of first reading of the bill -- Whether federal legislation violated s. 1(b) of the Canadian Bill of Rights -- Judges Act, R.S.C. 1970, c. J-1 as amended, s. 29.1.

Respondent, a Quebec Superior Court judge appointed on July 24, 1975, challenged the constitutional validity of s. 29.1 of the *Judges Act*. This section was introduced in Parliament on February 17, 1975 and was enacted December 20, 1975. Section 29.1(1) provided that judges appointed before February 17, 1975 would contribute one and one-half per cent of their salary toward the cost of pensions, while s. 29.1(2) provided that judges appointed after February 16, 1975 would contribute six and one-half per cent prior to January 1, 1977, and seven per cent thereafter. Prior to the enactment of s. 29.1, superior court judges were not required to contribute to their pension plan. The Federal Court, at trial and on appeal, accepted respondent's allegation, but for different reasons, that s. 29.1 violated s. 100 of the *Constitution Act, 1867* but rejected his argument that s. 29.1 was inoperative in that it violated his right to equality before the law recognized by s. 1(*b*) of the *Canadian Bill of Rights*. This appeal is to determine whether s. 29.1 of the *Judges Act* infringes (1) s. 100 of the *Constitution Act, 1867* and (2) s. 1(*b*) of the *Canadian Bill of Rights*.

Held (Beetz and McIntyre JJ. dissenting in part): The appeal should be allowed.

(1) *Section 100 of the Constitution Act, 1867*

Per curiam: The principle of judicial independence is fundamental to our Constitution. The role of our courts as resolver of disputes, interpreter of the law and defender of the Constitution, requires that they be completely separate in authority and function from all other participants in the justice system, in particular, from the executive and the legislative branches of government. One of the essential components of the principle of judicial independence is financial security. In the present case, the scheme for contributory pensions established in s. 29.1 of the *Judges Act* does not interfere with the independence of superior court judges. All s. 29.1 does is treat judges, pursuant to the constitutional obligation imposed by s. 100 of the *Constitution Act, 1867*, in accordance with standard, widely used and generally accepted pension schemes in Canada. Canadian judges are Canadian citizens and must bear their fair share of the financial burden of administering the country. Parliament's power to fix the salaries and pensions of superior court judges, however, is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, or if there were discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* of s. 100 of the *Constitution Act, 1867*. There is no suggestion of any of these considerations in the present appeal.

There is no "federalism" limitation on Parliament's capacity to change the basis of superior court judges' pensions from non-contributory to contributory. Provincial legislatures under s. 92(14) of the *Constitution Act, 1867* have no jurisdiction with respect to these pensions. Section 100 explicitly subtracts them from provincial jurisdiction respecting the administration of justice. This section states clearly that the salaries and pensions of superior court judges shall be fixed and provided by the Parliament of Canada.

Further, Parliament's ability to implement a widely used and accepted latter-day pension model is not constrained by the words of s. 100. The word "pensions" is not limited to the type of pensions known and in existence for the judiciary in 1867 and the word "provided" does not impose on Parliament an obligation to pay the full cost of judicial pensions.

Finally, although it might well be unconstitutional in most contexts for Parliament to direct how judges are to spend their salaries, the word "pensions" in s. 100 specifically authorizes Parliament to deal with this subject matter. In exercising that jurisdiction Parliament must legislate with respect to both the quantum and the scheme of judicial pensions. The 1975 law enacting s. 29.1 of the *Judges Act* dealt with the scheme. There can be no objection here to Parliament's action since the scheme chosen was a widely used and accepted one and since it was introduced in conjunction with a substantial increase in judicial salaries and other benefits in 1975.

Cases Cited

Referred to: *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *Toronto Corporation v. York Corporation*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *McEvoy v. Attorney General for New Brunswick*, 1983 CanLII 149 (SCC), [1983] 1 S.C.R. 704; *Judges v. Attorney-General of Saskatchewan*, 1937 CanLII 368 (UK JCPC), [1937] 2 D.L.R. 209; *Evans v. Gore*, 253 U.S. 245 (1920); *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *Di Iorio v. Warden of the Montreal Jail*, 1976 CanLII 1 (SCC), [1978] 1 S.C.R. 152; *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220.

(2) *Section 1(b) of the Canadian Bill of Rights*

Per Dickson C.J. and Estey and Lamer JJ.: Section 29.1 of the *Judges Act* does not violate s. 1(*b*) of the *Canadian Bill of Rights*. Once it is accepted that the general substance of the law is

consistent with a valid federal objective--here, to provide for remuneration of s. 96 judges--and that it is not discriminatory for Parliament to draw some line between present incumbents and future appointees, the cases under the *Canadian Bill of Rights* do not permit the courts to be overly critical in reviewing the precise line drawn by Parliament. Some line is fair and is not discriminatory. Thus, while from the respondent's perspective a line drawn on the date of passage of the bill would have been preferable, it cannot be said that the choice of the date of first reading as the cut-off date was contrary to the *Canadian Bill of Rights*.

Per Beetz and McIntyre JJ. (dissenting): The forms of discrimination prohibited by s. 1(*b*) of the *Canadian Bill of Rights* are not limited to the specifically mentioned grounds such as race, national origin, colour, religion or sex. This Court is also not bound by the Diceyan concept of equality nor is it prevented from adopting a more egalitarian approach.

A legislation passed by Parliament does not offend against the principle of equality before the law if passed in pursuance of a valid federal objective. The question which must be resolved in each case is whether an inequality that may be created by legislation affecting a special class is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of the universal application of law to meet special conditions and to attain a necessary and desirable social objective. Where variation from the principle of universal application of the law is justified, the principle cannot be tampered with to a degree or to an extent which goes beyond what is necessary to reach a desirable social objective. This test, including its element of proportionality, clearly extends to the manner or means chosen to achieve a valid federal objective, particularly where this manner or these means introduce the very inequality complained of. This manner or these means must then be carefully scrutinized by the courts and they must be struck down whenever they do not meet the test.

In the case at bar, s. 29.1(2) of the *Judges Act* is inconsistent with s. 1(*b*) of the *Canadian Bill of Rights*. The policy decision reflected in s. 29.1 of the *Judges Act* is that judges' pension plans

should be on a contributory basis in order to reduce the financial burden on future taxpayers. Parliament chose to phase in the contributory requirement, by requiring contributions at the higher rate only from newly appointed judges so that, through the attrition of senior appointees as a result of death or resignation, the whole body of the judiciary would eventually participate in the contributory scheme. However, in choosing the date of first reading of the bill as the cut-off date to implement the phasing-in feature of the federal legislation, the new measure "grandfathered" certain incumbent superior court judges, but did not "grandfather" them all. A small minority of them--those appointed after February 16, 1975 but before December 20, 1975--were not grandfathered. Applying the test to s. 29.1, it cannot be said that the distinction between incumbent judges, which resulted from the selection of the date of first reading as the cut-off point, was necessary to achieve the federal objective. No rational motives were advanced or appear to exist for the selection of that date as the cut-off point which, with its discriminatory effect, is entirely arbitrary and capricious.

Cases Cited

By the majority

Referred to: *MacKay v. The Queen*, 1980 CanLII 217 (SCC), [1980] 2 S.C.R. 370; *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889; *R. v. Drybones*, 1969 CanLII 1 (SCC), [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, 1973 CanLII 175 (SCC), [1974] S.C.R. 1349; *Attorney General of Canada v. Canard*, 1975 CanLII 137 (SCC), [1976] 1 S.C.R. 170; *R. v. Burnshine*, 1974 CanLII 150 (SCC), [1975] 1 S.C.R. 693; *Prata v. Minister of Manpower and Immigration*, 1975 CanLII 7 (SCC), [1976] 1 S.C.R. 376; *Bliss v. Attorney General of Canada*, 1978 CanLII 25 (SCC), [1979] 1 S.C.R. 183.

By the minority

Tab 118

CanLII

Re Residential Tenancies Act, 1981 CanLII 24 (SCC), [1981] 1 SCR 714

Source:	Supreme Court of Canada
Date:	1981-05-28
Other citations:	123 DLR (3d) 554 — 37 NR 158 — [1981] CarswellOnt 623 — JE 81-567 — [1981] SCJ No 57 (QL)
Citation:	Re Residential Tenancies Act, 1981 CanLII 24 (SCC), [1981] 1 SCR 714, <https://canlii.ca/t/1mjl9>, retrieved on 2026-01-18
Most recent unfavourable mention	R. v. Morrow, 1999 ABCA 182 (CanLII) [...] Therefore, this case **is distinguishable from both Reference re Residential Tenancies Act** , and Reference re Proposed Legislation Concerning Leased Premises and Tenancy Agreements. [...]

Supreme Court of Canada
Re Residential Tenancies Act, 1979, [1981] 1 S.C.R. 714
Date: 1981-05-28

In the Matter of a Reference to the Court of Appeal pursuant to *The Constitutional Questions Act,* R.S.O. 1970, Chapter 79, by Order in Council No. 2089/79, respecting *The Residential Tenancies Act, 1979*

1980: November 25, 26; 1981: May 28.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Estey, Mclntyre and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Constitutional law—Courts—Landlords and tenants—Provincial commission empowered to evict tenants and to enforce obligations of landlords and tenants—Whether or not grant of powers to Commission ultra vires—The Residential Tenancies Act, 1979, 1979 (Ont.), c. 78—British North America Act, R.S.C 1970, s. 96.

The Ontario Legislature enacted *The Residential Tenancies Act, 1979,* to come into effect on proclamation. The Act contained a legislative code to govern landlords and tenants and established the Residential Tenancy Commission to oversee and enforce the newly enunciated rights and

obligations. The Executive Council, responding to questions concerning the authority of the Legislature to make orders evicting tenants from residential premises and to require landlords and tenants to comply with obligations imposed under the Act, referred two questions dealing with those issues to the Ontario Court of Appeal. That Court concluded that it was not within the legislative authority of Ontario to make eviction orders and compliance orders as provided in *The Residential Tenancies Act, 1979.* This Court was only concerned with the constitutional validity of two powers, the subject matter of the reference, and not with the soundness of the overall legislative scheme.

Held: The appeal should be dismissed.

Royal Commission Reports and Reports of Parliamentary Committees made prior to the passing of a statute were admissible to show the factual context and purpose of the legislation. The practice adopted in the *Anti-Inflation Reference* of giving timely directions establishing the extraneous materials to be admitted should be followed. Material relevant to the issues before the Court and not inherently unreliable or offending against public policy should be admissible, subject to

[Page 715]

the provisio that such extrinsic materials are not available for the purpose of aiding in statutory construction.

Section 96 of the *British North America Act* limited provincial competence to make appointments to a tribunal exercising s. 96 judicial powers and implicitly limited provincial competence to endow a provincial tribunal with such powers. That section, however, could no longer be construed as a bar to a province seeking to vest an administrative tribunal with ancillary "judicial" powers formerly exercised by s. 96 courts, subject to the qualification that the judicial function not be isolated from the rest of the administrative structure of the legislation.

The test was to be formulated in three steps. The first involved consideration, in light of the historical conditions existing in 1867, of the particular power or jurisdiction conferred upon the tribunal. The matter ended there if the power was not broadly conformable to the jurisdiction formerly exercised by s. 96 courts. If, however, the power were identical or analogous to a power exercised by a s. 96 court at Confederation it became necessary to proceed to step two. The second step involved consideration of the function within its institutional setting to determine whether the function was still "judicial". The subject matter rather than the apparatus of adjudication was determinative and only if the power could still be characterized as judicial was it necessary to proceed to the third step—a review of the tribunal's function as a whole in order to appraise the impugned function in its entire institutional context. A provincial scheme was only invalid where the adjudicative function was a sole or central function of the tribunal so that it could be said to be operating like a s. 96 court.

Applying step one the Court found that the powers conferred on the Commission were in broad conformity with those historically exercised by the s. 96 courts before and after Confederation. The argument that the power to order eviction had been conferred before Confederation on County Court judges as *persona designata,* and that that power and by analogy the power to make orders of compliance were therefore outside the superior or county court structure, went too far. The jurisdiction over overholding tenants in pre-Confederation legislation was merely a modification of the traditional jurisdiction on ejectment exercised by the superior courts. The County Court judges acting under the over-holding tenants provisions were acting *qua* judge rather than as *persona designata.* The submission that the Commission's jurisdiction was analogous to that exercis-

[Page 716]

 able by courts of summary jurisdiction rather than by s. 96 courts was misconceived. Provinces could not avoid the limitations of s. 96 by taking a function of a s. 96 court, simplifying procedural matters, and then transferring the jurisdiction to a non s. 96 tribunal.

Proceeding to step two the Court found that the impugned power to order eviction or compliance, viewed in its institutional setting, remained essentially a "judicial power" exercised in all cases in the context of a *lis* between parties. The Commission in deciding contractual and property rights as between individual landlords and tenants also determined rights other than those relating to land and property. Each case involved analysis of law, an application of law to the facts, and a judicial decision and subsequent order.

The third step examined the inter-relationship between the impugned "judicial" powers and other powers under the Act. The central function of the Commission was the resolution of disputes, in the final form by a judicial form of hearing between landlords and tenants. The Commission's other functions were either ancillary to this central function, or were separate and distinct from it and bore no relation to it. There was no broad legislative scheme to subsume the Commission's judicial functions. The whole of s. 96 court's jurisdiction in a certain area, however limited, was transferred to provincially appointed officials.

Walker's Case (1587), 76 E.R. 676; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association,* 1971 CanLII 135 (SCC), [1971] S.C.R. 689; *Attorney General of Canada v. Reader's Digest Association (Canada) Ltd.,* 1961 CanLII 84 (SCC), [1961] S.C.R. 775; *Home Oil Distributors, Limited v. Attorney General of British Columbia,* 1940 CanLII 46 (SCC), [1940] S.C.R. 444; *Attorney-General for British Columbia v. Attorney General for Canada,* 1937 CanLII 365 (UK JCPC), [1937] A.C. 368; *Ladore and Others v. Bennett and Others,* 1939 CanLII 270 (UK JCPC), [1939] A.C. 468; *Reference re Eskimos,* 1939 CanLII 22 (SCC), [1939] S.C.R. 104; *Swait v. Board of Trustees of Maritime Transportation Unions* (1966), 1966 CanLII 513 (QC CA), 61 D.L.R. (2d) 317; *Reference re Anti-Inflation Act,* 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373; *Attorney-General for Alberta v. Attorney-General for Canada and Others,* 1938 CanLII 251 (UK JCPC), [1939] A.C. 117; *Letang v. Cooper,* [1965] 1 Q.B. 232; *Pillai v. Mudanayake and Others,* [1953] A.C. 514; *Edwards and Others v. Attorney-General for Canada and Others,* 1929 CanLII 438 (UK JCPC), [1930] A.C. 124; *Laidlaw v. The Municipality of Metropolitan Toronto,* 1978 CanLII 32 (SCC), [1978] 2 S.C.R. 736; *Re Apogee*

[Page 717]

Investments Ltd. and Saber (1978), 1978 CanLII 1314 (ON SC), 21 O.R. (2d) 663; *Re Blok-Glowczynski et al and Stanga et al.* (1978), 1978 CanLII 1736 (ON SC), 22 O.R. (2d) 376; *Toronto Corporation v. York Corporation,* 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *Reference re Adoption Act and Other Acts,* 1938 CanLII 2 (SCC), [1938] S.C.R. 398; *Labour Relations Board of Saskatchewan v. John East Iron Works, Limited,* 1948 CanLII 266 (UK JCPC), [1949] A.C. 134; *Tomko v. Labour Relations Board (Nova Scotia) et al.,* 1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112; *The Corporation of the City of Mississauga v. The Regional Municipality of Peel et al,* 1979 CanLII 37 (SCC), [1979] 2 S.C.R. 244; *Attorney General of Quebec et al v. Farrah,* 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638; *Re Pepita and Doukas* (1979), 1979 CanLII 757 (BC CA), 101 D.L.R. (3d) 577; *Dupont et al v. Inglis et al,* 1958 CanLII 8 (SCC), [1958] S.C.R. 535; *Pong v. Quong and Chong,* 1927 CanLII 2 (SCC), [1927] S.C.R. 271; *Pajelle Investments Ltd. v. Herbold and Herbold,* 1975 CanLII 32 (SCC), [1976] 2 S.C.R. 520; *Herman et al v. Deputy Attorney General of Canada,* 1978 CanLII 177 (SCC), [1979] 1 S.C.R. 729; *Ross v. The York, Newcastle & Berwick Railway Company* (1849), 18 L.J.Q.B. 199; *R. v. Mcintosh* (1869), 1869 CanLII 57 (NB KB), 12 N.B.R. 372; *Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements* (1978), 1978 ALTASCAD 264 (CanLII), 89 D.L.R. (3d) 460, referred to; *Reference Re Validity of Wartime Leasehold Regulations,* 1950 CanLII 27 (SCC), [1950] S.C.R. 124, not followed.

Tab 119

CanLII

McEvoy v. Attorney General for New Brunswick et al., 1983 CanLII 149 (SCC), [1983] 1 SCR 704

Source:	Supreme Court of Canada
Date:	1983-06-07
File number:	16773
Other citations:	46 NBR (2d) 219 — 148 DLR (3d) 25 — 48 NR 228 — 121 APR 219 — 4 CCC (3d) 289 — 10 WCB 30 — [1983] SCJ No 51 (QL)
Citation:	McEvoy v. Attorney General for New Brunswick et al., 1983 CanLII 149 (SCC), [1983] 1 SCR 704, <https://canlii.ca/t/1xv7b>, retrieved on 2026-01-18
Most recent unfavourable mention	Luo v. Canada (Attorney General), 1997 CanLII 16265 (ON SC) [...] In that respect, the situation **is distinguishable from that which existed in McEvoy v. New Brunswick** (Attorney General), 1983 CanLII 149 (SCC) , [1983] 1 S.C.R. 704, 148 D.L.R. (3d) 25, where a province and Parliament together attempted to confer jurisdiction protected by s. 96 on a court presided over by provincially [...]

Supreme Court of Canada
McEvoy v. Attorney General for New Brunswick et al., [1983] 1 S.C.R. 704
Date: 1983-06-07

John P. McEvoy *Appellant;*

and

The Attorney General for New Brunswick *Respondent;*

and

The Attorney General of Canada *Respondent.*

File No.: 16773.

1983: February 8; 1983: June 7.

Present: Laskin C.J. and Ritchie, Dickson, Beetz, Estey, Chouinard and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

Constitutional law—Proposal to establish unified criminal court—Transfer of criminal jurisdiction to new court—Judges provincially appointed—Inferior court transformed into a superior court—Whether proposal constitutional—Constitution Act, 1867, R.S.C 1970, Appendix II, ss. 91(2), 92(14), 96.

Appeal—Reference—Abstract questions—Whether the Court should answer referred questions—Judicature Act, R.S.N.B. 1973, c. J-2 as amended, s. 23(1).

The Lieutenant-Governor in Council of New Brunswick referred three questions to the Court of Appeal to determine the constitutional validity of a proposal to establish a unified criminal court in the province. The new court, which would exercise complete criminal jurisdiction, would replace the present Provincial Court and its judges would be provincially appointed. Parliament would be requested to amend the *Criminal Code* and other federal statutes to confer jurisdiction in criminal matters upon the new court. The Court of Appeal answered the three questions in the affirmative. Hence this appeal to determine whether s. 96 of the *Constitution Act, 1867* bars the proposal.

Held: The appeal should be allowed and the three questions answered in the negative.

Parliament can no more give away federal constitutional powers than a province can usurp them. Here, what was being contemplated was the complete obliteration of superior court criminal law jurisdiction. The effect of this proposal to transfer the present superior court criminal jurisdiction over indictable offences to a

[Page 705]

provincial court would be to deprive the Governor General of his power under s. 96 to appoint the judges who try indictable offences in New Brunswick. This is contrary to s. 96. This section bars Parliament and the provincial legislatures from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* which guarantee the independence of the superior courts from both levels of government. The result would be the same if the new court was given concurrent criminal jurisdiction with the superior court, since s. 96 is an insuperable obstacle to any attempt to transform an inferior court into a superior court.

Re The Educational System in the Island of Montreal, 1926 CanLII 67 (SCC), [1926] S.C.R. 246; *Reference re Waters and Water-Powers,* 1929 CanLII 72 (SCC), [1929] S.C.R. 200; *Reference re Angliers Railway Crossing,* 1937 CanLII 51 (SCC), [1937] S.C.R. 451; *Re Authority of Parliament in Relation to the Upper House,* 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54; *Attorney-General for Manitoba v. Manitoba Egg and Poultry Association,* 1971 CanLII 135 (SCC), [1971] S.C.R. 689; *Reference re Regulation and Control of Aeronautics in Canada,* 1930 CanLII 79 (SCC), [1930] S.C.R. 663; *In Re Marriage Laws* (1912), 1912 CanLII 35 (SCC), 46 S.C.R. 132; *Re Resolution to amend the Constitution,* 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753; *Re Vancini* (1904), 1904 CanLII 72 (SCC), 34 S.C.R. 621; *Papp v. Papp,* 1969 CanLII 219 (ON CA), [1970] 1 O.R. 331; *Nanaimo Community Hotel v. Board of Referees,* 1945 CanLII 302 (BC CA), [1945] 3 D.L.R. 225; *O. Martineau & Sons, Ld. v. City of Montreal,* 1931 CanLII 387 (UK JCPC), [1932] A.C. 113; *Toronto Corporation v. York Corporation,* 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *Valin v. Langlois* (1879), 1879 CanLII 29 (SCC), 3 S.C.R. 1; *Re Residential Tenancies Act, 1979,* 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Crevier v.*

Tab 120

CanLII

MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 SCR 725

Source:	Supreme Court of Canada
Date:	1995-12-14
File number:	24171
Other citations:	130 DLR (4th) 385 — 191 NR 260 — 59 ACWS (3d) 199 — 112 WAC 161 — [1996] 2 WWR 1 — 14 BCLR (3d) 122 — 103 CCC (3d) 225 — 44 CR (4th) 277 — 68 BCAC 161 — 29 WCB (2d) 160 — 33 CRR (2d) 123 — [1995] CarswellBC 974 — JE 96-63 — [1995] SCJ No 101 (QL) — [1995] ACS no 101
Citation:	MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 SCR 725, <https://canlii.ca/t/1frdw>, retrieved on 2026-01-18

MacMillan Bloedel Ltd. *v.* Simpson, [1995] 4 S.C.R. 725

J.P. *Appellant*

v.

MacMillan Bloedel Limited *Respondent*

and

The Attorney General of British Columbia *Respondent*

and

The Attorney General of Canada *Intervener*

Indexed as: MacMillan Bloedel Ltd. *v.* Simpson

File No.: 24171.

1995: June 12; 1995: December 14.

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

on appeal from the court of appeal for british columbia

Constitutional law -- Courts -- Transfer of superior court powers to inferior tribunal -- Youth courts granted exclusive jurisdiction to try youths for ex facie contempt of superior courts -- Whether exclusive grant of jurisdiction constitutional -- Constitution Act, 1867, s. 96 -- Young Offenders Act, R.S.C., 1985, c. Y-1, s. 47(2).

The appellant, a young person, contravened an injunction of the British Columbia Supreme Court prohibiting protest activities interfering with the respondent's logging operations in the Clayoquot Sound area of Vancouver Island. He was charged with contempt of court and, at trial, made an application to be tried in youth court pursuant to s. 47(2) of the *Young Offenders Act*. This section states that exclusive jurisdiction over *ex facie* contempt of court committed by a young person is transferred to the youth court. The application was dismissed and the appellant was later convicted and sentenced to 45 days' imprisonment and a fine. He appealed his conviction on the ground that the British Columbia Supreme Court had no jurisdiction to try him. The Court of Appeal upheld the conviction. The court found s. 47(2) unconstitutional, concluding that the contempt power is within the core jurisdiction of the superior courts and that it is beyond the jurisdiction of Parliament to

remove any part of it from those courts. The main issue in this appeal is whether Parliament, pursuant to its criminal law power, can confer upon youth courts the exclusive power to try youths for contempt *ex facie* of superior courts.

Held (L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and La Forest, Sopinka, Gonthier and Cory JJ.: This Court's approval of the *Young Offenders Act* in *Reference re Young Offenders Act* does not preclude a separate analysis of whether a particular provision of that Act meets constitutional requirements. That case left open the specific question of whether individual provisions of the *Young Offenders Act* may offend s. 96 of the *Constitution Act, 1867* even though the overall scheme of the *Young Offenders Act* does not. To determine the validity of the transfer of power in question in this case, a two-stage analysis is required: first, using the *Residential Tenancies* test, the Court must decide whether the grant of jurisdiction is permissible; second, if it is, it must decide whether the superior court's jurisdiction can be ousted. The second stage of the analysis only arises when the core or inherent jurisdiction of superior courts is affected. That jurisdiction is integral to their operations and no part of it can be removed by either level of government in the absence of a constitutional amendment.

The history of contempt of court, academic commentary, and the overall scheme of the *Criminal Code* and the *Young Offenders Act* all reinforce the view that criminal contempt of court has distinct characteristics from other crimes. The dispute is one between the individual and the court itself. *Ex facie* criminal contempt of superior courts committed by youths has some aspects of a crime and some aspects of a *sui generis* court power. To reflect both these aspects, the jurisdiction transferred by s. 47(2) of the *Young Offenders Act* should be characterized as the power to punish youths for *ex facie* contempt of a superior court. Once s. 47(2) is properly characterized, the three-part test outlined in the *Residential Tenancies* case shows that this power or jurisdiction may be constitutionally given to an inferior court. Although the power to punish youths for *ex facie* contempt of superior courts was within the jurisdiction of superior courts at Confederation and this power obviously remains judicial in nature even in its new institutional setting, when one considers the

institutional function of the youth courts, a transfer of this power is permissible. The policy objectives of the youth court system are clear and laudable. Our society wishes to establish different treatment for youths accused of criminal offences than for adults. Youth courts have an expertise in providing procedural protections appropriate for youths and in deciding punishments for convicted young offenders. The power to punish youths for *ex facie* contempt of superior courts is merely ancillary to these primary functions. Accordingly, granting jurisdiction to punish youths for *ex facie* contempt of superior courts does not infringe s. 96 of the *Constitution Act, 1867*.

This jurisdiction, however, cannot be granted to the youth court to the exclusion of provincial superior courts. Although the inherent jurisdiction of superior courts is difficult to define, there is no doubt that the power to punish for all forms of contempt is within that jurisdiction. The rule of law requires a judicial system that can ensure that its orders are enforced and its process respected. The provincial superior court is the only court of general jurisdiction in Canada. To remove the power to punish contempt *ex facie* by youths would maim the institution which is at the heart of our judicial system. Such an alteration is impermissible in Canada in the absence of a constitutional amendment. Thus, in light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing our Constitution and the principle of the rule of law recognized both in the preamble to the *Constitution Act, 1867* and in all our conventions of governance. It will, in most instances, be preferable for the youth court to try and punish a youth in *ex facie* contempt of a superior court, but the provincial superior court's jurisdiction cannot be ousted. It will always be for the superior court to elect whether to hold contempt proceedings against a youth in order to exert control over its process, or to defer to the youth court. In addition, in cases where the youth court does proceed against a youth for contempt *ex facie* of a superior court, the provincial superior court retains its supervisory power to ensure that the lower court's disposition of the matter is correct.

Section 47(2) of the *Young Offenders Act* is therefore unconstitutional to the extent that it purports to confer exclusive jurisdiction on the youth court and to deprive a superior court of general jurisdiction of its *ex facie* contempt power. Section 47(2) is valid to the extent that it confers jurisdiction on the youth court. The section should be read down accordingly. Section 47(2) is thus

inoperative to deprive the superior court of its jurisdiction to convict the appellant of contempt in this case.

Per L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ. (dissenting): The three-step test outlined in *Residential Tenancies* is the appropriate approach in determining whether a transfer of power from a s. 96 court to an inferior court is valid. The test permits only incidental derogations of powers from s. 96 courts, and then only to the extent that the judicial nature of such powers is transformed by the administrative context in which they are exercised. By focusing on the function of the power in the administrative context rather than the nature of the power conferred, this test provides sufficient flexibility to equip administrative tribunals with the powers they need to do their work, while preserving the constitutional position of the s. 96 courts. There is no need for an additional condition that the transfer not involve any aspect of the "core" inherent powers of the superior court. The proposed "core test" needlessly derogates from the functional approach of the *Residential Tenancies* test, making a shift toward a more categorical approach. This new test would amount to an important new fetter on the ability of Parliament and the provincial legislatures to create effective tribunals to ensure compliance with regulatory schemes.

The conferral of exclusive power over *ex facie* contempt of the court committed by juveniles on the youth court, and its removal from s. 96 courts, brings this case directly within the ambit of the *Residential Tenancies* test. There is nothing exceptional in the exclusive nature of the transfer of the s. 96 power to the inferior tribunal. If an administrative scheme is to operate effectively with a minimum of procedural confusion, it is typically essential that the tribunal have exclusive power to decide the matters at issue.

Further, the inherent power of superior courts to regulate their process does not preclude elected bodies from enacting legislation affecting that process. The court's inherent powers exist to complement the statutory assignment of specific powers, not override or replace them. Courts must conform to the rule of law and, while they can exercise more power in the control of their process than is expressly provided by statute, they must generally abide by the dictates of the legislature. It follows that Parliament and the legislatures can legislate to limit and define the superior courts'

inherent powers, including their powers over contempt, provided that the legislation is not otherwise unconstitutional. Parliament may thus enact s. 47(2) of the *Young Offenders Act*, provided that the conditions of the *Residential Tenancies* test are met.

The functional approach of the *Residential Tenancies* test is adequate to protect the s. 96 courts. Transfers of s. 96 jurisdiction to inferior tribunals have not ousted the power of the superior courts. These courts still have their rights of review of inferior tribunals' decisions and ensure that the law is followed and fair process maintained. Moreover, the facts of this case do not support the contention that powers essential to the proper functioning of s. 96 courts are in danger of being eroded. What is essential to maintaining the authority of a court is that consequences attach to the disobedience of its order, not the source of those consequences. *Ex facie* contempt of court is generally prosecuted, like any other crime, by the Attorney General, who gathers the evidence and presents the case to the court, and the youth court is just as able to protect the validity and efficacy of a superior court order as is the superior court. If the youth court errs, or fails to proceed where it should, it is subject to the corrective power of the superior court on judicial review or of the Court of Appeal on appeal. The superior court itself may initiate proceedings by referring a charge of *ex facie* contempt of court to the youth court. More importantly, the residual inherent jurisdiction of the superior courts to take such measures as may be required to preserve their process guarantees that the process of the superior courts will not be undermined by a transfer of juvenile contempt of court *ex facie* to the youth courts. Should the administration of justice require that a particular case be tried in superior court, that court possesses the inherent power to hold such a trial. Where the use of a legislative provision or rule of court would itself amount to an abuse of the court's process, the court may invoke its inherent jurisdiction to ensure that justice is done. Section 47(2) of the *Young Offenders Act* is no exception. That section, however, poses no threat to the authority of the superior courts. In leaving the power to try youths for *in facie* contempt of court with the superior courts, Parliament has carefully considered and weighed what is necessary to permit the superior courts to preserve their authority.

Parliament's transfer of contempt of court *ex facie* by youths from the s. 96 superior courts to the youth courts is valid. The test for transfer laid down in *Residential Tenancies* is met and this

test alone suffices to determine this appeal. The power was historically possessed by s. 96 courts, it is judicial, and it is merely ancillary to the larger role of the youth courts in relation to the special problems and needs of young offenders. Since the constitutionality of s. 47(2) of the *Young Offenders Act* has not been successfully challenged, it follows that the appellant should have been tried in youth court. His conviction in superior court should be set aside and the charges remitted to youth court for trial.

Cases Cited

By Lamer C.J.

Applied: *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; **considered:** *Reference re Young Offenders Act (P.E.I.)*, 1991 CanLII 11713 (SCC), [1991] 1 S.C.R. 252; **referred to:** *Sobeys Stores Ltd. v. Yeomans*, 1989 CanLII 116 (SCC), [1989] 1 S.C.R. 238; *McEvoy v. Attorney General for New Brunswick*, 1983 CanLII 149 (SCC), [1983] 1 S.C.R. 704; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307; *R. v. Vermette*, 1987 CanLII 51 (SCC), [1987] 1 S.C.R. 577; *United Nurses of Alberta v. Alberta (Attorney General)*, 1992 CanLII 99 (SCC), [1992] 1 S.C.R. 901; *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, 1992 CanLII 68 (SCC), [1992] 2 S.C.R. 394; *British Columbia (Attorney-General) v. Mount Currie Indian Band* (1991), 1991 CanLII 130 (BC SC), 64 C.C.C. (3d) 172.

By McLachlin J. (dissenting)

Re Residential Tenancies Act, 1979, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Toronto v. York*, 1938 CanLII 252 (UK JCPC), [1938] A.C. 415; *Reference re Adoption Act*, 1938 CanLII 2 (SCC), [1938] S.C.R. 398; *Labour Relations Board of Saskatchewan v. John East Iron Works, Ltd.*, 1948 CanLII 266 (UK JCPC), [1949] A.C. 134; *Tomko v. Labour Relations Board (Nova Scotia)*,

Tab 121

CanLII

Crevier v. A.G. (Québec) et al., 1981 CanLII 30 (SCC), [1981] 2 SCR 220

Source:	Supreme Court of Canada
Date:	1981-10-20
Other citations:	127 DLR (3d) 1 — 38 NR 541 — 11 ACWS (2d) 165 — [1981] CarswellQue 109 — [1981] SCJ No 80 (QL) — [1981] ACS no 80
Citation:	Crevier v. A.G. (Québec) et al., 1981 CanLII 30 (SCC), [1981] 2 SCR 220, <https://canlii.ca/t/1mjlq>, retrieved on 2026-01-18
Most recent unfavourable mention	J.C. c. Canada (Procureur général), 2012 QCCA 366 (CanLII) [...] Hence, the constitutional principles of the rule of law and of the division of powers invoked by the Supreme Court in **Crevier are not applicable** in the appellant's case. [...]

SUPREME COURT OF CANADA
Crevier v. A.G. (Québec) et al., [1981] 2 S.C.R. 220
Date: 1981-10-20

Pierre Crevier *Appellant;* and

The Attorney General of the Province of Quebec and Harmel Aubry *Respondents;*

and

Pierre Crevier *Appellant;* and

The Attorney General of the Province of Quebec and Robert Cofsky *Respondents;*

and

The Attorney General for the Province of Alberta *Intervener.*

1981: February 10, 11; 1981: October 20.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Professions Tribunal — Writs of evocation — Privative clauses — Express general exclusion of the supervisory authority of the Superior Court in respect of jurisdiction and law — Power to determine limits of jurisdiction without appeal or review — Whether a s. 96 court created — British North America Act, art. 96 — Professional Code, R.S.Q. 1977, c. C-26, arts. 162, 163, 164, 169, 175, 193, 194, 195 — Code of Civil Procedure, arts. 33, 846.

The appellant obtained two writs of evocation from a judge of the Superior Court of Quebec from two decisions of the Professions Tribunal quashing a decision of a Discipline Committee of a professional corporation on the ground that that body had acted beyond its authority. The Superior Court held that the wide powers conferred upon the Professions Tribunal—powers encompassing review of law or fact and jurisdiction—offended s. 96 of the *B.N.A. Act* because the question whether a body has exceeded its jurisdiction fell within the superintending and reforming power belonging solely to a superior court whose members are appointed by the Governor General in Council. That decision was reversed by a majority of the Quebec Court of Appeal. Hence the appeal to this Court.

[Page 221]

Held: The appeal should be allowed.

The Professions Tribunal is given no function other than that of a general tribunal of appeal in respect of all professions covered by the *Professional Code* and it was, therefore, impossible to see its final appellate jurisdiction as part of an institutional arrangement by way of a regulatory scheme for governance of the various professions.

Where a provincial legislature purports to insulate one of its statutory tribunals from any curial review of its adjudicative functions, and where that insulation encompassing jurisdiction, the legislation must be struck down as unconstitutional because it constitutes, in effect, a s. 96 court. It is unquestioned that privative clauses, when properly framed, may effectively oust judicial review on questions of law and on other issues not touching jurisdiction. However, given that s. 96 is in the *British North America Act* and that it would make a mockery of it to treat it in non-functional formal terms as a mere appointing power, there is nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review. Consequently, a provincially-constituted statutory tribunal could not constitutionally be immunized from review of decisions on questions of jurisdiction.

The present case was no different in principle from the *Farrah* case, 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638, when regard is had to ss. 175, 194 and 195 of the *Professional Code.* In both cases there was a purported exclusion of the reviewing authority of any court, whether by appeal or by evocation.

Attorney General of Quebec v. Farrah, 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638, followed; *Tomko v. Labour Relations Board (N.S.),* 1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112, distinguished; *Re Residential Tenancies Act, 1979,* 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Farrell v. Workmen's Compensation Board,* 1961 CanLII 46 (SCC), [1962] S.C.R. 48; *Toronto Newspaper Guild, Local 187 v. Globe Printing Company,* 1953 CanLII 10 (SCC), *[1953] 2 S.C.R.* 18; *L'Alliance des Professeurs Catholiques de Montréal*

Tab 122

CanLII

A.G. Can. v. Law Society of B.C., 1982 CanLII 29 (SCC), [1982] 2 SCR 307

Source:	Supreme Court of Canada
Date:	1982-08-09
File number:	16299; 16298
Other citations:	137 DLR (3d) 1 — 43 NR 451 — 15 ACWS (2d) 304 — [1982] 5 WWR 289 — 37 BCLR 145 — 19 BLR 234 — 66 CPR (2d) 1 — [1982] CarswellBC 133 — [1982] SCJ No 70 (QL) — [1982] ACS no 70 — 66 CER (2d) 1
Citation:	A.G. Can. v. Law Society of B.C., 1982 CanLII 29 (SCC), [1982] 2 SCR 307, <https://canlii.ca/t/1lpcn>, retrieved on 2026-01-18

SUPREME COURT OF CANADA
A.G. Can. v. Law Society of B.C., [1982] 2 S.C.R. 307
Date: 1982-08-09

The Attorney General of Canada, the Restrictive Trade Practices Commission, L.A. Couture, in his capacity as Acting Chairman of the Restrictive Trade Practices Commission, and Robert J. Bertrand in his capacity as Director of Investigation and Research, Combines Investigation Act *Appellants;*

and

The Law Society of British Columbia and Victor McCallum *Respondents;*

and

The Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Saskatchewan, the Attorney General of Alberta, the Law Society of Upper Canada, Federation of Law Societies of Canada/Fédération des professions juridiques du Canada, Prepaid Legal Services Program of Canada *Interveners;*

and between

Donald Jabour *Appellant;* and

The Law Society of British Columbia and Harry Rankin representing the Benchers of the Law Society of British Columbia *Respondents;*

and

The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of New Brunswick, the Attorney General of British Columbia, the Attorney General of Saskatchewan, the Attorney General of Alberta, Prepaid Legal Services Program of Canada *Interveners.*

File Nos.: 16298 and 16299.

1981: May 25, 26 and 27; 1982: August 9.

[page 308]

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Courts — Jurisdiction — Provincial superior courts — Power to declare federal statute ultra vires — Nature of exclusive powers of Federal Court (Trial Division) to grant injunctive and declaratory relief — Constitutional Act, 1867, ss. 91(2), 91(27), 92(15), 96, 100, 101 — Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, ss. 2, 17. 18.

Combines — Provincial law society — Advertising restrictions — Whether or not Combines Investigation Act applicable to restrictions — Combines Investigation Act, R.S.C. 1970, c. C-23, ss. 2, 8. 17(1), 32.

Civil rights — Freedom of speech — Law society restrictions as to advertising — Whether restrictions imposed under valid provincial law — Whether restrictions on member's right to advertise a violation of right to freedom of speech — Combines Investigation Act, R.S.C. 1970. c. C-23. ss. 2, 8, 17(1), 32 — Legal Professions Act, R.S.B.C. 1960, c. 214 (now Barristers and Solicitors Act, R.S.B.C. 1979, c. 26), ss. 1, 2(3), 36, 36A, 37, 43, 48(b), 62.

The Law Society of British Columbia initiated steps to discipline Jabour, a member who had advertised his practice contrary to the Society's rules, for "conduct unbecoming a member". In the B.C. Supreme Court, Jabour sought: 1) a declaration that the Law Society's rulings and orders were null and void because they offended the *Combines Investigation Act* and infringed upon Jabour's freedom of speech; and 2) an interlocutory injunction restraining the Law Society from proceeding pending the Court's determination of the issues raised. The request for the interlocutory injunction was rejected. The Law Society's Discipline Committee found Jabour guilty and recommended suspension of his licence to practice. Jabour, however, successfully sought an order enjoining the Law Society from considering the Committee's report pending disposition of the Court action. The order was sustained on appeal.

[page 309]

The Law Society started an action in the British Columbia Supreme Court after it received a notice of investigation under the *Combines Investigation Act.* The action sought: 1) an injunction preventing the Director from continuing with the inquiry relating to the Law Society and 2) declarations that the *Combines Investigation Act* did not apply to the Law Society, and if it did, that that Act was *ultra vires* Parliament to that extent.

 Held: The appeals should be dismissed.

The British Columbia courts have jurisdiction to entertain the claims for declarations relating to the applicability of the *Combines Investigation Act* to the Society and its members. Although Parliament might establish a court for the better administration of the laws of Canada, it lacks the constitutional authority to strip the provincial superior courts of the power to declare a federal statute beyond Parliament's competence. These courts occupy a position of prime importance in the constitutional pattern of this country and their power to consider the constitutionality of federal statutes is fundamental to the federal system established by the Constitution. Section 101 cannot justify such an exclusion of authority. Moreover, the British Columbia courts have jurisdiction to entertain a plea for injunction on these proceedings instituted under the *Combines Investigation Act* because it is a remedy ancillary to the court's principal determination and a part of the court's inherent general jurisdiction.

Section 32 of the *Combines Investigation Act* did not apply to the Law Society in the circumstances of this appeal. The Benchers' disciplining Jabour for advertising was authorized by the *Legal Professions Act.* That Act caused the discipline committee to be established, authorized disciplinary action for "conduct unbecoming a member of the society", and broadly defined that conduct to include "any matter, conduct or thing ... deemed in the judgment of the Benchers to be contrary to the best interests of the public or of the legal profession." The Benchers, in agreeing that Jabour was guilty of professional misconduct, did not conspire contrary to s. 32(1) of the *Combines Investigation Act.* Rather, they were discharging their duties under a valid provincial act. Where a federal statute can be properly interpreted so as not to interfere with a provincial statute, that interpretation is to be applied in preference to other constructions that would bring about a conflict between the two statutes. The defence, created by s. 32(6), dealing with conspiracy in relation to service or standards

[page 310]

of competence reasonably necessary to protect the public in the practice of a profession, did not expand the charging section or otherwise fundamentally change the plain meaning of the section's main operating provision. It was not necessary to consider whether the *Combines Investigation Act* was *intra vires* Parliament.

Appellant's right to freedom of speech was not violated by the Bencher's ruling. This freedom, absent constitutional entrenchment placing it beyond the reach of Parliament or the Legislature, can be curtailed by valid statute law. The ethical, moral and financial aspects of a trade or profession can be regulated by a province within its boundaries. The Benchers' ruling here was exercised under valid provincial law and the fact that it reduced a member's right to freedom of economic speech (advertising) did not invalidate this otherwise validly delegated power.

R. v. Thomas Fuller Construction Co. (1958) Ltd. et al., 1979 CanLII 187 (SCC), [1980] 1 S.C.R. 695; Ontario Boys' Wear Ltd. et al. v. The Advisory Committee et al., 1944 CanLII 7 (SCC), [1944] S.C.R. 349; Reference re The Farm Products Marketing Act, 1957 CanLII 1 (SCC), [1957] S.C.R. 198; Attorney General (Can.) and Dupond v. Montreal, 1978 CanLII 201 (SCC), [1978] 2 S.C.R. 770, applied; Merchant v. Benchers of the Law Society of Saskatchewan, 1972 CanLII 866 (SK CA), [1973] 2 W.W.R. 109; Pharmaceutical Society of Great Britain v. Dickson, [1967] 2 All E.R. 558 (C.A.), affirmed [1968] 2 All E.R. 686 (H.L.); R. v. Chung Chuck, 1929 CanLII 263 (BC CA), [1929] 1 D.L.R. 756; R. v. Can. Breweries Ltd., 1960 CanLII 99 (ON SC), [1960] O.R. 601, considered; Dyson v. Attorney-General, [1911] I K.B. 410; Thorson v. Attorney General of Canada, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138; R. v. Bradley, [1914] S.C.R. 270;

Tab 123

CanLII

Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.), 1989 CanLII 116 (SCC), [1989] 1 SCR 238

Source:	Supreme Court of Canada
Date:	1989-03-02
File number:	19682
Other citations:	57 DLR (4th) 1 — 92 NR 179 — 230 APR 271 — 90 NSR (2d) 271 — 25 CCEL 162 — [1989] CarswellNS 113
Citation:	Sobeys Stores Ltd. v. Yeomans and Labour Standards Tribunal (N.S.), 1989 CanLII 116 (SCC), [1989] 1 SCR 238, <https://canlii.ca/t/1ft92>, retrieved on 2026-01-18

Sobeys Stores Ltd. *v.* Yeomans and Labour Standards Tribunal (N.S.), [1989] 1 S.C.R. 238

The Attorney General of Nova Scotia representing Her Majesty The Queen in right of the Province of Nova Scotia *(Intervener)* *Appellant*

and

Clifford George Yeomans and A. Ross Mitchell, Director of Labour Standards for the Province of Nova Scotia, and Stephen K. Mont, Henry Martell and Ann Hebb in their capacity as Chairman and members respectively of the Labour Standards Tribunal (Nova Scotia) and the Labour Standards Tribunal (Nova Scotia) *Appellants (Respondents)*

v.

Sobeys Stores Limited, a body corporate

Respondent (Appellant)

and

The Attorney General of Canada,
the Attorney General of Quebec,
the Attorney General of Manitoba and
the Attorney General of British Columbia *Interveners*

indexed as: sobeys stores ltd. *v.* yeomans and labour standards tribunal (n.s.)

File No.: 19682.

1988: February 5; 1989: March 2.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the appeal division of the nova scotia supreme court

Constitutional law -- Courts -- Jurisdiction -- Employment law -- Provincial tribunal affirming decision requiring employee's reinstatement and the retroactive payment of wages -- Whether or not power of provincial official and tribunal to hear and determine disputes and to make orders contravening s. 96 and hence ultra vires -- Constitution Act, 1867, s. 96 -- Labour Standards Code, S.N.S. 1972, c. 10, s. 67A(2), (3).

The appellant Yeomans had been continuously employed by respondent Sobeys for ten years prior to his dismissal. He had been warned orally on at least three occasions about his shortcomings but had been given no written notice of them. Yeomans complained to the Director of Labour Standards for Nova Scotia that he had been dismissed "without just cause" within the meaning of s. 67A of the *Labour Standards Code*. The Director ordered Yeomans to be reinstated and to be paid lost wages

stemming from the unjust dismissal. This decision was upheld by the Labour Standards Tribunal. The Appeal Division of the Nova Scotia Supreme Court allowed Sobeys' appeal holding s. 67A(2) and (3) unconstitutional because they conferred a s. 96 power on a provincially-appointed tribunal.

The constitutional questions raised on this appeal were (1) whether the province had legislative jurisdiction to empower the Director of Labour Standards and the Labour Standards Tribunal to hear and determine disputes with respect to, and make orders enforcing, s. 67A of the *Labour Standards Code* in light of s. 96 of the *Constitution Act, 1867*; and (2) whether s. 67A(2) and (3) of the *Labour Standards Code* were *ultra vires* the province as contravening s. 96 of the *Constitution Act, 1867*.

Held: The appeal should be allowed; the first constitutional question should be answered in the affirmative and the second in the negative.

Per Dickson C.J. and McIntyre, Lamer and Wilson JJ.: Although the Labour Standards Tribunal exercises a jurisdiction broadly conformable to that of s. 96 courts at the time of Confederation, and although in doing so it performs a judicial function, it does so as a necessarily incidental aspect of the broader policy goal of providing minimum standards of protection for non-unionized employees.

The jurisdiction in this case should be characterized as in relation to unjust dismissal. Characterizations of s. 67A as being in relation to employer/employee relations, labour standards or the mandatory performance of an employment contract should be rejected.

Characterization should be determined with reference to the different purposes served by the three stages of the test developed in *Re Residential Tenancies Act, 1979*. The first stage of that test involves a search for "broad conformity" with the powers of s. 96 courts at the time of Confederation. A relatively strict approach to characterization is necessary at this stage in order to prevent the possibility of large accretions of jurisdiction in the inferior courts which would in turn defeat the purpose of s. 96. Jurisdiction over the remedy, however, is too narrow. The nature of the dispute should be the guide for the application of the historical test.

If the jurisdiction was exclusive to the superior courts at Confederation, the inquiry must pass to the second and third stages of the test. If the jurisdiction is shared, the legislation under challenge may, in some circumstances, be held valid by the historical test. Jurisdiction need not be entirely or even generally concurrent, for the nature of the inferior-superior court distinction necessarily means that the former's jurisdiction will be subject to a geographical or pecuniary limit. Only if the jurisdiction of the inferior courts is broadly co-extensive with the superior courts will the history of shared jurisdiction validate the contemporary scheme under the historical test.

Pre-Confederation jurisdiction refers to pre-1867 jurisdiction and not to jurisdiction in a particular province immediately prior to that province's joining confederation. The test of 1867 jurisdiction must include an examination of the jurisdiction in all four original confederating provinces, and if this results in a tie, the jurisdiction in the United Kingdom. A tie existed here. Jurisdiction over unjust dismissal in the United Kingdom in 1867 was therefore examined and found to be the preserve of courts equivalent to Canada's superior, district and county courts. This jurisdiction, accordingly, cannot be conferred on provincially-appointed tribunals today.

In the second stage of the *Residential Tenancies* test, where the issue of whether or not a function is judicial is considered, the nature of the question which the tribunal is called upon to decide is determinative. A distinction must be drawn between the roles of the Director and the Tribunal. The former does not perform a judicial function even though he deals with private disputes between parties; the latter does.

The third stage of the test examines the `context' in which this power is exercised. It is exercised in the context of a comprehensive scheme for the protection of non-unionised workers. The policy of promoting such protection is a response to changed social conditions since Confederation and is implemented in an administrative as opposed to a court context. Although the Tribunal does carry out a judicial function with regard to s. 67A and many other aspects of the Code, that function is necessarily incidental to the implementation of broader policy goals the Code is designed to achieve.

Per Beetz, La Forest and L'Heureux-Dubé JJ.: The *Labour Standards Code*'s judicial component bears no relationship to the contractual issues assigned to the s. 96 courts in 1867. Its labour relations standards transcend the relationship between the parties and apply independently of any contractual arrangement that may exist. The enforcement mechanisms are essentially conciliatory procedures. The Director and tribunal members are knowledgeable in, and are governed by the dynamics of, labour relations rather than legal norms. There is no requirement that they be legally trained. An appeal from the Director to the Tribunal does not involve a *lis* between the complainant and the alleged contravenor notwithstanding its judicial component. Labour standards legislation is an integral part of the modern concept of labour relations and the power to enforce these standards, by use of techniques appropriate to the subject-matter, should be vested in specialized bodies by the province. It is inappropriate that the regular enforcement of these standards be by action in s. 96 courts, let alone part of the protected jurisdiction of these courts.

Since the administration and enforcement of modern legislation respecting labour standards form no part of the protected jurisdiction of a s. 96 court, considerations as to the precise nature of the historical inquiry into some aspect of a s. 96 court's jurisdiction were not of immediate relevance. However, it should be noted that the question to consider is whether a tribunal's jurisdiction "broadly" conforms to that of a s. 96 court at Confederation. This is not precisely definable. The experience, not only of the original provinces, but that of other provinces and England, at the time of Confederation, is relevant. Mechanistic assessments should be avoided as well as consideration of a situation peculiar to a province.

Cases Cited

By Wilson J.

Applied: *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; **considered:** *Labour Relations Board of Saskatchewan v. John East Iron Works, Ld.*, 1948 CanLII 266 (UK JCPC), [1949] A.C. 134; *Re B.C. Family Relations Act*, 1982 CanLII 155 (SCC), [1982] 1 S.C.R. 62; *Attorney General of Quebec v. Grondin*, 1983 CanLII 165 (SCC), [1983] 2 S.C.R. 364;

disapproved: *Asselin v. Industries Abex Ltée*, 1985 CanLII 3414 (QC CA), [1985] C.A. 72, 22 D.L.R. (4th) 212; **distinguished:** *Attorney General of Quebec v. Farrah*, 1978 CanLII 195 (SCC), [1978] 2 S.C.R. 638; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; **referred to:** *The Adoption Reference*, 1938 CanLII 2 (SCC), [1938] S.C.R. 398; *Tomko v. Labour Relations Board (Nova Scotia)*, 1975 CanLII 183 (SCC), [1977] 1 S.C.R. 112; *Massey-Ferguson Industries Ltd. v. Saskatchewan*, 1981 CanLII 209 (SCC), [1981] 2 S.C.R. 413; *Séminaire de Chicoutimi v. Cité de Chicoutimi*, 1972 CanLII 153 (SCC), [1973] S.C.R. 681; *Re Cour de Magistrat de Québec*, 1965 CanLII 46 (CSC), [1965] S.C.R. 772; *Canadian Broadcasting Corporation v. Quebec Police Commission*, 1979 CanLII 24 (SCC), [1979] 2 S.C.R. 618; *Dupont v. Inglis*, 1958 CanLII 8 (SCC), [1958] S.C.R. 535; *Evans v. Employment Standards Bd.* (1983), 1983 CanLII 305 (BC CA), 46 B.C.L.R. 198; *Re Telegram Publishing Co. and Zwelling* (1973), 1973 CanLII 645 (ON SC), 41 D.L.R. (3d) 176, reversed in part on other grounds (1975), 1975 CanLII 580 (ON CA), 67 D.L.R. (3d) 404; *Attorney General of British Columbia v. McKenzie*, 1965 CanLII 105 (SCC), [1965] S.C.R. 490; *Jones v. Edmonton Catholic School District No. 7*, 1976 CanLII 207 (SCC), [1977] 2 S.C.R. 872; *Reference Re Proposed Legislation Concerning Leased Premises and Tenancy Agreements* (1978), 1978 ALTASCAD 264 (CanLII), 89 D.L.R. (3d) 460; *Re Pepita and Doukas* (1979), 1979 CanLII 757 (BC CA), 101 D.L.R. (3d) 577; *Re Fort Massey Realties and Rent Review Commission* (1982), 1982 CanLII 2957 (NS CA), 132 D.L.R. (3d) 516; *Robinson v. Hindman* (1800), 3 Esp. 235, 170 E.R. 599; *Emmens v. Elderton* (1853), 13 C.B. 495, 138 E.R. 1292; *Beckham v. Drake* (1849), 2 H.L.C. 579, 9 E.R. 1213; *Wilkinson v. Gaston* (1846), 9 Q.B. 137, 115 E.R. 1227; *Hartley v. Harman* (1840), 11 Ad. & E. 798, 113 E.R. 617; *Smith v. Thompson* (1849), 8 C.B. 44, 137 E.R. 424; *Re Mitchell and Employment Standards Division, Department of Labour* (1977), 1977 CanLII 1638 (MB CA), 82 D.L.R. (3d) 339; *Central Canadian Structures Ltd. v. Director of Employment Standards Division*, 1984 CanLII 3630 (MB CA), [1984] 4 W.W.R. 182.

By La Forest J.

Referred to: *Scowby v. Glendinning*, 1986 CanLII 30 (SCC), [1986] 2 S.C.R. 226; *Labour Relations Board of Saskatchewan v. John East Iron Works, Ld.*, 1948 CanLII 266 (UK JCPC), [1949]

Tab 124

CanLII

In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec, 2019 QCCA 1492 (CanLII)

Source:	Court of Appeal of Quebec
Date:	2019-09-12
File number:	500-09-027083-179
Other citations:	AZ-51627804 — [2019] CarswellQue 10358 — [2019] QJ 7806
Citation:	In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec, 2019 QCCA 1492 (CanLII), <https://canlii.ca/t/j2csc>, retrieved on 2026-01-18

In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the *Code of Civil Procedure* which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec

2019 QCCA 1492

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-027083-179

IN THE MATTER:

Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the *Code of Civil Procedure* which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec (Order in Council No. 880-2017)

DATE: September 12, 2019

CORAM: THE HONOURABLE NICOLE DUVAL HESLER, C.J.Q.
MARIE-FRANCE BICH, J.A.
NICHOLAS KASIRER, J.A.
JACQUES J. LEVESQUE, J.A.
MARTIN VAUCLAIR, J.A.
ROBERT M. MAINVILLE, J.A.
MARIE-JOSÉE HOGUE, J.A.

ATTORNEY GENERAL OF QUEBEC
APPLICANT
-and-

ATTORNEY GENERAL OF CANADA
ATTORNEY GENERAL OF BRITISH COLUMBIA
CHIEF JUSTICE, SENIOR ASSOCIATE CHIEF JUSTICE AND ASSOCIATE CHIEF JUSTICE OF THE SUPERIOR COURT OF QUEBEC
CONSEIL DE LA MAGISTRATURE DU QUÉBEC
CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
ORGANISME D'AUTORÉGLEMENTATION DU COURTAGE IMMOBILIER DU QUÉBEC (OACIQ)
CONFÉRENCE DES JUGES DE LA COUR DU QUÉBEC
INTERVENERS

TABLE OF CONTENTS

---

1. PRELIMINARY QUESTIONS..... 10

2. CONTEXT..... 13

2.1. The origin and purpose of the relevant constitutional provisions..... 13
2.2. Context of the first reference question and circumstances under which the Court was seized thereof... 24
2.3. Context of the second reference question and circumstances under which the Court was seized thereof 31
2.4. Summary description of the Superior Court and the Court of Québec..... 39

3. THE FIRST REFERENCE QUESTION..... 43

3.1. Preliminary Comments 43
3.2. The respondents' claims 48
3.3. The appropriate analytical framework 50
3.4. Analysis 62

4. THE SECOND REFERENCE QUESTION 76

4.1. Preliminary Comments 76
4.2. The interveners' positions 78
4.3. The statutory appeals in question 81
4.3.1. Act respecting access to documents held by public bodies and the protection of personal information 82
4.3.2. Act respecting the regulation of the financial sector 83
4.3.3. Real Estate Brokerage Act 83
4.3.4. Act respecting the distribution of financial products and services 84
4.3.5. Act respecting administrative justice 84
4.3.6. Police Act 85
4.3.7. Act respecting the Régie du logement 85
4.3.8. Act respecting the protection of personal information in the private sector 86
4.4. Characterization of the Court of Québec, sitting in appeal, as a court of justice 87
4.5. The standard of review applicable to appeals to the Court of Québec 93
4.6. The Re Residential Tenancies Act, 1979 test 104
4.6.1. Characterization of the impugned powers (step 1) 104
4.6.2. Are the impugned powers judicial powers (step 2)? 108
4.6.3. Are the impugned powers merely subsidiary or ancillary to an administrative function (step 3)? 108
4.7. Appeals to the Court of Québec 110
4.7.1. The judgment in Farrah 111
4.7.2. The judgment in Crevier 113
4.7.3. The judgment in Grondin 115
4.7.4. Conclusions arising from the analysis of these judgments 116
4.8. The duplication argument 118
4.9. Conclusions regarding the second reference question 122

5. CONCLUSIONS 122

Tab 125

CanLII

Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2019-07-19
File number:	C65180
Other citations:	147 OR (3d) 65 — 436 DLR (4th) 361 — 95 CCLI (5th) 194 — [2019] OJ No 3845 (QL) — 44 MVR (7th) 173
Citation:	Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615 (CanLII), <https://canlii.ca/t/j1l93>, retrieved on 2026-01-18

Stegenga v. Economical Mutual Insurance Company

[Indexed as: Stegenga v. Economical Mutual Insurance Co.]

Ontario Reports

Court of Appeal for Ontario

D.M. Brown, L.B. Roberts and Zarnett JJ.A.

July 19, 2019

147 O.R. (3d) 65 | 2019 ONCA 615

Case Summary

Insurance — Automobile insurance — Statutory accident benefits — Claim of bad faith conduct by insurer in relation to insured's entitlement to statutory accident benefits falling within jurisdiction of Licence Appeal Tribunal under s. 280(2) of Insurance Act — Prohibition in s. 280(3) of Act on court proceeding applying to claim — Insurance Act, R.S.O. 1990, c. I.8, s. 280.

The plaintiff sued the defendant insurer for bad faith in its handling of her claim for statutory accident benefits, seeking punitive and exemplary damages. She claimed that, for about three years after she was seriously injured in a motor vehicle accident, the defendant did not advise her or her parents that her injuries could qualify as a catastrophic impairment or inform them of the

benefits that could be available for such an impairment. The defendant moved successfully to strike out the statement of claim. The motion judge held that the claim was "in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled" and was therefore a claim over which the Licence Appeal Tribunal had exclusive jurisdiction under s. 280(2) of the *Insurance Act*, and that a court proceeding was prohibited under s. 280(3) of the Act. The plaintiff appealed, arguing that an insurer's duty of good faith is independent of and in addition to its duty to pay the benefits to which an insured person is entitled, and that a breach of the duty of good faith gives rise to a stand-alone action for bad faith which is unrelated to *SABS* entitlement.

Held, the appeal should be dismissed.

The SABs dispute resolution provisions capture a broad range of disputes, including disputes about how an insurer handled a SABs claim. The purpose of the provisions, the expansive language used and the extent of the powers given to the LAT all support that interpretation. Neither the legal characterization of the cause of action asserted against the insurer nor the relief claimed determines whether a claim falls within the scope of the dispute resolution provisions. If the dispute relates to the insurer's compliance with obligations to the insured concerning SABs, the timeliness of performance of those obligations, and/or the manner in which they were administered, it falls within the broad reach of the dispute resolution provisions, and within the jurisdiction of the LAT. At their core, the facts alleged in the plaintiff's statement of claim were about the defendant's failure to provide the benefits to which she was entitled, its delay in providing benefits, its withholding of benefits, and its conduct in handling the claim for benefits and dealing with the plaintiff and her family. The action, viewed with an eye to its essential character, was a dispute in respect of her entitlement to SABs and their amount. The action was barred by s. 280(3) of the Act.

Weber v. Ontario Hydro, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59, 125 D.L.R. (4th) 583, 183 N.R. 241, 82 O.A.C. 321, 30 Admin. L.R. (2d) 1, 12 C.C.E.L. (2d) 1, 24 C.C.L.T. (2d) 217, 95 CLLC para. 210-027, 30 C.R.R. (2d) 1, **apld**

Arsenault v. Dumfries Mutual Insurance Co. (2002), 2002 CanLII 23580 (ON CA), 57 O.R. (3d) 625, [2002] O.J. No. 4, 152 O.A.C. 224, [2002] I.L.R. para. I-4086, 20 M.V.R. (4th) 165 (C.A.); *Dundas [page66] v. Zurich Canada* (2012), 109 O.R. (3d) 521, [2012] O.J. No. 1321, 2012 ONCA 181, [2012] I.L.R. para. I-5272, 31 M.V.R. (6th) 177, 7 C.C.L.I. (5th) 1; *Mader v. South Easthope Mutual Insurance Co*. (2014), 123 O.R. (3d) 120, [2014] O.J. No. 4906, 2014 ONCA 714, 325 O.A.C. 265, 42 C.C.L.I. (5th) 1, **consd**

Other cases referred to

17-006757 v. Aviva Insurance Canada, 2018 CanLII 81949 (Ont. L.A.T.); *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, 2006 SCC 4, 263 D.L.R. (4th) 193, 344 N.R. 293, [2006] 5 W.W.R. 1, 54 Alta. L.R. (4th) 1, 380 A.R. 1, 39 Admin. L.R. (4th) 159; *Ayr Farmers Mutual Insurance Co. v. Wright* (2016), 134 O.R. (3d) 427, [2016] O.J. No. 5556, 2016 ONCA 789, 61 C.C.L.I. (5th) 64, 2 M.V.R. (7th) 31; *Belwood Lake Cottagers Ass'n Inc. v. Ontario (Environment and Climate Change)*, [2019] O.J. No. 485, 2019 ONCA 70, 23 C.E.L.R. (4th) 227, 431 D.L.R. (4th) 318, 83 M.P.L.R. (5th) 1; *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, [2010] S.C.J. No. 62, 2010 SCC 62, 273 O.A.C. 1, 410 N.R. 1, 56 C.E.L.R. (3d) 1, 327 D.L.R. (4th) 527, 96 C.L.R. (3d) 1; *L'Espérance v. Economical Mutual Insurance Group* (2014), 122 O.R. (3d) 773, [2014] O.J. No. 5135, 2014 ONSC 6293, 41 C.C.L.I. (5th) 281 (S.C.J.); *Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.* (2002), 2002 CanLII 45070 (ON CA), 61 O.R. (3d) 481, [2002] O.J. No. 3588, 217 D.L.R. (4th)

34, 164 O.A.C. 1, 40 C.C.L.I. (3d) 203, 24 C.P.C. (5th) 216 (C.A.); *Johnston v. Wawanesa Mutual Insurance Co.*, [2006] O.J. No. 3037, 2006 CarswellOnt 4528 (S.C.J.); *McQueen v. Echelon General Insurance Co.* (2011), 107 O.R. (3d) 780, [2011] O.J. No. 4563, 2011 ONCA 649, 285 O.A.C. 64, [2011] I.L.R. para. I-5207, 2 C.C.L.I. (5th) 196; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63, 2005 SCC 62, 258 D.L.R. (4th) 595, 340 N.R. 305, 32 Admin. L.R. (4th) 159, 201 C.C.C. (3d) 161, 18 C.E.L.R. (3d) 1, 36 C.R. (6th) 78, 134 C.R.R. (2d) 196, 15 M.P.L.R. (4th) 1, 67 W.C.B. (2d) 397; *Personal Insurance Co. v. Hoang*, [2014] O.J. No. 1383, 2014 ONSC 81, 319 O.A.C. 90, 32 C.C.L.I. (5th) 17 (Div. Ct.); *R. v. Nowegijick*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, 144 D.L.R. (3d) 193, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 83 D.T.C. 5041; *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC para. 210-006; *St. Denis v. TD Insurance Home and Auto Liberty Insurance Co. of Canada* (2005), 2005 CanLII 37593 (ON SC), 80 O.R. (3d) 706, [2005] O.J. No. 4441, [2005] O.T.C. 924, 33 C.C.L.I. (4th) 58 (S.C.J.); *TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19, [2008] O.J. No. 5291, 2008 ONCA 892; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, 209 D.L.R. (4th) 257, 283 N.R. 1, 156 O.A.C. 201, 20 B.L.R. (3d) 165, 35 C.C.L.I. (3d) 1, [2002] I.L.R. para. I-4048

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, ss. 279 [as am.], (1) [as am.], 280 [as am.], (1) [as am.], (2) [as am.], (3) [as am.], (4) [as am.], (5) [as am.], (6) [as am.], 2, 281 [as am.], (2) [as am.], (5) [rep.], 282 [as am.], (10) [rep.], 283 [as am.]

Labour Relations Act, R.S.O. 1990, c. L.2, s. 45(1) [rep.]

Rules and regulations referred to

Automobile Insurance, R.R.O. 1990, Reg. 664, s. 10 [as am.]

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21, 21.01(1)(a)

Statutory Accident Benefits Schedule — Effective September 1, 2010, O. Reg 34/10, s. 3(8) [as am.] [page67]

Authorities referred to

Cunningham, J. Douglas, 2014 Ontario Automobile Insurance Dispute Resolution System Review, *Final Report* (Toronto: February 25, 2014)

House of Commons Debates, "Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014", 1st reading, Ontario, Legislative Assembly, *Official Report of Debates* (Hansard), 41st Parl., 1st Sess., No. 8 (July 15, 2014) at 1510 (Hon. Charles Sousa)

Samworth, Philippa G., "AABS and SABS: The Evolving World of Ontario Statutory Accident Benefits in 2016" (2017), 46 Advoc. Q 1

Sullivan, Ruth, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014)

APPEAL from the judgment of Ramsay J., [2018] O.J. No. 1195, 2018 ONSC 1512 striking out a statement of claim.

J. Patrick Brown and *Michael Warfe*, for appellant.

Lisa Armstrong, *Julianne Brimfield* and *Mark A. Gelowitz*, for respondent.

The judgment of the court was delivered by
ZARNETT J.A.: —

[1] The Statutory Accident Benefits ("SABs") dispute resolution provisions of s. 280 of the *Insurance Act*, R.S.O. 1990, c. I.8, which came into force on April 1, 2016, give the Licence Appeal Tribunal ("LAT") jurisdiction to resolve certain disputes and prohibit bringing proceedings in respect of those disputes in court.[1] This appeal raises the question of whether claims for an insurer's bad faith conduct fall outside of those provisions.[2]

[2] The appellant, Morgan Stegenga, was seriously injured in a motor vehicle accident. She claimed SABs from her insurer, the respondent Economical Mutual Insurance Company. In light of the way Economical Mutual handled her claim, she brought an action against it alleging bad faith and claiming punitive and exemplary damages, among other things.

[3] Economical Mutual successfully moved to strike out Ms. Stegenga's statement of claim and obtained a determination, as a matter of law, that the LAT has exclusive jurisdiction to decide Ms. Stegenga's claim at first instance. [page68]

[4] The motion judge held that Ms. Stegenga's claim fell within the SABs dispute resolution provisions because it was "in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled": s. 280(1). It was therefore a claim over which the LAT has exclusive jurisdiction and one which may not be brought in court: s. 280(2), (3). In the motion judge's view, both s. 280 of the Act and this court's decisions under the prior version of the Act's dispute resolution provisions required that conclusion, even though Ms. Stegenga's lawsuit asserted and sought damages for bad faith stemming from Economical Mutual's administration of her SABs claim.

[5] Ms. Stegenga appeals. She argues that this is the first case to consider whether an action for bad faith administration of a SABs claim comes within the current s. 280, amended since the cases the motion judge relied on were decided. She argues that the principles of statutory interpretation, case law that has emphasized the standalone nature of a cause of action for bad faith, the nature of the relief claimed, and sensible policy considerations, all lead to the conclusion that s. 280 does not apply.

[6] For the following reasons, I conclude that s. 280 does apply. Interpreted in light of the principles of statutory interpretation, s. 280 grants the LAT jurisdiction over Ms. Stegenga's claim, and prohibits the claim from proceeding as an action in court, notwithstanding that the action alleges bad faith and the remedies the LAT can grant are different from those a court could. This result is a consequence of the policy choice the legislature made in enacting s. 280. I would therefore dismiss the appeal.

THE FACTS

[7] Economical Mutual brought its motion under rule 21.01(1) (a) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. On such a motion, the facts alleged in Ms. Stegenga's statement of claim are taken to be true. The facts set out below come from that statement of claim.

[8] In November 2011, when she was 15 years old, Ms. Stegenga was a passenger in a motor vehicle that was involved in a serious collision. She suffered significant injuries, including a head injury with a Glasgow Coma Scale ("GCS") score of 6, necessitating a period of intubation and treatment in a Pediatric Critical Care Unit. She also suffered multiple rib fractures, pulmonary contusions, fractures to her right clavicle, scapula and pelvic rami, as well as other injuries. These

injuries were accompanied by, among other things, a loss of cognitive ability; personality, behaviour and psychological changes; and [page69] anxiety, depression and chronic pain. As a result, Ms. Stegenga experienced a decline in her academic performance. She has struggled to maintain her grades, focus on school work and complete assignments.

[9] Ms. Stegenga was insured by Economical Mutual under an automobile insurance policy it issued to her father.

[10] In January 2012, Ms. Stegenga's mother applied on her behalf to the respondent for SABs. Pertinent medical information was provided by Ms. Stegenga's pediatrician.

[11] For a period of about three years, Economical Mutual did not advise Ms. Stegenga or her parents that her injuries could qualify as a catastrophic impairment or inform them of the benefits that could be available for such an impairment. Economical Mutual also did not

-- provide them with the application form required to make a determination about catastrophic impairment;

-- take steps to interview Ms. Stegenga or her parents regarding the nature and extent of her injuries or their effect on her daily life;

-- arrange to have her assessed by a health practitioner;

-- assign a case manager to assist with her care and rehabilitation, or advise her that she was entitled to a case manager;

-- obtain her hospital and clinical records for over two years, or respond appropriately to such records when eventually provided to them;

-- respond to requests to authorize a neurologic psychoeducational assessment; and
-- provide accurate benefit statements to Ms. Stegenga and her parents (those provided misrepresented both the nature of her injuries as non-catastrophic and the applicable policy limits available to her).

[12] In February 2015, Economical Mutual advised that based on Ms. Stegenga's GCS score, it now accepted that she had suffered a catastrophic impairment as a result of the collision. However, over the next year, Economical Mutual continued to provide benefit statements that described her injuries as non-catastrophic.

[13] Ms. Stegenga alleges that Economical Mutual breached the duties it owed to her because it acted wilfully and negligently in breach of its contract with her and in breach of its duty of good faith. The claim recites 56 particulars of Economical [page70] Mutual's alleged breaches, which may be grouped into several categories:

-- failing to inform Ms. Stegenga and her family of her rights and entitlements to benefits under the *Statutory Accident Benefits Schedule -- Effective September 1, 2010*, O. Reg. 34/10 (the "SABs Schedule");

-- while it knew or ought to have known that Ms. Stegenga suffered a catastrophic injury, failing to ensure she had the proper information, forms, examinations, assessments, treatment, care and a case manager;

-- failing to take steps to investigate Ms. Stegenga's medical condition and her entitlement to benefits, and not properly considering information provided to it on those topics;

-- preventing Ms. Stegenga from accessing benefits and withholding, delaying or denying benefits based on inaccurate and irrelevant considerations;

-- sending Ms. Stegenga and her family confusing, misleading and contradictory correspondence about her entitlement to benefits, misrepresenting her benefits, withholding information and failing to make disclosure, knowing that Ms. Stegenga would not receive the treatment, care and benefits she required and to which she was entitled; and

-- failing to follow reasonable standards for the handling of Ms. Stegenga's claim for benefits.

[14] As noted, the statement of claim refers to Ms. Stegenga's entitlement to SABs and to the fact that SABs were not, or were inadequately, provided. It states that, because of Economical Mutual's conduct, and reliance on its misleading representations, she did not "receive the care, treatment, and benefits to which she was entitled and should have received". Ms. Stegenga also pleads that although she provided all forms, information and medical documentation requested by Economical Mutual, Economical Mutual "did not provide the benefits to which [Ms. Stegenga] was legally entitled".

[15] The statement of claim alleges that Economical Mutual's conduct prolonged Ms. Stegenga's suffering, and caused new difficulties and impairments she would not otherwise have experienced, as well as emotional, psychological and financial distress. Damages, including punitive, aggravated and exemplary damages, are claimed. [page71]

THE MOTION JUDGE'S DECISION

[16] Economical Mutual moved under Rule 21 to strike the statement of claim, seeking the determination of a question of law: whether the appellant's claim is barred by s. 280(1) and (3) of the *Insurance Act*. The motion judge defined the question as whether a claim for negligent, fraudulent or bad faith administration of accident benefits is a claim falling within s. 280(1), that is, whether it is a dispute "in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled".

[17] The motion judge reasoned that the words "in respect of" in s. 280(1) import a connection in a very broad sense. He considered the dispute resolution provisions to be designed to provide a cost-efficient and fair mechanism for resolving disputes between insurers and insureds in respect of SABs, by mandating that disputes be heard at first instance by the LAT. To determine whether the dispute fell within the LAT's jurisdiction and therefore outside that of the courts, the motion judge instructed himself to look to the facts giving rise to the dispute rather than the legal characterization of the wrong, citing *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59, at para. 49. He cited this court's decision in *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 2002 CanLII 23580 (ON CA), 57 O.R. (3d) 625, [2002] O.J. No. 4 (C.A.), which was decided under the dispute resolution provisions of the Act before the 2016 amendments, as standing for the proposition that those provisions apply if a refusal of accident benefits is an essential part of a claim, regardless of whether bad faith in administering a claim may be an independent tort in the context of accident benefits. He concluded [at para. 14] that s. 280 is "intended to deprive a claimant of resort to the court at first instance whenever the claim is based on denial of accident benefits, no matter how the denial is characterized in legal terms".

THE APPELLANT'S POSITION

[18] Although the statement of claim seeks damages for breach of contract, negligence, misrepresentation and infliction of mental distress, Ms. Stegenga's argument on appeal focuses on her action as one for bad faith relating to the administration of her SABs claim. She argues that an insurer's duty of good faith is independent of and in addition to its duty to pay the benefits to which an insured person is entitled, a point she argues follows from the Supreme Court's decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19, 2002 SCC 18, at para. 79. [page72] A breach of the duty of good faith gives rise to a standalone action for bad faith in which aggravated, exemplary and punitive damages are available.

[19] Ms. Stegenga submits that nothing in the *Insurance Act* deprives the Superior Court of jurisdiction to deal with such a claim or confers jurisdiction on the LAT to do so, for interrelated reasons. Her standalone bad faith claim is not for benefits entitlement, and the LAT cannot award aggravated, exemplary or punitive damages. The cases by which the motion judge considered himself bound, including *Arsenault*, are distinguishable because they did not involve true bad faith

claims: they were claims for indemnity under the insurance contract and dealt with entitlement issues. The motion judge's conclusion that the LAT has exclusive jurisdiction over Ms. Stegenga's claim effectively insulates insurers from claims involving a breach of their duty of good faith in relation to claims for SABs, a result she contends should be avoided.

ANALYSIS

[20] This appeal requires me to consider three issues:

(1) What is the breadth of the SABs dispute resolution provisions in the *Insurance Act* that prohibit recourse to the court and empower the LAT to resolve disputes?

(2) Does a bad faith claim against an insurer, seeking relief such as punitive damages, fall outside the scope of the dispute resolution provisions?

(3) What effect do the conclusions under issues 1 and 2 have on Ms. Stegenga's claim?

[21] As I explain, the SABs dispute resolution provisions capture a broad range of disputes, including disputes about how an insurer handled a SABs claim. The purpose of the provisions, the expansive language used and the extent of the powers given to the LAT all support this interpretation.

[22] Neither the legal characterization of the cause of action asserted against the insurer nor the relief claimed determines whether a claim falls within the scope of the dispute resolution provisions. If the dispute relates to the insurer's compliance with obligations to the insured concerning SABs, the timeliness of performance of those obligations and/or the manner in which they were administered, it falls within the broad reach of the dispute resolution provisions, and within the jurisdiction of the LAT. The prohibition on court proceedings will apply. [page73]

[23] In this case, these conclusions apply to bar Ms. Stegenga's action.

The Statutory Scheme

[24] Subsection 280(1) of the *Insurance Act* describes the disputes to which the dispute resolution process it mandates applies. It provides:

> 280(1) This section applies with respect to the resolution of disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled.

[25] Subsection 280(2) goes on to confer jurisdiction on the LAT to resolve the disputes described in s. 280(1):

> (2) The insured person or the insurer may apply to the Licence Appeal Tribunal to resolve a dispute described in subsection (1).

[26] Subsection 280(3) then places a limit on what proceedings may be brought in court, prohibiting proceedings at first instance if they are with respect to a dispute described in s. 280(1), that is, a dispute that falls within the jurisdiction of the LAT:

> (3) No person may bring a proceeding in any court with respect to a dispute described in subsection (1), other than an appeal from a decision of the Licence Appeal Tribunal or an application for judicial review.

[27] Further guidance on what falls within the jurisdiction of the LAT and therefore outside that of the court at first instance is contained in the balance of s. 280 and the relevant regulations.

[28] Subsection 280(4) provides that a dispute shall be resolved in accordance with the SABs Schedule. Subsections (5) and (6) provide that the powers of the LAT and the orders it may make may be provided for by regulation, and may include the power to make orders "to pay amounts

even if those amounts are not costs or amounts to which a party is entitled under the [SABs Schedule]": s. 280(6)2.

[29] Both the SABs Schedule and the regulations envisaged by the Act contemplate the LAT making determinations about how an insurer has handled a claim and granting relief beyond the payment of SABs when payments have been "unreasonably withheld or delayed". Section 3(8) of the SABs Schedule provides:

> (8) If in a dispute described in subsection 280(1) of the Act, the Licence Appeal Tribunal finds that an expense was not incurred *because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense*, the Licence Appeal Tribunal may, for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred.

(Emphasis added) [page74]

[30] And s. 10 of *Automobile Insurance*, R.R.O. 1990, Reg. 664 provides:

> 10. *If the Licence Appeal Tribunal finds that an insurer has unreasonably withheld or delayed payments*, the Licence Appeal Tribunal, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory Accident Benefits Schedule, *may award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award* together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule.

(Emphasis added)

Issue 1: The broad scope of the SABs dispute resolution provisions

[31] The breadth of s. 280 of the *Insurance Act* is a question of statutory interpretation. The modern approach to statutory interpretation requires the court to consider the words of a statute "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Belwood Lake Cottagers Ass'n Inc. v. Ontario (Environment and Climate Change),* [2019] O.J. No. 485, 2019 ONCA 70, at para. 39, citing *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63, 2005 SCC 62, at paras. 9-12; and *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21. Reading a statutory provision in its entire context requires the court to consider the history of the provision and its place in the overall scheme of the act, among other things: *Belwood*, at para. 41.

[32] More specific principles of interpretation apply in some cases. Ms. Stegenga argues that as the Superior Court is a court of general jurisdiction, it has jurisdiction over all matters of substantive law in civil claims unless that jurisdiction is taken away by clear and unequivocal legislative language*: TeleZone Inc. v. Canada (Attorney General)* (2008), 94 O.R. (3d) 19, [2008] O.J. No. 5291, 2008 ONCA 892, affd *Canada (Attorney General) v. TeleZone Inc.*, [2010] 3 S.C.R. 585, [2010] S.C.J. No. 62, 2010 SCC 62, at paras. 3, 6.

[33] It is conceded that the *Act* does, by clear and unequivocal language, take away some jurisdiction from the court and confer it on the LAT. The Act's express directions that "[n]o person may bring a proceeding in any court with respect to a dispute . . ." (s. 280(3)) and that "[t]he insured person or the insurer may apply to the [LAT] to resolve a dispute . . ." (s. 280(2)) leave no doubt about that. The issue is the breadth of the subject matter [page75] carved out of the court's jurisdiction and given to the LAT to resolve.

[34] Ms. Stegenga essentially argues that the words "disputes in respect of an insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled" only capture disputes about whether or not a benefit should

be paid, that is, claims for a benefit itself, or disputes about whether a benefit was paid in an incorrect amount, that is, claims for the further amount that should be paid or for the excess amount that should not have been paid. She argues that the legislature used the terms "entitlement" and "amount" to limit the scope of s. 280(1). Had the legislature drafted the provision to cover "any dispute in respect of statutory accident benefits", for example, its reach would be broader.

[35] In my view, this argument reads the section too narrowly. Several indicators of legislative meaning, which I outline below, lead to the conclusion that a dispute in respect of an insured person's entitlement to SABs or the amount of an insured person's SABs entitlement embraces more than a claim for the payment of a benefit not paid or paid in an incorrect amount, and extends to the way the claim was handled.

(i) *Legislative purpose*

[36] The current version of s. 280 of the Act came into force on April 1, 2016. The previous version provided for mandatory mediation of disputes in respect of any entitlement to or the amount of an entitlement to SABs, and gave an insured person an option of then proceeding to court or arbitration for the resolution of such a dispute if mediation failed, but within a two-year limitation period: *Insurance Act*, ss. 279-283, as they appeared on March 31, 2016.[3]

[37] The pre-April 2016 provisions were described as a "mandatory scheme" and "complete code for dealing with disputes between an insured person and an insurer concerning SABs issues" (para. 34, emphasis omitted): *Ayr Farmers Mutual Insurance Co. v. Wright* (2016), 134 O.R. (3d) 427, [2016] O.J. No. 5556, 2016 ONCA 789, at paras. 4, 16, 34. The amendments enacted in [page76] April 2016 -- giving the LAT jurisdiction (subject to appeal or judicial review) over the same disputes that were previously subject to mandatory mediation, and prohibiting proceedings in court -- do not detract from the legislature's intention that the provisions continue to constitute a complete code for the resolution of disputes in respect of an insured person's entitlement to SABs or in respect of the amount of SABs to which an insured person is entitled.

[38] The purpose of the amendments that led to the current s. 280 has been described as reducing both insurance rates and insurance fraud, and speeding up dispute resolution, in large part by providing an efficient, fair and accessible mechanism for resolving disputes: "Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014", 1st reading, Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 41st Parl., 1st Sess., No. 8 (July 15, 2014) at 1510 (Hon. Charles Sousa); see, also, 2014 Ontario Automobile Insurance Dispute Resolution System Review, *Final Report*, by The Hon. J. Douglas Cunningham (Toronto: February 25, 2014), at pp. 2-3, 13, 31-33, the report that formed the basis for the amendments to the dispute resolution provisions. The amendments removing disputes from the courts and empowering the LAT to deal with them are among the "cornerstones" of the legislation passed to effect the above purpose: Hon. Charles Sousa, at 1510.

[39] The purpose of the current s. 280 has two important implications. First, the purpose of reducing insurance rates by providing for efficient dispute resolution through the LAT would not be served by an overly restrictive reading of the LAT's jurisdiction and the corresponding limit on the court's jurisdiction. The legislature must be taken to have considered the importance of its objectives of efficiency and cost reduction to outweigh the loss of insured individuals' access to the courts and to the full range of remedies available there.

[40] Second, while the legislature's intention that the dispute resolution provisions continue to be a complete code does not, on its own, determine which disputes fall within it, it does suggest that the legislature did not intend the same, similar, or overlapping issues to be adjudicated in more than one forum.

(ii) *The use of expansive language in s. 280(1)*

[41] The entry point to the SABs dispute resolution provisions is s. 280(1), which contains expansive language.

[42] As the motion judge correctly noted, the phrase "in respect of" connotes the broadest possible connection between two subject matters: *Arsenault*, at para. 16, citing *R. v. Nowegijick*, 1983 CanLII 18 (SCC), [1983] 1 S.C.R. 29, [1983] S.C.J. No. 5, at p. 39 S.C.R. In s. 280(1), that [page77] phrase connects "dispute" to "entitlement" to statutory accident benefits or their amount.

[43] The ordinary meaning of the noun "dispute" is broad. It has been described as a "conflict or controversy", a "disagreement or argument" and a "controversy; a debate": *Black's Law Dictionary*, 11th ed.; *Concise Oxford English Dictionary*, 12th ed.; *Canadian Oxford Dictionary*, 2nd ed.

[44] "Entitlement" is a term of wide meaning, referring to "a right to do or receive something": *Concise Oxford English Dictionary*, 12th ed. It embraces the content of the insured's right to receive SABs (*i.e.*, what SABs an insured person has a right to receive), when they have a right to receive those SABs, and the manner of performance by the insurer they have a right to receive.

[45] Taken together, the words of s. 280(1) cover a wide array of disagreements connected in some way to the SABs to which an insured person was or is entitled. Viewed in the context of the purpose and history of the dispute resolution provisions, those words include disagreements about when the insurer's obligation to provide SABs should be or should have been performed, and how the obligation to provide them should be or should have been performed.

(iii) *The LAT's jurisdiction*

[46] The balance of s. 280 informs the proper interpretation of the s. 280(1) reference to disputes in respect of entitlement to SABs or their amount. These provisions elaborate on the jurisdiction given to the LAT, and therefore on what falls within s. 280(1). The jurisdiction given to the LAT over those disputes is co-extensive with that removed from the court: s. 280(2), (3).

[47] The jurisdiction given to the LAT includes making determinations about the manner in which an insurer has administered a claim for SABs. Subsection 280(4) states that the LAT shall resolve disputes in accordance with the SABs Schedule. The SABs Schedule gives the LAT the power, for the purpose of making an award of benefits, to deem an expense to have been incurred if that expense was not incurred because an insurer unreasonably withheld or delayed payment of benefits in respect of the expense: s. 3(8). Determining whether a benefit was unreasonably withheld or delayed necessarily involves determining both what benefits were due and when, and whether the insurer's conduct that led to it not providing the benefit or providing it later than it should have was unreasonable.

[48] Similarly, s. 280(5) and (6) of the Act contemplate the LAT exercising power under other regulations. Subsection 280(6) 2 allows the regulations to authorize the LAT to award [page78] amounts beyond those for which the SABs Schedule provides. The regulations in turn allow the LAT to make, in addition to an award of the benefits and interest to which the insured is entitled under the SABs Schedule, an award (known as a "special award") of up to 50 per cent of the benefits to which the insured is otherwise entitled, and interest at a higher rate, if it finds the insurer unreasonably withheld or delayed the payment of benefits: *Automobile Insurance*, s. 10. The LAT's powers contemplate an enquiry into and determination of what and when benefits should have been paid, and into whether any delay or failure to pay was reasonable, that is, into the manner in which the insurer has dealt with the claim and performed its SABs-related obligations.

[49] The LAT's jurisprudence shows that it enters into such enquiries and makes such determinations. In *17-006757 v. Aviva Insurance Canada*, 2018 CanLII 81949 (Ont. L.A.T.), the LAT found the insurer to have unreasonably delayed payment of benefits: *17-006757*, at para. 32. In making a special award, the LAT considered the insured's entitlement to the benefits claimed, the insurer's delay in approving payments without apparent explanation, its near total disregard of the correspondence from the insured's legal representatives and medical practitioners, its failure to

reassess the claim when new information became available, its ignoring the claim for a period of time and its imprudent, stubborn, inflexible and unyielding stance with respect to the benefits claimed: *17-006757*, at paras. 36-37.

[50] This is consistent with the approach taken to special awards under the prior version of the Act. Jurisdiction to make a special award was vested in an arbitrator of the Financial Services Commission of Ontario: *Insurance Act*, s. 282(10) as it appeared on March 31, 2016. The operative language permitting such an award was nearly identical to the regulation now empowering the LAT to do so; that is, it required the insurer to have unreasonably withheld or delayed the payment of benefits. The approach to making special awards under the prior version of the Act required the arbitrator to determine the benefits owing to the insured person, and whether the insurer unreasonably withheld or delayed payments. Factors relevant to fixing the amount of a special award included the amount of benefits unreasonably withheld or delayed, the length of the delay and any failure to respect procedural and other protections for the insured. Bad faith was not required but was relevant if shown, as was the vulnerability of the insured if known to the insurer: *Personal Insurance Co. v. Hoang*, [2014] O.J. No. 1383, 2014 ONSC 81 (Div. Ct.), at paras. 64-65. [page79]

(iv) *Differences in remedial powers do not affect the result*

[51] The appellant points out that the remedies the LAT can grant, such as a special award, are different from what a court may award. For example, even if the LAT finds a delay or withholding of benefits that was unreasonable, and in making that determination finds conduct that would at common law amount to bad faith, it could not grant consequential or punitive damages as a court might.[4] The appellant submits that finding that s. 280 bars Ms. Stegenga's claim effectively insulates insurers from claims involving the breach of the duty of good faith in the SABs context, and from the punitive and deterrent effect of the court's remedial powers.

[52] In my view, this remedial difference does not bear on the issue of what types of disputes are captured by the grant of authority to the LAT and the parallel prohibition on court proceedings. The legislature made a choice as to what disputes would be within the exclusive jurisdiction of the LAT, and what remedial powers the LAT would have. That was a policy choice it was entitled to make. The *Insurance Act* and its regulations form a comprehensive scheme for the regulation of insurers and insurance. The legislature must be taken to have armed the LAT with the remedial powers it considered appropriate to deal with improper insurer behaviour, knowing those remedial powers were different from the court's.

(v) *Conclusion on the meaning of the dispute resolution provisions*

[53] Disagreements between an insurer and insured about the SABs the insured should receive, their amount, the timeliness of their provision, and the conduct and process of the insurer in providing them (that is, the handling or administration of the claim) constitute disputes in respect of the insured person's entitlement to SABs or their amount. Put in terms applicable here, an insured person could properly be said to have a dispute falling within s. 280(1) if a benefit the insured considers ought to have been paid or provided was not, or if it was paid or provided but only well after the insured considers it should have been [page80] because of what the insured considers to have been the insurer's inappropriate handling of the claim. These are matters the legislature has empowered the LAT to decide, and has taken away from the court.

Issue 2: A bad faith claim does not automatically fall outside the reach of s. 280

[54] The appellant argues that since bad faith is a standalone cause of action, her claim falls beyond the reach of s. 280. I agree that bad faith can be characterized as a cause of action which is available to a person insured by an insurance contract but is independent of and distinct from a claim for payment or indemnity under the insurance contract. However, it does not follow that this automatically takes the subject matter of a claim, even when characterized as one for bad faith, outside of s. 280.

[55] The following descriptions of the nature of an action for bad faith (all from cases that do not deal with SABs) are useful to analyze the appellant's submission:

(a) An insurer is under a duty of good faith and fair dealing. A breach of the duty of good faith is independent of and in addition to the breach of a contractual duty to pay the insured's loss. It is an actionable wrong, which can support a claim for punitive damages: *Whiten*, at para. 79.

(b) "A breach of the duty to act fairly and in good faith gives rise to a separate cause of action that is distinct from the cause of action founded on the express terms of the policy and that is not restricted by the limits in the policy. Hence it may result in an award of consequential damages distinct from the proceeds payable under the policy"*: Ferme Gérald Laplante & Fils Ltée v. Grenville Patron Mutual Fire Insurance Co.* (2002), 2002 CanLII 45070 (ON CA), 61 O.R. (3d) 481, [2002] O.J. No. 3588 (C.A.), at para. 78.

(c) Statutory conditions in an insurance contract imposing limitation periods for "a claim under [this] contract" or an action "under this contract . . . in respect of the loss or damage to person or property" do not apply to a bad faith claim. A bad faith claim is not a claim for indemnity under the contract: *Dundas v. Zurich Canada* (2012), 109 O.R. (3d) 521, [2012] O.J. No. 1321, 2012 ONCA 181, at paras. 46-49.

[56] In my view, the nature of a bad faith cause of action does not automatically take a claim so denominated outside the reach of s. 280. Section 280 is not limited to claims for breach of a contractual duty to pay SABs, nor to claims *under* an insurance contract. As [page81] explained above, s. 280 also embraces disputes about the manner in which a claim was handled or administered.

[57] Alleging bad faith did not automatically take a claim out of the ambit of the pre-April 2016 SABs dispute resolution provisions. In *Arsenault*, Abella J.A. (as she then was) held that a claim alleging bad faith in the termination of benefits was still subject to the limitation period in former s. 281(5), for two reasons. First, assuming that bad faith could form an independent basis for a claim (as was subsequently confirmed in *Whiten*), Abella J.A. reasoned that the claim fell within the subject matter of the SABs dispute resolution code in the Act, including its limitation period, because the claim required a determination as to whether the insurer's termination of benefits was improper: *Arsenault*, at para. 18. Second, looking at the substance of the claim, rather than its pleaded legal characterization, Abella J.A. also reasoned that the claim was for a determination that the insurer ought not to have terminated benefits when it did. On that basis, it also fell with the dispute resolution code: *Arsenault*, at para. 19.

[58] This court reached a similar result in *Mader v. South Easthope Mutual Insurance Co.* (2014), 123 O.R. (3d) 120, [2014] O.J. No. 4906, 2014 ONCA 714. The insured in that case framed her claims for income replacement benefits and damages as flowing not only from a breach of contract, but also from a breach of the duty of good faith and a conspiracy, and argued that the latter claims were not subject to the mandatory mediation requirement in the previous s. 281(2) of the Act. However, Hourigan J.A. concluded that the claim still fell within the Act's previous dispute resolution code, because "[t] he claims asserted by the appellant all flow from the denial of benefits" and essentially "amount to nothing more than a claim that the appellant was wrongly denied benefits to which she believes that she is entitled to receive": *Mader*, at para. 49. This was precisely the type of claim contemplated for resolution by the Act's former SABs dispute resolution procedure.

[59] I do not accept Ms. Stegenga's submission that the reasoning in these cases is inconsistent with or displaced by the decision in *Dundas*. The bad faith claim in *Dundas* was not covered by the statutory condition imposing a time limit on claims because the condition applied only to claims *under* the policy.[5] As noted, s. 280 is not similarly limited. [page82]

[60] In my view, the amendments to the Act following *Arsenault* and *Mader* do not affect their continued applicability. The language considered in those cases, "[d]isputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled", remains virtually the same.[6] The legislature preserved that language in the face of the broad interpretation the courts had given to it, of which the legislature is presumed to have been aware: *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, [2006] S.C.J. No. 4, 2006 SCC 4, at para. 59; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014), at p. 205. Only the consequences of a dispute coming within that definition have changed. Court proceedings were previously available following mandatory mediation, and within a certain limitation period; now they are not. That consideration does not prevail over the fact that the operative language remains the same. *Arsenault* and *Mader* continue to be applicable to the current s. 280(1).

[61] It is not the type of legal claim, whether bad faith or otherwise, which determines whether s.280 applies. As I explain below, it is the nature and subject matter of the dispute, assessed on the basis of the facts that give rise to it, that are determinative.

Issue 3: Application to the appellant's claim

[62] The approach taken by the Supreme Court in *Weber v. Ontario Hydro*, *supra*, applies to determine whether the Act has removed a dispute from the court's jurisdiction in favour of the LAT's jurisdiction. In *Weber*, McLachlin J. (as she then was) held that the facts giving rise to a dispute, rather than the legal characterization of a dispute, determined whether that dispute had been removed from the court's jurisdiction by the mandatory arbitration clause in s. 45(1) of the former *Labour Relations Act*, R.S.O. 1990, c. L.2: *Weber*, at para. 49. If the legal characterization of the claim were determinative, clever pleading could defeat the [page83] object of the legislature's prohibition on parallel court proceedings: *Weber*, at para. 49.

[63] As in *Weber*, the wording of the *Insurance Act* removing jurisdiction from the court and conferring it on the LAT indicates that the facts giving rise to the dispute determine which forum has jurisdiction over the dispute. In *Weber*, McLachlin J. noted that the mandatory arbitration provision in the *Labour Relations Act* "refers to 'all *differences* between the parties arising from the interpretation, application, administration or alleged violation of the agreement'": *Weber*, at para. 45 [emphasis in original]. She reasoned that the word "differences" denoted the *dispute* between the parties, rather than the type of legal claim one party might be able to bring against another. The legislature intended to exclude all proceedings arising from disputes of a certain character between the parties, "however those proceedings may be framed": *Weber*, at para. 45. The same reasoning applies here: s. 280 of the *Insurance Act* is not framed in terms of legal characterizations, but refers directly to disputes.

[64] At their core, the facts alleged in Ms. Stegenga's statement of claim are about the insurer's failure to provide the benefits to which Ms. Stegenga was entitled; the insurer's delay in providing benefits, its withholding of benefits, and the circumstances in which that occurred; and the insurer's conduct and process in handling the claim for benefits and dealing with Ms. Stegenga and her family, all of which caused or contributed to Ms. Stegenga not receiving "the care, treatment, and benefits to which she was entitled and should have received". These facts demonstrate that Ms. Stegenga's action, "viewed with an eye to its essential character", is a dispute "in respect of" her entitlement to SABs and their amount: *Weber*, at para. 67. It falls within s. 280.

[65] Ms. Stegenga's entitlement to benefits and the insurer's non-provision of benefits recurs as a theme in her pleading. If the court action were allowed to proceed, the benefits to which Ms. Stegenga was entitled, their amount and when they ought to have been provided would have to be determined as a predicate to determining whether the insurer's withholding or delay in providing benefits -- its handling of the claim -- gave rise to an actionable wrong such as bad faith. Those

same determinations would have to be made in order to decide whether the insurer made actionable misleading statements. But those predicate determinations are within the LAT's jurisdiction. In intending to enact a cost-effective and efficient dispute resolution scheme, the legislature did not intend both the LAT and the court to determine the same questions on the path to granting different relief. [page84]

[66] It does not matter that the LAT would look at the facts through the lens of unreasonableness, while a court would do so through the lens of bad faith. It is not the legal characterization of the claim but the facts giving rise to the dispute that are determinative.

[67] The facts giving rise to Ms. Stegenga's dispute with the insurer relate to her entitlement to benefits or to the amount of her entitlement, as those terms are used in s. 280(1): they are connected to the category of SABs to which she was entitled, and to the proper amount of her entitlement, and they relate to the insurer's handling of the claim. Because these matters are covered by the broad language in s. 280(1), they are within the LAT's jurisdiction under s. 280(2), and are thus within the ambit of the s. 280(3) prohibition on court proceedings. The LAT is specifically empowered to grant relief for claims like Ms. Stegenga's; the court is barred from doing so.

CONCLUSION

[68] In my view, the motion judge reached the correct conclusion. Ms. Stegenga's action is barred by the dispute resolution provisions of the *Insurance Act*. I would dismiss the appeal.

[69] The respondent is entitled to the costs of the appeal in the sum of $7,500, inclusive of disbursements and applicable taxes.

Appeal dismissed.

Notes

1 Appeals from or applications for judicial review of LAT decisions can be brought in court: s. 280(3).

2 Whether claims for extracontractual damages such as punitive damages fall outside of those provisions was the subject of some commentary shortly after they came into force: see Philippa G. Samworth, "AABS and SABS: The Evolving World of Ontario Statutory Accident Benefits in 2016" (2017), 46 Advoc. Q 1.

3 The prior version of s. 280(1), defining the scope of the dispute resolution provisions' application, read as follows: "Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the Statutory Accident Benefits Schedule": Insurance Act, R.S.O. 1990, c. I.8, s. 279(1) as it appeared on March 31, 2016.

4 Prior to the 2016 amendments, a court hearing a SABs entitlement dispute could also grant damages for mental distress to the SABs claimant: McQueen v. Echelon General Insurance Co. (2011), 107 O.R. (3d) 780, [2011] O.J. No. 4563, 2011 ONCA 649, at paras. 19, 65, 75.

5 Ms. Stegenga relies on three other cases that are similarly distinguishable: L'Espérance v. Economical Mutual Insurance Group (2014), 122 O.R. (3d) 773, [2014] O.J. No. 5135, 2014 ONSC 6293 (S.C.J.); Johnston v. Wawanesa Mutual Insurance Co., [2006] O.J. No. 3037, 2006 CarswellOnt 4528 (S.C.J.); and St. Denis v. TD Insurance Home and Auto Liberty Insurance Co. of Canada (2005), 2005 CanLII 37593 (ON SC), 80 O.R. (3d) 706, [2005] O.J. No. 4441 (S.C.J.). They are not SABs claims. Further, like Dundas, they involve limitation periods that are only applicable to claims "under" or "under or by virtue of" the relevant insurance policy: L'Espérance, at paras. 14, 25; Johnston, at paras. 2, 32; St. Denis, at para. 17.

2780 6 The word "any" has been changed to "an": see Insurance Act, R.S.O. 1990, c. I.8, s. 279(1), as it appeared on March 31, 2016.

End of Document

Tab 126

CanLII

Rosen v. Ontario (Attorney General), 1996 CanLII 443 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1996-01-17
File number:	c21206
Other citations:	131 DLR (4th) 708 — 60 ACWS (3d) 723 — 87 OAC 280 — 34 CRR (2d) 84 — [1996] OJ No 100 (QL)
Citation:	Rosen v. Ontario (Attorney General), 1996 CanLII 443 (ON CA), <https://canlii.ca/t/6j71>, retrieved on 2026-01-18
Most recent unfavourable mention	R. v. Mader's Tobacco Store Ltd., 2010 NSPC 52 (CanLII) [...] [23] I am satisfied that **Rosen and Greenbaum are clearly distinguishable** from the case at bar. [...]

File No.

C21206

COURT OF APPEAL FOR ONTARIO

FINLAYSON, DOHERTY and AUSTIN JJ.A.

B E T W E E N :	)	
LARRY ROSEN and SAV-ON DRUGS LIMITED	)	**Edward M. Morgan and Lawrence E. Thacker**
Applicants (Appellants)	)	**for the appellants**
- and -	)	**Robert E. Charney**
THE ATTORNEY GENERAL OF ONTARIO	)	**for the respondent**
Respondent (Respondent)	)	**Peter A. Downard and Richard B. Swan**
- and -	)	**for the intervenors**
THE CANADIAN CANCER SOCIETY (ONTARIO	)	

products is bad for one's health. This argument cannot succeed. It comes down to the assertion that, by obeying a law, one is communicating one's support for the message inherent in the purpose underlying the law. If this proposition is accepted, then compliance with virtually any law becomes a form of expression. I adopt the assertion of the Crown that freedom of expression guarantees our right to express disagreement with government regulation; it does not guarantee the right to be free from government regulation with which we disagree.

I cannot accept the argument that observance of this *Act*, whatever its intended purpose, somehow conscripts the appellants into a campaign to educate the public about the health hazards associated with smoking. The *Act* does not change the law-abiding pharmacist into a spokesperson for those who think that pharmacists and other health care professionals should not appear to endorse tobacco products. Nothing in the *Act* prevents an individual pharmacist or any group of pharmacists from, for example, putting up signs stating that they no longer sell tobacco products because they are prohibited from doing so by legislation which they feel is unnecessary and will result in increased costs of pharmaceutical products and reduced hours of service.

In my opinion, s.4 of the *Act* neither compels the appellants to communicate any message regarding the consumption or sale of tobacco products, nor constrains them from expressing their opinions on the subject. It simply prohibits them from selling such products in an accredited pharmacy. In the court below, Boland J. concluded her comprehensive reasons with the following observation:

> The applicants are still free to express whatever opinions they may have with regard to the consumption or sale of tobacco.

The appellants are free to speak their minds on the topic of the sale of tobacco products in pharmacies. They may speak their minds when and how they wish to do so. The appellant

Tab 127

Tab 127

CanLII

Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395

Source:	Supreme Court of Canada
Date:	2012-03-22
File number:	33594
Other citations:	343 DLR (4th) 193 — 428 NR 146 — 211 ACWS (3d) 852 — AZ-50841558 — [2012] EXP 1231 — 255 CRR (2d) 289 — 34 Admin LR (5th) 1 — EYB 2012-203967 — JE 2012-672 — [2012] SCJ No 12 (QL) — [2012] ACS no 12
Citation:	Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395, <https://canlii.ca/t/fqn88>, retrieved on 2026-01-18
Most recent unfavourable mention	S.C. c. Société de l'assurance automobile du Québec (SAAQ), 2022 QCCA 1615 (CanLII) [...] [45] L'appelant plaide que l'arrêt **Doré doit être écarté** parce que le TAQ n'était pas limité ici à une application des valeurs consacrées dans la Charte canadienne à l'occasion d'une décision discrétionnaire. [...]

SUPREME COURT OF CANADA

CITATION: Doré *v.* Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

DATE: 20120322
DOCKET: 33594

BETWEEN:

Gilles Doré
Appellant
and

Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec, Tribunal des professions and Attorney General of Quebec
Respondents
- and -
Federation of Law Societies of Canada, Canadian Civil Liberties Association and Young Bar Association of Montreal
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 72)	Abella J. (McLachlin C.J. and Binnie, LeBel, Fish, Rothstei n and Cromwell JJ. concurring)

Doré *v.* Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

Gilles Doré *Appellant*

v.

Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec, Tribunal des professions and Attorney General of Quebec *Respondents*

and

Federation of Law Societies of Canada, Canadian Civil Liberties Association and Young Bar Association of Montreal *Interveners*

Indexed as: Doré *v.* Barreau du Québec

2012 SCC 12

File No.: 33594.

2011: January 26; 2012: March 22.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of review — Disciplinary council — Lawyer challenging constitutionality of council's decision — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether framework developed in R. v. Oakes appropriate to determine if discretionary administrative decisions comply with Canadian Charter of Rights and Freedoms.

Law of professions — Discipline — Barristers and solicitors — Lawyer writing private letter to judge and criticizing him — Disciplinary council finding lawyer in breach of duty to behave with objectivity, moderation and dignity and reprimanding him — Whether council properly balanced relevant Charter values with statutory objectives — Whether decision reasonable — Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, art. 2.03.

D appeared before a judge of the Superior Court of Quebec on behalf of a client. In the course of D's argument, the judge criticized D. In his written reasons rejecting D's application, the judge levied further criticism, accusing D of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. D then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks.

The Assistant Syndic of the Barreau du Québec filed a complaint against D based on that letter alleging that D had violated art. 2.03 of the *Code of ethics of advocates*, which states that the conduct of advocates "must bear the stamp of objectivity, moderation and dignity". The Disciplinary Council of the Barreau du Québec found that the letter was likely to offend, rude and insulting, that the statements had little expressive value, and that the judge's conduct, which resulted in a reprimand from the Canadian Judicial Council, could not be relied on as justification for it. The Council rejected D's argument that art. 2.03 violated s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, finding that the limitation on freedom of expression was reasonable. Based on the seriousness of D's conduct, the Council reprimanded D and suspended his ability to practice law for 21 days. On appeal to the Tribunal des professions, D abandoned his constitutional challenge to the specific provision, arguing instead that the sanction itself violated his freedom of expression. The Tribunal found that D had exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction D was a minimal restriction on his freedom of expression. On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal.

Before the Quebec Court of Appeal, D no longer appealed the actual sanction of 21 days, challenging only the decision to reprimand him as a violation of the *Charter*. The Court of Appeal applied a full *Oakes* analysis under s. 1 of the *Charter* and upheld the reprimand. It found that D's letter had limited importance compared to the values underlying freedom of expression, that the Council's decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives.

Held: The appeal from the result should be dismissed.

To determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach, not a s. 1 *Oakes* analysis. The standard of review is reasonableness.

In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right

at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. But in assessing whether an adjudicated decision violates the *Charter*, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

There is nothing in the administrative law approach which is inherently inconsistent with the strong protection of the *Charter*'s guarantees and values. An administrative law approach recognizes that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of constitutional guarantees and the values they reflect. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case. Under a robust conception of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.

When applying *Charter* values in the exercise of statutory discretion, an administrative decision-maker must balance *Charter* values with the statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both

contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Here, the decision to suspend D for 21 days was not before the Court. The only issue was whether the Council's decision to reprimand D reflected a proportionate balancing of the lawyer's expressive rights with its statutory mandate to ensure that lawyers behave with "objectivity, moderation and dignity" in accordance with art. 2.03 of the *Code of ethics*. In dealing with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular. We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. The fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not, however, argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always

easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. Such criticism, even when it is expressed vigorously, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, D's letter was outside those expectations. His displeasure with the judge was justifiable, but the extent of the response was not.

In light of the excessive degree of vituperation in the letter's context and tone, the Council's decision that D's letter warranted a reprimand represented a proportional balancing of D's expressive rights with the statutory objective of ensuring that lawyers behave with "objectivity, moderation and dignity". The decision is, as a result, a reasonable one.

Cases Cited

Discussed: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3

Tab 128

CanLII

Labour Relations Board v. The Queen, 1955 CanLII 82 (SCC), [1956] SCR 82

Source:	Supreme Court of Canada
Date:	1955-11-15
Other citation:	[1955] 5 DLR 607
Citation:	Labour Relations Board v. The Queen, 1955 CanLII 82 (SCC), [1956] SCR 82, <https://canlii.ca/t/22tq4>, retrieved on 2026-01-18

Supreme Court of Canada
Labour Relations Board v. The Queen, [1956] S.C.R. 82
Date: 1955-11-15

The Labour Relations Board of Saskatchewan (*Respondent*) *Appellant*;

and

Her Majesty The Queen on The Relation of F. W. Woolworth Company Limited and Agnes Slabick *et al.* (*Applicants*) *Respondents*;

and

Saskatchewan Joint Board, Retail, Wholesale And Department Store Union. *Intervenant.*

1955: May 9, 10; 1955: November 15.

Present: Kerwin C.J., Kellock, Estey, Locke and Cartwright JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Labour—Mandamus—Right of employees to seek decertification of union— Union's failure to conclude collective agreement—Whether right affected by moral and financial help from employer—Duty of Labour Board—Trade Union Act, R.S.S. 1953, c. 259, ss. 3, 5, 14, 26.

The intervenant union was, in January, 1953, certified as bargaining agent for the employees of the respondent company but failed to conclude a collective agreement. In June, 1953, an application for decertification made by some employees, claiming to be a majority, was dismissed as premature by the appellant, the Labour Relations Board. A second application, made in December, 1953, by 13 out of the 19 employees of the company, was also rejected on the grounds that it (1) was an application of the

employees in form only, being in reality made on behalf of the company and (2) was not shown to be supported by a majority of the employees. The company joined the employees in their application before the Court of Appeal for a writ of mandamus which was ordered issued directing the Board to proceed to determine the application for decertification. The Board appealed to this Court.

Held: The appeal should be dismissed.

It was conclusively established by the evidence that the application had been made and supported by a majority of the employees.

The rights of employees, under s. 3 of the *Trade Union Act,* to bargain collectively through representatives of their own choosing are not forfeited if the employees receive help from their employer in asserting those rights. The evidence furthermore directly contradicted the statement that the employees had received financial help from their employer.

In view of the union's failure to negotiate an agreement with the employer, the right of the employees to choose another representative was not suspended nor affected.

[Page 83]

Although the language in s. 5 of the Act, by which the Board was given power to rescind or amend its orders or decisions, was permissive, it imposed a duty upon the Board to exercise this power when properly called upon to do so. *(Drysdale* v. *Dominion Coal Co.* (34 Can. S.C.R. 336) and *Julius* v. *Lord Bishop of Oxford* (5 A.C. 243) referred to).

The rejection of the application was made on grounds which were wholly irrelevant and amounted to a refusal on the part of the Board to perform its duties under the Act to deal with the statutory rights of the employees, which were not affected by any disputes between the employer and the union.

APPEAL from the judgment of the Court of Appeal for Saskatchewan [1], Martin C.J.A. and Culliton J.A. dissenting, ordering the Labour Relations Board to consider an application for decertification.

F. A. Brewin, Q.C. and *R. C. Carter* for the appellant.

E. D. Noonan, Q.C. for the respondent F. W. Woolworth Co. Ltd.

G. Taylor for the intervenant.

The judgment of the Court was delivered by:—

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal of Saskatchewan [2], directing that a peremptory writ of *mandamus* do issue directed to the appellant, the Labour Relations Board of that province, ordering it to proceed to determine the application of the respondents, employees of the F. W. Woolworth Company Limited in the City of Weyburn, for the decertification of the Saskatchewan Joint Board, Retail, Wholesale and Department Store Union (hereinafter referred to as the union) as their bargaining agents. The Chief Justice of Saskatchewan and Culliton, J.A. dissented and would have dismissed the application. The respondent company joined with its said

employees in applying to the Court of Appeal for the writ. The union was permitted to intervene in the appeal to this Court.

The Saskatchewan Labour Relations Board is a body composed of seven members appointed by the Lieutenant Governor in Council under the provisions of the *Trade Union Act* (c. 259, R.S.S. 1953). S. 3 of that Act declares the rights of employees (a term defined in s. 2) to bargain

[Page 84]

collectively through representatives of their own choosing and that the representatives selected for that purpose shall be the exclusive representatives of all employees in the unit of employees for such purpose. By s. 5 the Board is given power to make orders determining what trade union, if any, represents the majority of employees in an appropriate unit of employees and requiring an employer to bargain collectively. Among other powers vested in the Board by this section is that of rescinding or amending any of its own orders or decisions. S. 6 provides that in determining what trade union, if any, represents a majority of employees in an appropriate unit the Board may, in its discretion, direct a vote to be taken by secret ballot of all employees eligible to vote to determine the question. Other sections of the Act declare that certain specified acts shall constitute unfair labour practices on the part of any employer or employers agent, these including the failure or refusal to bargain collectively with the representatives elected or appointed by a trade union representing the majority of the employees in an appropriate unit, and penalties are prescribed for the commission of any such practice. S. 17 provides that there shall be no appeal from any order or decision of the Board under the Act and that its orders shall not be reviewable by any court of law or by any *certiorari, mandamus,* prohibition, injunction or other proceeding whatever.

On January 13, 1953, on the application of the respondent union, the Board made an order finding that the employees of the respondent company at Weyburn, except the Manager and Assistant Manager, constituted an appropriate unit of employees for the purpose of bargaining collectively and that the applicant represented the majority of such employees and directed the respondent company to bargain collectively with the duly appointed or elected representatives of the union in respect to the employees in the unit.

On June 9, 1953, nine of the employees of the respondent company, asserting that they were the majority of the employees, applied to the Board for an order to rescind the order of January 13, 1953, on the ground that the union was not supported by a majority of the employees in the store. This application came on for hearing before the Board on July 21, 1953 and, being opposed by the union, was dismissed on the ground that the application was premature.

[Page 85]

On December 9, 1953 a second application was filed with the Board to rescind the order of January 13, 1953 by thirteen of nineteen employees of the respondent company at Weyburn, the grounds for the application being the same as those advanced in support of the application made in the previous June. While the employees were residents of Weyburn, the application was first heard on January 5, 1954 at Saskatoon, and adjourned at the request of the union to Regina where a hearing was held and evidence taken *viva voce* on February 9 and 10, 1954. The Board reserved its decision which was subsequently delivered on March 9, 1954 dismissing the application.

Three of the seven members of the Board agreed with the reasons for the decision delivered by the Chairman. Three other members disagreeing would have directed the taking of a vote under the powers given to the Board by s. 6 to determine the wishes of the majority of the employees.

The reasons for the decision of the majority were: firstly, that the application was that of the employees in form only, being in reality made on behalf of the company, and secondly, that it was not shown to be supported by a majority of the employees.

As pointed out in the reasons for judgment delivered by Mr. Justice Gordon, no attempt was made in the Court of Appeal to support the second of these grounds, it being common ground that the majority of the employees had supported the application, and no attempt was made to support that finding on the argument before us. On this aspect of the matter, it may be added that the fact that the application was made and supported by a majority of the employees, as that term is defined in s. 2(5) of the Act, was conclusively established by the evidence.

As to the first of the grounds upon which the decision of the majority was based, the reasons delivered by the Chairman commenced with the following statement:—

> In the light of the evidence adduced the majority of the Board is satisfied that but for the moral and financial help of the employer neither of the two applications for decertification would ever have been brought.

As this statement indicates, the majority of the Board misconceived the nature of the rights given to the employees by s. 3 of the Act, they being of the opinion that if, in endeavouring to assert those rights, they received help from

[Page 86]

their employer those rights were forfeited. It is also not irrelevant to point out that all of the evidence referred to directly contradicts the statement that the employees received financial help from their employer in making either of the applications, even if doing so would have affected the employees' rights. I do not know what the expression "moral help" was intended to convey. If it was intended to indicate that the employer was sympathetic to the desire of the majority of its employees to rid themselves of an

unsatisfactory bargaining representative, I am quite unable to understand how that fact could affect the employees' rights.

As I have pointed out, s. 3 vests in employees the right to' bargain collectively with their employer through representatives of their own choosing. S. 26 declares that where a collective bargaining agreement has been entered into it is to remain in force for a period of one year from its effective date and thereafter from year to year unless terminated in the manner prescribed by that section. A trade union claiming to represent a majority of employees other than the union which has negotiated the agreement may, not less than thirty nor more than sixty days before the expiry of the agreement, apply to the Board for an order determining it to be the trade union representing the majority of the employees in the unit.

The Act does not otherwise define the time or restrict the manner in which the rights given to the employees by s. 3 may be exercised.

The union, for reasons which are irrelevant in determining the rights of the employees, had failed to negotiate an agreement with the employer and the right of the employees to choose another representative was thus neither suspended nor affected.

The language of s. 5, in so far as it affects this aspect of the matter, reads:—

> 5. The board shall have power to make orders:—
>
> . . . . . .
>
> (i) rescinding or amending any order or decision of the board.

While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having

[Page 87]

the right to make the application (*Drysdale* v. *Dominion Coal Company* [3] : Killam J.). Enabling words are always compulsory where they are words to effectuate a legal right (*Julius* v. *Lord Bishop of Oxford* [4]: Lord Blackburn).

By s. 14 of the Act the Board, subject to the approval of the Lieutenant Governor in Council, may make such rules and regulations not inconsistent with the Act as are necessary to carry out its provisions according to their true intent. The rules made pursuant to this power are in the record and contain nothing defining the time within which the rights of the employees given by s. 3 may be exercised. The right of the employees to choose a new bargaining representative in circumstances such as existed in the present case must, no doubt, be exercised in a reasonable manner. If, after the order of January 13, 1953 was made, the employees had applied to substitute some other bargaining representative for the union before that body had had a reasonable opportunity to

negotiate a collective agreement with the employer, the Board could undoubtedly, in my opinion, defer consideration of the matter until a reasonable time to effect that object had elapsed and no court could properly intervene. This, however, is not such a case and the application was not rejected on any such ground. The application with which we are concerned was not made until some eleven months had elapsed after the order sought to be rescinded had been made. The majority of the employees clearly did not wish this union to bargain on their behalf, for reasons which need not be enquired into, being entirely the concern of the employees themselves. It was the duty of the Board to hear the employees' application and to give effect to their statutory rights. While the Board considered the application, it was rejected upon grounds which were wholly irrelevant.

In my opinion, the manner in which the employees' application was dealt with amounted to a refusal on the part of the Board to perform the duties cast upon it by the sections of the *Trade Union Act* to which I have referred.

The majority of the Board, concerning themselves with what they considered to be the merits of the various disputes between the employer and the union, appear to have

[Page 88]

lost sight of the fact that their duty was to deal with the statutory rights of the employees, which were not affected by the fact that there had been such disputes.

I would dismiss this appeal with costs to be paid by the appellant to the respondents, except that the appellant should be paid by the respondents its costs of the day on the adjournment of this appeal on February 16, 1955. There should be no costs to or against the intervenant.

Appeal dismissed with costs.

Solicitor for the appellant: *R. C. Carter.*
Solicitor for the respondent F. W. Woolworth Co. Ltd: *A. W. Embury.*
Solicitors for the respondents A. Slabick *et al.*: *Robinson, Robinson & Alexander.*
Solicitors for the intervenant Union: *Goldenberg & Taylor.*

---

[1] 1954 CanLII 197 (SK CA), [1954] 4 D.L.R. 359; 13 W.W.R. (N.S.) 1.
[2] 1954 CanLII 197 (SK CA), [1954] 4 D.L.R. 359; 13 W.W.R. (N.S.) 1.
[3] (1904) 1904 CanLII 57 (SCC), 34 Can. S.C.R. 328 at 336.
[4] (1880) 5 A.C. 214 at 243.

Tab 129

SUPREME COURT OF NEW BRUNSWICK.

(APPELLATE DIVISION.)

N.B.
1935.
Sept. 10.

EX PARTE ALGERNON McSWEENEY.

Before BAXTER, C.J., GRIMMER and LEBLANC, JJ.

1935 CanLII 483 (NB CA)

1935. June 18. *J. E. H. Teed*, K.C., and *T. T. Goodwin*, K.C., for the Board of Assessors of the City of Moncton, to show cause against an order nisi for *mandamus*.

Writ of *mandamus* is discretionary and is not granted merely because the applicant requests it, even though there is some public right in which the applicant might be interested and which he might desire the Court to enforce. *The Queen v. The Church Wardens of All Saints et al.* (1876), 1 App. Cas. 611. If the motive of the applicant is spite or revenge *mandamus* will be refused. *Ex parte Swim* (1921), 49 N.B.R. 207.

G. F. G. Bridges, for applicant, *contra*.

As to good faith see: *Ex parte Gallagher* (1912), 44 N.B.R. 545. This application was made in good faith and the fact that the City treasury was enriched by $6,000 is evidence of that. In order to show improper motive, some affidavit should have been produced to show animosity on the part of the applicant towards the T. Eaton Co. (Maritimes) Limited. If discretion has been wrongfully exercised, this Court can and will interfere.

Cur. Adv. Vult.

1935. September 10. The following judgments were now delivered:

BAXTER, C.J.:—In June Term a rule *nisi* was granted ordering the City of Moncton to shew cause why a writ of *mandamus* should not issue directed to the Board of Assessors of the City of Moncton and the City Council of the City of Moncton, commanding the Board of Assessors of the City of Moncton—

"(a) To properly assess the T. Eaton Co. (Maritimes) Limited for the years 1933 and 1934 on income earned during the years 1932 and 1933 as provided in the City of Moncton Assessment Act.

(b) Or to employ a Chartered Accountant on the recommendation of the City Council of the said City of Moncton for the purpose of verifying the tax returns made by the said T. Eaton Co. (Maritimes) Limited in the years 1933 and 1934 as to income earned in the years 1932 and 1933 and purporting to be made under the City of Moncton Assessment Act, and to proceed to properly assess the said T. Eaton Co. (Maritimes) Limited for the years 1933 and 1934 on income earned during the years 1932 and 1933 if the said Company has shown a taxable income for the said years, and commanding the said City Council to recommend a Chartered Accountant to the said Board of Assessors of the City of

1935 CanLII 483 (NB CA)

N.B.
1935.
EX PARTE ALGERNON McSWEENEY.

Moncton for the purpose of verifying the said tax returns of the said T. Eaton Co. (Maritimes) Limited made in the years 1933 and 1934 as to income earned in the years 1932 and 1933, in accordance with the provisions of Section 29 of the City of Moncton Assessment Act."

Baxter, C.J.

If a *mandamus* were granted it would only direct the City Council and the assessors to proceed according to law. "The Court does not by *mandamus* direct either justices or any public body or anybody else upon whom a duty is cast, how and in what manner they are to perform their duty. They simply direct them by *mandamus* to perform their duty." Per Channell, J., in *Rex v. Justices of Kingston; Ex parte Dwyer* (1902), 86 L.T., at p. 691. On the first branch of the rule, therefore, were we to make it absolute, the direction would have to be to the assessors to make an assessment but not to make it in respect of any particular thing or in any specific manner. But the assessors, whether they have acted rightly or wrongly, have already made an assessment against the Company and by virtue of the powers contained in sec. 31 of the Moncton Assessment Act have amended that assessment by making a supplementary levy in respect of income. There is, therefore, an existing assessment against the Company. In *Ex parte Nash* (1850), 15 Q.B. 92, at p. 95, Lord Campbell, C.J., says with reference to *mandamus*: "We grant it when that has not been done which a statute orders to be done; but not for the purpose of undoing what has been done. We may, upon an application for a *mandamus*, entertain the question whether a corporation, not having affixed its seal, be bound to do so; but not the question whether, when they have affixed it, they have been right in doing so". In the present case the applicant might have applied to quash the assessment on *certiorari*, but he did not do so. The assessors' answer to the writ of *mandamus* would be that they had already made an assessment and that would, I think, be sufficient.

The other branch of the rule applied for is that the Board of Assessors be directed to employ a chartered accountant on the recommendation of the City Council for the purpose of verifying

1935 CanLII 483 (NB CA)

N.B.
1935.
EX PARTE ALDERSON McSWEENEY.
Baxter, C.J.

the tax returns of the Company as to income earned in the years 1932 and 1933. This raises the question of whether or not sec. 29 of the Assessment Act vests a discretion in the City Council or whether an absolute duty is imposed, where a taxpayer has made a statutory declaration of his belief that any return made pursuant to the Act is substantially incorrect. The material portion of sec. 29 is as follows:

"Should any Assessor or taxpayer have reason to believe that any return made pursuant to this Act is substantially incorrect and makes a statutory declaration of such belief, the Assessors, on the recommendation of the City Council shall, thereupon for the purpose of verifying any such return employ a chartered accountant; and for the purpose of such verification the books and papers of the taxpayer shall be open to the examining officer, or shall be produced for the purpose upon a summons, which the Assessor or examining officer is hereby authorized to issue."

There is no doubt that, if the City Council makes a recommendation, there is an absolute duty upon the assessors to employ a chartered accountant for the purposes specified, but the question remains whether there is any such absolute duty cast upon the council to make the recommendation. There is no language used which, so far as I can see, imposes a duty upon the City Council and I think as a matter of common sense that it would be most remarkable if that body were obliged by law in every case where a taxpayer filed a statutory declaration of his belief to incur the expense, which might be considerable, of an investigation into some other taxpayer's affairs. Surely it can not be contended that this is to be of universal application and if it is not, then there must be a discretion vested in the Council. If discretion exists, *mandamus* will not go.

The words of the section confer a power. One applicant in asking its exercise may furnish in his statutory declaration reasons for his belief. Another may limit his statement to his belief without giving any reasons which are not required by the section. Under such circumstances are we to conclude that the filing of a complaint automatically puts the machinery of investigation in

1935 CanLII 483 (NB CA)

2805

N.B.
1935.
EX PARTE ALGERNON McSWEENEY.
LeBlanc, J.

motion and that the City Council has no discretion in the matter? What is the object of interposing the City Council as a body which must make a recommendation before the assessors can act? And why must the recommendation of the City Council be obtained even though the complaint is made by one of the assessors? Surely it must be that that body, vested as it is with the "administration of the fiscal, prudential and municipal affairs" of the city (1890, ch. 6, sec. 4) has some discretion as to whether the city should be put to the cost of every investigation which is demanded. But it is said that the City Council have not exercised a proper discretion in this instance. I agree that the matter is one of considerable public importance. It is evident that the applicant seeks to raise the question as to the liability of the Eaton Company to taxation upon its mail order business the goods for which are supplied from its depot in Moncton. Nevertheless if discretion exists it is not for us to criticize its exercise. We cannot command the City Council to exercise its discretion in a particular way. *The King* v. *The Army Council; Ex parte Ravenscroft*, [1917] 2 K.B. 504, at p. 510, 86 L.J.K.B. 1087, 117 L.T. 306, per Viscount Reading, C.J., and to the same effect per Ridley, J., at pp. 512-3. The case, to my mind, falls squarely within the decision of *Julius* v. *Oxford* (1880), 5 App. Cas. 214, where at p. 244 Lord Blackburn says: "The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right". No legal right to anything has been shown in the applicant here. He may have an interest, but it is an interest in common with all the taxpayers of the city the administration of whose fiscal affairs is vested in the City Council. When the test of Lord Penzance (p. 233) is applied: Does the nature of the subject exclude the intention of conferring a discretion? I am of opinion that the answer must be in the negative.

The rule must therefore be discharged.

LEBLANC, J.:—This is an application for a writ of *mandamus* to issue directed to the Board of Assessors of the City of Moncton

1935 CanLII 483 (NB CA)

and to the City Council of the City of Moncton to command the Board of Assessors of the City of Moncton—

(a) To properly assess the T. Eaton Co. (Maritimes) Limited, for the years 1933 and 1934 on income earned during the years 1932 and 1933, as provided in the City of Moncton Assessment Act.

(b) Or to employ a chartered accountant on the recommendation of the City Council of the said City of Moncton for the purpose of verifying the tax returns made by the said T. Eaton Co. (Maritimes) Limited in the years 1933 and 1934 as to income earned in the years 1932 and 1933 and purporting to be made under the City of Moncton Assessment Act, and to proceed to properly assess the said T. Eaton Co. (Maritimes) Limited for the years 1933 and 1934 on income earned during the years 1932 and 1933 if the said company has shown a taxable income for the said years.

The matter comes before this Court upon a rule *nisi* granted by this Court on the 5th day of June last.

On the 11th day of March, A.D. 1935, Algernon E. McSweeney, acting under the provisions of sec. 29 of the City of Moncton Assessment Act, being 11 George V. (1921), ch. 56, filed with the Board of Assessors of the City of Moncton a statutory declaration setting out that he did reasonable grounds for believing and did believe that the said T. Eaton Co. (Maritimes) Limited had filed with the said Board of Assessors returns for the years 1930 to 1934 inclusive covering income earned for the years 1929 to 1933 inclusive purporting to be made under the said Moncton Assessment Act, which returns were substantially incorrect as to income. He demanded of the said Board of Assessors that they employ a chartered accountant in accordance with the provisions of the said sec. 29 of the City of Moncton Assessment Act for the purpose of verifying the returns of the said T. Eaton Co. (Maritimes) Limited for the years 1930 to 1934 inclusive as to income, and that the said Board obtain the recommendation of the City Council for that purpose and proceed to assess the said T. Eaton

1935 CanLII 483 (NB CA)

N.B. 1935.

EX PARTE ALDERMON McSWEENEY.

LeBlanc, J.

Co. (Maritimes) Limited on income for the years in question if an income were earned.

Mr. McSweeney appeared before the City Council of the City of Moncton at the regular meeting of the Council when the Mayor and Aldermen were present on the 11th day of March, A.D. 1935, and addressed the City Council demanding that the said Board of Assessors should employ a chartered accountant to verify the returns as to the income of the said T. Eaton Co. (Maritimes) Limited filed with the said Board for the said years and that the City Council proceed at once to recommend a chartered accountant.

The City Council referred the matter to the Finance Committee. After a good deal of discussion and after Mr. McSweeney had appeared again before the Council urging it to instruct the Board of Assessors to employ an accountant to examine the books of the T. Eaton Co. (Maritimes) Limited, the City Council adopted, by a majority of its members, the resolution of the Finance Committee refusing to instruct the Board of Assessors to employ any accountant for the purpose aforesaid.

During the progress of the deliberations the T. Eaton Co. (Maritimes) Limited paid to the City of Moncton on the 11th day of May, 1935, the sum of $6,616.98, which it was willing to treat as assessable for the years 1933 and 1934.

The money thus paid by the T. Eaton Co. (Maritimes) Limited was so paid for what it contends is taxable upon its retail trade in the City of Moncton. The Company maintains that its income on the mail orders of goods shipped from Moncton is not subject to taxation. It bases this contention upon some understanding it had with the Chairman of the Board of Assessors some time in 1918. There is no legislation on the point. All taxes in Moncton are assessable under the Assessment Act and the T. Eaton Co. (Maritimes) Limited has not been exempted by law from taxation.

In his solemn declaration of the 15th of February last, presented to the City Council in March, Mr. McSweeney gives the source of his information and the reason for his belief. The infor-

1935 CanLII 483 (NB CA)

N.B.
1935.
EX PARTE ALGERNON McSWEENEY.
LeBlanc, J.

mation was obtained from the reports of the auditors employed by the Price Spreads Committee of the House of Commons regarding the business of T. Eaton Co. (Maritimes) Limited.

Counsel for the City of Moncton took the ground that the application was not made in good faith and urged the fact that other concerns in the City of Moncton were escaping taxation in the same way as the T. Eaton Co. (Maritimes) Limited. It is fair to assume that the counsel for the City took his instructions from his clients, the City Council. They can complain only with very bad grace if Mr. McSweeney has not gone after all the tax-evaders at the one time, assuming that their counsel's contention is correct.

Mr. McSweeney has complied with the requirements of the Act and nothing has been put forward to sustain the contention of bad faith. The serious point is whether or not the City Council of the City of Moncton has any discretion in the matter. If they have, the matter is settled by the House of Lords in *Julius* v. *Oxford* (1880), 5 App. Cas. 214.

What construction must be placed upon sec. 29 of the City of Moncton Assessment Act of 1921? What does it mean? Does it confer upon the City Council a discretion with which a Court can not interfere?

The section reads in part as follows: (29) "Should any Assessor or taxpayer have reason to believe that any return made pursuant to this Act is substantially incorrect and makes a statutory declaration of such belief, the Assessors, on the recommendation of the City Council shall, thereupon for the purpose of verifying any such return employ a chartered accountant, etc."

The relation between the City Council and the Assessors rather excludes the thought that the word "shall" becomes necessary in the Act in order to make the servants carry out the instructions of their masters. It lends colour to the claim that by implication the word "shall" applies to the City Council, they being the ones who must set the machinery in motion; and that sec. 44 of the

1935 CanLII 483 (NB CA)

N.B.
1935.
EX PARTE ALLISON McSWEENEY.
LeBlanc, J.

Act giving in express terms discretion to the City Council to relieve any person, either wholly or partially, from the payment of any taxes under certain conditions, it shuts out the idea of any discretion in the matter of tax exemptions in sec. 29.

However, if such a construction must be placed upon that section it means that any taxpayer of the City of Moncton, who ever he may be, can force the City Council in every case to instruct the Assessors to employ an accountant. I do not think that such a situation was ever contemplated by the Legislature. The City Council is left with the last word in the matter as to whether or not an accountant should be employed.

But, it may be urged that Mr. McSweeney having supplemented the strict requirements of the Act by giving the source of his information; and a very substantial amount of taxes being at stake and in view of the City Solicitor's written opinions in the matter, the City Council should have complied with Mr. McSweeney's demands.

That is only another way of stating that a majority of the City Council were wrong in the exercise of their discretion. But the Court is not concerned with that. Once the Council is given a discretion it prevents all interference by the Court. The Council, not the Court, is given that discretion.

I think the application must be refused.

GRIMMER, J.:—I concur in the results.

Rule discharged.

1935 CarswellNB 483 (NB CA)

Tab 130

1952 CanLII 408 (MB KB)

MANITOBA

KING'S BENCH CAMPBELL, J.

In re The Manitoba Labour Relations Act
In re International Union of Operating Engineers, Local Union No. 827, A. F. of L. and Manitoba Labour Board

1952 CanLII 408 (MB KB)

H. G. H. Smith, K.C., for applicant.
W. P. Fillmore, K.C., for respondent.
D. C. McGavin, for employer company.
No one for intervener.

January 16, 1952.

CAMPBELL, J. — This is an application, by originating notice of motion in chambers (K.B.R. 182 [i]) pursuant to *The King's Bench Act*, RSM, 1940, ch. 44, sec. 57 and part of sec. 58, and K.B. RR. 15 and 556, for an order of *mandamus* requiring the Manitoba Labour Board (hereinafter called the board) to certify the applicant as the bargaining agent for certain employees of the Manitoba Sugar Company Limited (hereinafter called the company) to wit, "all the engineers and firemen employed by the Company under *The Manitoba Labor Relations Act* [1948, ch. 27] or for such other order as may seem just."

The business agent of the intervener union was in court but chose not to be represented by counsel and took no part in the proceedings. Counsel for the applicant union admitted that its members were also members of the intervener union. All counsel agreed that there was a subsisting agreement between the company and the intervener union and the applicants were presently members of it.

The facts are not disputed. The background of the application may be found by setting down in full (1) the decision of the board; (2) the minority decision of the board; and (3) the certificate of dismissal dated March 14, 1951. They are as follows (I have numbered the paragraphs for convenience of reference):

"I. THE DECISION OF THE BOARD.

"(1) This application for certification as a craft union covering five employees being Engineers and Firemen all five of whom are members of the Applicant Union was made under Section 8 of *The Manitoba Labor Relations Act*, which reads:

"'8. When a group of employees of an employer belong to a craft or group exercising technical skills, by reason of which they are distinguishable from employees as a whole and the majority of the group are members of one trade union pertaining to such craft or other skills, the trade union may apply to the board subject to the provisions of section 7, and shall be entitled to be certified as the bargaining agent of the employees in the group if the group is otherwise appropriate as a unit for collective bargaining.'

"(2) The application was opposed by the Employer and also by the Intervening Union who are the present certified bargaining agents on the grounds that the five employees

1951 CanLII 488 (MB KB)

involved were employed in a composite capacity the whole year round and were only called upon to exercise their craft or technical skill approximately 68 days each year during the campaign season; the balance of the year being employed like the rest of the plant employees at other work than operating Engineers and Firemen.

"(3) Following a hearing at which all parties involved presented their respective viewpoints the Board decided to dismiss the Application for the following reasons:

"If it was the intention of the Legislature, as claimed by the applicant that the use of the words: *'Shall be entitled'* in Section 8, *Manitoba Labor Relations Act*, to be obligatory, they would have said so explicitly and would not have used the closing words of the section: 'If the group is otherwise appropriate as a unit for collective bargaining.'

"(4) Furthermore they would not have placed any qualification on Section 8 as they did, by enacting Section 9, which gives the Board discretionary powers to determine:

"(A) 'Whether the unit in respect of which the application is made is appropriate for collective bargaining.'

"(5) Neither in our opinion would the Legislature have given the Board power as given in Section 9 to:

"'(I) alter the description of, and

"'(II) include additional classes of employees in,

"'or (III) exclude classes of employees from, the unit.'

"(6) In view of the above reasons and also considering Section 2 (3) of the Act which gives the Board power to determine whether the Unit appropriate for collective bargaining shall be an employer unit, craft unit, technical unit, plant unit or any other unit.

"(7) The Board is of the opinion that a bargaining unit is appropriate if the interests of the employees therein are capable of being adequately represented by a common group of bargaining representatives.

"(8) The Board is of the further opinion that the present certified Agent is capable of adequately representing the five employees, members of the applicant union who are employed in a composite capacity the full year like the other plant employees, and who like the other plant employees are

1952 CanLII 408 (MB KB)

only called upon in the course of their composite employment to exercise their craft or technical skill for approximately 68 days out of a full year's employment.

"(9) Having taken all the factors into consideration plus the mutuality of interest amongst the group and the efficient operation of the plant the application is accordingly dismissed.

[Five members of the board.]

"II. Minority Decision of Board.

"The facts in this case are not in dispute.

"The Company has erected and now operates a beet-sugar processing plant at Fort Garry in Manitoba. The active period of operation, locally called the 'campaign,' commences when harvested beets start to reach the plant, and continues day and night, seven days a week, until the harvest is processed. During this period, the group for which the applicant seeks certification operates the high-pressure steam plant which is the heart of the process. Other specialists perform their particular functions, and hundreds of 'campaign workers' fill out the working force.

"Just as soon as the processing season is ended, the campaign workers are discharged and the key personnel, including the operating engineer group, commence the rehabilitation of the plant. All the machinery is examined, much of it being dismantled, and 'work groups' busy themselves on this and on miscellaneous work till the next campaign season opens.

"In the off-season, operating engineers work side by side with men possessing entirely different skills, and are engaged on work bearing no relationship whatever to their classification.

"The applicant argues that the distinct 'craft' character of the operating engineers' work during the campaign entitles it to separate certification. The company and the intervener take the common ground that the miscellaneous type of work performed by all the permanent staff during the off-season makes the whole group a minimum appropriate bargaining unit and that it would be contrary to the intent of the Act, to the welfare of the company and to the well-being of the permanent staff to have a separate certification for the operating engineers. The parties object-

1952 CanLII 408 (MB KB)

ing to the application contrast the 68 days of campaign (during which it is conceded the engineers are engaged on their craft) with the 297 days during which they are indistinguishable from the rest of the permanent staff. They also urge that, if the operating engineers were not prepared to engage in the miscellaneous, non-craft work during the off-season, they would not be taken on staff at all.

"It was agreed at the hearing that in other plants, particularly those in more Southern areas, where a greater pool of operating engineers exists, there is a complete close down for the greater part of the year. The peculiar location and other characteristics of the Fort Garry plant have led the Company to adopt a different plan, holding the nucleus of skilled personnel the whole year.

"The application has been filed under Section 8. It is not disputed that, during the campaign, the employees in the applicant group belong to a craft (and are engaged in performance of duties peculiar to that craft) by reason of which they are distinguishable from the employees as a whole, or that a majority of the group are members of one trade union pertaining to such craft. The trade union pertaining to the craft has applied to the Board, and its application conforms to the provisions of section 7.

"The Board has, on other occasions, noted the mandatory nature of the wording of Section 8. Whereas the Board *may*, according to Section 9, certify an applicant union where the circumstances commend themselves to the Board, craft unions enjoy a peculiar status and, in the circumstances relating to this application, the union *'shall be entitled* to be certified as the bargaining agent of the employees in the group if the group is otherwise appropriate as a unit for collective bargaining.'

"In practice, the Board has never felt it had the right to ponder on whether the certification of a non-craft union, or of any union for a non-craft unit, is in the best interests of the employer and of the employees. For all practical purposes, this Board in common with all other Labor Boards across Canada has read the 'may' of Section 9 (or parallel provisions in the other Acts) as mandatory.

"This is the course dictated by caution and common sense. No Board could foresee whether the outcome of any particular certification will, in the long run, benefit any particular group of employees. All the Board can do is to administer

1952 CanLII 408 (MB KB)

the Act according to its wording, and leave the future to the parties whose status has been established. The situation then becomes the responsibility of the employer and of the certified bargaining agent.

"Keeping this in mind, and conceding that 'shall' could not be less obligatory than 'may,' I cannot conceive how certification can be logically or legally denied the applicant in this case. For this reason, I dissent from the Board decision to reject the application and because of the quite important considerations involved take the unusual step of recording my dissent.

[Two members of the board.]

"III. CERTIFICATION OF DISMISSAL.

"Whereas:

"1. On February 5th, 1951, the Applicant filed an application with the Board seeking certification, under Section 8 of the Act, as Bargaining Agent for all the engineers and firemen of the Employer;

"2. On March 7th, 1951, the Board heard all interested parties by submission and oral argument to the application;

"3. After considering material filed and argument made, the Board was of the opinion that, under the circumstances of the case, it would not be expedient to certify the applicant in respect of the group applied for, *because while the group is distinguishable from the other permanent employees during the 'campaign,'* (lasting about 10 weeks annually), nevertheless, during the balance of the year the employees are not distinguishable from the balance of the year-round staff.

"Therefore the Manitoba Labor Board dismisses the application, and * * *."

(The italics are mine.)

The matter of status of a union as a legal entity and for a limited purpose, to take proceedings in its own name, was referred to by counsel for the applicant in opening his argument. He submitted that a representation order under K.B.R. 58 was unnecessary but, should he be wrong in this view, he requested that his right be reserved for further argument. Counsel for the respondent and the company both argued that the applicant was not a legal entity and, therefore, had no status. In reply, counsel for the applicant dealt with it briefly and again

1952 CarswellMB 103 (MB CB)

requested, and was granted, the right to have a further opportunity, if necessary, to argue the matter. I am of opinion counsel need not develop the matter further than he did. In any event, I feel obliged to examine and deal with those aspects of the problem which affect the present application by motion.

The *Trade Unions Act*, RSC, 1927, ch. 202, does not apply because sec. 5 provides that:

> " * * * this Act shall not apply to any trade union not registered under the Act."

Counsel admits the applicant is not registered.

K.B.R. 58 reads as follows:

> "Where there are numerous persons having the same interest, one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of, all."

I am of opinion that:

(1) Decisions under P.C. 1003 are distinguishable in that under P.C. 1003 trades unions act through their elected representatives and not through the union itself, and that for that reason a representation order would be necessary.

(2) Under *The Manitoba Labor Relations Act*, 1948, ch. 27, this principle is reversed and the union speaks as a union and not through its officers and, therefore, a representation order is not necessary.

I hold that a representation order is not necessary in this case.

But there still remains to be decided what is the status of a union as a legal entity when it comes into court. The answer is not easy. This is the first case of its kind in Manitoba and the law in Canada on the subject is in an uncertain state.

For the purpose of this decision I am of opinion that actions in contract and tort, by a voluntary unincorporated association, or a union, not registered under the *Trade Unions Act* of Canada, by reason of the dissimilar attributes and origin, must be distinguished from an application for an order under *The Manitoba Labor Relations Act*.

Similar proceedings under similar statutes in other provinces have brought different conclusions.

Still dealing with the matter of status of a union as a legal entity, I will deal with one phase of the submission of counsel

1952 CanLII 408 (MB KB)

for the company that British Columbia had two statutes, viz., the *Trade-unions Act*, RSBC, 1936, ch. 289, and the *Industrial Conciliation and Arbitration Act, 1947*, ch. 44, and it was by reason of these two statutes that the Court of Appeal in British Columbia came to its decision in *In re Patterson and Nanaimo Dry Cleaning & Laundry Workers Union* [1947] 2 WWR 510, 63 BCR 493, followed in British Columbia in *Vancouver Machinery Depot Ltd. v. United Steelworkers of America* [1948] 2 WWR 325, at 328, and later followed in Ontario in *Re Int. Nickel Co. of Canada Ltd.; Shedden v. Kopinak* [1949] OR 765, at 777.

1952 CanLII 408 (MB KB)

With this submission I cannot agree. I quote from the judgment of O'Halloran, J.A. in the *Patterson* case, *supra*, at p. 512 (WWR):

> "In my judgment the trade union involved here is a legal entity upon the principle that legislation of the British Columbia legislature, like the *Trade-unions Act*, RSBC, 1936, ch. 289, and *Industrial Conciliation and Arbitration Act, 1947, supra*, has recognized trade unions as statutory entities possessing a legal existence apart from their members. It is true the trade union here has not been formally incorporated under any Act of the legislature which relates to the incorporation of an association or group of people. But the legislature, by conferring upon it rights, immunities and powers, and imposing upon it duties and obligations enforceable by penalties against it as a trade union, has recognized its legal status as a statutory entity distinct from its members."

I read this paragraph in his judgment as citing examples of statutes in British Columbia that give a status to trade unions under a statute.

I am of opinion that the Court of Appeal of British Columbia considered the one statute only, viz., the *Industrial Conciliation and Arbitration Act, 1947*. This view is confirmed by an examination of the other statute—the *Trade-unions Act*. This latter statute appears to me to deal with (1) liability of trade unions for torts; (2) exempting trade unions from liability for communicating certain information and employing fair arguments to induce workmen not to renew contracts; and (3) exempting trade unions for publishing certain information respecting strikes. It is patent that this statute can have no application to the subject-matter in the *Patterson* case, and I interpret that judgment accordingly.

But the problem does not end there. In Ontario the decision in *Re Int. Nickel Co. of Canada; Shedden v. Kopinak, supra,* at 777, agrees fully with the decisions in the *Patterson* case, *supra,* and the *Vancouver Machinery Depot* case, *supra.* Also in Ontario, on the other hand, is the decision in *Can. Seamen's Union v. Canada Labour Relations Board and Branch Lines Ltd.* [1951] OR 178, at 184-5. This was a case under *The Industrial Relations and Disputes Investigation Act,* 1948, ch. 54 (Dom.) (the Manitoba Act is substantially the same). There the learned trial judge considered the *Patterson* case and the *Vancouver Machinery Depot* case, both of which were decided under the British Columbia statute and neither of which he thought "applicable to the case at bar." No reference is made, in the report of this case, to the prior decision of *Re Int. Nickel Co. Ltd.; Shedden v. Kopinak, supra.* Three points are decided in the *Can. Seamen's Union* case that require examination. I quote from the judgment, pp. 183-4:

> "(1) It must therefore be found that the applicant is not a legal entity and has no right to bring the present proceeding unless it is given a status to bring the proceeding by reason of the terms of *The Industrial Relations and Disputes Investigation Act.*"

Here the applicant had been "decertified" as bargaining agent and the court was "satisfied that there was some evidence before the Board upon which it could make the order."

As to (1): The *ratio decidendi* under this heading seems to be that the *Can. Seamen's Union* disqualified itself as a trade union and thereby lost its status.

> (2) "In ss. 47, 52 and 61 the Act speaks of 'trade union or employers' organization.' If a trade union is to be found to be a legal entity under the Act, then likewise an employers' organization should be found to be a legal entity:" [1951] OR at 185.

As to (2): Whether or not employers' organizations are presently as well known as trade union organizations is not in issue. They can be if they so desire and, if and when they do, "the Board" will be obliged to recognize them. The statute provides for and defines them. See *The Manitoba Labor Relations Act, supra,* sec. 2 (1) (*k*), and sec. 46 (1).

(3) The definition of "corporation" as taken from *The Interpretation Act,* RSC, 1927, ch. 1.

1952 CanLII 408 (MB KB)

As to (3): Where the interpretation section of the statute defines "trade union" (*The Industrial Relations and Disputes Investigation Act*, sec. 2 [1] [r], *The Labour Relations Act*, RSO, 1950, ch. 194, sec. 1 [1] [i]) and confers powers and rights upon it, then recourse to the *Interpretation Act* in an attempt to override the interpretations in a particular statute is not only unnecessary but improper. (*The Manitoba Labor Relations Act*, by sec. 2 [1] [r] defines it also.)

For these reasons I distinguish the *Can. Seamen's Union* case, *supra*, and follow the two B.C. cases and the *Int. Nickel* case, *supra*, on the point of status as a legal entity.

I find, accordingly, that the appellant is given a status as a legal entity to take proceedings in court in the instant case and, for want of a better term, it is a "*quasi persona juridica.*"

The merits of the application fail to be decided under two headings:

(1) *The Manitoba Labor Relations Act*, and the decision and minority decision of the board;

(2) Is *mandamus* applicable?

The history of *The Manitoba Labor Relations Act* may be stated briefly. *The Industrial Relations and Disputes Investigation Act* (Dom.) was passed by the House of Commons of Canada on June 17, 1948 (assented to June 30, 1948) with few changes from the bill as introduced. The province of Manitoba passed an Act based on the first reading of the bill and it is substantially the same as the Dominion Act.

It is not disputed that the applicant members are certified under *The Steam Boiler and Pressure Plant Act*, RSM, 1940, ch. 199, and have been granted local union charter No. 827 (Ex. 3A) pursuant to the constitution of the International Union of Operating Engineers (Ex. 3). Counsel for the applicant, the board and the company disagree in the interpretation of secs. 8 and 9.

In view of my finding as to status, I need only deal particularly with the following sections: Secs. 2 (3), 8, 9 and 59. Sec. 2 (3) reads as follows:

> "2. (3) For the purposes of this Act, a 'unit' means a group of employees and 'appropriate for collective bargaining' with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit,

1952 CanLII 408 (MB KB)

> technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employer."

Sec. 8 is set out in the majority decision, *supra*.

Sec. 2 (3) defines "unit" and "appropriate for collective bargaining." Sec. 8 has a double requirement, i.e., (1) belong to a craft *or* group requiring technical skills; (2) is otherwise appropriate as a unit for collective bargaining. If these conditions precedent are fulfilled, then the unit *"shall be entitled to be certified * * * if * * * otherwise appropriate * * *."*

In order to receive and consider an application under sec. 8, the board had to decide that the applicant members belonged to a craft by reason of which they were distinguishable from the employees as a whole; that the majority of the applicant members were in good standing in a trade union pertaining to such craft and the applicant was otherwise appropriate as a unit for collective bargaining.

The applicant union satisfied these requirements for the following reasons:

(1) Its members were certificated under *The Steam Boiler and Pressure Plant Act, supra*.

(2) They constituted a majority of Local 827.

(3) They were more than one in number (sec. 2 [*h*] and [*j*]). That constituted entitlement to be certified, if otherwise appropriate.

Along with sec. 8 must be read sec. 9 (1):

> " * * * the Board *shall determine* whether the unit in respect of which the application is made is appropriate for collective bargaining * * *."

No mention is made in the decision or the certificate of dismissal as to its inappropriateness. I cannot envisage reasons for such a finding. The board did determine by necessary implication that the applicant was appropriate for collective bargaining but declined certification on other grounds which I will discuss later.

Sec. 9 (1) (*a*) (i) (ii) (iii) and sec. 9 (1) (*b*) were not invoked and do not apply to this case. They might apply, for example, in a craft union case if more than one craft union were involved. Re sec. 9 (2) (*a*) and (*b*), I am of opinion that it was unnecessary to refer to or invoke this subsection.

1952 CanLII 408 (MB KB)

Finally, the words following sec. 9 (2) (*b*)—"the board *may* certify the trade union as the bargaining agent of the employees in the unit." In the matter of interpreting the word "may" as meaning "shall," there is no dearth of authority.

Perusal of the cases on the old use of "shall and may" and the newer use of "may" carry along with the power the duty to exercise it when the authority is applied for by a party interested and having a right to make the application to effectuate a legal right: *Julius v. Oxford (Bishop)* (1880) 5 App Cas 214, 49 LJQB 577, Lord Blackburn at 242 and 244, Lord Cairns at 215; *Sheffield Corpn. v. Luxford* [1929] 2 KB 180, 98 LJKB 512, Talbot, J. for the court at 184, top; *Re Zwicker* (1939) 13 MPR 415, at 425. See also *Williams v. Moody Bible Institute of Chicago* [1937] 2 WWR 316; *Ex parte Atty.-Gen.; In re Goodspeed* (1903) 36 NBR 91; *Ex parte Gilbert* (1873) 14 NBR 231; *Short on Informations*, p. 254, and authorities there cited.

In the light of these interpretations of secs. 8 and 9 of the statute, I will now consider the decision of the board. In pars. (4) and (5) of the decision, the board says it has the right to determine under sec. 9 (1) "whether the unit * * * is appropriate for collective bargaining." If the board means by this "that the discretion must be exercised without taking into account any reason which is not a legal one," then I agree. For example, the applicant might fail to qualify under this Act or its members might be improperly certificated under *The Steam Boiler and Pressure Plant Act*, or impeached on other grounds, or otherwise *mala fide*. But none of these factors is present here. In my opinion the board erred in par. (6) in its understanding of sec. 2 (3), which is an interpretation or definition section; also it is in error in pars. (7) and (8) of its decision—the question of policy is not here in issue and is extraneous to it. Finally, the board in par. (9) of its decision uses the expressions "mutuality of interest" and "efficient operation." In this regard three points appear to have escaped the attention of the board and counsel in argument before me:

(1) The "campaign season" is the main object and sole purpose for the existence of the company. The other activities for the remainder of the year are incidental to that main object.

(2) The "campaign season," lasting approximately 75 days, operating 24 hours each day, is the equivalent of 225 days of 8 hours each, or 40 weeks of 44 hours each.

(3) Without certificated engineers the company could not operate.

In the result, the board acted upon factors in this case that should not have been taken into consideration, e.g., the small number comprising the group; the intervener union being already certified as bargaining agent; the employer might not want a second union in its plant, even though a craft union.

With respect, these are matters outside the scope of the board by which it considered itself entitled to refuse certification, interpreting the word "may" in sec. 9 (2) as permissive. I find "may" is used in an enabling sense and that it was imperative that the board certify the applicant as bargaining agent. The word "may" in this section is permissive, however, when the applicant is irresponsible, subversive, or otherwise acting *mala fide*, which is not suggested here.

The board refused to certify the applicant and we now consider the powers of the board and the powers of the court to review.

Sec. 59 (1) [as amended by 1950, ch. 31, sec. 6]:

> "If in any proceeding before the board or otherwise in the course of administration of this Act a question arises under this Act as to whether
>
> * * *
>
> "(*f*) a group of employees is a unit appropriate for collective bargaining;
>
> "(*g*) an employee belongs to a craft or group exercising technical skills;
>
> * * *
>
> "the board *shall decide* the question and its decision *shall be final and conclusive* for all the purposes of this Act."

In view of my finding, *supra*, the board did find affirmatively under pars. (*f*) and (*g*) of sec. 59 (1) but refused certification on other grounds. It is necessary then to consider the final words of the section—*"its decision shall be final and conclusive for all the purposes of this Act."* One of the most recent decisions on a similar section using similar words is in *Rex v. Labour Relations Board*, 29 MPR 66, [1951] 4 DLR 227 (N.S.). Sec. 58 of the Nova Scotia Act, 1947, ch. 3, provides that " * * * the decision or order of the Board shall be final and conclusive and not open to question, or review." It was there held, *inter alia*, that "the privative provisions of sec. 58 were not apt enough to oust the court from reviewing this question of jurisdiction." As to the jurisdiction of courts to review, see *Kuchma v. Tache R.M.*, [1945] SCR 234, at 239 (affirming

1952 CanLII 408 (MB KB)

[1944] 1 WWR 321, 51 Man R 314, at 321). This was a decision upon sec. 473 of *The Municipal Act*, RSM, 1940, ch. 141, which reads in part as follows:

> " * * * when so approved shall be valid, binding and conclusive, and its validity shall not thereafter be questioned in any court or any proceedings unless the minister * * *

> "It has always been the function of the courts to pass upon questions of jurisdiction, good faith and public interest, and legislatures pass this and similar legislation in the expectation that the courts will continue to pass upon * * * such questions."

Also see *Rex v. Northumberland Compensation Tribunal; Ex parte Shaw* [1951] 1 KB 711.

Is mandamus applicable?

The modern use of *mandamus* may be illustrated by two recent cases in England: *Rex v. Dunsheath; Ex parte Meredith* [1951] 1 KB 127: *Rex v. Minister of Labour and National Service; Ex parte Manning* (1951) 95 Sol J 238.

These two cases indicate the present scope and limitations of *mandamus*. By this order of *mandamus* the courts can impose the rule of law on every department, tribunal, body or person charged with the performance of a public duty and failing to perform it. It is irrelevant for the issue of the order whether the duty requires the exercise of administrative discretion or the determination of a question by judicial process or a process analogous to it. The scope of *mandamus* and the persons to whom it issues, and the functions which they exercise, can hardly be wider, but the remedy is subject to a serious limitation: It is only available where the party complained of fails to discharge the public duty which he is obliged to perform, or performs it in such an illegal or perfunctory manner that there is in fact no performance. *Mandamus* thus deals only with the negative aspect of non-performance of a public duty, but normally does not enable the courts to control the positive aspect of wrongful exercise of duty.

The conditions on which *mandamus* is available are, in the words of Lord Goddard, C.J., in the *Dunsheath* case, *supra*, that the duty which the officer failed to perform (1) is in the nature of a public duty; (2) specially affecting the rights of an individual; and (3) that there is no more appropriate remedy.

See *Can. Bar Review*, vol. 29, pp. 472-3.

1952 CanLII 428 (MB CA)

The most recent Canadian case is *In re United Steelworkers of America and B.C. Labour Relations Board* (1951) 3 WWR (NS) 272, in which a limited *mandamus* was granted. Also re *mandamus*, see *In re Commercial Taxi and Highway Traffic Board* [1950] 2 WWR 289 (Alta.), affirmed (1951) 1 WWR (NS) 465. The case of *In re Companies Act; Poizer v. Ward* [1947] 1 WWR 807, 55 Man R 214, reversed [1947] 2 WWR 193, 55 Man R 214, at 218, is distinguished on the facts.

I find that *mandamus* is the appropriate remedy and the board should have certified the applicant as bargaining agent. An order of *mandamus* will issue accordingly.

Costs to be spoken to.

1952 CanLII 408 (MB KB)

Tab 131

CanLII

Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] SCR 121

Source:	Supreme Court of Canada
Date:	1959-01-27
Other citations:	16 DLR (2d) 689 — [1959] SCJ No 1 (QL) — [1959] ACS no 1
Citation:	Roncarelli v. Duplessis, 1959 CanLII 50 (SCC), [1959] SCR 121, <https://canlii.ca/t/22wmw>, retrieved on 2026-01-18
Most recent unfavourable mention	R. v. Cheticamp Fisheries Co-operative Ltd., 1995 NSCA 24 (CanLII) [...] In my opinion, **Roncarelli is distinguishable** particularly in that the abuse there was flagrant, not connected with the purposes for which the powers were given and done with the specific intent of harming the plaintiff. [...]

Supreme Court of Canada
Roncarelli v. Duplessis, [1959] S.C.R. 121
Date: 1959-01-27

FRANK RONCARELLI *(Plaintiff)*

APPELLANT;

AND

THE HONOURABLE MAURICE DUPLESSIS *(Defendant)*

RESPONDENT

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

Crown-Officers of the Crown-Powers and responsibilities-Prime Minister and Attorney-General-Quebec Liquor Commission-Cancellation of licence to sell liquor-T7rhether made at instigation of Prime Minister and Attorney-General-The Alcoholic Liquor Act, R.S.Q.

1941, c. 255-The Attorney-General's Department Act, R.S.Q. 1941, c. 46-The Executive Power Act, R.S.Q. 1941, c. 7.

Licences-Cancellation-Motives of cancellation---Done on instigation of Prime Minister and Attorney-General-Whether liability in damages-Whether notice under art. 88 of the Code of Civil Procedure required.

[Page 122]

The plaintiff, the proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued the defendant personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. He alleged that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to cancel it before its expiration. This was done, it was alleged, to punish the plaintiff, a member of the Witnesses of Jehovah, because he had acted as bailsman for a large number of members of his sect charged with the violation of municipal by-laws in connection with the distribution of literature. The trial judge gave judgment for the plaintiff for part of the damages claimed. The defendant appealed and the plaintiff, seeking an increase in the amount of damages, cross-appealed. The Court of Appeal dismissed the action and the cross-appeal.

Held (Taschereau, Cartwright and Fauteux JJ. dissenting) : The action should be maintained and the amount awarded at trial should be increased by $25,000. By wrongfully and without legal justification causing the cancellation of the permit, the defendant became liable for damages under art. 1053 of the *Civil Code.*

Per Kerwin C.J.: The trial judge correctly decided that the defendant ordered the Commission to cancel the licence, and no satisfactory reason has been advanced for the Court of Appeal setting aside that finding of fact.

Per Kerwin C.J. and Locke and Martland JJ.: There was ample evidence to sustain the finding of the trial judge that the cancellation of the permit was the result of an order given by the defendant to the manager of the Commission. There was, therefore, a relationship of cause and effect between the defendant's acts and the cancellation of the permit.

The defendant was not acting in the exercise of any of his official powers. There was no authority in the *Attorney-General's Department Act,* the *Executive Power Act,* or the *Alcoholic Liquor Act* enabling the defendant to direct the cancellation of a permit under the *Alcoholic Liquor* Act. The intent and purpose of that Act placed complete control over the liquor traffic in the hands of an independent commission.

Cancellation of a permit by the Commission, at the request or upon the direction of a third party, as was done in this case, was not a proper and valid exercise of the powers conferred upon the Commission by s. 35 of the Act.

The defendant was not entitled to the protection provided by art. 88 of the *Code of Civil Procedure* since what he did was not "done by him in the exercise of his functions". To interfere with the administration of the Commission by causing the cancellation of a liquor permit was entirely outside his legal functions. It involved the exercise of powers which in law he did not possess at all. His position was not altered by the fact that he thought it was his right and duty to act as he did.

[Page 123]

2830 *Per* Rand J.: To deny or revoke a permit because a citizen exercises an unchallangeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act.* What was done here was not competent to the Commission and *a fortiori* to the government or the defendant. The act of the defendant, through the instrumentality of the Commission, brought about a breach of an implied public statutory duty toward the plaintiff. There was no immunity in the defendant from an action for damages. He was under no duty in relation to the plaintiff and his act was an intrusion upon the functions of a statutory body. His liability was, there-fore, engaged. There can be no question of good faith when an act is done with an improper intent and for a purpose alien to the very statute under which the act is purported to be done. There was no need for giving a notice of action as required by art. 88 of the *Code of Civil Procedure,* as the act done by the defendant was quite beyond the scope of any function or duty committed to him so far so that it was one done exclusively in a private capacity however much, in fact, the influence of public office and power may have carried over into it.

Per Abbott J.: The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification. The defendant was not entitled to avail himself of the exceptional provision of art. 88 of the *Code of Civil Procedure* since the act complained of was not "done by him in the exercise of his functions" but was an act done when he had gone outside his functions to perform it. Before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88, it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform.

Per Taschereau J., *dissenting:* The action cannot succeed because -the plaintiff did not give the notice required by art. 88 of the *Code of Civil Procedure* to the defendant who was a public officer performing his functions. The failure to fulfil this condition precedent was a total bar to the claim. That failure may be raised by exception to the form or in the written plea to the action, and the words "no judgment may be rendered" indicate that the Court may raise the point *propio motu.* Even if what was said by the defendant affected

[Page 124]

the decision taken by the Commission, the defendant remained, nevertheless, a public officer acting in the performance of his duties. He was surely a public officer, and it is clear that he did not act in his personal quality. It was as legal adviser of the Commission and also as a public officer entrusted with the task of preventing disorders and as protector of the peace in the province, that he was consulted. It was the Attorney-General, acting in the performance of his functions, who was required to give his directives to a govern-mental branch. It is a fallacious principle to hold that an error, committed by a public officer in doing an act connected with the object of his functions, strips that act of its official character and that its author must then be considered as having acted outside the scope of his duties.

Per Cartwright J., *dissenting:* The loss suffered by the plaintiff was *damnum sine injuria.* Whether the defendant directed or merely approved the cancellation of the licence, he cannot be answerable in damages since the act of the Commission in

cancelling the licence was not an actionable wrong. The Courts below have found, on ample evidence, that the defendant and the manager of the Commission acted throughout in the honest belief that they were fulfilling their duty to the province. On the true construction of the *Alcoholic Liquor Act,* the Legislature, except in certain specified circumstances which are not present in the case at bar, has not laid down any rules as to the grounds on which the Commission may decide to cancel a permit; that decision is committed to the unfettered discretion of the Commission and its function in making the decision is administrative and not judicial or quasi-judicial. Consequently, the Commission was not bound to give the plaintiff an opportunity to be heard and the Court cannot be called upon to determine whether there existed sufficient grounds for its decision. Even if the function of the Commission was quasi-judicial and its order should be set aside for failure to hear the plaintiff, it is doubtful whether any action for damages would lie.

Per Fauteux J., *dissenting :* The right to exercise the discretion with respect to the cancellation of the permit, which under the *Alcoholic Liquor Act* was exclusively that of the Commission, was abdicated by it in favour of the defendant when he made the decision executed by the Commission. The cancellation being illegal, imputable to the defendant, and damageable for the plaintiff, the latter was entitled to succeed on an action under art. 1053 of the *Civil Code.*

As the notice required by art. 88 of the *Code of Civil Procedure* was not given, the action, however, could not be maintained. The failure to give notice, when it should be given, imports nullity and limits the very jurisdiction of the Court. In the present case, the defendant was entitled to the notice since the illegality reproached was committed "in the exercise of his functions". The meaning of this expression in art. 88 was not subject to the limitations attending expressions

[Page 125]

more or less identical appearing in art. 1054 of the *Civil Code.* The latter article deals with responsibility whereas art. 88 deals with procedure. Article 88 has its source in s. 8 of *An Act for the Protection of Justices of the Peace,* Cons. Stat. L.C., c. 101, which provided that the officer "shall be entitled" to the protection of the statute although "he has exceeded his powers or jurisdiction, and has acted clearly contrary to law". That section peremptorily establishes that, in *pari materia,* a public officer was not considered as having ceased to act within the exercise of his functions by the sole fact that the act committed by him might constitute an abuse of power or excess of jurisdiction, or even a violation of the law. An illegality is assumed under art. 88. The jurisprudence of the province, which has been settled for many years, is to the effect that the incidence of good or bad faith has no bearing on the right to the notice.

The illegality committed by the defendant did not amount to an offence known under the penal law or a delict under art. 1053 of the *Civil Code.* He did not use his functions to commit this illegality. He did not commit it on the occasion of his functions, but committed it because ,of his functions. His good faith has not been doubted, and on this fact there was a concurrent finding in the Courts below.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Mackinnon J. Appeals allowed, Taschereau, Cartwright and Fauteux JJ. dissenting.

F. R. Scott and A. L. Stein, for the plaintiff, appellant.

L. E. Beaulieu, Q.C., and L. Tremblay, Q.C., for the defendant, respondent.

Tab 132

CanLII

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [2014] 3 SCR 31

Source:	Supreme Court of Canada
Date:	2014-10-02
File number:	35315
Other citations:	375 DLR (4th) 599 — 463 NR 336 — [2014] 11 WWR 213 — 619 WAC 1 — 51 RFL (7th) 1 — 361 BCAC 1 — 59 CPC (7th) 1 — [2014] SCJ No 59 (QL) — [2014] ACS no 59
Citation:	Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [2014] 3 SCR 31, <https://canlii.ca/t/gds2j>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

CITATION: Trial Lawyers Association of British Columbia *v.* British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31

DATE: 20141002
DOCKET: 35315

BETWEEN:

Trial Lawyers Association of British Columbia and Canadian Bar Association — British Columbia Branch
Appellants/Respondents on cross-appeal
and
Attorney General of British Columbia
Respondent/Appellant on cross-appeal
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and Action Fund and David Asper Centre for Constitutional Rights

Interveners

Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Reasons for Judgment: (paras. 1 to 69)	McLachlin C.J. (LeBel, Abella, Moldaver and Karakatsanis JJ. concurring)
Reasons Concurring in Result: (paras. 70 to 79)	Cromwell J.
Dissenting Reasons: (paras. 80 to 117)	Rothstein J.

Trial Lawyers Association of British Columbia *v.* British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31

Trial Lawyers Association of British Columbia and Canadian Bar Association — British Columbia Branch *Appellants/Respondents on cross-appeal*

v.

Attorney General of British Columbia *Respondent/Appellant on cross-appeal*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and Action Fund and David Asper Centre for Constitutional Rights *Interveners*

Indexed as: Trial Lawyers Association of British Columbia *v.* British Columbia (Attorney General)

2014 SCC 59

File No.: 35315.

2014: April 14; 2014: October 2.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Courts — Access to justice — Court hearing fees — Province enacting regulations establishing graduated court hearing fees — Regulations containing exemption provision from fees for persons who are "indigent" or "impoverished" — Whether province can establish hearing fee scheme under its administration of justice power pursuant to s. 92(14) of Constitution Act, 1867 — Whether regulations imposing hearing fees denying some people access to courts infringing core jurisdiction of s. 96 superior courts — Whether provincial hearing fee scheme constitutionally valid — Constitution Act, 1867, ss. 92(14), 96 — Court Rules Act, R.S.B.C. 1996, c. 80 — Supreme Court Rules, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98 — Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 20-5(1).

This case began as a family action. V and D were involved in a custody dispute. V went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, V asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial. The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some $3,600 — almost the net monthly income of the family. After legal fees had depleted her savings, V could not afford the hearing fee.

Aware that there was some authority for the proposition that hearing fees are unconstitutional, the judge invited submissions and interventions on the subject from outside parties and stayed V's obligation to pay the hearing fee. Ultimately, the B.C. branch of the Canadian Bar Association ("CBA"), the Trial Lawyers Association of British Columbia ("Trial Lawyers") and the Attorney General of British Columbia (the "Province") intervened.

The *Supreme Court Rules*, which were in place at the time this case began, were replaced in 2010 by the *Supreme Court Civil Rules*. The constitutionality of the hearing fees set out in both rules of court is challenged. The current hearing fees escalate from no fee for the first three days of trial, to $500 for days four to ten, to $800 for each day over ten. Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees if the court finds that a person is "impoverished". The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is "indigent".

The trial judge in this case ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words "or in need", it would pass constitutional muster. The Trial Lawyers and CBA appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

Held (Rothstein J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

Per McLachlin C.J. and LeBel, Abella, Moldaver and Karakatsanis JJ.: Levying hearing fees is a permissible exercise of the Province's jurisdiction under s. 92(14) of the *Constitution Act, 1867*; however, that power is not unlimited. It must be exercised in a manner that is consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. Section 96 restricts the legislative competence of provincial legislatures and Parliament; neither level of government can enact legislation that removes part of the core or inherent jurisdiction of the superior courts. The historic task of the superior courts is to resolve

disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. Therefore, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impermissibly impinge on s. 96 of the *Constitution Act, 1867*.

The connection between access to justice and s. 96 is further supported by considerations relating to the rule of law. The s. 96 function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, it is natural that s. 96 provide some degree of constitutional protection for access to justice. Concerns about the rule of law in this case are not abstract or theoretical. If people cannot bring legitimate issues to court, laws will not be given effect, and the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

Section 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96 of the *Constitution Act, 1867*.

Hearing fees are unconstitutional when they deprive litigants of access to the superior courts. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court. A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts. It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an

amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.

The hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court and is unconstitutional. The current exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

V is excused from paying the hearing fee. The hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the *Constitution Act, 1867* and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the Legislature or the Lieutenant Governor-in-Council to enact new provisions, should they choose to do so. "Reading in" is a remedy sparingly used, and available only where it is clear the legislature, faced with a ruling of unconstitutionality, would have made the change proposed. This condition is not met here. Further, modifying the exemption as suggested might still not cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

Per Cromwell J.: This case can be resolved on administrative law grounds and it is unnecessary to address the broader constitutional issues. There is a common law right of reasonable access to civil justice. This right of reasonable access may only be abrogated by clear statutory language. This common law right is preserved by the *Court Rules Act*. The common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding. This is a flexible standard: whether a person has the ability to

pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees. If the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*.

Here, the trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. The plain meaning of the exemption, referring to persons who are "impoverished" and "indigent" cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees. The hearing fees do not meet the common law standard preserved by the *Court Rules Act*. The exemptions under the *Court Rules Act* cannot be interpreted in a way that is consistent with the common law right of access to civil justice which is preserved by the *Court Rules Act*. Thus, the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

Per Rothstein J. (dissenting): The British Columbia hearing fee scheme does not offend any constitutional right. There is no express constitutional right to access the civil courts without hearing fees. Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. It is well established that provinces have the power under s. 92(14) to enact laws that prescribe conditions on access to the courts. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. Absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

The hearing fee scheme in this case cannot be struck down on the basis of a novel reading of s. 96 of the *Constitution Act, 1867*. Section 96 protects the core jurisdiction of superior courts that is integral to their operations; however, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core

jurisdiction. This Court has previously established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. The majority does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of s. 96. Instead, the majority significantly expands what is meant by the "core jurisdiction" of the superior courts beyond what is contemplated in the text or this Court's jurisprudence on the scope of s. 96. The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise.

The unwritten principle of the rule of law does not support the striking down of legislation otherwise properly within provincial jurisdiction. The majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. Section 96 requires that the existence and core jurisdiction of superior courts be preserved, but this does not, necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text. This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are not subject to s. 1 justification or the s. 33 notwithstanding clause.

This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation. To circumvent this caution, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme. Reading the unwritten principle of the rule of law too broadly would also render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. Provisions such as ss. 11(*d*) and 24(1) of the *Charter* would be unnecessary if the Constitution

already contained a more general right to access superior courts. The rule of law is a vague and fundamentally disputed concept. To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, it would not be unconstitutional. The majority's approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

Cases Cited

By McLachlin C.J.

Distinguished: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, rev'g 2005 BCCA 631, 262 D.L.R. (4th) 51; **applied:** *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; **referred to:** *Pleau v. Nova Scotia (Prothonotary)* (1998), 1998 CanLII 12462 (NS SC), 186 N.S.R. (2d) 1; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, aff'g (1985), 1985 CanLII 143 (BC CA), 20 D.L.R. (4th) 399; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679.

By Cromwell J.

Referred to: *Polewsky v. Home Hardware Stores Ltd.* (2003), 2003 CanLII 48473 (ON SCDC), 66 O.R. (3d) 600; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132; *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810.

By Rothstein J. (dissenting)

OPSEU v. Ontario (Attorney General), 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (FCA), [2000] 3 F.C. 185; *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1.

Statutes and Regulations Cited

A Mean to help and speed poor Persons in their Suits (Eng.), 11 Hen. 7, c. 12 [*Statute of Henry VII*].

Canadian Charter of Rights and Freedoms, ss. 1, 2, 7, 11(*d*), 24(1), 33.

[30] Section 96 therefore restricts the legislative competence of provincial legislatures and Parliament — neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *MacMillan Bloedel*, at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 88.

[31] It is not suggested that legislating hearing fees that prevent people from accessing the courts would abolish or destroy the existence of the courts. The question is rather whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts.

[32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[33] The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714; *MacMillan Bloedel*; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

[34] In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society — young persons — by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, *per* Lamer C.J., relied on *Crevier*, concluding that "[it] establishes . . . that powers which are 'hallmarks of superior courts' cannot be removed from those courts" (*MacMillan Bloedel*, at para. 35).

[35] Here, the legislation at issue bars access to the superior courts in yet another way — by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction — the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.

[36] It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

[37] This is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

[38] While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal's statement of the law ((1985), 1985 CanLII 143 (BC CA), 20 D.L.R. (4th) 399, at p. 406):

> . . . access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens. . . . Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category. [Emphasis added.]

As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, *per* Karakatsanis J., "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" (para. 26).

[39] The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

[40] In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account

— the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-9, *per* Newbury J.A.

[41] This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* — a case concerning a 7 percent surcharge on legal services — proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in *Christie*, on the evidence and arguments adduced, was not shown to have a similar impact.

[42] Nor does the argument that legislatures generally have the right to determine the cost of government services undermine the proposition that laws cannot prevent citizens from accessing the superior courts. (Indeed, the Attorney General does not assert such a proposition.) The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.

[43] I conclude that s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96.

C. *When Do Hearing Fees Become Unconstitutional?*

[44] The remaining question is how to determine when hearing fees deny access to superior courts.

[45] Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

[46] A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum — as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.

[47] Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[48] It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts — a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, of 1495, which provided relief for people who could not afford court fees.

Tab 133

CanLII

Ontario (Attorney General) v. $25,610 in Canadian Currency, 2017 ONCA 251 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2017-03-22
Citation:	Ontario (Attorney General) v. $25,610 in Canadian Currency, 2017 ONCA 251 (CanLII), <https://canlii.ca/t/h4c2l>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario (Attorney General) v. $25,610 in Canadian Currency, 2017 ONCA 251
DATE: 20170322

Brown J.A. (In Chambers)

BETWEEN

Attorney General of Ontario

and

$25,610 in Canadian Currency and $80.00 in US Currency (In Rem)

Heard: In Writing

On a fee waiver request made by Godwin Diogu in respect of the filing of a Notice of Appeal from the judgment of Justice Michael A. Penny of the Superior Court of

Justice, dated January 31, 2017, with reasons reported at 2017 ONSC 708.

Brown J.A.:

OVERVIEW

[1] Ensuring that litigants enjoy access to public courts to resolve their civil legal disputes is fundamental to our country's constitutional arrangements: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 32 and 41.

[2] At the same time, courts require money to operate. In Ontario, filing fees provide some of the court's operating revenue. In the case of most civil appeals brought to the Court of Appeal for Ontario, an appellant must pay $220 on the filing of a notice of appeal and $405 to perfect the appeal: *Superior Court of Justice and Court of Appeal – Fees*, O. Reg. 293/92, ss. 1(3) and (5).

[3] Those fees are quite modest in amount, given the services received by the litigant in return. However, for some, even such modest amounts are beyond their financial means. To address this concern, the *Administration of Justice Act,* R.S.O. 1990, c. A.6 (the "*AJA*"), creates a mechanism by which civil filing fees can be waived "so that individuals who might otherwise be denied access to justice because of their financial circumstances can be excused from paying fees": s. 4.1.

[4] Under the fee waiver regime, two different routes are available to a person to request a fee waiver for an appeal in this court: (i) a request to the court registrar; and (ii) a request to a judge: *AJA*, ss. 4.3 and 4.4.

[5] In the present case, Godwin Diogu has followed the second route, requesting a fee waiver from a judge in respect of his notice of appeal from the order of Penny J., dated January 31, 2017. For the reasons that follow I find that Mr. Diogu is not entitled to a fee waiver.

THE FEE WAIVER REGIME

[6] A new fee waiver regime came into force in November 2016. Below, I describe the procedural requirements for each of the two fee waiver request routes.

(1) The first route: a request to the court registrar

[7] First, the person can make a written request for a fee waiver to the court's registrar using a form provided by the Ministry of the Attorney General: *AJA*, s. 4.3(1). The request must be accompanied by proof of the person's income and, in some cases, proof of the spouse's income: *Fee Waiver*, O. Reg. 2/05, s. 2.1. The registrar must then review the request, together with the accompanying proof of income, to determine whether the person meets the prescribed financial conditions that entitle him or her to a fee waiver.

[8] A person meets the prescribed financial conditions if he or she falls into one of three categories:

(i) the primary source of the person's gross annual household income is one of several identified government benefit programs – e.g. Ontario Works, Old Age Security, Canada Pension Plan, and some others;

(ii) Legal Aid Ontario has approved the person's application to receive legal aid services in respect of the proceeding; or,

(iii) The person meets the financial criteria stipulated by the regulation: O. Reg. 2/05, s. 2(1).

[9] The stipulated financial criteria require a person to demonstrate that his or her gross annual household income, the value of the household's liquid assets, and the household's net worth all fall below certain dollar amounts set out in the regulation: O. Reg. 2/05, s. 2(2).

[10] If the registrar determines the person meets the prescribed financial conditions, the registrar shall give the person a fee waiver certificate: *AJA*, s. 4.3(4).

(2) The second route: a request to a judge

[11] The second way a person can request a fee waiver is by making a written request, using a prescribed form, to a judge of the court: *AJA*, s. 4.4. Before the request is put before a judge, the registrar must review it. If the registrar determines the person has met the prescribed financial conditions, the registrar shall issue a fee waiver certificate: *AJA*, s. 4.4(4).

[12] If the registrar determines the person does not meet the prescribed financial conditions, the registrar then forwards the request to a judge. In reviewing the request, a judge must determine whether the person has met two conditions:

(i) The person lacks the financial means to pay fees relating to the proceeding; and

(ii) Commencing or continuing the proceeding is not frivolous, vexatious or otherwise an abuse of the process of the court: *AJA*, ss. 4.4(5) and (7).

[13] If the judge is of the opinion the person meets those two conditions, then the judge shall make an order directing the registrar to give the person a fee waiver certificate: *AJA*, s. 4.4(5).

[14] Two practical questions arise about fee waiver requests made to a judge.

[15] First, what criteria does a judge use to determine whether the person "lacks the financial means to pay fees relating to the proceeding"? Although a judge will consider all the circumstances concerning a person's financial means, as part of that review a judge certainly will look at the financial criteria used on fee waiver applications to the registrar – i.e. whether: (i) the primary source of the person's gross annual household income is one of several identified government benefit

programs; (ii) the person has applied for and received approval for Legal Aid; or (iii) the person's income, liquid assets and net worth fall below the dollar amounts specified in the regulation.

[16] Second, what information must a fee waiver applicant include with a request to a judge? A fee waiver request to a judge first passes through the hands of the registrar. Since the registrar must determine whether the request meets the financial conditions prescribed by the regulation, it follows that an application to a judge for a fee waiver must, at a minimum, include the same information as would a fee waiver request to the registrar – i.e. information showing that the three financial criteria to satisfy a fee waiver are met: (i) the primary source of the person's gross annual household income is one of several identified government benefit programs; (ii) the person has applied for and received approval for Legal Aid; or (iii) the person's income, liquid assets and net worth fall below the dollar amounts specified in the regulation. The Ministry form for a request to a judge assists an applicant in organizing such information.

[17] A fee waiver request to a judge may contain additional information about the applicant's "financial means," and the Ministry form contains a page for "additional financial information."

[18] An applicant for a fee waiver must appreciate that as a result of the changes which came into force in November 2016, he or she can no longer simply file an affidavit stating the applicant lacks the financial means to pay the court filing fees. Financial information must be filed. It is important that any person who applies to a judge for a fee waiver take the time and care to assemble and place before the judge relevant financial documentation about his or her financial means. I say this because the decision of the judge on a fee waiver request is final: *AJA*, s. 4.4(9). The rules of court do not apply to a fee waiver request made to a judge, so the

decision made by the single judge will not be reviewable by a full panel of the court: *AJA*, s. 4.8.

THE FEE WAIVER REQUEST IN THE PRESENT CASE

[19] In the present case, Godwin Diogu requests a fee waiver in respect of his notice of appeal from the order of Penny J. In that proceeding by the Attorney General of Ontario under the *Civil Remedies Act, 2001*, S.O. 2001, c. 28, the application judge granted an application for the forfeiture of CDN $25,610 and US $80 on the basis the funds were either the proceeds of unlawful activity or an instrument of illegal activity. Mr. Diogu took the position that the funds were owned either by himself or Mr. Chidi Chinagrooom. The motion judge did not accept his evidence.

[20] Mr. Diogu wishes to appeal that judgment on several grounds: (i) the seized funds were not the proceeds of crime; (ii) the judgment was based on the improper application of the facts and law and, therefore, was wrong; and (iii) “further reasons to be provided”.

[21] The registrar has referred Mr. Diogu’s fee waiver request to me for consideration.

[22] Mr. Diogu has provided some information about his financial means in his affidavit. He states that he is “presently unemployed because [his] work authorization application is pending.” He lives with his wife and lists their net annual household income from employment at $11,000, but he attached 2016 T4s for his wife that show only about $175 in employment income. He lists their household assets as zero; he did not file any documentation about bank accounts or any other asset.

[23] I must assess the statements in Mr. Diogu’s fee waiver affidavit in light of other information about his financial means contained in the application judge’s

reasons. According to those reasons, Mr. Diogu filed evidence on the application that he was an inspection engineer and in 2013 earned annual income net of tax of $40,000. He also had a Canadian dollar bank account and a credit card. He received transfers of US dollars, and he bought used cars for export to Nigeria.

[24] The evidence Mr. Diogu placed before the application judge paints a much different picture of his financial means than shown by his fee request affidavit. Mr. Diogu has not provided me with any explanation that reconciles the statements he makes on this fee waiver request about his current financial means with the evidence he placed before the application judge about his prior employment in Canada, annual income, and use of bank accounts. As a result, I am not persuaded that Mr. Diogu lacks the financial means to pay fees relating to his appeal.

DISPOSITION

[25] Mr. Diogu is not entitled to a fee waiver certificate.

Released: March 22, 2017 ("DB")

"David Brown J.A."

Tab 134

CanLII

Uhrik v Terrigno, 2024 ABCA 383 (CanLII)

Source:	Court of Appeal of Alberta
Date:	2024-11-26
File number:	2301-0117AC
Citation:	Uhrik v Terrigno, 2024 ABCA 383 (CanLII), <https://canlii.ca/t/k82jr>, retrieved on 2026-01-18

In the Court of Appeal of Alberta

Citation: Uhrik v Terrigno, 2024 ABCA 383

Date: 20241126
Docket: 2301-0117AC
Registry: Calgary

Between:

Tibor Uhrik and Lieselotte Litzius

Applicants

- and -

Mike Terrigno and Michele De Cesare

Respondents

The Court:

The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Jolaine Antonio
The Honourable Justice Anne Kirker

Memorandum of Judgment

Application for Consent Judgment

Memorandum of Judgment

The Court:

[1] The applicants appealed an order declaring them vexatious litigants and subjecting them to court access restrictions. It appears the applicants and respondents have reached a settlement agreement which contemplates the parties jointly submitting a consent order that would vacate the order imposed below. The parties were directed by the Case Management Officer to bring an application before a panel for approval of the consent order. We deny their application.

Background

[2] The applicants and respondents have been embroiled in litigation at the Court of King's Bench. Eventually the applicants and respondents each filed applications to have the other declared vexatious litigants and to have court access restrictions imposed. The respondents' application was granted but the applicants' was denied. In the result, the applicants were declared vexatious but the respondents were not.

[3] The applicants filed a notice of appeal alleging numerous errors in the chambers judge's decision and asking that it be set aside in its entirety. With the respondents' consent, the applicants have now filed a discontinuance of the portion of their appeal arising from the chambers judge's decision not to declare the respondents vexatious litigants. The extant appeal therefore only concerns the portion of the decision below declaring the applicants vexatious and imposing restrictions on them.

[4] According to the applicant Mr. Uhrik, in an affidavit filed in support of this application, the parties reached a settlement agreement on June 8 of this year. He deposes that it is a condition of that agreement that it shall be kept confidential except insofar as disclosure is required by law.

[5] The redacted version of the agreement that was exhibited to Mr. Uhrik's affidavit indicates that the parties "wish to fully and completely resolve any and all outstanding matters between them". It further provides:

> 2. The Parties shall jointly file with the Court of Appeal a Consent Order directing that Justice Bourque's finding and declaration that UHRIK and LITZIUS are deemed vexatious litigants in *Uhrik v. Terrigno 2023 ABKB 223* (the **"Bourque Decision")** be overturned/reversed without costs to any of the parties.
>
> 3. If the Consent Order contemplated in *paragraph B (2)* is not granted at first instance and instead the Court of Appeal directs that the parties make further

submissions in person or writing, the Parties agree to facilitate and comply with the additional direction from the Court.

> a. **It is expressly understood and accepted by UHRIK and LITZIUS that the final decision to overturn the Bourque Decision and their respective designation as vexatious litigants is exclusively the jurisdiction of the Court of Appeal**. [emphasis in original]
>
> b. Neither MIKE TERRIGNO, MICHELE DE CESARE, or ANTOINETTA TERRIGNO make any representation or guarantees as to UHRIK or LITZIUS's success in the relief they now seek from the Court of Appeal.

4. The Release of the Settlement Amount is not dependent on UHRIK and LITZIUS's ultimate success in having their designation as vexatious litigants reversed; however, the release of the Settlement Funds to TERRIGNO and DE CESARE will not be permitted until the steps contemplated by paragraphs B2 and B3 have been voluntarily completed, along with any other conditions set out in the Settlement Agreement

[6] As discussed below, the applicants submit the chambers judge made reviewable errors. They submit the consent order should be granted because, *inter alia:* without it, the costs they have expended to date will have been wasted; they have no remaining assets; they do not foresee any reason they would need to engage in litigation in future, but should the need arise they would like to do so without restriction; and "[t]he dispute between the parties in this Honourable Court and in the Court below has been entirely in the nature of private litigation with no impact on third parties."

[7] The respondents filed no materials on this application, but they confirmed in oral argument that they are complying with their obligations under the agreement by supporting the application for consent judgment.

I. Analysis

[8] We accept that both parties wish to have the extant vexatious litigant order vacated. We accept that the litigation between the parties was private in nature. However, the vexatious litigant order is not purely, or primarily, private in nature. Therefore it is not appropriate to vacate it merely on the basis of giving effect to the wishes of private parties.

[9] Vexatious litigant orders may be imposed where the subject party has demonstrated a persistent pattern of inappropriate behaviour: *Judicature Act*, RSA 2000, J-2, s 23(2), *Jonsson v Lymer*, 2020 ABCA 167 at para 20 [*Jonsson*]. Such patterns of behaviour will virtually inevitably result in misuse of court resources. When determining a vexatious litigant application, the court's goal is to "find the proper balance between maintaining reasonable access to the court, while preserving court resources and shielding other litigants from abusive behavior": *Jonsson* at para 16.

[10] As this Court has said, universal access to the courts is an important component of the rule of law: *Jonsson* at para 10. As the Supreme Court of Canada has said in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paras 32 and 40:

> Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in

> the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. . .
>
> In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. . .

[11] Where persistent abusive conduct has been shown, it is the court's responsibility to step in and prevent the misuse, to ensure that the rights of other litigants to access the court is not impaired.

[12] Given the nature and purpose of vexatious litigant orders, it is evident that they are intended to protect interests beyond those of the parties to the litigation in which they arise. It follows that it is not appropriate to set aside a vexatious litigant order merely because it is the resolution desired by the parties.

[13] It should go without saying that courts "should never rubber stamp any judgment without being satisfied that it is proper": *Wensel v Wensel*, 1976 AltaSCAD 179 at para 15.

[14] Before us, the applicants submitted the decision below is flawed because the chambers judge did not give them an opportunity to respond orally to allegations concerning their conduct in an unrelated matter. They say they had understood the vexatious litigant application, and any remedy imposed, would address only the litigation between them and the respondents; in other words, they did not anticipate that they could be restricted from filing any action, against any respondent, without the court's permission.

[15] We are not satisfied from our review of the materials filed on the application and the parties' submissions that vacating the order in its entirety would be proper. We decline to say more about the merits of the matter since the appeal remains outstanding and may be argued on its merits with a full record before another panel.

II. Result

[16] The application is denied. Each of the parties shall bear their own costs.

[17] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order.

Appeal heard on November 21, 2024

Memorandum filed at Calgary, Alberta
this 26th day of November, 2024

Strekaf J.A.

Authorized to sign for: Antonio J.A.

Kirker J.A.

Appearances:

Applicants, T. Uhrik and L. Litzius

J.B. Denis, KC
for the Respondents, M. Terrigno and M. De Cesare

Tab 135

CanLII

Timm v. Canada, 2019 FC 238 (CanLII)

Source:	Federal Court
Date:	2019-02-27
File number:	T-1445-13
Citation:	Timm v. Canada, 2019 FC 238 (CanLII), <https://canlii.ca/t/j0880>, retrieved on 2026-01-18

Date: 20190227

Docket: T-1445-13

Citation: 2019 FC 238

[CERTIFIED ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, February 27, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

RICHARD TIMM

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] Mr. Timm, an inmate in a federal institution, is seeking damages from the federal Crown. He alleges that two Crown employees caused him various forms of injury by criticizing him for pursuing certain remedies and by discouraging another inmate from associating with him for that reason. I dismiss Mr. Timm's action. Indeed, with one exception, I find that the Crown employees' conduct did not constitute a fault. Moreover, I find that Mr. Timm failed to prove the alleged injury and the causal link between that injury and the faults that may have been committed. Lastly, Mr. Timm failed to demonstrate interference with his fundamental rights. Therefore, he cannot claim punitive damages.

[2] In making these findings, I am not denying that it is important for every person, including incarcerated persons, to be able to pursue the various types of statutory remedies without retaliation or interference by Crown officials. I find that there is evidence of such a conduct on one specific occasion. However, Mr. Timm has not shown that the improper conduct caused him any injury.

I. Factual background

[3] The plaintiff, Richard Timm, is an inmate serving a life sentence. In 1995, he was convicted of first degree murder and other offences. Since that time, he has maintained that he did not commit the crime for which he was convicted. The Minister of Justice dismissed his application for mercy. That decision was upheld by this Court and by the Federal Court of Appeal (*Timm v Canada (Attorney General)*, 2012 FC 505; 2012 FCA 282).

[4] Over a number of years, Mr. Timm has filed numerous complaints and grievances regarding various aspects of his conditions of detention. He has also commenced a number of proceedings in the Federal Court.

[5] In 2012, when the incidents giving rise to this action took place, Mr. Timm was incarcerated in La Macaza Institution, a medium-security facility. On September 14, 2012, his parole officer [PO], Valery Beaulieu-Guilbault, told him that she found it difficult to establish a relationship of trust

with him, given the numerous complaints he was filing against the institution's staff members. On January 11, 2013, Ms. Beaulieu-Guilbault had a meeting with Dave Roy, another inmate under her supervision, and noticed that his temporary absence request had clearly been prepared by another inmate, most likely Mr. Timm. Ms. Beaulieu-Guilbault told Mr. Roy that his request had been prepared by another inmate whom she described as [TRANSLATION] "very litigious". She advised him to be careful about the company he kept, because that inmate [TRANSLATION] "[would] only hinder him". Shortly after, Yves Maillé, Mr. Roy's Aboriginal liaison officer, advised Mr. Roy not to associate with Mr. Timm.

[6] In response to these events, Mr. Timm filed a grievance disputing the way in which he had been treated by Ms. Beaulieu-Guilbault and Mr. Maillé. In the grievance, he requested that the Correctional Service of Canada [CSC] acknowledge that Ms. Beaulieu-Guilbault and Mr. Maillé had breached a number of provisions in Commissioner's Directives [CDs] 060 and 081. At the time, the grievance process under CD 081 consisted of three levels. At the first level, the acting warden of La Macaza Institution, Yves Guimont, denied the grievance. At the second level, CSC's regional deputy commissioner for Quebec, Réjean Tremblay, also rejected the grievance. At the third level, however, CSC's senior deputy commissioner, Anne Kelly, allowed Mr. Timm's grievance. The specific rationale for allowing the grievance will be examined in detail below.

[7] Shortly after receiving the third-level decision, Mr. Timm brought this action based on extracontractual liability against the federal Crown. He maintains that the actions of Ms. Beaulieu-Guilbault and Mr. Maillé have caused him injury. In his statement, he also complains about the actions of Mr. Guimont, Mr. Tremblay and Ms. Kelly. At the hearing, however, counsel for Mr. Timm stated that Mr. Timm was not basing his claim on the faults that these three individuals allegedly committed. Therefore, these reasons will relate to the actions of Ms. Beaulieu-Guilbault and Mr. Maillé. Mr. Timm is claiming $400,000 in compensatory damages for [TRANSLATION] "moral damages and damage to reputation", and $800,000 in punitive damages. He is also seeking declarations by the Court that various statutory or regulatory provisions have been breached.

II. Legal framework

[8] Mr. Timm bases his action on the provisions of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 [the CLPA]. Under section 3 of the CLPA, the Crown is civilly liable for faults committed by "servant[s] of the Crown", that is, its employees. This means that, with respect to extracontractual liability, the Crown is subject to the private law of the province in which the events occurred. Since the events in this case occurred entirely in Quebec, the basic principles are set out in article 1457 of the *Civil Code of Québec*, SQ 1991, c 64:

1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.	**1457**. Toute personne a le devoir de respecter les règles de conduite qui, suivant les circonstances, les usages ou la loi, s'imposent à elle, de manière à ne pas causer de préjudice à autrui.
Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.	Elle est, lorsqu'elle est douée de raison et qu'elle manque à ce devoir, responsable du préjudice qu'elle cause par cette faute à autrui et tenue de réparer ce préjudice, qu'il soit corporel, moral ou matériel.
He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.	Elle est aussi tenue, en certains cas, de réparer le préjudice causé à autrui par le fait ou la faute d'une autre personne ou par le fait des biens qu'elle a sous sa garde.

[9] It should be emphasized that, under the CLPA, the federal Crown cannot be held directly liable for its own actions; it is liable only in respect of the fault of its employees (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at paragraphs 36–38; *Hinse v Canada (Attorney General)*, 2015 SCC 35 at paragraph 92, [2015] 2 SCR 621 [*Hinse*]). One cannot merely allege that a fault was committed by the "government" as an institution unless the fault was also that of a specific employee.

[10] In Quebec, the reference to private law in section 3 of the CLPA includes not only the Civil Code but also certain provisions of the *Charter of human rights and freedoms*, CQLR, c C-12 [the Quebec Charter] (*Hinse* at paragraphs 156–163). Consequently, when events giving rise to liability also constitute interference with a right guaranteed by the Quebec Charter, it is possible to claim punitive damages (sometimes called exemplary damages) under section 49, paragraph 2, of the Quebec Charter. According to *de Montigny v Brossard (Succession)*, 2010 SCC 51, [2010] 3 SCR 64 [*de Montigny*], the purpose of punitive damages is not to compensate for the injury, but rather to punish a person who interferes with a right, to deter similar interference and to publicly denounce the impugned conduct. The amount of such damages must be determined taking into account the factors listed in article 1621 of the Civil Code, namely the gravity of the fault, the debtor's patrimonial situation, the amount of compensatory damages and whether the debtor is insured.

[11] Procedurally, it is important to note that the scope of the debate before me is framed by the allegations contained in the pleadings—the statement of claim or statement of defence—filed by the parties. There is a reason for the requirement, found in rule 174 of the *Federal Courts Rules*, SOR/98-106, that pleadings contain "a concise statement of the material facts on which the party relies". This enables the opposing party to conduct its own verification of the facts and to bring evidence and make legal submissions to refute the other party's allegations. This prevents surprises and ensures that the trial is conducted fairly and properly. Pleadings are used to determine the scope of pre-trial proceedings, such as examinations for discovery, as well as what can be proven at trial. Of course, pleadings must be interpreted generously, but not in such a way as to allow an endless investigation into the dealings between the parties.

[12] In his pleadings, Mr. Timm identified precise and time-specific events that, he alleges, constitute a fault against him. This judgment deals with those allegations. At trial, Mr. Timm referred to various other sources of dissatisfaction with his conditions of detention. However, these events are not alleged in the pleadings. This proceeding is therefore not the appropriate time to consider every detail of Mr. Timm's time at La Macaza Institution.

III. Fault

[13] The concept of fault is the cornerstone of extracontractual liability in civil law. Article 1457 of the Code defines fault as a failure to abide by "the rules of conduct incumbent on [every person], according to the circumstances, usage or law". Thus, the first step in the analysis is to define the appropriate standard of conduct. Second, the evidence must be analyzed to determine whether that standard has been violated.

[14] The standard of conduct may be based on circumstances or usage. In some types of situations that are frequently brought before the courts, such as damage to reputation, case law helps to define the appropriate standard of conduct. In other cases, it is up to the judge to determine *a posteriori* what a reasonable person would have done in the circumstances.

[15] The standard of conduct may also be based on legislation or regulations made under a statute. As will be seen below, however, not all statutes or regulations give rise to civil liability when they are breached.

A. *Standard of conduct*

[16] In his pleadings, Mr. Timm alleges various types of fault. Many of his criticisms of CSC employees stem from the alleged violation of certain internal CSC rules. I must therefore identify the conditions under which the violation of a statutory norm gives rise to civil liability. Moreover, Mr. Timm bases his claims on the decision at the third level of the review of his grievance. I must therefore clarify the authority of such a decision with respect to this case. Once I have examined these preliminary issues, I will be able to describe the various standards of conduct at issue in this case.

(1) Relationship between violation of legislation and civil fault

[17] Despite the reference to "law" in the first paragraph of article 1457 of the Civil Code, there is general agreement that not every breach of a statute or regulation constitutes civil fault. For

example, in *Morin v Blais*, 1975 CanLII 3 (SCC), [1977] 1 SCR 570, the Supreme Court stated that the violation of a regulatory standard could constitute a fault if that standard also expressed an elementary standard of care. More recently, the Supreme Court stated in *St. Lawrence Cement Inc. v Barrette*, 2008 SCC 64 at paragraphs 34 and 36, [2008] 3 SCR 392:

> In Quebec civil law, the violation of a legislative standard does not in itself constitute civil fault . . . . For that, an offence provided for in legislation must also constitute a violation of the standard of conduct of a reasonable person under the general rules of civil liability set out in art. 1457 C.C.Q. . . .
>
> . . .
>
> As a result, the content of a legislative standard may influence the assessment of the duty of prudence and diligence that applies in a given context. In a civil liability action, it will be up to the judge to determine the applicable standard of conduct—the content of which may be reflected in the relevant legislative standards—having regard to the law, usage and circumstances.

(2) Relevance of grievance decisions

[18] The events giving rise to an extracontractual liability action may have been considered in other decision-making processes. If so, it is necessary to determine the authority of decisions rendered in such processes over a civil trial.

[19] The decisions rendered in such processes are not binding on a judge who rules on an extracontractual liability action. This is because the conditions for the recognition of *res judicata*, provided for in article 2848 of the Civil Code, are not fulfilled (*La Foncière, compagnie d'assurance de France v Perras*, 1943 CanLII 42 (SCC), [1943] SCR 165). For a matter to be considered to be *res judicata*, the parties, cause and object must be identical. For example, in a professional discipline decision, the cause is a breach of a code of discipline and the object is a regulatory penalty, which is very different from an extracontractual liability action arising from civil fault and seeking reparation for injury.

[20] Nevertheless, it is recognized that a criminal or disciplinary decision may have de facto authority over a civil trial (*Ali c Compagnie d'assurance Guardian du Canada*, 1999 CanLII

13177 (QC CA), [1999] RRA 427 (CA); *Audet c Transamerica Life Canada*, 2012 QCCA 1746 at paragraphs 44–46). This means that a criminal or disciplinary decision is a relevant fact that may be put into evidence in a civil trial. The decision may be a convincing indication that the facts that it finds did in fact occur, even if the legal conclusions it draws may not be applicable to the issue of whether there was civil fault.

[21] In this case, the grievance process under the *Corrections and Conditional Release Act*, SC 1992, c 20 [the CCRA], does not aim at awarding damages for injury. It is not based on the concept of civil fault. In fact, it appears that the main purpose of this process is to enforce the internal rules of the penitentiary system (see *May v Ferndale Institution*, 2005 SCC 82 at paragraph 63, [2005] 3 SCR 809). Grievance decisions therefore do not have the force of *res judicata* in this case; they have only de facto authority.

[22] Having made these clarifications, I can now turn to the main standards of conduct that may be relevant. I will divide them into two main categories, namely standards governing the conduct of a public body with respect to the exercise of legal or other remedies, and standards prohibiting harassment and discrimination.

(3) Prohibition against interfering with the pursuit of a legal remedy and prohibition against retaliation

[23] The right to an effective remedy is an essential component of the rule of law. It is pointless to recognize the rights of individuals if they cannot exercise those rights. There is a growing awareness of the practical difficulties that Canadians face when seeking to have their legal disputes determined by the courts and of the significant resources they must devote to this end (see, for example, *Hryniak v Mauldin*, 2014 SCC 7 at paragraphs 23–33, [2014] 1 SCR 87). Nevertheless, the issue here is more specific, namely imposing hurdles or constraints on the pursuit of a remedy, in particular through retaliation.

[24] One of the best-known decisions on this issue is *Golder v the United Kingdom*, a decision made by the European Court of Human Rights on February 21, 1975. Mr. Golder, an inmate,

sought to bring a civil suit against a prison guard who had allegedly made a false statement about him. However, the British prison authorities denied Mr. Golder permission to contact a lawyer. On the basis of Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the Court held that everyone has a right of access to the courts and that the British prison authorities had violated this right by denying Mr. Golder the right to consult a lawyer, thereby significantly interfering with his pursuit of a remedy.

[25] The Supreme Court of Canada applied the same principle in *BCGEU v British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 SCR 214. The Court confirmed an injunction to prevent picketing outside British Columbia's courthouses. Citing *Golder*, Chief Justice Dickson linked the prohibition against interfering with the pursuit of legal remedies to the principle of the rule of law, stating the following at page 230:

> There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.

[26] The Supreme Court reiterated these principles in a more recent decision, *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at paragraphs 32 and 38–40, [2014] 3 SCR 31.

[27] A concrete example of interference with the pursuit of a legal remedy that has been found to be contrary to the rule of law is provided by *Compagnie de construction et de développement cris ltée v Société de développement de la Baie James*, 2001 CanLII 20643 (QC CA), [2001] RJQ 1726 (CA). In that case, a municipality had included in the terms and conditions of its calls for tenders a clause that excluded from the bidding process any company that had filed a lawsuit against the municipality. The Court of Appeal found that such a clause was contrary to public order and the rule of law, since it imposed a disadvantage on persons who had exercised their right to pursue a legal remedy.

[28] To ensure the right to effectively pursue a remedy, it is also necessary to prohibit retaliation. Although this is undoubtedly a general principle, there are several statutory provisions that specifically prohibit retaliation against persons exercising certain rights or remedies (see, for example, section 14.1 of the *Canadian Human Rights Act*, RSC 1985, c H-6; section 147 of the *Canada Labour Code*, RSC 1985, c L-2; section 19 of the *Public Servants Disclosure Protection Act*, SC 2005, c 46; section 425.1 of the *Criminal Code*, RSC 1985, c C-46; and section 10 of the *Canadian Victims Bill of Rights*, SC 2015, c 13). In this case, the relevant provision is section 91 of the CCRA, which reads as follows:

91. Every offender shall have complete access to the offende r grievance procedure without negative consequences.	**91.** Tout délinquant doit, sans crainte de représailles, avoir li bre accès à la procédure de règ lement des griefs.

[29] How this process works is described in detail in CD 081—Offender Complaints and Grievances. (This directive has since been amended; I am quoting the provisions in force when the events took place.) Section 10(a) of this directive reiterates that retaliation ("negative consequences") is prohibited.

[30] In addition, section 54 of CD 081 states that the grievance process is confidential and that:

An offender's use of the comp laint and grievance process ma y not be mentioned in records outside the complaint and grie vance process without the auth orization of the Institutional H ead.	Le fait qu'un délinquant a eu r ecours au processus de règlem ent des plaintes et griefs ne pe ut être mentionné dans d'autre s dossiers que ceux qui concer nent ce processus sans l'autori sation du directeur de l'établis sement.

[31] Although most of the cases cited above dealt with applications to overturn government decisions, interfering with the pursuit of a remedy may also, depending on the circumstances, constitute a civil fault for which reparation may be sought if the fault has caused injury. Indeed, in the case of retaliation, several of the statutes above specifically provide for reparation to the victim.

(4) Prohibition against harassment and discrimination

[32] In his pleadings, Mr. Timm strongly emphasizes breaches of certain provisions of CSC's internal rules. More specifically, he refers to the prohibition against discrimination and harassment in the Commissioner's Directive No. 60 [CD 060]—Code of Discipline. For example, section 12 of the Code states that an employee has committed an infraction if he or she "maltreats, humiliates, harasses, discriminates and/or is abusive, by word or action, to an offender". Mr. Timm also refers to the following definitions in the appendix to the Code:

Discrimination: when the grievor believes that CSC staff actions, language or decisions were made in a discriminatory manner based on gender, race ethnicity, language, sexual orientation, religion, age, marital status, or a physical or mental disability. The category includes staff behaviour that constitutes a violation of the offender's human rights or the *Canadian Charter of Rights and Freedoms*.	Discrimination : des actes, des paroles ou des décisions du personnel du SCC qui incitent le délinquant à s'estimer victime de discrimination fondée sur le sexe, la race, l'ethnie, la langue, l'orientation sexuelle, la religion, l'âge, l'état civil ou une déficience mentale ou physique. Sont inclus les comportements du personnel qui enfreignent les droits de la personne ou de la *Charte canadienne des droits et libertés*.
Harassment: any improper conduct by one or more employees, offenders, visitors or volunteers, that is directed at and offensive to another person, and that the individual knew or ought reasonably to have known to cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.	Harcèlement : tout comportement inapproprié de la part d'un ou de plusieurs employés, délinquants, visiteurs ou bénévoles à l'égard d'une autre personne, et dont l'auteur ou les auteurs savaient ou auraient raisonnablement dû savoir qu'il serait offensant ou préjudiciable. Le harcèlement comprend tout acte, propos ou exhibition répréhensible qui diminue, rabaisse, humilie ou embarrasse une personne, ou tout acte d'intimidation ou de menace. Il comprend également le harcèlement au sens de la *Loi canadienne sur les droits de la personne*.

[33] Harassment and discrimination may also constitute a civil fault giving rise to an obligation to make reparation for the injury caused (regarding harassment, see *Syndicat des employées et*

employés de métiers d'Hydro-Québec, section locale 1500 (SCFP-FTQ) c Fontaine, 2006 QCCA 1642, [2007] RJQ 5; regarding discrimination, see *de Montigny* at paragraph 44). In this case, however, I must rely on the definitions of these concepts that have been adopted by the civil courts and not on the definitions in the internal CSC rules.

[34] With regard to harassment, I refer to the following definition proposed by Judge Christian Brunelle of the Court of Québec in *Bélanger c Hydro-Québec*, 2016 QCCQ 15565, at paragraphs 64 and 65:

> [TRANSLATION]
>
> In general, harassment occurs when there are unwanted, vexatious acts whose effects are ongoing, either because the acts are being repeated or because there are serious harmful effects on the person being harassed.
>
> To describe a situation as harassment, one must assess [TRANSLATION] "all the circumstances of the case before the Court". Indeed, there are differences—of nature and degree—between harassing acts and acts that are simply [TRANSLATION] "annoying" or [TRANSLATION] "bothersome". [References omitted.]

[35] With regard to discrimination, the conduct complained of must involve a distinction related to one of the grounds set out in section 10 of the Quebec Charter, for example colour, age or sex. In the absence of such a distinction, there can be no discrimination (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paragraph 52, [2015] 2 SCR 789).

B. *Evidence of fault*

[36] In his statement, Mr. Timm complains about two separate events, namely the discussion between him and Ms. Beaulieu-Guilbault on September 14, 2012, in which she criticized him for filing complaints against the staff, and the discussions on January 11, 2013, in which Ms. Beaulieu-Guilbault and Mr. Maillé advised Mr. Roy to stop associating with Mr. Timm. The circumstances of the first event are not subject to significant debate; however, the parties disagree

on the second event. I must therefore analyze the evidence in detail to determine what in fact took place.

[37] Having established the facts, I will then be able to characterize them legally and determine whether a fault has been committed. I will state my findings at the outset: Ms. Beaulieu-Guilbault and Mr. Maillé committed a fault with respect to the second event only, by trying to discourage Mr. Roy from pursuing certain remedies; however, Ms. Beaulieu-Guilbault's conduct in the first event was not a fault, and there was no harassment and no discrimination.

(1) Facts

[38] It is not disputed that, on September 14, 2012, Ms. Beaulieu-Guilbault had a meeting with Mr. Timm and made the comments recorded in the Offender Management System [OMS]:

> [TRANSLATION]
>
> . . . we spoke at length about his resistant attitude towards authority and CSC. We talked about the complaints he has been filing and the consequences of that for him. . . . I told him that I am finding it difficult to reach him and that it is hard to trust him because of the many complaints he has been making against the staff.

[39] However, the accounts of the events on January 11, 2013, are divergent. It is therefore necessary to examine the evidence in detail on this matter.

(a) *Mr. Roy's affidavit*

[40] Mr. Timm did not personally witness the actions he alleges. These acts were revealed to him by another inmate, Mr. Roy, who agreed to sign an affidavit relating these facts.

[41] This affidavit was initially prepared in support of Mr. Timm's grievance. However, the defendant objects to its admission into evidence in these proceedings, because Mr. Roy did not testify at trial.

[42] Under rule 285 of the *Federal Courts Rules*, I may order that a specific fact be proven by affidavit. I am of the opinion that this discretionary power should be exercised and I order that Mr. Roy's affidavit be admitted into evidence. This affidavit was brought to the attention of the defendant in 2013, as part of the grievance process. There is no indication that the defendant has challenged the content of this affidavit or attempted to prove otherwise. Decisions at all three levels of the grievance process were based, at least implicitly, on the premise that the events described by Mr. Roy had actually taken place. In addition, because Mr. Roy has since been released, Mr. Timm has not been able to locate him.

[43] In the affidavit, Mr. Roy states that he asked Mr. Timm for help in preparing a request for an escorted temporary absence [ETA]. He submitted this written request to his PO, Ms. Beaulieu-Guilbault. The following is his account of what then happened:

> [TRANSLATION]
>
> The following week, PO Valery Beaulieu Guilbault called me to her office to tell me that she had read my ETA request and was convinced that it had been written not by me but rather by Richard Timm, because she recognized his writing style.
>
> . . .
>
> PO Valery Beaulieu Guilbault then said not to associate with Richard Timm, because he was bad company, since he was a litigious person who had filed complaints against employees and since associating with him would only hinder my progress.
>
> On the same afternoon, Aboriginal liaison officer [ALO] Yves Maillé had a meeting with me to tell me that, further to a call from PO Valery Beaulieu Guilbault, he had to tell me to stop associating with Richard Timm, because he was bad company and was not well liked by the staff, since he had filed complaints against certain employees, and because it could hinder my reintegration in society.

[44] At first glance, these statements constitute evidence that, when Ms. Beaulieu-Guilbault discovered that Mr. Timm had helped Mr. Roy with a request, she and Mr. Maillé immediately intervened to discourage Mr. Roy from associating with Mr. Timm and asking for more help.

(b) *Ms. Beaulieu-Guilbault's testimony*

[45] Ms. Beaulieu-Guilbault testified at trial. I found her to be generally honest and professional. However, she occasionally sought to interpret the facts to her advantage.

[46] Ms. Beaulieu-Guilbault confirmed the accuracy of the note she entered in Mr. Roy's record in the OMS on January 11, 2013:

> [TRANSLATION]
>
> In addition, I noticed that the request was written not by him but by another very litigious inmate. I immediately told him that he should be careful about the company he kept and that this inmate would only hinder him. He said that he was able to form his own opinion about the other inmates and that he would not let another inmate hinder his progress. However, I urged him to be careful.

[47] She stated that, during this discussion with Mr. Roy, she did not mention Mr. Timm's name. However, she admitted that, at that time, she was certain it was Mr. Timm who had written Mr. Roy's ETA request, because only Mr. Timm had access to a computer and only Mr. Timm submitted typed documents. Even if I give her the benefit of the doubt in this regard, for her warning to make sense, she had to make it clear to Mr. Roy that she was referring to Mr. Timm, even if she did not say his name. Moreover, she wrote that associating with "this inmate" would hinder him. It is difficult to understand how this message could be conveyed without it being clear to Mr. Roy that she was talking about Mr. Timm. In fact, according to Mr. Roy's affidavit, that is how he understood the conversation. In this regard, it does not matter that Ms. Beaulieu-Guilbault testified that there were other litigious inmates at La Macaza.

[48] I must also say that I was not convinced by her attempt to downplay the derogatory nature of the word [TRANSLATION] "litigious." Even though, as she points out, the dictionary defines a litigious person as one who always uses the law to assert their point of view, it is obvious that she does not see this in a positive light, especially since she uses the adverb [TRANSLATION] "very" before the adjective [TRANSLATION] "litigious" and concludes that the litigious person in question is bad company.

[49] Ms. Beaulieu-Guilbault also acknowledged that she definitely told Mr. Maillé about this incident, probably at a meeting of Mr. Roy's case management team [CMT], although she could not say exactly when. She further stated that the workers did not keep secrets and that it was normal for one worker to talk to another about an inmate's interactions. She did not recall taking the initiative to contact Mr. Maillé on January 11, 2013, but she did not deny it.

[50] Finally, Ms. Beaulieu-Guilbault stated that the entire staff of La Macaza Institution knew that Mr. Timm made frequent use of the complaints and grievance process.

(c) *Mr. Maillé's testimony*

[51] At trial, Mr. Maillé said that he remembered Mr. Roy, because Mr. Roy was involved in the activities for Indigenous inmates that he organized or facilitated. In those days, he could be interacting with Mr. Roy between 15 and 30 minutes a day.

[52] When asked about the matter, Mr. Maillé said he did not remember receiving a call from Ms. Beaulieu-Guilbault regarding the relationship between Mr. Roy and Mr. Timm. He also does not remember advising Mr. Roy not to associate with Mr. Timm. This memory lapse seems implausible to me. One must not forget that these events were the subject of a grievance in the weeks that followed and of this action a few months later. It is unlikely that Mr. Maillé did not discuss this matter with the institution's management and then with the Crown attorneys. In other words, Mr. Maillé surely had several opportunities to refresh his memory shortly after the events took place.

(d) *The grievance decision*

[53] Mr. Timm filed a grievance regarding the facts underlying this action. This grievance was decided at all three levels. A review of these decisions shows that the facts alleged by Mr. Timm, including the discussions between Ms. Beaulieu-Guilbault, Mr. Maillé and Mr. Roy, are not in question. To that extent, I am prepared to give some de facto authority to these decisions.

[54] The decision at the first level, signed by the warden of the institution, contains the following paragraph:

> [TRANSLATION]
>
> We are of the opinion that the two employees [Ms. Beaulieu-Guilbault and Mr. Maillé], more particularly the PO (because the grievance focuses more on her), did not harass you, based on the definition in CD 081 mentioned above. However, the casework records attached to the grievance may raise some questions. Nevertheless, we conclude that Ms. Beaulieu-Guilbault acted openly with the intention of helping you, and the other inmate involved, in your respective paths.

[55] If the warden concludes that Ms. Beaulieu-Guilbault acted to assist Mr. Timm and Mr. Roy, it is because he necessarily admits that she made comments to discourage Mr. Roy from associating with Mr. Timm and obtaining his help in writing requests.

[56] The decision at the second level, signed by CSC's regional deputy commissioner, contains the following paragraphs:

> [TRANSLATION]
>
> On 2013-02-13, the inmate you mentioned completed an affidavit, sworn in by a commissioner for oaths. It states that the ALO [Mr. Maillé] intervened and suggested that he no longer associate with you since this would only hinder his personal progress under paragraph 6a of CD 710-1.
>
> The ALO has to communicate with the PO and the CMT to provide input on the intervention strategy in relation to your correctional plan, in accordance with paragraphs 6c and 6e of CD 710-1.

[57] In these passages, however, the regional deputy commissioner assumes that there were in fact conversations between Ms. Beaulieu-Guilbault and Mr. Maillé. He seeks to justify their actions rather than deny that they took place. Far from contradicting the content of Mr. Roy's affidavit, this decision makes sense only if one concludes that Mr. Roy was telling the truth.

[58] The decision at the third level does not contain any additional information on this matter.

(e) *Conclusion on facts*

[59] From all of this evidence, I conclude that the events did indeed unfold as Mr. Roy describes in his affidavit.

[60] At the hearing, the Crown attorney tried to argue that Mr. Timm's testimony regarding Mr. Roy's visit on January 11, 2013, was implausible, because the time at which Ms. Beaulieu-Guilbault entered her note on the conversation in the OMS is the time that Mr. Maillé would have finished his shift. Mr. Roy would therefore not have had time to visit Mr. Timm between the meetings with Ms. Beaulieu-Guilbault and Mr. Maillé. This argument assumes that the OMS entry was made at the exact time of the conversation and that Mr. Maillé remembers exactly what time he left work that day. I believe that this is speculation and that it does not support the inference that the Crown attorney urges me to draw, namely that the events described by Mr. Roy in his affidavit did not take place.

(2) Legal characterization of facts

(a) *Retaliation and interference with pursuit of remedy*

[61] The first event must be placed in context: it is a regular meeting between an inmate and his parole officer. It is normal in such a meeting to have a frank conversation on the various elements of the correctional plan and the factors that are hindering the inmate's progress. Ms. Beaulieu-Guilbault was entitled to point out the lack of a relationship of trust between Mr. Timm and his CMT and to identify Mr. Timm's [TRANSLATION] "many complaints" as one of the barriers to establishing such a relationship, along with Mr. Timm's [TRANSLATION] "resistant attitude". In doing so, Ms. Beaulieu-Guilbault was not retaliating: she was not attempting to impose negative consequences on Mr. Timm for pursuing a remedy. She was also not attempting to hinder the pursuit of remedies in the future.

[62] I would add that the fact that Ms. Beaulieu-Guilbault referred to Mr. Timm's complaints in the OMS does not, in my opinion, constitute a civil fault. Although this entry violates CD 081,

violating a regulatory standard does not necessarily constitute a civil fault. In this case, this violation was neither a form of retaliation nor an attempt to interfere with the pursuit of a remedy.

[63] However, in acting as they did in the second event, Ms. Beaulieu-Guilbault and Mr. Maillé committed a fault. They wanted to isolate Mr. Timm for having helped Mr. Roy write a request. This is retaliation for collaborating with another inmate in the pursuit of a remedy and, more generally, for having pursued multiple remedies in the past. In addition, the obvious goal was to discourage Mr. Roy and possibly other inmates from making more requests in the future with the help of Mr. Timm. In this sense, Ms. Beaulieu-Guilbault and Mr. Maillé sought to interfere with the exercise of the rights or remedies of these other inmates. The fact that their actions failed does not excuse their conduct, but remains relevant to the existence of injury, as discussed below.

(b) *Harassment and discrimination*

[64] To begin with, the evidence does not reveal any act of discrimination by Ms. Beaulieu-Guilbault or Mr. Maillé. Indeed, they did not act on any prohibited ground of discrimination set out in section 10 of the Quebec Charter. Pursuing a remedy or filing a grievance, even repeatedly, is unrelated to these prohibited grounds of discrimination.

[65] For that reason alone, I am also of the opinion that the acts that Mr. Timm describes as harassment do not constitute a civil fault. Even if their purpose was to discourage the pursuit of remedies, the actions taken by Ms. Beaulieu-Guilbault and Mr. Maillé, according to the admissible evidence, did not constitute repeated or especially serious vexatious acts.

[66] As I mentioned above, the first event must be considered in the context of the relationship between officers and inmates in a penitentiary. Ms. Beaulieu-Guilbault was simply trying to paint a realistic picture of Mr. Timm's situation to allow him to make progress towards achieving the objectives of his correctional plan. To make an analogy with workplaces, it is well established that the exercise of an employer's management rights, however unpleasant, does not constitute

harassment (Bernard Cliche et al., *Le harcèlement et les lésions psychologiques*, 2nd ed., Cowansville, Que., Yvon Blais, 2012 at pages 197–198).

[67] Moreover, regarding the second event, the evidence shows that Ms. Beaulieu-Guilbault and Mr. Maillé were not so much seeking to offend or humiliate Mr. Timm, whom they did not see that day, as to discourage other inmates from seeking Mr. Timm's assistance in preparing a request or pursuing a remedy. Judge Brunelle's remarks in *Bélanger*, at paragraph 68, may apply to Mr. Timm's situation: [TRANSLATION] "However 'irritating' or 'annoying' it may be, this practice does not seem serious enough to constitute harassment amounting to civil fault."

[68] Mr. Timm also refers to the third-level decision on his grievance. He submits that it upholds his grievance in its entirety and that the deputy commissioner has therefore acknowledged that he was a victim of harassment.

[69] In this regard, it is useful to recall that the grievance decision can only have de facto authority. The concept of harassment in CD 060 is not necessarily defined in the same way as harassment that constitutes civil fault. As well, the grievance process is not intended to compensate the grievor. The decision therefore does not have the authority of *res judicata*.

[70] Moreover, from a factual standpoint, this decision does not conclude that harassment occurred. To fully understand this, one particular feature of the grievance process must be emphasized, namely the two-step process for handling harassment complaints. In the first step, the first-level authority must determine whether the facts alleged by the complainant, if they are assumed to be true, constitute harassment. Only if this initial question can be answered affirmatively should the decision-maker move to the second step and proceed to an inquiry to establish the facts.

[71] In this case, however, the warden concluded that the acts alleged by Mr. Timm, although they had occurred, did not constitute harassment. He therefore felt no need to proceed to the second step

of the harassment process. At the second level, the regional deputy commissioner took the same approach:

> [TRANSLATION]
>
> Upon reading your allegations, I am able to conclude that the situations mentioned do not meet the definition of harassment . . . .

[72] At the third level, the senior deputy commissioner took a different approach. She states the following:

> [TRANSLATION]
>
> Despite the results of the first-level investigation, the conduct of your PO and ALO, were it proven [emphasis added], would meet the definition of harassment. However, the warden's investigation determined that the PO and ALO had not engaged in any conduct that was harmful to you. Indeed, at a meeting with the PO, it was determined that she had acted with the intention of helping you.
>
> [Emphasis in the original]

[73] Consequently, she deemed it necessary to proceed to the second step of the process. However, she noted that an examination of the facts that actually occurred did not support a finding of harassment. In other words, the senior deputy commissioner took a different path to reach the same result, the denial of the grievance with respect to harassment. Therefore, the grievance was allowed not because of harassment, but for another reason.

[74] In my opinion, the grievance was upheld at the third level only because the senior deputy commissioner found that the first-level process had not allowed Mr. Timm to present his arguments with respect to the entries in the OMS regarding complaints he had filed against staff members. The warden had noted that these entries might raise [TRANSLATION] "some questions", but had asked Mr. Timm to present a new grievance on the issue. At the third level, the deputy commissioner found that the grievance had [TRANSLATION] "not been dealt with in accordance with the provisions of CD 081 and GL 081-1".

[75] My understanding is that the only reason the grievance was upheld at the third level is that, at the two previous levels, Mr. Timm's allegations regarding the references to his complaints in the OMS had not been taken into consideration. This also explains why the only corrective measures imposed by the senior deputy commissioner are a reminder to staff members that they may not refer to the use of the complaint and grievance process in an inmate's record and the amendment of Mr. Timm's record to remove the references in question.

[76] I agree that the decision at the third level is not written in a way that makes it easy to understand. Nevertheless, the Supreme Court encourages us to read administrative decisions from a broad perspective and not to focus on flaws or deficiencies in drafting: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708. Mr. Timm claims that, since his grievance was not upheld [TRANSLATION] "in part", it was necessarily upheld [TRANSLATION] "in full". I disagree. A reading of the decision as a whole clearly shows that the allegations of harassment were not upheld and that the senior deputy commissioner agreed with Mr. Timm only on the issue of the casework record entries. There is therefore nothing in this decision to support an allegation of civil fault.

IV. Injury and causal link

[77] A finding of fault is not sufficient to establish extracontractual liability. The fault must also have caused injury. In his pleadings and at trial, Mr. Timm referred to various types of injury. I will assess whether Mr. Timm has proven this injury and whether he has shown that it was caused by the fault of Ms. Beaulieu-Guilbault and Mr. Maillé.

A. *Interference with pursuit of remedy*

[78] I should begin by noting that, although the fault I found may be described as discouraging the use of grievance procedures or other remedies, there is no evidence that this fault has had any consequence whatsoever.

[79] Indeed, Mr. Roy told Ms. Beaulieu-Guilbault that he would form his own opinion about his relationship with Mr. Timm. There is no evidence that Ms. Beaulieu-Guilbault's intervention discouraged Mr. Roy or anyone else from pursuing a remedy, with or without Mr. Timm's assistance. In any event, such injury would have been suffered by Mr. Roy (or another inmate), and Mr. Timm would not have the required standing to claim damages to compensate for that injury.

[80] During his testimony, Mr. Timm did not in any way claim to have been prevented from pursuing any remedy whatsoever. In fact, the evidence shows that he subsequently commenced a variety of recourses.

B. *Damage to reputation*

[81] In *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9, [2011] 1 SCR 214, Justice Marie Deschamps of the Supreme Court of Canada describes, at paragraphs 27 and 28, what constitutes damage to reputation in the context of an extracontractual liability action:

> A person is defamed where the image reflected back to the person by one or more other people is inferior not only to the person's self-image but above all to the image the person projected to "others" in the normal course of social interaction. . . .
>
> Therefore, the fact that a person alleging defamation feels humiliated, sad or frustrated is not a sufficient basis for an action in defamation. In such an action, injury is examined at a second level focussed not on the actual victim but on the perceptions of other people. Injury exists where "an ordinary person . . . believe[s] that the remarks made, when viewed as a whole, brought discredit on the reputation" of the victim.

[82] Mr. Timm argues that, in a prison context, the remarks made by Ms. Beaulieu-Guilbault and Mr. Maillé were extremely damaging, since, out of fear of authority, other prisoners would be strongly encouraged to avoid him and could even resort to physical violence towards him.

[83] These assertions are not supported by the evidence. Mr. Roy, the main recipient of the impugned remarks, did not stop associating with Mr. Timm. On the contrary, he even helped to prepare Mr. Timm's grievance by filing an affidavit.

[84] During his testimony, Mr. Timm alleged that, as a result of the events, some inmates avoided him. He did not say who the inmates were and did not give any further details. He also alleged that some staff members made comments, but did not provide further details. A finding of injury cannot be made on the basis of such vague statements.

[85] Mr. Timm states that at least three other inmates were present when Mr. Maillé told Mr. Roy to stop associating with him. The three inmates allegedly heard Mr. Maillé's remarks and went to see Mr. Timm to tell him what had happened. It was only at trial that Mr. Timm gave the names of these three inmates. He stated that he did not want to do so at discovery, for fear of hindering the progress of these inmates or, worse, for fear of retaliation. In any event, Mr. Timm's testimony in this regard is hearsay that is inadmissible in evidence. The other three inmates did not testify or provide an affidavit. In his affidavit, Mr. Roy does not mention the presence of the other three inmates. In any event, Mr. Timm did not claim that the three inmates stopped associating with him.

[86] Finally, there is no evidence that a fellow inmate used violence against Mr. Timm as a result of the events or for any other reason.

[87] Mr. Timm also testified about his reputation at La Macaza Institution. He claims that his nickname was [TRANSLATION] "the Citizen" and that he was known for not being associated with organized crime or contraband within the institution. Nothing in the evidence suggests that that perception has changed as a result of the interventions of Ms. Beaulieu-Guilbault and Mr. Maillé.

C. *Negative effect on certain decisions*

[88] At trial, Mr. Timm reported a number of events that occurred after the discussions on September 14, 2012, and January 11, 2013, that are central to his action. Although these subsequent events were not alleged in his statement, he asserted that they were consequences of the faults committed by Ms. Beaulieu-Guilbault and Mr. Maillé. This approach does not allow for a fair debate on these issues. Indeed, it deprives the Crown of the opportunity to investigate and bring evidence to refute Mr. Timm's allegations. In addition, the situations referred to by Mr. Timm

would constitute separate faults and not injury caused by the conduct alleged in the statement of claim. This makes the attempt to broaden the debate to include facts that were not alleged in the pleadings even more problematic. Nevertheless, I shall say a few words about the main situations referred to by Mr. Timm.

[89] First, Mr. Timm states that the faults committed against him resulted in the denial of his ETA request and his request for a security classification decrease. More generally, Mr. Timm claims that he is still in prison because of the [TRANSLATION] "poor management of his case".

[90] Although, at the meeting on September 14, 2012, Ms. Beaulieu-Guilbault told Mr. Timm that she would not support an ETA request, he nevertheless submitted one, and it was denied a few weeks later. The denial predates the events of January 11, 2013, which are the only events I consider to be faults. These events cannot be the cause of the ETA denial.

[91] It also appears that, in fall 2012, Mr. Timm requested that his security classification be decreased. His March 2013 correctional plan shows that the request was denied on November 14, 2012. Again, this decision predates the events of January 11, 2013.

[92] The correctional plan and the assessment for the ETA decision include detailed reasons. Mr. Timm's lack of commitment, lack of progress and resistant attitude are the main reasons given in support of the denials. There is no evidence to suggest that these grounds are unreasonable or flawed or that prison authorities acted on the basis of irrelevant factors. In any event, were that the case, these decisions would constitute separate faults, which are not alleged in the declaration, rather than injury.

D. *Move to a different wing*

[93] In January 2014, Mr. Timm was moved from Wing C of the La Macaza Institution, where he had been living for 11 years, to Wing A of the same institution. At discovery and at trial, he stated

that he had been told at the time by staff members of the institution that this decision was a consequence of his having brought this action in September 2013.

[94] Such allegations are troubling. As mentioned above, it is unacceptable to retaliate against a prisoner who pursues remedies available under the law.

[95] However, I can grant a remedy only if Mr. Timm can prove the reasons for the move to a different wing. He has not done so. His statement constitutes hearsay. He has not called the people who were involved in this decision to testify. On cross-examination, he also acknowledged that, in August 2013, he had requested to be physically separated from Ms. Beaulieu-Guilbault, since he believed that the third-level decision recognized that she had been harassing him. In addition, Exhibit 17 in the record contains a grievance apparently filed by Mr. Timm following the move to a different wing. The evidence does not show what action was taken on the grievance. In short, the situation may not be as clear-cut as Mr. Timm suggests. I am unable to draw a presumption of fact, as his counsel is asking me to do, since it is not serious, precise and concordant, as required by article 2849 of the Civil Code. Only fulsome evidence would allow me to make a finding.

E. *Unwarranted searches and sleep deprivation*

[96] During his testimony at trial, Mr. Timm also alleged that, after his move to Wing A, guards conducted unwarranted searches of his cell and deprived him of sleep. As for the latter, he stated that a guard would knock on his door to wake him up each hour during the night. Since his cell door was locked at night, he did not know the identity of the guards who had carried out these acts.

[97] Again, such allegations are troubling. However, there are a number of reasons preventing me from granting any reparation in this regard.

[98] First, Mr. Timm admitted on cross-examination that these events took place mainly over two months in 2016, shortly before he moved from La Macaza Institution to another institution. Moreover, while I acknowledge that it is inherently difficult to obtain evidence on this issue, I have

no information about the motives of the guards who allegedly deprived Mr. Timm of sleep. It is therefore difficult for me to conclude that the sleep deprivation resulted from the events in January 2013 or, at the very least, from the commencement of this action in September 2013.

[99] Secondly, these events are not mentioned in Mr. Timm's statement of claim, since it was written in 2013. Mr. Timm never amended his statement of claim to mention these events. Procedurally, one cannot simply raise entirely new injuries at trial. As mentioned above, doing so deprives the opposing party of any realistic opportunity to investigate and bring counterevidence.

[100] Third, Mr. Timm admitted on cross-examination that he had filed a grievance in relation to these events and that the grievance had been denied. Therefore, it is possible that not all the relevant facts have been put in evidence before me.

V. Punitive damages

[101] In *Hinse*, the Supreme Court of Canada affirmed that the Quebec Charter is part of the *jus commune* ("*droit commun*", or general law) of extracontractual liability in Quebec, which applies to the federal Crown through section 3 of the CLPA. It would therefore be possible to claim punitive damages, under section 49, paragraph 2, of the Quebec Charter, in cases of intentional interference with a right that it guarantees. Since the Supreme Court considered that Mr. Hinse's claim was unfounded, it did not consider it necessary to specify the conditions under which the federal Crown could be ordered to pay punitive damages.

[102] Mr. Timm maintains that the conduct of Ms. Beaulieu-Guilbault and Mr. Maillé interfered with his right to dignity, honour and reputation (s. 4), his right to equality (s. 10), his right to protection from harassment (s. 10.1) and his right to liberty (s. 24).

[103] It is true that, in *de Montigny*, the Supreme Court stated that punitive damages could be awarded even in the absence of compensatory damages. However, there must still have been interference with a guaranteed right.

[104] Given the findings I have already reached, I must conclude that Mr. Timm has not proven any interference with a right guaranteed by the Quebec Charter. I have ruled that Mr. Timm has not proven any damage to his reputation, which disposes of section 4. Mr. Timm has also failed to demonstrate that he was a victim of discrimination under section 10. As for harassment, section 10.1 prohibits only harassment arising from a ground set out in section 10, for example sex. Therefore, it is not possible for Mr. Timm to demonstrate that section 10.1 was breached. In any case, I have found that he was not harassed. Lastly, section 24 provides that "no one may be deprived of his liberty . . . except on grounds provided by law". Mr. Timm is incarcerated because he has been convicted of an offence under the *Criminal Code*. He has not asked me, either in his statement or at trial, to question the legality of his conviction. Therefore, section 24 was not breached. Mr. Timm has not raised any rights other than the ones I have just discussed.

[105] In the absence of interference with a guaranteed right, I cannot award punitive damages.

VI. Declarations

[106] Although he did not emphasize this issue at trial, in his statement, Mr. Timm also requests that a series of declarations be issued finding violations of various standards by Ms. Beaulieu-Guilbault, Mr. Maillé and the persons who ruled on his grievance.

[107] Declaratory relief may be provided where the parties have an interest in the determination of a genuine issue (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paragraph 46, [2010] 1 SCR 44 [*Khadr*]). As the Supreme Court stated in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at paragraph 11, [2016] 1 SCR 99, "[a] declaration can only be granted if it will have practical utility, that is, if it will settle a 'live controversy' between the parties".

[108] In Mr. Timm's case, there is no longer any "live controversy"

[109] between the parties over the facts of this case. The case is a thing of the past. Unlike in *Khadr*, it cannot be said that the facts before the Court, namely the events of September 14, 2012, and January 11, 2013, continue to have legal or practical implications.

[110] In other words, this decision constitutes a complete solution to the matter before the Court. A declaration would add nothing.

VII. Costs

[111] Although the usual practice is to award costs in favour of the successful party, rule 400 of the *Federal Courts Rules* provides that the Court retains full discretion in this regard. Exercising this discretion, I am of the opinion that Mr. Timm should not be ordered to pay the costs.

[112] I find that Ms. Beaulieu-Guilbault and Mr. Maillé did commit a fault. This fault is not sufficient to give rise to liability on the part of the federal Crown, since it did not cause any injury to Mr. Timm. However, it explains why Mr. Timm brought this action. In addition, the wording of the third-level decision on Mr. Timm's grievance was rather confusing. Given all the circumstances, I consider it unfair to make Mr. Timm bear the financial consequences of the failure of his action.

JUDGMENT in T-1445-13

THIS COURT ORDERS that the action is dismissed without costs.

"Sébastien Grammond"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-1445-13
STYLE OF CAUSE:	RICHARD TIMM v HER MAJESTY THE QUEEN

PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 21, 28 and 29, 2019
JUDGMENT AND REASONS:	GRAMMOND J.
DATED:	February 27, 2019

APPEARANCES:

Pierre Tabah Andrée-Anne Dion-Côté	FOR THE PLAINTIFF
Véronique Forest	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Labelle, Côté, Tabah et associés Avocats Saint-Jérôme, Quebec	FOR THE PLAINTIFF
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT

Tab 136

CanLII

Cris Construction and Development Company Ltd. v. James Bay Development Corporation, 2001 CanLII 20643 (QC CA)

Source:	Court of Appeal of Quebec
Date:	2001-08-03
File number:	500-09-007021-983
Other citations:	107 ACWS (3d) 994 — [2001] RJQ 1726 — EYB 2001-25349 — JE 2001-1511 — 16 CLR (3d) 26
Quote:	Cie de construction et de développement cris ltée v. Société de développement de la Baie James, 2001 CanLII 20643 (QC CA), < https://canlii.ca/t/1fcdq >, retrieved on 2026-01-18
Most recent unfavorable mention	J. Cote & Son Excavating Ltd. v City of Burnaby , 2018 BCSC 1491 (CanLII) [...] [73] **I decline to follow the approach taken in La Baie James** , where the court invalidated the clause at issue on the basis that it contravened the rule of law principle and was “contrary to public order”. [...]

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL CLERK'S OFFICE

No.: 500-09-007021-983
(500-05-040032-987)

DATE: AUGUST 3, 2001

IN THE PRESENCE OF: THE HONOURABLE S LOUISE MAILHOT JCA
FRANCE THIBAULT JCA
RENÉ LETARTE JCA AD HOC

JAMES BAY DEVELOPMENT CORPORATION,
APPELLANT - INCIDENTAL RESPONDENT/Respondent
c.
CRIS CONSTRUCTION AND DEVELOPMENT COMPANY LTD
And
NEMASKA DEVELOPMENT CORPORATION
And
NEMASKA EENOU COMPANEE,
RESPONDENTS - INCIDENTAL APPELLANTS/PLEADING PARTIES

STOP

---

[1] **THE COURT,** ruling on the appeal against a judgment rendered by the Superior Court of the District of Montreal (the Honourable Roger E. Baker), on July 31, 1998, which grants in part a motion for a declaratory judgment, with costs;

[2] **After** study, hearing and deliberation:

[3] **FOR THE REASONS** set out in the attached opinion of Justice Thibault, which Justices Mailhot and Letarte endorse:

[4] **DISMISSES** the main appeal, with costs, **ALLOWS** the cross-appeal, with costs and **SUBSTITUTES** the following conclusions for the operative part of the judgment of first instance:

> **The request for a declaratory judgment is granted** , with costs;
>
> **DECLARES** articles 3.1 and 3.3 *of the specifications* invalid and unenforceable against the applicants.

_____
LOUISE MAILHOT JCA

_____
FRANCE THIBAULT JCA

_____
RENÉ LETARTE JCA AD HOC

Mr. Yves Dulude
SPIEGEL, SOHMER, SENC
LAWYER FOR THE APPELLANT-CROSS-RESPONDENT

Sébastien Grammond
FRASER, MILNER, CASGRAIN
Lawyer for the Respondents-Cross Appellants

Tab 137

CanLII

Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25 (CanLII)

Source:	Court of King's Bench of Alberta
Date:	2015-01-12
File number:	0603 04866
Other citations:	14 Alta LR (6th) 124 — [2015] CarswellAlta 33
Citation:	Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25 (CanLII), <https://canlii.ca/t/gfwpw>, retrieved on 2026-01-18

Court of Queen's Bench of Alberta

Citation: Larouche v Court of Queen's Bench of Alberta, 2015 ABQB 25

Date: 20150112
Docket: 0603 04866
Registry: Edmonton

Between:

Eric Larouche

Applicant

- and -

The Honourable (Former) Chief Justice of the Court of Queen's Bench, A.H. Wachowich, Her Majesty the Queen, and the Clerk of the Court of Queen's Bench of Alberta (Criminal)

Respondents

content was "prescribed by law" for the purposes of s 1 of the *Charter*, such as to limit media and expressive freedom under s 2(b) of the *Charter*. In the end, the Supreme Court there concluded:

98 Freedom of the press and the fair administration of justice are essential to the proper functioning of a democratic society and must be harmonized with one another. Each one is just as vital as the other. Freedom of the press cannot foster self-fulfilment, democratic discourse and truth finding if it has a negative impact on the fair administration of justice. In the instant case, the government has taken action to reconcile those two values. Since no right is absolute, this reconciliation must be accepted.

[25] As mentioned above, it is contended by the applicant that the direction impugned in the present case adversely, and unlawfully, affected both access to justice under the *Criminal Code* and the liberty of the applicant as reflected in several provisions of the *Charter*. This is an important issue. The applicant's position is not banal. Access to justice has been recently explained (if not re-positioned) at an untouchable Constitutional level in ***Trial Lawyers Association of British Columbia v Attorney General of British Columbia***, 2014 SCC 59 at paras 24 to 43, (2014) 375 DLR (4th) 599.

[26] It is argued by the applicant that the direction improperly impeded in a legally cognizable manner the exercise of liberty-related legal rights by the applicant. It is surmised by the applicant that the same direction probably adversely affected the similar liberty-based legal rights of untold other individuals during the operational period of this direction, which appears to be a period of almost a decade, until the direction was rescinded earlier in 2014 as mentioned.

[27] Before addressing the Crown's motion for dismissal on the grounds of mootness squarely, it is necessary to more clearly situate the applicant's motion as it presently exists and in light of the procedural history. This follows.

III Specific Context of the Mootness Motion

[28] Counsel for the applicant, counsel for the Attorney General of Alberta, standing in for the former Chief Justice and for the Clerk of that Court, and counsel for Her Majesty the Queen in right of Alberta efficiently addressed this motion and the relevant contextual circumstances seem to be largely in agreement.

[29] The relevant circumstances appear to have commenced with a letter dated May 28, 2004, signed by the then Chief Crown Prosecutor for Edmonton and addressed to the then Supervisor of the Criminal and Jury Section of the office of the Clerk of the Court setting out an understanding that "Bail applications will not be scheduled in the Court of Queen's Bench for persons with outstanding warrants." The letter refers to other alleged understandings but only the paragraph including the foregoing words was approved by a handwritten endorsement by the then Chief Justice which appears to have been ascribed to the letter on March 23, 2006 as "Approved".

[30] The supervisor's affidavit refers to a follow up document entitled "Bail Review Application Procedures – Effective June 1, 2004" which instructed the desk clerks that defence counsel could set dates for hearings by "call in or apply at the counter". The scheduling forms must, however, be completed with the information required. The Procedures include the requirement that the matter not be set down for hearing if there are "outstanding warrants in Alberta". There were other elements not in issue here. Checking for warrants was to be done by the desk clerks via the Information System the Court used called "JOIN".

[31] The specific arrangement under consideration here appears to have been a step in an evolution of the "bail review" process which had been described in an announcement called a "Notice to All Members of the Bar" made by the former Chief Justice dated February 5, 2004. While that February 5, 2004 announcement did not specifically mention the impugned management direction here, the announcement shows that the Court was seeking to establish an efficient system conducive to access, particularly by reduction of the "collapse" rate of motions set

Tab 138

CanLII

In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec, 2019 QCCA 1492 (CanLII)

Source:	Court of Appeal of Quebec
Date:	2019-09-12
File number:	500-09-027083-179
Other citations:	AZ-51627804 — [2019] CarswellQue 10358 — [2019] QJ 7806
Citation:	In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the Code of Civil Procedure which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec, 2019 QCCA 1492 (CanLII), <https://canlii.ca/t/j2csc>, retrieved on 2026-01-19

In the matter: Reference to the Court of Appeal of Quebec pertaining to the constitutional validity of the provisions of article 35 of the *Code of Civil Procedure* which set at less than $85,000 the exclusive monetary jurisdiction of the Court of Québec and to the appellate jurisdiction assigned to the Court of Québec

2019 QCCA 1492

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-027083-179

IN THE MATTER:

Tab 139

CanLII

Trisura Guarantee Insurance v Duchnij, et al, 2021 ABCA 78 (CanLII)

Source:	Court of Appeal of Alberta
Date:	2021-03-03
File number:	2001-0189AC
Citation:	Trisura Guarantee Insurance v Duchnij, et al, 2021 ABCA 78 (CanLII), <https://canlii.ca/t/jdj46>, retrieved on 2026-01-18

In the Court of Appeal of Alberta

Citation: Trisura Guarantee Insurance v Duchnij, et al, 2021 ABCA 78

Date: 20210303
Docket: 2001-0189AC
Registry: Calgary

Between:

Trisura Guarantee Insurance Company

Applicant
(Respondent)

- and -

Michael Duchnij

Respondent
(Appellant)

- and -

**Superpro Painting Systems of Edmonton (2016) Ltd.,
Superpro Painting Systems International Inc.,
Superpro Painting Systems of Edmonton (2015) Inc.,
Cheryl-Ann Radke, and Kelly Caldwell**

Not Parties to the Application

[55] For example, a court could not impose a fee that obliged a plaintiff to pay $100,000 for the issuance of a statement of claim.[54] Such a fee would effectively deprive most persons of court access.

b. Section 96 of the *Constitution Act, 1867*

[56] Other provisions in the *Constitution Act, 1867*[55] also support the primacy of the court's role as the guardian of the rule of law.

[57] Section 96 allots to the Governor General – the federal cabinet – the power to appoint "the Judges of the Superior, District, and County Courts of each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick".

[58] The Supreme Court of Canada has used section 96 of the *Constitution Act, 1867* to abridge the scope of section 92(14).[56]

[59] In 1995 the Supreme Court of Canada, in *MacMillan Bloedel Ltd. v. Simpson*,[57] held that section 96 of the *Constitution Act, 1867* denies both Parliament and provincial legislatures the authority to transfer the "core jurisdiction of the provincial superior courts" to a nonsuperior court. Relying on this principle, the Court invalidated a provision in the federal *Young Offenders Act*[58] that transferred a core jurisdiction of a superior court to a youth court. The contested provision granted exclusive jurisdiction to youth courts over *ex facie* contempt of a superior court committed by a young person.[59] The Supreme Court held that Parliament could not deprive a superior court of the jurisdiction to try contemnors.

[60] Roughly twenty years later, in *Trial Lawyers' Association of British Columbia v. British Columbia*,[60] the Supreme Court completely reworked the "core jurisdiction of the provincial superior courts" principle.

[61] The new version had nothing to do with prohibiting legislation that transferred a core jurisdiction element of a superior court to nonsuperior courts. Surprisingly,[61] the retooled section 96 now protected the right of a class of impecunious litigants to access superior courts.

[62] One would have thought the fundamental values undeniably protected by the preamble – open courts – would have been the constitutional tool best suited to evaluate the constitutionality of British Columbia's contested law.

[63] The Court used the new tool to strike down a provision in British Columbia's *Supreme Court Rules*[62] obliging a party seeking to set a matter down for trial to pay a hearing fee:[63]

> The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. … To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[64] The Supreme Court concluded that British Columbia's *Supreme Court Rules* could not impose fees that would "prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction".[64] This translated into a new constitutional role for section 96 of the *Constitution Act, 1867* – a province cannot "enact legislation that prevents people from accessing the courts".[65]

[65] Chief Justice McLachlan, writing for the five-member majority, stated that a hearing-fee rule cannot apply to the very poor – there must be an exemption for this class of litigants[66] – or be set at a level that would not require those who are not affluent enough "to forego reasonable expenses in order to bring claims ".[67] She made it clear that this standard could not be invoked by indigents advancing frivolous or vexatious claims before a superior court.[68]

3. Rule 14.67 of the *Alberta Rules of Court* Is Not Inconsistent with the *Constitution Act, 1867*

[66] Rule 14.67 of the *Alberta Rules of Court*[69] does not, contrary to the principle adopted in *MacMillan Bloedel Ltd. v. Simpson*,[70] transfer a core jurisdiction of a provincial superior court to a nonsuperior court.

[67] This is obvious. Rule 14.67 allows the Court of Appeal of Alberta to order an appellant to pay security for costs. That is all it does.

[68] Rule 14.67 does not contravene the principle grounded in the preamble of the *Constitution Act, 1867* and stated by the Supreme Court of Canada in *Trial Lawyers' Association of British Columbia v. British Columbia*[71] – legislative barriers that unjustifiably restrict access to a superior court are unconstitutional.

[69] The Supreme Court of Canada declared unconstitutional a provision in British Columbia's *Supreme Court Rules*[72] that requires a plaintiff advancing a "non-frivolous or non-vexatious" action[73] to pay a trial hearing fee – no fee for the first three days of trial, $500 for each day of trial in excess of three days, and $800 for each day of trial over ten – before the registry would schedule trial dates unless the plaintiff met the criteria for a hearing fee waiver – the plaintiff was impoverished.

[70] Mr. Duchnij's constitutional challenge to rule 14.67 of the *Alberta Rules of Court* faces three insurmountable hurdles.

[71] First, the *Trial Lawyers' Association of British Columbia v. British Columbia* standard applied to a court rule that restricted access to a trial court. The rule that Mr. Duchnij contests – rule 14.67 – has the potential to restrict access to the Court of Appeal of Alberta – an appeal court, not a trial court. Rule 14.67 did not deny Mr. Duchnij access to the Court of Queen's Bench of Alberta. In fact, Mr. Duchnij was a defendant in proceedings Trisura Insurance instituted. He has already had his dispute with Trisura Insurance adjudicated by the Court of Queen's Bench.

[72] There is no constitutional right to appeal a decision of a superior court or any other court.[74]

[73] If there is no constitutional right of appeal, statutory provisions that allow some appeals to proceed only with permission of the appeal court[75] cannot be unconstitutional on the ground that they may contravene the access-to-court principle.

[74] Lord Justice Bowen, in *Cowell v. Taylor*,[76] drew a distinction between the effect poverty had on the ability of a plaintiff to proceed to trial and an appellant to appeal an adverse trial judgment. At common law and equity poverty did not deprive a plaintiff of the right to prosecute an action. But poverty had consequences for an appellant:[77]

> There is an exception in the case of appeals, but there the appellant has had the benefit of a decision by one of Her Majesty's Courts, and so an insolvent party is not excluded from the Courts, but only prevented, if he cannot find security, from dragging his opponent from one court to another.

[75] Second, even if the open-court principle applies to appeal courts, there is no reason to abandon the qualification introduced by the *Trial Lawyers' Association of British Columbia* principle that a litigant with a frivolous or vexatious claim is not exempt from the burden of paying trial court fees – complying with obligations other litigants encounter.

Tab 140

CanLII

Chisan v Fielding, 2017 ABQB 233 (CanLII)

Source:	Court of King's Bench of Alberta
Date:	2017-03-31
File number:	1601 06249
Other citation:	98 CPC (7th) 257
Citation:	Chisan v Fielding, 2017 ABQB 233 (CanLII), <https://canlii.ca/t/h311r>, retrieved on 2026-01-18
Most recent unfavourable mention	Chisan v Akers, 2020 ABQB 746 (CanLII) [...] [17] As I explained in Chisan v Akers #1 at para 21-24 , the Clerks filed Mr. Chisan's October 9, 2020 Statement of Claim **despite the Chisan v Fielding** court access restrictions because the Clerks do not have the authority to evaluate the substantive content of a court document. [...]

Court of Queen's Bench of Alberta

Citation: Chisan v Fielding, 2017 ABQB 233

Date: 20170331
Docket: 1601 06249
Registry: Calgary

Between:

James Brian Chisan

Plaintiff

- and -

Jeff Fielding, Persons A to E, Wayne Brown, Scott Miller, Person F, Douglas Merchant, C. Wallis

Defendants

Memorandum of Decision of the Honourable Mr. Justice J.T. Eamon

---

I. Introduction

[1] The Defendants apply to declare the Plaintiff a vexatious litigant pursuant to section 23.1 *Judicature Act*, RSA 2000, c J-2, and to bar him from commencing any further proceedings in his own name or in the name of any other person without leave of the Court.

[2] The application is based on the Plaintiff's historical conduct in litigation involving the City of Calgary ("**City**") or its representatives, employees or agents. The Defendants claim Mr. Chisan's law suits against the City, or its employees, representatives or agents include collateral attacks on previously decided issues concerning the legality of the use of a building in the City known as 2214/2216 - 42nd Street, SE ("**2214/2216**") and frivolous or vexatious claims. They also point to numerous appeals over the years, most of which were unsuccessful or abandoned. They say Mr. Chisan's conduct in legal proceedings demonstrate that he cannot be trusted to use court resources properly and causes those sued by him to incur needless expense and effort in responding to his frivolous claims.

[3] The proceedings relied on by the Defendants include:

(a) A prosecution against Mr. Chisan for committing an offence under the *Planning Act* in relation to the use of 2214/2216, leading to trial and conviction on September 16, 1992 (the "**1992 Trial**"), Mr. Chisan's unsuccessful application to this Court to stay the decision pending appeal to this Court, his unsuccessful appeal of the 1992 Trial decision to this Court (QB no. 9201-0408-S2), and his unsuccessful attempt to further appeal to the Alberta Court of Appeal (no. 14417AC/14462);

(b) Mr. Chisan's unsuccessful certiorari application attempting to remove the above mentioned prosecution to Queen's Bench (QB no. 9201-1386-CO) ("**Certiorari Application**") and his unsuccessful appeal therefrom to the Alberta Court of Appeal (no. 9201-13620-A1-01);

(c) Mr. Chisan's civil suit in this Court (action no. 9701-09641 filed July 3, 1997), which was discontinued ("**First 1997 Action**");

(d) Mr. Chisan's civil suit in this Court (action no. 9701-16441 filed November 19, 1997), which was dismissed for want of prosecution against several defendants, and has been stayed as against City defendants since 2002 ("**Second 1997 Action**");

(e) A contempt of Court proceeding against Mr. Chisan in this Court (action no. 9301-02696), which led to Mr. Chisan's imprisonment and other relief (the "**Contempt Proceeding**"), and Mr. Chisan's unsuccessful appeal to the Alberta Court of Appeal which was dismissed for failure to prosecute (no. 0201-0106AC);

(f) An application against Mr. Chisan in this Court (action no. 9910-18117), for an order permitting the City to inspect 2214/2216 ("**Inspection Application**"), leading to Mr. Chisan's unsuccessful appeal to the Alberta Court of Appeal (no. 00-18723) and unsuccessful applications by Mr. Chisan in the appeal;

(g) Mr. Chisan's civil suit in this Court (action no. 0201-17504 filed October 16, 2002), which has been stayed since 2002 ("**2002 Action**");

(h) An injunction application by the City against Susannah Chisan in this Court (action no 0701-13288 filed December 28, 2007) ("**2007 Injunction Application**"), in which Mr. Chisan participated;

(i) Mr. Chisan's civil suit in this Court (action no. 1301-15170 filed December 24, 2013) ("**2013 Action**"). Parts of this action were summarily struck out, and the remainder dismissed by summary judgment;

(j) Mr. Chisan's civil suit in this Court (action no. 1601-06249 filed May 10, 2016) ("**2016 Action**"). This action was summarily struck out by a Master of this Court, leading to Mr. Chisan's appeal in this Court which was struck out, and Mr. Chisan's appeal from that decision to the Alberta Court of Appeal (no. 1601-02555AC) which was struck for failure to prosecute.

II. The background, procedural objections, and evidence considered

a. Background

[4] The present application arises in the 2016 Action. Mr. Chisan sued various named and un-named parties, alleging loss from various allegedly unlawful actions. The underlying complaint in the action is described in para 1 of the Statement of Claim:

> "The cause of this Action is that the Defendants failed to effect disclosure respecting their actions and omissions, trespassed, and impaired the Plaintiff's constitutional rights not in accordance with the principles of fundamental justice."

[5] Generally speaking, the allegations relate to seizure of various properties, without "disclosure". The Plaintiff says he was the owner of a property in the City referred to in these reasons as "**Lots 19 to 24"**, before the lots were seized by "Defendants A to E". Another property (2214/2216) was allegedly seized by a City investigator and a City bylaw officer. "Defendant F" was another bylaw officer allegedly engaged to seize personal property and renovation materials at the same address. Neither allegation specifies the type of seizure. It is further alleged in para 5 of the Statement of Claim that a City manager has the obligation to effect disclosure and "facilitate actions of The City Actors that demonstrate compliance with the Plaintiff's right to be secure against unreasonable seizure". The Plaintiff also complains about a notice issued by a City corporate security officer prohibiting him from being on lands owned or occupied by the City. Finally, Mr. Chisan sued a City lawyer for allegedly committing fraud by failing to disclose that he did not have a solicitor and client relationship with the individual defendants in the 2013 Action.

[6] The Plaintiff seeks various damages and "an order for disclosure".

[7] The named Defendants and un-named Defendant F are alleged to be various representatives of the City -- two investigators, a manager, a corporate security officer, and a

lawyer.

[8] The Statement of Claim does not explicitly allege a nexus between the seizure of Lots 19 to 24 and activities of the City (or identify the persons who effected seizure of Lots 19 to 24 as the City or its personnel), but in fact that nexus exists.

[9] Lots 19 to 24 were under enforcement proceedings commenced by a writ of enforcement issued by the City, who as instructing creditor instructed that they be sold in the enforcement proceedings. The City is a corporation (*Municipal Government Act*, RSA 2000, c. M-26, s. 4), and therefore a person. With that context and the allegations of para 5 of the Statement of Claim, it is obvious that the un-named Defendants are the instructing creditor (the City) and perhaps individual representatives or agents of the City.

[10] The 2016 Action was struck by a Master in Chambers on June 10, 2016. The Plaintiff appealed that order. His appeal was returnable in morning Chambers on August 19, 2016.

[11] This caused the Defendants to file the present vexatious litigant application on August 9, 2016 in the 2016 Action, also returnable on August 19, 2016.

[12] At the return of the applications on August 19, 2016 Campbell J adjourned the vexatious litigant application to a full day special chambers application.

[13] Notice of the present application was provided to the Minister of Justice and Solicitor General, as required by section 23.1 of the *Judicature Act*. By letter dated August 10, 2016 Alberta Justice and Solicitor General acknowledged notice to the Attorney General of Alberta (who is also the Minister of Justice and Solicitor General) and advised the Attorney General of Alberta would not be taking a position or appearing.

[14] The Court raised during the special chambers application whether it might be an irregularity to make a motion in a struck action. However, Rule 6.3(1) permits such an application. Even if it did not, Campbell J's order obviously was meant to continue the application so that it could be heard on its merits. A section 23.1 application would be an appropriate response in the 2016 Action to ongoing efforts by the Plaintiff to try to keep the action alive. In any case, it would now be too late to complain about such an irregularity, if it was irregular: Rule 1.5(3).

b. Mr. Chisan's procedural objections

[15] At the outset of the application before me, Mr. Chisan raised various procedural objections.

[16] First, he noted Ms. Sinclair (a lawyer with the City of Calgary Law Department, who appeared on behalf of counsel for the Defendants at the application) is a "corporate lawyer" for the City of Calgary. He requested a clear statement of who she represents and how that comes to be. Second, he said the Defendants needed leave to allegedly limit Mr. Chisan's freedom of expression rights under the Canadian constitution. Third, he submitted the City cannot initiate proceedings under the *Judicature Act*.

[17] The Court dismissed the first objection, relating to Ms. Sinclair's role as counsel, during the hearing.

[18] Pursuant to Rule 2.24(1) of the Alberta Rules of Court, a lawyer becomes a lawyer of record by filing a record in an action. Ms. Sinclair or the City of Calgary Law Department became the lawyer of record for the Defendants in the 2016 Action by filing the motion to strike the action, and continued to be described in that capacity in the present vexatious litigant application.

[19] This Court has jurisdiction to embark on the inquiry requested by Mr. Chisan. Courts of inherent jurisdiction have supervisory power over lawyers as officers of the court and may exercise this power to ensure the proper administration of justice: ***Canadian National Railway Co v. McKercher LLP***, 2013 SCC 39 at paras 13 - 16.

[20] Generally speaking, the Court should be reluctant to inquire into the retainer of counsel who becomes a lawyer of record. Lawyers are officers of the Court who have ethical obligations, including of competence and candour, which makes reliance on their representations of authority appropriate in most cases. The terms of their retainers with their clients are privileged from disclosure.

[21] Mr. Chisan did not articulate an intelligible basis to inquire into Ms. Sinclair's authority.

[22] Mr. Chisan's second objection was that the application will limit his constitutional right to freedom of expression so the Defendants would require leave of the Court. Later in his submissions, he acknowledged that he was not challenging the validity of the applicable provisions of the *Judicature Act*. Rather, he was submitting that his constitutional rights are to be considered in the balance in deciding whether to make an order.

[23] There is no requirement on the Defendants, who are parties to the action, to get leave to apply under section 23.1 of the *Judicature Act*.

[24] It may be that Mr. Chisan is referring to the requirement in sub-section 23.1(2) that a person, other than a party, a clerk of the Court or the Minister of Justice and Solicitor General, obtain permission to apply. The City is not explicitly named as a Defendant, so Mr. Chisan might perceive that permission is required where counsel making the application was a member of the City law department.

[25] As explained above, the application has been made by the Defendants. The City is obviously one of the Defendants. No permission is required.

[26] There is no merit to the second objection.

[27] The third objection is that the City cannot initiate proceedings under the *Judicature Act* or bring a proceeding to limit one's freedom of expression.

[28] A municipality has the powers of a natural person except to the extent they are limited by an enactment: *Municipal Government Act*, s. 6. No limitation was cited to me that the City cannot protect itself from vexatious litigation arising from enforcement or litigation proceedings that arise in the course of its governmental operations. I conclude that there are no such gaps in its powers. In any case, other Defendants also made the application.

[29] The third objection is without merit.

c. The evidence tendered by the Defendants

[30] The motion proceeded on the basis of books tendered by the Defendants containing copies of numerous pleadings, orders and other records in previous court proceedings and the 2016 Action. These were served on Mr. Chisan on August 17, 2016 with a letter informing him that they would be relied on in support of the application. Additional records were appended to the Defendants' written brief later served on Mr. Chisan. There was no clerk's certificate authenticating the records as true copies of records on the Court's file. Counsel, who is an officer of the Court, represented that these records are true copies of the original court proceedings by tendering them to the Court.

[31] Mr. Chisan did not object before me to the manner in which the Defendants provided these materials for use in the application. He did not suggest any individual records were not authentic or complete copies.

[32] It would have been preferable that the Defendants obtain and provide copies of records obviously bearing an original certification or authentication under Rule 13.29(2) or the *Evidence Act* RSA 2000, C.A-18, section 33, 44 or by following the procedure in ***R v Tatomir*** (1990), 1989 ABCA 233 (CanLII), 69 Alta. L.R. (2d) 305 (CA), leave refused [1989] S.C.C.A. No. 448.

[33] For each transcript, it would be preferable to provide transcripts certified by the reporter, including digitally certified versions. Those are admissible in evidence, without proof of the

signature of the reporter: *Recording of Evidence Act*, RSA 2000, c. R-7.5 and the *Recording of Evidence Regulation*, A.R. 169/2009 and predecessor regulations; Rule 13.47.

[34] Notwithstanding the preferable procedures, it is not unusual for counsel to rely on photocopies of court records because any objection will typically result in a brief adjournment to obtain a certified or authenticated record. The present matter was booked for hearing on the special list for many months. Mr. Chisan knew the City would rely on the records. Mr. Chisan did not file any written brief prior to the application as required by Queen's Bench Practice Note 2, and did not otherwise object to the admissibility or authenticity of the copies. Mr. Chisan has frequently represented himself in the Alberta Courts since at least 1992, including in Chambers and Special Chambers applications and should know the rules by now.

[35] In this case, not all records were authenticated in the ordinary ways. However, there is really no doubt that the records submitted by the Defendants are authentic for the reasons outlined below. Asking for the formality of additional certifications would be useless and would cause further delay. The Court therefore accepts the records tendered by the City as true copies of the original proceedings as represented by counsel and given the absence of objection by Mr. Chisan.

[36] The following explains why there is no real doubt over the authenticity of the records.

[37] All of the records provided by the Defendants, other than transcripts of proceedings, reasons for decision, a letter from the Registrar of the Alberta Court of Appeal dated April 4, 2003, and a Struck Certificate - Late Appeal Record dated January 31, 2017 issued by the Registrar of the Alberta Court of Appeal, appear to be photocopies of stamped office copies of court filed documents or, in some cases, photocopies of court certified copies.

[38] All of the transcripts, save two, were proceedings in the Court of Queen's Bench. The two exceptions were:

(a) A transcript of the 1992 Trial in the Provincial Court. A certified copy of that transcript was filed in this Court in relation to various proceedings in this Court following Mr. Chisan's conviction.

(b) An extract from a transcript of a provincial offence proceeding on September 23, 2008 against Mr. Chisan's spouse in the Provincial Court. That document appears to be a photocopy of a certified copy.

[39] Transcripts provided by the Defendants for pre-2015 proceedings in Queen's Bench were photocopies of certified transcripts, other than the oral reasons for judgment of Phillips J on April 19, 2002 and an extract of reasons delivered October 23, 2002 where no certificates were provided.

[40] Transcripts provided by the Defendants for 2015 and 2016 proceedings in Queen's Bench were digitally certified.

[41] Most of the reasons for decision reproduced by the Defendants in their books are published versions of previous reasons for decision of the Alberta courts in matters concerning Mr. Chisan or are copies from the Court:

(a) ***R v Chisan***, [1992] A.J. No. 1108, the decision of the Alberta Court of Appeal in appeal no. 13266 dismissing Mr. Chisan's appeal from a decision by Power J wherein Mr. Chisan argued that the court lost jurisdiction in a provincial offence proceeding;

(b) ***R v Chisan***, 1992 CanLII 6234 (AB KB), [1992] A.J. No 1267, 7 Alta. L.R. (3d) 254, the decision of Montgomery J refusing Mr. Chisan's application to stay the decision of Stevenson PCJ in the 1992 Trial pending appeal;

(c) ***R v Chisan***, 1993 CanLII 16395 (AB KB), [1993] A.J. No. 509, 142 A.R. 201, 15 M.P.L.R. (2d) 275, the decision of Dixon J dismissing Mr. Chisan's appeal from conviction in the 1992 Trial (The original reasons for this reported decision are on

the Queen's Bench appeal file, and are the same as the reported version other than the paragraph numbers added);

(d) ***R v Chisan***, 1994 ABCA 14 (CanLII), [1994] A.J. No. 63, 149 A.R. 394, 16 Alta. L.R. (3d) 371 (CA), leave to appeal dismissed [1994] S.C.C.A. No. 109, the dismissal of Mr. Chisan's appeal from the decision of Waite J in the Certiorari Application;

(e) ***R v Chisan***, 1994 ABCA 209 (CanLII), [1994] A.J. No. 515, [1994] 9 W.W.R. 147, 21 Alta. L.R. (3d) 95, 155 A.R. 264, the decision of the Alberta Court of Appeal finding that court did not have jurisdiction to entertain Mr. Chisan's appeal from the decision of a single judge refusing leave to appeal from the decision of Dixon J;

(f) ***478370 Alberta Inc v. Chisan***, 1998 ABCA 169, 219 A.R. 6, leave to appeal dismissed [1998] SCCA No 485, the decision of the Alberta Court of Appeal dismissing Mr. Chisan's appeal from a Queen's Bench chambers decision granting an application for judgment against Mr. Chisan. This decision reviews the "difficult history" of that litigation, including the contempt finding against Mr. Chisan for refusing to answer questions on cross-examination, Mr. Chisan's abandonment of an appeal of a contempt order, and Mr. Chisan's failing to call oral evidence at the final application after obtaining an order for viva voce evidence in the application. Mr. Chisan was represented by counsel in the application and on the appeal;

(g) ***Calgary v Chisan***, 2000 ABCA 313, 271 A.R. 384, 4 C.P.C. (5th) 222, 16 M.P.L.R. (3d) 178, the decision of the Alberta Court of Appeal in appeal no. 99-18427 allowing the City's appeal from the decision of Lutz J striking out the Contempt Proceeding for want of prosecution, and restoring the Contempt Proceeding;

(h) ***Calgary v Chisan***, 2001 ABCA 14, 286 A.R. 85, 21 M.P.L.R. (3d) 194, the decision of the Alberta Court of Appeal on Mr. Chisan's appeal from the Order of Wilkins J in the Inspection Application;

(i) ***Calgary v Chisan***, [2002] A.J. No. 1713, 32 M.P.L.R. (3d) 256, the decision of Phillips, J. issued March 1, 2002 in the Contempt Proceeding finding Mr. Chisan in contempt of court;

(j) ***R v Chisan***, 2003 ABCA 19, [2003] A.J. No. 49, the decision of O'Leary JA granting Mr. Chisan judicial interim release from imprisonment ordered by Phillips J;

(k) ***R v Chisan***, 2003 ABCA 68, [2003] A.J. No. 241, the January 31, 2003 decision of the panel imposing conditions on Mr. Chisan's appeal from the decision of Phillips J finding Mr. Chisan in contempt of court and sanctioning him;

(l) ***Calgary v Susannah Chisan***, 2008 ABQB 320, [2008] A.J. No. 807, the decision of Erb J in the 2007 Injunction Application against Susannah Chisan.

[42] The Court may take notice of court records in appropriate cases: ***Wong v Giannacopoulos***, 2011 ABCA 277 at para 6; ***Calgary (City) v. Alberta (Energy and Utilities Board)***, 2010 ABCA 132, at para 193, ***Kin Franchising v. Donco*** (1993), 1993 ABCA 7 (CanLII), 7 Alta. L.R. (3d) 313 (C.A.) at para 7 (C.A.). This principle applies to published reasons for decision and records on the Court's proceedings file. It also applies to records of lower courts removed to this Court by certiorari: Stevenson and Côté, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003), p 45-55. Similarly, the principle obviously applies to records of proceedings of a lower court deposited in this Court in connection with an appeal to this Court, or to records of a higher court placed on the files of this Court in the course of an appeal from this Court. Examples are transcripts filed in connection with a summary conviction appeal to this Court, or a notice of appeal from an order in this Court to the Alberta Court of Appeal.

[43] The Court may take notice of proceedings in the Court and did so. The Court reviewed Queen's Bench files in action no. 9201-0408-S2, 9201-1386-CO, 9301-02696, 9701-09641, 9701-16441, 9901-18117, 0201-17504, 0701-13288, 1301-15170, and 1601-06249 to ensure that the copies of records tendered by the Defendants which were on those files were authentic.

[44] In reviewing the Queen's Bench files, the Court did not take note of other records in the files except: (1) a warrant of committal issued October 23, 2002 reflecting the decision of Phillips J contained in the extract of the transcript of proceedings of the same date submitted by the Defendants; and (2) an Order of Master Laycock made May 26, 2005 dismissing the Second 2007 Action against Her Majesty, as noted in a procedure record print of that action from the Clerk of the Court and submitted by the Defendants.

[45] The Court concluded there was no real doubt over authenticity because:

(a) the pleadings, affidavits, motions, discontinuance of the First 1997 Action, formal orders filed in Queen's Bench, transcript of the 1992 Trial, reasons for decision of Dixon J dated June 21, 1993, Mr. Chisan's Notice of Appeal filed July 22, 1993 from the decision of Dixon J, Mr. Chisan's Notice of Appeal filed March 10, 2000 from the decision of Wilkins J in the Inspection Application (appeal no. 00-18723), Order of Hunt JA made October 31, 2000 in appeal no. 99-18427 and 00-18724, Mr. Chisan's Notice of Appeal filed March 27, 2002 from decisions of Phillips J in the Contempt Proceeding, and Mr. Chisan's Notice of Appeal from the decision of Campbell J in Action no. 1601 - 06249, were confirmed to be authentic by comparing them to the Court copies on the Queen's Bench files;

(b) the transcripts of all proceedings taking place in 2015 and 2016 attached to the special Defendants' chambers brief are digitally certified and admissible under the *Recording of Evidence Act*;

(c) the rest of the transcripts (other than two extracts from transcript being reasons of Phillips J on October 19, 2002 and October 23, 2002 re further sanction of 6 months imprisonment, the latter attached to the Defendants' special chambers brief) purport to bear a signed certification and no objection was taken to their admission or use in the present application;

(d) the contempt findings and sanction decisions of Phillips J described in the transcripts referenced in sub-para 45(c) are accurately reflected in her formal Order of April 19, 2002, and a subsequent a warrant of committal that she signed dated October 23, 2002. No objection was taken by Mr. Chisan to the use or admission of those transcripts;

(e) the Court can take and has taken judicial notice of the published reasons for decision listed in para 41;

(f) the remainder of the records tendered by the Defendants is a small group of photocopies of records not found filed on the Queen's Bench files: (1) Mr. Chisan's filed Notice of Appeal in the Alberta Court of Appeal, 1992, in appeal no 13266 (appeal dismissed - see para 41(a) above); (2) Mr. Chisan's filed Notice of Motion in appeal no. 14417 seeking leave to appeal (leave refused - see para 41(e) above); (3) Mr. Chisan's filed motions, July 25, 2000 and October 26, 2000, Mr. Chisan's filed affidavit, October 26, 2000, and the Orders of Hunt JA filed August 3, 2000, in appeal no. 99-18427 and 00-18723; (4) Order of Paperny JA dated March 13, 2003 and letter from the Registrar of the Alberta Court of Appeal dated April 4, 2003 in appeal no. 02-0106AC; (5) Struck Certificate – Late Appeal Record, January 31, 2017, in appeal no. 1601-0255AC. No objection was taken by Mr. Chisan to their use or admission into evidence.

[46] Moving from authenticity to use of the records, the Court was mindful of limitations on the evidence:

(a) Mr. Chisan suggested that the Court should not refer to Madam Justice Erb's reasons for decision in the 2007 Injunction Application. Mr. Chisan said he was not a party to that proceeding. The records provided by the Defendants do not provide sufficient information to make a finding that he was a privy to that proceeding. Therefore, the Court has not considered the findings in Madam Justice Erb's reasons for judgment in its deliberations;

(b) A similar issue arises with respect to an Order of Romaine J in the 2007 Injunction Application disqualifying Mr. Chisan from representing Mrs. Chisan in those proceedings. It is not apparent from the face of the Order that Mr. Chisan participated in the submissions concerning disqualification or was privy to it. The Court has not considered that part of the Order in its deliberations;

(c) A similar issue arises with respect to the September 23, 2008 transcript in the City's materials recording a provincial court judge's disqualification of Mr. Chisan from representing Susannah Chisan in a prosecution in Provincial Court. Again, it is not apparent from the materials tendered by the City whether Mr. Chisan participated in that disqualification application. So the Court has disregarded it;

(d) Where transcripts were reviewed, they were taken as proof of what was said or found by the court, but not otherwise as proof of the truth of the contents. For this distinction, see for example***, R. v. WBC***, 2000 CanLII 5659 (ON CA), [2000] O. J. No 397 (CA) at paras 30 - 34.

[47] Mr. Chisan provided an affidavit sworn April 15, 2008 supporting Susannah Chisan in the 2007 Injunction Application. The Court has considered all of Mr. Chisan's affidavits provided in the Defendant's supporting materials in considering whether he is a vexatious litigant.

III. Applicable Law

a. General principles

[48] Section 23.1 of the *Judicature Act* authorizes a judge of this Court to restrict the right of a person start or continue litigation in Alberta courts where that person has initiated or engaged in vexatious proceedings:

> 23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Solicitor General, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that
>
> (a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or
>
> (b) a proceeding instituted by the person may not be continued, without the permission of the Court.
>
> (2) An application under subsection (1) may be made by a party against whom vexatious proceedings are being instituted or conducted, a clerk of the Court or the Minister of Justice and Solicitor General or, with the permission of the Court, any other person.
>
> •••
>
> (7) A person against whom an order has been made under subsection (1) or (4) may apply to a Court for permission to institute or continue a proceeding in that Court and the Court may, subject to any terms or conditions it may impose, grant permission if it is satisfied that the proceeding is not an abuse of process and that there are reasonable grounds for the proceeding.

[49] Section 23(2) of the *Judicature Act* provides a non-exclusive definition of instituting vexatious proceedings or conducting a proceeding in a vexatious manner:

> For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:
>
> (a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
>
> (b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
>
> (c) persistently bringing proceedings for improper purposes;
>
> (d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;
>
> (e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
>
> (f) persistently taking unsuccessful appeals from judicial decisions;
>
> (g) persistently engaging in inappropriate courtroom behaviour.

[50] Any one or more of those indicia is a basis to find a person has engaged in vexatious misconduct: ***Chutskoff v. Bonora***, 2014 ABQB 389 at para 131, leave to appeal refused, 2014 ABCA 444.

[51] In ***Chutskoff*** at para 92, Justice Michalyshyn provided a catalogue of potential features of vexatious litigation or abusive proceedings, which provides a useful guide to assessing a litigant's conduct. The Court was mindful of this catalogue in assessing Mr. Chiasan's litigation history.

[52] In determining whether to make an order the Court was also mindful of the difference between vexatious proceedings and vexatious litigants. Section 23.1 contemplates persistent conduct: ***O. (R.) v F. (D.)***, 2016 ABCA 170 at para 38.

[53] The entire history of the matter must be reviewed, to determine if there is a principled basis to make an order. That basis is demonstrated where the litigation history demonstrates a need to have litigation activities restricted to prevent future abuses of court processes: ***644036 Alberta Ltd v Morbank Financial Inc***, 2014 ABQB 681, at paras 51 - 97.

[54] In ***Hok v Alberta***, 2016 ABQB 651, leave to appeal refused 2017 ABCA 63, Verville J describes the issues that should be considered relating to the impact or scope of a vexatious litigant order:

> 36 I conclude that when a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:
>
> 1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
> 2. What litigation subject or subjects are likely involved in that abuse of court processes?
> 3. In what forums will that abuse occur?

[55] The Order should be a proportional response to the conduct proved on the application. Where the vexatious litigant focussed their litigation efforts on an identified group, it may not be justifiable to regulate that litigant's access to Courts to pursue claims against others: ***O.(R.)*** at para 39 - 40.

b. Mr. Chisan's constitutional objections

[56] As stated above, Mr. Chisan suggests the Court take into account his freedom of speech interests in deciding whether to make an order.

[57] No authority was cited to the Court that the act of filing a statement of claim is a form of speech that is protected under the Charter. Whether or not filing a statement of claim is protected speech, there is no doubt access to a Canadian superior court is protected: ***Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)***, 2014 SCC 59, at para 18 to 43.

[58] However, the Court is satisfied that whatever the source of the right to file or bring legal proceedings, the right does not extend to vexatious or abusive litigation.

[59] In ***Trial Lawyers Association of British Columbia***, McLachlin CJC speaking for the majority stated:

> 47 Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases, and measures that deter such cases may actually increase efficiency and overall access to justice.

[60] A vexatious litigants order is a reasonable screening procedure:

> 8 The applicant argues that the vexatious litigant order denies her the basic right of a Canadian citizen to commence a legal action. That is not the true effect of the order. The applicant can still commence any legitimate action; she is only subject to a screening procedure to make sure that any action she proposes is properly founded in fact and law, and will be diligently prosecuted. The vexatious litigant order does not substantially prejudice the applicant.
>
> ***Wong***, at para 8.

[61] Given the Court's focus, in deciding whether to make a vexatious litigant order, on the nature of the litigant and the need to protect from anticipated abuse of court process, the control of frivolous, vexatious, and abusive litigation is a valid exercise of legislative and court authority: ***Hok***, at para 37 of 2016 ABQB 651.

c. Form of order

[62] In ***KE v CSM***, 2016 ABQB 342 at para 36 the Court provided recommendations for court orders to assist persons who are typically self-represented litigants to make informative and focussed applications for permission to commence an action, for example:

1. The legislation that authorizes the restriction to access court processes.
2. A description of what activity has been restricted, for example, whether the vexatious litigant has been restricted from filing any application, or instead certain kinds of applications.
3. What preliminary requirements or preconditions may be necessary prior to a leave application.
4. The documents and information that are required for a proper leave application to obtain permission to file and application.
5. To what judge or judges the application should be directed.
6. In what forum the application will be heard, typically in open court and on the record or thorough paper appreciation.
7. That notice of the leave application to other parties is required, and to any other persons as the court directs.

[63] The reported cases show differing approaches to whether an unsuccessful applicant for permission to sue may apply more than once. Some orders provide that an application for permission shall not be made again before another judge unless the applicant discloses in writing to the second judge that the application has previously been dismissed (for example***, Wong v. Giannacopoulos,*** 2011 ABCA 206 at para 11; ***Chutskoff*** at para 135). Others provide that an application for permission which is dismissed shall not be made again (***Re Boisjoli***, 2015 ABQB 629 at para 110; ***Hok***, at para 51 of 2016 ABQB 651).

[64] A permission application engages the same values of finality and prudent use of court resources as any other application. An applicant should be obliged to diligently assemble his or her evidence and arguments on the first application, and should not be permitted or encouraged to make multiple applications if new evidence or theories of the claim are later developed. However, sometimes legitimate claims must be commenced out of concern for an expiring limitation period or other good reason where not all the evidence is yet discovered and could not be discovered using due diligence.

[65] The Court is reluctant to permanently prohibit what may be a meritorious action only because the applicant may have applied prematurely and been refused leave for that reason. A vexatious litigant order should provide some ground rules about what the applicant must establish if there has been a previous dismissal, to balance a litigant's interest where not all evidence may be available at the outset of litigation and the public interest in ensuring that if a subsequent application is brought it is only because there is material, fresh information that could not have previously been discovered by a claimant who investigated his or her claim in a diligent fashion.

IV. Mr. Chisan's litigation history

[66] As noted, it is necessary to review the entire history of the matter to ascertain whether there is a principled basis on which to make a Section 23.1 order. The facts determined by the Court are set out below.

a. The background - the prosecution alleging an offence under the *Planning Act*

[67] In 1991, Mr. Chisan and Susannah Chisan were charged that:

> "On or about the 6th day of November A.D. 1991, aforesaid, did unlawfully contravene [amended during trial on September 16, 1992 to "did commit an offence under"] Section 154 (a.1) of the Planning Act R.S.A. 1980 C., P-9, by contravening Section 16(1)(b) of the City of Calgary Land Use Bylaw, Number 2P80, as amended, in that the aforesaid did make use of land in a manner contrary to the provisions of this bylaw, to wit: to have more than the allowable number of dwelling units in the building at 2214/2216 42 St. S.E., Calgary."
>
> [Information on Behalf of her Majesty the Queen, sworn November 22, 1991, Provincial Court docket no. 11593753P1]

[68] The basis of the prosecution was that the building configuration was an illegal fourplex under zoning or land use provisions that permitted a maximum of 2 dwelling units in a semi-detached building. The City law department had conduct of the prosecution.

b. Certiorari Application

[69] Mr. Chisan made a certiorari application in respect of the prosecution described in para 67 by motion filed by Mr. Chisan (and Susannah Chisan, against whom the charge was later withdrawn) on August 27, 1992, returnable November 30, 1992.

[70] This application included an autrefois acquit plea, alleging that a previous dismissal of another prosecution was a bar to any subsequent proceedings in the same cause. The previous

dismissal relied on was an order of Egbert J on November 25, 1991 dismissing a charge of contravening a development officer's order in relation to the same property.

[71] The application further stated that if there was not sufficient evidence in respect of the same cause to demonstrate the autrefois acquit argument, then the Provincial Court declined jurisdiction to permit the applicants to call evidence or there was a breach section 7 of the Charter because the Provincial Court allegedly declined the applicants the right to call evidence before trial about the dismissal, the date of the unlawful development and exemptions under the *Planning Act*.

[72] The motion also claimed:

> "If the Provincial Court is not willing to respect the presumption of innocence, the Applicants seek the opportunity to prove exemption to the law, if the law is applicable."

[73] The motion was addressed to the Crown and 8 judges of the Provincial Court.

[74] The Crown (as noted, the City law department had carriage of the proceeding) applied to this Court, by motion filed September 8, 1992 in the Certiorari Application, to quash that proceeding so that the trial could proceed in Provincial Court as scheduled for September 16, 1992. This motion was returnable September 14, 1992.

[75] Mr. Chisan filed a motion in the Certiorari Proceeding on September 14, 1992 returnable September 14, 1992 for a remedy under section 24(1) of the Charter. The precise remedy sought is not specified. This motion quotes directly from the Crown's motion and re-asserts the autrefois acquit plea. It advances various objections including that the "Respondent" (clearly a reference to counsel from the City law department) knew the special plea was disposed of without evidence and that this lawyer "failed in his duty to be fair and as an officer of the Court" in failing to advise another judge that the plea of autrefois acquit does not require there to have been a trial on the merits. The motion also accuses that counsel of knowingly making a false statement in a submission in response to Mr. Chisan's position that the Provincial Court had lost jurisdiction, and of "deliberately and wilfully choosing to ignore the law". It says that the Crown's application was "purely vexatious and malicious". This motion concludes with the following ground:

> The Respondent knows that, notwithstanding his personal motives or views, the decision of the Court of Appeal is binding until and unless varied by the S.C.C."

[76] Waite J heard the Crown's motion on September 14 1992, and heard submissions from Mr. Chisan. Waite J ordered that the scheduled trial of the matter in Provincial Court proceed, and vacated the Certiorari Application and struck it from the November 30, 1992 Chambers list.

[77] Mr. Chisan's appeal from the decision of Waite J was dismissed by the Alberta Court of Appeal on January 14, 1994. The court found that the previous charge of contravening the development officer's order was factually and legally distinct from the charge of making use of the land contrary to the land use bylaw.

[78] A motion by Mr. Chisan for leave to appeal from that decision was dismissed by the Supreme Court of Canada on June 9, 1994.

c. 1992 Trial and appeal therefrom

[79] Mr. Chisan did not appear on September 16, 1992 for the trial of the charge described in para 60. The Trial Judge, Stevenson PCJ, was informed that Mr. Chisan had appealed Waite J's decision to the Alberta Court of Appeal. Stevenson PCJ decided to proceed ex parte in the absence of the accused, following the Crown's submission that the accused was well aware of his trial date. The charge was withdrawn against Susannah Chisan on the same appearance.

[80] Mr. Chisan was convicted of the offence on September 16, 1992. He was fined $2500. The Court ordered him to make the property comply with the land use bylaw by December 31, 1992 by converting it into a single family dwelling or a duplex.

[81] Mr. Chisan appealed the summary conviction on October 16, 1992 to this Court. This appeal included his theory that the property was built before Bylaw 2P80 came into force and the existing use was grandfathered. Various Charter and other breaches were claimed arising from what Mr. Chisan characterized as an "ex parte trial", and Mr. Chisan asserted that the court lost jurisdiction, proceedings were barred by statutory time limitations, Mr. Chisan was denied the right to be informed of the specific offence, and, the offence was unknown to law. The notice of appeal concludes with the following ground:

> 11. The ex parte sentence of the maximum penalty ($2500) permitted under the planning act is contrary to s2 of the said statute and sanitizes the wanton conduct of the City of Calgary: The injunctive like order disposses [sic] the Appellant of his property".

[82] Mr. Chisan applied to this Court to stay the fine and the compliance order pending determination of his appeal. That application was dismissed by Montgomery J on December 18, 1992. The requested stay of the fine was dismissed because "Mr. Chisan has delayed these proceedings without cause over a lengthy period of time in the earlier part of this year and continues to delay …." The request for a stay of the compliance order was dismissed because the Court had no jurisdiction to stay it.

[83] Mr. Chisan's appeal from the conviction and sentence was dismissed on June 21, 1993 by Dixon J. His Lordship ordered compliance with Judge Stevenson's compliance order by August 31, 1993.

[84] Dixon J observed:

> "Mr. Chisan elected to adopt what I describe as a "cute" or "fancy" posture as regards this proceeding in general, including his refusal to plead to the charge or to accommodate the setting of trial dates …"

[85] Mr. Chisan attempted to appeal Dixon J's decision to the Alberta Court of Appeal on July 22, 1993. This notice again propounded the theory that the property was effectively grandfatherd from Bylaw 2P80. Various Charter grounds were raised, and the grounds of the notice of appeal concluded with a request:

> … I ask the Court of Appeal to answer one simple question:
>
> **What have I done that is prohibited by law?"**
>
> [bold face in original]

[86] A single judge of the Alberta Court of Appeal refused leave to appeal from the decision of Dixon J, concluding the judgment did not involve a question of law of sufficient importance to justify a further appeal. Mr. Chisan appealed the refusal of leave to appeal. A three judge panel held on June 28, 1994 that the Court did not have jurisdiction to entertain an appeal from the refusal of leave to appeal.

d. First 1997 Action

[87] On July 3, 1997, Mr. Chisan and 4 other individuals sued, in this Court, the City of Calgary and an individual alleged to be a coordinator in the City finance department. This action claimed damages, and various injunctions and disclosure orders. The complaint concerned the alleged insufficiency of a local improvement petition and negligence in relation thereto. The suit also advanced claims based on alleged City refusals to provide information, and includes the following particular of negligence:

> "11. by asserting by conduct that he determines matters and that both the Municipal Government Act and the Canadian Charter of Rights and Freedoms are intrusive nuisances administratively, and that the taxpayer is irrelevant, except to the paying of taxes."

[88] The Plaintiffs were represented by counsel in that action.

[89] That action was discontinued (without costs, on the City's consent) on August 1, 1997. The Defendants' materials include a release purporting to be executed by the Plaintiffs and reciting that the City paid $2000 to the Plaintiffs in return for a release of this claim.

e. Second 1997 Action

[90] On November 19, 1997 Mr. Chisan and various tenants in properties alleged to be owned or managed by Chisan (some of whom were not named other than as Tenant A and Tenant B) launched another suit in this Court against the Province, the City, a natural gas utility, the VP Operations of the gas utility, several safety codes officers and employees of the City, the Calgary Police Commission, the Chief of Police, and a police officer. The claim alleges inter alia

(a) Unlawful entry by safety codes officers into a property in Calgary that I will refer to as "**2006/2008**";

(b) Certain safety code officers who entered 2006/2008 wilfully and deceptively misrepresented their powers, or in the alternative if they honestly believed their representations, they were "constitutionally illiterate, resulting in unconstitutional actions";

(c) The gas utility terminated gas service to 2006/2008. The Statement of Claim does not allege facts for concluding the service termination was unlawful. The claim includes an incomprehensible plea about the VP Operations of the gas utility to the effect that the company executed the wishes of the safety codes officer and "The defendant Stevens confirms this action on the basis of a close relationship with Safety Codes Officers."

(d) The police officer unlawfully arrested a tenant of 2006/2008;

(e) Safety codes officers unlawfully entered 2216;

(f) The City and employees seized property at 16 Varsity Estates Court under an unlawful clean up order;

(g) Safety codes officers unlawfully entered 2214, and city employees improperly made a clean-up order either by wilfully refusing to consider the Municipal Government Act or being unable to comprehend the words of the Municipal Government Act, resulting in unconstitutional actions.

(h) The Police Commission and the Chief of Police were both vicariously liable for the actions of all police officers in the city;

(i) The City, supported by the Province, effected a "personally motivated snitch program" whereby officers engage resources of the state to address a civil dispute for the benefit of a complainant or to satisfy the vindictive desire of one citizen to the detriment of another citizen, all of which conflicts with peace, order and good government.

[91] The Plaintiffs were represented by the same counsel as in the First 1997 Action.

[92] Master Laycock of this Court summarily dismissed the Second 1997 Action against Her Majesty on May 26, 2005 for want of prosecution.

[93] On March 27, 2006, Master Waller of this Court summarily dismissed the Second 1997 Action against the Police Commission, Chief of Police, and the gas utility and its VP Operations, for want of prosecution.

[94] On October 23, 2002, in the Contempt Proceeding, Phillips J prohibited Mr. Chisan from taking any steps in the Second 1997 Action against the City and its employees without leave of the Court until certain conditions occurred. There is nothing to indicate Mr. Chisan ever complied with

the conditions or attempted to obtain leave. A procedure record print from the Court Clerk's office provided by the Defendants (the Court obtained a copy from the Clerk's office to verify its authenticity) indicates that motions were brought for summary dismissal, leading to the Orders of May 26, 2005 and March 27, 2006, but otherwise there has been no activity in the Court on this action since 1999.

f. Contempt Proceeding

[95] By motion filed February 17, 1993 the City applied for an order declaring Mr. Chisan in contempt of court for failing to comply with the compliance order of Stevenson PCJ.

[96] On June 3, 1999 Rooke J (now ACJ) ordered that Chisan appear and show cause why he should not be held in contempt. This generated a dispute whether the Contempt Proceeding was in good standing or should be dismissed under the 5 year drop dead rule. The Defendants' materials indicate Mr. Chisan intended to appeal Rooke J's Order, then later applied to set the Order aside. Lutz J struck the proceeding out on June 22, 1999, but the Court of Appeal allowed the City's appeal and restored the contempt application. The Contempt Proceeding went into case management in 2000.

[97] The Contempt Proceeding came to trial before Phillips J. The trial lasted 5 days, and she gave judgment on March 1, 2002.

[98] Phillips J found Mr. Chisan guilty of contempt for breach of the order of Stevenson PCJ. Phillips J stated it is revealing and worthy of note that in the application before Wilkins J on March 6, 2000 (in the Inspection Application) Mr. Chisan through counsel advised that he did not admit the fourplex at 2214/2216 was "illegal under whatever the law happens to be", and continued:

> "Essentially, Mr. Chisan is still to this day attacking the underpinnings or correctness of Judge Stevenson's conclusive and binding order, which he has failed to challenge successfully."

[99] Mr. Chisan also alleged breach of his Charter rights in the Contempt Proceeding, including that his security of the person was violated by oppressive actions by the City. Phillips J dismissed these complaints, and noted that there was "no evidence" the City acted in a manner oppressive toward him and any problems he faced were caused by his own actions.

[100] Mr. Chisan appealed the contempt finding to the Alberta Court of Appeal on March 27, 2002.

[101] On April 19, 2002 Phillips J ordered Mr. Chisan to remove the basement suites in 2214/2216, stayed the Second 1997 Action as against the City and its employees pending compliance with Stevenson PCJ's order, and fined Mr. Chisan $25,000 and in default of payment sentenced him to imprisonment for 90 days. Her Order detailed the work to be completed by Mr. Chisan and ordered completion by September 30, 2002. A further hearing was set in the Order for October 23, 2002 to determine whether the work was completed and the fine paid.

[102] In assessing the fine Phillips J accepted that Mr. Chisan perverted the court process, made a game out of the proceedings, and prolonged his contempt of the order through his abuse of the proceedings. She found that Mr. Chisan's contempt was part of an ongoing pattern of conduct over 10 years; and rather than purge his contempt, provided the court with novel, cute and fancy arguments, none of which the Court accepted. He displayed "defiance in the extreme". Phillips J noted there were unpaid costs awards dating back to 1993.

[103] Following a further hearing on October 23, 2002, Phillips J found that Mr. Chisan had not purged his contempt, showed no remorse for his contempt, did not complete the work he was required to do under the April 19, 2002 order, and never intended to purge his contempt. Phillips J authorized the City to enter and do the work, at Mr. Chisan's expense, and imprisoned him for 6 months.

[104] Mr. Chisan appealed the contempt finding and sanction of Phillips J. He obtained judicial interim release from jail on December 19, 2002 from O'Leary JA.

[105] On January 31, 2003 a panel of the Alberta Court of Appeal established various deadlines for the appeal. Some of these were extended, on Mr. Chisan's application, by Paperny JA on March 13, 2003. Her Order provided that if Mr. Chisan did not file the appeal book within 7 days, the appeal is dismissed. Mr. Chisan did not comply with the deadlines so the appeal stood dismissed and a warrant of committal was issued.

g. Inspection Application

[106] On November 17, 1999 the City commenced an originating notice proceeding for orders permitting the City to inspect 2214/2216, as Mr. Chisan allegedly refused city inspectors the entry to which they are entitled under the *Municipal Government Act*.

[107] Mr. Chisan opposed the motion, asserting inter alia the "refusal of the City of Calgary to produce any authority for its requested action or authorizing its alleged designated officer, notwithstanding that such authority has been requested several times".

[108] On March 6, 2000 Wilkins J ordered Mr. Chisan to permit City representatives to enter and inspect 2214/2216.

[109] Mr. Chisan appealed Wilkins J's order to the Alberta Court of Appeal on March 10, 2000.

[110] Mr. Chisan applied in his appeal (as well as in the City's appeal no. 99-18247 from the decision of Lutz J) by motion and memorandum filed July 25, 2000 for an order that the City's lawyer provide him with the "resolution wherein the R-2 designation was affixed" to 2214/2216 and "the law of that date, common or statutory, which forbad the use of 4 suites".

[111] Hunt JA dismissed Mr. Chisan's application for production of those records on July 27, 2000.

[112] Mr. Chisan applied in his appeal (as well as in the City's appeal no. 99-18247 from the decision of Lutz J) by motion and memorandum filed October 26, 2000 for a stay or adjournment of the appeals "until a lawyer purportedly acting for The City of Calgary demonstrates standing to be heard". The grounds included that the City refused to provide resolutions of City Council authorizing the actions appealed from. This was addressed to counsel representing the City on the appeal, described by Mr. Chisan as "Purported Counsel for the City of Calgary". An affidavit in support from Mr. Chisan said the resolution sought may have shown grounds why his property was selected among 300,000 other properties and for what purpose. His affidavit indicates that the appeals were scheduled to be heard on November 10, 2000.

[113] That application was dismissed by Hunt JA on October 31, 2000. Mr. Chisan was ordered to pay costs in any event of the cause.

[114] On November 10, 2000 the Court of Appeal dismissed Mr. Chisan's appeal, stating the grounds of appeal were without merit. Following discussion, the Court directed the matter go back to the Chambers Judge for further directions regarding particulars of the inspection.

[115] Following the appeal the City issued a motion to vary the Order of Wilkins J as it relates to time and manner of entry to Mr. Chisan's property. The motion is dated 17 November 2000. The filing and service date(s) are unknown.

[116] Mr. Chisan cross-applied by motion filed November 24, 2000 to Wilkins J to vary the Order, stating he may rely on the Charter and the Alberta Bill of Rights, and on the transcript of the original proceedings before Wilkins J "wherein reliance on the Charter respecting government conduct was denied" by Wilkins J.

[117] The records provided by the Defendants do not contain any further proceedings in the Inspection Application. It is reasonable to infer, as the appeal was dismissed, that further directions were made to implement the inspection.

h. 2002 Action

[118] On October 16, 2002 Mr. Chisan again sued the City over 2214/2216. This action again asserts the theory that Bylaw 2P80 did not apply to 2214/2216. Mr. Chisan sought a declaration that the buildings were essentially legal non-conforming properties.

[119] Mr. Chisan stated in an affidavit filed October 22, 2002 opposing the City's motion to strike the claim, "Foremost in my Statement of Claim is the non-conforming status of the subject building, and the right of non-compliance." And further:

> "Fourteen years of litigation, including the contempt action, is the direct result of the City's refusal to apply the test to determine the right of non-compliance and its refusal to disclose".

[120] This action was another attempt by Mr. Chisan to re-litigate the decisions of Stevenson PCJ that 2214/2216 was regulated by the land use bylaw and that by November 6, 1991 the fourplex configuration was illegal. Nothing was pled in the 2002 Action as a new occurrence over the ensuing 10 years that changed that result.

[121] There are other indications of abusive litigation conduct in Mr. Chisan's affidavit filed October 22, 2002:

(a) He deposed that at the outset of the contempt trial in the Contempt Proceeding he was prohibited from calling subpoenaed witnesses relative to the jurisdiction of Stevenson PCJ. As stated earlier in these reasons, Dixon J dismissed Mr. Chisan's appeal from that decision and the Alberta Court of Appeal refused leave to appeal. The issue of the validity of Stevenson PCJ's Order was authoritatively determined in 1994, but Mr. Chisan refused to accept it.

(b) He provided a second example of making groundless allegations about judges, saying:

> "I have very serious concerns in that this matter should not be decided by Justice Phillips. People like to believe they are right even at the cost of defeating the pursuit of innocence".
>
> As mentioned above, his Certiorari Application expressed concerns that the Provincial Court would not respect the presumption of innocence.

[122] Phillips J ordered on October 23, 2002 that the proceedings in the 2002 Action were stayed until the later of Mr. Chisan having completed his sentence of incarceration and the City having completed the work authorized by the October 23, 2002 order. The Order provided that before taking further steps in the action, Mr. Chisan must attend before a judge to confirm the stay has been lifted.

[123] There is nothing in the records provided by the Defendants to indicate the stay was lifted. According to a procedure record obtained by the Court from the Court Clerk's Office, there have not been any steps in the 2002 Action for over 10 years.

i. 2007 Injunction Application

[124] At some time prior to late 2007, Mr. Chisan conveyed his interest in 2214/2216 to Susannah Chisan. On December 28, 2007 the City applied in this Court against for an injunction to force her to comply with the land use bylaw concerning 2214/2216.

[125] Mr. Chisan provided an affidavit sworn April 15, 2008 in the injunction proceeding.

[126] In his affidavit Mr. Chisan said he had previously been a part owner of 2214/2216. He re-argued his position that the building use is not precluded by land use bylaws, even quoting some of the prosecutor's submissions verbatim from the transcript of the 1992 Trial before Stevenson PCJ

and seeking to refute them; complained about alleged lack of disclosure by the prosecution in respect of the 1992 charge; asserted the courts have not ever addressed the non-conforming status of the property; alleged the City chose to ignore prior decisions of the Court of Appeal about land use; accused a City trainer of fraud; accused the City of making false claims on its website about the jurisdiction of the Subdivision Appeal Board; expressed beliefs as to whether certain conduct of the City was intentional and motivated in certain ways; and accused counsel for the City of making a "carefully fabricated fiction" by asserting the facilities had been rebuilt.

[127] He said he swore the affidavit "in support of any fair process that seeks to discover the truth as to whether or not the subject property is a statutory non-confirming building, so that the evidence may be transferred to the [Subdivision Appeal Board], the only tribunal that has jurisdiction, as determined by Justice Chrumka and as confirmed by the Supreme Court of Canada in the R v. Al Klippert case".

[128] As stated in Part II, the Court has not considered the reasons of Erb J on the injunction application because Mr. Chisan has not been shown to be a party or privy to the application.

[129] The Court therefore has nothing before it to indicate whether the facilities had been rebuilt as challenged by Mr. Chisan in his affidavit. The statement in his affidavit about fabrication of that matter by counsel acting for the City is nevertheless concerning from the perspective of assessing his conduct in litigation. The affidavit did not provide any detail or admissions as to the physical facilities in the building, nor any facts that would show the City's assertion is incorrect:

(a) It is an obvious example of an evasive argument that seeks to avoid providing any admissions that might be used against the respondent in the injunction application.

(b) It is a bare assertion unsupported by any recitation of the actual facts, calculated not only to challenge the underlying facts but also to attempt to impugn the personal conduct of lawyers acting for the City.

j. 2013 Action

[130] On December 24, 2013 Mr. Chisan sued various Councillors and employees of the City in this Court.

[131] The Plaintiff was named as follows:

JAMES B. CHISAN: AKA "SMALLIFY" LOCAL GOVERNMENT, AND JOHN DOE II

[132] The Statement of Claim:

(a) alleged Mr. Chisan is a property owner and taxpayer in the City. The Plaintiff "John Doe II" represents "other taxpayers who were overtaxed";

(b) alleged Calgary property owners were over taxed by $52 million or more. The Plaintiff sought an order that "requires pay back" of the alleged $52 million of over-taxation in 2013 with the cost to be borne by the Councillors who voted in favor of Bylaw 11M2013.

(c) complained about various enforcement proceedings by the City, including a complaint about invoices for the cost to remove items from various properties including 2214/2216.

(d) advanced a damages claim for the City's alleged trespass onto 2214/2216 and boarding it up. That plea again raised the land use issue:

"This is the same property wherein members of the law department had falsely claimed R-2 designation".

(This allegation demonstrates Mr. Chisan's propensity to assert irrelevant impropriety against counsel representing the City.)

(e) asserted various claims for wrongdoing of many types against several un-named individuals associated with the City.

(f) included claims against un-named lawyers in the City law department who provided advice to the corporate security department or gave instructions to a third party security company.

(g) demanded:

i. payback of 2013 property tax of $52 million;

ii. with respect to a notice issued by the City to Mr. Chisan, various disclosures by the City, including various information and resolutions, and damages from the City.

[133] On January 23 2014 Hunt-MacDonald J struck the claim of John Doe II, various allegations in the 2013 Action seeking disclosure on various issues, and many of the allegations against the City law department. She also struck the action against several defendants.

[134] The rest of the 2013 Action was summarily dismissed by Jeffrey J on January 27, 2015 on the application of the remaining defendants for summary judgment.

[135] In the proceedings before Jeffrey J, Mr. Chisan challenged the authority of a member of the City law department to represent the remaining defendants. Jeffrey J rejected that challenge, stating the "ostensible authority alone from a member of the bar is sufficient for my purposes."

[136] The transcript of proceedings before Jeffrey J records that Mr. Chisan is aware of the protections of section 535 of the *Municipal Government Act* that councillors and municipal officers and employees are not liable for loss or damage caused by acts or omissions done or omitted to be done in good faith in the performance or intended performance of their duties. In the January 2015 application, Mr. Chisan saw the onus on the City to prove good faith of its representatives in a claim against them. Jeffrey J stated, in dismissing the remainder of the 2013 Action:

> "… There is no onus shift to them, and, in any event, the law, the Municipal Government Act, works on the basis that employees of a municipality are entitled to liability protection and the Court of Appeal has said there needs to be some pleading and more than just a … bare allegation of bad faith..."

k. 2016 Action

[137] Notwithstanding the ruling by Jeffrey J, Mr. Chisan's 2016 Action (described at paras 4 - 12 above) again asserted allegations against City personnel without the necessary pleas of bad faith supported by particulars.

[138] The 2016 Action also includes a claim against the City lawyer who successfully represented the defendants in the 2013 Action for allegedly falsely representing that he was instructed by all the defendants in that action.

[139] Master Farrington of this Court struck the 2016 Action on June 10, 2016.

[140] Mr. Chisan appealed that decision. His appeal came on before Campbell J in ordinary chambers on August 19, 2016.

[141] Campbell J accepted the Defendants' position that Mr. Chisan's appeal must be adjourned to the special chambers list. The Defendants' counsel indicated the earliest dates were in September 2017. Mr. Chisan refused to provide dates in 2017, noting he just received the materials. Mr. Chisan asked that his application be set over for 2 weeks. Campbell J disagreed. Mr. Chisan again refused to provide dates in 2017 so his appeal was struck.

[142] During this hearing, a representative of a civil enforcement agency instructed by the City was present. He stated he had with him a bank draft in the approximate amount of $446,000 together with an accounting of the proceeds from the sale of Mr. Chisan's property that had been

sold in execution proceedings instructed by the City. He said he wanted to give the money and the accounting to Mr. Chisan. The Court asked Mr. Chisan whether he wanted to take the money or have it paid into court. The following exchange occurred:

> THE COURT: …So, Mr. Chisan, they want to give you $445,000. So, you can either take it from them now – it's a cheque payable to you – if you don't want to take it from them for whatever reason then I'm going to order that the money be paid into court and then you can apply to the clerk of the court to get the money if you don't want to accept the cheque from him directly. It's your choice. So, would you like to take the money from him directly or would you like me to order the money paid into court to your credit and then you can take steps to get that money from the clerk of the court should you wish? It's your money.
>
> MR. CHISAN: My Lady, you didn't want to hear from me a few minutes ago, so why should I speak now?
>
> THE COURT: Well, you don't have to.
>
> MR. CHISAN: Whatever you decide. You decide whatever you feel like. It doesn't matter what I say."

[143] Campbell J directed payment of the civil enforcement funds into court and declared them to be Mr. Chisan's property.

[144] Mr. Chisan appealed Campbell J's Order to the Alberta Court of Appeal by notice of appeal filed September 30, 2016. The grounds of appeal are:

1. Arrest and detention not in accordance with the principles of fundamental justice.
2. No jurisdiction to ignore s. 8, Constitution Act, 1982.
3. No jurisdiction to decide on a record of no evidence.
4. No jurisdiction to ignore application for adjournment.
5. Who does Colleen Sinclair represent?

[145] Colleen Sinclair was the lawyer from the City of Calgary law department who appeared for the Defendants on August 19, 2016.

[146] The relief sought in the appeal is:

> "An Order that requires non-partisan disclosure by City Manager, Jeff Fielding respecting the seizure of my land."

[147] The appeal to the Alberta Court of Appeal was struck because no appeal record was filed on time.

[148] In the present application, Mr. Chisan again challenged the authority of a City of Calgary law department lawyer (again, Colleen Sinclair) to act. He also said he did not want to speak about the merits of the application lest his statements be used against him. He also said if he was seriously going to oppose, he should make a written submission on the matter of 2214/2216 and raise the old zoning and disclosure issues. The Court was not prepared to adjourn, as Mr. Chisan was required to file his written submission well in advance of the application.

V. Assessment of Mr. Chisan's litigation history

[149] Mr. Chisan has persistently instituted vexatious proceedings and has persistently engaged in vexatious behaviours in litigation. He probably will continue to commence groundless and hopeless proceedings against the City or its representatives, or third parties that are somehow drawn into Mr. Chisan's disputes with the City or its representatives. He probably will behave in vexatious ways in those proceedings, including making groundless appeals, failing to prosecute

matters, and making groundless allegations about the authority or conduct of lawyers acting for parties he sues. The considerations leading me to these conclusions are set forth below.

[150] In assessing Mr. Chisan's litigation history, it is useful to be mindful of the basic substantive and procedural rules concerning the liability of statutory authorities, their representatives, and corporate officers.

[151] Litigation against a statutory authority or its representatives engages underlying legal principles that are vastly different than litigation with a private person. These types of defendants have defences where they purported to act under statutory authority. The *Municipal Government Act* confers wide powers on a municipality or its officers to conduct inspections and remedy contraventions: *Municipal Government Act*, sections 542, 544, 545, 546, 549, 550, 551, and 555. Appeals are provided from some types of municipal orders: *Municipal Government Act*, sections 547, 548. The municipality is liable only in limited circumstances: sections 527.2, 529. Section 535 protects City Councillors, officers and employees who act in good faith in the course of their duties: *Municipal Government Act*, section 535.

[152] Similar considerations apply in the case of the execution of duties by officers of commercial corporations. For example, an officer of a corporation is not guilty of inducing breach of a contract by that corporation or conspiring with that corporation without specific allegations sufficient to establish actions that are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own. See, for example, ***Bower v Evans***, 2016 ABQB 717; ***Kent v Postmedia Network Inc***., 2015 ABQB 461 at para 60 - 65; ***Hogarth v Rocky Mountain Slate Inc***, 2013 ABCA 57; ***Blacklaws v Morrow***, 2000 ABCA 175 at para 41; ***Criak v. Aetna Life Insurance Company of Canada***, [1995] OJ No 3286 (Gen Div), aff'd [1996] OJ No 2377 (CA). Sufficient facts must be pled for such a claim to survive an application to strike: ***Micro-watt Control Devices Ltd. v. Krohne Inc***., 2012 ABQB 53 at para 54 - 56.

[153] The Plaintiff has the burden to properly plead a case that, if the allegations were proved, would result in liability: Rule 13.6(2). The Plaintiff must allege facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and (where damages are a necessary element of the claim) that damages resulted. It is not sufficient to allege a legal conclusion alone. ***Tottrup v. Alberta (Minister of Environmental Protection)***, 2000 ABCA 121, 81 Alta.L.R. (3d) 27, 255 A.R. 204, at para. 11.

[154] Where it is necessary to establish bad faith, a bare allegation of bad faith without particulars is insufficient. Factual particulars must be provided where bad faith is alleged: Rule 13.6(3): ***Walton International Group Inc. v. Rocky View Municipal District***, 2007 ABCA 21, at para 12; ***Grenon v Canada Revenue Agency***, 2016 ABQB 260 at para 23 - 28, 32; ***Irwin v Buote***, 2016 ABQB 530 at para 41 - 47.

[155] Mr. Chisan's litigation history demonstrates a disregard for those basic concepts in litigation, as well as these concepts: finality of judicial decisions and the rules against collateral attacks and re-litigating settled issues; and, the rules against bringing groundless litigation.

[156] Many manifestations of Mr. Chisan's vexatious litigation and vexatious or abusive tactics in litigation since the early 1990's have been proved by the Defendants in the application. These propensities manifest themselves in pleadings, motions and appeals:

(a) attempting to re-litigate previously decided issues: his refusal to accept the decision of the Courts that the land use of the fourplex at 2214/2216 is unlawful:

   a. his attempt in the Contempt Proceeding to call witnesses to attack the jurisdiction of the trial judge in the 1992 Trial, years after his appeal from that trail decision was dismissed,

   b. his position in the 1993 Contempt Proceeding refusing to accept the fourplex was unlawful and the basement suites must be removed, and his refusal to abide

by court orders made by Stevenson PCJ, Dixon J and Phillips J to remove them,

c. the Second 1997 Action,

d. the 2002 Action;

e. his attempt to seek disclosure of the basis for the City's land use bylaws in the appeal from Wilson J's Order in the Inspection Application,

(b) pleading bare allegations or legal conclusions in Statements of Claim without sufficient underlying facts:

a. his claim against the gas utility and its VP Operations in the Second 1997 Action,

b. his claims against City representatives in the Second 1997 Action,

c. his claims against City representatives in the 2013 Action, and

d. his claims against the City and City representatives in the 2016 Action;

(c) making bare allegations of dishonesty against lawyers with the City law department or allegations that City lawyers must prove their authority in specific proceedings:

a. his motion filed September 14, 1992 in the Certiorari Application (allegations of dishonest or dishonourable conduct by City lawyer conducting prosecution),

b. his appeal from the Order of Wilson J in the Inspection Application (applied to stay appeal until provided proof of authority of counsel to appear for City),

c. his affidavit in the 2007 Injunction Application (alleged fabrication by City lawyer),

d. the 2013 Action (required proof of authority of counsel to appear for defendants), and

e. the 2016 Action (required proof of authority of counsel to appear for Defendants at the application before Campbell J, repeated same in the Notice of Appeal therefrom and in the present application);

(d) casting groundless aspersions on judges:

a. his suggestion in the Certiorari Proceeding that judges of the Provincial Court would not respect the presumption of innocence, and

b. his expression of concerns over the impartiality of Phillips J in his October 22, 2002 affidavit;

(e) taking frequent and unsuccessful appeals:

1. his unsuccessful appeal from the decision of Power J in 1992 (dismissed after hearing),

2. his unsuccessful appeal from the decision of Stevenson PCJ in the 1992 Trial to Queen's Bench (dismissed after hearing),

3. his unsuccessful appeal from the decision of Waite J striking his certiorari application (dismissed after hearing),

4. his unsuccessful application for leave to appeal to the Supreme Court of Canada from the decision of the Alberta Court of Appeal dismissing the appeal from Waite J (dismissed),

5. his unsuccessful attempt to appeal from the decision of Dixon J to the Alberta Court of Appeal (leave refused),

6. his unsuccessful attempt to appeal to the Alberta Court of Appeal from the aforementioned decision refusing leave to appeal (refused for lack of jurisdiction),
7. his unsuccessful appeal from the decision of the Court of Queen's Bench to the Alberta Court of Appeal in his litigation with 478370 Alberta Inc. (dismissed after hearing),
8. his unsuccessful application for leave to appeal to the Supreme Court of Canada in his litigation with 478370 Alberta Inc. (dismissed),
9. his unsuccessful appeal from Wilson J in the Inspection Application (dismissed after argument),
10. his unsuccessful appeal from Phillips J in the Contempt Proceeding (dismissed for failure to meet court ordered deadlines),
11. his unsuccessful appeal from Master Farrington's decision to strike the 2016 Action (struck because he refused to provide his availability for the appeal), and
12. his unsuccessful appeal from Campbell J's decision to the Alberta Court of Appeal (struck for late filing of appeal book);

(f) failing to prosecute litigation:

a. the Second 1997 Action, which was struck against some defendants and remains stayed against others,
b. the 2002 Action, which remains stayed,
c. the struck appeals mentioned above;

(g) launching groundless busybody litigation purporting to benefit others:

a. his claim by "JOHN DOE II" in the 2013 Action for damages of $25 million against Councillors who voted for a taxing bylaw. (The First 1997 Action may have been such a suit, but as the City appears to have paid a settlement to resolve the issue and no explanation of that was provided in the present application by the Defendants, the Court has disregarded it).

[157] The 2013 Action and the 2016 Action are recent examples of this persistent misconduct that show Mr. Chisan probably will continue his pattern of bringing vexatious litigation and using vexatious litigation tactics.

[158] The claims in these actions disregard the basic substantive law and procedural rules described above. Both actions were summarily struck out.

[159] In addition, the 2013 Action made baseless allegations of dishonesty in relation to the land use designation of 2214/2216. No one, having been through Mr. Chisan's litigation experience in the Contempt Proceeding and the Inspection Application could reasonably think that there was anything to argue over the land use of that property. Mr. Chisan was bound by the findings in the 1992 Trial, Contempt Proceeding and Inspection Application, all of which found that the fourplex was an illegal land use.

[160] Mr. Chisan's conduct in raising this again in the form of bare allegations of irrelevant falsehood against the City law department in the 2013 Action was egregious.

[161] His conduct in the 2016 Action again demonstrated persistent misuse of legal proceedings. He made the same types of allegations having the same fatal defects that the Court held could not be maintained in the 2013 Action. Worse, he advanced bare allegations of fraud against the City law department lawyer involved in the 2013 Action. He has continued to challenge the authority of lawyers appearing on the record in proceedings without articulating any basis for doing so. His pattern of persistent groundless appeals has also resurfaced in the 2016 Action.

[162] The Court is satisfied that based on his litigation history that it is likely that he will continue to bring frivolous or vexatious litigation against the City or its representatives.

[163] The Court finds on the basis of the foregoing that Mr. Chisan is a vexatious litigant.

[164] Mr. Chisan asks the Court to consider his section 2(b) Charter rights in the balance. The exercise of discretion may engage consideration of Charter rights like any other fundamental legal or civil right. Mr. Chisan has freedom of expression and the right to access courts like any other Canadian.

[165] As discussed in Part III (b), whatever rights of access or expression Mr. Chisan has do not extend to vexatious or abusive lawsuits. Mr. Chisan has many other avenues to express himself, and the requirement that he seek permission to sue does not preclude him from pursuing legitimate actions in the Courts.

[166] The Court has considered that the vast majority of the abusive behaviour by Mr. Chisan in litigation relates to claims against the City or its representatives. This behaviour has extended to others drawn into his disputes with the City, such as the gas utility and its VP Operations, and police. The Court must therefore be concerned not only for actions against the City and its representatives or agents, but also actions against others where there is a reasonable prospect that claims-over against the City and its representatives and agents will arise.

[167] There is evidence, in the decision of the Alberta Court of Appeal concerning Mr. Chisan's litigation with 478370 Alberta Inc., of a similar litigation pattern with other parties. However, there are no other proved instances of vexatious litigation with persons not related to the City since 1998. The Court is not satisfied that Mr. Chisan should be regulated at this time in any disputes he may have with unrelated litigants. Any order the Court makes can be varied to add others or increase its scope, should that later prove justified.

[168] In all the circumstances it is appropriate to make an order relating to claims against the City or its present or former representatives, or against anyone else relating to or arising in whole or in part from alleged acts or omissions on the part of the City or those representatives. There will be a provision permitting the restriction to be expanded if subsequent actions show that to be necessary.

VI. Order

[169] James Brian Chisan is declared to be a vexatious litigant, on the following conditions.

(a) James Brian Chisan is prohibited, under the *Judicature Act*, section 23.1, from commencing, or attempting to commence, or continuing any appeal, action, application or proceeding in the Alberta Court of Appeal, the Court of Queen's Bench of Alberta or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or entity:

   a. against the City of Calgary,

   b. against any current or former councillor, officer, employee, representative or agent of the City of Calgary, or

   c. against any person or entity not referred to in sub-para a. or b. above, in respect of any matter or allegation that relates to or arises from, in whole or in part, any alleged act, omission, or representation on the part of any person mentioned in sub-para a. or b. above,

without an order of a judge of the court in which the proceeding is conducted.

(b) An application for permission to commence a proceeding described in sub-para (a) must be in writing, and notice must be given

a. to the City of Calgary to the attention of the City of Calgary law department by serving the same, together with a true copy of all supporting affidavits or other materials, in accordance with the requirements of the Alberta Rules of Court for serving a commencement document,

b. to any other person directed by a justice or judge at any time (on application or on his or her own motion) by serving the same, together with a true copy of all supporting affidavits or other materials, in accordance with the requirements of the Alberta Rules of Court for serving a commencement document or such other manner prescribed by such judge,

c. the time for service shall be the time required for service of an originating application under the Alberta Rules of Court, subject to any expansion or abridgment granted by a judge or justice of the Court in which permission is sought.

(c) James Brian Chisan must describe himself in the application and any pleadings by his full name ("James Brian Chisan"), and not by using initials, a pseudonym, an alternative name structure, or any other name which he might have used or uses.

(d) An application to commence any appeal, action, application or proceeding must be accompanied by an affidavit:

a. attaching a copy of the order declaring Mr. Chisan to be a vexatious litigant,

b. attaching a copy of the appeal, pleading, application or process Mr. Chisan proposes to issue or file,

c. deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it,

d. indicating whether Mr. Chisan has ever sued some or all of the defendants or respondents previously in any jurisdiction or court, and if so providing full particulars,

e. indicating whether Mr. Chisan has previously applied for permission under this Order in respect of the same claim or matter, and if so the affidavit must include:

i. a certified copy of any order refusing permission or otherwise disposing of or adjourning the application,

ii. a certified copy of the transcript of the hearing and disposition of any prior request for permission,

iii. a true copy of the materials relied on for the previous application,

iv. a statement of new evidence or facts on which the applicant relies for the application, the source of such information, the reasons why the information was not previously known, and the facts if any demonstrating that the applicant investigated his claim diligently and did not previously discover such information,

f. undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the order granting leave to proceed, and the affidavit in support of the order will promptly be served on the defendants or respondents, and

g. undertaking to the Court to diligently prosecute the proceeding.

(e) The application shall be made in open court before a regularly assigned duty or chambers judge or justice (not in private chambers), and shall be recorded.

(f) Where an application for permission is dismissed, an application shall not be made again in relation to the same claim or matter unless (a) the fact an application was previously made is disclosed to the judge or justice hearing the application, and (b) the applicant provides relevant, credible and substantial information that could reasonably be expected to have affected the result, which was not before the judge or justice hearing the previous application and could not have been through due diligence provided in the previous application.

(g) Leave to commence proceedings may be given on conditions, including the posting of security for costs.

(h) This Order does not affect Mr. Chisan's right to apply to the Clerk of the Court pursuant to para 6 of the Order of Madam Justice Campbell made August 19, 2016 in action no. 1601-06249 in this Court, to obtain payment out of funds standing to his credit in that action.

(i) Nothing in this Order limits the authority of a Court to stay or dismiss a proceeding as an abuse of process or on any other ground.

(j) An application to vary this Order (including extending the scope of this order) or to set aside this Order must be made on notice to the Attorney General of Alberta, the City of Calgary, and any other person as directed by a justice of this Court.

[170] The Defendants' counsel are to prepare the formal order for my review. Subject to any request by the Defendants for an extension, they are to submit the draft to the Court for consideration within 14 days of the date of these reasons, and to mail a copy of their draft to Mr. Chisan by ordinary mail to any address for service that has been provided by him in the 2016 Action within the same period. Rule 9.4(2)(c) is invoked and approval of the draft by Mr. Chisan is not required.

[171] The parties are reminded that the above order is effective from pronouncement of these reasons, and notwithstanding any delay in entering the formal order.

Heard on the 24th day of February, 2017.

Dated at the City of Calgary, Alberta this 31st day of March, 2017.

J.T. Eamon
J.C.Q.B.A.

Appearances:

James Chisan (Self Represented)
Plaintiff

Colleen Sinclair
for the Respondents

Tab 141

CanLII

R. v. Li, 2008 CanLII 92006 (ON SC)

Source:	Superior Court of Justice
Date:	2008-01-11
File number:	M0368/06
Other citations:	231 CCC (3d) 563 — 78 WCB (2d) 227 — [2008] OJ No 1077 (QL)
Citation:	R. v. Li, 2008 CanLII 92006 (ON SC), <https://canlii.ca/t/g9zf1>, retrieved on 2026-01-18

Ontario High Court of Justice, Divisional Court

Citation: R. v. Li
Date: 2008-01-11
Court File No. M0368/06

Croll J.

Counsel:
J. Pinkovsky, for accused, applicant.
J. Lofft, for the Crown, respondent.
P. Stem, for The Queen in Right of Ontario and the Ontario Court of Justice, Co-respondent Record Keepers.

[1]CROLL J.: —On October 4, 2004, Mr. Li was charged with assault, assault with a weapon, attempt murder and two counts of forgery. His wife Fiona Sun is the complainant in the assault and attempt murder charges, and the forgery relates to an alleged false credit application presented to the TD Canada Trust.

[2]Mr. Li (the Applicant) has brought an 11(b) application in which he claims that the charges against him should be stayed on account of delay. As part of the 11(b) application, the Applicant seeks an order directing the Ontario Court of Justice at 111 Yonge Street, Toronto (College Park) to *praecipe* the contents of his file in its possession or control to the Trial Coordinator of the Superior Court in Toronto.

[3]In this case, two judicial pre-trials were held at College Park, one on August 5, 2005 and one on September 9, 2005. The file that has been provided by College Park contains the Information; Notice of Assignment Court; Trial Confirmation forms dated April 4, 2006 and April 7, 2006; Verification of Special Date(s) provided by the Trial Co-ordinator's Office; Recognizance of Bail; the Judicial Interim Release Order; Designation and

Acknowledgment of Counsel of Record; Appendix A (Name, Address and Charges); and Statement-Section 536.3 of the *Criminal Code.* No pre-trial reports, forms or information about the pre-trials are in the court file. While the application is broadly framed, it is the notes of the judges who presided at the pre-trials that are the subject of the application. To this end, the Applicant served notice of the application on the Senior Administrative Judge at College Park, the Chief Justice of the Ontario Court of Justice and the Attorney General for Ontario.

[4]The position of the Ontario Court of Justice is that the notes of the pre-trial judges are privileged and in the ordinary course should not be provided to the Superior Court. The Crown Attorney charged with the prosecution of this matter has advised that she is also acting as counsel for the Attorney General (Ontario) for all purposes on this application. In this regard, the Crown Attorney as counsel for the Attorney General (Ontario) adopts the position taken by the Ontario Court of Justice. During submissions on the *praecipe* application, the Applicant brought a further application for removal of the Crown Attorney from acting as counsel to the Attorney General (Ontario) in his capacity as the administrative superintendent of the Ontario Court of Justice, on the basis of institutional and personal conflict of interest. However, for reasons delivered at that time, the conflict application was dismissed.

[5]Having heard all the submissions on the *praecipe* application, I have determined that the application will not be granted. These are my reasons for that ruling.

[6]The Applicant submits that the records from the two judicial pre-trials held at College Park will shed some light on what occurred in the Ontario Court of Justice and, in particular, why a second judicial pre-trial was needed, The Applicant suggests that one of the issues canvassed was in the nature of an offer to withdraw the attempt murder charge, and that this may have necessitated the need for a second judicial pre-trial. The Applicant's position is that the notes of the pre-trial judges should be conveyed to the Trial Coordinator of this court, given that attribution of fault and an examination of the conduct of the parties are important in an 11(b) application. The Applicant relies on the decision in *R. v. McNeilly,* [2005] O.J. No, 1297 (QL), 64 W.C.B. (2d) 635, in which Hill J. stated at para. 24: "The experience with s. 11(b)/24(1) Charter applications in Brampton has consistently demonstrated that there are documents in the Ontario Court of Justice court file of particular relevance to these applications."

[7]Similarly, in *R. v. Cowell,* [2004] O.J. No. 71 (QL), 60 W.C.B. (2d) 168, Durno R.S.J. of the Superior Court in Brampton stated at para. 45 that "[j]ust as the trial co-ordinator's 'Verification of Trial Dates Offered' form is admissible to establish the dates offered and counsel 's position on them, the judge's pre-trial notes in regards to `case management' issues such as time estimates, witnesses to be called, and Charter issues, are essential when examining s. 11(b) issues. The forms should contain only the case management' issues, and no reference to discussions regarding resolutions, offers to resolve from either party, or the pre-trial Judge's opinion on sentence."

[8]I accept that there may be some relevance to the pre-trial information. and that the relevance should not depend on the region in which a person is charged. However, in both *McNeilly* and *Cowell,* the reference to the pre-trial information provided to the Superior Court from the Ontario Court of Justice is a specific reference to pre-trial forms (Sec *McNeilly, supra* at para. 25; *Cowell, supra* at paras. 45, 46). This is in accordance with Rule 27.04(1) of the *Rules of the Ontario Court of Justice in Criminal Proceedings,* SI/97-133, which provides as follows:

> (1) The pre-hearing conference judge, upon the completion of the hearing *may* complete a Pre-Hearing Conference Report in Form 14, a copy of which *shall* be

provided to the prosecutor and counsel of record for the accused, or to the accused if the accused is not represented by counsel of record, and may be provided to the judge, presiding over the proceedings, together with any materials filed by counsel of record on the pre-hearing conference relating to matters to be raised at proceedings, [emphasis added]

[9]It is clear that although the pre-trial judge is not required to complete the Pre-Hearing Conference Report, if it is completed, it must be provided. It is the position of the Applicant that although the pre-trial form was not completed by either pre-trial judge, her or his notes of the pre-trial conference should nonetheless be provided. The Applicant submits that as a pre-trial is not an adjudicative process, the notes are merely a record of the position of the parties, and whether they are completed on the prescribed form, or in some other fashion, is of no significance. The Applicant submits that without the pre-trial information from the College Park judges, the Applicant will not have all the facts or data about the pre-trials and, in particular, will not have disclosure as to why there was a need for a second pre-trial. The Applicant submits that this, in turn, will mean that he cannot present a complete factual and legal argument on the reasons for delay, which is a violation of his constitutional right to fundamental justice (See *Charkaoui v. Canada (Citizenship and Immigration),* 2007 SCC 9 (CanLII), [2007] 1 S.C.R. 350 (right to answer the case as an aspect of fundamental justice)).

[10] In my view, the factual context of this application is very different from those in cases like *Dersch v. Canada (Attorney General),* 1990 CanLII 3820 (SCC), [1990] 2 S.C.R. 1505, 60 C.C.C. (3d) 132, and *Charkaoui,* upon which the Applicant relies. In *Dersch,* the applicant sought access to a sealed wiretap packet under section 178.14 of the *Criminal Code,* R.S.C. 1970, c. C-34, and the court held it was not necessary for him to show *prima facie* misconduct on the part of the applicant for the wiretap authorization in order to gain access. Rather, the court found that an assertion that the admission of the evidence obtained through the interception is challenged, and that access is required to make full answer and defense, was sufficient to grant access. *Charkaoui* dealt with the constitutionality of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, which allowed the government to issue a certificate of inadmissibility to Canada on the grounds of security that would lead to the detention of the named person. While the certificate and detention were subject to review by a Federal Court judge, some or all of the information on which the certificate was based could not be disclosed to the named person or his or her representative in the review process. The court held that the principles of fundamental justice require that before a person is deprived of his or her liberty, he or she must be afforded a hearing before an independent and impartial judge; a decision by the judge on the facts and the law; and the right to know and to answer the case he or she is facing *(Charkaoui, supra* at para. 29).

[11] This is not a case where the Applicant is challenging a judicial order, such as a wiretap authorization or an arrest warrant. This is a case where the Applicant seeks a judge's notes. The Applicant claims that as the notes are simply the records of administrative proceedings, they do not attract any judicial privilege, and that they must be produced to ensure transparency in the criminal justice system,

[12] With respect, I do not accept the Applicant's position. Pre-trials are vital to effective case management and to ensuring that trials are efficient and focused (see *Rules of the Ontario Court of Justice in Criminal Proceedings,* r. 27.03(2)). Pre-trials often lead to agreement on a particular issue or to resolution, both of which save trial time, and resolution, as well, may impact sentence. A pre-trial judge has the discretion to require that an accused who has counsel be available for consultation with counsel, or that an investigating officer be available for consultation with the prosecution (see *Rules of the*

Ontario Court of Justice in Criminal Proceedings, r. 27.02(2)). Although a pre-trial judge does not make any adjudicative decisions on a pre-trial, she or he clearly is performing a judicial function when she or he conducts a pre-trial (see *Edwards y. Canada (Attorney General)* (1999), 1999 CanLII 15109 (ON SC), 46 O.R. (3d) 447 (S.C.J.)). A pre-trial judge is not, as the Applicant suggests, a kind of judicial stenographer of positions taken. Rather, pre-trials are held to facilitate and resolve matters before the court and, as such, a judge at a pre-trial is engaged in an integral part of the judicial function *(Edwards, supra* at para. 29).

[13] The determination that a judge conducting a pre-trial is fulfilling a judicial function, and thereby afforded judicial immunity, does not beg the question as suggested by the Applicant, nor is it the type of inference drawing criticized by Ducharme J. in *R. v. Munoz,* 2006 CanLII 3269 (ON SC), [2006] O.J. No. 446 (QL), 205 C.C.C. (3d) 70 (S.C.J.). This is because judicial immunity is an established legal principle. Ducharme J.'s criticism of deductive reasoning in *Munoz* related to the drawing of impermissible factual inferences from evidence, not the drawing of legal conclusions through the application of legal principles. In this case, what needs to be established on the evidence is whether the actions of the judges conducting the judicial pre-trials satisfy the requirements of judicial immunity. This entails an examination of whether they were carrying out a judicial function. Where it is established on the evidence that the actions of the judges do satisfy the preconditions to judicial immunity, the end result follows. This is not an impermissible inference, but rather the application of a legal principle.

[14] Given that a pre-trial judge is acting *qua* judge at a pre-trial, her or his judicial acts, including her or his note-taking, enjoy complete immunity. This principle is succinctly set out by Lax J. in *Edwards* at para. 18, where she referred to the decision of the Supreme Court of Canada in *MacKeigan v. Hickman,* 1989 CanLII 40 (SCC), [1989] 2 S.C.R 796, 50 C.C.C. (3d) 449, as "authority for the proposition that the thought processes of a judge may not be penetrated, nor may her administrative arts later be questioned."

[15] The Applicant also submits that the notes taken by the pre-trial judge are connected with the administration of the courts and thereby superintended by the Attorney General (Ontario) (see *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 72, as am. by *Access to Justice Act, 2006,* S.O. 2006, c. 21, s. 14) While section 72 of the *Courts of Justice Act* provides that the Attorney-General shall superintend all matters connected with the administration of the courts, paragraph 1 of the section specifically exempts matters that are assigned by law to the judiciary. Given that I am satisfied that there is no issue that judicial pre-trials are assigned by law to the judiciary, I also reject the Applicant's submission that the notes belong to the court as a record of the proceedings and that they do not belong to the pre-trial judge (See *Criminal Code,* R.S.C. 1985, c. C-46, s. 625.1).

[16] Similarly, paragraph 3 of section 72 of the *Court of Justice Act* exempts matters assigned by a memorandum of understanding under section 77 of the *Act* from being superintended by the Attorney General. The Applicant reviewed the current memorandum in some detail in support of his position that the judiciary is not independent of the Attorney General as superintendent of the courts with respect to the records of the pre-trial judges. The Applicant seems to suggest that because the memorandum is silent in respect of judge's notes at a pre-trial, they are not exempt from the superintendence of the Attorney General and therefore producible. However, in my view, this submission ignores the fact that judicial pre-trials are assigned by law to the judiciary and are thus exempt from the superintendence of the Attorney General under paragraph 1.

[17] The Applicant further relies on the memorandum to establish a more general lack of independence of the judiciary in the administration of The Ontario Court of Justice. He points to the administrative support services performed by the Ministry of the Attorney General on behalf of the Office of the Chief Justice, and to the acknowledgement in the memorandum that ". . .some of these additional support services may more appropriately be the responsibility of the Office of the Chief Justice, but that it is not possible to make this determination at this time" *(Memorandum of Understanding between the Attorney General of Ontario and the Chief Justice of the Ontario Court of Justice, December 16, 2004* at 5). The Applicant alleges that numerous aspects of the memorandum, dealing with matters from financing to staffing, undermine the Ontario Court's judicial independence. In support of this contention the Applicant refers to a line of cases dealing with judicial independence: *R. v. Valente,* 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, 23 C.C.C. (3d) 193; *R. v. Lippé,* 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, 64 C.C.C. (3d) 513; *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of the Prov. Court of P.E.L,* 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, 118 C.C.C. (3d) 193; *Newfoundland Assn. of Provincial Court Judges u Newfoundland,* 1998 CanLII 14092 (NL SC), [1998] N.J. No, 120 (QL), 160 D.L.R. (4th) 337; *Mackin v. New Brunswick (Minister of Finance): Rice v. New Brunswick,* 2002 SCC 13 (CanLII), [2002] 1 S.C.R. 405; *Re Application under s. 83.28 of the Criminal Code,* 2004 SCC 42 (CanLII), [2004] 2 S.C.R. 248, 184 C.C.C. (3d) 449 *sub nom. R. u Bagri.*

[18] While these cases are instructive on the evolution of the principle of judicial independence, in my view they do not assist the Applicant in this application. The Applicant has not established a nexus between the requisite level of administrative independence and judges' notes taken in a judicial context.

[19] The Applicant also points to the *Court Services Division Policies and Procedures on Public Access to Court Files, Documents and Exhibits.* The Applicant submits that while the policies and procedures set out in this document recognize that access to court files and documents is subject to "judicial direction", no such "direction" existed in this case, and accordingly, the records should be subject to production. Firstly, in my view, the notes kept by the pre-trial judges in this case are not within the scope of the files and documents encompassed by the Court Services Division policy manual. The policy manual deals with public access to official court records, access to exhibits, the effects of publication bans, and associated matters. It does not contemplate a judge's notes. Moreover, "judicial direction", in the context of the policy manual, should not be limited to a formal written direction or practice guideline. Rather, when one reads the phrase in context, it can be seen to refer to the fact that the court itself "... has a supervisory and protecting power over its records, and as a result determines rules for public access". *(CSD Policy Manual August 17, 2007 s. 1.1)* The direction may be in the form of a formal direction or practice guideline applying broadly, or may be the direction of an individual judge in an individual case.

[20] In my view, in many of the submissions and material provided to the court, The Applicant is conflating judicial independence with judicial immunity or privilege. Among other things, the Applicant provided the court with discussion papers on judicial independence, including *The Governance of Britain: A Consultation on the Role of the Attorney General* and the *Canadian Judicial Counsel's report Administering Justice for the Public.* While these papers include interesting discussion on possible court reform, it provides this court with little material that is relevant to the *praecipe* issue at hand.

[21] The practice at College Park differs from the practice at Peel, where it appears that the pre-trial judges complete Form 14, which, in turn, must be provided to the parties. At College Park, pre-trial information is kept in a judge's own notes, and, as I have indicated, these notes are presumptively private and protected by judicial immunity. While the

Applicant asserts that it is facile to suggest that pre-trial information from College Park should not be disclosed simply because it is not recorded on a prescribed form, in my view, that is precisely what the legislation allows. There is no ambiguity in the word "may" in Rule 27.04(1) and, accordingly, no ability to read into the rule words to the effect that the judge may complete a Pre-Hearing Conference Report in Form 14 *or make any other record deemed appropriate,* as suggested by the Applicant. This is not a case where the wording of the rule can be subject to more than one interpretation, such that it would be proper to embark on any exercise of statutory interpretation guided by Charter values (See the discussion of *Bell ExpressVu Limited Partnership v. Rex,* 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, in Ruth Sullivan, *Statutory Interpretation,* 2nd ed. (Toronto: Irwin Law, 2007) at 240).

[22] In urging this court to accept a broad construction of Rule 27.04(1), the Applicant refers to, among other things, the decision of the Supreme Court of Canada in *R. v. Potvin,* 1989 CanLII 130 (SCC), [1989] 1 S.C.R. 525, 47 C.C.C. (3d) 289, in which the court addressed the proper interpretation of the word "may" in the former section 643(1) of the *Criminal Code.* Section 643(1) dealt with the admission of evidence previously taken. The court held that the word "may" in section 643(1) was not directed at the parties, but rather at the trial judge, and gave him or her a discretion to not admit the previous testimony where it would be unfair to do so, even when the other requirements of the section had been met. The court considered the plain, literal meaning of the word "may" and noted that "...'may' is commonly used to denote a discretion, while the word is used to denote an obligation" *(Potvin, supra* at para. 32). In my view, a complete reading of *Potvin* supports the position taken by the Ontario Court of Justice, namely that the judges have the discretion as to whether or not to complete the Pre-trial Report, and it is only when they do so that the Report shall be produced. As stated by Ruth Sullivan, "[w]hen a statutory power is conferred using the word 'may', the implication is that the power is discretionary and that its recipient can lawfully decide whether or not to exercise it. After all, if the legislature wished to impose an obligation, it could easily have used instead of 'may" (Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Vancouver: Butterworths, 2002) at 57). While recognizing that the use of "may" is not conclusive, I am not satisfied that there is anything in the *Rules of the Ontario Court of Justice in Criminal Proceedings* that expressly or impliedly requires a pre-trial judge to complete Form 14. Given the purpose and context of pre-trials, this is not, in my view, a case where the failure to exercise the discretion to complete the form will undermine the purpose of the pre-trial rules (See Sullivan, *Statutory Interpretation, supra* at 74).

[23] I also note that prior to October 2006, the *Superior Court of Justice Criminal Proceedings Rules,* SI/92-99, of the Ontario Superior Court did not require a report to the trial judge, and it was not until the rules were changed that the pre-trial judge was required to complete a report that now becomes part of the Superior Court file (See Ontario, *Criminal Proceedings Rules,* r. 28.04(16), which replaces the former *Ontario Supreme Court Rules Respecting Pre-Hearing Conferences in Criminal Matters,* r. 6(a) [S1/86-145, C. Gaz. 1986 II. 3397]). There has been no comparable change to the *Rules of the Ontario Court of Justice in Criminal Proceedings.* While it is arguable that the same transparency which is now part of the Superior Court process should be part of the process of the Ontario Court of Justice, this is not what the rules prescribe.

[24] I return to the Supreme Court decision in *MacKeigan v. Hickman.* In that case, as indicated, while the majority of the court held that the administrative function of a judge also carried absolute immunity, Cory J., together with Lamer C.J.C. and Wilson J., were of the opinion that administrative functions are only protected by a qualified judicial immunity. In this regard, the comments of Cory J. are apposite: The qualified privilege of judges on administrative matters will clearly apply in most situations; however, there are

exceptional cases in which the qualified privilege of immunity from testifying must give way; this will occur when it is necessary to reaffirm public confidence in the administration of justice.

[25] In this case, the Applicant seeks the pre-trial notes in an 11(b) application on the basis that they may elucidate a 5 week period of delay in an overall period of 114 weeks. I note that the Crown, on the record, indicated that it was prepared to assume the 5 weeks of delay for purposes of the 11(b) application. As such, it cannot be said that the information sought goes to the ability of the Applicant to make full answer and defence. This can be contrasted to *R. y. Mills,* 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668, 139 C.C.C. (3d) 321, a case of record production where the court noted that where records are part of the case to meet, the concern about production is "particularly acute as such a situation very directly implicates the accused's ability to raise a doubt concerning his or her innocence" *(Mills, supra* at para. 71). This is also not a case where there is no other extrinsic evidence to establish the pre-trial information (see *Dersch, supra* at para. 15). In this case, there was a representative of the Applicant at each of the two pre-trials, and the potential significance of any pre-trial notes must be assessed in light of the fact that the Applicant was always represented *(R. v. Scott,* 2002 CanLII 44950 (ON CA), [2002] O.J. No. 2180 (QL) (C.A.)). Accordingly, even if I am incorrect in my finding that the privilege attaching to the judges' pre-trial notes is absolute, I am not satisfied that this is an exceptional case where privilege must give way to ensure public- confidence in the administration of justice.

[26] For these reasons, the *praecipe* application is dismissed.

Application dismissed.

TAB 142

CanLII

Long v. Red Branch Investments Limited, 2018 BCCA 115 (CanLII)

Source:	Court of Appeal for British Columbia
Date:	2018-03-28
File number:	CA43358
Citation:	Long v. Red Branch Investments Limited, 2018 BCCA 115 (CanLII), <https://canlii.ca/t/hr7cx>, retrieved on 2026-01-18

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Long v. Red Branch Investments Limited,* 2018 BCCA 115

Date: 20180328
Docket: CA43358

Between:

David P. Long

Respondent
(Plaintiff)

And

Red Branch Investments Limited and Gerald Wright

Appellants
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon

Supplementary Reasons to *Long v. Red Branch Investments Limited*, 2017 BCCA 256, Vancouver Registry S122642.

Counsel for the Appellants:	O. Ahmed and A. Way
Counsel for the Respondent:	C.M. Tribe and A.J. Piercy
Place and Date of Hearing:	Vancouver, British Columbia May 24, 2017
Place and Date of Judgment:	Vancouver, British Columbia July 12, 2017
Written Submissions of Appellants filed:	Vancouver, British Columbia November 1, 2017 and January 24, 2018
Written Submissions of Respondent filed:	Vancouver, British Columbia December 19, 2017
Place and Date of Supplementary Reasons:	Vancouver, British Columbia March 28, 2018

Supplementary Reasons of the Court

Summary:

The appellants apply to adduce fresh evidence and have this Court re-open and allow their previously dismissed appeal. They allege that they discovered new evidence after the dismissal of their appeal that demonstrates the respondent and a key witness perjured themselves during the original trial. Held: Application dismissed. While this Court does retain inherent jurisdiction to set aside a fraudulently obtained judgment, it would not be appropriate to do so in this case. Where a party seeks to set aside a prior judgment on the basis that it was obtained by fraud, the traditional approach in British Columbia is to bring a new action in the trial court. That is the most appropriate forum here, where the respondent denies all of the alleged fraud.

Supplementary Reasons for Judgment of the Court:

[1] On July 12, 2017, we dismissed an appeal brought by Red Branch Investments Limited ("Red Branch") and Gerald Wright from the order of Wong J. granting judgment in favour of David P. Long. Reasons for judgment at trial are indexed as 2015 BCSC 2192. Our reasons are found at 2017 BCCA 256. In the course of proceedings to recover the costs of the appeal, subsequent to our judgment, the respondent disclosed information from the solicitors' file that has given rise to new controversy.

[2] The appellants seek to adduce this information as fresh evidence and ask this Court to re-open and allow the appeal.

Background

[3] The litigation arises from a dispute over ownership of a royalty interest in a potash mine in Thailand. Its resolution hinged upon an assessment of the parties' credibility and the credibility and reliability of certain witnesses.

[4] In February 1999, Mr. Wright registered his share of the royalty interest in Mr. Long's name. Mr. Long paid for the royalty interest by a promissory note. He later repaid the promissory note using funds provided to him by Mr. Wright for that purpose.

[5] In June 2010, Mr. Wright asked Mr. Long to transfer the royalty interest to Red Branch, Mr. Wright's company. He provided Mr. Long with a document dated September 1, 2009, transferring the royalty interest to Red Branch for $1. Mr. Long executed it.

[6] In late June 2011, the parties had a falling out and Mr. Long asked Red Branch to confirm it held half the royalty in trust for him. Red Branch refused to do so and these proceedings were commenced.

[7] In our reasons for judgment, we summarized the trial judgment as follows:

> [10] The trial judge accepted Long's evidence that when Wright's share in the royalty was transferred to Long in 1999, Wright told Long they would each have a 50% beneficial interest in it. He accepted Long's evidence that Wright made the following representations to Long when the 2010 Agreement was signed:
>
> a) Wright was the beneficial owner of Red Branch and he controlled the company;
>
> b) Wright wanted to transfer the royalty to Red Branch because there were tax advantages of having the royalty held by a Hong Kong company; and
>
> c) Red Branch would continue to hold the royalty in trust for both Long and Wright as before, with each of them receiving an equal beneficial interest and, to that end, Wright would make Long a 50% shareholder and director of Red Branch.
>
> [11] While the 2010 Agreement made no reference to the fact Red Branch held the royalty in trust for Long and Wright, the trial judge accepted that Long relied upon these representations and assurances when he signed the agreement.

[8] The judge found that 50% of Mr. Wright's share in the royalty was, in fact, given to Mr. Long in consideration for holding the royalty, which was, at all times, intended to be shared between the two men.

[9] We considered the following finding of the trial judge to be critical to the outcome:

> [47] Mr. John Darch, who was a long-time business associate of Mr. Wright and a fellow Royalty holder testified that he knew that Mr. Wright was appointing Mr. Long as his nominee for the royalty and that he clearly told Mr. Darch that he was sharing this royalty with Mr. Long. Mr. Darch also said that Mr. Wright told him that he would rather receive half of the royalty than one quarter, the reason being that he would lose half to Canada Revenue Agency and he would have to share the other half with his wife Gail whom he was planning to leave for his Thai mistress. Mr. Darch said that Mr. Wright told him this on more than one occasion.

[10] Mr. Wright's appeal was founded upon the argument that the trial judge committed a palpable and overriding error by ignoring, forgetting, or misconceiving relevant evidence that went to the core of the case, including, specifically, the evidence of Mr. Wright's accountant, Paul Royce.

[11] At paras. 30-43 of our reasons for judgment, we discussed the trial judge's consideration of the evidence of the parties' intentions. We expressed the view that while it would have been preferable for the trial judge to have expressly addressed the evidence of Mr. Royce, we noted, at para. 31, that the trial judge had effectively done so by preferring the evidence of Mr. Darch, who he considered to be more impartial. The trial judge had concluded, at para. 50:

> Mr. Darch is a neutral witness, having no bias in favour of either of the parties. He has no financial interest in the outcome of this litigation.

[12] We found the trial judge had given reasons that, while less than ideal in their consideration of the conflicts in the evidence, were reasonably intelligible to the parties and sufficient to provide a basis for meaningful appellate review.

The Fresh Evidence

[13] On August 11, 2017, the respondent filed an application to settle the costs below to which was attached an affidavit with the solicitors' accounts. On receipt of those accounts, the appellants made enquiries which resulted in the disclosure of portions of the respondent's counsel's file. The documents obtained must be considered in light of the chronology: the notice of civil claim was filed on April 16, 2012, and the response on May 15, 2012; discoveries took place in February 2013; and the trial was originally scheduled for July 2013. The documents included:

a) Records of funds paid by Western Investments "on behalf of David Long" to his solicitors to pay their accounts in 2012 and 2013, as well as correspondence indicating that John Darch directed Western Investments to forward some of those funds to Mr. Long's counsel;

b) January 2012 correspondence from Mr. Long to his counsel advising them that Mr. Darch, described as a "trusted friend and colleague", had "volunteered to act as a witness (against Mr. Wright) in the action and assist in any way he can";

c) June 2012 correspondence from Mr. Darch to Mr. Long (after the close of pleadings) with advice on how to question Mr. Wright on examination for discovery and offering advice on the pleadings and conduct of the litigation, including the following advice:

> At some stage, as it unfolds that Gail [Mr. Wright's wife] is an officer (director or shareholder?) of Red Branch it may be worthwhile to add her name as a defendant as she was conspiring with GW [Mr. Wright] to defraud you of your Royalty.
>
> …
>
> Don't provide what you should not have [sic] until the right time, which to me is after GW has stated things under oath at his Discovery.
>
> The goal is to prove GW is a liar, discredit him, expose his scheme to evade tax, and in 1998 to leave Gail.
>
> …
>
> I have to be the last witness and the one who ties a bow on the case. You have to win with the documents and other witnesses leaving me to confirm. GW's lawyer will do everything to destroy my credibility and use the argument that I am supporting you through malice because of the lawsuit between GW and me. Or that I have been promised a part of the royalty or some compensation.
>
> …
>
> Probably much more to come up after the case gets underway and some brain storming.
>
> [Emphasis added.]

d) June 2012 correspondence from Mr. Long to his counsel, referring to Mr. Darch as "[m]y business partner, friend and confidant", advising them that Mr. Darch would be arriving in Vancouver from Bangkok and would be "carrying some documents for you", and inviting counsel to meet with him;

e) June 2012 correspondence from Mr. Darch to Mr. Long and his counsel describing a meeting with counsel for the estate of another holder of a royalty interest to "appraise them about the dispute" and offering further advice about proving the claim;

f) Later correspondence in the same month from Mr. Darch to Mr. Long and his counsel summarizing his review of files in the offices of Fasken Martineau LLP. and enclosing copies of documents he had obtained from them;

g) February 2013 correspondence from Mr. Darch to Mr. Long (at about the time discoveries were taking place) in which he states: "I feel that your lawyer MUST present to the judge that you were deceived by GW on the whole issue of tax and that he abused your trust in him and he conned you into signing the transfer[ ]to Red Branch and ask the judge to rule that your 50% be reinstated in your name";

h) February 2013 correspondence from Mr. Long's counsel to Mr. Long referring to Mr. Darch's correspondence and advice;

i) March 2015 correspondence from Mr. Long to his counsel in which he writes: "I note that John (Darch) has responded. Seems to be trying to run the show again? He hasn't made another mention of the missing files which I definitely left in his office immediately after the Discovery" (emphasis added).

[14] This material is said to be significant given the testimony of Messrs. Long and Darch at trial. Mr. Darch testified at the conclusion of his examination-in-chief:

Q All right. And so what is the reason you're here today, sir?

A I'm here because I had a subpoena to attend this case, and I'm pretty sure that either Mr. Wright or Mr. Long is going to be unhappy with what I have said, but I have no friendship interest, I have no financial interest, I have no business interest in either of the parties. So really to me it makes no difference who wins or who loses. What I have told you are the facts as much as I know them.

[Emphasis added.]

[15] And, in cross-examination:

Q And, sir, have you ever discussed this legal proceeding with Mr. Long?

A I did.

Q And when did you discuss it with him?

A In the early part of 2012.

Q And so you discussed this with him before he -- he initiated these proceedings?

A Yes.

Q You encouraged him to do so?

A No.

Q Sir, have you ever directly or indirectly contributed to his legal fees related to this proceeding?

A No. Never.

Q Have you provided him or his lawyers with documents relevant to this proceeding?

A I had a meeting with his lawyers, and we reviewed some documents.

Q And when was that?

A 2012.

Q Before the proceedings started?

A Yes.

Q And you provided them with documents?

A No, there may have been some emails that I had at the time.

Q Did you also provide those emails to Mr. Long?

A I think I might have given them to Mr. Long for his lawyer.

[Emphasis added.]

[16] When it was suggested to Mr. Darch that he had made efforts to preserve certain solicitor's records so as to assist Mr. Long, he testified as follows: "It's not entirely clear whose records those were … it's complicated":

Q Sir, why would you -- why would you volunteer that information? You would have volunteered that information to Mr. Long because you had been assisting him in this litigation?

A I have not been assisting Mr. Long in the litigation. I gave him this information at the time, that if he was being denied something which he claimed was justly his, then it would be inappropriate of me not to tell him where he might find the proof that he needs.

Q Sir, I suggest to you that you hired Mr. Long for a position he wasn't qualified for so that he would have sufficient income to pursue this lawsuit?

MS. TRIBE: Sir, I'm going to object. The question has been asked if he provided any financial assistance. He said no. That has been asked and answered, My Lord.

THE COURT: I will permit the question to be put just to settle the matter.

…

Because he has particularized it in another fashion.

THE WITNESS: Then my response will be to this, My Lord, absolutely I did not hire Mr. Long for any purpose of pursuing any claim against Mr. Wright. That is absolutely not my interest. I have no interest who wins, friendship-wise, business-wise, any other reason. So whatever you may be trying to suggest over and over again is simply not true.

[Emphasis added.]

[17] And at the conclusion of his cross-examination:

> Q Just to be clear, Doi Chang is a company in which you have an interest?
>
> A I have 50 percent. And if I may just say this, so it's absolutely clear, Long never received anything from me personally, nothing from Western Investments, nothing from Doi Chang. No money was given directly or indirectly in respect of this lawsuit. I am not in favour of the lawsuit. I wish I had no part of it.
>
> [Emphasis added.]

[18] Mr. Long, in turn, testified as follows in cross-examination:

> Q Sir, has Mr. Darch provided you with any assistance in this litigation?
>
> A No, My Lord.
>
> Q No financial assistance?
>
> A No, My Lord.
>
> Q But he has provided your lawyers with documents relevant to the litigation?
>
> A I can't answer for my lawyers, My Lord.
>
> Q Are you aware as to whether or not he has provided documents to your lawyers in this litigation?
>
> A I can't say for sure, My Lord.
>
> Q Has he provided you with documents that are relevant to this litigation?
>
> A No, My Lord.
>
> Q Have you ever met with him to discuss the issues in -- that relate to this litigation?
>
> A We've not discussed the litigation, My Lord.
>
> Q Sir, I suggest to you that that is, in fact, not true, that you have spoken to Mr. Darch about, in particular, this litigation.
>
> A My Lord, my recollection is that there has been no discussion of the litigation.
>
> Q That, in fact, sir, you had a discussion with Mr. Darch shortly before these proceedings were initiated, and he told you that if what you were saying was true, that you should start proceedings because you might have a claim?
>
> A No, My Lord, that was not his advice.
>
> Q So just so that I'm perfectly clear, you've never had a discussion with Mr. Darch about this proceeding?
>
> A No, My Lord.
>
> [Emphasis added.]

The Application

[19] The appellants seek orders re-opening the appeal, admitting fresh evidence, allowing the appeal, setting aside the judgment at trial, and ordering a new trial.

[20] They say the fresh evidence establishes that the testimony of Messrs. Long and Darch at trial was false and misleading and intended to create the false impression that Mr. Darch was uninterested and impartial. Mr. Darch's impartiality was material as the trial judge expressly considered it to be an important factor in the assessment of the evidence, and the outcome hinged upon the parties' credibility.

[21] In particular, the evidence of Messrs. Long and Darch at trial is said to be directly contradicted by the recently produced records which show that Mr. Darch:

a) indirectly contributed to the financing of the litigation;

b) was a friend, business partner, and confidant of Mr. Long;

c) was in favour of, and encouraged, the lawsuit;

d) was actively assisting Mr. Long and his counsel in the litigation, after the pleadings in April–May 2012, and through examinations for discovery in February 2013;

e) provided documents to Mr. Long and his lawyers; and

f) had conversations with Mr. Long about the litigation after the commencement of the proceedings.

Applicable Law

[22] The appellants seek to re-open the appeal with a view toward setting aside the judgment at trial on the ground it was founded upon misrepresentation amounting to perjury. This Court has inherent jurisdiction, founded upon control of its own process, to re-open an appeal after the appeal has been heard and judgment entered*: R. v. Hummel*, 2003 YKCA 4. The scope of that power in civil cases is described in, among other cases, *Menzies v. Harlos* (1989), 1989 CanLII

2760 (BC CA), 37 B.C.L.R. (2d) 249 (C.A.), and *Mayer v. Mayer Estate* (1993), 1993 CanLII 6861 (BC CA), 106 D.L.R. (4th) 353 (B.C.C.A.).

[23] In *Temple Consulting Group Ltd. v. Abakhan & Associates Inc.,* 2013 BCCA 119, Chiasson J.A., for the Court, addressed the circumstances in which the Court should re-consider an appeal as follows:

> [17] In my view, reconsidering a decision of this Court involves a two-step process: first, should the appeal be re-opened in order to consider a position advanced by a party; second, if so, should the decision be reconsidered, that is, changed. This is the approach taken by the court in *R. v. Hummel*, 2003 YKCA 4, 175 C.C.C. (3d) 1, leave to appeal dismissed, [2002] S.C.C.A. No. 434, and applied by this Court in *Hadcock v. Georgia Pacific Securities Corp.*, 2007 BCCA 127, 64 B.C.L.R. (4th) 316. I recognize that often, from a practical perspective, the two steps are conflated, but in a case like the present, this Court must consider whether to re-open the appeal to determine whether to admit the tendered fresh evidence. If we were to do so, only then would we decide whether to reconsider our decision based on the fresh evidence.
>
> [18] Reconsideration is guided by the words of this Court in *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2005 BCCA 111, 209 B.C.A.C. 197 at para. 6:
>
> > The circumstances in which a reconsideration will be undertaken are limited and do not include simple re-argument of the appeal. Something in the nature of overlooked or misapprehended evidence, or failing that, a clear and compelling case in law on the point and the prospect of a very serious injustice absent reconsideration, is required: *Mayer v. Mayer*. That is to say, an application for reconsideration is of an extraordinary nature.

[24] The respondent would have us set a particularly high bar, both in relation to the admission of fresh evidence and in relation to the substantive relief sought by the appellant: setting aside the judgment at trial. In relation to the admission of fresh evidence, the respondent refers us not only to the test in *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, but also to *Ascent Developments Corp. v. Stonehenge Projects Inc.*, 2016 BCCA 287. In the latter case, Goepel J.A., for the Court, followed *Jens v. Jens*, 2008 BCCA 392, in holding, at para. 64, that the case was "one of the rare situations where fresh evidence should be admitted" because "[t]o not admit the evidence could well lead to an injustice" (emphasis added).

[25] In our view, *Ascent* is not a departure from precedent. Goepel J.A. clearly follows *Albu v. The University of British Columbia*, 2015 BCCA 41, and *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263, and applies the test set out in *Palmer.*

[26] On the question of the substantive relief, the appellants say they can establish, on a balance of probability, on the affidavit evidence before us: Messrs. Long and Darch gave false testimony at trial; their perjured evidence is material; the fraud was not known to the appellants at the time of trial and could not have been known to them; and they are bringing the application in a timely fashion. In short, they say they can meet the test described in *Wentworth v. Rogers (No. 5)* (1986), 6 N.S.W.L.R. 534 (C.A.) at 538:

> …it must be shown, by the party asserting that a judgment was procured by fraud, that there has been a new discovery of something material, in the sense that fresh facts have been found which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment.

[27] The respondent says the conflict between the testimony of Messrs. Long and Darch at trial, on one hand, and the recently produced documentary record, on the other, may be explained. The conflict he says, does not clearly demonstrate perjury. Further, certain conflicts in the evidence were apparent at trial and with due diligence the conflicts upon which the application is founded might have been brought to light.

[28] In our view, before addressing these arguments it is necessary to determine whether we can and should resolve the allegation of perjury on the material in hand, when the affiants have not been cross-examined on their affidavits or testified in relation to the alleged perjury.

[29] Many of the cases referred to by counsel in their submissions have come on for hearing before appellate courts after examination of the alleged perjury issue by a judge of first instance. There is some authority for the proposition that an allegation that a judgment has been obtained by misrepresentation should not be determined in the first instance in this Court.

[30] In *Landreville v. Town of Boucherville*, 1978 CanLII 202 (SCC), [1978] 2 S.C.R. 801 at 814, Beetz J., for the Court, noted:

> Fraud, dishonesty, bad faith, extortion and bribery form a special category of causes of nullity, which transcends all others.
>
> > Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all

> transactions whatsoever…
>
> Lord Denning in *Lazarus Estates Ltd. v. Beasley*, at p. 712.

[31] In doing so, he emphasized two important principles: first, that fraud can vitiate a judgment, and second, that fraud must be distinctly pleaded and proved.

[32] The early cases deal with the grounds upon which an action can be brought to set aside an entered judgment. The dissent of Duff J. in the leading early case, *MacDonald v. Pier* (1922), 1922 CanLII 29 (SCC), [1923] S.C.R. 107, has frequently been cited as an authoritative description of the general principles. He wrote at 120-22:

> Now Lord Selborne [in *Boswell v. Coaks*] explicitly says that he has no doubt that a judgment may be set aside on the ground of fraud and it is to be noted that the observations of Lord Justice James [in *Flower v. Lloyd*] are not confined in their application to cases where the fraud charged consists of perjury; false answers to interrogatories, misleading production of documents, subornation of perjury are all pointed out in the passage quoted above, and I think that notwithstanding Lord Selborne's expressed approval of the spirit of those observations and notwithstanding the weight and force of the observations themselves one is constrained to the conclusion upon an examination of the authorities that there is jurisdiction in the court to entertain an action to set aside a judgment on the ground that it has been obtained through perjury. The principle I conceive to be this; such jurisdiction exists but in the exercise of it the court will not permit its process to be made use of and will exert the utmost care and caution to prevent its process being used for the purpose of obtaining a re-trial of an issue already determined, of an issue which *transivit in rem judicatam* under the guise of impugning a judgment as procured by fraud. … The principle upon which both these cases proceeded is that, to quote the judgment in the *Duchess of Kingston's case*:
>
> > Although it is not permitted to show that the court was mistaken it may be shown that it was misled.
>
> Where the court is misled by the fraud of the parties that is something which vitiates the most solemn proceedings of courts of justice and as Lord Coke says, it avoids all judicial acts ecclesiastical or temporal. In the very nature of things as Lord Coleridge C.J. said in *Abouloff v. Oppenheimer* at p. 302, the question whether the court was misled in pronouncing judgment never could have been submitted to them, never could have been in issue before them and therefore never could have been decided by them. Brett L.J. at p. 307 discusses the judgment of James L.J. in *Flower v. Lloyd* and he expressly dissents from the proposition that there can be any doubt that the fraud of the party to the action committed before the court for the purpose of deceiving the court is a ground for setting aside the judgment.

[33] The question of appropriate procedure is clearly addressed in Ontario. The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 59.06 (formerly R. 529 of the *Rules of Court*) provide:

> (2) A party who seeks to,
>
> > (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
> >
> > . . .
>
> may make a motion in the proceeding for the relief claimed.

[34] In *100 Main Street East Ltd. v. Sakas* (1974), 1974 CanLII 637 (ON SC), 3 O.R. (2d) 361 (H. Ct. J.), the trial judge set aside a judgment in a real estate dispute, after trial, on the basis that material evidence had been concealed. Justice Holland held, at 368:

> I think it comes down to this: that fraud has been clearly established on the part of the defendant which, if known to the trial Judge, may reasonably have affected the result. I cannot say that of necessity it would have affected the result. I am of the view, however, that where fraud has been clearly established the test of the effect of the fraud on the result should not be placed too high.

[35] On appeal, in *100 Main Street East Ltd. v. Sakas* (1975), 1975 CanLII 381 (ON CA), 8 O.R. (2d) 385 (C.A.), Estey J.A. described the procedure that had brought the case before the Ontario Court of Appeal, utilization of Rule 529 of the Ontario *Rules of Court*:

> The test applicable in these circumstances has not changed over the years although the procedure in obtaining the desired relief has. Formerly (and it is still the case in England), the party alleging that the judgment has been obtained by fraud was required to bring an action to set aside such judgment. In Ontario, such a person is required, by Rule 529 of the Rules of Court, to apply by motion in the original proceedings for such order as could formerly have been obtained by the bringing of a new action. This new procedure is of course not a form of appeal, nor are the principles to be applied in resolving such application those which would apply in the case of newly discovered evidence not revealing fraud, except that the fraud must not have been known to the complaining party at the time of the trial.
>
> [Emphasis added.]

[36] *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 1988 CanLII 4534 (ON SC), 66 O.R. (2d) 610 (H. Ct. J.), to which both parties have referred as an authoritative statement of the applicable test on an application

v. Granitile Inc. (2008), 2008 CanLII 63568 (ON SC), 302 D.L.R. (4th) 40 (Ont. Sup. Ct.), where the motion was converted into a trial in order to review the evidence of fraud.

[37] *Hill v. Hill,* 2016 ABCA 49, came on before the Court of Appeal of Alberta by a circuitous route. Ultimately, the appeal arose from a second action in the trial court seeking to set aside an earlier judgment on the basis of newly discovered evidence.

[38] There is, however, in Alberta a statutory provision applicable in some situations that is similar to the rule relied upon in Ontario. In *Re Smolak and Necula* (1973), 1973 CanLII 1085 (AB CA), 39 D.L.R. (3d) 730 (Alta. C.A.), Clement J.A. cited the provisions of the *Maintenance and Recovery Act*, R.S.A. 1970, c. 223:

> 30. Where an order has been made or an application for an order has been dismissed, a judge may, on the discovery of new evidence or of fraud, grant leave to reopen and may reopen and consider a previous decision.

[39] *Smolak* was an appeal from the refusal of a trial judge to re-open his previous decision.

[40] *Wentworth*, the leading Australian case, to which counsel referred, came on before the Court of Appeal as an appeal from the summary dismissal of an action to set aside a prior judgment. Interestingly, the case had previously come before the Court of Appeal but was remitted to the trial division, for reasons summarized by President Kirby, at 538, as follows:

> The appellant has appealed from the judgment entered by Maxwell, J pursuant to the jury's verdict. Her appeal was to have been heard in May 1986. She then commenced proceedings, supplementary to the appeal, to have the judgment set aside on the ground that it was obtained by fraud. Such proceedings are well-established in our law. They are independent of the appeal and equitable in origin and nature. That is the principal reason why this Court declined to consolidate the attack on the judgment for fraud with the appeal and required it to be tried separately in the Equity Division of the Court. When Young J received the matter by remission from this Court, he directed that a statement of claim be filed. This was subsequently done and the appellant verified it. It was later amended with the leave of the Court. It was the amended statement of claim, as verified, which was the subject of the motion by the respondent that gave rise to his Honour's peremptory orders now under challenge.
>
> [Emphasis added.]

[41] There are certainly instances where appellate courts have admitted fresh evidence, found a judgment to be vitiated by fraud, and set a trial judgment aside without a new trial. That appears to have been the result in the leading English case, *Meek v. Fleming*, [1961] 3 All E.R. 148 (C.A.). In that case, the English Court of Appeal described its ability to address misrepresentation or nondisclosure at trial. Holroyd Pearce L.J. held, at 154:

> Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other.

[42] Lord Pearson held, at 156:

> In the present case the fresh evidence only affects the credit of the defendant, and does not relate directly to any issue in the case. Accordingly it would not be right to order a new trial unless there is some feature of paramount importance outweighing the grave disadvantage of protracting in the litigation. In my opinion, however, there is such a feature in the present case.

And, at 157:

> There was in the result at the trial of this action the deception of the court, and the defendant in cross-examination was giving uncandid (and at one point false) evidence in order to preserve the concealment of the truth.
>
> The fresh evidence has materiality.

[43] Similarly, in *Vagi v. Peters*, 1989 CanLII 5121 (SK CA), [1990] 2 W.W.R. 170 (Sask. C.A.), the Saskatchewan Court of Appeal set aside a judgment at trial and ordered a new trial on the basis that the respondent's testimony at trial involved "concealment of relevant information which pertained either to the quantum of damages or had a bearing upon his credibility" (at 171). The *Palmer* test was found to have been met. Wakeling J.A., for the majority, held, at 172:

> This court has consistently indicated its concerns for the maintenance of respect for the administration of justice. To that end, I do not consider it appropriate to permit a judgment which is to at least some degree based upon evidence which is untruthful or conceals relevant information to be upheld. This is so even though every aspect of that evidence

> cannot be said to clearly bear on the judgment rendered. It is enough if the evidence is of some consequence and therefore might have some bearing upon the result of the trial: see *Meek v. Fleming* ….

[44] There is no discussion in *Vagi* of the Court's jurisdiction or the English practice of requiring the party alleging that the judgment has been obtained by fraud to bring an action to set aside the judgment. Nor does there appear to have been any doubt in *Vagi* that the respondent was untruthful or concealed relevant information at trial.

[45] In British Columbia, we have no equivalent to the Ontario provision referred to above, except rules that provide for the setting aside of orders made without notice or in default. In *Coughlin v. Kuntz* (1997), 1997 CanLII 2995 (BC SC), 43 B.C.L.R. (3d) 360 (S.C.), Cohen J. addressed the English practice referred to by Estey J.A. in *100 Main Street East*. After discuss *v. Gusola* (1991), 50 C.P.C. (2d) 154 (B.C.S.C.), and this Court's judgment in *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 1990 CanLII 586 (BC CA), 44 B.C.L.R. (2d) 1 (C.A.), he held:

> [35] Some of the cases cited above were brought as separate actions, and others brought as motions. The general rule in British Columbia has traditionally been that after a judgment or order has been entered, a new action must be brought to set aside that judgment. This was made clear by the Supreme Court of Canada in *Royal Trust Co. v. Jones*, [1962] S.C.R. 133, where at pp. 145-146 Cartwright J. said:
>
> > An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal.... There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and practice on this point in British Columbia and in England; in my opinion they are the same.
>
> [36] In *D.K. Investments Ltd.*, *supra*, the Court of Appeal confirmed that *Royal Trust Co. v. Jones*, *supra*, is still the law in British Columbia.
>
> ….
>
> [38] The cases which involve a motion to set aside a judgment, as opposed to an action, are Ontario cases. Ontario provides for the setting aside or varying of a judgment by way of motion in its *Rules of Civil Procedure* ….
>
> [39] There is no equivalent rule in the British Columbia *Rules of Court* to allow for the setting aside of a judgment on the basis of fraud by motion. The Rules do allow for applications to set aside judgments in circumstances where judgment was granted upon the default of one of the parties. …
>
> [40] It appears therefore, that, as a general principle, the jurisdiction of the trial judge ends with the entry of judgment and that when a party seeks to set aside a judgment which has been entered, a new action must be commenced. However, there is some authority to suggest that the court has an inherent jurisdiction to set aside its own entered order and may do so without the party having to commence a new action.
>
> …
>
> [48] … [I]n *C. (C.A.) v. H. (J.R.)* (1992), 1992 CanLII 1419 (BC CA), 67 B.C.L.R. (2d) 268, (C.A.), an application was brought to set aside a child maintenance order made by the Provincial Court. The application was dismissed in the Supreme Court, and the applicant appealed. In the course of her judgment dismissing the appeal, Southin J.A. stated at p. 271:
>
> > An order of a court of competent jurisdiction can be set aside in a number of ways. First, under the Rules of the court that made it if those Rules contain provisions for the setting aside of, for instance, a default judgment; secondly, by judicial review if the court is an inferior court, properly brought under the *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209; thirdly, by way of appeal - none of those proceedings have been taken; and fourthly, by what one might call by way of short-hand an action in the nature of *Royal Trust Co. v. Jones*, 1961 CanLII 50 (SCC), [1962] S.C.R. 132, 37 W.W.R. 1, 31 D.L.R. (2d) 292, a form of action which was discussed by this Court in *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1990), 1990 CanLII 586 (BC CA), 44 B.C.L.R. (2d) 1. It is not necessary in this case to expand on those authorities.
>
> [49] This passage is most significant because, first, it enumerates the ways in which an entered order might be upset in British Columbia, and second, because it does not contain any reference to setting aside an entered judgment or order by way of a motion in the action pursuant to the inherent jurisdiction of the court. In my view, this case, which was decided after [*Racz v. District of Mission* (1988), 1988 CanLII 2937 (BC CA), 22 B.C.L.R. (2d) 70 (C.A.)], brings into question the jurisdiction of this court, on a motion, to re-open, or to set aside, vary, or amend the original judgment in the instant case.
>
> …
>
> [51] In my opinion, the court does not have jurisdiction in the case at bar to re-open the trial or vary the entered judgment on a motion in the action. I think that the procedure approved in *Racz*, *supra*, is limited to setting aside a consent order. In my view, the result in that case does not operate to overrule the well-established law that once a judgment is entered the court is *functus officio* and its judgment can be set aside or varied only in a fresh action brought for that purpose. This, I find, is particularly so where, as in the instant case,

> the relief sought by the applicant raises complex issues which must be decided on controversial evidence.
>
> [Emphasis added.]

[46] In *Lemmon*, Josephson J. presided over trial in an action to set aside a prior judgment on the basis it was obtained by fraudulent testimony. Applying the test described in *100 Main Street East, Meek*, and *Hip Foong Hong v. H. Neotia & Co.*, [1918] A.C. 888 (P.C.), he allowed the action and set aside the prior judgment.

[47] *Bains v. Bhandar*, 1999 BCCA 32, came on before this Court as an appeal from a trial judge's order refusing to order a new trial of the original action in response to allegations of fraud. The trial judge was alleged to have erred in his findings regarding due diligence and in describing the evidentiary onus on the applicant. The application was not brought, in the first instance, in the Court of Appeal.

[48] Similarly, *D.K. Investments* was an appeal from the summary dismissal of an action to set aside a prior judgment. The trial judge found that the misrepresentation alleged was immaterial and the party seeking to set aside the judgment had not exercised due diligence.

[49] The judgment of this Court referred extensively to the decision in *Royal Trust Company v. E.M. Jones* (1961), 1961 CanLII 50 (SCC), [1962] S.C.R 132, where, Cartwright J. said, at 145-46:

> An examination of the authorities leads me to the conclusion that it has long been settled in England that the proper method of impeaching a judgment of the High Court on the ground of fraud or of seeking to set it aside on the ground of subsequently discovered evidence is by action, whether or not the judgment which is attacked has been affirmed or otherwise dealt with by the Court of Appeal or other appellate tribunal. Section 9 of the *Supreme Court Act*, R.S.B.C. 1936, c. 56, which was in force at the time when Manson J. [the trial judge] dealt with the matter (and which is now section 9 of the R.S.B.C. 1960, c. 374) reads as follows:
>
> > 9. The Court is and shall continue to be a Court of original jurisdiction, and shall have complete cognizance of all pleas whatsoever, and shall have jurisdiction in all cases, civil as well as criminal, arising within the Province.
>
> There appears to be nothing in the statutes constituting and continuing the courts in British Columbia or in the Rules of Court of that Province to suggest that there is any difference between the law and the practice on this point in British Columbia and in England; in my opinion they are the same.
>
> [Emphasis added.]

[50] Madam Justice Southin, for this Court, found that the action to set aside the judgment should not have been summarily dismissed and remitted some of the issues to be determined after a trial. She wrote, at 21:

> In my opinion, this was a case, at least on the issue of due diligence, where the court, whatever the parties wanted, should have declined to grant judgment. The learned judge spoke of evidence not adduced but in a case of so rare a nature in which there is no established practice -- no understood standard of evidence -- and where, as here, the issue is one of a man's honour, it behooves the court to give an opportunity for a full hearing.

[51] In our opinion, the judgment in *D.K. Investments* speaks strongly in favour of permitting the trial court to determine the issue the parties seek to put before us. The trial court continues to have the inherent jurisdiction to consider the question, notwithstanding our dismissal of the appeal, and it is the forum in which the parties may have a full hearing.

Application of the Law

[52] In response to the application to re-open the appeal, C. Michelle Tribe, counsel for the respondent at trial, has sworn an affidavit in which she attests to her unfamiliarity with the contents of the file said to establish the falsity of the evidence of Messrs. Darch and Long. She does not dispute that her firm was offered assistance by Mr. Darch, received documents from him, and was aware of discussions between Messrs. Long and Darch that took place after the commencement of the litigation.

[53] Mr. Darch has filed an affidavit in which he says, among other things: "It is not true, as alleged in these proceedings, that I offered and provided assistance over the period from June 2012 to February 2013. In fact, to the best of my recollection, I was involved in this matter on four separate occasions: June 2012; December 2012; February 2013; and shortly prior to trial." He deposes that he sent money to Mr. Long's lawyers at his request but those funds were "paid from Mr. Long's remuneration on his written instructions".

[54] Mr. Long has also filed an affidavit in which he deposes to the fact that he paid little attention to Mr. Darch's advice and at trial had forgotten the extent of his communication with Mr. Darch. He also swears that he did not regard Mr. Darch's correspondence or advice as assistance with the litigation.

[55] He says the evidence now before us could have been elicited at trial if the appellants had exercised due diligence and, in any event, the evidence does not bear on a decisive or potentially decisive issue.

[56] In their submissions, Mr. Long's counsel say there was no perjury or fraud. They say the allegation of perjury is in relation to a nebulous concept: whether Mr. Darch provided "assistance" or was "biased". In relation to Mr. Long's evidence, the respondent's counsel says: "the trial judge was aware, from the cross-examination, of the contradiction between Mr. Long's evidence and Mr. Darch's evidence … and to the extent that that affected Mr. Long's credibility, it must have been included in the trial judge's assessment of the case."

[57] In addition, the respondent says there is "no evidence at all to suggest anything other than that Long's memory was faded".

[58] On all of the relevant issues – falsity of the evidence at trial, knowledge of falsity, intention to mislead, materiality and, to the extent it is relevant, due diligence – the respondent joins issue with the appellants. While this Court has jurisdiction to re-open an appeal, hear fresh evidence in support of an allegation that a judgment was improperly obtained, and set aside a judgment on those grounds, we would be loath to do so in a case where the falsity of the impugned evidence is in issue. We say that because there is no doubt that the trial court retains jurisdiction to hear and determine a challenge to an entered judgment founded upon an allegation of fraud or perjury, and because courts of first instance are in a privileged position with respect to the determination of such factual disputes.

Disposition

[59] For those reasons, we would dismiss the applications to re-open the appeal and admit fresh evidence because our judgment does not pose an impediment to a future action in the British Columbia Supreme Court to set aside the judgment below as vitiated by fraud.

"The Honourable Mr. Justice Harris"

"The Honourable Mr. Justice Willcock"

"The Honourable Madam Justice Fenlon"

Tab 142

CanLII

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [2014] 3 SCR 31

Source:	Supreme Court of Canada
Date:	2014-10-02
File number:	35315
Other citations:	375 DLR (4th) 599 — 463 NR 336 — [2014] 11 WWR 213 — 619 WAC 1 — 51 RFL (7th) 1 — 361 BCAC 1 — 59 CPC (7th) 1 — [2014] SCJ No 59 (QL) — [2014] ACS no 59
Citation:	Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [2014] 3 SCR 31, <https://canlii.ca/t/gds2j>, retrieved on 2026-01-19

SUPREME COURT OF CANADA

CITATION: Trial Lawyers Association of British Columbia *v.* British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31

DATE: 20141002
DOCKET: 35315

BETWEEN:

Trial Lawyers Association of British Columbia and Canadian Bar Association — British Columbia Branch
Appellants/Respondents on cross-appeal
and
Attorney General of British Columbia
Respondent/Appellant on cross-appeal
- and -
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and Action Fund and David Asper Centre for Constitutional Rights

Tab 144

CanLII

S. S. v. Allstate Insurance Company of Canada, 2008 ONFSCDRS 159 (CanLII)

Source:	Ontario Financial Services Commission - Dispute Resolution Services
Date:	2008-09-26
File number:	FSCO A07-001223
Citation:	S. S. v. Allstate Insurance Company of Canada, 2008 ONFSCDRS 159 (CanLII), <https://canlii.ca/t/jq7jw>, retrieved on 2026-01-18

Ontario **Financial Services Commission of Ontario** **Commission des services financiers de l'Ontario**

Neutral Citation: 2008 ONFSCDRS 159

FSCO A07-001223

BETWEEN:

S. S.

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Arbitrator John Wilson

Heard: July 28, 2008 at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Mrs. S., on her own behalf
Eric K. Grossman for Allstate Insurance Company of Canada

Issues:

The Applicant, S.S., was injured in a motor vehicle accident on November 21, 2001. She applied for and received statutory accident benefits from Allstate Insurance Company of Canada ("Allstate"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through mediation, and Mrs. S applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Should the arbitrator recuse himself from the hearing of this arbitration and declare a mistrial?

Result:

1. There are no grounds for recusal and consequently no mistrial will be ordered.

EVIDENCE AND ANALYSIS

On Monday, July 28, 2008, I heard a motion for a mistrial brought by Allstate in the above matter. Due to the fast-approaching hearing dates I decided to advise the parties by letter as to the outcome of the motion with full reasons for my decision to follow in due course.

The following are my complete reasons for this decision.

As both sides are well aware, the circumstances leading up to the motion arose out of events that took place at the end of the first set of hearing dates on June 12, 2008.

There is no dispute that during her cross-examination by Mr. Grossman, Mrs. S became quite upset, and in the words of her own attendant, Ms. Martin, became hysterical.

It is in the context of this episode that Mrs. S is alleged to have divulged information relating to an attempt to settle her dispute with Allstate. Specifically, she is alleged to have revealed the amount of a settlement offer that she had refused to accept.

There is some confusion about what exactly was said at the time. Neither Mrs. S nor Ms. Martin has a specific recollection of her having made the statement in question. The affidavit material filed by Allstate, however, suggests the contrary.

Although I certainly recall the confusion resulting from Mrs. S's outbursts, and indeed recall certain other statements that gave rise to concerns about the safety of persons both inside and outside of the hearing room, I have no specific recollection of hearing the reference to a settlement offer allegedly made by Mrs. S at that time.

As noted in Allstate's affidavit material, I had ordered the hearing adjourned at the onset of the outburst. As a consequence there was no official record of what may have been said at that time. In any event, my recollection of the situation is not dispositive of a finding of what was or was not said in those crucial minutes.

My lack of recall, however, is relevant as to whether the uttering of such remarks, if such was the situation, would have necessarily created a situation in which my neutrality as to the parties to this arbitration was compromised. In this context, I take some consolation from the decision of the Divisional Court in *Authorson*, which, in a case that tuned on the alleged utterances of the presiding judge, observed as follows:

> [2] The allegations of bias against the Judge in acting in his case management judge role stem from comments apparently made during some of the sessions. There is no transcript, and there is some dispute amongst the parties, as to exactly what and how certain statements were made. In such circumstances, a certain degree of deference has to be given to a judge. We do not interpret the Judge's reasons as concluding that he was the dispositive witness as can be seen by his advice that he "... would add that I have no recall of making such a statement. If I had ever made a statement anything like that, I would have remembered it, and I would not then have continued on with the case."[3]

However, for the purposes of deciding this mistrial motion, I will assume that Mrs. S may well have disclosed the existence of a settlement offer, whether intentionally or by inadvertence, as well as considering the possibility that I may have unconsciously been compromised by the utterance, as Mr. Grossman has suggested.

Mr. Grossman submits that the mere fact of such a disclosure would be fatal to this arbitration process and would necessarily result in a mistrial.

It is trite law that a decision-maker must not favour the position of one side or another, and in hearing a matter and making his or her decision must keep an open mind as to the positions advocated by both the parties.

This common sense principle was further elaborated by Lord Denning in *Metropolitan Properties*:

> There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."[4]

In Canada, the Supreme Court has also examined the principles raised by an allegation of bias. Bastarache J. stated in *Arsenault-Cameron v. Prince Edward Island*[5]:

> ... True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

As also noted in *Authorson*,[6] a request for recusal must be timely. Mrs. S has suggested that in the context of this hearing, the request for recusal is not timely. Mr. Grossman believes otherwise, pointing to the gravity of the situation and the need for serious consideration before bringing such a motion.

Although unsupported by any direct evidence as to this aspect, Mr. Grossman claims that steps were underway well before the formal request was made to bring a recusal motion, and that only the need to take due consideration delayed initiating this procedure.

The rationale for timeliness was outlined by the Supreme Court in *Curragh*:

> The contrary view runs counter to the rule of law and the practical functioning of our judicial system. For example, if this view were to hold, parties perceiving bias could lie in the weeds and long after the trial judge rules against them, have the entire proceeding invalidated ab initio. A party who was not prejudiced by the bias could move to have the proceedings and verdict set aside on the ground of nullity. Persons affected by a court order would look to see whether there is some bias on which the Judge's jurisdiction could be impugned and decide accordingly whether to obey the order or not.[7]

As noted, Mrs. S attaches some importance to what may just be a coincidence of timing. [8] Allstate's first communication on the recusal issue came immediately after I released my ruling denying Allstate's request to waive the time limit for an expert report and to

admit Dr. Brigham's report on catastrophic impairment. While I admit that the coincidence of timing is certainly suggestive of an ulterior motive behind the recusal request, I accept Mr. Grossman's word as an officer of the court that neither he nor Allstate had any such ulterior motive.

I would prefer, in any event, to analyze the allegations of potential bias or appearance of bias on the grounds put forward by Allstate, since it must be admitted that even a finding of improper purpose, or lack of timeliness by a party bringing a motion would not preclude a finding of actual bias on the part of an adjudicator.

Mr. Grossman has cited my decision in *Webber**[9]* as standing for the assertion that as a matter of principle, settlement discussions and the hearing process cannot co-exist. In that case, it was alleged that critical details of the settlement position and a party's evaluation of its own case might have been inadvertently disclosed to the arbitrator by that party. Such is not the case here.

Settlement offers, it should be remembered, are part and parcel of the accident benefit scheme. Every arbitration goes through settlement discussions as part of normal procedure at the Commission. Everyone, including the arbitrator, is in a position to surmise that settlement offers were made and rejected on virtually every file that goes to arbitration.

Nor is there any magic in the mere mention of settlement numbers. Indeed, section 281(3) of the *Insurance Act* provides for the insurer to pay benefits pending arbitration on the basis of their last settlement offer.[10] In such cases, the existence and value of a settlement offer can hardly be a secret once evidence as to the quantum of the benefit claimed by the insured or the repayment requested by the insurer has been tendered.[11]

I do not accept that the necessary outcome of a mention of settlement offers in itself must always be a mistrial and the recommencement of the arbitration process. Rather, the outcome is fact dependent, based on the nature of the prejudice caused by such statements, the nature of the legal process, and the possibility that safeguards can be erected to prevent any possibility of a miscarriage of justice.

Arbitration is not a jury trial. Much of the jurisprudence surrounding mistrials arose from the perceived need to avoid the possibility of lay jurors making decisions based on extraneous criteria, or having their decision-making capability impaired by the disclosure of inappropriate or scandalous information, with the aim of avoiding a miscarriage of justice.[12]

I am not convinced that even if the amount of a settlement proposal was inadvertently disclosed during this arbitration process that prejudice to Allstate and a miscarriage of justice would necessarily result from a continuation of the hearing process.

The arbitration process, in addition to being less formal and more efficient, is also necessarily more robust. While a jury might well be tainted by a reference to insurance or influenced by irregularities, an arbitrator, as a professional adjudicator, is alert to the need to direct his or her attention only to the relevant facts, and to exclude extraneous considerations.

One such “extraneous consideration” might well be Mr. Grossman’s concern that I might possibly be influenced by having witnessed the behavior of a party, outside of the formal hearing, the effect of which, either consciously or unconsciously I would consider when evaluating Mrs. S’s claim for catastrophic impairment.

While I do not accept that Mr. Grossman’s fears in this regard are credible, the British Columbia Supreme Court in *McQueen’s Boat Works* [13] has suggested that an arbitrator may well consider direct demonstrative evidence outside of the hearing room (in this case inspecting damaged fiberglass panels during a “viewing” – damage that may well have gone to the heart of the case in arbitration…) without being irrevocably tainted. It further suggested that where such concerns were raised, it would be appropriate for the opposing party to be given the opportunity to address the “evidence” in cross-examination and in submissions.

Clearly, the arbitration process is somewhat more resilient than imagined by Mr. Grossman. A professional adjudicator or an arbitrator is in a position to weigh the evidence, to disregard improper or irrelevant evidence, and to provide a fair process to all parties.

Just as an arbitrator may hear evidence as part of a voir dire that may not be admitted as evidence in the arbitration, and still be capable of hearing the balance of the substantive dispute, so the mention of information relating to settlement that does not betray a party’s litigation strategy, or its own evaluation of its case, cannot in itself impair partiality. The courts recognize both the common sense and the judicial awareness of arbitrators and professional adjudicators, and have been reluctant to support a finding of mistrial in such cases. Even the disclosure of the details of settlement discussions has been found not to taint an arbitrator.

> The arbitrator, like a trial judge, will receive in evidence relevant background information provided by the parties which will help him/her to understand the issues and decide the dispute. In this case, it cannot be said that the

> arbitrator received any information which is unlikely to be provided to him by the parties either through motions or in evidence in support of their case. There was no breach of confidence by the mediator or by the applicant of the sort that would taint the arbitration process.[14]

In this matter, Mr. Grossman has yet to complete his cross-examination of Mrs. S. It is precisely Mrs. S's conduct that is at the heart of Mr. Grossman's concerns. I see no reason that Mrs. S's conduct at the close of the hearing could not form part of Mr. Grossman's ongoing cross-examination.

A claim for catastrophic impairment, such as that put forward by Mrs S in this matter, is a highly technical claim involving a complex rating system and based on expert evidence of disability within the criteria set out by the AMA guides. While an arbitrator certainly has expertise in interpreting legislative criteria as to catastrophic impairment, it would be unusual for any adjudicator to substitute his or her own assessment of disability, based solely on witnessing the behaviour or demeanour of a party in a hearing room setting.

Allstate's speculative suggestion that I might somehow unconsciously use information not on the record in deciding this case does not meet the high threshold for this motion nor satisfy the onus of demonstrating a real likelihood or probability of bias.

Mr. Grossman also takes exception to my actions in remaining in the hearing room after having adjourned the matter due to the ongoing commotion. Arbitrators also sit alone, without the panoply of supporting personnel to be found in a court. If a problem arises during the hearing process, it is the responsibility of the hearing arbitrator to control the process during the hearing and to maintain decorum and security. Although the *Statutory Powers Procedure Act* ("*SPPA*")[15] provides for calling on the support of a peace officer to maintain order in a hearing room, this is perhaps the ultimate step in the security continuum.

Security during a hearing is a proper concern for both judges and adjudicators. The *SPPA* recognizes this need. Even though courts may have more elaborate security protocols, and security resources provided by other branches of government, ultimate responsibility for the activities in the court or hearing rooms lies with the judge or adjudicator. As the Australian Federal Court of Appeal noted in *Skuse*[16]:

> …Judges, not the Executive or the Legislature, control activities within their Courts. They control the conduct of proceedings within them and the behaviour of those who are before them.

This stems directly from the principle of the independence of the judiciary from the executive and the legislature, an independence that also extends to adjudicators in a

court-like system such as arbitration.[17]

Obviously an adjudicator must use his or her powers to control the process sparingly and judiciously. What is proper and judicious depends on the specific circumstances of the case. Threatening, without cause, to find someone in contempt, continually correcting minor defaults in behavior, or consistently interrupting a party or counsel might justifiably give rise to a perception of bias. Such was not the case in this matter.

My recollection of the incident, which appears to coincide with that in the affidavit material file by Allstate, is that during the outburst, Mrs. S uttered what could only be interpreted as threats against certain politicians and others she held responsible for her situation and what she evidently perceived as the unfairness of the accident benefit system.

In addition, during her outburst Mrs. S precipitously took out a bottle of pills with the obvious risk in her agitated state that she might indeed take an overdose of medication.

This was a serious situation, and in the absence of formal security measures, I would have been remiss in my duty towards those in the hearing room, and the arbitration process, if I merely left the room, as advocated by Mr. Grossman, without first ascertaining whether I felt that there was any risk to Mrs. S or others arising from her conduct.

Once I was satisfied that the situation was under control, I left the room and reported my concerns to the administration. In the context of this arbitration, and the highly unusual circumstances that occurred during Mrs. S's cross-examination, that was the appropriate route to take.

It should be remembered that a mistrial, the relief requested by Allstate in this motion, is an extraordinary remedy in the context of an arbitration hearing. It should only be granted if the prejudice to the moving party, once established, cannot be addressed in any other way. Abbey J. commented as follows in an analogous matter:

> No matter which of these approaches is adopted, essentially, as I see it, the Court must weigh all of the circumstances of the particular case and determine whether the disclosure which has been made would likely result in real prejudice such that it would be unjust to continue the trial as presently constituted. [18]

Likewise, Nordheimer J. observed:

> The declaration of a mistrial, like the declaration of a stay, should be granted only as a last resort, in the clearest of cases and where no remedy short of that relief will adequately redress the actual harm occasioned.

None of the other options I have mentioned were explored by the trial judge prior to declaring the mistrial. [19]

Other than perhaps a delay of a few hours to the hearing process, I do not accept that Allstate was irrevocably prejudiced by Mrs. S's outburst.

That is not to say that I find Mrs. S's conduct in any way excusable. She was clearly wrong to behave as she did on June 12, 2008, especially in a formal hearing setting.

I am, however, not convinced that her behaviour, however unacceptable, constituted outright contempt, especially given the description of her outburst as "hysterical."

The proper remedy however for her misconduct, in the context of this arbitration, is in the consideration of an award of costs or expenses, not in an order for a mistrial, which would waste the significant time and effort that has been spent in getting this hearing underway.

When this arbitration is completed Allstate may address the conduct issue as part of its submissions on expenses in this arbitration.

In summary, I do not accept that a reasonable, fully informed person would believe that by possibly hearing a reference to settlement, and remaining in the hearing room until I determined that there appeared to be no risk to the parties or others, I compromised my ability to continue to hear this matter and to impartially adjudicate the issues referred to arbitration.

Nor do I accept that this arbitration process has been so compromised that the only practical alternative is to declare a mistrial.

For the reasons noted above I dismiss the Insurer's motion.

EXPENSES:

I leave the consideration of expenses to the end of the hearing process.

September 26, 2008

John Wilson
Arbitrator

Date

Ontario Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2008 ONFSCDRS 159

FSCO A07-001223

BETWEEN:

S. S.

Applicant

and

ALLSTATE INSURANCE COMPANY OF CANADA

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The motion for recusal of the arbitrator and for a mistrial is dismissed.

September 26, 2008

John Wilson
Arbitrator

Date

---

[1] *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

[2] *Authorson v. Canada* [2002] O.J. No. 2050 Divisional Court

[3] It is incumbent also upon the adjudicator not to abuse this deference. "A judge has a clear duty where his conduct is being impeached to place before the court facts which might have a bearing on his actions. That is especially so where there is no other way to get that evidence. Given that Crown and

defence counsel have no right to cross-examine a judge, and since judges are, at least, the primus inter pares among judicial officers in the court, they have a special duty to be scrupulously fair about what he or she states the facts to be." R. v. Benoit (1999), 1999 CanLII 18956 (NL CA), 134 C.C.C. (3d) 203 (Nfld. C.A.)

[4] *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and Others*, [1968] 1 Q.B. 577 (C.A.)

[5] *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851

[6] supra

[7] *R. v. Curragh* (1997), 1997 CanLII 381 (SCC), 144 D.L.R. (4th) 614 (S.C.C.)

[8] The fact that correspondence related to this motion was signed in the absence of Mr. Grossman, might indeed tend to corroborate Mrs. S's intuition that this motion was brought in haste after the release of my ruling.

[9] *Webber and State Farm Mutual Automobile Insurance Company* (FSCO A06-002695, December 10, 2007)

[10] Section 281(3) Subject to subsection (4), if mediation fails, the insurer shall pay statutory accident benefits in accordance with the last offer of settlement that it made before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitration Act, 1991* or by the Director

[11] See *Liberty Mutual Insurance Co. v. Fernandes* 2006 CanLII 30212 (ON CA), [2006] O.J. No. 3514 C.A. for a discussion of these provisions.

[12] Even in the case of a jury trial, it is often sufficient for the judge to properly instruct the jury to ignore or not otherwise consider certain statements or information that might otherwise support a mistrial. *Westlake v. Granby Steel Tank*s [2006] O.J. No. 2629 Ontario Court of Appeal

[13] *McQueen's Boat Works Ltd. v. Lanikai Holdings Ltd.*, [1996] B.C.J. No. 2063

[14] *Kay v. Korakianitis*, 2007 CanLII 29278 (ON SC), [2007] O.J. No. 2905

[15] Section 9 (2) of the *SPPA* states:

A tribunal may make such orders or give such directions at an oral or electronic hearing as it considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any such order or direction, the tribunal or a member thereof may call for the assistance of any peace officer to enforce the order or direction, and every peace officer so called upon shall take such action as is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose. R.S.O. 1990, c. S.22, s. 9 (2); 1994, c

[16] Re *Skuse v. The Commonwealth of Australia* [1985] S.C.A. 336

[17] *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3

[18] *Michaud v. Wales* [1991] O.J. No. 2455

[19] *R. v. Toutissani* [2007] C.C.S. No. 6041I.V.B. Nordheimer J.

Tab 145

CanLII

Smith v. Canada (Attorney General), 2020 FC 629 (CanLII), [2020] 4 FCR 3

Source:	Federal Court
Date:	2020-05-21
File number:	T-1713-18
Citation:	Smith v. Canada (Attorney General), 2020 FC 629 (CanLII), [2020] 4 FCR 3, <https://canlii.ca/t/j7v4k>, retrieved on 2026-01-18
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

T-1713-18

T-2055-18

2020 FC 629

The Honourable Justice Patrick Smith (*Applicant*)

v.

The Attorney General of Canada (*Respondent*)

and

The Canadian Judicial Council, the Canadian Superior Court Judges Association and **the Ontario Superior Court Judges' Association** (*Interveners*)

INDEXED AS: SMITH V. CANADA (ATTORNEY GENERAL)

Federal Court, Zinn J.—Toronto, January 21; Ottawa, May 21, 2020.

Judges and Courts — Judicial review of Canadian Judicial Council's (CJC) decision to constitute Judicial Conduct Review Panel (Review Panel), Review Panel's conclusion that applicant contravening Judges Act, s. 55 — Applicant, Ontario Superior Court of Justice judge, accepting appointment to position of Interim Dean of law school — Chief Justice granting applicant special leave pursuant to Judges Act, s. 54(1)(a) after obtaining approval from Minister of Justice — Executive Director of CJC of view that in light of Judges Act, ss. 54, 55, general duties, ethical obligations of Judges, acceptance

by applicant of Interim Dean role may warrant consideration by Council — Referring matter to Judicial Conduct Committee Vice-Chairperson — Matter referred to Review Panel — Review Panel concluding that leave of absence granted under Judges Act, s. 54 not removing prohibition under s. 55 — Finding applicant breaching ethical obligations, impermissibly using prestige of judicial office — Vice-Chairperson endorsing Review Panel's decision — Whether Review Panel decision reasonable, CJC proceedings procedurally unfair or abuse of process — Review Panel's interpretation of Judges Act, s. 55 unreasonable — "Prohibition" identified by Review Panel not "on judges carrying on extra-judicial activities" but rather on judges engaging "in any occupation or business other than his or her judicial duties" — Review Committee's broad interpretation exhibiting neither justification nor intelligibility — Applicant not breaching s. 55 when accepting appointment — S. 55 not complete ban on judges taking on non-judicial roles — S. 54 allowing for leave from judicial duties for reasons not inconsistent with those duties — Review Panel's decision as to ethical breach by applicant unreasonable — Review Panel failing to examine applicant's conduct on basis of informed public exercising mature judgment — CJC process involving applicant unfair, contrary to interests of justice — Constituting abuse of process — Nothing in record explaining how, on what basis Executive Director concluding that referral to Judicial Conduct Committee in public interest, due administration of justice — Applicant also denied procedural fairness by Executive Director — Not receiving fundamental procedural right to know case to be met — Initial referral to Judicial Conduct Committee failing to accord with CJC procedures — Executive Director raising matter on his own in absence of public complaint — In such circumstances, Executive Director ought to weight conduct against test set out in Baker v. Canada (Minister of Citizenship and Immigration) for conduct worthy of removal from bench, be convinced that conduct could result in such a finding — Here, removal of applicant by Minister of Justice inconceivable — Applications allowed.

These were applications for judicial review of the Canadian Judicial Council's (CJC) decision to constitute a Judicial Conduct Review Panel (Review Panel) and of the Review Panel's conclusion that the applicant contravened section 55 of the *Judges Act*.

The applicant, an Ontario Superior Court of Justice judge, accepted an appointment as Interim Dean of the Bora Laskin Faculty of Law at Lakehead University (the Law School). After obtaining the approval of the Minister of Justice, the Chief Justice granted the applicant special leave pursuant to paragraph 54(1)(a) of the *Judges Act* to accept the assignment, subject to certain parameters, including that his role be confined to "academic leadership". The Executive Director of the CJC subsequently wrote to the applicant informing him that "in light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges," acceptance of the Interim Dean role "brings me to the view that the situation may warrant consideration by Council." The Chief Justice informed the Executive Director of the CJC that the appointment would attract no remuneration, that the applicant's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future litigation. The Executive Director nevertheless referred the matter to the Vice-Chairperson of the Judicial Conduct Committee (Vice-Chairperson). The applicant responded that he did not view section 55 of the *Judges Act* as a bar to his acceptance of the position at the Law School. The applicant later signed a written agreement setting out the limitations of his appointment with Lakehead University. In August 2018, the Executive Director advised the applicant that the Vice-Chairperson had decided to constitute a review panel in respect of the appointment. The CJC later issued a press release stating that the applicant's decision to become Interim Dean raised some questions about whether such duties were compatible with judicial office. The Vice-Chairperson's reasons for referral rested on his view that the applicant accepted the role without considering the reaction from First Nations chiefs or the potential effect on the prestige of judicial office. Following notice that the matter had been referred to the Review Panel, the applicant advised the Executive Director that he had resigned from his position at the Law School in September 2018 and would return to his judicial duties with the Superior Court of Justice. The Review Panel concluded that section 55 of the *Judges Act* "requires judges … to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that the applicant had breached an ethical obligation to avoid becoming involved in public controversy, and he had impermissibly used the prestige of judicial office to bolster the Law School, but his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an inquiry committee. The Vice-Chairperson endorsed the decision of the Review Panel and concluded that in light of the applicant's resignation from the position, no further measures were needed. The applicant sought a declaration that he did not contravene section 55 of the Judges Act.

The main issues were whether the decision of the Review Panel was reasonable, and whether the CJC proceedings were procedurally unfair or an abuse of process.

Held, the applications should be allowed.

The interpretation given by the Review Panel to section 55 of the *Judges Act* was unreasonable. The "prohibition" identified by the Review Panel is set out in clear and explicit terms in the English version. However, the prohibition is not "on judges carrying on extra-judicial activities". Rather, it is on judges engaging "in any occupation or business other than his or her judicial duties". The Review Committee interpreted the phrase "occupation or business" in isolation from its context. Properly read, the phrase says that judicial duties are an occupation or business. By failing to include and examine this critical qualifier in its initial summary of the section, the Review Panel may have engaged in "reverse engineering" to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. In ignoring the context, the Review Panel's reasoning failed to properly apply the modern principle of statutory construction. The Review Panel's conclusion that the phrase "occupation or business" is to be broadly interpreted exhibited neither justification nor intelligibility. It was problematic in several respects, including the failure to consider the entire phrase. When considering the legislative history of section 55, the Review Panel did not address or consider the original wording of the provision. In neither official language do the words of section 55 support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge's regular remuneration. The Review Panel's reasoning was flawed and led to an unreasonable conclusion on interpretation. The applicant did not breach section 55 of the *Judges Act* when he accepted the appointment of Interim Dean. There is nothing in the language of section 54 of the *Judges Act,* suggesting that leaves of absence may not be granted to enable judges to take on responsibilities outside of their judicial duties. This leave provision was not enacted to be used exclusively for absences "such as an illness, a period of recovery from accident or parental leave" as the Review Panel suggested. Leaves under section 54 are not restricted to maternity or parental leaves. Section 55 is not a complete ban on judges taking on non-judicial roles. Parliament's intention was that judges are able to assume non-judicial roles in certain circumstances and section 54 of the Act allows for a leave from judicial duties for a variety of reasons that are not inconsistent with those duties. The decision of the Review Panel as to the ethical breach of the applicant in accepting the appointment was unreasonable and could not stand. The Review Panel failed to examine whether the applicant's conduct unnecessarily exposed him to criticism or attack on the basis of an informed public exercising mature judgment.

The CJC process involving the applicant was unfair to the point that it was contrary to the interests of justice. It was an abuse of process. The CJC disciplinary procedure was misused from the beginning, i.e. when the Executive Director determined that the applicant accepting the appointment to the Law School was a matter that "warrants consideration." There was nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The Executive Director placed no weight on the Minister's approval of the applicant's appointment. The Minister's approval could not reasonably be said to be "unofficial" simply because she did not expressly use the word "approved." In addition to the improper decision of the Executive Director that the matter "warrants consideration" there was evidence in the record that the applicant was also denied procedural fairness by the Executive Director. Specifically, the applicant was not informed of the Executive Director's concerns about the call for him to resign, nor was he provided with any of the "public comments" made in response to statements made by First Nations chiefs, nor those statements. The Executive Director failed to give to the applicant the fundamental procedural right to know the case to be met. If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then the applicant was entitled to know that and respond to it. Accordingly, the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner. In raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so. The Executive Director ought to weigh conduct against the test set by the Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* for conduct worthy of removal from the

bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

The declarations sought by the applicant were appropriate. The Court declared that the applicant, in accepting the appointment of Interim Dean, did not breach section 55 of the *Judges Act*, nor did he breach his judicial ethics.

STATUTES AND REGULATIONS CITED

An Act to amend the Act respecting the Judges of Provincial Courts, S.C. 1905, 4-5 Edward VII, c. 31, s. 7.

Canadian Judicial Council Inquiries and Investigations By-laws, 2015, SOR/2015-203, s. 2(1).

Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], s. 99.

Federal Courts Rules, SOR/98-106, rr. 109, 303(2).

Judges Act, R.S.C. 1906, c. 138, s. 33.

Judges Act, R.S.C., 1985, c. J-1, ss. 54 to 56.1, 54, 55, 56, 56.1, 57.

Judges Act, 1946 (The), S.C. 1946, c. 56, s. 34.

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3.

CONSIDERED:

Canada Post Corp. v. Canadian Union of Postal Workers, 2019 SCC 67, 441 D.L.R. (4th) 269; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, (1995), 130 D.L.R. (4th) 1; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282; *Cosgrove v. Canadian Judicial Council,* 2007 FCA 103, [2007] 4 F.C.R. 714.

REFERRED TO:

Girouard v. Canada (Attorney General), 2018 FC 865, [2019] 1 F.C.R. 404, affd 2019 FCA 148, [2019] 3 F.C.R. 503, leave to appeal to the S.C.C. refused December 12, 2019; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *Girouard v. Canada (Attorney General)*, 2019 FC 434; *Girouard v. Canada (Attorney General)*, 2019 FC 1282; *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4; *Ebrahimshani v. Canada (Citizenship and Immigration)*, 2020 FC 89; *Ennis v. Canada (Attorney General)*, 2020 FC 43; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121; *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217; *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501, 122 C.P.R. (4th) 195.

AUTHORS CITED

Canada. Parliament. Senate. *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996).

Canadian Judicial Council. *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*, 2015.

Canadian Judicial Council. News Release, "Canadian Judicial Council review of a matter involving the Honourable Patrick Smith" (3 October 2018).

Canadian Judicial Council. *Ethical Principles for Judges*, 2004.

Canadian Judicial Council. *Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable Patrick Smith*, November 5, 2018.

Canadian Judicial Council. *Reasons for the referral of a complaint to a Judicial Conduct Review Panel in the matter of the Honourable Patrick Smith of the Ontario Superior Court of Justice*, October 3, 2018.

"Justice Patrick Smith named interim dean of Lakehead law school", CBC News (May 3, 2018).

McQuigge, Michelle. "*Judge fights against disciplinary body's ruling that said he engaged in misconduct*", Toronto Star (27 September 2018).

Schmitz, Cristin. "Canadian judges rally around judge facing discipline for accepting interim law dean post at Lakehead University", *The Lawyer's Daily* (4 October 2018).

APPLICATIONS for judicial review of the Canadian Judicial Council's decision to constitute a Judicial Conduct Review Panel and of the Review Panel's conclusion that the applicant contravened section 55 of the *Judges Act*. Applications allowed.

APPEARANCES

Brian Gover and *Pam Hrick* for applicant.

Michael H. Morris, *Joseph Cheng* and *Elizabeth Koudys* for respondent.

Christopher D. Bredt, *Ewa Krajewska* and *Teagan Markin* for intervener Canadian Judicial Council.

Richard P. Stephenson and *Michael Fenrick* for intervener Canadian Superior Courts Judges Association.

Tom Curry, *Scott Rollwagen* and *Margaret Robbins* for intervener Ontario Superior Court Judges' Association.

SOLICITORS OF RECORD

Stockwoods LLP, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

Borden Ladner Gervais LLP, Toronto, for intervener Canadian Judicial Council.

Paliare Roland Rosenburg Rothstein LLP, Toronto, for intervener Canadian Superior Courts Judges Association.

Lenczner Slaght Royce Smith Griffin LLP, Toronto, for intervener Ontario Superior Court Judges' Association.

The following are the reasons for judgment and judgment rendered in English by

“The fact that Judge Patrick Smith is in danger of removal is a sobering illustration of the ‘no good deed goes unpunished’ saying.”

Christie Blatchford

I. INTRODUCTION

[1] The Honourable Justice Patrick Smith (Justice Smith) is a judge of the Superior Court of Justice of Ontario.

[2] He challenges two decisions of the Canadian Judicial Council (CJC). The first is the August 28, 2018, decision of Québec Superior Court Associate Chief Justice Robert Pidgeon, in his capacity as Vice-Chairperson of the Judicial Conduct Committee (Pidgeon A.C.J.), to constitute a Judicial Conduct Review Panel (Review Panel) (Court File T-1713-18). Second, Justice Smith challenges the November 5, 2018, decision of the Review Panel *[Report of the Review Panel constituted by the Canadian Judicial Council regarding the Honourable Patrick Smith]* (Court File T-2055-18).

[3] The Review Panel concluded that Justice Smith, in accepting the appointment of Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University (the Law School), contravened section 55 of the *Judges Act*, R.S.C., 1985, c. J-1 [the Act]. It further found that Justice Smith failed in his “ethical obligations as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office.” It recommended that an Inquiry Committee not be constituted, and remitted the matter back to Pidgeon A.C.J. for a decision on the most appropriate way to resolve the matter.

[4] Pidgeon A.C.J., in a letter to Justice Smith dated November 6, 2018 (Letter of Concern), writes that he “fully support[s] the Panel’s reasons and conclusions” and describes the decision to accept the role of Interim Dean as “ill-advised.” As Justice Smith had resigned as Interim Dean (Academic) of the Law School prior to the decision of the Review Panel and had resumed his judicial duties, it was concluded that no further measures were necessary.

[5] In their memoranda and oral submissions, Justice Smith and the CJC focused on the decision of the Review Panel and the subsequent Letter of Concern as they overtook the decision to refer the conduct of Justice Smith to the Review Panel. Likewise, I shall focus on the decision of the Review Panel and the Letter of Concern, except when relevant to the submission of Justice Smith that the CJC proceedings were procedurally unfair and an abuse of process.

[6] The Review Panel decision and this application bring into issue the interpretation of several sections of the *Judges Act*, which are reproduced in Appendix A.

[7] For the reasons that follow, I conclude that these applications must be allowed. The decision of the Review Panel is not reasonable, and the CJC procedure was applied unfairly to Justice Smith and was an abuse of process. Justice Smith is entitled to a meaningful remedy.

II. BACKGROUND

A. Procedural History

[8] Both applications for judicial review were under case management. By her July 4, 2019 order, the Case Management Judge consolidated these applications. Pursuant to rule 109 of the *Federal Courts Rules*, SOR/98-106 [Rules], leave to intervene was granted to the Canadian Superior Courts Judges Association and the Ontario Superior Court Judges' Association.

[9] The Attorney General of Canada was named as the respondent pursuant to subsection 303(2) [of the Rules]. The Attorney General agrees with Justice Smith that the decision of the Review Panel is unreasonable, and that its interpretation of sections 54 to 56.1 of the *Judges Act*, as adopted by Pidgeon A.C.J. in the Letter of Concern, is unreasonable.

[10] The Case Management Judge granted the CJC leave to intervene in these applications, restricted to the issue of its jurisdiction. That issue was resolved by the decisions in *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404, appeal dismissed *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503, leave to appeal to the S.C.C. refused December 12, 2019.

[11] In her October 17, 2019 order, the Case Management Judge expanded the scope of the CJC's intervention permitting it to defend its decision on the merits, within the parameters set out by the Supreme Court of Canada in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147.

B. Facts

[12] On April 16, 2018, the Interim President and Vice Chancellor, Lakehead University, wrote to Justice Smith asking him to accept an appointment to the position of Interim Dean of the Law School. The Law School has existed only since 2013. Its mandate is "Aboriginal and Indigenous Law, Natural Resources and Environmental Law, and small firm and Sole Practice." The second permanent dean of the Law School, Angelique EagleWoman, resigned earlier in 2018, alleging institutional racism. In her letter to Justice Smith, the Interim President notes the importance that it "maintain the confidence and support of the Law Society of Ontario, the Federation of Law Societies of Canada, and of our local bar and extended communities." The Interim President explains why he is being asked to take on this interim position:

> We make this urgent request based on your knowledge, skills, and experience as a Judge of the Superior Court of Ontario. In addition, your long standing connections and the respect you garner in the local, provincial and national legal communities, combined with your significant work with Indigenous communities and your important publications focused on

Aboriginal Law in Canada, are critical to the ongoing evolution and success of the Faculty of Law.

[13] Justice Smith sits in the Northwest Region and before becoming a judge in 2001, practised law in Thunder Bay for 25 years. He has significant expertise in Aboriginal and Indigenous law. In October 2009, he was appointed to the Specific Claims Tribunal. Justice Smith worked with former judge and current Senator Murray Sinclair, Chair of the Truth and Reconciliation Commission, on various judicial education initiatives, including developing and co-chairing a three-day intensive course, sponsored by the National Judicial Institute on Aboriginal Law for judges from across Canada, and creating and updating a Judicial Bench Book on Aboriginal Law. He is often invited by legal organizations to speak on Aboriginal and Indigenous law, and is called upon regularly by judges across Canada to assist with the mediation of land claims and other litigation between First Nations and various levels of government.

[14] Justice Smith informed the Honourable Heather J. Forster Smith, Chief Justice of the Superior Court of Justice (the Chief Justice) of the request from the Law School. In his letter, Justice Smith says, “the affairs at the school are in a crisis.” This characterization of the situation at the Law School is not questioned. He asked for the approval of his Chief Justice and the Minister of Justice to accept this short-term appointment.

[15] The Chief Justice wrote to Minister of Justice, Jody Wilson-Raybould, expressing her support for Justice Smith to accept this role. She notes that this request “would take him outside of his judicial duties in a role that is unprecedented for a judge of our Court.” She also notes that Justice Smith is a supernumerary judge “so the impact may be less than it would in other circumstances, particularly until the fall.” As a supernumerary judge, Justice Smith performs judicial duties for only six months each year. She indicates that this is an exceptional situation and “an opportunity for our Court to respond positively to a number of Truth and Reconciliation Commission recommendations.”

[16] The Chief Justice proposes to grant Justice Smith a leave of up to six months, from June 1, 2018, into November 2018, under the authority given to her in paragraph 54(1)(a) of the *Judges Act*. She notes that anything beyond that would require an Order in Council.

[17] The Chief Justice writes that Justice Smith appreciates that he can only accept the role “within certain clear parameters” including that his role be confined to “academic leadership.” He would delegate administrative authority over recruitment, financial decisions, and academic appeals to others within the school. Lastly, she observes, “given the restrictions of s. 55 of the Judges Act (which prohibits extra-judicial employment, occupation or business) he could not accept any remuneration from the university.”

[18] On April 27, 2018, the Minister replies:

> As Chief Justice, you have authority to grant Justice Smith a “special leave” under the *Judges Act*, for a period up to six months.…

> I have no concerns about your granting Justice Smith a "special leave" from June 2018 to November 2018, as outlined in your letter. In the event that more than six months is required, I will consider any requests for additional leave at the appropriate time. [Emphasis added.]

[19] On April 30, 2018, the Chief Justice granted Justice Smith special leave pursuant to paragraph 54(1)(a) of the *Judges Act* from June 1, 2018, to accept the assignment of Interim Dean at the Law School, subject to the parameters set out in her letter to the Minister of Justice.

[20] On May 9, 2018, the Executive Director of the CJC, Norman Sabourin, wrote to Justice Smith, with a copy to his Chief Justice. He observed that pursuant to section 4.2 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (the Review Procedures), in addition to receiving and reviewing complaints, he may "review any other matter involving the conduct of a superior court judge that comes to the attention of the Executive Director and appears to warrant consideration." He further noted that under section 4.3 of the Review Procedures, if he determines that the matter warrants consideration, he "must" refer it to the Judicial Conduct Committee.

[21] With that background, Mr. Sabourin writes in his letter to Justice Smith that media reports indicate that he has accepted to serve as "Dean of Lakehead University (on an interim basis)" and he attaches a CBC web report posted May 3, 2018, entitled "Justice Patrick Smith named interim dean of Lakehead law school." It reports on the departure of former Dean Angelique EagleWoman who on stepping down said, "Systemic issues within the university and challenges to implementing the Bora Laskin Faculty of Law's Aboriginal and Indigenous law mandate have made my continued involvement in the law school untenable." The news report concludes with the reaction of some Indigenous leaders to the situation at the Law School:

> Since then Indigenous leaders representing dozens of First Nations communities across northwestern Ontario called for "immediate change" at Lakehead University. They made several recommendations, including that Lakehead commit to appointing an Indigenous person as EagleWoman's successor, that an independent review examine "all issues and allegations" raised by her and that appropriate measures are subsequently taken.

[22] Mr. Sabourin says, "in light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges," acceptance of the Interim Dean role "brings me to the view that the situation may warrant consideration by Council." Prior to reaching any decision, Mr. Sabourin invites Justice Smith's views.

[23] The Chief Justice quickly responds by letter of May 11, 2018, noting that Justice Smith is unable to respond as he is out of the country. She assures Mr. Sabourin that she considered the request "very carefully taking into account the CJC's ethical principles and the Judges Act." She informs him that she obtained assurances that the appointment would attract no remuneration, that Justice Smith's duties would be restricted to providing only academic leadership, and that he would be insulated from concerns about future

litigation. Further, she informs Mr. Sabourin that she had sought and obtained approval from the Minister of Justice. She closes her letter with the following:

> I trust that the above clarifies how the matter unfolded and that it was thoroughly considered and approved both by me and the Minister of Justice. As such, I trust that you will agree that any further review of this matter is unwarranted.
>
> I anticipate that this explanation will satisfy all concerns you may have, but if not, please advise me and we may be able to suggest possible solutions.

[24] This response apparently did not satisfy Mr. Sabourin. He did not accept the invitation of the Chief Justice to contact her; he referred the matter to Pidgeon A.C.J.. On his behalf, Mr. Sabourin requests “more information about the precise scope and nature of the duties”. Justice Smith will undertake at the Law School and asks for his comments on the following:

> * who first contacted you in respect of the proposed appointment as Dean;
>
> * whether you have been granted leave from your judicial duties and, if so, by whom and on what basis;
>
> * whether, in your view, section 55 of the Judges Act is a bar to a judge engaging in professional activities other than judicial duties, whether remunerated or not;
>
> * whether you intend to engage in any judicial activities while acting as Dean;
>
> * whether there is any possibility of litigation in relation to Lakehead University;
>
> * whether the public confidence in the judiciary might be undermined by your engaging in the activities you propose at Lakehead University.

[25] Justice Smith responds directly to Pidgeon A.C.J. on May 24, 2018. He points out that the position he was invited to fulfill is not Dean of the Law School, as Mr. Sabourin’s letter states, but Interim Dean. He reiterates that he has been granted a leave of absence from his judicial duties by his Chief Justice who has consulted with the Minister of Justice who has “no concerns” with that.

[26] Justice Smith responds that he does not view section 55 of the *Judges Act* as a bar to his acceptance of the position at the Law School:

> While I do not believe that this provision creates a blanket ban on engaging in any “professional activities other than judicial duties”, I am hesitant to opine in the abstract on the circumstances in which section 55 prohibits such activities. I am pleased, however, to have the opportunity to provide submissions on whether this provision prohibits my proposed activities as Interim Dean.
>
> The role of “Interim Dean”, as defined above, does not in my respectful view qualify as an “occupation or business” in which the Legislature intended to prohibit judges from engaging. The Legislature intended to prohibit judges from moonlighting in other roles – particularly remunerative ones – that could undermine their ability to devote themselves fully to their judicial duties.

> Moreover, the role that I intend to play at the Bora Laskin Faculty of Law is not unlike a study leave granted to a judge to reflect, research, or teach at a Canadian Law School, as authorized by the Canadian Judicial Council and the Minister of Justice.
>
> Further, section 55 must be read in conjunction with section 54, which expressly contemplates that a judge may "be granted a leave of absence from his or her judicial duties." It is necessarily inferred that during a period of leave granted pursuant to section 54, a judge is relieved of the obligation in section 55 to "devote himself or herself exclusively to those judicial duties."
>
> Viewed in this context, as well as in the circumstances in which I would be fulfilling the temporary role of Interim Dean (i.e., during a period of leave pursuant to section 54), I respectfully submit that section 55 does not prohibit taking on this role, as defined above.
>
> Nevertheless, if this remains a concern for you, I would be open to suggestions on how this role might be more tightly tailored or differently stylized (e.g., "Interim Academic Dean", "Interim Dean/Judge-in-Residence", "Academic Lead" or "Special Academic Advisor") to ensure I do not run afoul of section 55.

[27] Justice Smith says that the restrictions placed on him to providing academic leadership "are intended, in part, to insulate me from concerns about future litigation." Upon his return to judicial duties, he will recuse himself from any matter in which Lakehead University is a party.

[28] Additionally, he expresses his view that public confidence in the judiciary would be enhanced and not undermined by him engaging in the proposed activities at the Law School:

> I share Chief Justice Smith's concerns about the current risk to Lakehead University's Faculty of Law, which includes a real possibility that the Faculty may collapse. I have only accepted to take on the role of Interim Dean in order to try to help the Faculty navigate a period of real crisis. I do not believe the public confidence in the judiciary could be undermined by me providing assistance to the Faculty as proposed. To the contrary; I believe the public confidence in the judiciary would be enhanced by knowing that a judge of the Superior Court is willing and enthusiastic to answer a call to service made by Lakehead University to assist its Faculty of Law through an existential crisis, while also ensuring full compliance with his obligations as a judge. That confidence would only be further enhanced by knowing that the Chief Justice of the Ontario Superior Court of Justice, the federal Minister of Justice, and the Canadian Judicial Council are united in their support of this effort to ensure that a Law Faculty with such important mandates continues to survive and thrive, and to address one of the Truth and Reconciliation Commission's Calls to Action in furthering the project of reconciliation. This will contribute to the public perception of the judiciary and the Canadian Judicial Council as relevant and responsive to a crisis in the community. [Emphasis in original.]

[29] The Chief Justice also wrote to Pidgeon A.C.J. on May 28, 2018, repeating her support of Justice Smith accepting the position. Further, she provided a legal opinion from former Ontario Deputy Attorney General Murray Segal who, after outlining the legislative history of and parliamentary intention regarding sections 54 and 55 of the *Judges Act* concludes that the appointment did not contravene section 55 of the *Judges Act*:

> In sum, our view is that ss. 54 and 55 of the *Judges Act* did not prevent Chief Justice H. Smith from granting special leave to Justice P. Smith to act as Acting Dean in a limited capacity, nor do they prevent Justice P. Smith from taking such leave.
>
> Granting special leave was within Chief Justice H. Smith's power and did not contravene s. 55 of the *Judges Act*. When leave is granted under s. 54, it must be for a purpose that is consistent with the office of the judge and judicial ethics, and it must be particularly sensitive to the judge's eventual return to the bench. These considerations were apparent in Chief Justice H. Smith's decision to grant leave on carefully designed conditions. Given the plain meaning and history of ss. 54 and 55, the history of judges pursuing roles in academia, and the principles of judicial ethics, granting special leave for Justice P. Smith to take on a closely circumscribed role as Acting Dean did not contravene s. 55. Emphasis added.

[30] In his opinion, Mr. Segal notes, as had Justice Smith, that academic leaves of absence established by the CJC were not viewed as offending the *Judges Act* or a judge's ethical principles. Further, he points out that there are precedents for a Superior Court justice acting as Dean of a law school. Former Chief Justice Gerald Fauteux was a justice of the Superior Court of Québec while serving as Dean of McGill Law School (1949–1950) and a justice of the Supreme Court of Canada while serving as Dean of Ottawa Law School (1953–1962). Mr. Segal also points out that while a Superior Court judge, Justice Bora Laskin joined the Board of Governors of York University (1967–1970) and was Chair of the Ontario Institute for Studies in Education.

[31] Mr. Segal recommends some additional conditions on Justice Smith's role at the Law School, including that a written agreement be entered into setting out the limitations of his appointment. Justice Smith and Lakehead University signed such a written agreement on May 31, 2018, and it was sent to Pidgeon A.C.J.. His position title was modified to Interim Dean (Academic) to reflect the limitations on his role.

[32] On July 12, 2018, Pidgeon A.C.J. sought further information from Justice Smith on the additional limitations on his role (as recommended in Mr. Segal's opinion), his duties, the written agreement, and the status of the search for a permanent dean. Justice Smith replied on July 17, 2018, stating that the agreement embodied the additional recommended limitations, except the condition that he approach his Chief Justice if there was a change in circumstances or the appearance of controversy. In its place, he confirmed that he had "undertaken to Chief Justice Smith to approach her or her office immediately should circumstances change, or any issues arise which may raise new ethical implications, possibly lead to public controversy, or generally on which I require direction."

[33] Mr. Sabourin notified Justice Smith by telephone on August 20, 2018, that Pigeon A.C.J. decided to constitute a Review Panel in respect of the appointment, and that a press release would be issued by the CJC.

[34] Justice Smith replied on August 23, 2018, providing an update on his duties and the results he had achieved, and asking the CJC not to issue a press release because of the negative effect this would have on the morale and reputation of the Law School. The CJC later issued a Press Release on October 3, 2018 ["Canadian Judicial Council review of a matter involving the Honourable Patrick Smith"], stating, "Specifically, the decision of

the Honourable Patrick Smith to become the Interim Dean of the Bora Laskin Law School at Lakehead University raises some questions about whether such duties are compatible with judicial office."

[35] Justice Smith received a letter from the CJC dated August 28, 2018, attaching the reasons for the decision to appoint a Review Panel "in respect of your appointment as Dean [*sic*] of the Faculty of Law at Lakehead University." Justice Smith was invited "to provide any written comments you may wish to make to the Panel, including on whether or not an Inquiry Committee should be constituted."

[36] The reasons provided by Pidgeon A.C.J. for the referral include his interpretation of the relevant provisions of the *Judges Act*. However, and contrary to the explanation in the press release, his decision to refer rests on his view that Justice Smith accepted the role "without considering the possible public controversy associated with the reaction from First Nations chiefs and without considering the political environment or the potential effect on the prestige of judicial office."

[37] The reasons for referral [*Reasons for the referral of a complaint to a Judicial Conduct Review Panel in the matter of the Honourable Patrick Smith of the Ontario Superior Court of Justice*, October 3, 2018], in relevant part, are as follows [at pages 3, 5, 6, 7,10, 11]:

> …. I begin my review by noting that this matter raises a question of interpretation with regard to sections 54, 55 and 56 of the *Judges Act*. Indeed, Justice Smith and his Chief Justice obtained a legal opinion in this respect (attached), prepared by Mr. Murray Segal, former Deputy Attorney General of Ontario. Mr. Segal provides a broad interpretation of sections 55 and 56 of the *Judges Act*:
>
> > The history of s. 55 and its predecessors does not suggest that it was targeted at preventing judges from engaging in unpaid academic pursuits. The history of s. 55 suggests it was aimed at preventing judges from: (1) engaging in paid employment while acting as judges, and thereby neglecting their judicial duties; (2) being involved in commercial enterprises; and (3) being involved in matter of public controversy. [Emphasis added by Pidgeon ACJ.]
>
> …
>
> In my view, a somewhat different interpretation must be given to the provision in question. In my respectful opinion, the question for Council in this matter is whether Justice Patrick Smith's conduct in accepting an appointment as Interim Dean of the Law Faculty potentially contravenes the *Judges Act* or his ethical obligations as a member of the judiciary.
>
> …
>
> Section 55 of the *Judges Act* requires judges to devote themselves exclusively to their judicial duties, and to abstain from businesses and occupations falling outside the judicial sphere. This is confirmed by the legislative history of sections 55, 56 and 56.1 of the *Judges Act*. Being granted a leave of absence under section 54 of the *Judges Act* does not permit a judge to take on a business or occupation outside of the judicial sphere (except for acting as a commissioner, arbitrator, adjudicator, referee conciliator or mediator on any commission or on any inquiry, provided certain statutory conditions under section 56 of the *Judges Act* are met). The meaning of "occupation" should be broadly interpreted to capture all non-judicial

activities that interfere with the judicial role, whether due to their onerous or time-consuming nature or given their incompatibility with judicial office.

In addition, it is worth noting that in a decision rendered on 22 June 2015 (attached), regarding a complaint made against an Ontario Court of Appeal judge who had accepted a position as chancellor at Brescia University College, the Chairperson of the Judicial Conduct Committee, the Honourable Michael MacDonald, concluded:

> Chief Justice MacDonald came to the opinion that Justice Gillese's appointment to the Chancellor's post did not place her in a position that is incompatible with her judicial functions. Chief Justice MacDonald took into consideration the strict limitations that were agreed upon by officials from Brescia and by Justice Gillese, as well as her pro-active course of action which included discussions with her Chief Justice to avoid any potential conflict and limit any associated risks. In these specific circumstances, Chief Justice MacDonald agrees with Chief Justice Strathy that Justice Gillese's acceptance of this ceremonial post is not contrary to judicial ethics and may, in fact, be of benefit to the judiciary. [Emphasis added by Pidgeon A.C.J..]

Note that in that case, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from Chief Justice MacDonald regarding the interpretation of sections 55 and 56 of the *Judges Act*, suggested the following:

> The words "occupation and business" cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words "occupation or business" certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity. [Emphasis added.]

…

After considering the interpretation of the relevant legislative provisions, only one question remains: did Justice Smith err by incorrectly assessing the situation, that is, by erroneously weighing the inherent risks of the situation? [Emphasis added.]

My answer is that he did….

…

In summary, I am of the view that Justice Patrick Smith engaged in misconduct by accepting a position as Interim Dean without considering the possible public controversy associated with the reaction from chiefs of First Nations and without considering the political environment or the potential effect on the prestige of judicial office.

I had to answer this question bearing in mind that (1) an interim or permanent dean is the public face of a faculty and (2) Justice Smith accepted the appointment while the media attention was underway. In addition, and with respect, it is my opinion that the situation is exacerbated by his erroneous assessment of the risks that will continue to exist at an institution where litigation would surely come before the Court of which he is a member.

I therefore conclude that the matter might be serious enough to warrant the removal of Justice Patrick Smith from office. I accordingly refer the matter to a Review Panel, in keeping with subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-Laws, 2015*, to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the *Judges Act*.

[38] Subsection 2(1) of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015*, SOR/2015-203 (the By-laws) provides:

Establishment of Judicial Conduct Review Panel

2 (1) The Chairperson or Vice-Chairperson of the Judicial Conduct Committee, established by the Council in order to consider complaints or allegations made in respect of a judge of a superior court may, if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge, establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the Act.

[39] In concluding that the conduct of Justice Smith was contrary to judicial ethics, Pidgeon A.C.J. relies on passages from the CJC's *Ethical Principles for Judges* (the Ethical Principles), and particularly the following statement under the heading "Impartiality:" "Judges are free to participate in civic, charitable and religious activities subject to the following consideration: … (c) Judges should avoid involvement in causes or organizations that are likely to be engaged in litigation." He also notes section C.9 of the Commentary:

C.9 Several Canadian judges have served as chancellors of universities or dioceses. Others have served on the boards of schools, hospitals or charitable foundations. Such participation may now present risks that did not appear evident in the past. These risks must be carefully weighed. Universities, churches and charitable and service organizations are now involved in litigation and matters of public controversy in ways that were virtually unheard of even in the very recent past. A judge serving as a chancellor of a university or a diocese or as a board member may be placed in an awkward position if the organization should become involved in litigation or matters of public controversy.

[40] The Court notes that Pidgeon A.C.J. does not reference the statement in the Ethical Principles that it is provided for guidance and "does not preclude reasonable disagreements about their application or imply that departures from them warrant disapproval."

[41] I also note that in the referral decision Pidgeon A.C.J. writes [at page 8] that the conditions imposed on Justice Smith in the role of Interim Dean (Academic) "for all intents and purposes would limit his role to a ceremonial one." This suggests that his role was no different from that of Justice Gillese as chancellor of a university.

[42] Justice Smith outlines the duties he performed in this role in a letter to Mr. Sabourin. He says that he delivered an address to graduating students of the Law School; he recommended the installation of a video conference facility to connect academics, elders, jurists, and others with the student body; through his efforts Senator Murray Sinclair delivered a keynote address during a special lecture at the Law School; and his efforts resulted in the engagement with the Aboriginal Advisory Committee regarding the content of Indigenous courses, and the provision of support for and connection with Indigenous students. While these arguably take his role outside a purely ceremonial one, as is noted by Pidgeon A.C.J. elsewhere in his reasons, the content of his role is not examined by the Review Panel in its decision. In my view, his duties as reflected in the record are consistent with the description given by his Chief Justice as one of academic leadership.

[43] Following notice that the matter had been referred to the Review Panel, Justice Smith's counsel wrote to Mr. Sabourin on September 4, 2018, stating that he had resigned his position at the Law School effective September 14, 2018, and would return to his judicial duties with the Superior Court of Justice on the following business day.

[44] On September 14, 2018, counsel for Justice Smith wrote to the CJC requesting that Pidgeon A.C.J. reconsider his decision to refer the matter to the Review Panel. Mr. Sabourin replied on September 19, 2018, that Pidgeon A.C.J. believes he is unable to reconsider his decision and that his function in the matter has concluded, unless and until the Review Panel returns it to him after a conclusion that no Inquiry Committee should be constituted.

[45] Justice Smith provides written submissions to the Review Panel on September 27, 2018, and his Chief Justice provided her comments on October 10, 2018.

[46] On September 24, 2018, Justice Smith commenced his application for judicial review challenging the decision to refer the matter to the Review Panel and refusing to reconsider that decision. He also brought a motion seeking an order staying the Review Panel's consideration of the matter referred to it.

[47] Counsel for Justice Smith together with counsel for the Attorney General on October 1, 2018, wrote to the CJC, asking the Review Panel not to proceed with the review until the stay motion had been decided. The CJC replied that the request had been put before the Chair of the Review Panel. The Panel never responded. The stay motion was adjourned at the request of counsel for Justice Smith and the Attorney General of Canada, and subsequently rescheduled by the Court to a special sitting on November 20, 2018. The CJC was informed of this revised hearing date. Prior to the scheduled motion date, the Review Panel issued its decision, rendering the motion moot.

[48] The Review Panel issued its decision on November 5, 2018. It concluded [at paragraph 47] that section 55 of the *Judges Act* "requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role" and that a leave of absence granted under section 54 does not remove this prohibition. It further found that, regardless of the interpretation of these sections, Justice Smith breached an ethical obligation to avoid becoming involved in public controversy, and he impermissibly used the prestige of judicial office to bolster the Law School. The Review Panel found that as Justice Smith had no bad behaviour or improper motives, his conduct was not serious enough to warrant removal from the bench and it therefore decided not to constitute an Inquiry Committee.

[49] The matter then returned to Pidgeon A.C.J. [at paragraph 80] to make "a decision on the most appropriate way to resolve this matter." He endorsed the decision of the Review Panel and noted that Justice Smith had resigned from the position and returned to his judicial duties. He concluded that no further measures were needed.

[50] On November 6, 2018, the CJC told two reporters that the Review Panel had reached its decision and that it would be released that day without having so informed Justice Smith or his counsel. The CJC published a press release on its Web site the same day, with a link to the Panel Decision.

III. ISSUES

[51] These applications focus on three issues:

i. whether the decision of the Review Panel decision is reasonable;
ii. whether the CJC proceedings were procedurally unfair or an abuse of process; and
iii. if the applications succeed, what is the appropriate remedy?

IV. ANALYSIS

A. Is the Review Panel Decision Reasonable?

[52] The Review Panel [at paragraph 76] reached two conclusions concerning the conduct of Justice Smith. First, that Justice Smith breached section 55 of the *Judges Act*. Second, that Justice Smith breached his ethical obligation "to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office" and he and the Superior Court of Justice, in lending their support to the Law School, put their reputations at risk.

[53] All parties agree, as does the Court, that the standard of review of the Review Panel decision is reasonableness, regardless of whether one is reviewing its interpretation of section 55 of the *Judges Act* or its finding that Justice Smith breached his ethical obligations.

[54] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), at paragraph 16, teaches that there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions." Moreover, it makes it clear at paragraph 115 that "Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard."

[55] As the Supreme Court explains at paragraph 87 of *Vavilov,* "a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome."

[56] In *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67, 441 D.L.R. (4th) 269, which was issued with *Vavilov*, the majority at paragraph 31, explains that when conducting a reasonableness review, a court should start with the reasons, looking to see if there is a coherent and rational chain of analysis based on the facts and law:

> A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[57] Other helpful guidance from *Vavilov*, when conducting a reasonableness review, includes the observation at paragraph 105 that a decision "must be justified in relation to the constellation of law and facts that are relevant to the decision." We are told at paragraph 106 that these considerations are many and varied:

> It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[58] In *Vavilov*, like the present matter, the decision under review involved the decision maker's interpretation of a statutory provision. The Supreme Court at paragraphs 115 to 124 provides extensive guidance to a reviewing court when reviewing such decisions. The main principles therein on which I rely in reviewing the Review Panel's interpretation of section 55 of the *Judges Act*, are the following:

1. The proper approach to interpreting a statutory provision, whether done by a court or an administrative decision maker, is the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (paragraphs 117–118);

2. "[T]he merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision." "[T]he usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are 'precise and unequivocal', their ordinary meaning will usually play a more significant role in the interpretive exercise" (paragraph 120); and

3. "[E]ven though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the 'correct' interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue" [italics in original] (paragraph 124).

[59] The CJC, at paragraph 67 of its memorandum of argument, and referencing *Girouard v. Canada (Attorney General)*, 2019 FC 434, at paragraph 26; *Girouard v. Canada (Attorney General)*, 2019 FC 1282, at paragraph 71; and *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249 (*Moreau-Bérubé*), at paragraphs 44 and 49; submits, "The composition and constitutional role of the Council demands deference to its assessment of judicial conduct."

[60] Justice Smith takes issue with the claim of the CJC that it has any such constitutional role. He correctly notes that the Federal Court of Appeal has concluded that the investigative power of the CJC is a statutory power and that the only procedure provided for in the constitution for removal of a superior court judge is that set out in subsection 99(1) of the *Constitution Act, 1867*: See *Canadian Judicial Council v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503, paragraphs 38–46.

[61] He further notes that the CJC at paragraphs 10, 67, and 87 of its memorandum, contends that it has a constitutional role in judicial discipline delegated to it under the *Judges Act*, that it is a special body with a special purpose performing the essential constitutional task of determining the boundaries of ethical judicial conduct and judicial independence, and that the composition and constitutional role of the Council demands deference to its assessment of judicial conduct. He submits that in making those submissions, the CJC has clothed itself with a role that does not belong to it. He says that the only constitutional actor in this process is the Minister of Justice, who is responsible for making any address to Parliament under section 99 of the *Constitution Act, 1867*.

[62] I agree with the submissions of Justice Smith that only the Minister of Justice plays a constitutional role in the matter of judicial conduct.

[63] I also agree with the submissions of the Attorney General of Canada regarding deference. Although the concept of deference in judicial review continues to have a role, *Vavilov*, at paragraphs 30 and 31, makes it clear that the previous rationale for the proposition that deference is owed by a reviewing court to the decision maker's relative expertise, no longer holds true:

> While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review.
>
> …
>
> We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. [Italics in original.]

[64] In summary, as the Supreme Court states at paragraph 58 of *Vavilov*, "the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review."

[65] The CJC also cites paragraph 49 of *Moreau-Bérubé* wherein the Supreme Court of Canada writes, “There is no basis upon which one could claim that a single judge sitting in judicial review of a decision of the Council would enjoy a legal or judicial advantage.” With respect, I may not enjoy a legal or judicial advantage to the Review Panel, but neither do I suffer any disadvantage. Indeed, one might ask what advantage the Review Panel has in this matter in light of the Attorney General and two judges’ associations, one of which represents superior court judges across Canada, expressing the view that the Review Panel’s decision is unreasonable. The point surely is that judicial review is not a quantitative analysis, but a qualitative one; one judge is as well placed as several when performing that task.

[66] In any event, *Moreau-Bérubé* was decided before *Vavilov* and the Supreme Court of Canada’s “revised framework” for judicial review of administrative decisions. Thus, it must be read with some caution. The comment the CJC relies on is directed at the suggested expertise of the decision maker and that is no longer the separate consideration it once was.

[67] The standard of review applicable to Justice Smith’s claim that the CJC process and resulting decision was procedurally unfair and an abuse of process is not reasonableness. In my view, *Vavilov* has not changed the law pertaining to procedural fairness; the standard of review remains correctness: *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, at paragraph 79; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43; and see *Garces Caceres v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4, at paragraph 23; *Ebrahimshani v. Canada (Citizenship and Immigration)*, 2020 FC 89, at paragraph 12; *Ennis v. Canada (Attorney General)*, 2020 FC 43, at paragraph 18. Whether a particular process was procedurally fair remains “‘eminently variable’, inherently flexible and context-specific”: *Vavilov*, at paragraph 77. This Court will consider whether the process employed was *fair* in the specific context of the decision, having regard to the *Baker*[1] factors: *Vavilov*, at paragraph 23; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at paragraphs 40, 54–56.

(1) *Section 55 of the* Judges Act

[68] I turn first to consider whether the Review Panel’s interpretation of section 55 of the *Judges Act* is reasonable. Did it read the words of that section “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament?”

[69] In conducting this exercise it is important to recall that federal statutes are bilingual, in French and in English, and both are equally authoritative. The shared meaning principle stipulates that in cases of discrepancies between the English and French versions of a statute, the meaning common to both versions must be accepted, unless evidence of legislative intent indicates otherwise: *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217. If the meaning of one version is broader than the other, the narrower version should be adopted: *Sandoz Canada Inc. v. Canada (Attorney General)*, 2014 FC 501 122 C.P.R. (4th) 195.

[70] Section 55 was first enacted in 1905 as section 7 of *An Act to amend the Act respecting the Judges of Provincial Courts*, S.C. 1905, 4-5 Edward VII, c. 31. The marginal note to section 7 is "Judges restricted to judicial duties / *Les juges ne s'occuperont que de leurs fonctions judiciaires*" and it reads as follows:

> Judges restricted to judicial duties
>
> **7.** No judge mentioned in this Act shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or for others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

[71] This provision is section 33 of the *Judges Act*, R.S.C. 1906, c. 138, headed "JUDGES NOT TO ENGAGE IN BUSINESS / *LES JUGES NE PEUVENT SE LIVRER AUX AFFAIRES*" and with a marginal note that reads "No judge to engage in business other than his judicial duties / *Les juges doivent se consacrer exclusivement à leurs fonctions judiciaires*". It reads as follows:

> No judge to engage in business other than his judicial duties
>
> **33.** No judge of the Supreme Court of Canada or of the Exchequer Court of Canada or of any superior or county court in Canada shall, either directly, or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties.

[72] The heading of sections 55 to 56.1, as they currently read, is "EXTRA-JUDICIAL EMPLOYMENT / *FONCTIONS EXTRAJUDICIARES*" and the marginal note for section 55 is "Judicial duties exclusively/*Incompatibilités*". Section 55 reads:

> **Judicial duties exclusively**
>
> **55** No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties.

[73] The Review Panel at paragraphs 38 and 39 of its decision says of section 55:

> …. Although its wording has been changed periodically, the section has always been comprised of two foundational components:
>
> (a) A prohibition on judges carrying on extra-judicial activities; and
>
> (b) A requirement that judges devote themselves exclusively to their judicial duties.
>
> The prohibition, and the requirement are set forth in clear and explicit terms in the current version of section 55. [Emphasis added.]

[74] The noted prohibition component on "carrying out extra-judicial activities" is found in the first phrase of the English language version of the section—"No judge shall … engage in any occupation or business other than his or her judicial duties." However, the

French language version reads differently. A more literal translation of the French version is that “Judges shall devote themselves to their judicial functions to the exclusion of any other activity.” This does not appear to have the two components noted by the Review Panel. Rather, it is directed only to the second foundational component identified by the Review Panel - a requirement that judges devote themselves exclusively to their judicial duties.

[75] I agree with the Review Panel that the “prohibition” it identifies is set out in clear and explicit terms in the English version. However, the Review Panel does not accurately capture that prohibition in its passage quoted above. The prohibition is not, as it writes [at paragraph 38], “on judges carrying on extra-judicial activities” [emphasis added.] Rather, as the section explicitly states, it is on judges engaging “in any occupation or business other than his or her judicial duties” [emphasis added.]

[76] Although subsequently the Review Panel interprets the phrase “occupation or business” it does so in isolation from its context. The full phrase—“any occupation or business other than his or her judicial duties”—provides an important interpretative context. Properly read, it says that judicial duties are an occupation or business. They are therefore reliable examples of what is meant by the phrase “occupation or business” guiding the reader in how the phrase is to be interpreted. The same holds true if one looks to the French language phrase “*à leurs fonctions judicaires à l’exclusion de toute autre activité*”.

[77] The failure to include and examine this critical qualifier in its initial summary of the section leads me to wonder whether the Review Panel is engaging in “reverse engineering” to achieve a desired outcome rather than discerning the meaning and legislative intent of the section. The Supreme Court of Canada at paragraph 121 of *Vavilov* expressly warned against that manner of proceeding. In any event, in ignoring the context, the Review Panel’s reasoning fails to apply properly the modern principle of statutory construction.

[78] When the Review Panel does turn its attention to the phrase “occupation or business” albeit standing alone, it concludes that it is to be broadly interpreted. It reaches that conclusion by looking at the French language equivalent—“*activité*”—and dictionary definitions of the English language word occupation [at paragraphs 40–41]:

> The prohibition in the English version is expressed in terms of an “occupation or business”, whereas the French version uses the broader term “*activité*”. The English version, by referring to “occupation or business” may imply that the prohibition is limited to some form of remunerative livelihood, but the French version, by using the broader term, is more explicit in prohibiting any activity other than judicial functions.
>
> The broader interpretation of the word “occupation” to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word and with the French version of section 55. [Emphasis added.]

[79] This reasoning exhibits neither justification nor intelligibility. It is problematic in several respects, including the failure to consider the entire phrase as previously discussed.

[80] First, the Review Panel states [at paragraph 41] that the "broader interpretation of the word 'occupation' to include non-remunerative pursuits and activities is consistent with various dictionary definitions of the word" but it does not point to any dictionary definition it relies on. The record contains none, leading me to question whether any were before the Review Panel.

[81] Second, while one use of the English word "occupation" might be said to include non-remunerative activity—such as in the statement "On Saturdays my occupation is chauffeur because every Saturday I drive my son to his football match"—others (and I suggest most) clearly reflect remunerated activities. In response to the question: "What is your occupation?" I daresay the response of four members of the Review Panel would be "Judge"—a paid occupation.

[82] Third, the Review Panel only examines the word "occupation" and ignores the word "business" in section 55. In my view, the plain and clear import when it is said that one is engaging in business is that they are being remunerated.

[83] The view of the Review Panel that section 55 is to be interpreted as prohibiting any activity (remunerated or not) other than judicial functions is not one shared by all. Indeed, as Pidgeon A.C.J. himself noted in his letter referring the matter to the Review Panel, in 2015, the Chief Justice of the Ontario Court of Appeal, the Honourable George Strathy, in response to a request from the Judicial Conduct Committee regarding the interpretation of sections 55 and 56 of the *Judges Act*, said [reasons for referral, at page 7]:

> The words "occupation and business" cannot be interpreted to apply to any activity. Otherwise they would prohibit such things as hobbies or personal activities. The words "occupation or business" certainly prohibit judges from engaging in any remunerative employment or business, but they cannot be interpreted to prohibit any unremunerated activity. [Emphasis added.]

[84] The Review Panel considers the legislative history of section 55 and, in reference to the opinion of Murray Segal, notes, "some of the remarks during the initial debates in the House of Commons in 1905, including those of Prime Minister Laurier, reflected a concern to restrict the commercial activities of judges." In those debates, the Prime Minister, responding to a question of whether the provision would prevent judges from acting as arbitrators in a reference involving Canada and the Provinces, responded:

> But what parliament intends and what we are all agreed to is that judges should not be allowed to participate in any kind of business which is of a commercial character; they should not be directors of insurance companies or banks or such. But as regards anything of a judicial character, I do not think any one has the intention of preventing the judges from acting. [Emphasis added.]

[85] A statement made by the Prime Minister at the time as to the intent of Parliament and its members ought to be accorded significant weight, if not considered conclusive on the issue of parliamentary intent. However, in response to the Prime Minister's statement, the Review Panel writes [at paragraph 42]:

> …. other members took a broader view. The Minister of Justice, Charles Fitzpatrick (later Chief Justice of Canada) commented that "The less a judge has to do with matters which are not clearly within the scope of his duties, the better for himself and the dignity of the bench."

[86] I agree with the submission of the Attorney General of Canada, that the Review Panel ignores the context in which that statement was made. In extracting a single sentence from its context, the Review Panel gives it a meaning it does not have.

[87] The Minister of Justice had been asked by Mr. Foster whether the provision being debated would prevent judges from "going on commissions." The context discloses that the Minister of Justice was not, as the Review Panel says, stating his preference that judges do nothing outside their judicial duties, rather his comment focuses on judges sitting on minor commissions, as the full report shows:

> **Mr. FOSTER.** Will that [clause] prevent judges from going on commissions? We know that a good deal of discussion has arisen of late about judges being appointed to commissions at various times. Sometimes these are high matters of interest in which it might be desirable to appoint judges; but in other cases they are minor matters, and the judges are left open to a great deal of criticism and cross currents of opinion, which do not seem to add very much to the dignity of the bench or to the respect in which judges should be held throughout the country. In fact, when you take a judge from the bench and make him commissioner in a matter involving other than legal points, you rather take his robe of dignity from him. He becomes then more like an ordinary individual and becomes subject to criticism to which a judge ought not to be subject. He comes down, so to speak, into the general arena, and stands to get a good deal of dust upon his clothes. I would like to know how far this goes towards preventing judges taking up commissions of the smaller kind and which are outside their judicial functions, or international affairs. I quite agree that on an international commission it may be quite necessary to have judges; but the Minister of Justice will understand what I allude when I say that there are commissions and employments which, when participated in by judges, detract from the general respect to which the bench ought to be held.
>
> **Mr. FITZPATRICK**. This amendment to the Act respecting judges will operate as a clear notice that judges are not to be employed in connection with commissions, except where it is important in the public interest that they should be so employed. I think the less a judge has to do with matters which are not clearly within the scope of his judicial duties, the better for himself and the dignity of the bench. Of that I am absolutely convinced. I would even go so far as to say that I entertain grave doubts as to the constitutionality of such appointments. That question arose in Parliament when it was decided by the British Parliament to refer matters arising out of contested elections to the courts. When the courts were first charged with the duties investigating such matters, Chief Justice Cockburn wrote a strong letter of protest from the constitutional standpoint. That protest was of no avail, but nevertheless it showed that there was considerable doubt as to the right of the judges to sit in such matters. There are cases, however, where it is in the public interest that we should utilize the service of the judges outside the bench, but only in matters of urgent public necessity.

[88] The Attorney General of Canada also references Bill 13 in 1906, which proposed further amendments to the section. It was introduced, but failed to receive Royal Assent. Importantly, and not referenced by the Review Panel, there was further discussion "providing additional insight into the intention of Parliament." Specifically, there was reference to the ability of a judge to teach in a law school, notwithstanding the restrictions set out in the *Judges Act*. The same Minister of Justice, Mr. Fitzpatrick, was asked whether "the law of last year excludes also the teaching in universities." The Minister responded that it did not prohibit teaching:

> No. I would be disposed, myself, to think, and I was acting upon that supposition, that those who are engaged in the teaching of the law in connection with our universities would not come within the law of last session. I think that must fairly be considered as in line with the performance of their professional work and I expressed that opinion, I think, last session when the Act was passed. [Emphasis added.]

I will add that it is my experience that judges are not remunerated when asked to teach in law schools.

[89] When considering the legislative history of section 55, the Review Panel does not address or consider the original wording of the provision. The English language version reads, "No judge … shall, either directly or indirectly as director or manager of any corporation, company, or firm, or in any other manner whatever … engage in any occupation or business other than his judicial duties ". The French language version reads, "*Aucun juge … ne peut se livrer ni directement ni indirectement, en qualité de directeur ou gérant de corporation, de compagnie ou de maison d'affaires, non plus qu'en aucune autre manière … à une occupation ou affaire autre que ses fonctions judiciaires*."

[90] In neither language do these words support the conclusion of the Review Panel that the intent of Parliament was to restrict judges from performing non-remunerative engagements. To the contrary, they are focused on remunerative commercial engagements.

[91] At paragraph 43 of its decision, the Review Panel asserts that the legislated exceptions to the general prohibition in section 55 reinforces the broader interpretation it has given to section 55:

> Furthermore, the broader interpretation of the word "occupation" to include non-remunerative pursuits and activities is reinforced by the narrow and specific exceptions to the general prohibition in section 55.

[92] It states that the narrow and specific exceptions are those set out in sections 56 and 56.1 of the *Judges Act*; namely, (1) a judge acting in a specific dispute resolution capacity when expressly authorized by an Act of Parliament or a Provincial Legislature, or the Governor in Council or lieutenant governor in council of a province, (2) a judge acting as an arbitrator or assessor of compensation or damages under a public Act of Canada or a province, and (3) Madam Justice Arbour serving as Prosecutor of the United Nations International Tribunal.

[93] The Review Panel [at paragraph 41] provides no reason or explanation why these exceptions provide support for its "broader interpretation of the word 'occupation' to include 'non-remunerative' pursuits and activities". Indeed, it is not obvious or evident how these exceptions support the view of the Review Panel. Its reasoning is unintelligible.

[94] It is to be noted that none of these exceptions is stated to be on a non-remunerated basis. When a judge is appointed by Parliament or a Legislature to head a commission or act as an arbitrator, his or her judicial compensation under the *Judges Act* continues and pursuant to section 57, there is no additional remuneration. However, in my view, that does not mean that these exceptional duties are done on a non-remunerative basis. Rather, they are done for the judge's regular remuneration. The remuneration received when performing these exceptional duties cannot be said to be remuneration for judicial duties, as the judge is not performing his judicial duties when acting as a commissioner or arbitrator. Even if it were otherwise, the exception regarding Justice Louise Arbour in section 56.1 expressly provides that she may elect to receive a leave of absence to accept the position offered by the United Nations without receiving her judge's pay if she receives remuneration from the United Nations. In fact, the record shows that the United Nations insisted that she not be remunerated as a judge but that it pay her. In her circumstance, one of the exceptions the Review Panel relies on to support its interpretation, it is without doubt that the exception to judicial duties is remunerated. Accordingly, it cannot be said to support the interpretation given by the Review Panel.

[95] For these reasons, I find that the analysis of the Review Panel, the manner in which it reaches its interpretation of section 55, is not in keeping with the modern principle of interpretation. The Review Panel, in its analysis, fails to read the words of the section "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Specifically, it ignores some words; it fails to properly consider the legislative history of the provision; it fails to properly consider the context in which the provision is found; and it fails to properly consider all of the evidence of Parliamentary intention. As such, the reasoning is flawed and leads to an unreasonable conclusion on interpretation.

[96] The Review Panel concludes its interpretation of section 55 at paragraphs 46 to 48 of its decision, as follows:

> In summary, section 55 of the *Judges Act* contains a prohibition on judges carrying on extra-judicial activities and a requirement that judges devote themselves exclusively to their judicial functions. In circumstances in which Parliament is of the view that there is a sufficiently important public goal to justify judges engaging in other activities, it has legislated specific, narrowly defined exceptions.
>
> Accordingly, the Review Panel has concluded that:
>
> (a) Section 55 requires judges, subject to a limited number of narrow exceptions, to confine themselves to their judicial role, and
>
> (b) Subject to those exceptions, judges are prohibited from engaging in any other occupation, whether paid or unpaid.
>
> The above-noted conclusions are consistent with the objectives of maintaining judicial independence and the preservation of the dignity and respect associated with the judicial office. Section 55 of the *Judges Act* is also intended to promote the efficient administration of justice and to uphold the dignity and integrity of the judiciary by restricting judges, except in very limited circumstances, to performing judicial functions. [Emphasis added.]

[97] The Review Panel [at paragraph 47] does not explain what it means by “any other occupation, whether paid or unpaid” but at paragraph 43 it describes its “broader” interpretation of the word “occupation” to include “non-remunerative pursuits and activities” (emphasis added).

[98] Counsel for the CJC, in its memorandum, says that the interpretation the Review Panel gives to section 55 is that it is “to prohibit judges from devoting their ‘productive time’ to vocations other than judging, such that they will work as judges” (emphasis added). In my view, counsel’s characterization does not reflect the interpretation given the section by the Review Panel. Nowhere in its decision does the Review Panel use the phrase “productive time” or the word “vocation.”

[99] It is unclear what legal counsel means by “productive time.” Other than time when sleeping, it is arguable that all of one’s time is productive time. As I pointed out at the hearing, my experience is that judging is not a 9 am to 5 pm, five days a week job. Judges, like lawyers and many others, work days, nights, and weekends.

[100] The Review Panel’s interpretation [at paragraph 41] of “‘occupation’” as including “non-remunerative pursuits and activities” [emphasis added] gives it a much broader definition than the word “vocation.” “[P]ursuits and activities” includes most of what one does in daily life, including taking children and grandchildren to soccer and ballet classes, attending choir practice, going to the gym, quilting and knitting, etc. Again, as was pointed out to counsel at the hearing, the phrase “pursuits and activities” includes writing a mystery novel. Even if written at night and on weekends, as our former Chief Justice did, is that a non-judicial activity done in a judge’s productive time? If so, did the former Chief Justice of Canada breach section 55 of the *Judges Act* in doing this prior to her retirement? Her activity certainly conflicts with the interpretation of section 55 given by the Review Panel.

[101] This question and these examples illustrate the unreasonableness of the outcome of the Review Panel’s interpretation. Its interpretation restricts judges from all non-judicial activities or pursuits, other than the narrow exceptions in sections 56 and 56.1 of the Act.

[102] For these reasons, I find the interpretation given by the Review Panel to section 55 of the *Judges Act* to be unreasonable.

(2) *The Impact of a Section 54 Leave of Absence on Section 55*

[103] After interpreting section 55, the Review Panel turns to section 54 of the *Judges Act* and the impact a leave of absence granted thereunder may have on a judge’s obligations under section 55.

[104] The Review Panel sees a leave of absence granted under section 54 as relieving a judge from the obligation in section 55 to “devote himself or herself exclusively to those judicial duties” but finds that it does not affect the prohibition in that section on carrying out extra-judicial duties. It finds that section 54 does not permit a judge, while on a leave

of absence, taking up extra-judicial activities. In support of that interpretation, the Review Panel relies on (1) its interpretation of section 55 (which I have found to be unreasonable), and (2) the language of section 54. It writes at paragraph 51 of its decision:

> There is nothing in the language of section 54 of the *Judges Act*, to suggest that leaves of absence properly granted and with proper notices issued, may be granted to enable judges to take on responsibilities outside of the judicial sphere.

[105] I begin by noting that there is nothing in the language of section 54 of the *Judges Act,* suggesting that such leaves of absence may not be granted to enable judges to take on responsibilities outside of their judicial duties. Indeed, as noted by Justice Smith, that has previously happened and with the approval of the CJC:

> In Canada, the Council's Study Leave Program has permitted judges to take academic leaves longer than six months to engage in teaching, talks with faculty, curriculum development, organizing conferences, guest lectures, and both formal; and informal discussions with students.

[106] The Review Panel provides no review of the legislative history of section 54, nor does any analysis of parliamentary intent. The Attorney General of Canada provides a very informative history of section 54 that supports an interpretation different from that provided by the Review Panel of both sections 54 and 55.

[107] The leave of absence provisions in section 54 were introduced in 1946, in a slightly different wording than at present. Section 34 of *The Judges Act, 1946*, [S.C. 1946] 10 George VI, c. 56 provides that no judge is to be granted a leave of absence from judicial duties for a period in excess of 30 days without the approval of the Governor in Council. If a judge were absent for a period in excess of 30 days without that approval, the judge and the Chief Justice are to inform the Minister of Justice.

[108] A reading of the Parliamentary debates confirms the submission of the Attorney General of Canada at paragraphs 42 and 43 of his memorandum, reproduced below, that this leave provision was not enacted to be used exclusively for absences "such as an illness, a period of recovery from accident or parental leave" as the Review Panel suggests at paragraph 49 of its decision:

> In enacting this provision, a concern was raised during the debates that some judges had been absent from the bench for several months without having obtained any sort of permission for a leave of absence. The Minister of Justice stated, "I think the clause does indicate, if it is passed by parliament, that parliament wants the Minister of Justice to see to it that gentlemen who are absent without leave are not paid."
>
> There is no indication here that this provision was enacted to be used exclusively for circumstances of disability or parental leave. Rather, the rationale for the provision was to

ensure that judges were not being paid when they were absent from the bench, for any reason.

[109] In 1996, the section was amended to create the current system. Leaves of six months or less can be granted by a chief justice but a longer leave requires approval from the Governor in Council. The debates indicate that the revision was recommended:

> … by the 1992 Triennial Commission on Judges' Salaries and Benefits and endorsed by the Canadian Judicial Council. It allows a judge to request maternity or parental leave without having to seek cabinet approval.

[110] I agree with the Attorney General of Canada that leaves under section 54 are not restricted to maternity or parental leaves. The reference above to those purposes was to illustrate and support the expansion of the leave period from 30 days to 6 months. Evidence of that is the statement then Justice Minister Rock gave to the Standing Senate Committee on Legal and Constitutional Affairs when it was considering the amendment to the *Judges Act* relating to Justice Louise Arbour [*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 2nd Sess., Issue No. 29 (October 3, 1996)]. He stated, "It might be noted that the Judges Act already provides for judges to be granted leaves of absence in order to perform non-judicial duties, such as serving as commissioners of inquiry … or to assist foreign countries developing codes of human rights" (emphasis added). While the first exception is provided for in section 56, the second exception is not. Later, the Minister of Justice describes the parameters of leaves other than for personal reasons:

> [Mr. Rock:] Second, while [judges] are there they should only be doing the work of judges and not working on the side for businesses or in some other fashion. While that is an important principle, the Judges Act itself already contemplates exceptions. As I mentioned in my opening remarks, a judge might be appointed to chair a commission of inquiry or to arbitrate a dispute. That goes on all the time. It is a necessary adjunct to a judge's life.
>
> Senator Beaudoin: We agree entirely.
>
> Mr. Rock: What I am suggesting, senator, is that it is consistent with section 56. It grows out of the same notion that we would permit a sitting judge to leave her duties for a stated period to go on an international organization and fulfil a worthy endeavour. That is not inconsistent with her judicial role. [Emphasis added.]

[111] The Attorney General concludes with his submission as to the proper interpretation of section 55:

> This legislative history demonstrates that Parliament did not intend for section 55 of the Act to act as a complete ban on judges taking on non-judicial roles. Section 55 instead functions to prohibit judges from taking on employment in a commercial, private, or political capacity that could call into question their judicial independence or otherwise threaten public confidence in their integrity or impartiality. The record consistently reiterates that judges should remain able to assume non-judicial roles in certain circumstances, particularly when that role serves an important public purpose. Additionally, the legislative record demonstrates that section 54 of the Act is to be read together with sections 55-57 and allows for a leave from judicial duties for a variety of reasons, including to assume a non-judicial role, as long as that role would not otherwise conflict with his or her eventual return to the bench.

[112] I agree (1) that section 55 of the Act is not a complete ban on judges taking on non-judicial roles; (2) that Parliament's intention was that judges are able to assume non-judicial roles in certain circumstances; and (3) that section 54 of the Act allows for a leave from judicial duties for a variety of reasons that are not inconsistent with the judge's judicial duties.

[113] I further agree that section 55, interpreted using the modern principle of interpretation, provides that a judge cannot assume employment in a commercial, private, or political capacity as that could call into question their judicial independence or threaten public confidence in the integrity and impartiality of the judge and the judiciary. These are inconsistent with his or her judicial duties. It is a matter for the chief justice or Minister of Justice to determine whether a leave request under section 54 warrants being granted. It is expected that they will consider whether the purpose of the leave serves an important public purpose and whether it could call into question their judicial independence or otherwise threaten public confidence in their integrity or impartiality. However, these requirements cannot be read into section 55.

[114] Collectively, the three findings set out above at paragraph 112 result in the conclusion that Justice Smith did not breach section 55 of the *Judges Act* when, on a leave of absence granted by his Chief Justice and approved by the Minister of Justice, he accepted the appointment of Interim Dean (Academic) of the Law School.

(3) *Ethical Obligations*

[115] I turn next to the Review Panel finding that Justice Smith breached his ethical duties. It writes [at paragraph 76]:

> (d) Regardless of the interpretation ascribed to sections 54 to 56.1 of the *Judges Act*, Justice Smith has an ethical obligation as a judge to avoid involvement in public debate that may unnecessarily expose him to political attack or be inconsistent with the dignity of judicial office. There were also reputational risks to Justice Smith and to the Ontario Court of Justice associated with lending their support to the Faculty of Law at Lakehead during a time of crisis.
>
> (e) In the circumstances facing Justice Smith in 2018, notwithstanding his genuine desire to help the Faculty of Law at Lakehead, his decision to accept an appointment as Interim Dean (Academic) at the Faculty of Law was ill-advised.

[116] In so concluding, the Review Panel considered the Ethical Principles and the past circumstances of Justice Fauteux serving as Dean of two separate law schools, and Justice Gillese occupying the position of university Chancellor.

[117] With respect to Justice Fauteux, the Review Panel [at paragraph 61] says only "that societal norms are shifting, and that it is much more likely in the present day that individuals assuming leadership roles within universities will be required to deal with controversial and highly public topical issues, than was formerly the case." Even if the Review Panel had any evidence that universities in the 1960s dealt with fewer controversial and highly public topical issues than today (and none is in the record), the

Review Panel fails to note that unlike Justice Fauteux, Justice Smith's deanship was limited to academic matters —an area that can hardly be said to be a wellspring of "controversial and highly public topical issues".

[118] With respect to Justice Gillese, the Review Panel notes [at paragraph 62] that the CJC agreed to her appointment as Chancellor because "of the strict limitations" agreed to by the university and the judge, and because "of the ceremonial nature of the post." This fails to reference the view of Pidgeon A.C.J. that the limitations agreed to by Justice Smith and the Law School limited his role to a ceremonial one. As to the conditions, it writes [at paragraph 74], "the use of such conditions may be an imperfect attempt to address unknowable contingencies arising in a dynamic environment". Nonetheless, significant conditions were agreed upon that removed Justice Smith from the administration of the Law School and the university. Most importantly, he had undertaken to inform and seek guidance from his Chief Justice if circumstances changed or "any issues arise which may raise new ethical implications, or [possibly] lead to public controversy" [at paragraph 72]. A condition not mentioned by the Review Panel.

[119] Moreover, and critically, his acceptance of the Interim Dean (Academic) role with these conditions was approved by his Chief Justice. If his decision was ill-advised, what does that say of the decisions of his Chief Justice and the Minister of Justice?

[120] The role of his Chief Justice both in terms of consenting to the appointment and her subsequent role should any public controversy arise was worthy of consideration and weight. In *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at paragraph 59, Justice Gonthier for the majority, notes the important role a chief justice plays in ethical decisions:

> We must recognize that the chief judge, as *primus inter pares* in the court, the efficient operation of which he or she oversees in all other respects, is in a preferred position to ensure compliance with judicial ethics. First, because of the chief judge's role as co-ordinator, events that may raise ethical issues are more readily brought to his or her attention. As well, because of the chief judge's status, he or she is often the best situated to deal with such delicate matters, thereby relieving the other judges of the court of the difficult task of laying a complaint against one of their colleagues where necessary. In short, the power to lay a complaint is an intrinsic part of the chief judge's responsibility in this area and it would not be fitting for the chief judge to act through someone else, whether a judge or a person outside the judiciary, to fulfil his or her obligations in this regard.

[121] The underpinning for the conclusion the Review Panel reaches on its consideration of the judicial ethics question is: (1) media reports that the former Dean had threatened litigation; (2) the possibility of litigation should the Law Society of Ontario remove the Law School's accreditation; (3) "extensive" media reports "which included allegations of a failure on the part of Lakehead to fulfill the Faculty of Law's Indigenous mandate and some criticism of Justice Smith's appointment from Indigenous leaders" [at paragraph 27]; and (4) that prior to accepting the appointment, the CJC Executive Director informed Justice Smith that it could be a matter for the CJC's consideration.

[122] As to the first two of these, although any litigation by the former Dean would come before the Superior Court, Justice Smith had already and appropriately indicated that he would recuse himself from any litigation in his Court relating to the University. This removes all possibility that he would be in a conflict of interest, or even appear to be in one, should litigation arise. This is equally true if a decision on accreditation were challenged before the Divisional Court. Justice Abella in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, [2015] 2 S.C.R. 282 (*Yukon*), at paragraph 59 noted the absence of restrictions on judges' associations when there is little likelihood of potential conflict:

> While I fully acknowledge the importance of judges avoiding affiliations with certain organizations, such as advocacy or political groups, judges should not be required to immunize themselves from participation in community service where there is little likelihood of potential conflicts of interest.

[123] Should the former Dean sue the Law School, it is extremely unlikely that she or any reasonably informed person would think her suit could be influenced by Justice Smith's involvement with the Law School. She is a lawyer and knows otherwise. Moreover, her taking legal action was not a certainty when the Review Panel report issued.

[124] The Review Panel's consideration of litigation regarding the accreditation of the Law School is entirely speculative and unworthy of its consideration. Again, both the Law School and the Law Society of Ontario being well informed of judicial matters would be extremely unlikely to have any concern if Justice Smith accepted the appointment and recused himself from such litigation.

[125] At paragraph 60 of *Yukon*, Justice Abella considers the Ethical Principles and observes that they "advise that while judges should clearly exercise common sense about joining organizations, they are not prohibited from continuing to serve their communities outside their judicial role" (emphasis added). Moreover, she wisely observes at paragraph 61, "We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case." The decision of the Review Panel, in my assessment, in examining whether Justice Smith's conduct unnecessarily exposed him to criticism or attack, fails to do so on the basis of an informed public exercising mature judgment.

[126] The Review Panel [at paragraph 27] exaggerates when it writes of the "extensive" media coverage generated by Justice Smith's appointment. There was some coverage; however, most of the media coverage was directed to the University and the resignation of the Dean. There was very little directed to Justice Smith's interim appointment and even the Review Panel describes it as "arguably unfounded" [at paragraph 64]. Moreover, as is noted by Pidgeon A.C.J. in his referral decision, following a meeting between a First Nations advisory committee and the university on May 10, 2018, "no public comments were made subsequently."

[127] I agree entirely with the submission of the Canadian Superior Courts Judges Association at paragraph 49 of its memorandum of argument that “CJC’s response to Justice Smith’s acceptance of the appointment resulted in a torrent of public criticism, not of Justice Smith or his conduct, but of the CJC itself.” This criticism from judges, lawyers, and the public directed to the CJC’s conduct far outweighs and is more damning than the sparse coverage directed to Justice Smith.

[128] As to the Review Panel relying on Justice Smith having received the letter from the Executive Director of the CJC as a fact underpinning its decision, I concur with the submission of The Canadian Superior Courts Judges Association that the letter “raised particularized concerns” and must be considered against the backdrop of the consent of the Chief Justice and the Minister of Justice. As it submits “the CJC’s Executive Director has no status or authority to advise judges on ethical matters and it would raise significant constitutional issues if he did.”

[129] The CJC submits, “Judicial ethics prohibit the prestige of judicial office from being used to bolster the reputation, status or public confidence in extra-judicial organizations.” The Ethical Principles do not make that broad statement. Section C.1 under Statement 6 dealing with impartiality provides that while judges are free to participate in “civic, charitable and religious activities” they “should not solicit funds … or lend the prestige of judicial office to such solicitations.” The commentary to that section repeats the same in C.6. C.10 speaks of using the prestige of judicial office to advance a person’s private interests.

[130] The association of a judge with any extra-judicial organization will, to some degree, bolster its reputation, status and public confidence. It is for precisely that reason that law schools seek to have judges teach. I daresay it was also for such reason that McGill and Ottawa Law School sought out Justice Fauteux as their Dean, and Brescia University College sought out Justice Gillese as its Chancellor. If that were the test, then no judge could ever join or participate in any extra-judicial civic, religious, or charitable organization.

[131] For these reasons, I find the decision of the Review Panel as to the ethical breach of Justice Smith in accepting this appointment to be unreasonable and it cannot stand.

B. Were the Proceedings Procedurally Unfair Amounting to an Abuse of Process?

[132] Counsel for Justice Smith submits that the CJC’s “treatment of Justice Smith’s case from its inception has been unfair and oppressive, such that it is an abuse of the Council’s process.”

[133] The Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paragraph 120, held that it is an abuse of process where an administrative proceeding has been conducted so unfairly that it is contrary to the interests of justice:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[134] The judicial conduct review process established by the CJC is ultimately directed to the possible removal of a judge because of conduct. In *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at paragraph 147, the Supreme Court describes the severity of conduct that warrants removal:

> …. before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office. [Emphasis added.]

[135] When analyzing whether the process of the CJC regarding the conduct of Justice Smith was so unfair as to constitute an abuse of process, this high standard should be kept in mind because, as is discussed below, the referral to the Review Panel can only be done if it is determined that the conduct may be serious enough to warrant removal from office.

[136] The submission of Justice Smith is that on the facts of this matter, the CJC misused its disciplinary procedure in a manner that is excessive and unreasonable, putting Justice Smith's livelihood and reputation at risk, causing him prejudice, and eroding public confidence in the judiciary and the fairness of the CJC's process. This is a serious allegation; however, on the record before me, I find that the CJC did misuse its disciplinary procedure in a manner that is excessive and unreasonable.

[137] I find that the CJC disciplinary procedure was misused from the beginning —when the Executive Director determined that Justice Smith accepting the appointment to the Law School was a matter that "warrants consideration."

[138] Subject to my comments below at paragraphs 171 to 175, I take no issue with the Executive Director, on May 9, 2018, writing to Justice Smith, informing him that this appointment has come to his attention and that under section 4.2 of the Review Procedures, it appears to him to be a matter that may warrant consideration. Although he references "Media reports", he attaches only one, a CBC web post that reports that Justice Smith has accepted the appointment.

[139] The Court notes that there is nothing in that attached report that criticises Justice Smith's conduct in accepting the position, nor is anything reported that is critical of the Law School appointing him on an interim basis. One part of the report sets out the position of some indigenous leaders about the conduct of the Law School, but this report does not show any objection by it to this appointment or to Justice Smith:

> Since then indigenous leaders representing dozens of First Nations communities across northwestern Ontario called for "immediate change" at Lakehead University. They made several recommendations, including that Lakehead commit to appointing an Indigenous person as EagleWoman's successor, that an independent review examine "all issues and allegations" raised by her and that appropriate measures are subsequently taken.

[140] In his letter to Justice Smith, the Executive Director writes, "In light of sections 54 and 55 of the Judges Act, and given the general duties and ethical obligations of judges, the information provided in these news reports brings me to the view that the situation may warrant consideration by Council." Based on the single report attached to the letter, one can only conclude that the "situation" that concerned the Executive Director was that Justice Smith accepted this appointment.

[141] Indeed, that appears to be exactly how the Chief Justice, who was copied on the letter read it. She responds by letter of May 11, 2018, providing the background facts leading to the appointment. She provides the Executive Director with the letter from the Law School requesting Justice Smith to accept the appointment, the letter of the Chief Justice to the Minister of Justice concerning it, and the Minister's response.

[142] Based on the record, these letters set out the facts on which the Executive Director made his decision that the matter warranted consideration by the CJC and, under section 4.3 of the Review Procedures, referred it to the Judicial Conduct Committee on May 16, 2018.

[143] Prior to making this determination, the Executive Director had to screen the matter as required under the Review Procedures. Indeed, in his affidavit, the Executive Director states that he refers every complaint or matter not falling within the exceptions described in section 5 of the Review Procedures, to the Chairperson of the Judicial Conduct Committee. Section 5 reads as follows:

> **5. Early Screening Criteria**
>
> For the purposes of these Procedures, the following matters do not warrant consideration:
>
> (a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;
>
> (b) complaints that do not involve conduct; and
>
> (c) any other complaints that are not in the public interest and the due administration of justice to consider.

[144] How did the Executive Director fail to conclude that it is "not in the public interest and the due administration of justice" to consider the matter of Justice Smith's appointment?

[145] That question is asked because the information the Executive Director had leads me to only one conclusion; namely, that the referral to the Judicial Conduct Committee of the matter raised by the Executive Director himself was "not in the public interest and the due administration of justice to consider." I arrive at that conclusion based on the following facts:

1. The Law School approached Justice Smith to consider the appointment, in part because of his "significant work with Indigenous communities" and his publications focused on Aboriginal Law in Canada;

2. Justice Smith immediately informed his Chief Justice that he had been contacted "out of the blue" with this request and that he would "accept a short term appointment with your approval and that of the Minister of Justice";

3. The Chief Justice writes to the Minister of Justice setting out the facts, including the role being limited to academic leadership, describing this as a "very exceptional situation" and one which provides "an opportunity for our Court to respond positively to a number of Truth and Reconciliation Commission recommendations" and advising, "With your approval, I am anxious to authorize this special leave" (emphasis in original);

4. The Minister of Justice responds, "I have no concerns about your granting Justice Smith a 'special leave' … as outlined in your letter [and] in the event that more than six months is required, I will consider any requests for additional leave";

5. Justice Smith's judicial colleagues in the Northwest Region support him being granted a leave to take this appointment; and

6. No complaint was made to the CJC by anyone at any time regarding the conduct of Justice Smith in accepting this appointment.

[146] There is nothing in the record explaining how and on what basis the Executive Director concluded that his referral to the Judicial Conduct Committee was in the public interest and the due administration of justice. The information disclosed to Justice Smith prior to the referral did not indicate any public debate or concern about the appointment, and the approval of his Chief Justice and Minister of Justice belie any suggestion that it affected the due administration of justice.

[147] Again, without evidence from the Executive Director we do not know what weight he placed on the Minister's approval; however, based on his affidavit, I find that he gave it none. Regarding the Minister's letter, he swears:

> On 11 May 2018, the Applicant sent me an email attaching a letter from Chief Justice Heather Smith which he referred to as Leave of Absence Approval from Chief Justice Smith. On the same date, the Applicant sent another email attaching a letter from the Honourable Judy

> Wilson-Raybould, Minister of Justice and Attorney General of Canada (as she then was) which he referred to as a Letter of Approval of the Minister of Justice for Secondment as (Interim) Dean. The Minister's letter did not indicate that the Minister has made any decision in respect of the matter, but that the Minister recognized that the authority to grant leave for less than six months rested with Chief Justice Smith. The Minister concluded her letter thus: "I would encourage the university to move quickly in appointing a permanent Dean, both to ensure long-term leadership for the Faculty of Law, and to minimize Justice Smith's time away from his regular duties as a supernumerary judge." [Emphasis added.]

[148] The following underlined passages of the Minister's letter are not referred to by Mr. Sabourin, and in my view, clearly show that the Minister made a decision, namely, that she has no concerns about the appointment and will consider an extension if asked:

> As Chief Justice, you have the authority to grant Justice Smith a "special leave" under the *Judges Act*, for a period up to six months. I also understand that Justice Smith's judicial colleagues in the Northwest Region are supportive of his taking a "special leave" in order to accept this position.
>
> I have no concerns about your granting Justice Smith a "special leave" from June 2018 to November 2018, as outlined in your letter. In the event that more than six months is required, I will consider any requests for additional leave at the appropriate time. I would encourage the university to move quickly in appointing a permanent Dean, both to ensure long-term leadership for the Faculty of Law, and to minimize Justice Smith's time away from his regular duties as a supernumerary judge. [Emphasis added.]

[149] The CJC and the Attorney General, echoing Mr. Sabourin, both submit that the response by the Minister was not an "approval" of the leave being granted. I disagree. The Chief Justice explicitly asked for the Minister's "approval" of her granting the leave. The Minister responded that she had no concerns with the leave being granted. The leave was granted by the Chief Justice who obviously considered the Minister's response to indicate approval. Further, Justice Smith indicated that he would accept the assignment with the approval of his Chief Justice and the Minister of Justice, and so he too viewed this as ministerial approval as he accepted the appointment.

[150] The position that there was no ministerial approval on these facts is absurd. If the Minister was not approving, then it was simple enough for her to say so. She did not. Moreover, she expressed a willingness to consider an extension which is not what one would expect from someone opposed to the initial leave. Apprised of all the facts, the Minister had no concerns.

[151] I find that the Minister's letter indicated her approval.

[152] Consider an analogy. A teenager who has a 10 p.m. curfew approaches father seeking a later curfew as the child and friends are going to a movie that runs longer than usual. Father says he is inclined to approve, but that they need to speak to mother. They go to mother to discuss the request and she responds that father can grant the request and she has no concerns. She adds that if the child is going to be later than an hour to seek her approval for an extension. On this basis, the child goes to the movie and arrives home 30 minutes past her 10 p.m. curfew. Is there anyone who would think it fair if the

mother were to ground the child for having been 30 minutes late because she did not grant her approval? Can anyone seriously suggest that the mother had not made a decision on the request and had not approved it?

[153] The Court is equally troubled by the treatment Pidgeon A.C.J. gives to the approval of the Minister. In his decision to refer the matter to the Review Panel, he writes of the Minister's letter that she had "unofficially" approved the leave to allow Justice Smith to serve as Interim Dean. He writes [at page 5 of the reasons for referral]:

> …. In my view, Chief Justice Heather Smith's consent and support for Justice P. Smith's leave of absence, and the Minister of Justice's apparent lack of concern, are simply factors to be weighed in assessing the nature and gravity of Justice Patrick Smith's conduct, and whether this conduct is appropriate. [Emphasis added.]

[154] My view, as earlier stated, is that the Minister's approval cannot be reasonably said to be "unofficial" simply because she did not expressly use the word "approved." Second, it is not an honest description of the Minister's actions to describe them as an "apparent lack of concern" when she expressly writes, "I have no concerns." She is to be taken at her word.

[155] It is unclear to me what Pidgeon A.C.J. means when he writes that these approvals are factors to be weighed in assessing whether Justice Smith's "conduct is appropriate." Pidgeon A.C.J. referred the matter to the Review Panel. Under section 8.2(*d*) of the Review Procedures, he could do that only if he "determines that the matter may be serious enough to warrant the removal of the judge."

[156] Counsel for Justice Smith submits that the CJC "pursued Justice Smith knowing that the Minister of Justice had already approved of his actions." She says that "it is inconceivable that the Minister of Justice would make an address to both Houses of Parliament asking … for Justice Smith's removal on the basis of actions that he took with her express approval."

[157] I agree.

[158] Under section 8.2(*d*) of the Review Procedures, the Chairman of the Judicial Conduct Committee may "refer the matter to a Panel, in accordance with subsection 2(1) of the By-laws, if the Chairperson determines that the matter may be serious enough to warrant the removal of the judge." How, one must ask, could Pidgeon A.C.J. determine that the matter may be serious enough to warrant the removal of Justice Smith when removal will never occur?

[159] As in the case of the Executive Director, he could only have made this decision based on his improper characterization of the Minister's approval.

[160] In addition to the improper decision of the Executive Director that the matter "warrants consideration" there is evidence in the record that Justice Smith was also denied procedural fairness by the Executive Director.

[161] As noted above, the only information Justice Smith had as to the substance of the matter was the initial letter of the Executive Director attaching one web page reporting that he had accepted the appointment, and his reference to sections 54 and 55 of the *Judges Act* and "the general duties and obligations of judges." However, Pidgeon A.C.J., in his reasons for referring the matter to the Review Panel, indicates that other material was before the Executive Director which guided his actions and decisions. He writes [at page 2]:

> Following Justice Smith's appointment as Interim Dean, First Nations leaders were upset and criticized the lack of prior consultation and failure to follow the recommendations of the national advisory committee on aboriginal issues. They called on the university to rescind the appointment.
>
> On 9 May 2018, given the public comments made in response to the statements made by First Nations chiefs, the Executive Director of the Canadian Judicial Council wrote to Justice Patrick Smith and his Chief Justice to obtain more information. [Emphasis added.]

[162] None of this information was provided to Justice Smith. Specifically, he was not informed of the Executive Director's concerns about the call for him to resign, nor was he provided with any of the "public comments" made in response to statements made by First Nations chiefs, nor those statements.

[163] Procedural fairness dictates that one is entitled to know the case to be met. This is a fundamental procedural right that the Executive Director failed to give to Justice Smith.

[164] A finding of judicial misconduct may result in the removal of the judge from office. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1999 CanLII 699 , the Supreme Court observed that the duty of procedural fairness is flexible and variable and depends on an appreciation of many matters. These were said to include: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the agency itself.

[165] Specifically, at paragraph 25, it was observed, "The importance of a decision to the individuals affected … constitutes a significant factor affecting the content of the duty of procedural fairness." That factor alone, in the context of a complaint regarding judicial conduct, points to the CJC being required to accord a judge significant procedural fairness.

[166] If the real concern of the Executive Director was the adverse reaction of some First Nations chiefs to his appointment, then Justice Smith was entitled to know that and respond to it. In an affidavit filed in this application, Justice Smith describes the response he would have provided if this were the concern.

[167] Justice Smith submits that the decision(s) to refer his acceptance of the appointment in the face of the approvals received and the lack of public complaint was done for an improper purpose. He points to statements made by the CJC in three publications:

1. The CJC Press Release ["Canadian Judicial Council review of a matter involving the Honourable Patrick Smith"] of October 3, 2018, announcing that the matter had been referred to the Review Panel, which says:

   > Council believes that all judges, and the public alike, will benefit from greater clarity regarding the permissible scope of activities for judges outside their normal judicial duties.

2. The report ["Judge fights against disciplinary body's ruling that said he engaged in misconduct" by Michelle McQuigge] in The Star [*Toronto Star*] of September 27, 2018, in which the Executive Director is quoted as saying: "We believe that all judges would benefit from clarity in this regard;" and

3. An article in *The Lawyer's Daily* of October 4, 2018 ["Canadian judges rally around judge facing discipline for accepting interim law dean post at Lakehead University" by Cristin Schmitz], in which the Executive Director is quoted as saying with respect to the referral to the Review Panel, "This will greatly assist [the judicial] council, and its Independence Committee, in its ongoing work of revising *Ethical Principles for Judges*, a project that is expected to be completed in the fall of 2019."

[168] Counsel for Justice Smith makes the following submission, with which I entirely agree:

> The purpose of judicial conduct proceedings is not to provide "clarity" to judges and the public. By improperly wielding its authority over Justice Smith in this way, including unreasonably and unnecessarily finding that he contravened s. 55 of the *Judges Act*, the Council abused its process. To the extent the Council wanted to provide such guidance, it should have done so through means other than launching frivolous and unfounded misconduct proceedings against Justice Smith.

[169] Accordingly, I conclude that the initial referral to the Judicial Conduct Committee by the Executive Director failed to accord with the procedures established by the CJC. It was not a matter that warranted consideration, and the referral was done in a procedurally unfair manner as Justice Smith was not informed of the Executive Director's real concerns. I further find that the referral to the Review Panel failed to accord with the procedures established by the CJC in finding, based on an improper characterization of the Minister's consent, that "the matter may be serious enough to warrant removal of the judge." I further find that the review of Justice Smith's acceptance of the appointment was made, at least in part, for an improper purpose.

[170] I find that the CJC process involving Justice Smith was unfair to the point that it is contrary to the interests of justice. It was an abuse of process.

[171] Before concluding, I wish to address the submission made by The Canadian Superior Courts Judges Association that it was not proper for the Executive Director "to initiate a complaint." It points out that as the Executive Director has responsibility to conduct an initial screening that cannot occur in any meaningful fashion if he is also the person initiating the complaint. It submits that this circumstance results in the judge being denied "this essential procedural safeguard and, as in this case, be called to account for conduct that could not reasonably have led to removal."

[172] In *Cosgrove v. Canadian Judicial Council,* 2007 FCA 103, [2007] 4 F.C.R. 714, the Federal Court of Appeal, at paragraph 77 commented on the advantages of the screening procedure:

> In practical terms, the screening procedure followed for an ordinary complaint under subsection 63(2) of the *Judges Act* is advantageous from the point of view of the judge for three reasons. First, it permits the resolution of a complaint without publicity. Second, it permits the summary dismissal of an unmeritorious complaint. Third, it permits the early resolution of a complaint by remedial measures, without the establishment of an Inquiry Committee.

[173] Provided the Executive Director assiduously applies the same review procedure to a matter he raises on his own as he does to complaints made by others, this concern does not seem to arise.

[174] Nonetheless, the Court finds that in raising matters on his own in the absence of any complaint from the public, the Executive Director would be well advised seriously to consider whether to do so.

[175] It is not as if the public never complains about judicial conduct. Evidence in the record shows that prior to 2005–2006 more than 150 complaints were filed annually. This suggests that if the Executive Director is raising a matter that is not the subject of a complaint, it ought to be of sufficient gravity to warrant that action. In that regard the Executive Director ought to weigh the conduct against the test set by the Supreme Court of Canada for conduct worthy of removal from the bench. Although that ultimate decision is not his to make, he ought to be convinced that it could result in such a finding. Here, in light of the approval of the Minister of Justice, removal action by the Minister of Justice was inconceivable.

C. What is the Appropriate Remedy?

[176] Justice Smith seeks the following by way of remedy:

(a) A declaration that Justice Smith did not contravene section 55 of the *Judges Act*;

(b) An order quashing the Letter of Concern; and

(c) An order that the entry about the Council's actions in this matter on its website be changed to conform to this Court's decision and order.

[177] Typically, on a successful judicial review application, the decision under review is quashed and the matter referred back for a new decision. The remedy sought cannot be granted unless the Court finds that there is only one reasonable interpretation of the *Judges Act* and Justice Smith's actions do not breach it.

[178] The Supreme Court of Canada at paragraph 124 of *Vavilov*, recognized that a court might make a finding of statutory interpretation in a judicial review application, such as that here:

> Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker. [Emphasis in original.]

[179] In this case, taking into account all of the factors in reviewing the reasonableness of the interpretation the Review Panel gave to section 55 of the *Judges Act*, I see this to be one of those situations where the analysis weighs overwhelmingly in favour of a different interpretation. Moreover, using the modern principle of interpretation, it is the only reasonable interpretation of section 55 of the *Judges Act*.

[180] It was never the intention of Parliament in enacting section 55, to prohibit judges from all non-judicial activities, and a reasonable interpretation must accord with that intention. Moreover, it has always been the intention of Parliament that section 55 prohibits judges from taking on employment in a commercial, private or political capacity, i.e. in businesses or occupations, and that is so whether the judge is sitting or on leave. A sitting judge is permitted to engage in non-commercial activities that do not impair his or her ability to perform judicial duties. Where the non-commercial activities duties cannot be performed without impairing the judge's ability to sit, the judge must obtain a leave of absence from his chief justice or Minister of Justice under section 54.

[181] In my view, that is the only reasonable interpretation of sections 54 and 55, based on the text of those sections, their statutory context, and their legislative history. That

does not mean that a judge can be authorized to engage in any non-judicial activity that falls outside the scope of section 55 with impunity. There may be circumstances where an otherwise permissible activity the judge wishes to do may raise ethical concerns. As an example, a judge accepting a teaching assignment or writing a legal text may run afoul of his or her ethical obligations if he or she expresses a legal opinion on matters or issues that may later come before the judge. For this reason, judges wishing to engage in such acceptable activities ought to have a full and frank discussion of the role with their chief justice, and be prepared to step out of the role should any conflict with ethical duties present themselves.

[182] In light of this interpretation, the declarations Justice Smith seeks are appropriate, as nothing will be gained by sending this matter back to the CJC for consideration.

[183] All parties agreed that there should be no order made as to costs.

[184] Before concluding, I wish to thank all counsel for their precise and thoughtful written and oral submissions. They have greatly assisted me in my deliberations. This has been a challenging application; it has occupied a very significant portion of my time. The conclusions reached and findings made are the only ones available to me based on the evidence and the law.

JUDGMENT IN T-1713-18 (T-2055-18)

THIS COURT ORDERS that:

1. These applications for judicial review are allowed;

2. The decision of the Judicial Conduct Review Panel dated November 5, 2018, is quashed;

3. The letter dated November 6, 2018, from Associate Chief Justice Pidgeon in his capacity as Vice-Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council which relies on the decision of the Judicial Conduct Review Panel, is quashed;

4. Justice Patrick Smith was denied procedural fairness in the Canadian Judicial Council process considering his conduct in accepting the appointment as Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University, and it was an abuse of process;

5. The Court declares that Justice Patrick Smith in accepting the appointment of Interim Dean (Academic) at Bora Laskin Faculty of Law at Lakehead University did not breach section 55 of the *Judges Act*, R.S.C., 1985, c. J-1, nor did he breach his judicial ethics;

6. The Canadian Judicial Council, within 10 days of this decision, shall post a copy of this judgment and reasons on its website, and shall provide a reference to it on all of its descriptions, references, reports, and decisions relating to its review of the conduct of Justice Patrick Smith; and

7. There is no order as to costs.

APPENDIX A

Judges Act, R.S.C., 1985, c. J-1

Leave of absence

54 (1) No judge of a superior court shall be granted leave of absence from his or her judicial duties for a period

(a) of six months or less, except with the approval of the chief justice of t he superior court; or

(b) of more than six months, except with the approval of the Governor in Council.

…

EXTRA-JUDICIAL EMPLOYMENT

Judicial duties exclusively

55 No judge shall, either directly or indirectly, for himself or herself or others, e ngage in any occupation or business other than his or her judicial duties, but e very judge shall devote himself or herself exclusively to those judicial duties.

Acting as commissioner, etc.

56 (1) No judge shall act as commissioner, arbitrator, adjudicator, referee, con ciliator or mediator on any commission or on any inquiry or other proceeding u nless

(a) in the case of any matter within the legislative authority of Parliament, the judge is by an Act of Parliament expressly authorized so to act or the judge is thereunto appointed or so authorized by the Governor in Counci l; or

(b) in the case of any matter within the legislative authority of the legislat ure of a province, the judge is by an Act of the legislature of the province expressly authorized so to act or the judge is thereunto appointed or so authorized by the lieutenant governor in council of the province.

…

Authorization

56.1 (1) Notwithstanding section 55, Madam Justice Louise Arbour of the Onta rio Court of Appeal is authorized to take a leave from her judicial duties to serv e as Prosecutor of the International Tribunal for the Prosecution of Persons R esponsible for Serious Violations of International Humanitarian Law Committe d in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda.

…

Canadian Judicial Council

…

Objects of Council

60 (1) The objects of the Council are to promote efficiency and uniformity, and to improve the quality of judicial service, in superior courts.

Powers of Council

(2) In furtherance of its objects, the Council may

…

(c) make the inquiries and the investigation of complaints or allegations described in section 63; and

…

Inquiries concerning Judges

Inquiries

63 (1) The Council shall, at the request of the Minister or the attorney general of a province, commence an inquiry as to whether a judge of a superior court should be removed from office for any of the reasons set out in paragraphs 65 (2)(a) to (d).

Investigations

(2) The Council may investigate any complaint or allegation made in respect o f a judge of a superior court.

---

[1] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817.

Tab 146

CanLII

Canada (Minister of Citizenship and Immigration) v. Tobiass, 1997 CanLII 322 (SCC), [1997] 3 SCR 391

Source:	Supreme Court of Canada
Date:	1997-09-25
File number:	25811
Other citations:	131 FTR 230 — 151 DLR (4th) 119 — 218 NR 81 — 74 ACWS (3d) 52 — 10 CR (5th) 163 — 118 CCC (3d) 443 — 14 CPC (4th) 1 — 1 Admin LR (3d) 1 — 40 Imm LR (2d) 23 — EYB 1997-02452 — JE 97-1836 — [1997] SCJ No 82 (QL) — [1997] ACS no 82
Citation:	Canada (Minister of Citizenship and Immigration) v. Tobiass, 1997 CanLII 322 (SCC), [1997] 3 SCR 391, <https://canlii.ca/t/1fr01>, retrieved on 2026-01-18
Most recent unfavourable mention	Sliwin v College of Physicians and Surgeons, 2017 ONSC 1947 (CanLII) [...] [88] In my view, however, **Tobiass , supra, is distinguishable** . [...]

Canada (Minister of Citizenship and Immigration) *v.* Tobiass, [1997] 3 S.C.R. 391

Erichs Tobiass *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and between

Johann Dueck *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and between

Helmut Oberlander *Appellant*

v.

The Minister of Citizenship and Immigration *Respondent*

and

The Canadian Jewish Congress *Intervener*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Tobiass

File No.: 25811.

1997: June 26; 1997: September 25.

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

on appeal from the federal court of appeal

Courts -- Jurisdiction -- Appeals -- Federal Court of Appeal -- Federal Court Trial Division staying citizenship revocation proceedings -- Whether stay of proceedings a decision made under s. 18(1) of Citizenship Act -- Whether decision to stay proceedings can be appealed to Federal Court of Appeal -- Citizenship Act, R.S.C., 1985, c. C-29, s. 18(1), (3) -- Federal Court Act, R.S.C., 1985, c. F-7, s. 27(1).

Courts -- Judges -- Judicial independence -- Government official meeting with Chief Justice of Federal Court to express concern about slow progress of citizenship revocation proceedings -- Whether meeting between government official and chief justice interfered with judicial independence -- If so, whether stay of proceedings appropriate remedy.

Civil procedure -- Remedies -- Stay of proceedings -- Meeting between government official and chief justice causing damage to appearance of judicial independence -- Whether stay of proceedings appropriate remedy.

In January 1995 the appellants received notices informing them that the respondent Minister intended to seek revocation of their Canadian citizenship on the ground that they had obtained it by failing to divulge to Canadian officials details of their involvement in atrocities committed during the Second World War. At the appellants' request, the cases were referred to the Federal Court -- Trial Division. Numerous procedural disputes then arose. On December 12, 1995 counsel for one of the appellants argued for the whole day on the preliminary motions before the Associate Chief Justice. In January 1996 the court advised the parties that May 15 and 16 had been set aside for the completion of the argument. Counsel for the respondent wrote a letter to the court administrator, a copy of which he sent to counsel for the appellants, complaining in strong terms about the slow progress of the cases. Following a teleconference with the parties, the Associate Chief Justice confirmed that oral argument on the preliminary issues would take place

on May 15 and 16, 1996. On March 1, T, the Assistant Deputy Attorney General in charge of civil litigation at the federal Department of Justice, met with the Chief Justice of the Federal Court. The two men discussed the scheduling of the appellants' cases and later that day exchanged letters, neither of which was copied to any of the counsel for the appellants. In his letter to the Chief Justice, T referred to the fact that the Attorney General was being asked to consider taking a reference to the Supreme Court of Canada to determine some preliminary points of law primarily because the Trial Division was unable or unwilling to proceed with the cases expeditiously. In his reply, the Chief Justice stated that he had discussed T's concerns with the Associate Chief Justice, and that both were prepared to take all reasonable steps to avoid such a reference. He added that the Associate Chief Justice said he had not fully appreciated "the urgency of dealing with these matters as expeditiously as the Government would like" until he had read T's letter. However, now that he was aware of the Government's concerns he would devote one week from May 15 to deal with the cases not only with respect to the preliminary points but also with respect to the merits. The respondent provided copies of these letters to the appellants. Counsel for the appellants advised the court that they would move for a stay of proceedings on the ground that T and the Chief Justice had interfered with the independence of the Associate Chief Justice. The Associate Chief Justice then recused himself. He directed that the appellants' cases should go forward under a new judge. The appellants' application for a stay of proceedings was granted. The Federal Court of Appeal, having decided that it had jurisdiction to consider the appeal, set aside the stay.

Held: The appeal should be dismissed.

The Federal Court of Appeal had jurisdiction to hear the Crown's appeal in this case. The stay of proceedings ordered was not a decision made "under" s. 18(1) of the *Citizenship Act*. Section 18(1) refers to a very particular kind of decision: a decision as to whether a person "has obtained, retained, renounced or resumed citizenship" by false pretences. Whether s. 18(1) is interpreted narrowly as encompassing only the ultimate decision as to whether citizenship was obtained by false pretences, or more broadly to include the interlocutory decisions made in the context of a s. 18(1) hearing which are related to this determination, it is apparent that it does not encompass an order granting or denying a stay of proceedings. Section 18(3) of the *Citizenship*

Act, which provides that no appeal lies from a decision of the Trial Division made under s. 18(1), thus does not apply. A decision allowing or denying a motion for a stay of proceedings is a decision made under s. 50 of the *Federal Court Act* and may be appealed according to the rules set out in s. 27 of that Act.

The appearance of judicial independence suffered significantly as a result of the meeting between T and the Chief Justice. The test for determining whether the appearance of judicial independence has been maintained is whether a reasonable observer would perceive that the court was able to conduct its business free from the interference of the government and of other judges. As a general rule of conduct, counsel for one party should not discuss a particular case with a judge except with the knowledge and preferably with the participation of counsel for the other parties to the case. The meeting between T and the Chief Justice, at which counsel for the appellants were not present, violated this rule and was clearly inappropriate, despite the fact that the occasion for the meeting was a highly legitimate concern about the exceedingly slow progress of the cases. Again as a general rule, a judge should not accede to the demands of one party without giving counsel for the other parties a chance to present their views. It was therefore clearly wrong, and seriously so, for the Chief Justice to speak to the Associate Chief Justice at the instance of T. While a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness, the actions of the Chief Justice here were in the nature of a response to a party rather than to a problem. Similarly, the Associate Chief Justice acted inappropriately by responding as he did to the Chief Justice's intervention without the participation of counsel for the appellants. A reasonable observer apprised of the workings of the Federal Court and of all the circumstances would perceive that the Chief Justice and the Associate Chief Justice were improperly and unduly influenced by a senior officer of the Department of Justice. However, there is no persuasive evidence of bad faith on the part of any of those involved, nor is there any solid evidence that the independence of the judges in question was actually compromised.

An appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay of proceedings, which is a discretionary remedy. While a stay is usually sought to remedy some unfairness to the individual that has resulted from state misconduct, there is also a "residual category" of cases in which a stay may be warranted. This residual category comprises cases in which a prosecution is conducted in such an unfair or vexatious manner that it contravenes notions of justice and thus undermines the integrity of the judicial process. For a stay of proceedings to be appropriate in a case falling into the residual category, it must appear that the state misconduct is likely to continue in the future or that the carrying forward of the prosecution will offend society's sense of justice. It must also be shown that no remedy other than a stay is reasonably capable of removing this misconduct. As well, it may be necessary in some cases to balance the interests that would be served by granting a stay of proceedings against the interest that society has in having a final decision on the merits. This balancing process would not be appropriate in the case of an ongoing affront to judicial independence or of a particularly egregious interference, either of which would outweigh any interest society might have in continuing the proceedings. Neither of these circumstances is present here.

A stay of proceedings is not the appropriate remedy in these cases. First, there is no likelihood that the carrying forward of the cases will manifest, perpetuate or aggravate any abuse. Second, the lesser remedy of ordering the cases to go forward under the supervision of a different judge of the Trial Division without any direction or intervention from the Chief Justice or the Associate Chief Justice will suffice. Third, Canada's interest in not giving shelter to those who concealed their wartime participation in acts of atrocities outweighs any foreseeable harm that might be done to the appellants or to the integrity of the system by proceeding with the cases. The appropriate remedy here is to have the cases against the appellants go forward under the supervision of a judge of the Trial Division who has had nothing to do with the affairs that form the subject matter of this appeal. The judge appointed will ignore all directions previously given by the Associate Chief Justice or the Chief Justice in these cases. The Chief Justice and Associate Chief Justice should not have anything further to do with these cases.

Cases Cited

Referred to: *Roberts v. Canada*, 1989 CanLII 122 (SCC), [1989] 1 S.C.R. 322; *ITO--International Terminal Operators Ltd. v. Miida Electronics Inc.*, 1986 CanLII 91 (SCC), [1986] 1 S.C.R. 752; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, 1976 CanLII 10 (SCC), [1977] 2 S.C.R. 1054; *McNamara Construction (Western) Ltd. v. The Queen*, 1977 CanLII 13 (SCC), [1977] 2 S.C.R. 654; *Luitjens v. Canada (Secretary of State)* (1992), 9 C.R.R. (2d) 149; *R. v. Seaboyer*, 1991 CanLII 76 (SCC), [1991] 2 S.C.R. 577; *R. v. Jewitt*, 1985 CanLII 47 (SCC), [1985] 2 S.C.R. 128; *R. v. Hinse*, 1995 CanLII 54 (SCC), [1995] 4 S.C.R. 597; *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56; *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367; *R. v. Carosella*, 1997 CanLII 402 (SCC), [1997] 1 S.C.R. 80; *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411; *R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659; *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267; *R. v. Vermette*, 1988 CanLII 87 (SCC), [1988] 1 S.C.R. 985; *R. v. Hubbert* (1975), 1975 CanLII 53 (ON CA), 29 C.C.C. (2d) 279; *R. v. Latimer*, 1997 CanLII 405 (SCC), [1997] 1 S.C.R. 217; *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358; *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 Q.B. 710.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(2).

Citizenship Act, R.S.C., 1985, c. C-29, ss. 2 "Court", 10, 18(1), (3).

Federal Court Act, R.S.C., 1985, c. F-7, ss. 6(1), (3), 27(1) [am. 1990, c. 8, s. 7], 46, 50(1).

Federal Court Rules, C.R.C., c. 663, rr. 5, 450-455, 461, 477, 900-920, 1714-1715.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 40.

Authors Cited

Canada. Parliament. House of Commons. *Beauchesne's Rules & Forms of the House of Commons of Canada, with Annotations, Comments and Precedents*, 6th ed. By Alistair

Tab 147

1972 CanLII 1409 (NB CA)

RE RAMSEY AND THE QUEEN

New Brunswick Supreme Court, Appeal Division, Hughes, C.J.N.B., Limerick and Bugold, JJ.A. June 21, 1972.

1972 CanLII 1409 (NB CA)

Robert L. Kenny, for accused, applicant.
Michael Landers, for the Crown, respondent.

The judgment of the Court was delivered by

LIMERICK, J.A.:—John Ramsey, Joseph Butler and Wayde Clifford were charged before Kelley, Prov. Ct. J. (Deputy Judge), in three separate informations with having unlawfully caused bodily harm to one Leonard O'Donnell.

On February 28, 1972, Ramsey elected trial by a magistrate and the case was adjourned to March 14, 1972, at 1:30 p.m. The Crown closed its case against Clifford just prior to the noon recess on that day.

Following the recess, when the Court resumed, the cases against Ramsey and Butler were called and Crown counsel moved with the consent of the defence counsel that the evidence of certain witnesses who had testified that morning in the case against Clifford be admitted and read into the evidence in the trials of Ramsey and Butler. The motion was granted. The hearing of the cases against Ramsey and Butler were set over until after the conclusion of the Clifford case.

The Clifford case was resumed by the Court and after hearing evidence adduced by the defence, the Deputy Judge acquitted the accused Clifford stating he accepted the testimony of the defence witnesses and rejected that of the prosecution.

Crown counsel then requested the Deputy Judge to waive jurisdiction in the Ramsey and Butler cases to another Judge of the Provincial Court on the ground that as the evidence would be the same in all three cases the Deputy Judge might be unconsciously biased in the other two cases, he having in effect prejudged those cases.

The Deputy Judge adjourned the matter for consideration. He informed this Court he did not consider he was biased and

3025

that in his opinion there was no ground justifying his waiving jurisdiction. Having been requested in the interim by the Chief Judge of the Provincial Court [Harrigan, C.J. Prov.Ct.], who forwarded to the Deputy Judge a form for his signature waiving jurisdiction to the Chief Judge, Kelley, Prov.Ct.J., signed the form thereby waiving jurisdiction to Harrigan, C.J. Prov.Ct.

Ramsey now applies for an order of prohibition forbidding Harrigan, C.J. Prov.Ct., from hearing or proceeding with the trial of the charge against that accused.

Subsequent to the application for prohibition Harrigan, C.J. Prov.Ct., tried and convicted the accused Clifford for an assault on another person arising out of the same incident.

Section 499(1) of the *Criminal Code* is as follows:

> 499(1) Where an accused is being tried under this Part by a judge or magistrate, as the case may be, and the judge or magistrate before whom the accused is being tried dies or is for any reason unable to continue, the proceedings may, subject to this section, be continued before another judge or magistrate, as the case may be, who has jurisdiction to try the accused under this Part.

A magistrate before whom the trial of an accused, charged with an indictable offence, has commenced, must proceed with that trial to its conclusion including verdict and sentence (if applicable) unless jurisdiction is or may be transferred to another magistrate under the provisions of this section.

The Deputy Judge in whom was vested the jurisdiction of a magistrate for the purposes of the *Criminal Code* had commenced and entered on the trial of the accused Ramsey when he made an order that the evidence of witnesses who testified in the trial of the charge against Clifford be read into the evidence in the Ramsey case: jurisdiction could only be transferred thereafter to Harrigan, C.J. Prov.Ct., where authorized by the provisions of the above s. 499(1).

It would appear Crown counsel was dissatisfied with the decision of the Deputy Judge acquitting the accused Clifford and was desirous of having the other two cases tried before a different magistrate in the hope of obtaining a conviction therein. Such a procedure, if permitted, would result in great unfairness in the administration of justice. One person would be acquitted and another convicted on identical evidence. The Crown should have appealed from the acquittal, if grounds existed for such appeal, and if grounds did not exist the Crown should have withdrawn the two charges against Ramsey and Butler.

Section 499(1) provides for a transfer of jurisdiction where the magistrate "dies or is for any reason unable to con-

1972 CanLII 1409 (NB CA)

tinue". Such a reason could be illness, absence, disqualification or other justifiable cause. The order or request of the Chief Judge does not constitute such a reason. The Chief Judge, appointed by the Province, has administrative duties and functions. He should not and cannot interfere with the judicial discretion of a Provincial Judge acting as a magistrate under the *Criminal Code*.

As magistrate, the Deputy Judge may disqualify himself if he considers he may be prejudiced or biased in any case, or this Court may prohibit him from trying a case if it considers he is or may appear to be biased. The Chief Judge had no such authority. No other reason is suggested for the transfer of jurisdiction than bias on the part of the Deputy Judge. The desire for a conviction on the part of the Crown does not constitute a legitimate reason for the transfer of jurisdiction.

The Deputy Judge did not consider himself disqualified. It therefore only remains to consider whether this Court considers he would be biased or appear to be biased in the circumstances.

The Crown contends that the magistrate made a finding of credibility disbelieving the Crown witnesses and believing the defence witnesses and that, in as much as the evidence in the Ramsey and Butler cases would be identical with that in the Clifford case, he would be biased and that the trials of Ramsey and Butler were in effect prejudged.

The Crown misinterprets the meaning of bias. Bias is prejudice or predisposition to be unreasonably favourable to one party rather than the other. The anticipated consistency of the Court in making the same finding on the same evidence adduced by the same witnesses in two different trials is not bias but a finding which the Crown counsel should have accepted and should have been a ground for withdrawing the other two cases. Bias exists in seeking to transfer jurisdiction in order to obtain convictions not in making consistent decisions. The Crown should be impartial and question the finding of the Court only by appeal.

There is no suggestion made, that the Deputy Judge would be prejudiced if other or additional evidence which had not been offered in the Clifford case were offered in the subsequent trials, and that he would fail to give proper weight to such other evidence.

When this Court or any other Court makes a finding based on specific circumstances the decision should be considered as a precedent establishing the finding that Court would make in any future case based on identical circumstances. An infor-

1972 CanLII 1409 (NB CA)

3027

mant or plaintiff, if that decision be unfavourable to him, would know it would be pointless to commence similar proceedings unless he is prepared to carry the proceedings to a higher Court by way of an appeal. Consistency is not bias.

There was therefore no reason for the proceedings being continued before the Chief Judge of the Provincial Court. The Deputy Judge having commenced the trial was obligated under the circumstances to continue the trial until its conclusion. He was without jurisdiction to transfer jurisdiction to another magistrate and the Chief Judge had no jurisdiction to direct him to transfer jurisdiction and had no right to assume jurisdiction over the trial of the accused Ramsey.

The application for prohibition is allowed. There will be an order prohibiting Harrigan, C.J. Prov.Ct., from proceeding with the trial of John Ramsey on the charge that he did on or about February 17, 1972, at Sussex Corner, in the County of King's, and Province of New Brunswick, unlawfully cause bodily harm to Leonard O'Donnell, and did thereby commit an assault contrary to s. 245(2) of the *Criminal Code* or any included offence for which he might have been convicted by Kelley, Prov.Ct.J.

The applicant to have his costs of the application before this Court to be paid by the Crown.

Application allowed.

1972 CanLII 1409 (NB CA)

Tab 148

CanLII

Faber v. R., 2015 QCCS 12 (CanLII)

Source:	Superior Court
Date:	2015-01-06
File number:	200-36-002068-146; 200-36-002088-144; 200-36-002087-146; 200-36-002080-141; 200-36-002092-146; 200-36-002078-145
Quote:	Faber v. R., 2015 QCCS 12 (CanLII), < https://canlii.ca/t/gfv8p >, retrieved on 2026-01-18

Faber c. R. **2015 QCCS 12**

JP1124

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF QUEBEC

No.: 200-36-002068-146
200-36-002088-144
200-36-002087-146
200-36-002080-141
200-36-002092-146
200-36-002078-145

DATE : January 6, 2015

UNDER THE PRESIDENCY THE HONORABLE RAYMOND W. PRONOVOST, JCS OF:

JEAN FABER

[111] In ruling on this article, Judge Dufour [22] wrote:

> "Note the difference in phraseology used in paragraphs 1, 3 and that in paragraph 2 of article 96 .
>
> In paragraph 2, and this is the only place where this is the case, the legislator stipulates that judges must submit to the orders and directives of the chief justice for the matter concerned.
>
> From this, I deduce that judges are not legally subject to any other directive issued by the chief judge of their court.
>
> The legislature undoubtedly intended this to protect judicial independence. The Chief Justice is "primus inter pares" [23] . It is only through his moral authority over the judges of his Court that he will impose his will on them regarding directives to which they are not legally subject.

[112] Therefore, the Chief Justice's sole power is limited to issuing summonses and setting court hearings. Neither the Chief Justice nor the coordinators may interfere in the work of the judge. The coordinators and assistant coordinators have only the power to issue summonses, which is delegated to them by the Chief Justice, as all judges are equal.

[113] At no time, as Justice Lemay wrote, can either the Chief Justice or the Coordinating Judge interfere in the work of the judge. The Assistant Coordinators have only the power to assign cases, which is delegated to them by the Chief Justice.

[114] As Justice Dufour pointed out, the Chief Justice has moral authority over the judges. But this moral authority cannot be delegated. The only power that Chief Justices can delegate is the administrative power to issue summonses. Without this, judicial independence, an essential principle in our system, could not be claimed.

[115] On this point, Judge Lemay [24] wrote:

> “(…) First parenthesis here. On two (2) occasions, during the hearing of this case, the accused’s prosecutor claimed that he had been obliged to proceed in this way following a directive from the then assistant coordinating judge.
>
> I must emphasize that this grants far too much power to the assistant coordinating judge, power he does not actually possess. The only thing I could be compelled to do on May 31, 2011, was to hear the accused's case, nothing else.
>
> Judicial independence would never allow me, any more than I would allow myself, to be the spokesperson for the assistant coordinating judge.

[116] The judge presiding over the hearing is the absolute authority and no directive can compel him to operate in any particular way. This is a fundamental principle of judicial independence.

Requests for discounts

[117] The appellants argue that they were forced to proceed in this manner because the judges systematically refused adjournments. However, during the hearing, the court emphasized to the prosecutors that this assertion was unsupported by any evidence. As with the other point, I have given the appellants until December 5, 2014, to produce any evidence to support this assertion.

[118] No evidence was submitted on this point. As mentioned previously, pleadings may only be based on proven facts. Since counsel for the appellants did not find that the directive existed, this point cannot be upheld.

[119] Judge Lemay [25] wrote:

Tab 149

CanLII

R. v. Q.H.T., 2004 ABQB 526 (CanLII)

Source:	Court of King's Bench of Alberta
Date:	2004-07-08
File number:	031256142U1; 031271141U1
Other citation:	34 Alta LR (4th) 179
Citation:	R. v. Q.H.T., 2004 ABQB 526 (CanLII), <https://canlii.ca/t/1n518>, retrieved on 2026-01-18

Court of Queen's Bench of Alberta

Citation: R. v. Q.H.T., 2004 ABQB 526

Date: 20040708
Docket: 031256142U1, 031271141U1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Q.H.T. and H.D.N.

Restriction on Publication: By Court Order, there is a ban on publishing the evidence taken, the information given, the representations made and these reasons for decision, until th e accused is discharged after the preliminary hearing, or, if t he accused is committed to stand trial, until the end of the tri al. See the *Criminal Code*, s. 517.

Note: The publication ban expired on March 24, 2006.

(5th) 19, 80 C.R.R. (2nd) 217, [2001] S.C.J. No. 13 (QL), 2001 CarswellOnt 496 (S.C.C. No. 27109; 2001 SCC 14).

Tab 150

CanLII

Gillespie v. Manitoba (Attorney General), 2000 CanLII 26952 (MB CA)

Source:	Court of Appeal of Manitoba
Date:	2000-04-20
File number:	AR99-30-04436
Other citations:	185 DLR (4th) 214 — [2000] 6 WWR 605 — 145 Man R (2d) 229 — 144 CCC (3d) 193 — [2000] MJ No 218 (QL)
Citation:	Gillespie v. Manitoba (Attorney General), 2000 CanLII 26952 (MB CA), <https://canlii.ca/t/2328l>, retrieved on 2026-01-18

Manitoba Court of Appeal
Gillespie v. Manitoba (Attorney General)
Date: 2000-04-20

R.I. Histed and D.J. Parker, for appellant.

H.S. Leonoff, Q.C., for respondent.

R.B. McNicol, Q.C., and J.S. Langhan, for the proposed intervener.

Court File No. AR99-30-04436

[1] TWADDLE J.A. (HUBAND and PHILP JJ.A. concurring) (giving the first judgment at the invitation of Scott C.J.M.):—At issue in this appeal is the jurisdiction of the Chief Justice of the Queen's Bench to make an order of general application authorizing the Sheriff to search persons seeking entrance to the Winnipeg Centre courthouse.

[2] Prior to August 1998, security at the Winnipeg courthouse was maintained, as it still is at all courthouses outside of Winnipeg, by the simple presence of the Sheriff and his officers. The officers were on duty during hours when members of the public had access to the building, whether to file or inspect documents, pay a fine, attend at one or other of the courts holding session or obtain access to the Great Library. Apart from fulfilling their duty of general surveillance, the Sheriff's officers were required:

(i) to ward off any threatened altercation;

(ii) to determine, in their professional judgment, where in the building the attendance of officers was specifically required; and

[137] In addition to *Schachter,* there are a number of other decisions of the Supreme Court in which a declaration of invalidity was temporarily suspended. In *R. v. Swain,* 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481, the majority of the Supreme Court provided for a six-month "period of temporary validity" after declaring the existing provisions of the *Criminal Code* requiring detention of a person acquitted on the ground of insanity to be unconstitutional. In *R. v. Bain,* 1992 CanLII 111 (SCC), [1992] 1 S.C.R. 91, 87 D.L.R. (4th) 449, 69 C.C.C. (3d) 481, a declaration of invalidity pronounced with respect to the provisions of the *Criminal Code* that allowed the Crown but not the accused to "stand by prospective jurors" was suspended for six months to permit Parliament to remedy this situation if it chose to do so. See as well *Rodriguez v. British Columbia (Attorney General),* 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342, 85 C.C.C. (3d) 15.

[138] As an interesting aside, it should be noted that Iacobucci J., writing for himself and Cory J., for the minority, in *RJR-MacDonald Inc. v. Canada (Attorney General),* 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, 100 C.C.C. (3d) 449, at para. 190, while agreeing with the majority that the government's products control legislation was unconstitutional, would have suspended the declaration of invalidity for a period of one year. To do otherwise, they reasoned (at para. 192):

> … would permit the tobacco companies the untrammelled ability to advertise until minimally impairing legislation is drafted; *the suspensive veto would permit the government to design such legislation while the status quo remains in force.* [Emphasis added.]

[139] Public interest is clearly a valid consideration when dealing with an application for an interlocutory stay. See *Manitoba (Attorney General) v. Metropolitan Stores Ltd.,* 1987 CanLII 79 (SCC), [1987] 1 S.C.R. 110 at p. 146, 38 D.L.R. (4th) 321 *sub nom. Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832,* as is preservation of the status quo: *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1987), 1987 CanLII 9356 (NS CA), 79 N.S.R. (2d) 29 (S.C., App. Div.).

[140] All these factors militate in favour of granting the shortest possible stay to permit the appropriate legislative intervention.

[141] If necessary I would be prepared to grant a stay for a period of not more than two months or until the appropriate legislation is in place, whichever comes first.

Appeal allowed.

Tab 151

CanLII

Reilly v. Wachowich, 1999 ABQB 309 (CanLII)

Source:	Court of King's Bench of Alberta
Date:	1999-04-26
File number:	9801-08707
Other citations:	[1999] 11 WWR 378 — 234 AR 1 — 71 Alta LR (3d) 214 — 64 CRR (2d) 57
Citation:	Reilly v. Wachowich, 1999 ABQB 309 (CanLII), <https://canlii.ca/t/5p8x>, retrieved on 2026-01-18

Reilly v. Wachowich, 1999 ABQB 309

Date: 19990426
Action No. 9801-08707

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

THE HONOURABLE JOHN D. REILLY,
JUDGE OF THE PROVINCIAL COURT OF ALBERTA

Applicant

- and -

THE HONOURABLE EDWARD R. WACHOWICH,
CHIEF JUDGE OF THE PROVINCIAL COURT OF ALBERTA

Respondent

REASONS FOR JUDGMENT
of The Honourable Mr. Justice D.B. Mason

I. INTRODUCTION

[1] This is an extremely distressing application because it forces the Court to balance certain fundamental principles of judicial independence. It is an application by Judge John R. Reilly ("Judge Reilly"), a judge of the Provincial Court of Alberta, for judicial review of a decision by Chief Judge Edward R. Wachowich (the "Chief Judge"). The Chief Judge re-assigned Judge Reilly from Canmore to Calgary and directed that he change his residence from Canmore to Calgary. I will refer to this as the "impugned decision".

[2] While these changes were to be effective September 1, 1998, I granted a stay pending the outcome of this application. I previously decided ([1998] A.J. No. 975, supplementary reasons 1998 ABPC 78 (CanLII), [1998] A.J. No. 990) that this Court does have the authority to conduct a judicial review. The Court of Appeal upheld that decision ([1998] A.J. No. 1475). I ordered the Chief Judge to produce the return required by Rule 753.13 of the ***Rules of Court***, which is the documentary "Record" upon which the decision was based. That Record and the parties' arguments before me, including pre-trial briefs, form the basis for the facts outlined in this judgment.

II. ISSUES

1. Can this Court judicially review the Chief Judge's decision? (While this was dealt with in my September 8, 1998 decision, the parties have argued some further points, which I address briefly).

2. What is the appropriate standard of judicial review in this situation?

3. Does a chief judge have the statutory or constitutional authority to re-assign a judge and order a judge to change his or her residence?

4. If a chief judge has such authority in general, was it properly exercised by the Chief Judge in this case?

5. If the Chief Judge here did have the authority to make such a decision, was he required to follow procedural fairness in making it? If so, did he meet the procedural fairness requirement?

III. SUMMARY

[3] The Chief Judge did not have the authority to make the impugned decision. Accordingly, Judge Reilly's re-assignment to Calgary and his change of residence to Calgary cannot be implemented. The concept of "judicial independence" is vital to this case. As stated by the late Sopinka J. in an October 2, 1997 speech to the Ukrainian-Canadian Conference on Judicial Independence and Accountability, judicial independence means that "even if the government doesn't like your decisions, you still have a job." I would broaden that statement to include others besides the traditional concept of "government".

[4] The character of the decision made by the Chief Judge in this case was disciplinary, not administrative, in spite of the collaboration between the Chief Judge and Assistant Chief Judge Brian C. Stevenson ("Assistant Chief Judge Stevenson") to tie it into a proposal made to the Deputy Minister of Justice to consider closing Canmore as a base point for the Provincial Court. The Record shows that although some preliminary administrative consideration had been given to this closure issue and preliminary costing had been done, such considerations were well short of any policy formulation. No consultation had taken place with Judge Reilly as promised. No consultation with other judges or any other participant in the system who might be affected is in evidence from the Record. No consultation is shown respecting the costing of the capital investment and costs and facility use in the event of closure.

[5] All this leads to the inescapable conclusion that tying the decision to transfer Judge Reilly and direct the movement of his residence from Canmore to Calgary with the closure of the Canmore Base Point was a mere subterfuge designed to cast the decision in an administrative context in an effort to disguise that disciplinary action was being meted out.

[6] Also, the Record is clear that the decision was effectively made at the time alleged by counsel for Judge Reilly, that is on or about April 3, 1998. It was put in place by the Chief Judge over the ensuing several weeks. No effective communication was made with Judge Reilly prior to the implementation of the decision as a *fait accompli* on May 26, 1998.

[7] The Chief Judge decided not to refer this matter to the Judicial Council. On my assessment of the law and the statutory authority under the ***Provincial Court Judges Act***, R.S.A. 1998 c.P-20.1 ("***PCJA***") that was an incorrect decision. It is irrelevant whether that was motivated in part by concern for Judge Reilly, including a desire to spare him from being on report before the Judicial Council. The Chief Judge chose to deal with the problem privately. He obviously assumed he had the authority and that such corrective measures were within his jurisdiction. They were not.

[8] It is appreciated that the Chief Judge and Assistant Chief Judge Stevenson faced a dilemma. There were deep differences between the Chief Judge, Assistant Chief Judge Stevenson and Judge Reilly as to Judge Reilly's position respecting the treatment of aboriginals in criminal law matters and the interpretation of the new provisions of the ***Criminal Code*** respecting sentencing of aboriginal offenders. There was also conflict over the place of "restorative justice" in sentencing. Most of the matters at issue between the Chief Judge, Assistant Chief Judge Stevenson and Judge Reilly related to what Judge Reilly had stated in his judgments. Such statements were, therefore, protected by his adjudicative judicial independence. In ***Judicial Independence: The Contemporary Debate*** (Dordrecht: Martinus Nijhoff Publishers, 1985), editors S. Shetreet and J. Deschênes discuss the concept of "substantive independence" (at 630), which encompasses "administrative, procedural and substantive aspects of adjudication". They state:

> Substantive independence means that in the discharge of his function a judge is subject to nothing but the law and the commands of his conscience. This aspect of the concept of judicial independence refers to the neutrality of mind of the judge, to his impartiality and his total freedom from irrelevant pressures.

I will elaborate on this concept later in these Reasons.

[9] In my assessment, the issue in the present case is not so much whether Judge Reilly had lost his objectivity. Rather, it is that the Chief Judge and Assistant Chief Judge Stevenson were divided from Judge Reilly and his jurisprudential perspective as to the proper objectives and application of the justice system in general, and sentencing principles in particular, with respect to aboriginal peoples in a criminal law setting.

[10] There is no doubt that Judge Reilly went outside of his jurisdiction in his demands for the investigation into the affairs of the Stoney Reserve under the guise of obtaining pre-sentencing material for the purposes of sentencing Hunter. This was cured by reading down the scope of the request by this Court on judicial review, through the judgment of LoVecchio J. of this Court. Judges must accept that the freedoms attached to their adjudicative independence impose concurrent responsibilities to address only those issues properly before them, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before them.

[11] As will be explained later in these Reasons, I am unable to read into the ***PCJA,*** either prior to its amendments or subsequent thereto, any statutory authority which invests in the Chief Judge the administrative authority to re-designate unilaterally where a judge is to reside after the initial appointment.

[12] Counsel for the Chief Judge submits that such authority may be found in s. 2(5) and s.9 of the ***PCJA***. The statute before its amendment treated the designation of the place where a judge shall have his residence by a separate section altogether - s. 13. That is the very section which the Supreme Court of Canada found unconstitutional in ***R. v. Campbell***, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, ruling that it violated s. 11(d) of the ***Charter*** by creating a reasonable apprehension that it could be used to punish judges whose decisions did not favour the government or, alternatively, to favour judges whose decisions did favour the government.

[13] Nothing in the s. 2(5) powers can, in any way, be extended to meet the proposition of counsel for the Chief Judge. Section 2(5) is a statutory attempt to cover the area of authority of a chief judge that has developed over time as necessary for the proper administrative direction of the Court. In turn, this facilitates the proper administration of justice. Again, I elaborate on this point later in these Reasons. Section 2(5)(d) raises concern in that it provides that the Chief Judge can also exercise powers and perform duties as may be prescribed by the Lieutenant Governor in Council. Such a provision could quickly become unconstitutional; for example, if there were purported delegation of duties or powers to the Chief Judge which would encroach upon a judge's judicial independence.

[14] Section 9 of the ***PCJA*** purported to grant the Chief Judge a power to review the conduct of a judge, with authority to take no action, or to reprimand a judge, take corrective measures or refer the matter to the Judicial Council. It is to be noted that this section has now been repealed, although it was in force at the time that the Chief Judge decided to transfer Judge Reilly and re-designate his residence unilaterally. Based on the parallel reasoning in the ***Campbell*** case, the powers in s. 9 would be unconstitutional if these disciplinary powers were effected on the basis that the Chief Judge differed with the judge being disciplined in a matter relating to that judge's adjudicative judicial independence. Giving the Chief Judge any statutory or constitutional power to discipline a judge with whom the Chief Judge disagrees with respect to judgments rendered, would threaten the judge's impartiality, and create the apprehension of bias that such authority could be used to punish judges whose decisions do not conform with the personal jurisprudence of the Chief Judge or, for that matter, to reward those whose judgments do so.

[15] Therefore, nothing in s. 2(5) or in s. 9 gives the Chief Judge authority to transfer a judge from his designated circuit or residence. That power was treated by a separate section in the ***PCJA*** (s. 13), which section has now been ruled unconstitutional by the Supreme Court of Canada in the ***Campbell*** case as invasive of judicial independence. Such an intrusion would violate the core characteristic of security of tenure and the dimension of individual independence. The historical core of judicial independence must remain inviolate and unassailable by any institutional or administrative independence. Restricting the exercise of the power to transfer to a chief judge alone does not cure the defect.

[16] The current amendment to s. 13 now in place provides that only the Judicial Council may make such a determination of re-designation. Such determination would be requested by the Chief Judge and would be approved and effected by the Judicial Council only if, in its opinion, it was necessary for the better administration of justice. This seems to be an effective standard for protecting judges from overzealous disciplinary action.

IV. FACTS

[17] The Record is in two thick volumes, plus a thin addendum volume. It details many events, which the parties went through in great detail. It also contains considerable correspondence. I also note that it contains many excerpts from newspapers, which is curious. I have not drawn these facts from such media excerpts, except to note that certain events caused specific reactions in the media.

[18] I have attempted to summarize the salient facts from the Record and the arguments. It would be impossible to touch on every factual point mentioned by each party. I have, however, taken all of the facts and arguments into consideration in reaching my decision. Throughout this judgment, unless otherwise indicated, references to "Tabs" refer to the documents in the Record.

A. The *Hunter* Pre-Sentencing Decision

[19] Judge Reilly's June 26, 1997 ruling in ***R. v. Hunter*** (1997), 1997 CanLII 24559 (AB CJ), 52 Alta. L.R. (3d) 359 (Prov. Ct.) (Tab 94) sparked considerable public controversy, media interest and political response. The accused, an aboriginal, had plead guilty to a serious spousal assault. The victim was kicked, suffering cuts and severe bruises. Her face was swollen beyond recognition. Both Hunter and the victim were considerably impaired by alcohol at the time. Hunter clearly had an alcohol abuse problem. Before he would consider a proper sentence, Judge Reilly ordered a comprehensive investigation and report by the Chief Crown Prosecutor into "social conditions, political corruption, and financial mismanagement on the Stoney Indian Reserve at Morley". He asked for answers to 17 specific questions, divided into those three categories. He said that this report was necessary for him to address the appropriate sentence, in light of s.718.2(e) of the ***Criminal Code***, which requires the judge to consider all reasonable sanctions in the circumstances other than imprisonment, "with particular attention to the circumstances of aboriginal offenders".

[20] Justice LoVecchio of this Court judicially reviewed Judge Reilly's order, and narrowed its scope on September 26, 1997 ((1997), 1997 CanLII 14834 (AB KB), 53 Alta. L.R. (3d) 169 (Q.B.)) (Tab 64). While LoVecchio J. found that Judge Reilly had the jurisdiction to compel evidence for the sentencing hearing, such jurisdiction is not open-ended: "There must be some logical nexus or relevance between what is being ordered to be produced and the matter under consideration." (at 181).

[21] Justice LoVecchio also held that the sentencing judge's experience in the community will help him or her assess what evidence is required to meet the particular blend of sentencing goals appropriate for the community (at 182). Here, LoVecchio J. characterized parts of Judge Reilly's order as "patently unreasonable", because they lacked the necessary logical nexus (at 183).

[22] In the result, LoVecchio J. upheld asking some of the questions (sometimes in a different form), but disallowed others. His decision was not appealed. A report was prepared based on the narrowed order.

[23] The Record contains many newspaper articles and other materials regarding the public, media and political response to Judge Reilly's ruling (*e.g.*, Tabs 65-93), including mention of a federal Indian Affairs probe into the allegations, triggered by Judge Reilly's ruling (*e.g.*, Tab 83).

B. The *Hunter* Sentencing Decision

[24] Once LoVecchio J. narrowed the scope of the investigation ordered by Judge Reilly, the investigation and accompanying report were prepared and presented to Judge Reilly for his consideration. Judge Reilly then heard submissions as to the appropriate sentence. On November 28, 1997, he gave Hunter a two year suspended sentence, with two years' probation, on certain conditions ([1997] A.J. No. 1215 (Prov. Ct.)) (Tab 47). Judge Reilly specifically noted that he was not following the Court of Appeal's guidelines. He gave extensive reasons, including a large

section on the circumstances of the aboriginal accused, including social, political and historical circumstances.

[25] The Court of Appeal substituted a sentence of 18 months' imprisonment, with the same probation order ([1998] A.J. No. 510 (C.A.)). This decision is not in the Record.

[26] Hunter's counsel admitted at the appeal that a suspended sentence was inappropriate, but argued for a conditional sentence. The Court of Appeal referred to other spousal assault cases, and addressed the interaction of those principles with the principles relating to conditional sentences and to aboriginal offenders. The Court held that s. 718.2(e) is only one factor to consider in imposing a fit sentence, but that Judge Reilly had over-emphasized that one factor. The Court of Appeal made no further comments on Judge Reilly's approach.

[27] Some of the correspondence leading up to the release of the ***Hunter*** sentencing decision is also important. Judge Reilly gave a copy of his draft sentencing reasons to Assistant Judge Stevenson. As the Record does not contain any letter doing this, I cannot be certain with whom the idea originated, but I will assume it originated with Judge Reilly. On October 17, 1997, Judge Reilly's draft reasons and Assistant Judge Stevenson's draft response to Judge Reilly were sent to Judge Cioni for his comments and suggestions (Tab 63). A handwritten addendum to Tab 63, that appears to be from Judge Cioni, indicates that he "concur[red] absolutely" with Assistant Judge Stevenson's draft comments.

[28] On October 21, 1997, Assistant Judge Stevenson wrote to Judge Reilly, commenting on the draft sentencing reasons (Tab 61). I note that Assistant Judge Stevenson offered his response solely as a colleague offering requested comments (which is perfectly proper), not as an Assistant Chief Judge exercising any sort of supervisory role. He then expressed concerns with "unnecessarily inflammatory and confrontational" language, questioned whether some assertions were supported by evidence, and made some other comments.

[29] The Chief Judge's response to this draft and to Assistant Chief Judge Stevenson's comments is at Tab 60. In a handwritten note dated October 28, 1997, he states that the letter is very good, and that if Judge Reilly were to release the judgment, "it could mean his job and definitely he would be before Judicial Council". Another handwritten note (dated October 29, 1997) says "Vijay [Bhardwaj, legal counsel, Provincial Court] read this and he says the bottom line is this judgment should not be delivered".

[30] A letter dated November 25, 1997 from Assistant Chief Judge Stevenson to the Chief Judge mentions a later draft of the sentencing judgment as "toned down", but still going "beyond the issue before him" (Tab 56). This letter also refers to other matters, and I discuss it again later.

[31] As discussed above, the sentencing decision in ***Hunter*** was released on November 28, 1997 (Tab 47), and the sentence was changed on appeal.

C. The *Goodstoney* Case

[32] In ***R. v. Goodstoney*** (24 November 1997), No. 71585673-P10101 (Alta. Prov. Ct.), Judge Reilly refused the Crown's application to revoke Goodstoney's bail for violating a condition of his recognizance (Tab 50). Goodstoney was charged with 11 counts relating to deaths and injuries that he caused driving while impaired (he later plead guilty to the charges - see Tab 34). One of the conditions he was under was to refrain completely from any alcohol use. However, approximately 17 months later, he was found to have alcohol in his system (60 milligrams) while a passenger in a car. Judge Reilly held that this was not a serious enough violation to warrant returning Goodstoney to custody, as he had successfully complied with all of his other conditions until that point.

Goodstoney had spent six days in custody pending this hearing, which Judge Reilly found more proportionate to his conduct than an additional several months before the trial. Judge Reilly also imposed a daily curfew of 9 p.m. to 6 a.m. I note that the Crown did not appeal this decision.

[33] The Chief Judge and Assistant Chief Judge Stevenson appear to have been upset by language Judge Reilly used in giving his decision. Judge Reilly said:

> . . . I think one of the most culpable elements of the original horrible accident in which these four people were killed is that an 18-year-old boy with Grade 8 education who is unemployed, never had any money, is all of a sudden given a cheque by Indian Affairs for $40,000. So he goes on a party. He gets 'roaring' drunk. He gets this new car and he drives it like an idiot and four people get killed. . . . I think the degree of responsibility is shared by society in general and the Department of Indian Affairs in particular when they irresponsibly give people a big chunk of money like that with no training, no help in how they might use it to their own benefit.

Assistant Chief Judge Stevenson's concern is reflected in the November 25, 1997 letter already mentioned (Tab 56), where he refers to "disturbing" comments by Judge Reilly. In my view, he must be referring to the above-cited passage. I note that Assistant Chief Judge Stevenson was careful not to criticize the decision itself, just the comments.

D. The *Twoyoungmen* Case

[34] On February 17, 1998, Judge Reilly released a ruling in ***R. v. Twoyoungmen*** (17 February 1998), No. 7001599-P10101 (Alta. Prov. Ct.) (see Tab 33). In those reasons, he refused the Crown's request for an adjournment. There was to have been a preliminary hearing on the charges of sexual assault, unlawful confinement, assault causing bodily harm, and pointing a firearm. The sole Crown witness was to be the victim, but she did not attend court that day, although she had been subpoenaed. The Crown counsel indicated that he had not met with the witness. The witness had not attended once before, although there was a consensual adjournment at that time.

[35] Judge Reilly was clearly upset with the Crown for not understanding the situation and not communicating with the witness. He stated that he refused the adjournment for two reasons - this was the witness's second failure to appear and, more importantly, there had been no communication between the witness and the Crown counsel. He found the second factor especially disturbing because the witness is aboriginal. Judge Reilly set out several facets of aboriginal culture, including references to ***The Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta - Justice on Trial*** (the ***Cawsey Report***).

[36] According to the judgment, one significant deviation between the "white" justice system and the aboriginals it has been "imposed on" is that the aboriginal society never gave decision-making authority to figures such as judges. Moreover, the aboriginal culture does not pit witnesses, even if victims, against accused, but all work together to reach a solution. Judge Reilly pointed out nine factors which he feels contribute to aboriginal witness's difficulties coming before the courts, including fear of repercussions, cultural ethics, community pride, lack of confidence in the "white" justice system, and lack of relationship between the prosecutor and witness.

[37] Judge Reilly concluded by stating:

> It is a strange result that an alleged domestic abuser is set free because of concerns for the victim, but it is my view that unless some over-all program is established to deal with the widespread incidence of this problem in this community, the hit and miss prosecution of a few offenders will do more harm than

> good. If offenders are unsuccessfully prosecuted they will get the message that they are above the law, and I believe that they will continue to be unsuccessfully prosecuted until something more is done for victims than just handing them a subpoena and leaving them to their own resources to deal with all of the fears and difficulties that they encounter in our justice system.

[38] On March 30, 1998, Assistant Chief Judge Stevenson sent a copy of the ***Twoyoungmen*** decision to the Chief Judge, along with a letter stating, in part (see Tab 25):

> I enclose a recent ruling by Judge Reilly. Its content continues an apparent obsession of Judge Reilly to subjugate the law to his perception of unjust social conditions on the Stoney First Nation Reserve at Morley.
> . . .
>
> The last paragraph of his ruling indicates a pre-judgment attitude that would clearly, in my view, support an application to disqualify him from presiding over any case on the basis of bias.
>
> For these reasons alone, it is my recommendation that Judge Reilly be re-assigned. . . .

The letter then addresses administrative details, as I discuss later in these Reasons. The letter was not copied to Judge Reilly.

E. The Corporal Young Complaint

[39] On February 11, 1998, Corporal W.F. Young of the Royal Canadian Mounted Police sent a letter to Assistant Chief Judge Stevenson making a complaint against Judge Reilly (see Tab 35). This stemmed from a sentencing of two individuals by Judge Reilly. In granting conditional sentences to both, Judge Reilly stated "I am somewhat of the view that, had the officer involved simply been more conciliatory, the difficulties may have been avoided with this man." (see Tab 36, ***R. v. Sigrist*** (5 February 1998) No. 71720668-P10101.02, App. No. 9801-0354-s5 (Alta. Prov. Ct.), p.6). I note that the Crown initially appealed the sentence, but abandoned the appeal on April 20, 1998.

[40] Corporal Young stated that he was more concerned over comments made by Judge Reilly at the conclusion of court in the presence of Corporal Young's subordinate and the Crown counsel. It appears that the comments were made after court had adjourned for the day. According to Corporal Young's letter, Judge Reilly stated the reason for lenient sentences "was due to the fact that I [Corporal Young] have had several cases before the courts recently in which the use of force played in the arrest of the individuals involved." Judge Reilly apparently stated that Corporal Young was "too aggressive", and that he was contemplating reporting the corporal to his supervisor. As of the date of Corporal Young's letter, no such report had been made.

[41] Corporal Young then outlined several concerns, foremost of which was his concern that Judge Reilly will not adjudicate fairly and impartially in cases where Corporal Young is involved.

[42] Assistant Judge Stevenson initiated an investigation by contacting Judge Reilly and the Crown counsel for their recollections. The Crown counsel's response (see Tab 29) confirms the information set out in Corporal Young's complaint letter. Judge Reilly's response (see Tab 28) seems to agree with the main facts, but also states that Corporal Young's complaint is an example of his confrontational attitude. Judge Reilly referred to another situation that caused him concern that Corporal Young used "excessive force" or "gratuitous violence".

[43] Judge Reilly stated that his negative view of Corporal Young was a mitigating factor in the sentencing. Finally, Judge Reilly stated that it is the accused who is entitled to an independent and impartial tribunal. Any problems Corporal Young encounters in Judge Reilly's court are due to Corporal Young's own behaviour.

[44] The Chief Judge responded to Corporal Young's complaint on May 21, 1998 (see Tab 12). He stated that the off-bench comments (after court had adjourned) were inappropriate, that he had advised Judge Reilly of that (see Tab 11), and that he hoped it would not be repeated. However, the on-bench comments (as quoted from the transcript) are appealable, and the appeal was abandoned. As to Corporal Young's concern that Judge Reilly has lost impartiality regarding the corporal, the Chief Judge stated that the allegation is too broad. Allegations of bias or lack of impartiality need to be raised with a judge on a case by case basis - "Blanket disqualification can not be imposed administratively." The drafts of Tabs 11 and 12 were earlier sent to Assistant Chief Judge Stevenson for comments (Tab 14), along with the drafts of what have become the three main letters (Tabs 8, 9 and 10).

F. The Tsuu T'ina Nation Public Inquiry

[45] On March 26, 1998, Judge Reilly wrote to Chief Judge Wachowich, asking to be considered as the Provincial Judge appointed to hear the above inquiry (see Tab 27). Judge Reilly stated that he would have the confidence of the Treaty 7 Nations as someone who would be fair and thorough. He went through some of his efforts to educate himself on aboriginal justice matters. He also acknowledged that some of his fellow judges have suggested that he has been "grandstanding". Finally, he said that he wished to hear the inquiry "in order to further contribute to my understanding of the Aboriginal situation and to write a report that will hopefully be a contribution to Aboriginal/main-stream-Canadian relations."

[46] The Chief Judge responded on March 27, 1998 (see Tab 26). He stated that he was surprised by the request and emphasized that the hearing is "limited to finding of facts, circumstances, cause, and manner of death of the fatality victims", not to edify a judge, nor to make any political statement. After some further comments on the perception of Judge Reilly by his fellow judges and others, he referred to the "apparent apprehension of bias" against Judge Reilly, and concluded that Judge Reilly's solicitation of the appointment was "almost conduct unbecoming of a judge".

[47] This exchange led to two more letters, which are important to this application. They are a letter from Judge Reilly to the Chief Judge, dated April 1, 1998 (see Tab 24), and the Chief Judge's reply of April 3, 1998 (Tab 22). I note that the Chief Judge sent copies of each to Assistant Chief Judge Stevenson (see Tab 23). Excerpts of both can be found in the Appendix. I discuss both in detail later in these Reasons.

G. Miscellaneous Incidents

[48] Judge Reilly attended, and was keynote speaker at, a November 25-27, 1997 seminar entitled "Building Aboriginal Community-Controlled Justice Systems". While Assistant Chief Judge Stevenson stated in a November 25, 1997 letter to the Chief Judge (Tab 56) that he was aware Judge Reilly was attending the seminar, Assistant Chief Judge Stevenson wrote that he was unaware of Judge Reilly's position as keynote speaker until November 24, 1997: "I am concerned that he was being less than forthright with me on the extent of his involvement with the seminar".

[49] Assistant Chief Judge Stevenson faxed a copy of Judge Reilly's speech to the Chief Judge on November 28, 1997 at 3:57 p.m. (Tab 54). This was a few hours before the speech was delivered, according to the seminar schedule at Tab 48 and attached to Tab 56.

[50] The last reference to this matter that I note in the Record is a December 1, 1997 memorandum from Assistant Chief Judge Stevenson to all Provincial Court Judges in Calgary Criminal Division (copied to the Chief Judge) (Tab 46). It attaches a copy of Judge Reilly's November 28 speech and states:

> I attach a copy of an address given by Judge Reilly on Friday, November 28, 1997 at the closing banquet of a week-long seminar entitled "Aboriginal Community-Controlled Justice Systems". It may be of interest to you and may give you some insight in relation to recen[sic] judicial and non-judicial pronouncements by our colleague.

This memo does not appear to have been sent to or copied to Judge Reilly.

[51] There are three letters in the Record dealing with the issue of sentencing circles and family group sentencing (restorative justice): (1) a February 5, 1998 letter from the Chief Judge to Judge Reilly (Tab 98); (2) a February 9, 1998 letter from Judge Reilly to the Chief Judge (Tab 97); and (3) a February 14, 1998 letter from the Chief Judge to Judge Reilly (Tab 96). All three were copied to Assistant Chief Judge Stevenson.

[52] In Tab 98, the Chief Judge responded to Judge Reilly's discussion of family group conferencing. While he applauded Judge Reilly's interest in the area, he stressed that it is not an area in which judges should organize seminars: ". . . that role belongs to community leaders, law reformers and other stake holders in the justice system like the crown (sic), corrections and police." Therefore, the Chief Judge did not approve Judge Reilly's participation in organizing a conference.

[53] According to Judge Reilly's Tab 97 letter, he had already taken organizational steps before receiving the Tab 98 letter. He asked the Chief Judge to consider several points, including the need to get the Stoneys involved in the justice system. He also mentioned that family group conferencing may be a good alternative to sentencing circles, which he stated some Stoneys are unwilling to use, for fear of repercussions. Finally, Judge Reilly noted that he hoped to use the method in an upcoming case, even though the private prosecutor was unwilling (whereupon Judge Reilly "indicated that if I found him to be acting unreasonably I would enter a Judicial Stay . . .").

[54] In reply, at Tab 96, the Chief Judge restated his opposition to judges participating in or organizing conferences in such matters: "Regrettably therefore, I reiterate that I cannot and do not approve of your participation in organizing any conference on this subject. I consider this matter now closed."

[55] I also note Tab 95, which contains a May 28, 1997 letter from Judge Reilly to the Chief Judge, along with Judge Reilly's reasons in ***R. v. McKay*** (27 May 1997) No. 61557104-P10101 (Alta. Prov. Ct.). In ***McKay***, Judge Reilly used family group conferencing for the first time. The letter refers to this and states that Judge Reilly considers it a proper exercise of his sentencing discretion to use the method with non-aboriginals. He also stated that he had not ignored the Chief Judge's February 14 letter:

> . . . Pursuant to that letter I advised the R.C.M.P. that it was your direction that I not participate in the organizing a conference of this kind. They were already committed to present the program and did so. Further to your admonition that I 'can only participate as a spectator and applaud from the sidelines' I encouraged attendance and will continue to encourage its use.

I hope this meets with your approval.

[56] The Record does not appear to contain any further reference to this matter.

[57] There are also materials in the Record detailing Judge Reilly's withdrawal from a commitment to speak during the Calgary Chamber of Commerce, Aboriginal Awareness Week. On June 11, 1998, Judge Reilly sent some materials to the Chief Judge, including Judge Reilly's proposed speaking notes for the conference (Tab 4). After both the Chief Judge and Assistant Judge Stevenson provided negative comments, including statements that the comments contravened judicial ethics (Tabs 2 and 3), Judge Reilly withdrew (Tab 1). I have described these events only because they are part of the filed Record. However, I note that these particular events occurred after the impugned decision was made and communicated to Judge Reilly. They could have formed no part of the impugned decision and are not a factor in these Reasons.

H. Judge Reilly's Complaint to the Judicial Council

[58] The parties returned before me on January 14, 1999 to address a complaint sent by Judge Reilly to the Judicial Council following the close of submissions in this case on December 18, 1998. The December 21, 1998 complaint relates to matters that are also the subject of this judicial review application. The complaint is directed at both the Chief Judge and Assistant Chief Judge Stevenson.

[59] While this complaint letter does not affect the impugned decision, which is the issue before me, it does potentially affect counsel for the Chief Judge's argument that Judge Reilly's proper course of action was to go to the Judicial Council, not to file this application. I deal with that argument later in these Reasons.

I. Other Relevant Documents

[60] Certain other documents are particularly relevant to this application. I have reproduced portions or summaries of those documents, as well as some already referred to, in the Appendix attached to these Reasons, and will refer to them throughout the Reasons, as necessary.

V. ARGUMENTS

[61] Each party made lengthy and detailed submissions before me, in addition to their comprehensive pre-trial briefs. Each party also took a different approach and viewed the issues from different angles. I will attempt to summarize briefly the framework and position laid out by each before addressing the issues with my own framework.

[62] Counsel for Judge Reilly (Mr. Hunter) sees the impugned decision as an unconstitutional interference with Judge Reilly's adjudicative independence. Mr. Hunter also alleges that the decision to close the Canmore Base Point was merely a convenient excuse to justify Judge Reilly's transfer.

[63] Counsel for the Chief Judge (Mr. Tavender) argues that the Chief Judge was not attempting to, and did not, interfere with Judge Reilly's adjudicative independence. According to Mr. Tavender, Judge Reilly had to be dealt with (from both an administrative and disciplinary standpoint) because he had lost his objectivity and impartiality regarding aboriginal people. Finally, Mr. Tavender argues that the transfer decision was made in conjunction with a valid cost-saving administrative decision to close the Canmore Base Point.

[64] As I have already reviewed the basic chronology and the matters of ***Hunter***, the ***Hunter*** sentencing, ***Goodstoney*** and ***Twoyoungmen*** above, I will not repeat all of those facts, but only deal with each party's interpretation of the incidents.

A. Counsel for Judge Reilly (Mr. Hunter)

[65] Mr. Hunter presented the oral argument on behalf of Judge Reilly. He divided his submissions into seven areas: (1) the impugned decision itself; (2) authority and constitutionality; (3) the role of the Judicial Council; (4) the availability of judicial review of the impugned decision; (5) Judge Reilly's off-bench conduct; (6) comments on the Return; and (7) this Court's discretion in the judicial review process. The written argument also addressed the issues of standard of judicial review and procedural fairness. I summarize these here as points 8 and 9, respectively.

1. The Impugned Decision

[66] Mr. Hunter characterizes the Chief Judge's decision as punitive and disciplinary, made because of Judge Reilly's on-bench conduct. That is, Mr. Hunter argues that the decision was made because the Chief Judge, and Assistant Chief Judge Stevenson, disagreed with Judge Reilly's decision-making. Mr. Hunter continually emphasizes that criticism as shown in the Record is for the appellate court - it is an affront to adjudicative judicial independence for anyone, including a chief judge or assistant chief judge, to attempt to influence the course of a judge's decision-making.

[67] Mr. Hunter further submits that the actual decision to transfer Judge Reilly was made on April 3, 1998, as indicated by the handwritten note of the Chief Judge (at Tab 25 - see Appendix). According to Mr. Hunter, all of the documents and correspondence after this point are merely to provide a cover story for the plan of moving Judge Reilly. That is, the actual decision was made on April 3, 1998, and it was made for the main purpose of moving Judge Reilly, not for any administrative or cost-saving reasons. Mr. Hunter calls the combined effect of this process the "chill effect", whereby Judge Reilly, and all other Provincial Court judges, are made aware that the Chief Judge will move or otherwise discipline them if he disagrees with the content of their decisions. Mr. Hunter also claims that Judge Reilly was entitled to notice of what was being planned, and that there was a deliberate effort made to keep him from getting such notice.

2. Authority and Constitutionality

[68] Mr. Hunter states that the Provincial Court is a statutory tribunal, with its jurisdiction limited by its enabling statute and by the Constitution. This appears to be common ground, although Mr. Tavender states that its jurisdiction is supplemented by common law principles. Mr. Hunter then argues that the powers of the Chief Judge, as a statutory delegate, are limited by the provisions in the statute, and that the Chief Judge here acted outside of his statutory authority in re-assigning Judge Reilly. As the decision was made outside the Chief Judge's administrative and disciplinary jurisdiction, it is unconstitutional. Alternatively, it is unsustainable as being made for an improper purpose, based on an improper consideration, made in breach of applicable rules of natural justice, or determined to be constitutionally impermissible.

[69] Regarding the constitutionality of the Chief Judge's decision, Mr. Hunter submits that the Chief Judge has no constitutional power to interfere with the judicial adjudicative independence of another judge, even if the Chief Judge does have the authority to re-assign a judge. Adjudicative independence is essential so that justice is done and is seen to be done. Mr. Hunter argues that the public must know that a judge is free to make a decision without fear of sanctions by the Chief Judge if the Chief Judge disapproves.

3. Role of the Judicial Council

[70] Mr. Hunter agrees with Mr. Tavender that judicial review is not available where there is an adequate alternative remedy. Here, however, Mr. Hunter submits that there is no adequate alternative remedy before the Judicial Council, as the Judicial Council does not have the power to grant the relief that Judge Reilly is seeking here.

4. The Availability of Judicial Review of the Impugned Decision

[71] As in the earlier arguments before me, Mr. Hunter again contends that judicial review is available in this situation.

[72] As he mentioned in the earlier hearing on this matter (on the jurisdictional issue), Mr. Hunter states that there is no privative clause and no immunity in these circumstances. Further, as already discussed, he argues that there is no adequate alternative remedy here.

5. Off-Bench Conduct and Notice

[73] Mr. Hunter submits that there was no adequate warning about Judge Reilly's off-bench conduct, such that he would be aware that the Chief Judge was setting himself up to conduct the investigation, prosecution, conviction, sanction, and punishment of Judge Reilly without a hearing.

6. Comments on the Return

[74] Mr. Hunter notes that Tabs 1 to 6 of the Return are documents dated after May 26, 1998. As such, he submits they could not have had any impact on the impugned decision. He also comments on the large number of newspaper clippings contained in the Return.

7. Court's Discretion in the Judicial Review Process

[75] Finally, Mr. Hunter submits that the Court should exercise its discretion in Judge Reilly's favour, as Judge Reilly was given no notice or hearing. That is, Mr. Hunter argues that the decision was not made with procedural fairness; thus, the decision should not enjoy any favourable exercise of discretion.

8. Standard of Judicial Review

[76] Mr. Hunter argues that the extent to which a decision such as this may be judicially reviewed depends, in part, on how the decision is characterized. However, he further submits that all decisions made pursuant to statutory authority are liable to review (regardless of characterization) unless such review has been clearly prohibited by the Legislature through a private clause.

9. Procedural Fairness

[77] Mr. Hunter argues that the Chief Judge did not accord Judge Reilly procedural fairness in reaching the decision to transfer Judge Reilly and order him to move his residence.

B. Counsel for the Chief Judge (Mr. Tavender)

1. General

[78] Mr. Tavender approaches the matter using a different framework. He first emphasizes that neither he nor the Chief Judge question Judge Reilly's sincerity in the views he has expressed, on and off the bench. Nor, he says, did the Chief Judge interfere with Judge Reilly's adjudicative independence. However, Mr. Tavender states that that is not the issue. In his submission, the real issue as "how and under what circumstances the applicant should be held accountable to his Chief Judge in respect of the perception that the applicant has lost his objectivity which gives rise to concerns of judicial conduct in a proper area of responsibility of a Chief Judge." (transcript, p.105, lines 2-7).

[79] Mr. Tavender argues that it is inappropriate for Mr. Hunter to draw certain conclusions from the Record, when there has been no sworn evidence, oral testimony, or cross-examination.

2. Reasons for the Move

[80] Mr. Tavender submits that there were clearly two reasons for the decision to move Judge Reilly. The primary reason was because of concerns over his loss of objectivity, and an appearance

of bias and partiality, as demonstrated in the Record. The secondary reason was the administrative, cost-saving ground.

3. Role of the Chief Judge, Judicial Council and the Court of Appeal

[81] Mr. Tavender submits a different view of the roles of the Chief Judge, Judicial Council and the Court of Appeal than does Mr. Hunter. In Mr. Tavender's interpretation, Mr. Hunter claims that the contents of judgments are matters to be dealt with only by the Court of Appeal, with no jurisdiction for the Chief Judge to take any administrative or disciplinary measures. Mr. Tavender, however, submits that judges are responsible to their Chief Judge for judicial conduct both on and off the bench. Here, a loss of objectivity or impartiality, as shown in the decisions, is improper judicial conduct which is properly dealt with by the Chief Judge. Mr. Tavender states that the accounting for such improper judicial conduct, under the terms of the ***Provincial Court Judges' Act***, is to the Chief Judge, the Judicial Council and, ultimately, the Lieutenant Governor in Council.

[82] Consequently, Mr. Tavender asks this Court to protect the institutional independence of the office of the Chief Judge. In his submission, this will internalize such disputes so that they are dealt with by chief judges and Judicial Councils, which is consistent with the legislative scheme of not airing such conflicts publicly.

[83] He states that the alternative approach, which he does not favour, is to enhance the individual independence of puisne judges, so that they can resist directions of a chief judge and allow them to challenge publicly the decisions of their chief judges. This would, in his view, indeed cause a "chilling effect", but it is chief judges who would be "chilled".

4. Specific Instances that Allegedly Demonstrate Bias or Loss of Impartiality

[84] Mr. Tavender submits that several of the specific instances discussed in the "Facts" sections demonstrate that Judge Reilly has bias or has lost his impartiality in dealing with aboriginal matters. He points to: (1) Judge Reilly's interest in sentencing circles and other restorative justice initiatives; (2) the ***Hunter*** pre-sentencing decision; (3) the ***Hunter*** sentencing decision; (4) Judge Reilly being keynote speaker at a seminar; (5) the ***Goodstoney*** decision; (6) Judge Reilly's concern over a potential Aboriginal Court for the Tsuu T'ina and Stoney Reserves; (7) the ***Twoyoungmen*** decision (which Mr. Tavender refers to as the "last straw"); (8) Judge Reilly's request to conduct the Tsuu T'ina inquiry; (9) reaction by the public and in the media, particularly to the controversial ***Hunter*** pre-sentencing decision; and (10) the complaint by Corporal Young.

5. Legal Issues

[85] Mr. Tavender submits that the ***PCJA***, supplemented by common law principles, is a comprehensive scheme for the operation of the Provincial Court, including the appointment, powers, management, discipline and removal of provincial court judges. He argues that a chief judge has the power to order a puisne judge to move, as well as to take other disciplinary measures to enforce compliance with judicial ethics. He further argues that the Judicial Council provides an adequate alternative remedy, and that there are only natural justice or procedural fairness requirements at the Judicial Council stage. He also claims that the Chief Judge has immunity under s. 16 of the ***PCJA*** for this decision. Finally, he notes that the Court has discretion when ruling on a judicial review application, and urges me to use that discretion to disallow the relief sought by Judge Reilly.

VI. ANALYSIS

Issue 1: Can this Court judicially review the Chief Judge's decision?

Yes.

A. Summary

[86] Although I ruled earlier that judicial review of the decision of the Chief Judge was available in this case, arguments were presented by Mr. Tavender that referral to the Judicial Council was still an available course of action and that this availability augured for a renewed consideration of the discretion of this Court as to whether or not the relief requested by Judge Reilly should be granted. Mr. Tavender challenged my previous ruling before the Court of Appeal. That Court rejected his submissions and affirmed that this Court has jurisdiction to conduct the judicial review and further affirmed the direction that the Chief Judge return a record for the purposes of that review. I reiterate my earlier comments and note that nothing presented by Mr. Tavender in the current application has changed my view.

[87] My previous decision ruled that Judge Reilly's request for judicial review of the validity of the decision of the Chief Judge was not a matter for the Judicial Council for two reasons. First, it was not within the statutory mandate of the Judicial Council. Second, the request for a judicial review by Judge Reilly calls for a ruling as to the constitutionality of the Chief Judge's decision, whether under his statutory powers or pursuant to the precepts of judicial independence under the unwritten constitution as defined by the Supreme Court of Canada in the ***Campbell*** case.

[88] Had the Chief Judge referred the matter by way of complaint to the Judicial Council, as he should have, the Judicial Council under s. 11 would have had the jurisdiction and the authority to address such a complaint. By taking unto himself the process - "investigating" Judge Reilly, gathering evidence, making the decision and implementing it - the Chief Judge purported to give himself extensive disciplinary powers over individual judges of his court, and thus put into issue the disciplinary power of a chief judge with respect to any one or more of the members of his court.

[89] It is this unilateral action that is under attack. If it is beyond the statutory powers and finds no authority based on the common law powers under the Constitution, then the action is substantially *ultra vires* and must be quashed on judicial review. This is addressed further under the third issue.

[90] Defining the range of a chief judge's powers is beyond the scope of this judgment. While a chief judge may have the power to, for example, encourage a judge to release judgments more quickly, the disciplinary powers purportedly exercised by the Chief Judge in this case unquestionably fall outside any possible scope allowed for by the principles of judicial independence and the development of the position of chief judge as first among equals. If Judge Reilly's situation needs to be addressed, it must be done via powers exercised by the Judicial Council, not by the Chief Judge taking the powers for himself.

[91] There is an excellent passage from ***Rees v. Crane***, [1994] 2 A.C. 173 (P.C.) at 187-88, which discusses and distinguishes the administrative and disciplinary powers of a chief judge:

> . . . the Chief Justice must have the power to organise the procedures and sitting of the courts in such way as is reasonably necessary for the due administration of justice. This may involve allocating a judge to do particular work, to take on administrative tasks, requiring him not to sit if it is necessary because of the backlog of reserved judgments in the particular judge's list, or because of such matters as illness, accident or family or public obligations. It is anticipated that these administrative arrangements will normally be made amicably and after discussion between the Chief Justice and the judge concerned. It may also be necessary, if allegations are made against the judge, that his work programme should be rearranged so that for example he only does a particular type of work for a period, or does not sit on a particular type of case or even temporarily he does not

> sit at all. Again this kind of arrangement can be and should be capable of being made by agreement or at least after frank and open discussion between the Chief Justice and the judge concerned.
>
> The exercise of these powers, however, must be seen against the specific provisions of the Constitution [of the Republic of Trinidad and Tobago 1976] relating to the suspension of a judge's activities or the termination of his appointment. It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a judge cannot be suspended nor can his appointment be terminated by others or in other ways. The issue in the present case is thus whether what Bernard C.J. did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.
>
> Their Lordships agree with the majority in the Court of Appeal that what happened here went beyond mere administrative arrangement.

The Privy Council held there was effectively an indefinite suspension in that case. I will return to the facts of ***Rees*** later in these Reasons.

[92] I also ruled in my earlier decision that the impugned decision was not part of any adjudicative decision-making to which immunity would apply pursuant to s. 16 of the ***PCJA*** or at common law. The only redress available to Judge Reilly respecting these directives of his Chief Judge is the process of judicial review. Mr. Tavender's further arguments have not convinced me otherwise.

B. Jurisdiction and Discretion for Judicial Review

[93] As mentioned in the above summary, I addressed this matter in my original judgment. Mr. Hunter again argues before me that there should be judicial review in these circumstances, while Mr. Tavender again takes the opposite viewpoint. Mr. Tavender approaches the matter from a somewhat different angle this time. He contends that this Court should opt not to exercise its discretion to judicially review. His reasons for not exercising the discretion are substantially the same as his earlier arguments claiming that this Court does not have the jurisdiction for judicial review. Although none of Mr. Tavender's arguments were persuasive, I will address them briefly for the sake of completeness.

[94] Mr. Hunter states that superior courts have an inherent jurisdiction for judicial review in five situations: (1) substantive *ultra vires*; (2) exercising discretion improperly (malice, bad faith, irrelevant considerations); (3) not considering relevant matters; (4) serious procedural errors; and (5) errors of law. His written brief summarizes his submissions in this area (p. 12):

> a. The Decision is subject to judicial review for lack of or abuse of jurisdiction regardless of how it is characterized;
>
> b. There is no evidentiary basis on which to characterize the decision as administrative;
>
> c. Even if administrative, there is no apparent administrative authority in the Chief Judge to designate a judge's residence;
>
> d. There is no administrative or judicial authority in the Chief Judge to designate a judge's residence because of displeasure with the content of the judge's decisions in the cases before him;

e. Characterization of the Decision as disciplinary does not validate the Decision but does make it subject to rules of fairness which the Applicant will submit were not observed; and

f. On the evidence, there is no indication that in making the decision the Appellant [sic] acted pursuant to any authority he may have had while there is every indication that he acted wrongly, arbitrarily and without jurisdiction.

[95] Mr. Hunter also states that there is no adequate alternative remedy here. He claims that this matter does not fall within the wording of ***PCJA***, s. 11(1)(b), as it is not a complaint "respecting the lack of competence of, conduct or misbehaviour of, or neglect of duty by, judges or the inability of judges to perform their duties.".

[96] Mr. Hunter disputes Mr. Tavender's argument (addressed later) that the fact that Judge Reilly filed the December 21, 1998 complaint with the Judicial Council means that the Judicial Council is an adequate alternative remedy to the relief sought from this Court. Mr. Hunter re-emphasizes that the relief available from the Judicial Council is not the same as that available from this Court. He also notes that Judge Reilly's complaint relates to the Chief Judge's "conduct", which is clearly within the Judicial Council's authority under s. 11(1)(b) of the ***PCJA***.

[97] Mr. Hunter also points to ***Mackin v. New Brunswick (Minister of Finance)***, 1998 CanLII 9800 (NB KB), [1998] N.B.J. No. 267 (Q.B.). The plaintiff there was Judge Mackin, a Provincial Court Judge. He brought an action for damages and declaratory relief, relating to the constitutional validity of provincial legislation that purported to repeal supernumerary provisions. The Court of Queen's Bench held that the repeal was unconstitutional.

[98] The relevant issue for the present case was Judge Mackin's dispute with his chief judge. Pending the outcome of the original court challenge, Judge Mackin stated that he felt it would be improper for him to hear cases. The chief judge directed him to hear cases. Judge Mackin unsuccessfully sought a court order prohibiting the chief judge from assigning him cases or requiring him to perform judicial duties. The chief judge later obtained an order of mandamus forbidding Judge Mackin from recusing or disqualifying himself. Judge Mackin continued to adjourn or stay cases, leading to a complaint filed against him by the Minister of Justice with the Judicial Council (for misconduct or neglect of duty).

[99] The Judicial Council dismissed the complaint, stating that it had no jurisdiction to resolve the important legal issues relating to the independence of the judiciary. Moreover, it could not deal with the complaint until the Court dealt with the legal issues in the original challenge. Therefore, the complaint was premature. Relying on this authority, Mr. Hunter submits that (apart from his argument that the Judicial Council has no authority to grant the remedy sought before this Court) the Judicial Council will not deal with Judge Reilly's complaint until the matters before this Court are resolved.

[100] Mr. Hunter also mentions that there have been some concerns raised over the existence (***R. v. Campbell***, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 at 146-47) and constitutionality (***R. v. Campbell*** (1994), 1994 CanLII 5258 (AB KB), 25 Alta. L.R. (3d) 158 (Q.B.) at 255-58) of the Provincial Judicial Council. I need not deal with those concerns in this case.

[101] Mr. Tavender emphasizes that the Judicial Council does have a broad enough jurisdiction to declare the Chief Judge's decision a nullity, to decide if his act was unconstitutional, and to

determine if any procedural fairness requirements had been met (and if not, whether any defects could be cured). He also argues that the Judicial Council provides an adequate alternative remedy, so that this Court should not exercise its discretion in favour of granting a judicial review of the impugned decision. He cites several authorities (brief, para. 52) for the proposition that the Judicial Council has a broad enough jurisdiction to provide an adequate alternative remedy. However, those authorities do not, in my view, support that contention. First, I note that the authorities largely refer to the Canadian Judicial Council - a completely different entity. While I accept that the provincial Judicial Council has powers of inquiry (see ***PCJA***, s. 11) and will "search for the truth", the issue here is not the Judicial Council's investigative powers, but its remedial authority. I cannot find that the Judicial Council has the jurisdiction to grant an adequate alternative remedy. I also cannot equate, as Mr. Tavender urges, the powers of the Judicial Council with the powers of a chief judge. The roles are not, and cannot be, interchangeable.

[102] Mr. Tavender cites ***C.U.P.E. v. Montreal***, 1997 CanLII 386 (SCC), [1997] 1 S.C.R. 793 and ***C.P. Ltd. v Matsqui Indian Band***, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3 as authorities for using the purposive and functional approach when interpreting the powers of the Judicial Council (***C.P. Ltd.*** at 24-25). In ***C.P. Ltd.***, the appellant Indian bands each had the power to pass taxation by-laws. One by-law provided for a lengthy appeal process; the others for a shorter appeal process. Both processes ended in the Federal Court, Trial Division. When C.P. Ltd. received its assessments, it commenced a judicial review application in the Federal Court, Trial Division, claiming that its lands could not be so taxed, as they were not "in the reserve". The Federal Court of Appeal, in reversing the Trial Division, held that the right of appeal to the Trial Division was not an adequate alternative remedy. The majority of the Supreme Court of Canada dismissed the appeal, as the appeal tribunals were not an adequate alternative remedy (at 61).

[103] The majority discussed the importance of using a "purposive and functional" approach in these circumstances, because of Parliament's objective in creating the new Indian taxation powers (at 24). This focuses the inquiry on the legislature's intent (at 24-25). While I appreciate Mr. Tavender's argument on this point, I cannot agree that the Judicial Council provides Judge Reilly with an adequate alternative remedy in these circumstances, as it cannot grant the remedy he seeks.

[104] Mr. Tavender also refers to ***Ruffo v. Conseil de la Magistrature***, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, emphasizing that the chief judge's complaint to the Judicial Council was upheld, and that any lingering problems of a Judicial Council decision can then be taken to the courts. As discussed elsewhere, ***Ruffo*** is a very different situation, precisely because the chief judge there did follow the proper course of action.

[105] Regarding Judge Reilly's December 21, 1998 complaint to the Judicial Council, Mr. Tavender submits that the existence of this complaint proves his argument that Judge Reilly has an adequate alternative remedy at the Judicial Council. Therefore, he argues that this Court should exercise its discretion to deny Judge Reilly a remedy in this judicial review application.

[106] In response to Mr. Hunter's submission on the ***Mackin*** case (where the Judicial Council stated it did not have authority to deal with the legal issues relating to judicial independence, and would not hear the Judicial Council complaint in the meantime), Mr. Tavender states that ***Mackin, Ruffo*** and ***Gratton v. Canadian Judicial Council***, 1994 CanLII 3495 (FC), [1994] 2 F.C. 769 (T.D.) all dealt with a challenge to the constitutionality of legislation. That, says Mr. Tavender, is, of course, beyond the scope of a complaint to the Judicial Council. He would distinguish the present case. While the present case does not deal with the constitutionality of legislation, the legal issues (including constitutional issues) on judicial independence are, in my view, matters within the Court's jurisdiction. The Judicial Council has a much different mandate.

1. Adequate Alternative Remedy

[107] I have already decided that the Judicial Council does not provide an adequate alternative remedy in this situation. The Judicial Council cannot provide the remedy that Judge Reilly is seeking - namely, declaring the impugned decision to be a nullity and setting it aside. Nor is it appropriate for the Judicial Council to determine the constitutionality of the impugned decision and the balance among different aspects of judicial independence. I agree with the statement in ***Mackin*** that a complaint to the Judicial Council would be premature where there are "important issues of law respecting the independence of the judiciary" (at para.14 of the findings of fact). The other authorities cited by Mr. Tavender are not helpful on this point.

[108] Mr. Tavender presented several additional authorities on the question of an adequate alternative remedy. For example, the majority of the Supreme Court of Canada held in ***Harelkin v. University of Regina***, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561 that a student's right of appeal to the university's senate was an adequate alternative remedy to seeking certiorari from the court. The student had been required to discontinue his studies. The senate on appeal would have dealt with precisely the same matter, as it had the right to "hear and decide" the issue (at 588). That is not comparable to the present situation, where the Judicial Council could only have examined a complaint against the Chief Judge, not nullified the Chief Judge's decision.

[109] In my view, it is irrelevant that Judge Reilly filed a complaint with the Judicial Council on December 21, 1998 against the Chief Judge and Assistant Chief Judge Stevenson. Judge Reilly is entitled under s.11(1) of the ***PCJA*** to file such a complaint, respecting the ". . . conduct or misbehaviour of, or neglect of duty by" those parties. This is entirely separate from the judicial review proceeding. In my view, the mere filing of this complaint is not any sort of admission or acknowledgment by Judge Reilly that he has an adequate alternative remedy at the Judicial Council. He is, in fact, seeking an entirely different type of remedy from the Judicial Council.

[110] I do accept Mr. Tavender's contention that complaints should go to the Judicial Council, when within the scope of s.11 of the ***PCJA***. Moreover, I agree that there is recourse to the courts after the Judicial Council makes a decision (as in ***Ruffo***). The problem with Mr. Tavender's argument is that the complaint that should have gone to the Judicial Council was the Chief Judge's problems with Judge Reilly, rather that Judge Reilly's problems with the Chief Judge's impugned decision. Had the Chief Judge filed a complaint about Judge Reilly with the Judicial Council, this Court would not review matters relating to that complaint unless asked to after the Judicial Council made a ruling. Here, however, the Chief Judge decided, for whatever reason, not to use that available and acceptable process. Accordingly, it is the Chief Judge himself who opened up the availability of judicial review.

2. Discretion

[111] Mr. Hunter also argues that the Court should exercise its discretion in Judge Reilly's favour, as Judge Reilly was given no notice or hearing. That is, Mr. Hunter argues that the impugned decision should not enjoy any favourable exercise of discretion because it was not made with procedural fairness.

[112] In discussing discretion, Mr. Tavender emphasizes the discretionary nature of granting either certiorari or discretionary relief in a judicial review application, as indicated in Rule 753.04 of the Alberta ***Rules of Court***. He submits that factors that courts consider in deciding whether to exercise that discretion include: (1) the subject matter; (2) the intent and framework of the legislation; (3) whether there has been a serious injustice; and (4) whether there is an adequate alternative remedy.

[113] Regarding the subject matter, Mr. Tavender notes the important public policy considerations that are at issue. For example, courts have been reluctant to interfere in internal disciplinary matters in the armed services, the police force and penitentiaries. Mr. Tavender argues

that even more restraint should be shown when the judiciary is the subject matter. This should have remained, in his submission, a private and internal dispute within the administration of justice system, similar to the way a university was found to be the appropriate sphere for a matter of "substantial internal autonomy" (***Harelkin*** at 594).

[114] I agree that it would be preferable if such a matter as this dispute did not have to come before a court. The problem here, as mentioned, is that the Chief Judge, by not following the proper and acceptable complaint procedure, invited this judicial review process.

[115] On the second point, Mr. Tavender states that the legislative intent, supplemented by principles of common law, is clear that natural justice does not have to be followed by a chief judge exercising administrative and disciplinary powers under ss. 2(5) and 9 respectively. I disagree, as discussed later.

[116] While Mr. Tavender does not seem to address specifically the issue of a serious injustice, he clearly believes there is neither a serious injustice, nor the perception of one. In my view, however, there will always be at least the perception of a serious injustice where a judge's adjudicative independence is at stake.

[117] On the fourth point, he again discusses the adequate alternative remedy issue. I have already outlined his arguments on this point and my disagreement with his submission.

[118]

C. Immunity

[119] Section 16 of the ***PCJA*** prevents an action against a Provincial Court judge when the judge acts within the performance of the judge's adjudicative role. This is an adjunct of the constitutional judicial independence of a judge.

[120] Mr. Hunter, as before, argues that this section is not a privative clause and does not grant immunity to the Chief Judge in these circumstances.

[121] Mr. Tavender argues there was immunity with respect to the administrative actions of a Chief Judge based on both s. 16 and on the decision of the Supreme Court of Canada in ***MacKeigan v. Hickman***, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796. Regarding s. 16, he argues that the Chief Judge should be protected, as he was exercising his administrative judicial independence in re-assigning Judge Reilly (with no malice or alleged malice).

[122] In ***MacKeigan***, the Court dealt with judicial immunity, both of the adjudicative function and of the administrative function, with particular focus on a Chief Justice. There, the question was the make-up of an appeal panel which dealt with an appeal relating to the wrongful conviction of Mr. Marshall. The Royal Commission inquiring into the wrongful conviction wanted to know why the appellate court judge who had been Attorney General at the time of the prosecution of Marshall was chosen as a member of the Appeal Panel.

[123] In a very split decision, the members of the Court determined that the adjudicative privilege is, in the words of Cory J., "of fundamental importance and is absolute in nature", whereas the administrative privilege "is not of the same fundamental importance and is qualified in nature" (at 841). However, the qualified administrative privilege allows disclosure only in exceptional circumstances. In the opinion of Lamer J. (as he then was), at p. 807, the only situation where the privilege would not apply was when there was an investigation into the conduct of a chief justice or other justices. That is the very issue before me in this matter. Wilson J. phrased the principle as "where the administration of justice is itself under review" (at 807).

[124] The impugned decision is internal to the Court. It was not made in the performance by a judge of his adjudicative role. Moreover, a chief judge cannot be protected from the consequences of doing that which he was statutorily and constitutionally unauthorized to do. Finally, as I decided on the earlier application, s. 16 is not relevant.

Issue 2: What is the appropriate standard of judicial review in this situation?

[125] Neither party spent much time on this issue. It is well accepted that there is a wide range of standards for judicial review. The appropriate point in the range depends on the legislature's intentions regarding the powers and authority of the decision maker (here, the Chief Judge). As D.J.M. Brown and J.M. Evans state when discussing the development of this range (***Judicial Review of Administrative Action in Canada*** (Toronto: Canvasback Publishing, 1998 looseleaf), Vol. 2, para. 13:1223): ". . . the overall thrust . . . has been to require legislatures to spell out unequivocally any powers they intend to confer on a public official or institution that limits or removes an individual's common law rights." Here, in my view, Judge Reilly's right at issue (adjudicative independence) is as significant as basic individual common law rights, because both types of rights are keystones to the rule of law in a democratic society, as reflected by the ***Charter***. It is the constitutional guarantee of judicial independence upon which our entire judicial system rests.

[126] As discussed elsewhere in these Reasons, the legislature did not intend the Chief Judge to have the authority to make the impugned decision, nor can he claim such authority under the Constitution. Accordingly, I am entitled to review the impugned decision on a "correctness" standard; that is, whether the Chief Judge made a "correct" decision.

[127] Also, as noted elsewhere in these Reasons, there is no privative or immunity clause that affects the standard of review in these particular circumstances.

Issue 3: Does a chief judge have the statutory or constitutional authority to re-assign a judge and order a judge to change his or her residence?

[128] A chief judge may, in appropriate circumstances, have the statutory and constitutional authority to re-assign a judge. However, a chief judge in Alberta has neither statutory nor constitutional authority to order a judge to change his or her residence, either for administrative or disciplinary reasons.

A. General Comments on Judicial Independence of Provincial Court Judges and of the Provincial Court

[129] It is now settled that the Provincial Court and its judges are entitled to judicial independence (***R. v. Campbell***, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 at 76). Chief Justice Lamer, for the majority, stated (at 77-78):

> Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

The Queen v. Beauregard, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56 at 72 also refers to the constitutional underpinnings of judicial independence (at 72).

[130] The goal of judicial independence is to ensure justice is done in individual cases and to ensure public confidence in the justice system (***Campbell*** at 79). ***Campbell*** continued by citing Le Dain J. from ***Valente v. The Queen***, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673 at 689:

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

I also note the following passage from ***Beauregard*** (at 70):

> The rationale for this two-pronged modern understanding of judicial independence [individual and institutional] is recognition that the courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It is also the context for a second, different and equally important role, namely as protector of the Constitution and the fundamental values embodied in it - rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important. In other words, judicial independence is essential for fair and just dispute-resolution in individual cases. It is also the lifeblood of constitutionalism in democratic societies.
> [emphasis added]

[131] From my review of the decisions of the Supreme Court of Canada in cases such as ***Valente***, ***Beauregard***, ***R. v. Lippé***, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114, ***Campbell*** and ***MacKeigan***, judicial independence has two dimensions: individual judicial independence and institutional judicial independence. The core principle of the individual judicial independence dimension is an individual judge's complete liberty to hear and decide cases. This is clearly stated by the majority in ***Lippé*** at 153, citing ***Beauregard*** at 69:

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.

At 153, the majority in ***Lippé*** continues by citing from ***Valente***, at 685:

> As such, it [independence] connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees. [emphasis added by ***Lippé***]

I also note ***Campbell*** at 87, which emphasizes that judicial independence insulates courts from interference. This basic theme is also present in the earlier cited passage from Shetreet and Deschênes on "substantive independence" - that a judge must be subject only to the law and his or her own conscience, not to irrelevant pressures.

[132] Also, in ***Lippé***, Lamer C.J.C. (at 138, for the minority) would have limited the insulation from interference to independence from "government". However, he gave "government" in this sense a broad interpretation, even including the Chief Justice (at 138):

> I do not intend, however, to limit this concept of 'government' to simply the executive or legislative branches. By 'government', in this context, I am referring to any person or body, which can exert pressure on the judiciary through authority under the state. This expansive definition encompasses, for example, the Canadian Judicial Council or any Bar Society. I would also include any person or body within

> the judiciary which has been granted some authority over other judges; for example, members of the Court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice. [original emphasis]

Chief Justice Lamer picked up on this again in ***Campbell*** at 78-79.

[133] At present, this core principle of individual judicial independence has concomitant immunities from suit and prosecution, as well as from being required to testify about the how and why of a particular decision. As McLachlin, J. stated for the majority in ***MacKeigan*** (at 830):

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence . . . The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v. Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence.

[134] These immunities, while absolute, are not final because of the appeal process. It is that appeal process which corrects errors in a judge's reasons and properly applies established legal principles. To establish effectively individual judicial independence in a democratic federal state, present law has codified the two dimensions and three core characteristics as the elements of this independence (***Campbell*** at 80-83, drawing on ***Valente***). The core characteristics are: (1) security of tenure; (2) financial security; and (3) administrative independence. The dimensions are: (1) individual independence; and (2) institutional or collective independence of the court to which the judge belongs.

[135] The three core characteristics make up judicial independence, while the two dimensions indicate which entity (the judge or the court) is protected by a certain characteristic (***Campbell*** at 82). A core characteristic may possibly have both an individual and an institutional dimension, although sometimes only one dimension is possible. As an example of the latter situation, ***Campbell*** stated at 83:

> To be sure, sometimes a core characteristic only attaches to a particular dimension of judicial independence; administrative independence, for example, only attaches to the court as an institution (although sometimes it may be exercised on behalf of a court by its chief judge or justice). [emphasis added]

[136] ***Valente*** discussed the core characteristics to a degree; ***Campbell*** elaborated upon them, particularly financial security. Two of the requirements for security of tenure for provincial court judges are that they can only be removed for cause "related to the capacity to perform judicial functions" and after a "judicial inquiry at which the judge affected is given a full opportunity to be heard" (***Valente*** at 697, cited in ***Campbell*** at 80).

[137] ***Valente*** defined financial security (at 706, cited in ***Campbell*** at 81): "The essential point, in my opinion, is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge." [emphasis added by ***Campbell***]. ***Campbell*** extended this to encompass three principles designed to ensure that the relationship between the judiciary and other government branches be as depoliticized as possible (at 88). Those principles are not relevant in the present case.

[138] ***Valente*** (at 712) also defined the administrative independence of the court: control by the courts "over the administrative decisions that bear directly and immediately on the exercise of the judicial function". The court there earlier stated (at 709) that judicial control over such matters as:

> . . . assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or 'collective' independence . . .

These statements were approved in ***Campbell*** at 81.

[139] In addition, ***Valente*** (at 687) discussed the two dimensions of judicial independence: a judge's individual independence and a court's institutional or collective independence:

> The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal. [cited in ***Campbell*** at 82]

[140] The above passages also illustrate that the second dimension - institutional judicial independence - attaches to the Court as an institutional entity. In ***Campbell***, Lamer, C.J. (at 81-82) stressed the importance of not confusing the concept of institutional independence (a dimension) with administrative independence (a core characteristic). Again, I note Lamer C.J.'s statement (***Campbell*** at 83) that administrative independence only attaches to the court as an institution, but may be exercised by the chief judge on behalf of the court.

[141] The major factor determining whether institutional judicial independence must be present is the court's role "as resolver of disputes, interpreter of the law and defender of the Constitution". These qualities require the Courts to be separate in authority and function from all other branches of government or participants in the justice system. (***MacKeigan*** at 827, citing ***Beauregard*** at 73). While there cannot be an absolute separation of the judiciary from the government, it is critical in achieving a proper balance that "the relations between the judiciary and other branches of government not impinge on the essential 'authority and function'" of the Court. (***MacKeigan*** at 827-28).

B. Judicial Independence in the Present Case

[142] Within this framework, I must characterize the issue in this case. On Judge Reilly's part, this case raises the issue of his complete liberty to hear and decide cases without interference by his Chief Judge. I find that liberty is at risk here. There is a violation of Judge Reilly's immunity from having to justify the how and why of his decisions, together with an attack on his security of tenure. Accordingly, I characterize the present case as involving Judge Reilly's core characteristic of security of tenure and the individual judicial independence dimension.

[143] While security of tenure is typically used in the sense of outright dismissal or removal, it also must include the lesser, but no less real, threat of a move from the current place of appointment. Such a move, or threat, could seriously undermine a judge's economic, family and social status in the community in which he or she is currently appointed. This undermining could approach or achieve dismissal. For example in ***Rees***, the Privy Council held that a judge was subject to "in effect an indefinite suspension" (at 188). There, the chief justice, after receiving complaints about the judge, did not include him on the sitting roster for the following term. An investigation commenced after that action was taken. The Privy Council agreed with the judge that

this was not merely an administrative arrangement, but was an indefinite suspension, which the chief justice did not have the power to impose.

[144] On the Chief Judge's part, the present case involves the core characteristic of the administrative independence of the Provincial Court (exercised here by the Chief Judge), along with the institutional or collective dimension. Regrettably, the parties have raised the spectre of two core characteristics (security of tenure and administrative independence) of judicial independence being in conflict, thus putting the dimensions (individual and institutional) into conflict as well. I will address this later in these Reasons.

C. Statutory Authority

[145] Section 2(5) of the ***PCJA*** gives a chief judge certain administrative and supervisory powers:

> 2 (5) Subject to section 13, the chief judge has the power and duty to supervise the judges in the performance of their duties, including the power and duty to
>
> (a) designate a particular case or other matter or class of cases or matters in respect of which a particular judge shall act;
>
> (b) designate which court facilities shall be used by particular judges;
>
> (c) assign duties to judges;
>
> (d) exercise any other powers and perform any other duties prescribed by the Lieutenant Governor in Council.

[146] Part of s.13, referred to in s.2(5), was declared unconstitutional in ***Campbell***. Section 13(1) provided:

> 13(1) The Minister of Justice and Attorney General or a person authorized by him may
>
> (a) designate the place at which a judge shall have his residence;
>
> (b) designate the day or days on which the Court shall hold sittings.

[147] In ***Campbell***, the trial judge held that s.13(1)(a) and (b) were unconstitutional. The majority of the Supreme Court of Canada agreed, using its own reasons. Regarding s.13(1)(a), Lamer CJC stated (at 148):

> . . . as it is presently worded, s.13(1)(a) creates the reasonable apprehension that it could be used to punish judges whose decisions do not favour the government, or alternatively, to favour judges whose decisions benefit the government. Section 13(1)(a)'s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. [original emphasis]

[148] The unconstitutionality of s.13(1) left a vacuum (which, subsequent to the impugned decision, has been filled with new legislation giving the power over residency to the Judicial Council, on request from the chief judge, and only if, in the Judicial Council's opinion, the residency change "is required for the better administration of the Court" (Bill 25, ***Judicial Statutes***

Amendment Act, 1998, 3rd sess., 24th Leg. Alta., s.4(7) , as amended)). Mr. Tavender suggests that vacuum should be filled by giving a chief judge the authority over the place of a judge's residence, as it is clearly an administrative concern. Moreover, he states that judges do not have "tenure" over an existing residence.

[149] Mr. Tavender cites the case of New Brunswick Provincial Court Judge Moreau-Bérubé, where her Chief Judge assigned her to sittings off of the Acadian Peninsula. Judge Moreau-Bérubé had made some comments during a sentencing regarding people on the Acadian Peninsula. Pending a Judicial Council hearing, the chief judge temporarily reassigned Judge Moreau-Bérubé.

[150] I note that this was a temporary reassignment, pending the outcome of the Judicial Council hearing. It was not, as in the present case, an attempt at a permanent re-assignment, in lieu of a Judicial Council hearing. The chief judge in the Judge Moreau-Bérubé case did not take it upon himself to discipline a judge for remarks over which he was concerned. He followed the proper route of allowing the Judicial Council to fulfil its role. I also note that in April 1999, the provincial cabinet removed Judge Moreau-Bérubé from the bench following a recommendation by the Judicial Council. Therefore, the issue of a possible permanent re-assignment never arose.

[151] Mr. Hunter disagrees that the vacuum left by s. 13 should be automatically filled by the chief judge; even if it were so filled, he argues that a chief judge could not exercise such a power for disciplinary reasons. I agree with Mr. Hunter that the vacuum should not be filled by giving the power to the chief judge, as further explained later in these Reasons.

[152] Mr. Tavender also points to the "disciplinary" section of the ***PCJA*** - s.9 (now repealed):

> 9 The chief judge shall review any matter regarding the conduct of a judge that comes to his attention, whether a complaint is made or not, and may do 1 or more of the following:
>
> (a) determine that no further action need be taken;
>
> (b) reprimand the judge;
>
> (c) take corrective measures;
>
> (d) refer the matter to the Judicial Council. [emphasis added]

Mr. Tavender argues throughout that the Chief Judge necessarily had to discipline Judge Reilly for improper judicial conduct - for losing his impartiality. This alleged disciplinary power presumably comes under the authority of s.9(c)'s "corrective measures". Mr. Hunter submits that the s.9 powers should not be allowed to interfere with adjudicative independence of Judge Reilly and, indeed, of all other Provincial Court judges who may feel a "chilling effect".

D. Constitutional Authority

[153] As discussed earlier in these Reasons, it is clear that judges of the Provincial Court have adjudicative independence. In the earlier-cited words of ***Beauregard***, judges must be free from interference, even from other judges. It is also clear that the Provincial Court itself has administrative independence to deal with such matters as judges' assignments and court sittings (see ***Campbell*** and ***Valente***, as cited above). The issue becomes balancing these two principles: adjudicative independence and administrative independence.

E. Conclusion

[154] Based on the foregoing, it is clear that a chief judge has certain statutory and constitutional powers. The issue is whether the Chief Judge here stayed within the bounds of the provisions of the ***PCJA*** and did not violate the constitutional principles outlined. In many instances, a chief judge's exercise of power is obviously valid and should not be questioned. For example, a decision to assign a judge to hear a particular case (in the absence of any conflict) would be both statutorily authorized and constitutional. Similarly, a decision to reprimand a judge for having reserve judgments outstanding for an excessive period of time would be both statutorily authorized and constitutional.

[155] The present circumstances are clearly more complicated, falling under neither extreme. The next section of these Reasons discusses the balance between administrative and adjudicative independence, in the context of a chief judge's statutory and constitutional powers. It then addresses the specific facts of this case.

Issue 4: If a chief judge has such authority in general, was it properly exercised by the Chief Judge in this case?
No.

A. Introduction

[156] I decided in the previous section that a chief judge has certain statutory and constitutional powers, as long as the exercise of such powers remains within the contemplated scope of the ***PCJA*** and does not infringe the constitutional principles discussed.

[157] In my view, the Chief Judge's decision here went beyond the scope of both his statutory authority under the ***PCJA*** and his constitutional authority. Moreover, the reasons for his decision, based on the Record before me, strike at, or could be perceived to strike, at Judge Reilly's fundamental entitlement to adjudicative independence. I note again that the right to adjudicative independence, while belonging to an individual judge, is for the benefit of the public and the judicial system as a whole. Because of its importance and history (elaborated on below), adjudicative independence must supercede administrative independence, where the two are at odds.

[158] I note that Mr. Tavender referred several times to the examples I gave in my earlier decision on judicial review ([1998] A.J. No. 975, para. 48a):

> To choose a clear example, for instance, if a Chief Judge were to say 'I think you should decide for Party X in the case you are hearing tomorrow,' that would be outside a Chief Judge's powers and would be judicially reviewed. Characterizing such a statement as administrative, supervisory or disciplinary could not save it, as it clearly interferes with adjudicative independence. Conversely, a statement by a Chief Judge that 'I am assigning you the case of X v. Y' is clearly within a Chief Judge's powers and ordinarily would not be reviewable.

Mr. Tavender correctly emphasizes that the Chief Judge did not tell Judge Reilly how to decide a specific case on a specific date. However, Mr. Tavender misses the point of these examples. There is a spectrum of behaviour by a chief judge - the examples I gave are clear examples from each end of that spectrum. There are, however, many possible situations between those two extremes. The present case highlights one of those interim situations.

B. Discussion

1. Conflicting Core Characteristics and Dimensions

[159] In most situations, it would not be necessary to balance the principles of judicial independence, nor to consider which is to be given more weight. In this situation, however, the

parties have left me no choice but to address this question.

[160] As quoted above from ***Beauregard***, the historical principal "core" of judicial independence is a judge's individual adjudicative independence (at 69), although an institutional aspect later developed (at 69-70). ***Campbell*** describes these as the individual dimension and the institutional dimension (at 81-82). The second dimension (institutional) has evolved as the judiciary itself "has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community" (***Beauregard*** at 69, citing S. Shetreet and J. Deschênes (eds.), ***Judicial Independence: The Contemporary Debate*** (1985), "The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration" at 393).

[161] ***Campbell*** also discusses the historical development of the two dimensions (at 84-85). It is the institutional independence which allows the courts to protect the Constitution and its values (at 84). Chief Justice Lamer continued by stating that provincial courts play a critical role in enforcing the Constitution and protecting its values:"Inasmuch as that role has grown over the last few years, it is clear therefore that provincial courts must be granted some institutional independence." (at 85).

[162] In my view, it is clear from that statement that institutional independence, while vital, developed in order to protect the central necessity for individual judicial independence. In particular, the necessity for institutional independence of the provincial courts has grown as the provincial courts' role has grown, particularly over the last few years.

[163] In a similar way, the role and authority of the chief judges and chief justices has developed over time. Again, in my view, this authority developed as another means to ensure and protect the individual adjudicative independence that is vital and central to our justice system.

[164] In ***Ruffo***, the majority of the Supreme Court of Canada discussed the functions and powers of a chief judge at 301-08. One of the issues in that case was whether the chief judge appropriately made a complaint about a judge to the Judicial Council. The majority held that the power to make such a complaint was an intrinsic part of a chief judge's role (at 304).

[165] The majority in ***Ruffo*** noted that many of the provinces and territories give the chief judge a key role in ensuring compliance with judicial ethics. This was, of course, the situation in Alberta where, as mentioned, the chief judge had the explicit statutory authority to carry out certain administrative, supervisory and disciplinary functions. The disciplinary powers set out in ***PCJA***, s. 9 have now been repealed. Justice Gonthier stated in ***Ruffo*** (at 303-04):

> It must therefore be thought that chief judges or justices, because of their role as co-ordinators, were able to have a certain influence on compliance with rules of conduct in the specific context of a disciplinary authority that was initially in the hands of the executive branch and then, starting in the 19th century after the principle of security of tenure for judges was established, belonged exclusively to the legislative branch.
>
> . . .
>
> It must not be forgotten that a large part of the chief judge's role in maintaining high-quality justice was defined gradually over the years, in the same way as judicial precedents...[T]he supervisory powers conferred on the chief judge by the

> [legislation at issue]...must be seen as the expression of a reality that is consistent with the general practice and gradual developments over time. [emphasis added]

[166] In ***R. v. Doyle***, 1992 CanLII 12827 (NWT CA), [1992] N.W.T.R. 81 (C.A.), the issue was the process for handling complaints about Territorial Court judges. There, the then Minister of Justice complained to the territorial council about certain sentences imposed by the judge, and certain "controversial social or criminological statements" made by the judge (during a private interview). The Minister also called a press conference denouncing the judge's attitudes. The council (half of whom were appointed by the Minister) recommended a formal hearing, which was conducted by a justice of the Court of Queen's Bench of Alberta. That report exonerated the judge and criticized the Minister in various respects.

[167] The court in ***Doyle*** emphasized several features relating to judicial independence, particularly the fact that the Minister's attack stemmed from a disagreement with the judge's perceived view. At no time was there a suggestion that the judge had acted unethically (at 86). The court continued (at 87-88):

> Judicial "discipline" statutes exist to deal with any judge who becomes too ill to function, refuses to work, or acts unethically. They do not exist, like some 16th century ecclesiastical body, to root out unorthodoxy, or even plain error. If a judge makes errors, appellate courts sit to undo them. A host of periodicals and books, learned and popular, criticize the errors after the individual cases are over. The penalties for judicial error are reversal on appeal, and bad reviews in legal journals. Neither removal nor threat of discipline lies for such matters.
>
> There are many reasons for that. One is that from time to time the multitude are wrong and the lone judge is right. . . .
>
> What the former minister did here was to try to use the power to remove judges either to influence public sentiment, or to influence the future results in future court cases. The latter would be a natural tendency of his acts. That is the gravest perversion of the system, . . . It is precisely what our whole system of judicial tenure is designed to prevent. [emphasis added]

[168] Mr. Tavender accepts these propositions, but argues that they are inapplicable because the Chief Judge was not dealing with the merits of Judge Reilly's decisions. I disagree - the Record clearly shows disagreement with Judge Reilly's views and decisions.

[169] In my view, therefore, the historical development and its underlying rationale lead to the inescapable conclusion that institutional independence and the powers of chief judges developed over time in order to protect and enhance the fundamental and central principle of individual adjudicative independence. Consequently, if, as here, one dimension has to be given preference over the others, individual adjudicative independence must receive that preference. Therefore, the security of tenure core characteristic must also supercede the administrative independence core characteristic.

2. Was Judge Reilly's Adjudicative Independence Threatened?

[170] I wish to address two preliminary points. First, I must deal with Mr. Tavender's argument that Mr. Hunter (and, by implication, this Court) should not draw conclusions based solely on the Record, when there is no testimony to explain or clarify items in the Record. This is impractical. There is often no live testimony or cross-examination during a judicial review. In my view, I am entitled to make reasonable findings of fact based on the information contained in the Record.

[171] Second, I note that some members of the judicial community have expressed concerns over a chief judge or chief justice's potential power. In ***A Place Apart: Judicial Independence and Accountability in Canada*** (Canadian Judicial Council, 1995), Martin L. Friedland reproduces several comments at 225-26:

> '. . . Will the new powers of the Chief Judges be confined to judicial administration? What of their power to control trips, travel and the education of judges – even the power to allocate desirable and undesirable cases to punish judges can represent a threat to judicial independence. Every increase in power to a Chief Judge over others might be seen as a threat to judicial independence.'
> . . .
>
> 'The opportunities for interference exist because of the unique nature of the chief judge's administrative authority and investigative, disciplinary and supervisory duties.' [footnotes omitted]

While it is not for me to comment on this in the broader context, it is interesting that a definite concern exists on this issue.

[172] I agree with Mr. Hunter that the Record indicates that the Chief Judge made the decision on April 3, 1998 to move Judge Reilly from Canmore. This is shown by the letter at Tab 25 (see Appendix) from Assistant Chief Judge Stevenson to the Chief Judge dated March 30, 1998, stating:

> I enclose a recent ruling by Judge Reilly [the ***Twoyoungmen*** decision]. Its content continues an apparent obsession of Judge Reilly to subjugate the law to his perception of unjust social conditions on the Stoney First Nation Reserve at Morley.
> . . .
> I can only conclude from his comments . . . that when matters before him involve aboriginal persons, he does not intend to act objectively, judicially or in accordance with Canadian law. The last paragraph of his ruling indicates a pre-judgment attitude that would clearly, in my view, support an application to disqualify him from presiding over any case on the basis of bias.
>
> For these reasons alone, it is my recommendation that Judge Reilly be re-assigned to preside in a legal environment other than the circuit where he now presides.

The letter goes on to recommend that "consideration be given" to closing Canmore as a base point. In a handwritten note of April 3, 1998 (which was conceded to be written by the Chief Judge), the Chief Judge stated:

> 1. I agree with ACJ Stevenson [sic] request.
>
> 2. Vijay [Bhardwaj, Counsel to the Provincial Court] tell me what procedure we have to take to make Canmore from a base point to a circuit point.
>
> 3. Tell me the procedure to transfer Reilly from Canmore to Calgary.
> [emphasis added]

[173] Therefore, the decision was made on April 3, 1998. This handwritten note does not, however, indicate on what grounds the Chief Judge made the decision to move Judge Reilly. While it could possibly be inferred that the Chief Judge agreed with Assistant Chief Judge Stevenson's comments regarding Judge Reilly's objectivity, I cannot infer that from this handwritten note. To me, the note only indicates that the timing of the decision, not the reason behind it. In my view, the April 21, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge formally recommending that the Canmore Base Point be closed and that Judge Reilly be transferred is merely part of the justification process for a decision that had already been made. I disagree with Mr. Tavender's attempted characterization of the Chief Judge's April 3 decision as a "preliminary decision", "tentative decision", "recommendation" or the "beginning of a process that may lead ultimately to a decision". To my mind, it was clearly a final and definite decision.

[174] Other documents in the Record do convey the Chief Judge's rationale and mechanics for moving Judge Reilly. For example, see the comments made by the Chief Judge in the April 3, 1998 letter to Judge Reilly (Tab 22 - see Appendix).

[175] In fact, Mr. Tavender admits that the impugned decision was made, at least in part, because the Chief Judge felt that Judge Reilly was biased or had lost his impartiality in dealing with aboriginal matters. Undoubtedly, judges must accept that the freedoms attached to their adjudicative independence impose concurrent responsibilities to address only those issues properly before them, along with a duty to make every effort to maintain impartiality and objectivity in dealing with the issues and parties before them. Because I find in these Reasons that the Chief Judge did not have the statutory or constitutional authority to make the impugned decision, I need not, and will not, address the question of bias and loss of impartiality. Judge Reilly's conduct is not part of this judicial review.

[176] In Mr. Tavender's submission, the issue is not whether the Chief Judge and Assistant Chief Judge Stevenson acted in a patently unreasonable manner in reaching their conclusions, nor whether their conclusions were correct. What happened here, Mr. Tavender states, is that the Chief Judge and Assistant Chief Judge Stevenson, in exercising their statutory and common law administrative, supervisory and disciplinary powers and obligations, concluded that Judge Reilly had violated his duty to be impartial and objective. They then took what they felt were appropriate and necessary measures.

[177] While they may have felt themselves entitled to take such measures, I reiterate that this was not the appropriate course of action. They did not have the statutory or constitutional authority to take these steps. If they felt strongly about these matters, the proper course was reference to the Judicial Council.

[178] As a final point regarding the mechanics of making and implementing the impugned decision, Judge Reilly's affidavit states, at para.4, that Judge Reilly asked Assistant Chief Judge Stevenson on May 14, 1998 about the purpose of the May 26 meeting. According to the affidavit, Assistant Chief Judge Stevenson denied any knowledge of the meeting's purpose. The affidavit continues by averring that Assistant Chief Judge Stevenson told Judge Reilly on May 25 that the purpose of the meeting was the future of the west circuit, but that he said nothing about Judge Reilly's re-assignment. Finally, Mr. Hunter notes a letter dated December 3, 1997 from Assistant Chief Judge Stevenson to Judge Reilly (Tab 51.1). Assistant Chief Judge Stevenson admitted there have been some discussions about the future of all circuits, on the sole basis of cost-effectiveness. However, he continued "...prior to any final recommendations concerning the future of Canmore as a base point, you will be consulted and asked for input, as will other 'players' in the system (Crown, defence, R.C.M.P., Probation, Corrections, etc.)." I note that the Record does not show any such consultation with any of these parties. To my mind, this strengthens the argument that cost-effectiveness was not the real reason for the impugned decision.

[179] I am particularly disturbed by the Chief Judge's frequent references to decisions he obviously had problems with, along with comments as to their partiality or bias. These decisions had proceeded through the court process in a normal fashion. Once the normal court process is over, the matter is closed.

[180] Regarding the power in s.13(1)(a) of the ***PCJA*** to set the residence of judges, I agree with Mr. Hunter that the vacuum created when it was declared unconstitutional is not automatically filled by giving the power to the chief judge. I reach this conclusion for three reasons. First, as a practical matter, I note that the legislature, when it finally filled the hole, did not give the power to the chief justice, but to the Judicial Council. Second, I know of no interpretive principle saying that a gap is to be filled in the manner urged by Mr. Tavender.

[181] Third, and most importantly, giving the power to the chief judge could potentially lead to the same problems that motivated the court to strike down s.13(1)(a) in the first place. Chief Justice Lamer stated that s.13(1)(a) "creates the reasonable apprehension that it could be used to punish judges..." (***Campbell*** at 148). While he was referring to a punishment for not ruling in the government's favour (or, alternatively, a reward for ruling in the government's favour), the same caution applies when dealing with any person or body that has the right to affect such a basic requirement of a judge's function and career. Here, the Chief Judge attempted to exercise this power. I have found that he did so to discipline Judge Reilly for decisions and an overall approach with which the Chief Judge did not agree. The fact that this occurred gives even more weight to Lamer C.J.C's. concerns. The issue of the new provision which gives this power to the Judicial Council is not before me; therefore, I will not comment on whether it courts the same danger.

[182] Regarding the constitutional authority of a chief judge, it seems clear to me that it is not unlimited, even in the exercise of administrative functions. I find support for this in the section of the ***Campbell*** decision dealing with provincial court closures in Manitoba for "Filmon Fridays" as a cost saving measure. The government had argued that the chief judge made the actual decision to close the court on those days, so that there was no interference with the court's administrative independence. The majority of the Supreme Court of Canada disagreed. Moreover, the majority held that the chief judge, had she in fact made the decision, would have exceeded her constitutional authority (at 152):

> . . . administrative independence is a characteristic of judicial independence which normally has a collective or institutional dimension. It attaches to the court as a whole. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, it is important to remember that the Chief Judge is no more than "*primus inter pares*": *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267, at para. 59. Important decisions regarding administrative independence cannot be made by the Chief Judge alone. In my opinion, the decision to close the Manitoba Provincial Court is precisely this kind of decision. [emphasis added]

[183] Therefore, while a chief judge can exercise his administrative independence (or exercise the Provincial Court's administrative independence) to a degree, a chief judge cannot interfere with a judge's individual adjudicative independence, or be perceived to interfere with that judge's individual adjudicative independence. I cannot emphasize enough that a judge's individual adjudicative independence must not be threatened or be perceived to be threatened. This is for the sake not only of the judge's independence, but for the integrity of the judicial system as a whole.

[184] In conclusion, I find that the actual decision to transfer Judge Reilly was made on April 3, 1998, and that it was made on improper grounds. The Record after April 3, 1998 shows an attempt

to colour the decision as a cost-saving and administrative measure. Even if those were real factors in the decision, they were not the primary motivation. The primary motivation was the Chief Judge's disagreement with Judge Reilly's views and conduct, particularly as expressed in certain judgments.

[185] I am particularly dismayed by the three letters dated May 25, 1998 (Tabs 10, 9 and 8 - see Appendix). The Tab 10 letter from the Chief Judge to Assistant Chief Judge Stevenson portrays the decision to close the Canmore Base Point and to move Judge Reilly as a "pragmatic" way to "improve the efficiency" of the courts. The Tab 9 letter from the Chief Judge to the then Deputy Minister also refers to improving the "efficiency of the justice delivery system". (I note that it also refers to a report by Assistant Chief Judge Stevenson, which never made it into the Record). The letter also acknowledges that the decision to close Canmore as a Base Point is in the Deputy Minister's jurisdiction, despite the Chief Judge's attempt to use this closure as a reason to justify Judge Reilly's transfer.

[186] The Tab 8 letter from the Chief Judge to Judge Reilly clearly sets out the real reason for Judge Reilly's transfer - his "obsession" and "pre-judgment attitude", as perceived by the Chief Judge. In my view, the most telling passage in that letter is: "For purposes of the executive branch, however, I have justified this move on administrative grounds." To my mind, this underscores the real reason for the transfer.

Issue 5: If the Chief Judge here did have the authority to make such a decision, was he required to follow procedural fairness in making it? If so, did he meet the procedural fairness requirements?

[187] Had I found that the Chief Judge had the authority to make the impugned decision in these circumstances, I would have found that Judge Reilly was entitled to procedural fairness. I would also have found that Judge Reilly did not receive the required level of procedural fairness.

[188] On the Record and after weighing the submissions of Mr. Tavender and Mr. Hunter, I find that the Chief Judge failed to accord Judge Reilly procedural fairness by deciding himself to deal with the matter as Chief Judge alone and by instituting an ad hoc process which denied clear notice and any opportunity for Judge Reilly to be heard effectively on his own behalf. Judge Reilly's right of adjudicative independence was at issue. There are distinct parallels here to the case of Mr. Justice Crane in the ***Rees v. Crane*** case, supra. The Privy Council in that case examined a number of decisions dealing with fairness and natural justice in any process that may affect another person's interests, rights and duties - individual or professional.

[189] Their Lordships emphasized (at 190) what Lord Morris of Borth-y-Gest stated in ***Furnell v. Whangarei High Schools Board***, [1973] A.C. 660 at 679:

> Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action.' Nor is it a leaven to be associated only with judicial or quasi-judicial occasions.

[190] There are no hard and fast rules. The learned Law Lords noted that depending upon the nature of the proceeding, type of investigation, the process involved, the nature and authority of the tribunal or decision maker, it is not required to provide notice and an opportunity to be heard at the preliminary stages of the inquiry. Such a situation is acceptable where, for example, it is a matter of urgency, or administrative necessity and no substantive rights are affected, and provided that notice of what is at issue and an opportunity to be heard in reply is part of the later process.

Nevertheless, their Lordships made it clear that natural justice may require otherwise. At 191-92, they state:

> It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity, that no penalty or serious damage to reputation is inflicted by proceeding to the next stage without such preliminary notice, that the statutory scheme properly construed excludes such a right to know and to reply at the earlier stage.
>
> But in their Lordships' opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As Professor de Smith puts it in *de Smith's Judicial Review of Administrative Action*, 4th ed. (1980), p. 199:
>
> > "Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will *generally* decline to accede to that person's submission that he is entitled to be heard in opposition to this initial act, *particularly* if he is entitled to be heard at a later stage." [emphasis added by ***Rees***.]
>
> In considering whether this general practice should be followed the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, 118 (as approved by Lord Guest in *Wiseman v. Borneman* [1971] A.C. 297, 311, and by Lord Morris of Borth-y-Gest in *Furnell v. Whangarei High Schools Board* [1973] A.C. 660, 679) to have regard to all the circumstances of the case . . .

[191] Judge Reilly never received notice that he was to be re-assigned and his residence moved. The real purpose of his meeting with the Chief Judge and Assistant Chief Judge Stevenson was not disclosed. There was no opportunity granted to him to prepare himself and no opportunity to respond.

[192] Mr. Tavender's assertion that nothing in the legislative scheme of the ***PCJA*** requires any "natural justice" when a Chief Judge exercises his administrative, supervisory and disciplinary powers (prior to s. 9 being repealed) is met by the principle that if a statute is silent upon the question the Courts will imply a rule that natural justice be applied where required. See ***Rees*** at 191, quoting Lord Guest in ***Wiseman v. Borneman***, [1971] A.C. 297 at 310.

[193] On this ground alone I would quash the decision of the Chief Judge.

DISPOSITION

[194] The Chief Judge did not have the authority to make the impugned decision and did not follow procedural fairness in making it. Accordingly, Judge Reilly's re-assignment to Calgary and his change of residence to Calgary cannot be implemented.

[195] The impugned decision is quashed.

[196] The parties may, on proper notice, speak to costs.

DATED at Calgary, Alberta, this 26th day of April, 1999.

_____
J. C.Q.B.A.

COUNSEL:

Allan D. Hunter, Q.C.
for Applicant (Respondent)

E. David D. Tavender, Q.C. & J.M. Doyle
for Respondent (Applicant)

APPENDIX - LIST OF DOCUMENTS

Tab 25 - March 30, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge

Tab 24 - Excerpts from April 1, 1998 letter from Judge Reilly to the Chief Judge

Tab 25 - April 3, 1998 handwritten note by the Chief Judge

Tab 22 - Excerpts from April 3, 1998 letter from the Chief Judge to Judge Reilly

Tab 20 - Excerpts from April 9, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson

Tab 18 - April 21, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge

Tab 16.1 - April 24, 1998 document from Dave Paul (Manager, Provincial Court) to Jim McLaughlin (Director, Court Services)

Tab 14 - May 13, 1998 letter from Vijay Bhardwaj (Legal Counsel, the Provincial Court of Alberta) to Assistant Chief Judge Stevenson (plus several draft letters)

Tab 10 - May 25, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson

Tab 9 - May 25, 1998 letter from the Chief Judge to Neil McCrank (Deputy Minister of Justice and Deputy Attorney General) (copied to Assistant Chief Judge Stevenson and Judge Reilly)

Tab 8 - May 25, 1998 letter from the Chief Judge to Judge Reilly (copied to Assistant Chief Judge Stevenson)

TAB 25 - March 30, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge

"**RE: <u>JUDGE REILLY/CANMORE - BANFF BASE POINT</u>**

I enclose a recent ruling by Judge Reilly [the ***Twoyoungmen*** decision]. Its content continues an apparent obsession of Judge Reilly to subjugate the law to his perception of unjust social conditions on the Stoney First Nation Reserve at Morley.

While his approach may be well-intentioned, it is not, in my view, in conformity with his obligations as a jurist which is to apply appropriate legal considerations to applications before him.

I can only conclude from his comments on pages 9-10 (Point 9) of his ruling that when matters before him involve aboriginal persons, he does not intend to act objectively, judicially or in accordance with Canadian law. The last paragraph of his ruling indicates a pre-judgment attitude that would clearly, in my view, support an application to disqualify him from presiding over any case on the basis of bias.

For these reasons alone, it is my recommendation that Judge Reilly be re-assigned to preside in a legal environment other than the circuit where he now presides.

Furthermore, for the past 18 months I have been monitoring the caseload on Judge Reilly's circuit. As you are aware, Judge Reilly sits four days per week. The average sitting times for each location over the past 18 months are (according to statistics supplied by his Court Clerk, which <u>includes</u> the time when the court is in recess) [original emphasis]:

Banff - 2:26
Canmore - 3:07
Cochrane - 2:51

Prosecution of cases on that circuit is all handled out of the Calgary Crown Office. Almost all defence counsel who appear in the courts on that circuit come from Calgary.

The Base Point in Canmore employs six persons. The budget request for 1998-1999 is $416,000. Following extensive discussions with Mr. Paul, our Court Manager, it is estimated that if the Canmore Base Point were to be closed, the circuit could be serviced just as efficiently out of Calgary by a combination of Judges and Commissioners with a cost saving of approximately $173,900.

A further consideration is the strong possibility that the initiation of an aboriginal justice component to deal with the Stoney Nation cases (plus Tsuu T'ina matters) would reduce the current combined Cochrane caseload by 80 percent.

For all of the above reasons, I recommend that consideration be given to closing the Canmore Base Point and transferring the court administration for that circuit to Calgary. That

closure should coincide with Judge Reilly's re-assignment.

I appreciate that the changes I am recommending may be interpreted in some quarters as being directed in a punitive way against Judge Reilly for his actions in the *Hunter* case and other matters involving aboriginals. While it will be impossible to prevent such interpretations from arising, the simple fact is that the changes, if approved, will not occur as a result of any government initiative; it will occur as a result of a judicial initiative. Simply put, at the moment there is not enough work for a judge on that circuit, with the anticipated aboriginal justice initiative there will be even less.

I look forward to your reaction and further direction."

TAB 24 - Excerpts from April 1, 1998 letter from Judge Reilly to the Chief Judge

"I sincerely apologize for my clumsiness and the consternation which it has caused you.

. . .

I do ask you to consider this. The Poles, the Irish and the Aboriginal People of Canada have all suffered from the humiliation and limitations of being dominated and oppressed by foreign powers. You and I escaped the foreign domination because our ancestors were able to leave their countries of origin and come here to Canada where we have enjoyed freedom and opportunity. That freedom and opportunity was not accorded the Aboriginal People except at the cost of assimilation, which meant the renunciation of their culture, tradition, traditional religion, and community in order to enjoy the benefits of 'white' society. It is my view that the phrase '... with particular attention to the circumstances of aboriginal offenders' in section 718.2(e) [of the ***Criminal Code***] means that to do justice to these people today we must be aware of the injustices of yesterday and their current effects, and compensate for them. In attempting to put this into practice I created far more of a stir than I ever intended. I am unaware of the extent of the difficulties this has created for you, but for all of it, I apologize.

. . ."

Tab 25 - April 3, 1998 handwritten note by the Chief Judge

"April 3/98 (1) I agree with ACJ Stevenson[sic] request [referring to the other Tab 25 document].

(2) Vijay tell me what procedure we have to take to make Canmore from a base point to a circuit point.

(3) Tell me the procedure to transfer Reilly from Canmore to Calgary."

[NOTE: It is impossible to tell from the Record which of the two "April 3, 1998" documents was prepared first.]

TAB 22 - Excerpts from April 3, 1998 letter from the Chief Judge to Judge Reilly

". . .

I applaud you for your conversion on the road to Damascus and the help you are prepared to accord the Aboriginal People but I strongly object to how you are improperly abusing your judicial position to achieve this end. Your judgments in Hunter and others recently are the most atrocious judgments that I have seen as Chief Judge of the Provincial Court. An example is making findings of fact when there is no evidence before you and there are many others. You want to justify your actions under 718.2(e) which is an interpretation of that section by yourself whereby you have greatly exceeded your jurisdiction. You should pay attention to what was said by Justice Levechio in the Hunter appeal. In short your recent handling of native matters before you is in my humble opinion an embarrassment to our court.

. . .

In view of information that I have received from other judges . . . I am not aware of any corrective measure that I can take that will get you on, what I think is, the right track."

TAB 20 - Excerpts from April 9, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson

"**RE: Judge Reilly/Canmore - Banff Base Point**

Thank you for your letter of March 30, 1998 on the above subject. I have given serious thought to this matter and I agree with you that the base point in Canmore be closed, Judge Reilly be moved to Calgary and the circuit be serviced from Calgary. This will be a cost saving measure which is further justified by our desire to preserve the good reputation of the Provincial judiciary.

. . . . .

I therefore suggest that you make a formal request to me to move Judge Reilly to Calgary, close to the Canmore base point and convert it into a circuit point, with your reasons showing how you arrive at cost-saving. I will order the closure of that base point, move Judge Reilly to Calgary and forward the matter to the Minister to take appropriate action regarding financial and administrative matters in accordance with their procedures."

TAB 18 - April 21, 1998 letter from Assistant Chief Judge Stevenson to the Chief Judge

This letter sets out administrative details in various circuits. It details projected cost savings from closing the Canmore Base Point. It recommends closure of the Canmore Base Point, plus the re-assignment of Judge Reilly.

TAB 16.1 - April 24, 1998 document from Dave Paul (Manager, Provincial Court) to Jim McLaughlin (Director, Court Services)

This is an administrative document discussing various aspects of closing the Canmore Base Point. It cites advantages (e.g., cost savings, centralization, consistency) and disadvantages (reduced service to the public). It also attaches statistics on caseload volume for the various circuit courts.

TAB 14 - May 13, 1998 letter from Vijay Bhardwaj (Legal Counsel, the Provincial Court of Alberta) to Assistant Chief Judge Stevenson (plus several draft letters)

This letter states that the Chief Judge would like Assistant Chief Judge Stevenson's comments on the attached draft letters (which were later finalized as Tabs 10, 9, 8, 12 and 11, respectively). The letter also sets up the May 26, 1998 meeting among the Chief Judge, Assistant Chief Judge Stevenson and Judge Reilly.

TAB 10 - May 25, 1998 letter from the Chief Judge to Assistant Chief Judge Stevenson

"**RE: Canmore Base Point - Judge Reilly**

Thank you for your letter of April 21, 1998 on the above subject. I support, whole heartedly, your commitment to improve the efficiency of the justice delivery system west of Calgary. I accept your well thought out and pragmatic proposal to convert Canmore into a circuit point and move Judge Reilly to Calgary.

While I will designate sitting days for Canmore, as per your letter of April 21, 1998, the decision to keep it as a base point or change it to a circuit point belongs in the jurisdiction of the Minister (including Deputy Minister). I am requesting the Deputy Minister to do whatever is necessary to accommodate these changes, namely, to provide the cost of the move of Judge Reilly's residence from Canmore to Calgary and provide facilities for new sitting days in Canmore. (See enclosed letter to Neil McCrank).

I have reassigned Judge Reilly to preside in Calgary effective 1st of September 1998. A copy of my letter to him is enclosed for your information and necessary action."

TAB 9 - May 25, 1998 letter from the Chief Judge to Neil McCrank (Deputy Minister of Justice and Deputy Attorney General) (copied to Assistant Chief Judge Stevenson and Judge Reilly)

"As part of our ongoing commitment to improve the efficiency of the justice delivery system, Assistant Chief Judge Stevenson has thoroughly reviewed the operations of the court circuit west of Calgary (Banff, Canmore and Cochrane). I enclose his report for your perusal. [such report was not included in the record]

I agree with Assistant Chief Judge Stevenson that the above noted circuit can be run more efficiently from Calgary. This can be done by adjusting our sitting schedule on that circuit and by moving Judge Reilly from Canmore to Calgary.

Pursuant to the authority that I have under the existing laws, I intend to designate the sitting days on that circuit as suggested by Assistant Chief Judge Stevenson and re-assign Judge Reilly from Canmore to Calgary: both decisions to be effective 1st of September 1998.

Whether Canmore should remain a base point or not is in your jurisdiction: my concern is the provision of facilities there to hold sittings of our court on designated days from 1st of September 1998.

This is to request you to do whatever is necessary to facilitate the changes that I am making, namely the change of residence of Judge Reilly from Canmore to Calgary and appropriate staffing and facilities at Canmore on the new sitting days there.

Thank you for your cooperation."

TAB 8 - May 25, 1998 letter from the Chief Judge to Judge Reilly (copied to Assistant Chief Judge Stevenson)

"As a result of continuing and mounting concerns about your obsession to subjugate the law to your perception of unjust social conditions of the aboriginal peoples as well as your pre-judgement attitude which can more frequently become grounds for application to disqualify yourself from presiding over a case on the basis of bias, Assistant Chief Judge Stevenson and I have decided to re-assign you to sit in Calgary from 1st of September 1998.

This entails a change of residence for you from Canmore to Calgary. Assistant Chief Judge Stevenson will assist you with the administrative details in this matter.

I may add that this move is the only honourable way of keeping you and the Provincial Judiciary out of harm's way. For purposes of the executive branch, however, I have justified this move on administrative grounds. (See copy of enclosed letter to the Deputy Minister).

I am sending a copy of this letter to Assistant Chief Judge Stevenson. Please contact him at your early convenience to make plans to sit in Calgary from 1st of September 1998."

Tab 152

CanLII

Newfoundland Association of Provincial Court Judges et al. v. Newfoundland, 1998 CanLII 14092 (NL SC)

Source:	Supreme Court of Newfoundland and Labrador
Date:	1998-05-21
File number:	1997 St. J. No. 3103; 1998 St. J. No. 0337
Other citations:	163 Nfld & PEIR 319 — 160 DLR (4th) 337 — 503 APR 319 — 12 Admin LR (3d) 224 — 32 CPC (4th) 324 — [1998] NJ No 120 (QL)
Citation:	Newfoundland Association of Provincial Court Judges et al. v. Newfoundland, 1998 CanLII 14092 (NL SC), <https://canlii.ca/t/1p8w7>, retrieved on 2026-01-18

Supreme Court of Newfoundland - Trial division

Newfoundland Association of Provincial Court Judges et al. v. Newfoundland

Date: 19980521

Docket: 1997 St. J. No. 3103; 1998 St. J. No. 0337

Roberts, J.: While the applicants, the Judges of the Provincial Court of Newfoundland (the "Judges"), and their Association, the Newfoundland Association of Provincial Court Judges (the "Judges' Association") are seeking a number of remedies, by way of general description, they are contending that the respondent, which includes the Legislature and the Executive branches of the Government of Newfoundland (the "Government"), has failed to comply with the provisions of the Provincial Court Act, R.S.N. 1991, c. 15, relating to the setting of their salaries and benefits.

The Judges' claims can only be understood against the background of various actions by the Government since 1991. Accordingly, I will elaborate chronologically those actions and the various responses by the Judges thereto before being more specific about the corrective measures they are asking be ordered.

My analysis of the Judges' claims will also require a review of the decisions of the Supreme Court of Canada in Reference Re Remuneration of Judges of the Provincial Court (P.E.I.), 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; 217 N.R. 1; 206 A.R. 1; 156 W.A.C. 1; 121 Man.R.(2d) 1; 158 W.A.C. 1; 156 Nfld. & P.E.I.R. 1; 483 A.P.R. 1 and 1998

CanLII 833 (SCC), [1998] 1 S.C.R. 3; 223 N.R. 21; 212 A.R. 161; 168 W.A.C. 161; 126 Man.R.(2d) 96; 167 W.A.C. 96; 161 Nfld. & P.E.I.R. 124; 497 A.P.R. 124 (the "Provincial Court Judges Case" and the "Provincial Court Judges Case No. 2"). The judgment of the Supreme Court of Canada in the Provincial Court Judges Case was issued on September 18, 1997. At the request of several of the parties concerned with the repercussions of the judgment, a rehearing was held on January 19, 1998. The Court's judgment on the rehearing was issued on February 10, 1998.

The Chief Judge of the Provincial Court of Newfoundland (the "Chief Judge") was granted leave to intervene in support of the Judges and to present arguments concerning the import of various amendments to the Provincial Court Act, S.N. 1997, c. 19, brought into force on December 11, 1997.

Background

Prior to the Provincial Court Act, 1991, the salary of the Provincial Court Judges was established by regulation under its predecessor act, The Provincial Court Act, 1974. For example, by Newfoundland Regulation 161-87 filed on September 1, 1987 the salary of a Provincial Court Judge was, "effective from the 1st day of April, 1988, 85 percent of the salary of the Deputy Minister of Justice of the Province as it is from time to time". The same Regulation provided for an additional payment of $5,000.00 to the Chief Judge.

The last increase of the salary of a Provincial Court Judge prior to the one given in December 1997, which will be referred to later, was effective January 1, 1991, at which time the salary was set at $90,129.00

[Page 325]

and the salary of the Chief Judge at $95,129.00. The salary scale of the Deputy Minister of Justice for the Province at the time was between $81,564.00 and $106,033.00. In April 1990, the salary of the Deputy Minister was $88,423.00. As of November 13, 1997, the pay scale of the Deputy Minister of Justice had not been changed. The salary for the position, nevertheless, had increased from $91,780.00 per annum for the fiscal year 1991-1992 to $106,033.00 per annum for the fiscal year 1995-1996.

For the Newfoundland Government and all governments in Canada, the first half of the 1990s demanded fiscal restraint. Thus, in early 1991, the Government introduced the Public Sector Restraint Act which was subsequently passed by the Legislature and assented to on April 18, 1991 (R.S.N. 1991, c. 3). Pursuant to s. 4(1) of the Act, Provincial Court Judges and the officers and employees of the Provincial Court of Newfoundland were deemed to be public sector employees. The Act prevented increases in pay scales during a restraint period identified in s. 2(e) as the fiscal year beginning on April 1, 1991 and ending on March 31, 1992.

Tab 153

CanLII

Manitoba Provincial Judges Association v. Manitoba (Minister of Justice), 1994 CanLII 6411 (MB QB)

Source:	Court of Queen's Bench of Manitoba
Date:	1994-11-25
File number:	CI 94-01-81773
Other citations:	98 Man R (2d) 67 — 30 CPC (3d) 31 — [1994] MJ No 646 (QL)
Citation:	Manitoba Provincial Judges Association v. Manitoba (Minister of Justice), 1994 CanLII 6411 (MB QB), <https://canlii.ca/t/1pflb>, retrieved on 2026-01-19

FILE NO. CI 94-01-81773

(WINNIPEG CENTRE)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

THE JUDGES OF THE PROVINCIAL COURT OF MANITOBA as represented by THE MANITOBA PROVINCIAL JUDGES ASSOCIATION, JUDGE MARVIN GARFINKEL, JUDGE PHILIP ASHDOWN, JUDGE ARNOLD CONNER, JUDGE LINDA GIESBRECHT, JUDGE RONALD MEYERS, JUDGE SUSAN DEVINE, and JUDGE WESLEY SWAIL, and the JUDGES OF THE PROVINCIAL COURT OF MANITOBA as represented by JUDGE MARVIN GARFINKEL, JUDGE PHILIP ASHDOWN, JUDGE ARNOLD CONNER, JUDGE LINDA GIESBRECHT, JUDGE RONALD MEYERS, JUDGE SUSAN DEVINE, and JUDGE WESLEY SWAIL,

Applicants,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA as represented by ROSEMARY VODREY, THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF MANITOBA and DARREN PRAZNIK, THE MINISTER OF LABOUR as the Minister responsible for The Public Sector Reduced Work Week and Compensation Management Act,

Respondents.

R. D. TONN for the Applicants

E. W. OLSON, Q.C. and V. E. RACHLIS for the Respondents

JUDGMENT DELIVERED: NOVEMBER 25, 1994

[Page 2]

SCOLLIN, J.

I. INTRODUCTION

The main legal issue in this case is whether the provincial government has unconstitutionally infringed the independence of the judiciary by legislating a reduction in the amount of their remuneration. The first of two other issues, both said to involve infringements of the independence of the judiciary, relates to the closing of the Provincial Court on certain days. The second relates to alleged improper pressure by the Government in the course of discussions with the judges about judicial salaries. Both of these are secondary issues involving findings of fact, and I will deal with them after I have disposed of the principal constitutional issue.

After resorting to layoffs and wage freezes in its operations for two years, the Government of Manitoba was still faced in early 1993 with a mounting deficit of about $230 million more than it had budgeted. Instead of directly laying off employees or merely rolling back wages, it decided in February of 1993 to save money by reducing pay, capping or cutting back funding and generally eliminating some paid working-time in the public sector. On July 27, 1993 it therefore passed The Public Sector Reduced Work Week and Compensation Management Act, S.M. 1993, c. 21 ("Bill 22"), to be administered by the respondent Minister of Labour.

The members of an association of provincially-appointed judges ("the Association") contend that, as a matter of law, Bill 22 cannot constitutionally be applied to them as it unjustifiably interferes, in an

[Page 3]

arbitrary and discretionary manner, with their financial security, by overriding the statutory process in The Provincial Court Act, R.S.M. 1987, c. 275 by which alone, they say, their compensation is to be set.

The respondent ("the Government") contends that neither in law nor in fact has it interfered with the individual or collective independence of the provincially-appointed judges; and that Bill 22 is not inconsistent with The Provincial Court Act or, if it is found to be inconsistent, it prevails.

II. THE RELATIONSHIP OF THIS CASE TO THE CASES OF R. v. CAMPBELL, R. v. EKMECIC AND R. v. WICKMAN

The issues raised by the Association in the present case were argued before me on October 24, 1994. In the course of preparing these reasons, counsel drew to my attention the reasons for judgment of McDonald, J. of the Court of Queen's Bench of Alberta covering these cases referred in the heading. Argument ("the Alberta case") had been presented during the summer and the reasons were handed down on November 15. The Alberta case dealt with various issues arising from the particular legislation in force there that has an impact on the independence of the judges of the provincial court in that province, including security of tenure and the involvement of the attorney general regarding sittings. The judgment, however, dealt primarily and extensively with the aspect of financial security of the judges of the provincial court of Alberta whose compensation was reduced as a result of legislation similar to Bill 22. In

[Page 4]

regard to this issue, the reasons of McDonald, J. cover the cases, statutes and texts which were canvassed in argument before me. More than enough repetitive bodies of quotation already slumber under the covers of the law reports. It would be pedantic for me to repeat the extracts selected by McDonald, J. from British, Canadian and American sources; for the purposes of my decision in this case, I shall simply refer to the lettered portions of his reasons.

I am in general agreement with the detailed analysis of the cases and statutes by McDonald, J., and I agree with his reasoning on the issue of financial security. I also agree with the substance of his conclusion that a true reduction of indefinite duration in judicial compensation is not constitutionally permissible except as a non-selective and non-discriminatory part of an overall legislative economic measure, such as income tax and the like; that is, a measure which is not confined to expenditure on the services provided by or through government and affecting only those paid from the public purse such as politicians, civil servants, members of administrative tribunals and the like. Neither the legislation in Alberta (nor, in my view, that in issue here) constitutes such an

overall economic measure. In the result, McDonald, J. concluded that the Alberta legislation was invalid.

On this issue of invalidity my reading of Bill 22, leads me to a different conclusion. For the reasons set out later, I have concluded that constitutional protection of the financial security inherent in judicial independence must in an economic emergency give way to a reasonable,

[Page 5]

proportionate and limited deferment only (by way of "reduction"); and that such deferment, not affecting or eroding the vested right to judicial compensation already fixed, is not and will not be perceived to be an infringement on judicial independence. Thus, I take the view that,. as a legislature is presumed to act within its constitutional limits, Bill 22 must be read down so as to provide only for a temporary suspension of the actual payment of full compensation, subject, on the expiry of the legislation, to full retroactive reinstatement of all compensation that was suspended.

III. THE MANITOBA LEGISLATION IN ISSUE

The Provincial Court Act. By s. 3, the Cabinet appoints judges in accordance with a statutory nomination and selection procedure. By s. 8, the Cabinet appoints a chief judge after a similar statutory nomination and selection process. By s. 3, the chief judge and the other full time judges hold office during good behaviour. By s. 8.1, the chief judge has general supervisory powers in respect of judges and "other staff" in matters that are assigned by law to the court and is also responsible for the judicial functions of the court, "including direction over sittings of the court and the assignment of judicial duties". Section 7 sets out the broad jurisdiction of the Provincial Court judges in Manitoba, including confirmation of the power conferred by federal legislation. Section 13 of Bill 22 establishes a criminal division of the court, and s. 16 establishes a family (including youth court) division. Section 10 prohibits any fill time judge carrying on any business, trade, profession or occupation. Section 11 provides for vacation pay, sick

[Page 6]

leave and other benefits "as if the judge were a Manitoba Government employee".

A significant provision for the purpose of the issues in this case is s. 11.1 which was added as a result of the recommendation of the Manitoba Law Reform Commission in 1989 that the Government should establish a different and more seemly relationship with the judiciary than that hitherto provided by provincial law, so that both the judiciary and the Government would be able to make recommendations to an "independent" compensation committee. The report of that committee, of course, would remain subject to the ultimate vote of the Legislature. The Association argues that this s. 11.1 "takes on

quasi-constitutional status which renders it 'greater' than other provincial legislation and must be interpreted and applied in a manner which is consistent with the constitutional guarantee of judicial independence". I will consider later the present status of s. 11.1 which provides:

"Compensation committee established

11.1(1) The minister shall, once every two

years, commencing in 1990, cause a compensation committee, to be known as the

Judicial Compensation Committee, to be established to review, determine and report to the minister on, the salaries and benefits payable to judges, including pensions, vacations, sick leave, travel expenses and allowances.

Composition of compensation committee

11.1(2) A compensation committee established under subsection (1) shall be appointed by the Lieutenant Governor in Council and shall

[Page 7]

consist of a person designated by the judges of the court, and two persons, one of whom shall not be a civil servant, designated by the minister; and the Lieutenant Governor in Council shall designate one of the persons as chairperson of the compensation committee.

Powers of compensation committee

11.1(3) A compensation committee appointed under subsection (2) has such powers of commissioners appointed under Part V of The Manitoba Evidence Act as the Lieutenant Governor in Council may direct, and has the protection and privileges of commissioners so appointed.

Minister to table report

11.1(4) A report submitted under subsection (1) shall, within 30 days after it is submitted, be tabled by the minister in the Legislature if it is in session, and if the Legislature is not in session, not later than 30 days after the opening of the next session of the Legislature.

Referral of report to committee

11.1(5) A report that is tabled in the Legislature under subsection (4) shall be referred, within 30 days of being tabled, to a standing committee of the Legislature to report, within 60 days or such time as the Legislative Assembly may direct, on the recommendations of the compensation committee.

Implementation of report

11.1(6) Where the Legislative Assembly receives and votes on the report of a standing committee that is received under subsection (5), the government shall proceed to implement the report in accordance with the vote of the Legislative

 Assembly, and all Acts, regulations and administrative practices shall be deemed to be amended as necessary to implement the report."

[Page 8]

Bill 22, which reduced the work week and compensation, provides by s. 3 that Part 1 of the Bill prevails over every other Act. Subsection 9(1) of Part 1 purports to "reduce" the remuneration of the provincially-appointed judges by 3.8% for the year from April 1, 1993 to March 31, 1994 and provides a formula for the reduction for the next fiscal year from April 1, 1994 to March 31, 1995. By ss. 9(2), the salary reduction "may be achieved where practicable" by the judge taking specific days of leave without pay. Part 2 of Bill 22 deals with the compensation of medical practitioners by limiting the total funding for the provision of insured medical services. Part 3 of the Bill, dealing with the reduction of the compensation for members of the Legislative Assembly, provides by subsections 24(1) and (2) and subsections 25(1) and (2) for reductions of indemnity and constituency allowance respectively, similar those in s. 9 for judges.

Section 3 of Bill 22 provides:

> "This Part prevails over every other Act and every regulation, collective agreement, employment contract or arrangement, arbitral or other award or decision and every obligation, right, claim,. agreement or arrangement of any kind."

Section 9 of Bill 22 provides:

[Page 9]

> "Judges, boards, commissions and committees 9(1) The amount that would otherwise be paid to every person who receives remuneration as a judge of The Provincial Court or in respect of services performed as a member of a Crown agency or a board, commission or committee, to which he or she is appointed by a minister or by the Lieutenant Governor in Council, shall be reduced
>
> (a) for the period commencing on April 1, 1993 and ending on March 31, 1994, by 3.8%;
>
> and
>
> (b) for the period commencing on April 1, 1994 and ending on March 31, 1995, by an amount that is generally equivalent to the amount by which the wages of employees under a collective agreement with Her Majesty in right of Manitoba are reduced in the same period as a result of a requirement to take days or portions of days of leave without pay in that period.
>
> Reduction achieved by leave days
>
> 9(2) The reduction mentioned in subsection (1) may be achieved, where practicable, by the person's taking specific approved days or portions of days as days of leave without pay."

As to s. 9, the Association takes the position that in enacting the provisions of Bill 22 the Government has improperly interfered with the financial security of judges and with the process of determining judicial compensation established by s. 11.1 of The Provincial Court Act. This issue of the relationship between the two pieces of legislation will be considered first.

[Page 10]

IV. DOES THE NEW ACT OVERRIDE S. 11.1 OF THE PROVINCIAL COURT ACT?

The description by the Association of s. 11.1 as "quasi constitutional" is not a very helpful assessment of the nature of the legislation. "Quasi" means that something seemingly is, but really isn't. The words were used by Laskin, J. (as he then was) in Hogan v. The Queen, 1974 CanLII 185 (SCC), [1975] 2 S.C.R. 574 at 579 to describe the special respect and status accorded to the 1960 Bill of Rights. However, the description is hardly merited by a statutory process designed to assist in the setting of judges' salaries. A constitution can be amended only by the amending formula it prescribes. It is its own source. All other legislation may be amended or repealed by later legislation. Subject to my remarks about legislative efforts that impair already fixed and settled judicial compensation, whatever might be the political or social ramifications of removing laws from the statute book, there is no legal impediment to doing just that. This is the case even with legislation designed to secure the often diversely-perceived "human rights". If the Government has the temerity to repeal such legislation, the issue still remains whether existing laws meet the minimum requirements of the Charter of Rights and Freedoms.

In any event, the independence of the judiciary is both implicit in the acknowledgment in the preamble to the Charter that Canada is founded upon principles that recognize the rule of law and express in ss. 11(d), although the precise parameters of judicial independence are not. fixed with precision by any law, even by sections 96 - 100 of the

[Page 11]

Constitution, which recognize the inherent authority and jurisdiction of judges of the superior courts. In these circumstances I cannot see that s. 11.1 of The Provincial Court Act and the process which it prescribes are immune from Bill 22. The section remains in force but its effective operation is suspended. There is nothing to prevent the continued appointment of compensation committees, but, without amending Bill 22, the Legislature has disentitled itself from voting to give immediate effect to any recommendations which it might endorse. In this respect, the position in the province is no different from that prevailing in regard to Superior Court judges. The statutory triennial commissions may make whatever recommendations they see fit for increase in salary but, unless the law is

amended, the present federal statutory "freeze" prevents Parliament from giving effect, in the meantime, to any proposed increase.

Further, although Bill 22, .while it remains in force, renders the process under s. 11.1 of The Provincial Court Act ineffective, it does not repeal that process; and it does not prevent the continuing biennial appointment of compensation committees under ss. 11.1(1) to review and report on all aspects of salaries, benefits, pensions and the like. The Legislature is, for the present, effectively precluded from fully implementing a committee report by reason of Bill 22, but the future decisions in the Legislature may well be affected by the continued reasoned recommendations of the committee; and in view of my conclusion on the main constitutional issue, the continuation of the process may well prove useful.

[Page 12]

V. DEVELOPMENT OF THE CONCEPT OF FINANCIAL SECURITY AS AN ESSENTIAL ELEMENT OF JUDICIAL INDEPENDENCE

At letter "E" of the judgment in the Alberta case, McDonald, J. quotes a number of recent judgments of the Supreme Court of Canada which discuss the historical foundations of the concept of judicial independence in Canada, leading to the conclusion expressed by Dickson, C.J.C. in Beauregard v. Canada, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56 at p. 73:

> "In summary, Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system."

It is important to note that in the same case, at p. 78, he observed that:

> "... salary and pension changes were intended to be complementary and, as a comprehensive package, did not diminish, reduce, or impair the financial position of federally-appointed judges." (emphasis supplied)

The underlined words show that the need to protect already-fixed judicial compensation from impairment by legislative action is an element that

[Page 13]

cannot be ignored in determining the validity of a purported diminution or reduction.

I also emphasize two observations made in Valente v. The Queen, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673. The first is at p. 689:

> "... It is ... important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees."

The second at p. 704 relates to security of compensation:

> "The second essential condition of judicial independence for purposes of s. 11(d) of the *Charter* is, in my opinion, what may be referred to as financial security. That means security of salary or other remuneration, and, where appropriate, security of pension. The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence. In the case of pension, the essential distinction is between a right to a pension and a pension that depends on the grace or favour of the Executive."

[Page 14]

For the sake of brevity, I adopt the historical account given by McDonald, *J.* at the letter "F" in his reasons. The development of financial security as an element of judicial independence in England has culminated in legislative recognition there that, once fixed, the salaries paid to judges of the Supreme Court "may be increased, but not reduced".

The history of the financial security of the judiciary has, of course, been incremental and not unbroken. During the depression years in England the salaries of judges were reduced, but the government action was much criticized and recognized as constitutionally questionable at the very least. In Canada, in the same period, the Government declined to apply to judges the statutory salary reduction which it applied to the civil service. It accepted the view that "it would be a breach of the statutory rights of judges to undertake to make a curtailment of their salaries in this way". However, as a result of political pressure in the Cabinet, it went on to pass a special income tax act to levy the same reduction on judicial salaries. This somewhat devious and dubious device seems to offend the constitutional principle by doing indirectly what is impermissible directly.

Of course, claims to high principle may turn out to be self-seeking on stilts: and the judiciary has occasionally, in the name of principle, sought to avoid the burden of such general economic measures as income tax. For example, over 50 years ago, some federally-appointed judges tried unsuccessfully to immunize themselves from provincial income

[Page 15]

tax: see Judges v. A.G. of Saskatchewan, 1937 CanLII 368 (UK JCPC), [1937] 1 W.W.R. 508 at 512 where the Privy Council said:

> "... Neither the independence nor any other attribute of the judiciary can be affected by a general income tax which charges their official incomes on the same footing as the incomes of other citizens. ..." (emphasis supplied)

And, again, in the United States the federal judges unsuccessfully sought a similar exemption on the ground that their compensation was being unconstitutionally "diminished".

Subsection 11(d) of the Charter provides:

> "Any person charged with an offence has the right
>
> …
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; ..."

Without repeating the reasoning of McDonald, *J.* on the issue of financial security and the effect of ss. 11(d) of the Charter, I adopt his conclusion that:

> " .. [O]nly a general reduction by a mechanism (like income tax), the burden of which is shared by the population at large is permissible, and the salary scale must be adjusted upward from time to

[Page 16]

> time to maintain the real value of the salaries. And these characteristics of the guarantee of financial security are applicable not only to federally-appointed judges but also to judges of the Provincial Courts who exercise jurisdiction over the trial of persons charged with an offence."

The reasons for the application of the same constitutional principle to provincially-appointed judges is obvious and I need not repeat the observations by McDonald, J. in the Alberta case at letter "D", in which he sets out the extensive jurisdiction and responsibilities of those judges. The substance of his remarks applies equally to the Provincial Court of Manitoba. On the issue of independence, the fact that the jurisdiction of the superior courts has an express constitutional base as compared with the purely statutory base of the Provincial Court is immaterial. The Provincial Court receives its jurisdiction both from federal statutes which confer it, such as the Criminal Code, and from provincial statutes such as The Highway Traffic Act, so that a person accused of an offence is entitled to a hearing by an independent and impartial tribunal whether his trial takes place before a Superior Court judge or before a judge of the Provincial Court.

In the result, I agree with the conclusions of McDonald, J. that the salaries of Provincial Court judges, once fixed, may not be eroded or impaired by the Legislature. I disagree with the contrary view of MacDonald, C.J.T.D., P.E.I.S.C. in R. v. Lowther, [1994] P.E.I.J. No. 98, delivered on September 21, 1994. The case concerned the application to

[Page 17]

the judges of the Provincial Court of Prince Edward Island of The Sector Pay. Reduction Act, S.P.E.I. 1994, Cap. 51. MacDonald, C.J.T.D. decided, in the result, that the manner in which the Act was applied to the judges of the Provincial Court created a reasonable perception that they lacked judicial independence or impartiality (paragraph 56). However, I am not persuaded by his classification of the legislation, which affects the public sector only, as a general overall economic measure. He said:

> "... Here, only a limited group of people have been involved in reductions of pay rates. Nevertheless, if the legislation is only making an equal reduction in pay rates to all those mentioned in the Act, then such would not derogate from a judge's judicial independence." (para. 35)

He consequently took the position that:

> "... If Provincial Court judges have been dealt with in a manner consistent with public sector employees, it cannot be said to be an arbitrary interference with the independence of the judges. ..." (para. 37)

In my view, the historical development of the concept of the independence of the judiciary leads to the conclusion arrived at in the Alberta case rather than that arrived at in the Prince Edward Island case.

It is simplistic to say that what has been fixed by legislation may also be unfixed or altered by legislation. That is generally true of

[Page 18]

ordinary legislation even if the change may have major social impact: see, for example, Re Canada Assistance Plan (B.C.), [1991) 1991 CanLII 74 (SCC), 2 S.C.R. 525. That case involved the application of the legislative power of repeal contained in ss. 42(1) of the federal Interpretation Act, R.S.C., c. I-21 which provides:

> "Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person."

Subsection 23(1) of The Interpretation Act of Manitoba, R.S.M. 1987, c. 180 is in essentially the same terms. It does not, however, follow that legislation which is passed to comply with a constitutional imperative may be altered at will and with constitutional impunity. In this regard 1 disagree with the opinions of Thurlow, C.J. and Pratte, J. as recounted in Beauregard v. Canada, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56 at 66. They held that as Parliament had power to fix the salaries of the judges of the superior courts, it had power to reduce them. As the Supreme Court of Canada took an entirely different view of the impact of the legislation in question, it did not have to address the issue of an actual reduction.

My conclusion that judicial salaries cannot generally be reduced is not inconsistent with accepting the constitutionality of a reasonable, temporary and proportionate suspension of payment in an economic emergency. Where, in the judgment of the Government, fiscal demands on

[Page 19]

the public treasury can be met only by immediate but determinate restraints on the Government's own spending, the constitutional entitlement of the judiciary to the compensation already fixed and vested can properly be accommodated by a deferment of payment, subject to full restoration when the legislated period terminates. I do not regard such a temporary reduction in disbursement of compensation as an infringement of the independence of the judiciary.

I consider that the situation here warrants "reading down" s. 9 of Bill 22. In its general application and in its application to the judges of the Provincial Court, the legislation is essentially valid. Understandably, it does not confirm that, when it expires on March 31, 1995, the amount of the deductions withheld from the already-fixed compensation of the judges will be restored in full. On the other hand, whatever effect the legislators thought they were bringing about, they enacted legislation which does not expressly preclude restoration and which should, if possible, be given a meaning consistent with the Constitution. That being so, and given that the fixed base of judicial compensation may not be impaired or eroded by legislation such as Bill 22, the terms, "reduced" and "reduction", in their application to amounts withheld from judges of the Provincial Court, may reasonably be and should be construed to mean only that payment is deferred for the limited period of the operation of the statute.

[Page 20]

VI REASONS FOR NON-IMPAIRMENT OF FINANCIAL SECURITY

In letter "F(f)" and elsewhere in his reasons, McDonald, J. considers various practical arguments in favour of preserving the financial security of judges from legislative and economic in-roads. Judges obviously cannot and do not expect the self-bestowed largesse of senior corporate executives or money managers. They cannot and do not expect to be able to fix their own salaries and pensions as legislators do. And they do not seek the rewards of those who are endowed with transient talent in the firing of such commercial projectiles as pucks, baseballs, footballs and basketballs. Clearly, the salaries of judges must be set at a firm, fair and sensible level in the appreciation that the amounts must be found in either the Consolidated Fund or in the annual appropriations. The constitutional right in ss. 11(d) of the Charter is the right of the citizen, not of the judge, but the derivative right of the judge is to have the constitutional right protected. by due legislative action by the government.

In this regard a certain assurance exists in the common method of arriving at reasonable compensation by relating it in some way to the salaries of senior public servants. Some reasonable yardstick must be used, but the use of this particular yardstick is liable to lead to the common confusion, reinforced by attempts to reduce judicial salaries, that the judiciary is merely another group of employees. In law and in fact, the judiciary is in quite a different position from either ministers or senior civil servants, who hold their offices at pleasure and who may and frequently do move on to lucrative positions in the world of business, diplomacy or

[Page 21]

academe. The career of the judge is not generally taken up until the lawyer is well into mid-life and the office of judge is its own beginning and its own end. In the vast majority of cases there is neither ambition, opportunity nor energy left for late-life endeavour in another field. This is part of the real foundation that underlies the constitutional guarantee. Compensation by society of its judges must be sufficient and sufficiently stable to ensure as far as possible that good, experienced and competent practitioners are attracted to the bench. If the salaries of judges are to be subjected to political vagaries, then the standards of impartiality and independence are imperilled in the long term; the citizen is put at risk of widespread patronage and in eventual danger of being judged by inadequate appointees chosen from the denizens of the grubby netherworld of the law or from lawyers who have barely subsisted above the mental poverty line.

In concluding my remarks on financial security, I point out that various processes have been adopted by legislators to fix judicial salaries. In some cases the compensation is set by the Lieutenant Governor in Council, in others it is set directly by the Legislature itself. In some cases commissions or committees are appointed by Cabinet to make recommendations to the legislators; in other cases, not. Unfortunately, the recommendations of successive statutory commissions may end up effectively ignored and the reports may stand as derelict bridges between the legislators and the judiciary. It is clear, however, that, while legislators have the last word in voting, persistent refusal to pay more than lip-service to the independent, non-partisan committees or commissions appointed

[Page 22]

under purposive legislation endangers not only the institutional standing of the judiciary but also the very constitution itself.

VII PUBLIC RIGHT OF ACCESS TO COURTS

I propose to treat this allegation very briefly. The issue is one of fact. I am satisfied from the affidavit of Mr. Bruce, the Assistant Deputy Minister responsible, that successive Chief

Judges of the Provincial Court were duly consulted and did indeed direct the closing of the courts over the summer and in the Christmas period. I accept the evidence that, one way or another, the necessary staff would have been provided to enable the courts to remain open. Equally, I am sure that if the chief judge had decided that there would be no closing of the sort envisaged by the Government's overall plan, sufficient court and other staff would have been made available to satisfy operational requirements.

In what was really the second year of legislated cut-backs, the people involved already had experience of the arrangements carried out in the first year. It was no doubt a reasonable expectation of repetition that led to early instructions being issued to crown attorneys, full-time legal aid lawyers and others about the days on which court would not be held. These instructions had been issued before Chief Judge Webster announced her decision, but I am satisfied that if she had decided that the Provincial Court would remain open on the "down" days selected, any conflicting instructions to staff and other involved would have been countermanded. I am also satisfied that the operational decision as to court sittings is a matter

[Page 23]

for the chief judge under ss. 8.1(1)(b) of The Provincial Court Act. No doubt the chief judge may consult the members of the court in arriving at a decision on sittings but the responsibility in law is that of the chief judge alone, not that of the collectivity. This is not inconsistent with there remaining in the hands of each individual judge the ultimate responsibility for control of the times and days on which the particular case before him will be heard or will continue. As well, there are sound practical reasons for the Crown playing a major role in organizing appearances and in getting cases to trial, but that arrangement is a matter of convenience, not of law.

In the circumstances, I conclude that the Government did not infringe judicial independence in regard to court sittings.

VIII ALLEGED IMPROPER PRESSURE BY THE GOVERNMENT ON JUDGES

Again, this is a matter of fact with which I propose to deal with only briefly. At one point counsel for the Government and counsel for the Association had reached agreement to present a joint recommendation to the compensation committee set up under s. 11.1 of The Provincial Court Act. Before the joint recommendation could be signed, counsel for the Government sought to have the Association state whether it intended to challenge the validity of Bill 22. The Association saw this as an attempt to tie in the issue of compensation with the issue of the Association's right to challenge the Bill and, therefore, declined to answer the request about the

[Page 24]

position it proposed to take. In the result, the joint submission was neither signed nor made.

The Association perceives the Government's conduct as a pressure tactic, an attempt to undermine the independence of the judiciary, and an attempt to circumvent the judicial compensation process.

Particularly in the light of my conclusion on the main issue, am satisfied that Bill 22 does not negate the continuation of the compensation committee process. The Association was then, and remains now, free to continue with its submissions to the committee.

The position taken by the government at the time the joint recommendation was about to be submitted to the committee was as indiscreet but, in the circumstances, immaterial.

IX SECTION 1 OF THE CHARTER

Both parties addressed as an alternative the possible application of s. 1 of the Charter which provides:

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

[Page 25]

The Association contends that, on the basis of R. v. Oakes (1986), 1986 CanLII 46 (SCC), 26 D.L.R. (4th) 200 (S.C.C.), Bill 22 is an unjustified limit on judicial independence. The government argues that, as Bill 22 has no impact at all on ss. 11(d), s. 1 is not relevant; and that even if Bill 22 has an impact, the requirements of s. 1 have been met.

I see no need to invoke s. 1 otherwise than as a sensible general canon of construction in deciding on the rational, inherent boundaries of the particular right. In subsection 11(d) of the Charter individual rights and the rights of society coincide and produce the derivative rights of the judiciary. Flowing from the right to an independent and impartial tribunal is the assurance to the individual and to society that judges are financially secure. It is only if, either in fact or in the informed perception of society, the Legislature renders the judges less than financially secure that the coincident rights of the individual and society are infringed. If the actions of legislators do not cause judges to be financially insecure, neither the right of the individual nor the right of society is in jeopardy. The deferment of compensation for a limited time and as a result of pressing fiscal conditions (as is the case here) is not sufficient to place any rights in jeopardy. Therefore, as the right of the individual and the right of society to an independent and impartial tribunal have not been

infringed, no Charter right has been limited and the almost inedible law-and-policy porridge of the Oakes case need not be served.

[Page 26]

X SUMMARY OF CONCLUSIONS

1. Subsection 11(d) of the Charter expressly enunciates the overriding, established constitutional requirement for an independent and impartial tribunal. This requirement applies not only to Superior Court judges but also to judges of the Provincial Court. Once fixed, judicial salaries may not be reduced except as part of a general overall economic measure.

2. Bill 22 is not a general overall economic measure. It is a specific restraint measure applicable only to members of the Legislature, to civil servants and to various state supported operations. These subjects of Bill 22 are not protected by the constitutional imperative of an independent and impartial tribunal. The Bill, therefore, cannot operate to effect a reduction in judicial compensation already fixed.

3. However, read in a manner that is consistent with the Constitution, Bill 22 is effective to defer payment while the statute is in force. This determinate deferment is not a limitation of any rationally-defined constitutional right, provided that restoration is made following the expiry of the legislation.

In the circumstances, Bill 22 as I have construed it is not unconstitutional and the application of the Association is dismissed.

[S] J.

[ScanLII Collection]

Tab 154

CanLII

Bell Canada v. Canadian Telephone Employees Assn. (T.D.), 1998 CanLII 9055 (FC), [1998] 3 FC 244

Source:	Federal Court
Date:	1998-03-23
File number:	T-2722-96
Other citations:	143 FTR 241 — 10 Admin LR (3d) 116 — 32 CHRR 213 — 53 CRR (2d) 56
Citation:	Bell Canada v. Canadian Telephone Employees Assn. (T.D.), 1998 CanLII 9055 (FC), [1998] 3 FC 244, <https://canlii.ca/t/4cct>, retrieved on 2026-01-18
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

T-2722-96

T-950-97

T-1257-97

Bell Canada (*Applicant*)

v.

Canadian Telephone Employees Association, Communications, Energy and Paperworkers Union of Canada, Femmes Action and **Canadian Human Rights Commission** (*Respondents*)

Indexed as: Bell Canadav. Canadian Telephone Employees Assn. (T.D.)

Trial Division, McGillis J."Ottawa, January 19, 20, 21 and March 23, 1998.

Human Rights — Human Rights Tribunal's institutional independence and impartiality — Statutory scheme failing to provide Tribunal members with sufficient guarantee of security of tenure, financial security — Therefore,

Tribunal lacking requisite level of institutional independence, giving rise to reasonable apprehension of bias — Presently binding guidelines which Commission may issue on Tribunal with respect to manner in which any provision of Act applies in particular case should be non-binding — Pay equity case cannot be decided by Tribunal until legislation amended.

Administrative law — Statutory scheme failing to provide Human Rights Tribunal members with sufficient guarantee of security of tenure, financial security — Reasonable apprehension of bias as Tribunal lacking requisite level of institutional independence — Presently binding guidelines which Commission may issue on Tribunal with respect to manner in which any provision of Act applies in particular case should be non-binding.

Pay equity complaints were filed with the Canadian Human Rights Commission against Bell Canada and a Human Rights Tribunal was appointed to hear the matter. Bell Canada then raised the question of whether the Tribunal was an institutionally independent and impartial quasi-judicial body. This was an application for judicial review of the Tribunal's decision concluding that it was an independent quasi-judicial body, institutionally capable of providing a fair hearing in accordance with the principles of natural justice and fundamental freedom.

Held, the application should be allowed.

The Human Rights Commission and Tribunal

Originally, the Human Rights Tribunals were, administratively, financially and statutorily extensively dependent on the Human Rights Commission. The Tribunal Panel was created in 1985 to improve the situation. However, the power of the Commission to make by-laws fixing the rates of remuneration for its part-time members, its experts and the members of a Tribunal, as well as their expenses, remained in effect. Similarly, the power of the Commission to issue guidelines binding on itself and any Tribunal was unaffected. Finally, the Commission, under the supervision and direction of the Chief Commissioner, retained its general responsibility for the administration of the Act, including Part III relating to all aspects of the Tribunal Panel and its activities. The Commission provided all administrative and corporate services, including financial and personnel services, to the Tribunal Panel. Fees or expenses of the members of a Tribunal would be submitted to the Commission's financial services for payment. Pay cheques for Tribunal members were requisitioned by the Commission and bore on their face the words "Canadian Human Rights Commission". Furthermore, the Tribunal Panel had no authority to submit its budget to Parliament; only the Commission could appropriate the necessary funding. Steps were gradually taken to increase the Tribunal's institutional independence.

Bills introduced to amend the Act for the purpose of ensuring institutional independence died on the order paper. Another bill, S-5, seeking to achieve that purpose was still, in March 1998, before the Justice and Human Rights Committee for study. Meanwhile, by orders in council adopted in 1996, the Commission ceased to have any operational or budgetary role in relation to the Tribunal Panel. Nevertheless, the Act still required the Commission to fix the remuneration, travel and living expenses of the members of a Tribunal. Furthermore, the Commission still had statutory power to issue guidelines binding on itself and any Tribunal with respect to the manner in which any provision of the Act would apply in a particular case or in a class of cases. The Commission's *Equal Wages Guidelines, 1986*, respecting the application of section 11 of the Act and prescribing factors justifying different wages between men and women performing work of equal value in the same establishment, was still in effect for the purposes of the present case.

Since 1985, all appointments (and reappointments) to the Tribunal Panel, including the President, were part-time appointments (generally for two, three or five years) made by the Governor in Council. The Minister of Justice had complete discretion to make a recommendation concerning the question of reappointment. In the present case, the terms of all three members appointed in 1996 to constitute the Tribunal were scheduled to expire in 1997, and it would be necessary to make an application to the Minister of Justice to extend their terms. When they were asked to hear the present case, the three members were told that the hearing would be a lengthy one. They were presumably interested in having their terms extended, or they would not have agreed to sit on the case.

Judicial independence

Judicial independence is part of the rules of natural justice, and as such applies to proceedings before administrative tribunals performing an adjudicative role. In determining the judicial independence of a tribunal, both its institutional independence and its institutional impartiality may be challenged. With respect to institutional independence, the classic test in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 (test for reasonable apprehension of bias) as approved in *Valente v. The Queen et al.*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, and virtually all of the other applicable Supreme Court of Canada cases, must be applied to an analysis of the three core characteristics of judicial independence: security of tenure, financial security and administrative independence. The test should be applied flexibly, having regard to the functions exercised by the tribunal. The level of institutional independence required will depend on the nature of the tribunal, the interests at stake and other indices of independence. Furthermore, in assessing the

question of institutional independence, the practice of a tribunal is relevant. In relation to institutional impartiality, the two-pronged test outlined in *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114 must be applied (1- will there be a reasonable apprehension of bias in the mind of the fully informed person in a substantial number of cases; 2- if the answer is no, allegations of an apprehension of bias cannot be brought on an institutional level, but must be dealt with on a case-by-case basis; if yes, one must consider what safeguards are in place to minimize the prejudicial effects and whether they are sufficient to meet the guarantee of institutional impartiality under paragraph 11(*d*) of the Charter).

Nature of a Tribunal appointed under the Act and its requisite level of independence

Given the purely adjudicative role and the functions performed by a Human Rights Tribunal in relation to rights and interests which are quasi-constitutional in nature, a high level of independence is required, and a relatively strict application of the principles in *Valente v. The Queen et al*., is warranted.

Institutional independence of a Tribunal appointed under the Act

a- security of tenure. The facts of the present case illustrate the tenuous nature of the security of tenure afforded to a Tribunal member whose appointment expires during the course of a hearing. The Act contains no objective guarantee that the member's prospect of reappointment to complete a case would not be adversely affected by any decisions made by that member, whether in the context of the outstanding case or any other matter. In order to ensure a sufficient guarantee of the essential condition of security of tenure in the context of an administrative tribunal requiring a high level of independence, the statutory scheme must accord to the person performing the adjudicative role the right to complete that task without any intervention from the executive or legislative branches of the government. Therefore, the insufficient nature of the security of tenure, in this context, would raise a reasonable apprehension of bias in the mind of a fully informed and reasonable person.

b- financial security. In the present case, the legislative scheme in the Act does not respect the essence of the condition of financial security, in that the remuneration of the members of a Tribunal is controlled by the Commission, an interested party in all Tribunal proceedings. Furthermore, any increase in the remuneration prescribed in the Commission's by-law may be obtained only by virtue of negotiations between the Tribunal Panel and the Commission. Such negotiations would create a conflict of interest negatively impacting on the appearance of independence. Therefore, a fully informed and reasonable

person, considering all the facts, would have a reasonable apprehension of bias on the part of the Tribunal.

c- administrative independence. A Tribunal appointed under the Act has enjoyed sufficient independence in relation to administrative matters bearing directly on the exercise of its judicial function.

Institutional impartiality

Although it was unnecessary to consider this question, it was suggested that, in order to preserve the institutional impartiality of a Tribunal appointed under the Act, the preferable and prudent course of action would be to make the guidelines, which the Commission may make with respect to the manner in which any provision of the Act applies in a particular case, non-binding on a Tribunal.

The proceedings before the Tribunal in the present case were therefore void. The fundamental rights at issue in the present case cannot be determined by a Tribunal appointed under the Act until legislative reform, which has been sought for so many years, has corrected the problems identified in relation to security of tenure and financial security.

statutes and regulations judicially considered

Access to Information Act, R.S.C., 1985, c. A-1.

Bill C-98, *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, 2nd Sess., 35th Parl., 1997, cls. 19, 20, 26.

Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1992, cls. 11(2), 12, 21, 29.

Bill S-5, *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, 1st Sess., 36th Parl., 1997.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 11(*d*).

Canadian Human Rights Act, R.S.C., 1985, c. H-6, ss. 11, 26(2), 27(2),(3), (4), 30(1),(3), 31, 37(1)(*e*),(*f*), 40 (as am. by R.S.C., 1985 (1st Supp.), c.

31, s. 62), 40.1 (as enacted by S.C. 1995, c. 44, s. 48), 41 (as am. *idem*, s. 49), 43 (as am. by R.S.C., 1985 (1st Supp.), c. 31, s. 63), 44(1),(2),(3) (as am. *idem*, s. 64), (4), 47, 48.1 (as enacted *idem*, s. 65), 48.2 (as enacted *idem*), 48.3 (as enacted *idem*), 48.4 (as enacted *idem*), 48.5 (as enacted *idem*), 49 (as am. *idem*, s. 66), 50(1),(2),(3),(5), 51, 52, 53(1),(2),(3), 55, 56 (as am. *idem*, s. 67), 61.

Canadian Human Rights Act, S.C. 1976-77, c. 33, ss. 21(2), 22, 24(1),(3), 25, 29(1)(*d*),(*e*), 32, 33, 35, 36(1),(2),(3),(4), 37, 38.1, 38.2, 38.3, 38.4, 38.5, 39, 40(1),(2),(3),(4),(6),(7), 41(1),(2), (3), 42.1, 47.

Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 23.

Equal Wages Guidelines, SI/78-155.

Equal Wages Guidelines, 1986, SOR/86-1082.

Financial Administration Act, R.S.C., 1985, c. F-11.

Judges Act, R.S.C., 1985, c. J-1.

Miscellaneous Statute Law Amendment Act, 1978, S.C. 1977-78, c. 22, s. 5.

Order Amending Schedule I of the Public Service Staff Relations Act, SOR/96-540.

Order Amending Schedule I to the Access to Information Act, SOR/96-538.

Order Amending Schedule I to the Public Sector Compensation Act, SOR/96-541.

Order Amending Schedule I.1 of the Financial Administration Act, SOR/96-537.

Order Amending the schedule to the Privacy Act, SOR/96-539.

Order Transferring from the Canadian Human Rights Commission to the Human Rights Tribunal Panel the Control and Supervision of the Registry of the Human Rights Tribunal Panel, SI/96-109.

Privacy Act, R.S.C., 1985, c. P-21.

Public Sector Compensation Act, S.C. 1991, c. 30.

Public Service Employment Act, R.S.C., 1985, c. P-33.

Public Service Rearrangement and Transfer of Duties Act, R.S.C., 1985, c. P-34.

Tab 155

CanLII

British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 (CanLII), [2005] 2 SCR 473

Source:	Supreme Court of Canada
Date:	2005-09-29
File number:	30411
Other citations:	257 DLR (4th) 193 — 339 NR 129 — 142 ACWS (3d) 425 — [2006] 1 WWR 201 — AZ-50335185 — [2005] BCWLD 5973 — 45 BCLR (4th) 1 — 218 BCAC 1 — 134 CRR (2d) 46 — 27 CPC (6th) 13 — [2005] CarswellBC 2207 — EYB 2005-95296 — JE 2005-1753 — [2005] SCJ No 50 (QL)
Citation:	British Columbia v. Imperial Tobacco Canada Ltd., 2005 SCC 49 (CanLII), [2005] 2 SCR 473, <https://canlii.ca/t/1lpk1>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

Citation: British Columbia *v.* Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49

Date: 20050929
Docket: 30411

Between:
Imperial Tobacco Canada Limited
Appellant
v.
Her Majesty the Queen in Right of British Columbia
Respondent
AND BETWEEN:

Imperial Tobacco Canada Limited
Appellant
v.
Attorney General of British Columbia
Respondent
AND BETWEEN:
Rothmans, Benson & Hedges Inc.
Appellant
v.
Her Majesty the Queen in Right of British Columbia
Respondent
AND BETWEEN:
Rothmans, Benson & Hedges Inc.
Appellant
v.
Attorney General of British Columbia
Respondent
AND BETWEEN:
JTI-Macdonald Corp.
Appellant
v.
Her Majesty the Queen in Right of British Columbia
Respondent
AND BETWEEN:
JTI-Macdonald Corp.
Appellant
v.
Attorney General of British Columbia
Respondent
AND BETWEEN:
Canadian Tobacco Manufacturers' Council
Appellant
v.
Her Majesty the Queen in Right of British Columbia
Respondent
AND BETWEEN:
British American Tobacco (Investments) Limited
Appellant
v.
Her Majesty the Queen in Right of British Columbia
Respondent
AND BETWEEN:
Philip Morris Incorporated, Philip Morris International Inc.
Appellants
v.
Her Majesty the Queen in Right of British Columbia
Respondent
- and -
Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta and Attorney General of Newfoundland and Labrador
Interveners

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 78) Major J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

British Columbia *v.* Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49

Imperial Tobacco Canada Limited *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Imperial Tobacco Canada Limited *Appellant*

v.

Attorney General of British Columbia *Respondent*

and

Rothmans, Benson & Hedges Inc. *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Rothmans, Benson & Hedges Inc. *Appellant*

v.

Attorney General of British Columbia *Respondent*

and

JTI-Macdonald Corp. *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

JTI-Macdonald Corp. *Appellant*

v.

Attorney General of British Columbia *Respondent*

and

Canadian Tobacco Manufacturers' Council *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

British American Tobacco (Investments) Limited *Appellant*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Philip Morris Incorporated and Philip Morris International Inc. *Appellants*

v.

Her Majesty The Queen in Right of British Columbia *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta and Attorney General of Newfoundland and Labrador *Interveners*

Indexed as: British Columbia *v.* Imperial Tobacco Canada Ltd.

Neutral citation: 2005 SCC 49.

File No.: 30411.

2005: June 8; 2005: September 29.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Division of powers — Extra-territoriality — Limitation on provincial legislation — Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products — Tobacco manufacturers sued by government challenging constitutional validity of legislation — Whether legislation exceeds territorial limits on provincial legislative jurisdiction — Constitution Act, 1867, s. 92(13) — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Constitutional law — Judicial independence — Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products — Whether legislation constitutionally invalid as being inconsistent with principle of judicial independence — Whether rules of civil procedure contained in legislation interfere with adjudicative role of court hearing action — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Constitutional law — Rule of law — Provincial legislation authorizing civil actions by government of British Columbia against manufacturers of tobacco products for recovery of health care expenditures incurred by government in treating individuals exposed to those products — Whether legislation constitutionally invalid as offending rule of law — Whether Constitution, through rule of law, requires legislation to be prospective, general in character and devoid of special advantages for government (except where necessary for effective governance), as well as to ensure fair civil trial — Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

The *Tobacco Damages and Health Care Costs Recovery Act* (the "Act") authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government having incurred health care expenditures in treating disease in those individuals caused by such exposure. The appellants, each of which was sued by the government pursuant to the Act, challenged its constitutional validity. The British Columbia Supreme Court dismissed the government's actions, concluding that the Act was unconstitutional because it failed to respect territorial limits on provincial legislative jurisdiction. The Court of Appeal set aside the decision, finding that the Act's pith and substance is "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *Constitution Act, 1867*, and that the extra-territorial aspects of the Act, if any, are incidental to it. The court also found that the Act does not offend judicial independence or the rule of law.

Held: The appeals should be dismissed. The Act is constitutionally valid.

The Act is not unconstitutional by reason of extra-territoriality. The cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province" under s. 92(13) of the *Constitution Act, 1867*. The Act is meaningfully connected to the province as there

are strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs). The Act also respects the legislative sovereignty of other jurisdictions. Though the cause of action may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. The breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and thus the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and British Columbia. [37-38] [40] [43]

The Act does not violate the independence of the judiciary. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role, and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts onuses of proof in respect of some of the elements of an aggregate claim or limits the compellability of certain information does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence. [55-56]

The Act does not implicate the rule of law in the sense that the Constitution comprehends that term. Except in respect of criminal law, the retrospectivity and retroactivity of which is limited by s. 11(*g*) of the *Canadian Charter of Rights and Freedoms*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Nor does the Constitution, through the rule of law, require that legislation be general in character and devoid of special advantages for the government (except where necessary for effective governance), or that it ensure a fair civil trial. In any event, tobacco manufacturers sued pursuant to the Act will receive a

fair civil trial: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. That defendants might regard the Act as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair. [69] [73] [76-77]

Cases Cited

Applied: *Air Canada v. British Columbia*, 1989 CanLII 95 (SCC), [1989] 1 S.C.R. 1161**;** *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39; **referred to:** *JTI-Macdonald Corp. v. British Columbia (Attorney General)* (2000), 184 D.L.R. (4th) 334, 2000 BCSC 312; *Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, 1993 CanLII 43 (SCC), [1993] 4 S.C.R. 289; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40; *Reference re Upper Churchill Water Rights Reversion Act*, 1984 CanLII 17 (SCC), [1984] 1 S.C.R. 297; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31; *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20; *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796; *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57; *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick*

(Minister of Justice), [2005] 2 S.C.R. 286, 2005 SCC 44; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130; *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199; *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (FCA), [2000] 3 F.C. 185; *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 1999 CanLII 12234 (SK CA), 180 Sask. R. 20; *Cusson v. Robidoux*, 1975 CanLII 199 (SCC), [1977] 1 S.C.R. 650; *Notre-Dame Hospital v. Patry*, 1974 CanLII 174 (SCC), [1975] 2 S.C.R. 388; *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *In re Spectrum Plus Ltd.*, [2005] 3 W.L.R. 58, [2005] UKHL 41.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 11(*d*), (*g*).

Constitution Act, 1867, preamble, ss. 92, 96-100.

Constitution Act, 1982, preamble.

Limitation Act, R.S.B.C. 1996, c. 266, s. 6(1).

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30.

Tobacco Damages Recovery Act, S.B.C. 1997, c. 41.

Authors Cited

British Columbia. *Debates of the Legislative Assembly*, vol. 20, No. 6, 4th Sess., 36th Parl., June 7, 2000, p. 16314.

Edinger, Elizabeth. "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5.

Elliot, Robin. "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1997 (updated 2003, release 1).

Hogg, Peter W., and Cara F. Zwibel. "The Rule of Law in the Supreme Court of Canada" (2005), 55 *U.T.L.J.* 715.

Newman, Warren J. "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005), 16 *N.J.C.L.* 175.

Sullivan, R. E. "Interpreting the Territorial Limitations on the Provinces" (1985), 7 *Sup. Ct. L. Rev.* 511.

APPEALS from the judgments of the British Columbia Court of Appeal (Lambert, Rowles and Prowse JJ.A.) (2004), 239 D.L.R. (4th) 412, 199 B.C.A.C. 195, 326 W.A.C. 195, 29 B.C.L.R. (4th) 244, [2004] 9 W.W.R. 230, [2004] B.C.J. No. 1007 (QL), 2004 BCCA 269, reversing a decision of Holmes J. (2003), 227 D.L.R. (4th) 323, [2003] B.C.J. No. 1309 (QL), 2003 BCSC 877. Appeals dismissed.

David C. Harris, *Q.C.*, *William S. Berardino*, *Q.C.*, and *Andrea N. MacKay*, for the appellant Imperial Tobacco Canada Limited.

Kenneth N. Affleck, *Q.C.*, *James A. Macaulay*, *Q.C.*, *Steven Sofer*, *Michael Sobkin* and *Ian G. Christman*, for the appellant Rothmans, Benson & Hedges Inc.

Jack M. Giles, *Q.C.*, *Jeffrey J. Kay*, *Q.C.*, and *Dylana R. Bloor*, for the appellant JTI-Macdonald Corp.

Written submissions only by *Maryanne F. Prohl*, for the appellant Canadian Tobacco Manufacturers' Council.

John J. L. Hunter, *Q.C.*, *Craig P. Dennis*, *Matthew J. Westphal*, for the appellant British American Tobacco (Investments) Limited.

Simon Potter and *Cynthia A. Millar*, for the appellants Philip Morris Incorporated and Philip Morris International Inc.

Thomas R. Berger, *Q.C.*, *Daniel A. Webster*, *Q.C.*, *Elliott M. Myers*, *Q.C.*, and *Craig E. Jones*, for the respondents.

Robin K. Basu and *Mark Crow*, for the intervener the Attorney General of Ontario.

Alain Gingras and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Written submissions only by *Edward A. Gores*, for the intervener the Attorney General of Nova Scotia.

John G. Furey, for the intervener the Attorney General of New Brunswick.

Eugene B. Szach, for the intervener the Attorney General of Manitoba.

Graeme G. Mitchell, *Q.C.*, and *R. James Fyfe*, for the intervener the Attorney General for Saskatchewan.

Robert Normey, for the intervener the Attorney General of Alberta.

Donna Ballard and *Barbara Barrowman*, for the intervener the Attorney General of Newfoundland and Labrador.

The judgment of the Court was delivered by

MAJOR J. — The *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 (the "Act"), authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. Liability hinges on those individuals having been exposed to tobacco products because of the manufacturer's breach of a duty owed to persons in British Columbia, and on the government of British Columbia having incurred health care expenditures in treating disease in those individuals caused by such exposure.

These appeals question the constitutional validity of the Act. The appellants, each of which was sued by the government of British Columbia pursuant to the Act, challenge its constitutional validity on the basis that it violates: (1) territorial limits on provincial legislative jurisdiction; (2) the principle of judicial independence; and (3) the principle of the rule of law.

For the reasons that follow, the Act is constitutionally valid. The appeals are dismissed, with costs to the respondents throughout.

I. Background

A. *The Legislation*

The Act, in its entirety, is reproduced in the Appendix. Its essential aspects are summarized below.

Section 2(1) is the keystone of the Act. It reads:

> The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

The terms "manufacturer", "cost of health care benefits" and "tobacco related wrong" are defined in s. 1(1) of the Act. Their definitions in turn refer to other defined terms. Incorporating the definitions into s. 2, then paraphrasing to some degree, the section provides as follows:

> The government has a direct and distinct action against a manufacturer for the present value of existing and reasonably expected future expenditures by the government for
>
> (a) benefits as defined under the *Hospital Insurance Act* or the *Medicare Protection Act*;
>
> (b) payments under the *Continuing Care Act*; and
>
> (c) programs, services or benefits associated with disease,
>
> where
>
> (a) such expenditures result from disease or the risk of disease caused or contributed to by exposure to a tobacco product; and
>
> (b) such exposure was caused or contributed to by
>
> (i) a tort committed in British Columbia by the manufacturer; or
>
> (ii) a breach of a common law, equitable or statutory duty or obligation owed by the manufacturer to persons in British Columbia who have been or might have become exposed to a tobacco product.

Viewed in this light, s. 2(1) creates a cause of action by which the government of British Columbia may recover from a tobacco manufacturer money spent treating disease in British Columbians, where such disease was caused by exposure to a tobacco product (whether entirely in British Columbia or not), and such exposure was caused by that manufacturer's tort in British Columbia, or breach of a duty owed to persons in British Columbia.

The cause of action created by s. 2(1), besides being "direct and distinct", is not a subrogated claim: s. 2(2). Nor is it barred by the *Limitation Act*, R.S.B.C. 1996, c. 266, s. 6(1). Crucially, it can be pursued on an aggregate basis — i.e., in respect of a population of persons for whom the government has made or can reasonably be expected to make expenditures: s. 2(4)(b).

Where the government's claim is made on an aggregate basis, it may use statistical, epidemiological and sociological evidence to prove its case: s. 5(b). It need not identify, prove the cause of disease or prove the expenditures made in respect of any individual member of the population on which it bases its claim: s. 2(5)(a). Furthermore, health care records and related information in respect of individual members of that population are not compellable, except if relied upon by an expert witness: s. 2(5)(b) and (c). However, the court is free to order the discovery of a "statistically meaningful sample" of the health care records of individual members of that population, stripped of personal identifiers: s. 2(5)(d) and (e).

Pursuant to s. 3(1) and (2), the government enjoys a reversed burden of proof in respect of certain elements of an aggregate claim. Where the aggregate claim is, like the one brought against each of the appellants, to recover expenditures in respect of disease caused by exposure to cigarettes, the reversed burden of proof operates as follows. Once the government proves that

(a)the defendant manufacturer breached a common law, equitable or statutory duty or obligation it owed to persons in British Columbia who have been or might become exposed to cigarettes;

(b)exposure to cigarettes can cause or contribute to disease; and

(c)during the manufacturer's breach, cigarettes manufactured or promoted by the manufacturer were offered for sale in British Columbia,

the court will presume that

(a)the population that is the basis for the government's aggregate claim would not have been exposed to cigarettes but for the manufacturer's breach; and

(b)such exposure caused or contributed to disease in a portion of the population that is the basis for the government's aggregate claim.

In this way, it falls on a defendant manufacturer to show that its breach of duty did not give rise to exposure, or that exposure resulting from its breach of duty did not give rise to the disease in respect of which the government claims for its expenditures. The reversed burden of proof on the manufacturer is a balance of probabilities: s. 3(4).

Where the aforementioned presumptions apply, the court must determine the portion of the government's expenditures after the date of the manufacturer's breach that resulted from exposure to cigarettes: s. 3(3)(a). The manufacturer is liable for such expenditures in proportion to its share of the market for cigarettes in British Columbia, calculated over the period of time between its first breach of duty and trial: ss. 3(3)(b) and 1(6).

In an action by the government, a manufacturer will be jointly and severally liable for expenditures arising from a joint breach of duty (i.e., for expenditures caused by disease, which disease was caused by exposure, which exposure was caused by a joint breach of duty to which the manufacturer was a party): s. 4(1).

Pursuant to s. 10, all provisions of the Act operate retroactively.

The Act is the second British Columbia statute designed to enable the government to sue tobacco manufacturers for tobacco-related health care costs that has been challenged on the basis of its constitutionality. The Supreme Court of British Columbia struck down the earlier statute, the *Tobacco Damages Recovery Act*, S.B.C. 1997, c. 41, as being in pith and substance legislation in relation to extra-provincial civil rights and therefore *ultra vires* the Legislative Assembly of British Columbia: see *JTI-Macdonald Corp. v. British Columbia (Attorney General)* (2000), 184 D.L.R. (4th) 334, 2000 BCSC 312.

The legislative history of the Act confirms that it was drafted to address concerns about the extra-territorial aspects of the earlier statute and to avoid any further challenges with respect to extra-territoriality: see *Debates of the Legislative Assembly*, vol. 20, No. 6, 4th Sess., 36th Parl., June 7, 2000, at p. 16314.

B.*Procedural History*

On January 24, 2001, the Act came into force. On the same day, the government sued 14 entities in the tobacco industry in the Supreme Court of British Columbia, pursuant to s. 2 of the Act.

The appellants are among the 14 entities sued by the government. The appellants Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., JTI-Macdonald Corp. and Canadian Tobacco Manufacturers' Council are Canadian corporations, and were served in British Columbia. The appellants Philip Morris Incorporated (now Philip Morris USA Inc.) and Philip Morris International Inc. are incorporated under the laws of Virginia and Delaware, respectively, and were served *ex juris*. The appellant British American Tobacco (Investments) Limited is incorporated under the laws of the United Kingdom, and was also served *ex juris*.

The Canadian appellants applied for a declaration that the Act is unconstitutional. The appellants served *ex juris* applied to set aside service on the basis that the Act is unconstitutional, and thus that the government's actions founded on it were bound to fail.

Throughout the proceedings, the appellants' constitutional attack has been essentially tripartite. They argue that the Act exceeds the territorial limits on provincial legislative jurisdiction, violates judicial independence and infringes the rule of law.

II.Judicial History

A.*Supreme Court of British Columbia* (2003), 227 D.L.R. (4th) 323, 2003 BCSC 877

Holmes J. rejected the appellants' submissions concerning judicial independence and the rule of law, but accepted their submissions concerning extra-territoriality. He concluded that the Act fails to respect territorial limits on provincial legislative jurisdiction because, in his view, the exposure to tobacco products giving rise to liability is territorially unconfined, and the aim of the Act is recovery of health care costs "from the tobacco industry nationally and internationally" (para. 222).

In the result, Holmes J. declared the Act invalid, dismissed the government's actions brought pursuant to the Act and set aside all *ex juris* service by the government.

B.*Court of Appeal for British Columbia* (2004), 239 D.L.R. (4th) 412, 2004 BCCA 269

The Court of Appeal for British Columbia allowed the respondents' appeals. Lambert, Rowles and Prowse JJ.A. each gave reasons concluding that the Act's pith and substance is "Property and Civil Rights in the Province" within the meaning of s. 92(13) of the *Constitution Act, 1867*; that the extra-territorial aspects of the Act, if any, are incidental to it; and therefore that the Act is not invalid by reason of extra-territoriality. All agreed that the Act does not offend judicial independence or the rule of law.

In the result, the court dismissed the appellants' applications for declarations that the Act is invalid, set aside Holmes J.'s orders dismissing the government's actions and remitted to the Supreme Court of British Columbia the applications of the appellants served *ex juris* to have service set aside, with such applications to be decided on the basis that the Act is constitutionally valid.

III.Issues

McLachlin C.J. stated the following constitutional questions:

1. Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, *ultra vires* the provincial legislature by reason of extra-territoriality?

2. Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally invalid, in whole or in part, as being inconsistent with judicial independence?

3. Is the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30, constitutionally invalid, in whole or in part, as offending the rule of law?

IV. Analysis

A. *Extra-territoriality*

Section 92 of the *Constitution Act, 1867* is the primary source of provincial legislatures' authority to legislate. Provincial legislation must therefore respect the limitations, territorial and otherwise, on provincial legislative competence found in s. 92. The opening words of s. 92 — "In each Province" — represent a blanket territorial limitation on provincial powers. That limitation is echoed in a similar phrase that qualifies a number of the heads of power in s. 92: "in the Province".

The territorial limitations on provincial legislative competence reflect the requirements of order and fairness underlying Canadian federal arrangements and discussed by this Court in *Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077, at pp. 1102-3, *Hunt v. T&N plc*, 1993 CanLII 43 (SCC), [1993] 4 S.C.R. 289, at pp. 324-25, and *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, at para. 56. They serve to ensure that provincial legislation both has a meaningful connection to the province enacting it, and pays respect to "the sovereignty of the other provinces within their respective legislative spheres": *Unifund*, at para. 51. See also, generally, R. E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985), 7 *Sup. Ct. L. Rev.* 511.

Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations on provincial legislative competence, the analysis centres on the pith and

substance of the legislation. If its pith and substance is in relation to matters falling within the field of provincial legislative competence, the legislation is valid. Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity. See *Reference re Upper Churchill Water Rights Reversion Act*, 1984 CanLII 17 (SCC), [1984] 1 S.C.R. 297 ("*Churchill Falls*"), at p. 332, and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 24.

In determining the pith and substance of legislation, the court identifies its essential character or dominant feature: see *Global Securities Corp.*, at para. 22, and *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 16. This may be done through reference to both the purpose and effect of the legislation: see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 53. See also *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20, at para. 20.

Where the pith and substance of legislation relates to a tangible matter — i.e., something with an intrinsic and observable physical presence — the question of whether it respects the territorial limitations in s. 92 is easy to answer. One need only look to the location of the matter. If it is in the province, the limitations have been respected, and the legislation is valid. If it is outside the province, the limitations have been violated, and the legislation is invalid.

Where legislation's pith and substance relates to an intangible matter, the characterization is more complicated. That is the case here.

The pith and substance of the Act is plainly the creation of a civil cause of action. More specifically, it is the creation of a civil cause of action by which the government of British Columbia may seek compensation for certain health care costs incurred by it. Civil causes of action are a matter within provincial legislative jurisdiction under s. 92(13) of the *Constitution Act, 1867*: "Property and

Civil Rights in the Province". See *General Motors of Canada Ltd. v. City National Leasing*, 1989 CanLII 133 (SCC), [1989] 1 S.C.R. 641, at p. 672.

But s. 92(13) does not speak to "Property and Civil Rights" located anywhere. It speaks only to "Property and Civil Rights in the Province". And, to reiterate, it is, like all provincial heads of power, qualified by the opening words of s. 92: "In each Province". The issue thus becomes how to determine whether an intangible, such as the cause of action constituting the pith and substance of the Act, is "in the Province".

Churchill Falls dealt with a similar issue. In that case, McIntyre J. was confronted with a Newfoundland statute, the pith and substance of which was the modification of rights existing under a contract between Churchill Falls (Labrador) Corporation Limited and Quebec Hydro-Electric Commission. Since the entity possessing those rights (namely, the Commission) was constituted in Quebec, and the parties had agreed that the Quebec courts had exclusive jurisdiction to adjudicate disputes concerning their contract, McIntyre J. regarded the rights created by that contract as situated in Quebec. The Newfoundland law that purported to modify them was thus invalid. It related to civil rights, but not to civil rights "in the Province".

McIntyre J.'s approach to locating the civil rights constituting the pith and substance of the Newfoundland legislation illustrates the role, pointed out by Binnie J. in *Unifund*, at para. 63, that "the relationships among the enacting territory, the subject matter of the law, and the person[s] sought to be subjected to its regulation" play in determining the validity of legislation alleged to be impermissibly extra-territorial in scope. In *Churchill Falls*, an examination of those relationships indicated that the intangible civil rights constituting the pith and substance of the Newfoundland legislation at issue were not meaningfully connected to the legislating province, and could properly be the subject matter only of Quebec legislation. Put slightly differently, if the impugned Newfoundland legislation had been permitted to regulate those civil rights, neither of the purposes underlying s. 92's territorial

limitations would be respected. It followed that those civil rights should be regarded as located beyond the territorial scope of Newfoundland's legislative competence under s. 92.

From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on provincial legislative competence. The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall. Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e., whether it is in the province. If the pith and substance is tangible, whether it is in the province is simply a question of its physical location. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province.

Here, the cause of action that is the pith and substance of the Act serves exclusively to make the persons ultimately responsible for tobacco-related disease suffered by British Columbians — namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco — liable for the costs incurred by the government of British Columbia in treating that disease. There are thus strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia's tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs), such that the Act can easily be said to be meaningfully connected to the province.

The Act respects the legislative sovereignty of other jurisdictions. Though the cause of action that is its pith and substance may capture, to some extent, activities occurring outside of British Columbia, no territory could possibly assert a stronger relationship to that cause of action than British Columbia. That is because there is at all times one critical connection to British Columbia exclusively: the recovery permitted by the action is in relation to expenditures by the government of British Columbia for the health care of British Columbians.

In assessing the Act's respect for the territorial limitations on British Columbia's legislative competence, the appellants and the Court of Appeal placed considerable emphasis on the question of whether, as a matter of statutory interpretation, the breach of duty by a manufacturer that is a necessary condition of its liability under the cause of action created by the Act must occur in British Columbia. That emphasis was undue, for two reasons.

First, the driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. The Act leaves breaches of duty to be remedied by the law that gives rise to the duty. Thus, the breaches of duty to which the Act refers are of subsidiary significance to the cause of action created by it, and the locations where those breaches might occur have little or no bearing on the strength of the relationship between the cause of action and the enacting jurisdiction.

Second, and in any event, the only relevant breaches under the Act are breaches of duties (or obligations) owed "to persons in British Columbia" (s. 1(1) "tobacco related wrong" and s. 3(1)(a)) that give rise to health care expenditures by the government of British Columbia. Thus, even if the existence of a breach of duty were the central element of the Act's cause of action (it is not), the cause of action would remain strongly related to British Columbia.

The question of whether other matters, such as exposure and disease, to which the Act refers, must occur or arise in British Columbia is equally or more irrelevant to the Act's validity. Those matters too are conditions precedent to success in an action brought pursuant to the Act and of subsidiary significance to it.

It follows that the cause of action that constitutes the pith and substance of the Act is properly described as located "in the Province". The Act is not invalid by reason of extra-territoriality, being in pith and substance legislation in relation "Property and Civil Rights in the Province" under s. 92(13) of the *Constitution Act, 1867*.

B. *Judicial Independence*

Judicial independence is a "foundational principle" of the Constitution reflected in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, and in both ss. 96-100 and the preamble to the *Constitution Act, 1867*: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 109. It serves "to safeguard our constitutional order and to maintain public confidence in the administration of justice": *Ell v. Alberta*, [2003] 1 S.C.R. 857, 2003 SCC 35, at para. 29. See also *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, at paras. 80-81.

Judicial independence consists essentially in the freedom "to render decisions based solely on the requirements of the law and justice": *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 37. It requires that the judiciary be left free to act without improper "interference from any other entity" (*Ell*, at para. 18) — i.e., that the executive and legislative branches of government not "impinge on the essential 'authority and function' . . . of the court" (*MacKeigan v. Hickman*, 1989 CanLII 40 (SCC), [1989] 2 S.C.R. 796, at p. 828). See also *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673, at pp. 686-87; *Beauregard v. Canada*, 1986 CanLII 24 (SCC), [1986] 2 S.C.R. 56, at pp. 73 and 75; *R. v. Lippé*, 1990 CanLII

18 (SCC), [1991] 2 S.C.R. 114, at pp. 152-54; *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57, at para. 57; and *Application under s. 83.28 of the Criminal Code (Re)*, at para. 87.

Security of tenure, financial security and administrative independence are the three "core characteristics" or "essential conditions" of judicial independence: *Valente*, at pp. 694, 704 and 708, and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, at para. 115. It is a precondition to judicial independence that they be maintained, and be seen by "a reasonable person who is fully informed of all the circumstances" to be maintained: *Mackin*, at paras. 38 and 40, and *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44, at para. 6.

However, even where the essential conditions of judicial independence exist, and are reasonably seen to exist, judicial independence itself is not necessarily ensured. The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)*, at paras. 82-92.

The appellants submit that the Act violates judicial independence, both in reality and appearance, because it contains rules of civil procedure that fundamentally interfere with the adjudicative role of the court hearing an action brought pursuant to the Act. They point to s. 3(2), which they say forces the court to make irrational presumptions, and to ss. 2(5)(a), 2(5)(b) and 2(5)(c), which they say subvert the court's ability to discover relevant facts. They say that these rules impinge on the court's fact-finding function, and virtually guarantee the government's success in an action brought pursuant to the Act.

The rules in the Act with which the appellants take issue are not as unfair or illogical as the appellants submit. They appear to reflect legitimate policy concerns of the British Columbia

legislature regarding the systemic advantages tobacco manufacturers enjoy when claims for tobacco-related harm are litigated through individualistic common law tort actions. That, however, is beside the point. The question is not whether the Act's rules are unfair or illogical, nor whether they differ from those governing common law tort actions, but whether they interfere with the courts' adjudicative role, and thus judicial independence.

The primary role of the judiciary is to interpret and apply the law, whether procedural or substantive, to the cases brought before it. It is to hear and weigh, in accordance with the law, evidence that is relevant to the legal issues confronted by it, and to award to the parties before it the available remedies.

The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions — i.e., the common law — in order to bring the legal rules those decisions embody "into step with a changing society": *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 666. See also *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at paras. 91-92. But the judiciary's role in developing the law is a relatively limited one. "[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform": *Salituro*, at p. 670.

It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit. "The wisdom and value of legislative decisions are subject only to review by the electorate": *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199, at para. 59.

In essence, the appellants' arguments misapprehend the nature and scope of the courts' adjudicative role protected from interference by the Constitution's guarantee of judicial independence. To accept their position on that adjudicative role would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance.

None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock*, at para. 57:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.

No such fundamental alteration or interference was brought about by the legislature's enactment of the Act. A court called upon to try an action brought pursuant to the Act retains at all times its adjudicative role and the ability to exercise that role without interference. It must independently determine the applicability of the Act to the government's claim, independently assess the evidence led to support and defend that claim, independently assign that evidence weight, and then independently determine whether its assessment of the evidence supports a finding of liability. The fact that the Act shifts certain onuses of proof or limits the compellability of information that the appellants assert is relevant does not in any way interfere, in either appearance or fact, with the court's adjudicative role or any of the essential conditions of judicial independence. Judicial independence can abide unconventional rules of civil procedure and evidence.

The appellants' submission that the Act violates the independence of the judiciary and is therefore unconstitutional fails for the reasons stated above.

C.*Rule of Law*

The rule of law is "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142) that lies "at the root of our system of government" (*Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 70). It is expressly acknowledged by the preamble to the *Constitution Act, 1982*, and implicitly recognized in the preamble to the *Constitution Act, 1867*: see *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 750.

This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power": *Reference re Manitoba Language Rights*, at p. 748. The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order": *Reference re Manitoba Language Rights*, at p. 749. The third requires that "the relationship between the state and the individual . . . be regulated by law": *Reference re Secession of Quebec*, at para. 71.

So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15.

This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, "unwritten constitutional principles", including the rule of law, "are capable of limiting government actions". See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed).

Nonetheless, considerable debate surrounds the question of what *additional* principles, if any, the rule of law might embrace, and the extent to which *they* might mandate the invalidation of legislation based on its content. P. W. Hogg and C. F. Zwibel write in "The Rule of Law in the Supreme Court of Canada" (2005), 55 *U.T.L.J.* 715, at pp. 717-18:

> Many authors have tried to define the rule of law and to explain its significance, or lack thereof. Their views spread across a wide spectrum. . . . T.R.S. Allan, for example, claims that laws that fail to respect the equality and human dignity of individuals are contrary to the rule of law. Luc Tremblay asserts that the rule of law includes the liberal principle, the democratic principle, the constitutional principle, and the federal principle. For Allan and Tremblay, the rule of law demands not merely that positive law be obeyed but that it embody a particular vision of social justice. Another strong version comes from David Beatty, who argues that the 'ultimate rule of law' is a principle of 'proportionality' to which all laws must conform on pain of invalidity (enforced by judicial review). In the middle of the spectrum are those who, like Joseph Raz, accept that the rule of law is an ideal of constitutional legality, involving open, stable, clear, and general rules, even-handed enforcement of those laws, the independence of the judiciary, and judicial review of administrative action. Raz acknowledges that conformity to the rule of law is often a matter of degree, and that breaches of the rule of law do not lead to invalidity.

See also W. J. Newman, "The Principles of the Rule of Law and Parliamentary Sovereignty in Constitutional Theory and Litigation" (2005), 16 *N.J.C.L.* 175, at pp. 177-80.

This debate underlies Strayer J.A.'s apt observation in *Singh v. Canada (Attorney General)*, 2000 CanLII 17100 (FCA), [2000] 3 F.C. 185 (C.A.), at para. 33, that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be."

The appellants' conceptions of the rule of law can fairly be said to fall at one extreme of the spectrum of possible conceptions and to support Strayer J.A.'s thesis. They submit that the rule of law requires that legislation: (1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial. And they argue that the Act breaches each of these requirements, rendering it invalid.

A brief review of this Court's jurisprudence will reveal that none of these requirements enjoy constitutional protection in Canada. But before embarking on that review, it should be said that acknowledging the constitutional force of anything resembling the appellants' conceptions of the rule of law would seriously undermine the legitimacy of judicial review of legislation for constitutionality. That is so for two separate but interrelated reasons.

First, many of the requirements of the rule of law proposed by the appellants are simply broader versions of rights contained in the *Charter*. For example, the appellants' proposed fair trial requirement is essentially a broader version of s. 11(*d*) of the *Charter*, which provides that "[a]ny person charged with an offence has the right . . . to . . . a fair and public hearing." But the framers of the *Charter* enshrined that fair trial right only for those "charged with an offence". If the rule of law constitutionally required that all legislation provide for a fair trial, s. 11(*d*) and its relatively limited scope (not to mention its qualification by s. 1) would be largely irrelevant because *everyone* would have the unwritten, but constitutional, right to a "fair . . . hearing". (Though, as explained in para. 76, the Act provides for a fair trial in any event.) Thus, the appellants' conception of the unwritten constitutional principle of the rule of law would render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional

framers. That is specifically what this Court cautioned against in *Reference re Secession of Quebec*, at para. 53:

> Given the existence of these underlying constitutional principles, what use may the Court make of them? In [*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*], at paras. 93 and 104, we cautioned that the recognition of these constitutional principles . . . could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. [Emphasis added.]

Second, the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. See *Bacon v. Saskatchewan Crop Insurance Corp.* (1999), 1999 CanLII 12234 (SK CA), 180 Sask. R. 20 (C.A.), at para. 30; Elliot, at pp. 141-42; Hogg and Zwibel, at p. 718; and Newman, at p. 187.

The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text.

A review of the cases showing that each of the appellants' proposed requirements of the rule of law has, as a matter of precedent and policy, no constitutional protection is conclusive of the appellants' rule of law arguments.

(1)Prospectivity in the Law

Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(*g*) of the *Charter*, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P. W. Hogg sets out the state of the law accurately (in *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 48-29):

> Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

Hence, in *Air Canada v. British Columbia*, 1989 CanLII 95 (SCC), [1989] 1 S.C.R. 1161, at p. 1192, La Forest J., writing for a majority of this Court, characterized a retroactive tax as "not constitutionally barred". And in *Cusson v. Robidoux*, 1975 CanLII 199 (SCC), [1977] 1 S.C.R. 650, at p. 655, Pigeon J., for a unanimous Court, said that it would be "untenable" to suggest that legislation reviving actions earlier held by this Court (in *Notre-Dame Hospital v. Patry*, 1974 CanLII 174 (SCC), [1975] 2 S.C.R. 388) to be time-barred was unconstitutional.

The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness": *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), at p. 268.

It might also be observed that developments in the common law have always had retroactive and retrospective effect. Lord Nicholls recently explained this point in *In re Spectrum Plus Ltd.*, [2005] 3 W.L.R. 58, [2005] UKHL 41, at para. 7:

> A court ruling which changes the law from what it was previously thought to be operates retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v Stevenson* 1932 CanLII 536 (FOREP), [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Mrs Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.

This observation adds further weight, if needed, to the view that retrospectivity and retroactivity do not generally engage constitutional concerns.

(2)Generality in the Law, Ordinary Law for the Government and Fair Civil Trials

Two decisions of this Court defeat the appellants' submission that the Constitution, through the rule of law, requires that legislation be general in character and devoid of special advantages for the government (except where necessary for effective governance), as well as that it ensure a fair civil trial.

The first is *Air Canada.* In it, a majority of this Court affirmed the constitutionality of 1981 amendments to the *Gasoline Tax Act, 1948*, R.S.B.C. 1960, c. 162, that retroactively taxed certain companies in the airline industry. The amendments were meant strictly to defeat three companies' claims, brought in 1980, for reimbursement of gasoline taxes paid between 1974 and 1976, the collection of which was *ultra vires* the legislature of British Columbia. The legislative amendments, in addition to being retroactive, were for the benefit of the Crown, aimed at a particular

industry with readily identifiable members and totally destructive of that industry's ability to pursue successfully their claims filed a year earlier. Nonetheless, the constitutionality of those amendments was affirmed by a majority of this Court.

The second is *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40, 2003 SCC 39, in which this Court unanimously upheld a provision of the *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1, aimed specifically at defeating certain disabled veterans' claims, the merits of which were undisputed, against the federal government. The claims concerned interest owed by the government on the veterans' benefit accounts administered by it, which interest it had not properly credited for decades. Though the appeal was pursued on the basis of the *Canadian Bill of Rights*, S.C. 1960, c. 44, the decision confirmed that it was well within Parliament's power to enact the provision at issue — despite the fact that it was directed at a known class of vulnerable veterans, conferred benefits on the Crown for "undisclosed reasons" (para. 62) and routed those veterans' ability to have *any* trial — fair or unfair — of their claims. See para. 15:

> The *Department of Veterans Affairs Act*, s. 5.1(4) takes a property claim from a vulnerable group, in disregard of the Crown's fiduciary duty to disabled veterans. However, that taking is within the power of Parliament. The appeal has to be allowed.

Additionally, the appellants' conception of a "fair" civil trial seems in part to be of one governed by customary rules of civil procedure and evidence. As should be evident from the analysis concerning judicial independence, there is no constitutional right to have one's civil trial governed by such rules. Moreover, new rules are not necessarily unfair. Indeed, tobacco manufacturers sued pursuant to the Act will receive a fair civil trial, in the sense that the concept is traditionally understood: they are entitled to a public hearing, before an independent and impartial court, in which they may contest the claims of the plaintiff and adduce evidence in their defence. The court will determine their liability only following that hearing, based solely on its understanding of the law as applied to its findings of fact. The fact that defendants might regard that law (i.e., the Act) as unjust, or the procedural rules it prescribes as unprecedented, does not render their trial unfair.

The Act does not implicate the rule of law in the sense that the Constitution comprehends that term. It follows that the Act is not unconstitutional by reason of interference with it.

V. Conclusion

The Act is constitutionally valid. The appeals are dismissed, with costs to the respondents throughout. Each constitutional question is answered "no". The stay of proceedings granted by McLachlin C.J. on January 21, 2005 is vacated.

APPENDIX

Tobacco Damages and Health Care Costs Recovery Act, S.B.C. 2000, c. 30, as am. S.B.C. 2003, c. 70, s. 297

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Definitions and interpretation

1 (1)In this Act:

"cost of health care benefits" means the sum of

(a)the present value of the total expenditure by the government for health care benefits provided for insured persons resulting from tobacco related disease or the risk of tobacco related disease, and

(b)the present value of the estimated total expenditure by the government for health care benefits that could reasonably be expected will be provided for those insured persons resulting from tobacco related disease or the risk of tobacco related disease;

"disease" includes general deterioration of health;

"exposure" means any contact with, or ingestion, inhalation or assimilation of, a tobacco product, including any smoke or other by-product of the use, consumption or combustion of a tobacco product;

"health care benefits" means

(a)benefits as defined under the *Hospital Insurance Act*,

(b)benefits as defined under the *Medicare Protection Act*,

(c)payments made by the government under the *Continuing Care Act*, and

(d)other expenditures, made directly or through one or more agents or other intermediate bodies, by the government for programs, services, benefits or similar matters associated with disease;

"insured person" means

(a)a person, including a deceased person, for whom health care benefits have been provided, or

(b)a person for whom health care benefits could reasonably be expected will be provided;

"joint venture" means an association of 2 or more persons, if

(a)the relationship among the persons does not constitute a corporation, a partnership or a trust, and

(b)the persons each have an undivided interest in assets of the association;

"manufacture" includes, for a tobacco product, the production, assembly or packaging of the tobacco product;

"manufacturer" means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past

(a)causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,

(b)for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,

(c)engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or

(d)is a trade association primarily engaged in

(i)the advancement of the interests of manufacturers,

(ii)the promotion of a tobacco product, or

(iii)causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

"person" includes a trust, joint venture or trade association;

"promote" or **"promotion"** includes, for a tobacco product, the marketing, distribution or sale of the tobacco product and research with respect to the tobacco product;

"tobacco product" means tobacco and any product that includes tobacco;

"tobacco related disease" means disease caused or contributed to by exposure to a tobacco product;

"tobacco related wrong" means,

(a)a tort committed in British Columbia by a manufacturer which causes or contributes to tobacco related disease, or

(b)in an action under section 2 (1), a breach of a common law, equitable or statutory duty or obligation owed by a manufacturer to persons in British Columbia who have been exposed or might become exposed to a tobacco product;

"type of tobacco product" means one or a combination of the following tobacco products:

(a)cigarettes;

(b)loose tobacco intended for incorporation into cigarettes;

(c)cigars;

(d)cigarillos;

(e)pipe tobacco;

(f)chewing tobacco;

(g) nasal snuff;

(h)oral snuff;

(i)a prescribed form of tobacco.

(2)The definition of "manufacturer" in subsection (1) does not include

(a)an individual,

(b)a person who

(i)is a manufacturer only because they are a wholesaler or retailer of tobacco products, and

(ii)is not related to

(A)a person who manufactures a tobacco product, or

(B)a person described in paragraph (a) of the definition of "manufacturer", or

(c)a person who

(i)is a manufacturer only because paragraph (b) or (c) of the definition of "manufacturer" applies to the person, and

(ii)is not related to

(A)a person who manufactures a tobacco product, or

(B)a person described in paragraphs (a) or (d) of the definition of "manufacturer".

(3)For the purposes of subsection (2), a person is related to another person if, directly or indirectly, the person is

(a)an affiliate, as defined in section 1 of the *Business Corporations Act*, of the other person, or

(b)an affiliate of the other person or an affiliate of an affiliate of the other person.

(4)For the purposes of subsection (3) (b), a person is deemed to be an affiliate of another person if the person

(a)is a corporation and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, owns a beneficial interest in shares of the corporation

(i)carrying at least 50% of the votes for the election of directors of the corporation and the votes carried by the shares are sufficient, if exercised, to elect a director of the corporation, or

(ii)having a fair market value, including a premium for control if applicable, of at least 50% of the fair market value of all the issued and outstanding shares of the corporation, or

(b)is a partnership, trust or joint venture and the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has an ownership interest in the assets of that person that entitles the other person or group to receive at least 50% of the profits or at least 50% of the assets on dissolution, winding up or termination of the partnership, trust or joint venture.

(5)For the purposes of subsection (3) (b), a person is deemed to be an affiliate of another person if the other person, or a group of persons not dealing with each other at arm's length of which the other person is a member, has any direct or indirect influence that, if exercised, would result in control in fact of that person except if the other person deals at arm's length with that person and derives influence solely as a lender.

(6)For the purposes of determining the market share of a defendant for a type of tobacco product sold in British Columbia, the court must calculate the defendant's market share for the type of tobacco product by the following formula:

$$dms = \frac{dm}{MM} \times 100\%$$

where

dms =the defendant's market share for the type of tobacco product from the date of the earliest tobacco related wrong committed by that defendant to the date of trial;

dm =the quantity of the type of tobacco product manufactured or promoted by the defendant that is sold within British Columbia from the date of the earliest tobacco related

wrong committed by that defendant to the date of trial;

MM =the quantity of the type of tobacco product manufactured or promoted by all manufacturers that is sold within British Columbia from the date of the earliest tobacco related wrong committed by the defendant to the date of trial.

Direct action by government

2 (1)The government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong.

(2)An action under subsection (1) is brought by the government in its own right and not on the basis of a subrogated claim.

(3)In an action under subsection (1), the government may recover the cost of health care benefits whether or not there has been any recovery by other persons who have suffered damage caused or contributed to by the tobacco related wrong committed by the defendant.

(4)In an action under subsection (1), the government may recover the cost of health care benefits

(a)for particular individual insured persons, or

(b)on an aggregate basis, for a population of insured persons as a result of exposure to a type of tobacco product.

(5)If the government seeks in an action under subsection (1) to recover the cost of health care benefits on an aggregate basis,

(a)it is not necessary

(i)to identify particular individual insured persons,

(ii)to prove the cause of tobacco related disease in any particular individual insured person, or

(iii)to prove the cost of health care benefits for any particular individual insured person,

(b)the health care records and documents of particular individual insured persons or the documents relating to the provision of health care benefits for particular individual insured persons are not compellable except as provided under a rule of law, practice or procedure that requires the production of documents relied on by an expert witness,

(c)a person is not compellable to answer questions with respect to the health of, or the provision of health care benefits for, particular individual insured persons,

(d)despite paragraphs (b) and (c), on application by a defendant, the court may order discovery of a statistically meaningful sample of the documents referred to in paragraph (b) and the order must include directions concerning the nature, level of detail and type of information to be disclosed, and

(e)if an order is made under paragraph (d), the identity of particular individual insured persons must not be disclosed and all identifiers that disclose or may be used to trace the

names or identities of any particular individual insured persons must be deleted from any documents before the documents are disclosed.

Recovery of cost of health care benefits on aggregate basis

3 (1)In an action under section 2 (1) for the recovery of the cost of health care benefits on an aggregate basis, subsection (2) applies if the government proves, on a balance of probabilities, that, in respect of a type of tobacco product,

(a)the defendant breached a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have been exposed or might become exposed to the type of tobacco product,

(b)exposure to the type of tobacco product can cause or contribute to disease, and

(c)during all or part of the period of the breach referred to in paragraph (a), the type of tobacco product, manufactured or promoted by the defendant, was offered for sale in British Columbia.

(2)Subject to subsections (1) and (4), the court must presume that

(a)the population of insured persons who were exposed to the type of tobacco product, manufactured or promoted by the defendant, would not have been exposed to the product but for the breach referred to in subsection (1) (a), and

(b)the exposure described in paragraph (a) caused or contributed to disease or the risk of disease in a portion of the population described in paragraph (a).

(3)If the presumptions under subsection (2) (a) and (b) apply,

(a)the court must determine on an aggregate basis the cost of health care benefits provided after the date of the breach referred to in subsection (1) (a) resulting from exposure to the type of tobacco product, and

(b)each defendant to which the presumptions apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product.

(4)The amount of a defendant's liability assessed under subsection (3) (b) may be reduced, or the proportions of liability assessed under subsection (3) (b) readjusted amongst the defendants, to the extent that a defendant proves, on a balance of probabilities, that the breach referred to in subsection (1) (a) did not cause or contribute to the exposure referred to in subsection (2) (a) or to the disease or risk of disease referred to in subsection (2) (b).

Joint and several liability in an action under section 2 (1)

4 (1)Two or more defendants in an action under section 2 (1) are jointly and severally liable for the cost of health care benefits if

(a)those defendants jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1 (1), and

(b)as a consequence of the breach described in paragraph (a), at least one of those defendants is held liable in the action under section 2 (1) for the cost of those health care benefits.

(2)For purposes of an action under section 2 (1), 2 or more manufacturers, whether or not they are defendants in the action, are deemed to have jointly breached a duty or obligation described in the definition of "tobacco related wrong" in section 1 (1) if

(a)one or more of those manufacturers are held to have breached the duty or obligation, and

(b)at common law, in equity or under an enactment those manufacturers would be held

(i)to have conspired or acted in concert with respect to the breach,

(ii)to have acted in a principal and agent relationship with each other with respect to the breach, or

(iii)to be jointly or vicariously liable for the breach if damages would have been awarded to a person who suffered as a consequence of the breach.

Population based evidence to establish causation and quantify damages or cost

5Statistical information and information derived from epidemiological, sociological and other relevant studies, including information derived from sampling, is admissible as evidence for the purposes of establishing causation and quantifying damages or the cost of health care benefits respecting a tobacco related wrong in an action brought

(a)by or on behalf of a person in the person's own name or as a member of a class of persons under the *Class Proceedings Act*, or

(b)by the government under section 2 (1).

Limitation periods

6 (1)No action that is commenced within 2 years after the coming into force of this section by

(a)the government,

(b)a person, on his or her own behalf or on behalf of a class of persons, or

(c)a personal representative of a deceased person on behalf of the spouse, parent or child, as defined in the *Family Compensation Act*, of the deceased person,

for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong is barred under the *Limitation Act*.

(2)Any action described in subsection (1) for damages alleged to have been caused or contributed to by a tobacco related wrong is revived if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the *Limitation Act*.

Liability based on risk contribution

7 (1)This section applies to an action for damages, or the cost of health care benefits, alleged to have been caused or contributed to by a tobacco related wrong other than an action for the

recovery of the cost of health care benefits on an aggregate basis.

(2)If a plaintiff is unable to establish which defendant caused or contributed to the exposure described in paragraph (b) and, as a result of a breach of a common law, equitable or statutory duty or obligation,

(a)one or more defendants causes or contributes to a risk of disease by exposing persons to a type of tobacco product, and

(b)the plaintiff has been exposed to the type of tobacco product referred to in paragraph (a) and suffers disease as a result of the exposure,

the court may find each defendant that caused or contributed to the risk of disease liable for a proportion of the damages or cost of health care benefits incurred equal to the proportion of its contribution to that risk of disease.

(3)The court may consider the following in apportioning liability under subsection (2):

(a)the length of time a defendant engaged in the conduct that caused or contributed to the risk of disease;

(b)the market share the defendant had in the type of tobacco product that caused or contributed to the risk of disease;

(c)the degree of toxicity of any toxic substance in the type of tobacco product manufactured or promoted by a defendant;

(d)the amount spent by a defendant on promoting the type of tobacco product that caused or contributed to the risk of disease;

(e)the degree to which a defendant collaborated or acted in concert with other manufacturers in any conduct that caused, contributed to or aggravated the risk of disease;

(f)the extent to which a defendant conducted tests and studies to determine the risk of disease resulting from exposure to the type of tobacco product;

(g)the extent to which a defendant assumed a leadership role in manufacturing the type of tobacco product;

(h)the efforts a defendant made to warn the public about the risk of disease resulting from exposure to the type of tobacco product;

(i)the extent to which a defendant continued manufacture or promotion of the type of tobacco product after it knew or ought to have known of the risk of disease resulting from exposure to the type of tobacco product;

(j)affirmative steps that a defendant took to reduce the risk of disease to the public;

(k)other considerations considered relevant by the court.

Apportionment of liability in tobacco related wrongs

8 (1)This section does not apply to a defendant in respect of whom the court has made a finding of liability under section 7.

(2)A defendant who is found liable for a tobacco related wrong may commence, against one or more of the defendants found liable for that wrong in the same action, an action or proceeding for contribution toward payment of the damages or the cost of health care benefits caused or contributed to by that wrong.

(3)Subsection (2) applies whether or not the defendant commencing an action or proceeding under that subsection has paid all or any of the damages or the cost of health care benefits caused or contributed to by the tobacco related wrong.

(4)In an action or proceeding described in subsection (2), the court may apportion liability and order contribution among each of the defendants in accordance with the considerations listed in section 7 (3) (a) to (k).

Regulations

9 (1)The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2)Without limiting subsection (1), the Lieutenant Governor in Council may make regulations prescribing a form of tobacco for the purposes of paragraph (i) of the definition of "type of tobacco product" in section 1 (1).

Retroactive effect

10When brought into force under section 12, a provision of this Act has the retroactive effect necessary to give the provision full effect for all purposes including allowing an action to be brought under section 2 (1) arising from a tobacco related wrong, whenever the tobacco related wrong occurred.

. . .

Commencement

12This Act comes into force by regulation of the Lieutenant Governor in Council.

Appeals dismissed with costs.

Solicitors for the appellant Imperial Tobacco Canada Limited: Berardino & Harris, Vancouver.

Solicitors for the appellant Rothmans, Benson & Hedges Inc.: Macaulay McColl, Vancouver.

Solicitors for the appellant JTI-Macdonald Corp.: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the appellant Canadian Tobacco Manufacturers' Council: Kuhn & Company, Vancouver.

Solicitors for the appellant British American Tobacco (Investments) Limited: Sugden, McFee & Roos, Vancouver.

Solicitors for the appellants Philip Morris Incorporated and Philip Morris International Inc.: McCarthy Tétrault, Montréal.

Solicitors for the respondents: Bull, Housser & Tupper, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of Nova Scotia: Attorney General of Nova Scotia, Halifax.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener the Attorney General of Newfoundland and Labrador: Attorney General of Newfoundland and Labrador, St. John's.

Tab 155

CanLII

Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 (CanLII), [2021] 2 SCR 845

Source:	Supreme Court of Canada
Date:	2021-10-01
File number:	38921
Other citations:	462 DLR (4th) 1 — 495 CRR (2d) 272
Citation:	Toronto (City) v. Ontario (Attorney General), 2021 SCC 34 (CanLII), [2021] 2 SCR 845, <https://canlii.ca/t/jjc3d>, retrieved on 2026-01-18
Most recent unfavourable mention	Mercer v. Yukon (Government of), 2025 YKCA 5 (CanLII) [...] He says **City of Toronto is distinguishable** because it was concerned with the position of municipalities within the constitutional structure. [...]

SUPREME COURT OF CANADA

Citation: Toronto (City) *v.* Ontario (Attorney General), 2021 SCC 34, [2021] 2 S.C.R. 845

Appeal Heard: March 16, 2021
Judgment Rendered: October 1, 2021
Docket: 38921

Between:

City of Toronto
Appellant

and

Attorney General of Ontario
Respondent

- and -

Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia
Interveners

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

Joint Reasons for Judgment: Wagner C.J. and Brown J. (Moldaver, Côté and Rowe JJ. concurring)
(paras. 1 to 85)

Dissenting Reasons: Abella J. (Karakatsanis, Martin and Kasirer JJ. concurring) (paras. 86 to 186)

City of Toronto *Appellant*

v.

Attorney General of Ontario *Respondent*

and

Attorney General of Canada,
Attorney General of British Columbia,
Toronto District School Board,
Cityplace Residents' Association,
Canadian Constitution Foundation,
International Commission of Jurists (Canada),
Federation of Canadian Municipalities,
Durham Community Legal Clinic,
Centre for Free Expression at Ryerson University,
Canadian Civil Liberties Association,
Art Eggleton,
Barbara Hall,
David Miller,
John Sewell,
David Asper Centre for Constitutional Rights,
Progress Toronto,
Métis Nation of Ontario,
Métis Nation of Alberta and
Fair Voting British Columbia *Interveners*

Indexed as: Toronto (City) *v.* Ontario (Attorney General)

2021 SCC 34

File No.: 38921.

2021: March 16; 2021: October 1.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression —Municipal elections — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Better Local Government Act, 2018, S.O. 2018, c. 11.

Constitutional law — Unwritten constitutional principles — Democracy — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August 14, 2018, the *Better Local Government Act, 2018*, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the *Act* and applied for orders restoring the 47-ward structure. The application judge found that the *Act* limited the municipal candidates' right to freedom of expression under s. 2(b) of the *Charter* and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s. 1 of the *Charter* and set aside the impugned provisions of the *Act*. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the *Act*. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the *Charter*, and concluded that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*, nor do they limit provincial legislative authority over municipal institutions.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and Moldaver, Côté, **Brown** and Rowe JJ.: Ontario acted constitutionally. The *Act* imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can the unwritten constitutional principle of democracy be used to narrow provincial authority under s. 92(8) of the *Constitution Act, 1867*, or to read municipalities into s. 3 of the *Charter*.

A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927.

However, as explained in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression, the applicable framework is that of *Baier*. As held in *Baier*, to succeed, a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016: (1) the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; (2) the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression; and (3) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This single question, a salutary clarification of the *Baier* test, emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. The *Baier* framework therefore applies, and the City had to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The *Act* imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression. Some of the candidates' prior expression may have lost its relevance, but something more than diminished effectiveness is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the *Act*. Unwritten principles are part of the law of the Constitution, in the sense that they form part of the context and backdrop

to the Constitution's written terms. Their legal force lies in their representation of general principles within which the constitutional order operates and, therefore, by which the Constitution's written terms — its provisions — are to be given effect. In practical terms, unwritten constitutional principles may assist courts in only two distinct but related ways.

First, they may be used in the interpretation of constitutional provisions. Where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.

Neither of these functions support the application of unwritten constitutional principles as an independent basis for invalidating legislation. On the contrary, unwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the *Charter*, a province, under s. 92(8) of the *Constitution Act, 1867*, has absolute and unfettered legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle.

As for s. 3 of the *Charter*, it guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it does not extend to municipal elections. Effective representation is not a principle of s. 2(b) of the *Charter*, nor can the concept be imported wholesale into s. 2(b). Section 3 and its requirement of effective representation also cannot be made relevant to the current case by using the democratic principle. Section 3 democratic rights were not extended to candidates or electors to municipal councils. The absence of municipalities in the constitutional text is not a gap to be addressed judicially; rather, it is a deliberate omission. The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

Per **Abella**, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application judge's declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter* restored. Changing the municipal wards in the middle of an ongoing municipal election was unconstitutional.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. The right to disseminate and receive

information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making.

A two-part test for adjudicating freedom of expression claims was established in *Irwin Toy*. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second asks whether the government action, in purpose or effect, interfered with freedom of expression.

The legal framework set out in *Baier*, which was designed to address under inclusive statutory regimes, only applies to claims placing an obligation on government to provide individuals with a particular platform for expression. Claims of government interference with expressive rights that attach to an electoral process are the kind of claims governed by the *Irwin Toy* framework.

The distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes.

In the present case, the s. 2(b) claim is about government interference with the expressive rights that attach to the electoral process and it is precisely the kind of claim that is governed by the *Irwin Toy* framework. Applying that framework, it is clear that the timing of the legislation, by interfering with political discourse in the middle of an election, violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries during an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse. The *Act* eradicated nearly half of the active election campaigns, and required candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance. The timing of the *Act* breathed instability into the election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern.

The limitation on s. 2(b) rights in this case was the *timing* of the legislative changes. Ontario offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. In the absence of any evidence or explanation for the timing of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society.

As for the role of unwritten constitutional principles, there is disagreement with the majority's observations circumscribing their scope and power in a way that reads down the Court's binding jurisprudence. Unwritten constitutional principles may be used to invalidate legislation. The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources. Canada's Constitution, as a result, embraces unwritten as well as written rules. Unwritten constitutional principles have been held to be the lifeblood of the Constitution and the vital unstated assumptions upon which the text is based. They are not merely "context" or "backdrop" to the text. On the contrary, they are the Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.

Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions. The legislative bodies in Canada must conform to these basic structural imperatives and can in no way override them. Accordingly, unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with the Constitution's internal architecture or basic constitutional structure. This would undoubtedly be a rare case; however, to foreclose the possibility that unwritten principles can be used to invalidate legislation in all circumstances is imprudent. It not only contradicts the Court's jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it.

Unwritten constitutional principles are the foundational organizing principles of the Constitution and have full legal force. They serve to give effect to the structure of the Constitution and function as independent bases upon which to attack the validity of legislation since they have the same legal status as the text. Unwritten constitutional principles not only give meaning and effect to constitutional text and inform the language chosen to articulate the specific right or freedom, they assist in developing an evolutionary understanding of the rights and freedoms guaranteed in the Constitution, which have long been described as a living tree capable of growth and expansion. Unwritten constitutional principles are a key part of what makes the tree grow. They are also substantive legal rules in their own right. In appropriate cases, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional.

Cases Cited

By Wagner C.J. and Brown J.

Applied: *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; **distinguished:** *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; **considered:** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; **referred to:** *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470; *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 1997 CanLII 12352 (ON SC), 151 D.L.R. (4th) 346; *East York (Borough) v. Ontario* (1997), 1997 CanLII 1316 (ON CA), 36 O.R. (3d) 733; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158; *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725; *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2; *R. v. Poulin*, 2019 SCC 47; *Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, 1993 CanLII 43 (SCC), [1993] 4 S.C.R. 289; *Huson v. The Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285.

By Abella J. (dissenting)

Di Ciano v. Toronto (City), 2017 CanLII 85757; *Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349; *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *United Taxi Drivers' Fellowship of*

Southern Alberta v. Calgary (City), 2004 SCC 19, [2004] 1 S.C.R. 485; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241; *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342; *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527; *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790; *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6, [2017] 1 S.C.R. 93; *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, [2020] 3 S.C.R. 113; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373; *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262; *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491; *AXA General Insurance Ltd. v. HM*

Advocate, [2011] UKSC 46, [2012] 1 A.C. 868; *Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245; *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410; *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520; *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162; *South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883; *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374; *Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (Germany); *Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2; *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Attorney-General for Canada v. Attorney-General for Ontario*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326; *Attorney General of Nova Scotia v. Attorney General of Canada*, 1950 CanLII 26 (SCC), [1951] S.C.R. 31; *Reference re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54; *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121; *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1 S.C.R. 175; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629; *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473.

Statutes and Regulations Cited

Better Local Government Act, 2018, S.O. 2018, c. 11, Sch. 3, s. 1.

By-law to amend By-law 267-2017, being a by-law to re-divide the City of Toronto's Ward Boundaries, to correct certain minor errors, City of Toronto By-law No. 464-2017, April 28, 2017.

By-law to re-divide the City of Toronto's Ward Boundaries, City of Toronto By-law No. 267-2017, March 29, 2017.

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d), 3, 7, 15, 33.

City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A, s. 128(1).

Constitution Act, 1867, preamble, ss. 91, 92.

Constitution Act, 1982, preamble, s. 52.

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 4.

Magna Carta (1215).

Municipal Elections Act, 1996, S.O. 1996, c. 32, Sch., s. 10.1(8).

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221.

Authors Cited

Bhagwat, Ashutosh, and James Weinstein. "Freedom of Expression and Democracy", in Adrienne Stone and Frederick Schauer, eds., *The Oxford Handbook of Freedom of Speech*. Oxford: Oxford University Press, 2021, 82.

Bobbitt, Philip. *Constitutional Fate: Theory of the Constitution*. New York: Oxford University Press, 1982.

Canada. House of Commons. *House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, p. 10585.

Canadian Urban Institute. *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online: https://www.toronto.ca/legdocs/mmis/2014/ex/bgrd/backgroundfile-69434.pdf; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC34_1_eng.pdf).

Chan, Kathryn. "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151.

Courtney, John C. *Commissioned Ridings: Designing Canada's Electoral Districts*. Montréal: McGill-Queen's University Press, 2001.

Dawood, Yasmin. "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 *S.C.L.R.* (2d) 105.

Elliot, Robin. "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67.

Flynn, Alexandra. "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 *Osgoode Hall L.J.* 271.

Fredman, Sandra. "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498.

Good, Kristin R. *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver*. Toronto: University of Toronto Press, 2009.

Hogg, Peter W., and Wade K. Wright. *Constitutional Law of Canada*, 5th ed. Supp. Toronto: Thomson Reuters, 2021 (updated 2021, release 1).

Johnson, (Alyn) James. "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 *Alta. L. Rev.* 1077.

Kreimer, Seth F. "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 *U. Pa. L. Rev.* 1293.

Leclair, Jean. "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 *Queen's L.J.* 389.

Macklem, Patrick. "Aboriginal Rights and State Obligations" (1997), 36 *Alta. L. Rev.* 97.

Moon, Richard. *The Constitutional Protection of Freedom of Expression*. Toronto: University of Toronto Press, 2000.

Newman, Dwight. "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions*. New York: Cambridge University Press, 2019, 209.

Oliver, Peter C. "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 *McGill L.J.* 207.

Ontario. Greater Toronto Area Task Force. *Greater Toronto*. Toronto, 1996.

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, p. 605.

Ontario. Office of the Premier. *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online: https://news.ontario.ca/en/release/49795/ontarios-government-for-the-people-announces-reforms-to-deliver-better-local-government; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC34_2_eng.pdf).

Pal, Michael. "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269.

Rawls, John. *Political Liberalism*, Expanded ed. New York: Columbia University Press, 2005.

Roach, Kent, and David Schneiderman. “Freedom of Expression in Canada” (2013), 61 *S.C.L.R.* (2d) 429.

Rowe, Malcolm, and Nicolas Déplanche. “Canada’s Unwritten Constitutional Order: Conventions and Structural Analysis” (2020), 98 *Can. Bar Rev.* 430.

Sen, Amartya. *The Idea of Justice*. Cambridge, Mass.: Belknap Press of Harvard University Press, 2009.

Siegel, David. “Ontario”, in Andrew Sancton and Robert Young, eds., *Foundations of Governance: Municipal Government in Canada’s Provinces*. Toronto: University of Toronto Press, 2009, 20.

Toronto Ward Boundary Review. *Additional Information Report*, August 2016 (online: https://static1.squarespace.com/static/53bc0914e4b0eb57996e4dee/t/57b5cc06b3db2b7747f917c3/1471532043560/TWBR.AdditionalI AUG2016FINAL.pdf; archived version: https://www.scc-csc.ca/cso-dce/2021SCC-CSC34_3_eng.pdf).

Toronto Ward Boundary Review. *Final Report*. Toronto, 2016.

Toronto Ward Boundary Review. *Options Report*. Toronto, 2015.

Urbinati, Nadia. “Free Speech as the Citizen’s Right”, in Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution*. Cambridge, Mass.: Harvard University Press, 2014, 125.

Walters, Mark D. “Written Constitutions and Unwritten Constitutionalism”, in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory*. New York: Cambridge University Press, 2008 (2010 reprint), 245.

Weinrib, Jacob. “What is the Purpose of Freedom of Expression?” (2009), 67 *U.T. Fac. L. Rev.* 165.

Zhou, Han-Ru. “Legal Principles, Constitutional Principles, and Judicial Review” (2019), 67 *Am. J. Comp. L.* 889.

Zipkin, Saul. “The Election Period and Regulation of the Democratic Process” (2010), 18 *Wm. & Mary Bill Rts. J.* 533.

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Tulloch, Miller, Nordheimer and Harvison Young JJ.A.), 2019 ONCA 732, 146 O.R. (3d) 705, 439 D.L.R. (4th) 292, 442 C.R.R. (2d) 348, 92 M.P.L.R. (5th) 1, [2019] O.J. No. 4741 (QL), 2019 CarswellOnt 14847 (WL Can.), setting aside a decision of Belobaba J., 2018 ONSC 5151, 142 O.R. (3d) 336, 416 C.R.R. (2d) 132, 80 M.P.L.R. (5th) 1, [2018] O.J. No. 4596 (QL), 2018 CarswellOnt 14928 (WL Can.). Appeal dismissed, Abella, Karakatsanis, Martin and Kasirer JJ. dissenting.

Glenn K. L. Chu and *Diana W. Dimmer*, for the appellant.

Robin K. Basu and *Yashoda Ranganathan*, for the respondent.

Michael H. Morris, for the intervener the Attorney General of Canada.

Mark Witten, for the intervener the Attorney General of British Columbia.

Paul Koven, for the intervener the Toronto District School Board.

Selwyn A. Pieters, for the intervener the Cityplace Residents’ Association.

Adam Goldenberg, for the intervener the Canadian Constitution Foundation.

Guy Régimbald, for the intervener the International Commission of Jurists (Canada).

Stéphane Émard-Chabot, for the intervener the Federation of Canadian Municipalities.

Omar Ha-Redeye, for the intervener the Durham Community Legal Clinic.

Jamie Cameron, for the intervener the Centre for Free Expression at Ryerson University.

Geetha Philipupillai, for the intervener the Canadian Civil Liberties Association.

Christine Davies, for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell.

Alexi N. Wood, for the intervener the David Asper Centre for Constitutional Rights.

Donald K. Eady, for the intervener Progress Toronto.

Jason Madden, for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta.

Nicolas M. Rouleau, for the intervener Fair Voting British Columbia.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE AND BROWN J. —

TABLE OF CONTENTS

	Paragraph
I. Introduction	1
II. Background	6
III. Issues	13
IV. Analysis	14
A. *Freedom of Expression*	14
(1) Principles of *Charter* Interpretation in the Context of Section 2(b)	14
(2) The *Baier* Framework	22
(3) Application	29
(a) *Nature of the Claim*	29
(b) *Application of Baier*	36
(c) *Effective Representation*	44
B. *Democracy*	48
(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles	49
(a) *The Provincial Court Judges Reference*	64
(b) *The Secession Reference*	67
(c) *Babcock and Imperial Tobacco*	70
(d) *Trial Lawyers Association of British Columbia*	74
(2) Relevance of the Democratic Principle to Municipal Elections	76
(a) *Section 92(8) of the Constitution Act, 1867*	79
(b) *Section 3 of the Charter*	81
(3) Conclusion on the Democratic Principle	83
V. Conclusion	85

I. Introduction

[1] While cast as a claim of right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

[2] Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province". Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has "absolute and unfettered legal power to do with them as it wills" (*Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 1997 CanLII 12352 (ON SC), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario* (1997), 1997 CanLII 1316 (ON CA), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

[3] Aside from one reference to s. 92(8) — and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case — our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet, these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says that doing so was unconstitutional, because it limited the s. 2(b) *Charter* rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867* by virtue of that same unwritten constitutional principle of democracy.

[4] None of these arguments have merit, and we would dismiss the City's appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the *Act* coming into force and the election day. There was no substantial interference with the claimants' freedom of expression and thus no limitation of s. 2(b).

[5] Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, and there is no

freestanding right to effective representation outside s. 3 of the *Charter*. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

[6] In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

[7] On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

[8] The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the *Act* breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

[9] The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the *Act* limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the *Act*, enacted as it was during the election campaign. Secondly, he found that the *Act* limited municipal voters' s. 2(b) right to effective representation — despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the *Charter* — due to his conclusion that the ward population sizes brought about by the *Act* were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the *Act*. As a result, the election was to proceed on the basis of the 47-ward system.

[10] The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the *Act* (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

[11] When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the *Act* as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a

positive rights claim — that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded in s. 2(b) of the *Charter*, and that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression. Further, he had erred in finding that the right to effective representation — guaranteed by s. 3 — applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

[12] The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City's standing was not challenged before this Court.

III. Issues

[13] Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

IV. Analysis

A. *Freedom of Expression*

(1) Principles of *Charter* Interpretation in the Context of Section 2(b)

[14] This appeal hinges on the scope of s. 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, [2020] 3 S.C.R. 426, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, "Developments in

Constitutional Law: The 2009-2010 Term" (2010), 52 *S.C.L.R.* (2d) 65). Following *Irwin Toy*, then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of "expression" (p. 969). Further, if the purpose or effect of the impugned governmental action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

[15] Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself — such as violence — or the location of that activity is not consonant with *Charter* protection (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

[16] Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a negative obligation . . . rather than a positive obligation of protection or assistance" (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.

[17] In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).

[18] Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier*, this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

[19] The *Baier* framework is therefore not confined, as our colleague suggests, "to address[ing] underinclusive statutory regimes" (para. 148). This Court could not have been clearer in *Baier* that it applies "where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(*b*)" (para. 30). Were it otherwise — that is, were *Baier*'s application limited to cases of underinclusion — claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy*. This is illogical. *Baier*'s reach extends beyond cases of

underinclusion or exclusion, and categorically limits the "obligation[s] on government to provide individuals with a particular platform for expression" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

[20] We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a "right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways" (P. Macklem, "Aboriginal Rights and State Obligations" (1997), 36 *Alta. L. Rev.* 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying expression on that subject? While in *Haig*, L'Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is "not always clearly made, nor . . . always helpful", she nevertheless distinguished typical negative claims from those that might require "positive governmental action" (p. 1039). This is the distinction with which we concern ourselves here.

[21] This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore*, which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The *Baier* Framework

[22] The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority*, at para. 35). Here, therefore, if the City's claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier*, at para. 35).

[23] In *Baier*, this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a

substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? (3) Is the government responsible for the inability to exercise the fundamental freedom?

[24] These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking — in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor — which requires that the claimant establish a *substantial* interference with freedom of expression — sets a higher threshold than that stated in *Irwin Toy*, which asks only whether "the purpose or effect of the government action in question was to restrict freedom of expression" (p. 971; see also *Baier*, at paras. 27-28 and 45).

[25] So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as the significant overlap among the factors — particularly between the first and second — this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court's approach in *Baier* and *Greater Vancouver Transportation Authority*. To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter* (*Haig*, at p. 1041).

[26] If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed. Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and — subject to justification of such limit under s. 1 — government action or legislation may be required.

[27] There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented — that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier*, at para. 27; *Dunmore*, at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

[28] The height of this bar of effective preclusion is demonstrated by *Baier*. There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court —

applying the *Dunmore* factors — concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants' ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) *Nature of the Claim*

[29] The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City's claim can be understood. Each leads to the conclusion that the claim is, in substance, a positive claim that must, therefore, show a substantial interference with freedom of expression.

[30] The first possible view of the City's claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City's requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the *Act*) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier*, this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; "[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(*b*)" (para. 36).

[31] The second possible view of the City's claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City's view, what is otherwise political expression becomes what it calls "electoral expression" during an election period (A.F., at para. 54). Protection of this "electoral expression", it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City's claim that the impugned provisions of the *Act* limited s. 2(b) turns squarely on the *timing* of the *Act*. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested — in the event that this Court finds only that the timing of the *Act* was unconstitutional — a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

[32] The City's focus on the timing of the *Act* cannot, however, convert its positive claim into a negative one. While its claim is couched in language of non-interference — something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework — the City does not seek protection of electoral participants' expression from restrictions tied to content or meaning (as was the case,

for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

[33] So understood, the claim is akin to that rejected in *Baier*. The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees), while the claim in this case is for temporary protection — that is, for the duration of the campaign — of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the *Act* modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can — subject to the elevated threshold of a substantial interference — change the rules as they wish.

[34] To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined with her broad articulation of the *Irwin Toy* threshold in this context — whether legislation "destabiliz[es] the opportunity for meaningful reciprocal discourse" — such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the *Constitution Act, 1867*.

[35] In sum, the City advances a positive claim and the *Baier* framework applies.

(b) *Application of Baier*

[36] As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

[37] Here, the candidates and their supporters had 69 days — longer than most federal and provincial election campaigns — to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign remained. It was twice that.) The *Act* did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the *Act* prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

[38] It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure — and larger ward populations — came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

[39] While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation — see, for instance, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J. and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569 — more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

[40] Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance, the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is

clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

[41] The City says that the expression at issue here — again, what it calls "electoral expression" — is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the "unique role" of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier*. Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier*, at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

[42] In sum, the *Baier* threshold is not met here. The *Act* imposed no limit on freedom of expression.

[43] Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it "offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election" (para. 161). This ignores the Province's written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) *Effective Representation*

[44] The City also says that the impugned provisions of the *Act* infringe "effective representation", an incident of the guarantee contained in s. 3 of the *Charter* which, the City says, can be imported into s. 2(b).

[45] Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees "only the right to vote in elections of representatives of the federal and the provincial legislative assemblies" (*Haig*, at p. 1031 (emphasis added)) and "does not extend to municipal elections" (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (*Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877, at paras. 79-80; *Harper*, at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

[46] In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of "prime importance" (*Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace

with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldly growth in the size of Toronto City Council (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (2001), at pp. 15 and 19).

[47] And *even were* effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the *Act*. It is not disputed that the 25-ward structure of the *Act* enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review's reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors — geography, community history, community interests and minority representation — that could conceivably justify a departure from parity (see *Reference re Prov. Electoral Boundaries (Sask.)*, at p. 184).

B. *Democracy*

[48] The second issue on appeal is whether the impugned provisions of the *Act* are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court's s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

[49] The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 93; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law, "infuse our Constitution" (*Secession Reference*, at para. 50). Although not recorded outside of "oblique reference[s]" in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are "foundational" (para. 49), without which "it would be impossible to conceive of our constitutional structure" (para. 51). These principles have "full legal force" and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753, at p. 845). "[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches" (C.A. reasons, at

para. 84, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

[50] Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that "full legal force" necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism* —— and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

[51] Further, the authorities she cites as "recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government" (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary — for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

[52] Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision . . . is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the "constitutional requirements that are derived from the federal character of Canada's

Constitution" (pp. 844-45 (emphasis added)). And this is precisely the point —— while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

[53] To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof —— particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act, 1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once "constitutional structure" is properly understood, it becomes clear that, when our colleague invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

[54] Ultimately, what "full legal force" means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has "full legal force" within its proper ambit. Our colleague's position — that because unwritten constitutional principles have "full legal force", they must necessarily be capable of invalidating legislation — assumes the answer to the preliminary but essential question: what *is* the "full legal force" of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their "full legal force" is realized *not* in *supplementing* the written text of our Constitution as "provisions of the Constitution" with which no law may be inconsistent and remain of "force or effect" under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not "provisions of the Constitution". Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms — its *provisions* — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

[55] First, they may be used in the interpretation of constitutional provisions. Indeed, that is the "full legal force" that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing "the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined" (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

[56] Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, 1993 CanLII 43 (SCC),

[1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

[57] Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

[58] First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 *Queen's L.J.* 389, at pp. 427-32). Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

[59] Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the *Charter* — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concep[t] of democracy . . . ha[s] no canonical formulatio[n]" (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*).

[60] We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not "set out" in the *Charter*. To find,

therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

[61] Our colleague says that the application of s. 33 "is not directly before us" (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33's application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

[62] We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, at p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

[63] In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court's jurisprudence supports this conclusion.

(a) *The Provincial Court Judges Reference*

[64] In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act, 1867* (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

> The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

[65] In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect to constitutional text. It is thus not dissimilar to this Court's approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)*, at paras. 8-10); unwritten constitutional principles inform the purpose of the provisions

of the text, thus guiding the purposive definition (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose" (*Quebec (Attorney General)*, at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)*, the Constitution "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation "must first and foremost have reference to, and be constrained by, [its] text" (para. 9).

[66] Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself* "emanates" from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned (paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) *The Secession Reference*

[67] In *Secession Reference*, this Court said:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in [*Reference re Resolution to Amend the Constitution*], *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference — the conditions for secession of a province from Confederation — which the Court was called upon to answer. The case combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a "legal framework" in the form of a set of rules to legitimize secession, was enforceable only *politically* as "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101 (emphasis added); see also Elliot, at p. 97).

[68] Of course, the Court made clear that it had identified "binding obligations under the Constitution of Canada" (para. 153), and that a breach of those obligations would occasion "serious legal repercussions" (para. 102). But the Court also acknowledged the "non-justiciability of [the] political issues" involved (para. 102), which meant that the Court could have "no supervisory role" over the political negotiations (para. 100). Recognizing that the "reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm" (para. 153), the Court fashioned rules in the event of whose breach the "appropriate recourse" would lie in "the workings of the political process rather than the courts" (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

[69] Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that case had legal force by way of a judicial declaration, how that declaration would be given effect — that is, *enforced* — was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) *Babcock and Imperial Tobacco*

[70] At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that "[a]lthough the unwritten constitutional principles are capable of limiting government actions, . . . they do not do so in this case" (para. 54 (emphasis added)). She reached this conclusion on the basis that "unwritten principles must be balanced against the principle of Parliamentary sovereignty" (para. 55), concluding:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. [para. 57]

[71] McLachlin C.J.'s statement that unwritten constitutional principles are "capable of limiting government actions" was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants' proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

> . . . the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments

> fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

[72] In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law "is not an invitation to trivialize or supplant the Constitution's written terms", nor "is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are "capable of limiting government actions" is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, "but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)" (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

[73] This, we would add, is a complete answer to our colleague Abella J.'s assertions that this Court has "never, to date, limited" the role of unwritten constitutional principles, and that their interpretive role is not "narrowly constrained by textualism" (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle —— the rule of law —— and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) *Trial Lawyers Association of British Columbia*

[74] In *Trial Lawyers Association of British Columbia*, this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the *Constitution Act, 1867*, violated s. 96 of the *Constitution Act, 1867* as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was "further supported by considerations relating to the rule of law" (para. 38), as "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230). This was, she said, "consistent with the approach adopted by Major J. in *Imperial Tobacco*" (para. 37):

> The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

[75] In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) Relevance of the Democratic Principle to Municipal Elections

[76] Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution — including its establishment of the House of Commons and of provincial legislatures — connotes certain freely elected, representative, and democratic political institutions (*Secession Reference*, at para. 62).

[77] The democratic principle has both individual and institutional dimensions (para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law (paras. 66-67).

[78] In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) *Section 92(8) of the Constitution Act, 1867*

[79] The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.*, at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier*, at para. 39).

[80] Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards' Assn. of Alberta*).

(b) *Section 3 of the Charter*

[81] Nor can the democratic principle be used to make s. 3 of the *Charter* — including its requirement of effective representation — relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the *Charter*.

[82] Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier*, at para. 39). Again, and like the school boards at issue in *Baier*, municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation" (*Quebec (Attorney General)*, at para. 4). It is not for the Court to do by "interpretation" what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.

(3) Conclusion on the Democratic Principle

[83] Even had the City established that the *Act* was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the *Act* unconstitutional. The *Act* was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to introduce the legislation at a particular time. (As the application judge correctly noted, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the *Act* and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

[84] In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the *Constitution Act, 1867*. Nor can they be applied to judicially amend the text of s. 3 of the *Charter* to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

[85] We would dismiss the appeal.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA J. —

[86] Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

[87] The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

[88] The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

[89] The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

[90] Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

Background

[91] In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was "to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of 'effective representation'" (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

[92] Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor's staff, and individually interviewed members of the 2010-2014 City Council and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

[93] The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review's *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

[94] The Boundary Review's *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

[95] At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 "to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required" (*Additional Information Report*, August 2016 (online), at p. 10).

[96] City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

[97] The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of the Board rejected the appeals and approved the By-laws on December 15, 2017 (*Di Ciano v. Toronto (City)*, 2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

> The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

[98] An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

> Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

[99] On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

[100] On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

[101] The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

[102] The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

[103] The nomination period was extended to September 14, 2018, but the election date remained the same — October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

[104] The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

[105] In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (*Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), Sch. 3, s. 1; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

[106] The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

[107] On September 10, 2018, Belobaba J. held that the *Act* was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

[108] On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.'s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

[109] On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.'s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. "impermissibly extended the scope [of] s. 2(b)" to protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

[110] In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the *Act* infringed s. 2(b), concluding that "[b]y extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters".

[111] I agree with MacPherson J.A.

Analysis

[112] Under s. 92(8) of the *Constitution Act, 1867*, the provinces have exclusive jurisdiction over "Municipal Institutions in the Province". The question therefore of whether the Province has the authority to legislate a change in Toronto's ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the *Charter*, which states:

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

[113] The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

[114] It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the *Charter* applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

[115] When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

[116] Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that "services should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences" (*Greater Toronto*, at p. 174; see also D. Siegel, "Ontario", in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (2009), 20, at p. 22; A. Flynn, "Operative Subsidiarity and Municipal Authority: The

Case of Toronto's Ward Boundary Review" (2019), 56 *Osgoode Hall L.J.* 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

> important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.
>
> (*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

[117] The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

[118] The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is . . . closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342).

[119] These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

> courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

[120] The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged — the duties of elected members "to the electors", and of electors "in the election of their representatives" (*Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, at p. 583).

[121] How then does all this relate to the rights in s. 2(b) of the *Charter*? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects "the political discourse fundamental to democracy" (*R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at p. 765).

[122] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that "participation in social and political decision-making is to be fostered and encouraged" (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being "at the core of s. 2(b)", and curtailed under s. 1 "only in service of the most compelling governmental interest" (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

[123] This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the *Charter*.

[124] *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

[125] Dealing with the first part, the "activity" at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, noted that

> *[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.* Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. [Emphasis added; pp. 763-64.]

[126] The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court's jurisprudence under s. 2(b) of the *Charter* has usually arisen in circumstances where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard.[1] The case before us, on the other hand, deals with whether the *effect* of the legislation — redrawing the ward boundaries and cutting the number of wards nearly in half mid-election — was to interfere with these expressive activities.

[127] Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

> . . . the right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." [Citations omitted.]
>
> (*Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775)

[128] In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6 (CanLII), [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, "Freedom of Expression in Canada" (2013), 61 *S.C.L.R.* (2d) 429; J. Weinrib, "What is the Purpose of Freedom of Expression?" (2009), 67 *U.T. Fac. L. Rev.* 165).

[129] Political expression during an election period is always "taking place within and being constrained by the legal and institutional framework of an election" (Y. Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 *S.C.L.R.* (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569, this Court explained that elections and referendums are "procedural structure[s] allowing for public discussion of political issues essential to governing", which serve to ensure "a reasonable opportunity to speak and be heard" and "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties" (paras. 46-47).

[130] The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

> Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions. All exercises of expression, at each and every stage of the electoral process — not only the final act of voting — must receive consistent and robust *Charter* protection. [Footnotes omitted.]
>
> (I.F., at para. 8)

[131] The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

> . . . the electoral process is the primary site in which the representative relationship is constructed. Indeed, "[c]ampaigns . . . are a main point —perhaps *the* main point — of contact between officials and the populace over matters of public policy." The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]
>
> ("The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, "Freedom of Expression and Democracy", in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, "Free Speech as the Citizen's Right", in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

[132] An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

[133] State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including "participation in social and political decision-making" (*Irwin Toy*, at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

[134] A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by "[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled" (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269, at p. 302).

[135] For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

[136] After the *Act* came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The *Act* eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards "no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place" (Dawood, at p. 132). Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

[137] The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had "focused

on the concerns and the needs of the approximately 55,000 residents of Ward 14" (A.R., vol. XV, at p. 80). Ward 14 was abolished by the *Act*.

[138] Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

> Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I . . . know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.
>
> . . .
>
> If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.
>
> (A.R., vol. XI, at pp. 15-16)

[139] Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

[140] Another candidate, Jennifer Hollett, explained the effect of the two week "legal limbo" (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

> Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister's powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.
>
> . . .
>
> The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

[141] Megann Wilson, another candidate and participant in the Women Win TO's training program, described the ensuing uncertainty vividly:

> Since . . . the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in — and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward will make it more difficult for voters to make a good decision about what candidate to vote for since

> electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents — a significant distraction from the municipal issues I am trying to engage residents about.
>
> As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.
>
> (A.R., vol. X, at p. 132)

[142] Since the *Act* did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely due to the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

> We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable. . . . It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.
>
> (A.R., vol. IX, at p. 125)

[143] Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as "deeply disappointing . . . as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time" (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that "his own political expression has been compromised" and that "candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him" (A.R., vol. IX, at p. 104).

[144] It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

[145] The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to

their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

[146] Nominations were extended to September 14, leaving only five weeks — from the date that nominations closed, solidifying which candidates were running and in what wards — for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

[147] The timing of the *Act*, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the *Charter*.

[148] With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.[2] The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to "claims of underinclusion", "exclusion from a statutory regime" and "underinclusive state action" (*Dunmore*, at paras. 24-26; *Baier*, at paras. 27-30). It has no relevance to the legal or factual issues in this case.

[149] The *Baier* framework was, additionally, confined to its unique circumstances by this Court's subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier* "summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual" (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

> . . . taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.

> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a *distinction* was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

[150] The *Baier* test has no application to this appeal. As Deschamps J.'s full quote shows, it is clear that *Baier* only applies to claims "placing an obligation on government to provide individuals with a particular platform for expression". *Irwin Toy*, on the other hand, applies to claims that are about "protecting the underlying freedom of expression of those who are free to participate in expression on a platform", like the case before us.

[151] None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the *Charter* requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier*, at para. 42; *Greater Vancouver Transportation Authority*, at para. 35; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, at para. 31).

[152] In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.[3] To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*.

[153] All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction "is notoriously difficult to make . . . . Appropriate verbal manipulations can easily move most cases across the line" (S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 *U. Pa. L. Rev.* 1293, at p. 1325).

[154] It is true that freedom of expression was once described by L'Heureux-Dubé J. in *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, as prohibiting "gags" but not compelling "the distribution of megaphones" (p. 1035; see also K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig* — a precursor to *Baier* — L'Heureux-Dubé J. acknowledged that this was an artificial distinction that is "not

always clearly made, nor . . . always helpful" (p. 1039; see also *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627, at pp. 666-68, per L'Heureux-Dubé J., concurring).

[155] There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights "baby" in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

[156] The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse "as an instrument of democratic government" (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)'s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier*, adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy*, which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

[157] Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

[158] This brings us to s. 1 of the *Charter*. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as "demonstrably justified in a free and democratic society" (*Charter*, s. 1; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

[159] But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: "We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement" (Office of the Premier, *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

> During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.
>
> So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a

> streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.
>
> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

[160] Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity" (*Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 188).

[161] But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

[162] In the absence of any evidence or explanation for the *timing* of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

[163] While this dispenses with the merits of the appeal, the majority's observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court's binding jurisprudence warrants a response.

[164] In the *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217 ("*Secession Reference*"), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as "a Constitution similar in Principle to that of the United Kingdom" (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 *McGill L.J.* 207).

[165] The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430, at p. 438). Our Constitution, as a result, "embraces unwritte[n] as well as written rules" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 92, per Lamer C.J.).

[166] It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government.[4]

[167] Unwritten constitutional principles have been held to be the "lifeblood" of our Constitution (*Secession Reference*, at para. 51) and the "vital unstated assumptions upon which the text is based" (para. 49). They are so foundational that including them in the written text "might have appeared redundant, even silly, to the framers" (para. 62).

[168] Unwritten constitutional principles are not, as the majority suggests, merely "context" or "backdrop" to the text. On the contrary, unwritten principles are our Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*" (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

[169] Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes*, per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them":

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867,* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes,* at p. 133, "such institutions derive their efficacy from the free public discussion of affairs . . . ." and, in those of Abbott J. in *Switzman v. Elbling,* at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [p. 57]

[170] This leads inescapably to the conclusion — supported by this Court's jurisprudence until today — that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

[171] In the *Secession Reference*, a unanimous Court confirmed that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action" (para. 54, quoting *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753 ("*Patriation Reference*"); see also *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

[172] The Court's reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have "full legal force". In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles "*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*" (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to "preserving the integrity of the federal structure" (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326 (P.C.), and *Attorney General of Nova Scotia v. Attorney General of Canada*, 1950 CanLII 26 (SCC), [1951] S.C.R. 31 (see also *Secession Reference*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

[173] This Court expressly endorsed the unwritten principles of democracy as the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated" (*Secession Reference*, at para. 62); the rule of law as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142, per Rand J.), "the very foundation of the *Charter*" (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent "where giving effect to that intent is precluded by the rule of law" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 23); federalism as "a foundational principle of the Canadian Constitution" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII), [2021] 1 S.C.R. 175, at para. 3, per Wagner C.J.); and judicial independence as a "constitutional imperative" in light of "the central place that courts hold within the Canadian system of government" (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

[174] In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence

finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

[175] In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy — the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

[176] Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

[177] And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

[178] The majority's emphasis on the "primordial significance" of constitutional text is utterly inconsistent with this Court's repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and "function as independent bases upon which to attack the validity of legislation . . . since they have the same legal status as the text" (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 95; see also H.-R. Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 *Am. J. Comp. L.* 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. "Full legal force" means full legal force, independent of the written text.

[179] Unwritten constitutional principles do not only "give meaning and effect to constitutional text" and inform "the language chosen to articulate the specific right or freedom", they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as "a living tree capable of growth and expansion" (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

[180] Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

> [The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

[181] Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

> The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is "to fill out gaps in the express terms of the constitutional scheme." This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.
>
> *But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases*. . . . We must alter the bridge metaphor accordingly: The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from this single underlying foundation. *The constitutional text is not just supplemented by unwritten principles; it rests upon them.* [Emphasis added; footnote omitted.]
>
> ("Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

[182] It is also difficult to understand the need for the majority's conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the *Charter*. This question is not directly before us.

[183] Finally, I see no merit to the majority's argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the *Constitution Act, 1982* only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that "any law that is inconsistent with the *provisions* of the Constitution is . . . of no force or effect". The majority's reading of s. 52(1), like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that

unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

[184] It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

> . . . it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

[185] The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 *Alta. L. Rev.* 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982)). There is no need, as a result, to constrain the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

[186] I would allow the appeal and restore Belobaba J.'s declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter*.

Appeal dismissed, Abella, Karakatsanis, Martin *and* Kasirer JJ. *dissenting.*

Solicitor for the appellant: City of Toronto, Toronto.

Solicitor for the respondent: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Toronto District School Board: Toronto District School Board, Toronto.

Solicitor for the intervener the Cityplace Residents' Association: Selwyn A. Pieters, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the International Commission of Jurists (Canada): Gowling WLG (Canada), Ottawa.

Solicitor for the intervener the Federation of Canadian Municipalities: Federation of Canadian Municipalities, Ottawa.

Solicitor for the intervener the Durham Community Legal Clinic: Durham Community Legal Clinic, Oshawa.

Solicitor for the intervener the Centre for Free Expression at Ryerson University: Borden Ladner Gervais, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Goldblatt Partners, Toronto.

Solicitors for the interveners Art Eggleton, Barbara Hall, David Miller and John Sewell: Goldblatt Partners, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: St. Lawrence Barristers, Toronto.

Solicitors for the intervener Progress Toronto: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta: Pape Salter Teillet, Toronto.

Solicitor for the intervener Fair Voting British Columbia: Nicolas M. Rouleau, Toronto.

---

[1] This Court's jurisprudence has involved, for example, restrictions on: **publication** (*Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 S.C.R. 527); **obscene content** (*R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (CanLII), [2000] 2 S.C.R. 1120); **advertising** (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295); **language** (*Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*,

1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790); **harmful content** (*R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697); **manner or place of expression** (*Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141); **who can participate in a statutory platform for expression** (*Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627; *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 S.C.R. 673); **voluntary expression** (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), [2007] 2 S.C.R. 610); **expenditures on expression** (*Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827); or **access to information** (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

[2] *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

[3] The same legal standard has applied to claims with respect to: **freedom of association under s. 2(d)** (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the **right to life, liberty and security of the person under s. 7** (*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (CanLII), [2011] 3 S.C.R. 134 (safe injection facility)); and **equality under s. 15** (*Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

[4] See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: **United Kingdom** (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 102, per Lord Steyn (judicial independence); *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868, at para. 51, per Lord Hope (judicial independence and rule of law)); **Australia** (*Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245 (H.C.) (judicial independence); *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51 (H.C.) (federalism); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410 (H.C.) (federalism); *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520 (H.C.) (freedom of political communication); *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162 (the right to vote)); **South Africa** (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); **Germany** (*Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and **India** (*Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

Tab 157

CanLII

Alfano et al v. Piersanti et al, 2014 ONSC 60 (CanLII)

Source:	Superior Court of Justice
Date:	2014-01-03
File number:	CV-11-9318-00CL
Citation:	Alfano et al v. Piersanti et al, 2014 ONSC 60 (CanLII), <https://canlii.ca/t/g2hl3>, retrieved on 2026-01-18

CITATION: Alfano et al v. Piersanti et al, 2014 ONSC 60
COURT FILE NO.: CV-11-9318-00CL
DATE: 20140103

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: Bertina Alfano, Trustee of the Carmen Alfano Family Trust, Bertina Alfano, Italo Alfano, trustee of the Italo Alfano Family Trust, Italo Alfano, Ulti Alfano Trustee of the Ulti Alfano Family Trust and Ulti Alfano ,

Plaintiffs

AND:

Terry Piersanti also known as Terry Scatcherd, Christian Piersanti, Piersanti and Co. Barristers and Solicitors, Piersanti and Co. Professional Corporation, 1269906 Ontario Limited, 1281111 Ontario Limited, 1281038 Ontario Limited, 1314112 Ontario Limited, 1281633 Ontario Limited, 1281632 Ontario Limited, 1466556 Ontario Limited, 3957331 Canada Inc., 3964400 Canada Inc., 3968626 Canada Inc., 4002598 Canada Inc., 4011902 Canada Inc., 6051685 Canada Inc., 6060439 Canada Inc., 6260365 Canada Inc., 6292470 Canada Inc., 6306560 Canada Inc., 6324223 Canada Inc., 6792715 Canada Inc., Yonge Centre Properties Inc., 6335144 Canada Inc., TMJ Investments, Tara Piersanti also known as Tara Piersanti-Blake, Justin Piersanti and Morgan Piersanti,

Defendants

BEFORE: Newbould J.

COUNSEL: *V. Ross Morrison and R. Samantha Chapman*, for the Piersantis/moving parties

Kevin D. Sherkin, for the plaintiffs/responding parties

HEARD: December 23, 2013

ENDORSEMENT

[1] The Piersantis move to quash the attempt of the plaintiffs to bring on for hearing a motion made to the trial judge, Justice Ellen Macdonald, in June 2009 towards the end of the trial. Part of the relief sought by the plaintiffs at that time was dismissed. Later, the trial judge released her reasons for judgment in the action in which she held for the plaintiffs in a number of respects. An appeal by the defendants to the Court of Appeal was partially successful. Leave to appeal to the Supreme Court of Canada was denied.

[2] In their motion to the trial judge, the plaintiffs asked for an order that a number of documents be produced, and an order that a number of the defendants pay $4.8 million into court pending the release of the trial reasons for judgment on the basis that those defendants had paid that amount to various parties out of the ordinary course of business and therefore contrary to a Mareva injunction granted by Malloy J. in 2002 several years before the trial. That injunction had enjoined the defendants from dissipating their assets or dealing with their assets other than in the ordinary course of business. The plaintiffs also asked for a declaratory order that those defendants had breached the Mareva injunction.

[3] In her reasons for decision released on June 22, 2009, the trial judge declined the request to order that the $4.8 million be paid into court, holding that the plaintiffs were protected by the Mareva injunction registered on title to three plaza properties. She did not make any decision on the request for a declaration that the defendants had breached the Mareva injunction and said she would make findings on this matter in her reasons for judgment. More particularly, she said:

> [8]... With respect to the payment into court of the $4,800,000, I decline to grant such relief. I do so even in the face of the very broad discretion that I have under Rule 60.02…
>
> [9] The attitude of the Defendants towards their obligation to make full and timely production of all relevant documents was appalling, if not defiant. Collectively or individually, they held back many documents from the very early stages of these proceedings. They picked or chose the documents that they would produce. For example, there has been almost no production of the documents listed in paras. 1, 2, 3, and 4 of the notice of motion. Mr. Diamond conceded that it is too late to order this production. Except for closing submissions, scheduled to begin tomorrow, this case is closed. The Defendants justified their actions with respect to the three plazas to which the Alfanos claim an interest on a very fluid concept of

> what is in the ordinary course of business. It will be for me to make findings on this matter and on the credibility of the parties and their witnesses when I am considering the totality of the evidence when writing my reasons for judgment. It must be kept in mind that I ordered the re-registration of the Mareva on title to the three plaza properties very recently. Bearing in mind that I have carefully listened to the Piersanti and Gold defendants, there are matters that I cannot decide until I hear and consider closing submissions. The plaintiffs are sufficiently protected with the existence of the Mareva injunction on title to the three plaza properties. The request for payment into court of the $4,800,000 or such lesser sum as I might arbitrarily fix is therefore dismissed. Costs of this motion are reserved to be dealt with at the time of the ultimate disposition of costs in this action.

[4] In her reasons for judgment dated September 3, 2010 the trial judge appeared to make a finding, or come close to making a finding, that the Mareva injunction had been breached, and she ordered that 1281632 Ontario Limited, a Piersanti company, pay $2.5 million into court. She stated:

> 103 The evidence is that they have conducted the operation of 1281632 Ontario Limited (the mall properties) without regard to the injunction. Ms. Piersanti was cross-examined extensively on payments made that appear to contravene the terms of the injunction. Ms. Piersanti justified these payments on the basis that it was necessary to do so because they were in the ordinary course of business. Her interpretation of what was in the ordinary course of business was a very fluid one. Mr. Diamond prepared a chart revealing a total of $2,465,436.46 in payments that he submitted were not in the ordinary course of business.
>
> 104 There was brief reply evidence on June 5, 2009, followed by the renewal of a motion by the Plaintiffs to compel the Gold Defendants to pay into court $2,465,436.43. The Plaintiffs alleged that these monies were used by Mr. and Ms. Piersanti in contravention of the injunction imposed by Molloy J. in September 2002. I declined to order the payment into court stating that I would deal with these issues in these reasons. The following is the chart prepared by Mr. Diamond setting out the details of payments made from the proceeds of mortgages on the Mall properties.
>
> …
>
> TOTAL $2,465,436.46
>
> 105 I have concluded that $2,500,000 shall be paid into court to the credit of the Plaintiffs within 30 days of the release of these reasons. This will not cause any hardship to the Piersanti Defendants and will be some security for the Plaintiffs who will most likely encounter great difficulty in enforcing any judgment granted by this court in respect of their damages for losses in Osler.

[5] In the Court of Appeal, this part of the judgment was set aside. It was held that the trial judge had made no finding of a breach of the Mareva injunction but that that issue had not finally been disposed of. O'Connor A.C.J.O stated:

> [165] The appellants argue that the trial judge erred in ordering 128 (a Piersanti related company) to pay $2.5 million into court.

> [166] The respondents sought the payment into court on the basis that Ms. Piersanti had caused 128 to pay out approximately $2.5 million in breach of the Mareva injunction granted on June 18, 2002.
>
> [167] I would set aside this order.
>
> …
>
> [171] In para. 105, the trial judge did not link the award to the breach of the Mareva injunction. Notably, she did not make any finding of contempt, nor give any indication that the $2.5 million award was being ordered for punitive or denunciatory purposes. On the contrary, she appears to have considered the payment of $2.5 million as a down payment against her damage award.
>
> [172] 128, the party ordered to pay the $2.5 million, was not a defendant in the claim for fraud related to the Osler bankruptcy that gave rise to the judgment against Mr. Piersanti. The trial judge did not make any findings that would render 128 liable to pay the damage award for the fraud claim.
>
> [173] In the result, I would set aside this order. To be clear, I do not conclude that there was no basis for a finding that the Piersantis breached the Mareva injunction. Rather, I am not satisfied that the trial judge, in her reasons, made that finding. That being the case, the trial judge's reasons and these reasons should not be read as finally disposing of that issue. (underlining added).

[6] Mr. Morrison for the Piersantis contends that by deciding in her reasons on the motion dated June 22, 2009 to refuse to order $4.8 million be paid into court, the trial judge effectively dismissed the application for a declaration that the Mareva injunction had been breached. I do not read her decision that way. I read her decision to have put off any decision on the request for declaratory relief until her reasons for judgment would be prepared and released. To repeat, in her reasons on the motion she stated:

> The Defendants justified their actions with respect to the three plazas to which the Alfanos claim an interest on a very fluid concept of what is in the ordinary course of business. It will be for me to make findings on this matter and on the credibility of the parties and their witnesses when I am considering the totality of the evidence when writing my reasons for judgment.

[7] The trial judge confirmed in paragraph 104 of her reasons for judgment of September 3, 2010 that in her reasons on the motion, she had put off the issue so it could be dealt with in her reasons for judgment.

[8] While it appeared in her reasons for judgment in paragraph 103 that the trial judge found that there had been a breach of the Mareva injunction, the Court of Appeal though otherwise, as set out in paragraph 173 of its reasons. The plaintiffs point to the underlined passages of that paragraph to assert that it cannot be said that the trial judge found there to have been no breach of

the Mareva injunction. Rather, the plaintiffs say, it is clear from that passage of the Court of Appeal's reasons that the issue has been left open.

[9] I agree with the plaintiffs. The decision of the Court of Appeal, binding on the parties and on me, means that the issue of whether there was a breach of the Mareva injunction was not finally disposed of and it cannot be said that there was no basis for a conclusion that the Piersantis breached the injunction.

[10] However, it is necessary to consider what happened after the decision of the Court of Appeal.

[11] On January 3, 2013, counsel for the plaintiffs provided written submission to Macdonald J. asking her to dispose of their motion that there had been a breach of the Mareva injunction and asked that it be dealt with at an appointment on February 8, 2013 that had been scheduled to deal with other issues. It was contended that rule 59.06 (1) provided her with the necessary jurisdiction. That rule provides that an order that requires amendment in any particular on which the Court did not adjudicate may be amended on a motion in the proceeding. Reliance was placed on the decision of the Court of Appeal that said the issue was still open.

[12] Counsel for the Piersantis filed written submissions opposing the request, essentially arguing that Macdonald J. had decided the issue in her reasons on the motion of June 22, 2009 in declining to order payment into court and therefore there was no issue that had not been adjudicated upon. This submission appears to have disregarded paragraph 173 of the reasons of the Court of Appeal.

[13] Due to health issues, the trial judge adjourned the appointment on several occasions. The appointment eventually took place on April 26, 2013. Oral submissions were made on the request of the plaintiffs that day to decide whether there had been a breach of the Mareva injunction. Near the end of that appointment, counsel for the Mrs. Piersanti provided a draft order to the trial judge that there be an inquiry into damages sustained by the Gold Defendants (some of the defendants, including Mrs. Piersanti) as a result of the Mareva injunction. This was caused by the action being dismissed against the Gold Defendants in the Court of Appeal. Macdonald J. signed the order that day.

[14] On June 13, 2013, the parties received an e-mail from Theresa Finelli, the administrative assistant to Macdonald J. The e-mail was as follows:

> After hearing submissions on April 26, 2013, I have concluded that I am not prepared to amend my judgment.
>
> *Madam Justice Ellen Macdonald*

[15] On the same day, June 13, 2013, Mr. Sherkin for the plaintiffs sent an e-mail back to Theresa Finelli and stated:

[16] Your Honour

> With great respect, our clients did not ask that you amend your judgment. Our clients asked for a disposition on their motion which pursuant to your Endorsement on the motion was to form part of the Trial Endorsement. The Court of Appeal left that issue open for determination by stating that neither your Trial Endorsement nor the Court of Appeal's decision foreclosed that open motion and it was not disposed of.
>
> We would graciously appreciate knowing the following:
>
> 1. Is your email to be codified in an Endorsement?
>
> 2. Will there be further reasons?
>
> 3. If not your Honour, is your email directing our clients to seek a disposition of that motion from another judge?
>
> Thank you for your continued assistance and clarification in that regard.

[17] On the following day, June 14, 2013, Mr. Diamond on behalf of the plaintiffs emailed Mr. Morrison and other defence counsel and stated that depending on the response of Macdonald J. to Mr. Sherkin's email of the previous day, in the event that the email from Macdonald J. is the "Endorsement", he wished to place Mr. Morrison on the earliest possible notice that it was his clients' intention to appeal the ruling.

[18] On June 17, 2013 Mr. Diamond sent a further email to Mr. Morrison and other defence counsel and asked them if they required the plaintiffs to serve a formal notice of appeal from the email of Macdonald J. He said he was not sure how to proceed without an actual endorsement and was hopeful that Macdonald J. would provide a further response. He asked for a response a.s.a.p. if they needed a formal notice of appeal. No substantive response was received to this email.

[19] A further attendance before Macdonald J. was scheduled to deal with outstanding costs of the proceedings. Unfortunately, that attendance was also cancelled, again due to her health issues.

[20] On August 27, 2013, Mr. Sherkin wrote to Macdonald J. and asked that an appointment be scheduled to deal with his email to her of June 13, 2013. No response was received. Unbeknownst to the parties, on August 30, 2013 Justice Macdonald retired from the bench for health reasons. On October 10, 2013, and not knowing of her retirement, Mr. Sherkin emailed Ms. Finelli and asked Justice Macdonald to deal with the issues raised in his email of June 13, 2013.

[21] Mr. Morrison takes the position that by her email of June 13, 2013, Macdonald J. disposed of the request by the plaintiffs to have her rule on whether there had been a breach of the Mareva injunction. He says the only route open to the plaintiffs was to appeal that decision to the Court of Appeal, which did not occur. Mr. Sherkin says that the email was not an endorsement.

[22] This is an unfortunate situation. Madam Justice Macdonald was not well in the spring of 2013 and eventually retired from the court at the end of August. What is most concerning is that no reasons whatsoever were given by her for the statement that she was not prepared to amend her judgment. Requests of her for clarification of the e-mail went unanswered. If the e-mail could be considered to be a final decision dismissing the motion, it would not be possible for an appellate court to make any meaningful review of it in accordance with the principles of *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869 and the matter would have to be sent back for a rehearing.

[23] I disagree with the plaintiffs that they did not request the judgment to be amended. They justified their renewal of the motion on the basis that the judgment could be amended to deal with something not dealt with by the judge. To this extend the e-mail dealt with their request.

[24] The e-mail was not an order. Nor was it an endorsement as required by rule 59.02(1). That rule requires it to be "made" by a judge on the motion record. No such endorsement was made by Macdonald J. I would not treat the endorsement as a valid endorsement. Thus there has been no final decision on the motion.

[25] It seems to me that even if it could be said that the e-mail passed procedural muster, no order has been taken out and Macdonald J. was not *functus*. As I am the judge directed to hear the remaining issues in the action, it follows that I am not *functus*. This is not a rule 59.06(1) situation in which an order taken out is sought to be amended because of some accidental slip or omission or requires amendment in any particular on which the court did not adjudicate. There has been no order.

[26] There is authority, mainly in cases involving attempts to re-open matters because of alleged new evidence, that a court has a wide discretion to re-open a matter where the integrity of the process is at risk or a principle of justice is at stake that requires the reconsideration of the matter, and while a court should re-open a motion or other matter sparingly and with the greatest of care, it may re-open it when it is just to do so in exceptional circumstances. See *Strugarova v. Kissiov* (2009), 2009 CanLII 40552 (ON SC), 82 C.P.C. (6th) 298 at para. 7 per Roberts J. See also *Degroote v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 at para. 6, per Lax J.; aff'd 1999 CanLII 4115 (ON CA), [1999] O.J. No. 2313 (C.A.).

[27] In these circumstances, even if the endorsement could be said to be a real or proper endorsement, which in my view it was not, the circumstances here, in which no reasons were provided by Macdonald J. who before her retirement failed to respond to requests for clarification of the e-mail, are exceptional and the integrity of the process is at stake. Moreover, any appeal would inevitably result in the matter being sent back to me for decision on the basis of *R. v. Sheppard*. I would exercise my discretion and re-hear the matter.

[28] In the circumstances, I am of the view that the matter of whether the Mareva injunction was breached is an open question and that I have jurisdiction to deal with the matter. Counsel may arrange a 9:30 a.m. appointment to discuss scheduling of the motion.

[29] The motion of the Piersantis is dismissed. The plaintiffs are entitled to their costs. If costs are not agreed, the plaintiffs may make brief written submissions no longer than three pages in length along with a proper cost outline within 10 days and the Piersantis may make brief written reply submissions no longer than three pages in length within a further 10 days.

Newbould J.

Date: January 3, 2014

Tab 158

CanLII

Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33 (CanLII), [2021] 2 SCR 785

Source:	Supreme Court of Canada
Date:	2021-09-24
File number:	38992
Other citations:	461 DLR (4th) 635 — [2021] SCJ No 33 (QL)
Citation:	Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33 (CanLII), [2021] 2 SCR 785, <https://canlii.ca/t/jj7kf>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

CITATION: Canadian Broadcasting Corp. *v.* Manitoba, 2021 SCC 33, [2021] 2 S.C.R. 785

APPEAL HEARD: March 17, 2021
JUDGMENT RENDERED: September 24, 2021
DOCKET: 38992

BETWEEN:

Canadian Broadcasting Corporation
Appellant

and

Her Majesty The Queen, Stanley Frank Ostrowski, B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.
Respondents

- and -

Attorney General of Ontario, Attorney General of British Columbia, Centre for Free Expression, Canadian Association of Journalists, News Media Canada, Communications Workers of America/Canada and Ad Idem/Canadian Media Lawyers Association
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 107)	Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe and Martin JJ. concurring)
DISSENTING REASONS: (paras. 108 to 131)	Abella J.

Canadian Broadcasting Corporation *Appellant*

v.

Her Majesty The Queen,
Stanley Frank Ostrowski,
B.B., spouse of the late M.D., and
J.D., in his capacity as executor of the estate of the late M.D. *Respondents*

and

Attorney General of Ontario,
Attorney General of British Columbia,

Centre for Free Expression,
Canadian Association of Journalists,
News Media Canada,
Communications Workers of America/Canada and
Ad Idem/Canadian Media Lawyers Association *Interveners*

Indexed as: Canadian Broadcasting Corp. *v.* Manitoba

2021 SCC 33

File No.: 38992.

2021: March 17; 2021: September 24.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

Courts — Jurisdiction — Publication bans — Variation — Criminal proceedings — Court of Appeal ordering indefinite publication ban on affidavit filed in criminal proceedings before it — Motion brought by media representative after judgment on merits of proceedings rendered asking Court of Appeal to set aside publication ban — Court of Appeal declining to hear motion on basis that jurisdiction exhausted — Whether court retains jurisdiction to reconsider publication ban orders and other such ancillary orders after merits of criminal proceedings decided.

An affidavit filed in a criminal matter before the Court of Appeal had been subject to a publication ban pending a decision as to its admissibility as new evidence. In its November 2018 reasons allowing the appeal on the merits, the Court of Appeal dismissed the motion for new evidence but ordered that the publication ban remain in effect indefinitely. In May 2019, the CBC brought a motion before the Court of Appeal to have the publication ban set aside, arguing that

having access to the affidavit would shed light on the criminal matter before the Court of Appeal and the court's conclusion on the merits that a miscarriage of justice had occurred at trial.

The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion. The CBC applied for and was granted leave to appeal to the Court from both the Court of Appeal's 2019 decision refusing to reconsider the publication ban ("2019 Jurisdiction Judgment") and the Court of Appeal's 2018 decision ordering the indefinite publication ban ("2018 Publication Ban Judgment").

Held (Abella J. dissenting): The appeal from the 2019 Jurisdiction Judgment should be allowed and the matter remanded to the Court of Appeal. The appeal from the 2018 Publication Ban Judgment should be adjourned *sine die*.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.: The Court of Appeal had jurisdiction to consider the CBC's motion to set aside the publication ban. While the court could not rehear the appeal on the merits and while the doctrine of *functus officio* precluded it from reconsidering the substance of the appeal, the court retained the authority to supervise access to the record of its own proceeding, which allowed it to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. The matter should be remanded to the Court of Appeal, as it is best placed to decide the CBC's motion and the discretionary and fact-specific issues raised. It would be inappropriate for the Court to decide the CBC's appeal from the 2018 Publication Ban Judgment before the Court of Appeal has had a chance to consider the CBC's motion to have the publication ban set aside.

According to the rule of *functus officio*, a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. A court loses jurisdiction once the formal judgment has been entered. This rule serves goals of finality and

of an orderly appellate procedure. If lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court.

That said, it is important to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. Even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter. This power is part of a court's authority to control its own process and arises by necessary implication from the legislative grant of a court's adjudicative authority. It is anchored in the vital public policy favouring public access to the workings of the courts. Important decisions about the openness of the court record, such as rendering, varying or vacating publication bans and sealing orders, may need to be taken after the proceeding on the merits is over. Recognizing that a court's jurisdiction to control its record survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments as the doctrine of *functus officio* was never intended to restrict the ability of lower courts to control their own files.

That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. A publication ban or sealing order is susceptible of reconsideration by the issuing court on two narrow grounds and regardless of whether formalized in an order or not.

First, a court may vary or set aside a publication ban or sealing order it has made on timely motion by an affected person, such as the media, who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose. Regarding publication bans in criminal matters, standing should be thought of as a matter of a court's discretion. The media should generally have standing to challenge an order that threatens the open court principle where they are able to show they will make submissions that were not considered and that could have affected the result. A court does retain residual discretion to deny standing where hearing the

motion would not be in the interests of justice, such as where it would unduly harm the parties or duplicate argument already before the court. As to delay, a moving party is expected to take prompt action to challenge such an order once it has become aware it exists. In the absence of legislative direction, a court must be guided by the purpose of the rule and the circumstances of each case. The task is a contextual balancing of finality and timely justice against the importance of the matter being heard on the merits. This determination is inherently tied to the facts of each particular case and the nature of the issue raised.

Second, a court may vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed. The moving party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms. The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances.

Instances in which a court may reconsider a publication ban or sealing order are distinct from an appeal or application for *certiorari* made to a higher court from such decisions, as the original court is not being asked to reconsider its decision because it is wrongly decided. Finally, the general principles underlying the two grounds for reconsideration can be displaced by legislation, such as applicable rules of court.

In the present case, the Court of Appeal erred in concluding that applicable legislation, such as its rules of court procedure, or the doctrine of *functus officio* deprived it of jurisdiction to consider the CBC's motion to set aside the publication ban. The Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered. That the Court of Appeal had jurisdiction to consider the CBC's motion does not mean, however, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts, a determination that should be made by the Court of Appeal. Since the CBC has not established a material change of circumstances, it will therefore have to rely on the Court of Appeal's power to reconsider an order on the basis that it was

made without notice to an affected party. The impugned order was made of the Court of Appeal's own accord at the oral hearing and then continued indefinitely. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons were released. The Court of Appeal will have to determine whether the CBC has standing to challenge the relevant order and whether CBC's motion was timely. Furthermore, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test for discretionary limits on court openness: a court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects.

Per Abella J. (dissenting): The appeals should be dismissed. The CBC is not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay.

The media is a crucial voice in protecting and promoting the openness of courts, and their right to challenge publication bans is undisputed. But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court that rendered the decision. Although the application of *functus officio* is less formalistic and more flexible in respect of ancillary orders and publication bans, and circumscribed avenues must be maintained through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over, the rationales underlying this doctrine show that it has a role to play in respect of publication ban orders.

Finality matters. The parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over. A reconsideration of a publication ban must therefore be sought in a timely manner, and a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media's application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests of finality and the interests in support of the open court principle.

Courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions, and there is no reason to assume that did not happen in this case.

In the present case, the CBC is unable to establish a material change in circumstances. The only bases under which it could move for reconsideration of the publication ban are by showing that the ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met.

First, the publication ban was not issued without notice. If the media is present in the courtroom when a publication ban is issued, as was the CBC, it follows that it knows of its existence. Second, the CBC has not discharged its burden of showing that its proposed submissions could make a material, or even any difference in the outcome.

Third, and more significantly, the CBC's failure to act in a timely manner is determinative. An unexplained six-month delay for filing a motion to have a publication ban reconsidered is inordinately long. Under no definition of "due dispatch" can this delay be justified, particularly since the CBC was fully aware of the ban from the outset of the proceedings. The delay in this case causes acute harm to the parties, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings.

Cases Cited

By Kasirer J.

Referred to: *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 521; *R. v. Ostrowski and Correia* (1989), 1989 CanLII 7367 (MB CA), 57 Man. R. (2d) 255, aff'd *R. v. Ostrowski*, 1990 CanLII 116 (SCC), [1990] 2 S.C.R. 82; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R.

442; *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848; *Reekie v. Messervey*, 1990 CanLII 158 (SCC), [1990] 1 S.C.R. 219; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. Adams*, 1995 CanLII 56 (SCC), [1995] 4 S.C.R. 707; *R. v. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75; *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, 1934 CanLII 1 (SCC), [1934] S.C.R. 186; *R. v. H. (E.)* (1997), 1997 CanLII 418 (ON CA), 33 O.R. (3d) 202; *The Queen v. Jacobs*, 1970 CanLII 143 (SCC), [1971] S.C.R. 92; *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257; *Ayangma v. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103; *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330; *Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 2002 CanLII 41398 (ON CA), 59 O.R. (3d) 18; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Supermarchés Jean Labrecque Inc. v. Flamand*, 1987 CanLII 19 (SCC), [1987] 2 S.C.R. 219; *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594; *Dickie v. Woodworth* (1883), 1883 CanLII 51 (SCC), 8 S.C.R. 192; *Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *R. v. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 2003 CanLII 43168 (ON CA), 63 O.R. (3d) 769; *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 2000 CanLII 50628 (NS SC), 184 N.S.R. (2d) 159; *9095-7267 Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878; *Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67; *Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306; *1202600 Ontario Inc. v. Jacob*, 2012 ONSC 361; *585430 Alberta Ltd. v. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man.

R. (2d) 191; *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374; *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *Morin v. R.* (1997), 1997 CanLII 12082 (ON CA), 32 O.R. (3d) 265; *R. v. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1; *R. v. Baltovitch* (2000), 2000 CanLII 5680 (ON CA), 47 O.R. (3d) 761; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Lochner v. Ontario Civilian Police Commission*, 2020 ONCA 720; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673; *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543; *Wells v. Newfoundland*, 1999 CanLII 657 (SCC), [1999] 3 S.C.R. 199; *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209; *Canadian Planning and Design Consultants Inc. v. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98; *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65; *MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135; *Aleong v. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44; *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, 1977 CanLII 231 (SCC), [1977] 2 S.C.R. 740.

By Abella J. (dissenting)

Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Adams*, 1995 CanLII 56 (SCC), [1995] 4 S.C.R. 707; *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, 2006 NSCA 85, 246 N.S.R. (2d)

reconsideration, and from the 2018 Publication Ban Judgment, which made the indefinite publication ban at issue in this case.

[27] In these two appeals, the CBC seeks three orders from this Court. First, the CBC asks for an order setting aside the 2019 Jurisdiction Judgment. It argues the Court of Appeal erred in concluding it had no jurisdiction to hear its motion and should have addressed the issues of whether to reconsider the publication ban and of whether the public and the press have the right to access the Posner affidavit. Notably, the CBC argues that neither the rule against rehearings in the *Court of Appeal Rules* nor the doctrine of *functus officio* deprived the Court of Appeal of jurisdiction to consider the motion based in constitutional principles of court openness. It says that the publication ban could be reconsidered on the basis of a change in circumstances or because, as an affected party, it did not have notice of the making of this order.

[28] The CBC also asks this Court for a second order setting aside the continuing publication ban in the 2018 Publication Ban Judgment and a third giving it access to the Posner affidavit as part of the court record. It argues the open court principle applies to material that is tendered as new evidence even if, at the end of the day, it is not admitted. In this instance, it says the publication ban fails the test for discretionary limits on this principle set forth in *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. It contends further that the public is legally entitled to access the Posner affidavit because the applicable rules do not provide for continued sealing of this material. Mr. Ostrowski adopts the CBC's position and adds that the orders of the Court of Appeal preclude the proper accountability of public officials whose actions he alleges contributed to his wrongful conviction.

[29] The Crown takes the position that the Court of Appeal was right to conclude that it had no jurisdiction to consider the CBC's motion. The Crown says, however, that if the Court of Appeal had authority to consider these issues, this Court does not have jurisdiction with respect to the publication ban and, if it does, it should decline to exercise its authority. Should this Court proceed to consider the merits, the Crown's position is that the Court of Appeal's decision to

impose a continuing publication ban was correct, even if it might have given more fulsome reasons. The material in the Posner affidavit is deeply personal and speaks to intimate details about M.D. that would re-traumatize the family, such that a discretionary limit on court openness was justified here. Similarly, the interested parties argue that the limits on court openness are necessary to protect the privacy of M.D.'s family and that the limit is justified given the inadmissible, irrelevant and unreliable nature of the proposed new evidence.

[30] The parties raise a broad series of questions before this Court bearing on jurisdiction over and the appropriateness of a publication ban or sealing order in the circumstances. It is sufficient to answer the following questions to dispose of this matter:

1. Did the Court of Appeal err in concluding it had no jurisdiction to consider the CBC's motion to reconsider the publication ban and gain access to the Posner affidavit?

2. Should the matter be remanded to the Court of Appeal to hear the merits of that motion?

[31] For the reasons that follow I am respectfully of the view, in the first appeal from the 2019 Jurisdiction Judgment, that the Court of Appeal did err on the issue of jurisdiction and that as a result the matter should be remanded to that court. This ends the analysis. The second appeal from the 2018 Publication Ban Judgment would best not proceed until the Court of Appeal decides the CBC's motion.

IV. Analysis

A. *Jurisdiction to Make, Vary and Set Aside Orders Concerning Court Openness*

(1) Supervisory Jurisdiction Over the Court Record Survives Entering a Judgment on the Merits

[32] In concluding that it lacked jurisdiction to vary or set aside the relevant orders concerning court openness, the Court of Appeal relied, in part, on the doctrine of *functus officio*. The term *functus officio* — often rendered as "having performed his or her office" — has traditionally been understood to mean that once a judge decided a matter, they had discharged their office and did not have the ability to return to and correct their decision (A. S. P. Wong, "Doctrine of *Functus Officio*: The Changing Face of Finality's Old Guard" (2020), 98 *Can. Bar Rev.* 543, at pp. 546-47; see A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 193, who also uses the term *functa officio*).

[33] In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision (see *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 S.C.R. 848, at p. 860; *Reekie v. Messervey*, 1990 CanLII 158 (SCC), [1990] 1 S.C.R. 219, at pp. 222-23; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 77-79). A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered (*R. v. Adams*, 1995 CanLII 56 (SCC), [1995] 4 S.C.R. 707, at para. 29; *R. v. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75, at paras. 33-34). After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits (*Chandler*, at p. 861, citing *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, 1934 CanLII 1 (SCC), [1934] S.C.R. 186; *R. v. H. (E.)* (1997), 1997 CanLII 418 (ON CA), 33 O.R. (3d) 202 (C.A.), at pp. 214-15, citing *The Queen v. Jacobs*, 1970 CanLII 143 (SCC), [1971] S.C.R. 92; see also *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857, at para. 54).

[34] This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure (*Chandler*, at p. 861; *H. (E.)*, at p. 214). As Doherty J.A. wrote in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257 (C.A.), for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More

Tab 159

CanLII

Leadbetter v Nor, 2016 ONSC 5289 (CanLII)

Source:	Superior Court of Justice
Date:	2016-08-23
File number:	CV-13-227-00
Citation:	Leadbetter v Nor, 2016 ONSC 5289 (CanLII), <https://canlii.ca/t/gt2v5>, retrieved on 2026-01-18

CITATION: Leadbetter v. Nor, 2016 ONSC 5289
COURT FILE NO.: CV-13-227-00
DATE: 2016 08 23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
MICHAEL LEADBETTER Plaintiff/Respondent	A.Moras, for the Plaintiff/Respondent
- and -	
ABDIRISSAQ NOR Defendant/Appellant	Stan J. Sokol, for the Ministry of Attorney General, Appellant

)
) **HEARD:** July 27, 2016

DECISION ON APPEAL

Justice M.G. Emery

[1] This is an appeal of the order made by Master Wiebe on February 1, 2016, dismissing the motion of the Minister of Finance to strike a jury notice served by the plaintiff. The Minister brought that motion on the basis that the jury notice was served after the close of pleadings, without leave, and therefore outside the time permitted under Rule 47.01.

[2] For the reasons that follow, the appeal is allowed and the order of Master Wiebe is set aside.

Background

[3] The plaintiff Michael Leadbetter was injured as a pedestrian in a parking lot when he was struck by a motor vehicle on the night of March 15, 2011. No one has been able to identify the driver of that motor vehicle.

[4] Shortly after the accident, the police recovered the motor vehicle that had struck Mr. Leadbetter. The driver had abandoned that motor vehicle where it had found. The registered owner of the motor vehicle was determined to be the defendant, Abdirissaq Nor.

[5] Mr. Nor denied that he was involved in the accident, or in the brawl in which both he and Mr. Leadbetter had been involved that evening prior to the accident. Mr. Nor was charged with dangerous driving causing bodily harm and with failure to remain at the scene of an accident. He did not appear to face these charges in court, and was convicted in absentia on March 6, 2013.

[6] Mr. Leadbetter named Mr. Nor as the sole defendant in the Statement of Claim issued on January 18, 2013 to commence the action. In that Statement of Claim, Mr. Leadbetter claimed $1,000,000 in damages. Mr. Leadbetter alleges in the Statement of Claim that “at all times [Nor] was the owner and operator of” the motor vehicle that had struck him.

[7] Mr. Nor did not defend the action. In due course, Mr. Leadbetter's lawyer served the Minister of Finance with a Notice of Default under the *Motor Vehicles Accident Claims Act*, (the "MVAC Act").

[8] The Minister investigated the allegations of material fact made in the Statement of Claim and attempted to locate Mr. Nor. The Minister ultimately concluded that Mr. Nor had left Canada, and could not be found. The Minister notified Mr. Leadbetter of this conclusion on June 24, 2014 and delivered a Statement of Defence on behalf of Mr. Nor on August 29, 2014. In the Statement of Defence, the Minister denies that Mr. Nor was the driver and operator of the motor vehicle that had struck Mr. Leadbetter on the evening in question.

[9] On September 18, 2014, the pleadings were considered closed pursuant to the Rules of Civil Procedure.

[10] Mr. Leadbetter was examined for discovery on January 28, 2015.

[11] On April 6, 2015, the lawyer at Sokoloff Lawyers having carriage of Mr. Leadbetter's file left the firm and was replaced by Savannah Chorney, another lawyer at the firm.

[12] On April 27, 2015, the parties engaged in mediation. That mediation was not successful.

[13] On April 29, 2015, Ms. Chorney served a jury notice on the Minister. Counsel for the Minister responded in writing on May 1, 2015 to object to the service of the jury notice as it had been served after the close of pleadings, and no leave had been obtained from the court. According to the Minister's motion materials, Ms. Chorney did not respond to this letter, and instead served and filed a trial record containing the jury notice on May 14, 2015.

The Decision Below

[14] The Master correctly identified the requirement for leave if one party intends to serve a jury notice on another party in a civil action after the close of pleadings. In paragraph 11 of his Reasons for Decision, he stated that:

> [11] It is well settled law that a party who does not serve a jury notice in accordance with Rule 47.01 of the *Rules,* must seek leave of the court to do so; see *Proper v. Nikore* 2010 ONSC 2307 (CanLII), 2010 ONSC 2307 (Div. Ct.) at paragraph 9. Mr. Moras pointed out that there was no rule that required such leave. That may be so, but Rule 47.01 implicitly requires such leave and, in any event, the *Proper* decision makes the obligation explicit.

[15] The Minister's motion to the Master was brought under Rule 47 of the *Rules of Civil Procedure*. That rule sets out the time one party is permitted to serve a jury notice as of right on another party, and various requirements for a motion any party may bring to strike a jury notice. Rule 47 reads in totality as follows:

> ACTIONS TO BE TRIED WITH A JURY
> 47.01 A party to an action may require that the issues of fact be tried or the damages be assessed, or both, by a jury, by delivering a jury notice (Form 47A) at any time before the close of pleadings, unless section 108 of the *Courts of Justice Act* or another statute requires that the action be tried without a jury. R.R.O. 1990, Reg. 194, r. 47.01
>
> STRIKING OUT JURY NOTICE
> Where Jury Notice not in Accordance with Statute or Rules
> 47.02 (1) A motion may be made to the court to strike out a jury notice on the ground that,
> (a) a statute requires a trial without a jury; or
> (b) the jury notice was not delivered in accordance with rule 47.01. R.R.O. 1990, Reg. 194, r. 47.02 (1).
>
> Where Jury Trial Inappropriate
> (2) A motion to strike out a jury notice on the ground that the action ought to be tried without a jury shall be made to a judge. R.R.O. 1990, Reg. 194, r. 47.02 (2).
>
> Discretion of Trial Judge
> (3) Where an order striking out a jury notice is refused, the refusal does not affect the discretion of the trial judge, in a proper case, to try the action without a jury. R.R.O. 1990, Reg. 194, r. 47.02 (3).

[16] The Master determined that the plaintiff had not brought a motion for leave, or a motion for an order extending time to serve and file a jury notice outside the time prescribed by Rule 47.01. The Master found the explanation for the decision given by counsel not to bring a motion for leave to be inadequate, having regard to the gravity of the matter. He professed an attraction to the argument of counsel for the Minister that the conduct of the plaintiff made a travesty out of Rule 47.01. The Master made the observation that the plaintiff could have brought a motion for leave and instead chose to serve and file a trial record containing the jury notice and in doing so, represented to the court that the trial record was proper.

[17] Master Wiebe then stated as follows:

> [13] Reluctantly, however, I have decided not to strike the jury notice for this reason. Pursuant to Rule 2.01, non-compliance with the Rules does not render a proceeding or a step a nullity. The same rule obligates the court to grant

> amendments or relief to secure a just determination of the real matters in dispute, and to set aside a proceeding or a step only where the "interest of just" require that it do so. I must, therefore, go on to the other aspects of the analysis to determine whether it is in the "interest of justice" to strike the jury notice.
>
> [14] Furthermore, Rule 1.04(1) requires the court to construe the rules in such a way as to secure the most expeditious and least expensive determination of a proceeding. Striking the jury notice due to the absence of a leave motion would only invite another proceeding, namely a leave motion, when the issues can be resolved here.
>
> [15] I will, though, take the plaintiff's conduct into account in awarding costs.

[18] The Master embarked on an analysis to determine the issues as he found them in the following way:

1. Was there unconscionable delay in serving the jury notice? The Master concluded that he was not satisfied there had been unconscionable delay *per se*.

2. Was the delay in service due to inadvertence? The Master concluded that there was no evidence of inadvertence on the part of the plaintiff. He reached that conclusion because Ms. Chorney had stated in her affidavit that Mr. Leadbetter had told her that the prospect of a jury notice had not been discussed with him by her predecessor on the file, and that she "assumed that this was inadvertence on his part". The Master found that this was nothing but speculation as there was no evidence from the previous lawyer himself.

3. Is there prejudice to the Minister due to the late service? The Master considered prejudice to be the more critical issue. After a review of the evidence and upon considering the decision of Master Brott in *Crummey v. Andrade*, 2003 CarswellOnt. 4144 (Ont. Master), he concluded that the Minister will not be prejudiced by the late service of the jury notice in the action.

4. Is this a case that cannot or should not be tried by a jury? On this issue, the Master examined what he considered to be the "pith and substance" of the action. Counsel for the Minister had argued that the "pith and substance" was essentially a claim against the Superintendent of Financial Services under Sections 12 and 15 of the *MVAC Act*. Those sections apply to situations where the identities of the owner or driver of a motor vehicle involved in an accident "cannot be established". In those situations, the plaintiff may sue the Superintendent of Financial Services if the plaintiff seeks to recover

> from the motor vehicle fund for the liability of the unidentified driver or owner. The Master explained that these provisions are there to provide relief to a plaintiff who is injured by an uninsured vehicle, and where the plaintiff has no applicable insurance or coverage under an available policy for protection when injured by an unidentified owner or driver of a motor vehicle. The significance of this provision for the purpose of the motion is found in Section 14 of the *MVAC Act* that provides that "the action shall be tried by a judge without a jury." The Master gave no merit to this argument, finding that the action does not involve the Superintendent.

[19] The learned Master therefore determined, after reaching his conclusions about delay and prejudice, and upon finding that the Superintendent was not a party to give effect to Section 14 of the *MVAC Act*, that there was no impediment to the trial of this action by a jury. After reaching this conclusion, the Master dismissed the Minister's motion.

Analysis

[20] The parties agree that the question of whether the Master erred when he dismissed the Minister's motion to strike the jury notice is a question of law. Accordingly, the parties agree that the standard of appellate review on this appeal is one of correctness. This agreement is consistent with the law summarized by the Court of Appeal in *Wellwood v. Ontario Provincial Police*, 2010 ONCA 386, at paragraph 28:

> [28] Based on this court's recent decision in Zeitoun v. Economical Insurance Group (2009), 96 O.R. (3d) 639, [2009] O.J. No. 2003, 2009 ONCA 415 (CanLII), it is now settled law in Ontario that [page 563] an appeal from a master's decision is not a rehearing. Rather, on questions of fact and mixed fact and law, deference applies and the role of the reviewing court is limited. An appellate court cannot substitute its interpretation of the facts or reweigh the evidence simply because it takes a different view of the evidence from that of the master. On questions of law, the correctness standard applies: see Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235,[2002] S.C.J. No. 31; L. (H.) v. Canada (Attorney General), 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24. (2) Divisional Court judge's application of standard of review

[21] There is no dispute that the plaintiff had not served a jury notice by the time pleadings were considered closed on September 18, 2014. Nor does counsel for the plaintiff contest the Minister's evidence that the plaintiff has never obtained leave to deliver the jury notice in this case. The Divisional Court in *Nikore v. Proper* recognized that a jury notice may be served and filed after the time for doing so under Rule 47.01, *but only with leave.*

[22] The Minister's motion was not a leave motion. It was a motion to strike a jury notice under Rule 47.02. My reading of Rule 47.02 provides the court with the power to strike out a jury notice for one of three reasons:

a.) Where a statute requires a trial without a jury: Rule 47.02 (1) (a);

b.) Where the jury notice was not delivered in accordance with Rule 47.01: rule 47.02 (1) (b); or

c.) Under Rule 47.02(2), on the grounds that the action ought to be tried without a jury.

[23] In this case, the Master was hearing a motion brought on behalf of a defendant to strike a jury notice because the plaintiff had served and filed a jury notice that had not been served within the time prescribed by Rule 47.01. The Master appears to have converted that motion into a motion resembling a motion for leave.

[24] The Master notes in his reasons that Rule 1.04 requires the court to construe the rules in such a way as to secure the most expeditious and least expensive determination of a proceeding. He went on to conclude that striking the jury notice due to the absence of a leave motion would only invite another proceeding in the form of a motion for leave, when he could resolve the issue then and there.

[25] With great respect, I disagree. Without a motion for leave before him, the Minister had no motion framing the issues to which evidence could be given or submissions made. More to the point, the Master did not appear to consider the all-important qualifier at the end of Rule 1. 04(1): to secure the just, most expedient and least expensive determination of a civil proceeding *on its merits*. The application of this general principle to interpret Rule 47.01 required a proper consideration whether a motion was required under the circumstances.

[26] The Master likely believed he was interpreting the powers available for the court to exercise under Rule 2.01 to treat the plaintiff's non-compliance as an irregularity, and to make a corrective order in a manner consistent with Rule 1.04. Rule 2.01 provides the court with the following powers where a failure to comply with the rules amounts to an irregularity:

> 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or
>
> (b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part. R.R.O. 1990, Reg. 194, r. 2.01 (1).

[27] The appellant argues that the Master exceeded his authority under the *Rules of Civil Procedure* to grant leave on this basis, and that he erred by exercising his discretion under Rule 2.01 in the absence of a motion brought by the plaintiff for leave. The respondent takes the view that the Master exercised his discretion given by Rule 2.01 properly on the evidence before him, and that he is entitled to deference.

[28] The powers under Rule 2.01 permit the court to grant all necessary amendments or other relief as are just, or to set aside the proceeding or a step, document or order only where and as necessary in the interests of justice. Those are not the powers that the Master exercised when he in essence granted leave. Instead, the Master exercised a discretionary power granted by Rule 2.03 to relieve compliance entirely. Justice Cronk describes the purpose and effect of Rule 2.03 in *Wellwood* as follows:

> [33] Rule 2.03 is clear and unambiguous. To repeat, it states: "The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time" (emphasis added).
>
> [34] This rule provides the court with a general discretion to relieve against the time requirements of any of the Rules, at any stage of a proceeding, if one essential precondition is satisfied: the court must first conclude that such relief is necessary in the interest of justice. Nothing in the language of rule 37.14(1) exempts it from what the Divisional Court judge aptly described [at para. 49] as "the overarching discretion afforded to the court by rule 2.03".

[29] Rule 2.01 is curative in nature, designed to repair the irregularity created by the failure of one or more parties to comply with the rules. Rule 2.03 gives power to the court to forgive noncompliance by relieving a party from strict compliance with a rule in appropriate situations after first concluding that granting such relief would be necessary in the interest of justice. The power under either

Rule 2.01 or 2.03 permits the party to seek forgiveness from the court after the fact.

[30] Leave, on the other hand, is a judicial act; it is the granting of permission to take a step or course of conduct that could not be taken under the rules but for obtaining leave. Despite the best of intentions, the Master exercised a power not available under those subrules to grant judicial permission for the plaintiff to deliver a jury notice where no jury notice had been delivered before.

[31] The Master did not set aside any step, document or order under Rule 2.01 upon finding it necessary in the interests of justice to make his order. He did not dispense with compliance under Rule 2.03 upon making his finding that it was necessary in the interest of justice to make an order under Rule 2.03. The order he made was not within the powers given to him under either Rule 2.01 or Rule 2.03 to make.

[32] Factors a court may consider on a motion for leave include whether there has been unconscionable delay in seeking leave, solicitor inadvertence, prejudice to the other party and whether the action in which leave is sought is the type of case to be heard by a jury: see *Jackson v. Hautala* (1983), 1983 CanLII 1974 (ON SC), 42 O.R.(2d) 153 and *Jane Doe v. Bragg*, 2005 CarswellOnt 4403. Justice Molloy, when speaking for the Divisional Court in *Nikore v. Proper*, identified the two key factors to be taken account when deciding whether to permit the service of a jury notice after the closing pleadings to be (1) the circumstances of the delay, and (2) whether there is prejudice to the other side. The Master considered these factors under the auspices of deciding whether it would be in the interests of justice to grant relief under rule 2.01. With respect, the Master did not have the appropriate motion before him to consider those factors or the power to make the order under appeal.

[33] It is my view that the Master should have considered that as the jury notice had not been delivered before the close of pleadings under Rule 47.01, no jury notice had been delivered at all. It was therefore incumbent upon the plaintiff to either bring a motion for leave under *Nikore v. Proper*, or a motion to extend time to serve and file a jury notice. The plaintiff in this action has done neither. Without a motion, the Master erred at law when he made the order.

[34] The appeal is therefore allowed and the order of Master Wiebe dismissing the Minister's motion to strike the jury notice is hereby set aside.

[35] If the Minister seeks costs, written submissions may be submitted by September 2, 2016. The plaintiff shall then have until September 16, 2016 to file written submissions to respond. All written submissions shall consist of no more than two type-written pages, not including a costs outline, bill of costs or dockets. All written submissions may be made by fax to my judicial assistant, Mr. Christopher Charles, at 905-456-4834 in Brampton.

_____

Justice M.G. Emery

Released: August 23, 2016

CITATION: Leadbetter v. Nor, 2016 ONSC 5289
COURT FILE NO.: CV-13-227-00
DATE: 2016 08 23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL LEADBETTER

Plaintiff/Respondent

- **and –**

ABDIRISSAQ NOR

Defendant/Appellant

DECISION ON APPEAL

Released: August 23, 2016

Tab 160

CanLII

König v. Hobza, 2015 ONCA 885 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2015-12-15
File number:	C60361
Other citation:	129 OR (3d) 57
Citation:	König v. Hobza, 2015 ONCA 885 (CanLII), <https://canlii.ca/t/gmjt8>, retrieved on 2026-01-18

König v. Hobza et al.

[Indexed as: König v. Hobza]

Ontario Reports

Court of Appeal for Ontario,

Cronk, G.J. Epstein and Huscroft JJ.A.

December 15, 2015

129 O.R. (3d) 57 | 2015 ONCA 885

Case Summary

Civil procedure — Costs — Offer to settle — "No near miss" policy applying to mandatory timing requirement under rule 49.03 of Rules of Civil Procedure — Trial judge erring in treating offer to settle which was served within seven days of commencement of trial as valid Rule 49 offer — Trial judge nevertheless entitled to take offer into account pursuant to rule 49.13 — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 49.03, 49.13.

The ultimately unsuccessful defendants in an oppression action served an offer to settle nine calendar days before the trial. Having regard to the way in which rule 3.01 of the Rules of Civil Procedure mandates the calculation of time, the offer was technically served fewer than seven days before trial. Despite that fact, the trial judge treated the offer as a valid Rule 49 offer which attracted the costs consequences of rule 49.10. He awarded the plaintiff his costs on a substantial indemnity scale up to the date of the offer and the defendants their costs on a partial indemnity scale afterwards. The plaintiff appealed.

Held, the appeal should be dismissed.

The "no near miss" policy applies to the timing requirement under s. 49.03 of the Rules as well as to the amount of the judgment. The trial judge erred in treating the offer as a valid Rule 49 offer. However, the trial judge was entitled to take the offer into account pursuant to rule 49.13 despite the fact that it did not attract rule 49.10 consequences. While the trial judge did not specifically refer to rule 49.13, he employed a holistic approach and took all the applicable relevant factors, including the offer, into account. The award fell squarely within the trial judge's discretionary authority to fashion a costs award that was appropriate and proportionate in all the circumstances. [page58]

Elbakhiet v. Palmer (2014), 121 O.R. (3d) 616, [2014] O.J. No. 3302, 2014 ONCA 544, 323 O.A.C. 300, 242 A.C.W.S. (3d) 39 [Leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 427], **apld**

Other cases referred to

Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC Â210-025, 128 A.C.W.S. (3d) 1111; *Igbokwe v. HB Group Insurance Management Ltd*. (2001), 2001 CanLII 3804 (ON CA), 55 O.R. (3d) 313, [2001] O.J. No. 3018, 204 D.L.R. (4th) 434, 148 O.A.C. 222, 33 C.C.L.I. (3d) 183, [2002] I.L.R. I-4045, 20 M.V.R. (4th) 50, 107 A.C.W.S. (3d) 217 (C.A.) [Leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 470, 166 O.A.C. 200]; *König v. Hobza*, [2013] O.J. No. 2121, 2013 ONSC 1060, 31 B.L.R. (5th) 248, 228 A.C.W.S. (3d) 701 (S.C.J.); *König v. Hobza*, [2014] O.J. No. 4791, 2014 ONCA 691, 326 O.A.C. 213, 245 A.C.W.S. (3d) 838, varg [2013] O.J. No. 5279, 2013 ONSC 5531, 31 B.L.R. (5th) 301, 235 A.C.W.S. (3d) 53 (S.C.J.); *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership* (2014), 125 O.R. (3d) 121, [2014] O.J. No. 5783, 2014 ONCA 858, 379 D.L.R. (4th) 368, 49 R.P.R. (5th) 1, 36 B.L.R. (5th) 41, 247 A.C.W.S. (3d) 715; *Wilson v. Cranley*, [2014] O.J. No. 5680, 2014 ONCA 844, 325 O.A.C. 396, 42 C.C.L.I. (5th) 173, 70 C.P.C. (7th) 21, 247 A.C.W.S. (3d) 283

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 133(*b*)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 3.01, 49, 49.03, 49.10, 49.13, 57.01(1)

APPEAL from the costs order of Pattillo J., [2015] O.J. No. 250, 2015 ONSC 411 (S.C.J.).

Ronald Flom and *Robert W. Trifts*, for appellant.

Sarit E. Batner and *Vladimira Ivanov*, for respondents.

The judgment of the court was delivered by
G.J. EPSTEIN J.A.: —

A. *Overview*

[1] At the core of this appeal is a judge's discretion to award costs under rule 49.13 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. However, this decision also clarifies that an offer to

settle must strictly comply with the seven-day timing requirement set out in rule. 49.03 before the mandatory cost consequences of rule 49.10 apply.

[2] The appellant was successful in an oppression action against the respondents: *König v. Hobza*, [2013] O.J. No. 2121, 2013 ONSC 1060, 31 B.L.R. (5th) 248 (S.C.J.).

[3] The trial judge awarded the appellant his costs on a substantial indemnity basis. He considered an offer by the [page59]respondents served four days before the commencement of trial to be a valid Rule 49 offer (the "offer"), but held that rule 49.10 was not engaged because the trial judgment was more favourable than the offer: *König v. Hobza*, [2013] O.J. No. 5279, 2013 ONSC 5531, 31 B.L.R. (5th) 301 (S.C.J.), at paras. 21-23.

[4] The respondents appealed. This court upheld the finding of oppression but reduced the damages award and remitted the matter back to the trial judge to consider the costs award in the light of the reduction in damages: *König v. Hobza*, [2014] O.J. No. 4791, 2014 ONCA 691, 326 O.A.C. 213.

[5] In reconsidering costs, the trial judge found that the offer was more favourable than the revised judgment. Against that background, he awarded the appellant his costs up to the date of the offer on a substantial indemnity scale, and the respondents their costs thereafter, on a partial indemnity scale.

[6] The appellant sought leave to appeal this second discretionary costs award pursuant to s. 133(*b*) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This court granted leave by order dated April 21, 2015.

[7] The appellant's main submission on appeal is that the trial judge erred in treating the offer as a valid Rule 49 offer given that it did not meet the rule 49.03 seven-day timing requirement. He requests that the previous costs decision be reinstated.

[8] For the following reasons, I would dismiss the appeal.

B. *Applicable Rules*

[9] The relevant portions of Rule 49 of the Rules are as follows:

> 49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply.
>
> . . . . .
>
> 49.10(2) Where an offer to settle,
>
> (a) is made by a defendant at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the plaintiff,
>
> and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.
> 49.10(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2). [page60]
>
> . . . . .

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

C. *Background Facts*

[10] The appellant was a silent investor in the respondent company 1669051 Nova Scotia Limited, formerly East West Plastics & Electric Products Limited. He was the only shareholder not involved in its management.

[11] He brought an action against the respondents, as officers and directors of East West, alleging that they had awarded themselves excessive compensation over a period of 22 years -- conduct that the appellant maintained called for a damages award under the oppression remedy.

D. *Procedural History*

(a) *The trial judge's decision*

[12] The trial judge found that the respondents' oppressive conduct justified a damages award in the amount of $250,000, plus prejudgment interest of $49,793.83.

(b) *The first costs decision*

[13] The trial judge concluded, at para. 38, that the respondents' actions justified awarding substantial indemnity costs in the amount of $413,000, inclusive of disbursements and taxes.

[14] Before trial, the parties had exchanged several offers and counter-offers. Nine calendar days before trial, the respondents served the offer. It provided for a payment to the appellant of $300,000, inclusive of interest, plus partial indemnity costs and disbursements to be agreed upon or assessed. The appellant rejected the offer.

[15] The parties disputed whether the offer was a valid Rule 49 offer given that it was not served within seven days prior to the commencement of trial having regard to the way in which rule 3.01 mandates how time is calculated.

[16] In addressing this issue, the trial judge reasoned that the purpose of the seven-day requirement under rule 49.03 was to ensure that the party receiving the offer had sufficient time to properly consider it. The trial judge held that the appellant had enough time to do this in the light of the earlier offers and the nine calendar days between service of the offer and the commencement of trial. The trial judge therefore held that the offer was a valid Rule 49 offer. [page61]

[17] However, the mandatory cost consequences of rule 49.10 were not engaged because, after factoring in the substantial indemnity costs, to which the appellant was entitled, the judgment was more favourable than the offer.

(c) *The Court of Appeal's decision*

[18] On appeal, this court upheld the trial judge's finding of oppression but held that the trial judge erred in not considering the respondents' under-compensation during East West's early years. This court therefore reduced the damages to $187,453.51, plus prejudgment interest of $37,336.12.

[19] This court found no reason to interfere with the trial judge's finding that the respondents' conduct called for a costs award on a substantial indemnity basis but sent the matter back to the trial judge to reconsider the quantum of costs and the consequences of rule 49.10, in the light of the reduced damages award.

(d) *The second costs decision*

[20] In revisiting the issue of costs, the appellant argued that the trial judge erred in treating the offer as a valid Rule 49 offer as it did not comply with the rule 49.03 seven-day service

requirement. He relied on *Elbakhiet v. Palmer* (2014), 121 O.R. (3d) 616, [2014] O.J. No. 3302, 2014 ONCA 544, leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 427, a decision of this court released after the first costs decision.

[21] In *Elbakhiet*, Rosenberg J.A. considered whether the offer at issue in that case was more favourable than the judgment. At para. 31, he articulated what is known as the no "near miss" policy: "A party that comes close to meeting the judgment is not thereby entitled to an award of costs as if they did provide a successful offer."

[22] The trial judge rejected the appellant's argument that the no "near miss" policy established in *Elbakhiet* should be found to apply not only to quantum but also to timing. At para. 8, he concluded that the policy concerned only the former.

[23] He went on to find that because, under the revised judgment, the appellant was entitled to an award of damages and interest that was $9,235.32 less than the offer, the cost consequences of rule 49.10 applied.

[24] Having regard to his finding that the respondents' conduct justified substantial indemnity costs, the trial judge relied on the overriding discretion afforded in rule 49.10 to award substantial indemnity costs to the appellant to the date of the offer in the amount of $270,925.15. He concluded that the [page62]respondents were entitled to partial indemnity costs thereafter, in the amount of $127,616.56, both amounts inclusive of disbursements and taxes.

[25] The appellant appeals this order.

Issues

[26] The issues raised are the following:

(1) whether the trial judge was permitted to give effect to an offer to settle under rule 49.10 even if it was served fewer than seven days before trial; and

(2) if not, whether the trial judge was nonetheless entitled to exercise his discretion to fix costs the way he did in this case.

Analysis

1. *Was the trial judge permitted to give effect to an offer to settle under rule 49.10 even if it was served fewer than seven days before trial?*

[27] The respondents' position is that the trial judge was within his discretion to decide that the offer was a valid rule 49.10 settlement offer. Effectively, interpreting the rule in a purposive fashion was in keeping with this court's decisions in *Igbokwe v. HB Group Insurance Management Ltd.* (2001), 2001 CanLII 3804 (ON CA), 55 O.R. (3d) 313, [2001] O.J. No. 3018 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 470, 166 O.A.C. 200 and *Matthew Brady Self Storage Corp. v. InStorage Limited Partnership* (2014), 125 O.R. (3d) 121, [2014] O.J. No. 5783, 2014 ONCA 858, cases in which this court held that technical deficiencies should not invalidate settlement offers.

[28] For the following reasons, I do not agree.

[29] First, the requirement that, in order to attract the mandatory cost consequences of rule 49.10, an offer to settle must be served at least seven days before the commencement of the hearing, is contained within Rule 49 itself. The wording of the provision makes clear that the timing requirement is just that -- a requirement. It is mandatory.

[30] Second, although Rosenberg J.A.'s comment about there being no "near misses" in *Elbakhiet* referred to quantum, in my view, the decision supports the conclusion that the no "near miss" policy should also apply to timing. His detailed examination of the timing requirement under rule 49.03, including a review of a number of appellate decisions, indicates that he viewed the two requirements for a valid Rule 49 offer as being equally important. [page63]

[31] Rosenberg J.A. noted, at para. 20, that the "consensus [that a trial commences on the first day of evidence] has provided certainty to parties making Rule 49 offers, and such certainty furthers the purposes of Rule 49". It goes without saying that certainty as to whether an offer meets the seven-day timing requirement also furthers the purposes of Rule 49 by affording parties two important pieces of information.

[32] The first is whether the time has passed during which to expect an offer to settle that will attract the mandatory cost consequences under rule 49.10. The second is whether an offer will be treated as a valid Rule 49 offer. Both are necessary for a party to be fully equipped to assess the risk of proceeding to trial.

[33] I conclude that the no "near miss" policy applies to meeting the timing requirement under rule 49.03 as well as to the amount of the judgment. It follows that, in my view, the trial judge erred in treating the offer as a valid Rule 49 offer.

2. *If the offer was not a valid Rule 49 offer, was the trial judge nonetheless entitled to exercise his discretion to fix costs the way he did in this case?*

[34] Given my conclusion that the offer was not a valid Rule 49 offer, on a plain reading of Rule 49, the mandatory cost implications found in rule 49.10 are not applicable. This takes me to the trial judge's residual discretion to make an appropriate costs determination under rule 49.13.

[35] Rule 49.13 calls for a holistic approach to the determination of costs having regard to factors including any offers to settle -- regardless of whether they meet the requirements of Rule 49 -- where appropriate to do justice between the parties. Rosenberg J.A. addressed the role of rule 49.13 in *Elbakhiet*, at para. 33:

> As this court pointed out in *Lawson v. Viersen* (2012), 108 O.R. (3d) 771, [2012] O.J. No. 109, 2012 ONCA 25, at para. 46, rule 49.13 is not concerned with technical compliance with the requirements of rule 49.10. Rather, it "calls on the judge to take a more holistic approach." The appellants complied with the spirit of Rule 49 even if they failed for technical reasons to provide an offer that exceeded the Judgment. As held in *Lawson*, at para. 49, this was the type of offer that ought to have been given "considerable weight in arriving at a costs award."

[36] This approach was endorsed by Gillese J.A. in *Wilson v. Cranley*, [2014] O.J. No. 5680, 2014 ONCA 844, 325 O.A.C. 396, at para. 26, where she said "even where an offer does not attract rule 49.10 consequences, pursuant to rule 49.13 the court should consider such offers when exercising its discretion with respect to costs". [page64]

[37] Here, although I have concluded that the trial judge should not have treated the offer as a valid rule 49.10 offer, he was entitled to take it into account pursuant to rule 49.13, and pursuant to rule 57.01(1), which sets out the general principles a court considers when exercising its discretion to award costs.

[38] I appreciate that the trial judge did not specifically refer to rule 49.13 in his reasons but I do not see this as a basis to interfere with his exercise of discretion in awarding costs. In *Cranley*, at para. 28, this court held that a trial judge can employ his or her discretion under rule 49.13 without explicitly referring to it.

[39] The question is whether the trial judge took the required holistic approach in awarding costs as he did in the second costs endorsement. In my view, he did.

[40] The only difference between the trial judge's first and second costs endorsements is this court's intervening judgment. The judgment reduced the damages award but did not alter the circumstances surrounding the offer. Significantly, as previously noted, this court expressly supported the trial judge's conclusion that the respondents' conduct called for costs on a substantial indemnity scale.

[41] In determining whether the trial judge employed a holistic approach to rule 49.13, it is therefore appropriate to consider the second costs endorsement in the light of its precursor.

[42] As previously mentioned, this court upheld the key factor considered by the trial judge, namely, the appropriateness of substantial indemnity costs. In his second costs endorsement, the trial judge considered this fact in addition to the fact that the offer was more favourable than the judgment received by the appellant. In his first costs endorsement, at para. 21, the trial judge found that the offer complied with the spirit of Rule 49 since "[the appellant] had more than enough time to properly consider the offer before the trial started".

[43] After considering the trial judge's approach to costs in both of his costs endorsements, I am satisfied that in arriving at the award he did, the trial judge took into account the applicable relevant factors, including the offer. He employed a holistic approach.

[44] Finally, I note that the Supreme Court of Canada has made it clear that a costs award should be set aside on appeal only if the trial judge erred in principle or if the award was plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, at para. 27.

[45] Although, in the context of the history of this matter and the ultimate outcome, the trial judge's revised costs decision may appear unfair to the appellant, I find no error in principle. [page65]And I do not view the award as plainly wrong. The award fell squarely within the trial judge's discretionary authority to fashion a costs award that was appropriate and proportionate in all the circumstances. This was his call to make.

E. *Disposition*

[46] For these reasons, I would dismiss the appeal. The respondents are entitled to their costs of the appeal, fixed at $6,500, inclusive of disbursements and applicable taxes.

Appeal dismissed.

End of Document

Tab 161

CanLII

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (SCC), [1993] 1 SCR 319

Source:	Supreme Court of Canada
Date:	1993-01-21
File number:	22457
Other citations:	100 DLR (4th) 212 — 146 NR 161 — 37 ACWS (3d) 1194 — 118 NSR (2d) 181 — 327 APR 181 — 13 CRR (2d) 1 — JE 93-231 — [1993] SCJ No 2 (QL) — [1993] ACS no 2
Citation:	New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), 1993 CanLII 153 (SCC), [1993] 1 SCR 319, <https://canlii.ca/t/1bsww>, retrieved on 2026-01-18
Most recent unfavourable mention	Harvey v. New Brunswick (Attorney General), 1996 CanLII 163 (SCC), [1996] 2 SCR 876 [...] **Distinguished:** New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) , **1993 CanLII 153 (SCC) , [1993] 1 S.C.R. 319** . [...]

New Brunswick Broadcasting Co. *v.* Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319

Arthur Donahoe in his capacity as the Speaker of the House of Assembly *Appellant*

v.

Canadian Broadcasting Corporation *Respondent*

and

The Honourable Guy Charbonneau, Speaker of the Senate, the Honourable John Fraser, Speaker of the House of Commons, the Honourable David Warner, Speaker of the Legislative Assembly of the province of Ontario, the Honourable Jean-Pierre Saintonge, President of the National Assembly of Quebec, the Honourable Denis Rocan, Speaker of the Legislative Assembly of the province of Manitoba, the Speaker of the Legislative Assembly of the province of British Columbia, the Honourable Edward W. Clark, Speaker of the Legislative Assembly of the province of Prince Edward Island, the Honourable Herman Rolfes, Speaker of the Legislative Assembly of the province of Saskatchewan, the Honourable David John Carter, Speaker of the Legislative Assembly of the province of Alberta, the Honourable Thomas Lush, Speaker of the House of Assembly of the province of Newfoundland, the Speaker of the Legislative Assembly of the Northwest Territories, the Speaker of the Legislative Assembly of the Yukon, the Attorney General for Ontario, the Attorney General of British Columbia and the Canadian Association of Journalists *Interveners*

Indexed as: New Brunswick Broadcasting Co. *v.* Nova Scotia (Speaker of the House of Assembly)

File No.: 22457.

1992: March 2, 3; 1993: January 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

on appeal from the nova scotia supreme court, appeal division

Constitutional law -- Charter of Rights -- Application of Charter -- Provincial legislatures -- Parliamentary privileges -- Nova Scotia House of Assembly refusing media access to public gallery

to film proceedings with their own cameras -- Whether Charter applicable to a legislative assembly -- Whether exercise of privileges by members of a legislative assembly subject to Charter review -- Canadian Charter of Rights and Freedoms, s. 32(1)(b).

Constitutional law -- Charter of Rights -- Freedom of expression -- Provincial legislature refusing media access to public gallery to film proceedings with their own cameras -- Whether refusal infringes guarantee of freedom of expression -- Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law -- Parliamentary privileges -- Provincial legislatures -- Whether privileges of a provincial legislature part of Constitution of Canada -- Constitution Act, 1867, preamble.

The respondent made an application to the Nova Scotia Supreme Court, Trial Division for an order allowing it "to film the proceedings of the House of Assembly with its own cameras". The application was based on s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of expression, including freedom of the press. The media have regular access to the public gallery in the House where they may witness the proceedings and they also have access to Hansard, but the House of Assembly, in the exercise of its parliamentary privileges, has prohibited the use of television cameras in the House, except on special occasions. The respondent claimed that it was possible to film the proceedings from the public gallery with modern hand-held cameras which were both silent and required no special lighting or electrical equipment. In his evidence, the Speaker indicated that the respondent's proposal would interfere with the decorum and orderly proceedings of the House. Apart from controlling decorum, the House would have no control over the production and use of the film. The trial judge granted the respondent's claim and the Appeal Division confirmed its right of access, pursuant to s. 2(*b*) of the *Charter*, to televise the proceedings of the House from the gallery with its own unobtrusive cameras. The question as to whether any limits could be placed on this right of access was left open.

Since the judgment of the Appeal Division, the House of Assembly's proceedings have been televised through a system approved and controlled by the House. The cameras of the

"electronic Hansard" record only the member recognized by the Speaker as having the floor. A direct feed of the "electronic Hansard" is available to the media who are able to broadcast the proceedings live or tape them.

The constitutional questions stated here queried (1) whether the *Charter* applies to the members of the House of Assembly when exercising their privileges as members; (2) if so, whether exercising a privilege so as to refuse access to the media to the public gallery to record and relay to the public proceedings of the House of Assembly by means of their cameras contravenes s. 2(*b*) of the *Charter*; and (3) if so, whether such refusal is justifiable under s. 1 of the *Charter*.

Held (Cory J. dissenting): The appeal should be allowed.

Per La Forest, L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci JJ.: The *Charter* does not apply to the members of the Nova Scotia House of Assembly when they exercise their inherent privileges, since the inherent privileges of a legislative body such as the Nova Scotia House of Assembly enjoy constitutional status.

Per L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci JJ.: A textual and purposive approach to s. 32(1) of the *Charter* does not support the conclusion that a legislative assembly can never be subject to the *Charter*. By the terms of the *Charter* itself, the word "legislature" in s. 32(1) cannot conclusively be narrowly defined to cover only those actions for which the legislative body and the Queen's representative are jointly responsible. Further, the tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities -- the privileges -- of legislative assemblies. Without deciding that the legislative assembly is a government actor for all purposes, as a public body it might be capable of impinging on individual freedoms in areas not protected by privilege. The legislative assembly could, therefore, fall within the rationale for regarding such bodies as government actors subject to the *Charter*. Absent specific *Charter* language to the contrary, however, the long history of curial deference to the independence of

the legislative body, and to the rights necessary to the functioning of that body, cannot be lightly set aside, even conceding that our notions of what is permitted to government actors have been significantly altered by the enactment and entrenchment of the *Charter*.

The *Charter* does not apply to the House of Assembly's action at issue in this appeal. The privilege of the legislative assembly to exclude strangers enjoys constitutional status as part of the Constitution of Canada, and hence cannot be abrogated by another part of the Constitution. The House of Assembly has the constitutional power to exclude strangers from its chamber by virtue of the preamble to the *Constitution Act, 1867*, which proclaims an intention to establish "a Constitution similar in Principle to that of the United Kingdom". This preamble constitutionally guarantees the continuance of Parliamentary governance and, given Canadian federalism, this guarantee extends to the provincial legislatures in the same manner as to the federal Parliament. The Constitution of the United Kingdom recognized certain privileges in the British Parliament. Since the Canadian legislative bodies were modelled on the Parliamentary system of the United Kingdom, they possess similar, although not necessarily identical, powers. Given the clear and stated intention of the founders of our country that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested, it seems indisputable that the inherent privileges of Canada's legislative bodies, historically recognized as necessary to their proper functioning, fall within the group of principles constitutionalized by virtue of the preamble. This is not a case of importing an unexpressed concept into our constitutional regime, but rather of recognizing a legal power fundamental to the constitutional regime which Canada has adopted. The definition of "Constitution of Canada" in s. 52(2) of the *Constitution Act, 1982* is not clearly meant to be exhaustive and the interpretation of that section should not be restricted in such a way as to preclude giving effect to the intention behind the preamble to the *Constitution Act, 1867*, thereby denying recognition to the minimal, but long recognized and essential, inherent privileges of Canadian legislative bodies.

From an historical perspective, Canadian legislative bodies had, from their inception, those privileges which were necessary for the maintenance of order and discipline during the performance of their duties. These privileges are part of the fundamental law of our land, and hence are constitutional. While courts may determine if the privilege claimed is necessary to the capacity of the

legislature to function, they have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.

Finally, from a practical point of view, a legislative body must possess such constitutional powers as are necessary for its proper functioning. An absolute right to exclude strangers from its chamber, when it deems them to be disruptive of its efficacious operation, is a valid category of privilege founded on necessity. This privilege is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries.

The Speaker of the House of Assembly ruled against the media's demands because he was of the view that they would interfere with the decorum and efficacious proceedings of the House. In doing so, he acted within the ambit of his constitutional power to control attendance in the House. It follows that this constitutional power cannot be abrogated by the *Charter*. At issue is a valid constitutional power. To subject this power to the *Charter* would be to negate this power. Were the issue here an action taken pursuant to a valid power, that action might be subject to *Charter* scrutiny.

La Forest J.'s reasons were also agreed with.

Per La Forest J.: The reasons of McLachlin J. were generally agreed with, subject to the following comments. When the British government granted a legislative assembly to a colony, the grant carried with it, as an adjunct, the powers (or parliamentary privileges) necessary for that body to carry out its functions, in particular the power to regulate its internal processes, but not the broader parliamentary privileges of the British Parliament. The legislative assembly, with its concomitant privileges, was part of the colony's constitution, and in the case of the pre-existing provinces, like Nova Scotia, was continued by the *Constitution Act, 1867*. Parliamentary legislative privileges in Nova Scotia are, therefore, ultimately anchored in the grant of a legislative assembly and incorporated into the *Constitution Act, 1867*. The new legislative bodies created by that Act and subsequent constitutional instruments are governed by the same principle. The preambular statement in the *Constitution Act, 1867*, that what was desired was "a Constitution similar in Principle to that of the United Kingdom", among other things, gives expression to the nature of the legislative bodies that

were continued or established by it. The privileges of these bodies are similar in principle, though not identical, to those of the Parliament of the United Kingdom.

Per Lamer C.J.: The Houses of Parliament and the provincial legislative assemblies, and their members, hold and exercise parliamentary privileges which are necessary to the discharge of their legislative function. These privileges are held as against the Crown and the judiciary. Courts can inquire into the existence and extent of privilege, but not its exercise. Since general categories of privilege are deemed necessary to the discharge of the Assembly's function, each specific instance of the exercise of a privilege need not be shown to be necessary. In the United Kingdom, privilege evolved from a history of conflict between the Houses of Parliament, the Crown and the courts. Given its historical development, the source of those privileges is constitutional in the most fundamental sense in that it has everything to do with the relationships between the different branches of government. In Canada, however, the colonial legislative assemblies were held to have certain inherent powers simply by virtue of their creation. The inherent powers of the Canadian assemblies are not as broad as those of the Houses of Parliament of the United Kingdom. Powers beyond the inherent privileges of the Canadian legislatures can be granted to them by statute.

While the Constitution of Canada is undoubtedly founded upon many of the same broad principles as is the Constitution of the United Kingdom, the wording of the preamble of the *Constitution Act, 1867* -- "a Constitution similar in Principle to that of the United Kingdom" -- cannot, without specific reference, be taken to transplant directly art. 9 of the English *Bill of Rights* of 1689 into our Constitution, and thereby incorporate the privileges of legislative bodies. History makes clear that the different paths of evolution of government in the two jurisdictions led to significant differences in the branches of government themselves from the very beginning. Canada has diverged further in recent years with the patriation of its Constitution in 1982. Similar in principle does not mean identical in the powers granted.

In light of the conclusion below concerning s. 32 of the *Charter*, it is unnecessary to determine whether the privileges of provincial legislative assemblies have a constitutional status which would make them immune to *Charter* review.

Section 32, as it relates to the application of s. 2(*b*) of the *Charter*, does not encompass the members of the House of Assembly when exercising their inherent privileges. The House of Assembly does not fall within the words "legislature" or "government" in s. 32 since the term "government" refers to the executive or administrative branch of government and the term "legislature" refers to the body capable of enacting legislation, and not to its component parts taken individually. The House of Assembly is a component of the legislature but only together with the Lieutenant Governor does it comprise the legislature. The language, structure and history of the constitutional text support that conclusion. Section 32 specifically refers to "all matters within the authority of the legislature". This is the language of legislation and is a clear reference to legislative authority. Section 33 of the *Charter* strengthens this interpretation. Further, the distinction between the federal or provincial legislatures and their component parts is observed with reasonable consistency in the *Constitution Act, 1867* and in the language employed in the amending provisions set out in Part V of Schedule B of the *Constitution Act, 1982*. There are certain provisions in the *Charter*, notably ss. 5, 17 and 18, in relation to which the specific context requires a different meaning. While these sections show that usage is not completely consistent, they by no means take away from the general rule that "legislature" in s. 32 means the body that enacts legislation. The place and importance of legislative privileges in our political life and the long-standing practice of judicial non-interference resolve any residual ambiguity concerning the interpretation of s. 32 as it relates to the application to the House of the rights guaranteed under s. 2(*b*) of the *Charter*.

Privileges are clearly "matters within the authority of the legislatures of each province" in the sense that the provincial legislatures have the power to legislate in relation to privileges. The legislation that the provinces have enacted with respect to privileges will be reviewable under the *Charter* as is all other legislation. It does not follow, however, that the exercise by members of the House of Assembly of their inherent privileges (which are not dependent on statute for their existence) is subject to *Charter* review. Here, given the long-standing acceptance of the power to exclude strangers and to control the internal proceedings of the House as valid categories of privilege founded on necessity, in this country as well as in the United Kingdom, the ban by the members of the House

of Assembly on the use of independent video cameras in the House fell within their inherent privileges.

Per Sopinka J.: The impugned rule or practice of the legislative assembly is not immune from *Charter* scrutiny. The privileges of the members of the legislative assembly are subject to legislation by the province as part of the constitution of the province. The exercise of those privileges, whether by legislation or by rules or practices of the legislative assembly, are matters "within the authority of the legislature" and therefore subject to s. 32 of the *Charter*. One implication of treating those privileges as part of the Constitution of Canada is that they would arguably not be subject to provincial legislation and any change would require an amendment pursuant to s. 43 or s. 38 of the *Constitution Act, 1982*. One would expect something more than a general reference to "a Constitution similar in Principle" in a preamble in order to have this effect.

With the system currently used to broadcast the proceedings of the House of Assembly, the media are not allowed to have their hand-held cameras in the public gallery. The effect on the publication of news is that they are prevented from obtaining the reaction of the members who are not speaking. The inability to gather news can occasion a restriction on freedom of the press if it interferes with disseminating the news, but this Court has not yet determined whether the protection of s. 2(*b*) of the *Charter* extends to the means by which the gathering and dissemination of news is done. In any event, assuming that the restriction complained of constitutes a violation of s. 2(*b*), it is justifiable under s. 1 of the *Charter*. The exercise of the historic privilege in issue in this appeal is a pressing and substantial objective. That objective is to maintain order and decorum and ensure the smooth functioning of the legislative assembly. The present restriction on the number and location of cameras is rationally connected with the objective. While some other method might have been equally effective, the procedure which has been adopted appears eminently sensible and the Court should not second guess the legislative assembly who studied the matter and adopted a method which ensures that in essence the proceedings of the Assembly are made available to the television viewing audience. Finally, given the importance of preserving the decorum of the House of Assembly, the alleged intrusion on the freedom of the press is not out of proportion to this objective.

Per Cory J. (dissenting): Given a broad and liberal interpretation, the words "legislature" and "government" in s. 32(1) of the *Charter* include the House of Assembly. The underlying purpose of s. 32(1) is to restrict the application of the *Charter* to public actors. The legislative assembly is an institution that is not only essential to the operation of democracy but is also an integral part of democratic government. It is a public actor. It follows that the *Charter* should apply to the actions of the House of Assembly, which include not only the legislation passed by the Assembly but also its own rules and regulations. The rules and regulations, if they are found to violate the *Charter*, can, like the Acts passed by the Assembly, be saved under s. 1. Such a procedure would ensure that the courts never unduly interfere with the inherent and enacted rights and privileges possessed by a legislature which enable it to effectively carry out its role.

The ban on television cameras is an exercise of privilege by the legislative assembly subject to the *Charter* scrutiny. While the legislatures of this country possess such constitutional privileges as are necessary for their operation, courts may, when properly called upon, enquire as to whether a particular exercise of parliamentary privilege falls within the privileged jurisdiction of the legislature. The exercise of the constitutional power of privilege is not entrenched in the Constitution of Canada and the *Charter* must apply to the exercise of that parliamentary privilege. Here, the privilege of the House of Assembly represents an exercise of legislative authority over itself and members of the media and is reviewable. The test for review is one of necessity. A complete prohibition on cameras is not essentially necessary to the operation of the House, nor would the presence of cameras automatically constitute an immediate obstruction. Such a rule falls outside the constitutional scope of parliamentary privilege. The House of Assembly, when it banned all cameras, exceeded the jurisdiction inherent in parliamentary privilege.

There is an infringement of s. 2(*b*) of the *Charter* when a legislative assembly denies any media, or one form of media, access to its public debates. The protection of news gathering does not constitute a preferential treatment of an elite or entrenched group -- the media -- but rather constitutes an ancillary right essential for the meaningful exercise of the *Charter*. Since the television media constitute an integral part of the press, a prohibition on television cameras is by definition a restriction on freedom of the press. So long as the camera is neither too pervasive nor too obtrusive, there can be

no good reason for excluding it. The legislative assembly does have a right, in appropriate circumstances, to exclude or remove visitors including members of the press. It may also, with regard to the attendance of television media, limit the number of cameras and their location and regulate their manner of operation. What the Assembly cannot do is to exclude television entirely by means of regulation without infringing s. 2(*b*). A balance must be kept between efficient and dignified operation of the legislative assembly and the right of freedom of expression. The system currently used in the House of Assembly is eminently fair and suitable and would be justifiable under s. 1 of the *Charter*. The refusal to permit any television cameras, however, contravenes s. 2(*b*) of the *Charter* and cannot be justified under s. 1.

Cases Cited

By McLachlin J.

Applied: *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, 1987 CanLII 65 (SCC), [1987] 1 S.C.R. 1148; **distinguished:** *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158; **referred to:** *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573; *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441; *Lavigne v. Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211; *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753; *Kielley v. Carson* (1842), 4 Moore 63, 13 E.R. 225; *Fielding v. Thomas*, [1896] A.C. 600; *Landers v. Woodworth* (1878), 1878 CanLII 25 (SCC), 2 S.C.R. 158; *Stockdale v. Hansard* (1839), 9 Ad. & E. 1, 112 E.R. 1112; *Payson v. Hubert* (1904), 1904 CanLII 68 (SCC), 34 S.C.R. 400.

By Lamer C.J.

Referred to: *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Reference re Bill 30, An Act to amend the Education Act (Ont.),* 1987 CanLII 65 (SCC), [1987] 1

Tab 162

CanLII

Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. (Master), 1991 CanLII 7311 (ON SC)

Source:	Superior Court of Justice
Date:	1991-09-12
Other citations:	5 OR (3d) 65 — 28 ACWS (3d) 966
Citation:	Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. (Master), 1991 CanLII 7311 (ON SC), <https://canlii.ca/t/g15rk>, retrieved on 2026-01-18

Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.
and Theodore
Indexed as: Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.
(Master)

5 O.R. (3d) 65

ONTARIO
Ontario Court (General Division)
Master Peppiatt
September 12, 1991

Barristers and solicitors -- Professional conduct -- Duty to court -- Solicitor instructed by client not to approve draft order -- Solicitor obliged to approve order in absence of legitimate objection -- Refusal to approve amounting to contravention of Rules of Law Society of Upper Canada -- Obligation not dispensed with by fact that solicitor no longer acting for client.

Judgments and orders -- Settlement of order -- Client instructing solicitor not to approve draft order -- Solicitor obliged to approve order where there are no proper grounds upon which to withhold approval -- Fact that solicitor no longer acting for client not relieving solicitor of obligation.

Where a client has given instructions to a solicitor not to approve a draft order and there are no proper grounds upon which to withhold such approval, the refusal of the solicitor to approve the order contravenes the Rules of the Law Society of Upper Canada. The fact that the solicitor has

ceased to act for the client does not relieve the solicitor of his obligation to the court and other solicitors.

RULING concerning the approval of a draft order.

Statutes referred to Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 141 [am. 1984, c. 64, s. 9] Rules and regulations referred to Rules of Civil Procedure, O. Reg. 560/84, Rules 45, 59, rules 57.07, 59.01, 59.02, 59.03 [am. O. Reg. 366/87, s. 12; am. O. Reg. 364/89, s. 7(1)], 59.04 [am. O. Reg. 364/89, s. 7(2); am. O. Reg. 711/89, ss. 56, 57] Rules of Professional Conduct (Law Society of Upper Canada), Rules 10, 14

J.P. Willson, for plaintiff.

Helder M. Travassos, for defendants.

MASTER PEPPIATT:-- On July 29, 1991 a motion in this action seeking interim possession of a Mercedes-Benz motor vehicle pursuant to Rule 45 of the Rules of Civil Procedure, O. Reg. 560/84, came before me. Ms. Willson appeared for the plaintiff, moving party, and Mr. Charles Gastle appeared for the defendants. Also present was Mr. Paul Theodore, a personal defendant and the president of the corporate defendant.

When the motion was called for hearing Mr. Gastle requested an adjournment. He informed me that there had been a loss of confidence between his firm and the defendants and that a motion would shortly be brought for an order removing his firm as solicitors of record for the defendants. His clients did not wish him to argue the motion, but intended to retain new solicitors. This was confirmed by Mr. Theodore.

After hearing their submissions and the submissions of Ms. Willson, who opposed the granting of an adjournment, I made an order adjourning the motion for two weeks subject to certain terms, and I endorsed the record accordingly. I am now informed that an appeal from my order has been launched. The matter now before me does not relate to the merits of my order.

Ms. Willson prepared a draft of my order and sent it to Mr. Gastle for approval. He has refused to approve the order and accordingly, at Ms. Willson's request, I granted an appointment for Friday, August 2, 1991, to settle the order. At that time Ms. Willson and Mr. Travassos attended before me in my chambers.

Mr. Travassos informed me, as Mr. Gastle had previously informed Ms. Willson, that he had no fault to find with the order as drafted by her. The refusal to approve it was based upon two factors, first, that although they were still solicitors of record for the defendants they were not in fact acting for them and secondly, that they had received Mr. Theodore's specific instructions not to approve the order. I was not told why these instructions had been given but it was confirmed to me that Mr. Theodore had been informed of what was involved in the approval of an order and that he understood that such approval did not prejudice any rights of appeal or the right to contend in any appropriate forum that the order was wrong. Nevertheless, he issued emphatic instructions which the solicitors felt bound to follow.

This raises two issues, the first being what is involved in the approval of an order and secondly, the rights and obligations of solicitors in a situation such as this.

There appears to be no authority directly on point and there is no consensus of opinion among those whom I have consulted. It is in the hopes of providing some authority which may be approved or disapproved in due course that I am writing these reasons setting out my views.

In certain circumstances the answer to the questions set out above will have cost consequences for parties and for solicitors.

The settling and signing of orders is governed by Rule 59 and I set out the relevant parts of that rule:

59.01 An order is effective from the date on which it is made, unless it provides otherwise.

59.02(1) An endorsement of every order shall be made on the appeal book, record, notice of motion or notice of application by the court, judge or officer making it, unless the circumstances make it impractical to do so.

(2) Where written reasons are delivered,

(a) in an appellate court, an endorsement is not required;

(b) in any other court, the endorsement may consist of a reference to the reasons,

and a copy of the reasons shall be filed in the court file.

59.03(1) Any party affected by an order may prepare a draft of the formal order and send it to all other parties represented at the hearing for approval of its form.

(2) Approval of the form of an order that merely dismisses a motion, proceeding or appeal, with or without costs, is not required.

(3) An order shall be in Form 59A (order), 59B (judgment) or 59C (order or certificate on appeal) and shall contain,

(a) the name of the judge or officer who made it;

(b) the date on which it was made; and

(c) a recital of the particulars necessary to understand the order, including the date of the hearing, the parties who were present or represented by counsel and those who were not, and any undertaking made by a party as a condition of the order. [am. O. Reg. 366/87, s. 12]

59.04(1) Every order shall be submitted in accordance with subrules (4) and (8) for the signature of, ...

. . . . .

(4) Where all the parties represented at the hearing have approved the form of the order, the party who prepared the draft order shall,

(a) file the approval of all the parties represented at the hearing, together with a copy of the order; and

(b) leave the order with the registrar for signing.

(5) Where approval of the form of an order is not required under subrule 59.03(2), the party who prepared the draft order shall leave it with the registrar for signing.

. . . . .

(6) Where the registrar is satisfied that the order is in proper form, he or she shall sign the order and return it to the party who left it to be signed.

(7) Where the registrar is not satisfied that the order is in proper form, he or she shall return the order unsigned to the party who left it to be signed and the party may,

(a) submit the order in proper form and, if required by the registrar, file the approval of the parties to the order in that form, together with a copy of the order; or

(b) obtain an appointment to have the order settled by the court, judge or officer that made it and serve notice of the appointment on all other parties who were represented at the hearing.

(8) Where approval is not received within a reasonable time, a party may obtain an appointment to have the order settled by the registrar or, where the registrar considers it necessary, by the court, judge or officer that made it, and notice of the appointment shall be served on all other parties who were represented at the hearing.

(9) In a case of urgency, the order may be settled and signed by the court, judge or officer that made it without the approval of any of the parties who were represented at the hearing.

(10) Where an objection is taken to the proposed form of the order in the course of its settlement before a registrar, the registrar shall settle the order in the form he or she considers proper and the objecting party may obtain an appointment with the court, judge or officer that made the order to settle the part of the order to which objection has been taken and serve notice of the appointment on all other parties who were represented at the hearing.

. . . . .

(13) Where an appointment is not obtained under subrule
(10) or (11) within seven days after the registrar settles the order, a party may require the registrar to sign the order as settled by him or her.

(14) After an order has been settled under subrule (10) by the judge or officer who made it, or under subrule (11) and
(12), the registrar shall sign it unless it was signed by a judge or officer at the time it was settled.

The purpose of this procedure is to ensure, so far as humanly possible, that the formal order upon which an appellate court, and other members of the same court, sheriff, accountant, etc., will act accurately sets out the intention of the court which pronounced the order as reflected in the endorsement or the reasons. It is important that this should be done so that all concerned may know their rights, obligations and duties. It is far more than a mere formality.

It will be seen that raising an objection to a draft order or refusing to approve it involves the person seeking to take out the order in additional time and cost. In addition, since courts and officers will not and should not, usually, act upon an endorsement but only upon a formal order signed, issued and entered, delay may nullify the effect of rule 59.01.

The approval of orders is, therefore, one of the things which is necessary in order to permit the court to function. It is akin to being on time for a hearing. It is perhaps unnecessary to say that if there is legitimate objection to the form of the draft order it is quite proper to pursue the objection through the process laid out by the rules. However, to refuse approval, or to raise specious or

frivolous objections in order to gain a collateral advantage, such as delay, or simply to cause additional trouble and expense to the other side is an abuse of process.

I should make it clear that, as I have mentioned above, approval of a draft order is only an agreement that that is what the court ordered. It is not, in the slightest degree, a concession that the order was right, or that the court had jurisdiction, or an agreement not to appeal. It is purely an administrative act for the purpose of permitting the court system to function.

In what I have said above I have drawn no distinction between the counsel and the client. However, in the circumstances which obtain here, the issue is the duty of counsel where the client has given instructions not to approve the order, and there are no proper grounds upon which to withhold such approval and it is to that issue which I now turn.

It is well to start with the general well settled proposition that a solicitor is the agent of his/her client and must, like any other agent, follow the principal's instructions. This is, however, subject to the exception that those instructions must be lawful. It is no defence for an agent who has committed a tort or criminal offence to say that it was committed upon the instructions of the principal.

Members of the bar are subject to particular constraints arising from their position as officers of the court. The Rules of Professional Conduct of the Law Society of Upper Canada are of great assistance, and shed light upon the matter before me. There are two specific rules to which I refer.

Rule 10

> When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law.

Commentary

> 2. The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect.

The lawyer must not, for example:

> (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
>
> (b) knowingly assist or permit the client to do anything which the lawyer considers to be dishonest or dishonourable;

Rule 14

> The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith.

Commentary

> 1. Public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the

client, and neglect of the Rule will impair the ability of lawyers to perform their function properly.

2. Any ill feeling which may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

. . . . .

4. The lawyer should avoid sharp practice, and should not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of the client's rights.

[Footnotes omitted]

In my view, the refusal to approve a draft order to which there is no genuine objection contravenes those rules.

Does the fact that a solicitor has ceased to act for the client alter these obligations? In my opinion, it does not.

The obligation to approve an order, to which there is no legitimate objection, is owed to the court and to the other solicitors as well as to the client. Ceasing to act for the client does not relieve the solicitor of the obligations to the court and other solicitors. It may not release the obligations owed to the client in this respect. If the order is not approved by the solicitor who appeared on the motion, a succeeding solicitor may well say that he cannot give approval as he was not present on the motion or there may be no succeeding solicitor. There is, therefore, a breakdown in the court process resulting in unnecessary delay and expense. It is the duty of solicitors to avoid this if possible, and it can hardly be said that the brief amount of time and effort required to consider a draft order, endorse the approval upon it and return it to the solicitor who has drafted it is an unreasonable burden upon a solicitor.

It should hardly be necessary to add that at a time when the court system is under attack from many quarters, including those who should know better, it is short-sighted for members of the legal profession to provide ammunition for their enemies.

In dealing with the costs consequences of such conduct the applicable rule of civil procedure is rule 57.07:

57.07(1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;

(b) directing the solicitor to reimburse the client for any costs that the client had been ordered to pay to any other party; and

(c) requiring the solicitor personally to pay the costs of any party.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the

solicitor is given a reasonable opportunity to make representations to the court.

(3) The court may direct that notice of an order against a solicitor under subrule (1) be given to the client in the manner specified in the order.

I have reviewed the cases decided under that rule and under s. 141 [am. 1984, c. 64, s. 9] of the Courts of Justice Act, 1984, S.O. 1984, c. 11, and those relating to the inherent jurisdiction of the court to control its own officers through an award of costs against them. It appears to me that an important factor in those cases is the good faith of the solicitors in question and whether their actions were reasonable. I have no doubt that the solicitors for the defendants have acted entirely in good faith. I am satisfied that they did their best to have their client act reasonably and that, after careful consideration, they came to the conclusion that they were bound to follow his instructions.

In that latter respect, I think that they were wrong but that is not nearly enough to justify an order for costs against them personally. Before a solicitor, acting in good faith, can be ordered to pay costs personally, he or she must be guilty of outrageous conduct or incompetence amounting to outrageous conduct. That is far from the case here, particularly in view of the fact that, as I have mentioned earlier, there is no authority on the point and opinion is divided. It may be that if this judgment comes to the attention of the bar it will no longer be possible to say that there was an honest belief that the client's instructions must be followed in these circumstances.

I therefore award costs of the settlement of the order against the defendants but not against their solicitors.

Order accordingly.

Tab 163

CanLII

Mayer v. Rubin, 2018 ONSC 1826 (CanLII)

Source:	Superior Court of Justice
Date:	2018-03-16
File number:	05-162/16
Citation:	Mayer v. Rubin, 2018 ONSC 1826 (CanLII), <https://canlii.ca/t/hr1pp>, retrieved on 2026-01-18

CITATION: Mayer v. Rubin, 2018 ONSC 1826
COURT FILE NO.: 05-162/16
DATE: 20180316

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN:

ANNIE MAYER in her capacity as an estate trustee
of the Estate of JOHANN RUBIN and in her personal capacity, Applicant

- and -

MORRIS ERIC RUBIN in his capacity as an estate trustee of the Estate of Johann Rubin and in his personal capacity, IDA RUBIN in her capacity as an estate trustee of the Estate of Johann Rubin and in her personal capacity, SARAH WERNER in her capacity as an estate trustee of the Estate of Johann Rubin and in her personal capacity, ARSANDCO INVESTMENTS LIMITED in its capacity as trustee for the Estate of Johann Rubin and in its personal capacity, FAIGY ESTHER HAMMER AND THE OFFICE OF THE CHILDREN'S LAWYER and The Bank of Nova Scotia Trust Company, in its capacity as Estate Trustee During Litigation of the Estate of Johann Rubin, also known as the Jay Rubin Estate, Respondents

BEFORE: F.L. Myers J.

COUNSEL: *Arieh Bloom,* counsel for the applicant
David M. Lobl, counsel for The Bank of Nova Scotia Trust Company, in its capacity as estate trustee for the estate of Johann Rubin
Jacob Kaufman, counsel for Morris Rubin
Henry Juroviesky, counsel for Faigy Hammer and Sarah Werner
Jessica Firestone, counsel for Joseph Pernica, litigation guardian for Ida Rubin

HEARD: March 16, 2018

ENDORSEMENT

[1] A case conference was held this morning by telephone. The purpose of the case conference was to settle the terms of the court's order dated November 24, 2017 and to schedule competing motions for costs.

[2] All counsel who wished to do so have previously made written submissions on the form of the order in issue. They were content that the form of the order be settled during the call today. In accepting the form of order proposed by the estate trustee, I was accepting the form of schedule "A" to which the parties had consented in open court.

[3] Settling an order is an administrative act that counsel is required to conduct in good faith. The order is to be drafted simply. It records, in the appropriate format, the operative terms of the tribunal's endorsement. Settling an order is not an opportunity for clients to negotiate or for counsel to regret a consent given. Rather, settling an order is a professional matter that counsel is required to perform regardless of the positions or preferences of the client. *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.* (1991), 1991 CanLII 7311 (ON SC), 5 OR (3d) 65 (MC).

[4] The applicant seeks costs against Ms. Hammer, Ms. Werner, and their lawyer Henry Juroviesky personally for time and cost she says was wasted in the order settlement process. Ms. Hammer and Ms. Werner wish to bring a motion for costs as well although I am unsure of the subject matter of that proposed motion. I have already received written costs submissions concerning the November 24, 2017 hearing. No further costs motion for that hearing is required.

[5] I have advised the parties previously that I am no longer case managing this matter generally. I do not recall reserving costs other than with respect to the November 24, 2017 order. Costs of the order settlement process remain an open topic. If any party believes that there is another proceeding that I heard for which costs remain a live issue, then he, she, or they may serve a motion record on the other parties and have it delivered to my attention before the end of March. A case conference will then be held to schedule submissions and to consider whether the costs sought on any motion that I heard remain available. Otherwise, if the parties have motions to bring, they may do so on the Estates List in the ordinary course.

[6] The applicant's motion record under rule 57.07 was delivered to the court on February 21, 2018. Mr. Juroviesky advised this morning that he has yet to put LawPro on notice of the motion for costs against him personally. He undertook to do so forthwith.

[7] The costs of the order settlement process are very modest. Although costs are sought personally against a lawyer and therefore it is necessary and appropriate that a full opportunity to respond be provided, the process must still be proportionate. Ms. Hammer and Ms. Warner may need independent counsel to respond as Mr. Juroviesky and they are potentially adverse in interest. It may be that they will resolve matters among themselves to remove the potential for adversity.

[8] Although some time has passed already, some further time is required due to Mr. Juroviesky not taking steps to see to his own and his clients' representation. Accordingly, Ms. Hammer, Ms. Warner, and Mr. Juroviesky shall respond to the outstanding motion by serving the other parties and delivering to my attention any evidence upon which they rely by April 6, 2018. Counsel are to schedule a case conference by telephone for the following week at which further procedural steps, if any, will be discussed under Rule 50.13 (6).

[9] The parties are on notice that during that case conference, in accordance with rule 57.01 (7) the court will devise and adopt the simplest, least expensive, and most expeditious process that appears fitting at that time.

[10] It is perfectly obvious that the current motions are uneconomical and are designed to make tactical points among counsel. This litigation has been extremely hard fought and expensive already. There is a very substantial amount of money at stake. The principal parties are siblings. The allegations among them have been exceptionally nasty and betray an underlying personal bitterness that perhaps only family members can hold toward one another. The siblings are now engulfed in a sea of professionals poised to engage on a very extensive and expensive voyage through years and years of legal and accounting documentation to re-package history to best suit their own current positions. The costs and distress of the process seem to be more attractive to the parties than sitting down, splitting a difference, and salvaging whatever is left of their family ties while their mother remains alive. There is enough money available that none of them will notice the difference in the long run. Instead, they choose to play out their damaged family dynamics in a public forum at great expense and with immense personal emotional cost.

[11] I decided to stop case managing this case because it became a tool to help the parties bludgeon each other rather than to resolve their issues. This has become one of a small number of unfortunate cases in which case management seems to encourage the parties to disagree.

[12] Normally, parties recognize that case management should encourage reasonable compromise and cooperation. Most parties do not want to show themselves to be taking unreasonable positions in front of a judge whom they know will be seeing them over and over again. Moreover, most reasonable parties recognize that with some cooperation on procedural matters such as scheduling, there are great advantages available in case management like streamlining the issues and reducing delay in the proceedings. Parties usually realize a case management premium by cooperating.

[13] But sometimes, the low cost of case management leads parties to an erroneous conclusion that they should harden their positions and decline even the slightest cooperation because the process of seeking resolution is so quick and cheap. The judge is just a phone call away. In these cases, the judge becomes the parties' private referee. The parties get repeated, privileged access to a judge. They are prepared to abuse the judge's commitment of non-sitting time to their case in hopes of achieving minor tactical gains and showing a resoluteness to oppose even the most trivial concession. In those circumstances, case management does not move the case forward or lessen expense.

[14] Case management only works where counsel are able to cooperate and to obtain instructions to do so from their clients. Case management can fail as well where counsel focus on their obligation to be zealous and fearless advocates while ignoring the concomitant obligation to do so "in a way that promotes the parties' right to a fair hearing in which justice can be done." The quoted words are found right after the obligation to be fearless in Commentary [1] to Rule 5.1-1 of the *Rules of Professional Conduct*. The overriding commitment to fairness and justice is part and parcel of the obligation to be zealous and fearless advocates. Otherwise, we revert to trial by battle in which parties pay champions to assault each other. That is not justice as we know it.

[15] In *Hryniak v Mauldin*, 2014 SCC 7, at para. 28, the Supreme Court of Canada reminded us that the principal goal of the civil justice system is a "fair process that results in a just adjudication of disputes."

[16] Now counsel are swinging at each other personally because they cannot even get orders settled without judicial intervention. Whether issues are born of bilateral, proper, hard fought negotiating, or unilateral, improper conduct remains to be determined if necessary. Another front is opened in the unrelenting distress of this family's war. How much preferable might it be for the parties to take a step back and choose to resolve their difficulties another way? Perhaps, for example, a judge with background in their issues might agree to help them discuss a negotiated outcome.

F.L. Myers J.

Date: March 16, 2018

Tab 164

CanLII

Meridian Credit Union Limited v. Baig, 2016 ONCA 150 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2016-02-25
File number:	C59249
Other citations:	394 DLR (4th) 601 — 262 ACWS (3d) 934 — 346 OAC 57 — 35 CBR (6th) 158 — [2016] OJ No 947 (QL) — 63 RPR (5th) 179
Citation:	Meridian Credit Union Limited v. Baig, 2016 ONCA 150 (CanLII), <https://canlii.ca/t/gngt9>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Meridian Credit Union Limited v. Baig, 2016 ONCA 150
DATE: 20160225
DOCKET: C59249

Strathy C.J.O., LaForme and Huscroft JJ.A.

BETWEEN

Meridian Credit Union Limited

Plaintiff (Respondent)

and

Ahmed Baig

Defendant (Appellant)

Milton A. Davis and John Adair, for the appellant

vicarious liability or his counsel's concession. Therefore, it is not necessary to address this ground of appeal.

II. The interveners' arguments

[41] During the motion, counsel for the appellant invited the motion judge to render a "decision on the merits in favour of either party". The motion judge found that the appellant was liable to Meridian on the basis of fraudulent misrepresentations, including misrepresentations made by the interveners.

[42] The interveners' position is that, by making adverse findings against them in their absence, the motion judge breached the rules of natural justice and procedural fairness. They rely on the principle of *audi alteram partem*, or the right to be heard.

(a) Fresh evidence

[43] The interveners also seek to introduce as fresh evidence affidavits sworn by a lawyer with Miller Thomson and by Kiborn. The affidavits provide evidence concerning what the interveners knew of the summary judgment motion and why they were not present at it. They are the same affidavits sworn for the intervention motions, and were the subject of cross-examination by Meridian.

[44] The interveners first contend that the fresh evidence should be admitted pursuant to this court's decision in *R. v. Poulos*, 2015 ONCA 182, 124 O.R. (3d) 675, at paras. 13-14. They argue that because the affidavits concern the validity of the motion process and comply with the normal rules of evidence, they should be admitted.

[45] In any case, the interveners say the criteria in *R. v. Palmer* 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at p. 775, are satisfied. That is, the evidence: (i) could not, through the exercise of due diligence, have been adduced at the summary judgment motion; (ii) is relevant in that it bears on a decisive or potentially decisive

issue; (iii) is reasonably capable of belief; and (iv) if believed, could reasonably be expected to have affected the result at the motion being appealed.

[46] The fresh evidence application should be denied. *Poulos* does not assist the interveners because their honest, though mistaken, belief about the outcomes possible does not affect what rights they were entitled to. In other words, the fresh evidence is irrelevant to the validity of the process followed by the motion judge.

[47] The fresh evidence application also fails if considered under the *Palmer* criteria, for similar reasons. Because the interveners' belief is irrelevant to the issues raised, the fresh evidence could not have affected the results of the motion below.

(b) The interveners' right to be heard

[48] The interveners were witnesses in the summary judgment motion. No relief was sought from them and none was granted. Although they were not present at the motion, the motion judge released a decision which, they say, seriously affects them. The motion judge found that they had prepared documents which contained fraudulent misrepresentations and held that they had "actively hid" Yellowstone's ownership through those misrepresentations.

[49] As noted in *Ontario (Provincial Police) v. Mosher*, 2015 ONCA 722, 340 O.A.C. 311, at paras. 60-63, the principle of *audi alteram partem*, which the interveners rely on heavily, is composed of two elements: a right to be heard by a decision-maker, and a right to notice of a hearing sufficient in time and substance to enable a party to present their case. In my opinion, the interveners did not have a right to be heard or to receive notice in this case.

[50] *Audi alteram partem* applies whenever a person's rights, interests, or privileges are affected by a decision. As non-parties to this action, the interveners are not directly impacted by the order. They are not bound by the motion judge's

Tab 165

CanLII

Alevizos v. Nirula, 2003 MBCA 148 (CanLII)

Source:	Court of Appeal of Manitoba
Date:	2003-12-05
File number:	AI02-30-05293
Other citations:	234 DLR (4th) 352 — 127 ACWS (3d) 563 — [2004] 10 WWR 634 — 180 Man R (2d) 186 — [2003] MJ No 433 (QL) — 15 RPR (4th) 167
Citation:	Alevizos v. Nirula, 2003 MBCA 148 (CanLII), <https://canlii.ca/t/1g2q1>, retrieved on 2026-01-18

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Kroft and Hamilton JJ.A.

B E T W E E N :

IOANNIS ALEVIZOS and DARCIE SINGLE-ALEVIZOS	)	***R. E. Olschewski and J. M. Feuer***
	)	*for the Appellants*
(Plaintiffs) (Appellants) Respondents	)	
	)	***B. R. Kress***
	)	*for the Respondents*
- and -	)	
	)	*Appeal heard:*
JASBIR NIRULA and SARTAJ NIRULA	)	***September 11, 2003***
	)	
	)	*Judgment delivered:*
(Defendants) (Respondents) Appellants	)	***December 5, 2003***

SCOTT C.J.M.

1 The question of law to be decided on this small claim appeal is whether the judge's conclusion, that the vendors of residential property made a fraudulent

defect, no matter how plain, should be considered to be latent simply because its cause was not visible or known.

17 In response, the purchasers' counsel simply argued that the trial judge was correct.

Analysis

18 There can be no doubt that *caveat emptor* is alive and well in Manitoba despite its well-publicized deficiencies. In *Stotts v. McArthur* (1991), 1991 CanLII 12042 (MB CA), 75 Man.R. (2d) 212 at para. 18, this court considered with approval the following statement from V. DiCastri, Q.C., *Law of Vendor and Purchaser*, 3rd ed. (Toronto: Carswell, 1988), vol. 1 (at para. 239):

> It is reasonably clear that a vendor is not obliged to disclose all known facts affecting the value of the land which may be material to the purchaser's judgment. The purchaser must form his own judgment: *caveat emptor*. This principle, though much criticized, continues to demonstrate a disconcerting durability.

19 Thus mere silence without more on the part of the vendor with respect to a defect subsequently discovered by a purchaser will not normally found a cause of action against the vendor by the purchaser for misrepresentation or for fraud. But there are exceptions as we shall see, if a vendor is found to have been deceitful.

20 A convenient summary of the general principles relating to falsity by omission, silence or inaction is found in *Halsbury's Laws of England*, 4th ed. reissue (London: Butterworths, 1998), vol. 31 (at para. 748):

> **When silence constitutes falsity.** There are two main classes of case in which reticence may contribute to establish a misrepresentation: (1) where known material qualifications of an absolute statement are omitted; and (2) where the circumstances raise a duty on the representor to state certain matters, if they exist, and where, therefore, the representee is entitled as against the representor to infer their non-existence from the representor's silence as to them.

21 By way of elaboration, *Halsbury's* notes (at paras. 749-50):

> The representor must not merely abstain from positive falsehood; he must not knowingly or willingly omit anything which is required to render completely true that which without it is not completely true. … mere incompleteness is not a factor in misrepresentation; it must always be proved clearly that it rendered what was stated fallacious and false.
>
> Where a person has said something to another, a duty may at once arise to say more, and if he fails to discharge this duty his reticence from that point becomes an implied misrepresentation, although complete silence throughout the transaction would not have amounted to, or have afforded any evidence of, misrepresentation, or even of actionable non-disclosure.

22 The point is neatly summarized in Fridman's *Law of Contract*, *ibid*. (at p. 324):

> A distinction must be made between a failure to disclose which in effect renders what has been stated a misrepresentation, and a failure to disclose which leaves anything said or written as true, but results in some misconceptions since the whole truth has not been told. The former kind of non-disclosure if fraudulent is fraudulent misrepresentation. For this to occur there must be what Lord Cairns in *Peek v. Gurney* [(1873), L.R. 6 H.L. 377 at 403] described as "some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false."

23 Many authorities illustrate this latter point. In *Peek*, Lord Chelmsford also noted (at p. 392):

> … half a truth will sometimes amount to a real falsehood; and I go farther and say, that to my mind it contains a positive misrepresentation. The language of the prospectus must be read in the sense in which the Respondents must have known it would be understood.

24 It is clear therefore that silence and half-truths can amount to a fraudulent misrepresentation. As explained in *Tapp and Another v. Lee* (1803), 3 Bos. & Pul. 367, 127 E.R. 200 at 203: "Fraud may consist as well in the suppression of what is true, as in the representation of what is false," and see *Curtis v.*

Chemical Cleaning and Dyeing Co., Ltd., [1951] 1 All E.R. 631 (C.A.) (at p. 634):

> … a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation.

See as well *C.R.F. Holdings Ltd. et al. v. Fundy Chemical International Ltd. et al.* (1980), 1980 CanLII 586 (BC SC), 14 C.C.L.T. 87 (B.C.S.C.), aff'd on issue of liability at 1981 CanLII 488 (BC CA), [1982] 2 W.W.R. 385 (C.A.), *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1990), 1990 CanLII 6952 (ON SC), 75 O.R. (2d) 513 (Gen.Div.), appeal allowed in part at (1993), 1993 CanLII 8673 (ON CA), 13 O.R. (3d) 229 (C.A.), and many other cases to like effect.

25 In sum, as stated in G. Spencer Bower, K.C., & The Hon. Sir A. K. Turner, *The Law of Actionable Misrepresentations*, 3rd ed. (London: Butterworths, 1974) (at p. 94):

> To state a thing which is true only with qualifications or additions known to, but studiously withheld by, the representor, is to say the thing which is not. Such a statement is a "lie", and one of the most dangerous and insidious forms of lie. "If a man", says Chambre J. [in *Tapp v. Lee* at p. 372] "professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood."

26 In addition to silence and half-truths that mislead or imply something other than the truth, active concealment of a defect that would otherwise be patent is treated as fraudulent. While active concealment is most often encountered as a physical cover-up, that is to say an action to hide a visible defect, its application is much broader in scope. See *Halsbury's, ibid.* at vol. 42 (at para. 46):

> … any active concealment by the vendor of defects which otherwise would be patent is treated as fraudulent, and the contract is voidable by the purchaser if he has been deceived by it. Any conduct calculated to mislead a purchaser or lull his suspicions with regard to a defect known to the vendor has the same effect.

27 As noted by Masten J. in *Leeson v. Darlow et al.*, 1926 CanLII 407 (ON CA), [1926] 4 D.L.R. 415 (Ont.S.C., App. Div.) (at p. 432):

> Active concealment of a fact is equivalent to a positive statement that the fact does not exist. By active concealment is meant any act done with intent to prevent a fact from being discovered ….

28 The purpose of active concealment, of course, is to make latent that which would otherwise be patent. *Gronau v. Schlamp Investments Ltd.; Canada Trust Co.* (1974), 1974 CanLII 1295 (MB QB), 52 D.L.R. (3d) 631 (Man. Q.B.). Kenny J., in *Belzil v. Bain* (2001), 45 R.P.R. (3d) 233, 2001 ABQB 890, put the point this way: "Where there is an active concealment of an otherwise patent defect, the general rule of *caveat emptor* will not apply" (at para. 63). *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1980), vol. 42, explains (at p. 48), therefore, where work is done on a house which results in concealment of a patent defect, an action for recovery of damages arises as if it was a fraudulent misrepresentation. See, for example, *Unrau et al. v. Gay* (1983), 30 R.P.R. 198 (N.S.S.C.).

29 I note in passing that there are a number of court decisions such as *McGrath v. MacLean* (1979), 1979 CanLII 1691 (ON CA), 22 O.R. (2d) 784 (C.A.), *Gumbmann et al. v. Cornwall et al.* (1986), 44 R.P.R. 114 (Ont.S.C.), and *Allen et al. v. McCutcheon et al.* (1979), 1979 CanLII 280 (BC SC), 9 R.P.R. 191 (B.C.S.C.), which in my view incorrectly explain the principle by stating that it applies when latent defects are actively concealed; this is not right – it is rather the concealing of a patent defect to make it latent that makes the activity fraudulent.

30 In this instance, it can certainly be said that the PCS, which states that the only "flooding or leakage" was due to frozen pipes and omits all reference to other leakage, constitutes an "act done with intent to prevent a fact from being discovered" (*Leeson*, at p. 432**)**, or to put it another way, the purchasers were "induced to withhold inquiry." See *Rasch v. Horne*, 1930 CanLII 275 (MB CA), [1930] 3 D.L.R. 647 at 651 (Man.C.A.). This is sometimes referred to as

Tab 166

CanLII

Outaouais Synergest Inc. v. Lang Michener LLP, 2013 ONCA 526 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2013-08-26
File number:	C53648
Other citation:	116 OR (3d) 742
Citation:	Outaouais Synergest Inc. v. Lang Michener LLP, 2013 ONCA 526 (CanLII), <https://canlii.ca/t/g06wv>, retrieved on 2026-01-18

Outaouais Synergest Inc. v. Lang Michener LLP et al.

[Indexed as: Outaouais Synergest Inc. v. Lang Michener LLP]

Ontario Reports

Court of Appeal for Ontario,

Blair, Rouleau and Pepall JJ.A.

August 26, 2013

116 O.R. (3d) 742 | 2013 ONCA 526

Case Summary

Professions — Barristers and solicitors — Negligence — Municipality building road on farm property and entering into agreement with owner that it would recover portion of its construction costs from subsequent owner — Deferred payment mechanism implemented by creation of 0.3 metre reserve abutting farm property which was owned by municipality and which would be released upon payment by subsequent owner — Cost recovery agreement not registered on title but title search revealing existence of reserve and of restrictive covenant that referred to cost recovery — Plaintiff purchasing property for development without being aware of cost recovery agreement — Trial judge not erring in finding that plaintiff's solicitor was negligent in failing to thoroughly investigate access issues raised by existence of reserve.

Real property — Registration — Municipality building road on farm property and entering into agreement with owner that it would recover portion of its construction costs from

Keenan testified that it was his intention to provide notice that there would be charges against the reserve. Apart from anything else, the existence of the amendment at least underscores the obligation of the purchaser under the agreement of purchase and sale to satisfy itself regarding what the cost recoveries related to the reserve entailed.

[74] Finally, in a handwritten addition to Sch. "A", the vendor represented to the purchaser "that the Vendor has never conducted or caused to be conducted any environmental tests, studies or investigations whatsoever on the Property". Whether that representation was untrue was the subject of much attention at trial, but the trial judge found that the Keenans had not conducted or caused any environmental tests to be conducted, although others had. For present purposes, the representation extracted by the purchaser underscores the fact, in my view, that [page760] where the purchaser wished to protect itself from the rigours of the doctrine of *caveat emptor*, it did so expressly.

[75] Given this context, I turn now to the trial judge's conclusions and the appellant's arguments concerning fraudulent misrepresentation.

Fraudulent misrepresentation

[76] The trial judge found, at paras. 106-107, that the cost recovery clause could be said to be a defect relating to the quality of the lands to be conveyed and a defect relating to title -- the two types of title defect to which *caveat emptor* relates.[2] He noted that, aside from prohibiting active concealment or a failure to disclose a latent defect rendering premises dangerous, a vendor is under no duty to disparage his property and may remain silent. This is because, in Ontario, as a general proposition, a vendor is, apart from express contract, under no general duty to disclose defects relating to title or to quality: see Bora Laskin, Q.C. (as he then was), "Defects of Title and Quality: *Caveat Emptor* and the Vendor's Duty of Disclosure", in *Special Lectures of the Law Society of Upper Canada 1960: Contracts for the Sale of Land* (Toronto: Richard De Boo Ltd., 1960), at p. 401; McCamus, at p. 102.

[77] This court and the Manitoba Court of Appeal have both confirmed that silence and half-truths can amount to fraudulent misrepresentation and that, where a vendor, who has no duty to speak, decides to break that silence, the doctrine of *caveat emptor* falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised: see *Krawchuk v. Scherbak* (2011), 106 O.R. (3d) 598, [2011] O.J. No. 2064, 2011 ONCA 352, at para. 77, citing *Kaufmann v. Gibson*, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293 (S.C.J.); *Alevizos v. Nirula*, [2003] M.J. No. 433, 2003 MBCA 148, 180 Man. R. (2d) 186, at paras. 18-25. These cases involved situations where vendors completed voluntary vendor disclosure statements in residential real estate transactions.

[78] The appellant contends that when a vendor discloses information in an agreement of purchase and sale that he may not have been required to disclose, the doctrine of *caveat emptor* [page761] similarly falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised. In *Peek v. Gurney* (1873), L.R. 6 H.L. 377, [1861-73] All E.R. Rep. 116 (H.L.), at p. 403 H.L., Lord Cairns long ago described falsity by half-truth as "a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false".

[79] The appellant contends that if Harold Keenan intended the amendment to disclose the existence of the cost recovery associated with lifting the 0.3 metre reserve -- as he said he did -- the disclosure had to be forthright. Instead, the amendment was couched in "half-truths", deceptively leading the purchaser and Saikaley to believe the amendment referred only to municipal development charges (which the purchaser was prepared to absorb, thinking they were minor), when he knew the cost recovery agreement related to the costs of the road project and gave rise to a much more significant financial obligation on the part of the purchaser.

[80] The appellant rests this submission on the trial judge's comment, at para. 41, that the amendment "standing on its own did little to give meaningful notice of the nature of the obligation awaiting anyone who intended to purchase and develop the Keenan land". Having so concluded, the appellant contends, the trial judge erred in failing to consider the legal effect of that conclusion.

[81] In my opinion, the amendment in clause 7 of Sch. "A" is not a misstatement of the nature described in *Peek*, if it is a misstatement at all.

The context of the amendment

[82] As described above, the amendment did not stand alone, an important qualification to the trial judge's observation that it did little to give meaningful notice of the nature of the obligation contained in the cost recovery clause. Context is important. Here, the context includes the fact noted by the trial judge that the means by which the cost recovery clause "derives its force, the .3 metre reserve, appears in the records of the land registry office as depicted on Plan 4R-14871" and "the presence of the reserve is sufficient to put a purchaser on notice that inquiries need[ed] to be made" (at para. 99).

[83] The context also includes the restrictive covenant registered against the reserve lands, which was in Saikaley's search file. This covenant states: "no part of the [0.3 metre reserves] shall be dedicated as a public road until such time as the [municipality] has collected from the owners of the lands [page762] adjacent to such part a proportionate share of [the municipality's] costs incurred in connection with [the road project]". Other relevant aspects of the context are that the agreement of purchase and sale placed the onus on the purchaser to satisfy itself on matters relating to access and the purchaser's solicitors were specifically advised to satisfy themselves in response to the requisition concerning unregistered easements, restrictions or encumbrances affecting the property.

Interpreting the amendment in context

[84] When the amendment is read in this context, its reference to "all costs recovered to the City of Ottawa to its .3 metre reserve" is not, as explained in *Peek*, such a fragmentary statement of fact as to make the statement false, in my opinion.

[85] The amendment specifically requires the purchaser to satisfy "all costs recovered to the City of Ottawa to its .3 metre reserve". While this obligation was expressed as an inclusion in "municipal development charges for the property", the wording clearly signals an obligation for "costs recovered" to the city -- that is, an obligation referencing something that has happened in the past -- as opposed to a fee or something to defray costs incurred by the municipality in the future.

[86] It seems to me that all of the foregoing was sufficient to put the purchaser on notice to clarify exactly what those "costs recovered to the City of Ottawa to its .3 metre reserve" entailed. It may be that the language of the amendment was not as clear as it might have been. However, Saikaley had the proposed amendment in advance of the agreement of purchase and sale being signed, and could have asked for clarification, but did not.

[87] Given the foregoing context, and what was known or ought to have been known by the purchaser or its solicitors, I do not see how it could be said -- even if one accepts that the language in the amendment was ambiguous -- that it constituted "some active misstatement of fact, or at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false" (*Peek*, at p. 403 H.L.).

[88] For these reasons, I would not give effect to the argument that Harold Keenan, having decided to break silence and give notice of the cost recovery clause -- if that is what he did -- was in violation of an obligation to disclose it in a more forthright fashion. While he may have been nibbling at the edges of the "honest fair-dealing" concept referred to by the trial judge, Keenan's conduct -- having regard to all of the circumstances outlined above -- did not rise to the level

where it would be [page763] "unconscientious for [him] to avail himself of the advantage obtained": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, [2002] S.C.J. No. 20, 2002 SCC 19, at para. 39, citing *McMaster University v. Wilchar Construction Ltd.*, 1971 CanLII 594 (ON SC), [1971] 3 O.R. 801, [1971] O.J. No. 1717, 22 D.L.R. (3d) 9 (H.C.J.), at p. 811 O.R., p. 19 D.L.R.

Equitable fraud/bad faith

[89] The appellant points to the principle established in *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, 1978 CanLII 215 (SCC), [1978] 2 S.C.R. 1072, [1978] S.C.J. No. 52, at p. 1084 S.C.R., that a vendor is under a duty to act in good faith and to take all reasonable steps required of the vendor to complete the sale. It contends that the cost recovery clause in the 1999 agreement could have been disclosed to the purchaser at any time prior to the sale, and should have been disclosed in response to the purchaser's requisition concerning unregistered restrictions or other encumbrances.

[90] According to the appellant, Harold Keenan breached the duty of good faith in failing to disclose the cost recovery clause in the 1999 agreement and his conduct "reaches the unconscionable conduct threshold for equitable fraud". It contends that, as a person experienced in real estate and development matters -- having been a councillor for the City of Gloucester and a member of its planning committee for ten years -- Keenan knew that the 1999 agreement was unregistered and effectively undetectable because of that, and he could not have failed to appreciate the practical effect of the agreement was to reduce the value of the land (as the trial judge subsequently observed in his costs reasons).

[91] It seems to me that the appellant's interrelated equitable fraud and bad faith argument is misconceived for several reasons. First, the appellant did not plead equitable fraud, which may well explain why the trial judge did not refer to this doctrine.

[92] Moreover, the appellant offers no authority for the view that the concept of equitable fraud is applicable in the present circumstances. The leading authority on equitable fraud is the English Court of Appeal's decision in *Kitchen v. Royal Air Force Assn.*, [1958] 2 All E.R. 241, [1958] 1 W.L.R. 563 (C.A.), where Lord Evershed M.R. defined equitable fraud as "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other" (at p. 249 All E.R.).

[93] Although not necessarily an exclusive list, there appear to be certain recognized circumstances where the concept of equitable fraud is engaged. First, conduct amounting to equitable [page764] fraud or fraudulent concealment may prevent a party from relying on a limitation period or other statutory provision that would otherwise exonerate the party from liability: see *Guerin v. Canada*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, [1984] S.C.J. No. 45, at p. 356 S.C.R. (*per* Wilson J.), and at p. 390 S.C.R. (*per* Estey J.); *First City Capital Ltd. v. British Columbia Building Corp.*, 1989 CanLII 2868 (BC SC), [1989] B.C.J. No. 130, 43 B.L.R. 29 (S.C.); *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, [2008] B.C.J. No. 1298, 2008 BCCA 278, 81 B.C.L.R. (4th) 199, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 416. Second, conduct amounting to equitable fraud is one of the preconditions to the availability of the remedy of rectification of a contract on the grounds of unilateral mistake: see *Sylvan Lake*, at paras. 38-39. Finally, equitable fraud has been used to describe conduct that gives rise to a breach of a fiduciary duty or other equitable obligation: see *Canson Enterprises Ltd. v. Boughton & Co.*, 1991 CanLII 52 (SCC), [1991] 3 S.C.R. 534, [1991] S.C.J. No. 91, at p. 571 S.C.R.

[94] None of the recognized circumstances for considering whether a party has engaged in conduct amounting to equitable fraud exist in the present case. Harold Keenan is not seeking to rely on any limitation period or other statutory provision to escape liability. Outaouais did not seek a remedy of rectification of the agreement of purchase and sale. Finally, Keenan did not owe any fiduciary duty to Outaouais in the circumstances of this commercial transaction where both parties were represented by counsel.

[95] Nor is there any other basis on which to find equitable fraud or to find that Harold Keenan acted in bad faith. There is nothing in the agreement of purchase and sale, or, as mentioned, in the context of the transaction, that placed any onus on the vendor to carry out the purchaser's obligation to make inquiries on the purchaser's behalf. This is not a case like *Dynamic Transport*, where the vendor failed to discharge an implied obligation to apply for subdivision approval when obtaining such approval was the only way that business efficacy could be given to the sale agreement.

[96] While the vendors clearly knew of the cost recovery clause and its materiality, it was reasonably discoverable by the purchasers. Had the purchaser's lawyer made the necessary inquiries, which it was incumbent upon him to do, the payment requirement would have been revealed. He failed to do so, however, and in the circumstances that failure should not be visited upon the vendors. Within the boundaries of law and equity, and in the absence of any representation and warranty requiring otherwise, commercial real estate vendors such as the respondents, [page765] who are parties to a *caveat emptor* type of agreement of purchase and sale, are entitled to conduct themselves as the respondents did.

Disposition

[97] I would accordingly dismiss the appeal.

[98] The respondents Douglas Keenan and Outaouais are entitled to their costs, fixed in the amount of $25,000 each, inclusive of disbursements and GST. In the circumstances, we make no order as to costs with respect to the respondent Harold Keenan.

Appeal dismissed.

Notes

1 The project was described as "the Algoma Road Extension Kenaston Street Re-Alignment" and involved the construction of a municipal road, sanitary sewer, storm sewer and water services on the lands conveyed by the Keenans to the city.

2 Briefly, the distinction between defects in title and defects in quality is this: a defect in title relates to deficiencies that impair the quality of *ownership* of the lands; a defect in quality relates to deficiencies in the quality of *the property* to be conveyed that affect the use to which the land may be put and the physical condition of the lands or structures or improvements made to them: see McCamus, at p. 115.

End of Document

Tab 167

CanLII

Hamilton (City) v. Metcalfe & Mansfield Capital Corporation, 2012 ONCA 156 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2012-03-13
File number:	C53208
Other citations:	347 DLR (4th) 657 — 212 ACWS (3d) 832 — 290 OAC 42 — [2012] OJ No 1099 (QL)
Citation:	Hamilton (City) v. Metcalfe & Mansfield Capital Corporation, 2012 ONCA 156 (CanLII), <https://canlii.ca/t/fqj56>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Hamilton (City) v. Metcalfe & Mansfield Capital Corporation, 2012 ONCA 156
DATE: 20120313
DOCKET: C53208

Blair and LaForme JJ.A. and Benotto J. (*ad hoc*)

BETWEEN

City of Hamilton

Plaintiff (Appellant)

and

Metcalfe & Mansfield Capital Corporation, Metcalfe & Mansfield Alternative Investments VII Corp., Barclays Bank PLC, Deutsche Bank Securities Limited, Quanto Financial Corporation, DBRS Limited, The Bank of New York and CIBC Mellon Trust Canada

Defendants (Respondents)

reasoning in these cases supported the City's position, these cases are not nearly as on point and persuasive as *Central Trust* and *Nykredit*.

(6) Extent of the damage

Damage and damages are different concepts

[54] The City's position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. *Damage* is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. *Damages*, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was *damage*.

[55] The Nova Scotia Court of Appeal in *Smith v. Union of Icelandic Fish Producers Ltd.*, 2005 NSCA 145, 238 N.S.R. (2d) 145, approved a description of the distinction by A.I. Ogus in *The Law of Damages* (London, Butterworths, 1973), at p. 2:

> The terms "damage" and "damages" have suffered from loose usage. Some writers and judges have used them as if they were synonymous. But "damages" should connote the *sum of money payable by way of compensation*..., while the use of "damage" is best confined to instances where it refers to the *injury inflicted* by the tort or breach of contract...

[56] In *Smith*, at para. 122, the court held that damage (or injury) occurred when the plaintiff entered into a non-competition agreement based on a misrepresentation by the defendant employer because: (1) he was at the very least deprived of the opportunity to negotiate, or attempt to negotiate, a better deal or seek out alternatives; and (2) he was induced to comply with the non-competition agreement without receiving the corresponding benefit that the employer misrepresented it would provide him.

[57] Similarly in the City's case, damage occurred when the City purchased the Devonshire notes as: (1) the City could have negotiated, or at least tried to negotiate, a lower purchase price for the notes had it known their true nature; and (2) the City became subject to a purchase agreement without the corresponding benefit of obtaining the safe, liquid investment that the City had been allegedly assured by the respondents.

[58] While the City may not have known the monetary measure of its loss until the Devonshire notes matured and it was not repaid, the City incurred loss sufficient to give rise to its cause of action when it entered into the transaction to purchase the Devonshire notes.

(7) Some damage is required, not the full extent

[59] The City's position that damage did not occur until the Devonshire notes matured is grounded in the damage element of negligent misrepresentation as it is phrased in *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC), [1993] 1 S.C.R. 87, at p. 110: "the reliance must have been detrimental to the representee *in the sense that damages resulted*" (emphasis added).

[60] A plain reading of this phrase might suggest that one ought to analyze when the City incurred damages (the monetary measure of its detrimental reliance) to determine when its cause of action arose. However, doing so would, in my view, fundamentally alter the discoverability principle, which is well-settled in law.

[61] The authorities make it very clear that "some damage" is sufficient for the cause of action to accrue and to start the limitation period. The Supreme Court of Canada set out the discoverability principle in *Peixeiro v. Haberman*, 1997 CanLII 325 (SCC), [1997] 3 S.C.R. 549, at para. 18:

> Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per*

Tab 168

CanLII

Holmes Foundry Ltd. v. Village of Point Edward Caposite Insulations Ltd. v. Village of Point Edward, 1963 CanLII 197 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1963-05-21
Other citations:	[1963] 2 OR 404 — 39 DLR (2d) 621 — [1963] OJ No 737 (QL)
Citation:	Holmes Foundry Ltd. v. Village of Point Edward Caposite Insulations Ltd. v. Village of Point Edward, 1963 CanLII 197 (ON CA), <https://canlii.ca/t/g1cvl>, retrieved on 2026-01-18

Holmes Foundry Ltd. v. Village of Point Edward
Caposite Insulations Ltd. v. Village of Point Edward

[1963]2 O.R. 404-411

ONTARIO
[COURT OF APPEAL]
LAIDLAW, SCHROEDER and McGILLIVRAY, JJ.A.
21st MAY 1963.

Statutes -- Legislation retroactively affecting prior decision of Court -- Special levy in rating by-law declared invalid by Courts for want of required approval -- Retroaxtive corrective legislation after appeal orally dismissed -- Judgment reversed on rehearing -- Policy of legislation no concern of Courts.

The principle that an order can always be withdrawn or modified by a Judge Suo motu or on application of a party until such time as it is drawn up, passed and entered applies to an order of the Court of Appeal given orally at the conclusion of the hearing where, before being drawn up and entered, retroactive legislation became effective requiring reversal of the order. The Courts have no concern with the policy of ex post facto legislation once it is determined that the legislation is within the competence of the enacting Legislature.

A municipality was held to have no power to include a levy for sewer charges in a relating by-law where it had not received Municipal Board approval, under s. 64(1) of the Ontario Municipal Board Act, R.S.O. 1960, c. 274, of the by-law raising funds to pay for the sewer works, although

approval had been obtained for the works themselves. After an appeal had been heard and orally dismissed legislation was enacted with retroactive effect declaring that notwithstanding the decision of any Court, the Board approval in s. 64(1) was the approval of the works or project only. On rehearing held the legislation was valid and retroactively validated the impugned rating by-law. The additional objection raised on rehearing that a money by-law was required to authorize imposition of the sewer rate was untenable; this was so only where debentures were to be issued. The municipality had passed all necessary by-laws.

Costs -- Successful action against municipality -- Rehearing of appeal because of retroactive legislation enacted after appeal orally dismissed -- Municipality successful -- Disposition of costs.

Where plaintiffs succeeded in actions against a municipality challenging the validity of a by-law in so far as it included a levy for sewer charges, and the judgment was affirmed orally on appeal at the conclusion of the hearing but before entry and issue of the order of the appellate Court a retroactive legislative enactment undercut plaintiffs' position and on motion by appellant municipality the appeal was allowed, held, by a majority, plaintiffs were justified by the state of the law at the time of the actions and appeals in taking the proceedings and they should have their costs of the actions and of the appeals down to the time of the motion for rehearing. Per Laidlaw, J.A., dissenting; the change in the judgment of the Court, necessitated by the legislation, cannot be attributed to either party and there should be no costs either of the actions or of the appeals.

APPEALS by a municipality from judgments of Gale, J., invalidating a certain by-law levying sates for sewer works. Reversed on a motion for rehearing in consequence of retroactive intermediate legislation which became effective after oral judgment dismissing the appeal.

[Re Harrison's Share under a Settlement, Harrison v. Harrison, [1955] 1 Ch. 260, [1955] 1 All E.R. 185, Phillips v. Eyre (1870), 40 L.J.Q.B. 28, refd to]

H.E. Manning, Q.C., for appellant, defendant.

D. Park Jamieson, Q.C., and K.G. Stoner, for respondent,
plaintiff.

LAIDLAW, J.A. (dissenting as to costs):-- The appellant is an incorporated village in the County of Lambton, Province of Ontario. respondents are companies duly incorporated and carry on business in the appellant municipality. Each of the respondents commenced an action on May 4, 1962 and claimed inter alia "a declaration that the defendant (appellant) municipality wrongfully and without authority levied part of the cost of the sewage works constructed by the defendant municipality against the property of the plaintiff in the Village of Point Edward by including in By-law number 1371 for 1961 of the defendant municipality (which by-law fixed the rates to be levied against the full assessed value of all the property within the limits of the defendant municipality a sewage rate of 9.05 mills, without passing and obtaining the requisite approval, of a by-law to provide for and authorize the imposition of a sewer rate against the property of the plaintiff and others in the municipality". Both actions came on for trial together before Gale, J., and in written reasons for judgment given by him he expressed the opinion "that Section 64 of The Ontario Municipal Board Act applies in the circumstances, and the result is, that before the Village here could effectively collect moneys to pay for any part of the sewer charges for 1961, it had to pass not only a by-law with respect to the levying of such charges but that by-law had to have the prior approval of the Ontario Municipal Board". Accordingly it was held that although the municipality had received the approval of the Municipal Board under s. 64 of the Ontario Municipal Board Act, R.S.O. 1960, c. 274 to the sewer project it also required the approval of the Board to the by- law providing for the raising of funds to pay for the project.

The municipality corporation appealed to this Court from the judgment delivered by Gale, J., and at the conclusion of the hearing of the appeal it was the unanimous opinion of the Court that the

judgment in appeal should be affirmed and that the appeal should be dismissed with costs. The opinion of the Court and the reasons for judgment were stated orally. The order of the Court has not been perfected by the entry and issue thereof. In the meantime the Legislature of the Province of Ontario passed an Act cited as the Ontario Municipal Board Amendment Act, 1962-63, c. 97, s. 1(1). That Act was assented to by His Honour the Lieutenant-Governor of the Province of Ontario on April 26, 1963 and came into force on the day it received Royal assent. I now reproduce s. 1 of the Act.

> 1(1) Section 64 of The Ontario Municipal Board Act is amended by adding thereto the following subsection:

1a) The approval of the Board mentioned in subsection 1 means and, notwithstanding the decision of any court, shall be deemed always to have meant the approval of the undertaking, work, project, scheme, act, matter or thing mentioned in subsection 1.

Counsel for the appellant moves this Court "for leave to present argument that the appeal should be allowed, having regard to the provisions of The Ontario Municipal Board Amendment Act, 1962-63 (No. 2) [now c. 97]".

It is well settled in law that an order can always be withdrawn, altered or modified by a Judge either on his own initiative or on the application of a party until such time as the order has been drawn up, passed and entered. I refer to Re Harrison's Share under a Settlement, Harrison v. Harrison, [1955] 1 Ch. 260 at p. 275, [1955] 1 All E.R. 185.

Counsel for the respondents does not challenge the right of this Court in the circumstances of the instant case to withdraw its oral judgment and to alter or modify that oral judgment in such manner as may be proper. He argued, however, that the Court ought not exercise that right to alter the oral judgment for these reasons

(1) The Ontario Municipal Board Amendment Act was passed without any opportunity being afforded to the respondents to make any submissions as to their rights in law.

(2) That Act was an unwarranted and unjustifiable intervention in proceedings pending in the Courts and the judgments of the Courts of this Province including the Court of Appeal for Ontario and in part constituted a judicial declaration that those Courts erred in the interpretation and the meaning and effect given by them to s. 64 of the Ontario Municipal Board Act.

(3) The Ontario Municipal Board Amendment Act was a wrongful exercise of judicial powers of a Court of last resort.

(4) In any event and apart altogether from the meaning and effect of s. 64 of the Ontario Municipal Board Act and the amendment thereto it was necessary in law for the municipality to pass a special money by-law to provide for annual payments on account of their debt to the Ontario Water Resources Commission and in the absence of such special money by-law the councol of the Village of Point Edward could not lawfully include in By-law 1371 for 1961 the rate to be levied against the full assessed value of all the properties within the limits of the municipality to pay the sum due and payable in that year to the Ontario Water Resources Commission.

The Ontario Municipal Board Amendment Act is twofold in character. First, it contains a definition of the words "approval of the Board mentioned in subsection 1" of s. 64. In that respect counsel for the respondents takes no exception. Secondly, it contains a judicial declaration of law that overrules and countermands judgments of the Courts of the Province in pending proceedings and thus is an exercise of judicial functions of a Court of last resort. During the course of argument members of the Court expressed views of disapproval and criticism of that kind of legislation and counsel for all parties notwithstanding their great experience and learning stated that they had been

unable to find any precedent for legislation of that character. However, since the hearing I have found the law stated clearly and with ample authority in Clement's Canadian Constitution, 3rd ed., pp. 357-8. I quote as follows:

> When once it is determined that an Act passed by any Canadian legislature, federal or provincial, is within the power conferred by the British North America Act it is not for any Court of justice to enquire further.
>
> .....
>
> "It can not be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say."
>
> Courts of law are interpreters merely in such case and have no right to enquire whether the jurisdiction has been exercised wisely or unwisely, justly or unjustly. Magna Charta may be interfered with; taxation imposed without regard to uniformity or equality; class legislation and laws discriminating against race may be enacted; one man's property may be taken from him and given to another without compensation; ex post facto legislation passed; in short, the power may be abused but "the only remedy is an appeal to those by whom the legislature is elected."

Counsel for the respondent argued that the Legislature did not have power to pass that part of the Ontario Municipal Board Amendment Act now the subject of controversy. I reject that argument; it is my opinion that the Legislature did have that power. Unquestionably the Legislature had power at the time s. 64(1) was enacted to define the meaning of the words "approval of the Board" as mentioned therein. Likewise it possessed that power at the time the Ontario Municipal Board Amendment Act was passed and in my opinion it had power to make that definition retroactive in force and effect. In Phillips v. Eyre (1870), 40 L.J.Q.B. 28, Willes, J., said at p. 37:

> Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. ... Accordingly the Courts will not ascribe retrospective force to new lwas affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. But to affirm that it is naturally or necessarily unjust to take away a vested right of action by Act subsequent is inconsistent both with the common law of England and the constant practice of legislation.

At p. 38 he referred to Calder v. Bull (1798), 3 Dallas Rep. 386, in which the Supreme Court of the United States "held that an Act of the State of Connecticut passed to set aside a decree of a Court of Probate, and grant a new hearing was valid, though the effect was ultimately to deprive the party in whose favour the first decision was made of the benefit of the decree". After quoting from the decision in that case the learned Justice proceeded to say at p. 39:

> In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. ... Whether the circumstances of the particular case are such as to call for special and exceptionable remedy, is a question which must in each case involve matter of policy and discretion fit for debate and decision in the Parliament which would have had jurisdiction to deal with the subject- matter by preliminary legislation, and as to which a court of ordinary municipal law is not commissioned to inquire or adjudicate.

I refer also to A.-G. Can. v. Foster (1892), 1892 CanLII 202 (NB KB), 31 N.B.R. 153. Having reached the conclusion that the Ontario Municipal Board Amendment Act was wholly within the jurisdiction and power of the Legislature of Ontario I follow the authorities quoted, supra, and

make no further inquiry and now deliberately refrain from expressing any views as to whether the jurisdiction has been exercised "wisely or unwisely, justly or unjustly".

The point that By-law 1371 was invalid in so far as it included the sewer rate to be levied against the full assessed value of all the properties within the limits of the municipality because there is no money by-law approved by the Ontario Municipal Board to provide for and authorize the imposition of such sewer rate was not the subject of argument at the time this appeal first came on for hearing because counsel for the respondents was content to rest his case in this Court or the interpretation and the meaning and effect of s. 64 of the Ontario Municipal Board Act. However, he did not waive or abandon his right to support the judgment at trial on the ground now relied on by him and accordingly, this Court heard argument on the point at length. It is my opinion that the objection taken by counsel for the respondent is not sound in law and cannot be given effect. He contended that this case is not distinguishable from one in which the cost of the project is to be paid by the issue of debentures. I cannot agree. I cannot find in s. 282 of the Municipal Act, R.S.O. 1960, c. 249, any obligation on the part of a municipality to pass a money by-law for raising in each year by special rate on all the rateable property in the municipality the sum due and payable by the municipality as a contract debt in such year except in the case of a money by-law for the issuing of debentures. But, be that as it may, the Ontario Municipal Board authorized the municipal corporation to enter into an agreement with the Ontario Water Resources Commission for the construction of the sewers and for that purpose the municipal corporation was authorized to "exercise all its powers and pass all requisite by-laws". In pursuance of that authority the council of the municipal corporation passed a by-law authorizing the reeve and clerk of the municipality to enter into an agreement with the Ontario Water Resources Commission for the completion of each phase of the sewage work. Each agreement was made a schedule to a by-law covering each phase. In each agreement the municipality agrees in accordance with s. 40 of the Ontario Water Resources Commission Act, R.S.O. 1960, c. 281, to pay to the commission certain sums in each calendar year for a period of 30 years. I conclude that all requisite by-laws were passed by the council of the municipality and that no other special money by-law was requisite to give validity to that part of By-law 1371 now in question.

I have given much thought to the matter of costs of the proceedings between the parties at trial and in this Court and have concluded that I must dissent from the opinion of my learned brethren. I can find no reason to believe or even suspect that the Ontario Municipal Board Amendment Act was passed at the instigation or upon the request or other action of the appellant. It is said by counsel to have been deemed necessary and expedient by advisors of the government by reason of other similar cases in which large sums of money are owing by various municipalities to the Ontario Water Resources Commission. Thus, whatever may have been the reason for passing the Act I could not justify an order that the appellant pay the costs of the proceedings because of any advantage or benefit obtained by the appellant under the Act or any hardship or prejudice occasioned thereby to the respondents. If the law as declared in the Ontario Municipal Board Amendment Act must be deemed to have had force and effect at the time of the commencement of the action, then in my opinion the action would have been properly dismissed with costs to be paid by the plaintiff's to the defendant. Likewise, an appeal, if any, from such a judgment would have been dismissed with costs. I think that in the circumstances of this case the alteration of the opinion of this Court as delivered orally and an order that the judgement at trial be set aside and the action dismissed cannot be attributed directly or indirectly, either wholly or in part, to either party. It is simply the result of a change in the law as made by the Ontario Municipal Board Amendment Act. In the circumstances I would not order the payment of costs by either of the parties at trial or in this court.

My conclusion is that the judgement of this Court delivered orally should be withdrawn forthwith; that it should be set aside and in place thereof an order should be made that the appeal to this Court be allowed; that the judgement at trial should be set aside and in place thereof, that the action should be dismissed; and there should be no order as to costs of the action or in this Court.

SCHROEDER, J.A.:-- I agree with the disposition of this appeal as proposed by the Honourable Mr. Justice Laidlaw for the reasons expressed by him, except as to the disposition of costs. In the state of the law as it was at the time of the institution of these actions, and the appeal from the judgement at trial, the plaintiffs were fully warranted in taking the proceedings brought and continued by them. I therefore deem it proper to exercise my discretion with respect to costs in favour of the plaintiffs and accorkingly I would direct that they should have the costs of the actions and of the appeals down to the defendant's motion to this Court for a rehearing, as to the costs of which latter proceeding I would make no order. Save as aforesaid, I concur in the judgement of my brother Laidlaw.

McGILLIVRAY, J.A.:-- Other than as to costs I concur with the disposition of this action by Laidlaw, J.A.; and I concur with Schroeder, J.A., as to costs.

Tab 169

CanLII

Castlerigg Investments Inc. v. Lam (Gen. Div.), 1991 CanLII 7355 (ON SC)

Source:	Superior Court of Justice
Date:	1991-02-15
Other citations:	2 OR (3d) 216 — 25 ACWS (3d) 539 — 47 CPC (2d) 270 — [1991] OJ No 204 (QL)
Citation:	Castlerigg Investments Inc. v. Lam (Gen. Div.), 1991 CanLII 7355 (ON SC), <https://canlii.ca/t/g13hw>, retrieved on 2026-01-18

Castlerigg Investments Inc. v. Lam and Lam Skin Care Products Ltd.
Indexed as: Castlerigg Investments Inc. v. Lam (Gen. Div.)

2 O.R. (3d) 216
[1991] O.J. No. 204

ONTARIO
Ontario Court (General Division)
Dennis Lane J.
February 15, 1991

Civil procedure -- Trial -- Re-opening of trial -- Trial judge who has not been rendered functus by taking out of formal order having untrammelled discretion to re-open trial to hear new evidence -- Fundamental consideration being avoidance of miscarriage of justice -- Proof not required that evidence could not have been obtained for trial with exercise of reasonable diligence.

In an action for recovery of rent, the landlord and the tenant adduced conflicting evidence as to the landlord's mitigation of damages, the tenant claiming that the premises were re-leased before the end of the term of the lease and the landlord denying this. The trial judge accepted the landlord's evidence. After reasons for judgment were delivered but before the formal judgment had been taken out, the tenant moved to re- open the trial on the grounds of the discovery of new evidence (two unsworn statements which supported the tenant's allegation that the premises were re-leased before the end of the term) and a new legal argument on the issue of interest. While the new evidence would have affected the outcome of the trial, it could have been obtained before trial by

the exercise of reasonable diligence. The question was whether there was any requirement that the evidence could not have been available for introduction at trial with the exercise of reasonable diligence where the application to introduce new evidence is made to the trial judge before he has been rendered functus by the taking out of a formal order.

Held, the application should be allowed.

A trial judge who has not yet been rendered functus has untrammelled discretion in determining whether to re-open a trial so as to ensure that a miscarriage of justice does not occur. There is no basis for fettering a trial judge who has not become functus with the same rules which apply to courts of appeal. In particular, there is no basis for a requirement of proof that the evidence could not have been obtained for the trial with the exercise of reasonable diligence. This was an appropriate case for the re-opening of the trial to permit the hearing of the proposed evidence.

Since the tenant failed to show that the point of law which he wished to argue was prima facie meritorious, that aspect of the trial should not be re-opened.

APPLICATION to re-open a trial before the formal judgment was taken out.

Clayton v. British American Securities Ltd. (1934), 1934 CanLII 229 (BC CA), 49 B.C.R. 28, [1935] 1 D.L.R. 432, [1934] 3 W.W.R. 257 (C.A.), apld 394363 Ontario Ltd. v. Fuda (1983), 1984 CanLII 1994 (ON SC), 42 O.R. (2d) 779 (Master) [revd (1984), 44 O.R. (2d) 698 (Div. Ct.)]; Saginur v. Sbrocchi (1979), 12 C.P.C. 21 (Ont. Master); Scott v. Cook, 1970 CanLII 331 (ON SC), [1970] 2 O.R. 769, 12 D.L.R. (3d) 113 (H.C.J.), consd Bauz v. Registrar of Motor Vehicles, [1950] O.W.N. 386 (H.C.J.); Whitehall Development Corp. v. Walker (1977), 1977 CanLII 1249 (ON CA), 17 O.R. (2d) 241, 4 C.P.C. 97 (C.A.); distd Other cases referred to Hosking v. Terry (1862), 15 Moo. P.C.C. 493, 15 E.R. 581, 10 W.R. 884 (P.C.); Marchyshyn v. Fane Auto Works Ltd., 1932 CanLII 281 (AB CA), [1932] 4 D.L.R. 618, [1932] 3 W.W.R. 232 (Alta. C.A.); Mitsui & Co. v. Ocelot Industries Ltd. (1986), 1986 ABCA 39 (CanLII), 43 Alta. L.R. (2d) 189, 68 A.R. 120, [1986] 3 W.W.R. 337 (C.A.); Urichuk v. Code Hunter (1986), 1986 ABCA 65 (CanLII), 68 A.R. 128 (C.A.) Statutes referred to Interest Act, R.S.C. 1985, c. I-15, ss. 4, 5 Rules and regulations referred to Rules of Practice, R.R.O. 1970, Reg. 545, rule 529

A. Irvin Schein and Ian J. Cantor, for plaintiff.

Adrian Hill, for defendants.

DENNIS LANE J.:-- This is a motion to re-open a trial which I heard on November 21, 1990 and in which I delivered reasons for judgment on November 30, 1990. The formal judgment has not been taken out. The grounds argued by the defendants to re-open the case are the discovery of new evidence and a new legal argument on the matter of interest.

The action was on a lease dated November 15, 1979 between Regency Investments Limited as landlord (subsequently succeeded by the plaintiff) and "Hubert Lam of Scarborough, Ontario, carrying on business as Lam Skin Care Products Ltd." as tenant. The term of the lease expired December 27, 1989. The tenant moved out in late 1988 and the suit essentially was to recover the rent for the year 1989. The major issue in the case was the identity of the tenant, the corporate entity or the individual defendant. I found the individual defendant to be the tenant. The only other defence pleaded was that the plaintiff interfered with the efforts of the defendant to sublet the property. This defence was not pursued at trial.

At trial counsel for the tenant contended that the tenant's obligation to pay rent should cease at August 31, 1989 because there was evidence that the premises were occupied by a real estate company, Century 21, as tenant by that date. The evidence relied on was that of Mr. and Mrs. Lam, each of whom testified to having passed the building in about September 1989 and going up to

look at the premises. Mrs. Lam said she saw people and office furniture and a Century 21 sign. Mr. Lam said he saw a reception, desks all set up as a business office and people working. The plaintiff's evidence, from its president Mr. Fishman, was that no new tenant was obtained in 1989 and that while Century 21 occupied other space in 1989, it had people in the Lam space only from January 1990. Mr. Reoch, the plaintiff's real estate agent, said he did everything he could to lease the space but got no new tenant in 1989. In September 1989, he was still advertising the Lam space for lease.

There was thus a conflict of credibility. In the reasons I delivered on November 30, 1990, I preferred the evidence of Mr. Fishman and Mr. Reoch to the evidence of the Lams on the point. It was also the case that there had been no pleading of any occupation by the landlord in breach of the covenant for quiet enjoyment.

It was common ground between the parties that the Lam premises were renovated by the landlord in the summer of 1989. Counsel for the defendant took no point as a result of this renovation because he recognized that it was a necessary step to render the premises suitable for leasing to a new occupant.

The new evidence which is offered on the issue of the occupation of the leased premises by Century 21 is outlined in two unsworn statements dated in January 1991. Domenico Colapietro says that he is the janitor in the building in question and that the Lam premises were occupied in September or at the latest October 1989 by Beverly Hills Realty Corporation (Beverly Hills), a Century 21 real estate office. Rosanna Rocci says that she is a part time sales representative of Beverly Hills working in the subject building. She says that in the summer of 1989 Beverly Hills, which had occupied the third floor of the building, moved to the second floor space formerly occupied by the defendants. She says that by October 1989 the entire Lam Skin Care premises were occupied by Beverly Hills.

If the evidence of Colapietro and Rocci had been presented to me at trial and had survived cross-examination, it seems probable to me that I would have preferred the sum total of the evidence of the Lams, Colapietro and Rocci to the evidence of Fishman and Reoch. Since I have not seen either Colapietro or Rocci in order to assess their credibility, I cannot be certain of this. Further, if counsel for the defendant had been armed with the statements which he now has from these witnesses for the purpose of cross-examining Fishman and Reoch, he might have succeeded in shaking their evidence. In presenting his argument to me on this motion, counsel for the defendant, who was the trial counsel, quite candidly stated that he could not say that the evidence was not available to him prior to the trial in November 1990. He said he made a judgment that the evidence of Mr. and Mrs. Lam would be believed. Accordingly, he did not seek out people such as Colapietro and Rocci to bolster the Lams' evidence.

On these facts, the proffered evidence meets the first test employed in the cases to be cited below; that it would probably have affected the outcome of the trial. However, if the test for admission of new evidence includes a requirement that the evidence could not have been available for introduction to the trial with the exercise of reasonable diligence, the applicant cannot meet it. Is there any such requirement where the application to introduce new evidence is made to the trial judge before he has been rendered functus by the taking out of the formal order embodying his judgment?

An extensive discussion of the legal principles involved in an application such as this can be found in Clayton v. British American Securities Ltd. (1934), 1934 CanLII 229 (BC CA), 49 B.C.R. 28, [1935] 1 D.L.R. 432, [1934] 3 W.W.R. 257 (C.A.). After written judgment had been handed down but before entry of the judgment, the defendant moved the trial judge for an order to permit further evidence on the main issue in the case. It was held that it was open to the trial judge, prior to entry of judgment to re-open. At pp. 440-41 D.L.R., Macdonald J.A. said:

> My view has always been that the trial Judge might resume the hearing of an action apart from rules until entry of judgment but as it was vigorously combatted I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment -- but before entry showing that the judgment was wrong and the trial Judge was convinced of its authenticity no lack of diligence by solicitor in producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.
>
> There are reasons for rules governing the admission of evidence by an Appellate Court, not applicable to a trial Judge. Hearing new evidence is a departure from its usual procedure and it is fitting that departures in ordinary practice should be limited by rules to prevent abuse. Entry of judgment may be merely a formality but it is necessary that at some arbitrary point the jurisdiction of the trial Judge should end. A vested right to a judgment is then obtained subject to a right to appeal and should not be lightly jeopardized. Before the gate is closed by entry a trial Judge is in a better position to exercise discretion apart from rules than an Appellate Court. He knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to new evidence offered. I may add that he might well be guided, although not bound by the rules referred to.

In the following pages Macdonald J.A. extensively reviewed the authorities in England on the re-opening of trials after decision but before entry of judgment. He concluded that there was no basis in the English authorities for fettering a trial judge who has not yet become functus with the same rules which applied to courts of appeal. In particular, there was no basis for a requirement of proof that the evidence could not have been obtained for the trial with the exercise of reasonable diligence. He acknowledged that a trial judge should proceed with caution and should inquire into the circumstances of the discovery of the evidence, but that, having done so, his discretion was untrammelled by the rules that applied to courts of appeal.

The reasoning of the British Columbia Court of Appeal is persuasive. It is argued, however, that there is Ontario authority to the contrary. My attention is drawn to Bauz v. Registrar of Motor Vehicles, [1950] O.W.N. 386 (H.C.J.); Scott v. Cook, 1970 CanLII 331 (ON SC), [1970] 2 O.R. 769, 12 D.L.R. (3d) 113 (H.C.J.); Whitehall Development Corp. v. Walker (1977), 1977 CanLII 1249 (ON CA), 17 O.R. (2d) 241, 4 C.P.C. 97 (C.A.) and 394363 Ontario Ltd. v. Fuda (1983), 1984 CanLII 1994 (ON SC), 42 O.R. (2d) 779 (Master) [revd (1984), 44 O.R. (2d) 698 (Div. Ct.)].

In Bauz, Wells J. decided the case primarily on the character of the evidence test and only secondarily referred to diligence. He found the evidence would not have substantially altered his view of the matter in issue. He noted that the proposed witnesses -- a doctor and his patient the plaintiff -- had both given evidence at trial but neither had mentioned the matter now sought to be introduced. He declined to exercise his discretion. The Clayton case was not drawn to his attention. The only authority referred to was Hosking v. Terry (1862), 15 Moo. P.C.C. 493, 15 E.R. 581, 10 W.R. 884 (P.C.), at pp. 503-04 Moo. P.C.C., which was a case in which the new evidence was not proffered until the case had already been appealed to the Supreme Court of New South Wales and thence to the Privy Council. For these reasons, I do not view Bauz as a definitive decision on the point before me.

Whitehall was a case where the Senior Master had given summary judgment. The order was taken out. An appeal to the Divisional Court was dismissed as was an application to the Court of Appeal for leave to appeal. Only at this stage was the new evidence brought forward in a motion before Van Camp J. to set aside the senior master's order. Her refusal to do so was upheld in the Court of Appeal in part because the evidence could have been ascertained by the exercise of reasonable diligence in time for the trial. This is clearly not a case like the one before me, where the motion is made to me as trial judge while I am still seized of the case.

Fuda is a decision of Master Peppiatt on an application to re-open a summary judgment which had not been taken out, in order to admit new evidence and argue a new point of law. Much of the case was concerned with whether the master, as opposed to a judge, could make such an order. Dealing with the issue of the circumstances under which such an order might be made, the master adopted the test set out in Whitehall and then referred to the decision of Master Sandler in Saginur v. Sbrocchi (1979), 12 C.P.C. 21 (Ont. Master) at p. 23 where that learned master set out a test similar to that in Whitehall and including a reasonable diligence requirement.

In Saginur after summary judgment had been granted but before the judgment was taken out, the defendant applied to file a new affidavit of merits disclosing new facts. The learned master applied a reasonable diligence test. In doing so, he reasoned by analogy to then Rule 529 of the Rules of Practice, R.R.O. 1970, Reg. 545, which he recognized applied to judgments that had already been issued and entered. Although a number of cases were reviewed by the master, primarily relating to motions to replace one affidavit of merits by another, none of the cases relating to re-opening a trial -- Bauz, Clayton or Scott -- were drawn to his attention.

The principal case relied on before me by the respondents was Scott v. Cook, supra, where Grant J. heard and decided a motor vehicle case. Before the judgment was taken out, the plaintiff applied to him as trial judge to re-open the trial and admit further evidence. He heard the proposed evidence and concluded that it would have been of little help at the trial and would not have altered the decision already given. He then reviewed the law, beginning at p. 773 O.R., p. 117 D.L.R., with the statement:

> On an application to the trial Judge to receive further evidence after reasons for judgment have been delivered but before entry of judgment, he is not restrained by the strict rule that prevails on an application to the Court of Appeal for a new trial.

He continued by citing from Bauz, supra, Wells J.'s reference to the test relating to the character of the evidence but not the reference to reasonable diligence. Next he referred to Marchyshyn v. Fane Auto Works Ltd., 1932 CanLII 281 (AB CA), [1932] 4 D.L.R. 618, [1932] 3 W.W.R. 232 (Alta. C.A.), from which he cited the passage (at p. 620 D.L.R.) relating to the character of the evidence, but not the immediately preceding passage relating to reasonable diligence. Marchyshyn was an application to the Court of Appeal and the standard of reasonable diligence clearly applied.

Grant J. then quoted from Clayton the two passages quoted by me earlier in these reasons. He concluded that all these cases showed that the test as to the character of the evidence was more stringent in an application to the Court of Appeal than in one made to the trial judge. An applicant to the trial judge must show that the new evidence, if presented at trial, would probably have changed the result, whereas on an appeal the applicant must show the evidence to be conclusive or practically so and not merely corroborative. He then said [p. 774 O.R.], in the passage primarily relied on by the respondent before me:

> In both instances the party must also prove that such evidence could not have been obtained by reasonable diligence before the trial.

He concluded his reasons with a summary of the position as he drew it from the authorities (pp. 774-75 O.R., pp. 118-19 D.L.R.):

> (1) The trial Judge should have unfettered discretion in this matter so as to ensure that a miscarriage of justice does not occur;
>
> (2) before entry of a judgment, the trial Judge is in a better position to exercise that discretion than is an appellate Court. The trial Judge knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to the new evidence offered;
>
> (3) the authorities indicate that a trial Judge can always reconsider his decision until the judgment is drawn up and entered;
>
> (4) the trial Judge is the one in the best position to judge the bearing of the new or further evidence upon the case in light of the evidence already heard;
>
> (5) once a litigant has obtained a judgment, he is entitled not to be deprived of it without very solid grounds.

Grant J. in Scott was clearly focusing on the test relating to the character of the evidence. That was the basis on which he decided the case; indeed, at p. 770 O.R., p. 114 D.L.R., he records that counsel for the respondents did not challenge the evidence as to diligence and expressly asked that the case be decided on the basis that the evidence was not of such a character that it should be admitted in the circumstances. No doubt this explains why the passages as to reasonable diligence from Bauz and Marchyshyn were not quoted by him and why there is no analysis of that requirement but merely the flat statement that reasonable diligence is required. That statement is not easy to reconcile with the subsequent five-point summary. In these circumstances I think I do nothing disrespectful of that learned judge when I say that that particular passage appears to me to be both obiter and not the considered result of analysis of the authorities.

Accordingly, no Ontario authority has been put before me by counsel which prevents me from adopting the view of the British Columbia Court of Appeal in Clayton as the law of Ontario in the narrow set of circumstances here presented.

I am conscious that a diligence requirement is a salutary one and in most cases I would expect trial judges would scrutinize the circumstances of the discovery of the evidence with care being, as Macdonald J.A. suggests, guided but not bound by the rules applicable to appellate courts. But in the final analysis, it appears to me that the Clayton rule is appropriate [p. 441 D.L.R.]:

> The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.

Applying my discretion to the case at bar I note that:

1. The proposed evidence, while corroborative of the evidence of the Lams, is not simply further one-time observations of other people in the Lam space, but evidence of actual occupation for business purposes, in one case from an employee of the new tenant;

2. If accepted by me, such proposed evidence would probably have led to the conclusion that the plaintiff was in breach of the lease and may well not be entitled to rent for October- December, an amount of some $20,000;

3. The alleged occupation began, if at all, after examination for discovery had taken place. It is said that at the discovery questions were objected to on the subject of the occupation of the premises and no motion was brought to require answers. While, for this reason, there may, strictly speaking,

have been no obligation under the rules to disclose the alleged changes in the facts, the court should not encourage any such practice of non-disclosure of material facts;

4. It is admitted that the evidence could have been brought to court for the trial had counsel thought it necessary;

5. If the proposed evidence is ultimately accepted, the court has been misled -- perhaps deliberately -- by the evidence of the plaintiff's witnesses;

6. To the extent that there has been expense which would not have been incurred if the evidence had been brought at trial, a remedy in costs is at hand.

Weighing up these factors, and bearing in mind that the primary objective is to avoid a miscarriage of justice, I direct that the trial be re-opened to permit the hearing of the proposed evidence and any reply evidence the plaintiff may wish to call upon the issue of the use and occupation of the premises in September, October, November and December 1989. If necessary, the pleadings may be amended to raise this issue.

There is a further issue. The defence wishes to present argument that the lease interest rate of 2 per cent per month is contrary to the Interest Act, R.S.C. 1985, c. I-15, and the plaintiff is thereby restricted to 5 per cent per annum. The applicant cited only ss. 4 and 5 of the Interest Act. The respondent plaintiff cited a number of cases to support the view that the Interest Act applies only to interest arising out of an agreement to extend time for payment of a loan or purchase price in return for payment of interest and not to interest paid, in effect as damages, for a wrongful withholding of money which ought to have been paid: see Mitsui & Co. v. Ocelot Industries Ltd. (1986), 1986 ABCA 39 (CanLII), 43 Alta. L.R. (2d) 189, 68 A.R. 120, [1986] 3 W.W.R. 337 (C.A.); Urichuk v. Code Hunter (1986), 1986 ABCA 65 (CanLII), 68 A.R. 128 (C.A.). There is no allegation here that there was any agreement to extend the time for payment of rent in return for interest; the claim is clearly for interest in consequence of failure to pay rent on time.

There was no plea of this point in the statement of defence and no explanation has been suggested for the failure to raise it earlier. Unlike the occupation issue, nothing has changed since the action began. An applicant for such relief must be prepared to show that the point of law is at least prima facie meritorious. This has not been shown; indeed, the cases cited show the contrary. I decline to re-open this aspect of the trial.

The parties should speak to the trial co-ordinator to have the action placed upon my list at the earliest possible date. Costs are reserved for disposition at the end of the re-opened trial.

Application allowed.

Tab 170

CanLII

Smith Bus Lines Ltd. v. Bank of Montreal, 1987 CanLII 4190 (ON SC)

Source:	Superior Court of Justice
Date:	1987-12-30
Other citations:	61 OR (2d) 688 — 25 CPC (2d) 255 — [1987] CarswellOnt 566 — [1987] OJ No 1197 (QL)
Citation:	Smith Bus Lines Ltd. v. Bank of Montreal, 1987 CanLII 4190 (ON SC), <https://canlii.ca/t/g1czc>, retrieved on 2026-01-18

Smith Bus Lines Ltd. v. Bank of Montreal

61 O.R. (2d) 688
[1987] O.J. No. 1197

Ontario High Court of Justice
Sutherland J.
December 30, 1987.

[QL Ed. note: In the paper version, the oral decision of Rosenberg J. in this matter, rendered July 30, 1987, was incorporated within the judgment of Sutherland J., beginning at 1987 CanLII 4189 (ON SC), 61 O.R. (2d) 690. The two decisions have been separated in the online version to enable linking to citators. The following headnote was published on the combined case and applies to both decisions.]

Civil procedure -- Costs -- Security -- Insufficient assets in province -- Burden on plaintiff to show undisclosed assets or impecuniosity -- Showing of impecuniosity requiring examination of merits -- Merits not determined from pleadings alone -- Where evidence of impecuniosity insufficient no need to examine merits -- Rule 56.01(d).

Courts -- Jurisdiction -- Provincial superior court -- High Court judge sitting in weekly court lacking jurisdiction to set aside order of other High Court judges.

The plaintiff appealed an order for security for costs and the appeal was allowed on the grounds of plaintiff's impecuniosity. The judge hearing the appeal, having learned before the order was taken out that, from the point of view of one of the parties, the argument had not been completed when

he adjourned, quashed his decision and referred the matter for rehearing. The judge rehearing the matter dismissed the appeal. In his reasons he held: (1) security for costs are awarded where the plaintiff has insufficient assets within the province to pay the costs; (2) the burden then shifts to the plaintiff to show either undisclosed assets or impecuniosity; (3) since impecuniosity would halt the action, the merits should be looked at to see if this would be just; (4) where the evidence of impecuniosity is insufficient to permit the master to determine whether or not the plaintiff is able to obtain the money to post security, the need to consider the merits does not arise; (5) nor can the merits be assessed on the basis of the pleadings alone.

The plaintiff moved in weekly court to quash the last decision as well as the decision to refer the matter for rehearing, and to restore the original decision allowing the appeal from the master. In the alternative the plaintiff asked for leave to appeal to the Divisional Court.

Held, the motion should be dismissed.

A judge in weekly court lacks jurisdiction to set aside an order of another High Court judge, at least where the order was not made ex parte and there is no allegation of fraud upon the other judges, nor any allegation of an error in calculation on the face of an order. Nor were there grounds for granting leave to appeal. The first judge had jurisdiction to vary or withdraw his order and refer the matter for rehearing. There was no reason to believe the decision of the second judge was wrong nor were there conflicting decisions.

MOTION (1) to quash an order of Rosenberg J., dismissing, after a rehearing, an appeal of an order for security for costs; (2) to quash an order of Hollingworth J. setting aside his own order, 1987 CanLII 4401 (ON SC), 60 O.R. (2d) 185, and referring to the matter for rehearing; (3) to reinstate Hollingworth J.'s first order allowing the appeal; (4) in the alternative for leave to appeal to the Divisional Court.

Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. (1986), 1986 CanLII 2683 (ON SC), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1; Smallwood v. Sparling (1983), 1983 CanLII 1930 (ON SC), 42 O.R. (2d) 53, 34 C.P.C. 24; John Wink Ltd. v. Sico Inc. (1987), 1987 CanLII 4299 (ON SC), 57 O.R. (2d) 705, 15 C.P.C. (2d) 187, consd Other cases referred to Re Cook and Morley, [1950] O.W.N. 739; Billinkoff's Ltd. v. Mid West Construction (1969) Ltd., [1973] 5 W.W.R. 26; Williams v. Adie (1966), 1966 CanLII 615 (BC CA), 57 W.W.R. 221; Tozer v. New Brunswick (1985), 4 C.P.C. (2d) 164; Canadian Land & Emigration Co. v. Municipality of Dysart (1885), 9 O.R. 495; Craig v. Kanseen, [1943] 1 All E.R. 108; Re Constantineau and Jones (1912), 26 O.L.R. 160 Statutes referred to Courts of Justice Act, 1984 (Ont.), c. 11, ss. 15, 16(2)(c) Rules and regulations referred to Rules of Civil Procedure, rules 1.03 (am. O. Reg. 323/86, s. 1), 37.14(1), (4), 56.01 (d) (rep. & sub. O. Reg. 221/86, s. 16), 59.01, 59.06(2), 62.02(1), (5)

L.A. Vandor, for applicant.
B.L. Grossman, for respondent.

SUTHERLAND J.:-- This motion is brought with respect to an appeal from the April 3, 1987 order of Master Peterson made under rule 56.01 and requiring the plaintiff corporation to provide security for the costs of the defendant. Under the order of the learned master the plaintiff was required to post security of $25,000 of which $8,000 was to be posted within 60 days of the order, and a further $17,000 within 30 days of the action being set down for trial. That order further provided that until security was posted the plaintiff was not to take any further step in the proceeding except for examinations of the defendant for discovery and except for an appeal of the order itself.

The plaintiff's appeal of the order came on on June 12, 1987, before the Honourable Mr. Justice Hollingworth who, on June 25th, released written reasons for an order allowing the appeal. After the release of those reasons counsel for the defendant wrote to Hollingworth J. expressing the view

that the hearing had not been completed on June 12th but was to have been adjourned to a date in July, to allow for further submissions and argument, especially by the defendant. After receipt of that letter Hollingworth J. informed counsel that he would allow them an opportunity to make further submissions, and he instructed that in the interim no order was to be taken out on the basis of his reasons released on June 25th.

By a further letter counsel for the defendant suggested that it would be preferable to have the appeal heard by another weekly court judge. On July 23rd there was a further hearing before Hollingworth J., at which submissions were made as to the latter suggestion. After that hearing Hollingworth J. decided to withdraw his decision of June 25th and he endorsed the record on July 23rd to the effect that there would be a rehearing of the appeal, de novo, before the Honourable Mr. Justice Rosenberg on the following day, July 24th.

When the matter was called by Rosenberg J. an objection as to jurisdiction was brought by the plaintiff, by way of a notice of motion dated July 24, 1987. Rosenberg J. reserved his decision on the motion and adjourned the appeal until the afternoon. On his return after lunch Rosenberg J. informed counsel that Hollingworth J. had made an addition to his July 23rd endorsement, the addition stating as follows: "A.H.H. I have decided to quash my decision." Rosenberg J. proceeded to hear the appeal de novo and on July 30th issued reasons dismissing the appeal and reinstating the master's order requiring the plaintiff to post security, with the variation that the first $8,000 was to be paid by September 22, 1987.

Time estimated for the hearing of this motion

The defendant, in order to protect its position, had served and filed within the prescribed time-limit a notice of application for leave to appeal from the June 25, 1987 decision of Hollingworth J. allowing the appeal from the master. That application was scheduled to come on for hearing on September 2, 1987, and it was estimated that it would have taken one and a half hours. When the defendant later abandoned that appeal (of a decision the defendant believed had been effectively withdrawn), the plaintiff was able to obtain the same date for the hearing of this motion. Notwithstanding that this motion covers a great deal more ground, the estimated time for the hearing of it was increased by a mere half-hour, making the total estimated time for the hearing two hours, i.e., the maximum estimated time for a regular weekly court motion or application. Matters estimated to take longer than two hours are classified, as is well known, as long motions and go on a different, and often slower, list or are made the subject of special arrangements. The court records show that this matter was heard on parts of three days -- and the total time of hearing was several times the estimated two hours. I tried to minimize the resulting inconvenience to counsel scheduled to appear on other matters in that court -- by commencing early on the second day and by adjourning this matter to the end of the list for that day, by the time we had reached the normal time of commencement, and by sitting later that day, and by commencing the hearing of the next matter as soon as the hearing of this one was completed on the third day. Despite those efforts it is clear that not only the court but several counsel on other matters were significantly inconvenienced by the gross and colourably self-serving under-estimate of the time required for this motion.

Order sought by moving party

As stated in the notice of motion dated July 29, 1987, the moving party (plaintiff) seeks:

> (a) an Order quashing the decision of Mr. Justice Rosenberg, dated July 24, 1987 and quashing the decisions of Justice Hollingworth dated July 23, 1987 and July 24, 1987;
>
> (b) an Order reinstating the decision of Mr. Justice Hollingworth, dated June 25, 1987;

(c) an Order requiring the Defendant to attend on Discovery regardless of the proceedings herein, and pursuant to the Order of Master Peterson dated April 3, 1987;

(d) in the alternative, leave to appeal to the Divisional Court from the Judgment of Mr. Justice Rosenberg dated July 24, 1987;

(e) in the further alternative, an Order to receive further evidence by Affidavit of Don McGinnis; and

(f) such further and other relief as this Court may deem just.

The application for relief made in para. (e) above was abandoned at the hearing, on the basis that it is properly brought to the court appealed to, if leave to appeal is granted, and so I have nothing more to say about it.

Requested order re attendance on discovery

Before I turn to a consideration of my jurisdiction to set aside orders of fellow judges of this court (and I believe that if there is such a jurisdiction the term "to set aside" would be appropriate and the term "to quash" inappropriate), I wish to deal with para. (c) set forth above, i.e., the request for an order that the defendant attend on discovery regardless of the other proceedings herein.

The master had permitted examinations for discovery to be proceeded with before any security for costs was posted. Hollingworth J. first issued reasons that would have allowed the appeal from the master's order as to security for costs, and subsequently he withdrew or purported to withdraw his order. The motion brought by the plaintiff before Rosenberg J. on July 24th included a motion for an order requiring the defendants to attend on discovery. The reasons of Rosenberg J. make no reference to the discovery question and the record does not show whether it was expressly dealt with by him elsewhere. Rosenberg J. dismissed, or purported to dismiss, the appeal from the order of the master, and the plaintiff contends that that means, either under the order of the master or under the first decision of Hollingworth J. herein allowing the appeal from the master there is no reason for not proceeding with the discoveries.

Counsel for the respondent bank points out that this part of the motion could be brought before a master, and that is acknowledged by counsel for the moving party. Moreover, there was no disputing of the assertion by counsel for the respondent that no proper material has been served on the respondent in respect of the alleged failure by the defendant to comply with a proper notice of appointment, in the sense that no affidavit (upon which there could be cross-examination seeking to show the impropriety of the notice of appointment) has ever been served. Counsel for the respondent asserts that the appointment was served for the wrong city and that if proper material were served she would be able to cross-examine with a view to establishing that.

Even if the time estimate for this motion had been much more accurate I would have dismissed this aspect of the motion without prejudice to the applicant's right to bring such a motion before the master on proper material. The woefully inaccurate time estimate might itself have been a reason for refusing to deal with this aspect of the motion even if proper material had been served and filed and an opportunity afforded for cross-examination thereon. Counsel for the moving party acknowledged that he found it more convenient to bring forward all matters in the same proceeding. Given that he was squeezing (if that is the appropriate term when the container bursts) this matter into a slight expansion of a time slot reserved for an obviously briefer matter, his blithe preference for his own convenience has little to commend it.

This aspect of the motion is dismissed without prejudice to the right, if any, of the applicant to bring such a motion before the master on proper notice and material.

Jurisdiction to hear and deal with this motion

It is clear, and not disputed, that under rule 62.02(1) the alternative relief, on application for leave to appeal the interlocutory order of Rosenberg J. to the Divisional Court, is properly brought before another High Court judge. With respect to the main relief sought by the moving party, that of setting aside orders of Hollingworth J. and Rosenberg J., I questioned whether one High Court judge sitting in weekly court had jurisdiction to set aside an order of another High Court judge, at least where, as here, the order in question was not made ex parte and there is no allegation of fraud upon the other judges, nor any allegation of an error in calculation apparent on the face of an order.

Counsel for both parties expressed the view that I had jurisdiction, except as stated above with respect to para. (e) of the notice of motion. Their reasons are, however, quite divergent.

Ms. Grossman, for the respondent, expressed with admirable clarity and economy, the view that, properly considered, the aspect of the motion as to which I found jurisdiction troubling, was not really a motion to set aside orders of my fellow judges of this court but an application for leave to appeal to those orders. Counsel points out that none of the orders have been entered. In her submission the reasons pronounced by Hollingworth J. have been withdrawn by him as he, acting judicially, had the right and power to do, and so exist no more. In the alternative, it is submitted that the decision of Hollingworth J. to withdraw his decision and to refer the matter to Rosenberg J. to be dealt with, de novo, is itself an interlocutory order of a High Court judge and so not appealable except by leave of another High Court judge, under Rule 62, the appeal, if such leave be granted, being to the Divisional Court. The order of Rosenberg J. is submitted to be another interlocutory order and subject to the same rule. At one level these submissions appear to pose the difficulty that they would make jurisdiction to enter upon the inquiry depend upon the (confidently predicted) result of the inquiry. It may be questioned whether the court could thus be said to be giving itself jurisdiction by, to use an old expression, hoisting itself by its own bootstraps. However, I do not believe that does justice to Ms. Grossman's argument. Her submissions as to jurisdiction do not depend on which way the court answers what she regards as the only proper question, i.e., whether or not to grant leave to appeal. Her submissions focus on what is the proper question and amount to an assertion that, because the applicant is wrong in its contention that Hollingworth J. lacked jurisdiction to withdraw his reasons of June 25th, and in its contention that Rosenberg J. either did not have jurisdiction to embark upon the hearing of the motion or lost jurisdiction by seeking a further endorsement by Hollingworth J., none of the July orders are nullities and therefore as interlocutory orders they can be attacked only by way of an application for leave to appeal. Those submissions would alone have been enough to cause me to embark upon the inquiry, reserving decision on the question of jurisdiction until the other submissions were made.

On behalf of the moving party Mr. Vandor made two main submissions in support of the position that I had jurisdiction to set aside the July orders referred to above. The first submission or group of submissions sought to establish that a single judge of the High Court sitting in weekly court had jurisdiction to set aside or declare null the impugned orders, on the basis of the interaction of a number of rules none of which, taken singly, would, or was asserted to, confer jurisdiction for such purposes. This submission involved quick oral references to a number of rules and was presented without the assistance of any written outline, in a factum or elsewhere, that could have been reviewed by me beforehand, or used as an aide memoire after or during the hearing. I am not able from my notes as supplemented from memory soon after the hearing to reconstruct the argument, but I do recall clearly that my conclusion at the time was that it was complex and unconvincing. I was reminded of the observation of the great French mathematician, Poincare, to the effect that if a mathematical equation looks elegant it is probably correct.

One of the provisions relied on by counsel for the moving party on the question of my jurisdiction is subrule 59.06(2), which states, as follows:

59.06(2) A party who seeks to,

(a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;

(b) suspend the operation of an order;

(c) carry an order into operation; or

(d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

It was acknowledged on behalf of the moving party that in this case there was not at any stage evidence of fraud relating to the order for security for costs, nor any evidence of facts arising or discovered after the decision of the master dealt with by Rosenberg J. or subsequent to the decision of Rosenberg J. The conditions precedent to an order under cl. (a) of subrule 59.06(2)(are thus not met and in my opinion this motion cannot be brought within that paragraph. Nor in my opinion does cl. (d) authorize a motion for the relief sought.

On behalf of the moving party reference was also made on the question of my jurisdiction, to the provisions of rule 37.14 and especially to subrule (4) thereof. For convenience of reference that subrule and subrule 37.14(1) are set out below:

37.14(1) A person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice; or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

. . . . .

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge, local judge or master in a proceeding in the High Court or District Court may be made,

(a) to the judge or master who made it, at any place; or

(b) where the order was made by,

(i) a High Court judge, to any other High Court judge,

(ii) a local judge, to any other local judge or a High Court judge,

(iii) a District Court judge, to any other District Court judge, or

(iv) a master, to any other master or a local judge,

at any place in accordance with rule 37.03 (place of hearing of motions).

I cannot agree that subrule 37.14(4) is a free-standing grant of jurisdiction; it supplements subrule 37.14(1), "or any other rule to set aside, vary or amend an order of a judge, local judge or master in a proceeding in the High Court or District Court", by stating to what court a motion otherwise authorized may be made, but it is not of itself a provision sufficient to confer jurisdiction. Here the moving party has not brought itself within subrule 37.14(1) nor within any of the other rules referred to in subrule 37.14(4), and so that subrule does not help it. Two of the links in Mr. Vandor's chain being not applicable, this branch of the argument fails.

In the second branch of his submission as to my jurisdiction, Mr. Vandor pointed out that although sitting in weekly court I was also designated as a judge of the Divisional Court and so had jurisdiction to deal with this motion if it was directed to me after it was declared by the Chief Justice or Associate Chief Justice of the High Court, acting pursuant to cl. 16(2) (c) of the Courts of Justice Act, 1984 (Ont.), c. 11, to be a matter that can and ought to be heard and determined by one judge. I have two difficulties with that submission. The first is that I have seen nothing to indicate that such a declaration was made with respect to this motion. If that were the only difficulty I would be prepared to assume that the matter would not have come before me without such a declaration having been made. However, the second difficulty is more formidable. It is that Mr. Vandor has not directed my attention to anything that would lead me to believe that this motion, in so far as it is a motion to set aside interlocutory orders by judges of the High Court, can properly be regarded as "a proceeding in the Divisional Court" within the meaning of cl. 16(2)(c), and so eligible under that clause to be directed by the Chief Justice or the Associate Chief Justice to a single judge of the Divisional Court. It has not been established how the matter gets to be a Divisional Court proceeding in the first place. The Divisional Court is a statutory court and its jurisdiction, except for that conferred by other statutes, is that conferred by s. 15 of the Courts of Justice Act, 1984. As I read that section there is nothing in it that confers upon the Divisional Court a jurisdiction to entertain directly, i.e., without a prior application for leave, a motion to set aside an interlocutory order of a High Court judge. With regard to such orders it appears that the only jurisdiction of the Divisional Court is that conferred by cl. 15(1)(b) of the Courts of Justice Act, 1984, in the following terms:

> 15(1) Subject to the Divorce Act (Canada), an appeal lies to the Divisional Court from,
>
> . . . . .
>
> (b) an interlocutory order of a judge of the High Court, with leave as provided in the Rules of Civil Procedure, other than an order made on an appeal from the District Court;

Accordingly, I conclude that this matter cannot be a proceeding in the Divisional Court and so cannot be directed to a single judge of that court under cl. 16(2)(c) of the Courts of Justice Act, 1984. It follows that this motion comes before me only in my capacity as a High Court judge. Thus, with respect to the remaining parts of this motion, the only question properly before me is whether or not to grant leave to appeal one or more of the July orders of Hollingworth J. and Rosenberg J.

I dispense with any requirement that the orders be settled and entered before the question of leave is considered.

The moving party has submitted that Hollingworth J. and Rosenberg J. did not have jurisdiction to make the above- mentioned orders purported to have been made by them in July. Before moving on to the leave to appeal application, I shall comment briefly on those jurisdiction questions.

Jurisdiction of Hollingworth J. and Rosenberg J. to make their orders herein

It is not disputed that Hollingworth J. had jurisdiction to enter upon and to dispose of the appeal from the master. As stated above, the moving party challenges the legal capacity of Hollingworth J.

to withdraw his June 25, 1987 reasons as he purported to do on July 23, 1987. Prior to July 23rd, Hollingworth J. had directed that, until further order, no order was to be entered in respect of his June 25th reasons for allowing the appeal from the master.

It is the submission of the moving party that Hollingworth J. was functus officio before he purported, on July 23rd, to withdraw his "order" of June 25th, and accordingly that the July 23rd order is a nullity. Two main arguments are put forth in favour of that proposition. The first is based upon subrule 59.06(2), which states as follows:

59.06(2) A party who seeks to,

> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

(Emphasis added.)

The focus of Mr. Vandor is upon cl. (a) above. It is asserted that there was no evidence of either fraud or further facts arising or discovered after the June 25th order was made, and before that the respondent had not met the tests in Re Cook and Morley [1950] O.W.N. 739, with the result that the defendants' "motion" to set aside or vary should have failed. The submission is that the proceeding was reopened merely to allow further argument, and that that is not a proper ground under the subrule. I am not at all persuaded by this argument. It appears to be based upon a confusion of the limited circumstances in which a party may apply, by motion, to reopen an order, even after the order is entered with, on the other hand, the right of a judge of this court to vary or withdraw his order on his own motion before the order is entered. Explicit in Mr. Vandor's submissions is the proposition that it was improper for the respondent to be in communication with Hollingworth J. after his reasons of June 25th were released, except by a motion under subrule 59.06(2). There is no foundation for that proposition either on the authorities or in common sense. There is evidence in the record, in August 25, 1987, of Jasper Meyers, who appeared for the defendant bank not only before Master Peterson but also before Hollingworth J. on June 12, 1987. From that affidavit it appears that the appeal from the master was scheduled to come on in weekly court before one judge but, because that judge's list was very long, it was transferred that day to the list of another judge who at approximately 3:25 p.m. informed counsel that as he would not reach it that day the matter was being transferred to Hollingworth J. The court records show that counsel actually began making submissions at 3:50 p.m. and that at 4:10 p.m. His Lordship informed counsel that he had a previously scheduled appointment at 4:15 p.m. It is not disputed that Hollingworth J. had little or no opportunity to review the papers before the hearing began. According to the affidavit of Mr. Meyers, Mr. Vandor was called upon and made opening remarks and was asked to sit down, whereupon Mr. Meyers was allowed to outline his position before he, in turn, was asked to sit down without finishing. According to that affidavit Mr. Vandor was given an opportunity to make a few more remarks, before Hollingworth J. stated that the argument would have to be completed at a later date, after he had had an opportunity to read the material filed on the appeal. Reportedly, Hollingworth J. stated that he would be in Ottawa for a couple of weeks at the end of June but could be available in the first week in July, and when both counsel indicated their availability they were told that they would hear from His Lordship's secretary about a specific date. The next thing Mr. Meyers heard on the matter was that the weekly court office had called to say that written reasons dated June 25, 1987, were ready to be picked up.

Mr. Meyer's first action on learning of the issue of the written reasons was to call Mr. Vandor by telephone. After Mr. Meyers and Mr. Vandor had exchanged correspondence, in which the former took the position that Hollingworth J. had stated clearly that the hearing of the appeal would be resumed, and the latter took the position that His Lordship had merely reserved the right to call counsel back if required, Mr. Meyers wrote to Hollingworth J., with copy to Mr. Vandor. There is no suggestion whatever of unethical conduct by Mr. Meyers. He obviously kept Mr. Vandor fully informed of his intention to contact Hollingworth J. Before he wrote to His Lordship, Mr. Meyers had received a letter from Mr. Vandor to the effect that the latter would not consent to a rehearing before Hollingworth J. or before another judge. Mr. Meyers' letter to His Lordship resulted in an invitation to counsel to appear before him on July 23rd. Mr. Vandor had previously expressed his willingness to attend and he did attend, I would think with full knowledge of what would be submitted by Mr. Meyers.

At the rehearing Hollingworth J. was faced with submissions by Mr. Meyers that he had not been given an opportunity to make his submissions at the previous hearing and that he had then been promised an opportunity to make submissions at a later date. Those submissions raised in clear form an issue of natural justice in that they amounted to an assertion that the fundamental tenet audi alteram partem, had not been adhered to.

I do not agree with the submission that this was a situation governed by subrule 59.06(2) or that in these circumstances Mr. Meyers' only proper recourse was to proceed by way of a formal notice of motion. The order not having been entered and there being a serious issue of want of material justice, it was quite proper in my opinion for Mr. Meyers to have brought the issue to the attention of His Lordship in the way that he did, by letter and after full notice to Mr. Vandor.

In my opinion subrule 59.06(2) was not intended to restrict the course of action of either counsel or judge in a case like this, and the submissions based on that subrule must be rejected.

That brings me to the question of whether Hollingworth J. was functus officio in the sense that he lacked jurisdiction to vary or withdraw his reasons or "order" of June 25th even though no order had been entered. Although he raised the issue not even Mr. Vandor asserted flatly that Hollingworth J. was functus officio. Instead, Mr. Vandor conceded, citing Billinkoff's Ltd. v. Mid West Construction (1969) Ltd., [1973] 5 W.W.R. 26 (Man. Co. Ct.), that until a judgment has been perfected by formal entry, a judge is not functus officio. However, citing Williams v. Adie (1966), 1966 CanLII 615 (BC CA), 57 W.W.R. 221 (B.C.C.A.), and Tozer v. New Brunswick (1985), 4 C.P.C. (2d) 164 (N.B.Q.B.) (the latter being a case in which the order had been entered), that such jurisdiction to vary is exercisable only in exceptional circumstances.

On this branch of his argument the moving party seeks to gain support from the fact that under the Rules of Civil Procedure (rules 1.03 and 59.01) an order is effective from the date on which it is made, unless it provides otherwise, whereas under the (former) Rules of Practice a judgment had effect from when it was made or pronounced and an order had effect only from when it was entered. As with so many of Mr. Vandor's submissions on this motion, this one does not stand up to scrutiny. The new rules treat judgments and orders in the same way. It follows logically that the jurisprudence developed earlier with respect to what, if anything, an issuing judge or court could do, of its own motion, about varying or withdrawing its judgment before entry thereof would now apply equally to orders. As Ms. Grossman observed, this is not an uncharted sea.

I am satisfied that Hollingworth J. had jurisdiction to vary or withdraw his "order" of June 25th, and that when he withdrew it on July 23rd he was acting judicially, to avoid any suggestion or appearance that because he had already expressed views in his written reasons he might not be disinterested if he reopened the matter and heard further submissions on behalf of the parties. I am also of the opinion that he was acting judicially in concluding that additional submissions should be heard.

There is abundant authority, including many decisions reviewed in Billinkoff's Ltd., supra, cited by the moving party for the proposition that a judgment can be reconsidered and varied or withdrawn before it is entered. In Tozer, also cited by the moving party, the jurisdiction to amend before entry was not questioned. Such a jurisdiction is quite independent of the rules, and of the fact that once entered an order takes effect from the time of its pronouncement. See in this regard Canadian Land & Emigration Co. v. Municipality of Dysart (1885), 9 O.R. 495, where, at p. 512, Ferguson J. stated as follows:

> We were all then of the opinion that, at any time before formal judgment issued by the Court, the judgment, or part of it, might be recalled and a term imposed, or a change made. It is, of course, not a desirable thing to do, but circumstances may well justify its being done.

See also Craig v. Kanseen, [1943] 1 All E.R. 108, where the Court of Appeal stated that a court has an inherent jurisdiction to set aside its own order and that where it moves to do so an appeal from the order is not necessary.

In my opinion Hollingworth J. was not functus officio when he withdrew his reasons, but had jurisdiction to do so and to refer the matter to Rosenberg J. for a hearing de novo. Those reasons being withdrawn there was no reason for Rosenberg J. not to embark upon the hearing of the appeal. When Rosenberg J. called the matter he was confronted with a motion by Mr. Vandor challenging his jurisdiction. He reserved his decision on that motion and recessed for lunch before embarking upon the hearing of the actual appeal. As stated, before returning after lunch, Rosenberg J. obtained a further endorsement of Hollingworth J. in the terms set forth above. Mr. Vandor contends that if Rosenberg J. had jurisdiction to hear the appeal he lost it when he obtained that further endorsement -- because by so doing he reinvolved Hollingworth J. and two judges cannot be seized of the same matter at the same time. I do not agree. I have two reasons, either of which is sufficient. The first is that Rosenberg J. had not, in fact, entered upon the hearing of the appeal until after the second, i.e., the July 24th endorsement by Hollingworth J., and so he was free to embark upon the hearing of the appeal when he did. The second is that even if Rosenberg J. had embarked upon the appeal before Hollingworth J. made his clarifying endorsement he would not have lost jurisdiction by seeking and obtaining such clarification. To hold otherwise would be carrying formalism to ridiculous lengths. It would also be contrary to precedent. See in this regard Canadian Land Co., supra, where, at p. 504, Ferguson J. made it clear that he had spoken to the judge who granted an interim injunction to obtain clarification of the meaning of his endorsement. Moreover, in Re Constantineau and Jones (1912), 26 O.L.R. 160, it is clear from p. 162 that Middleton J. (as he then was) on hearing an appeal from a taxing officer's certificate consulted the trial judge in order to obtain an explanation of his endorsement.

The endorsement made by Hollingworth J. does no more, in my opinion, than was implicit in his endorsement of July 23rd. After all, it would be pretty difficult, impossible in my view, to interpret the July 23rd endorsement, in which it was stated that the appeal would be heard de novo on July 24th by Rosenberg J. as anything other than a withdrawal by Hollingworth J. of his June 25th reasons, and as his complete withdrawal from the appeal itself. In my opinion, it is clear that Rosenberg J. had jurisdiction to hear and deal with the appeal.

I have dealt with the moving party's submission as to the jurisdiction to make the July orders herein, notwithstanding my opinion, as expressed above, that the only motion properly before me is a motion for leave to appeal the July orders. I did that for two reasons. The first is that in case I am wrong about my lack of jurisdiction to entertain a motion to set aside an interlocutory order of a fellow judge of the High Court, it will be clear that, in my opinion, the orders in question were properly made by judges having jurisdiction to make them. I will so declare.

My second reason is that a great deal of time was spent on the jurisdiction question, and the moving party's arguments were in my opinion so devoid of merit as to raise a question as to costs

regardless of whether leave to appeal were granted.

I turn, at long last, to the issue of leave to appeal.

Leave to appeal

In my opinion, there is no basis upon which to grant leave to appeal the July 23rd order of Hollingworth J. As stated above, it is my opinion that His Lordship had jurisdiction to withdraw his order before it was entered, and he was acting judicially when he did so. The July 23rd endorsement by Hollingworth J. was, at most, a clarification and in my view not even a necessary one. There is nothing about either of those orders that meets either of the double-barrelled tests in subrule 62.02(5).

Leave to appeal the "order" of Rosenberg J. herein is refused, for the reason that neither of the tests in subrule 62.02(5) have been met. To deal first with the test in cl. (b) of the subrule, there does not appear to me to be good reason to believe the decision of Rosenberg J. to be wrong. On the contrary, I find myself in complete agreement with all of his reasons that are relevant to this motion, including his statement that the relevant tests are those set forth by Trainor J. in Warren Industrial Feldspar Co. Ltd. v. Union Carbide Canada Ltd. (1986), 1986 CanLII 2683 (ON SC), 54 O.R. (2d) 213, 8 C.P.C. (2d) 1.

Under rule 56.01(d) a defendant seeking an order for security for costs where the plaintiff is a corporation must show that there is good reason to believe that the plaintiff corporation has insufficient assets in Ontario to pay the defendant's costs if the plaintiff is unsuccessful in the litigation. The master found that on the evidence the defendant met that test and there has been no successful attack on that finding, nor in my opinion could there be on the evidence.

The obligation on the defendant is not to prove that the plaintiff corporation has insufficient assets; to do so would require the defendant to do something that is uniquely within the plaintiff's knowledge: see Warren Industrial Feldspar and Smallwood v. Sparling (1983), 1983 CanLII 1930 (ON SC), 42 O.R. (2d) 53, 34 C.P.C. 24.

When the defendant has shown that there is good reason to believe that the plaintiff has insufficient assets in Ontario the defendant has met its onus and is prima facie entitled to an order for security for costs, and the onus shifts to the plaintiff to introduce evidence to show either:

(a) that it has sufficient assets in Ontario, or

(b) that (i) it is impecunious and (ii) an injustice would result if it were not allowed to proceed with its action.

Here the plaintiff did not introduce evidence to show that it had sufficient assets in Ontario, nor did it introduce evidence to show that it was "impecunious". There was simply no evidence on the question from the plaintiff. Accordingly, on that basis alone, there is nothing to displace the prima facie entitlement of the defendant for an order for security. Pleadings which are contradictory are not evidence. Impecuniosity has to be established by evidence.

The term "impecuniosity" does not appear in the rule; it is a term introduced as part of the judicial gloss upon the rule in response to the words "as is just" in the part of the rule stating that (upon satisfaction of the stated conditions precedent) "the court ... may make such order as is just". The corporate plaintiff wishing to be allowed to proceed with its action, without either showing sufficient assets or putting up security, must first show "impecuniosity" meaning not only that it does not have sufficient assets itself but also that it cannot raise the security for costs from its shareholders and associates, partly because the courts do not want a successful defendant to be effectively deprived of costs where, for example, wealthy shareholders have decided to carry on

business and litigation through a shell corporation. To go the impecuniosity route the plaintiff must establish by evidence that it cannot raise security for costs because, if a private company, its shareholders have not sufficient assets. As expressed by Reid J. in John Wink Ltd. v. Sico Inc. (1987), 1987 CanLII 4299 (ON SC), 57 O.R. (2d) 705 at p. 709, 15 C.P.C. (2d) 187: "If an order for security stops a plaintiff in its tracks it has disposed of the suit." To raise impecuniosity there must be evidence that if security is required the suit will be stopped -- because the amount of the security is not only not possessed by the plaintiff but is not available to it. Here there is simply no evidence to that effect.

The moving party (plaintiff) has also sought to base its application for leave to appeal upon cl. (a) of subrule 62.02(5), i.e., on the basis that there is a conflicting decision by another judge or court in Ontario or elsewhere, and it is desirable that leave to appeal be granted. One of the conflicting decisions cited on behalf of the plaintiff is the June 25, 1987 decision of Hollingworth J., but in my opinion it cannot count because, as stated above, it has been properly withdrawn and is no more. There is no decision of which I am aware where a plaintiff was allowed to proceed where it had produced no evidence of either sufficient assets in Ontario or, on the other hand, impecuniosity, and so I am not persuaded that there are any conflicting decisions within the meaning of the subrule.

The moving party has submitted that there is a conflict between the decision in Warren Industrial Feldspar and that in John Wink v. Sico. I agree that there does appear to be a conflict between those decisions, but it relates only to the last of the criteria to be met by a plaintiff that has already established its impecuniosity, that is, to the degree of merit that there must be to the case of an impecunious plaintiff an order to induce a court to refrain from making an order for security for costs. As I read the decision of Reid J. in Wink he accepts the reasoning of Trainor J. in Warren except as to the strength of the plaintiff's case. In my opinion there is no conflict between Warren and Wink on the question of the need for the corporate plaintiff to establish its impecuniosity by evidence before the court goes on to consider the merits of the plaintiff's case. When leave to appeal Wink was granted by Austin J., by an endorsement dated March 9, 1987, it was on the basis of a difference between Wink on the one hand and Warren and other decisions on the other, as to the required degree of merit of the plaintiff's case. (It is noted that the case was settled before the appeal was heard.) That difference is not relevant to this appeal; this case does not get to that question, because there is no evidence of impecuniosity. The decision of Rosenberg J. is not in conflict with either Warren or Wink or with any other decision to which I have been referred or of which I am aware.

Accordingly, the motion for leave to appeal the order of Rosenberg J. is also dismissed.

Costs to the respondent.

Motion dismissed.

Tab 171

CanLII

Mehedi v. 2057161 Ontario Inc., 2015 ONCA 670 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2015-10-06
File number:	C59772
Other citations:	391 DLR (4th) 374 — 76 CPC (7th) 225 — [2015] OJ No 5178 (QL)
Citation:	Mehedi v. 2057161 Ontario Inc., 2015 ONCA 670 (CanLII), <https://canlii.ca/t/glgfd>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Mehedi v. 2057161 Ontario Inc., 2015 ONCA 670
DATE: 20151006
DOCKET: C59772

Cronk, Lauwers and van Rensburg JJ.A.

BETWEEN

Golam Mehedi

Appellant

and

2057161 Ontario Inc. (c.o.b. Job Success), M.A. Hameed, Wendell Lacombe and Dale Smith

Respondents

Golam Mehedi, acting in person

Ranjan K. Agarwal and Joseph Marcus appearing as *amicus curiae*

Dale Smith, acting in person and as agent for all respondents

Heard: September 4, 2015

On appeal from the order of Justice Kevin Whitaker of the Superior Court of Justice, dated November 21, 2014.

Lauwers J.A.:

[1] The motion judge refused an order under rule 59.06 of the *Rules of Civil Procedure*, R.R.O., 1990, Reg. 194 permitting the appellant to lead new evidence after the dismissal of his claim by the trial judge. The evidence, if accepted, could cast doubt on the veracity of the testimony of the respondents on which the trial judge relied. The circumstances are most unusual. For the reasons set out below, I would allow the appeal.

The Trial Decision

[2] According to the appellant, the respondents, operating as "Job Success", promised to find him a job paying $70,000 per year within two months; he paid them a fee of about $3,700. He sued when they were unable to find him the job.

[3] The trial judge dismissed the case for oral reasons given on June 23, 2011. He accepted the trial testimony of the respondents Hameed and Lacombe, whom he found to be credible witnesses. He stated: "On the evidence before me, there is no basis for a finding that Job Success or any of the defendants made any promises or commitments to Mr. Mehedi that they did not fulfill."

[4] The trial judge added:

> Mr. Mehedi's understanding of the commitment he claims they made to him is not supported by any independent evidence and, in my view, it is unrealistic and unreasonable under the circumstances. Although Mr. Mehedi may honestly believe he was given the commitment he testified he had received, there is no reasonable basis for his belief and it is not supported by either the *viva voce* or documentary evidence.

[5] The trial judge specifically found “there was never a promise to find the plaintiff a job within any specified time frame or at any specified salary range.”

[6] This court dismissed the appellant’s appeal from the trial judgment by way of endorsement on January 23, 2012: *Mehedi v. 2052761 Ontario Inc.*, 2012 ONCA 46.

The Proposed New Evidence

[7] Shortly after this court’s decision, the CBC broadcast an episode of the television program *Marketplace*, which put into question the evidence given by the respondents at the trial. The appellant moved before this court for directions on the procedure for introducing fresh evidence, since the trial decision had been upheld on appeal. In his ruling on the motion, Juriansz J.A., sitting in chambers, explained the situation, at paras. 5-6:

> On February 17, 2012, the CBC broadcast an episode of *Marketplace* titled "Recruitment Rip-off". *Marketplace*, using hidden cameras, purports to expose how a recruitment agency, carrying on business as "Toronto Pathways", exploits vulnerable unemployed persons by promising to find them good jobs in exchange for fees. The clients shown in the program are mainly unemployed immigrants newly arrived in Canada. The program shows Dale Smith acknowledging that "Toronto Pathways" and "Job Success" are the same business. Mr. Smith, the owner, states, "It is the same corporation. Same address. Brand marketing is the only reason for the change.... Brand marketing just allows a fresh market approach." The program states that the company has changed business names five times in seven years.
>
> The program purports to show company officials unequivocally promising prospective clients that they will be provided good jobs to induce them to enter contracts. The defendant Mr. Lacombe is shown being asked by a *Marketplace* staffer, "So you're basically guaranteeing me that I'm going to get a job?", and responding, "Absolutely. And we are very good at it." The witness Mr. MacKay is also shown in the program. The program also shows

> numerous other individuals who make essentially the same allegations as Mr. Mehedi.

See *Mehedi v. 2057161 Ontario Inc. (c.o.b. Job Success)*, 2014 ONCA 604.

[8] Justice Juriansz directed the appellant to bring a motion to adduce fresh evidence and re-open the trial. Since the trial judge had declined to hear the motion because he had been assigned to criminal court, Juriansz J.A. directed that the motion be brought before a motion judge of the Superior Court in the ordinary way. The appellant then brought a motion to introduce as new evidence the *Marketplace* report, as well as an article in the *Metro* newspaper recounting similar statements apparently made by the respondent Dale Smith, to a reporter who was posing as a Job Success customer.

The Motion Judge's Decision

[9] On November 20, 2014, the motion judge dismissed the appellant's motion. His reasons, in their entirety, read:

> On July 30, 2014, Juriansz J.A. in chambers directed the plaintiff to bring a motion in the normal course regarding the admission of new evidence and a new trial as a result. I am not persuaded that this is an appropriate case to exercise my discretion to reopen this matter that had already been tried by Justice Himel [Hainey]. Even if the new evidence was allowed, I do not believe that that would reasonably affect the outcome. The action [*sic*] is dismissed. Costs to the defendant of $500.00 payable forthwith. Order as appropriate.

[10] The appellant appeals the motion judge's dismissal of his motion, and invokes both rule 59.06 of the *Rules of Civil Procedure* and the court's inherent jurisdiction.

[11] Rule 59.06(2)(a) of the *Rules of Civil Procedure* provides:

> A party who seeks to, (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made; … may make a motion in the proceeding for the relief claimed.

The Standard of Review

[12] A motion judge's decision under rule 59.06(2)(a) is discretionary and attracts considerable deference from a reviewing court, unless the motion judge errs in principle, misapprehends or fails to take account of material evidence, reaches an unreasonable decision (*Young v. Tyco International of Canada Ltd.*, 2008 ONCA 709), or if the reasons do not set out the judge's reasoning process and reflect consideration of the main relevant factors: *R. v. Sheppard*, 2002 SCC 26; *Diamond Auto Collision Inc. v. Economical Insurance Group*, 2007 ONCA 487, at paras. 11-12; *Barbieri v. Mastronardi*, 2014 ONCA 416, at paras. 22-23.

Analysis

[13] The test under rule 59.06(2)(a) to re-open a trial that applies *after* the judgment or other order has been issued and entered was set out by Doherty J.A., speaking for the court, in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 1998 CanLII 5454 (ON CA), 41 O.R. (3d) 257, [1998] O.J. No. 3516, at paras. 41 and 44. As he noted, the onus is on the moving party to show that all the circumstances "justify making an exception to the fundamental rule that final judgments are exactly that, final." In particular, the moving party must show that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings. The court will go on to evaluate "other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment."

[14] In this case, the motion judge's reasons for refusing to re-open the trial are inadequate. While he briefly states what he views as the appropriate test, the motion judge does not describe the proposed new evidence or relate the test to it. He does not explain why the new evidence fails to meet the test, or why it would not, in his words, "reasonably affect the outcome", given the critical importance of

the trial testimony of the respondents, Hameed and Lacombe, to the trial judge's decision. In the result, this court is unable to meaningfully review the basis for his dismissal of the appellant's motion.

[15] In my view, the appellant has met the test under rule 59.06(2)(a) as articulated in *Baetz.* It is plain that the proposed new evidence was not available at the time of the first trial or the first appeal. The appellant did not delay in seeking relief. The new evidence is cogent, in that it is apparently credible and, if accepted, would probably have affected the result at trial; the new evidence could serve to undermine the evidence given by the respondents and bolster that of the appellant. That is because the video shows representatives of Job Success apparently making the same or similar promises to others that the trial judge found to be "unrealistic and unreasonable" with respect to the appellant. Finally, I see no prejudice to the respondents if the trial were re-opened.

[16] *Amicus* submits that the motion judge erred in applying the test for re-opening a trial described by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983. The *Sagaz* test was articulated in a case in which the judgment at issue had not yet been issued and entered. In the present case, while no formal judgment was taken out, the trial decision had been appealed. *Amicus* asserts that the motion judge ought to have applied the *Baetz* test, which includes the consideration of a number of different factors, including balancing fairness against the interest in finality.

[17] In *Sagaz*, the Supreme Court accepted, at paras. 20 and 64, the motion judge's application of the two-part test for re-opening a trial described by the High Court in *Scott v. Cook*, 1970 CanLII 331 (ON SC), [1970] 2 O.R. 769:

> First, would the evidence, if presented at trial, probably have changed the result? Second, could the evidence

> have been obtained before trial by the exercise of reasonable diligence?

[18] Courts citing *Sagaz* often seem to boil the test down to these two questions (see, for example, *1057854 Ontario Inc. v. Kara Holdings Inc.*, [2005] O.J. No. 1144, at para. 40; *Wesbell Networks Inc. (Receiver of) v. Bell Canada*, 2013 ONSC 7814; *Irving Shipbuilding Inc. v. Schmidt*, 2014 ONSC 5089, at para. 57; *Madock v. Grauer*, 2010 BCSC 1709). However, the Supreme Court, at para. 60, added this important direction: "Appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened." Plainly then, fairness is also an important factor, including prejudice to others who have acted in reliance on the judgment, as *Baetz* notes.

[19] I further note that in *Sagaz,* the Supreme Court, at para. 63, approved the following comments by Lord Denning in *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.), at p. 1491:

> It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. *To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.* [Emphasis added.]

[20] In my view, properly understood, the test in *Sagaz* goes beyond the two questions of whether the new evidence, if presented at trial, would probably have changed the result, and whether the evidence could have been obtained before trial by the exercise of reasonable diligence. It includes considerations of finality, the apparent cogency of the evidence, delay, fairness and prejudice, factors that

were articulated by this court in its decision in *Baetz*. The error in this case was not in the motion judge's decision to apply *Sagaz* rather than *Baetz*, but in his application of the test, as I have already described. In this case, the new evidence meets both the *Baetz* and the *Sagaz* tests for re-opening a trial assuming there is any real distinction between the two.

Disposition

[21] Because of the nature of the inquiry, a motion under rule 59.06(2)(a) to reopen a trial decision based on fresh evidence should be brought before the trial judge, who is in the best position to contextualize the fresh evidence and to direct the trial of an issue if appropriate: *Janjua v. Khan*, 2014 ONCA 5 at para. 11. See *Sagaz*, at para.60. This is the practice that should be followed unless there is some real impediment to the trial judge dealing with the motion.

[22] I would allow the appeal, re-open the trial and remit the matter to the trial judge for reconsideration in light of the fresh evidence. It will be for the trial judge to determine the admissibility of the new evidence and its effects, if any, on the merits of the case.

[23] In the circumstances, I would set aside all previous cost orders against the appellant in this matter, including the costs of the first trial, the appeal to this court from the first trial judgment and the costs of the motion before the motion judge. It will be for the trial judge to determine appropriate costs dispositions, based on his reconsideration of the case.

[24] I would also award the appellant $2,000 for the costs of this appeal, inclusive of disbursements and all applicable taxes.

Released: October 6, 2015 "PL"

“P. Lauwers J.A.”

“I agree E.A. Cronk J.A.”

“I agree K. van Rensburg J.A.”

Tab 172

CanLII

Yatar v. TD Insurance Meloche Monnex, 2024 SCC 8 (CanLII)

Source:	Supreme Court of Canada
Date:	2024-03-15
File number:	40348
Other citations:	489 DLR (4th) 191 — [2024] SCJ No 8 (QL) — [2024] ACS no 8
Citation:	Yatar v. TD Insurance Meloche Monnex, 2024 SCC 8 (CanLII), <https://canlii.ca/t/k3gs5>, retrieved on 2026-01-18
Most recent unfavourable mention	Humberplex Developments Inc. v. Ontario (AG), 2024 ONSC 2335 (CanLII) [...] In these circumstances, **Yatar SCC is distinguishable** and this court is justified in declining to determine procedural fairness issues in the context of the applicants' judicial review application. [...]

SUPREME COURT OF CANADA

CITATION: Yatar *v.* TD Insurance Meloche Monnex, 2024 SCC 8

APPEAL HEARD: November 15, 2023
JUDGMENT RENDERED: March 15, 2024
DOCKET: 40348

BETWEEN:

Ummugulsum Yatar
Appellant

and

TD Insurance Meloche Monnex and Licence Appeal Tribunal
Respondents

- and -

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Alberta, Income Security Advocacy Centre, Advocacy Centre for Tenants Ontario, Canadian Telecommunications Association, Insurance Bureau of Canada, Forest Appeals Commission, Aboriginal Council of Winnipeg, Inc. and Social Planning Council of Winnipeg
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: Rowe J. (Wagner C.J. and Karakatsanis, Côté, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ. concurring)
(paras. 1 to 78)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Ummugulsum Yatar *Appellant*

v.

TD Insurance Meloche Monnex and Licence Appeal Tribunal *Respondents*

and

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Income Security Advocacy Centre,
Advocacy Centre for Tenants Ontario,
Canadian Telecommunications Association,
Insurance Bureau of Canada,
Forest Appeals Commission,
Aboriginal Council of Winnipeg, Inc. and
Social Planning Council of Winnipeg *Interveners*

Indexed as: Yatar *v.* TD Insurance Meloche Monnex

2024 SCC 8

File No.: 40348.

2023: November 15; 2024: March 15.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Judicial review — Limited statutory right of appeal on questions of law — Tribunal finding insured's application contesting denial of statutory accident benefits by insurer time-barred — Provincial legislation limiting right of appeal from tribunal's decision to questions of law — Insured appealing decision on questions of law and seeking judicial review on questions of fact and mixed fact and law — Appeal and application for judicial review dismissed — Whether courts should have exercised discretion to undertake judicial review on merits in light of limited statutory right of appeal on questions of law — Proper approach to judicial review where limited statutory right of appeal.

Insurance — Automobile insurance — Statutory accident benefits — Denial — Limitation period — Insured injured in automobile accident — Insurer denying statutory accident benefits — Tribunal finding insured's application contesting denial of benefits time-barred — Whether Tribunal's decision was reasonable.

Y was injured in an automobile accident in 2010. Her insurer initially paid her accident benefits. However, in January 2011, the insurer informed Y by letter that payment of all benefits had been stopped in the absence of a completed disability certificate. A dispute resolution form was attached to the letter. Then, in February 2011, the insurer informed Y that following a medical assessment her income replacement benefits were reinstated but her claim to the other two benefits — housekeeping and home maintenance — was denied. Finally, in September 2011, the insurer informed Y that her income replacement benefits were denied and payments would be stopped. No dispute resolutions forms were attached to either of the last two letters.

Y applied for mediation, which was mandatory at the time, to dispute the denial of her benefits. The mediation process came to an end in January 2014 and the mediator released his report. At the time of Y's accident, Ontario's *Insurance Act* provided for a two-year limitation period after the insurer's refusal to pay the benefits to commence a proceeding to contest the denial. It also provided that the limitation period was extended by a period of 90 days after the mediator provided their report. Y commenced a proceeding before the Licence Appeal Tribunal ("LAT") in March 2018. Her application was dismissed as being time-barred and her request for reconsideration was dismissed.

Pursuant to Ontario's *Licence Appeal Tribunal Act, 1999*, Y's right of appeal from the LAT adjudicator's reconsideration decision was restricted to questions of law. Y pursued an appeal on questions of law, and also sought judicial review regarding questions of fact or mixed fact and law. The Divisional Court dismissed the appeal, holding that Y showed no errors of law made by the LAT adjudicator. It also dismissed Y's application for judicial review, on the basis that there were no exceptional circumstances that would justify judicial review. The Court of Appeal dismissed Y's appeal, holding that it would only be in rare cases that the remedy of judicial review

would be exercised given the legislated scheme for the resolution of such disputes, and that Y had an appropriate alternative remedy. It also concluded that even if the judicial review application ought to have been considered, it would have been denied as the LAT adjudicator's decision was reasonable.

Held: The appeal should be allowed and the matter remitted to the LAT adjudicator.

It was an error for the courts below to hold that, where there is a limited right of appeal, judicial review should only be exercised in exceptional or rare cases. The limited right of appeal from LAT decisions to pure questions of law does not reflect an intention by the legislature to restrict recourse to the courts on other questions arising from the LAT's administrative decision. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review, and proceeding with judicial review on questions of fact or mixed fact and law is fully respectful of the legislature's institutional design choices. Furthermore, the LAT adjudicator's reconsideration decision was unreasonable, as he failed to take into account relevant legal constraints. The matter should be referred back to the LAT adjudicator for reconsideration.

As held by the Court in *Vavilov*, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal. Where there is a statutory right of appeal limited to questions of law, judicial review is available for questions of fact or mixed fact and law. However, while there is a right to seek judicial review, it is open to the judge before whom judicial review is sought to decide whether to exercise his or her discretion to grant relief — although this discretion does not extend to decline to consider the application for judicial review. The discretion whether to undertake judicial review should be exercised by the judge having regard to the framework set out in *Strickland v. Canada (Attorney General)*, 2015 SCC 37. At a minimum, the judge must determine whether judicial review is appropriate. If, in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application. The judge also

has the discretion to refuse to grant a remedy even if they find that the decision under review is unreasonable.

In exercising its discretion, in addition to the suitability and appropriateness of judicial review in the circumstances, the court should consider the available alternatives. This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue. Alternative remedies exist where internal review processes have not been exhausted or where there is a statutory right of appeal that is not restricted, such that questions of law, fact and mixed fact and law could be considered on appeal. It would be ignoring *Strickland* to conclude that only in exceptional circumstances would judicial review be available where there is a limited right of appeal. It would also be an error to hold that judicial review should only be exercised in rare cases.

In the instant case, the Divisional Court should have exercised its discretion to undertake judicial review for issues not dealt with under the statutory right of appeal. The statutory right to appeal and the LAT adjudicator's reconsideration decision do not constitute adequate alternative remedies. Y raises errors of fact or mixed fact and law which are not reviewable under the statutory right of appeal, and access to internal reconsiderations cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review.

Furthermore, the LAT adjudicator's reconsideration decision is unreasonable, as he failed to have regard to the effect of the reinstatement of the income replacement benefits between February and September 2011 on the validity of the initial denial. In addition, he did not consider earlier tribunal decisions, some of which had held that when an applicant's benefits are reinstated, the limitation period can only be triggered when they are validly terminated again. It is arguable that there needed to be a valid denial of the income replacement benefits to start the clock running on the limitation period, and this question is one to be properly decided by the LAT.

Cases Cited

Applied: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713; **referred to:** *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49; *Smith v. The Appeal Commission*, 2023 MBCA 23, 479 D.L.R. (4th) 121; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545, 61 Alta. L.R. (7th) 170; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, 84 Admin. L.R. (6th) 96, aff'd 2022 ABCA 50, 95 Admin. L.R. (6th) 163; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161; *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39, 14 Admin. L.R. (7th) 42; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Veldhuizen v. Coseco Insurance Co.*, 1995 ONICDRG 144 (CanLII); *Rudnicki v. Certas Direct Insurance Co.*, 2001 ONFSCDRS 60 (CanLII).

Statutes and Regulations Cited

Insurance Act, R.S.O. 1990, c. I.8, ss. 280(3), 281(2), 281.1(1), (2)(b) [rep. 2014, c. 9, Sch. 3, s. 14].

Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 2(1).

Licence Appeal Tribunal Act, 1999, S.O. 1999, c. 12, Sch. G, s. 11(6).

Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996, O. Reg. 403/96, s. 51(2) [rep. & sub. 45/16, s. 5].

Authors Cited

Daly, Paul. *A Culture of Justification: Vavilov and the Future of Administrative Law*. Toronto: UBC Press, 2023.

Daly, Paul. *Understanding Administrative Law in the Common Law World*. New York: Oxford University Press, 2021.

APPEAL from a judgment of the Ontario Court of Appeal (Lauwers, Nordheimer and Zarnett JJ.A.), 2022 ONCA 446, 25 C.C.L.I. (6th) 1, [2022] O.J. No. 2602 (Lexis), 2022 CarswellOnt 7863 (WL), affirming a decision of Swinton, Penny and Kristjanson JJ., 2021 ONSC 2507, 157 O.R. (3d) 337, [2021] O.J. No. 2154 (Lexis), 2021 CarswellOnt 5678 (WL), dismissing an application for judicial review of a decision of the Licence Appeal Tribunal, 2020 CanLII 34442, 2020 CarswellOnt 6879 (WL). Appeal allowed.

Sean Dewart, *Tim Gleason* and *Ian McKellar*, for the appellant.

Christine Lonsdale, *Adam Goldenberg* and *Erin Chesney*, for the respondent TD Insurance Meloche Monnex.

Brian Blumenthal and *Valerie Crystal*, for the respondent the Licence Appeal Tribunal.

John Provart and *Michelle Kellam*, for the intervener Attorney General of Canada.

Michael J. Sims and *Matthew Chung*, for the intervener Attorney General of Ontario.

Stéphane Rochette and *Francesca Boucher*, for the intervener Attorney General of Quebec.

Meera Bennett and *Katherine Reilly*, for the intervener the Attorney General of British Columbia.

Michael Wall and *Adam Ollenberger*, for the intervener the Attorney General of Alberta.

Nabila F. Qureshi, *Anu Bakshi* and *Anna Rosenbluth*, for the intervener the Income Security Advocacy Centre.

Ryan Hardy, for the intervener the Advocacy Centre for Tenants Ontario.

Paul Daly, for the intervener the Canadian Telecommunications Association.

Nina Bombier and *Nikolas De Stefano*, for the intervener the Insurance Bureau of Canada.

Robin J. Gage and *Julia W. Riddle*, for the intervener the Forest Appeals Commission.

Allison Fenske and *Natalie Copps*, for the interveners Aboriginal Council of Winnipeg, Inc. and the Social Planning Council of Winnipeg.

The judgment of the Court was delivered by

ROWE J. —

TABLE OF CONTENTS

	Paragraph
I. Overview	1
II. Factual Context	6
A. *The Underlying Insurance Claim*	6
B. *Denial of Requested Benefits and Subsequent Proceedings*	7
III. Judicial History	11
A. *Licence Appeal Tribunal*	11
B. *Ontario Superior Court of Justice (Divisional Court), 2021 ONSC 2507, 157 O.R. (3d) 337 (Swinton, Penny and Kristjanson JJ.)*	17
C. *Court of Appeal for Ontario, 2022 ONCA 446, 25 C.C.L.I. (6th) 1 (Lauwers, Nordh eimer and Zarnett JJ.A.)*	23
IV. Issues on Appeal	30

V. Submissions of the Parties 31
A. *Ms. Yatar* 31
B. *TD Insurance and Licence Appeal Tribunal* 34
VI. Analysis 41
A. *Standard of Review* 41
B. *The Existence of a Circumscribed Right of Appeal Does Not, on Its Own, Preclude Applications for Judicial Review* 43
C. *The Exercise of Discretion To Grant Relief on Judicial Review* 51
D. *The LAT Adjudicator's Decision Was Unreasonable* 68
VII. Conclusion 77

I. Overview

[1] This case deals with a court's exercise of discretion as to whether to undertake judicial review on the merits in light of a limited statutory right of appeal.

[2] Ummugulsum Yatar is contesting the denial of her insurance benefits, following an accident in 2010. After having her application dismissed by the Licence Appeal Tribunal ("LAT") in 2019, due to the matter being time-barred, Ms. Yatar requested reconsideration of this decision, which was dismissed. Then, she simultaneously appealed the decision before the Divisional Court of Ontario, and applied for judicial review. Section 11(6) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 12, Sch. G ("*LAT Act*"), provides that an appeal from a decision of the LAT relating to a matter under the *Insurance Act*, R.S.O. 1990, c. I.8, may be made on a question of law only.

[3] As per *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, a right of appeal does not preclude an individual from seeking judicial review for questions not dealt with in the appeal. In this case, despite the statutory right of appeal limited to questions of law, judicial review is available for questions of fact or mixed fact and law. It is then a matter of discretion whether to undertake judicial review, having regard to the framework

for analysis set out in *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713.

[4] The Divisional Court erred when it concluded that only in "exceptional circumstances" would judicial review be available where there is a limited right of appeal (2021 ONSC 2507, 157 O.R. (3d) 337, at para. 4); this ignored *Strickland*. The Court of Appeal for Ontario also erred when it held that only in "rare cases" judicial review would be exercised (2022 ONCA 446, 25 C.C.L.I. (6th) 1, at para. 42), and that in this case, Ms. Yatar had an appropriate alternative remedy. Both courts sought to apply *Strickland*, but erred in principle in doing so. They did so by relying on a statutory right of appeal for questions of law as indicative of legislative intent to restrict access to judicial review for questions of fact and mixed fact and law. No such inference is warranted. Properly applying *Strickland*, the Divisional Court should have exercised its discretion to undertake judicial review for issues not dealt with under the statutory right of appeal.

[5] As to the LAT adjudicator's reconsideration decision (2020 CanLII 34442 ("reconsideration decision")), it is unreasonable, as he failed to consider the effects of the reinstatement of benefits on the limitation period, and he did not have regard to jurisprudence relevant to the matter. Accordingly, the appeal is allowed and the matter is referred back to the LAT adjudicator for reconsideration.

II. Factual Context

A. *The Underlying Insurance Claim*

[6] Ms. Yatar "was injured in an automobile accident in February 2010 and sought benefits under the *Statutory Accident Benefits Schedule — Accidents on or After November 1, 1996*, O. Reg. 403/96 ('*SABS*')" (Divisional Court decision, at para. 5). One of the two respondents, TD Insurance Meloche Monnex, was her insurer at the time, and received Ms. Yatar's application for accident benefits on February 22, 2010, as well as her employer's confirmation

form on March 13, 2010. Ms. Yatar's claim also included income replacement benefits ("IRBs") as well as housekeeping and home maintenance benefits.

B. *Denial of Requested Benefits and Subsequent Proceedings*

[7] Ms. Yatar's request for benefits was initially considered valid by TD Insurance, which paid benefits to Ms. Yatar. In the months that followed, however, TD Insurance denied the benefits in three letters:

(a) *The January Letter*: On January 7, 2011, TD Insurance informed Ms. Yatar that payment of IRBs, as well as housekeeping and home maintenance benefits, had been stopped in the absence of a completed disability certificate. The letter contained directions for a medical examination, which Ms. Yatar attended on January 17 and January 27. A dispute resolution form was attached to that letter.

(b) *The February Letter*: On February 16, 2011, Ms. Yatar was informed by TD Insurance that following the medical assessment, her claim to housekeeping and home maintenance benefits was denied. However, her IRBs were reinstated. No dispute resolution form was attached to that letter.

(c) *The September Letter*: On September 19, 2011, Ms. Yatar was advised that her IRBs were denied by TD Insurance, and that the payments would be stopped on September 28, 2011. No dispute resolution form was attached to that letter.

[8] There have been significant legislative amendments since Ms. Yatar commenced her procedures. At the time of the accident, in 2010, the *Insurance Act* provided for a two-year limitation period after the insurer's refusal to pay the benefits to commence a proceeding (s. 281.1(1)), as well as mediation as a mandatory first step to resolve a dispute (s. 281(2)), which extended the limitation period to 90 days after the mediator provided their report (s. 281.1(2)(b)).

Ms. Yatar applied for mediation on September 13, 2012, to dispute the denial of her benefits. The mediation process came to an end on January 14, 2014.

[9] However, what is most relevant in this case is that when Ms. Yatar commenced her proceeding before the LAT in March 2018, both the *Insurance Act* and the *SABS* had been redesigned. Under the amended *Insurance Act*, the LAT was given exclusive jurisdiction at first instance over the resolution of *SABS* disputes. As well, mandatory mediation was eliminated. The *LAT Act* was also amended to provide for an appeal from a decision of the LAT on a question of law only (s. 11(6)).

[10] On March 31, 2016, Ms. Yatar commenced an action in the Superior Court of Justice. The action was dismissed through a consent order on March 27, 2017, and the application underlying this appeal was brought to the LAT in March 2018.

III. Judicial History

A. *Licence Appeal Tribunal*

[11] In the LAT adjudicator's first decision in April 2019 (2019 CanLII 43918 ("preliminary decision")), the LAT adjudicator considered Ms. Yatar's claim for IRBs, housekeeping benefits and home maintenance benefits and dismissed it, concluding that the claim was time-barred since April 2014. When Ms. Yatar proceeded with mediation in early 2011, both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a limitation period that expired 90 days after the mediator's report was released.

[12] The LAT adjudicator found that TD Insurance denied the IRBs, home maintenance and housekeeping benefits in a letter dated January 7, 2011. Given that "[Ms. Yatar] filed this Application before the [LAT] on March 16, 2018, more than seven years after these benefits were denied on January 7, 2011" (para. 19), and even taking into account the extensions of the limitation

period due to the evaluation and mediation, the LAT adjudicator found that the claims were time-barred since April 2014.

[13] The LAT adjudicator noted that "[f]rom counsel's evidence, it is clear that lawyers at her firm should have been aware of the applicable two-year limitation period. It is also clear that [Ms. Yatar] relied on the expertise of her counsel, to her detriment, in the face of the statutory limitation period" (preliminary decision, at para. 25).

[14] In the reconsideration decision, the LAT adjudicator reviewed his earlier reasons as well as the evidence. A factual error was corrected at para. 12 of the decision, but the LAT adjudicator re-affirmed the original decision.

[15] The LAT adjudicator relied on *Smith v. Co-operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129. He concluded that the dispute resolution form, attached to the January 2011 letter, "clearly sets out three steps in the dispute process and warns in clear straightforward language of the two-year limitation period" (para. 13). The LAT adjudicator stated that, in *Smith v. Co-operators*, the Supreme Court of Canada sought to ensure that the applicant is aware of the dispute resolution process. He noted that there was an "implicit acceptance of the denials effective January 4, 2011" and affirmed his previous finding that the January 7, 2011 letter constituted a valid denial of benefits (reconsideration decision, at para. 15; see also para. 16).

[16] The limitation period was extended into April 2014 following the mediation. However, Ms. Yatar made the application to the LAT for benefits on March 16, 2018. Thus, the request was time-barred. The application was dismissed.

B. *Ontario Superior Court of Justice (Divisional Court), 2021 ONSC 2507, 157 O.R. (3d) 337 (Swinton, Penny and Kristjanson JJ.)*

[17] Ms. Yatar's right of appeal from the LAT adjudicator's reconsideration decision was restricted to questions of law, per s. 11(6) of the *LAT Act*. In light of this, Ms. Yatar pursued an

appeal on questions of law, and also sought judicial review regarding questions of fact or mixed fact and law.

[18] The Divisional Court held that its authority to hear the judicial review application stemmed from s. 280(3) of the *Insurance Act* and s. 2(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1; this authority was not precluded by the limited right of appeal on questions of law provided by s. 11(6) of the *LAT Act*.

[19] The appeal was dismissed, as Ms. Yatar showed no errors of law made by the LAT adjudicator and, instead, recited "findings of fact made by the [LAT] adjudicator and then baldly assert[ed] that the [LAT] adjudicator erred in law, without identifying the legal error or any extricable legal principle" (Divisional Court decision, at para. 27).

[20] On judicial review with respect to the questions of fact and mixed fact and law, the Divisional Court concluded that, per *Vavilov*, the limited right of appeal in the *LAT Act* did not "deprive this court of jurisdiction to consider other aspects of a decision in judicial review proceedings" (para. 36). The court added that judicial review is a discretionary remedy, and should thus be declined when alternative remedies are adequate (see *Strickland*, at paras. 37 and 40).

[21] As to whether to exercise its discretion to undertake judicial review in this case, the Divisional Court considered four factors: (i) the legislative intent to limit judicial review of LAT decisions on statutory accident benefits to questions of law only, (ii) the breadth of the LAT's reconsideration power, (iii) the nature of the alleged errors, and (iv) the systemic difficulties associated with dealing with judicial review and an appeal (paras. 41-45).

[22] The Divisional Court concluded that there were "no exceptional circumstances" in this case that would justify judicial review (para. 46). On this basis, the Divisional Court declined to grant the application for judicial review.

C. *Court of Appeal for Ontario, 2022 ONCA 446, 25 C.C.L.I. (6th) 1 (Lauwers, Nordheimer and Zarnett JJ.A.)*

[23] Two issues were appealed to the Court of Appeal: (i) whether "the Divisional Court err[ed] in limiting judicial review, in cases where there has been a statutory appeal . . . to 'exceptional circumstances'" and (ii) whether "the [LAT]'s reconsideration decision [was] reasonable" (para. 27).

[24] The Court of Appeal observed that when the Divisional Court referred to the availability of judicial review, "the use of the language 'exceptional circumstances' was an unfortunate one" and led to potential confusion (para. 35). The Court of Appeal held that what the Divisional Court "was attempting to communicate is that it would only be in rare cases that the remedy of judicial review would be exercised, given the legislated scheme for the resolution of disputes over SABS" (para. 42).

[25] The Court of Appeal held that a limited statutory right of appeal does not preclude judicial review. The right to seek judicial review is always available, but this does not "change the fact that judicial review is a discretionary remedy" (para. 41). The Court of Appeal also stated that "[t]he court's discretion with respect to judicial review applies both to its decision to undertake review and to grant relief", relying on *Strickland* (para. 44).

[26] The Court of Appeal held that the Divisional Court correctly considered the factors in *Strickland* as to whether there are alternative remedies to judicial review. There is "legislative intent to limit access to the courts regarding these disputes" (para. 43).

[27] The Court of Appeal concluded that even if "the judicial review application ought to have been considered", Ms. Yatar had failed to show that the LAT adjudicator's reconsideration decision was unreasonable: ". . . that application would have failed on the presumptive standard of review of reasonableness . . ." (para. 52).

[28] The Court of Appeal held that the LAT adjudicator's underlying finding, that the valid denial of benefits triggered the beginning of the limitation period, was also reasonable:

> . . . the limitation period would have expired in 2013, but for the . . . mediation process that extended that limitation period to April 2014. In either event, the fact that [Ms. Yatar] had not launched her application to the [LAT] until March 16, 2018 meant that it was outside of the limitation period. [para. 51]

[29] Thus, while the Court of Appeal concluded that judicial review of the LAT adjudicator's decision ought not to have been considered, the application for judicial review would have been denied as the LAT adjudicator's decision on the reconsideration was reasonable.

IV. Issues on Appeal

[30] Ms. Yatar raises two questions on appeal: first, whether the Court of Appeal erred when it concluded that the legislature's decision to limit the right of appeal from LAT decisions to "pure" questions of law restricted the availability of judicial review of LAT decisions for errors of fact or mixed fact and law to "rare" or "unusual" cases; and second, whether the Court of Appeal erred in concluding that the LAT adjudicator's reconsideration decision was reasonable (A.F., at para. 28).

V. Submissions of the Parties

A. *Ms. Yatar*

[31] Ms. Yatar submits that the Court of Appeal erred in finding that the existence of a limited statutory right of appeal can be a basis to decline to undertake judicial review regarding issues outside the scope of the statutory appeal. *Vavilov* confirms that "a right to appeal on a question of law is not an adequate remedy if a litigant seeks judicial review of a question of fact, or a question of mixed fact and law, . . . the two remedies are compl[e]mentary" (A.F., at para. 52).

[32] Regarding judicial review in this case, Ms. Yatar argues that since no dispute resolution form accompanied the letters in February and September 2011, the latter cannot be considered valid denials of benefits. The LAT adjudicator erred in considering that the letter from

January 2011 was a valid denial, as it was a temporary suspension of benefits and "did not constitute notice in 'straightforward and clear language, directed towards an unsophisticated person' that benefits would not be provided" (A.F., at para. 79). Thus, the letter from January 2011 cannot be the starting point for the limitation period.

[33] The fact that the LAT adjudicator did not address the issue of "ambiguities" in the January 2011 letter, Ms. Yatar submits, is a central flaw in the analysis and, therefore, the decision is unreasonable.

B. *TD Insurance and Licence Appeal Tribunal*

[34] TD Insurance submits that the Divisional Court did not err in exercising its discretion to decline to undertake judicial review of the LAT adjudicator's reconsideration decision. The Ontario legislature chose to limit the courts' involvement in appeals on questions of law.

[35] Judicial review is discretionary and the Divisional Court's exercise of this discretion is entitled to deference. As this Court recognized in *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, prerogative writs are an "extraordinary remedy". The right to seek judicial review does not entail "a right to require the court to undertake judicial review" regardless of the nature of the question (para. 30; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, at p. 93).

[36] TD Insurance submits that the *Strickland* factors provide a sufficient basis on which to dismiss this appeal. If the alternatives to judicial review are adequate, as they are here, then it is "appropriate" to give effect to the legislature's intent and to decline to undertake judicial review. Other factors from the jurisprudence confirm that judicial review was not appropriate here, including: the nature of the statutory scheme, the nature of the decision and the process followed in making it, the importance of the decision to the individual or individuals affected, and whether the case is of public interest.

[37] In the alternative, TD Insurance submits, if the LAT adjudicator's reconsideration decision is to be judicially reviewed, the LAT adjudicator reasonably determined that the application was statute-barred.

[38] The LAT submits that the Court of Appeal correctly held that the discretion to entertain judicial review on questions of fact and mixed fact and law should be exercised "only . . . in rare cases" (C.A. reasons, at para. 42). Otherwise, the legislative intent in enacting the restrictive appeal clause would be undermined.

[39] The LAT submits this is consistent with *Strickland*'s holding on the exercise of discretion on judicial review. *Vavilov* did not change the law on the discretion to decline to undertake judicial review where there is an alternative remedy; *Vavilov* did not overrule *Strickland*.

[40] In the LAT's view, reading *Vavilov* and *Strickland* together leads to the conclusion that the exercise of discretion on judicial review must consider the adequacy of the restrictive appeal as an alternative remedy while also being respectful of the legislature's choice to create a right of appeal limited to questions of law only. The LAT takes no position on the reasonableness of its decision.

VI. Analysis

A. *Standard of Review*

[41] The main issue in this appeal relates to the decision by the Divisional Court and the Court of Appeal not to undertake judicial review. As this is a discretionary decision, deference is to be shown (see *Strickland*, at para. 39). However, the exercise of discretion can be set aside when a judge "considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion" (*Matsqui Indian Band*, at para. 39). As I will explain, the Divisional Court and the Court of Appeal erred in their application of *Strickland* in that they acted on the basis of a "wrong principle" (*Matsqui Indian Band*, at para. 112, per Sopinka J.).

[42] Once it is determined that it is appropriate to undertake judicial review in this case, the issue arises whether the LAT adjudicator's reconsideration decision was reasonable. Per *Vavilov*, there is "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions" (para. 16). That presumption is not rebutted here.

B. *The Existence of a Circumscribed Right of Appeal Does Not, on Its Own, Preclude Applications for Judicial Review*

[43] When the dispute arose in early 2011, mediation was a mandatory first step to challenge an insurer's denial of benefits. Both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a 90-day extension of the limitation period after the mediator's report is released. Ms. Yatar undertook mediation in September 2012. When Ms. Yatar commenced her proceeding before the LAT in March 2018, the statutory scheme had been amended and provision was made for an appeal from a decision of the LAT on a matter under the *Insurance Act* on questions of law only.

[44] In the case at bar, the Divisional Court and the Court of Appeal held that a party can both exercise a statutory right of appeal and seek judicial review for questions outside the scope of the statutory right of appeal. Other courts have also determined that a statutory right of appeal does not alter the availability of judicial review (see *Smith v. The Appeal Commission*, 2023 MBCA 23, 479 D.L.R. (4th) 121; *Wongkingsri v. Alberta (Appeals Commission for Alberta Workers' Compensation)*, 2022 ABQB 545, 61 Alta. L.R. (7th) 170; *Zarooben v. Workers' Compensation Board*, 2021 ABQB 232, 84 Admin. L.R. (6th) 96, aff'd 2022 ABCA 50, 95 Admin. L.R. (6th) 163).

[45] The question remains: what role does the right of appeal play in the exercise of discretion to undertake judicial review? In settling this question, it is important to have regard to first principles. In *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, this Court held that "[t]he principle that public authorities are subordinate to

the supervisory power of the superior courts is the cornerstone of the Canadian and Quebec system of administrative law. Such judicial review is a necessary consequence of the rule of law" (p. 360).

[46] The importance of judicial review was affirmed by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 27:

> As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers.

[47] This Court held in *Vavilov*, at para. 52, that the legislative intent to restrict statutory rights of appeal does not, on its own, affect the availability of judicial review:

> . . . the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal.

[48] This Court's precedent contemplates a person pursuing both a statutory appeal on questions of law and judicial review on questions of fact and mixed fact and law. In such an instance, as set out in *Vavilov*, at para. 37, the questions of law being appealed would be subject to review on a standard of correctness (see also *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), and questions of fact and mixed fact and law would be subject to review on a standard of reasonableness on judicial review (see *Vavilov*).

[49] A person has a right to seek judicial review, and "[t]o give courts a discretion not to hear judicial review applications because of their perception of the quality and quantity of internal reconsiderations would allow judicial discretion to trump [a] constitutional principle" (P. Daly, *A Culture of Justification: Vavilov and the Future of Administrative Law* (2023), at p. 226, note 94).

While there is discretion to hear the application on the merits and deny relief, this discretion does not extend to decline to consider the application for judicial review, as will be explained below.

[50] I would note recent jurisprudence from the Federal Court of Appeal as to the availability of judicial review where there is a privative clause, i.e. a clause that seeks to bar or restrict judicial review (see, e.g., *Canada (Attorney General) v. Pier 1 Imports (U.S.), Inc.*, 2023 FCA 209; *Canada (Attorney General) v. Best Buy Canada Ltd.*, 2021 FCA 161; *Democracy Watch v. Canada (Attorney General)*, 2023 FCA 39, 14 Admin. L.R. (7th) 42; *Democracy Watch v. Canada (Attorney General)*, 2022 FCA 208). But that is not the question at issue in this case. Accordingly, I leave that question for another day.

C. *The Exercise of Discretion To Grant Relief on Judicial Review*

[51] While there is a right to seek judicial review, it is open to the judge before whom judicial review is sought to decide whether to exercise his or her discretion to grant relief. This Court stated in *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90:

> Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief . . . . Declarations of right, whether sought in judicial review proceedings or in actions, are similarly a discretionary remedy: ". . . the broadest judicial discretion may be exercised in determining whether a case is one in which declaratory relief ought to be awarded" . . . . [Emphasis added.]

[52] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 135, Rothstein J. stated:

> The traditional common law discretion to refuse relief on judicial review concerns the parties' conduct, any undue delay and the existence of alternative remedies: *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, at p. 364. As *Harelkin* [*v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561,] affirmed, at p. 575, courts may exercise their discretion to refuse relief to applicants "if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty". As in the case of interlocutory injunctions, courts exercising discretion to grant relief on

> judicial review will take into account the public interest, any disproportionate impact on the parties and the interests of third parties. [Emphasis added.]

[53] In the case at bar, the Court of Appeal stated that "[t]he court's discretion with respect to judicial review applies both to its decision to undertake review and to grant relief" (para. 44). This wording is unclear; thus, there is need for clarification.

[54] When an applicant brings an application for judicial review, a judge must consider the application: that is, at a minimum, the judge must determine whether judicial review is appropriate. If, in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application (*Strickland*, at paras. 1, 38 and 40; *Matsqui*, at para. 31). The judge also has the discretion to refuse to grant a remedy, even if they find that the decision under review is unreasonable (*Khosa*, at para. 135; *Strickland*, at para. 37, quoting *Minister of Energy, Mines and Resources*, at p. 90).

[55] The Court of Appeal initially found no reversible error in the Divisional Court's decision to refuse to hear the judicial review application and agreed with the Divisional Court that: (i) there were alternative remedies, and (ii) the legislative scheme demonstrates "the legislative intent to limit access to the courts regarding these disputes" (para. 43). The Court of Appeal then went on to conduct a judicial review, as had the Divisional Court.

[56] Per *Strickland*, the exercise of discretion requires the court to determine the appropriateness of judicial review: "The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. . . . This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue . . ." (paras. 43-44).

[57] Respectfully, the Court of Appeal erred in its application of the *Strickland* factors. As I will explain, there is no proper basis to infer legislative intent to eliminate judicial review for issues (of fact and mixed fact and law) outside the scope of a statutory appeal. Furthermore, there was no adequate alternative remedy for Ms. Yatar on questions of fact and mixed fact and law.

[58] The Court of Appeal erred by holding that the limited right of appeal reflected an intention to restrict recourse to the courts on other questions arising from the administrative decision, and that judicial review should thus be rare. The legislative decision to provide for a right of appeal on questions of law only denotes an intention to subject LAT decisions on questions of law to correctness review. The idea that the LAT should not be subject to judicial review as to questions of facts and mixed facts and law cannot be inferred from this.

[59] The respondent TD Insurance argues that the legislative scheme and its amendments in 2016 reflects a policy choice by the legislature to severely limit the courts' involvement in accident benefits disputes: "Section 11(6) of the *LAT Act* restricts appeals to questions of law. . . . For LAT decisions made under nearly twenty other statutes, the legislature has made appeals available on all questions" (R.F., at paras. 62-63). TD Insurance further submits that "applying a deferential standard of review (reasonableness) to factual and mixed questions arising out of LAT decisions concerning SABS would not be appropriately respectful of the legislature's institutional design choices" (para. 84).

[60] With respect, I do not agree. The legislature could have decided to encompass all types of errors in the right to appeal, but it did not. Moreover, s. 2(1) of the *Judicial Review Procedure Act* preserves the right of litigants to seek a judicial review "despite any right of appeal". Errors of fact or mixed fact and law, thus, are not subject to a correctness standard of review. With that in mind, proceeding with judicial review of questions of fact or mixed fact and law is fully respectful of the legislature's institutional design choices.

[61] In *Vavilov*, this Court held that "because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial

scrutiny entirely" (para. 24). Professor Paul Daly argues that "[w]here the judicial review jurisdiction of the courts *has been* successfully ousted by statute . . . the legislature has provided a particular channel for oversight of the legality, rationality and procedural fairness of administrative action" (*Understanding Administrative Law in the Common Law World* (2021), at p. 188 (emphasis in original)). In other words, there was an appropriate alternative forum or remedy.

[62] The statutory right to appeal and the LAT adjudicator's reconsideration decision do not constitute adequate alternative remedies. The right to appeal under s. 11(6) of the *LAT Act* is restricted to errors of law only. Ms. Yatar raises errors of fact or mixed fact and law. Review of these questions is not available under the statutory right of appeal.

[63] The access to internal reconsideration cannot be an adequate alternative remedy, as the reconsideration decision itself is the subject of the review. Alternatives do exist where internal review processes have not been exhausted or where there is a statutory right to appeal that is not restricted, such that questions of law, fact, and mixed fact and law could be considered on appeal. But, that is not so here.

[64] This Court in *Strickland*, at para. 43, also emphasizes the appropriateness of judicial review in the circumstances, referring to a "balancing exercise":

> The categories of relevant factors are not closed, as it is for courts to identify and balance the relevant factors in the context of a particular case: *Matsqui*, at paras. 36-37, citing [*Minister of Energy, Mines and Resources*], at p. 96. Assessing whether there is an adequate alternative remedy, therefore, is not a matter of following a checklist focused on the similarities and differences between the potentially available remedies. The inquiry is broader than that. The court should consider not only the available alternative, but also the suitability and appropriateness of judicial review in the circumstances. In short, the question is not simply whether some other remedy is adequate, but also whether judicial review is appropriate. Ultimately, this calls for a type of balance of convenience analysis: *Khosa*, at para. 36; *TeleZone*, at para. 56. As Dickson C.J. put it on behalf of the Court: "Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant . . ." [*Minister of Energy, Mines and Resources*], at p. 96). [Emphasis added.]

[65] It has been argued by both respondents that judicial review was not appropriate in the circumstances, as the legislative intent was to "streamline dispute resolution and reduce costs" (R.F., TD Insurance, at para. 61). Respectfully, I do not agree. Judicial economy is a legitimate concern. However, the countervailing consideration is to ensure that those whose interests are being decided by a statutory delegate have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification, or were taken in a way that was procedurally unfair.

[66] Thus, in this case, the elements of the reconsideration decision that are not covered by the limited right of appeal should be judicially reviewed.

[67] I turn now to whether the LAT adjudicator's decision was reasonable.

D. *The LAT Adjudicator's Decision Was Unreasonable*

[68] Ms. Yatar received a letter from the insurer in January 2011 advising her that she would not receive further IRBs, housekeeping and home maintenance benefits, as she had not submitted a disability certificate. Attached to the letter was a dispute resolution form.

[69] Ms. Yatar provided the disability certificate and per the letter she received from the insurer in February 2011, her IRBs were reinstated, but her housekeeping and home maintenance benefits were denied. Following another medical examination, the insurer denied further IRBs as set out in the letter of September 2011.

[70] Ms. Yatar argues that the letters of February and September 2011 are not valid denials as no dispute resolution form was attached. While the LAT adjudicator also arrived at that conclusion, Ms. Yatar submits that the LAT adjudicator erred in finding that the letter from January was a valid denial.

[71] Per *Vavilov*, two types of flaws can render a decision unreasonable: first, a "failure of rationality internal to the reasoning process", and second, "when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it" (para. 101). The LAT adjudicator's reconsideration decision should be "approached as an organic whole, without a line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54).

[72] The LAT adjudicator relied on *Smith v. Co-operators* and concluded from the affidavit adduced by Ms. Yatar that there was an "implicit acceptance of the denials effective January 4, 2011" (reconsideration decision, at para. 15) and that her counsel should have been aware of the two-year limitation period, but that nothing was done to protect her rights.

[73] At the time, both s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS* provided for a 90-day extension of the limitation period after the mediator's report was released. The LAT adjudicator took into account the fact that Ms. Yatar commenced the mediation process after receiving the September letter. The LAT adjudicator had regard to the letters as well as the mediation process, and concluded that "[t]he limitation period lapsed April 14, 2014, [at the end of] the statutory ninety-day extension following the report of the mediator" (preliminary decision, at para. 26, aff'd in reconsideration decision, at para. 17).

[74] However, the LAT adjudicator failed to have regard to the effect of the reinstatement of the IRBs between February and September. The LAT adjudicator did not consider earlier tribunal decisions, some of which had held that when an applicant's benefits are reinstated, the limitation period can only be triggered when they are validly terminated again (see *Veldhuizen v. Coseco Insurance Co.*, 1995 ONICDRG 144 (CanLII); *Rudnicki v. Certas Direct Insurance Co.*, 2001 ONFSCDRS 60 (CanLII)).

[75] It is not in question that Ms. Yatar initiated mediation in September 2012. The mediation took place between June 18, 2013 and January 14, 2014. On January 14, 2014, the mediator released his report. However, s. 281.1(2)(b) of the *Insurance Act* and s. 51(2) of the *SABS*

(as they existed at the time) do not *trigger* a 90-day limitation period from the release of the mediator's report. Rather, they provide for an *extension* of the two-year limitation period from the mediator's report. In other words, it is arguable that there still needed to be a valid denial of the IRBs to start the clock running. I do not purport to decide this question; it is one properly to be decided by the LAT.

[76] The LAT adjudicator failed to take into account relevant legal constraints. In light of this, his decision is unreasonable.

VII. Conclusion

[77] The appeal is allowed. Having concluded that the reconsideration decision is unreasonable, I send the matter back to the LAT adjudicator to consider the issue of the effects of the reinstatement of benefits on the validity of the initial denial and, thus, on the limitation period.

[78] As Ms. Yatar succeeded on the jurisprudential question relating to the exercise of discretion to undertake judicial review when there is a limited statutory right of appeal, and in the judicial review, she is awarded her costs in this Court and the courts below payable by TD Insurance.

Appeal allowed with costs.

Solicitors for the appellant: Dewart Gleason, Toronto.

Solicitors for the respondent TD Insurance Meloche Monnex: McCarthy Tétrault, Toronto.

Solicitor for the respondent the Licence Appeal Tribunal: Tribunals Ontario — Legal Services Branch, Toronto.

Solicitors for the intervener the Attorney General of Canada: Department of Justice Canada — Ontario Regional Office, National Litigation Sector, Toronto; Department of Justice Canada — Quebec Regional Office, National Litigation Sector, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Ministry of the Attorney General — Crown Law Office — Civil, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of the Attorney General, Legal Services Branch, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Legal Services Division — Constitutional and Aboriginal Law Team, Edmonton.

Solicitors for the intervener the Income Security Advocacy Centre: Income Security Advocacy Centre, Toronto; Clinic Resource Office — Legal Aid Ontario, Toronto.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the intervener the Canadian Telecommunications Association: Paul Daly Law, Ottawa.

Solicitors for the intervener the Insurance Bureau of Canada: Lenczner Slaght, Toronto.

Solicitors for the intervener the Forest Appeals Commission: Arvay Finlay, Victoria.

Solicitor for the interveners Aboriginal Council of Winnipeg, Inc. and the Social Planning Council of Winnipeg: Public Interest Law Centre, Winnipeg.

Tab 173

CanLII

Hayward et al. v. Mellick et al., 1984 CanLII 1975 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1984-02-06
Other citations:	45 OR (2d) 110 — 5 DLR (4th) 740 — 23 ACWS (2d) 566 — 2 OAC 161 — 26 BLR 156 — [1984] OJ No 3091 (QL) — 36 RPR 106
Citation:	Hayward et al. v. Mellick et al., 1984 CanLII 1975 (ON CA), <https://canlii.ca/t/g1cjp>, retrieved on 2026-01-18

Hayward et al. v. Mellick et al.

45 O.R. (2d) 110
5 D.L.R. (4th) 740

ONTARIO
COURT OF APPEAL
HOULDEN, WEATHERSTON AND GOODMAN JJ.A.
6TH FEBRUARY 1984.

* On appeal to the Supreme Court of Canada, notice of discontinuance filed, February 28, 1985. S.C.C. File No. 18620.

Contracts -- Misrepresentation -- Liability for negligent misrepresentation inducing contract -- Effect of clause excluding all representations not contained in written agreement.

The vendor of a farm informed the purchaser that the farm contained 65 workable acres honestly believing this to be true. The sale agreement provided that "there is no representation, warranty, collateral agreement or condition affecting this agreement or the Real Property or supported hereby, other than as expressed herein in writing". A few months after completion the purchaser discovered that the farm included only 51.7 workable acres. An action for damages succeeded at trial, the judge holding that the parties' true bargain was for the sale of 65 workable acres, and that the disclaimer clause did not prevail against breach of a fundamental term.

On appeal to the Ontario Court of Appeal, held, allowing the appeal, the statement as to acreage was a representation and not a warranty. It would have been actionable as a negligent misrepresentation, except for the clause in the contract which had the effect of excluding liability for all misrepresentations, including liability in tort for negligent misrepresentation.

Per Houlden J.A. dissenting: The disclaimer clause was not sufficiently clear to exclude liability for negligence.

APPEAL from a judgment of Reid J., 23 R.P.R. 265, in favour of the plaintiff in an action for damages for misrepresentation nand breach of contract.

Cases referred to Redican et al. v. Nesbitt, 1923 CanLII 10 (SCC), [1924] S.C.R. 135, [1924] 1 D.L.R. 536, [1924] 1 W.W.R. 305; Fraser-Reid et al. v. Droumtsekas et al., 1979 CanLII 55 (SCC), [1980] 1 S.C.R. 720, 103 D.L.R. (3d) 385, 9 R.P.R. 121, 29 N.R. 424; Hill v. Harris, [1965] 2 All E.R. 358; Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465; Esso Petroleum Co. Ltd. v. Mardon, [1976] 2 All E.R. 5; Sodd Corp. Inc. v. Tessis (1977), 1977 CanLII 1415 (ON CA), 17 O.R. (2d) 158, 79 D.L.R. (3d) 632, 25 C.B.R. (N.S.) 16, 2 C.C.L.T. 245; Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. (1978), 1978 CanLII 2165 (ON SC), 19 O.R. (2d) 380 and 25 O.R. (2d) 155n, 85 D.L.R. (3d) 321 and 1980 CanLII 2740 (ON SC), 104 D.L.R. (3d) 702n, 41 C.P.R. (2d) 196, 28 C.B.R. (N.S.) 128, 4 B.L.R. 1 and 8 B.L.R. 133n; revd 1979 CanLII 75 (ON CA), 27 O.R. (2d) 168, 105 D.L.R. (3d) 684, 50 C.P.R. (2d) 50, 32 C.B.R. (N.S.) 4, 9 B.L.R. 290; revd 1982 CanLII 19 (SCC), [1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 42 N.R. 181; Case Threshing Machine Co. v. Mitten et al. (1919), 1919 CanLII 527 (SCC), 59 S.C.R. 118, 49 D.L.R. 30, [1919] 3 W.W.R. 601; Photo Production Ltd. v. Securicor Transport Ltd., [1980] 1 All E.R. 556; Cain et al. v. Bird Chevrolet-Oldsmobile Ltd. et al. (1976), 1976 CanLII 615 (ON SC), 12 O.R. (2d) 532, 69 D.L.R. (3d) 484; vard 1977 CanLII 1283 (ON CA), 20 O.R. (2d) 569n, 88 D.L.R. (3d) 607n; Alderslade v. Hendon Laundry, Ltd., [1945] 1 All E.R. 244, [1945] 1 K.B. 189; Canada Steamship Lines, Ltd. v. The King, 1952 CanLII 260 (UK JCPC), [1952] 2 D.L.R. 786, [1952] A.C. 192, 5 W.W.R. (N.S.) 609, [1952] 1 All E.R. 305; Goss v. Lord Nugent (1833), 5 B. & Ad. 57, 110 E.R. 713; De Lassalle v. Guildford, [1901] 2 K.B. 215; Mendelssohn v. Normand Ltd., [1970] 1 Q.B. 177; J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., [1976] 2 All E.R. 930; Brikom Investments Ltd. v. Carr et al., [1979] Q.B. 467; Carman Construction Ltd. v. Canadian Pacific R. Co. et al. (1980), 1980 CanLII 1721 (ON SC), 28 O.R. (2d) 232, 109 D.L.R. (3d) 288; affd 1981 CanLII 69 (ON CA), 33 O.R. (2d) 472, 124 D.L.R. (3d) 680; affd 1982 CanLII 52 (SCC), [1982] 1 S.C.R. 958, 136 D.L.R. (3d) 193, 18 B.L.R. 65, 42 N.R. 147

Robert M. Thompson, for appellants.

Karlheinz K. Beyer, for respondents.

WEATHERSTON J.A.:-- This action arose out of the purchase and sale of a farm on the Nith River near Paris. During negotiation leading up to the sale, Kenneth Hayward, one of the purchasers, plaintiffs in this action, was informed by the real estate agent, and by Bruce Mellick who with his wife was the owner of the farm, that the farm contained 65 workable acres. "Workable" in this context means "under cultivation". That was the meaning agreed to by both Hayward and Mellick. Hayward relied on this information in his mind it was one of the factors that went to determine the purchase price. Mellick believed the information to be true. He had been told by his father and grandfather before him that the area of land under cultivation was 65 acres. The evidence is clear that he authorized the real estate agent to describe the farm as containing 65 workable acres.

The plaintiffs submitted an offer to purchase prepared by the vendors' agent in which the farm was described as "land size -- 94 acres". There was no term as to the acreage of workable land. The offer also contained the following term:

> It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the Real Property or supported hereby, other than as expressed herein in writing.

After further negotiations Hayward submitted a second offer in the same form, except for agreed-to amendments which are not now material, and this offer was accepted. The transaction was completed in due course and a deed of conveyance was delivered. Several months later the plaintiffs discovered that the amount of workable land was only 51.7 acres.

The trial judge held that despite the parol evidence rule, "evidence was admissible to show that the bargain was not merely the purchase and sale of a 95 acre farm, but such a farm with 65 workable acres on it" [23 R.P.R. 265 at p. 269]. He found that the accepted offer to purchase was an incomplete statement of the parties' real intention. He said:

> Vendors agree that "the offer does not reflect the bargain":
> the bargain was to convey 65 workable acres. The written contract rested on the acceptance by both sides that the purchase and sale of 65 workable acres was what both sides intended to accomplish.

In the result, he found breach of a collateral contract, and negligent misrepresentation. He gave no effect to the disclaimer clause. He awarded the plaintiffs damages of $12,300.

In the passage from his reasons for judgment that I have quoted, the judge attributed to the vendors the words "the offer does not reflect the bargain". Those words do not appear in the transcript of the evidence. Mellick agreed that he thought the farm had 65 workable acres. I think the proper characterization of the agreement is that it was for the purchase and sale of a 94-acre farm containing two fields under cultivation which were thought by all parties to have areas of 60 and 5 acres respectively.

There can be no question on the facts found by the judge but that the plaintiffs were influenced by the erroneous statement by the defendants' agent, confirmed by the defendant Mellick, that it contained 65 workable acres. The only question is whether that statement can survive the accepted offer to purchase and the conveyance of the land as an actionable statement.

In Redican et al. v. Nesbitt, 1923 CanLII 10 (SCC), [1924] S.C.R. 135 at p. 146, [1924] 1 D.L.R. 536 at p. 543, [1924] 1 W.W.R. 305, Duff J. said:

> The vendee may rely after completion upon warranty, contractual condition, error in substantialibus, or fraud. Once the conveyance is settled and the estate has passed, it seems a reasonable application of the rule to hold that as to warranty or contractual condition resort must be had to the deed unless there has been a stipulation at an earlier stage which was not to be superseded by the deed, as in the case of a contract for compensation.

That passage governed real estate practice in this province for many years. But in Fraser-Reid et al. v. Droumtsekas et al., 1979 CanLII 55 (SCC), [1980] 1 S.C.R. 720 at p. 738, 103 D.L.R. (3d) 385 at p. 397, 9 R.P.R. 121, Dickson J. said:

> There is no presumption of merger. The proper inquiry should be to determine whether the facts disclose a common intention to merge the warranties in the deed; absent proof of such intention, there is no merger.

The vendor's statement that the farm contained 65 workable acres was not part of the accepted offer to purchase. It was either an innocent misrepresentation made without fault, but which, before completion, might have given rise to the remedy of rescission, or an innocent, but negligent misrepresentation, or a collateral warranty, either of which would give rise to the remedy of damages after completion.

In my opinion, the statement was not a collateral warranty. I quote again from the judgment of Dickson J. in Fraser-Reid, supra, at pp. 731-2 S.C.R., p. 392 D.L.R.:

An affirmation at the time of sale is a warranty provided it appears on the evidence to have been so intended: per Buller J. in Pasley v. Freeman (1789), 3 T.R. 51 [100 E.R. 450] (K.B.D.). No special form of words is necessary. In De Lassalle v. Guildford, [1901] 2 K.B. 215 (C.A.) at p. 221, A. L. Smith, M.R., said:

"It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it."

The real estate agent was undoubtedly authorized to inform potential purchasers that the farm contained 65 workable acres, but he had no authority to enter into contractual obligations on the vendors' behalf: see Hill v. Harris, [1965] 2 All E.R. 358 at p. 362, per Diplock L.J. As to Mellick himself, the plaintiff Hayward, whose evidence the trial judge accepted, testified:

Q. All right now, what happened after you had completed the inspection of the house, did you have any conversation with anybody at that time?

A. The only conversation I had with Mr. and Mrs. Mellick was upon leaving their house with Mr. Etherington we were putting on our coats and hats and I just wanted to confirm with Mr. Mellick on the workable land and I asked him if the cultivated land that he was farming was the 65 workable acres.

Q. And what did he reply?

A. He agreed with Mr. Etherington that he was working 65 acres.

. . . . .

Q. And you looked over the barn and you went over on to the hill overlooking the property with Mr. Etherington?

A. That is right.

Q. Mr. Mellick was not present?

A. That is right.

Q. And you could see the land from there?

A. You could see -- we looked at it from two different angles, one being the east side of the barn and the other being the west side.

Q. And it was fully visible to you, you could see?

A. You could see the outline of the farm.

Q. All right, and what was the conversation that took place while you were standing on the hill overlooking the farm between yourself and Mr. Etherington?

A. Mr. Etherington pointed out the bush, the western boundary of the property, in the large area -- may I?

Q. Certainly.

A. On this angle here pointed out this large field, having 60 acres in it and the bottom field, small field between the bush and the river flats having 5 acres in it. Standing on the east side of

the barn you can see most of the river flats to the bridge, this area right in here is obstructed by these trees.

. . . . .

Q. All right, and then after that conversation which took about, and the inspection which took about 15 to 20 minutes, I understand you went up to the house and you did not speak to either Mr. or Mrs. Mellick in the house; is that correct?

A. We were introduced and they gave Larry permission for us to go through it.

Q. But there was no discussion concerning with either Mr. or Mrs. Mellick in the house?

A. Until we were about to leave.

Q. Until we were about to leave?

A. Yes.

Q. And it's my understanding that you did not have any conversation with Mrs. Mellick but rather it was Mr. Mellick you had the conversation with?

A. That is right.

Q. And that conversation was as you put it confirming --

A. The 65 workable.

Q. All right, I take it there wasn't a long conversation?

A. No.

Q. And it was commenced by you asking a question of Mr. Mellick?

A. Yes, it was.

Q. And what exactly was that question?

A. The question was the land that he had cultivated and he had in crops was the 65 acres of workable land, was it 65 acres?

Q. That was the question that you put to him?

A. That was.

Q. He was able to answer it?

A. I went away from there confirming what Larry had showed me.

Q. What did he say?

A. He told me that the land that he had under cultivation was 65 acres.

. . . . .

Q. The only thing Mr. Mellick said to you is I have 65 acres under cultivation?

A. Yes.

Q. That is all he said in this entire transaction?

A. Yes.

Q. Concerning acreage?

A. Yes.

Q. And do I take it that you assumed that he knew what you were talking about?

A. Yes.

HIS LORDSHIP: You assumed what?

A. That there were 65 acres of workable land that was stated on the listing, that was shown to me by Mr. Etherington. There were no statements of approximately 60 acres or 65 or this might be five or this might be four acres, this might be 64 acres or this parcel or anything, it was 60 in this parcel, five in the other.

Q. And you assumed that he knew what you were talking about?

A. That is correct.

In light of the circumstances and the informal manner in which this response from Mellick was obtained, I think it is impossible to infer that he intended it to be a matter of contract between him and Hayward. It was merely an affirmation of what the real estate agent had already said. As such, it was a representation. That representation was only his own information and belief, but it was, nevertheless, a representation because it was stated as a matter of fact. It was a negligent misrepresentation because it was made without personal knowledge of the fact or even information that the fields had been carefully measured. He must have known that the acreage was important to Hayward, and he said nothing to qualify his statement, or to tell Hayward to satisfy himself. The fields were irregular in shape, it was winter-time, and he must or should have known that Hayward would rely on him.

Since Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, it has been clear that a negligent misrepresentation, if made to a person to whom the representor owed a duty of care, will give rise to a cause of action for damages. Lord Reid said at p. 483:

> So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than the mere misstatement. I therefore turn to the authorities to see what more is required. The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility, and that appears to me not to conflict with any authority which is binding on this House. Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty.

This sounds as if there is no cause of action for a negligent misstatement made in pre-contract negotiations, unless it amounted to a warranty. But Esso Petroleum Co. Ltd. v. Mardon, [1976] 2 All E.R. 5, decided otherwise. Lord Denning said [at p. 16]:

> It seems to me that Hedley Byrne, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another--be it advice, information or opinion--with the intention of inducing

> him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages.

Esso Petroleum was followed in this Court in Sodd Corp. Inc. v. Tessis (1977), 1977 CanLII 1415 (ON CA), 17 O.R. (2d) 158, 79 D.L.R. (3d) 632, 25 C.B.R. (N.S.) 16, and by Rutherford J. in Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. (1978), 1978 CanLII 2165 (ON SC), 19 O.R. (2d) 380 and 25 O.R. (2d) 155n, 85 D.L.R. (3d) 321 and 1980 CanLII 2740 (ON SC), 104 D.L.R. (3d) 702n, 41 C.P.R. (2d) 196. The Lister case went on to the Supreme Court of Canada, 1982 CanLII 19 (SCC), [1982] 1 S.C.R. 726, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1], but there was no cross-appeal on this point.

In the present case Mellick professed to have special knowledge of the number of workable acres. He knew that there was no easy way for Hayward to satisfy himself. The question then becomes whether the accepted offer to purchase contained all the agreed terms and conditions of the contract, or whether the representation continued as an underlying basis of the contract, giving rise to an action in tort in addition to the contractual rights.

In Case Threshing Machine Co. v. Mitten et al. (1919), 1919 CanLII 527 (SCC), 59 S.C.R. 118, 49 D.L.R. 30, [1919] 3 W.W.R. 601, the respondents had purchased a farm tractor. The agreement provided that "no representations, warranty or conditions, expressed or implied, other than those herein contained nor ... any agreement collateral hereto be binding upon the vendor unless it is in writing" [p. 123 S.C.R., p. 34 D.L.R.]. The engine had two tanks, one labelled "kerosene" and one "gasoline". The agent of the appellant vendor represented to the respondents that the engine would also operate on kerosene, but it stopped whenever so operated.

Duff J. said at pp. 119-20 S.C.R., p. 31 D.L.R.:

> The written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing exclusively. In face of this provision it is not, in my opinion, competent for a court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument.

Hill v. Harris, supra, was a case where a sublease was being negotiated to a person who intended to use the premises for a confectionery and tobacco business. The lessee's agents said that would be all right. Correspondence was exchanged between the respective solicitors and a sublease was entered into. Later, under a clause in the head lease, the landlord refused to consent to the intended use of the premises. There was no term in the sublease by which the sublessor warranted that the sublessee could carry on his intended business. It was held that there was no collateral warranty. Diplock L.J. said [at p. 363] that the "letters, statements and discussions were made in the course of negotiations. They were superseded by the terms of the lease entered into between the parties. The only rights which the sub-lessee has are the rights conferred on him by the lease".

That case was decided after Hedley Byrne but before Esso Petroleum, but I think the result would have been the same if the lessees' agent's words "that would be all right" had been regarded as a misrepresentation. In either case one starts with the assumption that if a contract has been put in writing, all terms material to the contract will be embodied in the writing. Otherwise it would be a meaningless exercise to create the written document.

There are cases of a negligent misrepresentation inducing the misrepresentee to enter into an improvident contract, where the representation is as to some overriding or collateral matter. Esso Petroleum was such a case. Then the representation is entirely outside the terms of the contract, and a disclaimer clause does not affect liability for the misrepresentation unless it is effective as a

disclaimer of responsibility. But there are other cases where the representation is as to the quality or fitness of the subject-matter of the contract, as in Case Threshing Machine Co. In such a case the rights of the parties must be governed by all the terms of the contract, including a disclaimer clause if there is one.

Here, the representation that the farm contained 65 workable acres was descriptive of the subject-matter of the contract, and so the rights of the parties are to be governed by the terms of the contract.

The trial judge dismissed the disclaimer clause on the ground that there was no evidence that either side paid any attention to it at the time. Further, he said it was wholly at odds with their common intention in respect of a matter fundamental to the contract [p. 270]: "A disclaimer clause will not prevail against breach of a fundamental term."

Hayward did pay attention to the clause. He said that he had read it, and that it meant "that there was 94 acres". In my opinion, this answer is consistent with the view that the plaintiffs did not rely on any representation as to acreage other than that which was stated in the offer to purchase.

The doctrine that a fundamental breach of contract deprived the party in breach of the benefit of clauses in the contract excluding or limiting his liability was laid to rest by the House of Lords in Photo Production Ltd. v. Securicor Transport Ltd., [1980] 1 All E.R. 556. The headnote sums up the effect of the decision as follows:

> There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of their obligations they chose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract, including any exception clauses, and because (per Lord Diplock) the parties were free to reject or modify by express words both their primary obligations to do that which they had promised and also any secondary obligations to pay damages arising on breach of a primary obligation.

The courts of this province have followed the Court of Appeal of England in holding that a fundamental breach of contract relieves the innocent party of a disclaimer clause. I so held in Cain et al. v. Bird Chevrolet-Oldsmobile Ltd. et al. (1976), 1976 CanLII 615 (ON SC), 12 O.R. (2d) 532, 69 D.L.R. (3d) 484; affirmed on this point 1977 CanLII 1283 (ON CA), 20 O.R. (2d) 569n, 88 D.L.R. (3d) 607n. Since the courts of this province adopted the doctrine from the English courts, I think we should now follow their lead in rejecting it as a rule of law. Nevertheless, there are many cases in our courts decided before the doctrine was invented, which held that where there was a significant failure by one party to perform his contractual obligations, he was not insulated against liability by an exemption clause. I gave some examples in Cain, supra. Those cases are still good law. They are not relevant to this case.

A disclaimer clause (sometimes called exemption, or exceptions or exclusion clauses) is to be strictly construed, and will not protect the party relying on it from his negligence if "the head of damage may be based on some ground other than that of negligence": see Alderslade v. Hendon Laundry, Ltd., [1945] 1 All E.R. 244; Canada Steamship Lines, Ltd. v. The King, 1952 CanLII 260 (UK JCPC), [1952] 2 D.L.R. 786 at p. 794, [1952] A.C. 192, [1952] 1 All E.R. 305 at p. 310 (P.C.) Those cases dealt with negligent performance of contracts.

The case against the defendants is one of negligent misrepresentation, but I think it would be too strained a construction of the disclaimer clause to say that it applies only to representations that are not negligent. I think that effect must be given to it, and that it should be held that the

representation that the farm had 65 workable acres was excluded by the disclaimer clause, and did not create a liability of the defendants to the plaintiffs outside the contract.

Accordingly, the appeal must be allowed with costs and the action dismissed with costs.

GOODMAN J.A. concurs with WEATHERSTON J.A.

The plaintiffs were induced to enter into the agreement to purchase the defendants' farm by the representation of the defendants' agent, confirmed by the defendant Bruce Corless Mellick, that the farm contained 65 workable acres. The amount of workable land was only 51.7 acres.

I agree with Weatherston J.A. that, on the facts of this case, the representation did not amount to a collateral warranty. The trial judge found, however, that the representation was made negligently. If it were not for the disclaimer clause in the agreement of purchase and sale, the plaintiffs would clearly be entitled to damages: Esso Petroleum Co. Ltd. v. Mardon, [1976] 2 All E.R. 5; Sodd Corp. Inc. v. Tessis (1977), 1977 CanLII 1415 (ON CA), 17 O.R. (2d) 158, 79 D.L.R. (3d) 632, 25 C.B.R. (N.S.) 16.

The disclaimer clause reads as follows:

> It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the Real Property or supported hereby other than as expressed herein in writing.

The crucial issue in this appeal is: What is the effect of the clause? Does it include a negligent misrepresentation that has induced the making of the contract? With the greatest deference, I cannot accept Weatherston J.A.'s view that there are two kinds of negligent misrepresentation, one of which relates to a collateral matter, and one of which relates to quality or fitness of the subject-matter of the contract. In my opinion, the appeal turns on the construction of the disclaimer clause. If the clause is wide enough to include a negligent misrepresentation that induces a purchaser to enter into the agreement of purchase and sale, the appeal should be allowed; if it is not, the appeal should be dismissed.

The clause, as I read it, provides that the written agreement contains all the terms of the bargain between the parties and that all antecedent representations, warranties, collateral agreements and conditions are of no effect. The clause is, in my judgment, simply a restatement of the parol evidence rule. The classic statement of that rule is contained in Goss v. Lord Nugent (1833), 5 B. & Ad. 57, 110 E.R. 713, where Lord Denman C.J. said (at pp. 64-5 B. & Ad., p. 716 E.R.):

> By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract ...

Would the parol evidence rule prevent the giving of evidence of a negligent misrepresentation which induced the making of a contract? In my opinion, the answer is no. In De Lassalle v. Guildford, [1901] 2 K.B. 215, the plaintiff and the defendant entered into negotiations for a lease of the defendant's house. The terms were arranged, and the counterpart of a lease was signed by the plaintiff. The plaintiff refused to hand over the counterpart until he received an assurance from the defendant that the drains were in good order. The defendant orally represented that they were in this condition, and upon receiving this assurance, the plaintiff delivered the counterpart to the defendant. The lease contained no reference to the drains. It subsequently turned out that the drains were not in good order, and the plaintiff incurred expense in altering the sanitary arrangements. The jury found that there was a representation by the defendant that the drains were in good order; they negatived fraudulent misrepresentation; and they assessed the damages sustained by the

plaintiff as a result of the defendant's misrepresentation. The trial judge, however, dismissed the action. The plaintiff appealed and the appeal was allowed.

At the time of the De Lasalle case there was no cause of action for damages for negligent misrepresentation. The Court of Appeal, in reversing the trial judge, found that the defendant's representation amounted to a collateral warranty. Since a negligent misrepresentation now gives a cause of action for damages, the distinction between collateral warranty and negligent misrepresentation is no longer of importance where the court finds that the representation amounts to a negligent misrepresentation.

It was contended by counsel for the defendant that the lease being in writing, it must be taken that the writing was intended to be the whole contract. The Court of Appeal, in a unanimous judgment, rejected this submission. The court held that, notwithstanding the fact that the lease made no mention of the drains, the defendant's statement as to the condition of the drains having induced the plaintiff to enter into the lease, it was admissible in evidence and effect could be given to it. As A. L. Smith M.R. said (at p. 222):

> The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed.

Similarly, here, the representation as to the number of workable acres in no way contradicts the terms of the agreement of purchase and sale, and without the representation the plaintiffs would never have entered into the agreement.

The importance of the representation being the thing which induces the making of the contract is noted in Mendelssohn v. Normand Ltd., [1970] 1 Q.B. 177. In that case, the plaintiff parked a car in the defendants' parking garage. He was told by the attendant that he should leave his car unlocked. The plaintiff told the attendant that he had valuable luggage in the back seat. The plaintiff, however, as requested, gave his car keys to the attendant who agreed to lock the car as soon as he had moved it. The attendant gave the plaintiff a ticket which contained a clause relieving the defendant of "responsibility for any loss or damage sustained by the vehicle its accessories or contents however caused". The attendant failed to lock the car and the plaintiff 's luggage was stolen. The county court judge held the defendants liable for the loss. The Court of Appeal dismissed the appeal and held that the defendants could not shelter behind the exemption clause. Lord Denning M.R. said (at pp. 183-4):

> There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition, see Couchman v. Hill [1947] K.B. 554; Curtis v. Chemical Cleaning and Dyeing Co. [1951] 1 K.B. 805; and Harling v. Eddy [1951] 2 K.B. 739; nor is he allowed to go back on his promise by reliance on a written clause, see City and Westminster Properties (1934) Ltd. v. Mudd [1959] Ch. 129, 145 by Harman J. The reason is because the oral promise or representation has a decisive influence on the transaction--it is the very thing which induces the other to contract--and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. As Devlin J. said in Firestone Tyre and Rubber Co. Ltd. v. Vokins & Co. Ltd. [1951] 1 Lloyd's Rep. 32, 39: "It is illusory to say: 'We promise to do a thing, but we are not liable if we do not do it'." To avoid this illusion, the law gives the oral promise priority over the printed clause.

and to the same effect Phillimore L.J. said (at pp. 185-6):

> The submission which Mr. Yorke made is that but for the conversations which Mr. Mendelssohn had with the employee of the defendants it is obvious that he would have made

other arrangements or perhaps he would not have left the car there at all. He was clearly concerned about his luggage, and it seems to me that he was induced to leave the car there by a firm promise that it would be locked. Whether you regard that promise as a representation or whether you regard it as a collateral term of the contract, or whether you regard the contract as being partly oral and partly in writing in the shape of the ticket, it seems to me it can make no real difference. It is quite clear that if it was really a representation, then, on the authority of Curtis v. Chemical Cleaning and Dyeing Co. [1951] 1 K.B. 805, the defendants could not in such circumstances, namely, the representation being made and believed, rely upon their exemption clauses. In the words of Denning L.J. in that case at p. 808:

> "In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption."

I would refer also to J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd., [1976] 2 All E.R. 930, and Brikom Investments Ltd. v. Carr et al., [1979] Q.B. 467.

In Carman Construction Ltd. v. Canadian Pacific R. Co. et al. (1980), 1980 CanLII 1721 (ON SC), 28 O.R. (2d) 232, 109 D.L.R. (3d) 288; affirmed by the Court of Appeal, 1981 CanLII 69 (ON CA), 33 O.R. (2d) 472, 124 D.L.R. (3d) 680; affirmed by the Supreme Court of Canada, 1982 CanLII 52 (SCC), [1982] 1 S.C.R. 958, 136 D.L.R. (3d) 193, 18 B.L.R. 65, the plaintiff was invited by the defendant to tender for a contract for the excavation and removal of a section of earth and rock. The plaintiff received from the defendant a tender package which contained, among other things, a specimen form of the contract to be entered into. Before submitting its tender, the vice-president of the plaintiff discussed with an employee of the defendant the quantity of rock to be excavated and was informed that it would be 7,000 to 7,500 cu. yd. On the basis of this representation, the plaintiff tendered for the work and was awarded the contract. The contract contained the following clause [p. 238 O.R., p. 294 D.L.R.]:

> "3.1 It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company."

The vice-president of the plaintiff admitted that he had read the provisions of cl. 3.1 in the draft contract before submitting the plaintiff 's tender. The amount of rock to be excavated turned out to be some 11,000 cu. yd., and the plaintiff sued the defendant for the extra expense that it had incurred in performing the contract.

Griffiths J., the trial judge, held that the defendant could rely on the exemption clause in the contract and dismissed the action. His judgment was affirmed by a majority of the Court of Appeal (Brooke J.A. dissenting). Wilson J.A., who delivered the judgment of the majority, said (at p. 473 O.R., p. 681 D.L.R.):

> This is not, in the view of the majority, a case in which, after making a negligent misrepresentation to the plaintiff in order to induce it to enter into a contract, the terms of which were at the time of the misrepresentation unknown, the defendant thereafter inserts into the contract an exculpatory clause in order to insulate itself against antecedent tort liability. This is a case in which the plaintiff tendered knowing that in the very contract on which it was tendering it had agreed to assume the risk of using any information obtained by it from the defendant's

> employees. There is no basis in these circumstances for the exercise of the Court's equitable jurisdiction.

(Emphasis is mine.)

The Supreme Court of Canada, in a unanimous judgment, affirmed the judgment of the majority of the Court of Appeal. Martland J., speaking for the court, agreed with the Court of Appeal that the plaintiff had relied on the information furnished to it by the defendant at its own risk. Following Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, he held that cl. 3.1 of the contract had the effect of excluding the assumption of a duty of care by the defendant. He drew a distinction between the traditional exemption clause and a clause such as cl. 3.1 (at p. 972 S.C.R., p. 203 D.L.R.):

> The judgment at trial dealt with the situation on the basis that negligent misrepresentation had been established, but that clause 3.1 was an exemption clause which exempted C.P.R. from liability. In the circumstances of this case, I would prefer to regard the clause as establishing that C.P.R. did not assume any duty of care, and a claim in negligence will not arise in the absence of a duty of care.

and at p. 973 S.C.R., p. 204 D.L.R., he said:

> [Clause 3.1] is what the Court of Appeal described as a non- reliance provision, the effect of which was to prevent liability arising on the part of C.P.R. in respect of statements made or information given by its employees.

Clause 3.1 in the Carman case is, of course, different in wording from the disclaimer clause in the present case. In my opinion, however, the case falls squarely within the example given by Wilson J.A. that I have italicized. Here, the defendants made a negligent misrepresentation to the plaintiffs in order to induce them to enter into the agreement of purchase and sale, the terms of the agreement being unknown at the time that the misrepresentation was made, and the defendants are now attempting to rely on the disclaimer clause to insulate themselves against the antecedent tort liability arising from the misrepresentation.

A disclaimer clause could, of course, be drawn that would include antecedent negligent misrepresentations that induce the making of a contract. But if the clause is to have this effect, I believe that it must expressly so provide; otherwise it will not be given that coverage: see Alderslade v. Hendon Laundry, Ltd., [1945] 1 K.B. 189; Canada Steamship Lines, Ltd. v. The King, 1952 CanLII 260 (UK JCPC), [1952] 2 D.L.R. 786, [1952] A.C. 192, 5 W.W.R. (N.S.) 609; Chitty on Contracts, 25th ed. (1978), para. 879.

I would dismiss the appeal with costs.

Appeal allowed.

Tab 174

CanLII

Vale v. Sun Life Assurance Co. of Canada, 1998 CanLII 14823 (ON SC)

Source:	Superior Court of Justice
Date:	1998-04-14
Other citations:	39 OR (3d) 444 — 78 ACWS (3d) 1206 — 19 CPC (4th) 215 — [1998] OJ No 6465 (QL)
Citation:	Vale v. Sun Life Assurance Co. of Canada, 1998 CanLII 14823 (ON SC), <https://canlii.ca/t/1w9kk>, retrieved on 2026-01-18
Most recent unfavourable mention	Imperial Oil Ltd. v. Lubrizol Corp., 2000 CanLII 15742 (FC) [...] [See Nesbitt Thompson & Co. v. Pigott, 1941 CanLII 13 (SCC) , [1941] S.C.R. 520 per Taschereau J. at 530; Vale et al. v. Sun Life Assurance Company of Canada **(1998), 1998 CanLII 14823 (ON SC) , 39 O.R. 444 (General Division) at 453, var"d [1999] O.J. 1507 (C.A.)** ; and Derry v. Peek (1889), 14 App. Cas. 337 (H.L.) , per [...]

Vale et al. v. Sun Life Assurance Company of Canada
[Indexed as: Vale v. Sun Life Assurance Co. of Canada]

39 O.R. (3d) 444
[1998] O.J. No. 6465
Court File Nos. 93-CQ-36698, 94-CQ-58410CM, 95-CQ-62306
Commercial Court File No. B254/96

Ontario Court (General Division)
Cullity J.
April 14, 1998

Civil procedure -- Judgments and orders -- Motion to set aside judgment on grounds of fraud -- Fraudulent evidence given at trial -- Fraudulent evidence not relating to material issue -- Issue not material if it is clear that different resolution of issue could not have affected result of trial --

Motion to set aside judgment dismissed -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 59.06.

Judgments and orders -- Motion to set aside judgment on grounds of fraud -- Fraudulent evidence given at trial -- Fraudulent evidence not relating to material issue -- Issue not material if it is clear that different resolution of issue could not have affected result of trial -- Motion to set aside judgment dismissed -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 59.06.

In three separate actions, the plaintiffs had sought to establish that JV had a right pursuant to s. 10(1) of the Interest Act, R.S.C. 1985, c. I-15, and s. 18(1) of the Mortgages Act, R.S.O. 1990, c. C.40, to prepay long-term mortgages granted by corporate mortgagors to the defendant Sun Life. JV had signed each mortgage as an additional covenantor, and in those proceedings, JV had testified that, to the knowledge of Sun Life, the mortgages had been placed by corporate mortgagors holding as a bare trustee as a matter of convenience for him, and he testified that there was a common intention that he should have a right to redeem the mortgages after five years notwithstanding the absence of any right of prepayment in the mortgages. JV testified that he had been assured by a representative of Sun Life that he would be able to prepay the mortgages. The trial judge, however, held that JV was mistaken in his evidence about Sun Life's knowledge and about the assurances of a right of repayment. Further, the trial judge held that had the assurances been given, they had been made by a person without authority to bind Sun Life. In each action, Sun Life relied on ss. 10(2) of the Interest Act and s. 18(2) of the Mortgages Act, respectively, which exempt the statutory right of prepayment when the mortgagor is a corporation. In each action, Sun Life called evidence from RS, who was then its vice-president of investments. RS testified that only long-term mortgage investments were matched with Sun Life's long-term fixed income obligations. In judgments affirmed by the Court of Appeal, the trial judge held that JV had no statutory right of prepayment. The Court of Appeal held that the result would not have been different even if Sun Life had been aware of the bare trust relationship.

After the Supreme Court of Canada had refused to grant leave to appeal the judgment of the Court of Appeal, JV discovered that RS's evidence was false. Contrary to his evidence, Sun Life matched substantial amounts of short-term mortgages with Sun Life's long-term fixed income obligations. The plaintiffs moved pursuant to rule 59.06(2)(a) of the Rules of Civil Procedure for orders setting aside the three judgments on the ground of fraud.

Held, the motion should be dismissed.

Under rule 59.06 of the Rules of Civil Procedure and as a part of its equitable jurisdiction, the court has the jurisdiction to set aside a judgment on the grounds of fraud. Fraud in this context is sometimes described as "common-law fraud" and is an essential element of the tort of deceit, where fraud is proved when it is shown that a misrepresentation has been made knowingly or without belief in its truth or recklessly whether it be true or false. Proof of the absence of a belief in the truth of the misrepresentation is sufficient to make the misstatement fraudulent. RS's evidence with respect to the allocation of mortgage investments by Standard Life was fraudulent. His statements were untrue and he had no honest belief in their truth. However, a judgment will not be set aside on the basis of perjury or other fraudulent conduct unless it relates to a material issue at the trial, although not necessarily a decisive issue. Materiality is a matter of degree, and whether an issue is material should be determined first by an examination of the pleadings, but the evidence at trial should also be considered. An issue will not be material if it is clear that a different resolution of the issue could not have affected the result of the trial. For this purpose, a review of the reasons of the trial judge is necessary, but it is not the role of the reviewing court to analyze the reasons to determine whether the trial judge would have regarded the fraud as related to a material issue. An issue may not be material if a party does not rely on it at trial, although there may be circumstances where it would still be material because the fraud affected decisions about the conduct of a party's case. While the outcome of, and the reasons given on, an appeal may

need to be considered on the question of materiality, the weight, if any, to be given these matters will depend upon how the grounds of appeal were or may have been affected by findings on factual issues that were tainted by the fraudulent evidence at the trial.

In the immediate case, the alleged statutory rights of JV provided the main focus of the plaintiffs' case at trial and RS's untruthful evidence did not relate to this issue. The plaintiffs argued, however, that the issue of a common intention that JV should have a right of prepayment was a material issue. But this would not be the case unless the issue of common intention was fairly raised by the pleadings and, on the assumption that JV's evidence had been believed and RS's evidence had been untruthful, it could have provided a possible basis or step in the reasoning for a decision that JV was entitled to rights of prepayment. Further, there would also need to be evidence that the issue was relied upon at trial or at least evidence that makes it reasonable to conclude that, but for the fraud, it might have been relied upon. These factors had not been established. There was no allegation of a common intention in the plaintiffs' pleadings and JV's evidence at trial did not provide any significant support for the submission that the existence of a common intention was a material issue in the actions. The finding that there could not have been an assurance binding on Sun Life precluded JV's allegations of a common intention from being a material issue as, even if RS had testified truthfully, there would have been no evidence that Sun Life had the alleged common intention. On the basis of the pleadings, the evidence at trial, and the findings with respect to the alleged assurances, RS's evidence was not related to a material issue and the motions to set aside the judgments should be dismissed.

MOTION pursuant to rule 59.06(2)(a) of the Rules of Civil Procedure for orders setting aside three judgments (reported (1995), 1995 CanLII 7087 (ON SC), 24 O.R. (3d) 619, 47 R.P.R. (2d) 1 (Gen. Div.), reversed (1996), 1996 CanLII 2462 (ON CA), 30 O.R. (3d) 579, 5 R.P.R. (3d) 161, 143 D.L.R. (4th) 77 (C.A.)).

Cases referred to 100 Main Street East Ltd. v. Sakas (1975), 1975 CanLII 381 (ON CA), 8 O.R. (2d) 385, 58 D.L.R. (3d) 161 (C.A.); Cook v. Forster, [1950] O.W.N. 739 (H.C.J.); Derry v. Peek (1889), 14 App. Cas. 337, [1886-90] All E.R. Rep. 1, 58 L.J. Ch. 864, 61 L.T. 265, 54 J.P. 148, 38 W.R. 33, 5 T.L.R. 625, 1 Meg. 292 (H.L.); Flower v. Lloyd (1878), 10 Ch. D. 327, 39 L.T. 613, 27 W.R. 496 (C.A.); Glatt v. Glatt, 1935 CanLII 16 (ON CA), [1936] O.R. 75, [1936] 1 D.L.R. 387, 17 C.B.R. 219 (C.A.); Johnston v. Barkley (1905), 10 O.L.R. 724 (Div. Ct.); International Corona Resources Ltd. v. Lac Minerals Ltd. (1988), 1988 CanLII 4534 (ON SC), 66 O.R. (2d) 610, 54 D.L.R. (4th) 647 (H.C.J.); Litowitz v. Standard Life Assurance Co. (1996), 1996 CanLII 2462 (ON CA), 30 O.R. (3d) 579, 5 R.P.R. (3d) 161, 143 D.L.R. (4th) 77 (C.A.); MacDonald v. Pier, 1922 CanLII 29 (SCC), [1923] S.C.R. 107, [1923] 1 D.L.R. 670, [1923] 1 W.W.R. 376; Patch v. Ward (1867), 3 Ch. App. 203, 18 L.T. 134, 16 W.R. 441 (L.JJ.) Statutes referred to Interest Act, R.S.C. 1985, c. I-15, s. 10(1) Mortgages Act, R.S.O. 1990, c. M.40, s. 18(1) Statute of Frauds, R.S.O. 1990, c. S.19 Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 59.06(2) (a) Authorities referred to Gordon, D.M., (1961), 77 L.R.Q. 358, p. 533 Halsbury's Laws of England, 4th ed., vol. 31, para. 1059

Peter R. Jervis, Joel Vale and Michael J. Meredith, for moving parties (plaintiffs).
Joel J. Goldenberg and Aubrey E. Kauffman, for responding party (defendant).

CULLITY J.: -- This motion was brought by the plaintiffs in three actions against the defendant, Sun Life Assurance Company of Canada ("Sun Life"). In each of the actions the plaintiffs were unsuccessful in establishing that Mr. Joel Vale had a right to prepay an otherwise long-term mortgage in which the corporate plaintiff was the mortgagor, Mr. Vale was an additional covenantor and Sun Life was the mortgagee. Appeals to the Court of Appeal were subsequently dismissed and leave to appeal to the Supreme Court of Canada was refused. The plaintiffs now

seek an order pursuant to rule 59.06(2)(a) of the Rules of Civil Procedure setting aside the judgment in each of the actions on the ground of fraud, or of facts arising or discovered after the judgments were delivered. The allegation of fraud arises out of evidence given at trial by an employee of Sun Life, Mr. Robert Sharkey.

Background

The relevant aspects of the facts will be described in more detail later in these reasons. The following general summary is intended merely to provide the context in which the issues in this motion arose.

The mortgages in question were on properties in Toronto located at 77 Spencer Avenue, 470 Roncesvalles Avenue, and 829 Birchmount Road. Title to the properties in Spencer Avenue and Birchmount Road was registered in the name of H.L.V. Trading Limited, while that to the property in Roncesvalles Avenue was in the name of J.V. Trading Limited. Mr. Vale's evidence was that, in each case, title had been placed in the name of the corporation for his convenience and was held by the particular corporation as a nominee or bare trustee for him. Although the mortgage documents did not disclose the existence of this relationship, Mr. Vale alleged that it was known to Sun Life. As already mentioned, Mr. Vale executed each mortgage as an additional covenantor.

Each of the actions involved a claim by Mr. Vale that he was entitled to exercise the rights of a mortgagor under s. 10(1) of the Interest Act, R.S.C. 1985, c. I-15, and s. 18(1) of the Mortgages Act, R.S.O. 1990, c. M.40, to prepay, after five years, the amount advanced under the particular mortgage (respectively the "Spencer mortgage", "Birchmount mortgage", and the "Roncesvalles mortgage"). None of the mortgage documents contained a right of prepayment and Mr. Vale was advised of this by his solicitors for two of the transactions.

Sun Life, the mortgagee under the mortgages, denied that any such statutory right existed on the ground that the mortgagor in each case was the corporate plaintiff from whom the right to prepay conferred upon individuals was withheld by virtue of s. 10(2) of the Interest Act and s. 18(2) of the Mortgages Act.

The actions were tried together in May and June 1995. Mr. Robert Sharkey was called as a witness for Sun Life. Mr. Sharkey has degrees in mathematics, and philosophy from McGill University. He is a Fellow of the Society of Actuaries and a Fellow of the Canadian Institute of Actuaries. At the time he gave evidence on May 30, 1995, he was vice-president of investments in the corporate office of Sun Life and had been employed by Sun Life for 17 years. Mr. Sharkey testified that Sun Life had allocated the mortgages to various accounts or funds (the "Funds") where they were, in effect, matched with obligations of Sun Life. The thrust of part of his evidence was that each of the funds to which the mortgages were allocated contained long-term fixed income obligations. In his affidavits filed in this motion, he testified that the purpose of his evidence was to demonstrate that Sun Life treated the mortgages from Mr. Vale's corporations as long-term mortgages and, in consequence, allocated them to long-term obligations of Sun Life.

The transcript of Mr. Sharkey's evidence-in-chief and cross- examination includes the following questions and answers (the italics are mine):

> (evidence in chief)
>
> Q. Mr. Sharkey, can you tell from looking at that document then to what allocation was the Spencer mortgage made?
>
> A. Yes, Spencer Mortgage was made to Fund 223, which is an individual retirement annuity fund, which our monthly pay level amount annuities for the life an individual typically.

Q. Right.

A. And very long-term is a consequence, and we would only allocate long-term fixed income investment in this type of fund . . .

Q. Okay. Stop there for a second. And the next one, which one have you got next, is that Birchmount?

A. Birchmount is allocated to Fund 270, which is a long-term disability fund, and basically it's also long-term because you need to keep making medical -- or payment for support disability until the person recovers, which is, on average, a fairly long period of time. So, once again, you would only allocate longer term investments to this type of fund . . .

Q. And the last document?

A. Roncesvalles. It's allocated to Fund 241, which is a pension retirement annuities. So when people working for a company retire, typically age 65, they would begin to receive a monthly level payment for the balance of their life, and, once again, we would never allocate a short term investment to this fund. We would only allocate longer term fixed income investments.

(cross-examination)

Q. . . . and I take it that there are several mortgages that are allocated against each of these funds?

A. Yeah, there's a few hundred million mortgages in each of these funds, each one being long term of course.

Q. Oh, I understand. And when you talk about long term, what you do is look at the term of the mortgage, whether it's 15 years, whether its 20 years, where do you draw the line about long term? What's a long term mortgage, anything longer than a year?

A. No, long term in segments 240 -- the two retirement annuities funds would be 15 and 20 year mortgages and in the long term disability, they would be 10 year or longer terms, so it would be an error to allocate mortgages to either
-- any of these three segments that had a term of less than 10 years.

Q. And you don't -- what you look at is the term of the mortgage?

A. No, in fact, we examine the entire document looking for special conditions, and I must say the top priority special condition is pre-payment privileges, and that sets off alarm bells, and if there were prepayment conditions, then we would not allocate the mortgage to either of these three segments.

The decision at trial was released on July 5, 1995 [see 1995 CanLII 7087 (ON SC), 24 O.R. (3d) 619, 47 R.P.R. (2d) 1]. The court accepted Sun Life's position that neither the bare trust relationship nor Mr. Vale's status as an additional covenantor was sufficient to give him the statutory rights of prepayment. In reaching the first of these conclusions, the trial judge attributed some significance to his finding of fact that Sun Life was not aware that the mortgages were being entered into by the corporations as bare trustees. On this point he found that Mr. Vale was mistaken. He also found that Mr. Vale was mistaken in testifying that he had been assured by an employee of Sun Life, with whom the mortgages had been negotiated, that he would be able to pay off the mortgages after five years on payment of a penalty. The evidence of the employee, Mr. Watson, was not available as he had died prior to the hearing. The learned judge also held that Mr. Watson had no authority to bind Sun Life to terms that were not contained in the mortgage

documentation. As will be mentioned in more detail below, it is Mr. Vale's position on this motion that some, or all, of these findings may have been influenced by what he characterizes as the fraudulent evidence of Mr. Sharkey, and may have led the court to conclude that there was no common intention of the parties that Mr. Vale should be able to redeem the mortgages after five years. The thrust of Mr. Vale's submissions on this motion was directed at the possible existence and potential significance of such a common intention.

Mr. Vale's appeal to the Court of Appeal was heard on June 10 to 12, 1996, and the court's judgment dismissing the appeal was released on October 31, 1996 [see 1996 CanLII 2462 (ON CA), 30 O.R. (3d) 579, 5 R.P.R. (3d) 161]. It was held that, for the purposes of the Interest Act and the Mortgages Act, the mortgages were to be regarded as given by the corporations and not by Mr. Vale. While declining to disturb the findings of fact of the trial judge -- which the court found to have more than ample support in the evidence as a whole -- the Court of Appeal held that the result would have been no different even if Sun Life had been aware of the bare trust, or nominee, relationship between the corporations and Mr. Vale. Leave to appeal to the Supreme Court of Canada was refused on April 17, 1997.

In his affidavit sworn for the purposes of this motion, Mr. Vale has testified that he first began to investigate the truth of Mr. Sharkey's evidence with respect to Sun Life's matching of the mortgages with long-term obligations in the summer of 1997 after reading accounts of litigation involving Sun Life and so-called vanishing premiums. Between then and December 4, 1997, when the motion record in these proceedings was served, Mr. Vale made repeated representations to Sun Life's solicitors and others expressing his concerns about the veracity of Mr. Sharkey's evidence. In November 1997 he obtained a copy of a Sun Life mortgage that was allocated to one of the Funds and ascertained that it was not a long-term mortgage. In September and October he attempted unsuccessfully to obtain further information. He then commenced these proceedings and on December 9, 1997, he obtained an order for cross-examination and production of documents. Upon viewing the documentation produced with respect to the Funds, Mr. Vale discovered that, contrary to Mr. Sharkey's testimony, a substantial number of the mortgages allocated to them were not long-term and that the Funds included mortgages with prepayment conditions as well as long-term mortgages given by individuals who, presumably, would have the statutory rights to prepay. In the Fund to which the Birchmount mortgage was allocated, mortgages representing more than 50 per cent of the value of all of the mortgages in the Fund were for terms of less than ten years. These conclusions of Mr. Vale were subsequently confirmed by an experienced actuary, Mr. Ian E. Baker who, in an affidavit, summarized the results of his review of the documentation as follows:

> In summary, my review of the documentation provided to me indicates that 354 mortgages with a December 31, 1995, book value of $672,869,215 have conditions which are different from Robert Sharkey's testimony. The total number of mortgages in the three Funds was 695 with a December 31, 1995, book value of $1,283,992,945.

Mr. Baker was severely critical of Mr. Sharkey's testimony and his attempts to explain it in the first affidavit he filed in this motion:

> Robert Sharkey's trial evidence is clear, unambiguous and precise regarding whether the three funds have short term mortgages as defined or whether there are any mortgages with prepayment conditions. Robert Sharkey's testimony is clear that mortgages with terms longer than ten years given by an individual would be placed in a fund other than the Funds 270, 223 or 241. I have found discrepancies to Robert Sharkey's testimony in excess of $600,000,000. In my opinion, these discrepancies cannot be explained as an acceptable margin of error.

Mr. Vale's affidavit evidence on these matters was not, in my view, significantly weakened by his cross-examination in these proceedings. Mr. Baker was not cross-examined.

The Issues

The motions to set aside simply on the ground of facts arising after the judgments were not pressed at the hearing. On such a motion it is necessary to establish that the new facts may reasonably be considered to have affected the decision at trial. The evidence of the inaccuracies in Mr. Sharkey's testimony falls short of doing this. Even if Mr. Sharkey had testified truthfully with respect to the composition of the Funds, his evidence would have been neutral on the question of common intention. I am not able to hold that the trial judge's findings, that Mr. Watson did not make the representations attributed to him and that, in any event, he had no power to bind Sun Life, would have been different. Nor am I able to hold that, if proven, the alleged common intention would reasonably have affected the decision. However, different principles apply to a motion to set aside on the ground of fraud. After reviewing the previous authorities in this province and elsewhere, Estey J.A. in 100 Main Street East Ltd. v. Sakas (1975), 1975 CanLII 381 (ON CA), 8 O.R. (2d) 385 at p. 389, 58 D.L.R. (3d) 161 (C.A.), concluded:

> These authorities make it clear that the new evidence of fraud . . . need not necessarily amount to a "determining factor in the result".

The issues to be determined on this motion are:

(1) Was evidence given by Mr. Sharkey tainted by fraud?

(2) If so, was the fraud related to a material issue in the proceedings?

(3) Should Mr. Vale be considered to have had knowledge of the alleged fraud at the time of the trial?

(4) Did Mr. Vale act with due diligence and without undue delay in bringing these proceedings?

(1) Fraud

Rule 59.06(2)(a) provides a procedure by which orders may be set aside in summary proceedings. It does not alter the principles that formerly applied, and would still apply, in an action brought to accomplish the same end. Despite statements made in earlier cases in this jurisdiction, the Privy Council and English courts with respect to the relative merits of proceeding by action and by motion, the use of the summary procedure is now well established in this jurisdiction. In cases where the facts that are alleged to have constituted fraud are in dispute, a trial of an issue might well be ordered. Here, although Mr. Sharkey has attempted in affidavits sworn for the purposes of this motion to minimize the effect of the inaccuracies in his testimony at the trial, the existence of the inaccuracies is not substantially in dispute. Neither party asked for a trial of an issue and I see no reason why this matter should not be dealt with on a motion under rule 59.06(2).

Independently of the Rules of Civil Procedure, the jurisdiction to set aside judgments on the ground of fraud is part of the equitable jurisdiction of this court. The development of the principles that governed the exercise of that jurisdiction both before and after the Judicature Acts is dealt with in an article by D. M. Gordon, Q.C., in (1961), 77 L.Q.R. 358 at p. 533. There appears to have been very little academic or professional writing on the subject before that time and that which existed generally supported quite restrictive views of the circumstances in which the jurisdiction should be exercised. These views echoed the statements made by English judges in the 19th century of which a celebrated example was the passage in the reasons of James L.J. in Flower v. Lloyd (1878), 10 Ch. D. 327 at pp. 333-34, 39 L.T. 613 (C.A.), that was quoted by Estey J.A. in 100 Main Street East Ltd., at p. 389. Although Mr. Gordon cited a number of Canadian decisions in his article, he also appears to have been influenced by the English decisions in his conclusion that different principles apply in proceedings to set aside judgments on the ground of perjury than when other types of fraud are alleged. The subsequent cases in this court are inconsistent with this conclusion: as will be seen, in all cases the question is whether the fraud should be considered to relate to a "material issue" in the earlier proceedings.

None of the authorities under rule 59.06(2)(a), or its predecessors, that were cited to me contain any extensive consideration of the constituent elements of fraud for the purposes of this motion. It was accepted by the counsel for the moving parties that the relevant concept is that which is sometimes described as "common-law fraud" and which is an essential element of the tort of deceit. Counsel referred me to dicta in the report of the influential decision of the House of Lords in Derry v. Peek (1889), 14 App. Cas. 337, [1886-90] All E.R. Rep. 1, to Canadian cases in which the analysis of the House of Lords was adopted and applied and to passages in various treatises dealing with fraudulent representation and deceit. No attempt was made to rely upon broader concepts of equitable, or constructive, fraud. This restraint by counsel was, I believe, justified in that it appears to be consistent with the principles applied by the Court of Chancery in earlier cases involving actions to set aside judgments on the ground of fraud: Patch v. Ward (1867), 3 Ch. App. 203 at pp. 207 and 212-213, 18 L.T. 134 (L.JJ.).

In Derry v. Peek, at p. 22 All E.R., Lord Herschell summarized the effect of the authorities as follows:

> First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

The above passage cited from the reasons of Lord Herschell is consistent with that of the other members of the House of Lords who were parties to the decision. In emphasizing the requisite mental element in this variety of fraud, the House of Lords rejected statements made in the court below to the effect that a statement made without any reasonable grounds for believing it to be true would necessarily be fraudulent. Lord Herschell stated (at p. 361 App. Cas.):

> To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true.

At the same time, Lord Herschell recognized that, although the absence of reasonable grounds for believing in the truth of a statement would not in itself be sufficient to indicate the existence of a fraudulent intention, it may legitimately have an influence on a trier of fact endeavouring to ascertain whether the statement was honestly believed to be true (pp. 375-76 App. Cas.):

> At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can concede many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one.

Just as proof of an honest belief in the truth of the statements will be a defence to an allegation of fraud, proof of the absence of such a belief in the truth of an untrue statement will be sufficient to make the statement fraudulent:

> By the mid nineteenth century it had been established that not only a misrepresentation known or believed by the representor to be false when made was fraudulent, but that mere non-belief in the truth was also indicative of fraud. Thus, whenever a person makes a false statement which he does not actually and honestly believe to be true, for purposes of civil liability, that statement is as fraudulent as if he had stated that which he did not know to be true, or knew or believed to be false. Proof of absence of actual and honest belief is all that is necessary to satisfy the requirements of the law, whether the representation has been made recklessly or deliberately; indifference or recklessness on the part of the representor as to the truth or falsity of the representation affords merely an instance of absence of such a belief.

(Halsbury's Laws of England, 4th ed., vol. 31, at para. 1059)

On the basis of the evidence before me I have no hesitation in finding that Mr. Sharkey's evidence with respect to the composition of the Funds was fraudulent in the relevant sense. It was conceded at the hearing of the motion that his evidence contained "inaccuracies". In my view, this was a considerable understatement. The affidavit evidence filed by Mr. Vale, and confirmed by Mr. Baker, with respect to the composition of the Funds was only faintly challenged in Mr. Sharkey's affidavits filed on the motion and I accept it as being substantially accurate. On this footing Mr. Sharkey's emphatic and unequivocal evidence at trial with respect to the allocation of mortgages to the Funds was simply untrue. Whether they were fraudulent depends upon whether he honestly believed them to be true.

In his affidavits Mr. Sharkey swore that he had such an honest belief:

> I did not commit perjury. To the contrary, I gave my evidence honestly and truthfully.
>
> . . . . .
>
> The evidence I gave at trial was given in good faith with my full belief in its truth.

I find it impossible to accept these statements. Mr. Sharkey deposed that, in preparing to give evidence at trial, he had his staff retrieve documentation to show to which funds the mortgages had been allocated. He did not claim that he was unaware of the composition of the Funds. Instead, he claimed that the statements he made at the trial were intended as "a general description of the nature of the mortgage investments in the funds" and that he had not dealt with "the particulars of the contents of the assets in the funds" as he had not been questioned on this point. Even more remarkably, he stated that it was evident "from even a cursory review" of an exhibit that he had provided to Sun Life's counsel and on which he was questioned at trial that one of the Funds contained mortgages from individuals for terms of five years.

Accordingly, it is quite clear that Mr. Sharkey's position is not that he was unaware of the inclusion of short-term mortgages in the Funds but rather that he was not intending to address that question and did not choose his words with sufficient care:

> In retrospect, the language of some of my responses may not have been as precise as it could have been, however, the responses are accurate in terms of the general concepts they were intended to address and the level of detail that seemed appropriate given the issues with respect to which I was testifying.
>
> When these statements in his affidavits are read in conjunction with his testimony at the trial, I find them quite unconvincing. His evidence at trial was general not in the sense that it was vague or imprecise but rather because it contained unequivocal statements that excluded the existence of any exceptions. These statements were untrue and I find that he either knew this to be the case or that he was recklessly indifferent to their truth or falsity. In that sense they

 were fraudulent for the purposes of rule 59.06(2)(a).

As is apparent in the passage quoted from the reasons of Lord Herschell in Derry v. Peek, Mr. Sharkey's motive in giving the evidence I have found to be fraudulent is immaterial. It does not matter whether he was carried away by feelings of partisanship, whether he lacked an appreciation of his duty to the court, or whether he had some other motive. His unequivocal statements with respect to the composition of the Funds were, in view of his knowledge, unacceptable, inexcusable and, for the present purposes, fraudulent.

(2) Materiality

A judgment will not be set aside on the basis of perjury or other fraudulent conduct unless it relates to a material issue at the trial. This requirement has been affirmed in a number of reported decisions with inevitable variations in the language used. It was discussed at some length in 100 Main Sweet East Ltd. where Estey J.A. referred, at pp. 388-89, to the following statements of the principle:

(a) "[the fraud] should have undoubtedly been at the foundation of the decision which has been attacked": Johnston v. Barkley (1905), 10 O.L.R. 724 (Div. Ct.), at pp. 728-29, per Street J.

(b) "before a judgment will be set aside [the perjured evidence] must have been material to the Court's decision":
Cook v. Forster, [1950] O.W.N. 739 (H.C.J.), at p. 741.

(c) "the perjury must be in a material matter": MacDonald v. Pier, 1922 CanLII 29 (SCC), [1923] S.C.R. 107, at pp. 120-21, [1923] 1 D.L.R. 670, per Duff J.

Estey J.A. concluded:

> These authorities make it clear that the new evidence of fraud must relate to the "foundation" of the decision or be "material" to the claim or defence, but need not necessarily amount to a "determining factor in the result".

Later in his reasons Estey J.A. emphasized again that it was not necessary for the moving party to establish that the fraud probably, or may reasonably be considered to have, "tipped the scale" in favour of the respondent at trial. In applying the requirement of materiality he stated at p. 395:

> . . . the principle of law preserving the sanctity of the principle of res judicata must give way to the principle recognizing the right and duty of the Court to protect its own processes so as to ensure that litigants do not profit from their improper conduct. This conclusion flows inexorably from the evidence and is reached reluctantly in view of the serious difficulties facing the respondent in seeking to achieve a different outcome on a second trial.

> In my view, it is not necessary to determine at this stage of the process that the disclosure of this additional evidence will affect the result or "may reasonably have affected the result", as [the trial judge] put it. It is only sufficient to conclude that the evidence withheld relates to the material issues arising from the appellant's failure to perform the 1968 contract and the damages, if any, flowing therefrom.

The reasoning of Estey J.A. was considered and applied in International Corona Resources Ltd. v. Lac Minerals Ltd. (1988), 1988 CanLII 4534 (ON SC), 66 O.R. (2d) 610 at p. 621, 54 D.L.R. (4th) 647 (H.C.J.) where Osborne J. commented:

> It seems to me the word "material" means that which goes to the foundation of the decision or which goes to the crux of a central issue before the court. "Material" obviously means something different from and, in this context, more than "relevant"; it means more than evidence which would be an appropriate topic for cross-examination on credibility, but collateral in the sense of being divorced from any of the main issues in the case in a trial.

As, in my judgment, the requirement of materiality will determine the disposition of the motion in this court, and as in a number of respects its application will raise issues that have not been expressly addressed in the earlier decisions, I should make explicit my acceptance of the following principles which I believe to be consistent with the analysis in those decisions:

(1) Although, as Justice Estey indicated in his concluding comments, the test is not stringent, there may, in particular circumstances, be questions of degree involved in determining whether evidence is sufficiently related to a material issue or even whether an issue is sufficiently material.

(2) It is not the role of the court hearing the motion to interpret and analyze the reasoning of the trial judge in order to penetrate his mind and determine whether he would have regarded the fraud as related to a material issue. That is not to say that no weight at all should be given to the trial judge's identification of material issues as long as it is kept firmly in mind that this, like the rest of the reasons for decision, may have been affected by the fraud. The court hearing the motion should similarly be wary of attempting to estimate precisely the extent the fraudulent evidence influenced the findings of fact made at the trial. This would often be a dangerous, and in some cases a hopeless, exercise.

(3) Whether an issue is material should be determined, first, by an examination of the pleadings. If an issue to which the fraud relates is not raised by the pleadings, I do not believe it could properly be treated as material. If such an issue is raised sufficiently by the pleadings, it will usually be material unless, of course, it has subsequently been abandoned for reasons unaffected by the fraud. This might not always be the case. If, for example, relief is sought on alternative unrelated grounds, fraud sufficient to vitiate success on one ground only should not be sufficiently relevant to a material issue if the court at trial found for the plaintiff on the other ground or on each ground. Similarly, an issue raised by a party who is unsuccessful at trial should not be material if the fraud that relates to it has no bearing on a separate issue that had to be -- but was not -- decided in favour of that party in order to be successful in the action. In short, while it is established by the authorities that it is not necessary to show that the fraud was a determining factor in the result at trial, an issue will not be material if it is clear that a different resolution of the issue could not have affected the result of the trial. For this purpose, a consideration of the reasons of the trial judge would usually be necessary. I do not think this inquiry is precluded by statements in the cases that fraud vitiates, or taints, the whole proceedings.

(4) Again, even though an issue raised by the pleadings could have a direct bearing on a party's entitlement to relief, I believe it may not be material if that party does not seek to rely on the issue at trial. I say "may" and not "will" because there could be circumstances in which the fraud should properly be regarded as possibly having affected decisions about the conduct of the party's case. In the absence of any such circumstances, the question of materiality should be determined by an examination not merely of the pleadings but also of the evidence given at trial. Whether this point is properly to be regarded as going to the materiality of an issue or as a separate legitimate consideration affecting the discretion of the court under rule 59.06(2)(a), it follows, I believe, from the caution given by Middleton J.A. in Glatt v. Glatt, 1935 CanLII 16 (ON CA), [1936] O.R. 75 at p. 79, [1936] 1 D.L.R. 387 (C.A.), to the effect that jurisdiction to set aside a judgment on the ground of fraud should not be exercised so as to permit an unsuccessful litigant to reopen and reargue the case on some new and, hopefully, better basis than that relied upon at the trial.

(5) While the outcome of, and the reasons given on, an appeal may need to be considered for the purpose of determining whether an issue is material in accordance with (3) above, the weight, if any, to be given to these matters may depend upon whether the grounds on which the appeal was taken were, or may have been, affected by findings on factual issues at the trial that were tainted by the fraudulent evidence.

Each of the above propositions is, I believe, relevant to the disposition of this motion.

As I have already mentioned, Mr. Vale's position at the trial was that he was entitled to rights to prepay the funds advanced under the mortgages after the expiration of five years. For the purposes of this motion, his counsel did not contend that Mr. Sharkey's evidence was relevant to the existence of rights of prepayment directly pursuant to the statutes. Mr. Vale's argument is essentially that one material issue was whether he was entitled to those rights because there was a common intention or understanding with Sun Life that he would be able to exercise them. In short, he now asserts that, irrespective of the question whether the statutes conferred such rights on him, it was understood and intended that he would have such rights. Whether this common intention existed and whether Sun Life was bound by it were, in his counsel's submission, crucial issues in the action. In the factum filed on his behalf it was stated at para. 14:

> The key issue at trial was whether the parties in the circumstances intended that Joel Vale, as an individual mortgagor (along with the corporate plaintiffs) on the mortgages could avail himself of the statutory rights of prepayment available to an individual as a statutory mortgagor (but not available to corporations) under the Mortgages Act, R.S.O. 1990, c. M.40, s. 18, and the Interest Act, R.S.C. 1985, c. I.15, s. 10. The issue of the parties' common intention with respect to Mr. Vale's right to rely on statutory prepayment rights was intimately linked to this determination.

It was submitted further that the trial judge considered the intention of the parties -- Mr. Vale and Sun Life -- to be a fundamental issue and that, in view of the disparity in the evidence given by them or on their behalf, findings of credibility were required. It was submitted that these findings were "integral to the outcome of the case" (applicants' factum para. 16).

The precise legal significance of the alleged common intention was not explored to any great extent at the hearing of the motion. My understanding is that, if a new trial is ordered, Mr. Vale would wish to rely on a collateral agreement, equitable estoppel, or some other equitable ground arising from the common intention of the parties that would be enforceable notwithstanding the Statute of Frauds, R.S.O. 1990, c. S.19. Without expressing any view on the likelihood of such an argument's success, I would be prepared to exercise my discretion and set aside the judgment at trial if this question is properly to be regarded as one of the material issues in those proceedings.

Sun Life submits that neither the existence nor the effect of the common intention now asserted by Mr. Vale were material issues at the trial. Sun Life's position is that the material issues raised by the plaintiffs and dealt with at trial were concerned exclusively with the alleged statutory rights of Mr. Vale as a beneficiary of bare trusts or as an additional covenantor under each of the mortgages. Both the trial judge and the Court of Appeal held that, for the purposes of the Mortgages Act and the Interest Act, the mortgages were given by the corporations and not by Mr. Vale and that, in consequence, he did not have the right to prepay conferred by the statutes upon a mortgagor who is an individual. Counsel for Sun Life submitted that Mr. Sharkey's evidence as to the composition of the Funds had no bearing on the resolution of these issues which were essentially questions of statutory interpretation. It followed, in his submission, that, as the evidence did not relate to the material issues in the proceedings at trial, the motion should be dismissed.

I am satisfied that the alleged statutory rights of Mr. Vale provided the main focus of the plaintiffs' case at trial. This is evident both from the statements of claim and the testimony of Mr. Vale. It also appears sufficiently from the reasons delivered by the trial judge who defined the issues as follows:

> The case, therefore, raises a narrow but interesting point. Are there circumstances in which a mortgage given by a corporation is not a mortgage "given by a corporation", either because the corporation is a mere shell or bare trustee for the true owner of the property, or because the mortgage is, in effect, granted by both an individual and a corporation thus affording to the individual the protection granted by the pre-payment privileges of s. 10(1) of the Interest Act, R.S.C. 1985, c. I-15 and s. 18(1) of the Mortgages Act, R.S.O. 1990, c. M.40? If so, is Mr. Vale entitled to succeed on one or another of those grounds in the circumstances of this case?

As I have indicated above, I believe the trial judge's identification of the issues should be given some weight although it must be approached with a degree of caution. During the course of a trial issues may, in effect, be abandoned as counsel weigh the effect of the evidence given. In view of the death of Mr. Watson, the only evidence that had any direct bearing on Sun Life's intention -- other than that of Mr. Vale -- was the manner in which Sun Life treated the mortgages. The clear effect of Mr. Sharkey's impugned evidence was that this treatment was inconsistent with the common intention now relied upon by Mr. Vale.

For the same reason it would be dangerous for me to rely on the written submissions provided to the court by Mr. Vale's counsel at the conclusion of the trial even though these submissions appear to have been directed exclusively at Mr. Vale's alleged rights under the statutes. Thus, although in a memorandum entitled "Reply Argument", which I am informed was presented to the court, it was submitted that Mr. Vale's discussions with Mr. Watson raised an equity sufficient to exclude an application of the Statute of Frauds, this was quite clearly directed at Sun Life's knowledge of the bare trust relationship and not at any agreement or common intention that Mr. Vale should have the statutory rights of prepayment. The argument was that Mr. Vale was entitled to the statutory rights as a beneficiary of the trust and that Sun Life's alleged knowledge of the trust relationship precluded it from relying on the Statute of Frauds. As I have indicated above, this argument is now moot as the Court of Appeal held that Mr. Vale would not have been entitled under the statutes even if Sun Life had been aware that the corporations were bare trustees for Mr. Vale. In Litowitz v. Standard Life Assurance Co. (1996), 1996 CanLII 2462 (ON CA), 30 O.R. (3d) 579, 5 R.P.R. (3d) 161 (C.A.) -- a decision delivered contemporaneously with those in Mr. Vale's appeals -- it was held that a beneficiary of a bare trust did not have the statutory rights of prepayment conferred on individuals even where the existence of the trust was disclosed in the mortgage documents.

Similarly, although counsel for Sun Life, in his written submissions to the trial judge, stated that:

> Sun Life relied on the fact that these were closed long-term mortgages. The mortgages were allocated towards long-term financial obligations of Sun Life

this argument has also become moot as the effect of the decisions of the Court of Appeal is that such reliance was irrelevant.

The decision of the Court of Appeal and the submissions made on behalf of Mr. Vale on the application for leave to appeal to the Supreme Court of Canada have even less persuasive force for the purpose of determining the material issues at trial. The grounds upon which the appeals were taken may have been influenced significantly by the findings of fact at the trial -- findings that, in turn, may have been influenced by Mr. Sharkey's evidence.

The existence of Mr. Vale's rights under the statutes as the beneficiary of bare trusts, or as an additional covenantor, were clearly material issues. I accept the submission of Sun Life's counsel that Mr. Sharkey's untruthful evidence did not relate to them. The more difficult question is whether these are to be considered as the only material issues or whether the alleged common intention of the parties should be considered to have been material independently of them. As I have indicated, this would not, in my view, be the case unless the issue was fairly raised by the pleadings and, on the assumption that Mr. Vale's evidence had been believed and Mr. Sharkey's

evidence had been truthful, if it could have provided a possible basis, or step in the reasoning, for a decision that Mr. Vale was entitled to the same rights of prepayment that he would have had if he had been the mortgagor. As I have also indicated, I do not believe that, by itself, this would be sufficient. There must also be evidence that the issue was relied upon at trial or at least evidence that makes it reasonable to conclude that, but for the fraud, it might have been relied upon.

Viewed in its strongest and most favourable light for Mr. Vale, Mr. Sharkey's evidence gave rise to an inference that the alleged common intention never existed: that Sun Life never had any intention or understanding, and did not agree, that Mr. Vale would have the rights of prepayment provided by statute for mortgagors who were individuals. This conclusion was undoubtedly accepted by the trial judge and it seems very likely that it was influenced by Mr. Sharkey's evidence. I will say more on this matter later but, as I have indicated, I do not believe that the effect of the fraud on the trial judge's findings of fact is the precise question I am required to determine. The question is whether, on the basis of the pleadings, the evidence and the other factors I have mentioned, the existence and effect of the supposed common intention of the parties should be considered to have been a material issue in the action. There is not a great deal in the motion records and the other material before me that would support an affirmative answer.

In each of the statements of claim in the actions the relief sought is a declaration that Mr. Vale was entitled to the rights of prepayment under the two statutes. In none of them is there any allegation, suggestion or even implication that, in entering into the mortgage transactions, Mr. Vale relied upon representations or statements by anyone from Sun Life. There is no allegation that there was any agreement or common intention between the parties. The only reference to a representation is the following statement that appears in each of the statements of claim:

A representative of the Defendant, Mr. Richard Watson, advised Vale that pursuant to his rights at law he would be entitled after a period of five years to prepay the mortgage in its entirety upon the payment of a 3-month interest bonus. Vale was aware of this statutory right. The Defendant's representative indicated that given the interest rate and the expensive cost of a three months penalty, it was unlikely as a pragmatic business matter that Vale would wish to avail himself of that right.

Each of the statements of claim alleges that Mr. Vale, as a "covenantor, or additional covenantor" was entitled to the benefit of the legislation. Each of the statements of claim alleges, in the alternative, that Sun Life at all times knew that the corporate mortgagor was only a bare trustee for Mr. Vale. On each of these points it is claimed that Sun Life "cannot seek to avoid or contract out of the legislation in a effort to deprive Vale of his statutory rights". In none of the statements of claim is it alleged that Sun Life was estopped or, in some other way bound, by Mr. Watson's alleged statements. Nor is it alleged that Mr. Vale relied upon them.

Nor does Mr. Vale's evidence at the trial provide any significant support for his counsel's submission that the existence of a common intention was a material issue in the proceedings. In his evidence-in-chief with respect to the Spencer mortgage, Mr. Vale testified that the issue of his right to prepay after five years arose in his discussions with Sun Life's representative, Mr. Watson, in the context of the possibility that Mr. Vale might sell the property:

> . . . I asked Richard: What happens if I sell the property and the new purchaser doesn't want the mortgage or if you don't approve of him? How does that work?
>
> I didn't have experience in this regard, so Richard told me that they wouldn't unreasonably withhold a sale to a purchaser, and he said: In any event, "no prepayment privileges" meant no free prepayment privileges. I could prepay after five years with a 3-month penalty. But, at the time, that would be $50,000.00 which was more than the whole year profit of what the building was throwing off, and it was discussed that it would be unlikely that I would ever want to pay that type of bonus. But that was basically the only discussion with respect to it.

In cross-examination Mr. Vale testified that there were a number of provisions in the mortgage documents that were not acceptable to him, but that he was told by Mr. Watson that Sun Life would not insist on them if, as they did insist, he signed the documents in the form in which they were presented to him. It is implicit in his testimony that he executed the documents based on the advice of Mr. Watson and of the solicitor acting for both parties that Sun Life would not insist on strict performance of a number of conditions in the mortgages. As indicated above, one of these alleged representations was that, in the event of a sale, Sun Life would not unreasonably withhold its consent. Further, he alleged that Mr. Watson told him that, "in any event" he could prepay after five years with a three-month penalty. There is, however, nothing in the evidence to suggest that this particular representation was material, or influential, in his decision to execute the mortgage documents or that he relied on it to any extent. On the contrary, in both the reference to it in the statements of claim and in his evidence at trial, it appears that the representation was immediately dismissed as having no practical importance.

Mr. Vale's testimony-in-chief was also consistent with the allegation in the statement of claim in that, apart from the situation where he might wish to sell the property, this alleged representation related to his statutory rights. Apart from the case of a possible sale of the property Mr. Watson was not alleged to have expressly represented that Sun Life would permit Mr. Vale to prepay as if he had rights under the statute. This is also the thrust of Mr. Vale's answers in cross-examination:

> Q. And you were asking His Honour to believe that you really believed you had any right to prepay this mortgage?

A. Not under the mortgage, but under the statute . . .

> Q. Is it your understanding that a corporation has no right to pay off closed mortgages?
>
> A. My understanding is if the individual owned, was the beneficial owner, that was an exception to the rule, and the individual could -- owner could enjoy the benefit of the statute.

However, a representation as to the legal position can carry with it an implied representation that the party making it will act in accordance with that position. This appears to have been the interpretation of Mr. Vale's evidence accepted by the trial judge [pp. 628-29]:

> Mr. Vale also testified that Mr. Watson had assured him that he would be able to pay off the mortgages after five years, upon the payment of a penalty, but that they both felt it was an academic issue because the amount required -- around $50,000 -- was felt to be unacceptably high. Mr. Watson has died and I do not have the advantage of his testimony. However, I am not satisfied, on the evidence, that he made the remarks attributed to him by Mr. Vale. I think, again, that Mr. Vale is mistaken. It may be that he is simply telescoping a series of discussions over the years, about the advancing of funds, generally, to his business operation, and that he is endeavouring to extract something specific for the specific transactions which did not occur. I find that what Mr. Watson said was that "an individual can pay off the mortgage after five years". In his testimony, Mr. Vale stated this is what Mr. Watson said. He went on to explain that the comment was made in the context of Mr. Vale being able to pay off the mortgage because Mr. Watson viewed him as the borrower. I had the clear sense, at this point in Mr. Vale's testimony, however, that he recognized his reference to an "individual" having the ability to prepay the mortgage was not helpful to his case, and that he was struggling to reposition the case in the best light he could. I am satisfied that Mr. Watson did not give any undertaking, binding upon Sun Life, that Mr. Vale would be entitled to prepay the mortgages after five years had expired on their terms.

> Even if he had, I do not think that Sun Life would be bound by such a statement unless there was something to the same effect in the loan package put forward to the mortgage approval committee which authorized the mortgages. I have already indicated, there was not. Mr. Watson was a senior mortgage investigator. His job was to bring in and present mortgage funding opportunities for approval. He did not have the authority to bind Sun Life to an approval which is quite contradictory to what is contained in all of the signed documentation pertaining to the mortgages, and to the related documentation accompanying it.

Immediately after the passage quoted, the trial judge went on to consider the evidence of Mr. Sharkey with respect to Sun Life's treatment of the mortgages. It is this evidence that I have found to be tainted by fraud. On the basis of that evidence, the trial judge concluded that "the mortgages were all treated and dealt with in the fashion of long-term mortgages".

If this court were bound to accept the trial judge's findings of fact in the passage quoted, it would follow that Mr. Sharkey's evidence had no significant bearing on any issue of the common intention of the parties as the court did not accept that the alleged representations of Mr. Watson -- the only evidence of Sun Life's intentions -- had been made. As I have indicated, however, I do not believe that this would be a correct approach for me to adopt. It is impossible to know if, and if so to what extent, the court's finding on this question was affected by Mr. Sharkey's evidence with respect to Sun Life's treatment of the mortgages.

The court's finding that Mr. Watson had no authority to bind Sun Life is a different matter if -- as I believe it to be -- it is tantamount to a decision that no representation by Mr. Watson could properly be treated as a representation of Sun Life. The finding was made on the basis of the evidence before the court with respect to Mr. Watson's responsibilities and authority and it could not have been affected by Mr. Sharkey's impugned testimony. If it is to be understood as excluding Mr. Watson's ability to make representations on behalf of Sun Life, I do not believe the allegations that Mr. Vale now makes could properly be considered to relate to a material issue as, even if Mr. Sharkey had testified truthfully as to the content of the Funds, there would have been no evidence that Sun Life had the alleged common intention.

I find it difficult to see how any more limited meaning can be given to the finding with respect to Mr. Watson's lack of authority to bind Sun Life. If, contrary to my view, a more limited interpretation should be attributed to the finding -- on the basis, perhaps, that the trial judge may not have turned his mind to, and did not intend to deal with, equitable remedies that might be available to Mr. Vale if he relied on Mr. Watson's statements and believed them to bind Sun Life -- this would give rise to a strong inference that, as far as the trial judge was concerned, the availability of such remedies was not an issue raised in the proceedings. This should not be decisive but, as I have indicated, neither in the pleadings nor in his testimony at trial did Mr. Vale suggest that Mr. Watson's statements with respect to the existence of a right to prepay significantly affected Mr. Vale's decision to enter into the mortgage transactions with Sun Life. The point was dismissed as academic on the only occasion it was discussed with Mr. Watson. Even more to the point, if the emphasis were placed not on Sun Life's actual intention but on what Mr. Vale was induced to believe it to be, I do not see how Mr. Sharkey's evidence could be said to relate to that issue.

It is established that, on a motion such as this, the court is engaged in a balancing process. It must weigh:

> . . . the need for the Courts to protect the integrity of their process against fraudulent practices before the Court, on the one hand, against the practical requirement of certainty and finality in litigation on the other.

(100 Main Street East Ltd., supra, at p. 389, per Estey J.A.)

Similarly, in International Corona Resources Ltd., Osborne J. stated, at p. 622 O.R., p. 658 D.L.R.:

> Balanced against the court's right and duty to remedy abuses in appropriate circumstances, is the public and the private interest in there being certainty and finality in litigation. Each case must be assessed on its own merits, particularly having in mind the nature of the fraud proved, its perpetrator, the evidence in each case, and the judgment sought to be set aside.

As I have mentioned above, the procedure under rule 59.06(2)(a) is not available to permit a party who has been unsuccessful at trial to relitigate the action on grounds that might possibly, or conceivably, have been, but were not, raised in the earlier proceedings.

On the basis of the pleadings, the evidence at trial, and the findings with respect to the authority of Mr. Watson, I conclude that Mr. Sharkey's evidence was not related to a material issue in the proceedings. Neither the pleadings nor the evidence of Mr. Vale reveal or suggest that the alleged common intention of the parties and Mr. Vale's reliance on it were, in any sense or to any extent, at, or part of, the foundation of his case. There is nothing before me that suggests that the significance Mr. Vale now seeks to attribute to this intention was relied upon or even mentioned at the trial or that Mr. Sharkey's evidence had an inhibiting effect in this regard. The discussions with Mr. Watson were undoubtedly relied upon in an attempt to establish that Sun Life was aware of the bare trust relationship. Mr. Sharkey's evidence might -- at a stretch and with some risk of circularity -- be regarded as related to this issue but, for the reasons given above, it is one that cannot now be regarded as material. Moreover, even if the issue now relied upon had been raised squarely by Mr. Vale, the finding at trial with respect to Mr. Watson's ability to bind Sun Life excludes any reasonable possibility that Mr. Vale could have proven the existence of any such common intention. There would simply have been no evidence that Sun Life had the intention that Mr. Vale now seeks to attribute to it. An issue that would not be triable on the basis of the evidence before the court, even if Mr. Sharkey had testified truthfully with respect to the composition of the Funds, cannot, in my view, be considered to be a material issue for the purposes of rule 59.06(2)(a) unless, which is not the case here, there is some reason to conclude that truthful testimony might have led to the production of other evidence relating to the issue.

Accordingly, it is my view that, having been unsuccessful on the material issues raised in the proceedings, Mr. Vale is now seeking to have the fraudulent evidence of Mr. Sharkey treated as a basis for relitigating the case on another ground and one that could not have been successful if it had been raised at the trial. I do not believe the principles governing the jurisdiction to set aside judgments on the ground of fraud permit this to be done.

The above finding is sufficient to dispose of the motion. However, in case this matter goes further, I should deal briefly with two other questions that arose on the motion.

Knowledge and Due Diligence

It is established that an action, or motion, to set aside a judgment on the ground of fraud will fail if the fraud was known to the plaintiff, or moving party, at the time of the trial: MacDonald v. Pier, supra, at p. 121; 100 Main Street East Ltd., supra, at p. 388.

I accept Mr. Vale's testimony that the first time he began to investigate the truth of Mr. Sharkey's evidence was in the summer of 1997. Mr. Sharkey has, however, sworn that the inclusion of short-term mortgages in the Funds was clearly evident from documents he produced at the trial. These documents were computer print-outs that included references to a number of the mortgages in one of the Funds.

At the trial, counsel for Sun Life explained the failure to produce the documentation earlier on the ground that he could not "figure it out". Under cross-examination, another employee of Sun Life's mortgage department, who swore an affidavit for the purposes of the motion, stated that he could

not readily have interpreted the documentation or have "figured it out". The information in the print-outs is cryptically stated to say the least. Its lack of explicitness was referred to by Mr. Baker. In view of the obscurity of the documentation and its late production, I am not prepared to hold that its meaning and significance were so apparent at the trial that knowledge of the fraud should be attributed to Mr. Vale. Nor am I prepared to find that Mr. Vale should have subsequently discovered the significance of the documentation that was apparently evident to Mr. Sharkey. Given the mass of documentation exhibited at the trial, the obscure manner in which the information in the print-outs was presented, the fact that it was produced in apparent support of Mr. Sharkey's false testimony and the fact that no further attention appears to have been given to it at the trial, I do not think it would be reasonable to find that Mr. Vale should subsequently have given it the attention required to appreciate its alleged significance. I find Sun Life's position that this obscure documentation produced by Mr. Sharkey should have alerted Mr. Vale to the inconsistency between Mr. Sharkey's evidence and the truth to be unconvincing. Indeed, I find it incongruous that Sun Life and Mr. Sharkey would seek to rely on the documentation for this purpose while Mr. Sharkey continued to assert his belief in the truthfulness of his testimony that the documentation contradicts if his interpretation of it is correct.

My conclusion with respect to Mr. Vale's failure to appreciate the alleged significance of the computer print-outs is relevant to the question whether the delay between the conclusion of the trial in June 1995 and the commencement of these proceedings in December 1997 indicates a want of due diligence by Mr. Vale in raising the question of fraud.

In International Corona Resources Ltd., supra, Osborne J. summarized the requirements of due diligence as follows, at pp. 622-23 O.R., p. 659 D.L.R.:

> The unsuccessful trial party is exposed to a test of due or reasonable diligence . . . In my view, the onus is on the moving party to establish due diligence. Evidence cannot be stockpiled during the litigation process to be taken from inventory after an unsuccessful trial or appeal . . . The test imposed upon the unsuccessful trial party to obtain relevant evidence -- that is, evidence going to establish fraud -- with due diligence, is objective. The questions to be asked are: what did the moving party know, and what ought the moving party to have known? Delay will defeat a motion to set aside a trial judgment under rule 59.06. I refer in this regard to cases where the evidentiary burden has been met and the due diligence test passed, but where there is unreasonable delay in bringing or pursuing the motion to set aside.

Having declined to attribute significance to the computer print-outs provided by Mr. Sharkey at trial, I do not believe there is any other basis on which Mr. Vale could be held to have acted with less than due diligence. I see no reason to reject or question his evidence of the circumstances that, in the summer of 1997, caused him to begin to investigate the truth of Mr. Sharkey's testimony. Nor, apart from the computer print-outs, has any reason been suggested why he should have had any earlier suspicions. Once he had reason to pursue the question there was no undue delay. He acted responsibly in seeking to obtain satisfactory responses from Sun Life and its solicitors and, when these were not forthcoming, he brought this motion.

In making the above findings of fact I have accepted the sworn evidence of Mr. Vale with respect to the circumstances in which he discovered the fraud. Neither that evidence nor Mr. Vale's credibility has been seriously challenged on these matters by Sun Life. Although the trial judge found that Mr. Vale had probably been mistaken in some aspects of his recollections of his discussions with Mr. Watson, there is no suggestion in his reasons that he considered Mr. Vale to be an untruthful witness. There is nothing in the material before me that would support any other conclusion. I do not think the credibility of Mr. Vale in this sense was an issue at the trial or on this motion.

Finally, in its counsel's factum Sun Life submitted that, even if Mr. Vale were successful on all of the other issues raised in this motion, I should, in the exercise of my discretion, refuse to set aside the judgment at trial because of certain other alleged aspects of Mr. Vale's conduct. This submission was not addressed at the hearing and I make no comment on it.

Accordingly, the motion is dismissed. Counsel may speak to me on the question of costs or, if they so agree, they may make written submissions within 30 days of the release of these reasons.

Motion dismissed.

Tab 175

CanLII

Brown v. Spagnuolo, 2012 ONSC 2141 (CanLII)

Source:	Superior Court of Justice
Date:	2012-04-11
File number:	CV-11-419288
Citation:	Brown v. Spagnuolo, 2012 ONSC 2141 (CanLII), <https://canlii.ca/t/fqzhl>, retrieved on 2026-01-18

CITATION: Brown v. Spagnuolo, 2012 ONSC 2141
COURT FILE NO.: CV-11-419288
DATE: 20120411

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
EWART BROWN and DERRICK V. BURGESS	)	*Charles F. Scott* & *Christine Muir*, for the Plaintiffs (moving parties)
Plaintiffs	)	
– and –	)	
SAM SPAGNUOLO and LAWRENCE BRADY	)	*Sarah Shody*, for the Defendant, Sam Spagnuolo (responding party)
Defendants	)	No one appeared for the Defendant, Lawrence Brady
	)	
	)	**HEARD: March 28, 2012**

LEDERER J.:

[1] This is a motion to strike certain paragraphs of a Statement of Defence.

Introduction

[2] Typically, one would expect that such a motion would be brought pursuant to Rule 25.11 of the *Rules of Civil of Procedure* and heard by a Master. Under this rule, pleadings that (a) are prejudicial or will delay a fair trial; (b) are scandalous, frivolous or vexatious; or, (c) are an abuse of process, may be struck. This rule runs to the specifics of the pleading. Are the facts referred to irrelevant or immaterial? Are they argumentative and inserted for colour that is prejudicial? The rule is relied on for this motion, but counsel for the plaintiffs (the moving parties) made it clear that the core of his argument is founded on Rule 21.01(1)(b). It addresses the broader and purely legal question of whether the pleading accomplishes its purpose. If it is a Statement of Claim, does it disclose a reasonable cause of action? If it is a Statement of Defence, does it disclose a reasonable defence? A motion brought pursuant to this rule must be heard by a judge. The Court of Appeal has directed that, on motions made under Rule 21, only part of a pleading be struck (see: *Dynasty Furniture Manufacturing Ltd. v. Toronto-Dominion Bank* 2010 ONCA 514 at paras. 4, 5 and 10; and *Heaslip Estate v. Ontario,* 2009 ONCA 594 at para. 35).

Background

[3] In this case, the plaintiffs allege that they were defamed. They were, and in the case of Derrick V. Burgess, remain senior members of the government of Bermuda. At the material time, Ewart F. Brown was Premier and Derrick V. Burgess was Minister of Works and Engineering. At present, Derrick V. Burgess is Deputy Premier and Minister of Public Works. The defendant, Sam Spagnuolo, was a Project Architect and Senior Associate with the architecture firm of Carruthers, Shaw and Partners ("CS&P"). Sam Spagnuolo resides, and CS&P is located, in Toronto. In 2007, tenders were called for the construction of a new courthouse and police headquarters to be located in Hamilton, Bermuda. CS&P was the original architect. The contract to construct the building was awarded to Landmark Lisgar Construction, a Bermudian-Canadian joint venture, and, after the Canadian partner withdrew, was taken over by LLC Bermuda Ltd. (referred to collectively as "Landmark Lisgar"). As the administrator of the contract, CS&P was responsible for overseeing and approving payments to be made to Landmark Lisgar. Sam Spagnuolo was the architect most involved in the project. The approvals for payment relied on packages of documentation, referred to as draw-downs. The draw-downs supported the payments, made by Landmark Lisgar, that were being submitted for reimbursement. They included copies of the cheques that had been paid by Landmark Lisgar to its sub-contractors. In late 2008, CS&P began to refuse to approve payments submitted by Landmark Lisgar. On December 2, 2008, CS&P was terminated and removed from the project.

[4] In late 2008 and early 2009, copies of two "purported cheques" relating to the project were discovered in the files of the responsible Ministry. These "purported cheques" were altered copies of legitimate cheques drawn on the bank account of Landmark Lisgar and paid to suppliers and vendors to the project. The altered copies of the cheques had been falsely manipulated so as to appear to be payable to "Dr. E. Brown" and "D. Burgess". In this action, the plaintiffs allege that Sam Spagnuolo created the false cheques, was part of a conspiracy to plant the cheques in the files of the Ministry and to ensure they would come to public attention. It is said that the cheques defamed the plaintiffs.

[5] Counsel advised the court that it is generally accepted and acknowledged that the cheques are false.

[6] In the Statement of Defence, Sam Spagnuolo pleads that he did not falsify or disseminate the cheques.

The impugned paragraphs

[7] By this motion, the plaintiffs seek to strike out two separate groups of paragraphs (paragraphs 13 to 16 and paragraphs 22 to 37) found in the Statement of Defence that they say disclose no reasonable defence to this action, contain no material facts, are irrelevant and likely to

prejudice and delay the fair trial of this action, are scandalous, frivolous and/or vexatious, and an abuse of the court process. In so doing, the plaintiffs encompass the considerations raised by both Rule 21.01(1)(b) and Rule 25.11.

[8] The first group, paragraphs 13 to 16, generally refer to allegations concerning what transpired during the course of the tender process that led to the selection of Landmark Lisgar. These paragraphs suggest Landmark Lisgar was:

- selected despite its bid being incomplete;
- had performed poorly in the past; and,
- had limited experience.

[9] The paragraphs allege that based, among other factors, on Landmark Lisgar's lack of prior experience and poor performance history, CS&P recommended that the contract should be awarded to another bidder. Contrary to the recommendation of CS&P, the contract was awarded to Landmark Lisgar.

[10] The second group, paragraphs 22 to 37, generally refer to allegations of problems on the job and with the processing of requests for payments made by Landmark Lisgar. The Statement of Defence pleads that these problems began even before the contract was finalized. Landmark Lisgar complained that it was being required to follow what the pleading refers to as "ususal and customary administrative processes…, such as providing the schedules required in the Project specifications and following shop drawing review procedures". In November 2007, it is alleged that Landmark Lisgar requested an advance of approximately $3,000,000 to $4,000,000 for mobilization. CS&P, with the defendant, Lawrence Brady, declined the request subject to reconsideration after Landmark Lisgar provided a list itemizing what would be ordered with these funds. The Statement of Defence says that the list was never provided.

[11] In this group of paragraphs, it is alleged that there were serious concerns with the work of Landmark Lisgar in that:

- it did not obtain a performance bond in Bermuda, as the contract required;
- it entered into a contract for excavation where the price was well beyond the appropriate market costs for the services of the subcontractor;
- during the early phase of excavation, it was unable to handle soft soil conditions which had been identified in the tender documents;
- with a local engineering firm, it eliminated some of the piling required to support the project, contrary to the views of CS&P and the subcontractor who had developed the structural design;
- it constructed an elevator core for the project, then one-storey high, which was not properly founded and had to be removed;
- it approached Derrick V. Burgess directly to request that the requirement to waterproof the outside of the tank be deleted from the project specifications and to request that funds be released to it despite little progress and a scaling back of specifications; and,
- it submitted inappropriate expenses and charges for reimbursement throughout the project. Its draw-downs frequently contain copies of documents that had been submitted in previous requests for payment.

[12] In the Statement of Defence, it is said that Landmark Lisgar blamed CS&P and its subcontractors for its problems on the project. In the Statement of Defence, it is alleged that Sam Spagnuolo would not certify amounts he found to be inappropriate for reimbursement and would often confirm lesser amounts than were sought by Landmark Lisgar. The engineer of record identified numerous issues with the work that had been done. It determined that Landmark Lismark had not performed in accordance with the contract and directed that work be removed. It is said that this essentially required Landmark Lisgar to re-start the project at its own cost. According to the defendant, in response to some of these problems, Landmark Lisgar went directly to the government. Often throughout the project, Certificates of Payment issued by CS&P were overruled by the Ministry and payments made to Landmark Lisgar for an amount above that which was certified. Landmark Lisgar approached the plaintiff, Derrick V. Burgess, directly with payment and other requests. This was done without consulting CS&P or otherwise following the approved and required processes. Recommendations made by CS&P to refuse the release of funds to Landmark Lisgar and to refuse amendments to the specifications sought by Landmark Lisgar were overruled. The money was paid and changes made as requested by Landmark Lisgar.

[13] In short, the counsel for the plaintiffs submitted that none of this can reflect on whether or not Sam Spagnuolo altered the cheques, disseminated them or ensured that they came to public attention. The manner of selection and the competence of the company chosen to complete the project are not material to those issues. Counsel says the allegations contained in these paragraphs are intended to create a false context and colour, disclose no reasonable defence and, on this basis, should be struck.

Analysis

[14] Counsel for the plaintiffs readily conceded the test is a high one. It must be plain and obvious that the pleading does not disclose a reasonable defence. A Statement of Defence will be subject to a motion to strike if the defendant is unable to establish a defence disentitling the plaintiff from the relief sought, assuming the facts alleged in the defence are true. A pleading that: "demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of pleadings that are irrelevant, argumentative or inserted for color, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party…" (see: *George v. Harris* (2000), 97 A.C.W.S. (3d) 225, 2000 CarswellOnt 1714 (S.C.) at para. 20).

[15] In *Quizno's Canada Restaurant v. Kileel Developments Ltd.* (2008), 2008 ONCA 644 (CanLII), 92 O.R. (3d) 347, the Court of appeal has provided guidance as to the parameters to be applied on these motions. The case was part of a larger battle between a franchisor and a number of its franchisees. The decision is driven by the determination of a motions judge that certain paragraphs of a Statement of Defence should be struck out, not because they were irrelevant, but because, as she saw it, the prejudice associated with them outweighed their probative value. The Court of Appeal observed:

> Pleadings are not the appropriate stage in an action to engage at large in what is essentially a trial judge's exercise for determining the *admissibility of evidence at trial* – i.e., weighing the probative value versus prejudice of facts. That exercise is not particularly well-suited to *defining issues for trial*, something which is for the parties to decide. … A fair trial requires that the defendant be able to put forward a 'full' defence, not – as the motion judge erroneously concluded – a 'reasonable' defence defined in advance by the plaintiff and the court.
>
> ….

> A defendant is entitled to plead whatever material facts it chooses to in response to a plaintiff's allegations, provided the allegations are relevant and of at least marginal probative value and their probative value is not outweighed by their prejudicial effect. While the court will look at '[the extent to which] the particulars attacked are necessary to enable the defendant to prove its case,' it is not for the court to prove the case at this stage and limit the allegations to what it considers a 'reasonable defence'.
>
> …….
>
> A plaintiff cannot claim to be prejudiced when the defendant's allegations are directly responsive to allegations made in its statement of claim.
>
> (*Quizno's Canada Restaurant v. Kileel Developments Ltd., supra,* at paras. 16, 23 and 29)

[16] A key element in the case pleaded against Sam Spagnuolo is fraud:

> …fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. ...
>
> (*Derry v. Peek*, [1886-1890] All E.R. Rep. 1 (H.L.); adopted in *Vale v. Sun Life Assurance Co. of Canada,* 1998 CanLII 14823 (ON SC), [1998] O.J. No. 6465 (Gen. Div.) at para. 18 (Q.L.); and, *Gregory v. Jolley,* 2001 CanLII 4324 (ON CA), [2001] O.J. No. 2313 (C.A.), at para. 15 and quoted in *Canada v. Granitile Inc.,* 2008 CanLII 63568 (ON SC), at para. 286)

[17] In this case, it is alleged that Sam Spagnuolo knowingly falsified the cheques, arranged for them to be placed in the files of the government and to be discovered.

[18] Whatever information is forthcoming at trial, it is unlikely that anyone will appear and testify that they were present when the false cheques were created or placed in the draw-down files. Fraud is not, as a rule, implemented in the presence of bystanders. It may be that there will be forensic evidence that will point to the person responsible for the false cheques. Be that as it may, the courts allow that fraud can be found based on circumstantial or inferential evidence:

> The respondents would thus seem to contend, indirectly or at least, that the courts cannot find fraud unless it be directly proved. But, for obvious reasons, this proposition is untenable.
>
> There would be very little protection against fraud if such was the law. Those who intend to defraud do all in their power to conceal their intent.
>
> Their acts could not defraud if they were not clothed with the garb of honesty. A maxim of the criminal law, based on the same principle, is that the guilt of the accused is never to be presumed. But that does not mean that a criminal shall not be convicted if he has not taken a witness for his crime.
>
> It is likewise, as a general rule, only by presumptions and circumstantial or inferential evidence that dishonesty can be proved.
>
> (*North British & Mercantile Insurance Co. v. Tourville* (1895), 1895 CanLII 68 (SCC), 25 S.C.R. 177, at paras. 7-9 and quoted in *Canada v. Granitile Inc.,* at para. 291

[19] In their factum, counsel for the plaintiffs note that "rather than asserting any of the usual defences to a claim of defamation, such as justification or fair comment, Spagnuolo pleads only that he did not falsify and disseminate the cheques." This is hardly surprising. Practically speaking, there can be no other defence. It is not possible to "justify" fraud or to suggest that a fraud resulted in "fair comment". Just as fraud can be proven through circumstantial or inferential evidence, so it must be that it can be defended on the same basis.

[20] The Statement of Claim alleges that: "Spagnuolo created and disseminated the false cheques." From what is this drawn? It relies on allegations that, if proven, would serve to demonstrate that the file, in which the cheques were discovered, had been in the possession of Sam Spagnuolo and was received, from him, by officials of the government. It relies on allegations that, if proven, would serve to suggest that Sam Spagnuolo sought to create an aura of scandal and controversy involving the plaintiffs. It relies on allegations that, if proven, would suggest Sam Spagnuolo sought retribution as a result of the termination that occurred.

[21] The plaintiffs seek to have these things contribute to an inference that the cheques were prepared and disseminated by or under the direction of Sam Spagnuolo in order to demonstrate that the plaintiffs are dishonest and received "kickbacks" from Landmark Lisgar.

[22] In my view, the impugned paragraphs are responsive to inferences and conclusions raised in the Statement of Claim. Sam Spagnuolo seeks to defend the action by reviewing the conduct of CS&P and its relationship with Landmark Lisgar and the Government of Bermuda. This may suggest that there are other inferences to be drawn leading to a submission that the plaintiffs have failed, on a balance of probabilities, to prove that it was Sam Spagnuolo who created the false cheques. The impugned paragraphs, if proven, would suggest that the difficulties with the project, including the selection of Landmark Lisgar, and the work it carried out or was responsible for, were caused by Landmark Lisgar. This could lead to an inference that the government, by overruling recommendations of its architect, was a source of problems with the project. These paragraphs, if proven, could demonstrate that this difficult situation was dealt with by Sam Spagnuolo in a professional and responsible manner. It may be that this will lead to an understanding that, even as it was decided that CS&P's role in the project was to be terminated, the parties each understood what had occurred and that there was no reason for CS&P to seek retribution and that, whoever caused the false cheques to be created, it was not established to be Sam Spagnuolo.

[23] The Statement of Defence pleads facts that demonstrate how CS&P came to be terminated from the project. It was as a result of long-standing difficulties with the project among CS&P, Landmark Lisgar and the government of Bermuda. The Statement of Defence says that, in the end, it was a termination that was agreeable to both CS&P and the government.

[24] The first of the two groups of paragraphs that the plaintiffs seek to have struck out (paragraphs 13 to 16) set out how the construction contract was awarded to Landmark Lisgar, contrary to the recommendations of CS&P. The second group of paragraphs the plaintiffs seek to strike out (paragraphs 22 to 37) deal with issues concerning the draw-down of payments that persisted throughout the project. They indicate that CS&P was often overruled by the government of Bermuda on its decisions with respect to payment. These paragraphs provide particulars of the issues which formed the conflict between CS&P and Landmark Lisgar and led to the termination.

[25] I should point out that there are two places within these paragraphs which counsel for the defendant concedes should be struck. This refers to paragraph 16 and the second sentence of paragraph 35. These refer to the appointment of two people related to the plaintiffs as silent, non-voting partners of Landmark Lisgar and to the appointment, as construction consultant, of a person who had been the best man at the wedding of one of the two plaintiffs.

[26] Finally, it was submitted that, failing to strike out the paragraphs to which the plaintiffs object, would unduly complicate the action as a whole. This is not a reason to strike relevant portions of a Statement of Defence:

> While it will be more than likely that the inclusion of the impugned pleadings will increase the scope of discovery and result in a more complex, lengthy and costly trial, that alone is not a reason to strike a pleading that contains facts that are otherwise relevant and of potential probative value.
>
> (*National Public Relations Inc. v. Hill & Knowlton Canada Ltd.* 2010 CarswellOnt 9570 (S.C.J.) at para. 20)

[27] To my mind, the paragraphs in question are relevant and have potential probative value. Counsel for the plaintiffs expressed the concern that this will lead to a full inquiry into each of the issues raised within these paragraphs. This ought not to be so. These matters are pertinent only insofar as they can contribute to the issues raised in this proceeding. It may be that the appropriate parameters can be found through the cooperation of counsel but, if not, the question of what part of this history is probative to the issues in this action may be raised in the course of any examination-for-discovery and, again, at trial.

[28] To be the victim of fraud, particularly in a public context, is a difficult and sensitive matter. To be accused of being the perpetrator is no less serious. The parties should be permitted the full breadth of pleading allowed by the *Rules of Civil Procedure* even if it causes some hardship in the course of the proceeding.

Conclusion

[29] Paragraph 16 and the second sentence of paragraph 35 of the Statement of Defence are struck. The remainder of the motion is dismissed.

Costs

[30] No submissions were made as to costs. If the parties are unable to agree, I will consider written submissions on the following terms:

1) On behalf of the defendant, Sam Spagnuolo, no later than fifteen days after the release of these reasons. Such submissions are to be no longer than four pages, double-spaced, exclusive of any Bill of Costs, Costs Outline or case law that may be filed;

2) On behalf of the plaintiff, no later than ten days thereafter. Such submissions are to be no longer than four pages, double-spaced, exclusive of any Bill of Costs, Costs Outline or case law that may be filed; and,

3) On behalf of the defendant, Sam Spagnuolo, in reply, no later than five days thereafter. Such submissions are to be no longer than two pages, double-spaced.

LEDERER J.

Released: 20120411

CITATION: Brown v. Spagnuolo, 2012 ONSC 2141
COURT FILE NO.: CV-11-419288
DATE: 20120411

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

EWART BROWN and DERRICK V. BURGESS

Plaintiffs

– and –

SAM SPAGNUOLO and LAWRENCE BRADY

Defendants

JUDGMENT

LEDERER J.

Released: 201204 11

Tab 176

CanLII

Sugar v. Peat Marwick Ltd. (Ont. H.C.J.), 1988 CanLII 4635 (ON SC)

Source:	Superior Court of Justice
Date:	1988-12-07
Other citations:	66 OR (2d) 766 — [1988] CarswellOnt 874 — [1988] OJ No 1959 (QL)
Citation:	Sugar v. Peat Marwick Ltd. (Ont. H.C.J.), 1988 CanLII 4635 (ON SC), <https://canlii.ca/t/g1dm4>, retrieved on 2026-01-18

Sugar et al. v. Peat Marwick Ltd. et al.
Indexed as: Sugar v. Peat Marwick Ltd.
(Ont. H.C.J.)

66 O.R. (2d) 766
[1988] O.J. No. 1959
Action No. 3197/85

ONTARIO
High Court of Justice
Southey J.
December 7, 1988.

Torts -- Deceit -- Receiver-manager acting as bank's agent making innocent misrepresentation -- Employees of bank, knowing representation to be false, remaining silent -- Bank guilty of fraud.

In August of 1983, a bank, which had lent money to a company, learned through two of its inspectors that the amount of the accounts receivable was overstated in the company's records. In September the bank appointed a receiver-manager. S., relying on the company's records, invested money in the purchase of the company from the receiver-manager by a new company in which S. had part ownership. S. was advised to verify the statements but did not do so. There was no evidence that the receiver-manager knew of the false statement of accounts receivable. The new company failed, and S.'s investment was lost. In October, 1984, S. learned of the bank's inspection of August, 1983, and brought an action against the receiver-manager and the bank.

Held, the bank was guilty of fraud in remaining silent and permitting S. to rely on the statements of the receiver-manager acting as the bank's agent, when employees of the bank knew the statements to be false.

S.'s negligence in failing to verify the statements was no defence; nor was her delay, since she did not learn of the bank's knowledge until October, 1984. S. was entitled to recover the full amount of her investment before that date.

ACTION for damages for deceit.

Cases referred to Lloyd's Bank Ltd. v. Bundy, [1975] 1 Q.B. 326; Woods v. Martin's Bank Ltd., [1959] 1 Q.B. 55; Standard Investments Ltd. v. C.I.B.C. (1985), 1985 CanLII 164 (ON CA), 52 O.R. (2d) 473, 22 D.L.R. (4th) 410, 30 B.L.R. 193 [leave to appeal to S.C.C. refused 53 O.R. (2d) 663n, 1986 CanLII 2547 (ON SC), 65 N.R. 78 n]; Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158 Rules and regulations referred to Rules of Civil Procedure, O. Reg. 560/84, rule 5.02(2)

J.B. Berkow and R.L. Youd, for plaintiffs.

J.D. Crane, Q.C., and J.P. Hoffman, for defendants.

SOUTHEY J.:-- The plaintiffs sue to recover an investment of about $250,000 in a business that failed. Their investment was in Dimension Furniture Ltd. ("Newco"), a corporation which purchased the assets of Dimension Furniture Design Canada Ltd. ("Oldco") in September, 1983, from the defendant Peat Marwick Limited ("Peats") as receiver and manager and trustee in bankruptcy of Oldco. The defendant bank had appointed Peats as receiver and manager and was the petitioning creditor in the bankruptcy. Newco continued the furniture manufacturing business of Oldco for about 18 months, but without success. Newco went into bankruptcy in June, 1985, again on a petition of the bank. The plaintiffs lost all the money they had invested in Newco.

The plaintiffs claim that the bank had knowledge at the time of the sale to Newco of a substantial falsification of the books and records of Oldco pertaining to the accounts receivable of the company. It is common ground that the bank gave no warning of any such falsification to Stanley Sugar ("Sugar"). Sugar is the husband of the plaintiff, Sandra Sugar, and he had acted on behalf of his wife in investigating Oldco and in negotiating the purchase of its assets. Newco was a company incorporated for the purpose of purchasing the assets of Oldco and continuing its business. Sandra Sugar invested money in Newco. The corporate plaintiff, 582087 Ontario Limited, was incorporated after the purchase. It is wholly owned by Sandra Sugar and assumed her investment in Newco. The plaintiffs claim that they would not have invested in Newco, if the bank had disclosed to Sugar its knowledge of the falsifications.

The falsifications resulted in a gross overstatement of the accounts receivable of Oldco in statements and reports prepared by or for Jacqueline and Thomas Klein, the principal shareholders and operators of Oldco. These statements were subsequently used by Peats in its reports and statements at the time of the sale of assets.

The issues

Among the grounds on which the plaintiffs' claim is based is the allegation that the conduct of the bank and Peats amounted to a fraudulent or negligent misrepresentation as to the state of the accounts receivable. Alternatively, even if there was no misrepresentation, the plaintiffs claim that the bank was guilty of a breach of a fiduciary duty owed by it to the plaintiffs as valued customers. It is further submitted that the bank is liable simply because it remained silent at the time of the purchase without disclosing facts which would have led the Sugars to refrain from becoming involved in the purchase.

The issues are complicated by the fact that the Kleins, who were responsible for the falsifications, continued in the business until August, 1984, as owners of 50% of the shares of Newco and managers of its operations. In addition, and perhaps of greater significance, Sugar admittedly became aware of the falsifications in January, 1984, yet continued to cause the plaintiffs to increase their investment in Newco, and the bank to increase its loans to Newco, without making the claims now asserted in this action. These claims were not made until this action was commenced in May, 1985.

Sugar did not inform the bank of his discovery of the falsifications until a meeting on October 18, 1984. It was at that meeting, according to Sugar, that a statement was made by Peter De Guerre, an employee of the bank, which revealed to Sugar for the first time that the bank had been aware all along of the falsifications. Only then, Sugar says, did Sugar become aware of the actionable conduct of the bank. The claim made at that time was for an adjustment of the purchase price. That was a contractual claim and could be asserted only by Newco. Newco is now bankrupt, and the claims in the action are on behalf of the investors in Newco, and are founded primarily in tort or breach of fiduciary duty.

The bank denies having knowledge of the falsifications at the time of the purchase. The bank also denies that any representation as to the validity of the accounts receivable of Oldco was made by Peats or the bank, or was relied upon by Sugar, or that there was any special relationship between the bank and the Sugars which gave rise to a fiduciary duty by the bank to the plaintiffs. The bank further relies on an "As is, Where is" clause in the agreement of purchase and sale, which confirmed that Peats gave no warranty or condition with respect to the assets sold. Finally, the bank asserts that the Sugars' delay in informing the bank of the falsifications gives rise to an estoppel.

What knowledge and belief as to the falsifications did the bank have at the time of the purchase by Newco?

The bank became concerned in August, 1983, about the safety of its loan to Oldco, which then exceeded $600,000. An important part of the bank's security was the accounts receivable of Oldco, which had been reported by the Kleins as having a face value of $592,119. On August 18, 1983, De Guerre and Klaus Spies, another inspector in the special loans department of the bank, attended at the premises of Oldco. They examined the files of the company relating to accounts receivable and discovered, from spot checks made within a period of several hours, that there was a substantial number of cases in which the price of goods ordered had been entered in the accounts receivable, when the goods had not yet been manufactured, let alone delivered. These entries reflected situations in which the customers could not have been under any legal obligation to pay for the goods, so that the accounts receivable had not yet come into existence. The practice was described as "pre-billing". Its effect was to overstate the amount of the accounts receivable, and De Guerre considered it to be fraudulent.

Because he had made only a cursory examination, De Guerre could not have known with any certainty the extent of the falsifications due to pre-billing. The evidence is conflicting as to what he suspected or believed the extent to be. Sugar's evidence is that De Guerre said at the meeting on October 18, 1984, that he could find valid accounts receivable in August, 1983, of only $150,000 or so. De Guerre's evidence was that Sugar's recollection and notes of what he said at the meeting were inaccurate, and that what he, De Guerre, had said was that the bank inspectors thought the accounts receivable were overstated by $100,000 to $150,000. As accounts receivable of almost $600,000 had been reported to the bank by the Kleins, this would have left valid accounts receivable of $450,000 to $500,000.

The evidence of Spies, the other bank inspector who accompanied De Guerre on the visit to Oldco on August 18, 1983, confirmed that they had found a number of instances of pre- billing. In a

memorandum written in April, 1985, he said they had estimated that receivables were overstated by about $150,000. On the other hand, he acknowledged that he had made no effort to correct a report dated August 25, 1983, written by the acting manager of the Alness & Supertest branch at which the Oldco account was located, that some $200,000 of the listed receivables were suspected to be merely orders in hand, and that the real value of the receivables "on a stress collection basis" was estimated at some $150,000. Spies accepted that this report was probably based on information received from him. I assume that the valuation of the accounts receivable on a "stress collection basis" would be considerably lower than that at which they would be included in a sale of the assets of the company as a going concern.

I find as a fact on the foregoing evidence that Spies and De Guerre believed, as a result of their investigations at Oldco on August 18, 1983, that the accounts receivable reports and records of Oldco had been falsely inflated by as much as $200,000.

It is undisputed that Sugar was given no warning by the bank of any suspected falsification in the accounts receivable records of Oldco before he arranged for the purchase of the assets of Oldco. The purchase by Newco, which involved the investment of funds by Sandra Sugar, avoided for the time being a loss to the bank in the bankruptcy of Oldco, which Spies estimated might have been as much as $200,000.

The difficult legal issue in the case is whether the silence of the bank regarding its knowledge and belief as to the falsifications constituted in the circumstances a misrepresentation to Sugar, on which he relied, respecting the validity of the accounts receivable entries. The determination of this question requires an examination of the roles played by Sugar and Peats.

Sugar's conduct and capabilities and his reliance on Peats

Sugar was a chartered accountant and a sophisticated businessman. He had been considering the purchase of another company in August, 1983, when his brother Harvey, who was engaged in a branch of the furniture business, suggested he get in touch with the Kleins. The Kleins told Sugar that they had a very viable business, but they needed someone to act as financial controller and to provide them with additional working capital of $200,000 or more. One of the bank's documents contained the statement that Sugar and his brother Harvey had reportedly had previous success in restoring the health of ailing businesses.

Sugar was provided with the financial statements of Oldco for the past few years, and he prepared an analysis of them. He said he did not go behind the statements and look at the company's books. His analysis showed a company that was recovering from a disastrous loss, and appeared to have "turned the corner". He decided against investing in Oldco in August, however, because its debt load was too great. The investigations of Oldco by Sugar and the discussions with the Kleins in August, 1983, took place over 10 to 12 days.

Sugar was approached again by the Kleins in mid-September. They told him their relationship with the bank was deteriorating, and that the bank had threatened to call their loan and appoint a receiver. Sugar told them he would be interested in making a deal to purchase the assets, if a receiver was appointed. Peats was appointed receiver and manager on September 14th, and on September 15th, Sugar, accompanied by his lawyer and a business advisor, met with the Kleins to discuss the purchase of the assets of Oldco. The meeting took place at the Toronto General Hospital, where Mrs. Klein was receiving treatment. The discussions contemplated the formation of a new company, in which the Kleins would have a 50% interest, after repayment of the investment to be made by the Sugars. The Kleins would continue to direct the sales and manufacturing aspects of the business. The Kleins told Sugar that they thought a price of $450,000 would be required for acquisition of the assets.

On September 20th, Sugar met with Joseph Atkins, the officer of Peats in charge of the receivership of Oldco, at the offices of the bank's solicitors, Strathy, Archibald and Seagram. Sugar and Atkins reached a firm agreement as to the basis of a purchase of the assets of Oldco. The total price would be $450,000, of which $65,000 would be paid in cash on closing, with the balance to be financed by loans from the bank. The portion of the purchase price allocated to accounts receivable was $330,000, with that amount to be adjusted up or down on closing in accordance with any variation in the book value of the accounts receivable from a total of $400,000. Atkins insisted that there be no delay in concluding an agreement. He said that he must have an agreement in writing by the end of the week, Friday, September 23rd, or he would close the business and liquidate the assets on Monday, September 26th.

A written agreement was prepared by Andrew Brands of the Strathy firm for the sale of the assets by Peats as receiver and manager and trustee in bankruptcy of Oldco to Newco, a company to be incorporated. The agreement was made as of September 23, 1983, and was signed on that day on behalf of Newco by Jacqueline Klein, as president, and Sugar as general manager. Jacqueline Klein and Thomas Klein consented in writing to the terms of the agreement. The purchase was completed in escrow on September 26, 1983. The bank entered into a loan agreement with Newco on that date, to which the Kleins and Stanley, Harvey and Sandra Sugar consented. The Kleins executed a formal acknowledgment under seal acknowledging that Newco was purchasing the accounts receivable of Oldco based on the representations and warranties of the Kleins, that the collectable portion of such accounts receivable would be not less than $300,000, and that the Sugars were loaning money to and investing money in the capital of Newco based on such representations and warranties. The Kleins agreed to indemnify Newco for any amount by which the collectable portion of the accounts receivable was less than $300,000, or, alternatively, to indemnify Stanley and Sandra Sugar for 50% of such deficiency.

It was emphasized in the evidence that there was no suggestion, prior to closing, of any problem with the accounts receivable, or of any pre-billing or fraud. Sugar spent several days at the Oldco premises prior to closing, but said he was unable to examine the accounts receivable ledger because it was in the possession of the receiver and manager or of Mrs. Klein in the hospital. All witnesses agreed that the books and records were in bad shape. The ledgers were written up only to July 31st. The bookkeeper was on holidays. Sugar telephoned some of the Oldco customers to determine the outstanding balances of their accounts, but many would give him no information.

Sugar received from John Riviere of Peats a series of type- written documents marked exs. A to F, prepared by Peats as part of their assessment of the affairs of Oldco done by Peats for the bank. Exhibit A showed accounts receivable (unaudited) at July 31, 1983, in an estimated amount of $592,000. The accounts receivable values at August 19, 1983, were estimated in ex. B at $505,000 for book value and $300,000 for realizable value. In the cash flow projections for the period ending February 28, 1984, cash receipts from accounts receivable were shown at $475,000, which allows a loss of $30,000 for doubtful accounts. Sugar testified that he relied on these documents as showing what Peats had learned about Oldco. I accept that evidence as meaning that he relied on the statements as showing what Peats had found in the books and records of Oldco.

Sugar also received from Peats on September 23rd, the day the agreement was signed, two untyped lists of the outstanding balances for all customers to September 14, 1983. These were prepared by the Kleins or employees of Oldco. They showed total balances ranging from $400,000 to $410,000. I am satisfied that Sugar relied on these statements as well as accurately reflecting the books and records of Oldco.

All of the statements provided to Sugar by Peats were based on the accounting records of Oldco which De Guerre and Spies knew had been falsified.

The accounts receivable were adjusted at closing to $405,955 in a statement prepared by Peats for the purpose of determining the adjusted purchase price. The escrow was lifted on September 28th, notwithstanding a disagreement as to the manner of adjusting the accounts receivable. By letter of that date, Sugar's solicitors proposed that the matter be settled in one of two ways:

> (i) adjustments be made from an opening book value of accounts receivable of $402,883.00 which is the assumption that the Purchaser made at the time of entering into the agreement of purchase and sale; or
>
> (ii) an accurate determination be made of the accounts receivable by way of circulating such accounts receivable, verifying accounts receivable with the Purchaser accepting all risks of collectability being the rationale for the discrepancy between the $400,000.00 book value and the $330,000.00 allocation to accounts receivable.

The letter concluded with these prophetic words:

> If neither of the above alternatives are acceptable to the Vendor we once again stress to you difficulties will arise when the adjustments are to be finalized.

It is clear that Atkins was pressing Sugar to proceed with extraordinary haste to make the purchase, and that Sugar did so against the specific advice of his accountant that he carefully check the accounts receivable. Sugar was keen to complete the deal and get on with the business of Newco. Any break in the continuity of operations would probably have caused costly problems with customers, suppliers and employees. Any delay in the sale would have resulted in a rapid decline in the value of the assets. It was in the interests of both sides to avoid delay.

The role of Peats

There were no significant direct communications between the bank and Sugar prior to the purchase. Sugar was dealing with Peats, and their solicitors (who were the bank's solicitors) and with the Kleins. The role of Peats' employees requires careful consideration, not only because they were the persons communicating with Sugar, but also because they made reports to the bank, which both De Guerre and Spies say they relied upon as satisfying their concerns about the accounts receivable, and provide the reason why they gave no warning to Sugar of the falsifications.

Peats had been instructed on the day after the visit by De Guerre and Spies to make a viability study of Oldco. The representatives of Peats were told that the bank's inspectors had been unable to find some of the supporting documentation for the accounts receivable and Peats was asked, while its representatives were there, to check for missing documents, with particular attention being paid to two large accounts, De Boers and the Art Shoppe. On the basis of a random check one afternoon of De Boers and Art Shoppe files, and those of 10 to 20 other customers by Riviere, it was reported by Peats to the bank that there were no documents missing in connection with the accounts receivable. The significance of this report is greatly reduced by the fact that no one at the bank had told any employee of Peats that the bank had found the falsification of records by pre-billing. Peats was told only that documents appeared to be missing. All Riviere did was to check that the normal supporting documents were present. If he had been told of the discovery by De Guerre and Spies of the falsification records, he would no doubt have scrutinized the dates in the documents.

I cannot believe, in these circumstances, that the report by Riviere of Peats that there were no documents missing could have led De Guerre and Spies to believe that they had been mistaken in thinking that they had discovered fraudulent entries, or otherwise affects the legal significance of their failure to warn Sugar of the falsifications.

Did the bank make a misrepresentation?

The result of my findings is this: that the bank stood by and let the Sugars invest in Newco without warning them of the bank's discovery that the books of Oldco had been falsified. Statements containing the false total of accounts receivable were furnished by Peats to Sugar, and were relied on him in proceeding with the investment. There is no evidence that Peats knew them to be false. If Peats had known them to be false, the use of those statements would have constituted a fraudulent misrepresentation by Peats.

Peats was initially appointed by the bank to make investigations of Oldco, and then to monitor its affairs. Later, it was appointed by the bank as receiver and manager of the undertaking, property and assets of Oldco under the security held by the bank. Peats was being paid by the bank, and the bank's solicitors acted for Peats in connection with the sale of assets. There is evidence that Peats acted on the instructions of the bank, and no evidence of Peats receiving instructions from any other creditor. Although Peats was not an agent of the bank in its capacity as trustee in bankruptcy, I am satisfied that one of the capacities in which Peats was acting in dealing with Sugar was as agent of the bank. De Guerre and Spies must have known that Peats was providing Sugar with the statements which the bank knew was false. In the circumstances, in my judgment, the bank was guilty of fraud.

The relevant law is stated as follows in Chitty on Contracts, 25th ed. (1983), vol. I, p. 228:

> Again, if one agent makes a statement honestly believing it to be true, but another agent or the principal himself knows that it is not true, knows that the statement will be or has been made, and deliberately abstains from intervening, the principal will be liable. In these circumstances the party with the guilty knowledge can himself be treated as being guilty of fraud.

Sugar's knowledge and lack of care

I accept the evidence of Sugar that he was unaware of the falsification of the accounts receivable records at the time the purchase of assets was completed, and that he did not find out about it until late December, 1983.

On the other hand, it is clear that Sugar was being advised to check the accounts receivable before completing the transaction. According to L.S. Rosen, a chartered accountant called to give evidence on behalf of the plaintiffs, it would have been an obvious thing to do in the circumstances. But Sugar did not do it. As Mr. Crane pointed out, Sugar deliberately took a chance on the validity of the accounts receivable. He may have been negligent in so doing, but it is no defence to the claim for fraud against the bank that he might have discovered the falsity by the exercise of reasonable care (Chitty on Contracts, p. 223).

The materiality of the inducement

The evidence as to the extent of the falsifications is conflicting. Sugar calculated them to be $289,464, leaving a balance of genuine accounts receivable at closing of only $116,491. These figures are quite inconsistent with a letter written by Sugar's solicitor, dated December 16, 1983, informing the bank's solicitors that:

> ... it appears that the accurate calculation of the accounts receivable that were acquired by Dimension Furniture Ltd. ... was $333,313.00. As of November 30, 1983, $189,944.00 of the said amount was collected and the balance is still outstanding.

It would appear from that letter that the falsifications would not have totalled more than about $200,000. The expert witnesses who testified on this subject -- L.S. Rosen for the plaintiffs and Michael Beber for the defendants -- gave totals in the range of $200,000 to $290,000.

It is unnecessary to determine the extent of the falsifications, provided it was such that Sugar, if he had known of it, would not have caused his family to invest in Newco. I am satisfied from the evidence that the falsification totalled at least $150,000, and that Sugar would not have proceeded with the investment if he had known of them. As was explained by L.S. Rosen, if Sugar had known of the true state of the accounts receivable, it would have appeared to him not that Oldco had "turned the corner", but that Oldco remained a very sick company that would not have been a reasonable investment.

Sugar's delay in reporting the fraud to the bank

After the purchase by Newco was completed, and Sugar had taken over control of the accounting of the business, he instructed that a new list of accounts receivable be prepared in which each invoice number was listed. When this was completed in late October or early November, 1983, it showed a total at September 30, 1983, of $349,072, which was more than $50,000 less than the figure used at the closing on September 28, 1983. This total was further reduced later by Mrs. Klein to $335,935. Sugar accepted Mrs. Klein's explanation that the books had not been kept up to date, and that the figure used on closing was simply inaccurate. Sugar informed the bank of the discrepancy in the accounts receivable total, and arranged for the bank to change the margin requirements for the Newco loan, because the accounts receivable were less than what they were believed to have been at the time of closing.

Sugar's evidence is that he did not discover the existence of the falsification of the accounts receivable until the latter part of December, 1983, when the Kleins were away on vacation. Sugar did some "digging" at that time, and found from a partial analysis that there was pre-billing to the extent of $100,000 to $150,000. He did not confront the Kleins with his discovery immediately upon their return, because he needed their help in operating the enterprise which he was struggling to keep alive. He finally confronted them with the pre-billing at a meeting on January 30, 1984, in the presence of lawyers for both Sugar and the Kleins, and Mrs. Klein's father, who had invested in the business. There was no denial by the Kleins of the falsification of accounts receivable records. Mrs. Klein's father left the meeting in tears.

Despite the discovery of what is now regarded as massive fraud, Sugar felt it was necessary for him to live with the Kleins, because he had no one to take over the production and sales aspects of the business. Instead of demanding their withdrawal from Newco, he told them they must somehow get the money back into the business. He gave them two to three months to come up with a viable solution. Sugar thought that Mrs. Klein might be able to "pull a rabbit out of a hat".

The contributions of the Kleins to the business went from bad to worse in the following months, and, by May, Sugar was negotiating with them to withdraw from the business. These negotiations finally resulted in an agreement made as of August 3, 1984, between the Kleins, Sugar, Newco and Harvey Sugar, a brother of Stanley, who had invested money in Newco. The agreement contained the immediate resignation of the Kleins as officers, directors and employees of Newco, and a non-competition agreement by the Kleins. The Kleins agreed to pay $50,000 to Harvey Sugar, whereupon they would be released from their indemnity agreement regarding the accounts receivable. They also agreed not to withdraw their guarantee of the indebtedness of Newco to the bank until they paid the $50,000 to Harvey Sugar.

The Kleins ceased to be involved in the operation of Newco after August 3, 1984, and a person knowledgeable about the furniture manufacturing business was brought in as general manager. The Kleins never paid to Harvey Sugar any part of the $50,000 provided for in the agreement of August 3, 1984, so that the release of the Kleins from the claims under the indemnification agreement respecting accounts receivable was never effective. No money was ever recovered from the Kleins under that agreement, because they became bankrupt.

During all this time, however, the bank had not been informed of the discovery by Sugar of extensive pre-billing. Sugar said he did not do so, because this would have revealed to the bank that the financial condition of Newco was much worse than had been indicated by the statements produced at the time of closing, and might have resulted in the bank's calling the loan to Newco and putting Newco out of business. What Sugar did not know until the meeting on October 18, 1984, was that the bank had been aware of the pre-billing since De Guerre and Spies visited Oldco on August 18, 1983.

The bank called the Newco loan on November 5, 1984, shortly after Sugar told it of the falsifications. The bank instructed Ernst & Whinney Inc. to conduct an investigation of Newco's financial position, including a review of the accounts receivable purchased by Newco from Peats, to determine, if possible, whether certain accounts receivable were inaccurately stated, as alleged by Sugar. Meanwhile the bank's solicitors continued to deny all allegations made against the bank.

The Ernst & Whinney report, dated December 17, 1984, concluded from a "cursory review" that the receivables as of June 30, 1983, might have been overstated, and suggested that further evidence might be obtained. Mr. W.C. Simpson, superintendent, special loans department of the bank interpreted this somewhat cautious report as saying that there had been fraud perpetrated by the principals of Oldco relating to the receivables, and that Sugar's claims were basically correct.

The bank did not follow up the suggestion of Ernst & Whinney to obtain further evidence, because, according to the evidence of Mr. Cameron of the special loans department, it would serve no good purpose to do so. He said that knowledge as to the exact amount of the discrepancy did not matter, if there was a problem.

The bank did not respond to Sugar's claim for an adjustment in the price paid for the assets of Oldco, but did increase its advances to Newco by $250,000. As a condition of this increase, the Sugars were required to invest an additional $30,000 in Newco. This brought their total investment to $245,000, which is the principal amount claimed in this action.

The action was commenced by statement of claim dated May 23, 1985. The bank responded with a demand for payment, dated June 12, 1985. Ernst & Whinney were appointed as receiver and manager of the undertaking of Newco on June 26, 1985. A petition for a receiving order was filed on June 25, 1985.

The essential element in the claim against the bank for damages for fraudulent misrepresentation is the bank's knowledge, through De Guerre and Spies, of the fraudulent conduct of the Kleins. I accept the evidence of Sugar that he was unaware of the bank's knowledge of the fraud by the Kleins until October 18, 1984. It was, of course, unnecessary for Sugar then to confront the bank with his discovery of its complicity in the fraud, because he had learned of the bank's knowledge from De Guerre, an employee of the bank. I accept the evidence of Sugar that De Guerre was incredulous that Sugar had not known all along of the fraudulent conduct of the Kleins in inflating the accounts receivable, as had been discovered by De Guerre and Spies in short order on August 18, 1983.

In my opinion, the delay of the Sugars after October 18, 1984, in commencing this action does not give rise to any bar to the action by way of estoppel or otherwise. The claim made initially by the Sugars was for an adjustment in the purchase price paid by Newco for the assets of Oldco. The bank made no response to this claim, but co-operated by extending further credit to Newco in hopes that the ill-starred venture could be nursed back to success. Nor does the delay cast doubt on the factual basis of Sugar's claim that he relied on a representation by the bank as to the validity of the accounts receivable. Until Sugar became aware of the bank's knowledge of the inflation of the accounts receivable by the Kleins, Sugar had no reason to suppose that the misrepresentation by the bank was other than innocent.

Different considerations apply in respect of Sugar's knowledge of the fraud by the Kleins. Sugar was aware of pre- billing by the Kleins in January, 1984, but did not inform the bank of the pre-billing until October, 1984. It may be that the bank and the Kleins were joint tortfeasors. In that event, if the Sugars had released the Kleins from liability under the agreement of August 3, 1984, the bank might also have been released. No release of the Kleins occurred, however, because the Kleins never paid to Harvey Sugar any part of the sum of $50,000 specified in the agreement of August 3, 1984.

Breaches by Newco of its loan agreement

Mr. Crane submitted that the bank had a good defence to the plaintiffs' claim, because of breaches by Newco of its loan agreement with the bank. This agreement is contained in a letter dated September 26, 1983, and was one of the related agreements made at the time the assets of Oldco were purchased. Mr. Crane referred specifically to cls. 6(e) (warranty that statements furnished to the bank should be accurate and complete), 7.1(g) (notice of adverse changes), and 7.2 (covenant against corporate reorganization).

The loan agreement was one of the related transactions which the Sugars were induced by the fraudulent misrepresentation of the bank to enter into, and which caused the loss and damages which the plaintiffs seek to recover. If the bank caused damage to the plaintiffs by fraudulently inducing the Sugars to cause this agreement to be made as part of the venture, it would be a travesty if the bank could rely on a provision of the agreement as providing a defence to the claim against the bank for fraud. If the fraud had not occurred, there would have been no loan agreement and no provisions to rely on.

In any event, I am not satisfied that any breaches of the covenants in question (or, at least those to which the Sugars were privy) had any material effect on the financial condition of Newco, or the extent of the loan to it from the bank.

"As is, Where is" clause

The "As is, Where is" clause would probably have provided a complete answer to a claim in contract by Newco against Peats. It might also have been relevant to a claim for negligent misrepresentation against Peats or the bank, because it could be taken as a disclaimer of responsibility. But, the "As is, Where is" clause has no application, in my opinion, to a claim in fraud by the Sugars against the bank. It is a provision in the agreement of purchase and sale which would not have been entered into if the fraudulent misrepresentation had not been made. Its only possible relevance to that claim might be to make more doubly certain the loss by the Sugars at being induced to make the investment, if it prevented any claim under the agreement of purchase and sale.

Liability for fraud

In my judgment, the bank is liable to the plaintiffs, or one of them, for damages for fraudulent misrepresentation. Before considering the amount of those damages, I shall deal with the claim advanced by the plaintiffs at trial that the bank was guilty of a breach of fiduciary duty to the plaintiffs.

Claim of breach of fiduciary relationship

The allegation of breach of fiduciary duty was made by amendment to the statement of claim at trial. The amendment was as follows:

> 15.(a) The Plaintiffs allege that the Defendant C.I.B.C. was in a special relationship with the Plaintiffs as valued customers of the C.I.B.C. As a result, the Plaintiffs allege that the

 Defendant CIBC owed them a fiduciary duty which the Defendant C.I.B.C. breached by its failure to reveal to the Plaintiffs its knowledge of the discrepancy in the accounts receivable as aforesaid.

Spies stated in a report dated September 30, 1983, that "the Sugar family are valued customers of our St. Clair & Dufferin Branch". Oldco and Newco dealt at another branch of the bank, namely, Alness & Supertest. There was no other evidence as to the nature of the dealings between the Sugar family and the bank at the St. Clair & Dufferin branch. The mere fact that the Sugars were customers of the bank is not enough to establish a fiduciary relationship.

Sugar accepted at trial the description of himself as a knowledgeable trouble-shooter. He was an experienced businessman. He was introduced to the Oldco situation by his brother, Harvey, not by the bank. There is no evidence that either the bank or Peats offered any advice to Sugar regarding the soundness of an investment in Oldco or Newco. Sugar had his own legal and accounting advisors and was not relying on the bank for advice as to what he should do. Although he was required by Atkins to act quickly to enter into and complete the agreement for the purchase of the assets of Oldco, the health of the business as a going concern required prompt action. There was no evidence of anything that would suggest duress or undue influence in law.

Mr. Youd relied on Lloyd's Bank Ltd. v. Bundy, [1975] 1 Q.B. 326; Woods v. Martin's Bank Ltd., [1959] 1 Q.B. 55, and Standard Investments Ltd. v. C.I.B.C. (1985), 1985 CanLII 164 (ON CA), 52 O.R. (2d) 473, 22 D.L.R. (4th) 410, 30 B.L.R. 193 (C.A.). In my judgment, none of these decisions is applicable to the case at bar, because of the facts I have mentioned in the preceding paragraph. The plaintiffs dealt with the bank through Sugar. In my opinion, there was no fiduciary relationship between the plaintiffs and the bank in connection with the sale of assets to Newco.

The claim against Peats

As stated above, the evidence is that the bank did not inform Peats of the discovery of pre-billing by De Guerre and Spies. The employees of Peats did not themselves discover the falsification of records by the Kleins. There is no factual basis for a claim of fraud against Peats.

Nor can there be a valid claim for negligent misrepresentation as against Peats. The employees of Peats did a viability study of Oldco, during the course of which they prepared statements of the assets of Oldco based on existing accounting records. They did not purport to verify those records. The only entries for which Peats was responsible were those which adjusted the Oldco records for transactions occurring after Peats had arrived at the Oldco premises. There was no evidence of any errors in those adjusting entries. There was no evidence that Peats did not accurately represent to Sugar and the bank the contents of the accounting records prepared by Oldco. There was, therefore, no misrepresentation by Peats.

Furthermore, the "As is, Where is" clause in the agreement of sale from Peats to Newco constitutes a valid disclaimer of responsibility by Peats for the accuracy of any statements as to the assets being sold.

Peats was a proper defendant to the action under rule 5.02(2) of the Rules of Civil Procedure, because of doubt as to the person from whom the plaintiff was entitled to relief. Peats was defended by the same solicitors and counsel as the bank, and the presence of Peats as a party defendant did not add to the length or expense of the trial. The action is dismissed as against Peats, but without costs.

Damages

The proper measure of damages for fraudulent misrepresentation is that which will put the innocent party in the position he would have been in if the representation had not been made: see

Doyle v. Olby (Ironmongers) Ltd., [1969] 2 Q.B. 158. In this case, if the fraudulent representation had not been made, the plaintiffs would not have invested money in Newco. In my opinion, they are entitled to recover the full amount of that investment up to the time at which they became aware of the bank's knowledge of the falsification.

The evidence is that Sandra Sugar had invested $175,000 in Newco prior to April 30, 1984. On April 30, 1984, the investment by Sandra Sugar in Newco was assumed by her wholly owned company, the corporate plaintiff. Although the evidence was presented in a very confusing way, I understand the facts to be that the indebtedness of Newco to Sandra Sugar was satisfied by payment of $175,000 to 582087 Ontario Limited, but that an equal amount was repaid on the same day from the corporate plaintiff to Newco. The Sugars were aware at the time of these transactions of the falsifications by the Kleins, but not of the complicity of the bank in the fraud. No new money was invested. In my judgment, the effect of the transaction was to place the numbered company in a position where it was entitled to recover from the bank the damages for fraud that were initially sustained by Sandra Sugar.

Further payments of $40,000 were made by the corporate plaintiff to or on behalf of Newco during August and September, 1984. These sums were invested in a futile effort to keep Newco afloat. They were the result of the initial investment caused by the fraudulent misrepresentation, and were made without knowledge of the facts giving rise to a claim for fraud against the bank. I find that the corporate plaintiff is entitled to recover these additional investments of $40,000.

The final investment by the corporate plaintiff was of the sum of $30,000 on February 4, 1985. At the time of this investment, the Sugars were fully aware of the bank's knowledge of the fraudulent conduct of the Kleins. The investment was made, as noted above, as a condition of the further extension of credit by the bank to Newco. In my opinion, the corporate plaintiff cannot recover this last investment of $30,000 that was made with full knowledge of the fraudulent misrepresentation for which the bank was responsible.

For the foregoing reasons, there will be judgment for 582087 Ontario Limited against the bank for $215,000, together with interest at 12% per annum from May 23, 1985, the date of the statement of claim. Counsel may speak to me on the question of costs. This should be done before the end of term.

Judgment for plaintiffs.

Tab 177

CanLII

North British Ins. Co. v. Tourville, 1895 CanLII 68 (SCC), 25 SCR 177

Source:	Supreme Court of Canada
Date:	1895-12-09
Citation:	North British Ins. Co. v. Tourville, 1895 CanLII 68 (SCC), 25 SCR 177, <https://canlii.ca/t/g7xq0>, retrieved on 2026-01-18

Supreme Court of Canada

North British & Mercantile Insurance Company v. Tourville, (1895) 25 SCR 177

Date: 1895-12-09

THE NORTH BRITISH & MERCAN TILE INSURANCE COMPANY (DEFENDANT)

Appellant;

And

LOUIS TOURVILLE AND OTHERS (PLAINTIFFS)

Respondents.

1895: Oct 3; 1895: Oct 4; 1895: Oct 5; 1895: Dec 9

PRESENT :—Sir Henry Strong C. J., and Taschereau, Gwynne, Sedge wick, King and Girouard JJ.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Insurance against fire—Condition of policy—Fraudulent statement— Proof of fraud—Presumption —Assignment of policy—Fraud by assignor—Appeal—Questions of fact—Reversal on.

Where an insurance policy is to be forfeited if the claim is in any respect fraudulent it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference, or by circumstantial evidence.

The assignee of the policy cannot recover on it if fraud is established against his assignor.

If a sufficiently clear case is made out the court will allow an appeal on mere questions of fact against the concurrent findings of two courts. *Arpin* v. *The Queen* (14 Can. S.C.R. 736); *Schwersenski* v. *Vineberg* (1891 CanLII 41 (SCC), 19 Can. S.C.R. 243); and *City of Montreal* v. *Lemoine* (1894 CanLII 60 (SCC), 23 Can. S.C.R. 390) distinguished.

APPEAL from a decision of the Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court in favour of the plaintiffs.

The action was upon a policy of insurance against fire issued by the defendant company to one Duval on a quantity of lumber in his yard on the river Nicolet and assigned by Duval to the plaintiffs. One of the conditions of the policy was that it should be forfeited if the claim was in any respect fraudulent and the defence of the company to the action was that

[Page 178]

Duval in his application for insurance had materially [exaggerated the quantity and value of the lumber and obtained thereby insurance above its value and that he had fraudulently exaggerated the amount of his loss. The contention of the plaintiffs on this appeal was that the fraud charged had not been directly proved, but had to be presumed from the evidence which was not sufficient, and also that Duval's fraud could not deprive them of the benefit of the policy. The courts below held that the charge of fraud had not been made out and gave judgment against the company.

The material facts of the case with the pleadings and substance of the evidence are set out in the judgment of the court.

Trenholme Q.C. and *Lafleur* for the appellants. Á clear case of fraud has been made out and the evidence can be dealt with by this court as well as the court of first instance. *Bland* v. *Ross* ([1]).

Duval's fraud forfeited the policy and the assignees are in no better position than he would be.

Beique Q.C. and *Geoffrion* Q.C. for the respondents. There is no direct evidence of fraud and it cannot be presumed If it could Duval's fraud cannot affect the innocent assignees.

Two courts have found that no fraud was committed and this court will not interfere with those findings. *Arpin* v. *Tue Queen* ([2]); *Schwersenki* v. *Vineberg* ([3]); *City of Montreal* v. *Lemoine* ([4]).

The judgment of the court was delivered by :

TASCHEREAU J. By this action instituted in March 1884, the respondents, as assignees of one Evariste

[Page 179]

Duval, claim from the company appellant the sum of $5,000, being the amount of an insurance policy issued' on the 7th September 1883, by the appellant to the said Duval, concurrently with other policies in various other companies, amounting altogether to $17,000, on a quantity of lumber then piled in a yard on the river Nicolet, which lumber was but two weeks afterwards destroyed by fire.

The appellants pleaded in answer :

1 That the policy was obtained by the false and fraudulent representations of Duval that the lumler insured was worth $30,000 whereas at no time during the existence of the policy was it worth half that sum :

2. That Duval, in the application, materially exaggerated the quantity and value of the lumber mentioned therein, and thereby obtained from the appellants and other companies, represented by the same agent simultaneous insurances to the amount of $17,000 over and above $12,000 prior insurance —thus making

Tab 178

CanLII

Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2012-10-01
File number:	C53671; C53759
Other citations:	355 DLR (4th) 333 — 220 ACWS (3d) 659 — 298 OAC 189 — 7 BLR (5th) 173 — 96 CCLT (3d) 89 — [2012] OJ No 4558 (QL)
Citation:	Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650 (CanLII), <https://canlii.ca/t/fsz3m>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650
DATE: 20121001
DOCKET: C53671 & C53759

Laskin and Blair JJ.A. and Brown R.S.J. (*Ad Hoc*)

BETWEEN

Enbridge Gas Distribution Inc.

Plaintiff (Respondent)

and

Michael Marinaccio, also known as Mike Marinaccio, also known as Miguel Marinaccio, also known as Micahel Marinaccio, Maria Lettizia Marinaccio, also known as Maria Mariniccio, also known as Maria Messina, Angelo Piro, Angelica Piro, Italo Tony Montaldi, also known as Tony Montaldi, also known as Italo Montaldi, Nancy Nunziatina Montaldi also known as Nancy Montaldi, also known

as Nunziatina Montaldi, 1639374 Ontario Ltd., 1316679 Ontario Limited, Maverick & Associates (1991) Limited, also known as Maverick & Associates, 2132329 Ontario Ltd., 2132264 Ontario Ltd., Tera X Technologies Inc., Tarrco Construction, also known as Tarrco, Tek-Con, Mike Marinaccio Services, Tekka-Ent, Provac and 2138337 Ontario Inc.

Defendants (Appellants)

Ross Morrison and Natalie Schernitzki, for the appellant, Italo Tony Montaldi

Bryan Fromstein, for the appellant, Angelo Piro

Reid Lester and Matthew Morden, for the respondent

Heard: February 15, 2012

On appeal from the judgments of Justice Frank J.C. Newbould of the Superior Court of Justice, dated April 14, 2011 and August 22, 2011, with reasons reported at 2011 ONSC 2313 and 2011 ONSC 4962, 206 A.C.W.S. (3d) 685.

Laskin J.A.

A. OVERVIEW

[1] Piro and Montaldi appeal the summary judgment granted to Enbridge.

[2] Piro was a labourer. Montaldi was an accountant. The primary defendant, Marinaccio, was an operations supervisor for Enbridge. Enbridge, a regulated utility, frequently had to repair property it had damaged during its regular maintenance. In 2001, Marinaccio, Piro and Montaldi devised a scheme to do this repair work.

[3] According to the appellants, the scheme was to operate as follows. Piro alone would register business entities to do the work. Marinaccio's involvement would be concealed from his employer, Enbridge. However, Marinaccio would hire contractors to do the work. Montaldi would prepare the invoices to be given to Enbridge. Marinaccio would approve the invoices. Marinaccio, Piro and Montaldi would share the payments from Enbridge in predetermined percentages.

[4] The appellants and Marinaccio carried out the venture for over six years. Enbridge paid out over $6.5 million. Marinaccio has now admitted that the entire scheme was a fraud. No work was ever done. All the invoices were phoney. Marinaccio also claims that Piro and Montaldi were aware of the fraud. After the lawsuit began, Marinaccio settled Enbridge's claim against him for $1.9 million.

[5] Enbridge then moved for summary judgment against Piro and Montaldi. The motion judge, Newbould J., found that Marinaccio owed a fiduciary duty to Enbridge and that he breached his fiduciary duty by secretly profiting at the expense of his employer. The motion judge granted summary judgment against Piro and Montaldi on three separate bases: knowing assistance to Marinaccio in breaching his fiduciary duty; bribery; and unjust enrichment.

[6] On Enbridge's main claim for knowing assistance, the motion judge found Piro and Montaldi jointly and severally liable for $5,723,339.60, which was the entire amount received from Enbridge less the net settlement amount paid by Marinaccio (after deducting the costs of collection).

[7] On their appeal, Piro and Montaldi make four main arguments:

(1) Piro alone argues that the motion judge erred in finding that Marinaccio owed a fiduciary duty to Enbridge.

(2) Even if Marinaccio owed a fiduciary duty to Enbridge and he breached that duty, the motion judge erred in finding Piro and Montaldi liable for knowing assistance. They submit that to be liable for knowing assistance, they had to know that the scheme was a fraud. They contend that whether they knew at the time it was a fraud raises a genuine issue for trial.

(3) The motion judge erred in finding them liable for the tort of bribery because Enbridge did not plead bribery and did not prove the payment of a secret commission.

(4) The motion judge erred in finding them liable for unjust enrichment. They submit that as they did some work and did not know the scheme was a fraud they are entitled to keep their share of the profits.

[8] Montaldi argues two additional grounds of appeal:

(5) The motion judge erred in his calculation of the amount of the judgment.

(6) The motion judge erred in awarding compound interest.

[9] For the reasons that follow, I would dismiss both appeals in their entirety.

B. RELEVANT FACTUAL BACKGROUND

[10] Although the record before the motion judge was lengthy, the material facts are largely not disputed. Piro's and Montaldi's discovery evidence was filed, but neither filed an affidavit in response to Enbridge's motion. I am satisfied that the motion judge was entitled to dispose of this case by a summary judgment.

[11] The motion judge concisely summarized the factual background of this litigation. His summary is sufficient to put the issues on appeal in context. I therefore simply reproduce his summary taken from paras. 2, 3 and 5-10 of his endorsement:

> [2] This action arises from a business arrangement made by Piro and Montaldi with the defendant Michael Marinaccio who at the time was an employee of Enbridge. … Marinaccio was an operations supervisor with Enbridge with authority to retain third party contractors on behalf of Enbridge and to approve payment of invoices. Piro was a labourer who worked for various companies that did business with Enbridge and he got to know Marinaccio. Montaldi is an accountant and financial planner and sole shareholder and principal of the defendant Maverick.
>
> [3] Enbridge often required repair work to be done on properties where Enbridge technicians had done the

maintenance work such as repairing damaged landscaping. The business engaged in by Marinaccio, Piro and Montaldi that has given rise to this action was a venture under which Enbridge paid approximately $6.7 million from 2001 to 2007 for work and equipment allegedly supplied to Enbridge by four entities set up by Piro. Marinaccio and Piro each received at least 31.5% or 32.5% of this money, depending upon the year. Maverick received either 5% or 7% of the money, depending upon the year. There is a difference between the parties as to what happened to the remaining 30%. Piro and Montaldi say that it was given in cash to Marinaccio to be used to pay subcontractors and suppliers who were to do the work for the four entities set up by Piro. Marinaccio denies ever receiving the cash.

[5] The four entities set up by Piro were unincorporated. The first was Tarrco, followed by Tek-Con, Tekka-Ent and Provac. Invoices were sent out by each entity at different times. Tarrco invoices were submitted to Enbridge for a period of about 18 months from July, 2001 to January, 2003. Tek-Con submitted invoices from June, 2003 to January, 2004. Tekka-Ent submitted invoices from February to December, 2004. Provac submitted invoices from February, 2005 to October, 2007.

[6] Piro and Montaldi were aware that Marinaccio worked at Enbridge. Piro's evidence is that the businesses were registered in his name alone without Marinaccio's name appearing because he knew that Marinaccio had a conflict of interest because of his involvement with Enbridge and that Marinaccio's name was not to appear anywhere on the record. Montaldi's evidence was that the business was to be in Piro's and Marinaccio's name but that Marinaccio told him that his name could not appear on the ownership of the company because it would be a conflict of interest with Enbridge. Marinaccio made clear that he would ensure that Enbridge did not learn about his involvement in the venture.

[7] Montaldi was the accountant for the Piro entities. He also prepared all of the invoices to Enbridge from information supplied by Piro or Marinaccio. The invoices gave Maverick as the address for the entity supplying the invoice. These invoices were not sent to Enbridge. Rather they were hand delivered to Marinaccio by either

Montaldi or Piro. Both Piro and Montaldi knew that it was Marinaccio who approved these invoices on behalf of Enbridge.

[8] The total paid by Enbridge was $6,665,853.51. Montaldi received the Enbridge checks for the invoices either at the Maverick office or at a post box controlled by Montaldi, and these checks were deposited into the bank account for the entity that had invoiced Enbridge. The bank accounts for the four Piro entities were controlled by Piro and Montaldi who had the signing authority for the accounts.

[9] From these bank accounts, 5% and later 7% of the Enbridge payments were paid to Montaldi. His evidence is that these payments were for his fees for providing accounting services. That amounted to approximately $408,000. 30% of the Enbridge payments was taken out in cash and according to Piro and Montaldi was paid to Marinaccio for the purpose of paying the sub-contractors who allegedly did the work. Their evidence is that the cash was put in brown envelopes and given to Marinaccio from time to time along with the invoices. Marinaccio denies ever receiving this cash. The balance, being 63%, and later 61% after Montaldi's percentage was increased from 5 to 7%, was paid out equally to Marinaccio and Piro.

[10] Marinaccio's evidence was that no work was done by the Piro entities that had invoiced Enbridge and that the work had been done by other contractors to Enbridge. His evidence is that the invoices were phony to the knowledge of both Piro and Montaldi. Piro and Montaldi both assert that they were told by Marinaccio that the work was being done by subcontractors arranged by Marinaccio and that the 30% of the Enbridge payments made in cash to Marinaccio was for the purpose of paying those subcontractors. Their evidence is that they do not know who those subcontractors or persons were and it is admitted that Montaldi, purportedly the accountant for the Piro entities, kept no record of any of such subcontractors or persons or of amounts allegedly paid to them.

C. ANALYSIS

(1) Did the motion judge err in finding that Marinaccio owed a fiduciary duty to Enbridge?

[12] Marinaccio began working for Enbridge in 1979. He was promoted over the years. By 2001 he was an operations supervisor. He had authority to hire outside contractors to do work for Enbridge and to approve payment of their invoices. At first, he could only approve invoices of up to $2,000, but by late 2003 he could approve invoices of up to $5,000. The motion judge found at para. 20, "in this case there can be no question but that Marinaccio owed a fiduciary duty to Enbridge."

[13] Montaldi does not challenge the motion judge's finding. However, Piro does. He argues that Marinaccio was not a key Enbridge employee, but merely a mid-level manager with limited authority. Like any employee, Marinaccio owed a duty of loyalty to his employer. However, his role within Enbridge did not make him a fiduciary. At the very least, whether he owed a fiduciary duty is an issue that requires a trial. Piro attempts to buttress his argument by pointing out that the motion judge's finding of a fiduciary duty is unsupported by any analysis.

[14] I would not give effect to Piro's argument. As a starting point, the motion judge cannot be faulted for his brief treatment of the question whether Marinaccio owed a fiduciary duty to Enbridge because that question did not appear to have been a live issue before him. As the motion judge noted, Montaldi implicitly conceded that Marinaccio owed a fiduciary duty. And Piro, who now alone challenges the motion judge's finding, expressly conceded that Marinaccio owed a fiduciary duty. That express concession is evident from para. 19 of Piro's factum on the motion for summary judgment where he accepted that "it is established that

Marinaccio owed a fiduciary duty to Enbridge and that his action amounted to a breach of fiduciary duty vis-à-vis Enbridge."

[15] Although we no doubt have authority to revisit an issue that was conceded before a motion judge, we should be reluctant to do so. Moreover, even if we do revisit this issue, the question whether a person owes a fiduciary duty is largely a factual inquiry. Accordingly, a trial judge's or a motion judge's finding of a fiduciary duty is entitled to significant deference from an appellate court: see *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377, at pp. 425-426; *Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 13; *GasTOPS Ltd. v. Forsyth*, 2012 ONCA 134, at para. 81.

[16] In this case, the motion judge's finding of a fiduciary duty deserves deference because there is evidence to support it. A fiduciary relationship may exist where the fiduciary undertakes to act in the best interests of the beneficiary, the fiduciary has the power to affect the legal or substantial interests of the beneficiary, and, as a result, the beneficiary is vulnerable to the fiduciary: see *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247 at paras. 68-70; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at paras. 30-34. In the employment context, an employee may therefore be said to owe a fiduciary duty to his or her employer where the employee has discretionary power to affect adversely the employer's interests and the employer is vulnerable to the exercise of that power.

[17] Here, Marinaccio had discretionary power both to hire outside contractors for Enbridge and to approve the payment of invoices they submitted. Enbridge was undoubtedly vulnerable to the exercise of that power because Marinaccio used his power to defraud his employer of over $6.5 million over the course of six and a half years.

[18] I recognize the admonition of my colleague Gillese J.A. in *Hunt v. TD Securities Inc.* (2003), 2003 CanLII 3649 (ON CA), 66 O.R. (3d) 481, leave to

appeal to S.C.C. refused, [2003] S.C.C.A. No. 473, at para. 46:

> [O]ne cannot reason backwards from the fact that an individual is harmed by the unauthorized act of their broker, to the conclusion that they are vulnerable. Rather, the individuals and the nature of the relationship must be examined.

[19] Nonetheless, that Marinaccio had the authority, opportunity and ability to perpetrate such a large-scale fraud on his employer over such a prolonged period of time is some evidence that he possessed the hallmarks of a fiduciary duty: discretionary power over a correspondently vulnerable employer.

[20] For these reasons, I would not interfere with the motion judge's finding that during the period of the fraud, Marinaccio owed a fiduciary duty to Enbridge. In upholding this finding I should not be taken to signify that many mid-level employees of large corporations will owe a fiduciary duty to their employer. The finding in this case not only rests on its particulars facts but was largely uncontested. If the question whether Marinaccio owed a fiduciary duty to Enbridge had been more vigorously challenged, the motion judge may have taken a different view.

(2) Did the motion judge err in finding that Piro and Montaldi knowingly assisted Marinaccio in breaching his fiduciary duty?

[21] If Marinaccio had a fiduciary duty to Enbridge, unquestionably he breached that duty. He participated in an undisclosed scheme by which he induced Enbridge to unknowingly make payments to business entities in which he had an interest. He personally profited from those payments. These were acts of dishonesty, inconsistent with Marinaccio's fiduciary duty.

[22] If Marinaccio owed a fiduciary duty to Enbridge, neither Piro nor Montaldi contest that he breached this duty. However, both dispute their liability for knowingly assisting in the breach.

[23] In the recent case of *Harris v. Leikin Group Inc.*, 2011 ONCA 790, at para. 8, this court set out the components of a claim for knowingly assisting in a breach of a fiduciary duty:

> There is no dispute concerning the constituent elements of the tort of knowing assistance in breach of fiduciary duty: (1) there must be a fiduciary duty; (2) the fiduciary must have breached that duty fraudulently and dishonestly; *(3) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct*; and (4) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct. The knowledge requirement for liability based on this tort is actual knowledge, which, as the Supreme Court confirmed in *Air Canada* [*Air Canada v. M & L Travel Ltd.,* 1993 CanLII 33 (SCC), 1993] 3 S.C.R. 787], at para. 38, includes recklessness and wilful blindness. As this court observed in *Keeton v. The Bank of Nova Scotia*, 2009 ONCA 662, 254 O.A.C. 251, at para. 82, "to found liability [on knowing assistance in a breach of fiduciary duty], the stranger to the trust must have actual (as opposed to constructive) knowledge of the misconduct, or be wilfully blind to the breach or reckless in his failure to realize that there was a breach." [Emphasis added; internal citations omitted.]

[24] This ground of appeal turns on the third component, the knowledge requirement. Piro and Montaldi submit that to be liable for knowing assistance they had to know both that Marinaccio's conduct was dishonest *and* that the scheme was a fraud. And although the motion judge found that they both knew Marinaccio acted dishonestly, and indeed they participated in that dishonesty, they did not know at the time that the entire scheme was a fraud. They claim they

believed work was being done, and that Marinaccio was hiring and paying sub-contractors out of the money received from Enbridge.

[25] And yet Marinaccio says that they knew. And by the time of discovery, Piro acknowledged that the scheme was fraudulent. However, he says that he did not know that it was fraudulent at the time. Montaldi says that he never knew that the scheme was fraudulent. In the face of this conflicting evidence I accept, and Enbridge has accepted, that whether Piro or Montaldi knew at the time that the scheme was a fraud raises a genuine issue requiring a trial. Thus, if Enbridge were required to show the appellants' knowledge of the fraud, it would not be entitled to summary judgment on the basis of knowing assistance.

[26] Enbridge, however, submits that it is required to show only that Piro and Montaldi had knowledge of Marinaccio's dishonesty. It is not necessary to prove they knew that a fraud was committed, Enbridge argues, so long as they were aware that Marinaccio was dishonestly breaching his fiduciary duty by participating in the scheme. The motion judge agreed with Enbridge's position. He wrote at paras. 24-25 of his endorsement:

> [24] In this case both Piro and Montaldi knowingly assisted in the breach of Marinaccio's fiduciary obligations to Enbridge. They were aware that Marinaccio had a conflict and assisted him in taking steps to hide Marinaccio's role in the venture. They knew as well that Marinaccio was making sure that Enbridge was not aware of the venture. Montaldi was far more than an accountant for the Piro entities. He prepared the invoices, which he and Piro hand delivered to Marinaccio rather than sending them to Enbridge. The invoices directed payment to a Maverick address. He along with Piro opened bank accounts in which the Enbridge money was deposited and he arranged for wire transfers to Marinaccio as well, on his evidence, of taking cash and giving it to Marinaccio.
>
> [25] The fact that Piro and Montaldi assert that they were not aware that work was not being done for which invoices were sent does not assist them. It was a breach

> of Marinaccio's fiduciary obligations to Enbridge to be involved in a venture that resulted in him being the recipient of money, regardless of whether the work was done. Piro and Montaldi were quite aware of that breach and took steps in furtherance of it.

[27] I agree with the motion judge. In the context of a claim for knowing assistance in the breach of a fiduciary duty, dishonest and fraudulent conduct signify a level of misconduct or impropriety that is morally reprehensible but does not necessarily amount to criminal behaviour. The term fraudulent does not signify that an additional degree of corruption is necessary to make out the tort; it simply emphasizes the required dishonest quality of the fiduciary's act. As Buckley L.J. stated in *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 1)*, [1979] 1 All E.R. 118, at p.130, cited with approval in *Air Canada*, at p. 815:

> …I do not myself see that any distinction is to be drawn between the words 'fraudulent' and 'dishonest'; I think they mean the same thing, and to use the two of them together does not add to the extent of dishonesty required.

In *Air Canada*, at p. 826, Iacobucci J. described the type of conduct captured by the two terms used together as "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary." By extension, liability for knowing assistance requires only that the assister knew of the dishonest nature of the fiduciary's conduct.

[28] Here, both Piro and Montaldi knew that Marinaccio took a wrongful risk that prejudiced Enbridge. They knew that Marinaccio worked for Enbridge. Piro knew and the motion judge found that Montaldi knew that Marinaccio had authority to retain outside contractors and to approve invoices for payment by Enbridge. Piro and Montaldi also knew that Marinaccio had a conflict of interest by participating in the scheme. They knew that he wanted to conceal his involvement in the scheme from Enbridge and they assisted him in doing so. And they knew that he secretly profited from the scheme at the expense of Enbridge.

[29] In short, Piro and Montaldi knew that Marinaccio's conduct was dishonest, and indeed morally reprehensible, and that his conduct harmed Enbridge. They cannot escape liability by their assertion that they did not know at the time that they were participating in a fraud.

[30] I would not give effect to this ground of appeal.

[31] Piro and Montaldi accept that if they are liable for knowing assistance then the motion judge was correct to hold them jointly and severally responsible for the full amount advanced by Enbridge. As I would uphold the motion judge's finding of liability for knowing assistance, strictly speaking, it is not necessary to deal with the two other bases of the appellants' liability. For completeness, however, I will address them briefly.

(3) Did the motion judge err in finding Piro and Montaldi liable for bribery?

[32] The motion judge found Piro and Montaldi liable for bribery because of the payments they made to Marinaccio out of the money received from Enbridge.

[33] The civil tort of bribery is the payment of a secret commission. In *Ruiter Engineering & Construction Ltd. v. 430216 Ontario Ltd.* (1989), 1989 CanLII 4257 (ON CA), 67 O.R. (2d) 587 (C.A.), at p. 591, Morden J.A. set out the three elements of a cause of action in bribery:

> The term "bribe" has, for the purposes of the civil law, received a wide interpretation. In *Industries & General Mortgage Co. v. Lewis*, [1949] 2 All E.R. 573 (K.B.D.), Slade J. said at p. 575:
>
> > For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that

> he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent. Those three are the only elements necessary to constitute the payment of a secret commission or bribe for civil purposes.

[34] Once all the elements of bribery are established, the court will presume in favour of the principal and against the briber and the agent bribed, that the agent was influenced by the bribe. The presumption is irrebuttable: see *Optech Inc. v. Sharma,* 2011 ONSC 680, at para. 23. Moreover, the motive of the person making the bribe is irrelevant: see *Ruiter Engineering,* at p. 591-592; *Barry v. Stoney Point Canning Co.,* 1917 CanLII 620 (SCC), [1917] 55 S.C.R. 51, at p. 74.

[35] The motion judge found that Enbridge had established the three elements of bribery:

> [31] The three elements cited by Morden J.A. as constituting the only elements necessary to constitute the payment of a secret commission or bribe clearly are applicable to this case. The dealings were clearly surreptitious and in the language of James L.J. constituted a fraud on Enbridge entitling Enbridge to adequate relief as the court may think right to give.
>
> [32] Piro and Montaldi controlled the bank accounts and they together arranged for payment to Marinaccio of approximately $2.086 million pursuant to his 32.5% interest in two of the entities and his 31.5% interest in the other two entities. They also say they acted in paying approximate $2 million in cash to Marinaccio, representing 30% of the proceeds received from Enbridge, although Marinaccio denies receiving this money or telling them that he was paying any subcontractors. If in fact they paid this cash to Marinaccio, I find that none of this was paid by Marinaccio to any subcontractors. That was Marinaccio's evidence and neither Piro nor Montaldi have provided any evidence of any payments to any subcontractors or indeed of the existence of any subcontractors. If they did

> not pay the cash to Marinaccio, they have retained it for their own purposes.
>
> [33] In the circumstances, the appropriate remedy under the claim for bribery is to require Piro and Montaldi to pay Enbridge the $2.086 million paid to Marinaccio and a further $2 million either paid to Marinaccio or kept by them. Thus under this heading Piro and Montaldi are jointly and severally responsible to pay Enbridge $4.086 million.

[36] Piro and Montaldi challenge the motion judge's finding on three grounds. First, they say that Enbridge did not plead a cause of action in bribery. The motion judge, therefore, was wrong to grant judgment on a claim that was not pleaded. Second, they say that bribery was not made out because the payments to Marinaccio were not made to him as an agent of Enbridge, but as a principal of the Piro entities. Third, Piro says that the motion judge ought to have limited his damages award to $2 million, which was the amount of Piro's profit. I do not agree with any of these grounds advanced by the appellants.

[37] On the first ground, although Enbridge did not use the word "bribery" in its amended claim, it did plead all of the material facts required to establish a cause of action in bribery. More important, in its notice of motion, Enbridge expressly moved for summary judgment for bribery. Its motion was served on the appellants 14 months before it was heard, and the issue of bribery was fully argued before the motion judge. Therefore, neither Piro nor Montaldi can seriously claim that he was prejudiced by the omission of the word bribery from Enbridge's pleading.

[38] On the second ground, Piro and Montaldi admitted that they acted in concert to make secret payments to Marinaccio of approximately $2.086 million, which represented his percentage interest in the Piro entities. They have also asserted that they acted in concert in paying Marinaccio in cash a further $2 million, representing 30 per cent of the total proceeds of the fraud.

[39] Accepting their admission and their assertion, Piro and Montaldi secretly paid to Marinaccio approximately $4.086 million from the amounts invoiced to Enbridge and paid by Enbridge to the Piro entities. In other words, they paid bribes to Marinaccio amounting to $4.086 million and they kept these payments secret from Enbridge. Their motive in making these payments is irrelevant. Thus, Piro cannot escape liability by claiming that the payments were made to Marinaccio as a principal of the Piro entities and not as an agent of Enbridge.

[40] And Montaldi cannot escape liability by claiming that he did not know of the fraud or deal directly with Enbridge. Neither his reasons for transferring funds to Marinaccio nor his awareness of the fraudulent nature of the scheme has any bearing on his liability. His knowledge that Marinaccio was acting as an employee of Enbridge and his failure to disclose the payments to Enbridge are sufficient. Further, he dealt with Enbridge extensively: he prepared all of the invoices addressed to Enbridge on behalf of the Piro entities; he received Enbridge's checks at either the Maverick office or a post box he controlled; he deposited Enbridge's checks into bank accounts he controlled. The tort of bribery does not require that dealing be "direct."

[41] In his article "Remedies for the Victims of a Bribe" (1999-2000) 22 Advoc. Q. 198, at para. 198, Paul M. Perell describes the expansive nature of liability for bribery:

> The payment may be made to induce the recipient to exercise his influence in a way that favours the briber, but the motive is not determinative and *the essential factor is the secrecy*; if the payment is secret then a corrupt motive and the success of the inducement will be assumed. The secret payment is a bribe *even if the person making the payment did not intend a bribe and believed or expected that the recipient would properly disclose the payment.* [Emphasis added; footnotes omitted.]

[42] In my view, this passage is a complete response to Montaldi's claim.

[43] On the third ground, the measure of damages for bribery is generally the amount of the bribe or secret commission paid to the agent – in this case Marinaccio. Both Piro and Montaldi said that they made secret payments to Marinaccio of $4.086 million. Therefore, the motion judge did not err in awarding damages for this amount. I would not give effect to this ground of appeal.

(4) Did the motion judge err in finding Piro and Montaldi liable for unjust enrichment?

[44] Liability for unjust enrichment has three components:

- The defendant obtains an enrichment.
- The plaintiff incurs a corresponding deprivation.
- There is no juristic reason for the defendant's enrichment: *Garland v. Consumers' Gas Co.,* 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30.

[45] The motion judge held that Enbridge had established these three components:

> [35] This cause of action has undoubtedly been established. Piro and Montaldi were enriched by the amounts received by them and Enbridge is out the money. Piro admits that there was a fraud. Montaldi can point to no evidence that any work was done or equipment supplied by the four Piro entities. In the circumstances I find that no work was done and that there was no juristic reason whatsoever for the payments made by Enbridge.

[46] Piro and Montaldi submit that the motion judge erred in holding that the third component had been established because the Piro entities did some work and neither appellant knew at the time that the scheme was a fraud. Retaining the money paid by Enbridge was, therefore, not unjust. I do not accept this submission.

[47] On the first branch of the argument, Piro essentially conceded when he acknowledged the scheme was a fraud that the four entities registered in his name never provided anything of value to Enbridge. Therefore, all of the payments Enbridge made to the Piro entities represented a loss. Although Montaldi claims that the Piro entities did some work, he has no direct evidence that they did. He also failed to make any further inquiries into which sub-contractors were doing the work he alleges was done, and whether they were in fact paid by Marinaccio out of the funds allegedly earmarked for that purpose. The motion judge, thus, reasonably held that the appellants could not credibly claim a juristic reason for their enrichment on the basis some work had been done.

[48] On the second branch of the argument, the appellants contend that because they did not have knowledge of the fraud at the time, or at the very least whether they had knowledge raises a genuine issue for trial, they cannot by a summary judgment be required to disgorge the money they received from Enbridge. I do not agree with this contention.

[49] The entire scheme was a fraud, as Marinaccio claimed and Piro later admitted. That neither Piro nor Montaldi may have known it rose to the level of fraud at the time does not make out a juristic reason for their enrichment at the expense of Enbridge. Had either Piro or Montaldi been an innocent stranger to the scheme who could claim to have received the money from Enbridge lawfully, his position may have been different: see *Citadel General Assurance Co. v. Lloyds Bank Canada*, 1997 CanLII 334 (SCC), [1997] 3 S.C.R. 805, at para. 51. But neither Piro nor Montaldi was an innocent stranger to the scheme. Both fully participated and assisted Marinaccio in arranging what was shown to be a fraud on Enbridge. In these circumstances, Piro and Montaldi can have no juristic reason to retain Enbridge's money. I would not give effect to this ground of appeal.

(5) Did the motion judge err in calculating the amount of the judgment?

[50] As I have said, each appellant acknowledges that if he is liable for knowingly assisting in Marinaccio's breach of fiduciary duty then he is liable to account for the full amount paid by Enbridge and not just his share of the profit. Montaldi, however, submits that the motion judge erred in calculating the amount of the judgment for knowing assistance.

[51] In assessing Piro's and Montaldi's liability, the motion judge properly reduced the total loss incurred by Enbridge by the sum from the Marinaccio settlement. Instead of deducting the gross amount of the settlement, however, the motion judge took account of the fees and disbursements Enbridge incurred in collecting the settlement funds. Therefore, in fixing the amount of the judgment against Piro and Montaldi, he reduced the appellants' liability by the amount of Enbridge's *net* recovery from Marinaccio after legal costs. Montaldi contends that the motion judge should have instead deducted the gross amount of the settlement.

[52] Enbridge paid the four Piro entities $6,542,928.63. The Marinaccio settlement amounted to $1,948,727. The cost of collecting the settlement amounted to $1,129,138. Thus, the net recovery on the settlement was $819,589 ($1,948,727 minus $1,129,138). The motion judge granted judgment for $5,723,339.60 ($6,542,928.63 minus $819,589). Montaldi submits that he ought to have granted judgment for $4,594,201.63 ($6,542,928.63 minus $1,948,727).

[53] I do not agree with this submission. The motion judge addressed this submission at para. 19 of his supplementary endorsement. He held that Enbridge was entitled to be compensated for its loss. Its loss had to take account of the costs of recovery on the settlement. The motion judge wrote:

> In my reasons for judgment I held that the plaintiff was entitled to its loss, being the amount paid by it to the four Piro entities, less the net recovery after the costs of collecting resulting from the Marinaccio settlement. The

> loss was $6,542,928.63. The gross amount collected under the Marinaccio settlement was $1,948,727. The total fees and disbursements incurred by the plaintiff in collecting that amount was $1,129,138, leaving a net recovery under the settlement of $819,589. Mr. Morrison contends that the gross amount recovered from the Marinaccio settlement should be deducted from the loss rather than the net amount after costs as there is no breakdown or calculation of this amount in the evidence. I think if Mr. Morrison seriously contended that the amounts were not spent, he could have asked for more particulars, assuming they are not contained in the two inch thick bundle of invoices provided by the plaintiff. I am prepared to accept that the amount was spent. I ordered that the net recovery after costs under the Marinaccio settlement should be deducted from the plaintiff's loss in order that there not be double recovery. To deprive the plaintiff of the cost of the recovery under the Marinaccio settlement would deprive it of a portion of its loss. The net recovery of $819,589 is to be used with the result that the loss to be paid by Piro and Montaldi is $5,723,339.60. [Footnote omitted.]

[54] I agree. I would not give effect to this ground of appeal.

(6) Did the motion judge err in awarding Enbridge compound interest?

[55] For pre-judgment interest, the motion judge awarded Enbridge compound interest (at 4.3 per cent) compounded monthly. Montaldi does not dispute the rate but submits that the motion judge erred in ordering compound interest. He relies on s. 128(4)(b) of the *Courts of Justice Act*, R.S.O. 1990 c. C-43, which provides that pre-judgment interest shall not be awarded on interest accruing under this section. He also submits that unlike in *Bank of America v. Mutual Trust Co.,* 2002 SCC 43, [2002] 2 S.C.R. 601, a case the motion judge referenced in support of his discretion to award compound interest, there was no loan agreement specifically providing for compound interest between the parties.

[56] At para. 17 of his supplementary endorsement, the motion judge explained why he awarded compound interest:

> Courts of equity have always exercised the power to award compound interest whenever a wrongdoer deprives a company of money which it uses in its business. On general principles it should be presumed that had the business not been deprived of the money, it would have made the most beneficial use of it available to it. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. [Internal citations omitted.]

[57] I agree. I would simply add that this court has consistently approved of the trial court's exercise of discretion to award compound interest for breach of fiduciary duty or breach of trust: see *Kooner v. Kooner*, 2006 CarswellOnt 5884 (C.A.), at para. 2; *Waxman v. Waxman*, 2008 ONCA 426, at para. 5; and *Brock v. Cole* (1983), 1983 CanLII 1952 (ON CA), 40 O.R. (2d) 97 (Ont. C.A.), at p. 103.

[58] I would not give effect to this ground of appeal.

D. CONCLUSION

[59] I would dismiss both Piro's appeal and Montaldi's appeal. Enbridge is entitled to the costs of the appeal, which I would fix in the amount of $40,000, inclusive of disbursements and applicable taxes.

Released: Oct. 1, 2012
"JL"

"John Laskin J.A."
"I agree R.A. Blair J.A."
"I agree M.F. Brown R.S.J. (ad hoc)"

Tab 179

CanLII

Beasley et al. v. Barrand, 2010 ONSC 2095 (CanLII)

Source:	Superior Court of Justice
Date:	2010-04-09
File number:	06 CV 324751
Other citations:	101 OR (3d) 452 — 186 ACWS (3d) 1018 — 94 CPC (6th) 331 — [2010] OJ No 1466 (QL)
Citation:	Beasley et al. v. Barrand, 2010 ONSC 2095 (CanLII), <https://canlii.ca/t/2984g>, retrieved on 2026-01-18

Beasley et al. v. Barrand
[Indexed as: Beasley v. Barrand]

101 O.R. (3d) 452
2010 ONSC 2095

Ontario Superior Court of Justice,
Moore J.
April 9, 2010

Evidence -- Expert evidence -- Defendant in action arising out of motor vehicle accident not permitted to call experts who examined plaintiff seven years earlier on behalf of his insurer in connection with his claim for accident benefits -- Experts' reports not complying with rule 53.03 of Rules of Civil Procedure -- Experts not retained by defendant -- Purpose of rule 53.03 to rein in use of and reliance upon expert evidence at trial -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 53.03. [page453]

In a tort action arising out of a motor vehicle accident, the defendant applied for leave to call three expert witnesses at trial and to elicit their opinions regarding their physical examinations of the plaintiff, their diagnoses and their prognoses. The experts had examined the plaintiff seven years previously on behalf of his insurer in connection with his claim for accident benefits. The defendant argued that the experts' opinions were highly probative and went to the core of the issues regarding damages and that their evidence should not be rejected on an overly technical interpretation of rule 53.03 of the Rules of Civil Procedure.

Held, the application should be dismissed.

The experts' reports did not comply with rule 53.03. The purpose of rule 53.03 is not, as the defendant asserted, to promote and facilitate the leading of expert evidence at trial in order to allow the parties to establish opinion evidence generated for the parties during the course of the litigation. Rather, the rule advances the law that has been developing in recent years toward reining in the growing use of and reliance upon the evidence of experts at trial. The three experts were retained by the plaintiffs' insurer (who was not before the court), not by the defendant. Their opinions addressed instructions that were not well described in the evidence. The interests of trial fairness would not be well served by allowing the three experts to testify.

APPLICATION for leave to call certain expert witnesses at trial.

Cases referred to Song v. Hong, [2008] O.J. No. 772, 164 A.C.W.S. (3d) 996, 58 C.P.C. (6th) 135 (S.C.J.), consd Other cases referred to Burgess (Litigation Guardian of) v. Wu (2003), 2003 CanLII 6385 (ON SC), 68 O.R. (3d) 710, [2003] O.J. No. 4826, 235 D.L.R. (4th) 341, [2003] O.T.C. 1047, 127 A.C.W.S. (3d) 558 (S.C.J.); Fellowes, McNeil v. Kansa General International Insurance Co. (1998), 1998 CanLII 14856 (ON SC), 40 O.R. (3d) 456, [1998] O.J. No. 4050, 79 O.T.C. 241, 9 C.C.L.I. (3d) 17, 37 C.P.C. (4th) 20, 83 A.C.W.S (3d) 127 (Gen. Div.); Frazer v. Haukioja, 2008 CanLII 42207 (ON SC), [2008] O.J. No. 3277, 169 A.C.W.S. (3d) 206, 58 C.C.L.T. (3d) 259 (S.C.J.); Hall v. Kawartha Karpet & Tile Co., 2007 CanLII 46915 (ON SC), [2007] O.J. No. 4293 (S.C.J.); Johnson v. Milton (Town) (2008), 91 O.R. (3d) 190, [2008] O.J. No. 2157, 2008 ONCA 440, 45 M.P.L.R. (4th) 74, 239 O.A.C. 122; MacEachern (Committee of) v. Rennie, [2009] B.C.J. No. 1385, 2009 BCSC 939, 1 B.C.L.R. (5th) 129; National Justice Compania Naviera S.A. v. Prudential Assurance Co., [1995] 1 Lloyd's L.R. 455 (C.A.), varg [1993] 2 Lloyd's L.R. 68 (Q.B.D.) Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 53, 53.03, (2.1) Authorities referred to Binnie, Ian C., "Science in the Courtroom: The Mouse that Roared" (2008), The Advocates' Society Journal, Autumn 2008 Osborne, Coulter A., Civil Justice Reform Project: Summary of Findings & Recommendations (Ontario Ministry of the Attorney General, 2007)

Doug Wright and Sharon Ramsden, for plaintiffs.

Martin Forget and Stephen Kennedy, for defendant. [page454]

[1] MOORE J.: -- This action arises from a motor vehicle accident that occurred on September 16, 2002, when the plaintiff, Gordon Beasley (the "plaintiff"), was the operator of a motorcycle involved in a collision with a car that was owned and operated by the defendants. The plaintiff's claim is for damages for injuries suffered in the accident.

[2] Before the jury was selected, defence counsel applied for a ruling on the matter of whether certain expert witnesses could be called to provide opinion evidence at trial. Background

[3] The plaintiff was examined by a series of assessors in December of 2002 and early in 2003. The defendants filed a brief containing the reports authored by three medical doctors. Apparently, the reports at issue have been in the possession of the plaintiff since at least 2006, and the plaintiff has known since 2008 that the defendants propose to rely upon these reports at trial.

[4] The defendants seek to elicit the opinions of these three experts regarding their physical examinations of the plaintiff, their diagnoses and their prognoses. The Positions of the Parties

[5] The defendants submit that this evidence is clearly relevant and probative of issues between the parties at this trial.

[6] The defendants concede that the reports authored by these three medical specialists do not comply with the provisions of rule 53.03 [of the Rules of civil Procedure, R.R.O. 1990, Reg. 194];

however, the defendants submit that there is sufficient compliance with the provisions of that rule that the evidence should be received.

[7] The defendants also request leave to speak to the three experts to prepare them to give evidence at this trial. In this respect, the defendants can point to no authority or procedural rule to support this request, one made over the stated objection of the plaintiff.

[8] The plaintiff objects to the use of the reports of the three experts, Drs. Soric, Moddel and Weinberg.

[9] The plaintiff points out that these three doctors saw the plaintiff in connection with a claim that the plaintiff had made to his own insurer, a claim for accident benefits. The applicable legislation and the insuring agreement required the plaintiff to attend upon such examinations in order to satisfy the insurer that an appropriate claim for benefits existed.

[10] The experts have not seen the plaintiff since they authored their respective reports over seven years ago. [page455]

[11] The plaintiff points out that the reports of these experts cannot possibly be read to comply with the provisions of rule 53.03. The plaintiff adds that Wilkins J. ordered that the evidence of these three experts could not be received at trial unless their reports were brought into compliance with rule 53.03.

[12] It appears that the defendants made efforts to bring the three doctors before the court in substantial compliance with rule 53.03. Each of the three doctors has now signed forms entitled: Acknowledgment of Expert's Duty (Form 53). Indeed, in the interval between the dates on which this application was argued, Drs. Soric and Moddel signed new and slightly different forms, about which I will have more to say later.

[13] The plaintiff observes that the forms provided by the experts are flawed. The form requires the expert to name the party by whom they were engaged to provide evidence in "the above-noted court proceeding" and to enumerate the instructions provided to the expert in relation to "this proceeding" (emphasis added). In this case, the doctors were not retained by a party to this proceeding, nor were their reports prepared in the context of the current dispute. In addition, the form signed by Dr. Weinberg states that he has "been engaged by or on behalf of the Lawyers for the Defendants to provide evidence in relation to the above-noted court proceeding". Dr. Weinberg has not been retained by defence counsel. His report was written to an insurance adjuster for the benefit of the accident benefits insurer.

[14] The original forms signed by Drs. Soric and Moddel confirm that they had been "engaged by or on behalf of" the insurance adjusters. The forms these doctors signed more recently state that they have been "engaged by or on behalf of the defendant . . . in relation to [this] court proceeding". There is no contest that none of the three doctors had been retained by or on behalf of the defendants. These reports were not commissioned by any party to this action for the purposes of this action.

[15] The plaintiff insists that any steps taken by the defendants to bring the evidence of the three doctors into compliance with rule 53.03 and/or the order made by Wilkins J. are inadequate.

[16] Further, the plaintiff submits that the practical implication of allowing the three doctors to provide opinion evidence at trial will be to lengthen the trial and to focus the jury on the matter of whether the evidence of these doctors is accurate and complete. In this regard, the plaintiff asserts that these doctors gave their opinions before January of 2003. They apparently concluded at that time, for example, that the plaintiff could return to work. Among other things, Dr. Moddel wrote that [page456] "from a neurological point of view I feel this gentleman is able to do his normal

daily activities including housekeeping and home maintenance duties". Dr. Weinberg voiced the opinion that the plaintiff's psychological impairments were "of moderate severity and are not of a magnitude that would substantially preclude him from performing the essential tasks of his pre-accident employment position". Dr. Soric wrote that, in her opinion, the plaintiff "does not suffer substantial inability to perform ess ential tasks of his employment, housekeeping, home maintenance duties and personal care as long as these activities do not require full grip strength of the right hand".

[17] So, it seems that the defendants wish to put forward the expert opinions of the three doctors as a shield to the assertion that the plaintiff's ongoing impairments were disabling; however, the plaintiff points out that he did not return to work for three and one-half years thereafter, and even then it was on a supervised basis and on modified duties. In that interval, the plaintiff received income replacement benefits from his insurer as well as long-term disability benefits and Canada Pension Plan disability benefits. The plaintiff was seen by a host of doctors. These are matters that post-dated the involvement of the three doctors in question.

[18] The defence may also seek to call evidence at trial from two further experts that had been retained to assist the accidents benefits insurer. Ms. Desai, an occupational therapist, and Mr. Lin, a kinesiologist, are identified in the Statement of Law filed on this application; however, in oral argument, counsel allowed that these two experts have not yet been found. Therefore, this portion of the application is moot. The Reports at Issue

[19] For purposes of this application, it is agreed that the evidence to be given in chief by each of the three doctors is as stated in their respective reports.

[20] The reports of Drs. Soric, Moddel and Weinberg followed upon an assignment issued by Sobel, Adamsons, Clements, insurance adjusters for Kingsway General Insurance Company, by way of a letter dated October 31, 2002, addressed to Seiden Health Management Inc. asking:

> . . . that you please accept this as our formal request for Seiden Health Management Inc. to conduct an In Home Assessment of Mr. Beasley and advise us as to whether or not he suffers a substantial inability to perform the essential tasks of his pre-accident employment duties, housekeeping and home maintenance duties and activities of daily living including personal care. [Emphasis added] [page457]

[21] The assignment letter described an interview that the adjuster completed with the plaintiff, indicating, in part, that:

> . . . at the time of our interview with the insured, he continues to experience fatigue and mild headaches. He advised that he still has pain and muscle spasm in his upper back and lower back, pain in the inside of his right knee, pain in his ankles and in his right hand. He also has pain in the back of his leg.
>
> The insured advised that he worked for Seaton House Hostel for Men at 339 George St. in Toronto. He is the supervisor [shift leader]. He has been with this organization for about 10 years. His duties include scheduling, staff supervision, physical intervention leading to physical restraints, [See Note 1 below] performing CPR, etc. It is a full-time job.
>
> Your insured advised that since the accident he has not been able to return to work . . .

[22] Dealing with the three reports in chronological order, I begin with the report of Dr. Moddel, a report dated December 10, 2002. It describes the reason for assessment to be "an independent neurological assessment for injuries sustained in a motor vehicle accident that occurred on September 16, 2002". The doctor does not specifically reference his instructions but does note that

he received and reviewed certain documentation, including a "statement of fact" which may well have been the adjuster's letter described above.

[23] After describing the plaintiff's stated concerns and noting that he "has not been able to return to work because of the continuing back discomfort and difficulties with his right hand", Dr. Moddel went on to discuss information he received by way of social and past health history. He described his neurological examination findings and concluded that:

> . . . at this point in time I find that this gentleman has no neurological sequelae as far as the motor vehicle is concerned . . . from a neurological point of view I feel this gentleman is quite able to return to his usual occupation. From a neurological point of view I feel this gentleman is able to do his normal daily activities including housekeeping and home maintenance duties. From a neurological point of view I do not think he needs any further treatment at this time.

[24] In his report of December 19, 2002 addressed to the adjuster, Dr. Weinberg confirmed that he saw the plaintiff "for the sole purpose of conducting an impartial psychological examination". He went on to describe the history given by the patient, the documents he reviewed, the testing performed and behavioural observations made during the plaintiff's clinical interview. [page458]

[25] Dr. Weinberg concluded that "the results of the clinical interview and psychometric testing indicate that Mr. Beasley is experiencing mild to moderate levels of anxiety and depression respectively that appear to be secondary to his accident related physical injuries, pain and compromised activity levels". He added that:

> It is evident that Mr. Beasley exhibits psychological impairments [i.e. depression, anxiety, sleep disturbance, reported somatic distress], which, in my opinion, are directly attributable to the subject motor vehicle accident . . . .
>
> In my opinion, Mr. Beasley's psychological symptoms may serve to lower his pain threshold and may exacerbate his subjective experience of pain. In view of this, his psychological and physical symptoms may act in a mutually reinforcing manner.
>
> Given this, I believe that Mr. Beasley would certainly benefit from a course of psychological intervention . . . . Further, in order to ensure a smooth transition to the work force, I believe that psychological treatment should also be in concert with any physically-based care deemed appropriate by medical personnel.

[26] Dr. Weinberg did not enumerate any questions having been put to him for answer as part of his "his impartial psychological examination" but stated:

In response to your questions:

> although Mr. Beasley exhibits accident-related psychological impairments, it is my opinion based on the current evaluation, that they are of moderate severity and are not of a magnitude that would substantially preclude him from performing the essential tasks of his preaccident employment position . . .

[27] Dr. Weinberg did not attempt to correlate the plaintiff's work related abilities and/or limitations to the psychological impairments and symptoms that he described in his report.

[28] Dr. Soric wrote her report to the adjuster and dated it January 15, 2003. She listed the referral letter dated October 31, 2002, among the documentation that she referred to in connection with her physiatric evaluation. At the outset, she reported that:

> The purpose of this assessment is to obtain detailed history from client, to examine him and to determine the nature of underlying pathology and the degree of resulting impairment and disability. I was also asked to determine if there is a need for further diagnostic and/or therapeutic interventions.

[29] The source of the request for information regarding further diagnostic and/or therapeutic interventions is not clear; I see no reference to that request in the adjuster's instructing letter.

[30] Dr. Soric concluded that:

> Mr. Beasley sustained multiple contusions as a result of the accident and likely survival and thoracic strain. At the present time the most significant [page459] impairment relates to his right hand . . . . I do believe that he would benefit from modified treatments . . . there is no indication to restrict his level of function in any manner. The only exception to this are activities that require full strength of his right hand. At the present time I don't think he would be able to manage such activities.

[31] She went on to state an opinion that the plaintiff did "not suffer substantial inability to perform the essential tasks of his employment, housekeeping, home maintenance duties and personal care as long as these activities do not require full grip strength of the right hand". Analysis

[32] Clearly, none of the three doctors attempted or managed to author reports containing the requirements listed in subrule (2.1) of rule 53.03. Drs. Moddel, Weinberg and Soric did not state in their reports whether they were qualified to opine, on the basis of the information and documentation available to them, that the plaintiff was physically or psychologically capable of returning to all and every aspect of his activities of daily living, including his pre-accident employment. Nor did they describe on what basis Mr. Beasley might (as the adjuster's instructing letter asked) undertake the essential duties of his occupation (including, for example, physical intervention leading to physical restraints). In any event, the basis for their optimism that Mr. Beasley would be able to meet the demands of the job is simply not addressed.

[33] In the result, if these reports are received into evidence, the plaintiff will surely need to undertake a laborious, time-consuming and unnecessarily complicated description, for the benefit of the jury, of the statutory accident benefits system in place in this province at the time of the accident and at the time of the assessments undertaken by these three doctors. The plaintiff will have to lead evidence to explain the role and function of medical examiners retained by insurance adjusters for accident benefits insurers in connection with claims for benefits of the kind that the plaintiff apparently asserted under his automobile insurance contract with Kingsway. The plaintiff will need to contrast that with the roles of doctors retained by the parties to provide fair objective and non-partisan opinions upon issues joined by the pleadings between the parties in this litigation. To do less than that would risk misleading the jury into the belief that all doctors giving evidence would be opining from an equal footing and according to the same rules (in this case, Rule 53) when, in fact, they are not. [page460]

[34] The relationship between an insured and an insurer in accident benefits matters involves a duty of good faith, a fiduciary obligation; the relationship between plaintiff and defendant in a tort action does not. The obligation, if any, to pay accident benefits is very different from the exposure, if any, that a defendant faces in a tort action.

[35] Further, on the facts of this case, the three medical assessments, even if proven to contain expert opinions related only to matters within the expertise of their authors and even if they are correct, fair, objective and impartial, notwithstanding that they were written for purposes largely, perhaps entirely, unrelated to the issues between the parties to this action, are snapshots of the plaintiff's situation taken at a point more than seven years ago. These assessments can be of little, if any, help to the jury in assessing the plaintiff's medical and vocational progress (and the

defendant's exposure potentially arising) over the past seven years. There is no contest that these doctors did not see the plaintiff after January of 2003 and that several doctors engaged for the purposes of this litigation did. The latter have prepared reports and executed proper Form 53 documents in preparation for attending to give opinion evidence at trial.

[36] The fact that Kingsway paid accident benefits to the plaintiff, including income replacement benefits, over the course of more than three years following the date of these three reports is not disputed. I am not persuaded that the interests of trial fairness could be well served by allowing the three experts to testify; the additional time, complexity and expense necessarily involved, when weighed against the prejudice to the plaintiff, prejudice that I find cannot be compensated for by costs or an adjournment (especially as I have granted an adjournment of over two weeks to provide time to defence counsel to consider his alternatives) cannot be justified.

[37] While this motion stood adjourned, the defendant wrote to the three doctors and sent fresh forms for their consideration and execution. The letter referenced each doctor's involvement on behalf of the accident benefits insurer and stated that defence counsel intended to "call you to give evidence . . . as set out in your report".

[38] The letter quoted from rule 53.03 and added:

> We believe your report . . . . complies with the requirements of subsections 1, 2, 4, 5 and 6 of Rule 53.03. For the purposes of subsection 3 this letter constitutes the instructions provided to you in relation to this proceeding.
>
> . . . While we have not engaged to you but are merely calling it was a witness to give opinion evidence, we have indicated for the purpose of completing the form that you have been engaged by Patrick Barrand. [page461]

[39] The forms attached to each doctor's letter stated that the doctor had been retained to provide evidence in relation to this proceeding. The forms did not state that the doctors had not been retained by the defendants, nor that they had been engaged by the defendants merely for the purposes of completing the form. Drs. Soric and Moddel, nevertheless, signed and returned the fresh forms to counsel and they were filed on the resumption of the motion. The Law

[40] Before turning to an analysis of the impact of rule 53.03 upon this application, I pause to address two matters raised in argument: the matter of defendants meeting with a plaintiff's physician before trial and my ruling regarding the evidence to be heard from an occupational therapist in the Song [See Note 2 below] case.

[41] First, I reject the submission that there is no impropriety in defence counsel meeting with the plaintiff's physician before trial, without the consent of the plaintiff, regarding evidence from the physician's clinical records that were provided by the plaintiff to the defendants. The MacEachern [See Note 3 below] case does not answer the question of whether this proposition is still sound law in British Columbia (paras. 25-28); rather, it frames the issue for determination to be:

> . . . not whether the CN Defendants may interview Dr. Dowey in the absence of plaintiff's counsel, as that has already occurred. The issue before me is quite different: should Dr. Dowey be prohibited from testifying as an expert witness for the defence. [See Note 4 below]

[42] For reasons unrelated to the facts in this case, Dr. Dowey was allowed to testify but that outcome does not assist the defendants here.

[43] Counsel conceded that for purposes of this matter, the defendants cannot contact and they have not contacted the three doctors to discuss their medical opinions relating to their assessments of the plaintiff.

[44] Nor do I accept the proposition that my ruling in the Song case assists the defendants in this matter. It must be remembered that the Song case settled before the defendant called the witness in question to give evidence and that the evidence she [page462] may have given would have been based upon reports which plaintiff's counsel took no objection to, provided the evidence was otherwise properly received in the trial. [See Note 5 below] Even with the benefit of hindsight, we cannot now predict whether the witness would have provided evidence about her retainer in that matter from the accident benefits insurer. Further, and importantly, that ruling issued well before rule 53.03 was amended. Rule 53.03

[45] As of January 1, 2010, amendments to rule 53.03 came into force, with the result that any party who intends to call an expert witness at trial must, according to a specific timeline, serve every other party to the action with a report, signed by the expert and containing the information listed in subrule (2.1).

> [46] The following information is now required:
> 1. The expert's name, address and area of expertise. 2. The expert's qualifications and employment and educational experiences in his or her area of expertise. 3. The instructions provided to the expert in relation to the proceeding. 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates. 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range. 6. The expert's reasons for his or her opinion, including, i. a description of the factual assumptions on which the opinion is based, ii. a description of any research conducted by the expert that led him or her to form the opinion, and iii. a list of every document, if any, relied on by the expert in forming the opinion. 7. An acknowledgment of expert's duty (Form 53) signed by the expert.

[47] The rule goes on to provide that an expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in a report under the rule or a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial. [page463]

[48] The time provided for service of a report or supplementary report under the rule may be extended or abridged.

[49] The defendants assert that the three medical experts hold expert opinions that are highly probative as to the plaintiff's health status in late 2002 and early 2003, and go to the core of the issues regarding damages and that their evidence should not be rejected on an overly technical interpretation of rule 53.03.

[50] There is no provision in rule 53.03, or elsewhere in the Rules of Civil Procedure, addressing relief to be considered or granted where, as here, substantially all of the preconditions to admission of the evidence of an expert have been breached by the party seeking to adduce the evidence of the expert(s). This is not a matter of technically interpreting the provisions of the rule, but rather one of whether to ignore the rule altogether. The Purpose of Rule 53.03

[51] Counsel for the defendant asserts that the purpose of rule 53.03 is to promote and facilitate the leading of expert evidence at trial in order to allow the parties to establish opinion evidence generated for the parties during the course of the litigation. I disagree.

[52] In my view, the rule advances the law that has been developing in recent years toward reining in the growing use of and reliance upon the evidence of experts at trial.

[53] I have addressed this issue repeatedly in the course of determining whether expert witnesses could give evidence at trial and in deciding whether the evidence given by expert witnesses was of assistance to the court.

[54] In Frazer, [See Note 6 below] I said:

> Whatever role the expert may have undertaken during the course of the litigation in assisting counsel to a fuller appreciation of the facts in dispute and the inferences that might be drawn from them, the expert must set aside that role upon entering the witness box at trial. From the witness box the expert speaks only to assist the court.
>
> At trial the expert must be and appear to be independent of the party or counsel who retained the services of the expert and must demonstrate objectivity and impartiality in the analyses and opinions that she or he is allowed to give. Because the opinions stated by an expert are predicated upon expertise that the court does not possess, the court must be confident in relying upon the expert to provide a thorough, balanced and technically sound analysis. Independence and impartiality; the court expects nothing more and it will accept nothing less. [page464]
>
> The court endeavors to adjudicate each matter coming before it fairly and free from bias. To the extent that the court must receive and rely upon the expert opinions of others and to the extent that those opinions are tainted, the administration of justice is imperiled. [See Note 7 below]
>
> > [55] In England [See Note 8 below] and also in Canada, [See Note 9 below] courts have identified and applied several factors relevant to the receipt of expert evidence, including: 1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation[.] 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise . . . . An expert witness . . . should never assume the role of advocate. 3. An expert witness should state the facts or assumptions on which his [or her] opinion is based. He [or she] should not omit to consider material facts which detract from his [or her] concluded opinion[.] 4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise. 5. If an expert's opinion is not properly researched because he [or she] considers [there to be] . . . insufficient data . . . available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report[.][page465]

[56] The point is that even before rule 53.03 was amended, I was concerned about the use and effect of expert evidence in cases coming before our court for trial. I was not alone. [See Note 10 below]

[57] In June of 2006, the Honourable Coulter Osborne was charged with the task of leading a review of civil justice reform in the Province of Ontario. Having considered his terms of reference, which states that he consulted widely with members of the judiciary, the bar and the public, he reviewed potential areas of reform and made recommendations aimed at making the civil justice system more accessible and affordable, in the hope and expectation that access to justice would be enhanced for Ontarians.

[58] Mr. Osborne authored a report [See Note 11 below] to which I will make selective reference, especially to portions of interest on the subject of expert evidence. [See Note 12 below] I endorse the views he expressed, views that I conclude inform any reasonable understanding of the purpose underlying rule 53.03. He found that:

> There is general agreement that the increased use of experts is a factor that increases the cost of litigation and causes delay through trial adjournments. There is very little agreement on what to do about it . . . .
>
> Consistent with the views of the CBA Task Force on Systems of Civil Justice, the Discovery Task Force and the Advocates' Society Policy Forum, the vast majority of those consulted in the course of this Review identified the proliferation of experts as a significant problem that often leads to a battle of competing experts. Some observed that as soon as one party retains an expert, an opposing party is forced to retain an expert. The expert witness merry-go-round bears with it an advantage to a litigant who has significant financial resources.
>
> There is also the issue of partiality. A common complaint was that too many experts are no more than hired guns who tailor their reports and evidence to suit the client's needs. I know that this problem exists, but I hasten to add that not all experts should be tarred with the same brush . . . .
>
> The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations. To help curb expert bias, there does not appear to be any sound policy reason why the Rules of Civil Procedure should not expressly impose on experts an overriding duty to the court, rather than to [page466] the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.
>
> An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures. Matched with a certification requirement in the expert's report, it will reinforce the fact that expert evidence is intended to assist the court with its neutral evaluation of issues. At the end of the day, such a reform cannot hurt the process and will hopefully help limit the extent of expert bias . . . .
>
> . . . the most relevant organizations on this issue, including the medical experts and actuaries who participated in this Review, endorsed imposing an overriding duty to the court on experts, along with a certification that they understand that duty . . . .
>
> Currently, rule 53.03 requires the expert only to set out his/her opinion, name, address, qualifications and the substance of his or her proposed testimony. It is silent about the degree of information to be provided in the report. [See Note 13 below]

[59] For purposes of this application, it should be noted that, conspicuous by its absence from the list of considerations enumerated by Mr. Osborne in support of the recommendations for reform of rule 53.03 is any reference to the need to encourage placing expert opinion evidence found or developed by parties during the course of litigation into the trial record.

[60] Mr. Osborne recommended the adoption of:

> . . . a new provision (in the Rules of Civil Procedure or Evidence Act) to establish that it is the duty of an expert to assist the court on matters within his or her expertise and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. Require the expert, in an expert report, to certify that he or she is aware and understands this duty . . . .
>
> Amend rule 53.03 to require all expert reports include the following information:

-- Expert's name, address and current curriculum vitae;

-- A detailed description of the expert's qualifications and area of expertise;

-- A description of the instructions provided to the expert;

-- The nature of the opinion being sought and the specific issues to which the opinion relates;

-- A description of research conducted by the expert to be able to reach his/her opinion;

-- A description of the factual assumptions on which the opinion is based; [page467]

-- The list of any documents relied upon in formulating the opinion; and

-- The opinion and the basis for the opinion. Where there is a range of opinion on the matters dealt with in the report, summarize the range of opinion and give reasons for his/her own opinion. [See Note 14 below]

[61] In my view, there can be no doubt but that rule 53.03 was amended to reflect the concerns and recommendations raised by Mr. Osborne and the many people he consulted in the course of his review of the civil justice system in this province. I propose to give effect to the rule and the underlying rationale for its creation.

[62] Surely, one of the important reasons for the rule change was to eliminate the practice of tendering opinion evidence of questionable value in a trial, particularly where, as is the case here, the evidence was created in another proceeding, at the instance of a party who is not before this court and to address matters that are beyond the scope of this trial.

[63] I am aware that the court has allowed experts retained outside of the scope of the four corners of the litigation to attend and give opinion evidence at trial. The cases cited to me all predate the amendments to Rule 53 and they involve very different considerations.

[64] We are not dealing here with the treatment related opinions formed in the course of providing primary care to a plaintiff [See Note 15 below] and nor is the opinion of any of the three experts here so central to the outcome of the litigation as might be the opinion of an origin and cause expert, an assistant fire chief in a case where negligence causing a building fire is alleged. [See Note 16 below]

[65] In my view, having considered all of the circumstances of this case, I think that the application of rule 53.03 to the proposed evidence of the three experts is necessary. I am troubled by the fact that these experts were retained in fact by an insurer that is not before this court. They were not treating physicians. Their opinions addressed instructions that are not well described in the evidence before me.

[66] I can conceive of circumstances where an expert who is retained by a person outside of the litigation may be uncooperative or be professionally unable to communicate with one or [page468] more of the parties at trial but, in this case, the defendants have simply not made reasonable efforts to assist the three doctors to an understanding of the requirements of rule 53.03 and to enlist their help to assist the court by properly reporting on their opinion evidence in advance of the trial.

[67] As noted above, defence counsels' letters and the forms sent are inaccurate and confusing. More troubling is the fact that the doctors appear to have signed the forms without reading or understanding their content.

[68] I suggested that the defendants could invite the doctors, at the defendants' expense, to write meaningful, rule 53.03 compliant, reports to plaintiff's counsel which, if relevant and producible, could help me to understand any opinions they might be able to express on issues between the parties before this court. That was not attempted. No request has been made for more time to redress the current situation.

[69] I see no reason to require a high standard be met by consulting medical experts retained by the parties and a different, lower standard from consulting medical experts who just happened to have been retained by a non-party but whose opinions might be read to assist one of the parties at this trial.

[70] I am not to be heard to state that experts retained by accident benefits insurers cannot give opinion evidence in a tort action; rather, I say that such experts should first comply with rule 53.03. I say "should" for there may be cases where that is not possible and then the court might consider relieving against non-compliance to ensure a fair adjudication of the issues upon their merits but this is not one of those cases. Disposition

[71] The three medical reports at issue here were authored for the purpose of assisting an insurance company to process an accident benefits claim brought forward by its insured. That claim triggered contract and statutory provisions of an automobile insurance policy, matters very different from the rights and obligations of the litigants before this court.

[72] The purpose of the three reports is not a purpose within the meaning of rule 53.03(2.1) and, in any event, in their present form and content, the three reports cannot be read to comply with the requirements enumerated in the rule and the circumstances here do not support a claim for relief from the requirements of the rule.

[73] Further, I find that the Acknowledgment of Expert's Duty forms are seriously flawed; it appears clear to me that the [page469] doctors did not take time to read and reflect upon the content of the form before signing it and that affords me no comfort to believe that these experts understand their duty to assist the court with opinion evidence that is fair, objective, non-partisan and within the area of expertise of each doctor.

[74] The defendants' application to call expert, oral evidence from and/or to file the medical expert reports of Drs. Weinberg, Moddel and Soric is therefore denied.

[75] If the parties cannot resolve the issues of costs of this application, I may be spoken to.

Application dismissed.

Notes

Note 1: Emphasis added.

Note 2: Song v. Hong, [2008] O.J. No. 772, 58 C.P.C. (6th) 135 (S.C.J.).

Note 3: MacEachern (Committee of) v. Rennie, [2009] B.C.J. No. 1385, 2009 BCSC 939.

Note 4: Ibid., at para. 27.

Note 5: Song, supra, at para. 14.

Note 6: Frazer v. Haukioja, 2008 CanLII 42207 (ON SC), [2008] O.J. No. 3277, 58 C.C.L.T. (3d) 259 (S.C.J.).

Note 7: Ibid., at paras. 138-40.

Note 8: National Justice Compania Naviera S.A. v. Prudential Assurance Co. ("The Ikarian Reefer"), [1993] 2 Lloyd's L.R. 68 (Q.B.D.), at pp. 81-82 Lloyd's L.R. ("The Ikarian Reefer"), revd on other grounds but affd on this point [1995] 1 Lloyd's L.R. 455 (C.A.), at p. 496 Lloyd's L.R. ("The Ikarian Reefer C.A.").

Note 9: Fellowes, McNeil v. Kansa General International Insurance Co. (1998), 1998 CanLII 14856 (ON SC), 40 O.R. (3d) 456, [1998] O.J. No. 4050 (Gen. Div.).

Note 10: Johnson v. Milton (Town) (2008), 91 O.R. (3d) 190, [2008] O.J. No. 2157, 2008 ONCA 440, per Moldaver J.A., at paras. 48-50; "Science in the Courtroom: The Mouse that Roared", The Advocates' Society Journal, Autumn 2008, per the Honourable Mr. Justice Ian C. Binnie.

Note 11: Honourable Coulter A. Osborne, Q.C., Civil Justice Reform Project: Summary of Findings & Recommendations (Ontario Ministry of the Attorney General, 2007).

Note 12: Supra, at 68 ff.

Note 13: Supra, note 11, at 68-80.

Note 14: Ibid., at 83-84.

Note 15: Burgess (Litigation guardian of) v. Wu (2003), 2003 CanLII 6385 (ON SC), 68 O.R. (3d) 710, [2003] O.J. No. 4826 (S.C.J.), at para 80.

Note 16: Hall v. Kawartha Karpet & Tile Co., 2007 CanLII 46915 (ON SC), [2007] O.J. No. 4293 (S.C.J.).

Tab 180

CanLII

Jones v. Tsige, 2012 ONCA 32 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2012-01-18
File number:	C53577
Other citations:	108 OR (3d) 241 — 346 DLR (4th) 34 — 287 OAC 56 — 96 BLR (4th) 1 — 251 CRR (2d) 124 — 89 CCLT (3d) 221 — [2012] CarswellOnt 274 — [2012] OJ No 148 (QL)
Citation:	Jones v. Tsige, 2012 ONCA 32 (CanLII), <https://canlii.ca/t/fpnld>, retrieved on 2026-01-18
Most recent unfavourable mention	Roque v Peters, 2022 MBQB 34 (CanLII) [...] [135] **Jones is clearly distinguishable** . [...]

Jones v. Tsige

108 O.R. (3d) 241
2012 ONCA 32

Court of Appeal for Ontario,
Winkler C.J.O., Sharpe J.A. and Cunningham
A.C.J. (ad hoc)
January 18, 2012

Torts -- Invasion of privacy -- Intrusion upon seclusion -- Right of action for intrusion upon seclusion existing in Ontario -- Range of damages for intrusion upon seclusion being up to $20,000 -- Defendant committing tort of intrusion upon seclusion when she used her position as bank employee to repeatedly examine private banking records of her spouse's ex- wife -- Damages in amount of $10,000 awarded.

The plaintiff and the defendant did not know each other, but they worked for different branches of the same bank and the defendant had formed a common law relationship with the plaintiff's ex-husband. For about four years, the defendant used her workplace computer to access the plaintiff's personal bank accounts at least 174 times. She did not publish, distribute or record the information in any way. When she discovered the conduct, the plaintiff brought an action for damages for invasion of privacy and moved for summary judgment. The defendant brought a cross-motion for

summary judgment dismissing the action. The motion judge found that the tort of invasion of privacy does not exist at common law in Ontario. He dismissed the plaintiff's motion and granted the defendant's motion. The plaintiff appealed.

Held, the appeal should be allowed.

A right of action for intrusion upon seclusion should be recognized in Ontario. The case law supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. Charter jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion. It is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years by the common law under various guises and that, since 1982 and the Charter, has been recognized as a right that is integral to our social and political order. Finally, the facts of this case cried out for a remedy.

The key features of the cause of action of intrusion upon seclusion are, first, that the defendant's conduct must be intentional (which includes recklessness); second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish. Proof of harm to a recognized economic interest is not an element of the cause of action.

Given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum. The appropriate range is up to $20,000. Awards of aggravated and punitive damages may be appropriate in exceptional cases, but are not to be encouraged, as predictability and consistency are paramount values in an area where symbolic or moral damages are awarded. [page242]

The defendant committed the tort of intrusion upon seclusion when she repeatedly examined the plaintiff's private bank records. The intrusion was intentional, it amounted to an unlawful invasion of the plaintiff's private affairs, it would be viewed as highly offensive to the reasonable person and it caused distress, humiliation or anguish. The plaintiff was awarded damages in the amount of $10,000. The intrusion upon her seclusion did not exhibit any exceptional quality calling for an award of aggravated or punitive damages.

APPEAL by the plaintiff from the summary judgment of Whitaker J., [2011] O.J. No. 1273, 2011 ONSC 1475 (S.C.J.) dismissing an action for damages for breach of privacy.

The judgment of the court was delivered by

Cases referred toEuteneier v. Lee (2005), 2005 CanLII 33024 (ON CA), 77 O.R. (3d) 621, [2005] O.J. No. 3896, 260 D.L.R. (4th) 123, 202 O.A.C. 278, 133 C.R.R. (2d) 292, 142 A.C.W.S. (3d) 340 (C.A.), revg [2003] O.J. No. 4239, 113 C.R.R. (2d) 44 (Div. Ct.) [Leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 516], consd Other cases referred to Athans v. Canadian Adventure Camps Ltd. (1977), 1977 CanLII 1255 (ON SC), 17 O.R. (2d) 425, [1977] O.J. No. 2417, 80 D.L.R. (3d) 583, 4 C.C.L.T. 20, 34 C.P.R. (2d) 126, [1977] 2 A.C.W.S. 1066 (H.C.J.); Aubry v. Editions Vice Versa, 1998 CanLII 817 (SCC), [1998] 1 S.C.R. 591, [1998] S.C.J. No. 30, 157 D.L.R. (4th) 577, 224 N.R. 321, J.E. 98-878, 39 C.C.L.T. (2d) 100, 45 C.C.L.T. (2d) 119, 78 C.P.R. (3d) 289, 50 C.R.R. (2d) 225, 78 A.C.W.S. (3d) 775, REJB 1998-05646; Campbell v. MGN Ltd., [2004] UKHL 22, [2004] 2 A.C. 457, [2004] 2 All E.R. 995 (H.L.); Capan v. Capan, [1980] O.J. No. 1361, 14 C.C.L.T. 191, 5 A.C.W.S. (2d) 245 (H.C.J.); Dulude v. Canada, 2000 CanLII 16085

Tab 181

CanLII

Dervisholli et al. and Cervenak and State Farm, 2015 ONSC 2286 (CanLII)

Source:	Divisional Court
Date:	2015-04-24
File number:	DC-12-427
Other citations:	253 ACWS (3d) 695 — 333 OAC 367 — 48 CCLI (5th) 286 — 72 CPC (7th) 64 — [2015] OJ No 2076 (QL) — 79 MVR (6th) 15
Citation:	Dervisholli et al. and Cervenak and State Farm, 2015 ONSC 2286 (CanLII), <https://canlii.ca/t/ghb8c>, retrieved on 2026-01-18

CITATION: Dervisholli et al. and Cervenak and State Farm, 2015 ONSC 2286
DIVISIONAL COURT FILE NO.: DC-12-427
DATE: 20150424

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco ACJ, Kent and M. Edwards JJ.

B E T W E E N :	)	
	)	
Mirjeta Dervisholli, Fatmir Dervisholli, Fatlum Dervisholli, Flamur Dervisholli and Leonora Dervisholli by their Litigation Guardian Hamide Dervisholli, the said Hamide Dervisholli	)	*Sabrina Singh*, for the Plaintiffs/Respondents
Plaintiffs/Respondents	)	
- and -	)	

Roman Cervenak	)	
Defendant/Respondent	)	
- and –	)	
State Farm Mutual Automobile Insurance Company Added by Order pursuant to Section 258(14) of the *Insurance Act* R.S.O. 1990, c.I.8 as amended	)	*Jonathan J. Barr and Benjamin J. Flanagan,* for the Statutory Third Party/Appellant
Statutory Third Party/Appellant	)	**HEARD at Hamilton:** February 24, 2015

M. EDWARDS J.:

Overview

[1] This appeal raises the issue of whether an insurer, which has issued a policy of insurance covering third party liability for the defendant's motor vehicle, may retain the same defence counsel in both the tort action and in the plaintiff's claim for accident benefits.

[2] The Insurance Bureau of Canada ("IBC"), in its Internal Bulletin 184 dated July 22, 1997 ("the Bulletin"), provides the following advice to its members:

> …Where the same insurer insures both the tortfeaser for liability coverage and the victim for accident benefits, they should set-up 'Chinese walls' so that information gathered by it regarding the accident benefits claim does not become available to the tort adjuster, unless the insured so authorizes. The tort adjuster must rely solely on the *Rules of Civil Procedure* to obtain the information on the plaintiff's medical condition or on amounts she/he has received as accident benefits.

The Bulletin has been the subject-matter of some judicial comment, and while not binding on this court, it appears to have been accepted within the insurance industry as the standard by which an insurance company should govern itself when it finds itself in the position of defending both the tort and accident benefit claim of the plaintiff. While the Bulletin refers to a "Chinese wall", I will use the more neutral terminology of a "firewall".

The Facts

[3] The plaintiff, Mirjeta Dervisholli ("the plaintiff"), alleges that she was involved in a motor vehicle collision which occurred on October 29, 2007 ("the Accident"). The plaintiff claims that she suffered injuries in the collision with the defendant, Roman Cervenak ("Cervenak"). By pure coincidence, State Farm Mutual Automobile Insurance Company ("State Farm") insured both the plaintiff's vehicle and the Cervenak vehicle pursuant to separate and distinct automobile policies.

[4] In addition to her tort claim, the plaintiff applied to State Farm for statutory accident benefits under her own policy of insurance. State Farm investigated the claim and retained the law firm of Reisler Franklin ("Reisler") to examine the plaintiff under oath pursuant to the Statutory Accident Benefits Schedule. State Farm also obtained accident reconstruction reports with respect to the accident itself. These reconstruction reports were presumably obtained given the allegation

by State Farm that the accident was staged. State Farm has not to date produced any experts report that supports the allegation of a staged accident.

[5] As a result of its investigation State Farm has taken the position that the plaintiff and the defendant, Cervenak, planned and staged the collision and/or that the collision did not occur as alleged by the plaintiff. As a result of this investigation State Farm denied coverage to the plaintiff under her policy and also denied coverage to the defendant, Cervenak, under his policy.

[6] At the time that State Farm initially retained Reisler on July 21, 2008, State Farm, without the consent of the plaintiff, provided Reisler with the plaintiff's complete accident benefits file ("AB"). State Farm paid accident benefits to the plaintiff until February 16, 2009 when benefits were terminated.

[7] A tort action was commenced by the plaintiff against the defendant, and also against State Farm pursuant to section 265 of the *Insurance Act* which provides both uninsured and underinsured coverage to the plaintiff pursuant to her own policy of insurance. The statement of claim was issued on October 15, 2009.

[8] With the denial of her ongoing claim for accident benefits, the plaintiff disputed the denial and commenced arbitration proceedings before the Financial Services Commission of Ontario ("FSCO") on October 29, 2010. State Farm retained Reisler on January 6, 2011 to defend it in the arbitration proceedings at FSCO.

[9] Reisler wrote to counsel for the plaintiff on October 13, 2010, advising that they had been retained in the tort action to represent "the interests of the defendants regarding the above-noted matter". At the time of this representation to plaintiff's counsel, there was no indication from State Farm that it would be taking an off-coverage position.

[10] On February 22, 2011, State Farm was added to this action as a statutory third party pursuant to the order of Carpenter-Gunn J. dated February 22, 2011.

[11] On February 24, 2011 and again on June 10, 2011, plaintiff's counsel received correspondence from Reisler indicating that they represented State Farm not only in its capacity as the statutory third party, but also as the underinsurer pursuant to the plaintiff's policy of insurance with State Farm. A Statement of Defence was sent to plaintiff's counsel in which Reisler purported to defend both Cervenak and State Farm. This defence was not filed with the court and as such Reisler never formally was "on the record" for both State Farm and Cervenak.

[12] On June 23, 2011, plaintiff's counsel received a Notice of Intent to Defend from a different law firm; Pavoni, Patton, DiVincenzo ("Pavoni"), which confirmed that Pavoni had been retained to represent State Farm in its capacity as the plaintiff's underinsurer.

[13] On November 17, 2011, plaintiff's counsel received a defence from Reisler, confirming that Reisler was only representing State Farm in its capacity as the statutory third party.

[14] On July 25, 2012, State Farm delivered its sworn affidavit of documents in its capacity as the statutory third party. The affidavit of documents listed documents in relation to the plaintiff's accident benefit file, as well as transcripts from the examinations under oath of not only the plaintiff, but other claimants from the same accident including passengers who had been in the Cervenak vehicle. There is no evidence before this court that confirms these other claimants gave State Farm their consent to the release of this information from their accident benefits file.

Decision of the Motion Judge

[15] The plaintiff's motion to remove Reisler as solicitor of record for the defendant, Cervenak, came before Hambly J. on December 10, 2012. After a thorough review of the facts Hambly J.

began his analysis of the law by reference to a decision of Lederer J., *Ernst and Young v. Chartis Insurance Co. of Canada*, 2012 ONSC 5020 (CanLII), [2012] O.J. No. 4399, dealing with the relationship between an insured and an insurer as one where an insurer owes a duty of good faith to its insured. Such a relationship is in contrast to the relationship between an insurer and a claimant against its insured where no such duty exists. This is because the claimant is a stranger to the relationship between the insurer and the insured and there is no privity of contract.

[16] Having dealt with the relationship between an insured and an insurer, Hambly J. then dealt with the Divisional Court decision of *Klingbeil (Litigation Guardian of) v. Worthington Trucking Inc.,* 1999 CanLII 19927 (ON SC), [1999] O.J. No. 867. Hambly J. distinguished the facts in *Klingbeil* by noting that in *Klingbeil* the plaintiff was an infant and, as such, did not have a policy of motor vehicle insurance. The plaintiff was struck by a motor vehicle when she was a pedestrian, and claimed accident benefits from the insurer of the owner of the vehicle which had struck her. The plaintiff then commenced a tort action against the owner of the motor vehicle. The action was defended by the same insurer. The same law firm represented the insurer in both the accident benefits claim and the tort action. The plaintiff brought a motion to remove the law firm and solicitors of record in the tort action. The matter came before Ferrier J., who referred to the Bulletin and removed the law firm on the basis of a conflict of interest.

[17] When the matter came before the Divisional Court, the decision of Ferrier J. was reversed on the basis of the very brief two paragraph decision of Matlow J. in *Stratton v. Senger,* [1996] O.J. No. 4774, where Matlow J. held:

> With respect, I see no "appearance of impropriety" or "possibility of unfairness" in permitting Fireman Regan to continue to act for the defendant. The plaintiffs chose to rely on the statutory scheme set out in the Insurance Act to claim accident benefits from the defendant's insurer. The insurer was not, as a result, obliged to segregate or isolate the information provided by the plaintiff in pursuit of his claim when it came to conduct the defendant's defence. It follows, as a matter of logic, that it could obtain the services of the same firm of solicitors for matters pertaining to the accident benefits claim and for the defence of this action. There would be no point in requiring the insurer to retain separate solicitors for each purpose…

[18] In coming to the decision that it did, in reliance on the aforementioned decision of Matlow J., the Divisional Court held:

> The court agrees with the disposition of this issue by Matlow J. Where the defendants rely on the statutory scheme set out in the Insurance Act to claim no-fault benefits from the defendant's insurer, the insurer ought not, as a matter of course in a subsequent tort action by the plaintiffs, be required to retain separate solicitors for the no-fault claim and the defence of the tort action.

[19] Having reviewed the decision of Ferrier J. in *Klingbeil* and the decision of the Divisional Court in *Klingbeil* which reversed the decision of Ferrier J., Hambly J. came to the following conclusion:

> What distinguishes this case from *Kingbeil* (sic) is that the plaintiff in this case has a policy of insurance with State Farm in which she claims accident benefits. Reisler Franklin represents State Farm in Hamid's claim for accident benefits against State Farm under her policy of insurance with State Farm. It also represents State Farm in Hamid's tort action against its insured, Cervenak, under his policy of insurance with State Farm. Notwithstanding that a different lawyer in the law firm acts in each matter Reisler Franklin makes no pretense of erecting a "Chinese wall" or maintaining a "code of silence" between its files in the accident benefits claim and in defending the tort action. It is openly using documents and information obtained

> from Hamid in the accident benefits claim in defending the tort action. In doing so it is acting contrary to its privacy notice on its public website. Reisler Franklin in ensuring that State Farm acts in good faith towards Hamid in her claim for accident benefits under her policy of insurance with State Farm conflicts with it (sic) duty to Cervenak in defending Hamid's claim against him. State Farm and hence its solicitors owes no duty to Hamid in the tort action brought by her against its insured. By acting for State Farm in both matters Reisler Franklin is acting in contravention of the principles cited in *MacDonald Estates*. It is in a clear position of conflict of interest.

The Decision of the Leave to Appeal Justice

[20] Leave to appeal was sought from the decision of Hambly J. before Arrell J., who granted State Farm leave to appeal largely because the decision of Hambly J. was in conflict with *Klingbeil*. Arrell J. came to the conclusion, based on section 270 of the *Insurance Act*, that the plaintiff in *Klingbeil* was "a named insured under the defendant's policy with the same rights and obligations as the plaintiff in the case at bar, as a named insured under her policy with State Farm". Arrell J. came to the conclusion that:

> From a fact perspective between the case at bar and *Klingbeil*, little turns on whether the plaintiff is suing her own insurer or the defendants insurer, as the claim for AB benefits is a statutory claim and identical coverage is provided in either scenario under section 270 of the Insurance Act.

Standard of Review

[21] Both parties agree that the issue of whether Reisler is in a conflict of interest position involves the application of legal standards to a set of facts which are not in dispute. The standard of review is correctness.

[22] In their factums both parties agree that the issues in this appeal have significant precedential value, as it relates to matters important not only to the parties themselves, but which will also have a significant impact on the rights of motor vehicle accident claimants, insurance industry practices and are also a matter of public interest. In his judgment granting leave to appeal, Arrell J. also noted that the outcome of the appeal was of some significance to the personal injury bar and the insurance industry.

Position of the Plaintiff

[23] Counsel for the plaintiff notes that since the *Klingbeil* decision much has changed and, in particular, emphasis is placed on the fact that section 258.3 of the *Insurance Act* now requires a plaintiff to apply for statutory accident benefits before commencing a tort claim. Section 258.3 of the *Insurance Act* was introduced as part of the Bill 59 amendments effective November 1, 1996 and, as such, came into force and applies to motor vehicle accidents after November 1, 1996. The motor vehicle accident which was the subject matter of *Klingbeil* occurred on February 3, 1995. The plaintiff in *Klingbeil* was not required as a matter of law to apply for statutory accident benefits prior to the commencement of her tort claim.

[24] Counsel for the plaintiff emphasizes that because of the mandatory nature of section 258.3 of the *Insurance Act*, the plaintiff being obliged to apply for statutory accident benefits must, if requested, submit to independent medical examinations at the behest of her statutory accident benefits insurer, State Farm. She is also required to disclose all of her relevant health information to State Farm. This is a contractual obligation that the plaintiff has with State Farm.

[25] In addition to her obligation to submit to an independent medical examination and provide relevant health information, the plaintiff has an obligation within the context of her accident benefit claim to speak directly to the accident benefit carrier, State Farm, something which State Farm in its capacity as the insurer of Cervenak in tort action does not have the right to do.

[26] While there is no dispute that the plaintiff, in her tort action, would be obliged to produce much of what is contained in the file contents of State Farm in its capacity as accident benefit carrier, counsel for the plaintiff emphasizes that the prejudice in the production of this information flows from the fact that the documentation and information given to State Farm, in its capacity as the accident benefit carrier, were given by the plaintiff in a situation where the plaintiff had a reasonable expectation of privacy.

[27] Counsel for the plaintiff argues that merely because State Farm has added itself as a statutory third party cannot mean that State Farm can breach the privacy rights of its insured. Just because the plaintiff will have to produce the documentation contained in her accident benefit file, cannot mean that the plaintiff has waived her rights to privacy or waived her rights not to disclose to State Farm these documents in its capacity as the insurer of the tortfeasor. The obligation on the part of the plaintiff to disclose the contents of the accident benefit file is triggered by the plaintiff's obligation to produce relevant documents in accordance with the provisions of the *Rules of Civil Procedure* ("the *Rules*").

[28] Counsel for the plaintiff argues that the information which State Farm receives from its insured, in its capacity as the accident benefit carrier, clearly establishes that the information was provided in a situation where the plaintiff expected that the documentation and information provided was in a situation of confidence. As such, counsel for the plaintiff argues in reliance on the decision of Sopinka J. in *MacDonald Estate v. Martins*, [1993] S.C.R. 1235, having provided her medical and other private information to State Farm in a situation of confidence that an inference of prejudice should be inferred.

[29] Counsel for the plaintiff notes that not only did State Farm produce in its affidavit of documents relevant information from the plaintiff's accident benefit file, but also relevant information from the accident benefit files of other parties who have their own distinct accident benefit claims. Specifically, reference is made to the fact that State Farm disclosed the transcripts of the examinations under oath of the other parties involved in the alleged motor vehicle accident. Counsel for the plaintiff argues that this is a clear breach of the privacy of those other claimants.

[30] As to the application of the *Klingbeil* decision, counsel for the plaintiff argues that *Klingbeil* should, in essence, be restricted to the specific facts that were before the Divisional Court in 1999. It is suggested that both *Klingbeil* and *Stratton* carve out a distinction between the specific scenario where an applicant makes a claim for accident benefits to the tort defendants insurer from the more typical situation where an applicant claims from her own insurer, thereby allowing for an exception to the firewall principle and thus finding there was no conflict of interest in those cases. In the case at bar, the plaintiff did not apply for accident benefits from the defendant's insurer, but rather made the application to her own insurance company pursuant to her own policy of insurance.

[31] While counsel for the plaintiff argues that *Klingbeil* can be distinguished on its facts, given that the plaintiff's claim in *Klingbeil* for accident benefits was against the defendant's insurer, nonetheless, counsel for the plaintiff argues that to maintain the distinction carved out in *Klingbeil* and *Stratton* would result in the creation of two tiers of accident benefit claimants. The first tier would be one which is afforded no privacy protection where the plaintiff applies for accident benefits under the defendant's policy. The second tier would be the tier presently before this court, where the claim for accident benefits is made by the plaintiff pursuant to her own policy and, as such, would be afforded privacy protection.

Position of State Farm

[32] The position of State Farm is relatively simple. In essence, counsel for State Farm argues that the motions judge, Hambly J., did not have a proper basis to distinguish *Klingbeil*, i.e. a distinguishing factor between an accident benefit claim by a named insured versus a deemed insured.

[33] As well, counsel for State Farm argues that there is no prejudice in Reisler continuing to act for State Farm in its capacity as both the insurer of the tortfeasor as well as providing accident benefits to the plaintiff. In that regard, it is argued that anything that is contained in the plaintiff's accident benefit file, to which State Farm would have access, would be producible by the plaintiff in the tort action. As such, there is no risk of any prejudice in allowing Reisler to continue to act, as Reisler would not be giving State Farm anything that State Farm did not already have.

[34] It is conceded in the factum filed by counsel for State Farm on this appeal that the direction to the insurance industry, which is clearly spelled out in the Bulletin, is respected by insurers in terms of how an insurer manages the conflict between its role as accident benefit carrier and its duty to defend a tortfeasor. It is worth setting forth State Farm's position, as set forth in paragraph 52 of its factum which reads as follows:

> Typically, insurers maintain a "firewall" between the evidence obtained from a plaintiff's accident benefits claim and evidence obtained in the course of defending a tortfeasor in a civil action. When an insurer retains counsel to defend a tortfeasor, the insurer does not provide defence counsel with the evidence from the plaintiff's accident benefits file. There is a very good reason for that: the tortfeasor does not have the right to obtain evidence directly from the plaintiff's accident benefits insurer. Rather, the tortfeasor must use the mechanisms in the *Rules* to obtain the evidence in the possession of a non-party, including the plaintiff's insurer(s). If the tortfeasor *did* obtain the documents directly from the plaintiff's accident benefits insurer, the tortfeasor would be in breach of the *Rules of Civil Procedure*, and the insurance company would be in breach of the plaintiff's privacy rights.

[35] Having recognized its obligation to comply with the direction set forth in the Bulletin, State Farm then suggests that it has no obligation to maintain a firewall where defence counsel acts for the insurer and not the tortfeasor. This is because State Farm argues there is no risk that evidence from the plaintiff's accident benefit claim will be provided to the tort defendant, except as required by the *Rules of Civil* Procedure. State Farm argues that its obligation to comply with the *Rules* ensures respect for the plaintiff's privacy rights.

[36] Finally, State Farm argues there is no reason why State Farm, in its capacity as a statutory third party, should be required to maintain a firewall with State Farm acting in its capacity as the accident benefit insurer. This is because State Farm is one company defending itself against claims both in tort and accident benefits made by the plaintiff. By analogy, State Farm suggests that if the situation was different and State Farm was an individual being sued by the plaintiff in two different proceedings, it would be absurd to suggest that State Farm would have to retain different counsel in each context.

Analysis

[37] What is lost in State Farm's argument before this court is that State Farm is not any ordinary individual. It is an insurance company, which in the context of this litigation occupies two unique roles with distinct duties. The first is its obligation to defend the defendant, Cervenak, in the tort action. State Farm has taken an off-coverage position, as is its right, and added itself as a statutory third party utilizing the services of Reisler to defend it in that capacity. Its other role is that of the accident benefit insurer of the plaintiff. In its capacity as the accident benefit insurer,

State Farm owes the plaintiff a duty of good faith arising out of its fiduciary obligations, see *Beasley and Scott v. Barrand*, 2010 ONSC 2095 (CanLII), [2010] O.J. No. 1466 at paragraph 34.

[38] When the plaintiff submitted to an examination under oath and complied with her obligations to make disclosure of all relevant health information to State Farm, she did so pursuant to her obligation under section 33 (1 and 1.1) of the Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996 O. Reg. 403/96 s.33 ("the Regulation").

[39] In the context of her claim for accident benefits, when the plaintiff attended an independent medical examination at the request of State Farm she did so pursuant to her obligation under section 42(1) of the Regulation, which allows an insurer like State Farm to require its insured (the plaintiff) to be examined by a health professional "as often as is reasonably necessary".

[40] The implication of section 258.3 of the *Insurance Act*, which requires a tort plaintiff to apply for statutory accident benefits before initiating a tort claim, are far-reaching. By the time the tort action has been initiated the plaintiff will have been obliged to apply for statutory accident benefits, and with that application the plaintiff may also have been obliged to submit to an examination under oath, attend various independent medical examinations and disclose all relevant health information.

[41] Apart from its fiduciary obligation, the statutory accident benefit insurer also has an obligation to ensure that the information supplied by its insured is kept private. While decided in the context of a claim arising out of the unauthorized access by a bank employee to the banking records of a customer, the decision of the Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32 (CanLII), [2012] O.J. No. 148, is a significant advancement in the law insofar as whether this court should follow the decision of the Divisional Court in *Klingbeil*.

[42] In *Jones*, the plaintiff discovered that the defendant had been surreptitiously looking at her banking records and had done so without her authorization more than 174 times over four years. After a thorough review of the jurisprudence and statute law across the country, Sharpe J.A. accepted that the court should recognize the existence of a right of action for intrusion upon seclusion, or what has often been described as the tort of breach of privacy.

[43] In recognizing the tort of breach of privacy, Sharpe J.A. stated at paragraph 66:

> The case law, while certainly far from conclusive, supports the existence of such a cause of action. Privacy has long been recognized as an important underlying and animating value of various traditional causes of action to protect personal and territorial privacy. *Charter* jurisprudence recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy. The right to informational privacy closely tracks the same interest that would be protected by a cause of action for intrusion upon seclusion.

[44] As well, the comments of Sharpe J.A. at paragraph 72 are worthy of repetition in the context of the motion before this court:

> These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded; it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive.

[45] The plaintiff in the action before this court was mandated by section 258.3 to apply for statutory accident benefits before she could commence her tort action. The plaintiff in *Klingbeil* had no such obligation under the provisions of the *Insurance Act* then in force ("Bill 164"). The plaintiff was contractually obliged as part of her application for statutory accident benefits to submit to an examination under oath, disclose her relevant medical history and submit to an independent medical examination as often as reasonably required by State Farm. Before the plaintiff even commenced her tort action, State Farm would therefore have been in possession of a significant body of highly confidential information to which the plaintiff had a privacy interest, and which State Farm was obliged as a fiduciary to maintain confidential.

[46] The duty of an insurer acting in a dual capacity as both the accident benefit insurer and the tort insurer has been the subject of some judicial comment besides what is found in the decision of the Divisional Court in *Klingbeil*.

[47] In *Anand v. Belanger*, 2010 ONSC 1635, Stinson J. was dealing with a motion by the plaintiff who had settled her claim for statutory accident benefits with State Farm prior to the trial of the tort claim. The plaintiff sought a ruling that State Farm could not dispute the plaintiff's injuries and disabilities had been caused by the subject motor vehicle accident. State Farm in *Anand* was not only the accident benefit insurer but also the uninsured carrier in the tort action.

[48] While the issue before Stinson J. was not the same issue that is before this court, his comments at paragraphs 32 and 33 are important to note:

> I am also mindful of the potential impact on the practices in the insurance industry that would result from acceding to the plaintiff's submissions. At present, the practice in the industry is to maintain a so-called "firewall" between the SABs department and the tort liability department of an insurance company, where that insurer has provided coverage to both an injured party and an at-fault driver. The file contents, negotiations and settlement strategy relating to the SABs claim by the injured party are not disclosed to those who are defending the tort claim, save in accordance with the usual practice by way of discovery in the tort proceeding. This is so notwithstanding the same corporate entity or "legal person" is in possession of both files. Quite apart from privacy concerns, this is a recognition of the differing responsibilities and obligations of the insurer providing SABs coverage to its customers on a no fault basis, and its rights and obligations when providing a defence to its customers on a no fault basis, and its rights and obligations when providing a defence to its customers in a tort proceeding where the normal adversarial rule is applied.
>
> The evidence before me establishes that State Farm adheres to the foregoing firewall principle in cases such as the present one, where it finds itself involved not just as SABs provider, but also in a tort proceeding as a party defendant pursuant to the uninsured motorist coverage. The plaintiffs' submission that a concession for SABs purposes equates to a concession for tort purposes would lead to the erosion of this firewall, to the detriment of the integrity of the overall system.

[49] A more recent decision touching on the firewall principle is a decision of Master Muir, *De Sousa v. Aviva Insurance Co. of Canada*, 2013 ONSC 185, where Master Muir dealt with a motion brought by an insurer to set aside the plaintiff's notice of examination because the notice sought to produce the adjustor from the insurance company who had adjusted the plaintiff's accident benefit claim. The tortfeasor pled a limitation defence, to which the plaintiff argued that the insurer was well aware of the plaintiff's medical condition because the same insurer was adjusting the plaintiff's accident benefit claim. The plaintiff's argument essentially amounted to the same argument made before this court, i.e. State Farm is one company and therefore must know what it

has in its possession regardless of whether the claimant is the plaintiff in the tort action or the claimant for statutory accident benefits. Master Muir rejected this type of argument and held that the firewall could only be breached with the plaintiff's consent. In coming to this conclusion, Master Muir stated at paragraph nine:

> In my view, it would not be appropriate, in the circumstances of this action, to deny the plaintiff his right to examine a representative of his choosing. Bulletin 184 of the Insurance Bureau of Canada sets out the requirement for the firewall described above. However, Bulletin 184 states that the firewall should be set up so that "information gathered by [the insurer] regarding the accident benefits claim does not become available to the tort adjuster, *unless the insured so authorizes*" [emphasis added]. It is also clear from the decisions in *Klingbeil* at paragraph 30 and *McLennon* at paragraph 31. The purpose of the firewall is so that an insurer is not advantaged by the fact that it is responding to both claims. See *McLennon* at paragraph 35. The consent of the insured obviates this concern.

[50] Another decision dealing in part with the possible conflict of interest of an accident benefit adjuster allowing information to find its way into the hands of the tort adjuster is that of J.P. Moore J. in *Song v. Hong*, [2008] O.J. No. 772, where at paragraphs 64 and 65 Moore J. stated:

> There are good reasons for this distinction. To begin with, an accident benefits claimant is an insured person under the coverage bound by the insurer and, as such, the claimant is owed a duty of good faith in the handling of the claim. As well, the insurer comes into possession of personal, medical and other information during the claim handling process and it is obliged to keep that information private and confidential.
>
> On behalf of vehicle owners and drivers named as defendants in a tort case, such as this one, the insurer's contractual obligation is to provide defence and indemnity in accordance with the policy provisions. Those defendants do not owe a duty of good faith to the plaintiff; in fact those defendants may (and have here) set their position in litigation adverse to the claims made by the plaintiff. In the context of the tort claim, there is no direct, contractual or other dealing between the plaintiff and the insurer. A conflict of interest situation could well arise for an insurer that allows information from an accident benefits file to bleed through to a tort file, and visa (sic) versa.

[51] The issue argued before this court was also addressed at FSCO in the context of the plaintiff's accident benefit claim with State Farm. The arbitrator was required to answer the question of whether State Farm could retain the same law firm, i.e. Reisler, to defend it in both the tort proceedings and the arbitration proceedings for statutory accident benefits.

[52] Where the applicant for statutory accident benefits and the plaintiff in the tort action are one and the same person, i.e. Ms. Dervisholli, the arbitrator ruled in favour of State Farm. In doing so, the arbitrator relied on *Klingbeil* and *Stratton*, both of which had been followed at the FSCO appeal level, see *Ramrattan and Motor Vehicle Accident Claim Fund FSCO P12-00003* April 27, 2012.

[53] Arbitrator Susan Sapin concluded that *Klingbeil* was the most relevant case – a decision that she correctly found was binding on her. In following the *Klingbeil* decision, Arbitrator Sapin noted at page five of her reasons that:

> Insurance companies segregate their accident benefits and indemnity files, as a matter of corporate policy and industry practice, to comply with the obligation of utmost good faith enforced by the courts, and to protect the privacy of their insureds. This is the origin of the so-called "Chinese Wall" between the two types of files, so that information (usually medical) obtained in the accident benefits claim is not made

available to the tort adjuster, unless the insured person authorizes it or the law requires it.

[54] Arbitrator Sapin rejected the plaintiff's arguments that *Klingbeil* should be distinguished on its facts, because the plaintiff in *Klingbeil* was uninsured and had applied to the defendant's insurer, Lincoln, for statutory accident benefits, whereas Ms. Dervisholli had applied for SABs under her own policy of insurance with State Farm. Arbitrator Sapin also followed the reasoning in *Stratton*.

[55] It is important to note that the report of *Stratton* makes reference to a Court File – 95-CU-87367. This court file makes clear that the underlying claim in that action was in relation to a motor vehicle accident which occurred prior to November 1, 1996. As such, as in *Klingbeil*, *Stratton* involved a plaintiff who did not have to comply with the obligations the plaintiff before this court did have to comply with, i.e. to apply for statutory accident benefits prior to the commencement of the tort action.

[56] This court has the opportunity to clarify the duties of an insurer like State Farm, which has the dual responsibility to provide both third party liability tort coverage as well as pay statutory accident benefits to a plaintiff. Whether or not an insurer is named as a defendant, or has itself added as a statutory third party where that insurer also has the contractual obligation to pay statutory accident benefits, such a situation triggers privacy concerns on the part of the claimant seeking payment of statutory accident benefits. In this situation, if it was not already made clear by the Bulletin, the insurer with those dual responsibilities has an obligation to set up a firewall that prevents, without the consent of the insured/plaintiff, any dialogue or any transfer of the plaintiff/claimant's confidential accident benefit file to the tort adjuster.

[57] It does not matter that State Farm, with its responsibility to provide third party coverage and/or having added itself as a statutory third party, will ultimately come into possession of much of what is contained in the plaintiff's accident benefit file because of the disclosure obligations that the plaintiff has under the *Rules*. While this argument might have some preliminary appeal, in that State Farm and by implication the Reisler Law Firm will come into possession of most of the documentation found in the plaintiff's accident benefit file during the course of the tort proceedings, it fails to recognize that such information only comes into State Farm's possession with the consent of the plaintiff. State Farm does not have an automatic right to that information. The plaintiff has a privacy interest in the confidential health information supplied to State Farm, and it is only with the consent of the plaintiff, or by order of the court, that such information can be communicated to State Farm in its capacity as the statutory third party, or as the insurer obliged to provide coverage to the defendant, Cervenak.

[58] State Farm had an obligation to maintain the confidentiality of the plaintiff's accident benefit file. State Farm may very well be one distinct corporate entity and, as such, has possession of both information found within the accident benefit file and the tort file under one roof. Nonetheless, the insurance industry has recognized and implemented the principle of a firewall between the accident benefit department and the tort department within an insurance company. While the bodily injury adjuster for State Farm might very well be tempted to take a surreptitious look at the accident benefit file, such conduct is not condoned within the insurance industry, as reflected in the Bulletin. State Farm should not have retained Reisler to defend itself both with respect to the claims by the plaintiff for statutory accident benefits as well as in the plaintiff's tort action. The failure to separate the interests of State Farm on the tort and accident benefit side, by retaining the same law firm and disclosing confidential information to that law firm, resulted in a disqualifying conflict of interest as set forth in *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235.

[59] State Farm retained Reisler to defend the interests of State Farm as the statutory third party, and as is made clear by the affidavit of documents prepared by State Farm, essentially also provided unfettered access to the plaintiff's accident benefit file together with information from other claimant accident file contents. Without the plaintiff's consent to, or court order, the transmission of this information to Reisler, State Farm allowed an unauthorized intrusion into the plaintiff's privacy interests which are contrary to the good faith obligation of utmost trust and fair dealing which State Farm owed to the plaintiff.

[60] None of the information that the plaintiff provided to State Farm, in the context of her accident benefit file, was provided to State Farm in its capacity as the statutory third party. State Farm was the plaintiff's insurer, and any information that the plaintiff provided to State Farm in that capacity was supplied in confidence and with the expectation that her right of privacy would be respected.

[61] The only basis upon which State Farm was entitled to access the plaintiff's accident benefit file contents was with the consent of the plaintiff or by court order. That consent was never sought, nor was it ever provided. By disclosing this information to Reisler without the consent of the plaintiff, State Farm placed Reisler in an irreconcilable position of conflict, and the only appropriate remedy is to remove Reisler as the solicitor of record for State Farm in these proceedings.

[62] In the result, the appeal by State Farm of the order of Hambly J. is dismissed with costs. If the parties cannot agree upon the costs of this appeal, written submissions limited to three pages in length may be submitted to this court no later than May 15, 2015. If submissions are not received within that time frame this court will assume that the issue of costs has been resolved between the parties.

-

_____

MARROCCO ACJ.

_____

KENT J.

_____

M. EDWARDS J.

Released: April 24, 2015

CITATION: Dervisholli et al. and Cervenak and State Farm, 2015 ONSC 2286
DIVISIONAL COURT FILE NO.: DC-12-427
DATE: Final Draft

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Marrocco ACJ, Kent and M. Edwards JJ.

B E T W E E N :

Mirjeta Dervisholli, Fatmir Dervisholli, Fatlum De rvisholli, Flamur Dervisholli and Leonora Dervish olli by their Litigation Guardian Hamide Dervisho lli, the said Hamide Dervisholli

Plaintiffs/Respondents

- **and –**

Roman Cervenak and State Farm Mutual Automob ile Insurance Company

Defendants

- **and –**

State Farm Mutual Automobile Insurance Compan y Added by Order pursuant to Section 258(14) of t he *Insurance Act* R.S.O. 1190, c.I.8 as amended

Statutory Third Party

REASONS FOR DECISION

M. EDWARDS J.

Tab 182

CanLII

David v TransAmerica, 2016 ONSC 1777 (CanLII)

Source:	Superior Court of Justice
Date:	2016-03-11
File number:	CV-13-5278-00
Other citation:	131 OR (3d) 314
Citation:	David v TransAmerica, 2016 ONSC 1777 (CanLII), <https://canlii.ca/t/gnxsr>, retrieved on 2026-01-18

L. David, Personally, and as Estate Trustee of the Estate of H. David v. Transamerica Life Canada et al.

[Indexed as: David v. Transamerica Life Canada]

Ontario Reports

Ontario Superior Court of Justice,

Price J.

March 11, 2016

131 O.R. (3d) 314 | 2016 ONSC 1777

Case Summary

Civil procedure — Costs — Entitlement to costs — Applicant applying unsuccessfully for declaration that change of beneficiary of life insurance policy in her favour was invalid — Court finding that applicant had prepared change of beneficiary form and that form had been altered after insured signed it and did not reflect insured's wishes — Applicant's conduct combined with insurer's unnecessary delay and its own unreasonable conduct in failing to apply for interpleader order and pay insurance proceeds into court or to participate in mediation being principal cause of litigation — Applicant's claim for costs against insurer and insurer's claim for costs against applicant denied — Both applicant and insurer ordered to pay individual respondents' costs.

D designated the individual respondents, the applicant's half-siblings, as the beneficiaries of his life insurance policy with the respondent insurer. The insurer subsequently received a change of beneficiary form with D's signature, the effect of which would have been to transfer 75 per cent of the insurance proceeds to the applicant. Because there were errors in the change of beneficiary form, the insurer did not act on it, but failed to notify D. After D's death, the applicant claimed 75

per cent of the insurance proceeds. When the insurer refused her claim, she applied for a declaration that the change of beneficiary form was valid and that she was entitled to 75 per cent of the proceeds. Her application was dismissed. The court found that the applicant and her brother had likely collaborated in the preparation of the form, that the form had been altered after D signed it, if he did, in fact, sign it, and that D did not want or intend to change the beneficiaries. The applicant sought her costs against the insurer alone on the ground that its negligent administration of the insurance policy gave rise to the litigation and that its approach to the litigation was unreasonable and caused the parties to incur unnecessary costs. The insurer claimed its costs against the applicant on the ground that she unreasonably insisted on it remaining a party to the proceeding after it paid the balance of the disputed proceeds into court. [page315]

Held, the applicant and the insurer should pay their own costs and should pay the individual respondents' costs.

The insurer was not liable to pay the applicant's costs because it failed to send a notice of incomplete information to D and thereby precipitated the litigation. It was, in fact, the applicant's contrivance of the change of beneficiary form and her attempt to secure 75 per cent of the proceeds for herself that were the principal causes of the litigation. The application was utterly without merit. The insurer acted reasonably in refusing to produce its complete file to the applicant before she brought her application because she was not in fact a beneficiary and because she had not produced a probated copy of D's will naming her as estate trustee. However, the insurer acted unreasonably in not applying in a timely manner for an interpleader order and paying the insurance proceeds into court after the application was commenced. Had it applied for an interpleader order, its file would have been produced to the other parties, who would have been in a better position to assess their respective positions and to resolve their dispute. The insurer also acted unreasonably in refusing to participate in mediation. While the *Insurance Act*, R.S.O. 1990, c. I.8 did not impose a statutory obligation on the insurer to mediate in the circumstances of this case, the insurer's unwillingness to do so was a factor that could be considered as evidence of unreasonable conduct which contributed to the bringing of the application and caused the parties to incur unnecessary costs. Where it not for the suspicious circumstances in which the change of beneficiary form was prepared, the insurer would have been ordered to pay the applicant's costs also. The applicant was ordered to pay a portion of the individual respondents' costs fixed at $33,500, and the insurer was ordered to pay a portion of the individual respondents' costs fixed at $15,500.

Carter v. Junkin (1984), 47 O.R. (2d) 427, [1984] O.J. No. 3293, 11 D.L.R. (4th) 545, 6 O.A.C. 310, 7 C.C.L.I. 217, [1984] I.L.R. Â1-1815 at 6982, 27 A.C.W.S. (2d) 64, 1984 CanLII 1821 (Div. Ct.); *Muirhead v. York (Regional) Police Services Board*, [2015] O.J. No. 1674, 2015 ONSC 2142, 19 C.C.L.T. (4th) 164, 251 A.C.W.S. (3d) 399 (S.C.J.); *White v. Gicas*, [2014] O.J. No. 3036, 2014 ONCA 490, 98 E.T.R. (3d) 197, 323 O.A.C. 79, 242 A.C.W.S. (3d) 500, **consd**

Other cases referred to

394 Lakeshore Oakville Holdings Inc. v. Misek, [2010] O.J. No. 5692, 2010 ONSC 7238, 195 A.C.W.S. (3d) 959 (S.C.J.); *Adams v. Ontario (Information and Privacy Commissioner)*, 1996 CanLII 8114 (ON SC), [1996] O.J. No. 2269, 136 D.L.R. (4th) 12, 91 O.A.C. 367, 69 C.P.R. (3d) 364, 64 A.C.W.S. (3d) 6 (Div. Ct.); *Baldwin v. Daubney*, [2006] O.J. No. 3919, [2005] O.T.C. 1047, 21 B.L.R. (4th) 232, 152 A.C.W.S. (3d) 32, 2006 CanLII 33317 (S.C.J.); *Beasley v. Barrand* (2010), 101 O.R. (3d) 452, [2010] O.J. No. 1466, 2010 ONSC 2095, 94 C.P.C. (6th) 331, 186 A.C.W.S. (3d) 1018 (S.C.J.); *Bell Canada v. Olympia & York Developments Ltd.* (1994), 17 O.R. (3d) 135, [1994] O.J. No. 343, 111 D.L.R. (4th) 589, 70 O.A.C. 101, 26 C.P.C. (3d) 368, 1994 CanLII 239, 46 A.C.W.S. (3d) 14 (C.A.); *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291, [2004] O.J. No. 2634, 188 O.A.C. 201, 48 C.P.C. (5th) 56, 2004 CanLII 14579,

> *Usually, we only get into Affidavits of Documents and Discoveries on claims where we deny liability. In this particular case, we admit liability. The policy proceeds are indeed now payable. However, it is our opinion that your client has no claim to these proceeds*.
>
> A life insurance policy is a contract. As you know, any contract is a "meeting of the minds". That occurred in 1992, when the deceased and our Company agreed to issue this policy. That occurred again in 1996, when the deceased proposed an amendment to the policy contract, changing the designated beneficiary in favour of Rhinda Erica David and Randolph Hollis David, a proposal then agreed to by the Company. However, that did not occur in 2011, when the deceased again proposed another amendment again changing the designated beneficiary. His proposal was rejected by the Company and the policy contract was not amended in 2011. *If the family cannot sort this matter out, we reserve the right to discharge our liability by paying the Accountant of the Superior Court of Justice*. To advise the Court why we are doing this, we will prepare a sworn affidavit outlining the facts as we see them. The judge can then take it from there, assigning costs as he sees fit.

(Emphasis added)

[47] Transamerica produced to Mr. Morris a copy of the 1996 change of beneficiary, which it had accepted, and of the 2011 change of beneficiary, which it had rejected. It did not produce the notice of incomplete information that it had prepared in 2011, and which it now says it sent to Hollis David at the time, which Ms. David denies, and which I found, based on the evidence in the proceeding, was never sent to Mr. David.

[48] In the correspondence that ensued between Mr. Morris and Transamerica between March 11, 2013 and November 27, 2013, when Lystra David issued her application, Transamerica maintained its refusal to produce the remainder of its file to Ms. David. In an e-mail dated March 12, 2013, it stated:

> Thank you for your fax of March 11th, 2013.
>
> We note we do not consider a request for a copy of a file extending over 20 years to be routine. *As noted previously, we have an established procedure re the release of such files following the review by our own counsel and removal of anything deemed privileged*. [page332]
>
> You state Lystra David is a beneficiary of this life insurance policy contract. We disagree, for the reasons stated previously.
> We confirm we are in possession of a notarized copy of a Will dated November 9th, 2010, drawn up in the Republic of Trinidad and Tobago. *We are unaware if there are any subsequent Wills. We are also unaware if this Will has been probated* in Ontario, in the Republic of Trinidad and Tobago, or in the United States of America where we understand Lystra David resides. In any event, we confirm *the Estate is not now nor has it ever been the designated beneficiary under the terms of this life insurance policy contract. We note there is nothing in this Will dealing with this policy*.

(Emphasis added)

[49] In a further e-mail dated March 15, 2013, Transamerica stated:

> As noted in our previous email of March 12, 2013, we too are in possession of a notarized copy of a Will dated November 9, 2010, drawn up in the Republic of Trinidad and Tobago. We again note we are unaware if there are any subsequent Wills, a point we consider important in view of the dynamics of this family situation. Also, *we are unaware if Lystra David has applied for a Certificate of Appointment of Estate Trustee with a Will*.
> As you know, this Certificate is a document issued by the Court that proves the authority of an Estate Trustee (formerly called an Executor) to administer the provisions of the deceased's Will. An application for this Certificate is filed at the Superior Court of Justice in the county or

district where the deceased had his permanent residence. If the deceased had no permanent residence in Ontario, the application is filed at the Superior Court of Justice where the deceased property is located.

(Emphasis added)

[50] It is reasonable for insurance companies to require probate to protect themselves from liability in the event they distribute under a false or invalid will. Section 47 of the *Trustee Act* gives the insurance companies a form of protection in requiring probate.[26] Therefore, Transamerica cannot be faulted for requiring probate.

[51] Section 47 of the *Trustee Act* states:

47(1) *Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, even though the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate or appointment*, including all payments made in good faith to or by the personal representative, *are as valid and effectual as if the same had been rightly granted or made*, but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to subsections (2) and (3), recover from the person who acted under the revoked grant or appointment any part of the estate remaining in the person's hands undistributed and, [page333] subject to the *Limitations Act, 2002*, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin, or as a spouse of the decedent or supposed decedent, the part so received or the value thereof.

(Emphasis added)

[52] Additionally, the *Estates Administration Act* states:

2(1) *All* real and *personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto*, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.[27]

[53] Transamerica was entitled to refuse to produce its file to Lystra based on its position that she was not, in fact, a beneficiary of Hollis David's life insurance policy, and because she had not produced a probated copy of Mr. David's will, naming her as estate trustee. Lystra has not tendered any authority supporting her entitlement to the file, in the absence of a probated will, documenting her authority to act on behalf of her father's estate, before she acquired rights to production of the file as a party to the present proceeding.

[54] In its capacity as Hollis David's life insurer, Transamerica owed Mr. David, even following his death, a duty of good faith arising out of its fiduciary obligations to its insured.[28] Apart from its fiduciary obligation, Transamerica also had an obligation to ensure that the information supplied by its insured was kept private. Justice Marlys Edwards, speaking for the Divisional Court, made this point in *Dervisholli v. Cervenak*, in 2015, in the context of the duty of an automobile insurer for its insured's tort liability to keep its insured's information confidential, even from defence counsel whom the insurer had retained to represent itself in relation to the plaintiff's claim for accident benefits.[29] The court relied, in this regard, on the decision of the Court of Appeal in *Jones v. Tsige*, in 2012, involving unauthorized access by a bank employee to the banking records of a customer.[30] [page334]

[55] In *Jones v. Tsige*, the Court of Appeal recognized the existence of a tort of breach of privacy, or "intrusion upon seclusion". Justice Sharpe, after reviewing the elements of breach of privacy cause of action, stated:

> These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded; *it is only intrusions into matters such as one's financial or health records*, sexual practices and orientation, employment, diary *or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive*.[31]

(Emphasis added)

[56] On this basis, the Divisional Court in *Dervisholli* concluded:

> *The only basis upon which State Farm [tort liability department] was entitled to access the plaintiff's accident benefit file contents was with the consent of the plaintiff or by court order*. That consent was never sought, nor was it ever provided. By disclosing this information to Reisler [the lawyer it had retained to examine the insured under oath pursuant to the Statutory Accident Benefits Schedule] without the consent of the plaintiff, State Farm placed Reisler in an irreconcilable position of conflict, and the only appropriate remedy is to remove Reisler as the solicitor of record for State Farm in these proceedings.[32]

(Emphasis added)

[57] Hollis David's life insurance file was private, containing financial and health information, and private correspondence. Transamerica therefore required the consent of his estate trustee or an order of the court to disclose them. It refused access to Lystra on the basis that she had not provided a probated will, since renamed a certificate of appointment of estate trustee with a will, pursuant to recent amendments to the Rules of Civil Procedure.

[58] The issue of whether a certificate of appointment of estate trustee is necessary to establish the authority of a person who applies for the release of confidential information was addressed by Steven Faughnan, as adjudicator for the Ontario Privacy Commissioner in the context of an appeal from a refusal of information under Ontario's *Freedom of Information and Protection of Privacy Act*.[33] Although the Act does not govern requests to life insurance companies for information, its reasoning is instructive regarding the approach that the court can be [page335] expected to take to an insurer's common law obligation to maintain the privacy of a deceased insured's information in the face of a request by a person, such as Lystra David, who relies on a copy of the deceased's will naming her as estate trustee.

[59] The adjudicator in PO-2354 under the *Freedom of Information and Protection of Privacy Act*,[34] dealt with an appeal by the beneficiary of an estate from a refusal by the Ministry of Health and Long-Term Care to provide a summary of health care providers who had rendered care to the deceased testator before his death.[35] The beneficiary submitted an authorization signed by the person named as estate trustee in the deceased's will. The beneficiary's lawyer stated if the request was denied, his client would have to go to court and a judge would most certainly release the records, but that the application would result in an unnecessary expense to the estate.

[60] The ministry had denied the beneficiary's request on the basis of the mandatory exemption in s. 21(1) of the Act (personal privacy). It took the position that the request failed to satisfy the requirements of s. 66(*a*) of the Act (exercise of rights of deceased), which grants to the "personal representative" of a deceased person certain rights to access information about the deceased person under the Act so long as the exercise of these rights "relates to the administration of the individual's estate".

Tab 183

CanLII

Raffaella de Rosa v. Wawanesa Mutual Insurance Company, 2017 ONFSCDRS 161 (CanLII)

Source:	Ontario Financial Services Commission - Dispute Resolution Services
Date:	2017-06-12
File number:	FSCO A14-007746
Citation:	Raffaella de Rosa v. Wawanesa Mutual Insurance Company, 2017 ONFSCDRS 161 (CanLII), <https://canlii.ca/t/jq9lj>, retrieved on 2026-01-18
Most recent unfavourable mention	Mansuri v Dominion of Canada General Insurance Company, 2022 CanLII 138547 (ON LAT) [...] However, the **de Rosa case is distinguishable** from the present one because the insurer was seeking to tender a medical report detailing confidential health information about one accident benefits claimant in an arbitration about the claimant's spouse, who had been in the same accident and had claimed accident benefits from [...]

Ontario **Financial Services Commission of Ontario** **Commission des services financiers de l'Ontario**

Neutral Citation: 2017 ONFSCDRS 161

FSCO A14-007746

BETWEEN:

RAFFAELLA DE ROSA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

DECISION ON A MOTION

Before:	Arbitrator Deborah Anschell
Heard:	In-person at ADR Chambers on March 16, 2017
Appearances:	Mr. A. Fabio Longo participated for Ms. Raffaella De Rosa Mr. J. Claude Blouin and Ms. Hue Nguyen participated for Wawanesa Mutual Insurance Company

Issues:

The Applicant, Ms. Raffaella De Rosa, was injured in a motor vehicle accident on May 1, 2013 ("the accident") and sought accident benefits from Wawanesa Mutual Insurance Company ("Wawanesa"), payable under the *Schedule*.[1] The parties were unable to resolve their disputes through Mediation, and the Applicant, through her representative, applied for Arbitration at the Financial Services Commission of Ontario ("FSCO") under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

Ms. De Rosa brought a Notice of Motion seeking the following relief:

1. An Order declaring that Blouin Dunn LLP is in a conflict of interest.
2. An Order declaring that Blouin Dunn LLP is precluded from representing Wawanesa in the within Arbitration.
3. An Order requiring Wawanesa to retain new counsel to represent them in the Arbitration.
4. An Order that the information of Ms. De Rosa and the non-party, Mr. Eugenio De Rosa ("Mr. De Rosa"), be kept separate and confidential.
5. In the alternative, an Order removing Blouin Dunn LLP as counsel for Wawanesa, as they exchanged confidential information of a non-party without consent and have expressed a manifest intention to use that information.
6. An Order abridging time for service of this Motion.
7. An Order that the costs of this Motion be payable by Wawanesa within 30 days on a substantial indemnity basis, as well as costs thrown away.

Result:

1. Blouin Dunn LLP is not in a conflict of interest.
2. Blouin Dunn LLP may continue to represent Wawanesa in the within Arbitration.
3. Wawanesa is not required to retain new counsel to represent them in the Arbitration.
4. Blouin Dunn is ordered to keep the information of Ms. De Rosa and the non-party, Mr. De Rosa, separate.
5. No medical information pertaining to the non-party, Mr. De Rosa, including the report of Dr. Jonathan Briskin dated September 13, 2013, shall be admissible in this Arbitration.
6. The time for service of this Motion is abridged.
7. Each party shall bear its own expenses with respect to this Motion.

EVIDENCE AND ANALYSIS:

APPLICANT'S EVIDENCE AND SUBMISSIONS

Affidavit of Kristy Kerwin

Ms. De Rosa relied on the Affidavit of Kristy Kerwin, dated March 15, 2017 (the "Kerwin Affidavit"). Kristy Kerwin is a lawyer with the law firm of Trianta Longo LLP, counsel for Ms. De Rosa.

The Kerwin Affidavit states that Ms. De Rosa was involved in the accident on May 1, 2013. As a result of the accident and the injuries she sustained, Ms. De Rosa made a claim for accident benefits to Wawanesa. Ms. De Rosa and her husband, Mr. De Rosa, had a single policy of automobile insurance with Wawanesa. Mr. De Rosa was also involved in the accident and made a separate claim for accident benefits.

On or about September 4, 2014, Ms. De Rosa filed an Application for Arbitration with FSCO. On or about October 9, 2014, Blouin Dunn LLP served A. Fabio Longo, Ms. De Rosa's counsel, with the Response by Insurer to an Application for Arbitration on behalf of Wawanesa.

On or about September 29, 2014, Mr. De Rosa filed an Application for Mediation with FSCO. Wawanesa retained the services of Blouin Dunn LLP to represent it with respect to Mr. De Rosa's Mediation. On October 23, 2014, Mr. George Kanellakos served Mr. De Rosa's counsel with an Insurer's Form B, Response to an Application for Mediation. On or about January 7, 2015, FSCO closed its file. Ms. Nguyen, counsel for Wawanesa, with respect to Ms. De Rosa's accident benefit claim, was not involved with Mr. De Rosa's accident benefit claim.

On January 18, 2016, the parties to Ms. De Rosa's case attended a Pre-Hearing at the offices of ADR Chambers. At no time during that meeting was an intention to rely upon documents contained in Mr. De Rosa's file ever raised.

On February 2, 2017, Ms. De Rosa's counsel advised Ms. Nguyen, counsel for Wawanesa, that they would be calling Mr. De Rosa as a witness at the Arbitration. Subsequently, however, Ms. De Rosa's counsel changed his mind and decided that he would not be calling Mr. De Rosa as a witness.

On March 6, 2017, Ms. Nguyen sent Ms. Kerwin an email requesting that Mr. De Rosa still be made available for cross-examination at the Hearing. Further, Ms. Nguyen attached a report from Dr. Jonathan Briskin (the "Briskin Report"), dated September 13, 2013, regarding Mr. De Rosa. Ms. Nguyen advised that it was her client's intention to rely upon that report at the Hearing.

On March 6, 2017, Ms. Kerwin advised Ms. Nguyen that she would need to summons Mr. De Rosa if Ms. Nguyen intended to call him as a witness at the Arbitration. Further, Ms. Kerwin stated that she would be objecting to the introduction of the Briskin Report, and anything in relation to Mr. De Rosa's accident benefits file.

Ms. Nguyen responded on March 6, 2017, advising that her firm represented Wawanesa in relation to Mr. De Rosa's claim for accident benefits, and therefore they had Mr. De Rosa's accident benefits file in their possession.

On March 7, 2017, Ms. Kerwin responded, disputing Wawanesa's use of Mr. De Rosa's accident benefits file without his consent to dispute Ms. De Rosa's claim to accident benefits.

On March 7, 2017, Mr. De Rosa was served with a summons to appear at Ms. De Rosa's Arbitration Hearing.

Ms. Kerwin deposed that the Briskin Report contains confidential information of a personal nature regarding Mr. De Rosa. Further, Mr. De Rosa did not authorize the disclosure of his file contents to Ms. Nguyen, and did not consent to her using materials from his file in the ongoing litigation relating to his wife's Arbitration.

From a review of the correspondence from Blouin Dunn LLP and Wawanesa, at no point did Wawanesa or its counsel request documentation regarding Mr. De Rosa for the purposes of defending or litigating Ms. De Rosa's claim for accident benefits. Furthermore, neither Wawanesa nor its counsel requested permission to use information obtained in adjusting Mr. De Rosa's accident benefits claim to defend or litigate a claim from Ms. De Rosa.

Submissions of Mr. Longo, Counsel for the Applicant

Mr. Longo submitted that Mr. De Rosa never gave consent to the use of the Briskin Report for this Arbitration. The report was provided to Wawanesa for the purpose of adjusting Mr. De Rosa's claim for accident benefits. Blouin Dunn LLP, on behalf of Wawanesa, at no time sought a Motion to access Mr. De Rosa's accident benefits file for the purpose of using it in this Arbitration. Furthermore, Mr. De Rosa formally advised Wawanesa that he did not consent to the access or use of his medical information for any purpose other than the reason it was collected. Blouin Dunn LLP made no pretense of erecting a firewall or maintaining a code of silence between the accident benefit files in defending Mr. De Rosa's claim.

Mr. Longo submitted that Wawanesa has an obligation to maintain the confidentiality of information of its Insured, and to ensure that information supplied by its Insured is kept private.[2]

Further, the duty of confidentiality is also mandated by federal legislation. Mr. Longo submitted that Wawanesa is bound by the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") that prohibits the disclosure of a person's personal information without the knowledge or consent of that person, unless, amongst other things, that disclosure is required to comply with an Order made by a court, or person with jurisdiction to compel production of that information.[3]

In addition, Wawanesa has posted its privacy policies online to recognize the importance of protection from disclosure of personal information. Wawanesa's privacy policy states that information will not be used or disclosed for other purposes except with the consent of the customer or as required by law.

Mr. Longo submitted that Wawanesa had a duty to act in good faith; separate from its obligation to compensate it's Insured for losses covered by the insurance policy.

Mr. Longo relied on the *Dervisholli and Cervenak and State Farm* case,[4] where the Divisional Court found that the only basis on which a non-party was entitled to access the contents of an accident benefits file was with the consent of the party or by Court Order.

Mr. Longo also relied on *Jones v. Tsige*,[5] where the Court of Appeal characterized invasions of personal privacy into matters such as one's health records to be highly offensive.

Further, Mr. Longo referenced Director Delegate Blackman's decision in *Mujku and State Farm*.[6] In that decision, Director Delegate Blackman found that a production Order for the accident benefits file for the claimant's husband must follow rules of service under the *Dispute Resolution Practice Code*.

Mr. Longo concluded that Wawanesa had a duty to protect the confidential information of Mr. De Rosa in addition to its duty of good faith. Wawanesa is only permitted to use this information for the intended purpose of adjusting Mr. De Rosa's claim.

Mr. Longo submitted that Ms. De Rosa would be prejudiced if the Briskin Report is admitted. She has not had access to this report prior to the 30-day deadline, and would be unable to call responding evidence. Pursuant to Rule 39.1, all documents to be introduced at a Hearing by either party must be served on the other party at least 30 days before the first day of the Hearing.[7] A party can only serve a document or report outside of the 30 days in extraordinary circumstances to justify an exception.

Mr. Longo argued that even if the report is excluded, Blouin Dunn LLP must be removed as counsel for Wawanesa. Neither Ms. De Rosa nor her counsel has any indications as to the extent that Blouin Dunn LLP accessed Mr. De Rosa's accident benefits file.

Mr. Longo also submitted that the conduct of Wawanesa's counsel has led to a conflict of interest. Counsel for Wawanesa received confidential information for the accident benefits claim of Mr. De Rosa, relevant to the accident benefits of Ms. De Rosa. Wawanesa's counsel must be removed as counsel of record due to the violation of Mr. De Rosa's privacy interests, and their irreconcilable conflict due to the unlawful receipt and use of Mr. De Rosa's information.

INSURER'S EVIDENCE AND SUBMISSIONS

Affidavit of Hue Nguyen

Wawanesa relied on the Affidavit of Hue Nguyen, sworn March 15, 2017 (the "Nguyen Affidavit"). Ms. Nguyen swore that she is the lawyer with carriage of this file. In her Affidavit, she swore that on May 1, 2013, Ms. De Rosa and Mr. De Rosa were involved in a motor vehicle accident. Mr. De Rosa was driving, and Ms. De Rosa was a front-seat passenger.

On May 7, 2013, Wawanesa received a call to inform it about the accident. According to the adjuster's log notes, it appeared that Mr. De Rosa's son, Mr. Alberto De Rosa, spoke on his parents' behalf. On June 19, 2013, Mr. Longo, then with Neinstein & Associates, wrote to Wawanesa to advise that he had been retained to represent Mr. and Ms. De Rosa relating to the accident. Both Mr. and Ms. De Rosa submitted Applications for Accident Benefits on July 10, 2013.

On April 23, 2014, Ms. De Rosa submitted an Application for Mediation. The Report of Mediator was issued on July 31, 2014. On September 4, 2014, Mr. Longo filed an Application for Arbitration. On October 6, 2014, Wawanesa retained Blouin Dunn LLP to represent it in the Arbitration. On October 9, 2014, Mr. George Kanellakos of Blouin Dunn LLP filed the Response by Insurer to an Application for Arbitration. On September 29, 2014, Mr. Longo filed a second Application for Mediation on behalf of Ms. De Rosa. On October 22, 2014, Mr. Kanellakos filed the Response to an Application for Mediation. This Arbitration was scheduled to commence on March 14, 2017.

With respect to Mr. De Rosa, he submitted an Application for Mediation on or about September 29, 2014. On October 22, 2014, Mr. Kanellakos filed the Response to an Application for Mediation. By e-mail, dated January 7, 2015, FSCO wrote to Mr. Longo and Mr. Kanellakos to advise that Mr. De Rosa's file had been closed. No Mediation took place with respect to Mr. De Rosa's claim.

In January 2015, Mr. Kanellakos internally transferred the files relating to both Mr. and Ms. De Rosa to Mr. Claude Blouin of Blouin Dunn LLP. Mr. Blouin subsequently requested that Ms. Nguyen maintain the day-to-day carriage of both claims.

The Pre-Hearing with respect to Ms. De Rosa's matter took place on January 12, 2016. In the meantime, Mr. Longo wrote to Mr. Blouin on several occasions, including in August, September, and October 2015, with respect to settling Mr. De Rosa's claim. At all times, both Mr. Longo and Ms. Kerwin were aware that Blouin Dunn LLP represented Wawanesa in the defence of the accident benefits claims made by both Mr. and Ms. De Rosa.

According to the Nguyen Affidavit, Ms. De Rosa's claim for Non-Earner Benefits is one of the main issues in dispute in this Arbitration. In a witness list provided on February 2, 2017, Ms. Kerwin advised that she would be calling Mr. De Rosa as a witness. Similar information was provided by Ms. Kerwin on February 14, 2017.

As noted, in a March 6, 2017 email, Ms. Kerwin provided a schedule of witnesses, omitting Mr. De Rosa. Ms. Nguyen wrote to Ms. Kerwin advising that she wanted Mr. De Rosa available for cross-examination. Further, she attached the Briskin Report and advised of her intention to rely on that report at this Arbitration.

Ms. Kerwin objected to the introduction of the Briskin Report, and suggested that Wawanesa summons Mr. De Rosa if it required his evidence at the Hearing.

The first time that Mr. Longo advised Ms. Nguyen that he would be seeking an Order removing Blouin Dunn LLP as counsel of record was on March 14, 2017 at approximately 9:55 a.m., immediately before the Arbitration Hearing was to commence.

Submissions of Mr. Blouin, Counsel for the Insurer

Mr. Blouin argued that Wawanesa's decision to retain Blouin Dunn LLP to represent Wawanesa in the claims for accident benefits made by both Mr. De Rosa and Ms. De Rosa did not create a conflict of interest. First, in contrast to cases cited by Ms. De Rosa's counsel, neither Mr. De Rosa nor Ms. De Rosa's files have been disclosed in separate civil proceedings to which they are parties in breach of their privacy interests. Second, Blouin Dunn LLP never acted on behalf of Mr. De Rosa or Ms. De Rosa, and therefore they are owed no duty of confidentiality arising from a past or present solicitor-client relationship.

Mr. Blouin argued that there is no duty to keep accident benefit files of different parties segregated. Further, in accordance with the Court's decision in *Economical Insurance Company v. Fairview Assessment Centre Inc.*,[8] the disclosure of parts of Mr. De Rosa's accident benefits file to Wawanesa's legal counsel was authorized by Mr. De Rosa's signed consent when he submitted a claim for accident benefits.

Mr. Blouin submitted that there is no conflict of interest when the same law firm represents the same party. At no time did Blouin Dunn LLP act for and against Wawanesa. There is no risk that the confidential information obtained will prejudice Wawanesa, as it is favourable to its defence.

Mr. Blouin argued that a contract of insurance is founded on a duty of utmost good faith. But the duty of good faith is a mutual duty. An Insured must be honest and make full disclosure in the claims process. Consistent with the duty of utmost good faith, neither an Insured's privacy interest in their accident benefits file nor an Insurer's duty of confidentiality is absolute. In this case, both Ms. De Rosa and Mr. De Rosa provided their consent to disclosure of their personal information for purposes related to the claims process, and broader policy considerations such as the prevention and detection of fraud, when they signed their separate Applications for Accident Benefits, dated July 10, 2013.

Mr. Blouin submitted that in *Economical v. Fairview*, the Ontario Superior Court found that the consent provided in an Application for Accident Benefits is "sufficiently broad" to consent to the use of the medical documentation of claimants in a separate civil proceeding without the claimant's knowledge or express consent.[9]

ANALYSIS

I agree with Mr. Longo's submission that Mr. De Rosa did not consent to the use of the Briskin Report in this Arbitration. The report was provided to Wawanesa for the purpose of adjusting Mr. De Rosa's claim for benefits, and I cannot find that his signed authorization permitted the use of the Briskin Report to defend against Ms. De Rosa's claim for accident benefits.

The authorization speaks to the investigation of Mr. De Rosa's claim, obtaining information relating to his claim, recovering payments from other Insurers for amounts paid in connection with his claim, identifying and analyzing goods and services provided by health care providers, preventing fraud, compiling statistics, and assessing risks. In my view, the purposes listed do not extend to using the Briskin Report to defend Ms. De Rosa's claim.

Furthermore, by the time this issue came before me, Mr. De Rosa had made it clear through his counsel that he did not consent to the access or use of his medical information for any purpose other than the purpose for which it was collected. In this sense, I agree with Mr. Longo that consent is not

irrevocable and can be withdrawn. As noted by Mr. Longo, Mr. De Rosa explicitly withdrew any previous implied consent to Wawanesa's use of his personal information for the purposes of this Arbitration by Ms. Kerwin's email, dated March 6, 2017.

Furthermore, at no time prior to the hearing of this Motion were allegations of fraud made with respect to either Mr. or Ms. De Rosa. I am therefore not prepared to find that fraud exempts Wawanesa from the application of *PIPEDA*. I am also not prepared to find that fraud allegations somehow make the Briskin Report admissible. As noted by Mr. Longo, the fraud issue had never been raised previously, and no supporting information was provided to substantiate fraud.

Mr. Longo also relied on Wawanesa's privacy policy to argue that the Briskin Report should not be admitted at the Arbitration. That Policy provides in part that: "Personal information shall not be used or disclosed for purposes other than those for which the information was collected, except with the consent of the Customer or as required by law".[10]

On the basis of this Policy, and the fact that Mr. De Rosa has objected strongly to the introduction of the Briskin Report, I find that it would be inappropriate to introduce this report at the Arbitration. Wawanesa did not have Mr. De Rosa's consent or a Court Order to obtain the report. On this basis, I find that the Briskin Report is inadmissible in these Arbitration proceedings. It could be admitted at a later date if Mr. De Rosa provides his consent or if a Court Order is obtained.

This leaves the issue of whether or not Blouin Dunn LLP should be removed as Wawanesa's counsel on the basis of conflict of interest. Mr. Longo relies on the *Dervisholli* case[11] to support his position that the law firm should be removed. In that case, Mr. Dervisholli was successful at removing the defendant's counsel notwithstanding the fact that he was never formally a client of that firm. The Court found that the Insurer's duty went beyond good faith, and it also has an obligation to ensure that the information supplied by its Insured is kept private.

In *Dervisholli*, Reisler Franklin was hired by State Farm in relation to Mr. Dervisholli's accident benefits claim. Mr. Dervisholli also commenced a tort lawsuit and named State Farm with respect to his uninsured coverage. State Farm hired Reisler Franklin to defend both the third-party claim and Mr. Dervisholli's claim to accident benefits.

The Divisional Court considered at length the duty of an Insurer acting in a dual capacity as both the accident benefit Insurer and the tort Insurer. The Court states as follows at paragraph 58:

> State Farm had an obligation to maintain the confidentiality of the plaintiff's accident benefit file. State Farm may very well be one distinct corporate entity and, as such, has possession of both information found within the accident benefit file and the tort file under one roof. Nonetheless, the insurance industry has recognized and implemented the principle of a firewall between the accident benefit department and the tort department within an insurance

> company. While the bodily injury adjuster for State Farm might very well be tempted to take a surreptitious look at the accident benefit file, such conduct is not condoned within the insurance industry, as reflected in the Bulletin. State Farm should not have retained Reisler to defend itself both with respect to the claims by the plaintiff for statutory accident benefits as well as in the plaintiff's tort action. The failure to separate the interests of State Farm on the tort and accident benefit side, by retaining the same law firm and disclosing confidential information to that law firm, resulted in a disqualifying conflict of interest as set forth in MacDonald Estate v. Martin, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235.

The Divisional Court seemed to be influenced a great deal by the practice of the insurance industry to implement a firewall between the accident benefit department and the tort department.

However, similar evidence was not provided in this matter with respect to any practice in the insurance industry regarding an Insurer defending two related accident benefits claims, arising from the same motor vehicle accident.

In this sense, I agree with Mr. Blouin. *MacDonald Estate v. Martin*[12] dealt with whether a law firm representing the respondent should be disqualified where one of its associates used to work at the appellant's law firm. The Court ruled in favour of disqualification, finding that confidential information could potentially be disclosed, applying a two-part test:

> 1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
> 2) Is there a risk that it will be used to the prejudice of the client?

But this authority has not been applied in the accident benefits context, where a law firm defends an Insurer from two related accident benefit claimants. As noted by Mr. Blouin, "at no time did Blouin Dunn LLP act for and against Wawanesa. There is no risk that the confidential information obtained will cause prejudice to Wawanesa as it is entirely favourable to its defence."[13]

I am not satisfied that Blouin Dunn LLP is in a conflict of interest. I do not find that the jurisprudence goes so far as to find a conflict of interest where one firm represents an Insurer in defending two accident benefit claims arising out of the same motor vehicle accident. Accordingly, I am not prepared to declare that Blouin Dunn LLP is precluded from representing Wawanesa, nor am I prepared to order that Wawanesa retain new counsel to represent them in the Arbitration.

EXPENSES:

As the parties achieved mixed success with respect to this Motion, I am directing that each party shall bear its own expenses.

June 12, 2017

Deborah Anschell
Arbitrator

Date

Ontario Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2017 ONFSCDRS 161

FSCO A14-007746

BETWEEN:

RAFFAELLA DE ROSA

Applicant

and

WAWANESA MUTUAL INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c. I.8, as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, 2014, and Ontario *Regulation 664*, as amended, it is ordered that:

1. Blouin Dunn LLP is not in a conflict of interest.
2. Blouin Dunn LLP may continue to represent Wawanesa in the within Arbitration.
3. Wawanesa is not required to retain new counsel to represent it in the Arbitration.
4. Blouin Dunn LLP is ordered to keep the information of Ms. De Rosa and the non-party separate.
5. No medical information pertaining to the non-party, including the report of Dr. Jonathan Briskin dated September 13, 2013, shall be admissible in this Arbitration.
6. The time for service of this Motion is abridged.
7. Each party shall bear their own expenses with respect to this Motion.

June 12, 2017

Deborah Anschell
Arbitrator

Date

[1] *The Statutory Accident Benefits Schedule - Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

[2] *Dervisholli and Cervenak and State Farm*, 2015 ONSC 2286 (Div. Ct.), at pars. 43, 45.

[3] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

[4] *Supra*, note 2

[5] 2012 ONCA 32.

[6] *Mujku and State Farm Mutual Automobile Insurance Company*, FSCO Appeal P13-00008.

[7] *Dispute Resolution Practice Code*, Rules 39.2 and 39.3.

[8] 2016 ONSC 3169, at paras. 6-9.

[9] *Economical v. Fairview*, *supra,* at para. 6.

[10] Wawanesa Insurance, "Personal Information Protection Policy" Online: http://www.wawanesa.com/canada/pip/pip-personal.html, Section 5.

[11] *Supra*.

[12] *MacDonald Estate v. Martin, supra,* at p. 1260

[13] Wawanesa's Statement of Law, at p. 4, para. 7.

Tab 184

CanLII

R. v. Davis, 1999 CanLII 638 (SCC), [1999] 3 SCR 759

Source:	Supreme Court of Canada
Date:	1999-11-25
File number:	26441
Other citations:	182 Nfld & PEIR 78 — 179 DLR (4th) 385 — 248 NR 44 — 554 APR 78 — 139 CCC (3d) 193 — 29 CR (5th) 1 — 44 WCB (2d) 119 — EYB 1999-15271 — [1999] SCJ No 67 (QL) — [1999] ACS no 67 — 99 DTC 5841
Citation:	R. v. Davis, 1999 CanLII 638 (SCC), [1999] 3 SCR 759, <https://canlii.ca/t/1fql7>, retrieved on 2026-01-18

R. *v.* Davis, [1999] 3 S.C.R. 759

Glenn Norman Davis *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Davis

File No.: 26441.

1999: February 26; 1999: November 25.

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

on appeal from the court of appeal for newfoundland

Criminal law – Extortion – Extortion of sexual favours – Complainants persuaded to pose nude or semi-nude for accused who misrepresented himself as having connections with modelling agencies – Extortion of sexual favours by threatened exposure of compromising photographs – Whether extortion offence in Criminal Code includes extortion of sexual favours – Scope of word "anything" in extortion provision of Criminal Code – Criminal Code, R.S.C. 1970, c. C-34, s. 305(1).

Appeals – Supreme Court of Canada – Appeals as of right – Kienapple principle – Accused obtaining sexual favours from complainant by threatened exposure of compromising photographs – Supreme Court upholding both extortion and sexual assault convictions – Kienapple issue not raised in dissenting judgment in Court of Appeal – Whether Supreme Court has jurisdiction to address Kienapple issue – Supreme Court Act, R.S.C., 1985, c. S-26, s. 691(1)(a).

Criminal law – Kienapple principle – Extortion – Sexual assaults – Accused obtaining sexual favours from complainant by threatened exposure of compromising photographs – Whether principle against multiple convictions arising from same delict precluded convictions for both extortion and sexual assault.

Criminal law – Sexual assaults – Defence of honest but mistaken belief in consent – Whether trial judge failed to consider defence of honest but mistaken belief in consent – If so, whether there was air of reality to defence.

Criminal law – Sexual assaults – Reasonable doubt – Whether trial judge erred in applying principle of reasonable doubt – Whether trial judge's comment that he was "not convinced" that complainants consented to sexual activity reversed burden of proof.

Between 1984 and 1991, the accused, holding himself out as a photographer with connections to a modelling agency, invited the complainants, who ranged in age from 15 to 20, to pose for a portfolio of photographs with a view to initiating a modelling career. He persuaded all of them to pose nude or semi-nude, and some of them were photographed in bondage. The accused allegedly sexually assaulted the complainants D., K., S. and R. while they were posing in various stages of undress or were tied up and completely vulnerable. In the cases of B. and D., it was alleged that the accused threatened to send revealing photographs to either their parents or to a pornographic magazine if they did not agree to perform sexual favours for him. While D. ignored the accused's threats, B. acceded to them and performed sexual favours over the course of a two- to three-month period in exchange for the negatives. In her testimony, B. indicated that during that period there were at least two incidents in which the accused persisted in sexual activity after she had communicated her lack of consent. The accused testified that any sexual activity between B. and himself was consensual and that the photography sessions began after they had already been involved in a sexual relationship. He thus had no reason to threaten to expose the complainant, and never did so. In the case of D., the accused admitted taking her photos, but denied that any semi-nude photos were taken or that any sexual impropriety had occurred. He also denied trying to extort sexual favours from her, as there were no photographs with which to threaten her. With respect to K., S. and R., the accused claimed that any sexual contact was consensual. The trial judge convicted the accused of two counts of extortion against B. and D. and of five counts of sexual assault against the five complainants. On appeal, the majority of the Court of Appeal upheld the convictions.

Held: The appeal should be dismissed.

It is a crime to extort sexual favours. Although the extortion provision is located in the Part of the *Criminal Code* entitled "Offences Against Rights of Property", the word "anything" in the provision is not limited to things of a proprietary or pecuniary nature. Headings will never

be determinative of legislative intention, but are merely one factor to be taken into account. In this case, the extortion provision's location in the *Criminal Code* is outweighed by competing considerations in determining the scope of "anything". First, the ordinary meaning of "anything" in its immediate context is clear and supports a broad interpretation, which would include sexual favours. Second, an interpretation of "anything" that includes sexual favours is suggested by the purpose and nature of the offence of extortion. That purpose, which can be directly inferred from the wording of the provision, is that extortion criminalizes intimidation and interference with freedom of choice. Given this objective, it would be unreasonable to criminalize extortion of money or property, but not extortion of sexual favours. Third, Parliament could have easily limited the scope of the word "anything" to things of a proprietary or pecuniary nature. Finally, a number of Canadian courts have found that "anything" includes sexual favours.

It is unnecessary in this case to decide whether there is consent to sexual activity if it is obtained by threatened exposure of nude photographs. The accused's conviction of sexually assaulting B. may be affirmed on the basis of an independent sexual assault, wholly apart from his extortionate conduct. B. testified that, during the two- to three-month period in which she went to the accused's apartment and had sexual intercourse with him in exchange for the negatives, there were at least two incidents in which the accused persisted in sexual activity after she had unambiguously communicated her lack of consent. The trial judge found B. to be a credible witness and this Court is satisfied that the events unfolded as the complainant described them. This evidence supports a conviction of sexual assault.

Even though this is an appeal as of right pursuant to s. 691(1)(*a*) of the *Criminal Code* and the dissenting judge in the Court of Appeal dissented only on the extortion and sexual assault convictions in relation to B., the Court has jurisdiction to address the application of *Kienapple* in the case of B. The Court's jurisdiction over both the extortion and sexual assault convictions must, of necessity, include the jurisdiction to make whatever order that is required to dispose of these grounds of appeal. The Court cannot make an order that would violate established principles or rules of law. In the case of B., there is a possibility that in affirming the convictions without

considering the potential application of *Kienapple* the Court might be convicting the accused of multiple offences arising from the same delict. Such a disposition would be illegal, as it would contravene an established legal principle. Here, there is not a sufficient factual nexus between the extortion and sexual assault convictions to trigger the application of *Kienapple* in the case of B. The convictions arise out of different factual transactions. Any one of the occasions over the two- to three-month period in which the accused engaged in sexual activity with B. is sufficient to ground the extortion conviction. By contrast, the sexual assault conviction arises from one or two specific occasions in which B. explicitly communicated her lack of consent to sexual contact.

In the case of K., assuming, without deciding, that the trial judge failed to consider the defence of honest but mistaken belief in consent, a review of the evidence leads to the conclusion that there was no air of reality to the defence. Even if the testimony of the accused is completely accepted, it discloses that, at a minimum, he was wilfully blind as to whether K. consented to the fondling of her breasts and vagina. There is no suggestion by the accused that K. posed nude for any reason other than to further her modelling career. Nor was there any evidence that she invited him to touch her prior to his fondling of her breasts and vagina.

The trial judge did not err in his application of the principle of reasonable doubt. He clearly directed himself properly and his judgment reveals a thorough review of the evidence. In the cases of S. and R., the trial judge's remarks that he was "not convinced" that the complainants consented to the sexual activity in question suggest, when read out of context, that he may have reversed the burden of proof. These remarks, however, when viewed in the context of the entire judgment, were effectively neutralized by other passages.

Cases Cited

Applied: *R. v. Bird* (1969), 1969 CanLII 961 (BC CA), 9 C.R.N.S. 1; **considered:** *Kienapple v. The Queen*, 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729; **referred to:** *R. v. Coughlan* (1992), 1992 CanLII 7124 (NL CA), 100 Nfld. & P.E.I.R. 326; *R. v. Caskenette* (1993), 1993

CanLII 6879 (BC CA), 80 C.C.C. (3d) 439; *R. v. Guerrero* (1988), 1988 CanLII 9868 (ON CA), 64 C.R. (3d) 65; *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *R. v. McCraw*, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72; *R. v. Clemente*, 1994 CanLII 49 (SCC), [1994] 2 S.C.R. 758; *R. v. Vasil*, 1981 CanLII 46 (SCC), [1981] 1 S.C.R. 469; *Paul v. The Queen*, 1982 CanLII 179 (SCC), [1982] 1 S.C.R. 621; *R. v. Natarelli*, 1967 CanLII 11 (SCC), [1967] S.C.R. 539; *Attorney-General of Canada v. Jackson*, 1946 CanLII 29 (SCC), [1946] S.C.R. 489; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357; *Skoke-Graham v. The Queen*, 1985 CanLII 60 (SCC), [1985] 1 S.C.R. 106; *R. v. Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 S.C.R. 167; *R. v. D.K.P. (No. 1)* (1991), 11 W.A.C. 302; *R. v. Bloch-Hansen* (1977), 1977 CanLII 2110 (SK KB), 38 C.C.C. (2d) 143; *R. v. Prince*, 1986 CanLII 40 (SCC), [1986] 2 S.C.R. 480; *R. v. Ewanchuk*, 1999 CanLII 711 (SCC), [1999] 1 S.C.R. 330; *Pappajohn v. The Queen*, 1980 CanLII 13 (SCC), [1980] 2 S.C.R. 120; *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595; *R. v. Park*, 1995 CanLII 104 (SCC), [1995] 2 S.C.R. 836; *R. v. Bulmer*, 1987 CanLII 56 (SCC), [1987] 1 S.C.R. 782; *R. v. Esau*, 1997 CanLII 312 (SCC), [1997] 2 S.C.R. 777; *Sansregret v. The Queen*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1906, c. 146, ss. 450, 451, 452, 453, 454.

Criminal Code, R.S.C. 1927, c. 36.

Criminal Code, R.S.C. 1970, c. C-34, ss. 155, 246.1(1)(*a*) [ad. 1980-81-82-83, c. 125, s. 19], 305(1).

Criminal Code, R.S.C., 1985, c. C-46, ss. 265(3)(*b*), 271(1)(*a*), 273.2 [ad. 1992, c. 38, s. 1], 346(1) [rep. & sub. c. 27 (1st Supp.), s. 46], 691(1)(*a*) [am. 1991, c. 43, s. 9 (Sch., item 9)].

Criminal Code, S.C. 1953-54, c. 51, s. 291.

Criminal Code, 1892, S.C. 1892, c. 29, ss. 402, 403, 404, 405, 406.

Theft Act 1968 (U.K.), 1968, c. 60, ss. 21, 34.

Tab 185

CanLII

R. v. Alexander, 2005 CanLII 32566 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2005-09-14
File number:	C40654; C41042
Other citations:	202 OAC 54 — 206 CCC (3d) 233 — 32 CR (6th) 159 — [2005] CarswellOnt 4269 — [2005] OJ No 3777 (QL)
Citation:	R. v. Alexander, 2005 CanLII 32566 (ON CA), <https://canlii.ca/t/1llhs>, retrieved on 2026-01-18

DATE: 20050914
DOCKET: C40654,C41042

COURT OF APPEAL FOR ONTARIO

DOHERTY, FELDMAN and LAFORME JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	))	**Patrick McCann and Gregory Lafontaine**
Respondent	)	**for the appellant Alexander**
	)	
- and -	)	**Joseph Di Luca**
	)	**for the appellant Blake**
HARRY ALEXANDER and NORRIS B LAKE	))	
	)	**Roger A. Pinnock**
	)	**for the respondent**
Appellants	)	
	)	
	)	
	)	
	)	**Heard: June 29, 2005**

On appeal from the convictions entered by Justice G. Valin of the Superior Court of Justice, sitting without a jury, on July 3, 2003 and from the sentence imposed on

[72] The broad prohibition in s. 346(1) is tempered by the availability of the defence of "reasonable justification or excuse".[2] That defence and similarly-phrased defences appear in many of the offence-creating provisions of the *Criminal Code* (e.g., ss. 69, 254(5), 349, 351, 450, 452). A reasonable justification or excuse refers to some matter that is extraneous to the existence of the essential elements of the offence that justifies or excuses actions that would otherwise constitute the crime. An accused who relies on a "reasonable justification or excuse" admits that he committed the prohibited act with the requisite culpable mental state, but argues that the circumstances in which he did so justify or at least excuse what he did: *R. v. Taraschuk* (1975), 1975 CanLII 37 (SCC), 25 C.C.C. (2d) 108 at 110 (S.C.C.); *R. v. Holmes* (1988), 1988 CanLII 84 (SCC), 41 C.C.C. (3d) 497 at 520-21 (S.C.C.); *R. v. Santeramo* (1976), 1976 CanLII 1456 (ON CA), 32 C.C.C. (2d) 35 at 44 (Ont. C.A.); *R. v. Moser* (1992), 1992 CanLII 2839 (ON CA), 71 C.C.C. (3d) 165, per Doherty J.A. (concurring) at 178-79 (Ont. C.A.); J.C. Smith, *Justification and Excuse in the Criminal Law* (London: Stevens & Sons, 1989) at 47-50.

[73] It is impossible to list the circumstances that could give rise to a successful claim of reasonable justification or excuse to an extortion charge. The defence is both fact and offence specific: see E. Colvin, *Principles of Criminal Law*, 2nd ed. (Toronto: Carswell, 1991) at 199. For example, what may constitute a reasonable excuse for possession of counterfeit money would probably have no relevance to a claim of reasonable excuse in response to a charge of possession of house-breaking instruments.

[74] Two general statements can, however, be made. First, although I refer to the defence of "reasonable justification or excuse", the ultimate burden of persuasion is on the Crown to demonstrate beyond a reasonable doubt the absence of any reasonable justification or excuse: *R. v. Natarelli and Volpe*, 1967 CanLII 11 (SCC), [1968] 1 C.C.C. 154 at 161 (S.C.C.). If on the totality of the evidence there is an air of reality to the claim of reasonable justification or excuse, the trier of fact must determine whether the Crown has negated that claim beyond a reasonable doubt. Second, the use of the qualifying word "reasonable" connotes a partially objective inquiry when an accused advances a reasonable justification or excuse defence. The ultimate question is not whether the particular accused believed his threats were reasonably justifiable or excusable, but whether a reasonable person in the accused's position would have formed that view.[3]

[75] *Natarelli*, *supra*, is the leading authority on the meaning of the phrase "without reasonable justification or excuse" in s. 346. In that case, the accused threatened the victim and members of his family with death or bodily injury unless the victim paid money to the accused or gave certain shares to the accused. There was evidence that the money or shares demanded by the accused were legitimately owed to them, or that at least the accused believed that the money or shares were owed.

[76] A jury acquitted the accused. This court dismissed the Crown appeals, holding that a person who believed he was legally entitled to the thing demanded could not be convicted of extortion. The Supreme Court of Canada reversed. Cartwright J., for a unanimous court, rejected the contention that a genuine claim to the thing demanded precluded a conviction for extortion. He said at p. 160:

> To constitute a defence, there must be reasonable justification or excuse not only for the demand but for the making of the threats or menaces by which the accused sought to compel compliance with the demand.
>
> …
>
> When it is proved that threats have been made for the making of which there could be no justification or excuse, that the threats were made with intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime defined in s. 291 [now s. 346] is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them [emphasis added].

[77] Cartwright J., at p. 161, emphasized that the Crown could establish culpability on a charge of extortion by proving beyond a reasonable doubt either that the demand was not reasonably justifiable or excusable, or that the threat used was not reasonably justifiable or excusable. Cartwright J. further observed that an intention to kill or cause grievous bodily harm could never be reasonably justified. Consequently, if the jury on the retrial was satisfied that the accused had made the threats alleged against them, they were guilty of extortion regardless of whether they were owed the money or shares demanded by them.

[78] It is true, as counsel for Alexander contends, that *Natarelli* is distinguishable from this case in that the threats allegedly used to collect the debt in that case were clearly unlawful. I cannot, however, find any support in *Natarelli* for equating all lawful threats with the reasonable justification or excuse defence. *Natarelli* does not suggest that the existence of a reasonable justification or excuse for a threat made to collect a lawful debt turns solely on the lawfulness of the conduct constituting the threat. To the contrary, Cartwright J. explicitly states at p. 161 that the entire course of the accused's conduct, including both the threat and the demand, must be considered in deciding whether the Crown has proved that the threat used to collect a legitimate debt was made without reasonable justification or excuse. The very same threat could be reasonably justified when made in connection with one demand and in one set of circumstances, and not reasonably justified when made in other circumstances or in connection with a different demand.

[79] A distinction between threats used to collect legitimate debts that is based exclusively on whether the conduct constituting the threat is in and of itself unlawful would undermine the rationale for the crime of extortion. The potential for a threat to overwhelm a person's free choice and compel that person to act in the manner dictated by the threat is not necessarily tied to the lawfulness of the conduct constituting the threat. Some threats, while not *per se* unlawful (e.g., the threat to disclose some despicable act from one's distant past), will have a much more coercive effect than a threat to do something which is in and of itself unlawful (e.g., a threat to trespass on property).

[80] If Alexander's interpretation of a reasonable justification or excuse defence is accepted, the extortion prohibition would be rendered ineffective in circumstances that have historically been regarded as typical examples of blackmail. For example, in *R. v. McClure* (1957), 1957 CanLII 485 (MB CA), 118 C.C.C. 192 (Man. C.A.), the accused threatened to sell a story to the newspaper providing the details of the victim's recent criminal conviction on a charge of disorderly conduct unless the victim paid the accused $200.00. Publication of the details surrounding the conviction had the potential to seriously harm the victim's standing in the community and his employment. Applying the appellant's analysis, the offence of extortion would not be made out because the accused was legally entitled to sell the story to the newspaper and a demand for payment in lieu of publication is not *per se* unlawful. However, the threat and the demand taken together constitute powerful intimidation calculated to overcome the free choice of even the strongest person.

[81] The Manitoba Court of Appeal, in upholding the accused's conviction on extortion, approved the following jury instruction relating to "reasonable justification and excuse" at p. 198:

> … The question is simply whether on all the facts the accused had some reason for his demand of money. Supposing it was not unreasonable to threaten to publish something, was it reasonable to demand money as the price for his refraining to do so? That is a question for you [the jury] to determine, whether he had any reasonable justification for demanding this money.[4]

[82] A review of the statutory provisions governing blackmail in England, Australia and New Zealand lends support to the Crown's contention that demands can be unjustified even if not *per se* unlawful and even if made to collect a legitimate debt. While the provisions in the other jurisdictions are worded differently from s. 346(1) and offer little assistance in interpreting s. 346(1), they all appear to contemplate convictions where an accused who is owed a debt uses threats that, while not necessarily unlawful, are regarded as "improper" or "unwarranted" in an effort to collect the debt.[5]

[83] I think the phrase "reasonable justification or excuse", used in the context of the crime of extortion where the accused seeks to collect a debt, exists to distinguish between situations where individuals use what could reasonably be regarded as warranted or legitimate – albeit perhaps harsh – tactics to collect debts and situations where the means used to attempt to collect those debts goes beyond what could reasonably be regarded as warranted or legitimate. The "reasonable justification or excuse" defence seeks to draw the line, for criminal purposes, between hard bargaining and criminal blackmail. That line may be difficult to draw in any given case. Like any factual issue in a criminal trial, the dividing line between guilt and innocence will turn on the trier of fact's assessment of the evidence and the application of the burden of proof to that assessment. In this regard, the defence of "reasonable justification or excuse" to an extortion charge is no more uncertain than other contextual defences that depend in part at least on an assessment of the reasonableness of the conduct of the accused in the circumstances measured against a necessarily general standard.

[84] When an accused charged with extortion has used threats in an attempt to collect a legitimate debt, the trier of fact must consider all of the circumstances, including the nature of the threat and the nature of the demand, to determine whether the Crown has proved beyond a reasonable doubt that there was no reasonable justification or excuse for the threat. In jury cases, trial judges will instruct juries that it is not every distasteful threat used to support a legitimate demand for repayment of a debt that will constitute extortion. The jury will be told that the threat must go beyond that which a reasonable person in the circumstances of the accused would view as a legitimate or warranted means of attempting to collect the debt.

[85] As is evident from my analysis to this point, the phrase "reasonable justification or excuse" in s. 346 requires a fact-specific inquiry. In some circumstances, a trier of fact may find that a threat to contact a debtor's employer was a reasonable means of seeking to collect a debt. For example, if the debt was somehow connected to the employment and if the purpose for involving the employer was to obtain repayment of the debt from the employer, a trier of fact could well have a reasonable doubt as to whether an accused's threat to go to the employer was made without reasonable justification or excuse.

[86] Although the defence of reasonable justification or excuse is fact-driven, it is not entirely free from judicial control. As with any defence, there must be an air of reality to the reasonable justification or excuse claim. If the trial judge is satisfied that no reasonable person in the circumstances of the accused would have viewed the threat made as a legitimate or warranted means of attempting to collect the debt, the trial judge will instruct the jury that the threat cannot, as a matter of law, be excused or justified: see *R. v. Natarelli*, *supra*. There may also be circumstances when a trial judge will instruct a jury that as a matter of law, a given threat is reasonably justified or excused. For example, if an accused claims that his or her actions said to constitute the threat were a statutorily-authorized means of collecting a debt, the defence of reasonable justification or excuse would prevail unless the Crown proved beyond a reasonable doubt that the conduct said to constitute the threat was not authorized by the statute.

[87] In the vast majority of cases, however, the ultimate applicability of the defence of "reasonable justification or excuse" will depend on the findings of fact made and the trier of fact's assessment of whether the conduct said to constitute a threat was reasonable in all of the circumstances.

[88] Throughout my analysis of the "reasonable justification or excuse" defence, I have treated the phrase as creating one rather than two discrete defences. I recognize the distinction between justifications and excuses as applied to criminal law defences. I see no purpose, however, in drawing that distinction when addressing the "reasonable justification or excuse" defence in s. 346. In my view, the approach outlined above properly draws the distinction between threats used to collect legitimate debts that do attract criminal liability under the extortion provision and those that do not. I note that counsel did not suggest the need to draw any distinction between reasonable justifications and reasonable excuses for the purposes of the extortion provision.

[89] In the case at bar, it is acknowledged that M.M. owed Mrs. Alexander money. Alexander's demand for repayment of that money was clearly reasonable. As *Natarelli*, *supra*, instructs, however, a legitimate demand does not alone provide a reasonable justification or excuse. The question remained whether there was any basis upon which to conclude that Alexander had a reasonable justification or excuse for threatening to have M.M. fired if she did not repay the legitimate debt.

[90] The trial judge, after observing that Alexander relied on the defence of reasonable justification or excuse, said:

> It is one thing to demand payment of a loan. It is quite another thing to threaten the continuance of a person's employment by reason of her failure to keep an agreement to repay a loan.

[91] As this was a trial by judge alone, it was for the trial judge to decide on the totality of the evidence whether the Crown had negated Alexander's claim of justification or excuse beyond a reasonable doubt. I read the above-quoted passage as an implicit finding in favour of the Crown on this issue.

[92] A threat to have someone fired can be a powerfully coercive one, especially where the threat is made by someone like Alexander, who has apparent connections to the victim's employer. Employment is a mainstay of most people's lives. Consequently, any threat to that employment can strike at the very heart of that individual's autonomy and free will. Like the trial judge, I see no basis for a reasonable justification or excuse claim by Alexander. The fact that M.M. owed Alexander's wife a debt that was completely unconnected to M.M.'s employment did not provide a reasonable justification for an attempt to compel repayment by threatening to have M.M.'s employment terminated. That threat went beyond what any reasonable person in Alexander's circumstances could view as a justified means of attempting to obtain repayment of the money owed to Mrs. Alexander.

[93] I would not interfere with the conviction on count twelve.

(iv) The Appeal from the Conviction on the Possession of "Bugging" Equipment

[94] Count eleven charged Alexander with an offence under s. 191(1) of the *Criminal Code*. The relevant parts of that provision provide:

> Everyone who possesses … any electromagnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence …

[95] Count eleven particularized the device as "audio video cameras concealed in clock radios". Counsel for Alexander argued that these devices were not "primarily useful for surreptitious interception of private communications" because they were designed for both the surreptitious recording of private communications and the surreptitious taking of

Tab 186

CanLII

R v Barros, 2016 ABQB 243 (CanLII)

Source:	Court of King's Bench of Alberta
Date:	2016-04-29
File number:	050551845Q1
Citation:	R v Barros, 2016 ABQB 243 (CanLII), <https://canlii.ca/t/gpr4z>, retrieved on 2026-01-18

Court of Queen's Bench of Alberta

Citation: R v Barros, 2016 ABQB 243

Date: 20160429
Docket: 050551845Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Ross Barros

Accused

hand, the law does not require the person of extortion to act clumsily and without subtlety. What is required is that the message be sent in words definite enough to convey to a person of ordinary intelligence in the position of Brezinski, taking into account his shared police background with the Accused, a threat of harm to his "secret source" if the prosecution was not ended.

[16] Extortion criminalizes intimidation and interference with freedom of choice. Accordingly a veiled reference may constitute a threat if it is sufficient, in light of all the circumstances, to convey to the complainant the consequences which he or she fears or would prefer to avoid: ***R. v. McClure*** (1957), 1957 CanLII 485 (MB CA), 22 WWR 167 (Man. C.A.), at p. 172. The courts have adopted a similar contextual interpretation elsewhere: ***R. v. Hodson***, 2001 ABCA 111, 92 Alta. L.R. (3d) 262 (Alta. CA), at paragraphs 11-13; ***R. c. Pelletier*** (1992), 1992 CanLII 12794 (QC CA), 71 CCC (3d) 438 (Que. CA).

[17] The question is, as a matter of law, what would a reasonable person in the position of Brezinski understand?

(c) The Intent of the Accused

[18] The Crown must prove beyond a reasonable doubt that the Accused intended his declaration of knowledge of the identity of the confidential informer to influence police decision making.

(d) Reasonable Justification or Excuse

[19] The legal test for extortion requires a court to delve below the surface of the exchanges between the Accused and those whom he or she is accused of threatening, particularly where, as here, the individuals come from the same occupational background. Much that is understood between them need not be stated explicitly

The Trial Evidence

Inspector Brezinski's Evidence

[20] Brezinski explained that "source" and "confidential informant" are interchangeable terms referring to persons who voluntarily provide information to police, but who are not directed by police, and who do not want to be identified or to testify in Court. On the other hand, an "agent" Brezinski explained is directed by police to perform certain acts, are identified by police, and do testify in Court.

[21] The Accused spoke to Brezinski on his cell phone at 6:42 a.m. at his home on May 6, 2005, and arranged a meeting for that afternoon to discuss the Qureshi and Ajaj files. Brezinski says that the Accused advised that he had been hired by Tarrabain to analyse both files, that he had met with Brezinski's source yesterday and knew 100% that was the Detective's source.

[22] Brezinski also testified that the Accused said on the phone, "this is bad for you and bad for me", that Tarrabain did not want to know the identity of the source, and that Brezinski would have to trust him. Brezinski told him he would be very surprised if he knew his source, and "laughed it off". They made arrangements to meet at a Tim Hortons at 2:30 that afternoon. The Accused asked Brezinski to bring someone else along and they agreed to bring fellow police officer, Krewenchuk, as he was golfing with Brezinski that morning.

[23] At 8:02 a.m., the Accused called Brezinski again to move the scheduled meeting earlier for that morning, so that it would precede the pending bail application, as that was important to Tarrabain and Quereshi who was in custody. It was mutually agreed to meet at 8:45 a.m. at the golf course before the scheduled 9:00 a.m. golf game.

[24] Once they arrived at the clubhouse and sat down, according to Brezinski, the Accused indicated that he had been hired by Tarrabain to review the file and identify Brezinski's source,

Tab 187

CanLII

Ontario Realty Corp. v. P. Gabriele & Sons Ltd., 2000 CanLII 22697 (ON SC)

Source:	Superior Court of Justice
Date:	2000-10-11
Other citations:	50 OR (3d) 539 — 50 CPC (4th) 278 — 78 CRR (2d) 189 — [2000] OJ No 4340 (QL)
Citation:	Ontario Realty Corp. v. P. Gabriele & Sons Ltd., 2000 CanLII 22697 (ON SC), <https://canlii.ca/t/1w9m8>, retrieved on 2026-01-18

Ontario Realty Corporation v. P. Gabriele & Sons Limited et al.
[Indexed as: Ontario Realty Corp. v. P. Gabriele & Sons Ltd.]

50 O.R. (3d) 539
[2000] O.J. No. 4340
Court File No. 00-CL-3726

Ontario Superior Court of Justice
Farley J.
October 11, 2000

*Note: This case is being reported only with respect to the issue of s. 8 of the Canadian Charter of Rights and Freedoms in the context of an Anton Piller order. In separate reasons for judgment (28 manuscript pages), Farley J. concluded that the Anton Piller order had been properly granted and that it should be continued.

Charter of Rights and Freedoms -- Search or seizure -- Anton Piller order in civil proceedings not contrary to s. 8 of Charter -- Canadian Charter of Rights and Freedoms, s. 8.

Injunctions -- Anton Piller order -- Anton Piller order in civil proceedings not contrary to s. 8 of Charter -- Canadian Charter of Rights and Freedoms, s. 8.

On April 19, 2000, on an ex parte motion, O Corp. obtained an Anton Piller order. The defendants asserted that (a) neither the Courts of Justice Act, R.S.O. 1990, c. C.43 nor the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 permitted the issuance of an Anton Piller order, (b) the Superior Court did not have inherent jurisdiction to grant the order and (c) the order constituted a civil

search warrant that was contrary to s. 8 of the Canadian Charter of Rights and Freedoms. The defendants challenged the constitutional validity of s. 66(2) (k) of the Courts of Justice Act and rule 45.01 of the Rules of Civil Procedure, and claimed a remedy under s. 24(1) of the Charter.

Held, the Charter challenge should be dismissed.

There is a very strong public interest in ensuring that the court process in civil cases is not frustrated by the suppression of evidence. An Anton Piller order is not a civil search warrant. Its origins are found in the inherent jurisdiction of the court, and it enables the court to control and render efficacious its own process and to maintain the integrity of that process. The form of the order shows that it is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant in personam to permit inspection at the risk of being guilty of contempt. There is no authority granted by an Anton Piller order to demand entry to any location (be it a home or a place of business) with the right and authority to force entry if that demand is not acceded to. Rather, an Anton Piller order allows a request for entry and that request may be denied, but the denier faces contempt proceedings for failure to give the permission that the court h as ordered. There is no empowerment of the person who has obtained an Anton Piller order to force an entry; that person has no legal ability or capability to do so.

As the Anton Piller order is grounded in the inherent jurisdiction of the court, it is unnecessary and misleading to deal with s. 66(2)(k) of the Courts of Justice Act and rule 45.01 of the Rules of Civil Procedure. As an order of the court exercising its inherent jurisdiction, an Anton Piller order is not a government action subject to the Charter. However, assuming that s. 8 of the Charter did apply, Anton Piller orders meet the high standard required for a criminal search. Anton Piller orders generally have safeguards that exceed the requirements for a search as established by the Supreme Court of Canada. Further, if s. 8 of the Charter were infringed, then the infringement was justified under s. 1 of the Charter. The pressing and substantial objective of Anton Piller orders is to protect the judicial process from being undermined by those who are prima facie untrustworthy enough to sup press or destroy evidence.

MOTION to set aside an Anton Piller order.

Cases referred to Aetna Financial Services v. Feigelman, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2, 32 Man. R. (2d) 241, 15 D.L.R. (4th) 161, 56 N.R. 241, [1985] 2 W.W.R. 97, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145; Anton Piller KG v. Manufacturing Processes Ltd., [1976] 1 Ch. 55, [1976] 1 All E.R. 779, [1976] 2 W.L.R. 162, 120 Sol. Jo. 63, [1976] R.P.C. 722 (C.A.); Booker McConnell plc v. Plascan, [1985] R.P.C. 425 (C.A.); Computer Security Products Inc. v. Forbes, [1999] O.J. No. 4573 (S.C.J.); Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, 20 O.R. (3d) 816n, 120 D.L.R. (4th) 12, 175 N.R. 1, 25 C.R.R. (2d) 1, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269; Eccles v. Bourque, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739, 50 D.L.R. (3d) 753, 3 N.R. 259, 19 C.C.C. (2d) 129, 27 C.R.N.S. 325, [1975] 1 W.W.R. 609; Fila Canada Inc. v. Jane Doe, 1996 CanLII 4060 (FC), [1996] 3 F.C. 493, 114 F.T.R. 155, 68 C.P.R. (3d) 1, 48 C.P.C. (3d) 1, [1996] F.C.J. No. 736; Grenzservice Speditions Ges m.b.H. v. Jan s (1995), 1995 CanLII 2507 (BC SC), 15 B.C.L.R. (3d) 370, 129 D.L.R. (4th) 733, [1996] 4 W.W.R. 362, 64 C.P.R. (3d) 129 (S.C.); Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865n, 126 D.L.R. (4th) 129, 184 N.R. 1, 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89; Hunter v. Southam Inc., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, 33 Alta. L.R. (2d) 193, 11 D.L.R. (4th) 641, 55 N.R. 241, 9 C.R.R. 355, [1984] 6 W.W.R. 577, 14 C.C.C. (3d) 97, 41 C.R. (3d) 97, 27 B.L.R. 297, 2 C.P.R. (3d) 1, 84 D.T.C. 6467; Koby Foods Ltd. v. Dawson City General Store Ltd., [1997] Y.J. No. 77; Lock International plc v. Beswick, [1989] 1 W.L.R. 1268, [1989] 3 All E.R. 373, [1989] 1 R.L.R. 481, 133 Sol. Jo. 1297, [1989] N.L.J.R. 655; MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, 14 B.C.L.R. (3d) 122, 130 D.L.R. (4th) 385, 191 N.R. 260, [1996] 2 W.W.R. 1, 33 C.R.R. (2d) 123, 103 C.C.C. (3d) 225, 44 C.R. (4th) 277 (sub nom. P. (J.) v. MacMillan Bloedel Ltd.); Nike Canada v. Jane

Doe, [2000] F.J. No. 498; Nova Scotia (Attorney General) v. MacIntyre, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 132 D.L.R. (3d) 385, 40 N.R. 181, 96 A.P.R. 609, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193; Ontario (Attorney General) v. Dieleman (1994), 1994 CanLII 7509 (ON SC), 20 O.R. (3d) 229, 117 D.L.R. (4th) 449 (Gen. Div.), supp. reasons (1995), 1995 CanLII 7181 (ON SC), 22 O.R. (3d) 785, 123 D.L.R. (4th) 757 (Gen. Div.), supp. reasons (1995), 22 O.R. (3d) 785, 123 D.L.R. (4th) 766 (Gen. Div.); Proctor & Gamble Inc. v. John Doe, [2000] F.C.J. No. 61; R. v. Caslake, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, 123 Man. R. (2d) 208, 155 D.L.R. (4th) 19, 221 N.R. 281, 159 W.A.C. 208, [1999] 4 W.W.R. 303, 48 C.R.R. (2d) 189, 121 C.C.C. (3d) 97, 13 C.R. (5th) 1; R. v. Rao (1984), 1984 CanLII 2184 (ON CA), 46 O.R. (2d) 80, 4 O.A.C. 162, 9 D.L.R. (4th) 542, 10 C.R.R. 275, 12 C.C.C. (3d) 97, 40 C.R. (3d) 1 (C.A.); Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 33 D.L.R. (v4th) 174, 71 N.R. 83, [1987] 1 W.W.R. 577, 25 C.R.R. 321, 38 C.C.L.T. 184, 87 C.L.L.C. 14,002; Semayne's Case (1604), 5 Co. Rep. 91a, 77 E.R. 194, [1558-1774] All E.R. Rep. 62; Thomson Newspapers Inc. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission), 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, 72 O.R. (2d) 415n, 39 O.A.C. 161, 67 D.L.R. (4th) 161, 106 N.R. 161, 47 C.R.R. 1, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 76 C.R. (3d) 129 Statutes referred to Canadian Charter of Rights and Freedoms, ss. 1, 8, 24(1) Courts of Justice Act, R.S.O. 1990, c. C.43, s. 66(2)(k) Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 45.01 Authorities referred to Cromwell, "Aspect of Constitutional Judicial Review in Canada" (1995), 46 S.C.L. Rev. 1027 Godin, "Anton Piller Orders in an Age of Scepticism: Charter Applications and Other Safeguards for Judically-Ordered Searches" (1996), 54 U.T. Fac. L.R. 107, pp. 110-11, 112-15, 143-44 Jacob, "The Inherent Jurisdiction of the Courts" (1970), 23 Current Legal Problems 23 Mason, "The Inherent Jurisdiction of the Court" (1983), 57 A.L.J. 449, pp. 449, 452-53, 457

Kenneth Prehogan, David R. Wingfield and Kerry A. Boniface,
for plaintiff, Ontario Realty Corporation.
Peter R. Greene and Meredith L. Hayward, for defendant,
981602 Ontario Limited c.o.b. Tri-Spade.
J.E. Callaghan, for defendants, P. Gabriele & Sons Limited
and other Gabriele interests.
J. Bailey, for defendant, Vincent Catalfo.
Mark J. Freiman, for intervenor, the Queen in Right of
Ontario.
Brian Gover and B. Usher, for non-parties, Michael Zentil and
Mauro Tonietto.
Joseph J. Colangelo, for Bianchi, Presta.

[1] FARLEY J.: -- These Charter reasons should be read in conjunction with my non-Charter reasons as if they were one set of reasons.

[2] The defendants, (i) P. Gabriele & Sons Limited, Gabbro Construction Ltd., Gabriel Environmental Services Inc., 1331679 Ontario Limited, Pierino Gabriele, Frank Angelo Gabriele, Antonio Gabriele ("GG" collectively); (ii) 981602 Ontario Ltd. c.o.b. Tri-Spade ("TS"); and (iii) Vincent Catalfo ("C"), challenged the constitutional validity of s. 66(2)(k) of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended ("CJA") and rule 45.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended ("Rules") and claimed a remedy under s. 24(1) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (the "Charter") in relation to an act or omission of the Government of Ontario. In this challenge, as with the companion elements relating to the general unconstitutionality of the Anton Piller order I granted on April 19, 2000 pursuant to the ex parte motion of the plaintiff, Ontario Realty Corporation ("ORC"), the challengers were supported by Michael Zentil and Mario Tonietto (and their law firm Bianchi Presta). I will deal with the

companion matters in a separate set of reasons. The ORC and the intervenor, Her Majesty the Queen in Right of Ontario, as represented by the Attorney General of Ontario ("Crown"), opposed this challenge.

[3] The challengers asserted that neither the CJA nor the Rules permitted the issuance of an Anton Piller order ("AP order"), that the Superior Court of Justice did not have inherent jurisdiction to grant an AP order, and that the AP order constituted a civil search warrant and was therefore contrary to the Charter. The challengers argued that s. 8 of the Charter is infringed because the procedural elements and requirements set out by the Supreme Court of Canada in Hunter v. Southam Inc., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 were not explicitly set out in the impugned provisions of the CJA and Rules and they, therefore, sought to have such impugned provisions declared invalid, the granted AP order discharged and the seized materials returned.

[4] For the reasons set out below, I would dismiss this Charter challenge. It seems to me that the challengers have misconstrued the nature and substance of an AP order when they assert that it constitutes a civil search warrant. Unfortunately they may have been too eager to accept as unassailable truth some musings as to this type of order and perhaps further misguided by some references to s. 66(2)(k) of the CJA and rule 45.01. I would therefore think it helpful to note that the AP order had its origins out of the inherent jurisdiction of the court (and I should note that this involves a court of superior general jurisdiction).

[5] In Anton Piller KG v. Manufacturing Processes Ltd., [1976] 1 Ch. 55, [1976] 1 All E.R. 779 (C.A.), Lord Denning M.R. started his speech at p. 58 by saying:

> During the last 18 months the judges of the Chancery Division have been making orders of a kind not known before. They have some resemblance to search warrants. Under these orders, the plaintiff and his solicitors are authorised to enter the defendant's premises so as to inspect papers, provided the defendant gives permission.
>
> Now this is the important point: The court orders the defendant to give them permission. The judges have been making these orders on ex parte applications without prior notice to the defendant.

[6] It is pertinent that he stated that these orders had "some resemblance to search warrants". Certainly he did not state that they were search warrants, criminal or civil, nor that they constituted or were the equivalence of a civil search warrant. He merely stated that these orders had "some resemblance" to a warrant. He went on at p. 60 to declare that, "But the order sought in this case is not a search warrant" and after stating that, "This may seem to be a search warrant in disguise", he rejects that characterization. Furthermore, he stated at p. 61 that such an order was "not covered by the Rules of the Supreme Court and must be based on the inherent jurisdiction of the court."

[7] Brightman J. had refused to issue such an order for inspection or removal of documents in the Anton Piller case notwithstanding a strong prima facie case of copying, as he was concerned that such orders might be an instrument of oppression to be employed by a deep-pocketed plaintiff against a small man defendant. Lord Denning M.R. observed at p. 60 that Brightman J. "realized that the defendants might suppress evidence or misuse documentary material, but he thought that that was a risk which must be accepted in civil matters save in extreme cases." He then went on to state at pp. 60-61:

> Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get out." That was established in the leading

> case of Entick v. Carrington (1765) 2 Wils. K.B. 275. None of us would wish to whittle down that principle in the slightest. But the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solicitors or anyone else to enter the defendants' premises against their will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give permission. It does more. It actually orders them to give permission -- with, I suppose, the result that if they do not give permission, they are guilty of contempt of court.
>
> . . . . .
>
> Nevertheless, in the enforcement of this order, the plaintiffs must act with due circumspection. On the service of it, the plaintiffs should be attended by their solicitor, who is an officer of the court. They should give the defendants an opportunity of considering it and of consulting their own solicitor. If the defendants wish to apply to discharge the order as having been improperly obtained, they must be allowed to do so. If the defendants refuse permission to enter or to inspect, the plaintiffs must not force their way in. They must accept the refusal, and bring it to the notice of the court afterwards, if need be on an application to commit.
>
> You might think that with all these safeguards against abuse, it would be of little use to make such an order. But it can be effective in this way: It serves to tell the defendants that, on the evidence put before it, the court is of opinion that they ought to permit inspection -- nay, it orders them to permit -- and that they refuse at their peril. It puts them in peril not only of proceedings for contempt, but also of adverse inferences being drawn against them; so much so that their own solicitor may often advise them to comply. We are told that in two at least of the cases such an order has been effective. We are prepared, therefore, to sanction its continuance, but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed.

[8] Nothing which Lord Denning M.R. stated would appear to be contrary to Semayne's Case (1604), 5 Co. Rep. 91a, 77 E.R. 194, nor contrary to what Dickson J. expressed in Eccles v. Bourque, 1974 CanLII 191 (SCC), [1975] 2 S.C.R. 739 at p. 743:

> . . . the principle, so firmly entrenched in our jurisprudence, that every man's house is his castle, was expressed in these words: "That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose . . .". That, then, is the basic principle, as important today as in Biblical times (Deuteronomy 24:10) or in the 17th century. But there are occasions when the interest of a private individual in the security of his house must yield to the public interest in the process to be executed.

[9] Ormrod L.J. at p. 61 of Anton Piller indicated: "I agree with all that Lord Denning MR has said." He went on at p. 62 to state:

> There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.
>
> The form of the order makes it plain that the court is not ordering or granting anything equivalent to a search warrant. The order is an order on the defendant in personam to permit inspection.

[10] The third member of the Anton Piller court, Shaw L.J., indicated at p. 62 that he agreed with both judgments of his colleagues and observed that:

> The overriding consideration in the exercise of this salutary jurisdiction is that it is to be resorted to only in circumstances where the normal processes of the law would be rendered nugatory if some immediate and effective measure was not available.

(Emphasis added)

[11] Thus it seems to me that the English Court of Appeal in Anton Piller clearly and forcefully found the basis for an AP order in the inherent jurisdiction of the court and concluded that such an order was not the equivalence of a search warrant.

[12] Keith Mason in his article "The Inherent Jurisdiction of the Court" (1983), 57 A.L.J. 449 observed (at pp. 449, 452-53, 457):

> Faced with the limitless ways in which the due administration of justice can be delayed, impeded or frustrated, judges have responded with a vast armoury of remedies claimed to be part of their inherent jurisdiction. This unwritten source of power is said to arise from the very nature of a court. The inherent jurisdiction has positive and negative aspects, depending on whether judicial powers are being invoked to facilitate the proper conduct of legal proceedings or to overcome practices or devices which tend to delay, impede or frustrate judicial functioning. The mere fact that some statute or rule of court enables a court to deal with the particular problem in a particular way will not usually exclude inherent powers to deal with it in other ways. Indeed, this jurisdiction may be asserted even though the conduct complained of may be in literal compliance with some statute or rule of Court.
>
> . . . . .
>
> (2) Preventing Steps being taken that would Render Judicial Proceedings Inefficacious.
>
> It is not surprising that those peculiarly concerned with the due administration of justice should arrogate to themselves power designed to punish or impede persons who seek to circumvent the due process of law, whether litigants or not. Much of the law of contempt involves the punishment of persons whose actions are calculated to interfere in this way with the administration of justice. Stating the matter in positive terms, courts have wide inherent powers to ensure that justice is not denied to those who litigate before them.
>
> . . . . .
>
> The recent emergence of Mareva injunctions and Anton Piller orders neatly illustrates the judicial capacity to extend an appropriate remedy to meet a perceived "abuse" of this nature, as well as the way that substantive rights emerge "secreted in the interstices of procedure". Justification for the Mareva injunction was originally sought by resort to the statutory power contained in s. 45 of the Judicature Act 1925 (U.K.) and its Australian counterparts to grant interlocutory injunctions "in all cases in which it shall appear to the Court to be just or convenient". However this judicial basis was soundly attacked as being inconsistent with earlier authorities that held that the enactment was merely procedural since it extended equity's injunctive power to the common-law courts without increasing the scope of the jurisdiction. However, by the time this attack was mounted the utility of the new remedy had been perceived by courts and litigants. It is therefore not surprising that the judicial response was to anchor the remedy in the broader foundations of the inherent jurisdiction with the function of preventing the abuse and injustice that would result from a defendant making himself judgment-proof by removing or secreting his assets pendente lite. Whilst the English position has now been overtaken by express statutory enactment (s. 37(3) of the English

> Supreme Court Act, 1981) and some English judges have expressed reservations about attributing these developments to the inherent jurisdiction, this basis has recently been asserted authoritatively in New South Wales.
>
> The birth and rapid development of the Anton Piller order whereby a plaintiff can obtain ex parte pre-trial inspection of premises where property or documents might otherwise be removed or destroyed to the prejudice of the plaintiff's proof of his claim or satisfaction of his judgment is another example of a substantive judge-made remedy justified on a "procedural" basis. The rationale of this manifestation of the Court's inherent jurisdiction is that "if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or hidden or taken beyond the jurisdiction, and so the ends of justice be defeated". The power extends, in an appropriate case, to the making of an order requiring the property in question to be placed in the custody of a responsible person. Interesting illustrations of the inherent jurisdiction's capacity for exponential growth are found in recent authorities permitting an Anton Piller order coupled with an order for discovery to be granted in aid of a Mareva injunction.
>
> . . . . .
>
> Since the inherent jurisdiction is not derived by implication from statutory provisions conferring a general or particular jurisdiction, the onus lies squarely upon those asserting statutory curtailment or modification. Because "rules and forms of procedure are not ends in themselves, but means to an end, which is the attainment of justice", it follows that the mere fact that a statute or rule of court addresses itself in a particular way to a particular matter does not usually exclude by implication a superior court's wider inherent powers relating to that matter if they are appropriate.

[13] Paul D. Godin in his article "Anton Piller Orders in an Age of Scepticism: Charter Application and Other Safeguards for Judicially-Ordered Searches" (1996), 54 U.T. Fac. L.R. 107 raises a number of concerns about AP orders. At pp. 110-11, he observes:

> Certainly, good reasons exist for having Anton Piller orders in today's world. The order effectively preserves evidence that might otherwise be destroyed and helps plaintiffs track down hidden wrongdoers. Traditional judicial methods of discovery are incapable of dealing with many modern cases of patent infringement, trade secret theft, entertainment piracy, etc. Evidence of the infringement, such as computer records, computer programs, and portable electronic circuitry, can easily be erased, destroyed, or hidden, and suppliers of pirated material are both difficult to identify and highly mobile. Since the evidence sought would be compellable during discovery anyway, it is argued that an Anton Piller order simply gives the plaintiff a head start and only those defendants who never intended to comply with the discovery rules in the first place will be affected. This view, however, ignores the problems listed below that are related primarily to the methodology of "forced discovery" rather to the discovery process itself.
>
> A number of aspects of the Anton Piller order raise concerns. The first is the nature of the order. Although it is not a search warrant, an Anton Piller order effectively allows the same level of intrusion into one's privacy, and even one's home. Moreover, it does so without the redeeming element of public interest present in criminal law search warrants.

I pause to note that one would think that there is a very strong public interest in ensuring that the court process in civil cases is not frustrated by the suppression of evidence. Godin goes on at pp. 112-15 to state:

> Three possible jurisdictional foundations for the Anton Piller order have been advanced. The first and most generally accepted is the inherent jurisdiction of the court. The second is found

> in rules of civil procedure, which usually allow various forms of discovery, evidentiary preservation, and inspection of property. The third possibility is that orders can be made pursuant to statutes that authorize courts to grant interlocutory injunctions and mandatory orders "where it appears to a judge of the court to be just and convenient to do so". Although there is little doubt that Anglo-Canadian courts have the jurisdiction to grant Anton Piller orders, the implications for such orders will vary depending on the jurisdictional basis accepted. Constitutional provisions in Canada clearly apply to statutory instruments, for example, but may not apply to judge-made common law, at least not to the same extent.
>
> . . . . .
>
> How far does the inherent jurisdiction extend? The inherent jurisdiction of the court derives "not from any statute or rule but from the very nature of the court as a superior court." Wilson J.A. (as she then was) explained in Glover v. Glover et al. (No. 2) that
>
> > . . . the Court's inherent jurisdiction is part of the law of procedure and enables it to control and render efficacious its own process. It is, in other words, inherent in a Superior Court of Record that it have all the jurisdiction of a procedural nature which it requires in order to maintain the integrity of its process. . . . It is impossible to define the scope of the court's inherent jurisdiction because the contexts in which the Court may have to resort to it to protect its process and render it efficacious are themselves incapable of definition.
> >
> > . . . . .
> >
> > Even when Rules of Civil Procedure apply in part, courts can reach behind the Rules to the broader basis of inherent jurisdiction to support any aspects of the order that fall outside the rules.

(Emphasis added)

[14] Lamer C.J.C. in MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, 130 D.L.R. (4th) 385 concluded that the doctrine of inherent jurisdiction was alive and well in Canada and necessary for the functioning of the court system (for the benefit of all): see p. 751 where he notes the Mason article, pp. 749-50 as to the I.H. Jacob article "The Inherent Jurisdiction of the Courts" (1970), 23 Current Legal Problems 23; and the T.A. Cromwell article "Aspect of Constitutional Judicial Review in Canada" (1995), 46 S.C.L. Rev. 1027. Lamer C.J.C. noted Cromwell's observations that, "For example, the Superior Courts are said to possess 'inherent jurisdiction' and to have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute". Lamer C.J.C. at p. 750 stated:

> While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute". To remove any part of this core emasculates the court, making it something other than a superior court.

[15] Huddart J. in Grenzservice Speditions Ges m.b.H. v. Jans (1995), 1995 CanLII 2507 (BC SC), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.), stated at p. 744:

> The English Chancery judges found their jurisdiction in the English rules equivalent of Rules 30 and 46 of this court. The Court of Appeal in Anton Piller recognized that the ex parte inspection order extended well beyond both those jurisdictions (to order discovery and inspection of documents and to order inspection of property) and was derived from the inherent jurisdiction of the court to do what is necessary in the interests of justice.

She went on to observe at pp. 755-56:

> The Mareva and Anton Piller orders were conceived not so much to protect plaintiffs as to protect the court's jurisdiction against defendants bent on dissipating or secreting their assets or evidence in order to render inconsequential the judicial process again [sic] them. They represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue. It follows that counsel must be discerning in their execution and particularly sensitive to the rights of unrepresented defendants who have not been heard.

[16] I am of the view that the AP order is grounded in the inherent jurisdiction of this court and therefore it will not be necessary to deal with s. 66(2)(k) of the CJA nor with rule 45.01. The addition of these provisions in any material seeking an AP order is, in my view, not merely surplusage but rather it is unnecessary and misleading.

[17] The AP order is not a search warrant nor is it a civil search warrant and there is no authority granted by an AP order to demand entry to any location (be it a home or a place of business) with the right and authority to force entry if that demand is not acceded to. Rather, an AP order allows a request for entry and that request may be denied, but if so, the denier faces contempt proceedings for failure to give permission which the court has ordered. There is no empowerment of the person who has obtained an AP order to force an entry; that person has no legal ability or capability to do so.

[18] The challengers have raised the spectre that an AP order may be obtained in any civil proceeding merely with the allegation of fraud or its equivalent. That overlooks the fact that the mere allegation of fraud will not suffice to meet the three-part test enunciated by Ormrod L.J. in the Anton Piller case -- particularly the requirement that a plaintiff show in the ex parte hearing to obtain the AP order that there is an extremely strong prima facie case and that there is a real possibility that incriminating materials may be destroyed before an application were made involving the participation of the defendant. Dillon L.J. in Booker McConnell plc v. Plascan, [1985] R.P.C. 425 (C.A.) noted this question of "a real possibility" and contrasted it with the court otherwise proceeding with justification to rely on persons complying with their production obligations when he stated at p. 441:

> The phrase "a real possibility" is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off. Where the production and delivery up of documents is in question, the courts have always proceeded, justifiably, on the basis that the overwhelming majority of people in this country will comply with orders to, for example, produce and deliver up documents without it being necessary to empower the plaintiffs' solicitors to search the defendant's premises.

[19] To my view this further illustrates that the AP order is a necessary tool in the inherent jurisdiction of the court to prevent undermining of the court system which is the cornerstone of our free and democratic society, but it should be noted that this device is only to be used in those relatively few cases where the high standard of the test of Ormrod L.J. has been met. See Hoffmann J.'s observation at p. 1281 of Lock International plc v. Beswick, [1989] 1 W.L.R. 1268, [1989] 3 All E.R. 373 where he noted:

> The making of an intrusive order ex parte even against a guilty defendant is contrary to the natural justice and can only be done where there is a paramount need to prevent a denial of justice to the plaintiff.

[20] Anyone who wishes to contest me granting of AP order is free to do so under its provisions. How would one do that? Aside from having the terms of the AP order explained to them in layman's language (including as per Wein J. in Computer Security Products Inc. v. Forbes, [1999]

O.J. No. 4573 (S.C.J.), at para. 42: "To explain to the target that the [AP] order is not a search warrant but a civil remedy, and to ensure that the target is aware that he or she may contact counsel."). A person is entitled to consult with counsel of their own choice. With the benefit of that legal advice it would seem that the most practical way of proceeding would be to have the documentation at the location sealed, or, in the alternative, taken into the possession of the person's counsel with the counsel and client undertaking that the material would not [be] returned to the client pending a return to the court to contest the issuance of the AP order.

[21] The challengers assert that the April 19 AP order was not a true AP order since it contained the para. 21, which provides:

> 21. The Court Orders that a police officer shall assist Plaintiff's Counsel and the Investigators, if requested, to ensure public order and the avoidance of a disturbance by anyone, with respect to the entries permitted by this Order, and the Sheriff is authorized to use such reasonable force as may be necessary to carry out the terms of the Court Order, including the use of a locksmith to open any locked premises, equipment or storage places which the Defendants refuse to open voluntarily.

[22] First, it is clear that the purpose of the police officer being there is not to do anything but to ensure public order and the avoidance of a disturbance by anyone. This would include not only the defendants and third parties -- but also anyone from the plaintiff's side. I would suggest that the wording in this part might be clarified somewhat to avoid ambiguity. The second element about the sheriff using reasonable force including the services of a locksmith was candidly acknowledged by counsel for the ORC as being inappropriate and that on reflection he should not have included this in the draft order. However, it is I in the result who must bear the responsibility and blame for such language. Does this language imply that there may be a forced entry to the premises in question? I think not. Paragraph 4 is clear that the order provides that, the "Defendant . . . shall allow the persons enforcing this Order to search for, seize and copy . . . ORC-Related Information". The defendants are given a choice of allowing that (granting permission to do that) or as per para. 6, if they refuse to grant permission (or allow) that to happen, then they may risk contempt proceedings. There is absolutely no necessity to have anyone, let alone the sheriff, "use such reasonable force as may be necessary to carry out the terms of the Court Order". Further, once the defendant has permitted the search, that permission would carry with it free entry to any locked premises, equipment or storage places. Having granted permission to enter for the purposes of the search the defendant is not allowed to pick and choose what portion of the premises may be searched. I note in any event that no one refused to co-operate and all locked premises, equipment or storage places were voluntarily opened (including C's safety deposit box). The language of the second part of para. 21 is unfortunate. Words to this effect are unnecessary and should not form part of any AP order. I am in agreement with t he sentiments of Huddart J. expressed at p. 752 of Grenzservice.

[23] Counsel got into a debate about whether R. v. Caslake, 1998 CanLII 838 (SCC), [1998] 1 S.C.R. 51, 155 D.L.R. (4th) 19, and R. v. Rao (1984), 1984 CanLII 2184 (ON CA), 46 O.R. (2d) 80, 9 D.L.R. (4th) 542 (C.A.) were in conflict. It is quite clear that Martin J.A. in Rao at p. 91 was talking of the criminal power when he stated in dealing with a warrantless search for narcotics:

> There is no power at common law to issue a warrant to enter and search private premises except with respect to stolen goods.

He went on to expand to say at pp. 93-94:

> At common law there is no power to search premises without a warrant (or with a warrant except for stolen goods) save as incident to a lawful arrest. After making a lawful arrest, an officer has the right to search the person arrested and take from his person any property which he reasonably believes is connected with the offence charged, or which may be used as evidence against the person arrested on the charge, or any weapon or instrument that might enable the

arrested person to commit an act of violence or effect his escape: see Gottschalk v. Hutton (1921), 1921 CanLII 376 (AB CA), 36 C.C.C. 298 at pp. 301-2, 66 D.L.R. 499 at pp. 502-3, [1922] 1 W.W.R. 59 (Alta. S.C.A.D.); Dillon v. O'Brien and Davis (1887), 16 Cox C.C. 245. The power to search the person of the arrestee has generally been considered to extend to the premises where he is arrested and which are under his control: see the Report of the Canadian Committee on Corrections (1969), at p. 62; Leigh, Police Powers in England and Wales at p. 51. Thus, where a person has been arrested in his house, it seems that his house may be searched for evidence of the crime with which he is charged: see Ghani v. Jones, supra, at pp. 1165-6.

[24] Similarly it seems that Lamer C.J.C. in Caslake was similarly talking of that criminal power when he made the observation at p. 60:

> First, the state authority conducting the search must be able to point to a specific statute or common law rule that authorizes the search. It would seem to me that Lamer C.J.C. in referring to the common law rule is referring to those types of situations which Martin J.A. carved out as being extensions of the common law. That said, one should not be distracted from the fact that an AP order is not a search warrant as discussed above.

[25] In Nova Scotia (Attorney General) v. MacIntyre, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, Dickson J. defined a search warrant and discussed the two conflicting public interests when he observed at pp. 179-80:

> A search warrant may be broadly defined as an order issued by a justice under statutory powers, authorizing a named person to enter a specified place to search for and seize specified property which will afford evidence of the actual or intended commission of a crime. A warrant may issue upon a sworn information and proof of reasonable grounds for its issuance. The property seized must be carried before the justice who issued the warrant to be dealt with by him according to law.
>
> Search warrants are part of the investigative pre-trial process of the criminal law, often employed early in the investigation and before the identity of all of the suspects is known. Parliament, in furtherance of the public interest in effective investigation and prosecution of crime, and through the enactment of s. 443 of the Code, has legalized what would otherwise be an illegal entry of premises and illegal seizure of property. The issuance of a search warrant is a judicial act on the part of the justice, usually performed ex parte and in camera, by the very nature of the proceedings.
>
> The search warrant in recent years has become an increasingly important investigatory aid, as crime and criminals become increasingly sophisticated and the incidence of corporate white collar crime multiplies. The effectiveness of any search made pursuant to the issuance of a search warrant will depend much upon timing, upon the degree of confidentiality which attends the issuance of the warrant and upon the element of surprise which attends the search.
>
> As is often the case in a free society there are at work two conflicting public interests. The one has to do with civil liberties and the protection of the individual from interference with the enjoyment of his property. There is a clear and important social value in avoidance of arbitrary searches and unlawful seizures. The other, competing, interest lies in the effective detection and proof of crime and the prompt apprehension and conviction of offenders. Public protection, afforded by efficient and effective law enforcement is enhanced through the proper use of search warrants.
>
> In this balancing of interests, Parliament has made a clear policy choice. The public interest in the detection, investigation and prosecution of crimes has been permitted to dominate the individual interest. To the extent of its reach, s. 443 has been introduced as an aid in the administration of justice and enforcement of the provisions of the Criminal Code.

[26] In Retail Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, McIntyre J. stated the courts were not directly bound by the Charter as were the legislative executive and administrative branches of government. He went on to state at pp. 600-01:

> While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of Charter application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the Charter. The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the Charter precludes the making of the order, where a Charter right would be infringed, it would seem that all private litigation would be subject to the Charter. In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before the Charter applies.

[27] In Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, Lamer C.J.C. at pp. 874-75 stated:

> Challenges to publication bans may be framed in several different ways, depending on the nature of the objection to the ban. If legislation requires a judge to order a publication ban, then any objection to that ban should be framed as a Charter challenge to the legislation itself. Similarly, if a common law rule requires a judge to order a publication ban or authorizes a judge to order a publication ban that infringes Charter rights in a manner not reasonable and demonstrably justified in a free and democratic society, then any objection to that ban should be framed as a Charter challenge to the common law rule.
>
> In the case at bar, we are dealing with a common law rule which provides judges with the discretion to order a publication ban in certain circumstances. Discretion cannot be open-ended. It cannot be exercised arbitrarily. More to the point, as I stated in Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at p. 1078, in the context of legislative conferrals of discretion:
>
> > As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1.
>
> I would extend this reasoning, and hold that a common law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the Charter; exceeding these boundaries results in a reversible error of law. In this case, then, we are dealing with an error of law challenge to a publication ban imposed under a common law discretionary rule.

[28] In Hill v. Church of Scientology of Toronto, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, Cory J. at p. 1161 stated:

> The fact that persons are employed by the government does not mean that their reputation is automatically divided into two parts, one related to their personal life and the other to their

> employment status. To accept the appellants' position would mean that identical defamatory comments would be subject to two different laws, one applicable to government employees, the other to the rest of society. Government employment cannot be a basis for such a distinction. Reputation is an integral and fundamentally important aspect of every individual. It exists for everyone quite apart from employment.

While it is true that the ORC was acting as an agent of the Crown in relation to the various properties entrusted to it for management (including environmental clean-up) and disposition, it would not seem to me that this condition superadds any responsibility upon the ORC. This is particularly so in light of the fact that the Crown (and the ORC), in relation to those properties, are acting not in any public authority sense but rather in a private commercial context.

[29] Section 8 of the Charter states:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

[30] Dickson J. in Hunter, supra, stated that s. 8 of the Charter protected the right of privacy. At p. 159 he said:

> The guarantee of security from unreasonable search and seizure only protects a reasonable expectation.

(Emphasis in original)

[31] Here again it must be emphasized that Hunter was a case where the Director of Investigation and Research of the Combines Investigation Branch authorized several Combines Investigation Officers to enter the respondent's business premises and examine documents and other things. The Director did so pursuant to s. 10(1) of the Combines Investigation Act, R.S.C. 1970, c. C-23. The authorization was certified by a member of the Restrictive Trade Practices Commission pursuant to s. 10(3). The search was incident to the criminal power of that legislation. The Supreme Court of Canada determined that the legislation (s. 10) was unconstitutional for two general reasons. First, the authorizing procedures should be meaningful in the sense that the authorizing person should be able to assess the conflicting interests of the state and the individual on an entirely neutral and impartial manner. That person should act judicially and be capable of doing so. Thus, it would be inappropriate for those charged with the investigative and prosecutorial functions under that legislation to so act in a judicial capacity in authorizing a s. 10 search and seizure. Second, s. 10 did not embody a requirement for reasonable and probable grounds (established on oath) for the belief that an offence had been committed and that there was evidence to be found at the place searched; therefore, s. 10 did not measure up to the minimum standard consistent with s. 8 of the Charter of authorizing a search and seizure.

[32] Dickson J. observed at pp. 157-58:

> Historically, the common law protections with regard to governmental searches and seizures were based on the right to enjoy property and were linked to the law of trespass. It was on this basis that in the great case of Entick v. Carrington
> (1765), 19 St. Tr. 1029, 1 Wils. K.B. 275, the Court refused to countenance a search purportedly authorized by the executive, to discover evidence that might link the plaintiff to certain seditious libels. Lord Camden prefaced his discussion of the rights in question by saying, at p. 1066 [19 St. Tr. 1029]:
>
> > The great end, for which men entered into society, was to preserve their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.

The defendants argued that their oaths as King's messengers required them to conduct the search in question and ought to prevail over the plaintiff's property rights. Lord Camden rejected this contention, at p. 291 [1 Wils. K.B. 275]:

> . . . our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave: if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Lord Camden could find no exception from this principle for the benefit of King's messengers. He held that neither the instrusions [sic] nor the purported authorizations were supportable on the basis of the existing law. That law would only have countenanced such an entry if the search were for stolen goods and if authorized by a justice on the basis of evidence upon oath that there was "strong cause" to believe the goods were concealed in the place sought to be searched. In view of the lack of proper legal authorization for the governmental intrusion, the plaintiff was protected from the intended search and seizure by the ordinary law of trespass.

In my view interests protected by s. 8 are of a wider ambit than those enunciated in Entick v. Carrington. Section 8 is an entrenched constitutional provision. It is not therefore vulnerable to encroachment by legislative enactments in the same way as common law protections. There is, further, nothing in the language of the section to restrict it to the protection of property or to associate it with the law of trespass. It guarantees a broad and general right to be secure from unreasonable search and seizure.

[33] Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 discussed the Hunter criteria for appropriate legislation (and the searches and seizures thus authorized). Wilson J. then said at pp. 495-96:

> I would agree, however, that these criteria are not hard and fast rules which must be adhered to in all cases under all forms of legislation. What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or quasi-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation respond in a meaningful way to the concerns identified by Dickson J. in Hunter. This having been said, however, it would be my view that the more akin to traditional criminal law the legislation is, the less likely it is that departures from the Hunter criteria will be countenanced. This seems to have been what Dickson C.J. had in mind when he said in R. v. Simmons, 1988 CanLII 12 (SCC), [1988] 2 S.C.R. 495, at p. 527, that departures from the Hunter criteria will be exceedingly rare.

[34] If we assume for the purposes of this analysis that in fact s. 8 of the Charter applies to AP orders (assuming for this purpose then that there is governmental action) and as Adams J. observed at p. 285 of Ontario (Attorney General) v. Dieleman (1994), 1994 CanLII 7509 (ON SC), 20 O.R. (3d) 229, 117 D.L.R. (4th) 449 (Gen. Div.) that, "The Charter has relevance . . . as a superordinate constraint on common law doctrine supporting government action" but one should also keep in mind that in Dieleman the Attorney General took on a parens patriae role, then how do AP orders measure up? In my view Godin at pp. 143-44 provides a fair analysis. It would also be fair to observe that Godin is concerned about AP orders in practice not measuring up. He said:

> For all the reasons given above, the s. 8 balance should require standards for Anton Piller orders that are at least as high as for criminal searches, if not higher.
>
> Hunter sets out the standards of reasonableness for criminal searches, breaking them down into four main requirements:

> 1) There must be prior public authorization. For Anton Piller orders, the ex parte motion and order meet this requirement.
>
> 2) The authorization should be made by a neutral "judicial" decision-maker. Anton Piller orders are made by Masters or judges.
>
> 3) The justice must be satisfied by information sworn on oath. Anton Piller orders also require sworn evidence.
>
> 4) The substantive standards to be met are those set out in s. 487 of the Criminal Code. The mere possibility of finding evidence is not sufficient. One must show "reasonable and probable [that is, prima facie] grounds . . . to believe that an offence has been committed and that there is evidence to be found at the place of the search" Anton Piller orders satisfy and possibly exceed this test by requiring a strong prima facie case and "clear evidence that the defendants have in their possession incriminating documents or things." Because other safeguards and standards not required by Hunter are considered in granting an Anton Piller order, such orders theoretically meet a standard equal to or higher than Hunter. In practice, however, cases such as Thermax, along with the regularity with which Anton Piller orders are granted, suggest that these high standards are not maintained in practice. One important restriction enforced with search warrants that should also be strictly enforced for Anton Piller orders is that the search parameters not be overly broad.

(Emphasis added)

[35] It seems to me that AP orders generally have safeguards which exceed the s. 8 requirements as set out in Hunter. The challengers raised two of these points as a problem in the instant case -- (i) information sworn on oath and (ii) extremely strong prima facie case and clear evidence that the defendants have in their possession incriminating documents. They point to certain information given to me by counsel on the ex parte hearing on April 19 -- namely, the transcript of the interview of Ross Farewell, the existence of the Ontario Provincial Police investigation and the possibility that certain defendants might raise the question that the ORC was seeking the AP order to avoid closing on some properties. None of these points go to the question of whether the sworn material makes out an extremely strong prima facie case against the defendants; rather, they are the aspect of full and frank disclosure as to anything which may be of assistance to the defendants as known to the ORC. As to the second point, I would be of the view that once it has demonstrated that in a case which is based upon a fraudulent tendering process that [involves] bid rigging and phony tenders to do certain environmental clean-up, and the lack of doing the clean-up contracted for, there has been an extremely strong prima facie case made out, then this would impact directly upon the trustworthiness of the participants in such a scheme. Further, not only are the non-former employee defendants engaged in the business of performing such tendering, recommendations and clean-ups, and so would be presumed to have business records related to these elements, it is also a reasonable presumption that all defendants would have financial records which would include references to the assorted wrongdoings. Given that fraud-doers are untrustworthy and have either done things clandestinely or otherwise covered their tracks, when we are dealing with a case involving false documentation, it is reasonabl e to assume that there is a real possibility that such persons would continue to want to keep such incriminating material away from inspection. I will deal with the strength of the case otherwise and not get into assessing the various elements here.

[36] The challengers pointed out that Reed J. in Fila Canada Inc. v. Jane Doe, 1996 CanLII 4060 (FC), [1996] 3 F.C. 493 at pp. 497-98, [1996] F.C.J. No. 736 at paras. 5-6 stated:

> Anton Piller orders are, in effect, search and seizure orders. The fiction is that the defendant gives permission to the plaintiff to search and seize. [See Note 1 below] The defendant does so

> under threat of being found in contempt of court if permission is not granted. The penalty for contempt of court, at least theoretically, can be a term of imprisonment. Also, while the theory is that the goods are seized to be retained as evidence for use at trial, the seizures in fact often operate as executions before or sometimes even without judgment. Plaintiffs are using these orders as self-help measures in circumstances in which, in other days, the police may have played a more active role.
>
> Section 8 of the Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, appendix II, No. 44]] provides that individuals are entitled to be free from unreasonable search and seizures. That section is not confined to search and seizures by police officers or investigators pursuant to statutory powers. It is at least arguable that it applies to the civil search and seizures authorized by order of the Court under an Anton Piller order. An unreasonable search and seizure, as I understand that jurisprudence, encompasses one which has been conducted pursuant to an invalid order, or pursuant to an order which was too broadly drafted, or pursuant to an order which has been unreasonably executed; see Hunter et al. v. Southam Inc., 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145. When Anton Piller orders are sought and obtained from this Court it is important to place them within this context.
>
> 1 See Anton Piller KG v. Manufacturing Processes Ltd., [1976] Ch. 55 (C.A.); Allan M. Rock, "The 'Anton Piller' order: An Examination of its Nature, Development and Present Position in Canada" (1984-85), 5 Advocates' Q. 191; Takach, George, "Exploring the Outer Limits: The Anton Piller order in Canada" (1985), 23 Alta. L. Rev. 310, at p. 311.

[37] I would think it important to note the differences as I have described above, but as well to note that what some might call a (legal) "fiction" is not, in fact, a fiction for legal purposes. Rather it is "non-fiction". Then without analysis there is the observation that "it [sic] at least arguable" that s. 8 of the Charter applies to AP orders. In Nike Canada Ltd. v. Jane Doe, [2000] F.C.J. No. 498, Tremblay-Lamer J. concluded at paras. 80-81 that the Charter could not be invoked to set aside an AP order and that the execution of an AP order, a process which is civil in nature, was not governed by the Hunter criteria. Teitelbaum J. in Proctor & Gamble Inc. v. John Doe, [2000] F.C.J. No. 61, at para. 58, merely observed that:

> Having said that, there is no merit to the Charter argument raised by the defendant as the facts illustrate that the search and seizure guidelines articulated in the s. 8 jurisprudence have clearly been met.

[38] I am of the view that the material obtained pursuant to an AP order is to ensure that evidence for that particular case not be destroyed or otherwise suppressed. An AP order does not in any way allow that evidence to be used for any other purpose outside the confines of the case, including any criminal investigation. If the police wish to obtain such evidence I am of the opinion that they would have to do so pursuant to a valid search warrant: see Koby Foods Ltd. v. Dawson City General Store Ltd., [1997] Y.J. No. 77.

[39] Even if there were to be a conclusion that an AP order infringed the Charter, namely s. 8, then I would conclude that s. 1 of the Charter is able to come to the rescue. The pressing and substantial objective is the maintenance of the court process from being undermined by those who have demonstrated to be untrustworthy and, therefore, there exists the real possibility that they would suppress evidence. This would not only be to the detriment of the litigant on the other side of the case but it would also tend to destroy the ability of the court to dispense civil justice (and thereby lessen the public's confidence in the court system as a means of resolving disputes). The typical AP order provides a rational and connected way of dealing with that end and in a way (with the many safeguards) which respects any Charter right to the maximum extent on a proportional basis.

[40] The April 19 AP order included the following safeguards and protections as cited by the Crown in its factum:

> 1) The Plaintiffs were required to establish a strong prima facie case on the basis of sworn evidence. (see Farley, J.'s endorsement)
>
> 2) Plaintiff's counsel, acting as an Officer of the court, were ordered to explain in fair and everyday language the nature and effect of the Order. (paragraphs 3 and 33(a) of the Order)
>
> 3) Defendants or persons in charge of a premises to be searched were entitled to consult with a lawyer before complying with the Order. (paragraph 7)
>
> 4) The Order was restricted to ORC related records and materials. (paragraph 4(a) of the Order)
>
> 5) Documents with respect to which solicitor/client privilege was claimed were ordered sealed and the claim determined by a court. (paragraph 11 of the Order)
>
> 6) The Order provided that materials seized or delivered up pursuant to the Order were to be used solely for the purpose of "the proceedings in relation to the allegations contained in the statement of claim."
> (paragraph 27 of the Order).
>
> 7) The Defendants or their representatives were entitled to be present to monitor the search as they desired.
> (paragraph 33(b) of the Order)
>
> 8) Copies of seized documents were ordered to be returned to the Defendants.
> (paragraph 33(c) of the Order)
>
> 9) The Order was issued on the Plaintiffs' undertaking to abide by an Order concerning damages that might be made, should it be found that compensation is owed the Defendants. (paragraph 35 of the Order)

[41] I should note that my endorsement only reads that there is a "strong prima facie" case and not that there was an "extremely strong prima facie case". While I did not include the word "extremely", I think it obvious that was my conclusion, that I in fact granted the order and I was fully cognizant of the three-part test of Ormrod L.J. in the Anton Piller case as to it including an extremely strong prima facie case. In any event the Supreme Court of Canada appears to determine that a "strong prima facie case" is sufficient: see Estey J. in Aetna Financial Services v. Feigelman, 1985 CanLII 55 (SCC), [1985] 1 S.C.R. 2, 15 D.L.R. (4th) 161.

[42] In my view it is not helpful to the analysis to assume that an AP order is a search warrant -- either criminal or civil. Such a characterization only confuses the issue. Lord Denning M.R. in Anton Piller carefully reviewed that question -- at the highest he observed that it may resemble a search warrant but he rejected that as being a proper characterization.

[43] In conclusion, I would dismiss the Charter challenge as indicated previously. I will deal in a separate set of reasons with the balance of the constitutional challenge and the review and continuance of the AP order of April 19, 2000, as executed.

Order accordingly.

Tab 188

CanLII

Young v. IAMGOLD Corporation, 2022 ONSC 3811 (CanLII)

Source:	Superior Court of Justice
Date:	2022-06-27
File number:	CV-21-669174
Citation:	Young v. IAMGOLD Corporation, 2022 ONSC 3811 (CanLII), <https://canlii.ca/t/jq0qd>, retrieved on 2026-01-18

CITATION: Young v. IAMGOLD Corporation, 2022 ONSC 3811
COURT FILE NO.: CV-21-669174
DATE: 20220627

ONTARIO SUPERIOR COURT OF JUSTICE

RE: MARY KATHLEEN YOUNG in her capacity as Trustee and Executor of the ESTATE OF BRUCE MALCOLM YOUNG, Applicant

-and-

IAMGOLD CORPORATION, Respondent

BEFORE: FL Myers J

COUNSEL: *Nadia Campion and David Ionis*, for the Applicant

Zohar R. Levy and Chad Pilkington, for the Respondent

HEARD: June 20, 2022

REVISED ENDORSEMENT[I]

The Application and Outcome

[1] The applicant asks the court to prohibit the respondent from dealing with property in which she wants to claim an interest. She wants the respondent to be required to preserve the property for six months while she tries to obtain control of the interest that she hopes to assert.

[2] The applicant submits that the respondent should be prevented from parting with the property that she wants to claim so that the property will still be there if and when she is able to commence an action to claim an interest in it.

[3] The applicant is effectively arguing, "u*bi jus ibi remedium"* or "where there is a right there is a remedy". The court has all manner of remedies available. Whether an injunction is needed, a preservation order, or a simple Certificate of Pending Litigation would suffice, the issue is not the availability of a remedy. Rather, the question is whether the applicant has any right to assert.

[4] In my view, the applicant has no or insufficient legal or equitable right or basis to claim an interest in the respondent's property to justify granting a remedy at this date. Whether that changes in future will be for another day.

[5] While there may be cases where a person who has not yet sued might have rights that need a remedy, in this case there are too many steps and too many years between the applicant and the property that she seeks. In fact, she acknowledges that she needs the Legislative Assembly of Ontario to pass a special statute for her to have even a chance to assert the right she claims.

[6] The Legislature has already considered the applicant's request for a statute and, in its wisdom, it refused her request to pass the special statute that she needs. Once the request was refused, even the bare expectancy that the applicant asserts has been denied.

[7] As there has recently been a general election, the applicant may try again to seek a statute this fall. I am unaware of any limits on a person's entitlement to petition the Legislature to ask for a law to be enacted. But, at the present time, the applicant has no basis to claim a right in the respondent's property and certainly insufficient basis to prohibit the respondent from dealing with its property as it sees fit.

[8] There has to be a minimum threshold to justify legal intervention. The plaintiff has a sympathetic story looked at in one light and ignoring the passage of time. But if the court ordered people not to deal with their property while someone with a sympathetic story asks Parliament to give her rights in the property, it would be inviting mischief, ignore the policy behind the doctrine of standing, and encourage the granting of extraordinary equitable relief on a wing and a prayer.

[9] In my view, granting the relief sought in this case would be an illegitimate incursion by the court into the respondent's private property rights. The respondent owns its property. It is entitled to do what it pleases with its property subject to law. The plaintiff concedes that she

has no standing to sue for the interest she seeks. Neither does she have any legal or equitable right to obtain the standing she seeks. In short, right now, she has no rights that can or ought to be remedied.

The Facts

Superior Corporate Services Limited

[10] The facts are largely undisputed. I borrow liberally from the applicant's factum in the following recitation.

[11] Cyril Young was a prospector in the mid-1900s. He spent his life exploring and developing mineral claims in Chester Township, Ontario. Cyril's company, Young Shannon Gold Mines Limited, owned 11 patented mineral claims that now form part of Canada's largest gold mine called the Côté Gold Project. The land interests in the gold mine are currently held by the respondent IAMGOLD Corporation for itself and others.

[12] Cyril Young died in 1962. The economics of the times did not yet permit the mine to be brought into production.

[13] Bruce Young was Cyril's son. He worked with his father. On Cyril's death Bruce Young became the owner of Young Shannon Gold Mines Limited.

[14] The applicant Mary Young was Bruce Young 's spouse. She assisted Bruce in his work. She often visited the mine property. She is now quite elderly. She likes to tell the story of physically helping Bruce transport a generator on to the property and ensuring compliance with government regulations by capping the mine.

[15] In 1965 Bruce Young incorporated Superior Corporate Services Limited as the vehicle through which he would be remunerated for his work on the mine. There is more discussion on the shareholdings for this company below.

Superior Corporate Services Limited Receives a 1.5% Net Smelter Return Royalty Interest

[16] As the mine was not yet in production, Young Shannon Gold Mines Limited had no cash flow. It could not pay Bruce Young or his colleagues for the work they continued to do and the money they expended to develop the mine.

[17] Therefore, by written agreement dated April 15, 1987, Bruce Young had Young Shannon Gold Mines Limited grant to Superior Corporate

Services Limited a 3% net smelter return royalty in the 11 mineral claims.

[18] The royalty interest was intended to be compensation in lieu of salary.

[19] On the same day, Bruce Young had Superior Corporate Services Limited assigned one quarter of its net smelter return royalty (or 0.75% of the net smelter return) to each of his colleagues James T. Riley and Harry S Ferguson. That left Bruce Young with a 1.5% net smelter return royalty interest in the 11 claims held by Superior Corporate Services Limited.

[20] On March 9, 1989, Mr. Riley registered on the land title registry for the mineral claims both the April 15, 1987 3% royalty grant from Young Shannon Gold Mines Limited to Superior Corporate Services Limited and the assignments from Superior Corporate Services Limited of 0.75% to each of himself and Mr. Ferguson.

[21] I am prepared to assume for the purposes of this application that the net smelter return royalties are interests in land. They have certainly been treated as interests in land by all of the various parties who have registered them on title to the land including IAMGOLD Corporation. This matters to the cause of action that Mary Young wishes to advance as discussed below.

Superior Corporate Services Limited was Dissolved in 1989

[22] Bruce Young did not pay taxes owing by Superior Corporate Services Limited. In 1989 the corporation was dissolved administratively due to its filing arrears.

[23] By 1989 Bruce Young had started to suffer health problems. He remained active in managing the mineral claims. Mary Young postulates that Bruce's illness may have impaired his management of the technical corporate affairs of Superior Corporate Services Limited.

[24] On the company's dissolution, the assets of Superior Corporate Services Limited, including its 1.5% net smelter return royalty in Young Shannon Gold Mines Limited mineral claims, escheated to the Crown.

[25] Under the relevant corporate law, Bruce Young, as the shareholder of the dissolved corporation, had the ability to revive the corporation or to ask Her Majesty for a conveyance of the corporate assets had he wished to do so.

[26] In 2002, Bruce Young had Young Shannon Gold Mines Limited sign an agreement to put the mine into production. Sadly Bruce passed away shortly afterward in August of 2003.

[27] Bruce Young had 14 years before his death to revive Superior Corporate Services Limited. But he never revived the dissolved company.

The Estate of Bruce Young

[28] Mary Young and Bruce Young's accountant were the executors of Bruce's estate from his death in 2003 until the accountant resigned recently. Assuming that shares of a dissolved corporation continue to exist, at least as pieces of paper or book entries, Bruce Young's shares of the dissolved Superior Corporate Services Limited would be owned by his estate.

[29] Despite the knowledge of Bruce's accountant and Mary's evidence that she helped perform some of the work for which Superior Corporate Services Limited received its 1.5% net smelter return royalty, neither of the executors caused the estate to take any step to revive Superior Corporate Services Limited or to obtain its assets from the Crown.

[30] Curiously, the Estate of Bruce Young has never distributed to his beneficiaries any shares of Superior Corporate Services Limited. There is no explanation in the evidence of why this is so.

[31] Under cross-examination, the applicant had no evidence to show that Bruce Young actually owned 100% of the shares of the dissolved corporation. It is therefore not clear that the applicant, as estate trustee of the Estate of Bruce Young, is actually the owner of the shares.

[32] For the purposes of this decision however, as there is no evidence to the contrary, I am prepared to assume that the applicant is currently the owner of the shares of the dissolved company (or stands in the owner's shoes).

After 20 Years a Statute is Required to Revive Superior Corporate Services Limited

[33] The year 2009 was significant. That marked the passing of 20 years from the dissolution of Superior Corporate Services Limited. It is common ground that under the applicable statutes, once a corporation has been dissolved for 20 years in the circumstances of Superior Corporate Services Limited the shareholders can no longer revive it on request. Rather, a statute is required to revive it.

[34] The legislative practice is that these statutes are usually introduced as private members' bills. They are apparently passed fairly routinely in the ordinary course.

O*ngoing Recognition of the 1.5% Net Smelter Return Royalty*

[35] Also in 2009 a company called Trelawney Mining and Exploration Inc. bought 92.5% of the mineral claims from Metallum Resources Inc. (formerly Young Shannon Gold Mines Limited). I am not told how much money Trelawney Mining and Exploration Inc. paid to Metallum/Young Shannon Gold Mines Limited or to Bruce Young's estate to buy the mineral claims i.e. to buy the mine.

[36] In any event, Trelawney Mining and Exploration Inc. issued public statements acknowledging that the Young family continued to hold a 3% net smelter return. Its public notices made no mention of the dissolved Superior Corporate Services Limited or of Messrs. Riley or Ferguson.

[37] Despite Trelawney's suggestion that the royalty was held by the "Young family", there is no evidence of any purported distribution of any part of the net smelter return royalty from the Estate of Bruce Young to any beneficiary. There is no evidence that between 2003 and 2018, any of the Estate, Bruce Young's accountant, or Mary Young, ever recognized the existence of any part of the royalty interest as an asset owned by Bruce Young on his death.

Enter IAMGOLD Corporation

[38] In 2012, IAMGOLD Corporation acquired the mineral claims from Trelawney Mining and Exploration Inc. I do not know if it owns 92.5% or perhaps it bought 100% by that time.

[39] The applicant makes much of the fact that IAMGOLD Corporation must have known of the net smelter return royalty when it bought the mineral claims. Trelawny's public technical material referred to it expressly. The grant was registered on title to the property.

[40] I agree that based on the registration on title if nothing else, IAMGOLD Corporation is deemed to have notice of the net smelter return royalty interest.

[41] Although Trelawney's public disclosures referred to a 3% interest in the "Young family", this was incorrect. As discussed above, the 3% net smelter return royalty interest was initially held by Superior Corporate Services Limited. Two pieces of 0.75% each were assigned to Messrs. Riley and Ferguson. The remaining 1.5% escheated to Her Majesty in 1989.

[42] In 2021, as IAMGOLD Corporation prepared to construct an operating mine at the site, it decided to evaluate the existing royalty interests. It searched the title register for the land. It then conducted a corporate search for Superior Corporate Services Limited. IAMGOLD Corporation found the actual ownership of the net smelter return royalty interests.

[43] In 2021, IAMGOLD Corporation approached the Public Guardian and Trustee about buying the 1.5% interest that had by then been owned by the Crown for some 32 years.

[44] IAMGOLD Corporation obtained a fair market value evaluation of the royalty interest and gave it to the Public Guardian and Trustee. It then negotiated to buy the Her Majesty's 1.5% net smelter return royalty interest. On June 28, 2021, IAMGOLD Corporation paid approximately $6 million to the Public Guardian and Trustee to buy the remaining 1.5% net smelter return royalty interest formerly owned by Superior Corporate Services Limited.

[45] IAMGOLD registered its purchase of the net smelter return royalty interest on title to the mineral claims.

The Estate Learns of the Sale of the Net Smelter Return Royalty Interests

[46] After IAMGOLD's Corporation purchase became public, the Estate of Bruce Young was contacted by a lawyer for Metalla Royalty & Streaming Ltd. It is in the business of acquiring royalty and income stream interests. In 2021 it purchased 0.6% of Mr. Riley's 0.75% interest in the net smelter royalty return and all of Mr. Ferguson's 0.75% interest. It then went looking for the remining 1.5% interest.

[47] The applicant postulates in her affidavit that it was the public announcement of the purchase of the two smaller interests by Metalla Royalty & Streaming Ltd. that prompted IAMGOLD Corporation to start looking for the rest of the 3% net smelter return royalty interest.

[48] Under cross-examination the applicant was not able to provide any information about the initial contact that the Estate of Bruce Young received from the lawyer for Metalla Royalty & Streaming Ltd. Apparently her daughter has been involved in helping her manage her affairs including helping her with her affidavit evidence. It is unclear how much of Ms. Young's evidence is her personal recollection or whether her recollection is very reliable.

[49] Questions asked of Ms. Young about the Estate's dealings with Metalla Royalty & Streaming Ltd. were refused. IAMGOLD Corporation postulates that this application has nothing to do with the Young family legacy as claimed and everything to do with an effort by Metalla to obtain a royalty interest in the very valuable mine. This is consistent with the fact that Ms. Young and Bruce Young's accountant, as executors of the Estate of Bruce Young, did nothing to realize or distribute the shares of Superior Corporate Services Limited or the net smelter return interest for 18 years after his death until someone was contacted by Metalla.

[50] In my view, this application does not turn on credibility or reliability of Ms. Young's recollection, the question of whether she is a front for Metalla Royalty & Streaming Ltd. or if the 1.5% net smelter return royalty interest represents her late husband's life's work and legacy.

The Technical Legal Issue

[51] The applicant argues that the Public Guardian and Trustee had no authority to sell the escheated royalty interest to IAMGOLD Corporation. The Public Guardian and Trustee can transfer interests under the *Escheats Act*, 2015, S.O. 2015, c. 38, Sched. 4. But subsection 2 (2)2 of that statute provides that it does not apply to forfeited corporate property under the *Forfeited Corporate Property Act, 2015*, S.O. 2015, c. 38.

[52] Forfeited corporate real property (i.e. land and interests in land) are subject to the *Forfeited Corporate Property Act, 2015*,. Under subsection 26 (1) of that statute the applicable minister may transfer Her Majesty's interest in forfeited property to:

> …an applicant who satisfies the Minister that the applicant has a legal or moral claim to the property based on facts that arose before the property became forfeited corporate property.

[53] I heard argument about whether this authority was subject to a 20 year or a 10 year limitation period and whether the limitation runs from 1989 or from 2016 when the relevant part of the statute came into force. The transition provisions of the statute are complex.

[54] Suffice it to say that as the remaining executrix of the Estate of Bruce Young, the applicant wants to revive Superior Corporate Services Limited so that it can sue to invalidate the purported sale by the Public Guardian and Trustee to IAMGOLD Corporation under the *Escheats Act, 2015* of the 1.5% net smelter royalty return interest. For the purposes of this application, I am willing to assume that the claim, if brought by someone with standing to do so, would not be frivolous.

[55] Regardless, the applicant accepts that she lacks standing to bring the lawsuit to invalidate the sale. She needs to revive Superior Corporate Services Limited so that it can claim its interest back. And doing that requires a statute.

The Application to Revive Corporate Services Limited Failed

[56] When this application was brought initially, the applicant was in the midst of the process to obtain a private member's bill in the Legislature to revive Superior Corporate Services Limited. She sought a preservation order initially to require IAMGOLD Corporation to preserve the 1.5% net smelter return royalty interest to let the legislative process play out so that Superior Corporate Services Limited could be revived and then sue.

[57] Since then, however, the legislative committee charged with review of the proposed bill rejected it. The government refused to allow the proposed private member's bill to go forward. That means that the applicant's effort to revive Superior Corporate Services Limited came to an unsuccessful conclusion.

[58] The applicant complains that IAMGOLD Corporation interfered in what should have been a *pro forma* legislative process. Moreover, it did so at the last minute, twice, and deprived her of a fair hearing before the legislative committee. She also complains that the government members who formed the majority of the legislative committee did not want to take the risk that the government or the Public Guardian and Trustee might have to refund the $6 million that it received on the sale to IAMGOLD Corporation.

[59] Overall, the applicant believes that the legislative process was unfair and she will be trying again with the new government and perhaps under a new, streamlined procedure.

[60] I am not asked to weigh-in on the legislative process. It is not before me for review. Whether it ever could be before a court is not a matter on which I need to speculate.

[61] At best right now, the applicant says that the Estate has a moral if not legal claim to the 1.5% net smelter return royalty interest. It should have been notified of the sale process by the Public Guardian and Trustee or IAMGOLD Corporation before the sale of the interest by the former to the latter. Had it received notice of the sale, the Estate of Bruce Young could have revived Superior Corporate Services Limited and made a competing claim to the Minister for the return of the property escheated from the corporation,

[62] I asked Ms. Campion to describe the basis to assert that the successor to the (possible) shareholder of a dissolved corporation was entitled to be given notice by a potential buyer from the Crown of assets that escheated more than 30 years ago. Ms. Campion submitted that IAMGOLD Corporation owed this obligation to the applicant if it is to be a "good corporate citizen".

[63] There is no public shareholder's register in Ontario. If IAMGOLD Corporation wanted to give notice, it would have had to guess that Bruce

Young was the shareholder of Superior Corporate Services Limited rather than the shareholder(s) perhaps being the owner of the mineral claims, Young Shannon Gold Mines Limited, or some other corporate holding company for any number of possible shareholders. Then if it assumed the "3% Young family" interest described by Trelawney was the registered 1.5% interest owned by Superior Corporate Services Limited and that Bruce Young was the sole shareholder of that dissolved company, it had to find his beneficiaries and their successors 18 years after his death in circumstances where neither Mr. Young nor the successors had done anything to revive the corporate royalty-holder for 30 years.

[64] Mr. Ionis submits that had the proper process been utilized under the *Forfeited Corporate Property Act, 2015* the Minister was required to give notice to the prior owner before disposing of the forfeited net smelter return royalty interest. I do not agree.

[65] Under s. 25 (1)(c) of the statute, the Minister may sell forfeited corporate property in such manner as he or she considers appropriate. Subsection 25 (2) provides that where a corporation was dissolved for the reasons applicable to Superior Corporate Services Limited, the Minister must wait three years before disposing of its former property. Presumably this deferral is designed to give the owners of the dissolved corporation some time to try to revive the company.

[66] Then, subsection 25 (3) provides that "[d]espite subsections (2) and (3), the Minister may dispose of the property at any time, (a) after giving notice…". This means that if the Minister wants to sell forfeited property within the three-year waiting period prescribed under s. 25 (2), he or she can do so by giving notice. That is not at all what happened here.

[67] Moreover, the Minster's notice, if it is required, is to be published on a government website and is also to be given to:

> …the prior corporate owner and every person who is named as a director or officer of the prior corporate owner in the most recent notices or returns filed under the *Corporations Information Act*, or who is named in the prior corporate owner's articles or letters patent, whichever was most current as of the day before the prior corporate owner was dissolved,

[68] The Articles of Incorporation of Superior Corporate Services Limited show that it was incorporated in 1965. The initial shareholders were shown as lawyers in the law firm that incorporated the company. This is a typical process so that law firms have corporations available "on the shelf" for clients who need them. The notice of dissolution dated February 14, 1989 shows an address of an office suite on Richmond

Street West. Ms. Young did not know the head office address of Superior Corporate Services Limited. There is no evidence of any available corporate filing showing any name of any former director or officer of the company. The most recent corporate search profile pulled in 2021 simply shows that the corporation was cancelled.

[69] Even if notice by the Minister had been required therefore, there is no evidence of any reference to Bruce Young in the material referred to in the statute.

The Request for a Preservation Order

[70] The Estate of Bruce Young asks for an order requiring IAMGOLD Corporation to preserve the 1.5% net smelter return royalty interest while it tries for a second time to obtain a statute to revive Superior Corporate Services Limited.

[71] Underlying the need for a statute is a very simple proposition: the Estate has no standing to challenge the sale by the Public Guardian and Trustee. Even if Bruce Young died owning all the shares of Superior Corporate Services Limited, the Estate has no legal interest in the assets of the company sufficient to allow it to challenge the sale by the Public Guardian and Trustee to IAMGOLD Corporation.

[72] That does not leave the Estate or its beneficiaries without any relief I note. For example, they may be able to sue the Public Guardian and Trustee or some other representative of Her Majesty for damages for selling the asset improperly and thereby depriving them of the ability to try to advance a moral if not legal claim to get the asset back. IAMGOLD Corporation makes the point that Her Majesty is not a party to this application. Therefore, I have no one before me to speak for the vendor of the asset to try to show the righteousness of the sale from its perspective.

[73] What is before me is the desire of the Estate to make a claim for the return of the asset itself rather than just for damages. It says that there is a *prima facie* or at least a not frivolous basis to assert that the Public Guardian and Trustee had no right to sell the 1.5% net smelter return royalty interest to IAMGOLD Corporation. If the sale was unlawful, someone has to have the ability to say so and sue to right the wrong. U*bi jus ibi remedium*.

[74] Moreover, the Estate submits that the court should not countenance the acts of IAMGOLD Corporation to interfere in the legislative process to prevent the Estate from having access to civil justice. This is not a question of reviewing the will of the Legislature. Rather, it is an equitable consideration in the balance of convenance on the question of

whether IAMGOLD Corporation should be made to hold the disputed property interest for a few months while the Estate tries again.

[75] The Estate also argues that IAMGOLD Corporation suffers no prejudice in being required to hold the interest pending its efforts to revive Superior Corporate Services Limited so that it can sue for the return of its property.

[76] The Estate asks for a preservation order under Rule 45.01 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. The rule is flexible and can be broadly interpreted to do justice between the parties.

[77] I agree with IAMGOLD Corporation however that Rule 45 is not available. The Rule allows the court to make an "interim order…for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding".

[78] The Rule requires that there be a proceeding in which property is in issue. It speaks of an "interim order". That is an order in a lawsuit that applies during a piece of the proceeding between two events. The order speaks to a situation where someone sues about a property interest and it empowers the court to make a temporary order for the defendant to hold the property pending trial or some other defined event.

[79] Rule 45.01 does not contemplate a separate application for a preservation order for a future, possible lawsuit. An application would have to be returnable only to a judge. A motion under Rule 45.01 is returnable to an Associate Justice as well as to a judge. This is not a situation like an interpleader order where the rule differentiates an application to a judge form a motion to an associate judge. A motion under Rule 45 is always for ran interim order in an existing lawsuit.

[80] There can be claims brought in contemplation of another proceeding that is not yet started. The court has the authority to grant injunctive relief if a cause of action is made out in an application and damages are an inadequate remedy. But I am not aware of any basis for a lawsuit by someone who admits they lack the right to sue but are trying to obtain it. If the applicant had a defined right to obtain the interest that might raise a more difficult question especially in light of its claim that IAMGOLD Corporation interfered. But the need to ask the Legislature to pass a statute after it has already refused to do so is not even the barest of bare expectancies. There may be some expectation of these things being *pro forma*. But here more than 30 years have passed and the government has been paid $6 million. It is not surprising that this is not a cookie cutter.

[81] The applicant wants the court to tell someone that it must preserve a piece of property while a putative plaintiff tries to obtain the right to sue

it for an interest in the property. The effort to obtain the right to sue has already been refused. The applicant says that she only needs the order for a few months while she tries again with the Legislature. But why is a second try any different than a third, a fourth, or a fifth try?

[82] The court's jurisdiction can only be engaged by a party with standing to advance a cause of action against another. The court is not a roving tribunal righting wrongs it may encounter along its path. While it may be that Superior Corporate Services Limited has a right to claim that its former property has been improperly sold by the Public Guardian and Trustee, the fact that the Estate cannot or has not yet successfully revived the corporation does not mean that there is a right with no remedy or that the Estate is being wrongfully denied access to justice. It is putting the cart before the horse. Before it can be denied a legal right, it has to be entitled to it first.

[83] The Estate seems to be entitled to ask for a statute reviving Superior Corporate Services Limited. It is doing that. Unless or until it succeeds and Superior Corporate Services Limited is reinstated and sues, the Estate has no right to advance against the 1.5% net smelter return royalty currently owned by IAMGOLD Limited.

[84] Unless or until Superior Corporate Services Limited brings an action putting the title of IAMGOLD Corporation to its property in issue, no one has a right to an interim preservation order or other remedy against IAMGOLD Corporation's property.

[85] Even approached from a broad conception of flexibility, access to justice, and the Young family legacy, the balance of convenience favours the respondent. Too much time has passed. The Estate or the beneficiary of the shares of Metallum Resources Inc. (formerly Young Shannon Gold Mines Limited) sold the principal interest in the mine years ago for some undisclosed amount of money. None of Bruce Young, his accountant, Mary Young, or the daughter helping her give evidence did anything about the dissolved company or its property until they were contacted by Metalla Royalty & Streaming Ltd.

[86] Until there is an actual claim or someone with the right to make a claim for the asset itself, I see no basis for a court to be interfering in the affairs of IAMGOLD Corporation. In light of the timing and the government's refusal to pass the statute that the applicant concedes that she needs, I see no harm to the applicant in refusing the order sought. She continues to have whatever rights she and the Estate have against the Public Guardian and Trustee and the government (if any). But she has no rights against IAMGOLD Corporation and no legal basis to say that she will ever have rights against it.

[87] The applicant therefore lacks standing, lacks a cause of action, and even if she had a claim to an order under Rule 45.01, an injunction, or a CPL, the balance of convenience favours the dismissal of the request.

Result

[88] The application is dismissed.

[89] The parties agreed that costs of $60,000 should be payable to the successful party. Accordingly, the applicant is ordered to pay the respondent costs of $60,000 all-inclusive.

FL Myers J

Date: June 27, 2022
Rev. Date: July 4, 2022

---

[i] The word “not” was mistakenly omitted from the first sentence of para. 79 of the prior version of this Endorsement. The error is corrected herein.

Tab 189

CanLII

BMW Canada Inc. v. Autoport Limited, 2021 ONCA 42 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2021-01-22
File number:	C67818
Other citation:	456 DLR (4th) 443
Citation:	BMW Canada Inc. v. Autoport Limited, 2021 ONCA 42 (CanLII), <https://canlii.ca/t/jcwjp>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: BMW Canada Inc. v. Autoport Limited, 2021 ONCA 42
DATE: 20210122
DOCKET: C67818

Feldman, van Rensburg and Thorburn JJ.A.

BETWEEN

BMW Canada Inc.

Plaintiff (Respondent)

and

Autoport Limited

Defendant (Appellant)

Robert B. Bell, Emily Y. Fan, and Julia Boddy, for the appellant

Eric Machum, Kyle Ereaux, Marc D. Isaacs and Michelle Staples for the respondent

the Master's decision, or in the decision of the Divisional Court upholding that decision.

F. DISCUSSION

[37] In the discussion that follows I will begin by addressing some of the relevant principles. I will then identify the errors in the Master's analysis and that of the Divisional Court. Finally, I will explain why, on a proper consideration of the evidence, and having regard to the relevant factors, the order sought by the appellant must be granted.

(1) The Relevant Principles

[38] The parties invited the court on this appeal to address the test for r. 45.01 motions, clarifying the role of balance of convenience and whether there is a presumption in favour of the preservation of evidence in a proceeding. As I will explain, it is inappropriate to prescribe a single test for r. 45.01 motions, including a *Taribo*-type test that focusses on "balance of convenience", having regard to the variety of circumstances in which such motions can be brought. In a case such as the present, where the condition of property is at issue in the action and its preservation is sought for the purpose of inspection, the goal is to best ensure fairness in the litigation process. I will also explain why it is unnecessary to determine whether there is a presumption in all cases in favour of preserving evidence for litigation, but that r. 45.01 permits the court to address trial fairness concerns that would arise before evidence is destroyed.

(a) What is the Appropriate Test for Interim Preservation of Property in this Case?

[39] Rule 45.01 is available to parties as an interim measure during litigation. Rule 45.01(1) provides that the court may make an interim order for the custody or preservation of "any property in question in a proceeding or relevant to an issue in

a proceeding". The order is discretionary. Although the rule provides that the court "may authorize entry on or into any property in the possession of a party or of a person not a party", and r. 45.01(2) permits the court to order the property to be sold in such manner and on such terms as are just, there are no criteria prescribed by the rule for the exercise of the court's discretion under r. 45.01 and there is no limitation on the terms and conditions that can be imposed.

[40] Rule 45.01 is available in a wide variety of circumstances in which interim preservation of property may be sought. The court, in considering whether to make such an order and on what terms, will take into consideration the evidence on the motion and make the order that best responds to the circumstances. The only precondition for preservation or custody is that the property is "in question in a proceeding or relevant to an issue in a proceeding". As I will explain, it is inappropriate to attempt to prescribe and apply a single test (such as that set out in *Taribo* or a derivation of such test) to all r. 45.01 motions.

[41] In some cases a r. 45.01 motion will seek to preserve the very property the plaintiff or applicant is pursuing in its litigation. In *Taribo*, for example, the litigation involved a dispute about shares that former employees of the respondent corporation had tendered in consideration for a reduction of their obligations under promissory notes. The shares were pledged and deposited with a third party. The moving parties' motion for an interim preservation order sought what was essentially a form of injunctive relief – to prevent the corporate respondent from having the shares released from deposit to it and then converting or cancelling the shares.

[42] The motion judge in *Taribo* articulated and applied a three-part test requiring that: (1) the assets sought to be preserved constitute the very subject matter of the dispute; (2) there is a serious issue to be tried regarding the plaintiff's claim to that asset; and (3) the balance of convenience favours granting the relief sought by the

applicant or moving party. She relied on two cases involving r. 45.02, which provides that where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just: *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (S.C.); *Sun v. Ho* (1998), 18 C.P.C. (4th) 363 (Ont. Gen. Div.). The *Taribo* test has been applied in other cases involving r. 45.01 where the moving party is seeking to preserve property that it seeks to recover in the litigation: see e.g., *Progressive Moulded Products Ltd. v. Great American Group*, 2007 CanLII 12205 (Ont. S.C.); *Meade v. Nelson Resources Limited* (2005), 2005 CanLII 44818 (ON SC), 14 B.L.R. (4th) 244 (Ont. S.C.).

[43] I accept that the *Taribo* three-part test is appropriate where a r. 45.01 motion is brought to preserve property that the moving party is claiming in its litigation. In such cases, the moving party seeks to limit or constrain what the responding party may do with property that is in its possession, and to preserve the property for the benefit of its claim. Factors such as whether the property is unique and whether damages claimed in the alternative would be an adequate remedy are also relevant and can fit within the "balance of convenience" analysis: see *Auto Enterprise Ltd. v. Oakville Motors Sales & Leasing Inc.*, [1995] O.J. No. 716 (Gen. Div.), at paras. 10-14. And, where an interim preservation order would "tilt the scales in favour of a plaintiff on the basis of unproven allegations" the court must exercise caution before making such an order: see *Stearns v. Scocchia* (2002), 27 C.P.C. (5th) 339 (Ont. S.C.) involving a motion under r. 45.02.

[44] While the *Taribo* test is appropriate for r. 45.01 motions where the moving party claims an interest in property, or for r. 45.02 motions where the claim is to a specific fund, it is not required to be applied or adapted for all motions for interim preservation of property. This is apparent from the wording of the rule itself. Rule 45.01(1) authorizes the court to make an order for entry into any property,

including the property of third parties, for the purpose of an interim order under the rule. Likewise, r. 45.01(2) permits the court to order the sale of property. The test articulated in *Taribo*, even as modified by the Divisional Court, would be insufficient and would not account for the range of factors that would need to be considered where entry into property, third party interests, or sale of property arises in a r. 45.01 motion.

[45] Similarly, a *Taribo*-type test focussing on "serious issue to be tried" and "balance of convenience" is neither necessary nor appropriate in a case like the present, where the r. 45.01 motion sought to preserve evidence to permit inspection. In my view, the overall consideration in such motions is to make an order that is consistent with a fair litigation process. In making or refusing the order, and in establishing terms, the court should have regard to the issues in dispute in the litigation, the relevance and materiality of the property as evidence, the purpose for which interim preservation is sought and its proposed duration (whether for the entirety of the proceeding or for an interim period to permit the evidence to be documented, inspected, tested, and the like), and the benefits and harm or prejudice to the interests of each party in the litigation.

(b) Is There a *Prima Facie* Obligation to Preserve Evidence?

[46] The parties joined issue in the courts below and in this appeal on whether there is a *prima facie* obligation in all cases to preserve property that is the subject matter of litigation, or more narrowly, to preserve evidence for trial. It is unnecessary to determine that issue in this appeal. First, any attempt to delineate the scope of such a rule would be met by a range of factors, which could be characterized as exceptions to or limitations on such a rule, such as considerations of the importance of the evidence to the proceeding, the perishability of the property, the feasibility of its preservation, and the like. Second, the determination of the relatively narrow issue on the r. 45.01 motion in this case and accordingly on

appeal would not turn on any such obligation or presumption. Autoport seeks interim preservation of the vehicles for a limited time and purpose, and BMW characterizes the question as simply one of cost.

[47] While it is unnecessary to determine whether there is a *prima facie* obligation to preserve evidence, and its scope, I do not agree with the Divisional Court's unqualified rejection of the duty of litigants to preserve evidence, and BMW's assertion in this court that parties must be free to deal with their property as they see fit. The principle advanced by BMW, articulated so broadly, would apply whether or not the property is evidence and whether or not its temporary preservation or pre-trial destruction would affect trial fairness.

[48] The courts have long recognized the doctrine of spoliation of evidence: see *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, 302 D.L.R. (4th) 661 for a useful summary of the case law and principles. Underlying the doctrine is the trial fairness principle that parties to litigation are expected not to destroy important evidence, at least until the opposing party has had a fair opportunity to examine that evidence. The remedies are informed by considerations of trial fairness: the imposition at trial of a rebuttable presumption of fact that the missing evidence, had it been preserved, would have been unfavourable to the party who destroyed it, and other possible remedies to "level the playing field", such as the exclusion of expert reports: see *Gutbir v. University Health Network*, 2010 ONSC 6752, at para. 13; *McDougall*, at paras. 18, 29; *Stilwell v. World Kitchen Inc.*, 2013 ONSC 3354, 47 C.P.C. (7th) 345, at para. 55; and *Endean v. Canadian Red Cross Society* (1998), 1998 CanLII 6489 (BC CA), 157 D.L.R. (4th) 465 (B.C.C.A.), at para. 32, leave to appeal granted but appeal discontinued, [1998] S.C.C.A. No. 260. The debate in the cases about whether there is a standalone tort of spoliation, and whether remedies are available for negligent spoliation (the cases are summarized

at paras. 19 to 22 of *McDougall*), does not undermine the animating principle: that the destruction of evidence can be harmful to trial fairness.

[49] Rule 45.01 permits the court to address trial fairness concerns that would arise if property constituting evidence were to be destroyed prior to its destruction, and so avoid the kind of harm in the litigation process that spoliation remedies address.

(2) Application of the Considerations of Trial Fairness to This Case

[50] As I have already observed, it is not appropriate to apply the *Taribo* test, or a derivation of that test, to the motion that underlies this appeal. The focus here should have been on trial fairness – that is, on the parties' ability to prosecute and defend the proceeding, and ought to have considered the relevant factors, including the nature of the property and its materiality to the issues in the litigation, as well as the purpose of the preservation order and its proposed duration. In considering the r. 45.01 motion the court ought to have attempted to craft an order that was based on and responsive to the evidence before it on the motion.

[51] I agree with the appellant that the Master erred in concluding that she had to apply the *Taribo* test and that the balance of convenience in determining who should bear the cost of interim preservation of the vehicles favoured BMW. The Master considered only the cost of continued storage of the vehicles and Autoport's delay in inspecting when she concluded that the balance of convenience clearly favoured BMW: at para. 26. The Master referred to the fact that BMW had repeatedly offered to relinquish possession or custody of the vehicles to Autoport, and she concluded that it was manifestly unfair to require BMW to continue to bear the financial burden of storage when Autoport wanted preservation of the vehicles, but was unwilling to take possession of them. In arriving at this conclusion the Master failed to consider Autoport's evidence that it

Tab 190

CanLII

Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761 (CanLII)

Source:	Superior Court of Justice
Date:	2025-05-05
File number:	CV-19-00004487-0000
Citation:	Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761 (CanLII), <https://canlii.ca/t/kbzwc>, retrieved on 2026-01-18

CITATION: Derenzis et al v. His Majesty the King et al, 2025 ONSC 2761
COURT FILE NO.: CV-19-00004487-0000
DATE: 2025 05 05

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: DERENZIS, Lucia
DA SILVA, Joshua, **plaintiffs**

AND:

HIS Majesty THE KING in Right of Ontario,
GORE MUTUAL INSURANCE COMPANY,
SEVCIK, Heidi,
FERRITO, Joseph,
BEECRAFT, Sarah,
BETHUNE, Jennifer,
JONES, Ken, BY HIS LITIGATION ADMINISTRATOR
CHRISTOPHER RAYMOND JONES
WHITEHALL BUREAU OF CANADA LIMITED,
WRIGHT, Michael,
MASCARENHAS, David,
AMBLESIDE INVESTIGATION MANAGEMENT INC.,

RAPID INTERACTIVE DISABILITY MANAGEMENT INC.,
HEERAMAN Singh, Ranu,
PEEL REGION POLICE SERVICE BOARD,
PERONE, Andrea,
MULLINGS, Carl, **defendants**

AND:

TRIBUNALS ONTARIO, **third-party records holder**

BEFORE: Justice MANDHANE

COUNSEL: ISMAIL, Ashu, for the **plaintiffs**
Email: ashu@campisilaw.ca

WAGNER, Eric, for the **third-party records holder**
Email: eric.wagner@ontario.ca

REASONS ON RULE 30.10 MOTION FOR PRODUCTION OF RECORDS HELD BY TRIBUNALS ONTARIO

INTRODUCTION

[1] The Plaintiff, Lucia Derenzis, brings a motion pursuant to Rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for production of records held by the License Appeal Tribunal ("LAT"). The records include adjudicators' notes and draft decisions (the "notes and drafts"), and more than 400 emails between adjudicators, counsel and staff (the "emails"). The LAT created the records during its administration of Derenzis' applications against her insurance company, Gore Mutual Insurance Company ("the Insurer").

[2] Because the records contain her personal information, Derenzis first requested them from the LAT directly. The LAT refused to provide them, asserting deliberative secrecy and solicitor-client privilege. Derenzis appealed the LAT's refusal to the Information and Privacy Commissioner for Ontario ("IPCO"). The LAT would not disclose the records to the IPCO for their review. While the IPCO refused to order release of the notes and drafts, it found that there was "insufficient evidence" to determine whether the emails were also subject to deliberative secrecy. The IPCO ordered the LAT "to issue an access decision"

with respect to the emails. In its access decision, the LAT again refused to release the records to Derenzis. The IPCO's decision is now under review by the Divisional Court.

[3] Derenzis now appears before this court. She asks me to order Tribunals Ontario ("the Tribunal") to produce the records because they are relevant and necessary to her constitutional challenge to Ontario's no-fault auto insurance scheme, and because there are valid reasons for believing that the LAT did not comply with the rules of natural justice when administering her applications.

[4] The Tribunal opposes any production order: it says that the records are irrelevant to the claim and, in the alternative, that they are protected by deliberative secrecy and/or solicitor-client privilege. It says that I should not lift the veil of secrecy because the LAT complied with natural justice in administering her claim.

[5] Having carefully reviewed the records, I order the Tribunal to produce them to Derenzis, save and except those that I have determined are protected by solicitor-client privilege. The records are relevant to the constitutional challenge, and they are necessary because whether the LAT is sufficiently independent is a central issue in the litigation.

[6] While some records are protected by deliberative secrecy, the secrecy must give way on these facts because Derenzis has demonstrated concerns about a breach of natural justice. It is uncontroversial that two successive executive chairs of the Tribunal have directly intervened three times in Derenzis' applications to the LAT: first, to recuse a three-person panel for the appearance of bias; then, to recuse a panel member because she had been on the first three-person panel; and, most recently, to personally complain about plaintiff's counsel to the Law Society of Ontario.

OVERVIEW

[7] It is undisputed that Derenzis suffered catastrophic injuries after a truck ran her down on November 24, 2015. Pursuant to the Statutory Accident Benefits Schedule ("the

Schedule"), Derenzis claimed statutory accident benefits from the Insurer ("the benefits"), while also suing the driver of the truck for damages (CV-16-00001766-0000).

[8] Derenzis' applied to the LAT three times for relief against her Insurer about her benefits eligibility and coverage. Derenzis was roundly unsuccessful at the LAT and her applications are now mired in multiple appeals to the Divisional Court.

[9] In this action (CV-19-00004487-0000), Derenzis seeks general and punitive damages totaling over ten million dollars against the Insurer amongst others. She alleges that the Insurer and its sub-contractors intentionally caused her emotional distress by requiring her to attend repeated medical examinations and through aggressive public surveillance of her and her family.

[10] The Insurer says that this Court does not have jurisdiction over the substance of the claim: *Yang v. Co-operators General Insurance Company,* 2022 ONCA 178, at para. 7. Indeed, it is well-established that the LAT has exclusive jurisdiction over all matters related to the nature and extent of the insurer's obligations under the Schedule, including any alleged efforts to circumvent them: *Yang*, at paras. 4-7, referring to *Stegenga v. Economical Mutual Insurance Co.,* 2019 ONCA 615. At the same time, the LAT has interpreted its own enabling legislation to find that it does not have jurisdiction to award damages for torts or breach of contract: *Gilani v. Travelers Insurance Company of Canada,* 2022 ONLAT 19-009248/AABS.

[11] To get around these jurisdictional hurdles, as part of her civil claim, Derenzis asks me to declare sections 280 and 267.5 of the *Insurance Act*, R.S.O. 1990, c. I.8 unconstitutional ("the impugned provisions"). The impugned provisions form the backbone of Ontario's no-fault auto insurance scheme. They give the LAT exclusive jurisdiction over all aspects of disputes about how an insurer handles claims made pursuant to the Schedule. Derenzis says that the impugned provisions are invalid because they create a statutory bar on damage claims related to the administration of the benefits, and delegate adjudication of insurance

contracts to an inferior tribunal that lacks independence (*i.e.,* the LAT). Ontario is named as a defendant to respond to the constitutional issues but does not take a position on this motion.

[12] Derenzis now asks me to order the Tribunal to produce all the records in its possession that are relevant and necessary to her constitutional challenge.

[13] The Tribunal opposes the motion on behalf of the LAT. The Tribunal claims deliberative secrecy over all the records because they "may enclose a draft decision or direction, may reveal the adjudicator's procedural or substantive decisions or directions, and may reveal how adjudicators are assigned to files." The Tribunal claims solicitor-client privilege over the records where the adjudicator seeks advice from counsel or where counsel provides advice to the adjudicator, as well as staff communications that reveal legal advice sought or received.

[14] The parties agree that the law on a Rule 30.10 motion is set out in *Ontario (Attorney General) v. Stavro* (1995), 26 O.R. (3d) 39, 1995 CanLII 3509 (C.A.), and that I could review the records for the purposes of determining the motion.

[15] To decide this motion, I must answer the following questions:

- Are the records relevant to the constitutional challenge?
- Are the records necessary for a fair hearing of the constitutional application?
- Are the records protected by deliberative secrecy? If so, should the secrecy be lifted because Derenzis has demonstrated concerns about a breach of natural justice?
- Are any of the records protected by solicitor-client privilege?

ANALYSIS

[16] The LAT is a provincial administrative tribunal whose decision-makers have adjudicative independence but whose associate chair is accountable for the LAT's administration to the executive chair of the Tribunal. The executive chair is responsible for ensuring that all provincial administrative tribunals—including the LAT—are accountable, transparent, and efficient, while maintaining the independence of their decision-making: *Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, S.O. 2009, c. 33, Sched. 5, s. 1 & 16(1).

[17] The Tribunal says that the records were all produced as part of the LAT's day-to-day administration of Derenzis' applications. The Tribunal provided an affidavit outlining the steps in the LAT application process:

- Step 1: Upon receipt, the application is uploaded to the case management portal by staff.
- Step 2: The staff team lead assigns a case management officer to assess the file and take the administrative steps necessary to implement the procedural directions given by the adjudicator.
- Step 3: The associate chair (or their delegate vice-chair) assigns an adjudicator to conduct a case conference; assignments are based on the nature of the proceedings, the legal issues involved, the size and composition of the hearing panel, adjudicator expertise, and adjudicator availability.
- Step 4: If settlement is not achieved at the case conference, the case management adjudicator, with assistance of staff, manages the next procedural steps in the application, including scheduling motions.

- Step 5: The associate chair (or their delegate vice-chair) assigns an adjudicator or panel of adjudicators to conduct the merits hearing ("merits adjudicator").

- Step 6: The merits adjudicator may direct staff to release final or interim decisions.

[18] The LAT's affiant did not provide details about how the associate chair is accountable to the executive chair of the Tribunal.

Are the records relevant to the constitutional application?

[19] It is uncontroversial that the constitutional application is a material issue in the trial. The only issue at this stage is whether the records are relevant to the constitutional challenge—meaning, do they make it more or less likely that a fact in issue is true.

[20] The pleadings in the action frame the relevance analysis. Derenzis pleads her constitutional claim in her Second As Amended Statement of Claim in two main ways. First, she alleges that the impugned provisions extinguish her common law rights to seek damages in tort, equity, and contract—without monetary limits—contrary to s. 96 of the *Constitution Act, 1867*. Second, she pleads that he impugned provisions provide an inferior tribunal that lacks adjudicative independence (*i.e.* the LAT) with exclusive jurisdiction to decide disputes, and that this has a disproportionate negative impact on the disabled people, contrary to ss. 7 & 15 of the *Charter*. Ontario has not moved to strike the constitutional application and has agreed that it should be heard on its merits.

[21] Leaving aside the merits of the Plaintiff's claim, it is clear from the pleadings that a key factual issue in dispute is whether the LAT lacks adjudicative independence. The records are relevant to that issue because they are directly related to the adjudicative and administrative processing of her claim by the LAT, including the interactions between adjudicators, counsel, staff, and associate, vice, and executive chairs. While the records

may not be especially probative or even admissible at trial, that does not matter on a Rule 30.10 motion where the only question is relevance.

Are the records necessary for a fair hearing of the constitutional application?

[22] Having found that the records are relevant, I must go on the consider whether disclosure is necessary for a fair hearing of the constitutional application: *Ontario v. Stavro*.

[23] I find that it is. It is uncontroversial that *Charter* challenges cannot proceed in a factual vacuum and must be proven through evidence rather than speculation and conjecture. This is certainly the case here where Derenzis seeks to challenge legislation that creates Ontario's no fault auto insurance scheme: *Campisi v. Ontario (AG),*2017 ONSC 2884, at para. 15; aff'd 2018 ONCA 869.

[24] Meanwhile, the records cannot be obtained in any other way because the LAT has already refused Derenzis' freedom of information request. Suffice it to say, the Tribunal is not a typical third-party to this litigation: its actions lay at the heart of the constitutional challenge, its interests are the same as those of Ontario (they are accountable to the same Minister), and there is no contravening privacy interest in the documents.

Are the records protected by deliberative secrecy? If so, should the secrecy be lifted because Derenzis' has demonstrated concerns about a breach of natural justice?

[25] The LAT says that all the records are protected by deliberative secrecy. In addition to the adjudicator's draft and notes, the LAT says that the emails may reveal the adjudicator's procedural or substantive decisions or directions, and may reveal how adjudicators are assigned to files.

[26] Justice Nishikawa succinctly set out the law in *Grogan v. Ontario College of Teachers,* 2023 ONSC 2980, paras. 16-18. Deliberative secrecy is a core component of administrative independence: it promotes the finality of decision by preventing disclosure of how and why decision-makers reached their decisions, while also creating a zone of secrecy in which decision-makers can engage in collegial debate and seek appropriate feedback with the goal of ensuring consistency.

[27] Deliberative secrecy is not watertight in the administrative context because there is an inherent tension between secrecy and the fundamental right to know that the decision was made in accordance with the principles of natural justice. That is why the secrecy is interpreted more narrowly to only attach to matters that lie at the heart of the exercise of judgement or the deliberative process: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952, 1992 CanLII 1135.

[28] I start with the emails before turning to the notes and drafts. Based on my review, the emails fall into three broad categories. The first and largest category of emails are administrative communications about the management of Derenzis' applications before the LAT (the "administrative emails"). The administrative emails deal with day-to-day case management like receipt and distribution of application materials, receipt and response to routine communications, confirmation of procedural steps, internal tracking, and scheduling. The administrative emails are not protected by deliberative secrecy because there is nothing deliberative about them—they do not relate to the decision-making process in any way.

[29] The second category of emails are communications about adjudicator assignments and schedules ("scheduling emails"). In *Mackeigan v. Hickman,* [1989] 2 S.C.R. 796, 1989 CanLII 40, the Supreme Court reiterated the importance of courts having control over the assignment of judges without interference from the legislature or executive. This reasoning applies with equal force to administrative tribunals as far as it would be unthinkable for Ontario's Attorney General to instruct the LAT's associate chair to assign a particular adjudicator to a particular application. However, deliberative secrecy does not extend to the scheduling emails because they relate to scheduling and not decision-making. They have little to do with the associate chair applying his discretion to determine which members to assign to which files. Again, the substance of the scheduling emails is administrative; they are not protected by deliberative secrecy.

[30] The third category of emails are those that relate to or otherwise might reveal deliberations by adjudicators or the substantive decision-making processes employed by the LAT ("deliberative emails"). The deliberative emails shed light on the nature and extent to which adjudicators engage with other adjudicators, counsel, and staff as part of their decision-making process on both procedural and substantive matters. The deliberative emails are *prima facie* protected by deliberative secrecy because they relate to the process by which adjudicators arrived at both procedural and substantive decisions.

[31] Beyond the emails, the Tribunal claims deliberative secrecy over the notes and drafts. Most the notes and drafts fall within the core of the type of communications that are meant to be protected by deliberative secrecy. They include communications that go to the substance of the decision-making process, including what material was considered or not considered by the adjudicator, the legal advice that was requested or received, and the extent to which the adjudicator was influenced by the views of others: *Agnew v. Ontario Association of Architects* (1987), 1987 CanLII 4030 (ON SC), 64 O.R. (2d) 8 (Ont. Div. Ct.), at pp. 16-17.

[32] That all being said, administrative tribunals cannot rely on deliberative secrecy to the same extent as courts. The secrecy may be lifted where the litigant can present "valid reasons for believing that the process followed did not comply with the rules of natural justice": *Commission scolaire de Laval v. Syndicat de l'enseignement de la region de Laval*, 2016 SCC 8, at para. 58.

[33] Here, Derenzis says that I should order to lift the secrecy over the deliberative emails and the notes and drafts because she has presented valid reasons for believing that the process followed by the LAT did not comply with the rules of natural justice.

[34] I find that Derenzis has met her onus in this regard. To support my finding, I rely on three uncontroversial facts about Derenzis' applications before the LAT, that:

- On May 18, 2018, the executive chair recused a LAT panel assigned to hear the Derenzis matter after one of the adjudicator's told the parties that he had to take instructions from his "client."

- On May 1, 2019, the executive chair recused a LAT adjudicator from hearing a Derenzis matter because she had been on the LAT panel that had been recused in 2018.

- On January 24, 2025, the executive chair filed a complaint to the Law Society of Ontario against one of the Derenzis' lawyers based on materials that the lawyer filed at the LAT on her behalf.

[35] These facts alone raise concerns about the independence of LAT adjudicators, and whether their process complied with natural justice as it relates to Derenzis' applications. My concerns are amplified by the Court of Appeal's finding that the LAT's internal review process lacked sufficient independence during the same time frame as Derenzis' applications and under the same executive leadership: *Shuttleworth v. License Appeal Tribunal,* 2018 ONSC 3790, aff'd 2019 ONCA 518.

[36] I would order the LAT to produce the records save and except those protected by solicitor-client privilege. I turn to the privilege claim next.

Are any of the records protected by solicitor-client privilege?

[37] The LAT claims privilege over emails involving counsel who provide legal advice, provide comments on draft decisions when requested, and assist in the finalizing and publication of decisions.

[38] Because LAT counsel provides both legal and non-legal services, I must consider whether counsel's advice *in each communication* is such that it can be properly characterized as privileged: *Pritchard v. Ontario (Human Rights Commission),* 2004 SCC 31, at paras. 19-20.

[39] Solicitor-client privilege applies to communications between solicitor and client, which entails the giving of legal advice, and which are intended to be confidential by the parties. It is meant to create a zone of privacy where the client is able to speak freely with counsel to obtain their advice. In *Pritchard,* the Supreme Court found, for example, that staff counsel's legal opinion to the commission was protected by solicitor-client privilege, at para. 28. Once established, solicitor-client privilege is nearly absolute.

[40] The Tribunal claims solicitor-client privilege over nearly seventy emails, which include communications involving counsel, law clerks, staff, adjudicators, and larger staff teams. Having reviewed the emails, I find that some of them are properly considered privileged insofar as they relate to the request for and receipt of legal advice. However, many emails are not related to legal advice at all because they are administrative; they relate to the internal processing of Derenzis' application by the LAT and cannot be properly characterized as related to legal advice.

[41] Using the numbering found in the chart at Exhibit EE to the Tribunal's affidavit, I find that only the following emails are protected by solicitor-client privilege: 6, 7, 10, 17,

18, 20, 34, 36, 38, 43, 49, 52, 55, 56, 82, 85, 87, 148, 349-351, 353, 354.

[42] Using the LAT's document naming convention, I find that the following notes and drafts also protected by solicitor-client privilege because they involve legal advice:

- 4th Reconsideration Request Decision Derenzis 17-002762 - final version for release.msg
- FW_ Recon Legal Review - JB TO TG.msg
- 18-011978 - Response to July 30 2019 Letter_docx.msg
- Decision in mCL 18-011978.msg
- FW_ Decision in mCL 18-011978.msg
- July 18-19_ln_18-011978 - Motion.msg
- RE_ Tipping v Coseco Tribunal No__ 18-004783_AABS.msg
- Response to Recusal Request 18-011978.msg

ORDER

[43] The Tribunal shall produce all the records in its possession that are relevant to the constitutional challenge, except those protected by solicitor-client privilege pursuant to paragraphs 41 and 42 of these reasons.

[44] Derenzis was successful on this motion. Based on the agreement of the parties, Tribunals Ontario shall pay costs in the amount of $4,000.

MANDHANE J.

Released: May 5, 2025

Tab 191

CanLII

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII), [2019] 4 SCR 653

Source:	Supreme Court of Canada
Date:	2019-12-19
File number:	37748
Other citations:	[2019] 4 SCR 563 — 441 DLR (4th) 1 — 312 ACWS (3d) 460 — AZ-51654335 — [2020] EXP 27 — 59 Admin LR (6th) 1 — 69 Imm LR (4th) 1 — [2019] CarswellNat 7883 — EYB 2019-335761 — [2019] SCJ No 65 (QL) — [2019] ACS no 65
Citation:	Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 (CanLII), [2019] 4 SCR 653, <https://canlii.ca/t/j46kb>, retrieved on 2026-01-18
Most recent unfavourable mention	Decision No.: 2025-0725, 2025 CanLII 123091 (AB WCAC) [...] [42] The representative's reliance on **Vavilov is not applicable** , as that decision governs judicial review rather than appeals heard de novo. [...]

SUPREME COURT OF CANADA

Citation: Canada (Minister of Citizenship and Immigration) *v.* Vavilov, 2019 SCC 65, [2019] 4 S.C.R. 653

Appeal Heard: December 4, 5, 6, 2018
Judgment Rendered: December 19, 2019
Docket: 37748

Between:

Minister of Citizenship and Immigration
Appellant

and

Alexander Vavilov
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada
Interveners

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

Joint Reasons for Judgment: (paras. 1 to 197)	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.
Joint Concurring Reasons: (paras. 198 to 343)	Abella and Karakatsanis JJ.

CANADA *v.* VAVILOV

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Bar Association,
Canadian Association of Refugee Lawyers,
Community & Legal Aid Services Programme,
Association québécoise des avocats et avocates en droit de l'immigration and
First Nations Child & Family Caring Society of Canada *Interveners*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen — Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. C-29, s. 3(2)(a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have

highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldy and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to

appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be

exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask

what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will

generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply

only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per Abella and Karakatsanis JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the

central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons

offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

Cases Cited

By Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.

Considered: *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6; *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52; *Al-Ghamdi v. Canada (Minister of Foreign Affairs and International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 168; **explained:** *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; **discussed:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833; *Queensland v. Commonwealth* (1977), 139 C.L.R. 585; *Minister of Indian Affairs and Northern Development v. Ranville*, 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518; *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385

(SCC), [1997] 1 S.C.R. 748; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795; *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328; *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14; *R. v. Robinson*, 1996 CanLII 233 (SCC), [1996] 1 S.C.R. 683; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, 1995 CanLII 101 (SCC), [1995] 2 S.C.R. 739; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, 1985 CanLII 35 (SCC), [1985] 1 S.C.R. 831; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Westcoast Energy Inc. v. Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 S.C.R. 322; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3; *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013); *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653; *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Reference re*

Remuneration of Judges of the Provincial Court of Prince Edward Island, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267; *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135; *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151; *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17; *Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520; *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202; *Renaud v. Quebec (Commission des affaires sociales)*, 1999 CanLII 642 (SCC), [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398; *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279.

By Abella and Karakatsanis JJ.

Considered: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); **discussed:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **referred to:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 1994 CanLII 608 (ON CA), 17 O.R. (3d) 267; *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*,

1970 CanLII 7 (SCC), [1970] S.C.R. 425; *Bell v. Ontario Human Rights Commission*, 1971 CanLII 195 (SCC), [1971] S.C.R. 756; *Canada (Attorney General) v. Public Service Alliance of Canada*, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614; *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Cartaway Resources Corp. (Re)*, 2004 SCC 26, [2004] 1 S.C.R. 672; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014); *Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708; *R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897; *Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149; *Lee v. New South Wales Crime Commission* (2013), 302 A.L.R. 363; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42; *Buffalo City Metropolitan Municipality v. Asla Construction (Pty) Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331; *Payne v. Tennessee*, 501 U.S. 808 (1991); *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833; *Minister of Indian Affairs and Northern Development v. Ranville*, 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518; *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014); *Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54, [2009] 3 S.C.R. 465; *Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992); *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981); *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019); *Committee for the Equal*

Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission), 2001 SCC 37, [2001] 2 S.C.R. 132; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32, [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609; *Binus v. The Queen*, 1967 CanLII 15 (SCC), [1967] S.C.R. 594; *Bilski v. Kappos, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010); *Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997); *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Volvo Canada Ltd. v. U.A.W., Local 720*, 1979 CanLII 4 (SCC), [1980] 1 S.C.R. 178; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, [2018] 1 S.C.R. 83; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Northern Telecom Ltd. v. Communications Workers of Canada*, 1979 CanLII 3 (SCC), [1980] 1 S.C.R. 115; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6; *Mills v. Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29, [2012] 2 S.C.R. 108; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293; *Brossard (Town) v. Quebec (Commission des droits de la personne)*, 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539; *Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL); *R. v. Bonadie* (1996), 1996 CanLII 17924 (ON CJ), 109 C.C.C. (3d) 356; *Al-Ghamdi v. Canada (Minister of Foreign Affairs and International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67.

Statutes and Regulations Cited

Administrative Tribunals Act, S.B.C. 2004, c. 45, ss. 58, 59.

An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal, Bill 32, 1st Sess., 42nd Leg., Quebec, 2019.

Canadian Charter of Rights and Freedoms, s. 1.

Canadian Citizenship Act, R.S.C. 1970, c. C-19, s. 5(3).

Citizenship Act, R.S.C. 1985, c. C-29, ss. 3, 10, 22.1 to 22.4.

Citizenship Regulations, SOR/93-246, s. 26.

Constitution Act, 1867, s. 96.

Constitution Act, 1982, s. 35.

Federal Courts Act, R.S.C. 1985, c. F-7, ss. 18 to 18.2, 18.4, 27, 28.

Foreign Missions and International Organizations Act, S.C. 1991, c. 41, ss. 3, 4, Schs. I, II, arts. 1, 41, 43, 49, 53.

Human Rights Code, R.S.B.C. 1996, c. 210, s. 32.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 35 to 37.

Interpretation Act, R.S.C. 1985, c. I-21, s. 35(1).

Municipal Government Act, R.S.A. 2000, c. M-26, s. 470.

Ontario Human Rights Code, 1961-62, S.O. 1961-62, c. 93, s. 3.

Treaties and Other International Instruments

Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality, 500 U.N.T.S. 223, art. II.

Vienna Convention on Consular Relations, Can. T.S. 1974 No. 25.

Vienna Convention on Diplomatic Relations, Can. T.S. 1966 No. 29.

Authors Cited

Arthurs, H. W. "Protection against Judicial Review" (1983), 43 *R. du B.* 277.

Barak, Aharon. "Overruling Precedent" (1986), 21 *Is.L.R.* 269.

Biddulph, Michelle. "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119.

Bingham, Tom. *The Rule of Law*. London: Allen Lane, 2010.

Brouwer, Andrew. *Statelessness in Canadian Context: A Discussion Paper*, July 2003 (online: https://www.unhcr.org/protection/statelessness/40629ffc7/statelessness-canadian-context-discussion-paper.html; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC65_1_eng.pdf).

Brown, Donald J. M., and John M. Evans, with the assistance of David Fairlie. *Judicial Review of Administrative Action in Canada*, vol. 3. Toronto: Thomson Reuters, 2013 (loose-leaf updated December 2018, release 4).

Brownlie, Ian. *Principles of Public International Law*, 5th ed. Oxford: Clarendon Press, 1998.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, 34:23.

Coady, Jonathan M. "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 *U.N.B.L.J.* 87.

Cohen-Eliya, Moshe, and Iddo Porat. "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458.

Cromwell, Thomas A. "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307.

Daly, Paul. "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694.

Daly, Paul. "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233.

Daly, Paul. "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

Daly, Paul. "The Signal and the Noise in Administrative Law" (2017), 68 *U.N.B.L.J.* 67.

DeMarco, Jerry V. "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67.

Dicey, Albert Venn. *Introduction to the Study of the Law of the Constitution*, 10th ed. London: Macmillan, 1959.

Duxbury, Neil. *The Nature and Authority of Precedent*. Cambridge: Cambridge University Press, 2008.

Dyzenhaus, David. "The Politics of Deference: Judicial Review and Democracy", in Michael Taggart, ed., *The Province of Administrative Law*. Oxford: Hart, 1997, 279.

Dyzenhaus, David. "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 *Rev. Const. Stud.* 87.

Evans, John M. "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67.

Evans, John M. "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101.

Frankfurter, Felix. "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527.

Garner, Bryan A., et al. *The Law of Judicial Precedent*. St. Paul, Minn.: Thomson Reuters, 2016.

Gerhardt, Michael J. *The Power of Precedent*. New York: Oxford University Press, 2008.

Grant, Angus, and Lorne Sossin. "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context*, 3rd ed. Toronto: Emond, 2018, 341.

Green, Andrew. "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 *U.B.C. L. Rev.* 443.

Hall, Geoff R. "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434.

Iacobucci, Frank. "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 *Queen's L.J.* 859.

Laskin, Bora. "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684.

Lewans, Matthew. *Administrative Law and Judicial Deference*. Portland, Or.: Hart Publishing, 2016.

Lewans, Matthew. "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109.

Macdonald, R. A. "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307.

Macdonald, Roderick A., and David Lametti. "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123.

Macklin, Audrey. "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 *Queen's L.J.* 1.

Macklin, Audrey. "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context*, 3rd ed. Toronto: Emond, 2018, 381.

Madden, Mike. "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269.

Makela, Finn. "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345.

McLachlin, Beverley. "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171.

McLachlin, Beverley. *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online: https://www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC65_2_eng.pdf).

McLachlin, Beverley. "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127.

McLachlin, Beverley. "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law*. Toronto: University of Toronto Press, 2019, 25.

Morissette, Yves-Marie. "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225.

Mullan, David. "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1.

Munro, Katherine. "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour* 199.

Pape, Paul J., and John J. Adair. "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6.

Perell, Paul M. "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40.

Powell, Lewis F., Jr. "*Stare Decisis* and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281.

Régimbald, Guy. *Canadian Administrative Law*, 2nd ed. Markham, Ont.: LexisNexis, 2015.

Robertson, Joseph T. "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1.

Robertson, Joseph T. "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145.

Robertson, Joseph T. *Administrative Deference: The Canadian Doctrine that Continues to Disappoint*, April 18, 2018 (online: https://poseidon01.ssrn.com/delivery.php?ID=025078121121077073088100069023108009116008031085056044126101104009101077075091124065033020049102118033018088 version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC65_3_eng.pdf).

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Stacey, Jocelyn, and Alice Woolley. "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211.

Stack, Kevin M. "Overcoming Dicey in Administrative Law" (2018), 68 *U.T.L.J.* 293.

Stratas, David. "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

Van Harten, Gus, et al. *Administrative Law: Cases, Text, and Materials*, 7th ed. Toronto: Emond, 2015.

Waldron, Jeremy. "*Stare Decisis* and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1.

Willes, John A. *The Ontario Labour Court: 1943-1944*. Kingston, Ont.: Industrial Relations Centre, Queen's University, 1979.

APPEAL from a judgment of the Federal Court of Appeal (Stratas, Webb and Gleason JJ.A.), 2017 FCA 132, [2018] 3 F.C.R. 75, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, [2017] F.C.J. No. 638 (QL), 2017 CarswellNat 2791 (WL Can.), setting aside a decision of Bell J., 2015 FC 960, [2016] 2 F.C.R. 39, 38 Imm. L.R. (4th) 110, [2015] F.C.J. No. 981 (QL), 2015 CarswellNat 3740 (WL Can.). Appeal dismissed.

Michael H. Morris, *Marianne Zorić* and *John Provart*, for the appellant.

Hadayt Nazami, *Barbara Jackman* and *Sujith Xavier*, for the respondent.

Sara Blake and *Judie Im*, for the intervener the Attorney General of Ontario.

Stéphane Rochette, for the intervener the Attorney General of Quebec.

J. Gareth Morley and *Katie Hamilton*, for the intervener the Attorney General of British Columbia.

Kyle McCreary and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

Jamie Liew, for the intervener the Canadian Council for Refugees.

Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

Matthew Britton and *Jennifer M. Lynch*, for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission.

Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick).

Written submissions only by *Gavin R. Cameron* and *Tom Posyniak*, for the intervener the British Columbia International Commercial Arbitration Centre Foundation.

Terrence J. O'Sullivan and *Paul Michell*, for the intervener the Council of Canadian Administrative Tribunals.

Written submissions only by *Susan L. Stewart*, *Linda R. Rothstein*, *Michael Fenrick*, *Angela E. Rae* and *Anne Marie Heenan*, for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec.

Steven Barrett, for the intervener the Canadian Labour Congress.

Written submissions only by *William W. Shores*, *Q.C.*, and *Kirk N. Lambrecht*, *Q.C.*, for the intervener the National Association of Pharmacy Regulatory Authorities.

Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Guy Régimbald, for the intervener the Canadian Bar Association.

Audrey Macklin and *Anthony Navaneelan*, for the intervener the Canadian Association of Refugee Lawyers.

Written submissions only by *David Cote* and *Subodh Bharati*, for the intervener the Community & Legal Aid Services Programme.

Guillaume Cliche-Rivard and *Peter Shams*, for the intervener Association québécoise des avocats et avocates en droit de l'immigration.

Nicholas McHaffie, for the intervener the First Nations Child & Family Caring Society of Canada.

Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

[1] The Chief Justice and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ. — This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

[3] We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

[4] Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

[5] Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

[6] In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

[7] The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

[8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has

come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

[9] The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

[10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[11] The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

[12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

[16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47; see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

[18] Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57, 129-31 and 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 43-44; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, at pp. 849-50.

[19] On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in *Craig*, at para. 26:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[20] Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Minister of Indian Affairs and Northern Development v. Ranville*, 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518, at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": *Bernard*, at p. 858. These considerations apply here.

[21] Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

> . . . judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. . . . If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis]. . . . A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome.

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review". While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

[22] As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decision other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

[26] Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227 ("*C.U.P.E.*"), the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

[27] In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at paras. 50-53; *Dunsmuir*, at para.

49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault*, a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

[28] Unfortunately, this contextual analysis proved to be unwieldy and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

[29] Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

[30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the

fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

[31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[32] That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. *Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent*

[33] This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

(1) Legislated Standards of Review

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in her factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[38] We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is

justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

[39] First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J. T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27, at p. 33; Daly, at pp. 541-42; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7262591 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, at paras. 190-92, per Nadon J.A., concurring, and at paras. 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

[40] This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, 1996 CanLII 233 (SCC), [1996] 1 S.C.R. 683, at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

[41] Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, 1995 CanLII 101 (SCC), [1995] 2 S.C.R. 739, at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 7.

[42] The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

[43] Yet as, in *Dunsmuir*, *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

[44] More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

[45] That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, 1985 CanLII 35 (SCC), [1985] 1 S.C.R. 831, at p. 838.

[46] Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily

when the decision maker possessed greater relative expertise — what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

[47] The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

[48] Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

[49] In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

[50] We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide

for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

[51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

[52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

[53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, at para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 S.C.R. 322.

[56] The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

[57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) General Questions of Law of Central Importance to the Legal System as a Whole

[58] In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

[59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, at para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 20; *Canadian National*

Railway, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

[60] This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

[61] We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

[62] In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

[63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, at para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

[64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the

latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, [2017] 1 S.C.R. 360; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

[67] In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it to one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional".

E. *Other Circumstances Requiring a Derogation From the Presumption of Reasonableness Review*

[69] In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to

rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and

require a court to step in is not obvious. Given these practical difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

III. Performing Reasonableness Review

[73] This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

[74] In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": factum of the *amici curiae*, at para. 12.

[75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. *Procedural Fairness and Substantive Review*

[76] Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

[77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant

impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[78] In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S. A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment: Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of*

Judges of the Provincial Court of Prince Edward Island, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive

focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. *Reasonableness Is a Single Standard That Accounts for Context*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, [2018] 2 S.C.R. 293, at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review

of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons. Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing

court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission),* 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a

critical point (see *Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and

untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest" — it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a

relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

(c) *Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review

described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory

provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52, in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general

consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

[133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25.

However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

[136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

[140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

[141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, 1999 CanLII 642 (SCC), [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 54 and 88. Elements like concern

for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

[143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases —including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

[144] This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

[145] Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov's Application for Judicial Review

[146] The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the *Citizenship*

Act and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. *Facts*

[147] Mr. Vavilov was born in Toronto as Alexander Foley on June 3, 1994. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

[148] Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

[149] Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

[150] Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

[151] However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

B. *Procedural History*

(1) Registrar's Decision

[152] In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

(a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.

(b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.

(c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".

(d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

[153] For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

[154] In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued

to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*": A.R., vol. I, at p. 3. The report was dated June 24, 2014.

[155] In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> **(b)** an employee in the service of a person referred to in paragraph (a); or
>
> **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[156] The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government".

[157] The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

[158] The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government', but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

[159] Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The

exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship: *ibid.*, at p. 14.

(2) Federal Court (Bell J.), 2015 FC 960, [2016] 2 F.C.R. 39

[160] Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

[161] The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

[162] The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

[163] Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75

[164] A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

[165] The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

[166] The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

[167] The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

[168] The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. *Analysis*

(1) Standard of Review

[169] Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

[170] When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

(2) Review for Reasonableness

[171] The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government"

within the meaning of s. 3(2)(a) of the *Citizenship Act*.

[172] In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter, the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

[173] Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) *Section 3(2) of the Citizenship Act*

[174] The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*. Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

[175] The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> **(b)** an employee in the service of a person referred to in paragraph (a); or
>
> **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities

> certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[176] As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

(b) *The Foreign Missions and International Organizations Act and the Treaties It Implements*

[177] Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

[178] To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.

(A.R., vol. IV, at pp. 449-50)

[179] In *Al-Ghamdi v. Canada (Minister of Foreign Affairs and International Trade)*, 2007 FC 559, 64 Imm. L.R. (3d) 67, a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

> . . . Of particular interest are the special rules relating to the *jus soli*, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'. Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Footnotes omitted.]

(Brownlie, at pp. 392-93)

[180] Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, Respecting Bill C-20, An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at p. 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large foreign corporations": *ibid*. Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

[181] In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

[182] It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at

para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53-54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

(c) *Jurisprudence Interpreting Section 3(2) of the Citizenship Act*

[183] Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth": A.R., vol. I, at p. 7. But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi*; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 168 — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

[184] In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that

> [t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats . . . .

[185] The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the *Charter*, the court found that the choice

to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

[186] In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status": *Lee*, at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para. 58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

[187] *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

[188] What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

(d) *Possible Consequences of the Registrar's Interpretation*

[189] When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for — you're right, for diplomats and that they don't — because they are not — they are not obliged . . . to the law of Canada and everything, so that's why their children do not obtain citizenship if they were born in Canada while the person was in Canada under that status.

> But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person[s] than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that . . . .

(R.R., transcript, at pp. 87-88)

[190] In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged . . . to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

[191] Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358, in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

[192] It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Quebec (Commission des droits de la personne)*, 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

[193] Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 *Queen's L.J.* 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and recognize

that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship Regulations* and the revocation of an individual's citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. *Conclusion*

[194] Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

[195] As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

[196] Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

E. *Disposition*

[197] The appeal is dismissed with costs throughout to Mr. Vavilov.

The following are the reasons delivered by

[198] Abella and Karakatsanis JJ. — Forty years ago, in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

[199] Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

[200] We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190.

[201] But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

The Evolution of Canadian Administrative Law

[202] The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional

discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

[203] In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

[204] The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 1994 CanLII 608 (ON CA), 17 O.R. (3d) 267 (C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

[205] Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

[206] The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not

constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 *U.T.L.J.* 293, at p. 294).

[207] The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, the judicial progenitor of "jurisdictional error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors" capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

[208] The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, 1970 CanLII 7 (SCC), [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, 1971 CanLII 195 (SCC), [1971] S.C.R. 756. These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. Public Service Alliance of Canada*, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614, at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the *Ontario Human Rights Code*, *1961-62*, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

[209] As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R. A. Macdonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

[210] In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 45; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII), [2018] 2 S.C.R. 230, at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

[211] By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

> . . . legislatures and courts in . . . Canada have come to settle on the idea that the functional capacities of administrative agencies – their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change – justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]

(Stack, at p. 310)

[212] In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law — one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

[213] A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 *Queen's L.J.* 859, at p. 866).

[214] In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, the Court introduced the "pragmatic and functional" approach for deciding when a

matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

[215] Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> . . . has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

[216] By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision . . . [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be "the most important" (*Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 50).

[217] Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722, at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

[218] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the

nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

[219] Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, 2004 SCC 26 (CanLII), [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650, at paras. 88-92 and 100).

[220] Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

[221] Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para. 49). They noted that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93).

[222] Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, 2010 SCC 22 (CanLII), [2010] 1 S.C.R. 765, at para. 53; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly

confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise . . . (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

[223] And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (CanLII), [2016] 2 S.C.R. 293, the majority recognized:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer . . . . [E]xpertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions." [Citation omitted; para. 33.]

[224] The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

[225] As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 (CanLII), [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 (CanLII), [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII), [2016] 2 S.C.R. 80, the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

[226] In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language . . . a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471 ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless

> of whether the review is conducted in the context of an application for judicial review or of a statutory appeal . . . . [para. 38]

[227] In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case — would go against strong jurisprudence from this Court" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

[228] By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*'s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" . . . . After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

[229] In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

The Majority's Reasons

[230] The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise . . . institutional experience . . . proximity and responsiveness to stakeholders . . . prompt[ness], flexib[ility], and efficien[cy]; and . . . access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

[231] In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-

maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

[232] Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 S.C.R. 157, at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q*, at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

[233] All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H. W. Arthurs said:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.

("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

[234] Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

[235] Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381, at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

[236] Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

[237] Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

[238] We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that . . . those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Khosa*, at para. 25; see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

[239] The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

[240] In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

[241] The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law" had to be "reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 (CanLII), [2016] 1 S.C.R. 770, at para. 31, per Abella J.).

[242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

> . . . the aims of administrative law . . . generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.

(Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

[243] These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

[244] The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room . . . for both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in

Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*'s description of this category undisturbed.[1]

[245] We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

[246] In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

[247] The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[248] In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.[2]

[249] In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

[250] Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.[3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66 (CanLII), [2019] 4 S.C.R. 845, that, absent exceptional circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

[251] The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

[252] Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527, at pp. 542-43; the Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

[253] The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential

approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

[254] But the aspect of the majority's decision with the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

[255] *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, 2012 SCC 43 (CanLII), [2012] 2 S.C.R. 489, the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, 1990 CanLII 34 (SCC), [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740; *R. v. Robinson*, 1996 CanLII 233 (SCC), [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled* . . . .
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

[256] Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (*Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

[257] Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5,

[2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of* Justice, [2016] UKSC 9, [2016] 4 All E.R. 897, at paras. 22-23).

[258] New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (*Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

[259] Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (*Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction (Pty) Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

[260] The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Kimble*, at p. 2409, citing *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), at p. 798; *Kimble*, at p. 2409; *Kisor*, at p. 2422; see also *Camps Bay*, at pp. 55-56; Jeremy Waldron, "*Stare Decisis* and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1, at p. 28; Lewis F. Powell, Jr., "*Stare Decisis* and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281, at p. 288).

[261] Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54 (CanLII), [2009] 3 S.C.R. 465, at para. 13). American cases have stressed similar themes:

> There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

(*Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

[262] Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

> overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble

a ticket valid only for the day of purchase.

("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

[263] The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

[264] The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

[265] The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

[266] Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble*:

> . . . an argument that we got something wrong — even a good argument to that effect — cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification" — over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

[267] But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim*; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (CanLII), [2001] 2 S.C.R. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32 (CanLII), [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), [2009] 2 S.C.R. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas*; *Mouvement laïque*; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of

administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers' Association*; *Canadian Human Rights Commission*, among many others).

[268] Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig*, at para. 24; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 (CanLII), [2013] 2 S.C.R. 438, at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser*, at para. 57; see also *Nishi*, at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

[269] The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia's *Securities Act*[6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

[270] The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; *Kimble*, at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty — "the foundational principle upon which the common law relies" (*Bedford*, at para. 38; see also Cromwell, at p. 315).

[271] Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, 1967 CanLII 15 (SCC), [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos*, *Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), at pp. 601-2).

[272] Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor*. There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (*Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422). She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> . . . even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress's continuing ability to take up Kisor's arguments — we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23.]

[273] In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 *U.N.B.L.J.* 87; the Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67, at p. 79; the Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67).

[274] A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor. . . . *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account,

> another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.
>
> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]

(paras. 65-66, citing *Baker v. Campbell* (1983), 153 C.L.R. 52 (H.C.A.), at pp. 102-3.)

[275] This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser*, at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 S.C.R. 631, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401, at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434, at p. 436).

[276] To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect, is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII), [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 (CanLII), [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

[277] For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

[278] This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

Going Forward

[279] In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is . . . a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

[280] Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The Rule of Law* (2010):

> . . . it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]

(See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 (CanLII), [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, 2008 SCC 18 (CanLII), [2008] 1 S.C.R. 456, at paras. 14-16, per LeBel J., and 73-74, per Binnie J., concurring.)

[281] Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

[282] So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir.* These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

[283] To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution

lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

[284] We also acknowledge that this Court should offer additional direction on conducting reasonableness review.[7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458, at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

[285] Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

[286] We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer"[8] to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

[287] In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

[288] First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay "respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

[289] Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

[290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

> . . . when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. . . . The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness. . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]

(See also *Volvo Canada Ltd. v. U.A.W., Local 720*, 1979 CanLII 4 (SCC), [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 68 *U.N.B.L.J.* 67, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

[291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII), [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, 2014 SCC 24 (CanLII), [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, 2005 SCC 82 (CanLII), [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, 1979 CanLII 3 (SCC), [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

[292] Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at para. 18). Administrative law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, at para. 158 (dissenting in part, but not on this point):

> . . . not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate.

[293] Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness review. Context may make a challenge to an administrative decision more or less persuasive — but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

[294] Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

[295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.[9]

[296] The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

[297] Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

[298] Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is

incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

[299] Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration . . . than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

[300] When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

[301] Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 (CanLII), [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (CanLII), [2018] 1 S.C.R. 6, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

[302] The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker*, at para. 44), which may not be conducive to the production of "archival"

reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123).

[303] Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (*Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are "consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo Vikski*, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács*, at para. 24).

[304] The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 (CanLII), [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

[305] In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

[306] We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a

reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

[307] We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason*, at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

[308] Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

[309] Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

[310] Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

[311] Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons

of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

[312] We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 S.C.R. 293, at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

[313] In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

[314] Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[315] The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

[316] The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and

immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

[317] Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

[318] In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

[319] From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

[320] On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

[321] The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

[322] The Federal Court (2015 FC 960 (CanLII), [2016] 2 F.C.R. 39) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

[323] The Federal Court of Appeal (2017 FCA 132 (CanLII), [2018] 3 F.C.R. 75) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority,

Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

[324] As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

[325] The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> > **(a)** the person was born in Canada after February 14, 1977;
> >
> > . . .
>
> **Not applicable to children of foreign diplomats, etc.**
>
> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> > **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
> >
> > **(b)** an employee in the service of a person referred to in paragraph (a); or
> >
> > **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

[326] The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

[327] In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

[328] The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

[329] The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

> **Not applicable to children of foreign diplomats, etc.**
>
> (3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
>
> (*a*) is an alien who has not been lawfully admitted to Canada for permanent residence; and
>
> (*b*) is
>
> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

[330] The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

[331] Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

[332] In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

[333] In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

[334] First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the *FMIOA*, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the

FMIOA, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

[335] Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Hon. J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

[336] Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 (CanLII), [2005] 2 S.C.R. 539, at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (S.C.J.); *R. v. Bonadie* (1996), 1996 CanLII 17924 (ON CJ), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs and International Trade)* (2007), 2007 FC 559 (CanLII), 64 Imm. L.R. (3d) 67 (F.C.)).

[337] The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

[338] The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

[339] The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as

Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

[340] In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

[341] By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

[342] Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

[343] We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

Appeal dismissed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Jackman Nazami & Associates, Toronto; University of Windsor — Faculty of Law, Windsor.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto; Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University — The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Caza Saikaley, Ottawa.

Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Centre for Criminology & Sociolegal Studies — University of Toronto, Toronto; Legal Aid Ontario, Toronto.

Solicitor for the intervener the Community & Legal Aid Services Programme: Community & Legal Aid Services Programme, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Solicitors for the intervener the First Nations Child & Family Caring Society of Canada: Stikeman Elliott, Ottawa.

---

[1] Other than one of the two *amici*, no one asked us to modify this category.

[2] The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 *Rev. Const. Stud.* 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

[3] See *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

[4] The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

[5] Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

[6] R.S.B.C. 1996, c. 418, s. 159.

[7] Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

[8] Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

[9] Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 43.

Tab 192

CanLII

Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 SCR 623

Source:	Supreme Court of Canada
Date:	1992-03-05
File number:	22060
Other citations:	95 Nfld & PEIR 271 — 134 NR 241 — 89 DLR (4th) 289 — 31 ACWS (3d) 1124 — 301 APR 271 — 4 Admin LR (2d) 121 — [1992] CarswellNfld 170 — JE 92-380 — [1992] SCJ No 21 (QL) — [1992] ACS no 21
Citation:	Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), 1992 CanLII 84 (SCC), [1992] 1 SCR 623, <https://canlii.ca/t/1fsf0>, retrieved on 2026-01-18
Most recent unfavourable mention	McLaren v. Castlegar (City), 2010 BCSC 1629 (CanLII) [...] [47] Mr. Howieson for the City of Castlegar argued that **Newfoundland Telephone is distinguishable** in that it involved an administrative tribunal, not an elected body, and that in Newfoundland Telephone there was evidence that the tribunal member had expressed his strong views about the matter in question on numerous [...]

Newfoundland Telephone Co. *v.* Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623

Newfoundland Telephone Company Limited *Appellant*

v.

The Board of Commissioners of Public Utilities *Respondent*

Indexed as: Newfoundland Telephone Co. *v.* Newfoundland (Board of Commissioners of Public Utilities)

File No.: 22060.

1991: November 7; 1992: March 5.

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

on appeal from the court of appeal for newfoundland

Administrative law -- Apprehension of bias -- Policy-making board -- Board member expressing strong views as to issue board considering -- Decision made after Board declined to remove member from panel -- Extent to which an administrative board member may comment on matters before the board -- Whether or not reasonable apprehension of bias -- If so, whether or not decision void or merely voidable.

Respondent Board, whose members are appointed by cabinet subject only to the qualification that they not be employed by or have an interest in a public utility, regulates appellant. One commissioner, a former consumers' advocate playing the self-appointed role of champion of consumers' rights on the Board, made several strong statements which were reported in the press against appellant's executive pay policies before a public hearing was held by the Board into appellant's costs. When the hearing commenced, appellant objected to this commissioner's participation on the panel because of an apprehension of bias. The Board found that it had no jurisdiction to rule on its own members and decided that the panel would continue as constituted. A number of public statements relating to the issue before the Board were made by this commissioner during the hearing and before the Board released its decision which (by a majority which included the commissioner at issue) disallowed some of appellant's costs. A minority would have allowed these

costs. Appellant appealed both the order of the Board and the Board's decision to proceed with the panel as constituted to the Court of Appeal.

The Court of Appeal found that the Board had complete jurisdiction to determine its own procedures and all questions of fact and law and that it declined to exercise its jurisdiction when it refused to remove the commissioner from the panel. Although the court concluded that there was a reasonable apprehension of bias, it held that the Board's decision was merely voidable and that, given that the commissioner's mind was not closed to argument, the Board's order was valid.

The issues under consideration here were: (1) the extent to which an administrative board member may comment on matters before the board and, (2) the result which should obtain if a decision of a board is made in circumstances where a reasonable apprehension of bias is found.

Held: The appeal should be allowed.

The duty of fairness applies to all administrative bodies. The extent of that duty, however, depends on the particular tribunal's nature and function. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. Because it is impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision, an unbiased appearance is an essential component of procedural fairness. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.

There is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members.

For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

A member of a board which performs a policy-formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias. Statements manifesting a mind so closed as to make submissions futile would, however, even at the investigatory stage, constitute a basis for raising an issue of apprehended bias. Once the matter reaches the hearing stage a greater degree of discretion is required of a member.

The statements at issue here, when taken together, indicated not only a reasonable apprehension of bias but also a closed mind on the commissioner's part on the subject. Once the order directing the holding of the hearing was given, the Utility was entitled to procedural fairness. At the investigative stage, the "closed mind" test was applicable but once matters proceeded to a hearing, a higher standard had to be applied. Procedural fairness at that stage required the commission members to conduct themselves so that there could be no reasonable apprehension of bias.

A denial of a right to a fair hearing cannot be cured by the tribunal's subsequent decision. A decision of a tribunal which denied the parties a fair hearing cannot be simply voidable and rendered valid as a result of the subsequent decision of the tribunal. The damage created by apprehension of bias cannot be remedied. The hearing, and any subsequent order resulting from it, must be void. The order of the Board of Commissioners of Public Utilities was accordingly void.

Cases Cited

Considered: *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] S.C.R. 3; *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170; *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CanLII 1132 (SCC), [1990] 3 S.C.R.

Tab 193

CanLII

Hitchcock v. Sykes, 1914 CanLII 5 (SCC), 49 SCR 403

Source:	Supreme Court of Canada
Date:	1914-03-23
Other citation:	23 DLR 518
Citation:	Hitchcock v. Sykes, 1914 CanLII 5 (SCC), 49 SCR 403, <https://canlii.ca/t/1tsqs>, retrieved on 2026-01-18

Supreme Court of Canada
Hitchcock v. Sykes, (1914) 49 S.C.R. 403
Date: 1914-03-23

Irvin H. Hitchcock and Others *(Plaintiffs) Appellants;*

and

Hiram Sykes and Others *(Defendants) Respondents.*

1913: November 28; 1913: December 1; 1914: March 23.

Present: Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Vendor and purchaser—Agreement for sale—Agent to procure purchaser—Agent joining in purchase—Non-disclosure to co-purchaser—Payment of commission—Rescission of contract.

H. was owner of mining land and offered S. a commission of ten per cent. for finding a purchaser thereof. H. afterwards wrote to S. stating that the mine was very rich and urging him to induce some of his friends to join in a syndicate or company to purchase and work it. S., without disclosing his agency, induced W. to take up the matter and they agreed to join in the purchase and divide the profits. A contract was entered into with H. and W. paid $20,000 on account of the purchase price on which S. was paid his commission. Default having been made in the further payments H. brought action claiming possession of the property and the right to retain the amount paid. W. counter-claimed for rescission of the contract and return of the money paid with interest and on the trial swore that he knew nothing of S.'s agency for several months after the contract was signed.

Held, affirming the judgment of the Appellate Division (1913 CanLII 21 (ON CA), 29 Ont. L.R. 6), Fitzpatrick C.J. dissenting, that it was the duty of H., on becoming aware that S. was a co-purchaser with W. to satisfy himself that the latter was aware of the agency of S.; and that W. was entitled to the relief asked by his counterclaim.

Held, per Davies and Anglin JJ. (Duff J. contra), that S. by concealing from W. the fact that he was to receive a commission from the vendor was guilty of a fraud for which

H. was responsible as agent.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario[1], reversing the judg-

[Page 404]

ment of a Divisional Court which affirmed the verdict at the trial in favour of the plaintiffs.

The material facts are stated in the above head-note.

Cline, for the appellants, referred to Coy v. Pommerenke[2]; *Lewin on Charges (11 ed.), 1159-60, Murray v. Craig*[3].

Kilmer, for the respondents, cited Beck v. Kantorowicz[4]; *McGuire v. Graham*[5]; *Grant v. Gold Exploration and Development Syndicate*[6].

THE CHIEF JUSTICE (dissenting).—I would allow this appeal with costs.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

DUFF J.—I have come to the conclusion that this appeal ought to be dismissed with costs. The only point requiring discussion, in my judgment, is whether because of the dealings between the Hitchcocks and Sykes the respondent Webster became entitled on discovering those dealings to rescind the agreement for sale. The facts and the law have been very fully discussed in the various judgments delivered in the courts below. I do not think that among the cases cited there is one decision which exactly fits this case. But when the facts are fully seized, it appears to be well within the principle of the decisions upon the authority of which the Court of Appeal rested its judgment in Grant v. Gold Exploration, etc., Syndi-

[Page 405]

Cate[6]. The essential feature of the case, in my view of it is one which has perhaps not been emphasized as much as its importance would justify. It lies, I think, in the letter of March 29th, 1910, written by W.R. Hitchcock to Sykes. That letter is as follows:—

Cornwall, Ont., March 29, 1910.

Hiram Sykes, Montreal.

Dear Sir,—Enclosed herewith please find map as surveyed and drawn up by Robert B. McKay, M.E., of Cobalt, Ontario. It will give you an idea of the surface work done on the Hitchcock Bros.' silver property, and I may add that since Mr. McKay visited the property in the early part of January last, a large amount of work has been done, principally in stripping veins and trenching on them to a depth from two to eight feet, until native silver, smalltite or nickelite would appear.

LOCATION: The E. ½ of N. ½ Lot 10, Concession 1, Township of Tudhope, consisting of 80 acres, being only about one-half mile from the wharf at the foot of Elk Lake, where all steamboats between Latchford and Elk City may call. The land from the mine to the wharf is level, so that a good wagon road will be inexpensive.

TITLE: The claims were staked by E.H. Hitchcock, and recorded in November, 1909, under his own license. Sufficient work has been done and recorded so that a Crown

Tab 194

CanLII

Insurance Business (Banks and Bank Holding Companies) Regulations, SOR/92-330

Current version: in force since 2012-03-01

Link to the latest version: https://canlii.ca/t/805p

Stable link to this version: https://canlii.ca/t/lg23

Citation to this version: Insurance Business (Banks and Bank Holding Companies) Regulations, SOR/92-330, <https://canlii.ca/t/lg23> retrieved on 2026-01-18

Currency: This regulation is current to 2025-12-10 according to the Justice Laws Web Site

Insurance Business (Banks and Bank Holding Companies) Regulations

SOR/92-330

BANK ACT

Registration 1992-05-21

Insurance Business (Banks and Bank Holding Companies) Regulations

P.C. 1992-1106 1992-05-21

His Excellency the Governor General in Council, on the recommendation of the Minister of Finance, pursuant to section 416 of the *Bank Act*[*], is pleased hereby to make the annexed *Regulations respecting the extent to which a bank may undertake the business of insurance and relations between banks and entities that undertake the business of insurance, insurance agents and insurance brokers*, effective June 1, 1992.

[*] S.C. 1991, c. 46

1 [Repealed, SOR/2002-269, s. 2]

Interpretation

2 In these Regulations,

Act means the *Bank Act*. (*Loi*)

authorized type of insurance means

(a) credit or charge card-related insurance,

(b) creditors' disability insurance,

(c) creditors' life insurance,

(d) creditors' loss of employment insurance,

(e) creditors' vehicle inventory insurance,

(f) export credit insurance,

(g) mortgage insurance, or

(h) travel insurance; (*assurance autorisée*)

bank web page means a web page that a bank uses in relation to its business in Canada, including any information provided by the bank that is accessible on a telecommunications device. It does not include a web page that is only accessible by employees or agents of the bank; (*page Web de banque*)

credit or charge card-related insurance, in respect of a bank, means a policy of an insurance company that provides insurance to the holder of a credit or charge card issued by the bank as a feature of the card, without request and without an individual assessment of risk,

(a) against loss of, or damage to, goods purchased with the card,

(b) under which the insurance company undertakes to extend a warranty provided by the manufacturer of goods purchased with the card, or

(c) against any loss arising from a contractual liability assumed by the holder when renting a vehicle, when the rental is paid for with the card; (*assurance carte de crédit ou de paiement*)

creditors' disability insurance, in respect of a bank, means a group insurance policy that will pay all or part of the amount of a debt of a debtor to the bank, or to a loan company that is an affiliate of the bank, in the event of bodily injury to, or an illness or disability of,

(a) where the debtor is a natural person, the debtor or the spouse or common-law partner of the debtor,

(b) a natural person who is a guarantor of all or part of the debt,

(c) where the debtor is a body corporate, any director or officer of the body corporate, or

(d) where the debtor is an entity, any natural person who is essential to the ability of the debtor to meet the debtor's financial obligations to the bank or to the loan company; (*assurance-invalidité de crédit*)

creditors' life insurance, in respect of a bank, means a group insurance policy that will pay to the bank, or to a loan company that is an affiliate of the bank, all or part of the amount of a debt of a debtor or, where a debt is in respect of a small business or a farm, fishery or ranch, all or part of the amount of the credit limit of a line of credit, in the event of the death of

(a) where the debtor is a natural person, the debtor or the spouse or common-law partner of the debtor,

(b) a natural person who is a guarantor of all or part of the debt,

(c) where the debtor is a body corporate, a director or officer of the body corporate, or

(d) where the debtor is an entity, any natural person who is essential to the ability of the debtor to meet the debtor's financial obligations to the bank or to the loan company; (*assurance-vie de crédit*)

creditors' loss of employment insurance, in respect of a bank, means a policy of an insurance company that will pay, without any individual assessment of risk, all or part of the amount of a debt of a debtor to the bank, or to a loan company that is an affiliate of the bank, in the event that

(a) the debtor, if the debtor is a natural person, becomes involuntarily unemployed, or

(b) a natural person who is a guarantor of all or part of the debt becomes involuntarily unemployed; (*assurance crédit en cas de perte d'emploi*)

creditors' vehicle inventory insurance, in respect of a bank, means a policy of an insurance company that provides insurance against direct and accidental loss or damage to vehicles that are held in stock for display and sale purposes by a debtor of the bank, some or all of which have been financed by the bank; (*assurance crédit pour stocks de véhicules*)

export credit insurance means a policy of an insurance company that provides insurance to an exporter of goods or services against a loss incurred by the exporter due to a non-payment for exported goods or services; (*assurance crédit des exportateurs*)

group insurance policy, in respect of a bank, means a contract of insurance between an insurance company and the bank, or between an insurance company and a loan company that is an affiliate of the bank, that provides insurance severally in respect of a group of identifiable persons who individually hold certificates of insurance; (*police d'assurance collective*)

insurance company means an entity that is approved, registered or otherwise authorized to insure risks under an Act of Parliament or of the legislature of a province; (*société d'assurances*)

line of credit means a commitment on the part of a bank to lend to a debtor, without a predetermined repayment schedule, one or more amounts, where the aggregate amount outstanding does not exceed a predetermined credit limit, which limit does not exceed the reasonable credit needs of the debtor; (*marge de crédit*)

loan company means a company incorporated under the *Trust and Loan Companies Act* or a loan or trust corporation incorporated by or under an Act of the legislature of a province; (*société de prêt*)

mortgage insurance, in respect of a bank, means an insurance policy that provides insurance to the bank, or to a loan company that is an affiliate of the bank, against loss caused by a default on the part of a debtor who is a natural person under a loan from the bank or from the loan company that is secured by a mortgage on real property or on an interest in real property; (*assurance hypothèque*)

personal accident insurance means a group insurance policy that provides insurance to a natural person

(a) whereby the insurance company undertakes to pay one or more sums of money in the event of bodily injury to, or the death of, the person that is caused by an accident, or

(b) whereby the insurance company undertakes to pay a certain sum for each day that the person is hospitalized in the event of bodily injury to the person that is caused by an accident or in the event of an illness or disability of the person; (*assurance accidents corporels*)

small business means a business that is or, if it were incorporated, would be a small business corporation within the meaning of subsection 248(1) of the *Income Tax Act*; (*petite entreprise*)

travel insurance means

(a) a policy of an insurance company that provides insurance to a natural person in respect of a trip by the person away from the place where the person ordinarily resides, without any individual assessment of risk, against

(i) loss that results from the cancellation or interruption of the trip,

(ii) loss of, or damage to, personal property that occurs while on the trip, or

(iii) loss that is caused by the delayed arrival of personal baggage while on the trip, or

(b) a group insurance policy that provides insurance to a natural person in respect of a trip by the person away from the province in which the person ordinarily resides

(i) against expenses incurred while on the trip that result from an illness or the disability of the person that occurs on the trip,

(ii) against expenses incurred while on the trip that result from bodily injury to, or the death of, the person caused by an accident while on the trip,

(iii) whereby the insurance company undertakes to pay one or more sums of money in the event of an illness or the disability of the person that occurs on the trip, or of bodily injury to, or the death of, the person that is caused by an accident while on the trip,

(iv) against expenses incurred by the person for dental care necessitated by an accident while on the trip, or

(v) in the event that the person dies while on the trip, against expenses incurred for the return of that person's remains to the place where the person was ordinarily resident before death, or for travel expenses incurred by a relative of that person who must travel to identify that person's remains. (*assurance voyage*)

SOR/2001-190, s. 1; SOR/2002-269, s. 3; SOR/2011-183, s. 1.

2.1 For the purposes of these Regulations, a web page is not a bank web page by reason only that the web page provides access to a bank web page or promotes the business of a bank in Canada.

SOR/2011-183, s. 2.

Permitted Activities

3 A bank may carry on any aspect of the business of insurance, other than the underwriting of insurance, outside Canada.

SOR/2011-183, s. 3.

4 (1) A bank may administer an authorized type of insurance and personal accident insurance.

(2) A bank may administer a group insurance policy for

(a) its employees or the employees of an entity that the bank holds control of, or a substantial investment in, under section 468 of the Act;

(b) the employees of

(i) another bank or a bank holding company, that controls the bank, or

(ii) an entity that the other bank or the bank holding company, referred to in subparagraph (i), holds control of, or a substantial investment in, under section 468 or 930 of the Act;

(c) the employees of an entity that an affiliate of the bank holds control of, or a substantial investment in, in accordance with section 522.07 or 522.08 or subsection 522.32(1) or (3) of the Act;

(d) the employees in Canada of an authorized foreign bank that is an affiliate of the bank; and

(e) if the bank is controlled by a foreign bank, the employees in Canada of an affiliate of the foreign bank that is an entity referred to in section 522.17 or 522.18 of the Act and that carries on a business described in one of those sections.

SOR/2002-269, s. 4.

5 (1) A bank may provide advice regarding an authorized type of insurance or a service in respect of an authorized type of insurance.

(2) A bank may provide advice in respect of an insurance policy that is not of an authorized type of insurance, or services in respect thereof, if

(a) the advice is general in nature;

(b) the advice is not in respect of

(i) a specific risk, proposal in respect of life insurance, insurance policy or service, or

(ii) a particular insurance company, agent or broker; and

(c) the bank does not thereby refer any person to a particular insurance company, agent or broker.

Promotion

6 A bank shall not, in relation to its business in Canada, promote an insurance company, agent or broker unless

(a) the company, agent or broker deals only in authorized types of insurance; or

(b) the promotion takes place outside a branch of the bank and is directed to

(i) all the holders of credit or charge cards issued by the bank who regularly receive statements of account or notices of those statements,

(ii) all the bank's customers who are natural persons and who regularly receive statements of account or notices of those statements, or

(iii) the general public.

SOR/2011-183, s. 4.

7 (1) A bank shall not, in relation to its business in Canada, promote an insurance policy of an insurance company, agent or broker, or a service in respect of such a policy, unless

(a) the policy is of an authorized type of insurance or the service is in respect of such a policy;

(b) the policy is to be provided by a corporation without share capital, other than a mutual insurance company or a fraternal benefit society, that carries on business without pecuniary gain to its members and the policy provides insurance to a natural person in respect of the risks covered by travel insurance;

(c) the policy is a personal accident insurance policy and the promotion takes place outside a branch of the bank;

(d) the service is in respect of a policy referred to in paragraph (b) or of a policy referred to in paragraph (c) that is promoted as described in that paragraph; or

(e) the promotion takes place outside a branch of the bank and is directed to

(i) all the holders of credit or charge cards issued by the bank who regularly receive statements of account or notices of those statements,

(ii) all the bank's customers who are natural persons and who regularly receive statements of account or notices of those statements, or

(iii) the general public.

(2) Notwithstanding subsection (1) and section 6, a bank may exclude from a promotion referred to in paragraph (1)(e) or 6(b) persons

(a) in respect of whom the promotion would contravene an Act of Parliament or of the legislature of a province;

(b) who have notified the bank in writing that they do not wish to receive promotional material from the bank; or

(c) who are holders of a credit or charge card that was issued by the bank and in respect of which the account is not in good standing.

SOR/95-171, s. 3(E); SOR/2011-183, s. 5.

Web Promotion

7.1 (1) The promotion referred to in paragraph 6(b) may take place on a bank web page if it relates to an insurance company, agent or broker that deals only in authorized types of insurance and the promotion referred to in paragraph 7(1)(c) or (e) may take place on a bank web page if it relates to only an authorized type of insurance.

(2) However, a bank shall not, on a bank web page, provide access to a web page — directly or through another web page — through which there is promotion of

(a) an insurance company, agent or broker that does not deal only in authorized types of insurance; or

(b) an insurance policy of an insurance company, agent or broker, or a service in respect of such a policy, that is not of only an authorized type of insurance.

SOR/2011-183, s. 6.

Prohibited Activities

8 (1) No bank shall

(a) provide, directly or indirectly, an insurance company, agent or broker with any information respecting

(i) a customer of the bank in Canada,

(ii) an employee of a customer of the bank in Canada,

(iii) where a customer of the bank is an entity with members in Canada, any such member, or

(iv) where a customer of the bank is a partnership with partners in Canada, any such partner;

(b) permit any of its subsidiaries to provide, directly or indirectly, an insurance company, agent or broker with any information that it receives from the bank respecting

(i) a customer of the bank in Canada,

(ii) an employee of a customer of the bank in Canada,

(iii) where a customer of the bank is an entity with members in Canada, any such member, or

(iv) where a customer of the bank is a partnership with partners in Canada, any such partner;

(b.1) provide an affiliate of the bank that is not a subsidiary of the bank with information unless the bank ensures that the affiliate does not directly or indirectly provide the information to an insurance company, agent or broker if the information is in respect of

(i) a customer of the bank in Canada,

(ii) an employee of a customer of the bank in Canada,

(iii) where a customer of the bank is an entity with members in Canada, any such member,

(iv) where a customer of the bank is a partnership with partners in Canada, any such partner; or

(c) permit a subsidiary of the bank that is a trust or loan corporation incorporated by or under an Act of the legislature of a province to provide, directly or indirectly, an insurance company, agent or broker with any information respecting

(i) a customer of the subsidiary in Canada,

(ii) an employee of a customer of the subsidiary in Canada,

(iii) where a customer of the subsidiary is an entity with members in Canada, any such member, or

(iv) where a customer of the subsidiary is a partnership with partners in Canada, any such partner.

(2) Subsection (1) does not apply in respect of a bank or a subsidiary of a bank that is a trust or loan corporation incorporated by or under an Act of the legislature of a province where

(a) the bank or the subsidiary has established procedures to ensure that the information referred to in that subsection will not be used by an insurance company, agent or broker to promote in Canada the insurance company, agent or broker or to promote in Canada an insurance policy, or a service in respect thereof; and

(b) the insurance company, agent or broker, as the case may be, has given an undertaking to the bank or to the subsidiary, in a form acceptable to the Superintendent, that that information will not be used to promote in Canada the insurance company, agent or broker or to promote in Canada an insurance policy, or a service in respect thereof.

SOR/2002-269, s. 5.

8.1 (1) No bank holding company shall control a trust or loan corporation incorporated by or under an Act of the legislature of a province if the trust or loan corporation directly or indirectly provides an insurance company, agent or broker with any information in respect of

(a) a customer of the trust or loan corporation in Canada;

(b) an employee in Canada of a customer of the trust or loan corporation;

(c) where a customer of the trust or loan corporation is an entity with members in Canada, any such member; or

(d) where a customer of the trust or loan corporation is a partnership with partners in Canada, any such partner.

(2) Subsection (1) does not apply in respect of a bank holding company or a trust or loan corporation if

(a) the bank holding company or the trust or loan corporation has established procedures to ensure that the information referred to in that subsection will not be used by an insurance company, agent or broker to promote in Canada

(i) the insurance company, agent or broker, or

(ii) an insurance policy or a service in respect of an insurance policy; and

(b) the insurance company, agent or broker, as the case may be, has given an undertaking to the bank holding company or to the trust or loan corporation, in a form acceptable to the Superintendent, that the information will not be used to promote in Canada

(i) the insurance company, agent or broker, or

(ii) an insurance policy or a service in respect of an insurance policy.

SOR/2002-269, s. 6.

9 No bank shall provide a telecommunications device that is primarily for the use of customers in Canada and that links a customer with an insurance company, agent or broker.

10 A bank shall not carry on business in Canada on premises that are adjacent to the premises of an insurance company, agent or broker unless the bank clearly indicates to

its customers that its business and the premises on which its business is carried on are separate and distinct from those of the insurance company, agent or broker.
SOR/2011-183, s. 7.

Transitional

11 Where a bank administered a policy on May 6, 1992 the administration of which is not permitted under section 4, the bank may continue to administer the policy in respect of any person in respect of whom coverage was provided under the policy on that date.

Tab 195

CanLII

JV Mechanical v. Steelcase, 2010 ONSC 1443 (CanLII)

Source:	Superior Court of Justice
Date:	2010-03-16
File number:	06-CV-304773
Other citation:	93 CLR (3d) 109
Citation:	JV Mechanical v. Steelcase, 2010 ONSC 1443 (CanLII), <https://canlii.ca/t/28mqd>, retrieved on 2026-01-18

CITATION: JV Mechanical v. Steelcase, 2010 ONSC 1443
COURT FILE NO.: 06-CV-304773
DATE: March 16, 2010

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JV MECHANICAL LIMITED v STEELCASE CONSTRUCTION INC. and THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

BEFORE: Master Carol Albert

COUNSEL: G. Shible ffor the plaintiff (responding party)
tel: 416-601-6813; fax: 416-947-0909

C. Wiebe for the defendant (moving party)
tel: 416-368-8280; fax: 416-368-3467

E N D O R S E M E N T

1. Steelcase Construction Inc. ("Steelcase") asks the court to reconsider its December 22, 2008 decision and order JV Mechanical Limited ("JV") to post security for costs. The reason is that JV failed to disclose relevant information to the court when the motion was first argued on November 25, 2008 (the "2008 Motion") notwithstanding the sworn evidence of JV's principal, John Vrbanic, that he made full financial disclosure. Steelcase argues that if the information had been disclosed the court's order would have been different. Steelcase asks for costs of the 2008 Motion and this motion.

2. JV's position is that (i) its failure to disclose was inadvertent, (ii) had the information been disclosed it would not have changed the court's finding that JV was impecunious in November

2008, and (iii) in any event JV is presently impecunious.

3. Leave to bring this motion is not contested. I find that the motion is necessary for justice to be done and grant leave pursuant to subsection 67(2) of the *Construction Lien Act*.

The 2008 Motion

4. In the 2008 Motion Steelcase, the general contractor, sought security for costs from JV, the mechanical subcontractor, in the amounts of $46,138.77 in action 06-CV-304773 (the Toronto Daycare Project) and $41,293.04 in Whitby action 08-CV-348118 (the Whitby Train Station Project). Both actions are to be tried together or consecutively in this reference.

5. In the 2008 Motion I found that on the facts before the court JV was impecunious and that because its claim was not certain to fail the litigation could proceed without requiring JV to post security for costs.

6. I gave the following reasons, in part, beginning at paragraph 15[1]:

> [15] Mr. Vrbanic gave evidence of the financial position of JV, himself, his wife and his new company, 2104476 Ontario Inc. ("New JV"). The evidence shows that JV stopped operating its business in June 2006. Mr. Vrbanic formed New JV in or about that time. Mr. Vrbanic's evidence is that he is unable to borrow money personally or through New JV; that his wife, from whom he has recently separated, refuses to lend JV more money; and that his sister refuses to provide a guarantee or otherwise assist financially. Mr. Vrbanic volunteers to step out from behind the liability shield of his company and undertake to have any costs award made against JV in this litigation bind him personally and also bind New JV.
>
> [16] …
>
> [17] I am satisfied on the evidence that JV is insolvent and that New JV is in a loss position. I am also satisfied that Mr. Vrbanic has taken no income from JV or from New JV in 2006, 2007 or 2008 and that while his wife received income of $81,308.03 in 2007 and $80,000 in 2006 there is no basis for the court to require Mr. Vrbanic to look to his estranged wife for funds to continue this litigation.
>
> [18] Mr. Vrbanic had an equity interest of $50,000 in his home, but he recently sold it, closing the sale on October 31, 2008, one week before this motion was argued. The entire proceeds of sale went to an outstanding writ of seizure and sale of creditor Noble Trade Inc., for a recovery of 15% of the value of Noble's judgment.
>
> [19] A corporation without assets is not impecunious if it has the ability to raise funds from its principals, its shareholders and from those who stand to benefit from the litigation. The evidence shows that JV cannot raise funds from its principal or shareholders…

7. In the 2008 decision I found that on the facts of the case as presented JV could not have raised funds from its principals and shareholders and further found that JV was not obliged to go to its creditor CRA to raise funds to prosecute the action. However, on the 2008 Motion JV failed to disclose the existence and financial position of two related corporations.

Background leading to the present motion

8. Steelcase learned of the existence of the two undisclosed companies from the decision of Master Graham released November 27, 2009 in a motion for security for costs in *J.V. Mechanical Ltd. v Pegah Construction Ltd.*[2]. In that case Mr. Vrbanic had failed to disclose the existence of 210 and another company named 2110608 Ontario Inc. ("211"), using the

same business name and address as the former JV, with a former JV employee, William Burdass, as 211's officer. Master Graham drew the inference that JV was conducting business through these two related companies and ordered JV to post security for costs.

9. In the 2008 Motion JV failed to disclose 211, which was incorporated on August 14, 2006, only two months after Mr. Verbanic stopped operating JV and had incorporated 210. 211 registered the business name Air Moving Systems ("AMS") on August 15, 2006 and the business name JV Mechanical on October 23, 2006. Neither 211 nor the registration of the names JV Mechanical and AMS to 211 had been disclosed by Mr. Vrbanic on the 2008 Motion in what he had claimed to be full and complete financial disclosure.

10. Following release of Master Graham's decision Steelcase embarked on further investigations. Steelcase discovered that:

    a. The name JV Mechanical was registered to Air Moving Systems Inc. ("AMS Inc.") on September 22, 2006, three months after JV had ceased operations;

    b. AMS Inc. was incorporated on May 25, 2005;

    c. AMS Inc. shared the same address as JV, 210 and 211;

    d. John Vrbanic is an officer and director of AMS Inc.; and

    e. The name "V Mechanical" was registered to 210 on June 6, 2006, the date it was incorporated.

Evidence on the 2010 Motion

11. The material filed by JV on the motion to vary the December 2008 order (the "2010 Motion") includes an affidavit of John Vrbanic and transcript of his cross-examination. He testified that:

    <u>About 210:</u>

    a. He had forgotten that Mr. Burdass was officer and director of 210;

    b. He could forget things and yet have nothing to hide;

    c. He said registering "V Mechanical" to 210 was "an innocent mistake";

    <u>About AMS Inc.:</u>

    d. He is the operator and shareholder of AMS Inc., and had been at the time of the 2008 Motion. He had not located the minute book;

    e. AMS Inc. has "no assets of any kind";

    f. AMS Inc. had rendered about 24 invoices to JV for ventilation work;

    g. CRA[3] assessed AMS Inc. for unremitted source deductions of approximately $254,000 for 2005 and 2006, provingA MS Inc. carried on business with employees;

    h. AMS Inc. was in arrears of GST payments of $20,164.18 for business conducted in 2005 and 2006;

    i. AMS Inc. ceased operating in June 2006, even though the name JV Mechanical was not registered to AMS Inc. until September 22, 2006. Mr. Vrbanic denied registering

"JV Mechanical" to AMS Inc. two months after the date he claims that AMS Inc. discontinued operations, suggesting that his accountant had registered it. He did not lead evidence of the accountant;

j. AMS Inc. worked on a dozen projects in 2005 and 2006. Mr. Vrbanik could not explain why he forgot about AMS Inc. when the 2008 Motion was brought;

k. Mr. Vrbanic arranged for financial statements for JV for the 2008 Motion but could not explain why he did not have financial statements prepared for AMS Inc.;

About 211:

l. Based on the corporate records the structure of 211 is the same as 210, which Mr. Vrbanic admitted to owning and operating;

m. Mr. Vrbanic denied incorporating or operating 211. He guessed that Jacob Abecassis, an accountant with whom he had consulted about bankruptcy proceedings, had incorporated 211 and named JV's employee Mr. Burdass as its officer and director. Mr. Vrabnic did not lead any evidence from Mr. Abecassis or Mr. Burdass ;

n. Mr. Vrabnic said he knew nothing about 211 but would not be surprised if he had personally authorized its incorporation in August 2006;

o. Mr. Vrabnic could not explain why the names JV Mechanical and AMS had been registered to 211 in August 2006 and October 2006, two months and four months after JV ceased operating; and

p. Mr. Vrbanic admitted on cross examination that 211 was a "shelf company" created for him to carry on JV's business in the future.

Matrimonial home:

q. When the matrimonial home was acquired on June 1, 2005 Mr. Vrabnic and his wife took out a second mortgage for $75,000, the proceeds of which he had put into JV. His undertaking to produce the documents showing that the second mortgage proceeds were applied to JV was unanswered. I draw the inference that there are no documents to corroborate Mr. Vrbanic's evidence;

r. On September 11, 2006, one month after the "shelf" company 211 was incorporated and three months after JV had ceased operations (according to Mr. Vrbanic's evidence) the second mortgage was replaced with a new second mortgage for $135,000 with the additional funds of $60,000 put into JV. Mr. Vrbanic explained this as funds used to pay off JV's debts and undertook to produce documents to trace the mortgage advance to JV, but again he failed to comply with the undertaking. I draw the inference that there are no documents to corroborate Mr. Vrbanic's evidence;

s. On February 26, 2007 the accountant's firm registered a demand third mortgage for $112,679.69 on title and two days later the matrimonial home was transferred to Mr. Vrbanic's ex-wife for $2.00. Mr. Vrbanic denied knowledge of these transactions and blamed the accountant; and

t. Mr. Vrbanic has taken no legal action against the accountant.

Conflicting evidence on the 2008 and 2010 motions

u. In 2008 on cross-examination Mr. Vrbanic denied under oath that he had registered the name JV Mechanical to 210. However under cross-examination on the 2010 Motion Mr. Vrbanic testified that although the business name "V" Mechanical was registered to 210 he had intended to register the name JV Mechanical to 210 in June 2006 when 210 was incorporated. He explained the conflicting evidence as misunderstanding the question in 2008.

12. No financial records, tax returns or other documents were filed as evidence of the financial position of either 210 or AMS Inc.

13. Mr. Vrbanic's evidence that AMS Inc. ceased business operations in June 2006 contradicts Mr. Bowles' evidence, filed on behalf of the moving party, that the business name JV Mechanical was registered to AMS Inc. on September 22, 2006. Considering the many inaccuracies in Mr. Vrbanic's evidence and also considering that Mr. Bowles is an officer of the court I find that where the evidence of Mr. Vrbanic and Mr. Bowles conflicts I prefer the evidence of Mr. Bowles. If AMS Inc. ceased operations in June 2006 as Mr. Vrbanic testified there would have been no reason to register the business name JV Mechanical in September 2006. I draw the inference that disclosing the financial position of AMS Inc. would be detrimental to JV's pleas of impecuniosity

Burden of Proof

14. A party pleading impecuniosity must disclose with "robust particularity" their financial circumstances.[4] Complete disclosure is imperative.

15. As stated by Justice Roberts in *Technorag, supra,* at paragraph 17:

> "The onus remains on the plaintiff to adduce sufficient evidence of impecuniosity through supporting financial documents or details. The plaintiff must satisfy the court that funds are not available from corporate owners, officers and even family members. The plaintiff is not entitled to avoid an investigation of the financial condition of its principal owner, directors or officers by the simple stratagem of admitting impecuniosity. **It must leave no material question unanswered**." *Emphasis added*

16. Likewise, JV cannot avoid an investigation of the financial condition of its principal owner, directors or officers by the simple stratagem of failing to disclose relevant companies, then argue that the moving party loses because it failed to discover the undisclosed companies.

17. JV Mechanical left material questions unanswered. On key issues Mr. Vrbanic's evidence is vague, deliberately evasive and uncorroborated. Critical undertakings remain unanswered. For example:

a. JV gave no reasonable explanation for the absence of financial statements for AMS Inc.and 211;

b. According to Mr. Vrbanic's evidence AMS Inc. went out of business in June 2006 and the style name "JV Mechanical" was registered to it in September 2006. JV gave no reasonable explanation for registering the business name three months after AMS Inc. allegedly went out of business;

c. Mr. Vrbanic gave evidence that 211 was incorporated by the accountant of his own volition but gave no reasonable explanation for the accountant doing this on his own and filed no evidence from the accountant;

d. JV gave no reasonable explanation for incorporating 211 as a "shelf" company;

e. JV filed no evidence from Mr. Burdass, a former employee, who was shown in the corporate filings for 211 as the officer and director, and provided no reasonable explanation for naming Mr. Burdass to these positions; and

f. Mr. Vrbanic failed to comply with his undertakings to provide the bank records to corroborate his answers on cross-examination that the proceeds of the two second mortgages were put into JV to pay down debts, a glaring omission in light of the advance of the replacement second mortgage for an amount that was higher by $60,000, three months after JV allegedly discontinued operations and one month after 211 was incorporated.

18. Applying the test enunciated by Justice Roberts in *Technorag, supra,* JV and Mr. Vrbanic have left many questions unanswered and have failed to meet the heavy onus to adduce sufficient evidence of impecuniosity through supporting financial documents or details.

19. I draw the inference that JV's and Mr. Vrbanic's failure to provide full and robust disclosure is because the undisclosed evidence would undermine the plea of impecuniosity. I find that JV Mechanical has left material questions unanswered and has not satisfied the court that it was impecunious at the time of the 2008 Motion.

When should the court vary its order?

20. Rule 59.06(2)(a) provides:

> A party who seeks to,
>
> (a) Have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;…may make a motion in the proceeding for the relief claimed.

21. Steelcase asserts that Mr. Vrbanic materially and intentionally or recklessly misled the court on the 2008 Motion by failing to disclose the existence of two companies carrying on the business of JV as different but related entities, from which he could have borrowed funds, thereby defeating JV's claim of impecuniosity. Steelcase asks the court to set aside its 2008 finding of impecuniosity and replace it with an order that JV post security for costs.

22. Justice Osborne describes the test in rule 59.06(2)(a) in *International Corona Resources Ltd. v LAC Minerals Ltd.*[5]:

a. the fraud alleged must be proved on a reasonable balance of probability;

b. the proved fraud must be material;

c. the evidence of fraud must not have been known to the moving party at the time of the original proceeding;

d. the moving party applied reasonable or due diligence at the original hearing. Applying an objective test: what did the moving party know, and what ought the moving party reasonably have known? and

e. the motion to set aside must be brought without delay.

f. Relief under rule 59.06 is discretionary. The conduct of the moving party is relevant. The central question is whether the moving party has shown that material facts have

been newly discovered, which either by themselves or in combination with previously known facts, would provide reason to set aside the earlier decision.

23. Counsel for JV argues that Justice Osborne's test does not apply because in *International Corona* the court was faced with a motion to set aside findings made at trial whereas in this case I am asked to vary an order I made on a motion. In my view the test is even more appropriate when a judicial officer is asked to vary an order that he or she made. Who is in a better position to assess than the original decision maker?

a. Fraud

24. In *Vale v Sun Life Assurance Co. of Canada*[6] Justice Cullity considered the meaning of fraud as that term is used in rule 59.06. He adopted the approach of Lord Herschell as outlined in *Derry v Peek*[7] that fraud is a false representation made either knowingly, or without belief in its truth or else recklessly, careless as to whether it is true or false.

25. On the 2008 Motion Mr. Vrbanic failed to disclose that he was a shareholder of Air Moving Systems Inc. ("AMS"), a corporation established in 2005 that employed at least five people and billed JV Mechanical over $600,000.00 of which at least $200,000 was paid. His explanation in his affidavit on the 2010 Motion for not disclosing the company is that he thought it was worthless. On cross-examination he had a different explanation: he said he forgot about it. These are two very different explanations: the earlier explanation means he put his mind to it and decided unilaterally that the company was worthless. The later explanation means that he failed to make the effort to obtain all relevant information.

26. On the 2010 Motion, upon disclosing AMS Inc., Mr. Vrbanic provided no financial or audit records to corroborate his personal valuation as to its worthlessness. I find Mr. Vrbanic's explanation suspect and his failure to disclose in 2008 either a deliberate attempt to withhold material information to avoid a security for costs order, or else a reckless statement made without any evidence to prove the assertion that the company was worthless. I find his answers evasive and draw the inference that AMS Inc. is a corporation with sufficient assets that, if fully disclosed, would defeat Mr. Vrbanic's claim of impecuniosity.

27. Regarding 211, Mr. Vrbanic's evidence on the 2010 Motion is that he knows nothing about this company. But he also gave evidence that he would not be surprised if he was the one who had incorporated it. He refered to 211 in his affidavit and on cross-examination as a "shelf" company, incorporated perhaps to carry on business for him. Mr. Vrbanic ought to have examined this company more thoroughly on the 2008 Motion to find out who had incorporated it, what information was in the minute book and the status of bank accounts and financial statements. Failure to do so was reckless at best.

28. Mr. Vrbanic says his accountant incorporated this company, but has provided no affidavit from the accountant. 211 carried on business in the fall of 2006 as JV Mechanical, but Mr. Vrbanic either chose not to disclose this fact or recklessly disregarded his duty to provide full disclosure of JV Mechanical's affairs on the 2008 Motion.

29. Having considered Mr. Vrbanic's evidence as a whole on the 2008 Motion and on this motion I find that his inaccurate and incomplete statements were made either knowingly or else recklessly, without regard to whether they were true or false. Either way they were fraudulent for the purposes of rule 59.06.

b. Materiality

30. Evidence is material if it goes to the foundation of the decision. Such evidence may reasonably have affected the result but need not necessarily have affected it: *100 Main Street East v Sakas*[8]. Because JV Mechanical provided fraudulent evidence to the court on the 2008 Motion by asserting by asserting that it had made full and complete disclosure, any ambiguity or issue of credibility ought to be decided in favour of Steelcase.

31. I find that the evidence that was not disclosed on the 2008 Motion is material to the issue of impecuniosity.

c. *Knowledge of moving party*

32. I am satisfied that Steelcase did not have knowledge that JV had withheld material information at the time of the 2008 Motion.

d. Due diligence

33. The question is whether Steelcase would have discovered 211 and AMS Inc. had it applied reasonable diligence in 2008.

34. In the 2008 Motion John Vrbanic gave evidence by affidavit deposing that he and JV were both "legally impecunious", that JV discontinued business operations in June 2006 and that it had been operating at a loss for three years prior to closing. He also gave evidence of his personal financial circumstances. He disclosed that he had incorporated 2104476 Ontario Ltd. ("210"), a company in the construction business, on June 6, 2006 (the same time as JV discontinued operations) with himself as sole shareholder and director. He produced financial statements showing that 210 was in a loss position for the years 2007 and 2008.

35. Mr. Vrbanic concluded his sworn testimony in 2008 with the statement "aside from that described above and below, I have no other assets of any significance." He represented in his affidavit that he could not raise funds from any source.

36. Steelcase cross-examined Mr. Vrbanic on his affidavit and again Mr. Vrbanic swotre that he had disclosed all of his assets. It is now clear that Mr. Vrbanic's sworn evidence was incorrect: that he failed to disclose two companies under his control: 211 and AMS Inc.

37. Also on cross-examination on the 2008 Motion, when asked whether he had registered the business name "JV Mechanical" to 210, Mr. Vrbanic replied unequivocally that he had not. He withheld that he had registered the name "V Mechanical" to 210, a fact he disclosed on the 2010 Motion. The business names "V Mechanical" and "JV Mechanical" are so similar that I find JV intended to convey to its customers that JV Mechanical was still in business. Mr. Vrbanic was obliged to provide full and complete disclosure in 2008. His evidence was misleading and incomplete. Mr. Vrbanic's explanation that it was an innocent mistake is not credible.

38. JV argues that had Steelcase applied reasonable diligence it would have discovered the other two companies registered under the business names "JV Mechanical" and "V Mechanical". In essence JV says to Steelcase: "notwithstanding that we withheld material information from you and the court on the 2008 Motion, had you conducted a search that was available at the time you would have found out about the two companies".

39. The flaw in JV's argument is that the onus remains with JV to provide full and complete disclosure of its financial circumstances, and to satisfy the court that it is impecunious. (See:

Tallarico-Robertson v Communique Group Inc.[9], applied in applied *Bruno Appliance and Furniture Inc. v Cassels Brock & Blackwell LLP*[10]).

40. JV cannot now blame Steelcase for not catching Mr. Vrbanic in his lies, omissions and/ or partial truths. There was no reason for Steelcase to presume that Mr. Vrbanic had lied under oath causing Steelcase to conduct further investigations.

41. It would be unjust to permit a party pleading impecuniosity to withhold relevant evidence and then blame the party seeking security for costs for not discovering it. Mr. Vrbanic ought to have disclosed all of the companies in which he had an interest and provided evidence of the financial position of each company. He painted a misleading picture of his financial circumstances.

42. I find that Steelcase applied due diligence in its efforts to test the financial position of JV Mechanical presented in the 2008 Motion.

e. Timeliness

43. Steelcase booked the 2010 motion as soon as it discovered that JV had withheld relevant evidence on the 2008 Motion. I am satisfied that this motion was brought without delay.

f. Discretion

44. In exercising discretion I have taken into account the newly discovered facts as well as the evidence previously disclosed and find that there is sufficient reason to set aside the findings of impecuniosity made on the 2008 Motion.

Conclusion

45. The JV materials filed on the 2008 Motion made repeated reference to JV's and Mr. Vrbanic's full and complete disclosure of all potential sources of funds, of all of Mr. Vrbanic's assets and property and of Mr. Vrbanic's openness and good faith. In light of the new information discovered those statements of Mr. Vrbanic in his affidavit and the facts asserted by his counsel in JV's factum were false.

46. I find that JV's failure to provide full disclosure of relevant financial information on the 2008 Motion and the vague and incomplete evidence in the 2010 Motion about the subsequently discovered two companies are fatal to a finding that JV was impecunious at the time of the 2008 Motion or today.

47. For these reasons it is appropriate to vary my order of December 22, 2008. I am not persuaded that the plaintiff, JV Mechanical Limited, has met the burden of proving that it is impecunious. I find that JV must post security for costs of the actions. In calculating the amount to be posted I have taken into account that some of the costs claimed pertain to the Steelcase claim for set-off and counterclaim. I also find that it is appropriate to stage posting security for costs.

48. I further find that costs of the 2008 Motion should properly go to the moving party Steelcase.

49. Having reviewed the Bills of Costs filed on the 2008 Motion I make the following findings on the quantum of security for costs to be posted by JV Mechanical[11]:

    a. Toronto action 06-CV-304773: $18,000.00

    b. Whitby action 08-CV-348118: $12,000.00.

30. Accordingly, THIS COURT ORDERS that:

a. The order dated December 22, 2008 dismissing the motion for security for costs and the costs order of February 17, 2009 are hereby set aside and replaced with this order.

b. In the Toronto action the sum of $9,000.00 shall be posted by JV Mechanical Limited within 30 days from the date this decision is released;

c. In the Toronto action the additional sum of $9,000.00 shall be posted by JV Mechanical Limited within 30 days of the date the court fixes the date for trial;

d. In the Whitby action the sum of $6,000.00 shall be posted by JV Mechanical Limited within 30 days from the date this decision is released; and

e. In the Whitby action the additional sum of $6,000.00 shall be posted by JV Mechanical Limited within 30 days of the date the court fixes the date for trial.

f. JV Mechanical Limited shall pay costs of the 2008 Motions in actions 06-CV-304773 and 08-CV-348118 to Steelcase Construction Inc. fixed at $7,500.00 inclusive of GST and disbursements within 30 days of the date this decision is released.

g. If counsel cannot agree on costs of this motion brief written submissions of up to three (3) pages per party may be filed by March 31, 2010 in addition to the costs outlines already filed[12].

Master C. Albert

Schedule "A": Chronology

Date	Event	Comment
May 2005	Air Moving Systems Inc. is incorporated. Mr. Vrbanic is officer and director. This is relevant because four months after JV Mechanical Limited ceases operations Air Moving Systems Inc. takes on the registered business name "JV Mechanical".	Mr. Vrbanic failed to disclose the existence of Air Moving Systems Inc. in the 2008 Motion.
June 2006	JV Mechanical Limited ceased operations	
June 6, 2006	2104476 Ontario Inc. registers business name "V Mechanical"	
August 14, 2006	2110608 is incorporated with employee Burdass as officer and director, operating under the business name Air Moving Systems and registered with the same business address as JV Mechanical Limited	JV failed to disclose 2110608 on the 20087 motion

September 22, 2006	"JV Mechanical" is registered as the business name for Air Moving Systems Inc.	
October 23,. 2006	Business name "JV Mechanical" is registered to 2110608	JV failed to disclose that 2110608 carried on business as JV Mechanical four months after JV Mechanical Limited ceased operations

JV Mechanical v. Steelcase, 2010 ONSC 1443
COURT FILE NO.: 06-CV-304773
DATE: March 16, 2010

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JV MECHANICAL LIMITED v STEELCASE CONSTRUCTION INC. and THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

BEFORE: Master C. Albert

COUNSEL:
G. Shible for the plaintiff (responding party)
tel: 416-601-6813; fax: 416-947-0909,

C. Wiebe for the defendant (moving party)
tel: 416-368-8280; fax: 416-368-3467

ENDORSEMENT

Master C. Albert

DATE: March 16 2010

[1] [2008] O.J. No. 5777

[2] [2009] O.J. No.5069

[3] Canada Revenue Agency

[4] *Bruno Appliances and Furniture Inc. V Cassels Brock & Blackwell LLP,* [2007] O.J. No. 4096 (S.C.J.) as cited by Roberts, J. in *Technorag Ltd. V Atomic Energy of Canada Ltd.*[2009] O.J. No.5139 (S.C.J.) at para. 11

[5] (1988), 66 O.R. (23d) 7610 (H.C.)

[6] 1998 CanLII 14823 (ON SC), [1998] O.J. No. 6465 (Ont. Gen.Div.)

[7] (1889), 14 App. Cas. 337

[8] (1975), 1975 CanLII 381 (ON CA), 8 O.R. (2d) 385 per Howland, JJ.A.

[9] [2004] O.J. No. 4175 per Horkins, J. at para. 4

[10] [2007]O.J. No. 4096 per Master Glustein at para. 27

[11] The quantum does not include costs of the 2008 Motion and the 2010 Motion, for which specific costs awards are made, or for the Scott Schedule which is required because of the defendant's claim for set-off and counterclaim.

[12] Steelcase Costs Outline: $30,891.39 (partial indemnity) and $36,860.64 (substantial indemnity); JV Mechanical Costs Outline: $13,752.74 (partial indemnity).

Tab 196

CanLII

Fatemea Rezaiezadeh v. State Farm Mutual Automobile Insurance Company, 2016 ONFSCDRS 59 (CanLII)

Source:	Ontario Financial Services Commission - Dispute Resolution Services
Date:	2016-02-19
File number:	Appeal P15-00038
Citation:	Fatemea Rezaiezadeh v. State Farm Mutual Automobile Insurance Company, 2016 ONFSCDRS 59 (CanLII), <https://canlii.ca/t/jq9fm>, retrieved on 2026-01-18

Financial Services Commission of Ontario

Commission des services financiers de l'Ontario

Neutral Citation: 2016 ONFSCDRS 59

Appeal P15-00038

OFFICE OF THE DIRECTOR OF ARBITRATIONS

FATEMEA REZAIEZADEH

Appellant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Mr. Shahen A. Alexanian and Mr. Karl D. Furtado for the Appellant, Ms. Fatemea Rezaiezadeh Mr. Cary N. Schneider for the Respondent, State Farm Mutual Automobile Insurance Company
HEARING DATE:	January 29, 2016

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. The Arbitrator's June 10, 2015 decision is rescinded. The matter is remitted to arbitration for a new hearing by a different arbitrator.

2. The Respondent, State Farm Mutual Automobile Insurance Company, shall pay the Appellant, Fatemea Rezaiezadeh, her legal expenses of this appeal fixed in the amount of $6,423.19, inclusive of all fees, disbursements and taxes.

Lawrence Blackman
Director's Delegate

February 19, 2016
Date

REASONS FOR DECISION

I. BACKGROUND AND NATURE OF THE APPEAL

As a result of her injuries sustained as a pedestrian in a March 8, 2011 motor vehicle accident, the Appellant, Ms. Fatemea Rezaiezadeh, applied to her first part automobile insurer, the Respondent, State Farm Mutual Automobile Insurance Company, for statutory accident benefits under the *2010 Schedule.*[1]

An April 4, 2011 Form 1 (Assessment of Attendant Care Needs) prepared by Ms. J. Wong, O.T., stated the Appellant required $9,985.97 in monthly attendant care benefits for 24-hour basic supervisory care. Ms. Wong's April 4, 2011 Occupational Therapy Report, at page 15, stated:

> … [the Appellant] currently requires assistance with several aspects of her personal care activities and is dependent upon assistance for all instrumental activities of daily life due to her mobility restrictions and pain. Unfortunately [she] also copes with her daughter's ongoing medical issues and has no other social network for

> support. There is an urgent need for [a] personal support worker and assistive aids equipment to maximize her safety.

In January 2015, the parties came before Arbitrator Anschell (the "Arbitrator") of ADR Chambers for determination of a narrowed issue of whether, under subsection 3(8) of the *2010 Schedule*, the Appellant should be deemed to have incurred a $36,000 expense for attendant care, making the benefit payable.

The Respondent concedes, at page eight of the January 13, 2015 arbitration transcript, that the Appellant required the attendant care. The Appellant concedes, at page one of the transcript, that she did not incur the attendant care expense within the meaning of paragraph 3(7)(e) of the *2010 Schedule*.

Subsection 3(8) of the *2010 Schedule* states:

> If in a dispute to which sections 279 to 283 of the Act apply, a Court or arbitrator finds that an expense was not incurred ***because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense***, the Court or arbitrator may, for the purpose of determining an insured person's entitlement to the benefit, deem the expense to have been incurred.
> [Emphasis added]

The Appellant also sought a special award subsection under subsection 282(10) of the *Insurance Act*, R.S.O. 1999, c. I.8. That provision states:

> If the arbitrator finds that ***an insurer has unreasonably withheld or delayed payments***, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*. [Emphasis added]

The Arbitrator's June 10, 2015 decision dismissed the Appellant's claim for attendant care benefits and a special award, and awarded the Respondent its expenses. The Arbitrator rejected the Appellant's subsection 3(8) argument of deemed incurring for the following reasons:

1. The Arbitrator stated she was guided by Arbitrator Ahlfeld's decision in *Veley and Motor Vehicle Accident Claims Fund*, (FSCO A13-002630, May 5, 2014), that subsection 3(8) of the *2010 Schedule* was not meant to waive for disadvantaged individuals the incurred requirement of subsection 3(7) unless it was demonstrated that the insurer, knowing a person is impecunious and cannot afford the attendant care services in a Form 1 unreasonably denies or withholds the benefit. [2]

2. The Arbitrator found that the Appellant had not worked at any time since the accident (the top of page nine of her decision). The Appellant's "sole source of income has been the government payments" (also page nine). At the Respondent's July 5, 2011 Examination under Oath (held under the authority of subsection 33(2) of the *2010 Schedule*), the Appellant "testified that she had not paid for any Attendant Care Benefits, because she could not afford it" (page nine of the decision).

   The Arbitrator found that the Respondent had demonstrated, on a balance of probabilities, that the Appellant's "one brief comment" at her examination under oath was not a clear communication of her financial situation and her lack of funds for attendant care. The Arbitrator was not prepared to find that the Respondent was aware that the Appellant required attendant care benefits but could not afford to obtain them.

3. The Arbitrator found that the Respondent received an April 4, 2011 Occupational Therapy Report and Form 1. On April 15, 2011, it denied attendant care benefits on the basis the Appellant's injuries fell within the Minor Injury Guideline (the "MIG") and that, under subsection 14(2) of the *2010 Schedule*, an insurer was only required to pay attendant care benefits if an injury or impairment was not a minor injury.

   The Arbitrator accepted that the Respondent changed its position that the Appellant did not fall under the MIG based on non-medical information it received at the arbitration pre-hearing. The Arbitrator found the Respondent's failure for two years to remove the Appellant from the MIG "unfortunate," but not unreasonable.

The Arbitrator found, based on the medical information available to it in 2011, that the Respondent's adjudication, as she put it, was not unreasonable as required to invoke subsection 3(8). Having found that the Respondent did not unreasonably withhold or delay payment of attendant care benefits, the Arbitrator held that a special award was not payable.

III. ANALYSIS

Under subsection 283(5) of the *Insurance Act*, R.S.O. 1990, c. I. 8, the Arbitrator's June 10, 2015 decision is rescinded for the following reasons:

1. Subsection 283(1) of the *Insurance Act* restricts appeals from the order of an arbitrator to questions of law. Subsection 19(1) of the *2010 Schedule* requires an insurer to pay for reasonable and necessary attendant care benefits incurred by or on behalf of the insured person as a result of the accident. Paragraph 3(7)(e) defines the term incurred.

   The parties agree the Appellant has not incurred attendant care expenses, as defined.

Subsection 3(8) provides an exception where an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense.

There is ***no*** statutory requirement to access the relief under subsection 3(8) that the insured person communicate to the first-party insurer his or her financial inability to pay.

At oral appeal submissions, the *Respondent* agreed the *2010 Schedule* "certainly does not" have a requirement of communication; there "is nothing in the legislation that makes it obligatory for the insured to clearly state that." The Appellant opined that while an insured's impecuniosity may be evidence of whether an insurer unreasonably withheld or delayed payment of benefits, it is not a pre-requisite.

2. Subsection 3(8) of the *2010 Schedule* speaks of the insurer unreasonably withholding or delaying payment. Subsection 282(10) of the *Insurance Act* uses the same words.

Sullivan and Driedger on the Construction of Statutes, Fourth Edition (Markham Ontario, Butterworths Canada Ltd. 2002) states, at page 162, that there is a presumption of consistent expression. The legislature uses language carefully and consistently so that within a statute or other legislative instrument the same words have the same meaning. It is presumed the provisions of legislation are meant to work together, both logically and teleologically (the explanation of phenomena by the purpose they serve) as parts of a functioning whole (page 168).

Director Draper, at page 31 of *Liberty Mutual Insurance Company and Persofsky et al.*, (FSCO P00-00041, January 31, 2003) (repeating similar comments at page 23), held the "purpose of s. 282(10) is to punish insurers that unreasonably fail to pay accident benefits promptly, as required by the *SABS*, and to deter that company and others from acting similarly in the future. The size of the special award should be aimed at that purpose." Subsection 3(8) of the *2010 Schedule* does ***not*** require as a pre-requisite to waiving the paragraph 3(7)(e) incurred requirement that an insurer know that its insured is impecunious and cannot afford the attendant care services in the Form 1. In oral submissions, the *Respondent* agreed "there is nothing in the legislation that requires knowledge of impecuniosity."

This is consistent with Recommendation 25 of the *Report on the Five Year Review of Automobile Insurance*, March 31, 2009, cited by Arbitrator Ahlfeld in *Veley* at page 8:

> The attendant care benefit should continue to compensate claimants for incurred expenses. However, to enhance consumer protection and transparency, the SABS could clarify that where an arbitrator has found that the insurer has been unreasonable in denying the attendant care benefit, payments should be made even if no expenses have been incurred.

The Arbitrator's own earlier words, at the bottom of page nine of her decision, stated that in order for her to invoke subsection 3(8), "I need to find that State Farm unreasonably withheld or delayed payment of the Attendant Care Benefits."

As stated, the purpose of subsection 3(8) of the *2010 Schedule*, consistent with subsection 282(10) of the *Insurance Act*, is to "punish insurers that unreasonably fail to pay accident benefits promptly" and "deter that company and others from acting similarly in the future." The prohibition against an insurer unreasonably withholding or delaying benefits, as with its positive duty of utmost good faith, applies to ***all*** of its insureds.

Consistent with the legislative intent of punishing unreasonable insurer conduct, the exercise of adjudicative discretion under subsection 3(8) of the *2010 Schedule* is not restricted to the deserving poor, properly approaching their first-party insurer, cap in hand, like some waif from a nineteenth century Charles Dickens' serialized novel.

The pre-requisite for the application of subsection 3(8) is simply that "an expense was not incurred because the insurer unreasonably withheld or delayed payment of a benefit in respect of the expense." That includes, but is not necessarily restricted to, impecuniosity. An insurer's plea of ignorance of the exact ramifications of its unreasonable withholding or delay of benefits does not provide absolution from the application of subsection 3(8).

Ms. T. Stewart, the Respondent's representative, testified at page 63 of the January 14, 2015 transcript, that the Respondent required proof of incurred or economic loss prior to issuing payment. However, there were other options. She testified that the Appellant could have retained a third party service provider and the Respondent could have paid them directly. Ms. Stewart testified there was nothing in the file that this was ever communicated or made known to the Appellant.

Rather than advancing the legislative purpose of the *2010 Schedule*, *Veley* diluted the legislative purpose by adding a pre-condition the Legislature chose not to include and a pre-condition contrary to its intent, of the insurer's actual knowledge of the insured person's impecuniosity. This was an error of law.

The Arbitrator in this present case further diluted the legislative purpose by adding an additional pre-requisite that the insured person was responsible for clearly communicating his or her impecuniosity to the insurer, a pre-condition the Legislature chose not to include and that was contrary to its intent. This was a further error of law.

This was not the judicial exercise of discretion. It was not the exercise of discretion in accordance with principles of fairness and natural justice. It was the exercise of discretion based on a wrong principle. It was a restriction of the exercise of discretion contrary to the legislative intent. It was an exercise of discretion resulting in an injustice. [3]

3. In *Young and Liberty Mutual Insurance Company*, (FSCO P03-00043, June 20, 2005), application for judicial review dismissed, 2006 CanLII 7286 (ON S.C.D.C.), Delegate Evans cited Delegate McMahon in *Lombardi and State Farm Mutual Automobile Insurance Company*, (FSCO P01-00022, February 26, 2003):

> … errors of law include findings of fact made in the complete absence of supporting evidence, made on the basis of conjecture, or made on the basis of a misapprehension of the evidence caused by a misdirection on a legal principle. The vital distinction is between a conclusion that there was "no evidence" to support a finding and a mere "insufficiency of evidence."

The Appellant's July 5, 2011 Examination under Oath, at lines 16-20 of page 38 (of 43 pages), has the following question asked by the Respondent's counsel, Mr. D. Raposo, and answer given by the Appellant:

> Q. Has anybody come in to the house to help you with your self-care activities, since the accident on March 8th?
> A. No, I don't have anybody, because I don't have the money.

The transcript of the Examination under Oath shows two other individuals attending in person for the Respondent, Mr. W. Wong and Ms. K. Esposito. At arbitration, Ms. Stewart testified (January 14, 2015, page 40) that Ms. Esposito and Mr. Wong are "special investigation unit claim representatives at State Farm."

The Appellant submits there was further evidence before the Arbitrator regarding her impecuniosity: page five of her OCF-1 (Application for Benefits) showing her status as unemployed, Ms. J. Wong's March 29, 2011 assessment stating the Appellant could not undergo an MRI or purchase medication due to financial difficulties, and the adjuster's April 1, 2011 log note that the Appellant was unemployed and prevented from working.

Subsection 33(6) of the *2010 Schedule* provides that an insurer is not liable to pay a benefit in respect of any period during which the insured person fails to submit to an examination under oath. This is a serious consequence. It is an especially serious consequence to an impecunious first-party insured relying on a paid policy of insurance.

One is then at a loss to understand how an insurer, having exercised its rights under the *2010 Schedule* to hold an examination under oath to gather information, can subsequently imply (there being no evidence from either attending claims representative) poor hearing,

dull wits or bored indifference regarding information so obtained. This is so even if the insurer has less than three representatives attending the examination under oath. If I am in error in finding, in the application of subsection 3(8), that there is no pre-requisite that (1) the insurer know that its insured was impecunious and could not afford the attendant care services in the Form 1; or that (2) the insured clearly communicate his or her impecuniosity to the insurer, I find that the Arbitrator, in the absence of supporting evidence and on the basis of conjecture, erred in law in finding the Appellant, at a time and in a manner the Respondent chose, did not clearly communicate her impecuniosity.

4. At page 55 of the January 14, 2015 arbitration hearing, Ms. Stewart testified:

> Q. Why did you take [the Appellant] out of the MIG in 2013, in October 2013? Why was that done? What new information did you have to take her out of the minor injury guideline that you didn't have before you in 2011? I'm not going to lead you. What's the answer?
>
> A. I don't know the answer to that. Based on my review of the file there was a file review conducted and it was determined that your client's injuries were outside of the MIG.
>
> Q. Okay. Based on the information you already had?
>
> A. Yes.
>
> Q. And based on the information which we've agreed has not changed at all since 2011?
>
> A. Correct.

Under subsection 3(6) of the *2010 Schedule*, a minor injury "means one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." The MIG Guideline has a similar definition.

The Arbitrator states, at page nine of her decision, the parties agreed the Respondent's removal of the Appellant from the MIG "was not made on the basis of any new medical information." She stated that based upon the medical information available in 2011, the Respondent's *adjudication* was not unreasonable as required to invoke subsection 3(8) of the *Schedule*.

Adjusters do not adjudicate. Adjudicators adjudicate. I take it the Arbitrator meant to say adjusting. However, subsection 3(8) of the *2010 Schedule* does not speak to unreasonable adjudication or unreasonable general adjusting. It is specific to the unreasonable withholding or delay of payment of a benefit in respect of the expense.

At the oral appeal hearing, there being no objection, as requested, I included in the appeal record under Rule 56.4 of the *Dispute Resolution Practice Code* (Fourth Edition – Updated January 2014) (the "*Code*") the parties' written arbitration submissions. The Respondent's arbitration submissions, at paragraph 43, state:

> It is agreed that the Applicant's injuries were subsequently removed from the *MIG* following the pre-hearing held on October 21, 2013. This decision was communicated to the Applicant by way of OCF-9 dated October 23, 2013. Although no additional documentation had been received by State Farm since 2011, giving the timing of the pre-hearing, it is State Farm's position that new information was disclosed at the pre-hearing prompting State Farm to reconsider its *MIG* determination.

I agree with the Appellant's submission, citing *Marar v. Mueller*, 2011 ONSC 3744, at paragraphs 45 to 49, that evidence cannot be introduced through a factum.

The Respondent denied the Appellant's attendant care claim based on its contention she fell within the MIG. The Arbitrator's decision does not discuss what the MIG entails. She does not say what medical information was before or was not before the Respondent at any point in time that would make the Respondent's refusal to pay attendant care benefits based on the MIG reasonable or unreasonable.

The Respondent argues, at paragraphs 53 and 54 of its written appeal submissions:

> … State Farm has not alleged at any point that additional medical documentation had been received since 2011. However, its position is that information at the pre-hearing did in fact prompt it to reconsider its *MIG* determination.
>
> Given the timing and close proximity of the pre-hearing date and State Farm's decision to remove the Applicant from the *MIG*, the Arbitrator agreed that, on a balance of probabilities, State Farm reconsidered its *MIG* determination based on information received at the Pre-Hearing.

The Arbitrator does not say what this new information is. She does not say why it was reasonable for the Respondent to await this new, unidentified information. She does not say how or why it changed the Respondent's position on the MIG.

In oral appeal submissions, the *Respondent* conceded there was no evidence adduced at arbitration as to what information it received at the pre-hearing. It argues that since, temporally, the change in its decision followed the arbitration pre-hearing, deference should be given to the Arbitrator's conclusion.

The applicable Latin phrase is *Post Hoc, Ergo Propter Hoc*, the logical fallacy that "after this, therefore because of this." This concept was discussed at oral appeal submissions. In this case, the fallacy is not simply relying on one thing following another to find that the

former caused the latter. In this case, there is no evidence as to what the information was that was produced at the pre-hearing, if anything. Nor was there any actual evidence, written or oral, that the "something" (if anything) that was provided in fact caused the Respondent to take the Appellant out of the MIG.

That this "new information," if any, is unknown, may be due to the following:

(1) The Arbitrator, at page six of the January 14, 2015 transcript, noted she believed the Appellant's December 12, 2014 letter was in the file. The Appellant states she had asked the Respondent to produce for cross-examination six adjusters who had carriage and knowledge of this file. The Respondent produced only Ms. Stewart, who testified she took over carriage of the file in late 2014 and had no involvement or personal knowledge of anything being dealt with in the log notes.

The Respondent submits that if the Appellant wanted to have all of its adjusters attend, it should have served summons to witness. The Appellant states she had asked for the adjusters' last known contact information so she could subpoena them, but this information was not provided.[4]

(2) The Respondent claimed privilege over its log notes from early 2012 on, while relying on events at the September 2013 pre-hearing for changing it position in 2013 on the MIG. The Respondent argued in oral appeal submissions that if the Appellant had wanted these notes, she should have brought a motion.

R. v. Anglin, 2005 CanLII 8189 (ON CA), in setting a conviction aside and ordering a new trial, stated that the "conclusion of the trial judge is simply conclusory and generic … The failure to give adequate reasons is an error of law which warrants a new trial."

The Arbitrator's decision that it was not unreasonable for the Respondent to take the Appellant out of the MIG for two years "based upon information received at the Pre Hearing" is simply conclusory, made in the absence of supporting oral or written evidence and on the basis of conjecture.

5. The Arbitrator erred in law in awarding legal expenses to the Respondent:

(1) It is not disputed the Arbitrator failed to receive submissions on the question of entitlement to legal expenses. This was a breach of a fundamental precept of natural justice.

(2) The Arbitrator failed to give reasons for her legal expense entitlement award. As stated in *Scarlett v Belair Insurance*, 2015 ONSC 3635 (CanLII), the "duty of procedural

> fairness would include providing interested parties a reasonable opportunity to address case law, statutory provisions, and lines of argument which the arbitrator wishes to consider but which were not raised at the arbitration.”
>
> As stated in my September 18, 2015 Preliminary Appeal Order:
>
> > Neither the *Code* nor the *Expense Regulation* automatically award legal expenses to the successful party. Rather, other criteria for consideration include whether any novel issues were raised in the proceeding, the conduct of the parties and whether any aspect of the proceeding was improper, vexatious or unnecessary.

Rather than the matter being sent back to a new arbitration hearing, the Appellant asks for an appellate order that she is entitled to Attendant Care Benefits from April 13, 2011 in accordance with the April 4, 2011 Form 1 prepared by Ms. Wong, subject to any applicable policy limits, interest on those benefits and the maximum special award “or the matter to be referred to a different arbitrator for determination of the quantum of special award.”

In *Personal Insurance Company v. Hoang*, 2014 ONSC 81 (CanLII), the Divisional Court, having upheld an adjudicative decision of entitlement to a special award, agreed to determine the quantum of the award, stating:

> The court has been provided with the complete appeal record that was before the Delegate as well as the transcripts of the hearing before the arbitrator. Given the unusual circumstances of this case and the fact that both counsel wish this court to determine the amount of the special award, I agree that we should do so.

This present case involves more than the quantum of a special award. Even regarding the quantum of a special award, the Divisional Court in *Hoang* had before it both the interest calculation under both the *Schedule* and subsection 282(10) of the *Insurance Act* against which to determine an appropriate special award. I do not have such evidence.

Further, in the present case, the Respondent does not agree that, if I set aside the Arbitrator’s decision, I should decide whether to apply subsection 3(8) of the *2010 Schedule* to award the Appellant $36,000 in attendant care benefits, plus interest and legal costs, as well as determine her entitlement to and the quantum of any special award.

The Appellant, herself, argued in oral submissions that “the heart of my case is a lack of fairness of how the case went.” She notes her lack of opportunity to cross-examine the Respondent’s adjusters who had carriage and personal knowledge of the pertinent aspects of this case.

In the circumstances of this case, I find it appropriate to remit this matter back to arbitration for a new hearing, to be heard by another arbitrator.

IV. CHANGE OF THE TITLE OF PROCEEDING

The Appellant brought a motion for an order that both the appeal and arbitration title of proceeding be amended to substitute "Certas Home and Auto Insurance Company" for the Respondent. The Appellant submits that the Desjardins Group acquired State Farm January 1, 2015 and that the Respondent's correspondence and website suggest that Certas Home and Auto Insurance Company are now liable for any amounts payable to the Appellant.

The Appellant concedes there is no explicit procedure in the *Code* or the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, to permit a party to continue a proceeding against a non-party. She notes, however, that *CGU Insurance Company of Canada and Bittan*, (FSCO P01-00058, May 30, 2002), and *Abbas and Security National Insurance Co./Monnex Insurance Mgmt. Inc.* (P08-00034, February 18, 2009), held that the *Rules of Civil Procedure*, although not binding, may be helpful. Rule 1.1 of the *Code* states that the Rules will be broadly interpreted to produce the most just, quickest and least expensive resolution of the dispute.

The Appellant cites Rules 11.01 and 11.02 of the *Rules of Civil Procedure* that where at any stage in a proceeding the liability of a party is transferred or transmitted to another person by assignment or other means the proceeding is not nullified but is stayed until an order to continue against the person is obtained from the Court. She submits that the liability to pay her benefits has been "transferred or transmitted" to Certas and that *Abbas* supports an adjudicator having the authority to fashion an analogous procedural remedy to ensure a just and efficient outcome.

However, as the Respondent noted, the Appellant failed to provide any case law either regarding the Commission applying Rules 11.01 and 11.02 of the *Rules of Civil Procedure* or the Court application of these rules in similar circumstances.

The Respondent's January 19, 2016 Response to the Appellant's motion states "the issue is neither here nor there;" whether "State Farm no longer exists is <u>not an issue</u>. State Farm has and will continue to respond to this appeal as a named party and it is our position," (emphasis in the original). That State Farm continues to exist, it submits, is evidenced by the letterhead on recent correspondence to the Appellant. The Respondent does, however, concede:

> … as noted in the Appellant's motion materials, there is no dispute that the State Farm branded policies are now underwritten by Certas Home and Auto Insurance Company or Desjardin Financial Security Life Assurance Company.

The Appellant's apparent concern is that if she is successful on appeal and obtains a monetary award, if the Respondent does not pay, whose property does the sheriff seize? The Respondent

submits that Certas would respond to any "valid" judgment by cutting a cheque because of its contractual obligation with State Farm. This did not seem to reassure the Appellant.

Rule 66 of the *Code* provides that, on written request, the Director will provide a party with a certified copy of an order that may be filed with the Ontario Superior Court of Justice. The Order may be enforced by the Court as an order of that Court. Rule 65.5 provides, in part, that an adjudicator, "at any time" may correct a technical error in his or her decision. Rule 65.7 allows an adjudicator to make such orders or give such directions as he or she considers proper to prevent an abuse of process.

A change in the title of proceeding in this case potentially affects every Commission case involving the present insurer. At present there is no suggestion that this appeal is a nullity or that it should be stayed pending an order to continue as would happen under Rule 11.01 of the *Rules of Civil Procedure*. In the absence of any case law regarding a presently hypothetical concern, I defer to any further or other appellate officer the question of amending the title of proceeding in this appeal proceeding in the event there is any difficulty in the enforcement of this appeal order. I leave to arbitration any amendment of the title of proceeding at that level.

IV. LEGAL APPEAL EXPENSES

Both parties seek their legal expenses both of this appeal and arbitration. I refer the parties to arbitration for a determination of legal expenses at that level.

My December 7, 2015 letter stated that the parties should be prepared at the oral appeal hearing to speak to both entitlement to and the quantum of appeal legal expenses. Both parties brought a Bill of Costs. The Appellant seeks $6,423.19 in legal expenses. This consists of 27.5 hours at $150 an hour (equaling $4,661.25, including HST), and $1,761.94 in disbursements (including $1,263 for the arbitration transcripts). The Respondent seeks $7,459.60 in legal fees, consisting of 55.4 hours claimed at either $116.93 or $129.93 an hour. No legal disbursements are claimed.

Subsection 12(2) of R.R.O. 1990, Reg. 664 (the "*Expense Regulation*") sets out the criteria to be considered in awarding legal expenses. I find the Appellant entitled to her reasonable expenses of appeal, first because she was successful in setting aside the Arbitrator's order.

The Respondent argued that, at the end of the day, no legal expenses should be awarded as the issue was novel on appeal and there was only one prior arbitration decision on point, *Veley*. As I have found that *Veley* also erred in law regarding a point not dealt with in the appeal in that case, I find this to be a further reason to award the Appellant her reasonable legal expenses of this appeal.

I find the Appellant's claimed hours entirely reasonable, especially given that the Respondent claims twice as many hours. This is of significance when it is often argued on appeal that it is to be expected that the appellant, having the onus, should incur greater hours.

Insurers' counsel are subject to the increasing rates of the Legal Aid, Civil Tier 3 rate. The maximum $150 hourly rate for applicants' counsel under Rule 78.1 of the *Code* has been in effect for the nearly two decades since 1997. Successful applicants see their awards, and access to justice, eroded by inertia in the face of increasing cost of representation. It is difficult to disagree with the *Respondent* that this system undercompensates counsel.

I am persuaded that the relatively modest $150 an hour the Appellant seeks is more than justified in this case that addressed issues of law novel at the appellate level. I am persuaded that the Appellant's disbursements are reasonable. I specifically find the transcript in this case not merely reasonable, but necessary. I award the Appellant her requested legal appeal expenses of $6,423.19, inclusive of all fees, disbursements and taxes.

Lawrence Blackman Director's Delegate	February 19, 2016 Date

---

[1]*The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

[2]On appeal, in *Motor Vehicle Accident Claims Fund and Veley*, (FSCO P14-00021 and P14-00041V, April 20, 2015), Delegate Evans held that Mr. Veley's argument that the modifier "unreasonable" applied only to withholding, and not to denying, was "illogical, ungrammatical and impractical."

[3] See *Kalin v. Ontario College of Teachers*, 2005 CanLII 18286 (ON SCDC), 75 O.R. (3d) 523 and *Pugh v. Pugh*, 1979 CanLII 766 (BC CA), 17 B.C.L.R. 14 (C.A.).

[4]I note that under Rule 53.07(2) of the *Rules of Civil Procedure*, the attendance of an adverse party may be secured by service, with attendance money, on the adverse party's lawyer.

Tab 197

CanLII

Intact Insurance Company v. Margie Bateman, 2014 ONFSCDRS 14 (CanLII)

Source:	Ontario Financial Services Commission - Dispute Resolution Services
Date:	2014-01-27
File number:	Appeal P13-00039A
Citation:	Intact Insurance Company v. Margie Bateman, 2014 ONFSCDRS 14 (CanLII), <https://canlii.ca/t/jq8hc>, retrieved on 2026-01-18

Commission des servic es financiers de l'Ontario

Financial Services

Commission of Ontario

Neutral Citation: 2014 ONFSCDRS 14

Appeal P13-00039A

OFFICE OF THE DIRECTOR OF ARBITRATIONS

INTACT INSURANCE COMPANY

Appellant

and

MARGIE BATEMAN

Respondent

BEFORE:	Delegate Lawrence Blackman
REPRESENTATIVES:	Ms. Deborah G. Neilson for the Appellant, Intact Insurance Company Mr. Gordon Good for the Respondent, Ms. Margie Bateman
HEARING DATE:	January 20, 2014. The decision with reasons was provided orally the same da y, with full written reasons to follow.

APPEAL ORDER

Under section 283 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Pursuant to Rules 50.2 and 51.2(c) of the *Dispute Resolution Practice Code* (Fourth Edition – Updated August 2011), this appeal from the Arbitrator's November 26, 2013 motion decision is rejected. Accordingly, I decline to exercise my discretion pursuant to subsection 283(6) of the *Insurance Act* to stay the Arbitrator's decision.

2. If the parties are unable to agree on the legal expenses of this appeal, an expense hearing shall be requested within thirty days of the date of my oral decision, as set out within.

Lawrence Blackman
Director's Delegate

January 27, 2014
Date

REASONS FOR DECISION

I. NATURE OF THE APPEAL

The Respondent, Ms. Margie Bateman, was injured in a February 14, 1996 motor vehicle accident. As a result, she applied for statutory accident benefits pursuant to the *Schedule*[1] from her first-party automobile insurer which, at the time, was Zurich Insurance Company but is now the Appellant, Intact Insurance Company.

The parties dispute the Respondent's benefit entitlement, including loss of earning capacity benefits ("LECBs"), medical/rehabilitation, attendant care and housekeeping benefits, as well as a special award claimed pursuant to subsection 282(10) of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended.

On August 17, 2010, the Appellant received the Respondent's Application for Mediation. Mediation, held November 2, 2011, was unsuccessful in resolving the issues in dispute.

The Commission received the Respondent's Application for Arbitration in January 2012. Rule 32 of the *Dispute Resolution Practice Code* (Fourth Edition – Updated August 2011), (the "*Code*"), mandates that at least ten days before the pre-hearing discussion the parties have, in part, exchanged the documents identified in the Application for Arbitration and the Response, established a reasonable time frame for the exchange of any remaining documents, filed a list of outstanding document requests and identified any disputed items.

The parties' compliance with Rule 32 allows the pre-hearing arbitrator to more expeditiously and cost-effectively, under Rule 33.1(c) of the *Code*, decide any disputes relating to the identification and exchange of documents, make orders and set time lines for the exchange of outstanding documents. The Commission's time lines in the *Code* state that dates for the arbitration pre-hearing will be available within six to eight weeks from the registration of a completed Application and that dates for an oral arbitration hearing will be available within four to six months of the conclusion of the pre-hearing discussion.

The pre-hearing was held before Arbitrator Alves (the "Arbitrator") on August 9, 2012. The Arbitrator confirmed the substantive issues in dispute and set an eight-day hearing for March 2013. The pre-hearing was to resume on September 28, 2012, allowing the parties to sort out their production disputes in the interim.

At the resumption, procedural issues remained outstanding, including whether the Appellant's accident benefits file was to be produced. Oral submissions were received at the resumption, and on two further occasions. Written submissions were received by February 20, 2013. The Arbitrator's March 6, 2013 letter decision determined non-production preliminary procedural issues.

Additional submissions were then received by March 14, 2013. In the interim, the Arbitrator adjourned the March 2013 arbitration hearing to January 28, 2014. The Arbitrator released her production decision on November 26, 2013. The Arbitrator held:

1. The Appellant was to produce, by December 18, 2013, its complete file from February 14, 1996 to August 17, 2010, with the exceptions noted. August 17, 2010 was the date the Appellant received the Respondent's second Application for Mediation and the date on which the Arbitrator, citing arbitration case law,[2] held that litigation privilege could reasonably be said to attach. The Arbitrator noted that the Appellant retained its present counsel on September 2, 2010, shortly after the August 2010 Application for Mediation.

   Exempted from production were items #20 (reserve information) and #21 (legal opinion). Modified production was ordered regarding manuals, surveillance and contact information

for file handlers. The Arbitrator set out a page, single-spaced, of items identified either generically or individually that were to be specifically produced.

2. Citing *Dyczok and Wawanesa Mutual Insurance Company*, (FSCO A02-000766, August 26, 2003), the Arbitrator found that extraordinary circumstances warranted the Appellant producing an affidavit of documents. These circumstances, where the Respondent had been seeking production of the Appellant's file since 1998, included:

   - Evidence that the Appellant was missing documentation, there being a notation in the Appellant's file that four fifths of its file was missing;
   - The Appellant having two file numbers and the Appellant having neglected or having refused to confirm that both files had been produced;
   - The absence of key documents in what the Appellant had produced, the Respondent having listed 45 documents she received in February 2013 for the first time;
   - The absence of meaningful responses by the Appellant to the Respondent's requests for information and documentation; and,
   - the manner in which the Appellant had claimed privilege

3. The Appellant was to deliver, by December 18, 2013, an Affidavit of Documents, as particularized by the Arbitrator, restricted to documents that came into existence on or before August 17, 2010. The Arbitrator stated that the Appellant had set out 39 groups of documents over which it claimed solicitor-client, litigation and/or settlement privilege. Rather than producing the documents and redacting the material for which privilege was claimed, the Appellant had withheld entire documents, making it difficult for the Respondent and the Arbitrator to determine whether privilege was legitimately claimed.

   The Respondent had two days, until December 20, 2013, to challenge any claim of privilege made by the Appellant. The Appellant subsequently had until December 23, 2013 to file with the Commission a copy of each challenged document. The Arbitrator would then, based on the arguments articulated by the Appellant in its Affidavit of Documents and the Respondent's submissions, determine what further, if any, documents the Appellant should produce. The documents not ordered produced would be sealed.

4. The Appellant had refused to make those persons who had carriage of its file available to give evidence, or to provide their contact information. Holding that there was no property in witnesses, the Arbitrator ordered that by December 5, 2013 the Appellant provide contact information, as specified, for 12 individuals, exempting two individuals the Arbitrator found had not adjusted the file.

5. The Appellant was to provide the 48-page medical summary it prepared for a psychologist who was to do a psycho-vocational assessment of the Respondent.

6. The Appellant was to produce those directives or memoranda it used to adjust the Respondent's benefits claim, as they were relevant. The Arbitrator was not persuaded of the relevance of the manuals sought to be produced.

7. Citing *Uka and Aviva Canada Inc.*, (FSCO P08-00036, July 16, 2009) and *Mamaca (Litigation Guardian of) v. Coseco Insurance Co.*, 2007 CanLII 54963 (ON SC), [2007] O.J. No. 4899, the Arbitrator was not persuaded she had authority to order production of reserve information.

8. The Respondent had sought production of all surveillance particulars from the February 14, 1996 accident to present. The Respondent had a July 31, 2003 surveillance report. It had not yet determined if it would be relying on the report. Applying Rule 40.1 of the *Code*, the Arbitrator ordered that by December 5, 2013 the Appellant was to determine whether it intended to rely on any of its surveillance or investigative evidence and advise the Respondent of its position. If the Appellant intended to rely on any portion of the evidence, it was to provide copies of all of the surveillance and investigative evidence in its possession by December 18, 2013.

The Appellant's December 3, 2013 letter sought clarification from the Arbitrator regarding her order. The Respondent responded December 9, 2013. In part, the Appellant asked for clarification of her order regarding privilege. On the one hand, the Arbitrator had issued a production order to August 17, 2010. On the other hand, the Arbitrator had ruled that reserve information and legal opinions were not to be produced and an Affidavit of Documents was to be provided upon which privilege would be determined. It was not clear whether the items over which the Appellant had claimed privilege were to be presently produced.
The Arbitrator's December 20, 2013 letter clarified that the cost of obtaining all productions ordered produced would be at the Appellant's expense, unless waived by the Respondent. The order for production of log notes included those in the possession of third parties. Production of cheques included those benefits not in dispute in this arbitration. Otherwise, the Arbitrator stated "I refer you to the decision."

II. SHOULD THIS APPEAL FROM A PRELIMINARY OR INTERIM ARBITRATION ORDER BE ACCEPTED?

The Appellant's December 18, 2013 Notice of Appeal sought leave that this appeal from a preliminary or interim arbitration order be accepted. The Appellant also sought a stay of the Arbitrator's November 26, 2013 order.

Rule 50.2 of the *Code* provides that a party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute have been finally decided, unless ordered otherwise. Rule 51.2(c) states that an appeal may be rejected if it is from a preliminary or interim order that does not finally decide the issues in dispute.

Delegate Makepeace, in *Allstate Insurance Company of Canada and Torok*, (FSCO P01-00021, May 29, 2001), held that the purpose of Rule 50.2 of the *Code* is to:

> … facilitate the most cost-effective resolution of disputes by minimizing the time and money spent on procedural or collateral matters. The decision whether to hear an appeal of a preliminary order is discretionary … the over-arching principle guiding the exercise of the discretion is that the rule "should be broadly interpreted to produce the quickest, most just and least expensive resolution of the dispute." The criteria to be considered include the apparent strength of the appeal, the importance or novelty of the issue raised, and whether rejecting the appeal or hearing it will prejudice either party.

Subsection 283(6) of the *Insurance Act* provides that an appeal does not stay the order of an arbitrator, unless decided otherwise. In *Guardian Insurance Company of Canada and Armstrong*, (FSCO P00-00037, July 20, 2000), Delegate McMahon adopted the following criteria in determining whether a stay should be granted:

1. The *bona fides* of the appeal;
2. The substance of the grounds for appeal; and,
3. The hardship to the respective parties if the stay is granted or refused.

Endeavours were made to have an appeal preliminary issue teleconference with both parties the beginning of January 2014, given that the arbitration hearing was scheduled to begin the end of the month. Due to the unavailability of the Respondent's counsel to participate in a telephone conference call until January 20, 2014, oral submissions were received on the that date.

The Appellant submits that the Arbitrator erred in her November 26, 2013 decision in:

1. Failing to accept the Appellant's evidence regarding the privilege claimed and ordering production of documents for which privilege was claimed or that pertained to reserves.
2. Ordering production of the entire accident benefits file rather than those documents relevant to the issues in arbitration.
3. Ordering an Affidavit of Documents as well as an adjuster's and log note record.
4. Ordering production of copies of cheques of benefits that are not in issue.

The Appellant asks that the Arbitrator's order be replaced by an order:

1. It produce its complete accident benefits file from February 14, 1996 to August 17, 2010 except for those documents over which privilege is claimed or that pertain to reserves.

2. It not prepare an adjuster's and log note record indicating what notes were received and have not been provided.
3. It produce copies only of cheques for the medical, rehabilitation, attendant care and housekeeping benefits claimed in the arbitration.
4. Its Affidavit of Documents lists only those documents relevant to the arbitration rather than all Accident Benefits documents.

The Appellant cites *Primmum Insurance Co. and Rajasekaram*, (FSCO P12-00034, December 4, 2012), as to the following applicable criteria for whether to accept an appeal from a preliminary or interim order. It submits that it need not meet all of the criteria for its appeal to be accepted.

1. **The Apparent Strength of the Appeal**

The Appellant states that the Arbitrator failed to clarify whether her order requires production of all privileged and/or reserve documentation up to August 17, 2010. Therefore, the Appellant submits that it must now produce all such documentation, other than that expressly excepted in the Arbitrator's order. The Appellant argues that production of privileged documents is contrary to subsection 5(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 (the "*SPPA*") and Rule 39.3(a) of the *Code*, as overwhelmingly supported by case law.

At page 8 of her submissions, the Respondent submits that the Appellant has misinterpreted the Arbitrator's order, believing it must disclose documents over which it claims privilege. The Respondent states, at page 7, that the "Arbitrator did not order disclosure of privileged documents, but rather ordered production of an affidavit of documents." Documents for which privilege is claimed are to be included in the Affidavit of Documents with sufficient description to identify the document and whether privilege should attach. That, the Respondent argues, is within the Tribunal's power, as set out in *Dyczok*. The Respondent further submits that the Arbitrator held that reserve information was to be redacted from the disclosures.

The Appellant, in its companion Application for Variation/Revocation, stated, by letter dated January 15, 2014, that "in light of the clarification of the Arbitrator dated December 20, 2013," it was withdrawing its Application for Variation/Revocation. In oral submissions, the Appellant stated that if my decision specifically noted the Respondent's concession and that I am relying on her concession that the Arbitrator has not presently ordered production of documentation where privilege or reserve information is claimed, then the Appellant's concerns regarding that part of the appeal have been met. Accordingly, the Arbitrator will decide privilege and reserve issues pertaining to specific documents upon delivery of an Affidavit of Documents and the Respondent's further submissions.

Given the Respondent's concession, upon which I rely, I am not persuaded as to the strength of the primary focus of this appeal − the alleged error of law regarding privilege. Nor am I persuaded as to the strength of the remaining grounds of appeal, as discussed below.

2. **The Importance or Novelty of the Issues Raised**

The Appellant cites the Court of Appeal in *Pritchard v. Ontario Human Rights Commission et al.*, 2003 CanLII 8701 (ON CA), 63 O.R. (3d) 97, that solicitor-client privilege is a "fundamental civil and legal right." The Appellant further cites *Delisser v. State Farm Mutual Automobile Insurance* Company 2004 CanLII 13931 (ON SC), [2004] O.J. No. 1399, that statements made in the course of mediation should be entitled to absolute privilege. The Appellant submits that, therefore, questions of legal privilege are of extreme importance. That issue, however, has been rendered moot by the Respondent's concession.

The Appellant cites *Allstate Insurance Company of Canada and Rama*, (FSCO P07-00033, July 16, 2009), where Delegate Evans allowed an appeal regarding reserve information. In *Security National Insurance Co./Monnex Insurance Mgmt. Inc. and Morgan*, (FSCO P07-00002, October 29, 2007), Delegate Evans varied the arbitration surveillance evidence production order. In addition, the Appellant submits that the Arbitrator's decision conflicts with *Pantelidis and Certas Direct Insurance Company*, (FSCO A01-001126, January 25, 2002), where, in the circumstances of that case, I saw no need for the insurer to provide an affidavit of documents.

The Appellant argues that if leave is not granted to accept this appeal, the reputation of justice will be brought into disrepute. It notes that leave to appeal has been granted where there was a dispute over an order for production of privileged documents.

The Respondent submits that the Appellant has failed to raise any novel or important issue. As the Arbitrator noted, requests for an affidavit of documents have been considered before and the Commission has determined that it is vested with authority to order such production.

The Respondent further argues that the Arbitrator noted the extraordinary circumstances in this case, circumstances attributable to the Appellant itself. The Respondent submits that the Appellant has provided no basis to counter the Arbitrator's findings or any argument that the circumstances are not extraordinary such as to warrant an Affidavit of Documents.

I agree that the Arbitrator acknowledged that ordering an Affidavit of Documents was restricted to "extraordinary circumstances." The Arbitrator set out those extraordinary circumstances. The Appellant does not dispute those extraordinary circumstances in its Notice of Appeal, reply or oral submissions. While I was providing my oral decision, the Appellant broke in to say that it intended to provide those submissions once the appeal was accepted. The time to make submissions on the

strength of the appeal, however, brief, as a ground upon which the appeal should be accepted is before, not during or after that preliminary appeal decision.

Privilege is important. That does not mean, however, that every preliminary or interim arbitration decision entailing a claim of privilege is entitled to be appealed. While there may have been prior appeal decisions on a specific preliminary issue, that does not mean that an appeal from every arbitration decision on the same issue must be received. Rather, the intent of Rules 50.2 and 51.2(c) of the *Code* and the case law as in *Torok* is that accepting appeals from preliminary or interim arbitration orders is to be the exception in this dispute system that was established as a meaningfully expeditious, cost-efficient and simplified alternative to the courts.

I am not persuaded that the Arbitrator's fact based exercise of discretion raises issues of such importance or novelty warranting setting aside the general rule that a party may not appeal a preliminary or interim order of an arbitrator until all of the issues in dispute have been finally decided. Given the Respondent's concession that the Appellant's claims of privilege and reserves are still to be determined, now seventeen months or more after the issue was raised, I am not persuaded that the administration of justice will be brought into disrepute by rejecting an appeal that will add even further delay, expense and complication.

I am persuaded that accepting this appeal will not advance the administration of justice.

3. **Whether Rejecting the Appeal will Prejudice Either Party**

The Appellant argues that the Respondent's alleged hardship is contrary to the eleven years it took her to apply for arbitration.

The Appellant further submits that the $10,973.77 in attendant care benefits claimed covers the period 1996 to 2006 and that there is no issue for present attendant care. It argues that these claimed expenses are covered by the caregiver expenses it has already paid.
The Appellant argues that only the preliminary LECB issues (including whether the Respondent elected to receive LECBs and whether she received an LECB offer in 2001) should proceed on January 28, 2014. Once those issues are determined, the issue of LECB quantum should easily settle. The Appellant states that, in the interim, it is paying the Respondent other disability benefits weekly and, hence, there is no concern over any hardship the Respondent may have resulting from the arbitration hearing being delayed.

The Respondent submits that the Arbitrator's March 2013 order determined that the issue of whether the Respondent was entitled to an LECB should be determined as a substantive issue at

the main hearing along with the other disputed benefit claims. The Respondent argues:

- Accepting this appeal would result in a long adjournment of the arbitration hearing, to the Respondent's prejudice and great hardship;

- The Respondent is presently receiving weekly benefits of $185. The Respondent is entitled to increased benefits based on the Appellant's own calculations; and,

- The Appellant has indicated its intention to cease payment of benefits immediately for reasons related to an insurer's medical examination ("IME"). The Appellant responds that its requested IME and/or Form 1, Assessment of Attendant Care Needs Form, pertain to present day attendant care needs and not those in dispute in this arbitration.

I find the argument that the disputed attendant care benefits are seven years old does not support the arbitration hearing being further delayed. Whether the Respondent unduly waited to bring these disputes to resolution, it is now more than two years since she applied for arbitration, far longer to reach a hearing than provided for under the Commission's time lines. The suggestion that the January 28, 2014 hearing be limited to preliminary LECB issues would, through the back door, overturn the Arbitrator's March 2013 decision, that has not been appealed.

I am persuaded that the prejudice to the Respondent should this appeal be accepted, adding unwarranted delay, complication and expense, is greater than any prejudice to the Appellant in rejecting the appeal, especially given the Respondent's concession that privilege and reserve issue regarding specific documents are still to be determined by the Arbitrator.

4. **The Preference of the Parties**

As cited by the Respondent, *Allstate Insurance Company of Canada and Al-Obaidi*, (FSCO P99-00009, May 2, 2000), states that the preference of the parties is an important factor. In this case, the parties disagree on whether this appeal should be accepted.

5. **Whether the Arbitration Decision Departs from Prior Cases**

I agree with the Respondent that the Arbitrator's decision is consistent with *Dyczok* that an arbitrator is vested with the authority to order production of an affidavit of documents. The Arbitrator's decision is also consistent with *Campeau and Liberty Mutual Insurance Company,* (FSCO A00-000522, March 12, 2001).

Rule 1.1 of the *Code* provides that the Rules are to be broadly interpreted to produce the quickest, most just and least expensive resolution of the dispute. *Campeau* noted the broad strokes approach taken by the Commission regarding production of an insured person's clinical notes and records,

setting as a general rule production of an insured's clinical notes and records from one year pre-accident, subject to submissions that the scope of production should be broadened or narrowed:

> … medical entries may note abortions, extra-marital affairs and a myriad of other extremely private matters. The relevance of these matters to a claim such as a soft-tissue disability, especially without any alleged emotional component, may be questioned. Nevertheless, without even a bald allegation of a causation issue, insurers are routinely provided with the entire clinical notes and records of an applicant's medical practitioners from the standard period of one year prior to the motor vehicle accident, without any restriction to those entries which the applicant finds relevant.

Campeau, noting the similar *prima facie* relevance of an insurer's accident benefits file, took a similar broad brush approach to production of the file up to the date of mediation, subject to submissions as to why the scope of production should be expanded or narrowed.

Rule 5.4(1)(c) of the *SPPA* provides that a Tribunal may, at any stage before the hearing is completed, make orders for the exchange of documents. Rule 5.4(c) excepts orders requiring the disclosure of privileged information. Rule 15(2) of the *SPPA* provides that nothing is admissible in a hearing that is inadmissible in a court by reason of privilege under the law of evidence. The Ontario Court of Appeal, in *General Accident Assurance Co. v. Chrusz* et al., 1999 CanLII 7320 (ON CA), [1999] 45 O.R. (3d) 321, held that the onus is on the party asserting the privilege to establish the evidentiary basis for the privilege. The Appellant seemingly objects to the Arbitrator allowing it yet another opportunity to establish an evidentiary basis for the privilege it claims for individual documents.

6. **Whether Rejecting or Hearing the Appeal would provide the Quickest, Most Just and Least Expensive Way of Disposing of the Issues between the Parties.**

The Appellant states that subsection 15(1) of the *SPPA* limits documentary evidence at a hearing to that which is relevant to the subject-matter of the proceeding. Rule 32.2 of the *Code* requires the exchange of documents that are "reasonably necessary to determine the issues being arbitrated." Rule 32.3 provides, in part, that an arbitrator may at any time order the production of documents considered "relevant to the determination of the issues in the arbitration."

The Appellant argues that the Arbitrator has incorporated into arbitration a discovery process, including an Affidavit of Documents listing every document in its possession regardless of relevance. Such an order, the Appellant submits, undermines the Commission as an expeditious, less complicated and less expensive alternative to the court system. This appeal, it submits, will discourage parties seeking production of documents not relevant to the issues in a matter with a view to streamlining the arbitration process.

The Appellant submits that the Respondent requested, on March 1, 2013, that the arbitration hearing be adjourned to January 28, 2014. The Arbitrator's order came eight months after the close of submissions that took months to complete. Nonetheless, the Arbitrator only allowed the Appellant days to comply with her extensive order. The Appellant states that it has incurred 98 hours of staff time, including overtime on weekends, and at least 46 hours of counsel and staff time, to comply with the Arbitrator's order.

The Respondent argues that dismissing the appeal and the stay request would be the most just, expeditious and least expensive way of disposing of the dispute, rather than suspending its determination for months, at unnecessary further expenditure and time.

The Arbitrator had the advantage of hearing the parties on numerous occasions. *Al-Obaidi* held:

> Arbitrators have considerable options as to the form disclosure should take. In appropriate circumstances, this may involve a selective order, as in *Candido*, limited to entries related to specified benefits, and giving that party's lawyer the opportunity to decide which entries meet the criteria. However, this should always be subject to the ultimate discretion of the arbitrator to rule on aspects in relation to which there may be uncertainty, disagreement or concern."

The Arbitrator made findings of fact. She found that the Appellant had not provided meaningful responses to the Respondent's requests for information and documentation, it was missing documentation, it had two file numbers, it refused to confirm that both files had been produced and it had not provided key documents it said had been delivered.

The Arbitrator set out the basis for finding that there were extraordinary circumstances supporting her order. The Appellant has not challenged the extraordinary circumstances found by the Arbitrator. In any event, appeals from the order of an arbitrator are limited to questions of law under subsection 283(1) of the *Insurance Act*.

Deference is owed to first level adjudicators, specifically regarding credibility. It is not the role of an appellate officer to second guess such findings. As stated in *Calogero and The Co-operators General Insurance Company*, (OIC P-000251, February 13, 1992), the "principle, as generally understood, is one should only interfere in the discretion exercised by the trier of fact if it is so clearly wrong as to amount to an injustice (*Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367) … it is not the Director's function to substitute her assessment for that of the arbitrator."

As noted in *Torok*, the key criterion whether to accept an appeal is whether it would result in the quickest, most just and least expensive way of disposing of the issues between the parties. The onus is on an appellant to establish that an appeal from a preliminary or interim order should be

accepted. Further, appeals from the order of an arbitrator are limited to errors of law. That another arbitrator would have exercised his or her discretion differently is not sufficient.

As stated, the Respondent concedes that issues regarding privilege and reserve documentation are still to be determined by the Arbitrator. Ordering an Affidavit of Documents in the extraordinary circumstances noted by the Arbitrator was consistent with *Dyczok*. Ordering production of the Appellant's accident benefits file to the date of mediation, subject to determination of privilege and reserve issues, was consistent with *Campeau*.

Accepting this appeal will not bring back the seventeen months these issues have percolated in arbitration submissions and deliberations. Accepting this appeal will not bring back the 144 hours the Appellant says it has spent complying with the Arbitrator's order. The parties endeavoured to advise me as to the extent of the Appellant's compliance or lack of compliance with the Arbitrator's order. That, however, is not the issue before me.

I am not persuaded as to the apparent strength of the appeal, the importance or novelty of the issues raised, that the prejudice in rejecting the appeal is greater to the Appellant than the prejudice to the Respondent in accepting the appeal or that the arbitration decision departs from prior case law.

Accordingly, exercising my discretion pursuant to Rules 50.2 and 51.2(c) of the *Code*, I reject this appeal. As the appeal has been rejected, the issue of the requested stay of the Arbitrator's November 26, 2013 decision is moot. However, for completeness, I will briefly address that issue.

III. SHOULD THE REQUESTED STAY BE GRANTED?

The Appellant argued, in support of its stay request, that the likelihood of it being successful on appeal was great given that subsection 5(2) of the *SPPA* prevents an arbitrator ordering production of privileged documents. The Appellant submits that its privileged documents include e-mails between Zurich's in-house counsel and its adjuster, internal e-mails and adjuster's notes setting out settlement strategy and documents.

If the stay were not granted, the Appellant argues that it would suffer irreparable prejudice as the privilege attached to the documents ordered produced would be lost upon production, rendering the appeal moot. To allow these documents to be produced would have "a chilling effect on the

communications between insurers and their counsel and on preparation for settlement discussions or mediation."

As noted, the Respondent concedes that the Arbitrator's production order excludes documents for which privilege or reserve information is claimed. Disputes in this regard are to be resolved according to the procedure set by the Arbitrator. I am not persuaded that the hardship claimed by the Appellant warrants the exceptional order of a stay of the Arbitrator's order.

IV. EXPENSES

If the parties are unable to agree on the legal expenses of this appeal, applying the procedure in Rule 79.2 of the *Code*, an expense hearing shall be requested, within thirty days of the date of my oral decision. The request shall be accompanied by a Bill of Costs describing the expenses claimed, the services received and the costs. Although not stated in my oral decision, it would move matters along if the request was accompanied by written submissions regarding entitlement to and/or the quantum of legal expenses, as are in dispute.

Lawrence Blackman Director's Delegate	January 27, 2014 Date

---

[1] *The Statutory Accident Benefits Schedule — Accidents after December 31, 1993 and before November 1, 1996,* Ontario Regulation 776/93, as amended.

[2] *Campeau and Liberty Mutual Insurance Company*, (FSCO A00-000522, March 12, 2001) and *Vaitheeswaran and State Farm Mutual Automobile Insurance Company*, (FSCO A09-002295 July 26, 2010).

Tab 198

CanLII

Zurich Insurance Company v. Chubb Insurance Company of Canada, 2014 ONCA 400 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2014-05-15
File number:	C57553
Other citations:	120 OR (3d) 161 — 379 DLR (4th) 427 — 239 ACWS (3d) 997 — 319 OAC 287 — 34 CCLI (5th) 216 — [2014] CarswellOnt 6274 — [2014] OJ No 2330 (QL) — 65 MVR (6th) 159
Citation:	Zurich Insurance Company v. Chubb Insurance Company of Canada, 2014 ONCA 400 (CanLII), <https://canlii.ca/t/g6vrk>, retrieved on 2026-01-18
Most recent unfavourable mention	Northbridge General Insurance Corp. v. Jevco Insurance Co., 2024 ONSC 1520 (CanLII) [...] [19] Unifund Assurance Company v Security National Insurance Company , 2016 ONSC 6798 ; Zurich Insurance Company v. Chubb Insurance Co. **2015 SCC 19 , rev'g 2014 ONCA 400** ; Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co. (2008), 2007 CanLII 82792 (ON SC) , 94 O.R. (3d) 62 (S.C.J.); Kingsway General Insurance Co. [...]

Zurich Insurance Company v. Chubb Insurance Company of Canada

[Indexed as: Zurich Insurance Co. v. Chubb Insurance Co. of Canada]

Ontario Reports

Court of Appeal for Ontario,

Juriansz, Pepall and Pardu JJ.A.

May 15, 2014

120 O.R. (3d) 161 | 2014 ONCA 400

Case Summary

application" means an application for accident benefits (OCF-1) approved by the Superintendent for the purposes of the Schedule[.]

. . . . .

1. All disputes as to which insurer is required to pay benefits *under section 268* of the Act shall be settled in accordance with this Regulation.
2(1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.

(Emphasis added)

Analysis

[17] This court has dealt with these priority disputes in SABs context a number of times.

[18] In *Kingsway General Insurance Co. v. Ontario (Minister of Finance)* (2007), 84 O.R. (3d) 507, [2007] O.J. No. 290, 2007 ONCA 62, this court stated, at para. 19:

> Section 2 of Regulation 283 is critically important in the timely delivery of benefits to victims of car accidents. The principle that underlies section 2 is that the first insurer to receive an application for benefits must pay now and dispute later. The rationale for this principle is obvious: persons injured in car accidents should receive statutorily mandated benefits promptly; they should not be prejudiced by being caught in the middle of a dispute between insurers over who should pay, or as in this case, by an insurer's claim that no policy of insurance existed at the time.

[19] Further, this court noted in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.* (2002), 2002 CanLII 14202 (ON CA), 58 O.R. (3d) 251, [2002] O.J. No. 528 (C.A.), at para. 10:

> The Regulation sets out in precise and specific terms a scheme for resolving disputes between insurers. Insurers are entitled to assume and rely upon the requirement for compliance with those provisions. Insurers subject to this Regulation are sophisticated litigants who deal with these disputes on a daily basis. *The scheme applies to a specific type of dispute involving a limited number of parties who find themselves regularly involved in disputes with each other.* In this context, it seems to me that clarity and certainty of application are of primary concern. Insurers need to make appropriate decisions with respect to conducting investigations, establishing reserves and maintaining records. Given this regulatory setting, there is little room for creative interpretations or carving out judicial exceptions designed to deal with the equities of particular cases.

(Emphasis added) [page168]

[20] In my view, the application judge erred in concluding that the Chubb policy was a "motor vehicle liability policy". There was no element of that accidental death and dismemberment policy that insured against liability to others arising out of property damage or injury caused by an automobile or the use or operation thereof.

[21] The content of "motor vehicle liability policies" is highly regulated. These policies must provide for payment of SABs, and a statutory minimum amount of liability coverage. The Chubb policy has none of these characteristics.

[22] The rationale expressed in *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.* would not be furthered by requiring insurers other than "motor vehicle liability insurer[s]" to respond to a claim for SABs. An insurer providing fire or life insurance or some group or accident or disability insurance not having the features of a "motor vehicle liability policy" may have no expertise in adjusting these claims, and should not be expected to respond to them where it has

not issued a motor vehicle liability policy even if there is a nexus or relationship between the claimant and such insurer.

[23] The priority and dispute resolution regime established under O. Reg. 283/95 applies to "disputes as to which insurer is required to pay benefits *under s. 268* of the *Insurance Act*" (emphasis added).

[24] Section 268 says every contract "evidenced by a motor vehicle liability policy" shall be deemed to provide for SABs. These benefits are not incorporated into insurance policies which are not motor vehicle liability policies and those insurers may have no expertise in adjusting these claims.

[25] All of the cases cited in which an analysis is made to ascertain whether there was a sufficient nexus between the claimant and the first insurer to review an application for SABs are premised on there having been an actual or purported motor vehicle liability policy in place at some time.

[26] For example, in *Ontario (Minister of Finance) v. Royal & Sun Alliance Insurance Co.* (January 2003, Arbitrator M. Guy Jones), the investigating officer was given a certificate of insurance issued by Royal which had expired four years earlier and covered a different vehicle. This was found to be a sufficient nexus to a motor vehicle liability insurer to justify an obligation to pay. In *Ontario (Minister of Finance) v. Progressive Casualty Insurance Co. of Canada* (2009), 95 O.R. (3d) 219, [2009] O.J. No. 1216, 2009 ONCA 258 and *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.* (2008), 2007 CanLII 82792 (ON SC), 94 O.R. (3d) 62, [2008] O.J. No. 5239 (S.C.J.), motor vehicle liability policies expired two [page169] months before the accident. In these cases, the claimants' choice of recipient of the claim for SABs was not random or arbitrary and was connected to a "motor vehicle liability policy". Similarly, in *Danilov v. Unifund Assurance Co.*, [2009] O.F.S.C.D. No. 69 (Bujold), there was a fraudulent pink motor vehicle liability policy slip purporting to evidence a "motor vehicle liability insurance policy".

[27] Ms. Singh's choice to send her application to Chubb was not random or arbitrary, but was based on the optional coverage provided to Wheels 4 Rent customers. Nonetheless, Chubb was not required to respond as it was not a "motor vehicle liability insurer", nor had it held out or represented to have ever provided such coverage at any relevant time.

[28] Both the plain meaning of s. 268 of the *Insurance Act* and O. Reg. 283/95, and the underlying policy behind the legislation, favour excluding non-motor vehicle liability insurers from the obligation to pay first and dispute later.

Disposition

[29] Accordingly, I would allow the appeal. I would set aside the order of the application judge of April 3, 2013, setting aside the decision of Arbitrator Stanley Tessis and awarding costs to Zurich, and substitute an order dismissing the application and awarding costs in favour of Chubb in the sum of $7,149.

[30] I would award Chubb the costs of this appeal fixed in the agreed upon sum of $12,000, inclusive of all disbursements and HST.

[31] JURIANSZ J.A. (dissenting): -- I have read the decision of Pardu J.A. and, with respect, I am unable to agree with either the reasons or the result. I would simply apply the established "nexus" test to determine whether Chubb, as the first insurance company to receive a completed application for benefits, was obliged by O. Reg. 283/95 (the "Regulation") to pay those benefits while disputing coverage.

[32] There is a mature and stable jurisprudence relating to the "nexus" test and the application of the Regulation. Both the courts and arbitrators of the Financial Services Commission of Ontario have applied the nexus test on numerous occasions to determine whether an insurance company

Tab 199

CanLII

Zurich Insurance Co. v. Chubb Insurance Co. of Canada, 2015 SCC 19 (CanLII), [2015] 2 SCR 134

Source:	Supreme Court of Canada
Date:	2015-04-21
File number:	36002
Citation:	Zurich Insurance Co. v. Chubb Insurance Co. of Canada, 2015 SCC 19 (CanLII), [2015] 2 SCR 134, <https://canlii.ca/t/gh85t>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

CITATION: Zurich Insurance Co. *v.* Chubb Insurance Co. of Canada, 2015 SCC 19, [2015] 2 S.C.R. 134

DATE: 20150417
DOCKET: 36002

BETWEEN:

Zurich Insurance Company
Appellant
and
Chubb Insurance Company of Canada
Respondent

CORAM: Abella, Rothstein, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

REASONS FOR JUDGMENT: The Court
(para. 1)

Zurich Insurance Company *Appellant*

v.

Chubb Insurance Company of Canada *Respondent*

Indexed as: Zurich Insurance Co. *v.* Chubb Insurance Co. of Canada

2015 SCC 19

File No.: 36002.

2015: April 17.

Present: Abella, Rothstein, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance — Automobile insurance — Statutory accident benefits scheme — Claimant having declined optional motor vehicle liability policy from insurance company upon renting vehicle subsequently injured in single-vehicle accident — Insurance company refusing to provide benefits available under statutory scheme — Nexus between insurer and claimant — Application judge correctly found that arbitrator erred in concluding that insurance company not an insurer for purposes of statutory scheme — Insurance Act, R.S.O. 1990, c. I.8, s. 268 — Disputes Between Insurers, O. Reg. 283/95.

APPEAL from a judgment of the Ontario Court of Appeal (Juriansz, Pepall and Pardu JJ.A.), 2014 ONCA 400, 120 O.R. (3d) 161, 319 O.A.C. 287, 379 D.L.R. (4th) 427, 65 M.V.R. (6th) 159, 34 C.C.L.I. (5th) 216, [2014] I.L.R. I-5615, [2014] O.J. No. 2330 (QL), 2014 CarswellOnt 6274 (WL Can.), setting aside the decision of Goldstein J., 2012 ONSC 6363, 15 C.C.L.I. (5th) 287, [2013] I.L.R. I-5360, [2012] O.J. No. 5336 (QL), 2012 CarswellOnt 14170 (WL Can.). Appeal allowed.

Eric K. Grossman, *Michael Warfe* and *Kate M. MacLeod*, for the appellant.

Eugene Meehan, *Q.C.*, and *George Kanellakos*, for the respondent.

The following is the judgment delivered orally by

[1] THE COURT — We are of the view that the appeal should be allowed with costs for the reasons of Juriansz J.A.

Judgment accordingly.

Solicitors for the appellant: Zarek Taylor Grossman Hanrahan, Toronto.

Solicitors for the respondent: Supreme Advocacy, Ottawa; KBM Law, Toronto.

Tab 200

CanLII

Chubb Insurance Co. of Canada v. Zurich Insurance Company, 2024 ONSC 2929 (CanLII)

Source:	Superior Court of Justice
Date:	2024-05-23
File number:	CV-22-00686871-0000
Citation:	Chubb Insurance Co. of Canada v. Zurich Insurance Company, 2024 ONSC 2929 (CanLII), <https://canlii.ca/t/k4tln>, retrieved on 2026-01-18

CITATION: Chubb Insurance Co. of Canada v. Zurich Insurance Company, 2024 ONSC 2929
COURT FILE NO.: CV-22-00686871-0000
DATE: 20240523

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER of the Insurance Act, R.S.O. 1990, c. I. 8, Section 268 and Regulation 283/95 made under the Insurance Act
AND IN THE MATTER of the Arbitration Act, 1991, S.O. 1991, c.17
AND IN THE MATTER of an Arbitration

BETWEEN:	
CHUBB INSURANCE COMPANY OF CANADA Appellant	Kadey B.J. Schultz and Colin MacDonald, for the Appellant
– and –	
ZURICH INSURANCE COMPANY Respondent	Eric K. Grossman and Rebecca J. Brown Greer, for the Respondent
	HEARD: May 14, 2024

AKAZAKI J.

REASONS FOR DECISION

[1] The anomalous situation giving rise to this arbitration appeal arose from Zurich Insurance Company and Chubb Insurance Company of Canada both being the primary motor vehicle liability insurer of Sukhvinder Singh's Statutory Accident Benefits (SABS), even though one issued a policy and the other did not.

[2] Zurich insured the rental Ford Windstar minivan in the typical way, by selling a policy of fleet insurance to the rental company. After the rental company refused to provide insurance particulars to Ms. Singh's lawyer, she instructed her lawyer to submit the SABS application to Chubb, whom she mistakenly assumed was the automobile insurer. The Supreme Court of Canada ultimately held, after appeals from one arbitration decision, that this misdirected application made Chubb an insurer for the purpose of Ms. Singh's SABS claim.

[3] A second arbitrator then concluded that Chubb was solely liable to pay Ms. Singh's SABS benefits and that it must reimburse Zurich $998,368.99. Chubb appeals from that decision and contends that Zurich should have been found solely responsible.

[4] I have determined that the second arbitrator's decision was in error by omitting analysis of the interplay between the automobile insurance legislation and the insurance priority dispute regulation. However, the error does not lead to the reversal of fortunes sought by Chubb. Instead, correction of the error leads to the conclusion that the two insurers were equal in priority and must share liability 50/50. The exception to that equitable remedy is that each insurer must be responsible for the 2% compound interest sanction provided in the SABS regulation, in respected of delay intervals attributable to each insurer.

THE ISSUES

[5] The priority regime under s. 268 of the *Insurance Act*, R.S.O. 1990, c. I.8, is designed to pick one insurer among several that may have issued a motor vehicle liability policy to various parties injured in a traffic accident. It makes sure that no one is left without recourse to a minimum level of insurance. If there is no automobile insurance, the state-funded Motor Vehicle Accident Claims Fund appears at the bottom of the list as the insurer of last resort. Were it not for the rental company's misdirection, Zurich would have been the priority insurer and Chubb would never have been involved.

[6] The regulation for resolving priority, O. Reg. 283/95, allows the injured party to apply for benefits from any of the available insurers and to expect adjustment and payment of benefits immediately. The regulation then imposes the burden on the chosen insurer to notify another insurer within 90 days that the other insurer is higher in priority and therefore obligated to assume coverage. In the absence of grounds to extend that period, the chosen insurer cannot deny its liability to the claimant after it expires. By litigating instead of putting Zurich on notice, Chubb, too became a priority insurer on a permanent basis. Apart from these features, O. Reg. 283/95 is really intended to provide for private arbitration and to keep priority disputes out of the courts.

[7] The second arbitrator sanctioned Chubb for its initial refusal to accept the claim by treating it as the priority insurer *instead* of Zurich. The fact that Chubb ended up shouldering an insurance claim for which Zurich received the premium may seem intuitively wrong. However, the path to the result on appeal requires following several analytical steps:

1. Origin of Claim and Outcome of the First Arbitration and Appeals

2. Second Arbitral Award

3. Grounds of Appeal and Standard of Review

4. Interaction of O. Reg. 283/95 and s. 268 of the *Insurance Act*

5. Sanction for Breach of O. Reg. 283/95

ORIGIN OF CLAIM AND OUTCOME OF THE FIRST ARBITRATION AND APPEALS

[8] The first arbitration, after all three appeals, resulted in a determination that there was a sufficient nexus between the claim for accident benefits and Chubb to make it an 'insurer' for the responsibility to pay accident benefits under s. 2 of Reg. 283/95 and s. 268 of the *Insurance Act*, even though it did not insure the vehicle rented by the driver. The rationale for inserting of Chubb into a regime for requiring an automobile insurer to pay benefits pending a priority dispute will have a bearing on the outcome of the appeal, because the provisional first-insurer rule under the regulation and the priority regime under the statute operate differently.

[9] The driver, Ms. Singh, was involved in a single-vehicle accident on September 23, 2006. She returned the damaged rental car on September 25 to Wheels 4 Rent. The rental company tried several times to contact her, without success. The branch manager submitted a "records only" claim for reporting purposes, because the company's automobile policy with Zurich did not provide collision coverage. He submitted that report to McLarens, the insurance adjusting company administering the fleet coverage on behalf of Zurich. Wheels 4 Rent considered the matter closed and wrote off the damage.

[10] Several weeks later, Ms. Singh started experiencing upper body pain and decided to pursue a SABS claim. To do this, her lawyer needed to know the name of the insurance carrier and policy number. The client's recollection was that the rental agency offered coverage with Chubb. She did not know that this was only a policy of optional accidental death and dismemberment insurance which she had not purchased. Her lawyer, Murray Tkatch, telephoned Wheels 4 Rent to obtain the insurance particulars. After receiving no response, he sent a letter on November 6, 2006, to Gerry Weintraub at Wheels 4 Rent's corporate headquarters. On November 7, Ernest Weintraub, the president of the company, wrote back that it was not required to release the requested information because it was unaware of any accident. On November 9, 2006, Mr. Tkatch submitted an already-prepared OCF-1 Application for Accident Benefits to Chubb. The covering letter specifically stated that he was submitting the claim to Chubb because the rental company refused to provide information about the insurer. Chubb refused to accept the claim because it did not insure the automobile. It also failed to assist the claimant by contacting the insurance broker who also placed the Zurich fleet automobile insurance. This turned out to be a costly mistake.

[11] Chubb later argued that the November 7 letter amounted to a wrongful deflection of the accident benefits claim away from Zurich, because Mr. Weintraub was a sophisticated insured. As the second arbitrator found, the refusal to provide the insurance particulars amounted to the rental agency's violation of s. 269 of the *Insurance Act*, R.S.O. 1990, c. I.8. However, the arbitrator also declined to find that this amounted to a deflection of the SABS claim by Zurich, since Zurich did not find out about the claim until June 3, 2008. This came about after Chubb refused to accept Ms. Singh's claim and after further inquiries by Mr. Tkatch. Had Mr. Weintraub provided the insurance information instead of refusing to provide it, there is no doubt that Ms. Singh's lawyer would have submitted the OCF-1 to Zurich instead of Chubb.

[12] The other side of the deflection argument was that, as the second arbitrator found, Chubb could easily have ascertained that Zurich was the automobile insurer. Had Chubb done so, it could have set up an undisputable redirection of the claim to the proper insurer within the 90-day period under s. 3 of O. Reg. 283/95. Counsel for Chubb argued that, in 2006, the legal landscape was different than in 2015, after the Supreme Court of Canada held that Chubb ought to have responded to the SABS claim immediately on a 'pay first and dispute later' basis. I agree that this court should be cautious about superimposing current conduct expectations on decade-old circumstances. Nor does this court possess the jurisdiction to revisit the Supreme Court decision that determined the legal relations of the parties in 2006.

[13] The lengthy trajectory to that 2015 decision and its outcome can be summarized very briefly. After being notified of the claim, Zurich began to adjust and pay the claim on a without-prejudice basis in 2009. This halted the mediation-arbitration proceedings pending before the Financial Services Commission of Ontario (FSCO), the adjudicative body at the time. Zurich started an arbitration with Chubb under s. 7 of O. Reg. 283/95 under the *Insurance Act*. The issues on the arbitration were threefold:

1. Whether Chubb was an 'insurer' for the purposes of s. 268 of the *Insurance Act* and O. Reg. 283/95;

2. if Chubb was an 'insurer' for such purposes, whether it complied with O. Reg. 283/95; and

3. the amounts, if any, was Chubb responsible for indemnifying Zurich.

[14] The first arbitrator held that Chubb was not an 'insurer' because there was no nexus between it and the SABS claim. On appeal to this court, Goldstein J. set aside the arbitral award to Chubb on the basis that the claim submission to Chubb, albeit remote, was not arbitrary: 2012 ONSC 6363. Chubb appealed successfully to the Court of Appeal, subject to the dissenting opinion of Juriansz J.A.: 2014 ONCA 400. The Supreme Court then restored Goldstein J.'s decision, by adopting that dissent: 2015 SCC 19.

[15] In a nutshell, Ms. Singh's vague recollection about seeing Chubb's name at the rental office was sufficiently non-arbitrary to require Chubb to step into the shoes of the "first insurer" for the purposes of s. 2(1) of the regulation:

> 2.(1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2.

[16] As described in the prevailing appellate decisions, the purpose of this regulation was to prevent SABS claims, including vital treatments and income benefits, from being delayed while insurers fought over priority under s. 268(2) of the *Insurance Act*. In adopting para. 34 of Juriansz J.A.'s dissent, the Supreme Court also accepted that there would have been no nexus if Chubb did not provide automobile insurance in Ontario. Because it did write such policies, it qualified as an 'insurer' who first received the OCF-1, albeit mistakenly.

[17] After six years, the above process answered question #1 of the arbitration agreement by restoring para. 35 of Goldstein J.'s decision:

> The Application is allowed and the Arbitrator's decision is set aside. The matter is remitted back to the Arbitrator to determine the remaining issues on the priority dispute arbitration.

[18] Chubb then took over the adjustment of the claim from Zurich. The two insurers proceeded to the arbitration of the remaining two issues.

SECOND ARBITRAL AWARD

[19] The arbitration could not continue with the original arbitrator, due to his passing. The insurers could not agree on an arbitrator. On May 16, 2018, Dow J. appointed the Hon. Douglas Cunningham as the arbitrator for the remaining issues in dispute: 2018 ONSC 1907. Since the first arbitrator's decision is no longer a factor on this appeal, I will refer to the second one, Mr. Cunningham, henceforth as "the arbitrator."

[20] On August 5, 2022, the arbitrator awarded Zurich $998,368.99, plus prejudgment interest and costs, to be paid by Chubb. In answering the third question in the arbitration, he appears to have concluded that Chubb bore sole liability for the SABS claim by also finding against Chubb on the second question, *viz*. that it breached O. Reg. 283/95.

[21] The first nineteen paragraphs of the award set out the chronology of events and steps up to the 2015 Supreme Court ruling. At para. 20, he stated:

> The Supreme Court having determined a nexus existed between Chubb and Ms. Singh, the issue squarely before me is to determine which insurer is liable to pay statutory accident benefits to Ms. Singh as the priority insurer.

[22] I pause to observe that this question was *not* before the arbitrator. Neither of the second and third questions in the arbitration agreement required him to assign priority in this way.

[23] In paras. 21-22, he went on to describe the obligation of the first insurer recipient of an OCF-1 form to assume responsibility to adjust and pay appropriate accident benefits, as well as the 90-day period, subject to extension in certain circumstances, to dispute its obligation by providing notice to every insurer who it claims is required to pay under s. 268 of the *Insurance Act*. (The arbitrator incorrectly cited the provisions applicable to accidents after 2010, but nothing turns on this because the operative wording is similar.)

[24] In paras. 23 to 43 of the award, the arbitrator considered whether Zurich could have been deemed to have received a completed OCF-1 application in November 2006. This analysis included inferences that could have been drawn from various communications and reports among Ms. Singh's lawyer, the rental company's representatives, and the insurance adjuster for Zurich. He considered the company's breach of s. 269 in failing to provide insurance particulars to the lawyer, as well as the question whether the company and the adjuster had reason to believe that Ms. Singh intended to file a SABS claim with Zurich. Thus, at para. 43, the arbitrator found that "nothing that could be considered an accident benefits claim ever made its way to Zurich until sometime after June 3, 2008," after the lawyer discovered that Zurich was the actual automobile insurer. He found, in paras. 44-49, that Chubb could easily have identified Zurich at the outset and avoided the whole problem, instead of waiting for 18 months.

[25] The arbitrator then concluded, in paras. 50-62, that Chubb was the first recipient of the OCF-1 and should have begun investigating, adjusting, and paying benefits. It was then incumbent on Chubb to try to discover who the real automobile insurer was and to put that insurer on notice. He found, at para. 57, that Ms. Singh, who had pre-existing mental health issues, deteriorated dramatically during the period of delay.

[26] Counsel for Chubb urged at the appeal hearing that the implication that Chubb was responsible for the delay was contrary to his earlier finding, at para. 42, that the claimant's condition only began to deteriorate in 2009. Chubb further argued that if such deterioration could be due to delay in treatment or payments, it occurred after Zurich's without-prejudice undertaking to take over the claim in 2009.

[27] While I appreciate the apparent contradiction between paras. 42 and 57 on this point, the arbitrator's reasons could well have meant to explain that the 2006-09 period without treatment could have led to the deterioration after 2009. The evidence behind the curtain consisted of information from the claim and not any forensic etiology of the course of Ms. Singh's impairments. I take the arbitrator's commentary in these paragraphs to mean only that if Chubb had responded properly to the claim in 2006 and handed over responsibility to Zurich within 90 days, Ms. Singh would have had the full benefit of the Ontario SABS benefit scheme for whatever chance she had to avoid deterioration of her pre-existing condition. I did not read them as attributing cause and effect in the manner of a tort claim. In this light, there was no real contradiction between the paragraphs.

[28] Starting at para. 63, the arbitrator explored "the impact of Chubb failing to give notice within 90 days, let alone its failure to investigate at all … given Zurich's argument that Chubb ought to be entirely responsible for the payment of Ms. Singh's accident benefits." Chubb's argument was that it could not be the priority insurer because Zurich was the actual motor vehicle insurer.

[29] The arbitrator considered the Court of Appeal's decisions in *Kingsway General Insurance Company v. Ontario*, 2007 ONCA 62, as well as *Wawanesa Mutual Insurance Company v. Lombard Canada*, 2010 ONCA 383, as requiring the court to sanction an insurer for having failed to accept a claim at least provisionally under s. 2 of O. Reg. 283/95. He also explored the consequences of such an insurer's failure to give notice to other insurer(s) within 90 days under s. 3. The arbitrator also observed that the Court of Appeal considered the breach of s. 2 to be serious but not automatically leading to permanent liability for the claim.

[30] He then considered *Kingsway General Insurance Co. v. West Wawanosh Insurance Co*., 2002 CanLII 14202, 58 O.R. (3d) 251, in which the Court of Appeal considered whether the first-recipient insurer gave notice under s. 3 under O. Reg. 283/95 or whether the 90-day period should be extended.

[31] Finally, the arbitrator cited para. 62 from the decision of Strathy J. (as he then was) in *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co*. (2008), 2007 CanLII 82792 (ON SC), 94 O.R. (3d) 62 (Ont. S.C.J.). For the sake of completeness, I add and italicize the final two sentences omitted from para. 82 of the award:

> 62 In my view, there is much to be said for an inflexible rule that an insurer who fails to pay benefits and fails to put other insurers on notice on receipt of an application, with which there is some nexus, should be found permanently responsible for the claimant's benefits. This promotes compliance with the statutory scheme. It is no more inequitable than fixing permanent responsibility on the first insurer, who initially pays the claim but fails to give timely notice to the other insurer under subsection 3(2). *It is not necessary, in this case, to decide whether the rule should be inflexible. It is sufficient to say that I agree with the Arbitrator's decision on the facts of this particular case.*

[32] The arbitrator distilled these decisions as follows, before concluding that Chubb, not Zurich, was liable to pay Ms. Singh's benefits as the priority insurer:

> 83. One sees a steady trajectory in the reasoning from Sharpe JA in *West Wawanosh* to Laskin JA in *Kingsway* to Sharpe J [*sic*] in *Lombard*. For there not to be consequences would be to defeat the legislation's public policy: pay now and dispute later. A policy that ensures the provision of accident benefits in a timely manner such that claimants do not end up in the middle of disputes between insurers. As Sharpe JA noted in *West Wawanosh*: "Insurers subject to this regulation are sophisticated litigants who deal with these disputes on a daily basis." And those comments were made over 20 years ago.

GROUNDS OF APPEAL AND STANDARD OF REVIEW

[33] There was no dispute over the appellate standard of review in a general sense.

[34] Pursuant to s. 7 of O. Reg 283/95, the arbitration was to be conducted pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17 (*Arbitration Act*). The jurisdiction to hear the appeal from an arbitration lies to this court under s. 45 of the *Arbitration Act*. The standard of review under the arbitration agreement in this case was already determined by Goldstein J. in the appeal from the first arbitration: *Zurich Insurance v. Chubb Insurance*, 2012 ONSC 6363, at para. 8:

> The arbitration agreement between the parties provides for an appeal to a judge of the Superior Court of Justice on a question of law or a question of mixed fact and law. The arbitration agreement itself sets out that the standard of review on a question of law is correctness. On a question of mixed fact and law, the standard of review is reasonableness.

[35] The arbitration agreement did not provide for appeals on questions of fact alone.

[36] The notice of appeal cited numerous grounds, including various grounds embedded in the prayer for relief. These included assertions that the arbitrator inflexibly sanctioned Chubb by deeming it the sole insurer when a flexible approach was required, insufficiency of reasons, disregard for the reality that it was Zurich's dispute and not Chubb's, incorrect interpretation of the applicable legal standards, and failing to provide procedural fairness. I will not consider various grounds characterized as failures to consider evidence, because the arbitral agreement provided no appeal on questions of fact alone.

[37] The notice of appeal did not expressly state the arbitrator's recasting of the two remaining questions in the arbitration, although this has to be an integral element of considering grounds such as the employment of an inflexible legal test or the lapse in procedural fairness. The two questions deal with the legal consequences of the determination in the first arbitration that Chubb was an insurer for the purposes of the statute and the regulation.

[38] Appellate review of the second arbitral award therefore needs to start with the arbitrator's appreciation of the interaction of the statute and the regulation before concluding that Chubb was in breach and imposing the sanction for that breach. This statutory interpretation exercise, obviously an issue to be settled on a correctness standard of appellate review, requires the appellate court to begin with the conclusion it would have made in the lower tribunal's place: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 S.C.R. 653, at para. 15.

[39] The appellate review of the decision to impose on Chubb sole responsibility as if it were the priority insurer under s. 268 is a question of mixed fact and law because it requires application of the appropriate legal framework on the facts. The sanction, framed as an

indemnity claimed by Zurich in the third question in the arbitration, can therefore save the arbitral award even if this court finds an error of statutory interpretation on the correctness standard, if the decision comes within a range of reasonable outcomes when the correct law is applied to the facts. The reasonableness standard for questions of mixed fact and law requires the appellate court to focus on the actual decision under review and a tracing of the decision maker's reasoning without fatal flaws in the overarching logic, including "analysis, inference and judgment" (*Vavilov,* para. 102).

INTERACTION OF O. REG. 283/95 AND S. 268 OF THE *INSURANCE ACT*

(a) Positions of the Parties

[40] Chubb's principal position on the appeal was that Zurich improperly deflected the whole claim to Chubb. Had the rental company, as a sophisticated insured, responded to Ms. Singh's lawyer properly, Zurich would have had to respond as the s. 268 priority insurer. Insofar as Chubb became liable to Ms. Singh under s. 2 of the regulation, Chubb's position was that s. 2 did not impose permanent liability on Chubb and the arbitrator failed to follow the court precedents requiring a flexible approach.

[41] The arbitrator rightly analyzed Chubb's point on deflection to have been a counterfactual argument and not as grounds for finding that the rental company's misconduct should attract liability on Zurich's part. Zurich agreed with that finding and contended that the arbitrator was correct in concluding that Chubb became the sole insurer on the claim. Zurich maintained that Chubb's failure to dispute priority within the 90 days disentitled Chubb from taking the position that Zurich should be liable for the claim.

[42] In staking out their respective positions, the parties forcefully pointed the finger at the other based on Zurich's liability under the statute and Chubb's under the regulation. I could see how they may have driven the arbitrator into error by requiring him to choose between such opposed views when, in plain sight, the solution was that they were both equally on the hook for the claim by operation of the separate legislative provisions.

(b) Interpreting O. Reg. 283/95 in the Context of s. 268 of the Insurance Act

[43] The overarching logic of the arbitrator's award started with the Supreme Court's ruling that there was a sufficient nexus between Ms. Singh and Chubb that it was an insurer for the purposes of s. 268 of the *Insurance Act* and O. Reg. 283/95 and concluded by imposing as a sanction that Chubb be the priority insurer solely liable for the payment of the SABS benefits. He explained how Chubb's breach of ss. 2 and 3 of O. Reg. 283/95 made it sanctionable and incapable of disputing its obligation to pay benefits. However, his award did not reveal consideration of the effect of deeming Chubb an automobile insurer for the purposes of s. 268. The award referred to s. 268 several times without examining how it settled the insurers' competing positions. In the absence of this statutory analysis, the appellate court is required to start afresh.

[44] O. Reg. 283/95 is a regulation made under the *Insurance Act*. The modern approach to interpretation requires the application of two principles. First, the regulation has to be read in the context of the enabling act as a whole. Second, because regulations are submitted to industry consultations and amendments before proclamation, they tend to reflect important policy choices "to ensure order and stability in regulated industries." See: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26 (CanLII), [2005] 1 SCR 533, at paras. 99-100. With these two interpretive principles in mind, I turn first to s. 1 of the regulation:

> 1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

[45] In particular, s. 268(2) of the *Insurance Act* provides a hierarchy of insurers whose policies could be available for a claim. The insurers are ranked based on contractual proximity to the insured person. Thus, the priority insurer for no-fault benefits is one's own insurance carrier, followed by the insurer of the automobile without regard to insured status, followed by the insurer of any other automobile involved, followed by the provincial fund as the insurer of last recourse. The clear intent is to make sure no one is left without coverage and to distribute underwriting risk based on closeness to the claimant, notably the claimant's occupancy of the vehicle in which she suffered the injury:

> **Liability to pay**
>
> (2) The following rules apply for determining who is liable to pay statutory accident benefits:
>
> 1. In respect of an occupant of an automobile,
>
> i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
>
> ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
>
> iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
>
> iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
>
> **Liability**
>
> (3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

[46] These subsections first limit the claimant's recourse to the insurer with the highest ranking on the priority list and then affix liability on that insurer.

[47] There are situations where an injured party might have recourse against more than one insurer of equal priority. For example, a driver of a company car could be insured by the employer's insurance and also by one's personal automobile insurer. In such instances, the claimant is entitled to choose the insurer:

> **Choice of insurer**
>
> (4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

[48] Priority most frequently becomes an issue when the injured party is not an operator of the involved vehicle and does not own a vehicle. For example, a pedestrian struck by another's vehicle after parking his or her car will have recourse to the insurer of the parked car and not that of the driver of the vehicle causing the collision. But another pedestrian who does not own a vehicle would have recourse against the insurer of the vehicle that struck him or her. In these typical scenarios, the list in s. 268(2) imposes priority only because it does not allow the claimant to apply for benefits from an insurer lower in the list. In this case, it was not disputed that Zurich was the priority insurer because Ms. Singh did not have her own car insurance and she was injured while driving the rental agency's vehicle. If it had been a two-vehicle collision, she did not have recourse against the insurer of the other vehicle.

[49] The priority rules under the *Insurance Act* have supplanted the doctrine of equitable contribution otherwise applicable to duplicate insurance. In instances of multiple insurers of equal priority, the claimant's election determines priority under s. 268(2), provided the election is informed one, in the sense that the claimant is aware of multiple policies and the right to choose: *Jevco Insurance Co. v. Pilot Insurance Co*., 2003 CanLII 5265 (ON SC), at para. 7, and *Intact Insurance v. Economical Mutual*, 2021 ONSC 7750, at para. 70-75.

[50] In this case, however, there was no informed election. At paras. 38-40 of his award, the arbitrator found that the claimant's lawyer submitted her OCF-1 to Chubb because of the rental company's breach of s. 269 in refusing to provide insurance particulars. Indeed, the rental company's response failed to disabuse Mr. Tkatch of the stated belief that Chubb was the insurer. There was no decision, in the sense of the claimant's discretion under s. 268(4).

[51] The first arbitration, after appeals, concluded with the determination that Chubb was an insurer for the purposes of s. 268 and the regulation. The entry point for that "nexus" determination was s. 2 of O. Reg. 283/95:

> **2.** (1) The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2.
>
> (2) Subsection (1) applies in respect of benefits that may be payable as a result of an accident that occurs before September 1, 2010. O. Reg. 38/10, s. 2.

[52] The Supreme Court adopted Juriansz J.A.'s "nexus" analysis to answer the first question in the arbitration in the affirmative. In the second arbitration, the arbitrator made a factual finding that Chubb was the "first insurer" to receive a completed application. The unassailable reasoning was that Chubb did receive such an application in November 2006, and Zurich did not. He did not accept Chubb's assertion that Zurich "deflected" the claim to Chubb, because Zurich itself had no knowledge of it until months later. I need not consider that deflection argument, repeated on appeal, except that the rental company's violation of s. 269, although having no bearing on Zurich, was part of the factual matrix of the case.

[53] As a matter of legislative and regulatory purpose, the arbitrator correctly cited the public policy decision to require an automobile insurer to start a claim under s. 2 even if the priority insurer were another insurer. This relieved the claimant from having to wait, sometimes for months, while insurers fought over priority. The *provisional* liability of the "first insurer" under s. 2 of the regulation is subject to the priority dispute under s. 268. That means the "first insurer" wording does not mean that it is a priority insurer. To consider the wording as importing any form of priority under s. 268 defies the logic of the interaction between the regulation and the statute. It is s. 268, and s. 268 alone, that determines priority.

[54] I observe, in passing, that the sanctions described in the case law cited by the arbitrator, including those at the Court of Appeal, are judge-made sanctions. As a matter of principle, there is no difference between an insurer's failure to pay under s. 2 and a failure under any provision of the SABS, which was in this case O. Reg. 403/96. Under that pre-2010 regime, the main disincentive for an insurer to delay adjustment and payment of benefits was compound interest of 2% per month under s. 46. Given that the regulation defined the penalty for an insurer's breach of the obligation to pay, the "sanction" described in the case law seems very close to the "nominate tort of statutory breach" rejected by the Supreme Court in *The Queen (Can.) v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 SCR 205, at 225. Since the Court of Appeal decisions are more directly on point, I am obliged to follow them and leave it to these or other parties to test the theory at a higher level of court than mine. That said, in the circumstances of this case, the 2% provision should be a factor in imposing on the appropriate insurer the sanction that was, in fact, codified by regulation.

[55] Section 2 of the regulation therefore imposes a clear obligation on the first insurer to receive a completed application for SABS benefits to start adjusting and paying the claim, "pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act." Before returning to s. 268, I refer to s. 3(1), which reads:

> 3. (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).

[56] I heard Chubb's extensive argument that Zurich deflected the claim and deprived Chubb of the opportunity to give notice within the 90-day period. The arbitrator correctly held, and I have no appellate jurisdiction to overturn, that Chubb made no investigation to determine the actual automobile insurer, as required under clause 3(2)(b), to justify an extension of the 90-day period. Both Chubb's death and dismemberment policy and Zurich's automobile policy were brokered by the same insurance broker. Instead of denying the claim, it ought to have started the claim and inquired with the broker about the automobile insurance carrier. There is no basis to disturb the arbitrator's findings that Chubb was the first recipient of the OCF-1 application and that it allowed the 90-day period to lapse.

[57] The statutory estoppel in s. 3 of the regulation precludes an insurer from starting a dispute of the obligation to pay benefits under s. 268 of the *Insurance Act*. The issue of whether the insurer can have the 90 days extended can be part of an arbitration under s. 7. Since the purpose of the regulation is to govern disputes between insurers under s. 268 of the statute, the plain reading of s. 3 is to preclude an insurer whose obligation a claimant has triggered by submitting a claim, perhaps to the wrong insurer in priority, under s. 2, from starting a priority dispute. Priority is the only issue among insurers under s. 268. In most instances, s. 268 operates mechanically and there should be no dispute as such.

[58] To complete the dispute-resolution framework, s. 10 of the regulation provides for insurers notified under s. 3 to notify other insurers, as contemplated in multi-vehicle or multi-policy situations (including insurers of equal priority, per italics added):

> 10. (1) If an insurer who receives notice under section 3 disputes its obligation to pay benefits on the basis that other insurers, excluding the insurer giving notice, have *equal* or higher priority under section 268 of the Act, it shall give notice to the other insurers. O. Reg. 283/95, s. 10 (1).

[59] The above provisions in O. Reg. 283/95 therefore provide a logical framework for orderly resolution of priority disputes, including the preclusion of disputes, contesting the first

insurer's obligation to pay benefits under s. 268. Section 268, however, provides for liability based on the priority of insurers and, among insurers of the same priority, a choice by the claimant to choose. Beyond that claimant's choice, there is no statutory provision picking the responsible insurer for the purpose of adjusting and paying the claim. The estoppel under s. 3 of the regulation precludes a dispute by the "first insurer" of "its obligation." Usually, that means that it is the priority insurer and that no other insurer is ahead of it.

[60] The use of the word "equal" in s. 10 is also significant because it creates an estoppel by insurers further down the notice chain. However, s. 3 does not contemplate a notice by the s. 2 "first insurer" to an insurer of equal priority, and the only dispute precluded by a failure to give notice under s. 3 is the first insurer's obligation.

(c) The Law of Duplicate or Overlapping Insurance

[61] It is a fundamental principle of insurance law that, in cases of overlapping or duplicate coverage for the same risk, the insured may recover only the value of the actual loss but has the absolute right to select the insurer from whom to seek recovery. The selected insurer has a right to obtain equitable contribution pro rata from the other insurer(s): *Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48 (CanLII), [2002] 2 S.C.R. 695, at para. 14. I need not consider whether the "choice of insurer" provisions in s. 268, such as s. 268(4), preclude a claim for equitable contribution based on that principle, as the *Jevco* and *Intact* decisions appear to have held by settling priority based on the informed choice made by the claimant.

[62] Nevertheless, in observing that the "choice of insurer" provisions only codify, for the purpose of clarity, the equitable doctrine that the insured always has the choice between insurers of the same risk, the legislation is silent as to what is to happen where there are two or more insurers at the same level of priority, where there has been no informed choice. Indeed, the issue here must be determined against the backdrop, not of deflection by Zurich, but of the mistaken belief of the claimant that Chubb was the automobile insurer.

[63] Reading the regulation in the context of s. 268 of the statute, it is evident that it was intended to provide a framework for allowing claimants to submit applications for SABS benefits while leaving automobile insurers to dispute priority. By inserting into this regime an insurer who did not provide automobile insurance to any of the involved parties or vehicles, the effect of the Supreme Court's decision was to insert Chubb into priority position with Zurich. That was the effect of the answer to the first question in the arbitration.

(d) Equal Priority in this Case

[64] The consequences of Chubb's breaches of ss. 2 and 3 of the regulation must follow the regulation and the statute. The immediate consequence was that Chubb had an obligation to pay benefits as the first insurer to receive the OCF-1. The second consequence, 90 days later after it performed no investigation of the proper recipient, was that it precluded itself from disputing its obligation to pay the benefits. I agree with Chubb's submission that, according to the case law, breach of s. 2 does not result in an insurer being required to pay benefits to the claimant permanently. The failure to avail itself of s. 3 does. Chubb's permanent liability to pay benefits was a self-inflicted consequence of its failure to adhere to the requirements of both s. 2 and s. 3. This combination of provisions in the regulation transformed Chubb's provisional liability to Ms. Singh into a permanent one.

[65] This does not end the interpretation of the regulation and the statute. If Chubb's failure to follow the regulation made it Ms. Singh's insurer, the statute did not relieve Zurich of its responsibility under s. 268(3) and provided no mechanism for it to be relieved itself of that obligation. Because of the physical impossibility of an injured claimant to have been the occupant of more than one vehicle in a traffic accident, ordinarily an insurer in Zurich's

position would stand alone as priority insurer. Chubb, however, inserted itself into that priority ranking alongside Zurich, by operation of ss. 2 and 3 of the regulation.

[66] In *Allstate Insurance Company of Canada v. Progressive Casualty Insurance Company of Canada*, 2002 ONFSCDRS 109, the FSCO appellate tribunal applied the equitable contribution doctrine between SABS insurers of equal priority where there were overlapping injury claims against separate insurers arising from two accidents. The case on appeal here is one of insurers of equal priority, Zurich as the actual insurer in priority and Chubb as the insurer placed in that position out of happenstance. In the absence of a statutory provision allowing Zurich to be lowered in priority, the principles applicable to duplicate or overlapping insurance apply.

(e) Conclusion re Statutory Interpretation and Equal Priority

[67] Insofar as the arbitral award did not perform the exercise in statutory interpretation leading to this conclusion, or to any extent approximating it, the arbitrator erred by failing to provide adequate reasons demonstrating that he fully considered the interaction of O. Reg. 283/95 and s. 268 of the *Insurance Act*. When one performs that analysis, it is clear that the unusual facts of this case created two permanent insurers on the claim of equal priority. There was no provision in the legislation to put Chubb ahead of Zurich, or vice versa.

SANCTION FOR BREACH OF O. REG. 283/95

(a) Positions of the Parties

[68] Chubb's position was that the sanction the arbitrator imposed was inflexible and wholly out of proportion with its failure to administer the claim in the opening period. Moreover, the claimant's condition deteriorated starting from the time Zurich assumed handling of the claim and failed to provide benefits for a considerable period.

[69] Zurich argued that Chubb's initial position lasted until the Supreme court ultimately ruled against Chubb on the threshold issue of its status as 'insurer' for the claim. It was Chubb whose intransigence caused the claimant's deterioration and prejudiced Zurich's ability to mitigate the harm by providing benefits earlier.

(b) Applicable Law

[70] Neither of the parties' positions directly addressed the legal basis for the sanction within an area of law whose statutory and regulatory provisions are a complete code and are frequently updated to meet public policy objectives balancing the rights of injured parties and insurers.

[71] As I stated earlier, I am bound to follow the Court of Appeal guidance regarding the imposition of a sanction on an insurer failing to accept a claim under s. 2 of the regulation. In this appeal from the arbitrator, one must question the logic of punishing Chubb by requiring it to replace Zurich. That sanction benefits Zurich but offers no succour to the injured party, whose benefits claim was delayed in the process. If she availed herself of the 2% monthly compound interest, Chubb should be responsible for any portion of her SABS settlement attributable to that regulatory sanction for the period up to Zurich's commencement of payments. That not only seems to be the most just allocation of sanction in the case, but it also aligns with the legislative sanction for insurer non-payment in all cases.

[72] In the absence of a codified sanction for Chubb's breaches of the regulation, the case law providing sanctions for an insurer's breach of s. 2 provides no definitive guidance in an

instance where the insurer in breach is only a deemed insurer and where the obvious primary insurer under s. 268 is standing in the wings. In light of this, can the arbitrator's sanction be considered unreasonable?

(c) Does this Case call for a Sanction or Legal Conclusion?

[73] Considering Strathy J.'s decision in *Lombard Canada Ltd. v. Royal & SunAlliance Insurance Co.*, quoted by the arbitrator and reproduced above, the sanction against Chubb is the imposition of permanent liability is equivalent to the legal consequence of its having failed to give notice to Zurich under s. 3 of the regulation. It is not a sanction but, rather, a logical conclusion for failing to give notice.

[74] Chubb's failure to avail itself of s. 3 was a self-inflicted prejudice and had nothing to do with the harm and inconvenience to the claimant caused by its refusal to accept the claim under s. 2, apart from a matter of temporal sequence. Given that the purpose of s. 2 was to prevent priority disputes among insurers from holding up claims, the drafters of the regulation clearly intended a logical separation.

[75] By imposing *sole* liability on Chubb, contrary to the imposition of liability on Zurich by s. 268(3) of the *Insurance Act*, the arbitrator relieved Zurich of its obligation without grounds to do so. In this regard, the sanction he imposed on Chubb fell beyond the range of reasonable legal outcome. The jurisprudence cited by the arbitrator should be distinguished because they dealt with the sanctions or loss of rights of an insurer to assert a priority dispute. As between Chubb and Zurich in this case, their dispute was mischaracterized by the arbitrator as an insurance priority dispute. The proof of this is that there is no means of determining priority between them *qua* issuers of motor vehicle liability policies under s. 268. Chubb's equal priority status should not be considered a sanction for breach of s. 2. Rather, that status is a legal conclusion resulting from its failure under s. 3 to dispute responsibility to the claimant.

(d) Conclusion regarding the Sanction

[76] The arbitrator's sanction must therefore be set aside and replaced with one dividing the SABS obligation equally between the insurers, except for any 2% interest payments attributable to insurer delay. Those interest payments must be paid by the insurer in respect of the delay occasioned during their respective responsibilities for handling the claim. Up until Zurich assumed handling of the claim, the delay is to be pinned on Chubb.

CONCLUSION

[77] I set aside the arbitrator's award and impose on the insurers an equal obligation to pay for Ms. Singh's SABS claim, apart from any 2% interest incorporated into the settlement with Ms. Singh. The compound interest is the only sanction applicable to this case that has a basis in the SABS legal framework. Since I was not provided the particulars of the payments made to date, including the settlement of the claim, I will leave it to counsel for the parties to calculate and adjust the financial consequences of my decision. They may contact me through my judicial assistant, at Melissa.Issa@ontario.ca, if they are unable to agree on the accounting.

[78] The amount of costs has been set by agreement in the amount of $15,000. I find that the overall result was divided because Chubb sought a complete reversal of the arbitral award including reimbursement of the amounts it paid to Ms. Singh after 2015. For that reason, I also hold that there be no costs of the appeal or of the arbitration below.

Akazaki J.

Released: May 23, 2024

Chubb Insurance Co. of Canada v. Zurich Insurance Company, 2024 ONSC 2929
COURT FILE NO.: CV-22-00686871-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CHUBB INSURANCE COMPANY OF CANADA Appellant – and – ZURICH INSURANCE COMPANY Respondent

REASONS FOR JUDGMENT

Akazaki J.

Released: May 23, 2024

Tab 201

CanLII

EnerNorth Industries Inc. (Re), 2009 ONCA 536 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2009-07-03
File number:	C49062; C49072
Other citations:	96 OR (3d) 1 — 254 OAC 235 — 55 CBR (5th) 1 — [2009] OJ No 2815 (QL)
Citation:	EnerNorth Industries Inc. (Re), 2009 ONCA 536 (CanLII), <https://canlii.ca/t/249wt>, retrieved on 2026-01-18

In the Matter of EnerNorth Industries Inc.
[Indexed as: EnerNorth Industries Inc., Re]

96 O.R. (3d) 1

Court of Appeal for Ontario,
Simmons, Blair and Juriansz JJ.A.
July 3, 2009

Bankruptcy and insolvency -- Proof of claim -- Creditor not having unqualified right on application pursuant to s. 135(5) of Bankruptcy and Insolvency Act to challenge validity of judgment debt based on decision of court of competent jurisdiction if court considered merits of claim in granting judgment -- Creditors of bankrupt moving for order under s. 135(5) challenging proof of claim filed by judgment debtor based on Singapore judgment -- Issues of mitigation and set-off raised by creditors having been finally determined in Singapore proceedings -- Creditors being privies of bankrupt -- Doctrine of res judicata applying -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 135(5).

EnerNorth and Oakwell were parties to a joint venture agreement concerning the construction and operation of two power plants in India. They incorporated the Project Company to finance, construct and operate the Project. Disputes arose between EnerNorth and Oakwell which were ultimately resolved by way of a Settlement Agreement in which EnerNorth agreed to buy out Oakwell's interest in the Project Company. They agreed that any disputes would be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts. EnerNorth did not make the required payments under the Settlement Agreement. It sold its interest in the Project Company to VBC. Oakwell entered into negotiations with VBC directly, resulting in a Licence Agreement pursuant to which the Project Company was to pay Oakwell certain "technical fees".

Oakwell sued EnerNorth in Singapore to recover the outstanding amounts under the Settlement Agreement. EnerNorth counterclaimed. The action was successful and the counterclaim was dismissed. The Singapore Court of Appeal dismissed EnerNorth's appeal. EnerNorth did not pay the Singapore judgment. Oakwell commenced enforcement proceedings in Ontario. Those proceedings were successful, and EnerNorth filed an assignment in bankruptcy. Oakwell made a claim in that bankruptcy which was based entirely upon the Singapore judgment. Other creditors of EnerNorth (the "appellants") moved before the Bankruptcy Court for an order pursuant to s. 135(5) of the Bankruptcy and Insolvency Act ("BIA") challenging the proof of claim filed by Oakwell. Oakwell brought a cross-motion to dismiss that motion on the ground that the issue raised by the appellants, i.e., whether the Licence Agreement payments had to be set-off against any payments made to Oakwell under the Settlement Agreement, had been finally determined in the Singapore proceedings. The cross-motion was granted. The appellants appealed.

Held, the appeal should be dismissed. [page2]

While the court's power to expunge or reduce a proof of claim on an application under s. 135(5) of the BIA is wide, there is no basis for holding that an applicant pursuant to s. 135 should have an unqualified right to challenge the validity of a judgment debt that is based on a decision of a court of competent jurisdiction on the merits of the claim or that res judicata should not apply, where appropriate, in such circumstances. In the absence of fraud, collusion or some legitimate concern that there has been a genuine miscarriage of justice, a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee or a court regarding the legitimacy of a claim under s. 135 if, in awarding the judgment, the court has considered the merits of the claim.

The doctrine of res judicata applies in bankruptcy proceedings. The appellants were precluded by res judicata from advancing their contention that Oakwell's proof of claim had to be expunged or reduced by reason of the mitigation/set-off issue. Two of the appellants were the president and chairman of EnerNorth, respectively, at the time of the Singapore proceedings. For the purposes of the bankruptcy proceedings, the trustee stood in the shoes of EnerNorth, and for the purposes of the proposed s. 135(5) hearing, the creditors in effect stood in the shoes of the trustee because they sought to have the court do what the trustee had declined to do. They were identified with EnerNorth for purposes of comparison between the Singapore proceedings and the proposed s. 135(5) hearing, and there was a community or privity of interest between them in that regard. The appellants were privies of EnerNorth for the purpose of the res judicata analysis in the s. 135(5) context. The mitigation/set-off argument was considered and rejected by the trial judge in the Singapore proceedings. The appellants were barred from re-litigating that issue in their efforts under s. 135(5) of the BIA to accomplish what EnerNorth failed to do in the Singapore courts and the Ontario courts.

APPEAL from the order of C.L. Campbell J. (2009), 2008 CanLII 40226 (ON SC), 92 O.R. (3d) 392, [2008] O.J. No. 3137 (S.C.J.) granting a cross- motion to dismiss a motion for an order challenging a proof of claim.

Cases referred to Fraser (Re); Ex parte Central Bank of London, [1892] 2 Q.B. 633 (C.A.); Van Laun (Re); Ex parte Chatterton, [1907] 2 K.B. 23 (C.A.), affg [1907] 1 K.B. 155 (K.B. Div.), consd Other cases referred to A Debtor (Re) (1915), 113 L.T. 704 (K.B.); Angle v. Canada (M.N.R.), 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, [1974] S.C.J. No. 95, 47 D.L.R. (3d) 544, 2 N.R. 397, 74 D.T.C. 6278; Arnco Business Services Ltd. (Re), [1983] O.J. No. 973, 38 C.P.C. 226, 23 A.C.W.S. (2d) 91 (H.C.J.); Bank of Montreal v. Maple City Ford Sales (1986) Ltd. (2001), 2000 CanLII 22716 (ON SC), 51 O.R. (3d) 523, [2000] O.J. No. 5701 (S.C.J.); Banque Nationale de Paris (Canada) v. Canadian Imperial Bank of Commerce (2001), 2001 CanLII 24099 (ON CA), 52 O.R. (3d) 161, [2001] O.J. No. 53, 195 D.L.R. (4th) 308, 145 O.A.C. 349, 2 C.P.C. (5th) 1, 102 A.C.W.S. (3d) 302 (C.A.); Canada Asian Centre Developments Inc. (Re), [2003] B.C.J. No. 34, 2003 BCSC 41, 10 B.C.L.R. (4th) 161, 39 C.B.R. (4th) 35, 119 A.C.W.S. (3d) 8; Carl Zeiss

Stiftung v. Rayner & Keeler Ltd. (No. 2), [1967] A.C. 853, [1966] 2 All E.R. 536, [1966] 3 W.L.R. 125, [1967] R.P.C. 497 (H.L.); Chaban v. Chaban (Trustee of), 1999 CanLII 12238 (SK CA), [1999] S.J. No. 112, 172 D.L.R. (4th) 312, [1999] 6 W.W.R. 174, 177 Sask. R. 139, 9 C.B.R. (4th) 5, 87 A.C.W.S. (3d) 222 (C.A.); Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 2001 SCC 44, 201 D.L.R. (4th) 193, 272 N.R. 1, J.E. 2001-1439, 149 O.A.C. 1, 34 Admin. L.R. (3d) 163, 10 C.C.E.L. (3d) 1, [2001] CLLC Â210-033, 7 C.P.C. (5th) 199, 106 A.C.W.S. (3d) 460; Fallis v. United Fuel Investments Ltd., 1962 CanLII 96 (SCC), [1962] S.C.R. 771, [1962] S.C.J. No. 63, 34 D.L.R. (2d) 175, 4 C.B.R. (N.S.) 209; Flatau (Re); Ex parte Scotch Whisky Distillers, Ltd. (1888), 22 Q.B.D. 83 (C.A.); Gibson Mining Co. v. Hartin, 1940 CanLII 256 (BC CA), [1940] B.C.J. No. 21, [1940] 2 D.L.R. 605, [1940] 2 W.W.R. 155, 55 B.C.R. 196, 21 C.B.R. 403 (C.A.); Grossman (Re), [1998] A.J. No. 498, 1998 ABQB 381, 222 A.R. 139, 3 C.B.R. (4th) 267, [1998] 4 C.T.C. 197, 79 A.C.W.S. (3d) 449; [page3][cf2]Las Vegas Strip Ltd. v. Toronto (City) (1997), 1997 CanLII 3841 (ON CA), 32 O.R. (3d) 651, [1997] O.J. No. 1033, 99 O.A.C. 67, 70 A.C.W.S. (3d) 153 (C.A.), affg (1996), 1996 CanLII 8037 (ON SC), 30 O.R. (3d) 286, [1996] O.J. No. 3210, 13 O.T.C. 308, 38 C.R.R. (2d) 129, 34 M.P.L.R. (2d) 233, 65 A.C.W.S. (3d) 851 (Gen. Div.); Oakwell Engineering Ltd. v. Energy Power Systems Ltd. (April 27, 2004), CA129/2003/Y (Sing. C.A.), affg [2003] SGHC 241; Oakwell Engineering Ltd. v. Enernorth Industries Inc. (2006), 2006 CanLII 19327 (ON CA), 81 O.R. (3d) 288, [2006] O.J. No. 2289, 211 O.A.C. 262, 19 B.L.R. (4th) 11, 30 C.P.C. (6th) 253, 148 A.C.W.S. (3d) 897 (C.A.), affg (2005), 2005 CanLII 27149 (ON SC), 76 O.R. (3d) 528, [2005] O.J. No. 2652, [2005] O.T.C. 534, 7 B.L.R. (4th) 256, 140 A.C.W.S. (3d) 70, 141 A.C.W.S. (3d) 208 (S.C.J.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 343]; Orpen v. Roberts, 1925 CanLII 2 (SCC), [1925] S.C.R. 364 at 367, [1925] S.C.J. No. 14, [1925] 1 D.L.R. 1101 Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 135 [as am.], (1), (2), (3) [as am.], (4) [as am.], (5), 193 Authorities referred to Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra, The 2009 Annotated Bankruptcy and Insolvency Act (Toronto: Thomson Carswell, 2008) Lange, Donald J., The Doctrine of Res Judicata in Canada, 2nd ed. (Markham, Ont.: LexisNexis Canada Inc., 2004) Spencer-Bower, George, and Alexander Kingcome Turner, The Doctrine of Res Judicata, 2nd ed. (London: Butterworths, 1969)

Douglas G. Garbig, for appellants Fieldstone Traders Limited, Milton Klyman, Hagen Gocht, 1420041 Ontario Inc., Trigel Energy Inc., Reid Hill Enterprises Ltd., Richard Barrer, Hurricane Management Ltd. and Les's Mechanical Service Ltd.

Paul D. Guy, for appellants Sandra J. Hall and James C. Cassina.

Matthew I. Milne-Smith and Shelby Z. Austin, for respondent Oakwell Engineering Limited.

The judgment of the court was delivered by

BLAIR J.A.:-- I. Overview

[1] EnerNorth Industries Inc. is bankrupt. Its various creditors are squabbling amongst themselves over the amount owing to one of them, Oakwell Engineering Limited. To sort this out, the appellant creditors sought to obtain an order under s. 135(5) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B- 3 (the "BIA"), entitling them to challenge and determine the validity of the proof of claim filed by Oakwell. That proof of claim is [page4]founded upon a judgment rendered in Singapore prior to EnerNorth's assignment in bankruptcy.

[2] Justice Colin Campbell dismissed the creditors' motion on res judicata and issue estoppel grounds, holding that the very issue they wished to have determined had already been decided in

Tab 202

CanLII

The Personal Insurance Company v. Jia, 2020 ONSC 6361 (CanLII)

Source:	Divisional Court
Date:	2020-10-22
File number:	763/18
Citation:	The Personal Insurance Company v. Jia, 2020 ONSC 6361 (CanLII), <https://canlii.ca/t/jb7qm>, retrieved on 2026-01-18
Most recent unfavourable mention	Penney v. The Co-operators General Insurance Company, 2022 ONSC 3874 (CanLII) [...] For similar reasons, **I decline to follow Jia** . [...]

CITATION: The Personal Insurance Company v. Jia, 2020 ONSC 6361
COURT FILE NO.: 763/18
DATE: 20201022

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. CORBETT, DUCHARME and GOMERY JJ.

B E T W E E N:	)	
	)	
THE PERSONAL INSURANCE COMPANY	)	*Erik K. Grossman and Patrick M. Baker*,
	)	For the Appellant
Appellant	)	
	)	
- and -	)	
	)	
PEI YU JIA and LAN JIA	)	*Ashu Ismail*, for the Respondents
	)	
Respondents	)	**Heard at Toronto:** November 20, 2019

REASONS FOR DECISION

D.L. Corbett J.:

[1] The appellant insurer appeals the Reconsideration Decision of Vice-Chair Trojek of the Safety, Licensing Appeals and Standards Tribunals Ontario ("SLASTO") overturning the motion decision of Adjudicator Msosa of the Licensing Appeals Tribunal ("LAT"). At the conclusion of oral argument, the court dismissed the appeal with these reasons to follow.

Discussion

[2] On June 2, 2015, Xiu Zhe Xu was involved in a fatal collision. Her husband, Pei Yu Jia and her daughter, Lan Jia, (collectively the respondents) sought death and funeral benefits from the appellant insurer. These benefits were denied. The respondents disputed this decision before the LAT (the "benefits dispute").

[3] In a separate proceeding under O. Reg. 283/95, the appellant insurer initiated a dispute with CAA Insurance over which insurer is responsible for the respondents' accident benefits claims (the "priority dispute").

[4] The appellant compelled the respondents to examinations under oath (referred to in the decisions below as "EUOs") in connection with the priority dispute.

[5] The appellant used the same lawyer as its counsel in the priority dispute and the benefits dispute. That counsel filed transcripts of the respondents' evidence compelled in the priority dispute on behalf of the appellant in the benefits dispute.

[6] It is established law that insurers may not use the same counsel in statutory benefits cases and in tort cases brought against them by the same insured. This is because the duties of an insurer (and therefore of its counsel) are different in these contexts, and as an accident benefits insurer, the insurer is entitled to receive, and is required to keep confidential, a great deal of sensitive personal information from claimants.

[7] In the case at bar, the respondents took the position that the requirement for separate counsel applies where an insurer is involved in a priority dispute with another insurer and a benefits dispute with the insured. The respondents took the position that the insurer was not permitted to use evidence compelled from them in the priority dispute in the benefits dispute and the appellant's counsel's filing of that evidence in the benefits dispute was in breach of the applicable statutory scheme.

[8] At first instance, the LAT dismissed the respondents' motion, finding that there was no conflict in counsel acting in both proceedings, and that the filing of a transcript of evidence in non-compliance with the statutory scheme should not lead to exclusion of that evidence because the evidence is relevant and there is no prejudice to the respondents.

[9] SLASTO reversed on both decisions. It found that there is a conflict in counsel for the insurer acting in both the priority dispute and the benefits dispute. It found that breach of the statutory scheme was improper and prejudicial to the respondents, defeating the carefully balanced process prescribed by law.

Jurisdiction and Standard of Review

[10] Section 11(6) of the *License Appeal Tribunal Act* provides for an appeal to this court from LAT on a question of law.[1] This applies to a reconsideration decision of SLASTO from a LAT decision and, as at the time that this appeal was heard and decided, the standard of review of the reconsideration decision was considered to be "reasonableness" in this court.[2]

[11] The appellant argued that the appropriate standard of review in this case was correctness, because the issue of a lawyer's conflict of interest "implicates professional responsibility and the legal profession in Ontario". The court did not accept this submission: the conflict issue that arises in this case is contextually driven: the nature of conflicts that arise in accident benefits insurance cases, a context specifically within LAT's mandate and expertise.

Analysis

[12] We agree with the appellant that the conflict alleged in this case is not so clear as the conflict that arises if counsel defends an insurer in both a statutory accident benefits case and a tort case arising from the same loss.[3] However, we also agree with Vice-Chair Trojek that the situations are sufficiently analogous that the principle in the latter circumstance should apply in the former.

[13] Even if it was thought that the conflict identified by the Vice-Chair is not inevitable and should not, as a matter of general practice, preclude an insurer using the same counsel in a priority proceeding and a subsequent liability proceeding, in this case the potential conflict came to pass when the insurer misused transcripts gathered in the priority dispute in the subsequent benefits dispute.

[14] In this regard, Vice-Chair Trojek found that requirements set out in s.33 of the *SABS Schedule*[4] cannot be circumvented by reliance on a transcript obtained during a priority dispute. Otherwise the procedural protections afforded to an insured in the *SABS Schedule* would be frustrated. Although not relied upon by the Vice-Chair, we note that principles underlying the implied undertaking that applies to compelled disclosure in civil proceedings also militate against an insurer being able to file a transcript compelled in the priority dispute in a subsequent liability proceeding without first obtaining leave to so do. The Vice-Chair found that the specific protections provided in the *SABS Schedule* cannot be avoided by the general discretion granted to an Adjudicator under s.15 of the *SPPA*.[5] Otherwise the protections enacted in s.33 of the *SABS* would be largely illusory. This decision is reasonable.

[15] Finally, both aspects of the Vice Chair's decision are interlocutory. This court will not ordinarily hear an appeal from interlocutory decisions of LAT, unless the consequences of the decision cannot be rectified on appeal from a final decision. We would exercise our discretion to hear an appeal from the conflict decision, because it is evasive of appeal and it is potentially a matter of general practice important in proceedings before LAT. We would not, however, exercise our discretion to hear the appeal in respect to whether the EUOs ought to be received in evidence.

[16] In conclusion, I would find:

a. The Vice-Chair's finding that the appellant's lawyer was in conflict of interest acting in both the priority dispute and the liability dispute was reasonable;

b. The Vice-Chair's finding that the EUOs obtained by the insurer in the priority dispute should not be permitted to be used in the liability dispute because they were not obtained in compliance with s.33 of the *SABS Regulation* was reasonable.

c. This appeal was in any event premature as it relates to the use of the impugned transcripts.

[17] This appeal was heard and decided prior to release of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*. Our reasons are framed on the basis on which this decision was reached on November 20, 2019, when it was rendered. We considered and decided against conducting a re-hearing on the basis of *Vavilov* because our

decision would be the same in any event. Even if we had concluded that SLASTO erred as a matter of law on whether there is an inherent conflict in the same lawyer acting for an insurer in a priority dispute and a benefits dispute arising from the same events, on the facts there was a conflict in this case. This misuse of evidence obtained in the priority dispute in the benefits dispute, contrary to the checks and balances prescribed in the statutory scheme, placed the appellant's lawyer in a position where he could not continue to represent the insurer in the benefits dispute.

[18] I would also find that it is not necessary to re-hear this appeal or to receive supplementary submissions on the effect of *Vavilov* because of the improper filing of the EUO transcripts. The improper use of the transcripts arose because of the dual role played by counsel for the insurer in the two proceedings. These facts raise a conflict of interest in this case, as a matter of fact. No purpose would be served by reconsidering the parties' arguments in this case through the correctness lens brought to bear on questions of law as a result of the *Vavilov* decision.

_____
D.L. Corbett J.

I agree: _____
Ducharme J.

I agree: _____
Gomery J.

Date of Release: October 22, 2020

CITATION: The Personal Insurance Company v. Jia, 2020 ONSC 6361
COURT FILE NO.: DC 551/16
DATE: 202010xx

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

D.L. Corbett, Ducharme and Gomery JJ.

BETWEEN:

The Personal Insurance Company

Appellant

– and –

Pei Yu Jia and Lan Jia

Respondents

REASONS FOR DECISION

D.L. Corbett J.

Date of Release: October 22, 2020

---

[1] *License Appeal Tribunal Act*, SO 1999, c.12, s.11.
[2] *Taylor* v. *Aviva Canada Inc.*, 2018 ONSC 4472 (Div. Ct.).
[3] *Dervisholli* v. *Cervenak*, 2015 ONSC 2286.
[4] *Statutory Accident Benefits Schedule*, O. Reg. 34/10
[5] *Statutory Powers Procedures Act*, RSO 1990, c. S.22, s.15.

Tab 203

CanLII

Harold The Mortgage Closer Inc. v. Chief Executive Officer of the Financial Services Regulatory Authority of Ontario, 2024 ONSC 2236 (CanLII)

Source:	Divisional Court
Date:	2024-04-16
File number:	507/23
Citation:	Harold The Mortgage Closer Inc. v. Chief Executive Officer of the Financial Services Regulatory Authority of Ontario, 2024 ONSC 2236 (CanLII), <https://canlii.ca/t/k43bl>, retrieved on 2026-01-18

CITATION: Harold The Mortgage Closer Inc. v. Chief Executive Officer of the Financial Services Regulatory Authority of Ontario, 2024 ONSC 2236
DIVISIONAL COURT FILE NO.: 507/23
DATE: 20240416

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Harold The Mortgage Closer Inc. and Harold Gerstel, Applicants

-and-

Chief Executive Officer of the Financial Services Regulatory Authority of Ontario, Financial Services Regulatory Authority of Ontario, and Attorney General of Ontario, Respondents

BEFORE: FL Myers J

COUNSEL: *Melvyn L Solmon and Joanne Iskander Salmoon*, for the Applicants

Troy Harrison and Michael Scott, for the Respondents

HEARD: April 16, 2024

ENDORSEMENT

[1] The respondents move to quash this application for judicial review.

[2] In their application, the applicants ask the court to quash a notice of proposal delivered by the Financial Services Regulatory Authority on June 22, 2023. In the notice of proposal, the regulator proposes to revoke the mortgage broker license of the corporate applicant, to refuse to renew Ms. Gerstel's license, and to impose administrative penalties on Mr. Gerstel.

[3] The applicants also seek judicial review of the publication by the regulator on January 11, 2022 of a document entitled "*Transparent Communication of FSRA Enforcement Action*". This document provides guidance for when the regulator will publish o its website and elsewhere its enforcement steps against license holders.

[4] The applicants seek judicial review as well of the decision by the regulator to publish its notice of proposal to the public while refusing to publish the applicants' request for a hearing that takes issue with facts alleged by the regulator in the notice of proposal.

[5] Finally, the applicants seek orders compelling the regulator to amend its publication policy, to remove the notice of proposal from its website, to publish their response to the notice of proposal, and to enforce the statutory scheme to prevent the applicants' competitors from misusing the notice of proposal to injure the applicants' reputation and business.

[6] The regulator submits that it is plain and obvious that the relief claimed by the applicants in this proceeding is not available to them.

[7] In response to the notice of proposal, the applicants exercised their right to require a hearing before the Financial Services Tribunal. That is a specialized tribunal charged with hearing proceedings in the financial services sector.

[8] Under the applicable statutory scheme, the applicants will be entitled to a full hearing process before the tribunal in respect of the allegations contained in the regulator's notice of proposal. A very high degree of procedural protection is available to the applicants in light of the serious nature of the relief sought against them. The hearing is a full trial *de novo*. It is not just an appeal from the notice of proposal. The hearing outcome will be based on the evidence to be admitted, after pre-hearing disclosure, cross-examination of witnesses, and submissions.

[9] The regulator rightly distinguishes two types of claims brought by the applicants. They each result in different outcomes.

[10] First, it is plain and obvious and without any serious doubt that the applicants' complaints about the conduct of the regulator in issuing the notice of proposal and its contents are premature.

[11] Mr. Solmon asserts that it is clear that the regulator issued a notice of proposal that was deliberately false and that the court needs to be available to police such egregious misconduct.

[12] That is neither the scheme of the relevant statutes nor of the *Judicial Review Procedure Act* on which the applicants rely. This case is on all fours with *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 (CanLII). In that precedent decision, a judge quashed a tribunal's decision to appoint an investigator. The decision was made in direct violation of the statutory procedural right of the target of the investigation to be heard prior to the decision being made. In *Volochay*, even with the breach of a statute, the Court of Appeal held that proceedings must be left to run their course if there is an adequate alternative to the court becoming involved and absent exceptional circumstances.

[13] In this case, the applicants' reliance on very general duties of a regulator in ss. 3 and 6 of the *Financial Services Regulatory Authority of Ontario Act*, 2016, SO 2016, c 37, Sch 8, do not really add any more strength to the case than is available from the general legal notion that government bodies should obey the law, behave fairly, and should not lie.

[14] Even assuming for the sake of argument that the applicants can establish that the regulator deliberately issued and publicized falsehoods about the applicants in the notice of proposal, this application still runs right into the hearing before the Financial Services Tribunal provided by the *Mortgage Brokerages, Lenders and Administrators Act*, 2006, SO 2006, c 29.

[15] In that hearing, the regulator will bear the burden of proving the allegations in its notice of proposal. The applicants will be entitled to defend themselves fully and fairly. At the end of the day, the tribunal will make findings of fact and apply the appropriate law. If it finds that the regulator has been untruthful or violated its duties, it will consider the appropriate outcome. If the applicants are then not content with the outcome, they have further appeal rights to the court and possibly also the ability to seek judicial review for matters that do not fall within appeal rights.

[16] I do not agree with Mr. Solmon that the facts are uncontested or clear. I understand why the applicants allege the regulator said things to which they object. But I would not be able to make findings of fact on the written record before me and I do not believe that a panel of this court will be any better off on an early judicial review. The panel is a review body. It is not a fact-finding body generally.

[17] The place for findings of fact to be made on disputed evidence is before the tribunal.

[18] Moreover, any procedural unfairness caused to the applicants by the delivery of the notice of proposal containing incorrect facts can and will be cured by a

full trial process before the tribunal with a high standard of procedural fairness and natural justice enforced.

[19] I note that I do not necessarily agree with the tribunal's decision in this case that it has no authority to review the conduct of the regulator or to cause it to take steps deemed necessary for fairness of the proceeding before the tribunal. The notice of proposal is not necessarily spent or rendered a dead letter by the delivery of the request for a hearing. The notice of proposal remains the regulator's statement of allegations that guides the issues before the tribunal.

[20] But even if the applicants ask the tribunal to give some remedy against the regulator and the tribunal declines after a full hearing, the applicants will still have their appeal and review rights before the court. In those hearings, the court will be armed with a full evidentiary record, findings of fact on the contested evidence, and the specialist tribunal's views and reasoning on the issues that were argued before it by the parties.

[21] Under *Volochay*, the tribunal proceeding must be left to run its course as it is a very adequate alternative to the relief sought contesting the notice of proposal and the regulator's conduct in issuing it. There are no exceptional circumstances at play in my view. Mr., Solmon submits that this case is exceptional because the claim is that the regulator included untruthful allegations in the notice of proposal deliberately. That does not take the case outside the principle in *Volochay*. Moreover, the strategy that, "the best defence is a good offence" is not as unusual or exceptional before the court as Mr. Solmon surmises.

[22] It follows that I quash as premature the portion of the application challenging the validity of the notice of proposal.

[23] The other aspect of the case involves the regulator's publication decisions. The regulator submits that it did not exercise a statutory power of decision when it adopted its publication guidelines. They are not binding on anyone and do not have the force of law. They just tell the marketplace when to expect enforcement steps to be publicized by the regulator.

[24] Similarly, the regulator submits that it has no statutory duty to publish the applicants' request for a hearing although the applicants dispute the facts in the notice of proposal and ask the regulator to be fair and balanced.

[25] The applicants can also show that competitors have used the notice of proposal as published by the regulator to slag them in the marketplace. They submit that the regulator's decisions to publish the notice of proposal and the decision to refuse to publish their request for hearing impair its reputation and impact its legal rights.

[26] As I am not quashing these requests for judicial review, I will say little about them. The SCC has recognized peoples' legal interest in their reputation.

While I am dubious that the applicant has standing to challenge the publication guidelines or that the publication of the guidelines was an exercise of a statutory power, to the extent that the guidelines become an excuse or justification for the regulator's publication decisions, I would not put challenging them beyond the applicants' reach.

[27] But the real focus of the applicant is on the regulator's decision to publish the notice of proposal and the decision to refuse to publish the request for a hearing. It is not impossibly far-fetched that ss. 3 and 6 of the *Financial Services Regulatory Authority of Ontario Act* impose constraints (if not a duty) on the activity of the regulator especially where reputational harm of a registrant is at risk (or is intended rightly or wrongly). Moreover, since the notice of proposal is not a dead letter in the tribunal hearing, issues of procedural fairness may arise concerning the regulator's conduct if it affects the fairness of the hearing.

[28] I cannot say that it is plain and obvious that the applicants have no rights vis-à-vis the regulator's decisions about what to publish or not publish concerning the applicants. I expressly leave open to the panel of the Divisional Court the possibility that it may find this issue too best dealt with first before the Financial Services Tribunal. But while the validity of the notice of proposal and its contents is squarely before the tribunal, I am less sure that this issue will necessarily be before the tribunal.

[29] I am in no way endorsing the strength of the claims to challenge either the guidelines themselves or the publication decisions surrounding the notice of proposal, I do not accept the regulator's submissions that it is *plain and obvious* that they are either unreviewable private decisions or decisions that do not impair the legal rights or interests of the applicants.

[30] Mr. Solmon asks me to defer to the panel the question of whether the applicants need or ought to be granted more time to bring their applications under s. 5 (2) of the *JRPA*. Having quashed the claims against the notice of proposal, perhaps this is no longer an issue. Regardless, in my view, the panel that hears matters on their merits is generally better armed to assess the equities involved in the balancing of interests under s 5 (2). I therefore defer that issue to the panel.

[31] Finally, it is plain and obvious that the applicants have no claim for an order in the nature of *mandamus* against the regulator concerning competitors. There is no duty owing to the applicants for the regulator to take any steps against competitors. Moreover, prosecution and enforcement are always discretionary. Relief rooted in the availability of a writ of *mandamus* cannot be available for such decisions.

[32] Therefore, I quash the claims for orders set out in the the Amended Notice of Application dated November 8, 2023 (found beginning at Caselines page B1092) other than the following claims that survive and will be heard by the panel: Caselines page B1095, paragraphs 1, only the declaration sought in 3 (a), only the declaration sought in 3 (b), 3 (e), 3 (h), 3 (j), and 3 (l) to (n) inclusive.

[33] I am told that the Financial Services Tribunal may have been waiting for this decision before scheduling its hearing into the notice of proposal and request for hearing. In my respectful view, nothing left open for the court in this proceeding need have any bearing on the tribunal's scheduling decisions. The court generally respects and appreciates every effort by tribunals to complete proceedings as efficiently and affordably as possible.

[34] Success was divided. My inclination is to order no costs or to defer costs to the panel hearing the application. If counsel can agree on costs, they are requested to advise me accordingly. If counsel cannot agree, the applicants may deliver costs submissions by April 26, 2024. The regulator can then deliver submissions by May 3, 2024.

[35] Submissions shall be no longer than three double-spaced pages in minimum 12-point font with normal margins. Each submission shall be accompanied by the party's Costs Outline. Parties may also submit copies of any offers to settle on which they rely for costs purposes, if any.

FL Myers J

Date: April 16, 2024

Tab 204

CanLII

Volochay v. College of Massage Therapists of Ontario, 2012 ONCA 541 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2012-08-20
File number:	C54339
Other citations:	111 OR (3d) 561 — 355 DLR (4th) 518 — 220 ACWS (3d) 240 — 295 OAC 164 — 40 Admin LR (5th) 307 — [2012] OJ No 3871 (QL)
Citation:	Volochay v. College of Massage Therapists of Ontario, 2012 ONCA 541 (CanLII), <https://canlii.ca/t/fsdgd>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Volochay v. College of Massage Therapists of Ontario, 2012 ONCA 541
DATE: 20120820
DOCKET: C54339

O'Connor A.C.J.O., Laskin and Cronk JJ.A.

BETWEEN

Oleg Volochay

Applicant (Respondent)

and

College of Massage Therapists of Ontario

Respondent (Appellant)

Tab 205

CanLII

Sanscon Construction Ltd. v. City of Toronto, 2021 ONSC 6409 (CanLII)

Source:	Superior Court of Justice
Date:	2021-09-29
File number:	CV-21-006643904-000; 21ECS-TI-02BE .
Citation:	Sanscon Construction Ltd. v. City of Toronto, 2021 ONSC 6409 (CanLII), <https://canlii.ca/t/jjn4p>, retrieved on 2026-01-18

CITATION: Sanscon Construction Ltd. v. City of Toronto, 2021 ONSC 6409
COURT FILE NO.: CV-21-006643904-000
DATE: 20210929

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
Sanscon Construction Ltd.	Applicant	*Jonathan Frustaglio*, for the Applicant
– and –		
City of Toronto	Respondent	*Michele A. Wright and Molly Lowson*, for the Respondent
		HEARD: June 28, 2021

VELLA J.

REASONS FOR DECISION

[1] This Application is brought by Sanscon Construction Ltd. ("Sanscon") seeking various orders relating to its failed bid to obtain a construction contract from the City of Toronto (the "City").

[2] At the hearing of this matter, consistent with its factum, Sanscon argued this matter by way of a judicial review application. In its first paragraph of its factum, Sanscon states that it "has commenced this Application for the judicial review of an administrative decision made by the Respondent, the City of Toronto".

[3] By way of brief background, this matter arises out of the City's decision to award a construction contract arising out of Ariba Doc. No. 2877856257, Tender 71-2021 ("RFT") for the Bridge Rehabilitation, Road Reconstruction, Water Service Replacement, Cycle Tract Construction and Intersection Improvements on Cummer Avenue from Bayview Avenue to Leslie Street, Contract No. 21ECS-TI-02BE ((the "Project", "Bid" and/or "Contract").

[4] Sanscon was the lowest bidder.

[5] The City awarded the Contract to the second lowest bidder, Grascan Construction Ltd. and Torbridge Construction Ltd. ("Grascan").

[6] Sanscon states that Grascan's bid was non-compliant with the mandatory Bid requirements and was also mathematically and/or materially unbalanced. Furthermore, the City failed in its duty of procedural fairness and good faith when it assessed Sanscon's Bid as compared with Grascan's competing bid.

[7] The City submits that the RFT expressly permits the City to reject the lowest bidder. Furthermore, the City submits that it had an express contractual right to reject Sanscon's Bid on the basis that it had mathematically and/or materially unbalanced terms.

[8] The City submits that this court lacks jurisdiction to hear this matter by way of judicial review, as I am not sitting as a judge of the Divisional Court, but urges that the Application be dismissed on its merits based on purely contractual principles.

Jurisdiction

[9] Sanscon's factum does not seek leave of the court to hear this Application for judicial review under s. 6(2) of the *Judicial Review Procedure Act,* R.S.O. 1990, c.J.1 ("JRPA"), nor does it address the test for leave. In its factum, Sanscon relies on the standard of review of a decision of an administrative body that is set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 reinforcing its premise that this Application is brought as a judicial review.

[10] This court declines to hear this matter by way of an application for judicial review, consistent with the Practice Direction for Divisional Court Proceedings for the Toronto Region. More specifically, and as noted in the endorsement of by Myers J. who presided over the scheduling of this Application at Civil Practice Court:

> A proceeding to quash a governmental decision based on an unfair process or as unreasonable in fact or law is properly an application for judicial review. That would proceed on [sic] the Divisional Court. In Toronto, urgent applications for judicial review under s. 6(2) of the *Judicial Review Procedure Act* are heard by a single judge sitting on the Divisional Court as well. See s. 4 of the Consolidated Practice Direction for Divisional Court Proceedings, effective May 17, 2019.

[11] Myers J. scheduled the Application for June 28, 2021 on the basis that a damages claim for breach of contract lies with this court. In so doing, Myers J. declined to make an interim order to preserve the *status quo*. Myers J. was not satisfied that Sanscon would suffer irreparable harm if the subject project went ahead.

[12] However, inexplicably, Sanscon formulated its argument at the hearing before me entirely based in judicial review principles, and not breach of contract principles. The relief sought under its factum consists of an order in the nature of certiorari (declaring the City's decision to be of no force and effect) or in the alternative an order of mandamus (quashing the City's decision) or in the further alternative an order for prohibition (preventing the City from awarding the Contract to Sanscon's competitor).

[13] Under s. 7 of the JRPA, an application for an order in the nature of mandamus, prohibition or certiorari "shall be deemed to be an Application for judicial review and shall be made, treated and disposed of as if it were an Application for judicial review".

[14] Under s. 6(1) of the JRPA, an application for judicial review shall be made to the Divisional Court, subject to s. 6(2).

[15] Section 6(2) of the JRPA, in turn, provides that an application for judicial review may be made to the Superior Court of Justice with leave of a judge thereof, and may be granted at the hearing of the application, where it is made to appear to the judge that the case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice. However, s. 4 of the Consolidated Practice Direction for Divisional Court Proceedings, effective May 17, 2019 (the "Consolidated Practice Direction") directs that, in the Toronto Region, applications for urgent judicial review are to be brought in the Divisional Court for a hearing before a single judge of the Divisional Court, sitting as a judge of the Superior Court of Justice. Furthermore, the Notice of Application is to be filed with the Divisional Court.

[16] Sanscon's Application was not brought before the Divisional Court, contrary to the Consolidated Practice Direction.

[17] Sanscon's factum does not seek leave under s. 6(2) of the JRPA to have this matter heard, nor is it in the Notice of Application. It does not reference this court's jurisdiction, or address why the Application was not brought before a single judge of the Divisional Court, sitting as a judge of the Superior Court of Justice.

[18] In any event, this matter is not urgent. The Contract has already been awarded and the City has authorized Grascan to take certain steps under the Contract by the date of the hearing of this application. There was nothing preventing Sanscon from commencing an Application for judicial review in the proper forum and seeking an urgent hearing.

[19] This is not a matter of mere formality. Judges of the Divisional Court have experience in dealing with Applications under s. 6(1) and 6(2) of the JRPA. This matter should have been started as an application for judicial review and brought before the Divisional Court.

[20] The City submits that while the court does not have jurisdiction to hear this matter by way of judicial review, the court should nonetheless make a finding on the merits of the Application. The City advances as one reason supporting its submission that the subject matter of the Application does not fall within the scope of a judicial review in any event, and relies, in part, on *Wauzhushk First Nation v. Minister of Finance*, 2019 ONSC 3491 and *2169205 Ontario Inc. o/a Lefroy Freshmart v. Liquor Control Board of Ontario*, 2011 ONSC 1878 (CanLII).

[21] In *Wauzhushk First Nation*, the court held that the matter before it was not appropriate for judicial review because it involved the review of a policy decision of the Cabinet. This is not the situation here.

[22] In *Lefroy Freshmart*, the Divisional Court dismissed an application for judicial review of a decision of the Liquor Control Board of Ontario ("LCBO") to award authorization to operate an agency store following a competitive procurement process based on the alleged unfairness of the

procurement process and the unreasonableness of the decision. The Divisional Court found that in making the decision to award an agency store authorization, the LCBO had not exercised a statutory power of decision. Rather, it was a purely private commercial arrangement and accordingly to be dealt with in accordance with the principles of contract.

[23] However, in this case, the power to award the contract in question by the City's Bid Award Panel appears to arise by operation of subsection 195-8.2 of the *Toronto Municipal Code*, Chapter 195 (the "Municipal Code"). The Municipal Code appears to set out mandatory substantive requirements governing any recommendation made by the Chief Procurement Officer's recommendation. Accordingly, it is arguable that what is being challenged by Sanscon is the Bid Award Panel's exercise of a statutory power of decision.

[24] There was limited argument on the characterization of the nature of the Bid Award Panel's decision. This issue should have the benefit of full argument before the Divisional Court, should this matter proceed before it. Therefore, I am not ruling on it.

[25] The City also urges that as the evidence is before the court, and this court has jurisdiction under r. 14.05(3)(d) to hear this matter since it involves the determination of rights that depends upon contractual interpretation, it ought to rule on the merits of this matter, notwithstanding how the argument was framed at the hearing by Sanscon. The Notice of Application was originally brought under r. 14.05(3).

[26] The City submits that it is clear on the face of the RFT that it had the contractual right to reject the lowest bidder, and to consider the mathematical and/or material imbalance that was clearly present in the Bid in its decision to reject it. The City also states that the Bid was non-compliant with the mandatory Bid requirements. Sanscon admits that the Bid reflected material imbalances.

[27] In the circumstances, I decline to make a ruling on the merits of the Application based in contractual principles. The Application is fundamentally flawed as it was argued as a judicial review but not before the appropriate court and brought without leave. In my view, it would not be appropriate to render a ruling on the merits of the breach of contract matter in these circumstances.

[28] In my view it would not be in the interests of justice to dismiss the Application on the merits

Request for an interim or interlocutory injunction

[29] In light of my finding that this court declines jurisdiction to hear this matter by way of judicial review, this issue is moot.

Conclusion and Disposition

[30] Accordingly, this court declines to hear this matter by way of an urgent judicial review application under s. 6(2) of the JRPA and it should be brought before the Divisional Court in accordance with the Consolidated Practice Direction.

[31] The Application is dismissed on the basis that this Application has been brought in the wrong forum, without prejudice to the Applicant, Sanscon, to commence appropriate proceedings, and without prejudice to the City's right to plead any defences, including any limitation period defences, subject only to the following paragraph.

[32] Neither party asked me to exercise my discretion under s. 6(3) of the JRPA to transfer this matter to the Divisional Court. Should the parties, or either of them, wish me to consider this, I invite brief written submissions on this discreet issue which must be received within 10 days from

the release of these reasons. In the event I do not receive submissions on this issue within that time frame, then this disposition will be final, subject only to costs.

[33] In the event that Sanscon determines to bring this matter by way of a judicial review application in the proper forum, or by any other proceeding, it may be advisable that the parties rely on the same affidavits, and transcripts from cross examination (which can, on consent, be used as examinations for discovery). This would lead to a more efficient, expeditious and less expensive proceeding by minimizing duplication of time caused by the within Application.

[34] The parties should attempt to settle the issue of costs. However, if they cannot, then the City is to provide its Cost Outline within 20 days from the release of this decision, together with a brief written submissions, and Sanscon shall deliver its Costs Outline and brief written submissions within 10 days thereafter. The written submissions shall not exceed 3 pages double spaced in length. The cost outlines and submissions will be provided to my judicial assistant.

Vella, J.

Released: September 29, 2021

CITATION: Sanscon Construction Ltd. v. City of Toronto, 2021 ONSC 6409
COURT FILE NO.: CV-21-006643904-000
DATE: 20210929

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sanscon Construction Ltd.

Applicant

– and –

City of Toronto

Respondent

REASONS FOR JUDGMENT

Vella J.

Released: September 29, 2021

Tab 206

CanLII

Said v. Northbridge General Insurance Company, 2024 ONSC 5248 (CanLII)

Source:	Divisional Court
Date:	2024-09-25
File number:	502/23
Citation:	Said v. Northbridge General Insurance Company, 2024 ONSC 5248 (CanLII), <https://canlii.ca/t/k7088>, retrieved on 2026-01-18

CITATION: Said v. Northbridge General Insurance Company, 2024 ONSC 5248
DIVISIONAL COURT FILE NO.: 502/23
DATE: 20240925

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: ROSHAN SAID, Appellant

AND:

NORTHBRIDGE GENERAL INSURANCE COMPANY, Respondent

BEFORE: Backhouse, D.L. Corbett, Stothart, JJ.

COUNSEL: *Shahram Bahmadi*, for the Appellant

Jennifer McGlashan, for the Respondent

HEARD: September 16, 2024

ENDORSEMENT

D.L. Corbett J. (Orally)

[1] This is an appeal from the decisions of Adjudicator Kaur, dated August 1, 2023, of the License Appeal Tribunal ("LAT"), dismissing the Appellant's claims for income replacement benefits and related claims (2023 CanLII 122911 (ON LAT)) and denying the Appellant's request for reconsideration (2023 CanLII 122911 (ON LAT). The Adjudicator dismissed the claims on the basis that they were precluded by principles of *res judicata*, given the prior LAT decision of Adjudicator Lake dated October 15, 2021 (2020 CanLII 122073).

[2] This court has jurisdiction over this appeal pursuant to s. 11(1) and (6) of the *Licence Appeal Tribunal Act*, 1999, SO 1999, c. 12, Sched. G, on a question of law. The standard of review for questions of law is correctness: *Housen* v. *Nikolaisen*, 2002 SCC 33, para. 8.

[3] Before this court, the Appellant argues that *res judicata* does not apply to preclude his current claims, and that the process followed below was procedurally unfair. The Appellant's arguments on the merits misconceive the doctrine of *res judicata*. The test for *res judicata* was applied by the Adjudicator as follows (Decision, para. 12):

> In my view, the four preconditions for *res judicata* are satisfied. The parties are the same in both proceedings. The prior claim was within the jurisdiction of the Tribunal. The decision in the first application was based on the merits. The Tribunal reviewed the submissions and evidence and found that the applicant was not entitled to the IRB or found that the applicant was not entitled to IRBs for the period of January 14, 2020 to date and ongoing. Moreover, he was not entitled to payment for the November 9, 2019 accounting report. The first decision was a final decision because he did not file a reconsideration request and nor did he appeal the decision."

See *Danyluk* v. *Ainsworth Technologies Inc.*, 2001 SCC 44.

[4] The Appellant argues that the issue before the LAT in the first proceeding was the quantum of benefits to which the Appellant was entitled, and not the question of whether the Appellant was entitled to any benefits at all. Put another way, the Appellant argues that the issue was quantum and not liability. The Appellant argues that the decision was made without jurisdiction because there was no "dispute" between the parties on the issue of liability, within the meaning of s. 218 of the *Insurance Act*.

[5] A LAT decision is final and authoritative, subject to a party's rights of reconsideration or appeal from that decision. A party that disagrees with a LAT decision may not ignore that decision and recommence the same claims all over again. That is what the Appellant has done in this case. Even if the LAT erred in the first decision and decided the case on the basis of an issue that was not before it, that error would not have deprived the LAT of jurisdiction. The LAT's second decision is correct in law; this appeal fails on the merits.

[6] We see no procedural unfairness in the process followed below to adjudicate the preliminary issue of *res judicata*. This was an appropriate case in which to decide such an issue, which turns on a reading of the first decision and of the claims asserted in the second proceeding. Further, as just explained, the LAT's decision on the *res judicata* issue was correct, and thus the process followed by the LAT worked no prejudice to the Appellant.

[7] The appeal is dismissed, with costs to the respondent insurer fixed at $2,500.00, inclusive, payable within thirty days. There shall be no costs for or against the LAT.

"D.L. Corbett J."

I agree: "Backhouse J."

I agree: "Stothart J."

Released Orally: September 16, 2024
Written Endorsement Released: September 25, 2024

Tab 207

CanLII

Kazen v. Whitten & Lublin Professional Corporation, 2020 ONCA 325 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2020-05-26
File number:	C67805
Citation:	Kazen v. Whitten & Lublin Professional Corporation, 2020 ONCA 325 (CanLII), <https://canlii.ca/t/j7z9n>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Kazen v. Whitten & Lublin Professional Corporation, 2020 ONCA 325
DATE: 20200526
DOCKET: C67805

Gillese, Brown and Jamal JJ.A.

BETWEEN

Samuel Kazen

Plaintiff (Appellant)

and

Whitten & Lublin Professional Corporation, Daniel Asher Lublin, David Alan Whitten, Marc Warren Kitay, Stephen Clifford Wolpert and Gauri Jalota

Defendants (Respondents)

R. Lee Akazaki, for the appellant

Gavin Tighe and Lauren Rakowski, for the respondents Whitten & Lublin Professional Corporation, Daniel Asher Lublin, David Alan Whitten, Marc Warren

Kitay and Stephen Clifford Wolpert

Heard and released orally: May 25, 2020 by Videoconference

On appeal from the order of Justice Paul B. Schabas of the Superior Court of Justice, dated November 15, 2019.

REASONS FOR DECISION

[1] The appellant is a lawyer. He sued the respondents, a law firm and individuals connected to it (the "Action"). The cause of action is an alleged breach of solicitor-client privilege arising from the respondent law firm having provided the appellant with legal advice several years earlier. The alleged breach is said to have occurred on a motion in an unrelated lawsuit (the "earlier proceeding").

[2] The respondents moved to have the Action struck. By order dated November 15, 2019, the motion judge struck the Action on the basis of issue estoppel. The appellant appeals against the order.

[3] For the reasons that follow, the appeal is dismissed.

[4] In the Action, the appellant raised substantially the same alleged breach of solicitor-client privilege as had been dealt with in the earlier proceeding. In a motion on the earlier proceeding, the Master ruled against the appellant on the matter of solicitor-client privilege. The Master found, among other things, that if any privilege had existed, it had been expressly waived.

[5] As the motion judge set out, relying on *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, the test for issue estoppel consists of three parts:

i. the same question has been decided;

ii. the judicial decision which is said to create the estoppel was final; and

iii. the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised [or] their privies.

[6] We begin by noting that there is no real question that the second and third parts of the test are met. The appellant appealed the Master's decision but later withdrew the appeal. Accordingly, the Master's decision on solicitor-client privilege was a final decision. And, on the Motion before the Master relating to the issue of solicitor-client privilege, the parties or their privies were the appellant and the respondents.

[7] The appellant's primary contention on this appeal focusses on the first part of the test for issue estoppel. He argues that the Master did not decide the question of solicitor-client privilege. In making this argument, he relies on a narrow reading of one sentence in para. 23 of the Master's decision, where the Master refers to a legal consultation. We do not accept this argument. A fair and full reading of the Master's reasons as a whole show that the issue of solicitor-client privilege was squarely before the Master and that she found that the appellant had "expressly waived" that privilege. Thus, the same question was decided by the Master as that which the appellant raised in the Action.

[8] Accordingly, the motion judge did not err in finding that the Action was barred by issue estoppel or in striking the statement of claim without leave to amend.

[9] The appeal is dismissed with costs to the respondents fixed in the amount of $8,000, inclusive of disbursements and applicable taxes.

"E.E. Gillese J.A."
"David Brown J.A."
"M. Jamal J.A."

Tab 208

CanLII

Victoria University (Board of Regents) v. GE Canada Real, 2016 ONCA 646 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2016-08-29
File number:	C60511; C60512
Other citations:	269 ACWS (3d) 649 — [2016] CarswellOnt 13524 — [2016] OJ No 4493 (QL) — 76 RPR (5th) 104
Citation:	Victoria University (Board of Regents) v. GE Canada Real, 2016 ONCA 646 (CanLII), <https://canlii.ca/t/gt4qv>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Victoria University (Board of Regents) v. GE Canada Real Estate Equity, 2016 ONCA 646
DATE: 20160829
DOCKET: C60511 and C60512

Doherty, Pepall and Benotto JJ.A.

BETWEEN

The Board of Regents of Victoria University

Appellant/
Respondent by way of cross-appeal

and

GE Canada Real Estate Equity and
GE Canada Real Estate Equity Holding Company

Respondents/
Appellants by way of cross-appeal

potential freehold condominium project in the valuation. As a result, their decision was unreasonable.

(2) Issue Estoppel

[95] Under the heading of issue estoppel, I will first describe the applicable legal principles. Then I will address *Revenue Properties #1* analysis of the freehold/leasehold distinction and the treatment accorded that issue by the Appeal Judge and the Majority. Next, I will consider whether the Appeal Judge was correct in concluding that the Majority erred in departing from *Revenue Properties #1* by considering a potential freehold condominium project in the FMV. Lastly, I will address the treatment accorded to special circumstances.

(a) Legal Principles

[96] As Binnie J. explained in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 25, the three preconditions to the operation of issue estoppel are the following:

> (1) that the same question is being decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision are the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[97] One of the key objectives of issue estoppel is judicial finality: "[t]he doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation" (*per* Laskin J.A. in *Minott,* quoting from Holmstead and Watson, *Ontario Civil Procedure*, loose-leaf, vol. II, at s. 21. § 17[3]). More recently, the Supreme Court discussed issue estoppel in *Penner v. Niagara (Regional Police Services Board),* 2013 SCC 19, [2013] 2 S.C.R. 125, stating as follows, at para. 29:

> The one relevant [doctrine] on this appeal is the doctrine of issue estoppel. It balances judicial finality and

> economy and other considerations such as fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place. However, even if these elements are present, the court retains discretion to not apply issue estoppel when its application would work an injustice.

[98] However, as noted by Laskin J.A. in *Minott*, at p. 340, courts have not mechanically applied the doctrine every time the preconditions for its application have been satisfied:

> That the courts have always exercised this discretion is apparent from the authorities. For example, courts have refused to apply issue estoppel in "special circumstances", which include a change in the law or the availability of further relevant material. If the decision of a court on a point of law in an earlier proceeding is shown to be wrong by a later judicial decision, issue estoppel will not prevent relitigating that issue in subsequent proceedings.

[99] There is no question that the elements of issue estoppel are met; indeed, the College conceded as much. The parties are in essence the same, and the same language in the same leases is being interpreted. The question then is what did *Revenue Properties #1* decide and whether there is any basis (which may be characterized as special circumstances) for departing from *Revenue Properties #1*?

(b) Freehold or Leasehold Interest

[100] GE argues that both the Majority and the Appeal Judge erred by concluding that the Leases require a valuation of the freehold interest in the demised lands. In *Revenue Properties #1*, the Divisional Court concluded that the Leases required the valuation of lands subject to a lease and, according to GE, this means that the arbitrators should have valued the leasehold interest. It asks that the reasons of the minority arbitrator be adopted. Revenue Properties does not actively advance

Tab 209

CanLII

Awada v. Allstate, 2021 ONSC 8108 (CanLII)

Source:	Divisional Court
Date:	2021-12-07
File number:	628/21
Citation:	Awada v. Allstate, 2021 ONSC 8108 (CanLII), <https://canlii.ca/t/jl6vv>, retrieved on 2026-01-18

CITATION: Awada v. Allstate, 2021 ONSC 8108
DIVISIONAL COURT FILE NO.: 628/21
DATE: 20211207

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: TARICK AWADA V. ALLSTATE INSURANCE COMPANY

BEFORE: D.L. Corbett J.

HEARD: **In Chambers, In Writing**

ENDORSEMENT

[1] Allstate appeals a production order of the License Appeal Tribunal made in the course of ongoing proceedings brought by the respondent at the Tribunal.

[2] During initial triage of the appeal in this court, the court directed that the following inquiry be made of the appellant:

> Justice Corbett directs me to advise you as follows:
>
> This court will generally refuse to hear an appeal of an interlocutory ruling of the LAT on the basis of prematurity. While exceptions can be made to this principle, it does not appear that there are any bases for making an exception in this case. The appellant is asked to explain why this appeal should be permitted to proceed in light of the principle of prematurity.

[3] The court was not satisfied with the appellant's initial response to this inquiry and directed a notice be issued pursuant to R.2.1.01. The parties then exchanged written submissions pursuant to R.2.1.01.

[4] For the following reasons the appeal is dismissed as premature pursuant to R.2.1.01.

Rule 2.1.01

[5] An appeal will be dismissed as frivolous, vexatious and/or an abuse of process pursuant to R.2.1.01 only in the "clearest of cases".

[6] An appeal is considered frivolous, vexatious and/or an abuse of process if (among other things) it cannot possibly succeed or if it cannot possibly be of any benefit to the appellant.

Prematurity

[7] "[A]bsent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until effective remedies are exhausted" *Canada (Border Services Agency)* v. *C.B. Powell Limited*, 2010 FCA 61, per Stratas J.A.

[8] The classic statement of the courts' reluctance to intervene in the course of administrative proceedings is found in *Ontario College of Art* v. *Ontario (Human Rights Commission)* (1993), 1993 CanLII 3430 (ON SCDC), 11 OR (3d) 798 at 800:

> For some time now, the Divisional Court has … taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion….

[9] The principle was stated by this court in 1993, and it had been followed "[f]or some time now" then, nearly thirty years ago. It is followed just as scrupulously today and, with active case management being instituted by more and more administrative tribunals, the practical importance of the principle has in no way diminished.

[10] The appellant argues that the order under appeal fits within the "exceptional circumstances" category because it is "fatally flawed" and is procedurally unfair. In the result, a full hearing could unfold before the Tribunal that could be avoided if the appeal is successful: *Higashi* v. *Western Assurance Co.*, [2020] OJ No. 5395; *Certas Direct Insurance Co,* v. *Gonsalves*, 2011 ONSC 3986.

[11] I do not accept these submissions. This is an ordinary interlocutory production order. The appellant notes that scheduling orders, as currently structured, could lead to a situation where the appellant is unable to respond to issues raised by the respondent arising from the documents ordered disclosed. I do not agree that this is an "exceptional circumstance". If such a situation should arise, the current orders provide that the appellant can seek leave from the Hearing Adjudicator to provide additional materials. It remains the Hearing Adjudicator's task to ensure fairness for both sides as the case moves forward, and an appeal will be available to this court if, at the end of the process, a party argues it was not treated fairly. This case is not like *Gonsalves*, where the impugned order would necessarily lead to unfairness at the hearing. In the case at bar, the argument is premised on the possibility of procedural unfairness, not the inevitability of substantive unfairness found in *Gonsalves*. See also *Ontario (Liquor Control Board)* v. *Lifford Wine Agencies Ltd.* (2005), 2005 CanLII 25179 (ON CA), 76 OR (3d) 401 (CA); *Aon Inc. v. Towerhill Developments Inc.*, [2010] O.J. No. 2698 (Div. Ct.).

[12] Finally, the appellant argues that the appeal could result in the underlying claim being dismissed without a full hearing. This, it argues, would contribute to efficiency. That argument

does not establish "exceptional circumstances" – it is available every time the Tribunal makes a decision that could lead to a full hearing rather than summary disposition of the claim. The impact of the ruling is an aspect of the prematurity analysis (there is little point interrupting proceedings below to entertain an interlocutory appeal that will have no impact on the course of the proceedings below), but is not, by itself, sufficient to establish "exceptional circumstances."

[13] I note that this appeal, if it should proceed, will either be moot by the time it is decided or will lead to unacceptable delay in the proceedings below. If the impugned order is not stayed pending disposition of the appeal, then the appellant will be required to comply with the impugned order pending before the appeal is decided. The administrative process below will continue and may well reach a final disposition before the appeal is decided in this court. No purpose would be served by the appeal in this circumstance. If the impugned order is stayed pending disposition of the appeal, this will have the inevitable effect of delaying proceedings below. This delay would be substantial and would be an "interference" with the "administrative process" below within the meaning of the principle stated by Stratas J.A., quoted above: the prematurity principle would be defeated if premature appeals of interlocutory orders are permitted to proceed in this court at the will of the appellant, even where there are no "exceptional circumstances", only to have the appeal panel dismiss the appeals many months later on the basis of prematurity, but still visiting substantial delay on the administrative process.

[14] Finally, I note that the prematurity issue can be addressed as (i) a defence to the proceeding before a panel; (ii) on a motion to quash the proceeding, before a single Divisional Court judge whose decision is reviewable as of right before a panel of three judges of this court; and (iii) pursuant to R.2.1.01, where the decision is final, subject only to an appeal to the Court of Appeal with leave from that court. Where it is arguable whether there are "exceptional circumstances" within the meaning of the jurisprudence, recourse to R.2.1.01 is not appropriate. It is then for the responding party to decide whether to move to quash, and if it does so, it is then for the motion judge to determine whether to dismiss for prematurity or to dismiss the motion and leave the prematurity issue for the panel.

[15] The appeal is premature. There are no "exceptional circumstances". The appeal is dismissed pursuant to R.2.1.01.

[16] The respondent is entitled to costs of the R.2.1.01 process, which, in view of the written submissions exchanged between the parties, I fix at $2,500, inclusive, payable by the appellant to the respondent within thirty days.

"D.L. Corbett J."

December 7, 2021

Tab 210

CanLII

Mansuri v. Dominion of Canada General Insurance Company, 2023 ONSC 5764 (CanLII)

Source:	Divisional Court
Date:	2023-10-18
File number:	600/22
Citation:	Mansuri v. Dominion of Canada General Insurance Company, 2023 ONSC 5764 (CanLII), <https://canlii.ca/t/k0nrz>, retrieved on 2026-01-18

CITATION: Mansuri v. Dominion of Canada General Insurance Company, 2023 ONSC 5764
DIVISIONAL COURT FILE NO.: 600/22
DATE: 20231018

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

R.S.J. Edwards, Backhouse and Lococo JJ.

BETWEEN:	
MURTAZA MANSURI, JAVID MANSURI and MOHAMMAD MANSURI Applicants	*Ryan M. Naimark*, for the Applicants
– **and** –	
THE DOMINION OF CANADA GENERAL INSURANCE COMPANY, SCHULTZ FROST LLP and THE LICENCE APPEAL TRIBUNAL Respondents	*Kadey B. J. Schultz* and *Colin MacDonald*, for the Respondent The Dominion of Canada General Insurance Company Valerie Crystal, for the Licence Appeal Tribunal
	HEARD at Toronto: September 20, 2023

REASONS FOR JUDGMENT

R. A. LOCOCO J.

I. Introduction

[1] The applicants Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri bring an application for judicial review, challenging the interlocutory decision of the respondent Licence Appeal Tribunal dated September 28, 2022, reported at 2022 CanLII 138547 (the "Initial Decision").

[2] The Initial Decision was made in the context of the applicants' five applications for dispute resolution currently before the Tribunal arising from two separate motor vehicle accidents that occurred in 2018. In those applications, the applicants are challenging the denial by the respondent The Dominion of Canada General Insurance Company ("Dominion") of certain of the applicants' claims for accident benefits arising from the motor vehicle accidents.

[3] In the Initial Decision, the Tribunal dismissed the applicants' interlocutory motion to disqualify Dominion's counsel and its adjuster from handling the applicants' accident benefits claims on the basis of conflict of interest and breach of duties of privacy and confidentiality. In the reconsideration decision dated November 2, 2022 (the "Reconsideration Decision"), the Tribunal refused the applicants' Request for Reconsideration on the basis that the Initial Decision did not finally dispose of the applications before the Tribunal.

[4] The applicants argue that the court should exercise its jurisdiction upon judicial review and determine on the merits that the Tribunal erred in law in finding that there was no breach of privacy or confidentiality and no conflict of interest.

[5] Dominion disputes the merits of the application but, together with the Tribunal, raises the issue of prematurity. The respondents argue that unless there are exceptional circumstances, the Divisional Court should decline to consider an application for judicial review of the Tribunal's interlocutory decision until the underlying Tribunal applications are completed. The respondents submit that there are no exceptional circumstances nor is it a "rare case" that would warrant the court's intervention.

[6] Following oral submissions on the issue of prematurity, the parties were advised at the application hearing that the application was being dismissed, with written reasons to follow. These Reasons for Judgment explain the court's decision to dismiss the judicial review application as premature, without deciding the merits of the applicants' challenge to the Initial Decision.

II. Background

A. Applicants' accident benefits claims and Tribunal applications

[7] The applicants are brothers who at all relevant times resided in a three-bedroom apartment with a common kitchen, living room, bathroom and den.

[8] In 2018, the applicant Murtaza Mansuri was involved in a motor vehicle accident. Later that year, the applicants Javid Mansuri and Mohammad Mansuri were involved in a separate motor vehicle accident.

[9] Following those accidents, the applicants made separate applications to Dominion for accident benefits under *Statutory Accident Benefits Schedule – Effective September 1, 2010* ("*SABS*"), O. Reg. 34/10, s. 3(1), made pursuant to the *Insurance Act*, R.S.O. 1980, c. I.8. Dominion denied certain claims by two of the applicants for attendant care and housekeeping/

home maintenance services. Those services were provided by personal support workers from the same care provider.

[10] After the denial of benefits, the applicants made five applications to the Tribunal for dispute resolution under s. 280(2) of the *Insurance Act*. Those applications have not yet been heard on their merits and remain outstanding.

B. Applicants' motion before the Tribunal

[11] On March 1, 2022, the applicants filed a Notice of Motion before the Tribunal relating to all five applications, alleging that (i) Dominion and its counsel had breached their duties of privacy and confidentiality owed to the applicants, and (ii) Dominion's counsel and its adjustor had a conflict of interest with respect to the claim of all three applicants. Among other things, the applicants sought an order to (i) disqualify Dominion's counsel and its adjuster from handling the applicants' claims, and (ii) require Dominion to retain separate counsel and adjusters to handle the claims of each applicant.

[12] The "essential facts" upon which the applicants relied in support of their motion were "undisputed": Initial Decision, at para. 29. Based on those facts, the applicants alleged the improper sharing and commingling of information with respect to their claims, as set out in the Initial Decision at paras. 29-24 (relating to the adjuster) and paras. 38-41 (relating to Dominion's counsel).

[13] In the Initial Decision, at para. 63-64, the Tribunal adjudicator (Vice-Chair Theresa McGee) dismissed the applicants' motion, finding that the applicants had not established a factual and legal basis for a breach of duties of privacy and confidentiality that warranted disqualification of Dominion's adjuster and counsel. Among other things, the Tribunal found that under the terms of the Application for Accident Benefits (OCF-1) that the applicants signed when they made their claims, the applicants consented to the pooling of information relating to their claims: Initial Decision, at para. 45-47.

[14] In the Reconsideration Decision, the Tribunal adjudicator (Vice-Chair E. Louise Logan) dismissed the applicants' Request for Reconsideration of the Initial Decision. The Tribunal relied on r. 18.1 of the *Licence Appeal Tribunal, Animal Care Review Board, and Fire Safety Commission Common Rules of Practice and Procedure, Version 1 (October 2, 2017)*[1] ("*Common Rules*"), which provides that the Tribunal may, upon a party's request, "reconsider any decision of the Tribunal that finally disposes of an appeal" (emphasis added). An "appeal" is defined as including an application or a claim: *Common Rules*, r. 2.1. Since the underlying proceeding remained ongoing, the Tribunal would not entertain the Request for Reconsideration: Reconsideration Decision, at paras. 3-5.

C. Application for judicial review

[15] The applicants bring an application for judicial review of the Initial Decision. In their application, the applicants submit that the Tribunal erred in law, including by finding that there was no breach of privacy or confidentiality and no conflict of interest. They seek a declaration that (i) Dominion and its counsel have breached each applicant's privacy and confidentiality, and (ii) Dominion's counsel is in an actual or potential conflict of interest and should be removed as Dominion's counsel.

[16] The applicants also submit that the court should exercise its jurisdiction to hear and determine the application on its merits, rather than leaving the matter to be determined by way of challenge to the final orders of the Tribunal disposing of their accident benefit applications.

III. Legal principles

A. Jurisdiction

[17] In support of their submissions on jurisdiction, the applicants rely on the Court of Appeal decision in *Yatar v. TD Insurance Meloche Monnex*, 2022 ONCA 446 ["*Yatar CA*"], leave to appeal allowed, [2022] S.C.C.A. No. 310. In that case, the appellant brought an unsuccessful application before the Tribunal to determine whether she was statute-barred from challenging a denial of her claims for accident benefits under *SABS*. The appellant brought both an appeal and a judicial review application before the Divisional Court, challenging the Tribunal's decision.

[18] In its decision (reported at 2021 ONSC 2507;157 O.R. (3d) 337 (Div. Ct.)) ["*Yatar DC*"], the Divisional Court dismissed both the appeal and the judicial review application. At para. 24, the court noted that it had jurisdiction to hear the appeal on a question of law only: *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 112, Sched. G ("*LAT Act*"), s. 11(6). The court found that there was no error of law and dismissed the appeal on that basis: *Yatar DC*, at para. 32.

[19] With respect to the judicial review application, the Divisional Court recognized that a statutory appeal on questions of law "does not deprive this court of jurisdiction to consider other aspects of a decision in judicial review proceedings": *Yatar DC*, at para. 36. However, the court decided to exercise its discretion to dismiss the judicial review application. In reaching that conclusion, the court considered the following factors:

a. The *SABS* statutory scheme, which included the Tribunal's exclusive jurisdiction at first instance over disputes under *SABS* and a statutory appeal right restricted to questions of law: at para. 41;

b. The availability of an adequate alternative remedy, the Tribunal's reconsideration power, that applied in that case (since the decision under review was a final decision) and provided an "internal standard of review that is akin to correctness": at paras. 38-39, 42-43;

c. The nature of the alleged errors in that case, being alleged errors on questions of fact or mixed fact and law involving assessment of the evidence: at para. 44; and

d. Systemic difficulties associated with duplicative judicial reviews and appeals: at para. 45.

[20] Weighing those factors, the Divisional Court concluded that "judicial review of a LAT *SABS* decision is only available, if at all, in exceptional circumstances." The court found that there were no exceptional circumstances and dismissed the judicial review application: at para. 46

[21] In *Yatar CA*, the Court of Appeal upheld the Divisional Court's decision and dismissed the appeal. In doing so, the court considered whether the Divisional Court erred in limiting judicial review to "exceptional circumstances" in cases where there has been a statutory appeal from a Tribunal decision about *SABS*: *Yatar CA*, at para. 27. The court expressed the view that the use of the language "exceptional circumstances" was unfortunate in that context but went on to indicate that "it would only be in rare cases that the remedy of judicial review would be exercised": *Yatar CA*, at para. 35. Put another way, "there would have to be something unusual about the case to warrant resort to the discretionary remedy of judicial review, given the [*SABS*] statutory scheme", which includes "the right to reconsideration of the Tribunal's preliminary decision and the statutory right of appeal from decisions of the Tribunal on questions of law": *Yatar CA*, at para. 42.

[22] At para. 44, the court rejected the submission that the Divisional Court erred by exercising its discretion to refuse relief without first considering the merits of the judicial review application. The Court of Appeal found that the "court's discretion with respect to judicial review applies both

to its decision to undertake review and to grant relief", relying on previous case law that included *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 42.

[23] At para. 45, the Court of Appeal went on to state as follows:

> I agree with the Divisional Court's approach, which essentially concluded that judicial review should be restricted to those rare cases where the adequate alternative remedies of reconsideration, together with a limited right of appeal, are insufficient to address the particular factual circumstances of a given case. What constitutes such a rare case is for the Divisional Court to determine on a case-by-case basis.

[24] At para. 47, the court also noted as follows:

> It remains true that it will only be a rare case where the remedy of judicial review will be properly resorted to, given the alternative remedies that are available to an unsuccessful party. Those alternative remedies will be, in the vast majority of cases, "adequate in all the circumstances to address the applicant's grievance": *Strickland*, at para. 42.

[25] At para. 48, the court also found that the Divisional Court's use of the words "if at all" in exceptional circumstances was unfortunate and unnecessary, noting that in that context "judicial review is always available. The pertinent question is whether it is appropriate, in any given case, to exercise the discretion to hear and determine that judicial review."

[26] The applicants submit that the Divisional Court has jurisdiction to hear and determine the judicial review of the Initial Decision, given that the alternative remedies of reconsideration and appeal are not available with respect to an interlocutory decision of the Tribunal: see *Common Rules*, r. 18.1; *Penney v. The Co-operators General Insurance Company*, 2022 ONSC 3874, 25 C.C.L.I. (6th) 305 (Div. Ct.), at para. 26[2]. There is no dispute that the Initial Decision is an interlocutory order, since it does not finally dispose of the underlying proceedings before the Tribunal or a substantive issue or claim in that proceeding: see *Penney*, at para. 6.

[27] There is also no dispute that the Divisional Court has jurisdiction to hear and determine this judicial review application, in its discretion: see *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, ss. 2(1), 2(5), 6(1). The pertinent question is whether it is appropriate to exercise the discretion to hear and determine the judicial review in this case: *Yatar CA*, at para. 48.

B. Prematurity

[28] In support of their submission that this judicial review application should be dismissed as premature, the respondents rely on previous case law that provides that unless there are exceptional circumstances, the court will generally decline to consider an application for judicial review until the underlying tribunal proceeding has been completed. The rationale for this principle was summarized in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332, at paras. 31-32 (quoted with approval by the Court of Appeal for Ontario in *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561, at para. 69), as follows:

> Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the

> administrative process anyway. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge. [Citations omitted.]

[29] The prematurity principle has been consistently applied by the Divisional Court on judicial review from interlocutory tribunal decisions and was recently summarized in *Gill v. College of Physicians and Surgeons*, 2021 ONSC 7549, at para. 31 (Div. Ct.), as follows:

> This court has repeatedly held that absent exceptional circumstances, applications for judicial review of decisions of administrative bodies should not be brought until the end of the tribunal's proceedings and after the party seeking review has exhausted all available effective remedies within the administrative scheme: *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 1993 CanLII 3430 (ON SCDC), 11 O.R. (3d) 798, 99 D.L.R. (4th) 738 (Div. Ct.). The rationale for this principle is to avoid a piecemeal approach to judicial review, to allow administrative matters to run their full course before the tribunal, and to have all legal issues arising from the proceeding considered together at their conclusion.

[30] Previous cases have also indicated that while courts may exercise their discretion to entertain a premature judicial review in "exceptional circumstances", that is a high bar to establish. As stated in *C.B. Powell*, at para. 33:

> Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception.... Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high.... Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted.... [Citations omitted.]

[31] Similarly, in *Kadri v. Windsor Regional Hospital*, 2019 ONSC 5427 at para. 59 (Div. Ct.), the court indicated as follows:

> Thus, the general rule is that resort to the courts by way of judicial review of interlocutory, procedural or evidentiary rulings will only be permitted in rare cases where "exceptional circumstances" exist. The bar is very high. Assertions of bias, procedural unfairness, breach of natural justice and lack of jurisdiction do not give rise to an automatic right to judicial review. [Emphasis added.]

[32] As well, in *Lourenco v. Hegedus*, 2017 ONSC 3872 (Div. Ct.), at para. 6, the court stated that early judicial review "is the rare exception, not the rule, and will only be permitted in rare cases where the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion" (emphasis added).

[33] Previous case law also indicated that it is not an exceptional circumstance that the tribunal hearing will need to be conducted again if the court ultimately overturns the tribunal's final decision. That possibility always exists in a premature judicial review and is generally outweighed by the benefits of allowing the tribunal proceeding to run its course. In *Pafco Insurance Company v. Sahadeo*, 2022 ONSC 328 (Div. Ct.), at paras. 13-14, the court emphasized that the potential for

a successful appeal from the tribunal's final decision is insufficient to establish exceptional circumstances:

> Administrative tribunals make evidentiary rulings in the ordinary course of their work. The impact of those rulings is often potentially material. If this case does not offend the principle of prematurity, then appeals would be permitted in the ordinary course from interlocutory rulings – all a party would have to establish to interrupt the proceedings below is that the effect of the impugned ruling could matter to it in the final result, and that there is an arguable basis for the appeal. Permitting interlocutory appeals in this manner could render the underlying proceedings interminable.
>
> The appellant's submissions focus on the merits of its appeal. They do not address the jurisprudence as to what constitutes "exceptional circumstances" to overcome the prematurity principle. Having an arguable, even a strong, appeal is not sufficient to establish exceptional circumstances.
>
> [Emphasis added.]

IV. Analysis and conclusion

[34] The applicants submit that the facts and circumstances of this matter make it one of the rare cases in which judicial review of an interlocutory decision should be permitted to proceed. They say that the absence of alternative remedies of reconsideration and appeal leave no alternative to a judicial review application that would be sufficient to address the unique circumstances of this case. They also submit that deferring review of the Initial Decision until the underlying Tribunal applications are determined may result in the need to rehear and redetermine five applications for three applicants, resulting in needless delay and inefficiency. The applicants also argue that the continuing improper commingling and sharing of information by Dominion and its counsel and the continued involvement of conflicted persons would result in irreparable prejudice to the applicants that may be averted by hearing and determining the early judicial review of the Initial Decision.

[35] I do not agree.

[36] When an applicant seeks early judicial review of an interlocutory administrative decision, the burden is on the applicant to justify departure from the usual approach of waiting until the underlying proceedings are complete. The bar to be met is a high one, whether expressed as a "rare case" or "exceptional circumstances". I have concluded that in either case, the applicant have not met that burden.

[37] Contrary to applicants' submission, this is not a case where the applicants have no effective alternative to early judicial review. It is true that at this stage the applicants have no access to reconsideration (*Common Rules*, s. 18.1) or appeal (*LAT Act*, s. 11(6); *Penney*, at para. 26), but that is part of the *SABS* statutory scheme, which is entitled to deference: *Yatar CA*, at paras. 42-45; *Vavilov v. Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 24, 36. Once the underlying Tribunal applications are complete, the applicants will have access to reconsideration and to an appeal (on a question of law), consistent with the statutory scheme. The applicants would also have access to judicial review, subject to the court's discretion in a "rare case" as outlined in *Yatar CA*, at paras. 45, 47.

[38] I am also not persuaded that early judicial review is justified in the interest of avoiding delay and inefficiency. As noted in *Pafco*, at para. 13, even if the impact of an interlocutory ruling is potentially material, that fact (if established) does not necessarily outweigh the benefits of allowing the underlying proceedings to run their course. While it is possible that a successful appeal may result in three Tribunal re-hearings in this case, I am not satisfied that result would

outweigh the benefits of waiting until the underlying proceedings are complete before addressing the applicants' challenge to the Initial Decision. In fact, there may not be any need for subsequent court proceedings at all, depending on the outcome of the Tribunal applications.

[39] As well, I do not agree that the applicants would suffer irreparable prejudice if the issues of improper information sharing and conflict of interest are not determined in an early judicial review.

[40] In *Penney*, at para. 31, the court found that dismissal of a motion to remove insurer's counsel in *SABS* proceedings did not constitute "exceptional circumstances" in that case. The court went on to note as follows: "The Tribunal found that the factual basis to show a conflict of interest had not been made out. This is not a situation where there is a fatally flawed proceeding and where the alleged deficiencies cannot be cured on an ultimate appeal."

[41] The Divisional Court made a contrary finding in *The Personal Insurance Co. Ltd. v. Jia*, 2020 ONSC 6361 (Div. Ct.), where the court stated it was exercising its discretion to hear and decide an appeal from the Tribunal's interlocutory decision that found that insurer's counsel had a conflict of interest in acting in both a priority dispute and benefits dispute for the same accident. The court stated that it exercised its discretion to do so on the basis that the conflict decision "is evasive of appeal and it is potentially a matter of general practice important in proceedings before LAT": *Jia*, at para. 15.

[42] On the issue of whether a motion to remove counsel constitutes exceptional circumstances, the foregoing cases may be reconciled on the basis that in each case, the court exercised its discretion to determine whether, in the particular circumstances of the case, early judicial intervention outweighed the benefits of following the usual practice of allowing the Tribunal proceeding to run its course.

[43] In all the circumstances, I am not persuaded that the applicants have met the high bar required to justify early judicial review. Analogous to the decision in *Penney*, the Tribunal found in the Initial Decision that there was no conflict of interest and no improper sharing of information. To the extent that there are "alleged deficiencies" arising from the Initial Decision, the applicants have not established that they "cannot be cured on an ultimate appeal." Put another way, the applicants have not established that the alleged prejudice to the applicants outweighs the benefits of a single court proceeding once the underling Tribunal proceedings are complete.

V. Disposition

[44] Accordingly, I would dismiss the application for judicial review as premature.

[45] The parties have advised that they have resolved the issue of costs. Therefore, there will be no costs order.

_____

Lococo J.

I agree: _____

R.S.J. Edwards

I agree: _____
Backhouse J.

Date of Release: October 18, 2023

CITATION: Mansuri v. Dominion of Canada General Insurance Company, 2023 ONSC 5764
DIVISIONAL COURT FILE NO.: 600/22
DATE: 20231018

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

R.S.J. Edwards, Backhouse and Lococo JJ.

BETWEEN:

MURTAZA MANSURI, JAVID MANSURI and MOHAMMAD MANSURI

Applicants

– **and** –

THE DOMINION OF CANADA GENERAL INS URANCE COMPANY, SCHULTZ FROST LLP a nd THE LICENCE APPEAL TRIBUNAL

Respondents

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date of Release: October 18, 2023

[1] The *Common Rules* were made pursuant to the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 25.1, and the *Licence Appeal Tribunal Act, 1999*, S.O. 1999, c. 112, Sched. G, s. 6. For proceedings before the *Licence Appeal Tribunal*, the Common Rules have been superseded by the *Licence Appeal Tribunal Rules*, effective August 21, 2023.

[2] There are other decisions that suggest (contrary to *Penney*) that the Divisional Court has authority to hear an appeal from an interlocutory order of the Tribunal under s. 11(6) of the *LAT Act* in exceptional circumstances: *Taylor v. Aviva Canada Inc.*, 2018 ONSC 4472 (Div. Ct.), at para. 19; see also *Kahissay v. Intact Insurance*, 2022 ONSC 6357 (Div. Ct.); *The Personal Insurance Co. Ltd. v. Jia*, 2020 ONSC 6361 (Div. Ct.). It is not necessary to resolve this issue for purposes of the current application, since doing so would not affect the result.

Tab 211

CanLII

Mansuri v Dominion of Canada General Insurance Company, 2022 CanLII 138547 (ON LAT)

Source:	Ontario Licence Appeal Tribunal
Date:	2022-09-28
File number:	21-011918/AABS; 20-002907/AABS; 21-012045/AABS; 20-001365/AABS; 21-006952/AABS
Citation:	Mansuri v Dominion of Canada General Insurance Company, 2022 CanLII 138547 (ON LAT), <https://canlii.ca/t/jztv5>, retrieved on 2026-01-18

Licence Appeal Tribunal File Number: 21-011918/AABS
20-002907/AABS
21-012045/AABS
20-001365/AABS
21-006952/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Murtaza Mansuri

Applicant

and

The Dominion of Canada General Insurance Company

Respondent

MOTION DECISION

ADJUDICATOR: Theresa McGee, Vice-Chair

APPEARANCES:

For the Applicant: Ryan Naimark, Counsel

For the Respondent: Kadey B. Schultz, Counsel

Motion heard in writing and via videoconference on: **August 24, 2022**

BACKGROUND

[1] Murtaza Mansuri, Javid Mansuri, and Mohammad Mansuri ("the applicants") are brothers. Murtaza Mansuri was involved in two separate accidents, one on April 28, 2016, and the other on January 6, 2018. Javid Mansuri and Mohammad Mansuri were involved in an accident on May 4, 2018. Each of the applicants sought benefits pursuant to the applicable version of the *Statutory Accident Benefits Schedule*, *Effective September 1, 2010.**[1]***

[2] The applicants were denied certain benefits by the respondent, and they applied individually to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal"). The applicants currently have five applications before the Tribunal arising from the 2016 and 2018 accidents.

MOTION

[3] On March 1, 2022, the applicants filed a Notice of Motion concerning all five files. The Notice of Motion requested the following relief:

A. a declaration that the respondent and Schultz Frost LLP breached its duties of privacy and confidentiality owed to Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri, respectively;

B. a declaration of a conflict of interest, or alternatively potential conflict of interest on the part of Schultz Frost LLP and Ms. Policelli in all three of the herein claimants' matters; and

C. an order that Schultz Frost LLP and Ms. Policelli are disqualified from handling the herein claimants' matters and that separate counsel and adjusters are required to handle each separate matter.

RESULT

[4] The applicants' motion is denied.

ANALYSIS AND REASONS

Request to amend Notice of Motion

[5] At the commencement of the oral motion hearing on August 24, 2022, the Tribunal invited supplementary submissions from the parties on the issue of whether the Tribunal has authority to grant declaratory relief. Oral argument was held down to give the parties time to address this issue.

[6] During the applicants' supplementary submissions, their counsel requested leave to amend their Notice of Motion, adding the following forms of relief to the existing request:

> D. an order removing Schultz Frost LLP as counsel for Travelers / The Dominion General Insurance Company of Canada, as a result of a conflict of interest and or a breach of privacy and confidentiality; and
>
> E. an order that Ms. Policelli be disqualified from adjusting and handling the accident benefits claims pertaining to Murtaza Mansuri, Javid Mansuri and Mohammad Mansuri as a result of a conflict of interest and/or a breach of privacy and confidentiality.

[7] The respondent opposed this request.

[8] After hearing from both parties, I denied the request to amend orally, with written reasons to follow. These are my reasons.

[9] First, the Tribunal has a duty to adjudicate matters justly, cost-effectively, and on their merits. The underlying applications range in case age from approximately 350 to 900 days. All adjudicative events pertaining to these matters have been stayed pending the result of this motion. Two oral hearings have been adjourned, and a third is scheduled to proceed within a month. Permitting the applicants to redefine the relief requested at this late stage in the motion proceedings would have necessitated further procedural accommodations to facilitate the respondent's full participation. This would have resulted in further and unacceptable delay to the underlying disputes.

[10] Second, the substance of the proposed amendments to the Notice of Motion would have changed little in the Tribunal's analysis. In his own submissions on the request to amend, counsel for the applicants characterized the changes to the requested relief as "semantic." I agree. Paragraphs D. and E. in the proposed Amended Notice of Motion essentially re-state paragraph C. in the original Notice of Motion. The applicants' requests for disqualification and/or removal of counsel and the adjuster are, in essence, the same relief expressed in different terms.

[11] Third, if the Tribunal were to find that it lacked jurisdiction to issue the declaratory relief sought, the proposed amendments would do little to preserve the applicants' request for a remedy. Merely omitting the word "declaration" does not change the substance of the remedy. However, as I explain below, I am satisfied that the Tribunal has the authority to disqualify counsel where a conflict of interest can be established. And although I am not satisfied that the Tribunal has the jurisdiction to disqualify the adjuster, it is not because the Tribunal cannot, in principle, make declarations related to an insurer's handling of an accident benefits claim. I explain my reasons for these findings below.

Jurisdiction to issue relief sought

[12] Relying on the Ontario Court of Appeal's decision in *Stegenga v. Economical Mutual Insurance Company* ("*Stegenga*")[2], the applicants submit that the Tribunal has broad jurisdiction under s. 280 of the *Insurance Act,* RSO 1990, c I.8. to adjudicate disputes in respect of entitlement to, or quantum of, statutory accident benefits.

[13] The applicants submit that the Tribunal's authority to grant the requested relief is implied in the Divisional Court case of *The Personal Insurance Company v. Jia* ("*Jia*").[3] In *Jia*, the court upheld a reconsideration decision in which the Tribunal disqualified the insurer's counsel whom it found to be in a conflict of interest.

[14] The applicants submit the relief they seek relates to a dispute under the *Insurance Act* and, therefore, falls within the Tribunal's jurisdiction. The applicants also refer me to the Tribunal's authority under the *Statutory Powers Procedure Act*, RSO 1990, c S.22 ("*SPPA*") to make orders with respect to the procedures and practices that apply in a proceeding, and to the Tribunal's authority under the *Licence Appeal Tribunal Act, 1999*, SO 1999, c 12, Sched G ("*LAT Act*") to determine all questions of fact or law that arise in matters before it.

[15] The respondent submits that there is no statutory or common law authority for the relief the applicants seek. The respondent submits that the *Schedule* is silent on any declaratory power or ability to make findings on conflicts of interest. Relying on *Dominion of Canada General Insurance Company v. Ridi* ("*Ridi*"),[4] the respondent submits that one cannot impute information into legislative provisions that is not expressed therein and cannot read findings into case law. The respondent submits that it is improper to infer from *Jia* that the Tribunal possesses disqualification powers.

[16] The respondent submits that the case of *Raffaella de Rosa v. Wawanesa Mutual Insurance Company* ("*de Rosa*"),[5] demonstrates that no implied power to remove counsel for a conflict of interest exists. In *de Rosa*, the arbitrator found that the insurer's counsel had misused information, but no conflict of interest existed, and no disqualification order was made. The respondent submits that *de Rosa* supports its position that the appropriate remedy for improper information sharing is not removal of counsel, but an order that the parties comply with the prescribed process for the exchange of documents.

[17] The respondent also relies on the Tribunal's reconsideration decision in *M.I. v. Coseco Insurance Company*,[6] in which the Tribunal held that it lacks the jurisdiction to award declaratory relief when entitlement and quantum of benefits are not in issue. The respondent submits that there are no benefits in dispute that are tied to this motion, and that the applicants' request for relief cannot be characterized as falling within the scope of the Tribunal's jurisdiction. The respondent submits that the applicants are asking the Tribunal to make declarations akin to the "hypothetical" and "academic" issues which the Tribunal determined in *B.E. v The Personal Insurance Company and Ministry of the Ontario General (Ontario)**[7]*** that it lacked the jurisdiction to decide.

Findings on the jurisdictional issue

[18] The Tribunal is a statutory body. It is well settled that a statutory tribunal has no powers other than those it derives from legislation. The Supreme Court of Canada has long held that the exclusive jurisdiction of a statutory tribunal is subject to the residual discretionary power held by courts.[8] Because the Tribunal lacks inherent equitable jurisdiction, any authority to grant equitable remedies (such as declaratory relief) must be provided for in legislation.

[19] I am persuaded by the applicants' submission that an order disqualifying counsel for a conflict of interest falls within the Tribunal's broad authority to decide disputes

under s. 280 of the *Insurance Act*. In *Stegenga*, by which I am bound, the Court of Appeal held that the Tribunal has exclusive jurisdiction over a dispute if its "essential character" relates to entitlement to statutory accident benefits and their amount.[9] The Court also held that disputes involving an insurer's conduct in handling a claim satisfy this requirement.[10]

[20] This motion calls into question the respondent's handling of the applicants' claim, and I find that its essential character relates to a claim for accident benefits. I am unpersuaded by the respondent's submission that the Tribunal lacks the power to grant declaratory relief in this case because the motion itself does not involve determination of entitlement to or quantum of benefits. The underlying and ongoing disputes between the applicants and the respondent squarely engage questions of entitlement and quantum, and the outcome of this motion will impact the course of these underlying proceedings. The questions before me are neither hypothetical nor academic; they have direct bearing on the conduct of the litigation before this Tribunal.

[21] I find that no excess of jurisdiction would flow if I were to order the relief sought in this motion. The Divisional Court in *Jia* took no issue with the Tribunal's decision to remove counsel based on a conflict of interest. I am not persuaded by the respondent's submission that it is impermissible to "read in" findings to case law that are not explicitly expressed, or that the Court of Appeal's decision in *Ridi* stands for such a proposition. *Ridi* was a case about the principles of statutory interpretation and how ambiguity in legislative provisions should be resolved. The court's analysis in that case does not intersect with the jurisdictional issue before me. The inference the applicants ask me to draw from *Jia* is sound: If the Tribunal had exceeded its jurisdiction by declaring a conflict of interest and disqualifying counsel, the Divisional Court would have corrected that error when it directly addressed the matter on appeal.

[22] It is not enough to satisfy the basic common law requirement that a dispute has an essential character falling within the Tribunal's jurisdiction. The Tribunal's powers are subject to limits. Its orders must comport with its enabling legislation. The way an insurer staffs its claims is not a matter of Tribunal procedure or practice. As such, the Tribunal's power under s. 23 of the *SPPA* to make orders to control the conduct of its proceedings is not engaged. Compelling an insurer to remove a specific adjuster from handling a claim is not necessary or expedient for the Tribunal to carry out its duties, so the Tribunal's order-making authority under s. 3(2) of the *LAT Act* likewise does not apply. In the absence of statutory authority to make such an order, I find that the Tribunal lacks the power to disqualify an adjuster from handling a claim. If I am wrong about the scope of the Tribunal's authority, and the Tribunal does have the power to disqualify an adjuster under the *SPPA* and the *LAT Act*, I would decline to exercise that authority on substantive grounds, for reasons I explain below.

[23] The *Schedule* is not a complete code governing the relationship between insurers and insured persons. That relationship his also governed by private law obligations and legislative schemes outside this Tribunal's jurisdiction. The applicants submit that the alleged misconduct of the adjuster in this case could amount to civil liability for intrusion upon seclusion, a common law tort established by the Ontario Court of Appeal in the 2012 case, *Jones v. Tsige*.[11] They also submit that the respondent disclosed confidential information several weeks before obtaining authorization to

do so under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*").

[24] If the applicants believe that the adjuster's conduct constitutes a civil wrong, the appropriate forum to pursue a remedy is the civil courts, not this Tribunal. If the applicants maintain that the respondent has breached its obligations under *PIPEDA*, the federal Office of the Privacy Commissioner has jurisdiction to hear such a complaint.

[25] The Tribunal routinely adjudicates questions of insurer conduct under s. 10 of Regulation 664. If the applicants wish to pursue a remedy from the Tribunal, it is open to them to claim an award for unreasonable withholding or delay of benefits in the underlying proceedings.

[26] To conclude, the applicants have satisfied me that the Tribunal can disqualify counsel if it determines that a conflict of interest exists. Whether characterized as a "finding" or a "declaration," I find that an order disqualifying counsel is a permissible exercise of the Tribunal's authority to decide accident benefits disputes and make procedural orders in accordance with the *Insurance Act*, the *LAT Act*, and the *SPPA*. I further conclude that the Tribunal lacks the authority to bar an adjuster from handling a disputed accident benefits claim, or, in the alternative, that the facts before me do not warrant such an order.

The basis of the applicants' request for a remedy

[27] The applicants submit that the respondent has engaged in "deep, entrenched, pervasive and intentional" sharing, commingling, and reconciling of evidence between their claims files to defend itself and assess exposure for payment of benefits. In so doing, the applicants submit the respondent has breached its duty to keep their information private and confidential, and that their counsel's involvement in this information sharing constitutes disqualifying conduct.

[28] The applicants concede that it is not necessarily a conflict for the same counsel to act for an insurer in related accident benefits claims. Rather, they submit that the unique facts of this case give rise to a finding of impropriety.

Investigator and adjuster conduct

[29] The essential facts are undisputed. The applicants reside in a shared three-bedroom apartment. They share common areas including a kitchen, living room, bathroom, and den. Each brother has claimed accident benefits from the respondent separately. Both Murtaza Mansuri and Javid Mansuri have received attendant care and housekeeping/home maintenance services from personal support workers sourced by Pro Choice Medical Ltd. ("Pro Choice"). They have claimed reimbursement for those services. In the underlying proceedings, the parties dispute whether those expenses are payable.

[30] On October 8, 2021, the respondent's adjuster, Ms. Nikki Policelli, entered a log note in Javid Mansuri's file, which she was adjusting. The log note stated that she had spoken with the respondent's investigator, Ms. Sandra McSweeney, and advised her that the details submitted by Murtaza and Javid Mansuri in support of their attendant care and housekeeping claims appeared to show a "potential

overlap in HH [housekeeping/home maintenance] and ATC [attendant care]" that the documentation on file had not clarified.

[31] On October 11, 2021, Ms. McSweeney sent two separate emails to the personal support workers at Pro Choice who had provided attendant care and housekeeping/home maintenance services to Murtaza and Javid Mansuri, respectively. The emails requested "additional information/clarification" on services provided to the brothers "at the same times on the same dates of service" including dusting, window cleaning, vacuuming, and disinfecting common areas.

[32] Ms. Policelli began adjusting Murtaza's claim (in addition to Javid's) on October 27, 2021. On November 3, 2021, Ms. Policelli entered a log note requesting that Ms. McSweeney send the results of her recent investigation into the expenses Murtaza and Javid Mansuri had claimed for attendant care and housekeeping/home maintenance "so that I can review and consider if payment is reasonable at this time." She asked that the results be sent "separately, of course."

[33] On December 8, 2021, the respondent submitted three Information Disclosure Request Forms seeking authorization to disclose claims information, investigation information, and personal information about the applicants in accordance with the *PIPEDA*. The forms set out the following rationale for the requests: "There is suspected duplication of proposed/submitted goods, services and benefits contrary to the applicable Statutory Accident Benefits Schedule (SABS)".

[34] On December 23, 2021, Cyprian Kebbianyor, Director, Compliance and Chief Privacy Officer with Travelers Canada emailed Ms. Sandra McSweeney stating, "The requests are approved. Based on my conversations with you and Nikki, I have deduced that you and Nikki perceive an attempt at contravening a law."

[35] The applicants submit that the respondent knew its inquiry into the "potential overlap" between Murtaza's and Javid Mansuri's attendant care and housekeeping/home maintenance claims was improper. They submit that Ms. McSweeney emailed Pro Choice separately on October 11, 2021 to "demonstrate to the claimants and ultimately paper its file in such a manner that the investigations were separate." They submit that Ms. Policelli's remark in the November 3, 2021 log note that the results of the investigation should be sent "separately, of course" demonstrates that she knew it was a breach of privacy and confidentiality to be reconciling the brothers' claim information, and did so surreptitiously. "She was tempted [to look at the contents of both files]," they submit, "and she actually did it." The applicants underscore that at the time Ms. Policelli began referring to both files in her log notes, she was only adjusting Javid Mansuri's claim, and not Murtaza's. They submit that when Ms. Policelli began jointly adjusting these two separate matters, she shared information between the files "without discretion."

[36] The respondent submits that there is nothing improper about its handling of the applicants' claims. It submits that the applicants gave express consent for it to collect, share, and disclose their information when they signed OCF-1s to apply for accident benefits.

[37] The respondent submits that its email correspondence with the personal support workers in October 2021 was an attempt to properly determine the amount of attendant care payable to Murtaza and Javid Mansuri. The respondent submits

that there is nothing wrong with an adjuster entering log notes in a file they are not actively adjusting. It submits it is only obligated to notify a claimant when a new handling adjuster is assigned so the claimant knows who to correspond with.

The conduct of respondent's counsel

[38] The applicants submit that the improper sharing of information by the respondent has "infiltrated" not only its investigation and adjusting of their claims, but its defence of the claims in this litigation. On December 9, 2021, the applicants' then-counsel, Mr. Jordan Dahan, had a telephone conversation with Ms. Kadey Schultz, who had been recently retained to defend the respondent in all three brothers' Tribunal matters. Mr. Dahan gave evidence that during their conversation, Ms. Schultz explained to him that "establishing liability for payment for attendant care and housekeeping services was more complex and thus delayed in these claims […] because there were two personal support workers in the same residence, from the same attendant care company, providing similar attendant care and housekeeping services to Murtaza Mansuri and Javid Mansuri separately, but during the same times."

[39] Then, in a December 22, 2021 email to applicants' counsel about the scheduling of an examination under oath, Ms. Schultz's legal assistant referred to Javid and Murtaza's matters as the "companion matter[s]".

[40] On January 21, 2022, the respondent served productions on the applicants' counsel via email. The subject line of the letter was "Re: Dominion and Mansuri (Murtaza)(LAT)". Among the productions listed was the "Complete Surveillance file of Larrek Investigations". The surveillance file is not before me. However, the uncontested evidence of Mr. Dahan is that "[w]ithin the surveillance produced for Murtaza Mansuri, Schultz Frost LLP had served surveillance that was specifically attributable to Javid Mansuri, only. It was not that Javid Mansuri was merely captured in the surveillance. The surveillance was specifically for Javid Mansuri's separate matter."

[41] On January 21, 2022, the respondent's counsel sent email correspondence with the subject line "Dominion and Mansuri (Murtaza)(LAT)" requesting production of an Assessment of Attendant Care Needs ("Form 1") dated April 29, 2019. However, the Form-1 of that date was conducted in relation to Mohammad Mansuri, not Murtaza.

[42] The applicants submit that the disclosure of Javid Mansuri's surveillance within Murtaza Mansuri's matter and the request for Mohammad Mansuri's Form 1 in an email about Murtaza's matter demonstrate that Schultz Frost LLP had confused the evidence between the three separate matters due to their commingled handling.

[43] The respondent submits that it disclosed the complete surveillance file of Larrek Investigations in Murtaza Mansuri's matter to comply with a production order of the Tribunal. It submits that if surveillance of Javid Mansuri had been obtained in error, the respondent still had an obligation to produce the entire contents of the file. If surveillance was captured of the wrong claimant, then it simply has no bearing on the matter.

[44] The respondent submits that pooling information between claims is permissible to determine the proper amount of payment and to prevent, detect, and suppress

fraud, through the consent obtained in the OCF-1. The applicants submit that there has been no allegation of fraud in this case and the respondent cannot now allege fraud with no evidence to support such an allegation. The respondent submits that its investigation is ongoing and the proper place to raise the issue of fraud is at a hearing on the merits.

Findings on the merits

[45] I agree with the respondent that the applicants gave consent for the respondent to use their file information as it has done when they signed OCF-1s to apply for accident benefits.

[46] The signature page of the respective OCF-1s signed by each of the three brothers as a condition of applying for accident benefits states:

> "I UNDERSTAND that you, and persons acting for you, will collect personal information and personal health information about me that is related to my claims for accident benefits […] and that all such information will be collected directly from me or from any other person with my consent.
>
> […]
>
> I ALSO UNDERSTAND that the information described above will be collected and used only as reasonably necessary for the purposes of:
>
> - **Investigating my claims and processing my claims** as required by law, including the Ontario Automobile Policy;
>
> - **Obtaining or verifying information relating to my claims in order to determine entitlement and the proper amount of payment**;
>
> […]
>
> - **Preventing, detecting and suppressing fraud**;
>
> […]
>
> I ALSO UNDERSTAND that you, and persons acting for you, **may disclose this information to the following persons** or organizations, who may collect and use this information only as reasonably necessary to enable you or them to carry out the purposes described above:
>
> […] **insurance adjusters**; […] **health care professionals**; […] **solicitors**; […] **databases or registers used by the insurance industry to analyze and check information provided against existing information**; […].
>
> I ALSO UNDERSTAND that you, and persons acting for you, **may pool this information with information from other sources** and may analyze this information **for the limited purpose of preventing, detecting or suppressing fraud**.
>
> […]
>
> **I CONSENT** […] to you collecting, using and disclosing this information in the manner described above, but no more of such information than is reasonably

necessary to meet the legitimate purposes of such collection, use or disclosure.

[…]

I AM ALSO AWARE that you, and persons acting for you, may be required or permitted by law **to disclose information to others without my knowledge or consent**."

[Emphasis added.]

[47] I find that the emails of October 11, 2021 disclosed information to the applicants' personal support workers, who are health care professionals, for the purposes of investigating the applicants' claims and obtaining or verifying information to determine the proper amount of payment. The emails disclosed only as much information as was necessary for that purpose, including specific line items from the expense claims that appeared to overlap. The applicants expressly consented to this kind of disclosure in the OCF-1.

[48] I see no impropriety in Schultz Frost LLP's disclosure of surveillance capturing Javid Mansuri in relation to Murtaza Mansuri's matter. First, the disclosure was to a solicitor, a person authorized to receive disclosure under the OCF-1. Second, surveillance is not confidential personal health information. A claimant does not have a privacy interest in surveillance images or footage obtained in public areas.

[49] I accept the applicants' submission that Schultz Frost LLP's request for a Form-1 pertaining to one of the applicants in an email about another suggests that counsel may have confused the litigation files. However, no confidential information was disclosed in the January 21, 2022 email. In addition, I fail to see how references to the applicants' Tribunal matters as "related" or "companion matters" rises to the level of disqualifying conduct; even the applicants' submissions in support of this motion refer at paragraph 15 to the claims as "related."

[50] I find that the respondent's pooling of claim information between the applicants' files falls within the authorized scope of information sharing set out in the OCF-1. I am not persuaded that an insurer must formally allege or establish fraud to pool information with information from other sources and analyze it as described in the OCF-1. An insurer can legitimately engage in fraud prevention and detection without fraud ever having occurred. The use of the phrase "limited purpose" in the OCF-1 implies that an insurer cannot pool information from separate claims files gratuitously or for some improper purpose. However, if there is a reasonable basis to infer that fraud may be occurring or about to occur, then in my assessment the consent in the OCF-1 permits an insurer to collect, use, and disclose information as may be reasonably necessary to prevent, detect, and suppress it. Indeed, such pooling of information may assist an insurer in concluding that no fraud has taken place, permitting it to properly adjust the claim.

[51] In this case, Murtaza and Javid Mansuri submitted claims for expenses that, on their face, appeared to be potentially duplicative. Their invoices detailed similar services provided in common areas of their residence at the same times on the same days. In these circumstances, it was proper for the respondent to compare the documentation prepared by the service providers and to seek additional information from the applicants and their service providers to verify whether the amounts were payable. To be clear, I make no finding as to whether fraud has occurred in this matter. That is not a question I have been asked to decide, nor is it

within my authority to make such a determination. However, the evidence before me is enough to satisfy me that the respondent has complied with its confidentiality obligations, and that the applicants consented to the information sharing that has taken place in this case.

[52] The applicants submit that the consent they provided in the OCF-1s does not bar them from advancing a claim for disqualification due to a conflict of interest. They submit that the use of information in a manner that would constitute a conflict of interest cannot be considered authorized under the OCF-1's broad language. On this point, they rely on *Riley et al. v. Director of MVAC, et al*. ("*Riley*")[12] and *Dervisholli et al. and Cervenak and State Farm* ("*Dervisholli*").[13]

[53] This case does not engage the same principles as *Dervisholli* and *Riley*. In both of those cases, the accident benefits claimant's consent to information sharing did not bar the disqualification of counsel because information and documentation was being shared for an unauthorized purpose: to defend the tortfeasor against the accident benefits claimant in the tort action.

[54] This is a critical distinction. In both *Riley* and *Dervisholli*, the insurer (or the Motor Vehicle Accident Claims Fund acting as the "effective insurer" in the case of *Riley*) was in a conflict of interest because it was openly using documents and information obtained from the accident benefits claimant to defend a third-party tortfeasor in a separate tort action. The accident benefits claimants were under a duty of mandatory disclosure with respect to their personal health information, and the insurer's duty of good faith toward them conflicted with its duty to defend the tortfeasor. No such adverse position exists when counsel acts for an insurer defending related accident benefits claims.

[55] The applicants submit that the Divisional Court extended the principles from *Dervisholli* in *Jia*.[14] In *Jia*, the court upheld a Tribunal decision to disqualify the insurer's counsel who tendered transcript evidence that had been compelled in a priority dispute on behalf of the insurer in an accident benefits dispute. The respondent submits that the conflict in *Jia* arose in a setting where counsel had a "dual role" (acting in the priority dispute and in the accident benefits matter). The respondent submits that the concern about an insurer having dual or conflicting roles is absent in this case.

[56] Insofar as *Jia* extended the holding in *Dervisholl,* that extension was incremental and fact specific. The court declined to find, as a matter of law, that counsel acting for an insurer is necessarily in a conflict when acting for the same insurer in a priority dispute and an accident benefits matter arising from the same accident.

[57] The applicants submit that *de Rosa* dispenses with the notion that the OCF-1 authorizes information sharing between accident benefits files. However, the *de Rosa* case is distinguishable from the present one because the insurer was seeking to tender a medical report detailing confidential health information about one accident benefits claimant in an arbitration about the claimant's spouse, who had been in the same accident and had claimed accident benefits from the same insurer. The arbitrator found that the insurer's use of confidential information did not fall under the legitimate purposes set out in the consent in the OCF-1.

[58] In this case, the only disclosure of information was Ms. McSweeney's emails to the personal support workers in October 2021 itemizing the housekeeping services

that appeared to be duplicative and naming one brother in correspondence regarding the other. Health practitioners are authorized recipients of disclosure in the OCF-1. I find that the disclosure was for the purpose of investigating and verifying the applicants' claims to determine the proper amount of payment and was therefore done with the consent of the applicants.

[59] The applicants submit that the respondent's own Access to Personal Information Policy prohibits the use of information except with consent or as required by law. The policy does little to assist the applicants, as the respondent's use of their information occurred with their express consent and in accordance with the law.

[60] The applicants submit that even if they gave consent in the OCF-1, consent is revocable. Mr. Dahan's affidavit evidence is that if the Tribunal finds that the applicants consented to the information sharing, they revoke that consent. While I accept that it is open to an accident benefits claimant to revoke his consent to information sharing, to do so would effectively constitute a withdrawal of a claim for accident benefits, as a completed and signed OCF-1 is a precondition for entitlement to statutory accident benefits under s. 32 of the *Schedule*.

[61] The applicants submit that the respondent's Information Disclosure Request Forms were approved in December 2021, and that the information sharing began as early as October 2021. I note that the Chief Privacy Officer was aware that the request was for the "ongoing" release of information, as this language is present in the rationale for all three requests. The applicant has not directed me to any legislative provision that requires authorization in advance for the use of information consented to in the OCF-1. In my view, the signed OCF-1 provides sufficient authorization for the respondent's handling of the applicants' information, and I am not satisfied that the disclosure justifies an order disqualifying an employee or agent of the respondent.

[62] The test for disqualifying conflict of interest is set out in *MacDonald Estate v. Martin* ("*MacDonald Estate*").[15] The legal principles animating that test do not apply to the present case. *MacDonald Estate* addresses the conflict that may arise when a lawyer, acting against a former client, uses confidential information obtained in the context of the solicitor-client relationship to the detriment of the former client. Here, there is no solicitor-client relationship between the applicants and the respondent's counsel. Unlike in *Dervisholli*, where counsel for the insurer failed to separate the insurer's interests in the tort and accident benefits matters, the principles that the Supreme Court attempted balanced when it articulated the two-part test for a conflict of interest in *MacDonald Estate* are not engaged here.

[63] The issue before me is whether the conduct of the respondent constitutes a breach of its duties of privacy and confidentiality warranting the disqualification of its adjuster and counsel. The applicants have not established, on a balance of probabilities, a factual and legal basis for the relief they seek.

ORDER

[64] The applicants' motion is denied. The respondent's counsel may continue to act in the five underlying Tribunal matters. All adjudicative events that had been stayed pending the outcome of this motion may proceed as scheduled.

OTHER PROCEDURAL MATTERS

[65] If the parties resolve the issue(s) in dispute prior to the hearings in these matters, the applicants shall immediately advise the Tribunal in writing.

Released: September 28, 2022

_____
Theresa McGee, Vice-Chair

---

[1] O. Reg. 34/10.
[2] 2019 ONCA 615.
[3] 2020 ONSC 6361.
[4] 2022 ONCA 564.
[5] 2017 ONFSCDRS 161 (CanLII).
[6] 2021 CanLII 40712 (ON LAT).
[7] 2020 CanLII 69925 (ON LAT).
[8] See *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929 at para. 67.
[9] See also *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 SCR 929.
[10] *Stegenga* at para. 53.
[11] 2012 ONCA 32 (CanLII).
[12] 2021 ONSC 2123.
[13] 2015 ONSC 2286.
[14] 2020 ONSC 6361.
[15] 1990 CanLII 32 (SCC), [1990] 3 SCR 1235.

Tab 212

CanLII

Mosa v BelairDirect Insurance Company, 2022 CanLII 11164 (ON LAT)

Source:	Ontario Licence Appeal Tribunal
Date:	2022-01-11
File number:	21-011987/AABS
Citation:	Mosa v BelairDirect Insurance Company, 2022 CanLII 11164 (ON LAT), <https://canlii.ca/t/jmjgr>, retrieved on 2026-01-18

Citation: Mosa v. BelairDirect Insurance Company, 2022 ONLAT 21-011987/AABS-M

Licence Appeal Tribunal File Number: 21-011987/AABS

In the matter of an Application for Dispute Resolution pursuant to subsection 280(2) of the *Insurance Act,* RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

Mekonen Mosa

Applicant

and

BelairDirect Insurance Company

Respondent

DECISION

ADJUDICATOR: **Ian Maedel, Vice Chair**

APPEARANCES:

For the Applicant: Michael Bishop, Counsel

For the Respondent: Oliver Gorman-Asal, Counsel

Genevieve Madill, Articling Student

November 17, 2021 and January 5, 2022

Motion heard via Teleconference on:

BACKGROUND

[1] The applicant was injured in an automobile accident on **December 4, 2020** and sought benefits pursuant to the Statutory Accident Benefits Schedule *Effective September 1, 2010.*

[2] The applicant was denied certain benefits and submitted an application to the Licence Appeal Tribunal - Automobile Accident Benefits Service ("Tribunal").

[3] A case conference has been scheduled for August 25, 2022.

MOTION

[4] On October 6, 2021, the applicant filed a Notice of Motion requesting that the Tribunal;

i. Compelling the respondent to provide particulars clarifying the statement made by Rebecca McPhee, Claims Representative, made in the email correspondence dated September 22, 2021.

[5] On November 15, 2021, the applicant filed a reply to the respondent's motion materials and requested the Tribunal grant the following relief:

ii. Exclude Heather Morrow from the motion and disregarding the motion material purportedly served by the respondent on applicant and the Tribunal dated November 8 ,2021.

Applicant's Position

[6] The applicant submits further particulars are required regarding Ms. McPhee's comments and the Job Site Analysis Report dated August 30, 2021. The particulars are required because the rationale for denying the applicant's ongoing claim for income replacement benefits is unclear. These particulars are necessary not only to permit the applicant to know the case to meet, but for the Tribunal to have a full and satisfactory understanding of the issues in dispute.

[7] The applicant further submits that Ms. Morrow should be excluded from making submissions at this motion hearing pursuant to s. 23(3) of the *Statutory Powers Procedure Act* ("*SPPA*")[1]. The applicant submits Ms. Morrow is providing legal services, but is not licensed by the law society and not subject to sanction as a licensee. Similarly, Ms. Morrow is an employee of the insurance company, not a party pursuant to Rule 2.16 of the Tribunal's *Common Rules of Practice & Procedure ("Rules")*.

Respondent's Position

[8] The respondent submits it will consent to provide further particulars regarding Ms. McPhee's comments in the email correspondence dated August 30, 2021. However, the respondent will only provide this information if the particulars do not constitute an additional or subsequent denial. Regardless, this relief is improperly plead and should otherwise by a request for reasons pursuant to s. 38(8) of the *Schedule*, relating to medical and other reasons. This issue goes to the heart of the denial at issue and is part of the factual inquiry undertaken by the hearing adjudicator, not on a preliminary procedural motion. In the alternative, the request for particulars should be argued at the case conference.

[9] Ms. Morrow is the claims representative assigned to this file. Her appearance is akin to a self-represented litigant pursuant to Rule 6.7. She is not a witness and her exclusion from this motion hearing has no basis in law. To deny her ability to appear would result in an absurdity and would result in a negative precedent to set regarding self-represented litigants.

RESULT

Particulars

[10] The applicant's motion for further particulars is denied at this stage.

[11] As per Rule 2.15 particulars are specific facts that clarify an allegation or assertion or provide additional information about a person's statement.

[12] The statement made by Ms. McPhee regarding the Job Site Analysis Report goes to the very heart of the denial of income replacement benefits at issue. Whether or not there is a contradiction in this statement versus the medical and other reasons provided in the denial of this benefit is a factual issue that shall be determined at the hearing.

[13] Any evidence regarding this alleged contradictory statement shall be addressed during the potential hearing of this matter. The respondent has made a tactical decision at this stage to rely solely on the previous denial. For me to otherwise compel the respondent to provide this information at this stage may fetter the discretion of the hearing adjudicator. Only the hearing adjudicator may make a ruling regarding this issue, as only they will have the benefit of the full panoply of evidence tendered by both parties.

Exclusion of Ms. Morrow

[14] This issue is largely moot, as respondent counsel has now been retained and Ms. Morrow did not appear at continuation of this motion hearing on January 5, 2021. However, the applicant was unwilling to withdraw this form of relief in order to obtain direction from the Tribunal.

[15] I do not find that Ms. Morrow is a self-represented individual as the respondent submits. She appeared without counsel and as the ADR Alternative Dispute Resolution ("ADR") Representative for her employer BelairDirect Insurance Company.

[16] In response to the Applicant's Notice of Motion, Ms. Morrow filed a Notice of Motion in response, or a Cross-Motion dated November 8, 2021. While this Notice of Motion did not contain legal argument, she did appear on this motion and would have been required to respond to the legal arguments posed by the applicant.

[17] Ms. Morrow is not legal counsel, nor is she bound by membership in the Law Society of Ontario. My concern regarding her attendance at the previous Motion Hearing was that she would be expected to provide a response to the legal arguments and case law provided by the applicant. In my opinion, this strays into the realm of providing legal services on behalf of her employer. That is precisely why this matter was adjourned for her to provide further submissions on this very issue.

[18] ADR representatives regularly appear without counsel at case conferences pursuant to Rule 14 of the Tribunal Rules. Case conferences often involve settlement discussions and case management. They are not procedural motions where points of law are argued. Ms. Morrow is not a 'representative' as defined in Rule 2.20, as she is not licensed under the *Law Society Act**[2]***, thus, pursuant to s. 23(3) of the *SPPA*, she could be excluded as not being competent to represent or advise the BelairDirect at this motion hearing.

[19] Rule 26.1 of the *Law Society Act* states that no person other than a licensee shall practice law or provide legal services in Ontario. In my view, stretching the liberal interpretation of the *Rules* and the *SPPA* to permit Ms. Morrow and other ADR representatives to provide legal services is contrary to Rule 26.1. Permitting unlicensed parties to provide legal services could also result in procedural unfairness parties pursuant to Rule 3.1(a) of the Tribunal *Rules.*

[20] Overall, it is my view that sophisticated parties like BelairDirect shall ensure that any person providing legal services before the Tribunal is licensed to do so. Otherwise, it runs the risk of exclusion of representatives from Tribunal proceedings pursuant to Rule 2.20 of the *Rules* and s. 23(3) of the *SPPA.*

[21] **Except for the provisions contained in this Motion Order all previous orders made by the Tribunal remain in full force and effect**.

OTHER PROCEDURAL MATTERS

[22] This matter remains scheduled for a case conference on **August 25, 2022 at 9:00 am via teleconference.**

[23] If the parties resolve the issue(s) in dispute prior to the hearing, the applicant shall immediately advise the Tribunal in writing.

Released: January 11, 2022

_____

Ian Maedel
Vice Chair

---

[1] R.S.O 1990, CHAPTER S.22.
[2] R.S.O. 1990, c. L.8.

Tab 213

CanLII

Sudbury and District Health Unit v Ontario Nurses' Association, 2023 ONSC 2419 (CanLII)

Source:	Divisional Court
Date:	2023-05-31
File number:	DC-22-00002181
Other citation:	[2023] OJ No 2454 (QL)
Citation:	Sudbury and District Health Unit v Ontario Nurses' Association, 2023 ONSC 2419 (CanLII), <https://canlii.ca/t/jxgwc>, retrieved on 2026-01-18

CITATION: Sudbury and District Health Unit v. Ontario Nurses' Association, 2023 ONSC 2419
DIVISIONAL COURT FILE NO.: DC-22-00002181
DATE: 20230531

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Backhouse, Williams and Nieckarz JJ.

B E T W E E N:	
SUDBURY AND DISTRICT HEALTH UNIT Applicant	*Daryn Jeffries*, for the Applicant
- and –	
ONTARIO NURSES' ASSOCIATION and ROBERT J. HERMAN Respondents	*Nicole Butt*, *Sharan Basran* and *Sevda Mansour*, for the Respondent, Ontario Nurses' Association

) **HEARD by videoconference in Sudbury:**
) April 11, 2023
)

BACKHOUSE J.

REASONS FOR DECISION ON PREMATURITY OF APPLICATION

Overview

[1] The Applicant, Sudbury and District Health Unit, operating as Public Health Sudbury & District, applies for judicial review of the grievance arbitration decision of Arbitrator Robert J. Herman (the "Arbitrator") dated June 7, 2022 ("the Decision").[1] The Arbitrator determined that the Applicant engaged in *prima facie* discrimination when it denied the grievor's request for an exemption for failing to comply with the Applicant's COVID-19 Vaccination Policy which required the grievor to get vaccinated. The Arbitrator made this determination on the basis that the grievor was entitled to an exemption from the Policy based on the protected ground of creed, pursuant to the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Code*").

[2] In addition to the individual grievance, the Respondent also filed a policy grievance challenging the Policy. The parties agreed that the initial question for determination by the Arbitrator was whether or not the grievor was *prima facie* discriminated against on the basis of creed. The parties agreed to bifurcate this issue from the other issues raised by the grievances before the Arbitrator. The Arbitrator accepted the parties' agreement and after a hearing, rendered the Decision determining the *prima facie* discrimination issue.

[3] In its application, the Applicant requests an order quashing and setting aside the Decision and an order that the Applicant did not *prima facie* discriminate against the grievor. The Applicant submits that the grievor's refusal to get vaccinated did not have a nexus to or was not rooted in her religion. It submits that the Arbitrator failed to apply the correct legal test for establishing a *prima facie* case of discrimination on the basis of creed under the *Human Rights Code ("*the *Code")*. The Applicant further submits that the Decision was not justified in relation to the law and facts that constrained the Arbitrator and was not based on an internally coherent and rational chain of analysis.

[4] The decision being reviewed does not finally resolve all issues before the Arbitrator. The next phase of the arbitration will address whether the Applicant is able to accommodate the grievor without undue hardship. Depending on the response to that question the Arbitrator will then be asked to determine the appropriate remedy or will be asked to consider the broader challenge to the overall reasonableness of the vaccination policy.

[5] Neither party raised the issue of prematurity at the hearing, and both parties evidently wished to proceed with the application. After hearing the argument and upon considering this matter, the Court requested that the parties make submissions in writing on whether the application for judicial review was premature.

[6] In its written submissions, the Applicant argues that the application should not be dismissed as premature. The Respondent submits that the application is premature.

[7] For the reasons set out below, I have concluded that there are no extraordinary or exceptional circumstances to justify departing from the Divisional Court's usual approach

restricting judicial review to final decisions. The application should be dismissed for prematurity.

Submissions on Prematurity

[8] The Applicant submits that the following factors weigh in favour of determining that the instant application should not be dismissed as premature:

> a. Although it may be characterized as interim or interlocutory insofar as it was rendered prior to the completion of the proceedings before the Arbitrator, the Decision nevertheless determined a particular (and central) issue raised by the Individual Grievance, namely, whether or not the grievor was *prima facie* discriminated against on the basis of creed. The determination of this issue is finally dispositive of a substantive right arising under the *Code*. Accordingly, the Decision fully and finally disposes of a substantive defence that the Applicant may raise to the Individual Grievance.
>
> b. Given the nature of the issues raised by the grievances and the impact of the determination of the discrimination issue on any subsequent litigation between the parties, the proceedings before the Arbitrator were bifurcated at a natural and practical break between separate phases of the proceedings. This bifurcation was the product of an agreement between the parties, which the Arbitrator accepted and applied. This kind of bifurcation does not raise the same concerns with respect to the undue fragmentation of proceedings that the doctrine of prematurity is intended to curtail.
>
> c. The proceedings before the Arbitrator have not been substantially delayed by this application, which proceedings the parties have held in abeyance pending the resolution of the application.
>
> d. The application has already been scheduled and heard relatively expeditiously.
>
> e. It makes good labour relations and economic sense to deal with the application for judicial review at this point in the proceedings. The prompt resolution of the application will guide the parties in determining the course of any subsequent related litigation between them, and may avert complex and costly litigation that would otherwise prove unnecessary. Further, given the nature of the issue that it addresses and its general applicability to cases involving exemptions or refusals to comply with COVID-19 vaccination policies on the *Code*-protected ground of creed, the Arbitrator's ruling has broad implications not only for the immediate parties, but for other employers and unions throughout the province who are or may be faced with similar issues.
>
> f. Neither party raised the issue of prematurity, and both parties evidently wished to proceed with the application, which has now already been heard. It would be wasteful not to determine the application in the circumstances.
>
> g. The Applicant submits that it has made out a strong case that the Decision was incorrect or unreasonably decided.

Analysis

[9] A finding of *prima facie* discrimination means that the claimant has satisfied its initial evidentiary burden. It is not a final determination that discrimination has actually occurred-such a determination is made only after the Employer has called evidence about whether it could accommodate the claimant without undue hardship: As the Arbitrator properly recognized, to

demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the Employer to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur. (*Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360 at para 33.)

[10] The Arbitrator's decision only addressed the first part of this test. The following issues remain outstanding:

> a. Whether the Employer could have accommodated the grievor without undue hardship;
>
> b. If the Arbitrator finds that the Employer could have accommodated the grievor, there then is the issue of remedy to be determined;
>
> c. If the Arbitrator finds that the Employer could not have accommodated the grievor, the Respondent will be proceeding with the grievance challenging the reasonableness of the vaccine policy itself.

Judicial Review is a Discretionary Remedy Reserved for Final Decisions absent Exceptional or Extraordinary Circumstances

[11] The courts have long been reluctant to entertain judicial review applications unless the decision being reviewed is final and the underlying administrative proceeding is completed. Only in exceptional or extraordinary circumstances will the court interfere with a proceeding midstream. Federal and provincial appellate courts have affirmed this approach, confirming that parties generally only have recourse to the court system once a final decision has been rendered and after all adequate remedial recourses in the administrative process have been exhausted. (*C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61 (CanLII); *Wilson v. Construction and Allied Workers (Labourers' International Union of North America, Local 607*), 2008 CanLII 6522 (ON LRB), reviewed on other grounds 2016 SCC 29; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 12.)

[12] The Ontario Court of Appeal has explained in *Volochay* that the rationale for limiting judicial review to final decisions is to avoid fragmentation of the administrative process and a piecemeal approach to litigation. Fragmentation causes both disruption and delay to administrative proceedings. At para. 69, the Court quoted Stratas J.A. who summarized the rationales for the principle in *C.B.Powell* at paras.31-32:

> [69] …Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted. This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making

responsibilities to discharge. [Citations omitted.] (*Volochay v. College of Massage Therapists of Ontario,* 2012 ONCA 541 at paras. 68-69).

Extraordinary or Exceptional Circumstances

[13] A significant body of case law has developed on what constitutes "exceptional or extraordinary" circumstances such that the court will exercise its discretion to hear a judicial review application on an interlocutory decision. Those decisions confirm that such discretion is exercised sparingly and that exceptions are "most rare." (*Wilson v. Construction and Allied Workers (Labourers' International Union of North America, Local 607*), 2008 CanLII 6522 (ON LRB) at para 33, reviewed on other grounds 2016 SCC 29.)

[14] The court, in emphasizing that the bar is high, has noted that "assertions of bias, procedural unfairness, breach of natural justice and lack of jurisdiction do not give rise to an automatic right to judicial review." (*Kadri v. Windsor Regional Hospital*, 2019 ONSC 5427 (CanLII) at para 59); See also *Volochay* at para 63.)

[15] The court has exercised its discretion to judicially review an interlocutory decision in situations where there is real unfairness through a denial of natural justice and/or where a remedy later would not cure the unfairness. For example, in *Gage v Ontario (Attorney General)*, the Court exercised its discretion to hear a judicial review, finding that the underlying decision was so unfair that it represented an exceptional circumstance. In that case, Gage, a police constable, was not notified for ten months about the decision to forward allegations against him to a Board of Inquiry, despite a requirement that he be advised "forthwith." The court noted that "if there is a prospect of real unfairness through denial of natural justice or otherwise, a superior court may always exercise its inherent supervisory jurisdiction to put an end to the injustice before all the alternative remedies are exhausted…the unfairness in this case is so obvious that it would be inappropriate to put the officer through a trial before a tribunal that lost jurisdiction through a denial of natural justice.(*Gage v. Ontario (Attorney General)*, 1992 CanLII 8517 (ON SCDC) at para. 61).

[16] Similarly, where the College of Physicians and Surgeons failed to give notice of a complaint to the respondent physician and then did not deal with the complaint for more than four and a half years, the court exercised its discretion to hear the judicial review even though the substance of the complaint had not yet been adjudicated. (*McIntosh v College of Physicians and Surgeons of Ontario*, 998 CanLII 19444 (ON SCDC)).

[17] As the Divisional Court explained in *Lourenco v Hegedu:*

> In rare cases this court will intervene on an application for judicial review in the midst of an administrative process where there are strong reasons to believe that the ongoing process is so deeply flawed that there is a strong likelihood that it will have to be run over again, usually on the basis of bias, reasonable apprehension of bias or want of jurisdiction. This does not mean that judicial review is available before the conclusion of administrative proceedings in any case where an allegation of this kind is made. It must be emphasized that early judicial review is the rare exception, not the rule, and will only be permitted in rare cases where the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion. Analogies can be drawn to criminal prosecutions where it is very rare indeed for a proceeding to be interrupted for judicial review or appeal prior to

the conclusion of the proceeding. (*Lourenco v. Hegedus*, 2017 ONSC 3872 at para. 6.)

[18] There is no suggestion in this case that the process is deeply flawed, or that a breach of natural justice or real unfairness would occur if the judicial review was not heard. Instead, the Applicant sets out a number of submissions the court should consider, none of which amount to exceptional or extraordinary circumstances.

Final Disposition

[19] The Applicant argues that where a decision finally disposes of a substantive right, even if the decision is interlocutory, the judicial review is not premature and the court ought to hear the application. In this case, the Arbitrator's decision is not dispositive of a substantive right—it determined that the grievor met the initial onus of proving that the Applicant *prima facie* discriminated against her. It does not find in fact that the grievor was discriminated against since it remains to be determined that the Applicant could not have accommodated the grievor short of undue hardship.

[20] The Applicant relies upon the Court's decision in *Ackerman v Ontario Provincial Police*, 2010 ONSC 910 ("*Ackerman*") in arguing that the final disposition of a substantive right may be subjected to judicial review. *Ackerman* relies upon *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon* (2005), 2005 FC 1000 (CanLII) ("*Kahlon*".) Those decisions clarify that in circumstances where a decision finally disposes of a substantive right and there is no way to remedy the loss of that right in the future, the court may exercise its discretion to hear the judicial review application before the end of the whole proceeding. *Kahlon* challenged the issuance of a summons for a witness' immigration file. The court in that case found that the application was not premature because the decision finally disposed of the witness' rights once her privacy was lost, it could not be regained— and there was no way to cure the breach of her rights in the future.

[21] The court in *Ackerman* referred to *Kahlon* as an example of when judicial intervention may be warranted, explaining that "where the decision, although interlocutory in most respects, determines a particular issue (as in *Canada (Minister of Public Safety and Emergency Preparedness) v. Kahlon* (2005), 2005 FC 1000 (CanLII), 35 Admin L.R. (4th) 213 (FC) in which the summons issued would be dispositive of the witnesses' privacy rights."(*Ackerman v. Ontario Provincial Police,* 2010 ONSC 910 at para 19).

[22] This is distinguishable from the facts in this case. The Arbitrator does not finally dispose of any substantive rights. Additionally, there is no need for the court to intervene early because the rights at issue can be remedied in the event a future judicial review application finds that the Decision was unreasonable or incorrect.

Bifurcation

[23] The Applicant suggests that because the hearing was bifurcated at a natural break between separate phases of the hearing, it does not raise the same concerns with respect to fragmentation and delay. The case law does not support this argument. While the Federal Court of Appeal has recognized that decisions bifurcated between the merit and remedy phases of a hearing may not raise the same concerns about fragmentation, it explicitly contrasts that with the situation where the hearing is bifurcated on the merits. (*Wilson v. Construction and Allied Workers (Labourers'*

International Union of North America, Local 607), 2008 CanLII 6522 (ON LRB) at para. 36, reviewed on other grounds 2016 SCC 29.)

[24] Even where the only remaining issue is remedy, the court is often loathe to intervene, finding that the question of remedy should be determined before recourse is made to the Divisional Court. (*Air Canada v. Canadian Union of Public Employees, Air Canada Component*, 2020 ONSC 847 (CanLII); *Jones Lang Lasalle Real Estate Services Inc. v Human Rights Tribunal of Ontario and Brian Graff*, 2015 ONSC 4005 (CanLII)).

[25] In this case, the decision in question is clearly "in the middle of the hearing on the merits". There are multiple issues remaining to be determined and there is a real risk of fragmentation and piecemeal litigation if the court proceeds with the application at this time.

Delay

[26] The courts have expressed concern that proceeding with judicial review applications filed on interlocutory decisions will create delays in both the administrative and judicial legal systems. While the Applicant argues that proceedings before the Arbitrator have not been substantially delayed, it has already been almost a year since his first decision was released. If the Applicant is successful, the parties will need to return to the Arbitrator, make new submissions on the issue of *prima facie* discrimination, and wait for his decision before proceeding to the next phase of the hearing, leading to further delay. In addition, concerns about delay are not restricted to delay in a particular proceeding, but are broader in their impact to administrative proceedings in general. (*Air Canada v. Lorenz (T.D.)*, 1999 CanLII 9373 (FC) at para. 25).

[27] A similar sentiment was voiced by the Divisional Court in *Unimac-United Management Corp. v St. Clare's-Monaco Place*, 2015 ONSC 4760:

> [14] The third consideration is delay. As in the *Lorenz* decision, (see paras. 24- 25), the delay consideration extends beyond the parameters of this case. If the matter does not proceed, we are inviting other parties in other cases to seek delay by alleging bias or other breaches of natural justice. In such circumstances, we would thus run the risk of reducing fundamental concerns running to the heart of the administration of justice such as bias to an "off ramp" from a statutorily mandated process when the proceeding is not going well for one of those parties.

[28 The court has been clear about its concern that premature judicial review applications may lead to delay in both the individual case and the system as a whole. The Applicant's suggestion that there has not been substantial delay is not persuasive.

Need to Avert Costly and Complex Litigation

[29] The Applicant submits that resolution of this application will avert costly and complex litigation that would otherwise prove unnecessary. Resolution of this application does not resolve the outstanding issues before the Arbitrator. In addition, the court has been clear that this is not an exceptional circumstance that would lead it to hear a judicial review application on an interlocutory decision. For example, in *Allstate Insurance Company v Billard* 2019 ONSC 6265, the applicant argued that costs and time would be saved by hearing the judicial review because the expense and inconvenience of a full-blown hearing could be avoided. In denying the application, the court noted that "the possibility of cost savings by a fragmented hearing or a bifurcated trial is routinely the basis asserted for the strategic decision to ask for a review or appeal of a preliminary decision. That does not qualify as exceptional. Moreover, the potential costs-savings rationale has

been routinely rejected by courts on both policy and factual bases." (*Allstate Insurance Company v Billard),* 2019 ONSC 6265 at paras. 13 and 14).

[30] Similarly, in *Bannis v Ontario College of Pharmacists,* 2020 ONSC 6115, the applicant argued that if she was successful on judicial review, the need for the balance of the hearing would be avoided. This argument was rejected as not being an exceptional circumstance and the Court dismissed the application for judicial review on the grounds of prematurity. (*Bannis v Ontario College of Pharmacists* 2020 ONSC 6115 at para. 7).

Broad Implications of Arbitrator's Decision

[31] I am not persuaded by the Applicant's submission that the application should be heard because of its broad implications to cases involving exemptions or refusals to comply with COVID-19 vaccination policies on the *Cod*e-protected ground of creed. As Stratas JA was quoted in *Volochay* at paras. 68-69 as set out above, one of the rationales for limiting judicial review to final decisions is that it is only at the end of the administrative process that a reviewing court will have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience.

[32] These are important considerations for an application which may have broad implications and support that this application for judicial review is premature.

Not to Determine the Application Is Wasteful, Given That It Has Already Been Heard

[33] The issue of the prematurity of the application should have been brought to the court's attention at the outset of the hearing. The fact that the application was argued without the issue being raised does not make this an exceptional or extraordinary circumstance.

The Strength of the Case

[34] The court has not typically considered the strength of the case in determining whether to quash an application for prematurity. This is a factor that is considered rarely and only in cases where there are allegations of a breach of natural justice—particularly when allegations of bias are raised. Where the court is being asked to determine whether a particular breach of natural justice rises to an "exceptional" circumstance, the court may consider whether it is "clear and obvious" that the application will be successful. (*Unimac-United Management Corp. v St. Clare's-Monaco Place*, 2015 ONSC 4760 (CanLII) at paras. 16 and 17.)

[35] In the present case, there is no question of a breach of natural justice. The Applicant is seeking review of a singular issue raised during a hearing on the merits of the grievance.

Conclusion

[36] There are no extraordinary or exceptional circumstances to justify departing from the Divisional Court's usual approach restricting judicial review to final decisions. The application is dismissed for prematurity without prejudice.

Costs

[37] Given that the issue of prematurity was raised by the court, the parties shall each bear their own costs.

_____
Backhouse J.

I agree_____
Williams J.

I agree_____
Nieckarz J.

Released: May 31, 2023

CITATION: Sudbury and District Health Unit v. Ontario Nurses' Association
2023 ONSC 2023 ONSC 2419
DIVISIONAL COURT FILE NO.: DC-22-00002181
DATE: 20230531

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Williams and Nieckarz JJ.

B E T W E E N:

SUDBURY AND DISTRICT HEALTH UNIT

- and -

ONTARIO NURSES' ASSOCIATION and
ROBERT J. HERMAN

REASONS FOR JUDGMENT

Backhouse J.

Released: May 31, 2023

[1] The Decision is reported at *Public Health Sudbury & Districts v. Ontario Nurses' Association*, 2022 CanLII 48440 (Ont. L.A.)

Tab 214

CanLII

Lourenco v Hegedus, 2017 ONSC 3872 (CanLII)

Source:	Divisional Court
Date:	2017-06-22
File number:	DC-17-165
Citation:	Lourenco v Hegedus, 2017 ONSC 3872 (CanLII), <https://canlii.ca/t/h4h50>, retrieved on 2026-01-18

CITATION: Lourenco v. Hegedus, 2017 ONSC 3872
COURT FILE NO.: DC-17-165
DATE: 20170622

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:	
ADAM LOURENCO Applicant	*Peter Brauti*, for the Applicant
- and -	
RICHARD HEGEDUS, CHIEF OF POLICE OF THE TORONTO POLICE SERVICE, BURAA ABDULKADIR, BURHAN ABDULKADIR, MUATHE MAHDI, YOHANNES BRHANU and SHARNIL PAIS Defendant/Respondent	*Scott Hutchison and Reem Zaia*, for Chief of Police *Jeff Carolin*, for Burhan Abdulkadir *Peter Rosenthal*, for the rest of the Respondents **Heard at Toronto: June 21, 2017**

DECISION

D.L. Corbett J.:

[1] The respondent Chief of Police moves to quash this application for judicial review on the grounds that it is premature. For the reasons that follow, the motion is granted and the application for judicial review is quashed.

[2] The applicant is a police officer. He faces allegations of misconduct under the *Police Services Act*.[1] Those allegations will be heard in the Toronto Police Service Tribunal. The hearing was scheduled for 13 days starting in October 2016.

[3] The applicant moved to have the Hearing Officer, Inspector Richard Hegedus, recuse himself on the grounds of reasonable apprehension of bias and lack of jurisdiction because of defects in Inspector Hegedus' designation to hear the matter. The hearing dates were vacated and the recusal motion was heard. Inspector Hegedus released his decision on March 3, 2017, dismissing the recusal motion and finding that he was lawfully designated to hear the allegations against the applicant.

[4] The applicant commenced an application for judicial review to challenge the decision of Inspector Hegedus on the recusal and jurisdiction motion. The Chief of Police moves to quash that application on the basis of prematurity.

General Principles

[5] Generally, judicial review is not available until an administrative process has run its course, including any administrative appeals and reviews. This general approach conserves judicial resources and leads to more timely resolution of administrative proceedings.

[6] In rare cases this court will intervene on an application for judicial review in the midst of an administrative process where there are strong reasons to believe that the ongoing process is so deeply flawed that there is a strong likelihood that it will have to be run over again, usually on the basis of bias, reasonable apprehension of bias or want of jurisdiction. This does not mean that judicial review is available before the conclusion of administrative proceedings in any case where an allegation of this kind is made. It must be emphasized that early judicial review is the rare exception, not the rule, and will only be permitted in rare cases where the potential prejudice of the risk of repeating proceedings after review outweighs the prejudice to the general orderly processing of administrative proceedings without interruption until their conclusion. Analogies can be drawn to criminal prosecutions where it is very rare indeed for a proceeding to be interrupted for judicial review or appeal prior to the conclusion of the proceeding.

Bias Allegations

[7] It is a very rare case in which this court will interrupt proceedings on this basis. This allegation is easily made, can be made multiple times during a proceeding, and seldom succeeds. If interlocutory appeals or judicial reviews on this ground were permitted generally, proceedings would be at risk of interruption at the instance of one party with inevitable delays of months or years before resumption of proceedings, with consequent risk to the integrity of the trial process itself.

[8] In this case the record does not establish a strong likelihood that the allegations of reasonable apprehension of bias will succeed. I consider that the prejudice to the general orderly processing of administrative proceedings far outweighs the prejudice from the risk that the 13 day disciplinary proceeding might have to be held again.

Designation of Inspector Hegedus

[9] Inspector Hegedus has been designated a police complaints officer, authorized by the Chief of Police to hear police complaints such as the allegations against the applicant. Inspector Hegedus works full-time in this capacity and generally hears complaints that are not expressly assigned to another person by the Chief of Police, subject to his scheduling constraints. When Inspector Hegedus is not available to hear a complaint that has not been assigned to a specific person, then that matter is assigned to a part-time complaints officer.

[10] The applicant argues that the *Police Services Act*, s.94(1), requires that the Chief of Police expressly assign each hearing to a particular person. Thus, the applicant argues, the administrative

practice that is currently in place does not comply with the requirements of the *Act*. In the result, the applicant argues, Inspector Hegedus has not been designated lawfully to hear the complaint against the applicant, and, without that designation, has no jurisdiction to proceed.

[11] This challenge could be overcome, of course, if the Chief of Police specifically designated Inspector Hegedus to hear this case. He has not, to this point, done so. I infer from this circumstance that the Chief of Police stands by the current administrative framework.

[12] This situation is analogous to *MRS Sciences Inc.* v. *Ontario (Securities Commission)*, 2015 ONSC 6317, aff'd 2017 ONCA 279. In that case the Ontario Securities Commission scheduled a sanctions hearing before a differently constituted panel than the tribunal that had decided liability issues. Jurisdiction was challenged and the Commission ruled that the sanctions hearing panel was constituted properly. Challenge was brought to this court but was quashed as premature: *MRS Sciences Inc.* v. *Ontario (Securities Commission)*, 2012 ONSC 7198. The sanctions hearing then proceeded to a conclusion and the issue of the constitution of the sanctions hearing panel was raised again and decided on the merits by the Divisional Court. The Divisional Court concluded that the Commission's interpretation of its home statute was entitled to deference and that the constitution of the sanctions panel was reasonable. The Court of Appeal agreed.

[13] I appreciate that there is a legislative distinction between *MRS* and the instant case. The *Securities Act*, RSO 1990, c. S.5, s.9(1) provides only for appeals from "final orders". Swinton J., for the court in *MRS*, noted, however, that notwithstanding this provision, judicial review could be available in exceptional cases:

> The application for judicial review is premature. This Court has repeatedly refused to hear an application for judicial review of an interlocutory decision of an administrative tribunal. It has exercised its discretion to do so in exceptional cases but none exist here.

[14] In my view the same principle applies in the case before me. This is not an exceptional case, and review in this court should not take place until the administrative process has run its course. The issue of the propriety of the system generally used to assign police complaint cases can be addressed on judicial review at the end of the administrative process if any party wishes to challenge the final result of that process. Further, like in *MRS*, the interpretation of the *Act* by the Chief of Police in this context is entitled to deference, and on its face seems reasonable: I do not consider there to be a strong likelihood that the process under which Inspector Hegedus has been designated will be found to result in the Inspector lacking jurisdiction to conduct the hearing in this case.

[15] The motion is granted; the application for judicial review is quashed. As agreed by counsel, there shall be no costs of this motion or this application.

[16] Parties are entitled to challenge a decision of a single judge of the Divisional Court to a full panel of the Divisional Court.

[17] Hearing dates are scheduled before Inspector Hegedus starting in early August 2017.

[18] There is one week left in the spring term of this court, and thereafter only one sitting week (in July 2017) before the August hearing dates.

[19] A motion seeking to review this decision will not serve as a stay of this decision pending a challenge motion before a full panel, and thus the hearing may proceed before Inspector Hegedus if a motion has been brought to review this decision but not yet heard by the court. Therefore, if any party wishes to challenge this decision before the full panel, that party should make arrangements immediately through the managing judge of the Divisional Court, Nordheimer J. for scheduling directions.

D.L. Corbett J.

RELEASED : June 22, 2017

CITATION: Lourenco v. Hegedus, 2017 ONSC 3872
COURT FILE NO.: DC-17-165
DATE: 20170622

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:

ADAM LOURENCO

Applicant

- and -

RICHARD HEGEDUS

Respondent

DECISION

D.L. Corbett J.

Released: June 22, 2017

[1] *Police Services Act*, RSO 1990, c. P.15.

Tab 215

CanLII

London District Catholic School Board v. Weilgosh, 2024 ONSC 3857 (CanLII)

Source:	Divisional Court
Date:	2024-03-13
File number:	610/22
Citation:	London District Catholic School Board v. Weilgosh, 2024 ONSC 3857 (CanLII), <https://canlii.ca/t/k3gpr>, retrieved on 2026-01-18

CITATION: London District Catholic School Board v. Weilgosh 2024 ONSC 3857
DIVISIONAL COURT FILE NO.: 610/22
DATE: 20240313

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, King, Krawchenko JJ.

B E T W E E N:	
LONDON DISTRICT CATHOLIC SCHOOL BOARD and A.P. FERNANDES Applicants	*Christopher A. Sinal* and *Elizabeth M. Traynor*, for the Applicant
- and -	
KAREN WEILGOSH Respondent	*Toby Young* and *Marisa Scotto di Luzio*, for Karen Weilgosh
- and -	
HUMAN RIGHTS TRIBUNAL OF ONTARIO Respondent	*Brian Blumenthal* and *Valerie Crystal*, for Human Rights Tribunal of Ontario
- and -	
ONTARIO HUMAN RIGHTS COMMISSION Respondent	*Matthew Horner*, for Ontario Human Rights Commission

- and -	)	
	)	
ONTARIO ENGLISH CATHOLIC TEACHERS' ASSOCIATION (OECTA)	)	*Christopher Perri* and *Kylie Sier*, for Ontario English Catholic Teachers' Association (OECTA)
Intervenor	)	
- and -	)	
	)	
CANADIAN UNION OF PUBLIC EMPLOYEES (CUPE)	)	*Devon Paul* and *Alex Hunsberger*, for Canadian Union of Public Employees (CUPE)
Intervenor	)	
- and -	)	
	)	*Karen Spector*, for Empowerment Council, Systemic Advocates in Addictions and Mental Health
EMPOWERMENT COUNCIL, SYSTEMIC ADVOCATES IN ADDICTIONS AND MENTAL HEALTH	)	
Intervenor	)	
- and -	)	
	)	*Katie Rowen* and *Emily Home*, for Peel Regional Police Association of Ontario
PEEL REGIONAL POLICE ASSOCIATION	)	
Intervenor	)	
- and -	)	
	)	*Gary Bennett* and *Sharon Yeboah*, for G. McNulty
G. MCNULTY	)	
Intervenor	)	
	)	
- and -	)	
	)	*Sonia Regenbogen*, for Regional Municipality of Peel Police Services Board
REGIONAL MUNICIPALITY OF PEEL POLICE SERVICES BOARD	)	
Intervenor	)	
	)	
	)	
	)	
	)	**HEARD:** June 22, 2023, by videoconference in Toronto
	)	

BACKHOUSE J.

REASONS FOR DECISION

Overview

[1] The London District Catholic School Board (the "Applicant") has brought an application for judicial review of an interim decision by the Human Rights Tribunal of Ontario (the "HRTO"), dated October 4, 2022, reported at 2922 HRTO 1194 (the "Decision"). In the Decision, the HRTO held that it has concurrent jurisdiction to adjudicate an application commenced by Karen Weilgosh ("Weilgosh" or "the Respondent"). The Applicant seeks an order quashing the Decision on the grounds that the HRTO lacks jurisdiction. The Applicant asks for a declaration that labour arbitrators appointed under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "*LRA*")

have exclusive jurisdiction to decide human rights complaints arising from disputes under a collective agreement. The Respondents asks the court to dismiss the application.

[2] For the reasons set out below, the application is dismissed.

Background

[3] Karen Weilgosh filed an application with the HRTO against her employer, the Applicant, alleging discrimination and a failure to accommodate. Subsequently, the Supreme Court of Canada issued *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 [*Horrocks*]. There, the court held that labour arbitrators appointed under labour legislation in Manitoba have exclusive jurisdiction over human rights claims arising from disputes under a collective agreement. Following *Horrocks*, the Applicant raised a preliminary objection before the HRTO. It argued that the HRTO lacked jurisdiction to hear the application given that Ms. Weilgosh's union had filed grievances on her behalf relating to the same or similar allegations. The HRTO proceeded to a hearing on the interim issue, joining together another proceeding raising the same preliminary objection, *McNulty v. Regional Municipality of Peel Police Service Board* (the "*McNulty* application").

[4] The Supreme Court established a two-part test in *Horrocks* to resolve jurisdictional issues between labour arbitrators and competing statutory tribunals. Under Step 1, the relevant labour legislation should be examined to determine whether it grants a labour arbitrator exclusive jurisdiction, and if so, over what matters arising from a collective agreement. Legislation with a mandatory dispute resolution clause establishes exclusive jurisdiction, subject to clearly expressed legislative intent to the contrary. Under Step 2, the question is whether the dispute falls within the scope of the labour arbitrator's jurisdiction.[1]

Decision under Review

[5] In the Decision, the HRTO resolved the preliminary issue under Step 1 of the test. It determined that labour arbitrators appointed under both the *LRA* and the *Police Services Act*, R.S.O. 1990, c. P.15 (the "*PSA*") have exclusive jurisdiction to decide claims of discrimination and harassment falling within the scope of a collective agreement. It reached this conclusion based on the mandatory dispute resolution clause under s. 48 of the *LRA* and, in the absence of an analogous provision under the *PSA*, appellate case law.[2]

[6] The HRTO went on to find, as the Supreme Court indicated in *Horrocks*, that this exclusive jurisdiction under both statutes was displaced by a positive expression of legislative intent to establish a regime of concurrent jurisdiction over human rights claims.[3] Applying the Supreme Court's guidance at para. 33 of *Horrocks*, it pointed first to the broad provisions in s. 45 and 45.1 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "*Ontario Code*" or "*Code*") empowering the HRTO to defer or dismiss complaints if another proceeding has appropriately dealt with it. The HRTO did note that these provisions were more ambiguous than federal human rights legislation and B.C.'s *Human Rights Code*, which the Supreme Court cited in *Horrocks* as examples of statutory schemes disclosing an intent to establish concurrent jurisdiction. Those statutes specifically provide for deferrals where complaints are capable of being dealt with by the grievance process.[4]

[7] The analysis did not end there. *Horrocks* then instructs that where the provisions of a statute may be more ambiguous, but the legislative history plainly shows that the legislature contemplated concurrency, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.[5] The HRTO determined that the "unique legislative history" of the *LRA* and the *Ontario Code* more clearly indicated a legislative intent to establish concurrent jurisdiction.

[8] In 2001, the Court of Appeal determined in *Ontario (Human Rights Commission) v. Naraine,* 2001 CanLII 21234 (Ont. C.A.) [*Naraine*] that, following amendments to the *LRA* empowering labour arbitrators to apply the *Ontario Code*, the OHRC's deferral power under the *Ontario Code* signaled an intention to shift from exclusive to concurrent jurisdiction.[6]

[9] The legislature passed major amending legislation to the *Ontario Code* ("Bill 107") that came into effect in 2008. Among other things, Bill 107 removed the gatekeeper role of the OHRC and instead permitted individuals to apply directly to the HRTO. The direct access model remains in place today. Applying the interpretive presumption that the legislature is aware of existing law when it enacts new laws, the HRTO reasoned in the Decision that the legislature knew of *Naraine* when it passed Bill 107. Therefore, it found that the lack of constraints on the HRTO's broad powers under ss. 45 and 45.1 to defer or dismiss complaints appropriately dealt with in other proceedings demonstrates an intent to maintain concurrent jurisdiction.[7]

[10] In the Decision, the HRTO dismissed the requests of the Applicant and the Regional Municipality of Peel Police Services Board to dismiss the applications for lack of jurisdiction.

[11] The Regional Municipality of Peel Police Services Board did not seek judicial review of the Decision in respect of the McNulty application. It is participating as an intervenor.

Issues

[12] The application raises the following issues:

1. Is the application premature, and if so, should the court hear it?
2. What is the standard of review?
3. Was the HRTO's finding that it has concurrent jurisdiction correct or reasonable, as the case may be?

Court's Jurisdiction

[13] The Court has jurisdiction to hear this application pursuant to ss. 2(1) and 6(1) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1.

Analysis

Issue #1: Is the application premature, and if so, should the court hear it?

[14] The Applicant concedes the Decision is interlocutory in nature and that courts generally do not exercise their discretion to hear an application until the administrative proceeding is complete, absent exceptional circumstances.[8] The parties submit that there are exceptional circumstances in this case.

Appropriate for court to exercise its discretion to hear this judicial review application

[15] In *Ontario (Community Safety and Correctional Services) v. De Lottinville*,[9] this court exercised its discretion to judicially review an interim decision of the HRTO, finding that the HRTO treated the matter as a "test case" dealing with a significant legal issue, constituted a three-person tribunal and joined applications that raised the same issue.

[16] Similar circumstances arise here. The HRTO treated the preliminary issue as exceptional by:

(a) joining Weilgosh's Application with the McNulty Application for the purposes only of the preliminary issue;

(b) assigning case management of the preliminary issue to the HRTO's Chair; and,

(c) granting intervenor status to four organizations, in addition to the OHRC being added as a party.

[17] The Decision has broad implications for human rights disputes arising between unionized employers and employees throughout the province. Delaying this application until the conclusion of the hearing on the merits, which does not depend on any evidence or law relevant to the jurisdictional issue, will result in uncertainty for employers, employees and unions. This is an appropriate case for this court to exercise its discretion to hear this judicial review.

Issue #2: What is the standard of review?

[18] The Applicant submits the presumptive standard of reasonableness is rebutted for two reasons. First, the application concerns a question of the jurisdictional boundaries between two administrative bodies. The Supreme Court applied a correctness standard in *Horrocks* for a virtually identical question. Second, the question raised is of central importance to a legal system as a whole, given its broad implications for any future applications to the HRTO brought by unionized employees.

[19] The Respondents Weilgosh and OHRC agree with the Applicant on the first point and submit that the presumption of reasonableness is rebutted. However, they disagree that the question raised is one of central importance to the legal system as a whole. They submit that while involving a dispute that is of "wider public concern, it does not rise to the level of having an impact on the administration of justice as a whole that requires safeguarding consistency in the fundamental legal order of Canada.[10]

[20] The HRTO submits that the standard of review is reasonableness. It argues that the presumption of reasonableness is not always rebutted for questions of jurisdiction between two or more administrative bodies unless there is an operational conflict. The HRTO argues that there is no conflict or incompatibility in this case since we are dealing with concurrent jurisdiction. It points out that in *Horrocks*, there was no legislated standard of review and therefore the Supreme Court's finding on standard of review is not dispositive on the issue for this application. The HRTO agrees with Weilgosh and OHRC that the question raised is not one of central importance to the legal system as a whole either since it is statute- and province-specific. Finally, the HRTO argues that something more is required than just the three rule of law questions in order to rebut a legislated (as opposed to a presumptive) standard of review, like the one under s. 45.8 of the *Ontario Code (*"patently unreasonable*"* which has been interpreted by the courts post-*Vavilov* as "reasonable"). It argues that to rule otherwise conflicts with *Vavilov*'s strong endorsement of respect for legislative intent.

Correctness is the appropriate standard of review

[21] In *Horrocks*, at paragraph 7 of the Majority Decision, the Court stated:

> Decisions concerning the jurisdictional lines between two or more administrative bodies must be correct (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 53). This standard safeguards the rule of law, which "requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another" (para. 64). It also fosters predictability, finality and certainty in the law (*ibid.*).

Tab 216

CanLII

R.M. v CAA Insurance, 2020 CanLII 94775 (ON LAT)

Source:	Ontario Licence Appeal Tribunal
Date:	2020-11-23
File number:	19-003499/AABS
Citation:	R.M. v CAA Insurance, 2020 CanLII 94775 (ON LAT), <https://canlii.ca/t/jbwwr>, retrieved on 2026-01-18

Citation: R.M. vs. CAA Insurance, 2020 ONLAT 19-003499/AABS/AABS

Date: November 23, 2020
File Number: 19-003499/AABS

In the matter of an Application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8., in relation to statutory accident benefits.

Between:

R.M.

Appellant(s)

and

CAA Insurance

Respondent

DECISION

PANEL:	**Jeffrey Shapiro, Vice-Chair**
APPEARANCES:	
For the Applicant:	Todd Reybroek and Christina Campoli, Counsel
For the Respondent:	Caley Ross and Claudia Cappuccitti, Counsel
HEARD:	**By Telephone Conference on September 13, 2019 and written submissions completed December 5, 2019**

OVERVIEW

[1] The applicant ("R.M.") was catastrophically impaired in an automobile accident on March 22, 2016. She received insurance benefits from CAA Insurance under the *Statutory Accident Benefits Schedule – Effective after September 1, 2010*, O. Reg. 34/10 (the "*Schedule*"), including a non-earner benefit ("NEB"). By letter dated October 4, 2016, CAA denied further payment of the NEB after October 12, 2016.

[2] After two years, on November 19, 2018, R.M. appealed to this Tribunal to dispute the NEB and other denials. The parties resolved all issues except the NEB. This matter is now before me on CAA's motion requesting that the Tribunal decide if R.M.'s appeal of the NEB is untimely and thus time-barred. CAA's adjuster provided an affidavit and testified by telephone, followed by the parties' written submissions. After consideration, I find that the NEB is, in fact, time-barred.

PRELIMINARY ISSUE

[3] The sole issue for me to decide is: "Is the applicant barred from proceeding with her application due to her non-compliance with the limitation period from section 56 of the *Schedule*?"

RESULT

[4] R.M.'s claim for the NEB is time-barred under section 56 of the *Schedule*.

ANALYSIS

a. Section 56 of the Schedule

[5] Section 56 of the *Schedule* provides that an application to dispute a denial of a benefit must be commenced within two years of the insurer's refusal to pay. Section 64 allows the denial notice to be sent by regular mail or faxed to an insured's lawyer. Once a proper denial has been properly sent, if an insured does not appeal within that period, the Tribunal can not hear it as it is "time-barred".

[6] CAA submits that on October 4, 2016, Adi Gurovich, a senior claims adjuster for CAA, (1) personally drafted the denial letter that stated the benefit would be stopped effective October 12, 2016, (2) mailed it to R.M., and (3) faxed a copy to the R.M.'s lawyer. Thus, R.M. had until the two-year anniversary on October 4, 2018 (or possibly October 12, 2018) to appeal. Yet R.M. did not appeal until November 19, 2018 – 5 weeks later – and thus the appeal is late and time-barred.

[7] R.M. does not dispute the form of the denial, but questions whether CAA ever sent out the denial letter. I find CAA did so and accept CAA's timeline, as follows.

[8] First and foremost, in the case of the fax, there is virtually no doubt it was sent, because Mr. Gurovich produced a fax confirmation report.

[9] R.M. submits that the fax confirmation is not reliable because it refers to 60 pages being sent, while the affidavit only refers to the denial letter and a dispute addendum being sent, which are each only a few pages. I disagree. Mr. Gurovich provided a logical explanation that a coversheet and the underlying examination reports, referenced in the letter, were also sent and those add up to 60 pages.

[10] In fact, the 60-page length and transmission itself are corroborated by a copy of the denial letter in Alpha Med Wellness Centre's clinical notes and records[1]. The fax transmission stamp on that letter's lower margin shows the transmission was exactly 60 pages and dated October 4, 2016. The fax cover page also lists that it was to be faxed to both Jennifer at Reybroek Barristers and Dr. Charalambous, who is with Alpha. Thus, the fax confirmation report provided by Mr. Gurovich exactly matches this information – *i.e*. Mr. Gurovich's confirmation report shows two fax transmissions of 60 pages transmitted to each individual as listed on the fax cover page.[2]

[11] R.M. also submits that Mr. Gurovich's affidavit states *he requested* the denial be faxed to the lawyer – implying someone else did it, yet he testified he faxed it. Although a moot point due to the fax report and a copy does appear in Alpha's records, I accept his explanation that he meant he requested the system fax it.

[12] Second, in the case of the letter mailed to R.M., as the only probative evidence before me directly addressing the letter is Mr. Gurovich's affidavit and testimony that he mailed the letter, I accept that the letter was mailed on preponderance of the evidence. R.M. does not provide evidence that many, or even any, notices have not be received, and as noted below, she does not actually deny receiving this denial. As for R.M.'s argument that Mr. Gurovich admitted that he did not place the letter in the mail and that he only requested others to do so, I agree that weakens the strength of the evidence but do does not defeat it. For instance, CAA's claim on this point would be stronger with log notes from the mailing center or further evidence about processes, but I understood the thrust of Mr. Gurovich testimony is that he mailed the letter in accordance with regular procedure, at an insurance company that regularly mails out such letters. Neither party showed any problems with that mailing procedure used by CAA.

[13] While I accept Mr. Gurovich's testimony on both the mailing and faxing of the letter, I note that when I tried to clarify whether he has independent recollection of the events or is just piecing it together from log notes and his regular course, he did not give a clear answer, insisting that that he knows that "he did it". My impression is that he was piecing it together, although at one point he implied that he did have independent recollection. As well, the discrepancies appeared to be a function of the hearing process, rather than pointing to a lack of credibility. For instance, while the affidavit was not precise about what was sent, the letter did reference enclosures and it is logical that the fax coversheet would have been sent even if not specifically mentioned.

[14] Third, I note that while R.M. tried to show the above weaknesses in CAA's evidence, R.M. does not directly deny that the fax was received. Likewise, her denial on receiving the letter was a single conclusory sentence in submissions by counsel, unsupported by R.M.'s testimony or affidavit[3] - and thus not proper evidence. Even if I accept counsel's submission as evidence, it is of little value being hearsay by counsel, on the central disputed point, with no context such as showing a wrong address, and other context given (discussed below) appears factually incorrect. I take R.M.'s submission as a virtual admission on the receipt issue and that her real issue is relief under section 7 of the *Licence Appeal Tribunal Act, 1999* ("*LAT Act*") addressed below.

[15] Fourth, two other events were raised which weaken R.M.'s version of events:

- *First*, counsel submits his office first learned of the denial by email on November 15, 2018, and then immediately appealed by November 19, 2018[4]. However, (1) that time frame does not make sense as it would mean the benefit was stopped for more than two years without R.M. or counsel inquiring as why the payment stopped, and (2) Mr. Gurovich testified that he spoke with "Nicole" of R.M.'s lawyer's office on July 28, 2017 about the October 12, 2016 stoppage.

- *Second*, in her November 28, 2019 submissions for this motion, R.M. denied receiving CAA's submissions filed November 11, 2019 and due November 14, 2019, and thus she filed her own submissions blind, with the right to reply to CAA's submissions. However, CAA responded with a courier delivery receipt even identifying the recipient – whom counsel submits are listed on R.M.'s lawyer's website.[5] CAA also submits it "is at a loss to understand why [R.M.] would draft responding motion materials in the absence of the moving party's [*i.e*. CAA's] Submissions." I agree and find R.M's assertion dubious even without the courier receipt, as it would seem obvious to contact opposing counsel or perhaps even the Tribunal if it truly had not received CAA's submissions.

[16] When all the above points are taken together, there is little doubt the letters were sent/emailed as CAA claims. The evidence comes down to R.M. and her lawyer, denying receiving four contacts between them (*i.e.* the letter, fax, phone call, and recent submission), despite there are fairly indisputable records that three of those occurred, and Alpha (R.M.'s chiropractors) even received a faxed copy of the 60 page denial fax exactly as CAA claims to have sent it. As well, R.M. has not pointed to any wrong street or email address or similar error.

[17] I find that the fax and letter were both forwarded on or about October 4, 2016 as alleged by CAA, and that R.M. has not appealed the NEB denial within the two-year time frame and thus is time-barred.

b. S. 7 of the LAT Act

[18] R.M. submits that even if her claim for the NEB is technically barred under s. 56 of the *Schedule*, s. 7 of the Licence Appeal Tribunal Act provides the Tribunal discretion to extend the time for commencing the appeal if there are reasonable grounds for the extension and granting relief.

[19] I note there is conflicting authority of whether s. 7 applies to matters under the *Schedule*.[6] Thus, for the sake of argument, I will assume that s. 7 applies.

[20] Case law has established a four-part test to determine if the justice of the case requires the extension. The factors are: (1) the existence of a *bona fide* intention to appeal within the appeal period; (2) the length of the delay; (3) prejudice to the other party; and (4) the merits of the appeal. Also, the fact that applications under the *Schedule* are governed by the two-year limitation compared to the 15-day Notice period in many of the Tribunal's other proceedings, will "undoubtably influence" of how the factors are applied. [7]

[21] An applicant has the onus to establish the extension but need not satisfy all four factors. Rather, the analysis requires a balancing of the conclusions reached when applying the facts of the case to the factors.[8] The general rule is that an

extension not be granted unless the appealing party shows the factors apply to support an extension.

[22] For the first factor, R.M. submits that she had a *bona fide* intention to appeal within the appeal period regarding the denial of the NEB and would have appealed in a timely manner had she been aware of the denial date. While she did appeal other benefits, I do not accept this submission as R.M. was aware of the denial date as shown above, and the record is absent of any intention to appeal, other than the fact that R.M. did ultimately appeal *after* the period was over. As the Divisional Court held, while an intention to appeal does not need to be shown at the outset, it does need to be shown during the appeal period.[9]

[23] For the second factor (delay), the delay is 46 days – 6 to 7 weeks. While not extraordinary in length, it is also not a matter of a few days, nor is there a valid reason provided for the delay (as discussed above, the benefit was stopped more than two years earlier and I reject R.M.'s claim of a lack of notice), or why such a delay is minimal in context. I see this factor in CAA's favor.

[24] R.M. submits that two decisions of the Tribunal applied s. 7 with similar length delays but I find them distinguishable. First, in *16-001381 v. Aviva*[10], the Tribunal found 5 weeks is not too long. However, as CAA points out the Tribunal actually found the claim was timely, and only addressed s. 7 on alternate grounds. Even there, the case is distinguishable because the delay flows out of the transitional period when there was a jurisdictional change of *Schedule* disputes from FSCO to this Tribunal. The applicant did file within two years for then-mandatory mediation process but was then blocked by the respondent from adding the issue to the existing FSCO case. Still, the applicant was timely within the then existing 90-day extension under the old system, but untimely against the two-year requirement for a new LAT claim. Thus, the adjudicator found that claim was actually timely, but if not, then on alternative grounds, s. 7 would be properly applied due to the unique circumstances of the jurisdictional and process changes, the delay being due to factors beyond her control and the insurer refusing to add the issue to the pending case under the FSCO scheme.

[25] R.M. also submits that in *18-001196 v. Certas*[11], the Tribunal applied s. 7 for appeal delays ranging from 2 to 39 days. However, as CAA submits, this case was reversed on reconsideration and is also distinguishable as the delay in part flows from the transition of the dispute resolution process from FSCO to LAT. Again, the applicant started the dispute resolution process with FSCO prior to the two-year deadline, but due to the transition, the mediation never occurred, and called into question if the subsequent appeal to LAT was untimely or not.

[26] Regarding the third factor (prejudice), R.M. submits CAA would not be prejudiced because CAA has been actively engaged in this claim including deeming R.M. catastrophic on December 28, 2018, while she, rather than CAA, would be prejudiced by being barred on her NEB claim. Conversely, CAA submits R.M. would not be prejudiced as she was represented by counsel at all relevant times and "As such, [R.M.] has a potential claim against her lawyers…for their failure to submit [R.M.'s] Application…]" in a timely manner. CAA submits if the claim is allowed to proceed, it may be prejudiced as its reports "are more than two years old and it would be forced to locate, produce, and rely on experts and evidence which may not be available anymore."

[27] I find this factor weighs somewhat in R.M.'s favor. Certainly, R.M. would lose out on the NEB. While she might have a claim against her counsel to cover her losses, its is beyond the evidence in and scope of this case to confirm if she has a viable claim or its value. CAA might have some difficulty on its evidence for the NEB, and may need updated assessments, but its submission appears overstated, as this file was being actively adjusted when the late claim was filed.

[28] Finally, regarding the fourth factor (the merits), R.M. submits her impairments are substantial as she was deemed catastrophic by her own assessor on criteria 7 and 8 and CAA accepted her as catastrophic on criteria 8, and thus she would also be entitled to a NEB. Disability Certificates (OCF-3s) completed in April and June of 2016 opine she suffers a complete inability to carry on a normal life, and her family doctor notes she complained of difficulties in various tasks including housekeeping, and that he recommend physio and massage therapy, with a referral to an orthopedic surgeon. R.M. also points to several assessments, including psychological assessments, finding diagnoses such as an "adjustment disorder with mixed anxiety and depressed mood and specific phobia", and an assessments of attendant care needs recommending $1,160.17 and 1,223.02 monthly needs. A January 9, 2019 assessment – two days after her January 7, 2019 shoulder surgery – found she requires $6,716.00 a month in help as she has virtually no use of her right shoulder immediately following the surgery.

[29] CAA argues its denials were supported by IEs, and that a catastrophic designation does not establish entitlement to a NEB – they are different tests.

[30] I find this factor weighs somewhat in R.M.'s favor. Entitlement to a NEB and a catastrophic designation are different tests. R.M. has pointed to evidence that she was impaired from the accident but has not established that evidence likely translates to an NEB. R.M. has not shown what her regular activities that constitute her "normal life" are, or that she has a "complete inability" to carry on her normal life. However, while R.M. does not point to the specifics of the NEB test, the CAT reports and other medical evidence do discuss changes in her life, and all appear to agree – at least from a psychological point of view – that there were changes.

[31] Taking the factors together, I find that R.M. has not met her burden. At the core, it appears to me that R.M. missed the deadline, for a significant amount of time, with no reason for the late filing. Thus, while I acknowledge that the result may be harsh on R.M., R.M. is really asking that the two-year limitation period not apply simply because she feels she has a good case on the merits. While s. 7 may provide discretion to extend the two-year limitation, there must be more meaningful circumstances to exercise that discretion such as how or why the deadline was missed, or the two-year limitation period is rendered meaningless.

CONCLUSION/ORDER

[32] The application for the NEB is time-barred in accordance with section 56 of the *Schedule* and is hereby dismissed. As the parties have advised all other issues in dispute has been resolved, the Application is dismissed.

Released: November 23, 2020

---

[1] Tab 18 (p. 598), *Written Submissions of the Applicant.*

[2]While Alpha's copy of the fax corroborates Mr. Gurovich's fax confirmation, testimony and that the denial was transmitted to Reybroek Barristers, I note from the fact that Reybroek submitted Alpha's records, including Alpha's "CC copy" of the denial fax, as a Tab to R.M.'s submissions, that Reybroek also received a copy of the denial *from Alpha*. However, the evidence does not establish when Alpha provided the records, or the denial, to Reybroek. It might have been at a relevant time such as when Alpha first received the denial on October 4, 2016 or around March 6, 2018 (Tab 18, p. 528) when Alpha's invoice for the records is dated, but it could also be some other time such as just before these submissions.

[3] Para. 9, *Written Submissions of the Applicant*.

[4] See Tab 38 and Para. 9, *Written Submissions of the Applicant*.

[5] I note that while this evidence was also, at least in part, by counsel's submission, it is different from R.M. counsel's denial of receipt on R.M.'s behalf as CAA supports its submission by evidence such as the courier receipt, and the topic of service of documents is within counsel's purview.

[6] For example, in a reconsideration decision, *Certas Home and Auto Ins. Co.*, 2016 CanLII 153125 (ON LAT) (Reconsideration) Adjudicator D. Neilson found that s. 7 does not apply to the *Schedule*. R.M. cited the hearing decision in that matter. Currently, the reconsideration decision is on appeal before the Divisional Court.

[7] *A.F. v. North Blenheim Mutual Insurance Company* 2017 CanLII 87546 (ON LAT) (Reconsideration) *("North Blenheim")*

[8] *Manuel v. Registrar, Motor Vehicle Dealers Act, 2002,* 2012 ONSC 1492 (CanLII) (Div. Ct.)

[9] *Manuel,* 2012 ONSC 1492 (CanLII), Para. 22 – 23.

[10] *16-001381 v. Aviva Insurance Canada*, 2018 CanLII 39443 (ON LAT)

[11] *18-001196 v. Certas Home and Auto Insurance Company*, 2018 CanLII 141018 (ON LAT), reversed in *Certas Home and Auto Insurance Company*, 2016 CanLII 153125 (ON LAT).

Tab 217

CanLII

College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association (Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario), 2015 ONCA 851 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2015-12-07
File number:	C60110
Other citation:	[2015] OJ No 6452 (QL)
Citation:	College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association (Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario), 2015 ONCA 851 (CanLII), <https://canlii.ca/t/gmf92>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario v. Federation of Ontario Traditional Chinese Medicine Association (Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario), 2015 ONCA 851
DATE: 20151207
DOCKET: C60110

Sharpe, Cronk and Miller JJ.A

BETWEEN

College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario

Applicant (Respondent)

and

The Federation of Ontario Traditional Chinese Medicine Association, A. K. A the Committee of Traditional Chinese Medicine Practitioners & Acupuncturists of Ontario, the Ontario Acupuncture Examination Committee, the College of Traditional Chinese Medicine & Pharmacology Canada, the Canadian Association of Acupuncture & Traditional Chinese Medicine, Committee of Certified Acupuncturists of Ontario, James X.N. Yuan, and Jia Li

Respondents (Appellants)

Sean Hu, representative for the corporate appellants

James X.N. Yuan, acting in person

Jia Li, acting in person

Jaan Lilles and Laura Robinson, for the respondent College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario

Zachary Green, for the intervener the Attorney General of Ontario

Heard: November 30, 2015

On appeal from the judgment of Justice Graeme Mew of the Superior Court of Justice, dated February 6, 2015, with reasons reported at 2015 ONSC 661.

By the Court:

[1] The appellants, individuals and corporations engaged in various capacities in the practice of traditional Chinese medicine, appeal the decision of the Superior Court granting the respondent College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario (the "College") declaratory and injunctive relief. The application judge found that the corporate appellants falsely held themselves out as regulatory colleges, that the individual appellants had wrongly held themselves out as representatives of the regulator, that certain of the appellants had engaged in unauthorized practice, and that the individual appellants had engaged in the unauthorized use of the protected titles "Doctor" or "traditional Chinese medicine practitioner", all contrary to the *Regulated Health Professions*

Act, *1991*, S.O. 1991, c. 18 and the *Traditional Chinese Medicine Act, 2006*, S.O. 2006, c. 27.

[2] In their defense to the claims of the College, the appellants submitted that the *Traditional Chinese Medicine Act, 2006* and, in particular the Registration Regulation made under that Act, were discriminatory and violated their s. 15 *Charter* rights. The application judge rejected that defense on the ground that both individual appellants and one of the corporate appellants had previously unsuccessfully advanced essentially the same argument in an application before the Divisional Court: see *Yuan, Li v. Transitional Council of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2014 ONSC 351, 316 O.A.C. 272 (Div. Ct.). In that same application, the Divisional Court also dismissed the claim that the College had acted unlawfully in not enacting a regulation to permit the use of the title "Doctor" in relation to the practice of traditional Chinese medicine. The appellants did not seek leave to appeal the Divisional Court's decision. The application judge held that the Divisional Court judgment barred the appellants from advancing the same arguments on grounds of *res judicata*, issue estoppel or abuse of process.

A. ISSUE ESTOPPEL AND ABUSE OF PROCESS

[3] In our view, the application judge did not err by refusing to entertain the appellants' constitutional argument on the ground that it had been conclusively and finally determined against them in the prior proceeding. We agree with his conclusion that the required elements of issue estoppel were made out.

[4] The three preconditions for issue estoppel are:

1) the issue must be the same as the one decided in the prior decision;

2) the prior judicial decision must have been final; and

3) the parties to both proceedings must be the same or their privies.

See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 25.

(1) Same issue

[5] The central argument presented to the application judge was that the language proficiency requirement set out in the Registration Regulation is discriminatory. That same argument was unsuccessfully advanced before the Divisional Court. The appellants contend that before the Divisional Court, their s. 15 argument was that the language requirement discriminated against all people of Chinese origin, whereas before the application judge they argued that the language proficiency requirement was discriminatory against ethnic mainland Chinese practitioners.

[6] We agree with the application judge, at para. 52 of his reasons, that by reframing their argument in this manner, the appellants cannot "mask the reality that their complaints still emanate from the linguistic requirements of the Registration Regulation." As pointed out in *Danyluk*, at para. 18, litigants are "only entitled to one bite at the cherry" and are required "to put their best foot forward to establish the truth of their allegations when first called upon to do so." The applicable principle is that "litigation is conclusive upon issues actually brought before the court and upon any issues which the parties, exercising reasonable diligence, should have brought forward on that occasion": *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 1996 CanLII 8037 (ON SC), 30 O.R. (3d) 286 (Gen. Div.), aff'd (1997), 1997 CanLII 3841 (ON CA), 32 O.R. (3d) 651 (C.A.). The appellants have always complained that the language proficiency requirement is discriminatory and they have failed to provide an adequate explanation for why they could not, with reasonable diligence, have advanced the same argument that they sought to make before the application judge in the application before the Divisional Court.

[7] The appellants argue that the Divisional Court did not deal with the question whether the language proficiency requirement was discriminatory contrary to the Ontario *Human Rights Code*, R.S.O 1990, c. H.19. We agree with the respondent that the determination by the Divisional Court that the language proficiency requirement was not discriminatory under the *Charter* also answered the threshold issue of discrimination under the *Code*. It was not open to the appellants to re-litigate what in substance was the same argument by giving it a different legal label.

(2) Final decision

[8] The order of the Divisional Court dismissing the previous application was a final order. The appellants did not seek leave to appeal that order.

(3) Same parties

[9] The two individual appellants were parties to the Divisional Court proceeding as was the Federation of Ontario Traditional Chinese Medicine Association. All corporate appellants, except Committee of Certified Acupuncturists of Ontario, share the same registered address and they all share many of the same directors and officers, including the two individual appellants. In the context of these proceedings, this constitutes a sufficient degree of identification among the parties "to make it just to hold that the decision to which one was a party should be binding in the proceedings to which the other is a party": *Re EnerNorth Industries Inc.*, 2009 ONCA 536, 96 O.R. (3d) 1, at para. 62. In any event, even if the same parties requirement for issue estoppel is not strictly met, permitting the appellants to re-litigate the issue that was determined by the Divisional Court would amount to an abuse of process: see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37.

(4) Discretion

[10] Finally, we are not persuaded that the application judge erred by failing to exercise his discretion to permit the appellants to avoid the doctrines of issue estoppel and abuse of process. The application judge thoroughly reviewed the evidence and submissions of the appellants and concluded that they were simply re-litigating the same case before him that they had advanced before the Divisional Court. We agree with that conclusion and while we understand the appellants' frustration over the effect of the Registration Regulation, we see no basis for permitting them to re-litigate the issue whether that Regulation is discriminatory.

B. INJUNCTION AND DECLARATORY RELIEF

[11] The evidence before the application judge amply supported his findings that the College was entitled to declaratory and injunctive relief on the grounds that the corporate appellants falsely held themselves out as regulatory colleges, that the individual appellants had wrongly held themselves out as representatives of the regulator, that certain of the appellants had engaged in unauthorized practice, and that the individual appellants had engaged in the unauthorized use of the protected titles "Doctor" or "traditional Chinese medicine practitioner," all contrary to the *Regulated Health Professions Act*, 1991 and the *Traditional Chinese Medicine Act, 2006*.

C. DISPOSITION

[12] Accordingly, the appeal is dismissed with costs to the respondent fixed at $12,500, inclusive of disbursements and taxes.

Released: December 7, 2015

"Robert J. Sharpe J.A."
"E.A. Cronk J.A."
"B.W. Miller J.A."

3866

Tab 218

CanLII

Las Vegas Strip Ltd. v. Toronto (City), 1996 CanLII 8037 (ON SC)

Source:	Superior Court of Justice
Date:	1996-09-17
Other citations:	30 OR (3d) 286 — 65 ACWS (3d) 851 — 13 OTC 308 — 38 CRR (2d) 129 — [1996] OJ No 3210 (QL) — 34 MPLR (2d) 233
Citation:	Las Vegas Strip Ltd. v. Toronto (City), 1996 CanLII 8037 (ON SC), <https://canlii.ca/t/1vttp>, retrieved on 2026-01-18

Re Las Vegas Strip Ltd. et al. and Corporation of the City of Toronto; Zanzibar Tavern Inc., Intervenor
Re Sohmer and Corporation of the City of Toronto
Zanzibar Tavern Inc. v. Las Vegas Restaurant & Tavern Ltd. et al.
[Indexed as: Las Vegas Strip Ltd. v. Toronto (City)]

30 O.R. (3d) 286
[1996] O.J. No. 3210
Court File Nos. RE 6568/96, RE 6661/96 and 94-CQ-53524

Ontario Court (General Division),
Sharpe J.,
September 17, 1996

* An appeal from the following judgment of Sharpe J. to the Ontario Court of Appeal (Osborne, Abella and Charron JJ.A.) was dismissed on March 14, 1997. This information is noted at 1997 CanLII 3841 (ON CA), 32 O.R. (3d) 651 in this database.

Judgments and orders -- Res judicata -- Operator of adult entertainment parlour unsuccessful in application for declaration that its use of premises for live nude strip bar a legal non-conforming use -- Operator also unsuccessful in resisting injunction proceedings based on its use being contrary to zoning -- Operator commencing new proceedings for declaration that zoning by-law invalid and contrary to Canadian Charter of Rights and Freedoms -- New proceedings barred by doctrine of res judicata.

Municipal law -- By-laws -- Validity -- Limitation period -- Section 138 of Municipal Act requiring application to quash by- law to be made within one year of passing of by-law -- Limitation period not applying to proceedings by action or by application for declaration that by-law invalid -- Municipal Act, R.S.O. 1990, c. M.45, s. 138.

In 1993, L Ltd., whose principals were AH and MK, sought permission from licensing authorities to operate a live nude strip bar in premises on Yonge Street in the City of Toronto. This use was contrary to the City's Zoning By-law 438-86, which prohibited "adult entertainment parlours" in the downtown core; however, permission was granted based on L Ltd.'s representations that its operation constituted a legal non- conforming use. L Ltd.'s business began in December 1993, but in March 1994, Z Inc., which operated a similar establishment, asserted that L Ltd.'s premises had not previously been used as an adult entertainment parlour and that the operation was contrary to zoning. Two actions were then commenced.

In the first action, L Ltd. sued the City for a declaration that its business constituted a legal non-conforming use, and, in the second action, Z Inc. sued L Ltd. seeking injunctive relief on the basis that L Ltd.'s use was contrary to zoning. L Ltd.'s defence to the second action was that its use enjoyed the status of a legal non-conforming use. The actions were tried together. In June 1995, L Ltd.'s action was dismissed, and Z Inc.'s action for an injunction was successful. L Ltd. appealed, and, on its appeal, L Ltd. attempted to raise the argument that the zoning by-law was invalid. This argument was not permitted by the Court of Appeal since it had not been raised before. L Ltd.'s appeal was dismissed on April 23, 1996, and it subsequently filed an application for leave to appeal to the Supreme Court of Canada.

While its application for leave to appeal was pending, L Ltd. commenced a new proceeding in which it sued the City for a declaration that the by-law was invalid as contrary to municipal law principles and also the Canadian Charter of Rights and Freedoms. Z Inc. was granted intervenor status in this proceeding. L Ltd. also moved in the earlier action by Z Inc. for an order setting aside the injunction in the event the by-law was found to be invalid. These matters were joined by an action by AS, who was associated with MZ. She sought identical declaratory relief to that sought by L Ltd. in its new proceeding, and she asserted that she wished to establish an adult entertainment parlour. The three matters were heard together.

Held, the applications should be dismissed.

Contrary to the argument of the respondent City, the applications of L Ltd. and AS were not barred by s. 138 of the Municipal Act, which provides that an application to quash a by-law shall not be entertained unless made within one year after the passing of the by-law. Section 138 does not apply to proceedings for declaratory relief, whether by action or by application. The applications, however, were barred by the doctrines of res judicata or abuse of process.

The purposes behind the res judicata principle are that it is in the public interest that there should be an end to litigation and no individual should be subjected to proceedings more than once for the same cause. The plea of res judicata applies, except in special cases, not only to points upon which the court has ruled but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward. To analyze the operation of the doctrine, it was necessary to focus on the causes of action that were asserted in the prior proceedings. In those proceedings Z Inc. put squarely in issue the legal right of L Ltd. to carry on its operation. There was no doubt that L Ltd. could have raised as a defence to Z Inc.'s action, the argument it now sought to assert about the alleged invalidity of the by-law. Although inconsistent with L Ltd.'s position that it had a legal non-conforming use, the argument could have been pleaded in the alternative. It would be contrary to the policies underlying the principle of res judicata to permit L Ltd. now to raise the issue of the invalidity of the by-law. The principles of res judicata also applied with respect to the prior action in which L Ltd. sought a declaration; its

present action could not be said to be based upon a different set of facts and the same relief was being sought, namely, a declaration that the by-law did not prevent L Ltd. from carrying on its operation. For the purposes of the doctrine of res judicata, L Ltd. could not claim to be advancing a separate and distinct cause of action. The fact that a different legal theory was being advanced did not remove the action from the reach of res judicata. A litigant cannot establish a new and fresh cause of action by advancing a new legal theory in support of a claim based upon essentially the same facts.

The doctrine of res judicata also applied with respect to the principals of L Ltd., who are in privity with L Ltd. The claim of AS to declaratory relief was also barred. The evidence established that MK was in fact the moving force behind her application and it was brought with a view to avoiding the effect of res judicata. Alternatively, her application may also be dismissed as an abuse of process.

The applications being barred, it was not appropriate to rule on the questions of the validity of the adult entertainment zoning by-law.

APPLICATIONS for declarations as to the validity of an adult entertainment zoning by-law.

Cases referred to 420093 B.C. Ltd. v. Bank of Montreal (1995), 1995 CanLII 6246 (AB CA), 34 Alta. L.R. (3d) 269, 128 D.L.R. (4th) 488, [1996] 1 W.W.R. 561 (C.A.); Clements v. Toronto, 1959 CanLII 163 (ON CA), [1960] O.R. 18, 20 D.L.R. (2d) 497, [1960] O.W.N. 3 (C.A.); Glatt v. Glatt, 1937 CanLII 8 (SCC), [1937] S.C.R. 347, [1937] 1 D.L.R. 794, 19 C.B.R. 14; Gleeson v. J. Wippell & Co., [1977] 3 All E.R. 54, [1977] 1 W.L.R. 510, 121 Sol. Jo. 157; Gordon v. De Laval Co., 1938 CanLII 83 (ON CA), [1938] O.R. 462, [1938] 3 D.L.R. 263 (C.A.); Grandview (Town) v. Doering, 1975 CanLII 16 (SCC), [1976] 2 S.C.R. 621, 61 D.L.R. (3d) 455, [1976] 1 W.W.R. 388, 7 N.R. 299; Greymac Properties Inc. v. Feldman (1990), 1990 CanLII 6939 (ON SC), 1 O.R. (3d) 686, 46 C.P.C. (2d) 125 (Gen. Div.); Henderson v. Henderson (1843), 3 Hare 100, 67 E.R. 313, [1843-60] All E.R. Rep. 378, 1 L.T.O.S. 410; Hoystead v. Taxation Commissioner, 1925 CanLII 607 (UK JCPC), [1926] A.C. 155, [1925] All E.R. Rep. 56, 95 L.J.P.C. 79, 134 L.T. 354, 42 T.L.R. 207 (P.C.); Hunter v. Chief Constable of West Midlands, [1981] 3 All E.R. 727 (H.L.); Maynard v. Maynard, 1950 CanLII 3 (SCC), [1951] S.C.R. 346, [1951] 1 D.L.R. 241; Nigro v. Agnew-Surpass Shoe Stores Ltd. (1977), 1977 CanLII 3406 (ON SC), 18 O.R. (2d) 215, 82 D.L.R. (3d) 302 (H.C.J.), affd (1977), 1976 CanLII 692 (ON CA), 18 O.R. (2d) 714n, 1978 CanLII 2192 (ON CA), 84 D.L.R. (3d) 256n (C.A.); Sampson v. Kingston (City) (1982), 1982 CanLII 1784 (ON CA), 33 O.R. (2d) 105, 123 D.L.R. (3d) 652, 15 M.P.L.R. 298 (C.A.); Solomon v. Smith (1987), 1987 CanLII 117 (MB CA), 49 Man. R. (2d) 252, 45 D.L.R. (4th) 266, [1988] 1 W.W.R. 410, 22 C.P.C. (2d) 12 (C.A.) Statutes referred to Canadian Charter of Rights and Freedoms, s. 7 Municipal Act, R.S.O. 1990, c. M.45, s. 138 Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 14.05(3) (d), (g.1) [enacted O. Reg. 396/91, s. 3], (h) Authorities referred to Black's Law Dictionary, 6th ed. (1990), "cause of action" Dukelow and Nuse, The Dictionary of Canadian Law (1990), "cause of action" Spencer, Bower and Turner, The Doctrine of Res Judicata, 2nd ed. (1969), pp. 10, 210 Rogers, The Law of Canadian Municipal Corporations, 2nd ed. (Cumulative Supplement to vol. 2), p. 982 Walker, The Oxford Companion to Law (1980), "cause of action" Yogis, Canadian Law Dictionary, 2nd ed. (1990), "cause of action"

Clayton C. Ruby and Jill Copeland, for Las Vegas Strip Ltd.,
Abdul Hilmy, Mohammad Zak Khan and Annina Sohmer.
Sylvia Watson and Diana Dimmer, for Corporation of the City
of Toronto.
John D. Campbell, for Zanzibar Tavern Inc.

SHARPE J.: --

INTRODUCTION

Tab 219

CanLII

Payne v. Ontario Human Rights Commission, 2000 CanLII 5731 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2000-05-09
File number:	C31619
Other citations:	192 DLR (4th) 315 — 136 OAC 357 — 25 Admin LR (3d) 255 — 2 CCEL (3d) 171 — 38 CHRR 367 — [2000] CarswellOnt 2717 — [2000] OJ No 2987 (QL)
Citation:	Payne v. Ontario Human Rights Commission, 2000 CanLII 5731 (ON CA), <https://canlii.ca/t/1fb7n>, retrieved on 2026-01-18
Acknowledgements:	The addition of this document to the CanLII website was made possible by the Canadian Human Rights Reporter.
Most recent unfavourable mention	Roach v. Ontario (Workplace Safety and Insurance Appeals Tribunal), 2005 CanLII 10047 (ON CA) [...] In my view, **Payne is not applicable** to the present case. [...]

Ontario Court of Appeal

Stephnie Payne

Applicant / Appellant

and

Ontario Human Rights Commission

Respondent

Date of Decision:

May 9, 2000

Before:

Ontario Court of Appeal, Abella, O'Conner and Sharpe JJ.A.

Decision No.:

C31619

Appeal from:

(1999), CHRR Doc. 99-238 (Ont. Ct. (Gen.Div.))

Appearances by:

Geri Sanson and Mark Hart, Counsel for the Appellant

Anthony D. Griffin, Counsel for the Respondent

HUMAN RIGHTS COMMISSIONS — appointment of board/tribunal reconsidered — discretion to dismiss complaint — authority to discontinue proceedings — authority to reconsider decision to appoint board/tribunal — deliberative secrecy — fairness in investigation of complaint — human rights commission's refusal to supply information from investigator's report — role of human rights commission — sufficient reasons for decision — APPEALS AND JUDICIAL REVIEW — human rights commission's decision to dismiss complaint

EVIDENCE — affidavit evidence — examination for discovery in judicial review proceedings — examination of witness in judicial review proceeding — PRODUCTION OF DOCUMENTS — production of documents in judicial review proceedings — examination for discovery — investigation file — PROCEDURE — examination for discovery of human rights commission member — procedural fairness — CONFIDENTIAL RECORDS — human rights commission's deliberation record

Summary: *In a split decision the Ontario Court of Appeal ruled that Stephnie Payne was entitled to examine a senior Commission official to obtain further disclosure of the facts, arguments, and considerations that were presented to the Ontario Human Rights Commission when it decided not to refer her complaint to a Board of Inquiry for hearing.*

Stephnie Payne, who is a black woman, was an employee of Youth Clinical Services Inc. ("YCS"), a counselling organization serving young people in Toronto. In early 1993, Ms. Payne was active in leading opposition to the musical Showboat, scheduled for the opening of the North York Centre for the Performing Arts later that year. Many people in the local black community opposed the staging of this musical on the grounds that it portrayed black people in a negative way. In a television interview, Ms. Payne said: "Most of the plays that portray Blacks... in a negative way is always done by a white man, and always usually a Jewish person is doing plays to denigrate us." Ms. Payne subsequently apologized publicly for her anti-Semitic remark. However, she refused to apologize to her Jewish co-workers at YCS or to deny the veracity of her comment.

Because Ms. Payne's remarks received considerable publicity, and Ms. Payne had conducted the interview at YCS, some colleagues at YCS were concerned about her comment's effect on the organization and its relations with the people it served. Tension

ran high among Ms. Payne's co-workers. The Board and senior staff attempted to address concerns by conferring with staff members and by holding a day-long anti-racism workshop. Eleven months after the incident, when efforts to improve the divisive atmosphere had failed, the Board terminated Ms. Payne's employment.

Ms. Payne filed a human rights complaint alleging that there was an environment of systemic racism at YCS, that she was fired because she was a black woman, and that her termination constituted a reprisal against her for claiming her human rights.

In September 1996, the Commission considered a case analysis of Ms. Payne's complaint prepared by the staff. This report concluded that the evidence did not support a finding of systemic racism, but recommended that the allegations of termination based on race and reprisal be referred to a board of inquiry for hearing. At this meeting, however, Ms. Payne's complaint was "pulled" and staff were directed to undertake further investigation. At a subsequent meeting in March 1997, the Commission considered a second case analysis prepared by staff, which recommended that the case be referred to a board of inquiry, but only on the issue of whether Ms. Payne's termination was a reprisal for making a human rights complaint. The Commission decided not to refer the complaint for hearing. In March 1998, at Ms. Payne's request, the Commission reconsidered this decision. The Commission confirmed its 1997 decision not to refer.

Ms. Payne then sought judicial review of the Commission's decisions not to refer her complaint for hearing. In a related action, Ms. Payne sent a notice of examination under r. 39.03 of the Rules of Civil Procedure to the Registrar of the Ontario Human Rights Commission directing her to attend for examination and to bring with her all documents, notes, letters, records, etc. that pertained in any way to Ms. Payne's complaint and the Commission's consideration of it, including any documents relating to the temporary loss of Ms. Payne's file.

With her motion for an order that the examination take place, Ms. Payne filed an affidavit from St. Clair Wharton, who was a Human Rights Commissioner at the time that Ms. Payne's complaint was considered in 1996, though not at the times when decisions were made in 1997 and 1998. In his affidavit, Mr. Wharton stated that his recollection was that at the 1996 meeting the Commission decided to refer Ms. Payne's complaint for hearing. He also stated that staff put pressure on the Commission to decide on cases in certain ways, and that considerations other than the merit of a complaint were taken into account, including the costs of a hearing and "strategic concerns".

Since Ms. Payne was already in possession of all the documents that were before the commissioners in 1997 and 1998, the motions judge in the Divisional Court ruled that the scope of the examination of the Registrar should be limited to any documents and answers relating to the temporary loss of Ms. Payne's file, and to documents and answers relating to the September 1996 consideration of her file. Ms. Payne's motion to have this matter reconsidered by a full panel of the Divisional Court was dismissed. This is an appeal from that decision.

The issue before the Court of Appeal is the scope of r. 39.03 on an application for judicial review of a Commission decision.

The majority of the Court of Appeal found that the only legitimate factor to be considered by the Commission when deciding whether to refer a complaint for hearing is the merit of the complaint. If the Commission were to base its decision on some extraneous factor, such as cost or "strategic concerns", the court would intervene on judicial review. Further, if the Commission were to decide based on factors or considerations not disclosed to the parties, there would be no opportunity to respond and the right to fairness would be

placed in its hands. With this background in mind, I proceed to consider the precise issues presented on this appeal.

(c) Position of the Parties

[159] The appellant's position is that she has a *prima facie* right to conduct an examination of the Registrar under r. 39.03. The appellant also submits that even if, as the Commission submits, it is necessary to establish "a reasonable evidentiary foundation" for the examination, the evidence adduced, in particular, the Wharton affidavit satisfies that test. The Commission submits that it is necessary to establish an evidentiary foundation to justify an examination under r. 39.03 in an application for judicial review, and that the appellant has failed to do so in this case. The Commission does not, however, dispute before this Court the correctness of the motions judge's order permitting the appellant to have full disclosure of what was said or put before the commissioners by Commission staff in relation to the appellant's complaint at the September 10 and 11, 1996, meeting.

(d) The "Record" on Judicial Review

[160] The content of the court record for an application for judicial review is defined by the *Judicial Review Procedure Act,* R.S.O. 1990, c. J-1 and by the Rules of Civil Procedure. The process begins with the notice of application: r. 68.01(1). Upon being served with the notice of application for judicial review, the decision-maker is required by s. 10 of the *Judicial Review Procedure Act,* to file with the Divisional Court "the record of the proceedings in which the decision was made". The "record" is not defined by the *Act.*

[161] An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court. This is an aspect of the superior court's inherent powers of judicial review. A superior court may insist upon the production of an adequate record of the proceedings before the tribunal being reviewed. As stated by Denning L.J. in *R.* v. *Medical Appeal Tribunal ex p. Gilmore,* [1957] 1 Q.B. 574 at 583 (C.A.): "The court has always had power to order an inferior tribunal to complete the record ... [A] tribunal could defeat a writ of *certiorari* unless the courts could order them to complete or correct an imperfect record. So the courts have the power to give such an order". See also *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw,* [1952] K.B. 338 at 352–54 (C.A.); *Canadian Workers Union* v. *Frankel Structural Steel Ltd.* (1976), 1976 CanLII 829 (ON SC), 12 O.R. (2d) 560 at 577 (Div. Ct.) per Reid J.; *F.G. Spencer Ltd.* v. *Prince Edward Island (Labour Relations Board)* (1970), 1970 CanLII 960 (PE SCAD), 16 D.L.R. (3d) 670 (P.E.I.S.C.); *Battaglia* v. *British Columbia (Workmen's Compensation Board)* (1960), 1960 CanLII 334 (BC SC), 22 D.L.R. (2d) 446 (B.C.S.C.). A statutory body subject to judicial review cannot immunize itself or its process by arriving at decisions on considerations that are not revealed by the record it files with the court.

(e) Examination of Witnesses

[162] Rule 39.03 provides that a person may be examined as a witness before the hearing of a pending motion or application. Rule 39.03 applies to applications for judicial review. The leading Canadian text on administrative law, Brown and Evans, *Judicial Review of Administrative Action in Canada* (updated June 30, 1999) at § 6:5530, states: "A witness may be summoned to give evidence under oath in support of an application for judicial review and any transcript of that evidence is to be included in the Application Record". This proposition is borne out by the authorities that have considered the Rule in relation to applications for judicial review. As I explain below, these authorities hold that a party to an application for judicial review is entitled to adduce evidence by way of examination, provided the evidence sought to be adduced is relevant to an issue properly

Tab 220

CanLII

Lachance v. Solicitor General of Ontario, 2024 ONSC 975 (CanLII)

Source:	Divisional Court
Date:	2024-02-14
File number:	DC-22-2731
Citation:	Lachance v. Solicitor General of Ontario, 2024 ONSC 975 (CanLII), <https://canlii.ca/t/k2t0r>, retrieved on 2026-01-18

CITATION: Lachance v. Solicitor General of Ontario, 2024 ONSC 975
DIVISIONAL COURT FILE NO.: DC-22-2731
DATE: 20240214

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Stewart, Myers, and Leiper JJ

BETWEEN:

VICTOR LACHANCE AND KIRK ALBERT Applicants **– and –** **SOLICITOR GENERAL OF ONTARIO and ATTORNEY GENERAL OF ONTARIO**	)	*Stéphane Émard-Chabot*, for the Applicants

[37] I agree with the finding of Ryan Bell J. that by bringing this application for judicial review the applicants became entitled to receive all documents concerning their claims. Ryan Bell J. adopted the words of Sharpe JA in *Payne v. Ontario Human Rights Commission*, 2000 CanLII 5731 (ON CA) at para. 161:

> An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court. This is an aspect of the superior court's inherent powers of judicial review. A superior court may insist upon the production of an adequate record of the proceedings before the tribunal being reviewed.

[38] When met by a reluctant decision-maker, the applicants always had the ability to obtain the documents that they needed to advance their claim. They just had to initiate this application.

[39] A desire for documentary production in advance, by itself, is not a basis to extend the limitation period under s. 5 (2) of the *JRPA*.

[40] But the applicants submit that without the documents, they could not assess whether they had grounds to bring this application for judicial review. I do not agree.

[41] The applicants knew that the Municipality of North Grenville told them it was not consulted prior to the decision being announced by October, 2020. They made repeated requests for information that were not answered. Had the Solicitor General fulfilled her obligations to consider the provincial and municipal policy statements under the *Planning Act*, she readily could have provided proof to the applicants if she had been so minded.

[42] The absence of information from the Solicitor General, coupled with her officials' promises of transparency, would have provided an ample basis for the applicants to make a *prima facie* assertion that the Solicitor General did not fulfill her statutory obligations. This remains the principal basis for the applicants' assertions in this application even now two years later. Only the Solicitor General knows what she considered in advance of making the decision. The applicants had a basis to seek judicial review as soon as the Solicitor General declined to provide them with evidence or an explanation of how she complied with her statutory obligations.

[43] The applicants submit that they did not want to be met with an argument that their application was premature. But there was no ongoing proceeding to challenge the Solicitor General decision or some other appeal process that required completion before this proceeding could be brought.

Tab 221

CanLII

Jacko v. McLellan, 2008 CanLII 22921 (ON SCDC)

Source:	Divisional Court
Date:	2008-05-15
File number:	479/07
Other citations:	93 OR (3d) 468 — 79 Admin LR (4th) 150
Citation:	Jacko v. McLellan, 2008 CanLII 22921 (ON SCDC), <https://canlii.ca/t/1wxsm>, retrieved on 2026-01-18

Jacko v. McLellan, Chief Coroner for Ontario
[Indexed as: Jacko v. Ontario (Chief Coroner)]

93 O.R. (3d) 468

Ontario Superior Court of Justice,
Divisional Court,
Ferrier J.
May 15, 2008*
*** This judgment was recently brought to the attention of the editors.**

Administrative law -- Judicial review -- Procedure -- Applicant bringing application for judicial review of decision of Chief Coroner not to order inquest -- Respondent refusing to file record of proceedings on grounds that decision by Chief Coroner was not reviewable and that no "proceedings" took place -- Respondent ordered to file record of proceedings -- Questions of whether decision was reviewable and whether "proceedings" took place being for reviewing panel to determine.

The applicant brought an application for judicial review of the Chief Coroner's decision not to order an inquest into the death of a child. The respondent took the position that it was not required to file a record of the proceedings as a decision by the Chief Coroner not to order an inquest is not the exercise of a statutory power of decision and as no "proceedings" took place. The applicant brought a motion for an order compelling the respondent to file a record of proceedings.

Held, the motion should be granted.

As long as there was a pending application for judicial review, a record of the proceedings must be filed. It would be for the panel to determine whether the decision of the Chief Coroner was reviewable and whether there was a "proceeding" below.

MOTION for an order compelling the respondent to file a record of proceedings.

Cases referred to Barrington v. Institute of Chartered Accountants, 2004 CanLII 34623 (ON SCDC), [2004] O.J. No. 4351, 191 O.A.C. 230, 134 A.C.W.S. (3d) 744 (Div. Ct.); Markevich v. Canada, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9, 239 F.T.R. 159, 223 D.L.R. (4th) 17, N.R. 321, J.E. 2003-506, 2003 D.T.C. 5185, 120 A.C.W.S. (3d) 532; Payne v. Ontario Human Rights Commission, 2000 CanLII 5731 (ON CA), [2000] O.J. No. 2987, 192 D.L.R. (4th) 315, 136 O.A.C. 357, 25 Admin. L.R. (3d) 255, 2 C.C.E.L. (3d) 171, [2000] CLLC Â230-039, 100 A.C.W.S. (3d) 634 (C.A.) Statutes referred to Coroners Act, R.S.O. 1990, c. C.37, ss. 20, 26 [as am.], (2), 31(1) Judicial Review Procedure Act, R.S.O. 1990, c. J.1, ss. 1 [as am.], 10

Kimberly R. Murray, for applicant.

John P. Zarudny and Chantelle Blom, for respondent.

[1] FERRIER J.: -- This is a motion in a pending application for judicial review.

> [2] In the application, the applicant seeks: [page469] i) An Order quashing the decision of the Chief Coroner, Dr. Barry McLellan, dated April 2, 2007, denying the applicant's request that an Inquest be called to examine the death of the applicant's nine-year-old son, Jordan Jacko; ii) An Order requiring the Chief Coroner to call an Inquest into the death of Jordan Jacko; iii) Alternatively, an Order requiring the Office of the Chief Coroner to provide the applicant with a complete copy of the Coroner's Investigation Brief into the Death of Jordan Jacko and thereafter requiring the Chief Coroner to accept and consider further written submissions from the applicant in relation to whether an Inquest should be called to examine the death of Jordan Jacko; iv) In the further alternative, an Order requiring the Office of the Chief Coroner to provide adequate written reasons for its decision to not call an Inquest into the Death of Jordan Jacko;

[3] On April 25, 2005, Jordan Jacko ("Jordan"), a nine-year- old aboriginal child, choked to death after a portion of a hot dog lodged deep in his throat while he was eating lunch at his public school in Kenora in the company of his teacher and fellow students.

[4] At the request of the Jacko family, the coroner did not perform an autopsy.

[5] On June 1, 2005, the applicant wrote to the Regional Coroner to request an inquest into Jordan Jacko's death.

[6] The Regional Coroner conducted an investigation and determined that an inquest was not appropriate in the circumstances, based on the relevant provisions in ss. 20 and 26 of the Coroners Act, R.S.O. 1990, c. C.37. By letter dated September 16, 2005, the Regional Coroner, Dr. Legge, informed the applicant's counsel that he had investigated the matter and was denying the applicant's request for an inquest and provided detailed written reasons. The coroner advised in the said letter that Jordan's airway obstruction was so serious that his death was not only accidental but tragically "inevitable". The coroner further advised that Jordan's teacher, school principal and the Kenora police had all tried the "Heimlich manoeuvre" on Jordan without success.

[7] In the September 16, 2005 letter, the Regional Coroner explained that he had determined that the circumstances surrounding the death were rare and unusual, the response to the situation had been appropriate and that a Coroner's jury would not be able to make substantial recommendations

on how to avoid death in this type of situation in the future. The Regional Coroner also informed the applicant that the answers to the five questions in s. 31(1) of the Coroners Act had already been established and that compellable reasons did not exist for the public to be further informed of the circumstances of Jordan Jacko's death. [page470]

[8] On October 13, 2005, the applicant's counsel then wrote to the respondent Chief Coroner for Ontario, requesting a review of the Regional Coroner's decision (pursuant to s. 26).

[9] On April 2, 2007, following his own investigation, the Chief Coroner wrote to the applicant explaining that because he had determined that the circumstances of Jordan Jacko's death did not meet the criteria set out in s. 20 of the Coroners Act, he had decided not to order an inquest. He reminded the applicant that the Jacko family had requested that no autopsy be conducted and that the coroner had respected this request. The Chief Coroner stated:

> Having reviewed all of the information available, I have decided that the circumstances of Jordan's death do not meet the criteria as set out in Section 20 of the Coroners Act of Ontario. I will therefore not order an inquest into his death.

[10] Six months later, on October 9, 2007, the applicant issued, through his counsel Ms. Murray of the Aboriginal Legal Services Legal Clinic of Toronto ("A.L.S."), a Notice of Application for a judicial review of the Chief Coroner's decision not to hold an inquest.

[11] The applicant has requested that the respondent deliver a "record of proceedings" including the complete unredacted version of the Ontario Provincial Police Investigation Report and the complete "Coroner's file".

[12] By letter dated November 27, 2007, counsel for the respondent advised opposing counsel that it was not required to file a "record of proceedings" in this case.

[13] I note that the application for judicial review remains pending.

[14] The respondent notes in its material that a decision by the Chief Coroner not to order an inquest has never been determined by a court to be a decision within s. 1 of the Judicial Review Procedure Act, R.S.O. 1990, c. J.1.

[15] The respondent argues that a decision by the Chief Coroner pursuant to s. 26(2) of the Coroners Act to not hold an inquest is not the exercise of a statutory power of decision -- i.e., a "decision deciding or prescribing . . . the eligibility of any person . . . to receive a benefit or licence . . ." within s. 1 of the Judicial Review Procedure Act.

[16] Furthermore, the respondent argues that no "proceedings" took place. The respondent argues that the requirement to file a record pursuant to s. 10 of the Judicial Review Procedure Act applies only to those decisions in which the decision-maker exercised a statutory power of decision that generated a record of proceedings (Barrington v. Institute of Chartered Accountants, 2004 CanLII 34623 (ON SCDC), [2004] O.J. No. 4351, 191 O.A.C. 230 (Div. Ct.)). [page471]

[17] A "proceeding" or "proceedings" refers to a process or step in a process that determines a legal right:

> Although the word "proceeding" is often used in the context of an action in court, its definition is more expansive . . . [T]he "word 'proceeding' has a very wide meaning, and includes steps or measures which are not in any way connected with actions or suits". In Black's Law Dictionary
> (6th ed. 1990), at p. 1204, the definition of "proceeding" includes, inter alia, "an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect

 a legal right". Markevich v. Canada, 2003 SCC 9 (CanLII), [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, at para. 24.

[18] The purpose of requiring a tribunal or adjudicator to file a "record of proceedings" is to ensure that when the court reviews the tribunal's decision, it has the information and evidence as it appeared before the tribunal in the first instance. A court reviewing an adjudicative decision may look at decisions to admit evidence, submissions of witnesses, and other evidence and may substitute its judgment for that of the court of first instance (Payne v. Ontario Human Rights Commission, 2000 CanLII 5731 (ON CA), [2000] O.J. No. 2987, 136 O.A.C. 357 (C.A.), at para. 23).

[19] The respondent submits that the term "proceedings" in s. 10 of the Judicial Review Procedure Act means a judicial or quasi-judicial proceeding, such as an action, application, an appearance before an adjudicative board, tribunal or individual arbitrator to determine rights. In deciding whether or not to order an inquest, the Chief Coroner is not performing an adjudicative function. The Chief Coroner decides, based on the factors in s. 20 of the Coroners Act, whether or not to order an inquest by examining factual information to determine, based on his or her expertise, whether ordering an inquest is in the public interest.

[20] In my view, so long as there is a pending application for judicial review, which is the case here, a record of proceedings, such as it may be, must be filed.

[21] It will be for the panel to determine whether the decision of the Chief Coroner is a reviewable decision.

[22] It will be for the panel to decide whether there was a "proceeding" below.

[23] I note that although the respondent suggests in its material that what the applicant actually seeks in this motion is an unredacted copy of the Ontario Provincial Police investigation report, that relief was not sought on the motion and I make no order in reference to that question. That may be for the panel to consider because it is the subject of alternative relief in the application.

[24] Order to go as asked. [page472]

[25] For clarity, in making the order sought, I make no determination that the "proceedings" below are "proceedings" within the Judicial Review Procedure Act, and I make no determination of the question whether the Chief Coroner, in this context, exercises a statutory power of decision.

[26] On consent, no order as to costs.

Motion granted.

Tab 222

CanLII

Rew v Association of Professional Engineers of Ontario (Discipline Committee), 2016 ONSC 4043 (CanLII)

Source:	Divisional Court
Date:	2016-06-16
File number:	532/15
Citation:	Rew v Association of Professional Engineers of Ontario (Discipline Committee), 2016 ONSC 4043 (CanLII), <https://canlii.ca/t/gs5t9>, retrieved on 2026-01-18

CITATION: Rew v. Association of Professional Engineers of Ontario (Discipline Committee), 2016 ONSC 4043
DIVISIONAL COURT FILE NO.: 532/15
DATE: 20160616

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	
Paul Rew and Rubicon Environmental (2008) Inc.	*Arnold B. Schwisberg*, for the Applicants
Applicants	
– **and** –	*David P. Jacobs*, for Discipline Committee of The Association of Professional Engineers of Ontario
Association of Professional Engineers of Ontario (Discipline Committee)	*Leah Price* and *Nick Hambleton* for the Association of Professional Engineers
Respondents	
	HEARD at Toronto: June 16, 2016

DAMBROT, J. (ORALLY)

BACKGROUND

[1] Paul Rew and Rubicon Environmental (2008) Inc. (the "Applicants") brought a motion before the Association of Professional Engineers of Ontario (Discipline Committee) (the "Committee") for a permanent stay of certain discipline proceedings against them. On September 15, 2015, the Committee dismissed the motion. The Applicants seek judicial review of that dismissal. They bring two motions today in relation to their application for judicial review.

[2] On the motion before the Committee for a stay, the Committee heard the oral evidence of two witnesses, Mr. Slack, the Association's investigator and Mr. Rew. The oral evidence was recorded as required by s.30(5) of the *Professional Engineers Act* R.S.O. 1990 c. P.28 ("PEA") but has not been transcribed.

[3] The Committee has filed in this Court a record of proceedings for use on the judicial review application as required by s.10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1. In it, the Committee included transcripts of portions of the proceedings that were obtained and filed by the parties. The Committee did not order a transcript of the remainder of the hearing and of course did not include any such transcript in the record.

[4] The Applicants bring their first motion today to compel the Committee to "complete" the record by including a transcript of the oral evidence of the two witnesses who testified at the hearing.

[5] The Applicants also brought a motion for a stay of the discipline proceedings brought against them pending their application for judicial review. This motion was refused by the Committee on May 25, 2016 with reasons to follow. As a result, the Applicants bring their second motion today for an interim stay of the continuation of the discipline proceedings against them pending the final disposition of the application for judicial review.

THE TRANSCRIPT MOTION

[6] Pursuant to s.30(5) of the PEA, the oral evidence taken in proceedings before the Discipline Committee must be recorded and, if required, copies of a transcript of the evidence must be furnished to the parties upon the same terms as in the Superior Court of Justice. The statute does not require the Committee to order a transcript of the proceedings, far less does it require the Committee to base its determination on a transcription of the evidence.

[7] In this case, a court reporter was present at the hearing and made a recording of the oral testimony. Neither the Committee nor any of parties to the proceedings has ordered complete transcripts of the proceedings to date.

[8] When notice of an application for judicial review of a decision made in the purported exercise of a statutory power of decision which includes a decision of the committee is served on the person making the decision, that person is required by s.10 of the *Judicial Review Procedure Act,* to "forthwith" file the record of proceedings in which the decision was made. The content of such a record is prescribed by s.20 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 which provides that a record of proceedings must include, among other things, "the transcript, *if any*, of the oral evidence given at the hearing [emphasis added]."

[9] In this case, there is no suggestion that the Committee otherwise failed to comply with s.20 of the *Statutory Powers Procedure Act*. The only question is whether s.10 of the *Judicial Review Procedure Act* requires a tribunal such as the committee to order, pay for and file the complete transcript of a proceeding before it that is the subject matter of judicial review.

[10] In my view, neither the simple and unambiguous words of s.20 nor the nature and scope of judicial review support the Applicants' argument. If the words "if any" in s. 20 are to have any meaning, they must mean that a transcript must be included in the record if one exists. Where no transcript has been prepared, the words do not oblige the tribunal in question to order and pay for a transcript and include it in the record. Such an obligation would also be inconsistent with the obligation in s.10 to file the record "forthwith" after receiving notice of the application for judicial review.

[11] As for the nature of the judicial review, it must be remembered that an application for judicial review is not an appeal or trial *de novo* or a rehearing. On judicial review, courts must avoid undue interference with the discharge of duties delegated to administrative bodies by legislatures: see *Dunsmuir v. New Brunswick,* 2008 SCC 9 (CanLII), [2008] S.C.J. No. 9 para. 27. A routine requirement for tribunals to prepare and file transcripts as a part of their record of proceedings is inconsistent with the nature and scope of judicial review.

[12] Curiously, if the position taken by the applicants were correct, the requirements relating to transcripts would be broader on judicial review than on appeal. In ordinary appeal, the appellant, and not the Court is responsible for ordering, paying for and filing a transcript. Moreover, the *Rules of Civil Procedure* which apply to an appeal from the committee by virtue of s.31(1) of the PEA discourage the filing of a complete transcript: see Rule 61.05(8).

[13] This is not to say that the Applicants cannot avail themselves of any benefit they might obtain from the filing of a transcript on judicial review. They are free to obtain a transcript if they choose and, I have no doubt, the Court would receive it if satisfied that its admission is necessary to allow effective judicial review of findings of fact. Such an eventuality is contemplated by Rule 68.04(9), which obliges a party who intends to refer to a transcript of evidence at a judicial review application to file copies of the transcript with its application record and factum.

[14] As a result, I will not compel the Committee to "complete" the record by including a transcript of the oral evidence of the two witnesses who testified at the hearing.

THE STAY MOTION

[15] As I have noted, the Applicants bring a second motion for an interim stay for the continuation of the discipline proceedings against them pending the final disposition of the application for judicial review.

[16] The test for a stay is well known. The Applicants must show:

- that there is a serious question to be determined;
- that the Applicants will suffer irreparable harm if the stay is denied; and
- the balance of convenience favours making the stay order.

[17] In this case the motion for a stay founders on the first leg of the test. Leaving aside the ultimate merits of the abuse of process ruling, judicial review has been brought prematurely. The Applicants will have a right to raise issues of fact and law including, issues relating to the abuse of process motion, on an appeal provided for by the PEA if they are found guilty. It is the strong policy of this court to discourage fragmentation of the administrative process and prevent the piecemeal litigation of tribunal proceedings by the bringing of applications for judicial review before the completion of hearings. Such piecemeal litigation undermines the deference we pay to administrative bodies and is both costly and inefficient. I addressed this issue in considerable detail in *Minty v. Lucas,* 2014 ONSC 3169 (Div. Ct.) at paras. 17-38. Specifically, I said, at para. 18:

> **18** This Court has consistently held that save in extraordinary circumstances, applications for judicial review of decisions of administrative tribunals should not be brought until the completion of the tribunals' proceedings. The Court has consistently followed a well-established line of authority against a piecemeal approach to the judicial review of administrative action. In the absence of exceptional circumstances, it is preferable to allow administrative proceedings to run their full course before a tribunal and to consider the legal issues arising from the proceeding, including procedural matters, against the backdrop of a full record and a reasoned decision of the tribunal (see *Ontario College of Arts v. Ontario (Human Rights Commission*), 1993 CanLII 3430 (ON SCDC), [1993] 11 O.R. (3d) 798 (Div. Ct.) at 799-800; *Lala v. College of Physiotherapists of Ontario,* [2003] O.J. No.5062 (Div. Ct.) at paragraphs 1-3).

[18] For an example of the application of the prematurity principle to the refusal of a stay of proceedings by a tribunal at the outset of a hearing see *Hamalengwa v. The Law Society of Upper Canada*, 2014 ONSC 1759 (Div. Ct).

[19] The serious argument to be determined leg of the test for a stay is not limited to the substantive argument that is proposed to be advanced on the judicial review. It relates to the availability to the judicial review as well.

[20] In this case, as in *Talarico v. The Law Society of Upper Canada,* 2012 ONSC 2493 (Div. Ct.) the applicants have failed to show that there is an arguable basis for the availability of judicial review at this juncture of the proceedings, and accordingly they do not satisfy the first leg of the test for a stay.

[21] When an applicant fails the first leg of the test for a stay, there is no need to consider the other legs. The applicants conceded this point. There is no doubt that the applicants will suffer financial and reputational harm as a result of this proceeding, as do all professionals who undergo disciplinary proceedings. But this cannot outweigh a failure to satisfy the requirement to show that there is a serious question to be determined. In such circumstances, the balance of convenience inevitably favours a refusal of stay.

[22] Accordingly, I will not order a stay pending the application for judicial review.

DISPOSITION

[23] Both motions are dismissed.

COSTS

[24] I have endorsed the motion record as follows: "This motion and the second motion in the supplementary motion record were both dismissed for oral reasons delivered in court today. Costs to the Discipline Committee fixed at $6,000 all inclusive and to the Association fixed at $4,000 all inclusive. Costs of both motions are payable forthwith."

DAMBROT, J.

Date of Reasons for Judgment: June 16, 2016

Date of Release: June 21, 2016

CITATION: Rew v. Association of Professional Engineers of Ontario (Discipline Committee), 2016 ONSC 4043
DIVISIONAL COURT FILE NO.: 532/15
DATE: 20160616

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

Paul Rew and Rubicon Environmental (2008) Inc.

Applicants

– **and** –

Association of Professional Engineers of Ontario (Discipline Committee)

Respondents

ORAL REASONS FOR JUDGMENT

DAMBROT, J.

Date of Reasons for Judgment: June 16, 2016

Date of Release: June 21, 2016

Tab 223

CanLII

Endicott v. Ontario (Independent Police Review Office), 2014 ONCA 363 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2014-05-06
File number:	C57694
Other citations:	373 DLR (4th) 149 — 239 ACWS (3d) 823 — 319 OAC 324 — 70 Admin LR (5th) 59 — [2014] OJ No 2189 (QL)
Citation:	Endicott v. Ontario (Independent Police Review Office), 2014 ONCA 363 (CanLII), <https://canlii.ca/t/g6rkv>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Endicott v. Ontario (Independent Police Review Office), 2014 ONCA 363
DATE: 20140506
DOCKET: C57694

Gillese, Rouleau and Tulloch JJ.A.

BETWEEN

Clare Endicott

Applicant (Respondent)

and

The Office of the Independent Police Review Director

Respondent (Appellant)

[42] For his part, the Director only addressed what should be included in a record filed in response to an application for judicial review. He submitted that such a record should include:

> (a) The complaint form and any attachments provided by the complainant;
>
> (b) The reasons for decision;
>
> (c) Information from the Director's files that is directly relevant to or was part of the screening decision and is not subject to solicitor/client privilege, deliberative secrecy or statutory confidentiality; and
>
> (d) Any evidence relied on in making the screening decision which is directly relevant to the issues raised in the application.

[43] I view the extent of the material ordered by the Divisional Court and the list proposed by the respondent to be overly broad and unnecessarily detailed. It is well settled that the starting point for defining what a record of proceeding is to contain when no statutory definition is provided is the decision of Denning L.J. in *R. v. Northumberland Compensation Appeal Tribunal ex parte Shaw* (1951), [1952] 1 K.B. 338 (Eng. C.A.), at pp. 351-52. There Denning L.J. stated that:

> …throughout all the cases there is one governing rule: Certiorari is only available to quash a decision for error of law if the error appears on the face of the record. What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings … I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, certiorari lies to quash the decision.

[44] The statement was expanded upon by Sharpe J.A., writing for the majority in *Payne v. Ontario Human Rights Commission* (2000), 2000 CanLII 5731 (ON CA),

192 D.L.R. (4th) 315, wherein he stated, at para. 161:

> An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court. This is an aspect of the superior court's inherent powers of judicial review. A superior court may insist upon the production of an adequate record of the proceedings before the tribunal being reviewed. As stated by Denning L.J. in *R. v. Medical Appeal Tribunal, Ex parte Gilmore*, [1957] 1 Q.B. 574 (Eng. C.A.) at 583:
>
> > The court has always had power to order an inferior tribunal to complete the record … [A] tribunal could defeat a writ of certiorari unless the courts could order them to complete or correct an imperfect record. So the courts have the power to give such an order.

[45] The Director has indicated a willingness to file the materials listed in paragraph 42 above in response to an application for judicial review. With the exception of the materials referred to in item (d) of that list, I have assumed that he would file similar materials as part of a record of proceedings if we were to confirm the divisional court's decision. The materials referred to in item (d) only become relevant once the respondent has set out the issues she wishes to raise on judicial review. In my view, the materials listed in paragraph 42, items (a), (b) and (c), satisfy what is required in a record of proceedings in this context. Arguably, the breadth of the materials that could be encompassed within item (c) may, in some cases, exceed what is required or be subject to interpretation. In light of the Director's apparent willingness to include the materials listed in items (a), (b) and (c), in my view nothing more is needed in this case than to require that the Director file a record of proceedings so constituted. If further direction is required, it can be addressed in the judicial review proceedings.

[46] Defining the record in the way proposed by the respondent or as ordered by the Divisional Court is in my view unwarranted and can be confusing. The statutory

Tab 224

CanLII

Endicott v. Independent Police Review Director, 2013 ONSC 2046 (CanLII)

Source:	Divisional Court
Date:	2013-05-02
File number:	42/12
Other citation:	115 OR (3d) 328
Citation:	Endicott v. Independent Police Review Director, 2013 ONSC 2046 (CanLII), <https://canlii.ca/t/fz4c0>, retrieved on 2026-01-18

Endicott v. Office of the Independent Police Review Director

[Indexed as: Endicott v. Ontario (Office of the Independent Police Review Director)]

Ontario Reports

Ontario Superior Court of Justice,

Divisional Court,

Molloy, Lederer and Edwards JJ.

May 2, 2013

115 O.R. (3d) 328 | 2013 ONSC 2046

Case Summary

Administrative law — Judicial review — Statutory power of decision — Independent Police Review Director ("IPRD") exercising statutory power of decision within meaning of s. 10 of Judicial Review Procedures Act when it made decision under s. 60 of Police Services Act not [page329] to deal with complaint — IPRD required to file record of proceedings when complainant applied for judicial review of that decision — Judicial Review Procedures Act, R.S.O. 1990, c. J.1, s. 10 — Police Services Act, R.S.O. 1990, c. P.15, s. 60.

The applicant filed complaints against the Toronto Police Service and the Ontario Provincial Police. The Independent Police Review Director ("IPRD") exercised its discretion under s. 60 of the *Police*

10. When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in [page336] the court for use on the application the record of the proceedings in which the decision was made.

[21] The *JRPA* distinguishes between a "statutory power" and a "statutory power of decision", defining them as follows in s. 1:

"statutory power" means a power or right conferred by or under a statute,

(a) to make any regulation, rule, by-law or order, or to give any other direction having force as subordinate legislation,

(*b*) to exercise a statutory power of decision,

(c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing,

(d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party;

"statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,

(a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or

(b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

and includes the powers of an inferior court.

[22] In this case, subpara. (*b*) [of the definition of "statutory power of decision"] dealing with eligibility for a benefit or licence is not at issue. Thus, to qualify as a "statutory power of decision", the power to make the decision in this case must be conferred by statute and the decision must "decide" or "prescribe" the legal rights or privileges of any party or person.

[23] Counsel for the IPRD conceded that the power exercised under s. 60 is subject to judicial review, but takes the position that it is not a "statutory power of decision" because it does not determine the rights of any person, but rather merely makes a direction or order.

[24] Until the decision of the motion judge in this case, there had been no judicial determination of this issue within the context of s. 60 of the *PSA*.

The decision of the motion judge

[25] The motion judge held that the IPRD exercised a statutory power of decision when it decided not to deal with Ms. Endicott's complaint. The motion judge found that a member of the public has a statutory right to file a complaint and to have that complaint dealt with according to ss. 59 and 60 of the *PSA*. She [page337] rejected the argument of counsel for the IPRD that the IPRD has a broad discretion as to whether to screen complaints in or screen them out, and characterized the function of the IPRD under s. 60 as "screening out" complaints, as opposed to "screening in". The motion judge concluded that both on a literal and purposive interpretation of the legislation, the intent is that a complaint will be dealt with unless the IPRD screens it out under the defined and limited criteria set out in s. 60.

[26] The motion judge distinguished case law relied upon by the respondent on the basis that they dealt with a different statutory scheme or the person seeking a remedy was not affected by the decision.

The Statutory Powers Procedure Act and Rule 68 are not relevant

[27] Counsel for the IPRD does not contend that decisions of the IPRD under s. 60 of the *PSA* are immune from judicial review. However, she points to the fact that Rule 68 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 contemplates there will be some applications for judicial review which, by their nature, do not have a record of proceedings. She further submits that because the *Statutory Powers Procedure Act* ("*SPPA*")[13] does not apply to a decision under s. 60 of the *PSA*, such a decision is by definition not a "statutory power of decision".

[28] Clearly, there are many types of judicial review applications for which there would be no record of proceeding, sometimes because there wasn't even a proceeding, but rather a ministerial or administrative action or inaction. Rule 68.04 simply recognizes that there will sometimes be a record of proceedings and sometimes not. It does no more than that. It does not assist in the interpretation of either s. 10 of the *JRPA* or the nature of the powers of the IPRD under the *PSA*.

[29] Likewise, the *Statutory Powers Procedure Act* provides no such assistance. It was generally accepted by all counsel, and I agree, that a decision of the IPRD under s. 60 is not one to which the *SPPA* applies. Section 83(1) of the *PSA* stipulates that where a hearing is ordered with respect to a complaint of alleged misconduct by a police officer, the *SPPA* applies to that hearing. There is no such direction with respect to the initial decision by the IPRD under ss. 59 and 60, nor would I expect there to be. Clearly, a hearing is not contemplated for such a decision. However, just because an actual hearing is not required does not [page338] mean that the decision is not a statutory power of decision. Or to put it another way, not every statutory power of decision necessarily requires a hearing.

[30] The *SPPA* adopts the same definition for a "statutory power of decision" as is set out in s. 10 of the *JRPA*. Counsel for the IPRD points to s. 20 of the *SPPA*, which sets out what a tribunal is required to include in a record of proceedings. She argues that the *SPPA* record of proceedings clearly contemplates it applies to a proceeding in which a hearing is held, and that s. 10 of the *JRPA* should be interpreted in the same manner. Therefore, she submits, since there was no hearing or requirement of a hearing by the IPRD, there cannot be a requirement to file a record of proceedings.

[31] Section 20 of the *SPPA* provides:

> 20. A tribunal shall compile a record of any proceeding *in which a hearing has been held* which shall include,
>
> *(a)* any application, complaint, reference or other document, if any, by which the proceeding was commenced;
>
> (*b*) the notice of any hearing;
>
> (*c*) any interlocutory orders made by the tribunal;
>
> *(d)* all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding;
>
> *(e)* the transcript, if any, of the oral evidence given at the hearing; and
>
> *(f)* the decision of the tribunal and the reasons therefor, where reasons have been given.

(Emphasis added)

[32] The difficulty with the argument made by counsel for IPRD is that it is circular. Of course, the contents of the record of proceedings described by s. 20 of the *SPPA* seems to reflect a proceeding that involves a hearing. The section itself begins by stating that it relates to a proceeding "in which a hearing has been held". Further, the *SPPA* itself only applies to those

Tab 225

CanLII

Batacharya v. The College of Midwives of Ontario, 2012 ONSC 1072 (CanLII)

Source:	Divisional Court
Date:	2012-02-17
File number:	470/11
Other citations:	212 ACWS (3d) 560 — 37 Admin LR (5th) 165 — [2012] OJ No 697 (QL)
Citation:	Batacharya v. The College of Midwives of Ontario, 2012 ONSC 1072 (CanLII), <https://canlii.ca/t/fq4qp>, retrieved on 2026-01-18

CITATION: Batacharya v. The College of Midwives of Ontario, 2012 ONSC 1072
DIVISIONAL COURT FILE NO.: 470/11
DATE: 20120217

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: AUDREY JANETTE BATACHARYA, Moving Party/Applicant

AND:

THE COLLEGE OF MIDWIVES OF ONTARIO, Respondent

BEFORE: Pepall J.

COUNSEL: *Andrew Wray* and *Niiti Simmonds*, for the Moving Party/Applicant

Julie Maciura and *Lisa Braverman*, for the Respondent

HEARD at Toronto: February 8, 2012

ENDORSEMENT

Relief Requested

[1] The Moving Party/Applicant, Audrey Janette Batacharya, requests an order requiring the Respondent College of Midwives of Ontario (the "College") to file the complete record of proceedings relating to the January 18, 2011 decision of the College's Inquiries, Complaints and

Reports Committee (the "ICRC") '*In the Matter of the Consideration of a Deputy Registrar's Report Made under Section 79 of the Health Professions Procedural Code About Kim Cloutier-Holtz, RM'*.

Background

[2] The ICRC is a statutory committee of the College. It considers complaints, inquiries and reports brought to the attention of the College. On receipt of a complaint or report, the registrar may appoint an investigator to determine whether a member has committed an act of professional misconduct or is incompetent. The results of the investigation are reported to the ICRC for consideration. The ICRC is a screening committee. Its role is to determine whether the allegations are serious enough to refer to discipline or to require some other action. It does not make findings of professional misconduct.

[3] Ms. Batacharya is a mid-wife. Pursuant to section 85.5 of the *Health Professions Procedural Code*[1], she made a mandatory report to the College on December 29, 2009 outlining the circumstances in which an associate mid-wife and fellow college member, Kim Cloutier-Holtz, had left Ms. Batacharya's midwifery practice.

[4] Following an investigation relating to Ms. Cloutier-Holtz, the ICRC Panel issued reasons for decision on January 18, 2011. It noted that the issue for the Panel to decide was whether the nature of the allegations, if true, warranted a discipline hearing among other things. The Panel decided to take no action. In its reasons for decision, it noted that it did not have any concerns with the clinical care provided by Ms. Cloutier-Holtz to her clients or any concern for public safety.

[5] The Panel did have concerns with the mandatory report itself and was of the view that the report was not made with regard to the highest principles of integrity and professionalism. It noted its concern that the clinical issues Ms. Batacharya had described in her report had occurred three years ago without any mention of action taken to address these issues until she filed her mandatory report with the College. The Panel also noted that Ms. Batacharya had continued to assign clients to Ms. Cloutier-Holtz and allowed Ms. Cloutier-Holtz to teach students and to cover on-call duties. The Panel was of the view that it was unreasonable to believe a practice would allow a member to continue to see clients, teach students and cover on-call duties if the concerns of the member's clinical care, competency and professionalism were legitimate.

[6] The Panel also noted that the mandatory report was dated December 29, 2009 which was two months after Ms. Cloutier-Holtz had filed a Human Rights Complaint against her former practice and Ms. Batacharya. The Panel reiterated its view that the investigation results demonstrated that the report had no merit and therefore no further action would be taken. Accordingly, there was no referral to the discipline committee for a hearing.

[7] The ICRC provided a copy of its decision to Ms. Cloutier-Holtz but not to Ms. Batacharya. Ms. Batacharya learnt of the decision when it was circulated in the Sudbury community.

[8] Concerns about Ms. Batacharya's practice have been raised with the College. By correspondence dated March 24, 2011, the College identified these as including "the fact that at least seven midwives have left [her] practice in the last few years, as well, various colleagues have raised issues relating to the unmanageable workloads, being asked to cover for Ms. Batacharya without compensation, lack of continuity of care for clients, poor organization of the practice and a lack of respect on the part of Ms. Batacharya for her colleagues."

[9] On April 1, 2011, the College advised Ms. Batacharya that an investigator had been appointed to ascertain whether Ms. Batacharya has engaged in professional misconduct including with respect to failing to maintain the standards of practice of the profession and/or engaging in conduct that would reasonably be regarded as disgraceful, dishonourable or unprofessional.

[10] Ms. Batacharya has brought an application for judicial review of the decision in the matter of Ms. Cloutier-Holtz.

Position of the Parties

[11] Ms. Batacharya takes the position that the College is required to produce its record of proceedings pursuant to Section 10 of the *Judicial Review Procedure Act*[2] ("*JRPA*"). She states that the record is required in order for the judicial review application to be properly argued and decided and that the Court has residual discretion to order production of the record of proceedings.

[12] The College takes the position that the ICRC did not exercise or purport to exercise a statutory power of decision with respect to Ms. Batacharya. She was not the subject of the report nor did the College have the ability to take any action against her. The comments made in the ICRC report have no legal force and effect as against Ms. Batacharya. Furthermore, based on section 36(3) of the *Regulated Health Professions Act, 1991*[3], the record cannot be produced to Ms. Batacharya.

Discussion

[13] Section 10 of the *JRPA* states:

> When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

[14] Therefore, a decision-maker is required to file a record of the proceedings where the application for judicial review concerns a decision by a decision maker who has exercised or purported to exercise a statutory power of decision as defined in Section 1 of the *JRPA*.

[15] Section 1 of the *JRPA* defines a statutory power of decision as:

> a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
>
> (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,
>
> and includes the powers of an inferior court.

[16] Here the ICRC did not exercise or purport to exercise any statutory power of decision with respect to Ms. Batacharya within the meaning of Section 1 of the *JRPA*. Ms. Cloutier-Holtz was the subject of the ICRC's investigation and decision. The ICRC's decision did not decide or prescribe Ms. Batacharya's legal rights, powers, privileges, immunities, duties or liabilities. The ICRC made no findings that Ms. Batacharya had engaged in unprofessional conduct and did not issue a disciplinary reprimand or make any disciplinary decision against her.

[17] As stated in *Re: Medhurst v. Medhurst*[4], the purpose of the *JRPA* is not to afford rights to one person because a decision decided or prescribed the rights of another person.

[18] The ICRC decision does not form any part of Ms. Batacharya's file or record with the College. It is not a prior decision relating to her within the meaning of Clause 26(2) of the *Code*. Rather, it is a prior decision relating to Ms. Cloutier-Holtz. It is also not a disciplinary caution or reprimand of Ms. Batacharya as she asserts.

[19] In addition, under section 27(2) of the *Health Professions Procedural Code*, the member shall be given a copy of the ICRC decision. The member is Ms. Cloutier-Holtz. Someone who makes a mandatory report, that is Ms. Batacharya, is not entitled as of right to a copy of the ICRC decision.

[20] Not only is Ms. Batacharya not entitled to a copy of the ICRC decision, the College is prohibited from giving her a copy by virtue of section 36(3) of the *RHPA* as the ICRC decision relates to another member and is confidential to her. By logical extension, Ms. Batacharya would not be entitled to a copy of the investigatory records which contain personal information relating to Ms. Cloutier-Holtz. Furthermore, section 36(3) precludes the use of the record of the ICRC proceedings in a civil proceeding other than a proceeding under the *RHPA*. An application for judicial review is a civil proceeding: *Ellis-Don Limited*[5]. The record of proceedings relating to

Ms. Cloutier-Holtz is inadmissible in Ms. Batacharya's application for judicial review which is not a proceeding under the *RHPA*. The order for production requested by Ms. Batacharya would destroy the objective of confidentiality which is reflected in section 36(3) of the *RHPA*.

[21] For all of these reasons, I am of the view that there is no merit in Ms. Batacharya's position and I do not propose to exercise my discretion as she requests. The motion is dismissed. An order is granted extending the time for Ms. Batacharya to serve and file her application for judicial review and her factum to February 29, 2012.

Costs

[22] Both parties provided cost outlines. The College sought $12,435.99 in fees and $260.83 in disbursements for a total of $12,696.82 on a partial indemnity scale.

[23] Ms. Batacharya sought fees of $12,625 and disbursements of $761.92 for total fees and disbursements of $13,386.92. Even though the request of the College approximates that of Ms. Batacharya, I view the costs of both parties to be rather excessive given the issues in dispute and the nature of the record. Accordingly, I am ordering that Ms. Batacharya pay to the College the sum of $7,500 plus disbursements of $260.83 plus applicable H.S.T. within 30 days. In my view, this is a fair and reasonable sum.

Pepall J.

Date: February 17, 2012

---

[1] Schedule 2 to the *Regulated Health Professions Act*, 1991, S.O. 1991, c.18.

[2] R.S.O. 1990, c.J.1.

[3] Ibid.

[4] [1984] O.J. No. 3140 (H.C.J.).

[5] [1992] O.L.R.B. Rep. July 885 (Div. Ct.) at p. 2.

Tab 226

CanLII

LifeLabs LP v. Information and Privacy Commr. (Ontario), 2022 ONSC 5751 (CanLII)

Source:	Divisional Court
Date:	2022-10-11
File number:	053/21
Citation:	LifeLabs LP v. Information and Privacy Commr. (Ontario), 2022 ONSC 5751 (CanLII), <https://canlii.ca/t/js9xm>, retrieved on 2026-01-18

CITATION: LifeLabs LP v. Information and Privacy Commr. (Ontario), 2022 ONSC 5751
DIVISIONAL COURT FILE NO.: 053/21
DATE: 20221011

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett J.

BETWEEN:	
LIFELABS LP	*Alexandra E. Cocks, Gillian P. Kerr and Amanda d. Iarusso*, for the Applicants
Applicant/Moving Party	
– and –	
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO	*Linda Hsiao-Chia Chen*, for the Respondent and as agent for IPC (BC)
Respondent/Responding Party	*Shahana Kar*, for AG Ontario
	Catherine J. Boies Parker, for IPC (BC)
	HEARD at Toronto (by videoconference): January 21, 2022

REASONS FOR DECISION

D.L. Corbett J.

[1] This case concerns investigations by the Privacy Commissioners of Ontario and British Columbia into alleged unauthorized disclosure of personal information stored on computer systems of the applicant, LifeLabs LP, as a result of an alleged criminal cyber-attack. Most affected LifeLabs customers reside in either Ontario or British Columbia.

[2] In the wake of the cyber-attack, LifeLabs had to respond to inquiries from federal, provincial and territorial privacy commissioners across Canada and to respond to eleven proposed class proceedings in Ontario and British Columbia.

[3] LifeLabs reported the disclosure of personal information to the privacy commissioners of Ontario and British Columbia, as it was required to do. Both of these commissioners launched investigations. In the course of these investigations, both commissioners required LifeLabs to produce various documents. LifeLabs produced some of these documents but declined to produce other documents on the basis that the documents are privileged. Two bases of privilege were asserted: litigation privilege and solicitor-client privilege.

[4] By decision dated March 30, 2020, Ontario IPC ordered LifeLabs to produce documents over which LifeLabs asserts claims of privilege (*ReLifeLabs LP*, 2020 CanLII 24923 (PHIPA Decision 114)). LifeLabs produced documents in accordance with the production order, while asserting claims of both confidentiality and privilege in respect to the documents.

[5] On May 19, 2020, the Commissioners issued a joint "request for representations" to LifeLabs about information the Commissioners proposed to include in their final investigation report. On June 9, 2020, LifeLabs provided written submissions including argument that certain documents over which claims of confidentiality and privilege were asserted should not be included in the public version of the final investigation report. These submissions were supported by a sworn declaration from a lawyer, LifeLabs interim General Counsel, explaining the basis of LifeLabs' claims of privilege and confidentiality.

[6] On June 25, 2020, the Commissioners released a "Joint Privilege Decision" and a "Joint Investigation Report". In the Joint Privilege Decision, the Commissioners rejected all of LifeLabs' claims of privilege and confidentiality.

[7] LifeLabs commenced applications for judicial review of the Joint Privilege Decision in both Ontario and British Columbia.

Issues on the Application in this Court

[8] In its factum on this motion, LifeLabs describes the issues on the application as follows:

> The Joint Privilege Decision was the product of an unfair process, including;
>
> (i) unprecedented and improper collaboration between the Ontario IPC and the BC IPC;
>
> (ii) unreasonable order requiring LifeLabs to produce confidential and privileged documents without a hearing or an opportunity to respond to the order;
>
> (iii) unreasonable and unnecessarily expedited timelines for responses from LifeLabs;

(iv) a decision based on irrelevant considerations including the impending retirement of the Ontario IPC; and

(v) rejection of LifeLabs' evidence about privilege and confidentiality "without affording… a fair opportunity to respond."

There are other issues raised in the Notice of Application – such as a challenge to the jurisdiction of the Commissioner to decide questions of privilege – but I proceed on the basis that the relief claimed on this motion is based on the grounds for the application that are referenced in the factum and were raised during oral argument. In other words, I decide this motion on the basis on which it was argued.

[9] LifeLabs takes the position that, in addition to the Record of Decision produced by the Commissioner, it requires additional disclosure from the Commissioner for the purposes of this application, including:

(a) any documents, including background policies and internal memoranda, that governed the decision-making process of the Ontario IPC resulting in the Joint Privilege Decision;

(b) the documents that the Ontario IPC considered and generated during the decision-making process of the Ontario IPC resulting in the Joint Privilege Decision;

(c) all correspondence, including with the BC OIPC, about the decision-making process for the Joint Privilege Decision and/or about the drafting and content of the Joint Privilege Decision; and

(d) all correspondence, including with the BC OIPC, relating to the timing of the Joint Privilege Decision, and the timing of the release of the Joint Investigation Report.

[10] The Ontario Commissioner takes the position that none of the requested documents ought to be ordered produced as part of the record of Decision in this case because all of the requested documents are protected from compelled disclosure by (a) solicitor-client privilege; (b) common interest privilege; and/or (c) adjudicative privilege (sometimes called "deliberative secrecy").

[11] For the reasons that follow, the motion is dismissed. The requested documents are not properly part of the Record before this court. All are protected by deliberative privilege.

Analysis

The Record of Proceedings

[12] Section 10 of the *Judicial Review Procedure Act* (the "*JRPA*") provides:

> When a notice of application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.[1]

The *JRPA* is silent on what is included in the "record of proceedings."

[13] "An applicant for judicial review has the right to have a full and accurate record of what went on before the tribunal put before the court."[2] For some tribunals, the required content of the record is specified in the *Statutory Powers Procedure Act* (the "*SPPA*").[3] However, these requirements do not apply in this case: proceedings before the Commissioner are not ones "where

the tribunal is required… to afford the parties to the proceeding an opportunity for a hearing before making a decision."[4]

[14] The "record" then, in this case, is a matter of common law. About seventy years ago, Lord Denning stated that the record "has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings…. [It] must contain at least the document which initiates the proceedings."[5] By way of analogy to a trial in a court of record, the record should contain the pleadings or analogous documents, the evidence that was before the decision-maker, and transcripts (if oral evidence was taken and recorded for purposes of transcription). This court may insist upon production of an adequate record for purposes of review, and this court has the power to order the decisionmaker below to complete the record.[6]

Deliberative Privilege

[15] Sitting as a single judge of this court, Perrell J. reviewed principles of deliberative secrecy (or adjudicative privilege) as follows:

> [76] Under the doctrine or principle of deliberative secrecy, which promotes adjudicative independence, collegial debate, and the finality of decisions, a judge or an administrative tribunal adjudicator cannot be compelled to testify about the deliberations or the substance of the decision-making process or how or why a particular decision was reached by the court or administrative tribunal: *Re Clendenning and Board of Police Com'rs for City of Belleville* (1976), 1976 CanLII 696 (ON SC), 15 O.R. (2d) 97 (Div. Ct.); *Agnew v. Ontario Association of Architects* (1987), 1987 CanLII 4030 (ON SC), 64 O.R. (2d) 8 (H.C.J.); *156621 Canada Ltd. v. The City of Ottawa* (2004), 70 O.R. (3d) 291 (S.C.J.).
>
> [77] The substance of the decision-making process includes what material was considered or not considered by the adjudicator, whether the adjudicator pre-judged the matter, and the extent to which the adjudicator was influenced by the views of others: *Agnew v. Ontario Association of Architects*, *supra,* at p. 17.
>
> [78] Deliberative secrecy would cover the involvement of independent counsel unless there was good reason and a factual foundation to believe that counsel transgressed the limits of fairness and natural justice: *Rudinskas v. College of Physican and Surgeons of Ontario*, 2011 ONSC 4819(Div. Ct.); *Aronov v. Royal College of Dental Surgeons of Canada*, [2001] O.J. No. 1927 (Div. Ct.); *Stevens v. Canada (Attorney General)*, 2003 FC 1259.
>
> [79] Deliberative secrecy extends to the administrative aspects of the decision-making process, including the assignment of the adjudicator(s) to particular cases: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)* (2007), 2007 NSCA 37, 282 D.L.R. (4th) 538 at paras. 15-18 (N.S.C.A.); *Tremblay v. Québec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952.
>
> [80] Under the rule of deliberative secrecy, members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, *supra*. In *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General) supra* at para. 16, Cromwell, J.A., as he then was, noted that, although the principle of deliberative secrecy does not apply as strongly to administrative tribunals as to courts, the Supreme Court of Canada has confirmed that deliberative secrecy is the general rule for administrative tribunals.
>
> [81] The testimonial immunity of deliberative secrecy for the administrative aspects of the decision-making process is not absolute and will yield where it is

> alleged that the right of natural justice has been infringed: *Tremblay v. Québec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952; *Payne v. Ontario (Human Rights Commission)* (2000), 2000 CanLII 5731 (ON CA), 192 D.L.R. (4th) 315 (Ont. C.A.).
>
> [82] The testimonial immunity of deliberative secrecy can be lifted if a litigant can show clearly articulated and objectively sound reasons for believing that the process did not comply with the rules of natural justice or procedural fairness: *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General) supra; Payne v. Ontario (Human Rights Commission), supra*; *Agnew v. Ontario Association of Architects*), *supra,* at p. 15.[7]

I accept and adopt this summary.

[16] In this case, LifeLabs argues that it has alleged breaches of natural justice and procedural fairness that ground its request for additional documents to complete the record. I do not accept this argument.

[17] The onus rests on the litigant seeking to displace adjudicative privilege and this onus is not discharged on the basis of speculation, conjecture or simple allegation alone: there must be a foundation before the court for the allegation that not only raises an issue of procedural fairness, but also justifies displacing the privilege in order to adjudicate the procedural fairness issue.[8]

[18] I now consider the four categories of documents sought by LifeLabs in light of the principles set out above.

> **(a) any documents, including background policies and internal memoranda, that governed the decision-making process of the Ontario IPC resulting in the Joint Privilege Decision**

[19] Narrowly construed, one document in this category has been produced by the Ontario IPC. That document is the *PHIPA Code of Procedure*, and in particular section 18 of this *Code*, which addresses claims of confidentiality for documents provided to the IPC during an investigation. This material was disclosed to LifeLabs during the investigation and may be properly included in the Record.[9]

[20] LifeLabs has not identified any other documents or category of documents that "governed the decision-making process". During oral argument, reference was made to internal policy documents, precedents, memos to the IPC from staff, and other similar documents that were argued to be producible as part of the record. I reject this argument. By analogy, parties to an appeal are not entitled to a bench brief or memo written by a judicial law clerk, a standard benchbook, a list of textbooks available to the judge, or any other aspect of the internal processes at the court supporting the judge in doing her work. These are all covered by adjudicative privilege. Such documents do not "govern" the decision-making process, and they are well within the cone of adjudicative privilege. The *PHIPA Code of Procedure*, by contrast, is a code that contains principles that guide the decision and can be said to "govern" it, much in the same way the the *Rules of Civil Procedure* constrain and govern proceedings in court.

[21] No basis is stated to defeat adjudicative privilege in respect to this category of documents (other than the *Code of Procedure*). They would be irrelevant to the bases alleged for procedural unfairness (listed in para. 8, above).

> **(b) the documents that the Ontario IPC considered and generated during the decision-making process of the Ontario IPC resulting in the Joint Privilege Decision**

[22] The record should include the evidence considered by the IPC. This would include submissions received by the IPC (which have been included in the record) and any other documents relied upon by the IPC to establish the facts upon which it based its decision. This would not include internal documents "generated" by IPC staff in reviewing documents relied upon to establish facts. Thus, if the IPC reviewed documents available on the internet and relied on those documents, or reviewed policies and reports from other Canadian privacy commissioners to establish the facts, those must be disclosed as part of the record. Staff analysis or reports on this research are not producible. The evidence on this motion is that all of the information gathered by the IPC's staff that was relied on to establish the facts has been disclosed by citation in the Privilege Decision.

(c) all correspondence, including with the BC OIPC, about the decision-making process for the Joint Privilege Decision and/or about the drafting and content of the Joint Privilege Decision

[23] LifeLabs takes the position that it was improper for the Ontario and BC Commissioners to engage in a joint process in this case. The Commissioners take a contrary position, and also argue that LifeLabs may not raise this issue on judicial review because they did not raise it during the proceedings below. Those are issues for decision by a panel of this court on the main application.

[24] LifeLabs' request for production of communications between the two Commissioners is premised on its argument that the joint decision-making process was unlawful or unfair. Assuming, without finding, that the joint decision-making process was lawful and fair, then this request, on its face, strikes at the heart of adjudicative privilege. It is akin to seeking communications between panel members of this court on an appeal of a decision of this court to the Court of Appeal.

[25] Until a court finds that the Commissioners should not have conducted a joint investigation, the impugned decisions are taken to be correct.

[26] If a panel of this court concludes that the impugned decision should not have been made by way of a process of joint investigation and decision-making, then that panel can consider what the appropriate remedy should be. Unless and until that happens, adjudicative privilege applies to this category of documents, and it is not defeated by an allegation that the process ought not to have been joint. Further, this decision should not be taken to imply that adjudicative privilege is lost if the two Commissioners should not have proceeded jointly: that issue, to the extent that it may need to be addressed, is a matter for the panel to decide.

(d) all correspondence, including with the BC OIPC, relating to the timing of the Joint Privilege Decision, and the timing of the release of the Joint Investigation Report.

[27] This request is a subset of the request in issue (c). It is denied for the same reasons request (c) was denied. It raises one additional point – allegations of procedural unfairness as a result of procedural decisions taken in this case allegedly because of the retirement date of the Ontario IPC.

[28] First, deadlines imposed, and the schedule followed, were either fair or unfair to LifeLabs. The Commissioner's retirement date would not justify imposing a schedule that was procedurally unfair.

[29] LifeLabs' argument seems to be that there was an oblique motive that coloured the process in this case. Real scheduling constraints faced by a decisionmaker are not oblique motives. Neither are they justifications for following a process that is unfair. The focus of the procedural unfairness argument, in this court, is on the process followed and its impact on the parties. This does not justify inquiring into internal constraints under which the decision-maker was operating.

[30] The Ontario IPC argues that LifeLabs' argument on this point is mere speculation. The retirement of the IPC is not speculation. Wondering whether it impacted scheduling decisions is speculative because LifeLabs cannot do more than speculate about this point without disclosure. I would not order the disclosure because, even if a pending retirement was a factor taken into account in setting a schedule, that would neither justify a process that was unfair to LifeLabs, nor would it render unfair a process that was, in substance, fair to LifeLabs. In other words, the pending retirement of the IPC is not, on its face, relevant to whether the process was fair to LifeLabs.

[31] Finally, I note LifeLabs' argument that the decision itself was "rushed". Alacrity of decision-making is not a reviewable ground in this court. Whether a process is fast or slow, the analysis in this court is on procedural fairness and substantive reasonableness.

Disposition

[32] For these reasons the motion is dismissed. As agreed by the parties, there shall be no order respecting costs.

[33] The parties are directed to provide this court by email by October 31, 2022, with their consent schedule for the balance of steps left to ready this application for hearing before the panel.

_____

D.L. Corbett J.

Released: October 11, 2022

CITATION: LifeLabs LP v. Information and Privacy Commr. (Ontario), 2022 ONSC
DIVISIONAL COURT FILE NO.: 053/21
DATE: 20221011

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

D.L. Corbett J.

BETWEEN:

LifeLabs LP

Applicant/Moving Party

- and -

Information and Privacy Commissioner (Ontario)

Respondent/Responding Party

REASONS FOR DECISION

D.L. Corbett J.

Released: October 11, 2022

---

[1] *Judicial Review Procedure Act*, RSO 1990, c. J.1, s.10.

[2] *Payne* v. *Ontario Human Rights Commission* (2000), 2000 CanLII 5731 (ON CA), 192 DLR (4th) 315, para. 161 (Ont. CA); *Endicott* v. *Ontario (Director, Office of the Independent Police Review)*, 2014 ONCA 363, para. 44.

[3] *Statutory Powers Procedure Act*, RSO 1990, c.S.22, s.20.

[4] *SPPA*, s.3(1).

[5] *R.* v. *Northumberland Compensation Tribunal ex parte Shaw*, [1952] 1 KB 338 ay 351-2 (Eng. CA); quoted with approval in *Endicott* v. *Ontario (Director, Office of the Independent Police Review)*, 2014 ONCA 363, para. 43.

[6] *Payne* v. *Ontario Human Rights Commission* (2000), 2000 CanLII 5731 (ON CA), 192 DLR (4th) 315, para. 161 (Ont. CA), quoting with approval from *R.* v. *Medical Appeal Tribunal, ex parte Gilmore*, [1957] 1 QB 574 at 583 (Eng. CA), per Denning LJ.

[7] *Summit Energy Management Inc.* v. *Ontario Energy Board*, 2012 ONSC 2753 (Div. Ct.), paras. 76-82.

[8] *Payne v. Ontario (Human Rights Commission)* (2000), 2000 CanLII 5731 (ON CA), 192 DLR (4th) 315, para. 172 (Ont. CA); *Tremblay* v. *Quebec (Commission des affaires sociales)*, 1992 CanLII 1135 (SCC), [1992] 1 SCR 952 at 966.

[9] The *Code* is a public document, available on the IPC's web site.

Tab 227

CanLII

UFCW Canada v. Rol-Land Farms Limited, 2008 CanLII 6652 (ON SCDC)

Source:	Divisional Court
Date:	2008-02-22
File number:	262/07; 266/07
Other citations:	235 OAC 172 — 77 Admin LR (4th) 306 — [2008] OJ No 682 (QL)
Citation:	UFCW Canada v. Rol-Land Farms Limited, 2008 CanLII 6652 (ON SCDC), <https://canlii.ca/t/1vtm5>, retrieved on 2026-01-18

COURT FILE NOS.: 262/07 AND 266/07
DATE: 20080222

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEITCH R.S.J., GREER and SWINTON JJ.

B E T W E E N:)
)

Evidentiary Issues

Motion to adduce new evidence

[34] At the hearing of the applications before this panel, Rol-Land Farms and Mr. Vanderpol brought a motion seeking to adduce new evidence and allowing them to rely on an amended factum. The new evidence was an affidavit that purported to show an intention of the applicant Union to breach a settlement agreement between the Union and Rol-Land Farms.

[35] That motion was dismissed on the grounds that the evidence was not relevant to the matter before us. It relates to a claim of abuse of process, which should properly be brought before the Tribunal.

The admissibility of volume 3 of the Record of Proceedings

[36] The Tribunal filed a three volume Record of Proceedings. The first two volumes deal with matters relating to the three decisions under review. The third volume deals with matters from June to October, 2007, after these proceedings were commenced. It includes correspondence between counsel and, most importantly, a "Statement of the Tribunal re: Allegations of Bias", dated October 5, 2007, which purports to respond to the bias allegations. It also attaches biographies of Tribunal panel members that are much more detailed than the information provided to Ms. Harold's counsel in the May 10, 2007 letter.

[37] As indicated in an oral ruling during the hearing, volume 3 of the Record of Proceedings is not admissible. Section 10 of the JRPA requires a tribunal to file its record of proceedings when served with an application for judicial review of a decision. It is the record of proceedings relating to the particular decision that is to be filed, as is clear from the words of s. 10:

> When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application, the record of proceedings **in which the decision is made**. (emphasis added)

[38] Thus, the content of volume 3 is not properly part of the record required to be filed pursuant to s. 10 of the JRPA, as it post-dates the decisions under review. Moreover, it is not relevant to the issue of reasonable apprehension of bias before this Court, as it responds to an issue of actual bias.

[39] Counsel for the Tribunal submitted that the Statement was properly before this Court, as a similar approach had been followed in *Committee for Justice and Liberty v. Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369 and *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 S.C.R. 259. In each of those cases, an allegation of reasonable apprehension of bias was made - against a member of the Supreme Court of Canada in *Wewaykum* and against the chair of a tribunal in *Committee for Justice and Liberty*. At the outset of the hearing, the challenged adjudicator filed a statement in response. In *Wewaykum,* Binnie J. then withdrew from participation in the proceedings. The parties then made submissions based on the material filed (at para. 4).

[40] The Statement here was generated long after the applications for judicial review commenced. After Jennings J. refused to hear these applications on an urgent basis, the Tribunal invited the applicants to make submissions on bias. However, the applicants refused to do so, on the basis that the Tribunal had pre-judged the issue by taking a position on the merits in its factum filed for the proceedings before Jennings J. Subsequently, the Tribunal made its Statement dated

Tab 228

CanLII

Reflection Productions v. Ontario Media Dev. Corp., 2022 ONSC 64 (CanLII)

Source:	Divisional Court
Date:	2022-01-12
File number:	DC-19-315
Citation:	Reflection Productions v. Ontario Media Dev. Corp., 2022 ONSC 64 (CanLII), <https://canlii.ca/t/jlpf9>, retrieved on 2026-01-18

CITATION: Reflection Productions v. Ontario Media Dev. Corp., 2022 ONSC 64
DIVISIONAL COURT FILE NO.: DC-19-315
DATE: 2022-01-12

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MORAWETZ C.J., VARPIO, KRISTJANSON JJ.

BETWEEN:	
REFLECTION PRODUCTIONS CANADA LTD. Applicant	*Peter I. Waldmann*, for the Applicant
– and –	
ONTARIO MEDIA DEVELOPMENT CORPORATION Respondent	*Andi Jin*, for the Respondent

b. The OMDC allegedly withheld relevant production from the applicant that may have evidenced that bias.

Bias

[66] During oral submissions, the applicant took the position that it was not alleging that the OMDC was biased as against the applicant as a result of anti-evangelical Christian motives. Rather, the applicant submitted that the OMDC's reasoning was merely fettered by same. Simply put, this is a pyrrhic distinction in that an allegation that a decision-maker's reasoning is fettered by bias is in fact an allegation of bias. Accordingly, the legal principles governing allegations of bias apply to this case.

[67] Allegations of bias must be made at first instance to the decision-maker in question: *Alberta (Information and Privacy Commissioner)* v. *Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 23; *Speck v. OLRB,* 2021 ONSC 3176 at para 44 (Div. Ct.). In this case, the applicant conceded in oral argument that it did not raise any concerns regarding bias to the OMDC.

[68] The applicant's concerns about anti-evangelical Christian bias are founded upon Mr. Harilaid's interpretation of statements allegedly made by OMDC representatives. It bears repeating that a decision-maker is presumed to be impartial and that party's interpretation of a decision-maker's tone of voice, facial expressions and body language are insufficient to overcome the presumption of impartiality: *Beard Winter LLP* v. *Shekhdar*, 2016 ONCA 493 at para 12; *Ramirez* v. *Canada*, 2012 FC 809 at paras. 22 and 23; *SMR* v. *Children's Aid Society of Oxford County,* 2003 CanLII 2421 (ON SC), [2003] OJ No. 2568 (Ont. S.C.) at paras 23 – 25. The nature of the concerns raised by the applicant are thus not capable of overcoming the high hurdle required to show bias.

[69] Finally, the statements made by people other than a decision-maker are not proof of the decision-maker's state of mind: *Elson* v. *Canada*, 2017 FC 459 at paras. 146 – 149. Any statements made during the October 7, 2019 conversation between the applicant and representatives of the OMDC, even were the court to accept that the statements were made and that they evidence some form of bias as against evangelical Christians, are not evidence of potential bias held by the director, who was not present for that call.

[70] The applicant's effective submission that the OMDC was biased as against the applicant due to an anti-evangelical Christian motivation therefore fails.

Production

[71] The Applicant served a Notice of Examination under Rule 39.03 of the *Rules of Civil Procedure*, which is a mechanism to compel oral testimony. The Notice of Examination was quashed. The decision to quash was not appealed. The Notice of Application seeking judicial review does not raise the decision to quash the Notice of Examination as an error.

[72] A *subpoena duces tecum* is a mechanism to have a witness present oral testimony. It is not an order to produce documents to a party outside of court, as set out in *Law Society of Saskatchewan v Abrametz,* 2016 SKQB 134 at para 46:

> The document in issue, a *subpoena duces tecum*, is understood to have a particular function - to compel the subpoenaed person to court, or other independent tribunal, to testify and to bring with him/her certain, specified documents. Watt J. (as he then was) described a subpoena in these terms in *R. v. Finkle*, [2007] O.J. No. 3506 (Ont. S.C.J.) (QL): "literally translated 'under penalty', [a subpoena] is a command to the person named to appear at a

time and place specified to give testimony about a matter in issue between the parties to a proceeding" (para. 88). Watt J. then explained the function of a *subpoena duces tecum* and the limits that ought to attach to its use:

> ... A *subpoena duces tecum* requires the witness to bring with him or her things like books, papers and other things connected with his or her testimony. In the usual course, a *subpoena duces tecum* is not used to obtain these other things, which are often used as *aides memoires* for production at trial.
>
> . . .
>
> It is uncontroversial that, where alternative methods of obtaining evidence are available, the party who seeks the evidence may generally choose the means to achieve that end. At the same time, however, courts should be chary of manifest circumventions of traditional methods of acquiring evidence, especially those that avoid adherence to established constitutional principle. A *subpoena duces tecum* ought not to be used to avoid the scrutiny associated with other methods of acquisition. See, by comparison, *R. v. French* (1977), 1977 CanLII 2117 (ON CA), 37 C.C.C. (2d) 201, 213-4 (Ont. C.A.) *per* MacKinnon J.A., affirmed on other grounds (1979), 1979 CanLII 49 (SCC), 47 C.C.C. (2d) 411 (S.C.C.). [Emphasis in original.]

[73] Although not raised in the Notice of Application, the applicant now argues that the record filed by the decision-maker was underinclusive.

[74] Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 provides:

> **Record to be filed in court**
> When notice of an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision has been served on the person making the decision, such person shall forthwith file in the court for use on the application the record of the proceedings in which the decision was made.

[75] Ergo, pursuant to s. 10 of the *Judicial Review Procedure Act,* it was available to the applicant to bring a motion seeking production of documents it alleges were relied on by the decision-maker but are not contained in the record: see, for example *K.D. v. Peel Children's Aid Society*, 2017 ONSC 7392 (Div. Ct.) at paras. 16-17). The applicant failed to do so. As a result, it is precluded from raising this issue for the first time on judicial review.

[76] The applicant's argument in this regard therefore fails.

Conclusion

[77] There is no evidence to suggest that the OMDC failed to afford appropriate levels of procedural fairness to the applicant when it arrived at the Decision.

CONCLUSION

[78] The Decision was reasonable and the OMDC's conduct was also reasonable. The instant application for judicial review is dismissed.

COSTS

[79] The parties could not agree on costs. *Reflections'* counsel filed a Bill of Costs seeking $25,665.05 (all inclusive) at a partial indemnity rate. The OMDC's counsel seeks costs in the amount of $12,705.00 for the hearing of the application and $5,000.00 (as agreed upon by the parties) for the motion to quash the subpoena. Given the mandates of Rule 57.01 and given the Bill of Costs filed by *Reflections,* the quantum of costs sought by the OMDC is entirely appropriate.

[80] Therefore, the applicant shall pay $17,705.00 in costs (all inclusive) to the respondent (for both the instant application and the motion to quash) within 90 days of today's date.

Varpio, J.

"I agree" Morawetz, CJSCJ

"I agree" Kristjanson J.

Released: January 12, 2022

CITATION: Reflection Productions v. Ontario Media Dev. Corp., 2022 ONSC 64

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MORAWETZ C.J., VARPIO, KRISTJANSON JJ.

BETWEEN:

REFLECTION PRODUCTIONS CANADA LTD.

- and –

ONTARIO MEDIA DEVELOPMENT CORPORATIO
N

REASONS FOR DECISION

Released: January 12, 2022

Tab 229

CanLII

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), 2015 SCC 25 (CanLII), [2015] 2 SCR 282

Source:	Supreme Court of Canada
Date:	2015-05-14
File number:	35823
Other citations:	383 DLR (4th) 579 — 471 NR 206 — 252 ACWS (3d) 247 — [2015] 11 WWR 217 — AZ-51176286 — [2015] EXP 1501 — 75 BCLR (5th) 1 — 370 BCAC 1 — 336 CRR (2d) 137 — 84 Admin LR (5th) 185 — EYB 2015-252077 — JE 2015-825 — [2015] SCJ No 25 (QL) — [2015] ACS no 25
Citation:	Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), 2015 SCC 25 (CanLII), [2015] 2 SCR 282, <https://canlii.ca/t/ghl85>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

CITATION: Yukon Francophone School Board, Education Area #23 *v.* Yukon (Attorney General), 2015 SCC 25, [2015] 2 S.C.R. 282

DATE: 20150514
DOCKET: 35823

BETWEEN:

Yukon Francophone School Board, Education Area #23
Appellant
and
Attorney General of the Yukon Territory
Respondent
- and -
Attorney General of Quebec, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General of the Northwest Territories, Commissioner of Official

Languages of Canada, Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, Fédération des parents francophones de l'Alberta, Fédération nationale des conseils scolaires francophones and Fédération des communautés francophones et acadienne du Canada
Interveners

Coram: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Reasons for Judgment: (paras. 1 to 78)	Abella J. (McLachlin C.J. and Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring)

Yukon Francophone School Board, Education Area #23 *v.* Yukon (Attorney General), 2015 SCC 25, [2015] 2 S.C.R. 282

Yukon Francophone School Board,
Education Area #23 *Appellant*

v.

Attorney General of the Yukon Territory *Respondent*

and

Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General for Saskatchewan,
Attorney General of the Northwest Territories,
Commissioner of Official Languages of Canada,
Conseil scolaire francophone de la Colombie-Britannique,
Fédération des parents francophones de Colombie-Britannique,
Fédération des parents francophones de l'Alberta,
Fédération nationale des conseils scolaires francophones and
Fédération des communautés francophones
et acadienne du Canada *Interveners*

Indexed as: Yukon Francophone School Board, Education Area #23 *v.* Yukon (Attorney General)

2015 SCC 25

File No.: 35823.

2015: January 21; 2015: May 14.

Present: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR YUKON

Courts — Judges — Impartiality — Reasonable apprehension of bias — Allegation that judge's comments and interventions at trial as well as his community involvement before and after appointment as a judge gave rise to reasonable apprehension of bias — Whether judge's conduct and community involvement raised reasonable apprehension of bias.

Constitutional law — Charter of Rights — Whether school board can unilaterally decide to admit students who are not covered by s. 23 of the Canadian Charter of Rights and Freedoms.

The Yukon Francophone School Board is the first and only school board in the Yukon. It has responsibility for one school, École Émilie-Tremblay, a French-language school founded in 1984. In 2009, the Board sued the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial judge ruled in the Board's favour on most issues.

The Court of Appeal concluded that there was a reasonable apprehension of bias on the part of the trial judge based on a number of incidents during the trial as well as the trial judge's

involvement as a governor of a philanthropic francophone community organization in Alberta. Accordingly, it ordered a new trial except on three issues, only two of which were appealed to this Court: the trial judge's conclusion that, under s. 23 of the *Charter*, the Board had the unilateral right to set admission criteria so as to include students who are not covered by s. 23; and the trial judge's decision that the Yukon is required to communicate with the Board in French.

Held: The appeal from the Court of Appeal's conclusion that there was a reasonable apprehension of bias requiring a new trial is dismissed, but the Board's claims pursuant to the *Languages Act* should be joined with the other issues remitted by the Court of Appeal for determination at a new trial.

The test for a reasonable apprehension of bias is what would a reasonable, informed person think. The objective is to protect public confidence in the legal system by ensuring not only the reality, but the appearance of a fair adjudicative process. Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required — and expected — to approach every case with impartiality and an open mind. Because there is a presumption of judicial impartiality, the test for a reasonable apprehension of bias requires a real likelihood or probability of bias. Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. The reasonable apprehension of bias test recognizes that while judges must strive for impartiality, they are not required to abandon who they are or what they know. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Judges should be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities. The ability to be open-minded is enhanced by such knowledge and understanding. Impartiality thus demands not that a judge discount or disregard his or her life experiences or identity, but that he or she approach each case with an open mind, free from inappropriate and undue assumptions.

In the present case, the threshold for a finding of a reasonable apprehension of bias has been met. In addition to several disparaging and disrespectful remarks made by the trial judge and directed at counsel for the Yukon, several incidents occurred which, when viewed in the circumstances of the entire trial, lead inexorably to this conclusion.

The first was the trial judge's conduct during an incident where counsel for the Yukon attempted to cross-examine a witness based on confidential information contained in student files. After hearing some argument on the confidentiality issue, the trial judge told counsel he would entertain additional arguments on the matter the following day. However, he started the next day's proceedings with a ruling unfavourable to the Yukon and without giving the parties an opportunity to present further argument. While this by itself is unwise, the trial judge's refusal to hear the Yukon's arguments after his ruling, and his reaction to counsel, are more disturbing. He both characterized the Yukon's behaviour as reprehensible and accused counsel for the Yukon of playing games. Viewed in the context of the entire record, the trial judge's conduct was troubling and problematic.

The trial judge's treatment of the Yukon's request to submit affidavit evidence from a witness who had suffered a stroke was also improper. The judge accused counsel for the Yukon of trying to delay the trial, criticized him for waiting half-way through the trial to make the application, suggested that the incident amounted to bad faith on the part of the government, and warned counsel for the Yukon that he could be ordered to pay costs personally if he brought the application. There was no basis for the accusations and criticism levelled at counsel and, viewed in the context of the rest of the trial, this incident provides further support for a finding of a reasonable apprehension of bias.

Moreover, the trial judge's refusal to allow the Yukon to file a reply on costs is highly problematic in the overall context of the trial. After the release of his reasons on the merits, the trial judge required each party to file their costs submissions on the same day. To the Yukon's surprise, the Board sought not only solicitor-client costs, but also punitive damages and solicitor-client costs retroactive to 2002. The trial judge's refusal to allow the Yukon to file a reply factum is

questionable, particularly in light of the fact that the Yukon could not have known the quantum of costs sought by the Board at the time it filed its factum. The judge's refusal is made all the more worrisome by his decision to award a lump-sum payment to the Board, in addition to retroactive costs.

All of these incidents, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias.

However, the Court of Appeal erred when it concluded that the trial judge's current service as a governor of the Fondation franco-albertaine substantially contributed to a reasonable apprehension of bias. Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

In the present case, it is difficult to see how, based on the evidence, one could conclude that the Fondation franco-albertaine's vision could be said to "clearly align" with certain positions taken by Board in this case or that the trial judge's involvement in the organization foreclosed his ability to approach this case with an open mind. Standing alone, vague statements about the organization's mission and vision do not displace the presumption of impartiality. Although consideration of the trial judge's current role as governor of the Fondation franco-albertaine was a valid part of the contextual bias inquiry in this case, his involvement with an organization whose functions are largely undefined on the evidence cannot be said to give rise to a reasonable apprehension of bias.

The Court of Appeal's conclusion that the Board could not unilaterally decide whom to admit to its school should not be disturbed. There is no doubt that a province or territory can delegate the function of setting admission criteria for children of non-rights holders to a school

board. This delegation can include granting a minority language school board wide discretion to admit the children of non-rights holders. In this case, however, the Yukon has not delegated the function of setting admission criteria for the children of non-rights holders to the Board. In the absence of any such delegation, there is no authority for the Board to unilaterally set admission criteria which are different from what is set out in the territorial regulation applicable to French-language instruction.

This, however, does not preclude the Board from claiming that the Yukon has insufficiently ensured compliance with s. 23, and nothing stops the Board from arguing that the Yukon's approach to admissions prevents the realization of s. 23's purpose.

Finally, it is unclear why the Court of Appeal decided that this case was not a suitable vehicle for determination of rights under the Yukon's *Languages Act*. The Board's claims raise significant factual issues that may well lead to a finding that parts of the claims were justified and should be determined at the new trial with the benefit of a full evidentiary record.

Cases Cited

Discussed: *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484; **referred to:** *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369; *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539; *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, rev'g on other grounds (2001), 2001 CanLII 8525 (ON CA), 53 O.R. (3d) 641; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Ruffo v. Conseil de la magistrature*, 1995 CanLII 49 (SCC), [1995] 4 S.C.R. 267; *R. v. Lippé*, 1990 CanLII 18 (SCC), [1991] 2 S.C.R. 114; *Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673; *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 S.C.R. 357; *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC), [1999] 3 S.C.R. 851; *Brouillard v. The Queen*, 1985 CanLII 56 (SCC), [1985] 1 S.C.R. 39; *Jones v. National Coal Board*, [1957] 2 All E.R. 155; *Take and Save Trading CC v. Standard Bank*

Tab 230

CanLII

Benedict v. Ontario, 2000 CanLII 16884 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2000-10-13
File number:	C33628; C33629
Other citations:	51 OR (3d) 147 — 193 DLR (4th) 329 — 100 ACWS (3d) 58 — 136 OAC 259 — 48 CPC (4th) 1 — [2000] OJ No 3760 (QL)
Citation:	Benedict v. Ontario, 2000 CanLII 16884 (ON CA), <https://canlii.ca/t/1fbcw>, retrieved on 2026-01-18

Benedict v. Her Majesty the Queen in Right of Ontario
[Indexed as: Benedict v. Ontario]

51 O.R. (3d) 147
[2000] O.J. No. 3760
Docket Nos. C33628 and C33629

Court of Appeal for Ontario
Finlayson, Doherty and Borins JJ.A.
October 13, 2000

Courts -- Judges -- Bias -- Reasonable apprehension of bias -- Motion to disqualify judge on grounds of reasonable apprehension of bias -- Judge being party in ongoing litigation over claim similar to employment-related claim being advanced in case before her -- Judge having interest in outcome of motion that disqualified her from hearing motion -- Disqualifying interest broader than pecuniary or proprietary interest -- Sufficient for disqualification that judge have some relevant interest in matter -- Motion for disqualification granted.

The provincial Crown was the respondent in an application brought by JB for severance or pay in lieu of reasonable notice and for a declaration of his rights under the Public Service Act, R.S.O. 1990, c. P.47 and the Public Service Pension Plan Act, R.S.O. 1990, c. P.48. The Crown moved for an order staying JB's application on the ground that he ought to file a grievance before the Public Service Grievance Board. Molloy J. dismissed the Crown's motion. The Crown then submitted that Molloy J. should withdraw her decision on the ground that she was disqualified from hearing the motion because prior to her appointment to the bench she was a plaintiff in an outstanding action against the Crown arising from her employment as a lawyer for the Ontario Human Rights Commission. Molloy J. refused to withdraw the decision, reasoning that the issues on the Crown's motion did not overlap with any issues in her own litigation and that the real defendant in her own

concurring opinions.

[15] At p. 586, Lord Browne-Wilkinson began his discussion of apparent bias by setting out the circumstances that will result in the automatic disqualification of a judge:

> The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.
>
> In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet Judges on Trial (1976) p. 303 and De Smith, Woolf and Jowell Judicial Review of Administrative Action (5th edn, 1995) p. 525. I will call this "automatic disqualification".

(Emphasis added)

[16] He referred to Dimes v. Grand Junction Canal Proprietors (1852), 3 H.L. Cas. 759, 10 E.R. 301, in which authorities were cited that show how the principle was developed. Lord Cottenham, who owned a substantial shareholding in the defendant company which succeeded at trial, sat on appeal from the trial judgment, which he affirmed. Lord Browne-Wilkinson described what followed the hearing of the appeal at pp. 586-87:

> . . . There was an appeal to your Lordships' House on the grounds that Lord Cottenham LC was disqualified. Their Lordships consulted the judges, who advised that Lord Cottenham LC was disqualified from sitting as a judge in the cause because he had an interest in the suit (see 3 HL Cas 759 at 786, 10 ER 301 at 312.) This advice was unanimously accepted by their Lordships. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham LC to be biased and no inquiry as to the circumstances which led to Lord Cottenham LC sitting. Lord Campbell said (3 HL Cas 759 at 793, 10 ER 301 at 315):
>
> > No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest.

(Emphasis added)

He went on to explain at p. 587 that although in the beginning disqualification was required only in cases where the judge was an actual party, this "absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome".

[17] Lord Browne-Wilkinson discussed the nature of the "interest" which a judge has in a proceeding that will lead to his or her automatic disqualification. He stated at p. 587: "Hitherto only pecuniary and proprietary interests have led to automatic disqualification." He continued at p. 588:

> . . . My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity.
>
> . . . . .
>
> If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (see R. v. Sussex Justices, ex p. McCarthy [1924] 1 KB 256 at 259, [1923] All ER Rep 233 at 234).

Earlier, at p. 587, Lord Browne-Wilkinson observed that the area of apparent bias is one "in which legal technicality is particularly to be avoided".

[18] In the result, Lord Browne-Wilkinson was of the opinion that Lord Hoffmann's association with AI was such that he had a sufficient interest in the appeal to require his automatic disqualification. He found the critical facts to be that AI was a party to the appeal, that AI was joined as an intervener to the appeal in order to argue for a particular result, that the result was achieved and that Lord Hoffmann was the director of a charity closely allied to AI and sharing, in this respect, AI's objects.

[19] It is important, in our view, to emphasize, as Lord Nolan stated at p. 592, "that in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality". Lord Hope also addressed this concern at p. 593:

> As my noble and learned friend Lord Goff of Chieveley said in R. v. Gough [1993] 2 All ER 724 at 730, [1993] AC 646 at 661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decisi on of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

(Emphasis added)

[20] The importance of the appearance of impartiality was also emphasized by Lord Denning M.R. in Metropolitan Properties Co. (FGC) Ltd. v. Lannon, [1968] 3 All E.R. 304 at p. 310, [1969] 1 Q.B. 577 (C.A.):

> . . . It brings home this point; in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see R. v. Huggins; R. v. Sunderland Justices, per Vaughan Williams, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see R. v. Camborne Justices, Ex p. Pearce; R. v. Nailsworth Justices, Ex p. Bird. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

We note that while Lord Denning M.R. spoke in terms of a "real likelihood" rather than a "reasonable apprehension", in National Energy Board, de Grandpré J. took care to state that such variations in the expression used should not generally be treated as involving any substantive difference in the approach to be taken. "Reasonable apprehension", "real likelihood", "reasonable likelihood" and "reasonable suspicion" amount to the same standard.

[21] This passage from the reasons of Lord Denning M.R. in Lannon was cited, with approval, by Major J. in S. (R.D.) at p. 203 D.L.R. [pp. 496-97 S.C.R.]. At p. 232 D.L.R. [p. 533 S.C.R.] Cory J. added:

> It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[22] In 1998 the Canadian Judicial Council published Ethical Principles for Judges to assist judges in carrying out their responsibilities. At p. 27, at the beginning of the chapter entitled "Impartiality", the following statement appears:
"Judges must be and should appear to be impartial with respect to their decisions and decision making." In the commentary on this statement, the following is found at p. 42:

> As elsewhere in this area, the concern is with reasonable perception, as well as actual conflict of interest. In general, a judge should not preside over a case in which he or she has a financial or property interest that could be affected by its outcome or in which the judge's interest would give rise in a reasonable, fair minded and informed person, to reasoned suspicion that the judge would not act impartially. This general rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's

Tab 231

CanLII

Ontario (Director, Family Responsibility Office) v. Samra, 2008 ONCJ 465 (CanLII)

Source:	Ontario Court of Justice
Date:	2008-08-25
File number:	D1972/92
Other citations:	59 RFL (6th) 219 — 66 RFL (6th) 167
Citation:	Ontario (Director, Family Responsibility Office) v. Samra, 2008 ONCJ 465 (CanLII), <https://canlii.ca/t/210ks>, retrieved on 2026-01-18

Toronto Registry No. D1972/92
DATE: 2008·VIII·25
CITATION: *Ontario (Director, Family Responsibility Office) v. Samra*, 2008 ONCJ 465

ONTARIO COURT OF JUSTICE

B E T W E E N :

DIRECTOR OF THE FAMILY RESPONSIBILITY OFFICE, for the benefit of Sheila McGraw,
Applicant,

— AND —

JASPAL SAMRA,
Respondent.

Before Justice Heather L. Katarynych
Heard on 21 August 2008
Reasons for Judgment released on 25 August 2008

COURTS AND JUDGES — Judges — Disqualification — General — Father had been committed to prison about 3½ years ago for default in child support order but committal was suspended on certain conditions — When provincial agency

resumption, that evidence needed to represent a full and frank disclosure of Mr. Samra's financial situation over the course of the accumulation of those arrears as well as his financial situation at the time of the hearing. The reasonable pers on, properly informed, would not be surprised that the default order issued esse ntially because Mr. Samra had provided no credible evidence to rebut the presu mption in subsection 41(9) of the Act; and that the default order issued on the st rength of the Director's evidence and on the terms, including the committal ter m allowed by subsection 41(10) of the Act, to which the Director was entitled o n that evidence.

[43] The reasonable person, properly informed by the history of this case and the law governing enforcement of support orders would also find the following points relevant context to Mr. Samra's recusal motion:

- Over the course of the year preceding the default hearing, a number of adjourn ments had been granted to give Mr. Samra opportunity to pursue his appeal, to d eal with entitlement issues that he repeatedly raised, notwithstanding decisions of the appellate courts contrary to his stance, and to prepare himself for the defa ult hearing.
- On 14 February 2005, the court received submissions from both counsel in the c ase, in the presence of Mr. Samra, and ultimately found merit in the Director's s tance that Mr. Samra had been given sufficient and fair opportunity to properly r espond to the Director's case.

[44] The reasonable person, properly informed of the orders made subsequent to that default order of 14 February 2005, would also note, in considering the merits of Mr. Samra's recusal motion, that this court's credibility finding has not been dislodged by any appellate court.

[45] In terms of the relationship between adverse credibility findings and the reasonableness of a litigant's apprehension of real or perceived bias, the reasonable person, acting reasonably and properly informed of the law, would take into account the settled principle of law that a judge's adverse finding regarding a litigant's credibility in a previous hearing does ***not*** in itself create a reasonable apprehension of bias. That reasonable person would know that the fact that a trial judge had ruled adversely in a previous case on the credibility of either a defence witness or the accused does not necessarily result in a reasonable apprehension of bias. Something more is required showing a predisposition by the adjudicator with respect to the accused's credibility, such as to amount to pre-judgment of the result of the second hearing.

[46] That reasonable man would know that judges are routinely called upon to disabuse their minds of evidence that they have heard but that, as a matter of law, is not admissible in the trial before them, and that it is fundamental to their role to decide the case only on the evidence properly admissible in that case. See, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)* (1998), 160 F.T.R. 107, 1998 CanLII 8732, [1998] F.C.J. No. 1764, 1998 CarswellNat 2453 (Fed. Tr. Div.), affirmed at *Suresh v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 318, 258 N.R. 119, 188 D.L.R. (4th) 599, 6 Imm. L.R. (3d) 155, 2000 CanLII 15604, [2000] F.C.J. No. 1026, 2000 CarswellNat 1345 (Fed. App. Div.). See also *R. v. Novak* (1995), 1995 CanLII 2024 (BC CA), 59 B.C.A.C. 152, 98 W.A.C. 152, [1995] B.C.J. No. 1127, 1995 CarswellBC 494

(B.C.C.A.), *per* Appeal Justice Jo-Ann Prowse. See also *R. v. James,* 2000 BCCA 616, 147 B.C.A.C. 153, 149 C.C.C. (3d) 534, [2000] B.C.J. No. 2354, 2000 CarswellBC 2419 (B.C.C.A).

[47] That reasonable person would also be mindful that a prior adverse finding of credibility, in order to create a reasonable apprehension of bias, must be in "strident" terms. See *R. v. Bulmer* (2000), 49 W.C.B. (2d) 57, [2000] O.J. No. 4418, 2000 Carswell-Ont 4544 (Ont. C.A.), *per* Appeal Justice Stephen T. Goudge. The accused was denied permission to appeal to the Supreme Court of Canada. See *Bulmer v. The Queen*, [2001] 1 S.C.R. *vii*, 271 N.R. 199*n*, 149 O.A.C. 396*n*, [2001] S.C.C.A. No. 39, 2001 CarswellOnt 5596.

[48] The reasonable person, properly informed and acting reasonably, would also know that, without more, Mr. Samra's concern about appearing before the same judge who made the default order against him cannot be the basis of a recusal order — that both old and recent case law suggest that the courts are very reluctant to accept an apprehension of bias in such cases. See, for example, *R. v. Bolt* (1995), 1995 ABCA 22 (CanLII), 162 A.R. 204, 83 W.A.C. 204, [1995] A.J. No. 22, 1995 CarswellAlta 521 (Alta. C.A.); *R. v. Novak*, *supra*; and *Re Chisholm and City of Berlin* (1912), 1912 CanLII 530 (ON SC), 23 O.W.R. 571, 4 O.W.N. 431, 9 D.L.R. 264, [1912] O.J. No. 415, 1912 CarswellOnt 664 (Ont. H.C.).

[49] The fact that a trial judge has expressed words and actions in previous cases or interpreted the law as it related to similar issues does not in itself establish a reasonable apprehension of bias. See *Samson Indian Band v. Canada,* [1998] 3 F.C. 3, 141 F.T.R. 109, 1997 CanLII 6390, [1997] F.C.J. No. 1652, 1997 CarswellNat 2244 (Fed. Tr. Div.), affirmed at *Samson Indian Band v. Canada* (1998), 227 N.R. 386, 1998 CanLII 7815, [1998] F.C.J. No. 688, 1998 CarswellNat 946 (Fed. App. Div.).

[50] The reasonable person, properly informed about this enforcement proceeding and the law governing it and acting reasonably, could not accept Mr. Guiste's submission that the only jurisprudential guidance needed by the court to recuse itself lies in the "substantially similar" factual circumstances set out in the Ontario Court of Appeal's decision in *R. v. Hossu and Stoicescu*, *supra*.

[51] Mr. Guiste pointed out that the judge in that case had refused to hear submissions, expressed opinion about the credibility of a witness, introduced his negative impressions. He then stated that Mr. Samra's case "is not all that different". When invited to be more specific about the nexus between the facts found by the Court of Appeal in that case and Mr. Samra's circumstances, he had nothing further to add.

[52] A careful read indicates that, in *R. v. Hossu and Stoicescu*, *supra*, a panel composed of Appeal Justices James C. MacPherson, James J. Carthy and Rosalie S. Abella, sitting in appeal from both conviction and sentence imposed by a judge of the Ontario Court, ordered a new trial because the judge's comments and conduct in the trial did give rise to a reasonable apprehension of bias. The judge in that case made open and improper favourable comments about both Crown witnesses and he made open and improper negative comments about all three defence witnesses.

[53] The reasonable person, properly informed and acting reasonably, would not find Mr. Samra similarly situated.

Tab 232

CanLII

Savone v. Law Society of Upper Canada, 2013 ONSC 1015 (CanLII)

Source:	Divisional Court
Date:	2013-02-13
File number:	12-DC-1858
Citation:	Savone v. Law Society of Upper Canada, 2013 ONSC 1015 (CanLII), <https://canlii.ca/t/fwb21>, retrieved on 2026-01-18

CITATION: Savone v. Law Society of Upper Canada, 2013 ONSC 1015
COURT FILE NO.: 12-DC-1858

DATE: 2013-02-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
LUIGI SAVONE	)	
Applicant	)	Christopher A. Moore , for the Applicant
– and –	)	
THE LAW SOCIETY OF UPPER CANADA REGULATIONS DIVISION and THE HEARING PANEL OF THE LAW SOCIETY OF UPPER CANADA	)	Tim Gleason/Sean Dewart , for the Respondent The Law Society of Upper Canada Regulations Division
Respondents	)	
	)	**HEARD:** February 13, 2013

T.D.RAY, J

[1] This is an application for leave to have this application heard in the Superior Court, rather than the Divisional Court on the ground *that this case is one of urgency and that the delay required for an application to the Divisional Court is likely to involve a failure of justice.*[1] If I grant leave, I may continue to hear the application. If I refuse leave I may nonetheless transfer this application to the Divisional Court[2]. If this application had been brought in front of the Divisional Court, leave would not have been required.

[2] The applicant seeks leave for judicial review of that part of a decision of a Law Society Hearing Panel dated July 27, 2012 which dismissed with reasons the applicant's motion for a change of venue. The Law Society has scheduled the hearing to commence in Toronto, March 4, 2013.

[3] The applicant is a solicitor, licensed to practice law in the Province of Ontario. The Law Society's application of September 22, 2011 notes that a conduct proceeding has been commenced for determination of whether the applicant engaged in professional misconduct. Specifically he is alleged to have breached Rule 2.012(5) of the Rules of Professional Conduct as follows:

> *i. He participated in or knowingly assisted in fraudulent or dishonest conduct by his vendor and purchaser clients, or associated persons, to obtain mortgage proceeds under false pretences in connection with transactions involving the properties listed in schedule A annexed hereto;*
>
> ii. *Alternatively, he failed to be on guard against being duped by unscrupulous clients or associated persons in connection with the transactions*.

[4] In its reasons, the panel noted the relevant Law Society Rule 17.01 with respect to the place of a hearing, accepted that as a matter of principle the convenience of witnesses is a relevant consideration, and concluded that it is implicit (but not explicit) that changing the venue from Toronto *will only be granted in exceptional circumstances*. After reviewing the affidavit of the applicant's counsel's assistant concerning possible witnesses from the Ottawa area and their relevance to the proceeding, which was disputed by the Law Society Counsel, concluded:

> *[40] We cannot predict at this juncture who among the 20 proposed witnesses will be excluded or who counsel may elect not to call. However, as noted above, the affidavit material filed in support of this motion is less than persuasive. Finally, in disposing of the motion tor change of venue, we note that:*
>
> *a. No claim of financial or other prejudice to Mr. Savone was asserted anywhere in the affidavit evidence, nor is it claimed that any witnesses would be unavailable to testify in Toronto;*
>
> *b. The Society conceded in its material that a penalty hearing could be held in Ottawa, in the event of a finding of professional misconduct.*

[5] Were I to grant leave and hear this matter, the standard of review is correctness concerning matters of law, and otherwise the standard of review is reasonableness[3]. Great deference is owed to tribunals with experience in specific areas referred to as

their home statute, and deference may also be owed in matters interpreting their own statute and rules[4]

[6] However before that consideration and analysis, I must first address the threshold for leave to proceed with the application[5]. A two prong test must be considered. Firstly I must consider whether this case is one of *urgency*. If I conclude that it is, then I must consider *whether the delay required for an application to the Divisional Court is likely to involve a failure of justice*.

[7] Since the hearing is scheduled for March 4, 2013, I am satisfied it appears to be urgent. However, there is nothing in the material to indicate why this application could not have been heard earlier in Toronto by the Divisional Court where there are almost continuous sittings, and where the panel rendered its decision. Here in Ottawa, Divisional Court sits twice per year. If this application had been brought in the Divisional Court, the applicant would not have had to deal with these threshold issues. Under these circumstances, I have reservations as to whether the applicant has made out the requirement of urgency.

[8] I am not satisfied however that a delay for this application to be heard by the Divisional Court would involve a failure of justice. This was a procedural ruling in the nature of an interlocutory order, rather than a final order. While *venue* may affect the rights of the parties, a full record in that respect will not be available until the hearing has been concluded and a decision rendered[6]. Judicial review at this stage would be premature in the extreme. There are no demonstrable exceptional circumstances.[7] Furthermore, the panel that made the decision on the venue motion is not the panel that will hear the conduct matter. It will be open to the applicant (and the respondents will not oppose the bringing of the motion) to bring a motion for a change of venue on proper material before the panel.

[9] Leaving aside the issues of urgency and delay, I have serious reservations about the merits of the applicant's case. The merits of the application are an essential component of *failure to justice.* Without a finding that the motion before the panel had merit, then it would be impossible to establish failure to justice.

[10] I have concerns about the panel's application of an *exceptional circumstances* test for a change of venue. According to the respondents, this was the first time the matter had come up for adjudication since in all other cases agreement has been reached. They contend that deference is owed because it is procedural in nature and they are interpreting their own rules. My concerns are that there is nothing in the regulation to suggest an *exceptional* circumstances test is to be applied. To the contrary, we know that it is common for panels to conduct hearings outside Toronto. Once a party contends that the venue ought to be somewhere other than Toronto, and in the absence of agreement, it seems to me that the factors ought to be considered without applying such a restrictive test.

[11] The applicant's contention that if he is not granted relief in this application, that he will be denied a remedy is simply false. He can bring this motion again before the hearing panel on March 4, 2013. At the conclusion of the proceeding he has rights of appeal set out in the Law Society Act. He also has the right to bring a judicial review application if so advised.

[12] The panel correctly noted that the affidavit material was less than persuasive. The applicant submitted unsatisfactory evidence in support of his motion to the Law Society Panel to the point of it being unsettling. Both the nature of the evidence and

the contents of the affidavit are worrisome. Affidavit evidence is designed to place facts before a tribunal. The best evidence rule applies. To rely on an affidavit from an affiant who describes herself as counsel's assistant, with no ground for asserting the evidence other than she is counsel's assistant, and without asserting her source and ground of belief is very troubling. It smacks of trivializing an evidentiary record. The contents are vague and poorly considered with only vague assertions and reasons for intending to call various witnesses without regard for the issues on which the witnesses are intended to be called. I can well understand why the panel found the affidavit material to be less than persuasive. It is no answer to say that the contents of the affidavit were uncontradicted. As in all such cases, the burden is on the party seeking the relief. As a consequence the merits of the motion before the panel were seriously wanting.

[13] I find that the applicant has not met the burden of establishing either prong of the two prong test for leave, and I do not consider it appropriate in this case to transfer it to the Divisional Court which only sits in Ottawa twice a year, thereby guaranteeing further delay. It is open to the applicant bring his motion for a change of venue before the panel on March 4, 2013 or later during the proceeding. The application is dismissed.

[14] Both parties filed costs outlines at the conclusion of argument. If the parties cannot agree on costs, they make submissions of two pages or less within 14 days, and with a further five days for reply.

Honourable Justice Timothy Ray

Released: February 13, 2013

CITATION: Savone v. Law Society of Upper Canada, 2013 ONSC 1015
COURT FILE NO.: 12-DC-1858
DATE: 2013-02-13

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

LUIGI SAVONE

Applicant

– and –

THE LAW SOCIETY OF UPPER CANADA REGUL ATIONS DIVISION and THE HEARING PANEL OF THE LAW SOCIETY OF UPPER CANADA

Respondents

REASONS FOR DECISION

Honourable Justice Timothy Ray

Released: February 13, 2013

---

[1] *Judicial Review Procedure Act* R.S.O. 1990, Chapter J. 1, section 6(2).
[2] *Supra* s. 6(3)
[3] *Dunsmuir v. New Brunswick,* 2008 SCC 9.
[4] Wise v. LSUC, 2010 ONSC 1937
[5] Note 2.
[6] *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541 paras 68-70
[7] *Supra,* para 58

Tab 233

CanLII

Kolten v. Walker, 2019 ONSC 3210 (CanLII)

Source:	Superior Court of Justice
Date:	2019-05-27
File number:	CV-17-126400OT
Citation:	Kolten v. Walker, 2019 ONSC 3210 (CanLII), <https://canlii.ca/t/j0jnh>, retrieved on 2026-01-18

CITATION: Kolten v. Walker, 2019 ONSC 3210
COURT FILE NO.: CV-17-126400OT
DATE: 20190527

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GERALD KOLTEN, Plaintiff

AND:

DOUGLAS WALKER, Defendant

BEFORE: Firestone J.

COUNSEL: *Barry L. Evans*, for the Plaintiff

Alan L. Rachlin, for the Defendant

HEARD: In Writing

ENDORSEMENT

[1] The Defendant brings this motion in writing for the following:

(a) An order transferring this action from Oshawa to Toronto to be tried together or one after the other, as the trial judge may direct, with Toronto action number CV-16-545939;

(b) In the alternative, an order transferring this action to Toronto.

[2] The Plaintiff opposes the motion.

[3] On this motion the moving party seeks additional relief other than the transfer of this action from Oshawa to Toronto; namely that the Oshawa and Toronto action be tried together or one after the other, as the trial judge may direct.

[4] Motions brought by a party to transfer a proceeding are to be heard in writing in accordance with the Consolidated Provincial Practice Direction ("Practice Direction") effective July 1, 2014.The Practice Direction deals with the transfer of a civil proceeding in the Central East, Central West, Central South and Toronto Regions under Rule 13.1.02. Pursuant to the Practice Direction, motions to transfer should be brought in writing at the court location to which the moving party seeks to have the proceeding transferred.

[5] Rule 37.12.1(4) of the *Rules of Civil Procedure.* R.R.O 1990.Reg194 (the "Rules") sets forth the procedure to be followed where a party seeks to have a contested motion heard in writing which would include a motion for an order for trial together or one after the other. As part of that procedure pursuant to Rule 37.12.1(5)(d) the responding party, once served with the moving party's motion material, may deliver notice that they intend to make oral argument.

[6] The Plaintiff has delivered such notice in accordance with Rule 37.12.1(5)(d).

[7] I therefore order that the Defendant's motion be set down for an oral hearing before a judge in the Toronto Region. The moving party Defendant is directed to take all appropriate steps in accordance with the rules and applicable Practice Directions to secure the hearing date.

-

Firestone J.

Date: May 27, 2019

Tab 234

CanLII

Agbapu v Munshi, 2023 ONSC 2053 (CanLII)

Source:	Superior Court of Justice
Date:	2023-04-03
File number:	CV-22-00688733-0000
Citation:	Agbapu v Munshi, 2023 ONSC 2053 (CanLII), <https://canlii.ca/t/jwhgx>, retrieved on 2026-01-18

CITATION: Nodebe Agbapu v Dr. Tariq Munshi, 2023 ONSC 2053
COURT FILE NO.: CV-22-00688733-0000
DATE: 20230403

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: NODEBE AGBAPU, Appellant

AND:

DR. TARIQ MUNSHI, Respondent

BEFORE: Regional Senior Justice Firestone

COUNSEL: *Nodebe Agbapu*, self-represented

Jennifer Arduini, for the Respondent

HEARD: In Writing

ENDORSEMENT

[1] This matter arises from an appeal by Nodebe Agbapu (the "Appellant") of the decision of the Consent and Capacity Board ("CCB") dated September 29, 2022, confirming a finding of incapacity with respect to treatment with anti-psychotic medication. The Appellant has appealed that decision. Pursuant to section 18(3) of the *Health Care Consent Act*, 1996, S.O. 1996, c.2 Schedule A, the Respondent is not permitted to treat the Appellant with the proposed treatment pending the disposition of the Appeal.

[2] On March 29, 2023, counsel for the Respondent directed correspondence, which was copied to the Appellant, to my attention.

[3] In that correspondence counsel advised that on March 7, 2023, they attended Civil Practice Court ("CPC"). At that time counsel requested that *amicus curiae* be appointed. The appellant, who is self-represented, opposed that request. The CPC Court Judge directed that such request be brought by way of motion.

[4] Given the time it will take to have such motion scheduled and heard, the importance of ensuring that the Appellant's interests are fairly represented, as well as the importance of moving this matter forward expeditiously, Respondent's counsel requests that the Court consider the appropriateness of appointing *amicus curiae* now.

[5] In accordance with the Motions Judge's direction, the request to have *amicus curiae* appointed is to be brought by way of motion. I direct that this motion be brought in writing before me in accordance with the provisions of Rule 37.12.1(4) of the *Rules of Civil Procedure*, R.R.O.1990, Reg.194.

Date: April 3, 2023

R.S.J. Firestone

Tab 235

CanLII

Heegsma v. Hamilton (City), 2024 ONCA 865 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2024-11-27
File number:	COA-24-CV-1036
Other citation:	174 OR (3d) 793
Citation:	Heegsma v. Hamilton (City), 2024 ONCA 865 (CanLII), <https://canlii.ca/t/k845w>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Heegsma v. Hamilton (City), 2024 ONCA 865
DATE: 20241127
DOCKET: COA-24-CV-1036

Fairburn A.C.J.O., Coroza and Sossin JJ.A.

BETWEEN

Kristen Heegsma, Darrin Marchand, Gord Smyth, Mario Muscato, Shawn Arnold, Bradley Caldwell, Christine Delorey, Glenn Gnatuk, Taylor Gogo-Horner, Cassandra Jordan, Julia Lauzon, Ammy Lewis, Ashley MacDonald, Corey Monahan, Misty Marshall, Sherri Ogden, Jahmal Pierre, Linsley Greaves and Patrick Ward

Applicants (Respondents)

and

City of Hamilton

Respondent (Respondent)

and

Ontario Human Rights Commission

Proposed Intervener (Appellant)

Reema Khawja and Alisha Krishna, for the appellant Ontario Human Rights Commission

Sujit Choudhry, for the respondents Kristen Heegsma, Darrin Marchand, Gord Smyth, Mario Muscato, Shawn Arnold, Bradley Caldwell, Christine Delorey, Glenn Gnatuk, Taylor Gogo-Horner, Cassandra Jordan, Julia Lauzon, Ammy Lewis, Ashley MacDonald, Corey Monahan, Misty Marshall, Sherri Ogden, Jahmal Pierre, Linsley Greaves and Patrick Ward

Jennifer L. King, for the respondent City of Hamilton

Heard: November 14, 2024

On appeal from the order of Justice James A. Ramsay of the Superior Court of Justice, dated September 13, 2024.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] This is an appeal from a decision denying the Ontario Human Rights Commission ("OHRC") leave to intervene in an application before the Superior Court of Justice. The application is set to commence on December 16, 2024. It involves 19 individuals (the "applicants") who erected tents or shelters ("encampments") in various public parks in Hamilton, Ontario. The applicants were evicted from those encampments by the respondent City of Hamilton pursuant to several municipal by-laws. The applicants now challenge the constitutionality of various sections of those by-laws under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[2] Along with the Canadian Civil Liberties Association, the British Columbia Civil Liberties Association and the Women's Legal Action Fund, the OHRC sought leave to intervene as friends of the court in the underlying application. The motion for

intervention was brought pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[3] The applicants in the underlying application consented to the motion to intervene and the respondent City of Hamilton did not oppose.

[4] The motion was heard in writing. On September 13, 2024, the application judge issued an endorsement denying all motions for leave to intervene. His reasons for dismissing the motion are as follows:

> The [Canadian Civil Liberties Association], [Women's Legal Action Fund], the [British Columbia Civil Liberties Association] and the Ontario Human Rights Commission seek leave to intervene. The Applicants, who are very well-represented, propose to file expert evidence on the impact of the by-law in question and to make argument with respect to constitutional implications, the effect of international law and the particular impact of the by-law on vulnerable communities, including women. I do not think that the proposed interveners have much to add.
>
> The applications to intervene are dismissed.

[5] The OHRC appeals from the order dismissing their motion to intervene. They claim multiple errors on the part of the motion judge (who is also the application judge), including that he misapprehended and misapplied the law on intervention and failed to provide adequate reasons.

[6] I would quash this appeal for want of jurisdiction. For the reasons that follow, I conclude that this court does not have jurisdiction to hear an appeal from the dismissal of a motion for leave to intervene as a friend of the court.

B. THE HEARING

[7] In their written submissions, the OHRC submitted that the "decision denying leave to intervene is a final order as it disposes of the OHRC's ability to participate in the Application." In support of this proposition, the OHRC cited to *Maybank*

Foods Inc. Pension Plan v. Gainers Inc. (1990), 1990 CanLII 8117 (ON CA), 77 D.L.R. (4th) 236 (Ont. C.A.). In *Maybank,* at para. 12, this court said that "[a]n order refusing intervener status is a final order". In that case, the appeal was ultimately dismissed because this court found that the weekly court judge had properly exercised his discretion in refusing the request for party intervener status pursuant to r. 13.01(1)(b) of the *Rules of Civil Procedure.*

[8] During oral submissions, the OHRC was asked for further input regarding this court's jurisdiction to hear this appeal. The OHRC then also pointed to this court's decision in *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R. (3d) 792. In *Bedford*, this court granted an appeal from a decision denying intervener status in circumstances similar to this case, where the motion for intervener status as a friend of the court was made pursuant to r. 13.01(2) of the *Rules of Civil Procedure*.

C. INTERLOCUTORY VS FINAL ORDERS

[9] This court has jurisdiction to hear final, not interlocutory, orders of the Superior Court. Section 6(1)(b) of the *Courts of Justice Act,* R.S.O. 1990, c. C. 43, provides that an appeal to this court lies from "a final order of a judge of the Superior Court of Justice". By contrast, s. 19(1)(b) of the *Courts of Justice Act* provides for an appeal to the Divisional Court from "an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court."

[10] Determining the dividing line between a final and interlocutory order has attracted much attention in the jurisprudence. In my view, when the principles are properly applied, this matter falls on the side of an interlocutory order.

[11] While there has been some suggestion in the past that *Smerchanski v. Lewis* (1980), 1980 CanLII 1699 (ON CA), 30 O.R. (2d) 370 (C.A.), at pp. 377-78, stood for the proposition that an order finally disposing of an issue between a party and

non-party or a "stranger to the action" is a final order for purposes of appeal to this court, this suggestion has since been rejected. In *Royal Trust Corporation v. Fisherman* (2001), 2001 CanLII 4080 (ON CA), 55 O.R. (3d) 794 (C.A.), at para. 16, this court explained: "*Smerchanski* was not intended to mean that all orders directed to a non-party must be final, and the principle expressed therein should not be further expanded in that way."

[12] Since the time of *Smerchanski* and *Royal Trust Corporation,* there has been significant discussion around how to identify the dividing line between interlocutory and final orders. At its core, an interlocutory order is one that does not determine the "real matter in dispute between the parties—the very subject matter of the litigation—or any substantive right": *Drywall Acoustic Lathing Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.,* 2020 ONCA 375, at para. 16; *Paulpillai Estate v. Yusuf*, 2020 ONCA 655, at para. 16. Although an order will undoubtedly answer the question raised by the relevant motion, it remains interlocutory in nature if the substantive matters lying at the heart of the subject matter of the litigation remain undecided: *Drywall Acoustic*, at para. 16, citing *Hendrickson v. Kallio*, 1932 CanLII 123 (ON CA), [1932] O.R. 675 (C.A.), at p. 678 and *Ball v. Donais* (1993), 1993 CanLII 8613 (ON CA), 13 O.R. (3d) 322 (C.A.).

[13] In determining whether this test is met, one must look to the order, the reasons for the order, the nature of the proceedings from which the order has emerged, and any "contextual factors that may inform the nature of the order": *Prescott & Russell (United Counties) v. David S. Laflamme Construction Inc.*, 2018 ONCA 495, 142 O.R. (3d) 317, at para. 7; *Paulpillai Estate*, at para. 16; and *P1 v. XYZ School*, 2021 ONCA 901, 160 O.R. (3d) 445, at para. 12.

D. PARTY VS FRIEND INTERVENTIONS

[14] In my view, a decision to deny intervention in a matter as a friend of the court will not have the effect of impacting the non-party's substantive rights as they are not in play. To the contrary, the proposed intervention as a friend of the court is predicated, not on the non-party's substantive interests, but on their expertise and how that expertise may be of assistance to the court. This stands in contrast to the denial of an intervention in a matter where the non-party seeks leave to intervene as a party. The denial of intervention status to a proposed party intervener precludes them from participating in litigation that they say will directly or indirectly impact them at some level, in accordance with the criteria set out in r. 13.01 of the *Rules of Civil Procedure*.

[15] Rules 13.01 and 13.02 of the *Rules of Civil Procedure* address leave to intervene as a party and as friend of the court:

> **Leave to Intervene as Added Party**
>
> **13.01** (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that the person may be adversely affected by a judgment in the proceeding; or
>
> (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.
>
> **Leave to Intervene as Friend of the Court**
>
> **13.02** Any person may, with leave of a judge or at the invitation of the presiding judge or associate judge, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[16] As can be seen, there exists a fundamental difference between motions to intervene as a party (r. 13.01(1) and (2)) and motions to intervene as a friend of the court (r. 13.01(2)). In broad strokes, and in accordance with r. 13.01(1), resolving a motion for intervention as a party to the proceedings requires the court to consider how the proceedings may impact the proposed intervener. By denying a motion for leave to intervene to a proposed party intervener, the moving party is denied the opportunity to contribute to the underlying litigation that they say will have a direct impact on their interests. This consideration is entirely absent from a r. 13.02 motion which focusses, not on how the proposed intervener might be impacted by the proceedings, but how the proposed intervener might assist the court in the proceedings.

[17] While both types of interventions – party and friend – are discretionary in nature, they serve different purposes which I conclude informs the jurisdictional question in this matter. Party interventions focus on ensuring that non-parties who may be impacted by the litigation are given an opportunity to participate in appropriate circumstances. Friends of the court intervention motions are focussed upon whether the court will be assisted by the proposed intervention, not on whether their substantive rights might be impacted by the underlying proceeding.

[18] This brings us to the question of when this court has jurisdiction to hear an appeal from a decision denying intervention.

[19] In *Maybank,* a decision relied upon by the OHRC to suggest that this court has jurisdiction in this appeal, the court concluded that it had such jurisdiction. But that conclusion must be read in its full context, most specifically that the proposed intervener was seeking party intervener status pursuant to r. 13.01(1)(b), claiming that they could be adversely impacted by a judgment resulting from the underlying proceedings.

[20] Similarly, in *Hollinger Inc. v. The Ravelston Corp.,* 2008 ONCA 207, 89 O.R. (3d) 721, where this court unanimously concluded that the denial of intervention status was final in nature, the matter was decided in the context of an application for party intervener status: see the decision appealed from, *Hollinger Inc. v. Ravelston Corporation Ltd.,* 2006 CanLII 38862 (ON SC), 83 O.R. (3d) 258 (S.C.).

[21] The only decision that remains an outlier, which I must address, is *Bedford,* where this court allowed an appeal from the dismissal of a motion for leave to intervene as a friend of the court. As noted at the outset, in addition to *Maynard,* the OHRC relies upon the *Bedford* decision to suggest that this court has jurisdiction to hear this appeal. It is understandable why the OHRC points to *Bedford* in support of its position on jurisdiction as the case involved an appeal from the dismissal of a motion for leave to intervene as a friend of the court.

[22] While the OHRC is correct that this court exercised jurisdiction in that appeal, ultimately allowing the appeal and granting the intervener status requested, the issue of jurisdiction was neither raised nor decided on appeal. This is the only decision of this court that has been drawn to our attention that involves an appeal from this type of order.

[23] In my view, *Bedford* is not determinative of the jurisdictional question before this court. The fact that the court in *Bedford* exercised jurisdiction is only discernable in hindsight by necessary implication. The *Bedford* court did not pronounce any principle of law relating to jurisdiction and it should not be taken as such. It would create great uncertainty if the parties could impute principles of law to past decisions without any foothold in the actual reasoning of those decisions. To the contrary, where the issue of jurisdiction is neither raised nor decided on appeal, a decision of this court exercising jurisdiction does not establish that jurisdiction in a subsequent appeal: *Singh v. Heft*, 2022 ONCA 135, at para. 15; *CIBC Mortgages Inc. (FirstLine Mortgages) v. Computershare,* 2015 ONCA 846,

342 O.A.C. 49, at para. 12. Accordingly, *Bedford* is not determinative of this court's jurisdiction.

[24] In my view, this court has no jurisdiction to hear an appeal from the dismissal of a motion for leave to intervene as a friend of the court. Quite simply, the proposed intervener's substantive rights are not engaged during the motion or impacted as a result of the motion. To the contrary, the dismissal of a motion for leave to intervene as a friend of the court means only one thing, that the court does not need the offered assistance of the non-party in resolving the underlying proceedings. This is not a final order and not appealable to this court.

E. CONCLUSION

[25] In conclusion, there is no jurisdiction to hear this appeal.

[26] To be clear, nothing in these reasons should be taken as suggesting, had there been jurisdiction, that we would have found that the application judge erred.

[27] Appeal quashed for want of jurisdiction.

Released: "November 27, 2024 JMF"

"Fairburn A.C.J.O."
"I agree. Coroza J.A."
"I agree. Sossin J.A."

Tab 236

CanLII

CMLQ Investors Co. v. CIBC Trust Corp., 1996 CanLII 905 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1996-09-19
File number:	c21987
Citation:	CMLQ Investors Co. v. CIBC Trust Corp., 1996 CanLII 905 (ON CA), <https://canlii.ca/t/6hzv>, retrieved on 2026-01-18

Court File No. C21987

COURT OF APPEAL FOR ONTARIO

RE: **CMLQ INVESTORS COMPANY (Applicant / Appellant / Cross-Respondent) and CIBC TRUST CORPORATION (Respondent / Respondent / Cross-Appellant)**

BEFORE:McKINLAY, CARTHY JJ.A. and MacFARLAND J. (ad hoc)

COUNSEL: **R.B. Moldaver, Q.C.**
for the appellant, cross-respondent

C. G. Paliare and S. White
for the respondent, cross-appellant

HEARD: **September 16, 1996**

ENDORSEMENT

The Honourable Mr. Justice Hawkins gave judgment against the CIBC Trust Corporation ("CIBCT") on the hearing of a motion by the applicant, CMLQ Investors

Company ("CMLQ"). There was an appeal of part of the judgment by CMLQ, which was abandoned, and a cross-appeal by CIBCT, which is the subject of this endorsement.

The parties both held an interest in a mortgage against restaurant premises in downtown Toronto. CIBCT managed the mortgage for both parties, holding the interest of CMLQ in trust, and was the registered owner of the mortgage.

The mortgage was close to maturity when the parties had discussions and correspondence with respect to possible extension or renewal. The principal amount of the mortgage was not paid on maturity and, without the consent of CMLQ, CIBCT entered into a new mortgage arrangement with the mortgagor, purportedly on behalf of both parties. That mortgage subsequently went into default and the property was sold under power of sale.

CMLQ commenced an application for a number of items of relief, the overall purport of which was to obtain a declaration of its rights under the original agreement between the parties with respect to the mortgage, and for payment to it of amounts owing by CIBCT as a result of what CMLQ says was CIBCTs failure to pay to CMLQ the amount of principal and interest owing to it at the date of default under the original mortgage. Although it is not relevant to this cross-appeal, it is of interest to note that the motions judge did not consider full payment of principal and interest necessarily to represent actual damages suffered by CMLQ.

On April ll, 1995, an adjourned date set for hearing of the application, Hawkins J. heard a motion brought by CIBCT for an order directing a trial of the whole of the application or, in the alternative, for an order directing "the trial of an issue, or a number of issues". Hawkins J. directed a trial on the issue of damages, but otherwise dealt with the application on that hearing, making a declaration that CMLQ had elected not to participate in the new mortgage, and that CIBCT had entered into the new mortgage on its own account.

It is the position of CIBCT that Hawkins J., on such a motion, could only refer some or all of the issues for a trial, and that any remaining issues could only be dealt with at a later date on a hearing of the balance of the application. It also argues that it was inappropriate to decide the question of interpretation of the clause in issue in the agreement between CIBCT and CMLQ without expert evidence as to the business efficacy of not renewing the mortgage, and as to normal mortgage practice and the duty of CIBCT in managing the mortgage on behalf of itself and CMLQ.

In our view, expert evidence was unnecessary for the purpose of construing the relevant clause in the agreement between the parties. Whether it made good business sense to renew the mortgage was not the question but, rather, it was whether or not CMLQ had dealt properly with the matter of renewal according to the words of the relevant clause in the agreement. We agree with Hawkins J. on that point.

It is the position of CMLQ that all necessary evidence was before the motions judge, and that he was correct in dealing with the matter as if it were a motion for judgment pursuant to Rule 37.13(2)(a) of the Rules of Civil Procedure. CIBCT, on the other hand, argues that if a judge on a motion intends to convert it into a motion for judgment, he must state his intention of so doing. We are of the view that, although that might be a preferable route, where all of the necessary evidence is before the judge on the motion, and where the parties have had full opportunity of arguing their positions, as was the case here, there is nothing to be gained by either party by adding further proceedings to those already taken.

We see no error in the way the motions judge proceeded in this case, nor in the decision he arrived at.

The cross-appeal is dismissed, with costs to the respondent on the cross-appeal.

3964

Tab 237

CanLII

Royal Bank of Canada v. Rastogi, 2011 ONCA 47 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2011-01-20
File number:	C52474
Other citations:	330 DLR (4th) 98 — [2011] OJ No 202 (QL)
Citation:	Royal Bank of Canada v. Rastogi, 2011 ONCA 47 (CanLII), <https://canlii.ca/t/2fc85>, retrieved on 2026-01-18

CITATION: Royal Bank of Canada v. Rastogi, 2011 ONCA 47

DATE: 20110120
DOCKET: C52474

COURT OF APPEAL FOR ONTARIO

Doherty, Watt and Epstein JJ.A.

BETWEEN

Royal Bank of Canada

Plaintiff (Appellant)

and

Ankur Rastogi and Toronto Dominion Bank

Defendants (Respondent)

AND BETWEEN

Ankur Rastogi

Plaintiff by Counterclaim (Respondent)

and

Royal Bank of Canada, RBC Direct Investing Inc., and RBC Dominion Securities Inc.

Defendants by Counterclaim (Appellants)

Martin Greenglass, for the appellants

Christopher J. Cosgriffe, for the respondent

Heard: November 19, 2010

On appeal from the order of Justice Edward P. Belobaba of the Superior Court of Justice dated July 16, 2010, with reasons reported at (2010), 2010 ONSC 3981 (CanLII), 83 C. C.E.L. (3d) 98.

Doherty J.A.:

I

[1] The appellant, the Royal Bank of Canada (RBC), claims that it is entitled to unilaterally and without court sanction effectively freeze accounts belonging to the respondent, Ankur Rastogi (Rastogi), pending the results of its action against Rastogi. Three of those accounts are RBC accounts, two are accounts with the other appellant, RBC Direct Investing Inc. (RBC Direct), an affiliate of RBC, and one account, an account that Rastogi holds jointly with his wife, is with the Toronto Dominion Bank (TD). Belobaba J. (the motion judge) agreed that RBC was entitled to freeze its own accounts but ordered that the accounts at RBC Direct and TD should be released immediately to Rastogi. RBC and RBC Direct appeal from that order. Rastogi has not appealed from the order made with respect to the RBC accounts and the status of these accounts is not in issue on this appeal.

[2] Counsel for the appellants submits that although Rastogi purported to bring the motion under Rule 44, the motion was in reality a motion for summary judgment. Counsel argues that the motion judge effectively gave judgment on some of the claims advanced by RBC and by Rastogi in his counterclaim and that he erred in doing so in the face of several triable issues.

[3] I agree with counsel for RBC that Rule 44 had no application. This was in reality a motion for summary judgment on Rastogi's entitlement to the funds in his accounts. However, I agree with the motion judge that RBC had no basis in law to prevent Rastogi from accessing his funds in RBC Direct and TD. This was an appropriate case for summary judgment in the terms of the order made by the motion judge. I would vary the parts of the order referable to the accounts at RBC Direct and TD to a judgment in the same terms, and would otherwise dismiss the appeal.

II

[4] In its claim, RBC alleges that between December 2007 and September 2008 Rastogi misused his position as an employee of RBC to establish an arbitrage scheme trading Canadian and US dollars in his RBC accounts. RBC alleges that as a result of this illicit scheme, Rastogi made about $700,000 in net profit and RBC suffered the equivalent loss.

[5] According to RBC's allegations, Rastogi took advantage of a "loophole" in the RBC online banking system and his access to an employee preferred exchange rate to complete hundreds of currency exchange transactions on his own behalf at the opening of the market each day. He was able to make the trades at prices that ensured him a profit and an equivalent loss to RBC. RBC alleges that in operating the scheme to his personal advantage and the detriment of RBC, Rastogi breached the terms of his contract of employment with RBC and his duty of loyalty to RBC.

[6] Rastogi's trading was funded with borrowing on his RBC line of credit. The proceeds from the scheme were paid into his RBC accounts. Some of the proceeds were transferred from those accounts to Rastogi's accounts at RBC Direct. Some of the proceeds were also transferred to Rastogi's joint account at the TD.

[7] In its lawsuit commenced in the fall of 2008, RBC seeks:

- Damages for unjust enrichment and breach of Rastogi's employment contract in the amount of $700,000;
- An order tracing the proceeds of the arbitrage scheme including an order tracing those proceeds into the hands of third parties;
- A declaration that the proceeds are held in trust for RBC;
- An interim and permanent injunction restraining Rastogi from dissipating the proceeds of the scheme.

[8] RBC took no steps to obtain any interim relief. Instead, it froze Rastogi's three accounts with RBC. It also, presumably by virtue of its relationship with RBC Direct, froze both of Rastogi's accounts with RBC Direct. RBC then commenced this action and, by naming the TD as a defendant, effectively froze Rastogi's account at TD. Pursuant to s. 437(2) of the *Bank Act*, S.C. 1991, c. 46, TD declined to pay the funds in the account to Rastogi, pending either a court order or RBC's consent.[1] TD is holding the funds pending court order. It takes no position in respect of the competing claims of RBC and Rastogi.

[9] In his defence, Rastogi claims that he never worked for RBC although he acknowledges being employed by its affiliate RBC Dominion Securities Inc. (RBC Dominion). Rastogi admits that he engaged in currency trading on his own behalf. He alleges, however, that he used publicly available information and traded at the rates set by RBC. Rastogi maintains that his trading was well known to the RBC representatives at the branch where he kept his accounts. He contends that he did nothing that breached his contract of employment or made improper use of information available to him as an

employee. Rastogi goes on to assert that RBC did not suffer any loss as a result of his currency trading.

[10] Rastogi also counterclaims against RBC, RBC Direct and RBC Dominion. He seeks the return of all funds in his accounts at those institutions, damages for improperly freezing those accounts and damages for wrongful dismissal. Rastogi asserts that the funds in the accounts at RBC Direct and TD do not come exclusively from the profits earned in his currency exchange trading and that, by freezing those accounts without any authority to do so, RBC has made it impossible for him to pay his outstanding debts, such as his mortgage and his daily living expenses.

[11] Rastogi also cross-claims against TD. He seeks an order requiring TD to release the funds in the account jointly held by him and his wife. As indicated above, TD takes no position on this claim.

III

The Motion Judge's Ruling

[12] RBC claimed that Rastogi owed it some $700,000. There was about $100,000 in Rastogi's three RBC bank accounts. The credit in those accounts represented a debt owed by RBC to Rastogi. The motion judge held, at paras. 8-12, that RBC could claim a set off of the credits in Rastogi's account against any debt owed by Rastogi to RBC. The set off claim justified RBC's refusal to release the funds in Rastogi's RBC accounts unless ordered to do so following a trial of the merits of the respective claims.

[13] The motion judge determined that RBC Direct had no claim against Rastogi and therefore no debt that it could purport to set off against the credit in Rastogi's accounts at RBC Direct. The motion judge also rejected the argument that because of the corporate affiliation between RBC and RBC Direct, RBC was entitled to treat Rastogi's accounts in RBC Direct as if they were accounts in RBC. The motion judge said at para. 13:

> More importantly, Direct Investing ("DI") makes no claim against Rastogi. It has no legal basis, in set off or otherwise,

> for freezing his accounts and holding on to his funds, absent a court-granted injunction, which in all likelihood would not be granted on these facts. In any event, no such injunction has been sought by DI.

[14] The motion judge found no basis to withhold Rastogi's funds held by TD (paras. 16-21). He held that RBC's mere assertion that it was entitled to a tracing order could not provide the basis for withholding Rastogi's funds. The motion judge also rejected RBC's contention that s. 437(2) of the *Bank Act* gave RBC a right to freeze Rastogi's accounts at TD. The motion judge interpreted s. 437(2) as merely giving TD the option of interpleading the funds into court or holding the funds pending court order once TD was sued. TD had chosen the latter course. The motion judge concluded at para. 21:

> RBC's claim for a tracing order is not enough, absent an injunction or some other court order or at least some proof of legal entitlement, to justify any further retention by the TD Bank of depositor Rastogi's funds. In my view, these funds should be released immediately.

IV

The Nature of the Motion

[15] Rastogi's motion was brought under Rule 44. That rule applies to a motion for an "interim order" made under s. 104(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That section provides:

> In an action in which the *recovery of possession of personal property is claimed* and it is alleged that the property,
>
> (a) was unlawfully taken from the possession of the plaintiff; or
>
> (b) is unlawfully detained by the defendant,
>
> *the court, on motion, may make an interim order for recovery of possession of the property*. [Emphasis added.]

[16] Section 104 and Rule 44 speak of recovery of possession of "personal property". That phrase is not defined in the Act or in Rule 44.

[17] A credit in a customer's bank account is treated as a debt owed by the banker to the account holder. The relationship between the bank and the account holder is one of debtor and creditor: *BMP Global Distributions Inc. v. Bank of Nova Scotia*, 2009 SCC 15 (CanLII), [2009] 1 S.C.R. 504, at para. 63. Although RBC Direct is not a bank, I see no reason to treat credits in the RBC Direct accounts any differently. Those credits represented a debt owed by RBC Direct to Rastogi.

[18] The language of s. 104 of the *Courts of Justice Act* and, even more so, the language of Rule 44, suggest that "personal property" means property that is tangible and capable of physical description. The security requirements addressed in rule 44.03 suggest the same interpretation.[2] On this interpretation a debt would not constitute "personal property" for the purpose of Rule 44.

[19] It is unnecessary for me to come to any firm conclusion as to whether a debt is included within the phrase "personal property" in s. 104 and Rule 44. Even if the section and the rule could have application to a debt, Rastogi was not seeking an interim order for possession of property, and was not offering to post any security. Rastogi wanted the release of his funds plain and simple. The order made by the motion judge reflects the nature of the relief sought. There is nothing interim about the relief ordered by the motion judge.[3] The relief granted was not available under Rule 44.

V

Should the Motion be Treated as a Motion for Summary Judgment Under Rule 20?

[20] Rule 37.13(2)(a) states:

> A judge who hears a motion may,
>
> (a) in a proper case, order that the motion be converted into a motion for judgment;

[21] The motion judge was not asked to, and did not exercise the power under rule 37.13(2)(a). This court can, however, make the same order: s. 134(1)(a) of the *Courts of*

Justice Act.

[22] An order in the terms contemplated by rule 37.13(2)(a) is discretionary and is clearly not one that will be easily or routinely granted. In *CMLQ Investors Company v. CIBC Trust Corporation* (1996), 3 C.P.C. (4th) 62 (Ont. C.A.), this court affirmed a motion judge's exercise of the rule 37.13(2)(a) discretion to grant judgment on a motion for a trial of an issue. The motion judge granted a declaratory judgment and directed a trial on the question of damages. In upholding that decision, this court said at para. 8:

> [W]here all of the necessary evidence is before the judge on the motion, and where the parties have had full opportunity of arguing their positions, as was the case here, there is nothing to be gained by either party by adding further proceedings to those already taken.

[23] Counsel for the appellants does not suggest that the record before the motion judge did not contain all of the evidence necessary to determine whether Rastogi was entitled to summary judgment on the issue of his entitlement to the release of the funds held by RBC Direct and TD. The record was extensive. Detailed facta were also filed. [4]

[24] Counsel for the appellants also does not suggest that RBC did not have a full opportunity to put forward its case on the issue of Rastogi's entitlement to the funds in the accounts. As I read counsel's factum, he invites the court to treat this as if it were a motion for summary judgment. Counsel forcefully argues that on the motion record, Rastogi failed to establish that there were no genuine issues requiring a trial in respect of his entitlement to those funds. While counsel for RBC has no difficulty treating this as a motion for summary judgment, counsel for Rastogi contends that it would be unfair to do so as that would put the onus on Rastogi to show that there is no triable issue with respect to his entitlement to the funds.

[25] I agree with counsel for the appellants that Rastogi's claim to an entitlement to the funds in his RBC Direct and TD accounts can be properly and fairly resolved on this

motion. There is no need for further proceedings to make a proper determination on that issue. Nor, given my assessment of the merits, is there any prejudice to Rastogi.

VI

Should Summary Judgment be Granted on Rastogi's Claim to the Funds held by RBC Direct and TD?

[26] Rastogi's claim to the funds in RBC Direct and TD is straightforward. The credit in those accounts represents debts owed to him by RBC Direct and TD. He has demanded payment. Neither RBC Direct nor TD advanced any claim against Rastogi, much less a claim that would give rise to any right of set off. Counsel for Rastogi submits that RBC does not, merely by commencing a lawsuit in which it claims a right to the funds, acquire any right to unilaterally prevent Rastogi from obtaining those funds. Counsel contends that, absent a court order, RBC was not entitled to preemptively interfere with Rastogi's rights in respect of his accounts at RBC Direct and TD.

[27] RBC's claim that the funds should not be released to Rastogi rests on the assertion that the material filed on the motion demonstrates that RBC has an arguable claim to a restitution order with respect to the funds. RBC asserts that its remedy goes beyond damages and that the funds in those accounts in fact belong to RBC. The restitutionary claim is based on either a constructive trust flowing from Rastogi's breach of his duties to RBC, or on RBC's mistaken payment of the funds into Rastogi's accounts at RBC. RBC maintains that its arguable restitutionary claim, combined with the uncontroverted evidence that some of the proceeds of the currency trading are in the accounts in issue, is enough to give RBC a valid interest in those funds and create what counsel called a "interpleader situation" as between RBC and Rastogi.

[28] RBC's position confuses its undenied right to pursue its restitutionary claims and any right it has to unilaterally deprive Rastogi of his property while RBC pursues its restitutionary claim. The fact that RBC has an arguable case would certainly preclude Rastogi from obtaining summary judgment on RBC's restitutionary claim. The mere fact

that RBC has an arguable restitutionary claim, however, does not give it any right to interfere with Rastogi's property pending a determination of the merits of that claim.

[29] RBC's restitutionary claim comes down to the assertion that the funds in Rastogi's accounts at RBC Direct and TD belong to RBC and not to Rastogi. If RBC had concerns about the disputed property disappearing before trial, it could have sought an interlocutory injunction. Had RBC chosen to do so, however, it would have been required to show more than an arguable case before it could obtain an order freezing those accounts. Under the well-known tripartite test in *RJR MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, RBC would have been required to show:

- An arguable case (serious issue to be tried);
- Irreparable harm if injunctive relief was not granted;
- The balance of convenience favoured injunctive relief.

[30] RBC cannot escape the tripartite test for injunctive relief because the nature of the property in issue has permitted RBC to unilaterally achieve a *de facto* injunction without a court order. Surely RBC would not argue that it was entitled to go into Rastogi's garage and unilaterally seize his vehicles and hold them until trial if it had an arguable case that the vehicles were purchased with the proceeds of the currency trading. I do not see how RBC's legal position is improved because the assets in issue are debts owed to Rastogi by another bank and an affiliate of RBC.

[31] For whatever reason, RBC has not sought an interlocutory injunction in the two years since it started this action. RBC is not entitled to what would effectively be an interlocutory injunction merely by showing that its allegations, including those related to his restitutionary claims raise arguable issues. On the motion record, Rastogi's entitlement to the funds vis-à-vis RBC Direct and TD is undeniable. He is their creditor. RBC's entitlement to the funds is contingent upon RBC establishing the merits of its claim.

[32] Any entitlement RBC has to freeze Rastogi's accounts pending trial is not improved merely because RBC Direct is a subsidiary of RBC. RBC accepts that the credit in

Rastogi's RBC Direct accounts constituted a debt owed by RBC Direct. While the relationship between RBC Direct and RBC permitted the latter to freeze Rastogi's accounts by what counsel for RBC referred to as an "internal demand", the subsidiary status does not make the debts of RBC Direct debts of RBC. The two are separate corporate entities. RBC cannot claim any right to set off of a debt owed by RBC Direct to Rastogi against a debt owed by Rastogi to RBC.

[33] I also agree with the motion judge's interpretation of s. 437(2) of the *Bank Act*. That section gives TD the right to hold the funds in Rastogi's account that it would otherwise be obligated to pay on demand to Rastogi. That right is triggered by RBC's claim in which it names TD as a defendant. Section 437(2) does not give RBC any rights in respect of the funds in Rastogi's TD account or inhibit the court's power to make orders directing payment of funds out of those accounts.

VII

Conclusion

[34] For the reasons set out above, RBC has offered no legal basis upon which either RBC Direct or TD can withhold the funds held by them to the credit of Rastogi. There are no issues requiring a trial in respect of Rastogi's entitlement to those funds. Rastogi is entitled to summary judgment on his counterclaim to the extent that the claim seeks judgment directing the return to him of all funds held in Rastogi's accounts at RBC Direct. He is similarly entitled to judgment on the crossclaim to the extent that he seeks judgment directing that TD release all funds in Rastogi's joint account to him.

[35] All other claims raised in RBC's statement of claim and Rastogi's defence and counterclaim remain outstanding. Specifically, and contrary to counsel for the appellants' contention, this judgment does not decide RBC's restitutionary claims. Those claims may proceed. If they ultimately succeed, RBC may have practical difficulties obtaining an effective remedy in respect of the funds that are presently held in the RBC Direct and TD

accounts. Those difficulties are, however, no different that the difficulties faced by any plaintiff in RBC's position who advances a restitutionary claim and does not seek, or does not receive, the necessary interlocutory relief.

[36] The order of the motion judge dated August 20, 2010 should be varied to grant judgment in the terms of paragraphs 2 and 3 of that order. The appeal is otherwise dismissed. Rastogi should have his costs of the appeal in the amount of $9,700, inclusive of disbursements and applicable taxes.

RELEASED: "DD" "JAN 20 2011"

"Doherty J.A."
"I agree David Watt J.A."
"I agree Gloria Epstein J.A."

---

[1] There is an indication in the material that TD actually froze the account before notice of the action was given; however, after the notice of the claim was given, TD relied on s. 437(2).

[2] Rule 43.01, the interpleader rule, which is often engaged in disputes over bank accounts, defines property as meaning "personal property and includes a debt." Arguably the phrase "includes a debt" would be unnecessary if a debt was otherwise regarded as personal property for the purpose of the rule.

[3] My interpretation about the nature of the relief sought and the order granted on the motion also disposes of counsel for Rastogi's argument that as Belobaba J.'s order was interlocutory this court has no jurisdiction to hear the appeal.

[4] The motion was commenced by Rastogi before RBC filed its defence to the counterclaim. A summary judgment motion by the plaintiff cannot be served until after a defence is delivered: rule 20.01(1). However, the defence was delivered well before the hearing of the motion and I do not understand RBC to claim that it is prejudiced by treating the motion as a summary judgment motion even though it was served with the motion before the defence to the counterclaim was delivered.

Tab 238

CanLII

G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd., 1992 CanLII 934 (BC CA)

Source:	Court of Appeal for British Columbia
Date:	1992-12-24
File number:	CA016494
Other citations:	37 ACWS (3d) 1020 — 37 WAC 167 — 74 BCLR (2d) 283 — 21 BCAC 167 — [1992] BCJ No 2828 (QL)
Citation:	G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd., 1992 CanLII 934 (BC CA), <https://canlii.ca/t/1d9nh>, retrieved on 2026-01-18

CA016494
Vancouver Registry

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

BEFORE THE HONOURABLE — December 24, 1992

CHIEF JUSTICE McEACHERN

IN CHAMBERS — Vancouver, B.C.

BETWEEN:

G.W.L. PROPERTIES LTD. and BENTALL PROPERTIES

PLAINTIFF

(RESPONDENT)

AND:

W.R. GRACE & CO. OF CANADA LTD.
W.R. GRACE & CO. - CONN

DEFENDANTS
(APPLICANTS)

D.L. Rice and
E. Peaston — appearing for the Applicant

D. Church and
B.J. Freedman — appearing for the Respondents

(application for leave to appeal)

1 **McEACHERN, C.J.B.C.:** I have had overnight to consider this matter and I have given it some further thought this morning both before we resumed the argument and during the course of the argument. I am not persuaded by Mr. Rice's able submission that I should accede to his application.

2 The application is for leave to appeal putative interlocutory orders in a major alleged asbestos contamination case. These reasons for judgment which I shall endeavour to deliver now will be edited and changed somewhat but the result will be the same.

3 The action is a complicated one estimated by counsel to require upwards of six months or more at trial. It is set for trial in May of 1993. In February, 1992, the appellant/defendant, which I shall refer to as "Grace" requested the appointment of a pre-trial management judge. A pre-trial management judge is an indulgence offered by the court to the parties to assist them to manage complex

litigation and to hear as many of the interlocutory applications as may be possible without counsel having to wait their turn in chambers. This obviously is a great advantage to all parties.

4 In this case the Chief Justice of the Supreme Court appointed a pre-trial management judge and he has heard and decided a number of applications and he has made other decisions including, as I understand it, an order for a short adjournment to accommodate counsel for Grace, but he has made another order refusing a longer adjournment. As I have said, the trial is now set for May of 1993 and counsel for Grace assures me that this application is not intended in any way to assist Grace to obtain a further adjournment. I must, therefore, assume that the trial will proceed in May as scheduled.

5 It has been understood from the outset that the pre-trial management judge would not be the trial judge although that could be changed if all parties requested the pre-trial management judge to try the case. That, of course, is a matter that rests entirely with counsel.

6 On December 3, 1992, counsel for Grace informed me that he or his colleagues learned for the first time what I thought was common knowledge within the profession, that the pre-trial management judge has a brother who is associated with the plaintiff's solicitors Messrs. Lander Downs, which is a law firm having in the range of 100 or so lawyers. Counsel for Grace accordingly asked to see the pre-trial management

judge in his chambers and invited him to withdraw from the pre-trial management of this case. The pre-trial management judge quite properly asked counsel to speak to the matter in open court which was done. I have read a transcript of those proceedings. The pre-trial management judge considered the matter and spoke to Chief Justice Esson as he had been invited to do by counsel for Grace.

7 What happened is described in a memo delivered to counsel by Chief Justice Esson which includes the following:

> After the matter was raised on Friday morning last, the pre-trial management judge discussed the matter with me. It was for other reasons a hectic day. Without giving the matter adequate thought, I expressed the view that we should apply an approach (it is not a rule or a principle) which we often apply where questions of possible grounds for disqualification arise, as they often do, in circumstances of urgency. That approach is to avoid the "hassle" of having a judge face suggestions of bias, however spurious, by simply shifting the case to another judge. That problematic approach is entirely reasonable if it can be applied without injustice to the parties or the public interest.

8 As a result the pre-trial management judge informed counsel that he would withdraw from the management of the case. This led counsel for the other parties to bring to the attention of the Chief Justice the prejudice that might be caused by the withdrawal of the pre-trial management judge whereupon, after giving the matter careful consideration, the Chief Justice then directed the pre-trial management judge to continue to manage the case. This is what Chief Justice Esson said about that in the memo he sent to counsel:

> What I overlooked in my haste was that this is not such a case. If the pre-trial management judge does not continue as management judge, the value of his unique knowledge of the case resulting from the investment of time and effort which he has put into it will be entirely lost. That will prejudice the parties. Furthermore, it will damage the system and thus prejudice the public interest. Much judicial time, a scarce commodity at present, will be squandered. It must never be forgotten that the cost of providing judges, courthouses, and all the ancillary services falls upon the public. Those are some of the reflections, obvious enough to me now, which I overlooked on Friday last.

I pause to mention that pre-trial management is a part of the administration of the courts which has received some appellate consideration and I refer to the judgment of this Court in the ***Delgamuukw*** case where Chief Justice Nemetz said this:

> Another category of cases deals with case management, i.e., decisions made by the trial judge or, prior to assignment of a trial judge, the assigned pre-hearing judge, dealing with the mechanics of the trial. In these days, where trials may carry on for extended periods of time with consequential expense to the litigants, decisions must be made to control such expenses. Those decisions will be made ultimately by the judge in charge of the case assigned to him. The judge who has the management of the case is best able to decide how it will proceed.
>
> This Court ordinarily would decline jurisdiction to interfere with the administrative powers vested in the Chief Justice unless some error in applying a principle of law has been shown to exist, or where manifest injustice would occur if we did not interfere.

9 Based on all of the foregoing counsel for Grace has brought this application for leave to appeal. I have discussed with counsel the difficulties caused by all of this informality. There never was an application that the pre-trial management judge disqualify himself on legal grounds.

There was only a suggestion, or a request, that he withdraw. No material was filed in the court below and no order has been presented to the trial court which would be required if leave were to be granted. Mr. Rice now says that his appeal is against the order of the Chief Justice but I rather doubt if that is correct for Chief Justice Esson merely made an administrative decision which could not preclude the pre-trial management judge from disqualifying himself upon proper grounds. In an attempt to bolster a doubtful practice, Grace has filed an affidavit with this Court on the leave application which touches upon matters not before the pre-trial management judge. This affidavit is intended to suggest that the judge's brother had a general interest in this asbestos litigation. That affidavit is unfortunately vague and uncertain and leaves out more than it says.

10 Rather than requiring the matter to be adjourned Mr. Church chose not to object to the informality of the applicant's proceedings or to the court receiving the said affidavit, but he made a statement as counsel which I accept which is that the judge's brother is a solicitor with Ladner Downs who has taken no part whatsoever in any of the multitudinous asbestos litigation in which Ladner Downs is engaged. I, too, am anxious to deal with this matter on the merits and I shall not dwell further upon the procedural difficulties faced by the applicants.

11 I shall treat the application as one for leave to appeal against the decision of the pre-trial management judge not to withdraw in these circumstances and also against the

direction of Chief Justice Esson, if such it was, to the pre-trial management judge to continue to manage this litigation.

12 Mr. Rice of course has no difficulty locating authorities which discuss the test to be employed in determining whether a judge should be disqualified, namely, a reasonable apprehension on the part of fully informed right thinking members of society. He says that a hypothetical reasonable person would think the pre-trial management judge should disqualify himself. While it is not my function to decide such a question, I do not agree that any panel of this Court would agree with Mr. Rice on this question.

13 A reasonable apprehension of bias will not usually arise unless there are legal grounds upon which a judge should be disqualified. It is not quite as simple as that because care must always be taken to insure that there is no appearance of unfairness. That, however, does not permit the court to yield to every angry objection that is voiced about the conduct of litigation. We hear so much angry objection these days that we must be careful to insure that important rights are not sacrificed merely to satisfy the anxiety of those who seek to have their own way at any cost or at any price. I have taken comfort from the judgment of this Court in ***Adams v. Workers' Compensation Board*** (1989) 42 B.C.L.R. (2d) 228, where Mr. Justice Gibbs speaking for the Court said this:

> Mr. Justice Cowan dismissed the reasonable apprehension of bias argument in these words:
>
> I do not agree with the petitioner's counsel that a reasonable apprehension of

> bias exists in relation to the proposed hearing by three commissioners. There is nothing to suggest, in my view, that the commissioners will not in the terms of s.96(2) "rehear and redetermine" the matter in a fair and unbiased manner based on the evidence that will be before them on the rehearing.
>
> The presumption of the regularity of the acts of public officers expressed in the maxim omnia praesumuntur rite esse acta applies in the circumstances of this case.
>
> With respect, in my opinion that was entirely appropriate and proper disposition of the bias allegation. There is no evidence to support the allegation, nothing upon which a reasonable person could reach that conclusion other than a suspicion that a commissioner or commissioners would not bring an impartial mind to bear. I think that it should be understood that in the "prior determination" cases such as *Ctee. for Justice & Liberty v. Nat. Energy Bd.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 [Fed.], relied upon by the appellant, there was more than suspicion, there was evidence which could lead a reasonable person to apprehend bias.
>
> (my underlining)

14 There is no evidence that the pre-trial management judge would not bring an impartial mind to bear upon the limited duties he has to discharge in that capacity.

15 It is not the law or the practice in my view that a judge must always disqualify himself just because he has a brother who is a member of a large firm which is appearing in litigation assigned to the judge. This view was expressed by Chief Justice Esson in his memo in the following terms:

> I should not be understood as saying that a filial or fraternal relationship, if combined with other circumstances, could not be a ground for disqualification. Such circumstances might exist if, for instance, a judge's brother was a sole practitioner acting for a plaintiff in a large case. On the other hand, it would not necessarily be objectionable

> for a judge to sit on a case in which his brother is counsel. Generally, in this jurisdiction, we have drawn the line at children appearing before parents on matters of importance although in England, where a more robust approach prevails, that is commonplace. But the facts of this matter appear to me to put it beyond reasonable discussion. If the rule was as counsel for Grace suggests, a judge whose brother or sister (or parent, child, nephew or niece?) is a partner in a large firm could never sit on a case in which that firm is involved. That cannot be right.

16 The reference of Chief Justice Esson to the English practice is found in the ***Code of Conduct of the Bar of England and Wales***, Appendix 8, paragraph 10. The heading is "Appearance before Relatives" and the text says this:

> No barrister should habitually practice in any court of which his father or near relative is the judge but there is no objection to a barrister practising in a court where his father or near relative is one of several judges. In such a case it is impossible to know before hand which judge will in fact try a case. It is not considered improper for a barrister to appear before his father or near relative in the High Court, Court of Appeal, or in the House of Lords.

17 While it has not been the practice in this province where the offspring of judges to appear before their parents, that salutary rule has never been extended to include relatives such as we are concerned with here. As Chief Justice Esson has pointed out many judges would be disqualified from hearing many cases to the detriment of the bar and the public if the rule contended for were to be applied with the strictness that the application contemplates.

18 I have no way of knowing what level of discomfort Grace suffers under in the circumstances of this case. But, if it is apprehension of bias I do not believe any panel of the Court would regard it as a reasonable apprehension of bias. Reasonable apprehension of bias does not exist just in the subjective views of a litigant. Other factors must be taken into account including in this case such as: the size of the law firm in question; the assurance given by Mr. Church; the great waste and inconvenience which will arise by reason of the knowledge and familiarity of the pre-trial management judge being wasted; the relatively short period remaining until the commencement of the trial; the existing practice and continuing inconvenience that would accrue by the imposition of the regime suggested; and, importantly in this particular application, the fact that the judge is only dealing with management and interlocutory applications rather than the trial itself.

19 In addition, it is apparent from the memo of Chief Justice Esson that all relevant factors were given careful consideration and reconsideration. What was decided was clearly a matter of discretion keeping in mind the fact that this is not a case of pecuniary interest but rather a challenge of favour as described by Mr. Sedgewick in his comment upon ***The Queen v. Rand*** (1866), 1 L.R. 230 (C.A.) which commentary is published in the 1945 Canadian Bar Review at p.457. I am satisfied on this ground as well that no panel of this Court would interfere with the discretionary administrative decisions made in the court below.

20 I wish to stress that no criticism has been offered about any of the many interlocutory decisions or directions which have been made by the pre-trial management judge. One of the other defendants chose not to join with Grace in this application. I cannot fail to mention the comment of Mr. Justice Gibbs in ***Adams*** previously mentioned at p.231, where he warned against the harm and danger that is done by allegations of bias which are made perhaps too frequently. I agree entirely that that is a practice which should be discouraged.

21 For all of those reasons I would dismiss the application for leave to appeal.

22 The respondents will have their costs but taxed in the usual way on the usual scale.

"The Honourable Chief Justice McEachern"

Tab 239

CanLII

Stickel v. Unum Provident Corporation, 2009 CanLII 63588 (ON SC)

Source:	Superior Court of Justice
Date:	2009-11-12
File number:	06-CV-321638 PD3
Citation:	Stickel v. Unum Provident Corporation, 2009 CanLII 63588 (ON SC), <https://canlii.ca/t/26lrj>, retrieved on 2026-01-18

COURT FILE NO.: 06-CV-321638 pd3
DATE: 20091112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Darryl John Stickel, Plaintiff

A N D:

Unum Provident Corporation and First Unum Life Insurance Company, Defendants

BEFORE: Matlow, J.

COUNSEL: Robert Robinson, for the Plaintiff

Donna M. Kraft for the Defendants

HEARD: November 10, 2009.

E N D O R S E M E N T

[1] This motion, brought by the plaintiff for judgment pursuant to Rules 20 and 21, now stands adjourned before me to December 7, 2009. At that time I will hear a motion to be brought by the

defendants described by their counsel to be for an order "changing the place of trial". In the context of this case, that must mean that the defendants will seek an order staying this action so that a new action can be commenced in its place in an appropriate state of the United States.

[2] Both counsel had envisaged that, in the motion presently before me, I would conduct some form appeal hearing from a decision made by the defendants, or one of them, to discontinue payments of disability payments which they have been making to the plaintiff, their insured. However, when I questioned them about whether the motion fell within the scope of either of the Rules invoked, they realized, and acknowledged, that it did not. Both counsel and I then engaged in a dialogue that might assist me to determine whether there might be some proper basis on which I could continue with this motion.

[3] One of the purposes of this motion is to create a record of what has already taken place and what more may be required if this motion were to continue before me.

[4] I wish to call attention to counsel that this Court is not a statutory court and that it has inherent jurisdiction to grant relief to persons entitled when required. I further wish to call attention to rule 37.13 (2)(a) which permits a judge hearing a motion, "in a proper case, (to) order that the motion be converted into a motion for judgment". This may be such a proper case.

[5] I also wish to record that I have alerted both counsel of the requirement that, because the law that is applicable to this case is foreign law, it must be proven as if it were a fact. This is particularly important with respect to the law that defines the standard of review that I would have to apply in the *de novo* proceeding and also with respect to the options available to me on the disposition of the motion. The filing of copies of foreign statutes and reports of judgments is not sufficient to prove foreign law. If this motion were to continue before me, I would require compliance with the rule requiring proof. In default, I would have no option but to apply the law of Ontario and proceed on the fictional assumption that it is the same as the foreign law.

[6] Counsel for the defendants advised me that she intended to make a preliminary motion for an order allowing Patrick W. Begos, a foreign lawyer, to act with her as counsel for the defendants. I will hear this motion too on the next return date either before or after the other motion that will then be heard.

[7] Counsel for the defendants also advised me that she had further material that she wishes to file to complete the record that must be before me if the motion were to continue before me. I will consider this request, if necessary, at a later time.

[8] It is my present inclination that I do have jurisdiction to deal with costs regardless of the outcome of the motion to be brought and that it is the law of Ontario that would apply. Both counsel will be at liberty to make submissions on all aspects of any request for costs.

_____

MATLOW, J.

Released: November 12, 2009.

Tab 240

CanLII

Donovan v. Waterloo (Police Services Board), 2022 ONCA 199 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2022-03-10
File number:	C69467
Citation:	Donovan v. Waterloo (Police Services Board), 2022 ONCA 199 (CanLII), <https://canlii.ca/t/jn0t5>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Donovan v. Waterloo (Police Services Board), 2022 ONCA 199
DATE: 20220310
DOCKET: C69467

Strathy C.J.O., Roberts and Sossin JJ.A.

BETWEEN

Kelly Lynn Donovan

Plaintiff/Responding Party (Appellant)

and

Waterloo Regional Police Services Board and Bryan Larkin

Defendants/Moving Parties (Respondents)

Kelly Lynn Donovan, acting in person

Donald B. Jarvis and Clifton Yiu, for the respondents

demonstrated a high level of sophistication. She clearly appreciates the meaning and consequences of her words. In this case, there was no evidentiary basis for the allegation, and it can be described as "spurious". Her submission therefore fails.

(5) Litigation Efficiency

[39] The appellant submits that the second motion judge erred in failing to convert the motion before him to a motion for judgment "as the best way to achieve the most just, most expeditious, and least expensive result", in accordance with r. 37.13(2)(a) of the *Rules of Civil Procedure*.

[40] The short answer to this submission is that this was not fully argued before the second motion judge, and it would not have been appropriate for him to grant it in these circumstances, nor would it be appropriate to grant on this appeal: see *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, 111 O.R. (3d) 745, at para. 141.

Conclusion

[41] For these reasons, we agree with the respondents' submission that the appellant's claims are subject to determination pursuant to the procedures set out in the collective agreement and the *PSA*. To the extent that the claim seeks relief that is not available under the collective agreement or the *PSA*, it is subject to the jurisdiction of the HRTO, in which both parties have asserted claims that are currently outstanding.

[42] We therefore dismiss the appeal. In the particular circumstances of this case, however, we vary the order of the Superior Court by staying this action until such time as the appellant's remedies under the collective agreement and in the HRTO have been exhausted.

Tab 241

CanLII

Hiamey v Toronto Community Housing Corporation, 2016 ONSC 4372 (CanLII)

Source:	Divisional Court
Date:	2016-07-19
File number:	574/15
Citation:	Hiamey v Toronto Community Housing Corporation, 2016 ONSC 4372 (CanLII), <https://canlii.ca/t/gslds>, retrieved on 2026-01-18

CITATION: Hiamey v. Toronto Community Housing Corporation, 2016 ONSC 4372
DIVISIONAL COURT FILE NO.: 574/15
DATE: 2016-07-19

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Del Frate J.

BETWEEN:	)	
	)	
Godfred Kwaku Hiamey	)	
Applicant (Moving Party)	)	Godfred Kwaku Hiamey, self-represented
– and –	)	
Toronto Community Housing Corporation	)	Orna Raubfogel, for the Toronto Community Housing Corporation
Respondent	)	Margaret Leighton on behalf of the Social Ju stice Tribunals for Ontario
	)	
	)	**HEARD:** June 28, 2016

DECISION ON MOTION

[1] The applicant, "Mr. Hiamey" brings this motion seeking to strike the responding materials served and filed by the Toronto Community Housing Corporation ("Toronto Community") to prevent the landlord from participating in the judicial review application. Alternatively, Mr. Hiamey seeks damages of $50,000 and costs of $5,000 if the landlord is permitted to continue to defend this application.

Background

[2] Mr. Hiamey brought an application to the Human Rights Tribunal against the Toronto Community alleging that it violated his human rights by terminating his tenancy when he did not pay the full rent owed. Alternatively, the Toronto Community failed to grant him a rental subsidy when he lost his job and was no longer able to pay the unsubsidized market rate for his unit as required by his lease.

[3] After a full hearing, the Tribunal dismissed his application for the following reasons:

a. it had no reasonable prospect of success;

b. it was an abuse of process; and

c. it was statute barred due to a time limitation.

[4] A subsequent request for reconsideration of the decision was dismissed as well.

[5] On November 9, 2015, Mr. Hiamey commenced a judicial review application seeking remedies and damages, reinstatement of his employment, accommodation in the old apartment from which he was evicted, or an equivalent apartment, erasing the arrears of rent owing on his rental account and requiring the Toronto Community to reimburse him for any rental arrears already paid by him or on his behalf. He is also seeking a declaration that the Tribunal's decision was discriminatory. He is also seeking to add the Tribunal as a respondent to the judicial review application.

[6] That application was filed on December 11, 2015, but not perfected until April 12, 2016. The Toronto Community received the documents in December 2015 but since it was not clear whether the materials filed by Mr. Hiamey were perfected, the Toronto Community did not file any responding materials at that time.

[7] On January 19, 2016, the Toronto Community contacted the Divisional Court's administrative offices and was informed that the application filed was unperfected and that the Toronto Community should not file responding materials at that time.

[8] The Toronto Community continued to check with the Divisional Court and on April 12, 2016, was informed that Mr. Hiamey had perfected his application. On April 13, 2016, the Toronto Community filed the responding materials.

Position of Mr. Hiamey

[9] Mr. Hiamey submits that the pleadings ought to be struck since Rule 68.04(4) has not been followed. By filing the documents on April 13, 2016, the Toronto Community violated the 30-day time limit prescribed by Rule 68.04(4). Accordingly, his position has been prejudiced since the hearing date has still not been set, and as a result, he suffers from anxiety and loss of sleep because of the uncertainty about his future.

Position of the Toronto Community

[10] It submits that Mr. Hiamey's position is totally unfounded since what triggers the 30-day time limit is the filing of the perfected materials as opposed to the original notice of application. It has acted in good faith and has taken all reasonable steps to comply with the rule. It called the administrator at Divisional Court on numerous occasions to determine when the perfected materials would be filed. Once the perfected materials were filed, it responded promptly.

[11] Alternatively, the Toronto Community submits that if it were a late filing, Mr. Hiamey has not sustained any prejudice since he himself did not perfect the application until April 12, 2016. The matter would not have been heard in any event until such time as the application was perfected.

[12] Lastly, the Toronto Community submits that the relief of striking the responding materials is an extreme remedy which is not warranted on the facts of this case.

Position of Human Rights Tribunal

[13] The Tribunal is present solely because it was given notice that at some point it would be added to these proceedings. It has not filed any materials. However, its position is that the responding materials were filed within the 30 days that the application was perfected. Further, there has been no prejudice to Mr. Hiamey even if I were to find that the response was not filed within the 30 days of the notice of application.

Discussion

[14] Rule 68.04(4) states:

> 68.04(4) The respondent shall deliver an application record and a factum within thirty days after service of the applicant's application record and factum. R.R.O. 1990, Reg. 194, r. 68.04(4).

[15] On a strict interpretation of this rule, the responding materials should have been served by January 11, 2016.

[16] The position advanced by the Toronto Community is that it was not clear from the materials filed that these would be the materials to which it had to respond. The Record itself was not proper and was stapled as opposed to bound. Accordingly, it contacted the Divisional Court office to determine whether the application was perfected. The reply is that it was not and the Toronto Community should wait until the application had been perfected. Once informed of its perfection, it promptly served and filed the responding materials.

[17] In my view that is a totally reasonable and responsible course of action. Otherwise, had it filed the response by January 11, 2016, it may have had to amend its response once the perfected documentation had been served. Rule 1.04(1) states that the rules "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." It appears to me that the wait would have met this objective.

[18] Rule 2.01.1 permits the court to … "grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute."

[19] At most, and I do not make such a finding, failure to file the response by January 11, 2016, may be considered "an irregularity". The conduct exhibited by Toronto Community was not unreasonable nor in bad faith. By waiting until the application was perfected, Toronto Community knew exactly what it had to respond to. Further, even if it were "an irregularity", there is no

justification for not permitting Toronto Community to participate and defend the allegations brought by Mr. Hiamey, especially when there is no prejudice.

[20] The relief being sought by Mr. Hiamey, i.e. that the response be struck and damages of $50,000 plus $5,000 in costs be awarded if I were to permit the Toronto Community to continue, is totally unrealistic and without foundation.

[21] Mr. Hiamey's submission that he has been prejudiced by the supposed delay, is not well founded. Although he states that he is not trained in law, he has had extensive and intimate experiences with all levels of courts and tribunals as a self-represented litigant. Further, according to submissions, he is involved with ongoing litigation on numerous fronts on which he is self-represented. Although he may be stressed, I cannot conclude that all of his stressors are related to the alleged late filing of the responding materials.

[22] Accordingly, I find that he has not been prejudiced and his claim for damages is dismissed. Further, the application to strike the responding materials is dismissed.

[23] The Toronto Community seeks costs in the sum of $2,103.10. It appears that two hours were required to prepare the responding materials in this motion. It also claims $1,500 for the attendance. The attendance was less than one hour. The amount claimed by the Toronto Community is excessive. Accordingly, I award costs of $800 plus HST and disbursements of $103.10 inclusive of HST on the disbursements.

[24] Order to issue as per Reasons. Should Mr. Hiamey not approve the Order within 15 days of its service, the Registrar may issue the Order without Mr. Hiamey's approval provided it complies with the Reasons.

The Honourable Mr. Justice Robert G.S. Del Frate

Released: July 19, 2016

CITATION: Hiamey v. Toronto Community Housing Corporation, 2016 ONSC 4372
DIVISIONAL COURT FILE NO.: 574/15
DATE: 2016-07-19

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Del Frate J.

BETWEEN:

Godfred Kwaku Hiamey

Applicant (Moving Party)

– and –

4001

Toronto Community Housing Corporation

Respondent

DECISION ON MOTION

Released: July 19, 2016

Tab 242

CanLII

Pastoor v. Pastoor, 2007 CanLII 28331 (ON SC)

Source:	Superior Court of Justice
Date:	2007-07-18
File number:	07-FD-324790FIS
Other citations:	48 RFL (6th) 94 — [2007] OJ No 2851 (QL)
Citation:	Pastoor v. Pastoor, 2007 CanLII 28331 (ON SC), <https://canlii.ca/t/1s60x>, retrieved on 2026-01-18

COURT FILE NO.: 07-FD-324790FIS
DATE: July 18, 2007

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MAJORIE ELEANOR PASTOOR

Applicant

- and -

BOB PASTOOR

Respondent

COUNSEL:

W. Milne for the Applicant
R. Stancer for the Respondent

HEARING DATE: July 12, 2007

REASONS FOR DECISION

PERELL, J.

[1] Before this case began it was apparently settled. By her lawyer's letter dated September 25, 2006, the Applicant, Ms. Majorie Pastoor, forwarded negotiated Minutes of Settlement to the Respondent's lawyer for signature by the Respondent, Mr. Pastoor. Mr. Pastoor did sign the Minutes of Settlement and returned them for signature by Ms. Pastoor. (There was a small change

does not frustrate its apparent policy that matrimonial contracts be entered into with some care, solemnity, and formality, and this interpretation would also advance the policy of encouraging citizens to settle their disputes in a reasonable and fair manner without resorting to litigation.

[15] As to the first rationale for the decision in *Geropolous*, this involves a consideration of the scope of *Scherer v. Paletta*, which, in turn, requires an analysis of the rationale of that case. In *Scherer*, in a series of telephone calls, the plaintiff offered and the defendant accepted a settlement of a motor vehicle accident claim in an existing action. The defendant confirmed the oral settlement in writing. The plaintiff reneged, but reversing the motions court judge, the Court of Appeal enforced the settlement.

[16] The rationale of *Scherer v. Paletta* is found in two frequently quoted paragraphs from the judgment of Evans, J.A. at pp. 526-527, where he stated:

> The authority of a solicitor arises from his retainer and as far as his client is concerned it is confined to transacting the business to which the retainer extends and is subject to the restrictions set out in the retainer. The same situation, however, does not exist with respect to others with whom the solicitor may deal. The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party. A client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties. The scope of authority is, therefore, largely governed by the class of agent employed provided that he is acting within the limit of his ordinary avocation or by relation of the agent to the principal or by the customs of the particular trade or profession. [emphasis added]
>
> **11** A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor. [emphasis added]

Tab 243

CanLII

Canada Permanent Mortgage Corporation v. The City of Toronto, 1951 CanLII 121 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1951-10-04
Other citations:	[1951] OR 726 — [1951] 4 DLR 587
Citation:	Canada Permanent Mortgage Corporation v. The City of Toronto, 1951 CanLII 121 (ON CA), <https://canlii.ca/t/g16zf>, retrieved on 2026-01-18

Canada Permanent Mortgage Corporation v. The City of Toronto

[1951] O.R. 726-735

ONTARIO
[COURT OF APPEAL]
ROBERTSON C.J.O. and HOPE and BOWLBY JJ.A.
4th OCTOBER 1951.

Pleadings -- Amendment -- General Rule as to Permitting Amendments -- Exceptions to General Rule -- Withdrawal of Admission -- Prejudice -- Rules 183, 184.

An admission made in pleadings or otherwise for the purpose of trial is a judicial admission, and the vital feature of a judicial admission is its conclusiveness upon the party making it. Although an admission may, in some circumstances and upon proper terms, be withdrawn by leave of the Court, this should never be permitted unless it is proved by satisfactory evidence that the fact admitted was not true. The withdrawal of an admission of fact in a pleading is not something for which the other side can be compensated in costs, and is therefore not within the general rule stated in Williams v. Leonard et al. (1895), 16 P.R. 544 at 549. Delap v. Canadian Pacific R.W. Co. (1915), 8 O.W.N. 293; Wright v. Way (1880), 8 P.R. 326; Gesman v. The City of Regina et al. (1907), 1 Sask. L.R. 39; Wampler v. British Empire Underwriters Agency (1920), 1920 CanLII 454 (ON CA), 48 O.L.R. 428, quoted and applied.

Judgment of Kelly J., [1951] O.W.N. 574, reversed.

Tab 244

CanLII

Patterson v. Scherloski, 1971 CanLII 703 (ON SC)

Source:	Superior Court of Justice
Date:	1971-09-03
Other citations:	[1971] 3 OR 753 — 21 DLR (3d) 641
Citation:	Patterson v. Scherloski, 1971 CanLII 703 (ON SC), <https://canlii.ca/t/g13h1>, retrieved on 2026-01-18

Patterson v. Scherloski

[1971] 3 O.R. 753-760

ONTARIO
[HIGH COURT OF JUSTICE]
WRIGHT, J.
3rd SEPTEMBER 1971.

Sale of land -- Rescission -- Land subject to mortgage -- Purchaser requisitioning partial discharge thereof -- Mortgagee at first refusing to give partial discharge -- Vendor attempting to rescind -- Mortgagee subsequently changing his mind and agreeing to give partial discharge -- Whether vendor entitled to rescind.

In 1963 the defendant acquired 10 acres of property and gave back an open mortgage as part payment thereof. In 1967 the defendant sold most of the property to a third party who was to assume the entire existing mortgage. However, the mortgage was not discharged with respect to the land remaining to the defendant. In 1969 the defendant agreed to sell his remaining property to the plaintiff. The plaintiff's solicitors requisitioned a partial discharge of the mortgage and the defendant attempted to rescind the contract.

Evidence -- Admissions -- Agreed statements of facts -- Legal effect -- Right of party to withdraw admission in statement -- Power of Court to permit withdrawal.

An agreed statement of facts is binding on the parties to it and can only be changed by mutual consent or with leave of the Court. In granting leave, the Court should exercise its discretion warily and usually only on terms, one of which should generally be that the other party is at liberty to withdraw its agreement, and that the costs of such withdrawal and the necessary fresh preparation should fall on the renouncer.

ACTION for specific performance or alternatively damages, of an agreement of purchase and sale.

[Baines v. Tweddle, [1959] 1 Ch. 679; Selkirk v. Romar Investments Ltd., [1963] 1 W.L.R. 1415, [1963] 3 All E.R. 994; Mason v. Freedman, 1956 CanLII 147 (ON SC), [1956] O.R. 849, 4 D.L.R. (2d) 576; revd 1957 CanLII 28 (ON CA), [1957] O.R. 441, 9 D.L.R. (2d) 262; affd 1958 CanLII 7 (SCC), [1958] S.C.R. 483, 14 D.L.R. (2d) 529, refd to] [East v. O'Connor et al. (1900), 19 P.R. (Ont.) 301; Hollis v. Burton, [1892] 3 Ch. 226, refd to]

In an action for specific performance or, alternatively, damages, held, the action should be dismissed. Since the defendant rescinded the contract following receipt of a letter from the mortgagee stating that he would not give a partial discharge after reasonable efforts had been made by the defendant to obtain one, the defendant acted reasonably in rescinding the contract. Moreover, the fact that the mortgagee subsequently changed his mind and later agreed to give a partial discharge could not have affected the defendant's right to rescind at the time he exercised it.

A.B. Rosenberg, Q.C., for plaintiff.

W.G. How, Q.C., for defendant.

WRIGHT, J.:-- This is an action for a declaration that a contract for the sale of the service station property owned by the defendant, in the County of Peel, is binding, for specific performance, and, in the alternative, for damages of $10,945.30.

In June, 1963, the defendant purchased approximately 10 acres of land in the said county on which there were a motel and restaurant, and at the south-east corner a service station. The vendor was a Mr. Masionis. The sale price was $200,000. The deed was to uses. As part of the purchase price the defendant gave Masionis an open mortgage back for $32,500 secured on the whole property.

In July, 1967, the defendant sold approximately 8.2 acres of the land so purchased to a Mr. Trasiewicz for $192,500. Trasiewicz assumed the mortgage back to Masionis and thereafter made all payments on it. The Masionis mortgage was not discharged on the service station land remaining in Scherloski's name but I find as a fact that the defendant was under the impression that his remaining land was free of the Masionis mortgage, on which there was owing $22,862.92 on January 1, 1969.

On January 27, 1969, the defendant accepted an offer from the plaintiff to purchase the remaining service station property for $38,000 paying $500 as a deposit. The printed portion of the agreement of sale thus made, read, among other things:

> The purchaser is to be allowed sixty (60) days from the date of acceptance hereof to examine the title at his own expense. If within that time any valid objection to title is made in writing to the Vendor which the Vendor shall be unable or unwilling to remove, and which the Purchaser will not waive this agreement shall, notwithstanding any intermediate acts or negotiations in respect of such objections, be null and void and the deposit shall be returned by the Vendor without interest and he and the Agent shall not be liable for any cots or damages. Saave as to any valid objection so made within such time the Purchaser shall be conclusively deemed to have accepted the title of the Vendor to the real property.

The purchaser and the plaintiff Patterson entered into a further agreement of sale of the service station property on February 27, 1971, for $48,000. It provided for a second mortgage back of

Tab 245

CanLII

Serra v. Serra, 2009 ONCA 105 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2009-02-04
File number:	C46745
Other citations:	93 OR (3d) 161 — 307 DLR (4th) 1 — 246 OAC 37 — 61 RFL (6th) 1 — [2009] CarswellOnt 513 — [2009] OJ No 432 (QL)
Citation:	Serra v. Serra, 2009 ONCA 105 (CanLII), <https://canlii.ca/t/22bz6>, retrieved on 2026-01-18
Most recent unfavourable mention	Berman v Berman, 2016 ONSC 6249 (CanLII) [...] Although this court can consider post-separation circumstances pursuant to s. 5(6)(h) of the FLA, the factors, such as those that were present in **Serra , are not applicable** in this case. [...]

Serra v. Serra

93 O.R. (3d) 161

Court of Appeal for Ontario,
Moldaver, R.P. Armstrong and Blair JJ.A.
February 4, 2009

Family law -- Practice -- Wife making claim for constructive trust in husband's shares in profitable business -- Value of shares dropping deeply before trial -- Wife seeking leave to withdraw claim but not filing formal Notice of Withdrawal under rule 12(1) of Family Law Rules -- Husband delivering formal admission that he held certain shares in trust for wife -- Trial judge having residual discretion to consider wife's application -- Trial judge not erring in dismissing that application and in going on to try issue despite husband's admission -- Court not bound to give effect to admission of law or of mixed fact and law if interests of justice dictate that issue should be determined at trial -- Family law Rules, O. Reg. 114/99, rule 12(1).

Rule 12 of the Family Law Rules, O. Reg. 114/99, and an admission accepting that he holds 1,000 shares in the business in trust for Ms. Serra.

[98] Rule 12(1) of the Family Law Rules provides that:

> 12.(1) A party who does not want to continue with all or part of a case may withdraw all or part of the application, answer or reply by serving a notice of withdrawal (Form 12) on every other party and filing it.

[99] In his formal Notice of Withdrawal, dated May 8, 2006, Mr. Serra stated:

> 2. The Respondent Harold Serra withdraws part of his denial of Barbara Serra's claim for a declaration that she is the beneficial owner in respect of the common shares of 821129 Ontario Inc, and states as follows:
>
> a. Harold Serra owns directly 1000 common shares representing 25% interest in 821129 Ontario Inc by reason of a gift from his brother Carl Serra and Harold confirms that he owns these shares absolutely;
>
> b. Harold Serra owns directly a further 2000 common shares representing a 50% interest in the common shares of 821129 Ontario Inc of which he is holding one half in trust for Barbara Serra as of the date of separation (being the November 2000 valuation date). . . . . .
>
> 5. The Respondent admits for the purposes of this proceeding that he is holding in trust for the Applicant as of valuation date, one half of his 2000 common shares [in] 821129 Ontario owned directly by him that was not acquired by way a gift from his brother, and consents to judgment accordingly. (Emphasis added)

[100] Ms. Serra continued to assert her trust claims until October 2006 when, on the eve of trial, she sought leave from the trial judge to withdraw them, without resorting to rule 12(1).

[101] In taking these steps, both parties no doubt recognized that a successful trust claim by Ms. Serra would lead to her sharing in the decline in value of the business. [page192]

[102] The trial judge addressed the request to withdraw, and the issue of Mr. Serra's formal admission, in separate reasons. [See Note 18 below] She declined to permit Ms. Serra to withdraw her trust claims. At the same time, she declined to act upon Mr. Serra's formal admission. She felt it was unfair for either position to prevail at that stage. The trial judge proceeded to try the issue and found on the evidence that there was no constructive trust, principally because, in her view, Ms. Serra had been "very well compensated" overall for her contributions to the business and had not suffered any deprivation as a result. She did not deal with the resulting trust claim.

[103] In the current family law regime, the proper way to withdraw all or part of a claim is to file a formal Notice of Withdrawal under rule 12(1) of the Family Law Rules. It would appear that this can be done unilaterally at any stage of the proceedings, unlike under the comparable provision in civil cases where leave of the court is necessary once the pleadings are closed. [See Note 19 below] But there are cost consequences. Under rule 12(3) the withdrawing party is liable for the costs in relation to the withdrawn claim "unless the court orders or the parties agree otherwise".

Tab 246

CanLII

Agbapu v Dr. Munshi, 2023 ONSC 3458 (CanLII)

Source:	Superior Court of Justice
Date:	2023-06-01
File number:	CV-22-00688733-0000
Citation:	Agbapu v Dr. Munshi, 2023 ONSC 3458 (CanLII), <https://canlii.ca/t/jxgw0>, retrieved on 2026-01-18

CITATION: Agbapu v Dr. Munshi, 2023 ONSC 3458
COURT FILE NO.: CV-22-00688733-0000

DATE: 20230601

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF an application pursuant to section 32(1) of the *Health Care Consent Act*, S.O. 1996, c.2, Sch A, AND IN THE MATTER OF NODEBE AGBAPU

RE: **Nodebe Agbapu,**

AND:

Dr. Tariq Munshi,

BEFORE: Regional Senior Justice Firestone

COUNSEL: *Nodebe Agbapu*, Self-Represented

Jennifer Arduini, for the Respondent

HEARD: In Writing

ENDORSEMENT

[1] This matter arises from an appeal by Nodebe Agbapu (the "Appellant") of the decision of the Consent and Capacity Board ("CCB") dated September 29, 2022, confirming a finding of incapacity with respect to treatment with anti-psychotic medication. The Appellant has appealed that decision. Pursuant to section 18(3) of the *Health Care Consent Act*, *1996*, S.O. 1996, c. 2 Schedule A, ("HCCA"), Dr. Tariq Munshi (the "Respondent") is not permitted to treat the Appellant with the proposed treatment pending the disposition of the Appeal.

[2] In my endorsement dated April 3, 2023, I directed that the Respondent's request to have *amicus curiae* appointed to assist the court was to be made by a motion in writing before me in accordance with the provisions of Rule 37.12.1(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. (the "Rules"). Rule 37.12.1(4)(c) sets-out the process to have an opposed motion heard in writing.

[3] In accordance with my direction on May 11, 2023, the Respondent's motion record, factum and book of authorities was served on the Appellant in accordance with the procedure set forth in Rule 37.12.1(4). No responding materials have been delivered and no request for an oral hearing has been made within the timeframe provided in Rule 37.12.1(5).

[4] I have reviewed and considered the evidentiary record before me.

[5] The Appellant initiated the within appeal on September 30, 2022, after the CCB upheld a finding that he is incapable with respect to consenting to, or refusing, treatment with anti-psychotic medication. Given the significant deterioration in the Appellant's mental health to date and the serious risk of further deterioration, the Respondent intends to bring a motion pursuant to s. 19 of the HCCA to initiate treatment with anti-psychotic medication pending the disposition of the appeal.

[6] To date, the Appellant, who is self-represented, has not taken any steps to perfect the appeal or move this matter forward.

[7] In accordance with Rule 13.2 of the Rules and the inherent jurisdiction of the Superior Court I am satisfied that the appointment of *amicus curiae* as a friend of the court is appropriate, necessary and in the interest of justice. The *amicus curiae* can provide the necessary assistance so that all remaining steps as they relate to this appeal and the intended motion can be completed. The requested order is necessary to ensure that the integrity of the judicial process is maintained: *Ontario v. Criminal Lawyers' Association*, 2013 SCC 43, [2013] 3 S.C.R. 3.

[8] As requested, I appoint Jennifer Danch as *amicus curiae*. Order to issue in accordance with the original order signed by me today.

Firestone RSJ

Date: June 1, 2023

Tab 247

CanLII

M.E. v. Ontario, 2021 ONCA 718 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2021-10-14
File number:	M52619
Citation:	M.E. v. Ontario, 2021 ONCA 718 (CanLII), <https://canlii.ca/t/jjmrr>, retrieved on 2026-01-18

WARNING

This is a case under the *Child, Youth and Family Services Act, 2017* and subject to subsections 87(8) and 87(9) of this legislation. These subsections and subsection 142(3) of the *Child, Youth and Services Act, 2017*, which deals with the consequences of failure to comply, read as follows:

87(8) *Prohibition re identifying child* — No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

(9) *Prohibition re identifying person charged* — The court may make an order prohibiting the publication of information that has the effect of identifying a person charged with an offence under this Part.

142(3) *Offences re publication* — A person who contravenes subsection 87(8) or 134(11) (publication of identifying information) or an order prohibiting publication made under clause 87(7)(*c*) or subsection 87(9), and a director, officer or employee of a corporation who authorizes, permits or concurs in such a contravention by the corporation, is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to imprisonment for a term of not more than three years, or to both.

COURT OF APPEAL FOR ONTARIO

CITATION: M.E. v. Ontario, 2021 ONCA 718
DATE: 20211014
DOCKET: M52619 (M52555)

Hourigan, Huscroft and Coroza JJ.A.

BETWEEN

M.E.

Appellant

and

Her Majesty the Queen in Right of Ontario and Children's Aid Society of Toronto and Durham Children's Aid Society

Respondents

M.E., self-represented

Scott Hutchison, David Postel and Sheldon Inkol, for the respondents

Heard: October 7, 2021 by videoconference

REASONS FOR DECISION

[1] This matter has a long procedural history. For present purposes, it is sufficient to focus on the motion brought by M.E. on October 9, 2020, wherein she sought to add additional causes of action and new parties to the action. The motion judge dismissed the motion as frivolous, vexatious, and an abuse of process under r. 2.1.01: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. M.E. then sought leave to appeal the motion judge's order to the Divisional Court. A panel of the Divisional Court dismissed that motion.

[2] On May 17, 2021, M.E. applied to this court for leave to appeal the Divisional Court's order. The Registrar has repeatedly informed her that her materials do not comply with the Rules and practice directions. On July 5, 2021, M.E. filed the underlying" Notice of Motion for Non-Compliance." Simmons J.A. heard the motion on July 27, 2021. She adjourned the matter to a full panel, noting that while the Divisional Court's order was final, the motion judge's order concerned a motion to add causes of action, which may not be interlocutory. As a single judge, Simmons J.A. could not determine this issue.

[3] We conclude that M.E. was seeking to add new causes of action. An order refusing leave to amend pleadings to plead a new cause of action is final: *Atlas Construction Inc. v. Brownstones Ltd.* (1996), 46 C.P.C. (3d) 67 (Ont. Gen. Div.). So is an order dismissing a motion to add a party, which M.E. also appears to have been trying to do: *Bryson v. Kerr* (1976), 1976 CanLII 867 (ON SC), 13 O.R. (2d) 672 (Ont. Div. Ct.). Accordingly, leave to appeal is not required and an appeal lies as of right to the Court of Appeal: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6(1)(b).

[4] We order that the appeal of the motion judge's order of October 9, 2020 may proceed in this court. Costs of this motion are reserved to the panel hearing the appeal.

"C.W. Hourigan J.A."
"Grant Huscroft J.A."
"S. Coroza J.A."

Tab 248

CanLII

Almrei v. Canada (Attorney General), 2011 ONCA 779 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2011-12-13
File number:	M40628
Other citations:	345 DLR (4th) 475 — 210 ACWS (3d) 294 — 20 CPC (7th) 229 — 5 Imm LR (4th) 348 — [2011] OJ No 6433 (QL)
Citation:	Almrei v. Canada (Attorney General), 2011 ONCA 779 (CanLII), <https://canlii.ca/t/jzxdc>, retrieved on 2026-01-18

CITATION: Almrei v. Canada (Attorney General), 2011 ONCA 779

DATE: 20111213
DOCKET: M40628 (C53707)

COURT OF APPEAL FOR ONTARIO

Rosenberg, Cronk and Watt JJ.A.

BETWEEN

Hassan Almrei

Respondent (Appellant in Appeal)

and

The Attorney General of Canada

Moving Party (Respondent in Appeal)

Paul J. Evraire, Q.C. and Marianne Zoric, for the Attorney General of Canada, the Movin g Party

Lorne Waldman and David Baker, for the respondent Hassan Almrei

Heard: December 5, 2011

ENDORSEMENT

[1] The respondent Attorney General of Canada brings this motion to quash Mr. Almrei's appeal from the decision of Lederman J. dismissing a motion for partial summary judgment. In many circumstances, a decision dismissing a motion for full or partial summary judgment will be interlocutory because the merits of the claim remain to be tried: see *Cole v. Hamilton (City)* (2002), 2002 CanLII 49359 (ON CA), 60 O.R. (3d) 284 (C.A.). This court, however, has identified circumstances in which dismissal of a motion for summary judgment will constitute a final order and thus may be appealed to this court. We conclude that the order of the motion judge in this case is a final order. Accordingly, the motion to quash the appeal is dismissed.

[2] The appellant has brought an action for damages alleging, among other things, negligent investigation, false imprisonment and breaches of ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*. His claim arises out of the actions of state actors in relation to security certificates issued under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. The appellant was subject to two security certificates, one issued on October 19, 2001 and a second one on February 22, 2008, and was held in custody for many years. In lengthy public reasons reported at 2009 FC 1263, Mosley J. found that the 2008 certificate was unreasonable and he quashed it. Mosley J. held a 38-day hearing. Parts of that hearing were held *in camera* or *ex parte*. In addition to the lengthy public reasons, Mosley J. also gave secret reasons, to which the appellant has never had access.

[3] In the motion before Lederman J., the appellant sought partial summary judgment on the basis of issue estoppel. He argued, in effect, that the parties were bound by the

findings made by Mosley J. that made out all or most of the elements of the causes of action. Lederman J. noted the unusual nature of this use of issue estoppel:

> What is novel about this rule 20 motion is that the plaintiff is attempting to invoke the doctrine of issue estoppel as a sword to obtain a summary judgment rather than its traditional use as a shield or a defence to preclude further litigation on issues that have already been decided between the parties.

[4] It is the novel nature of the appellant's use of issue estoppel and the unusual context in which this case arises that convinces us that the order of Lederman J. is final. The effect of Lederman J.'s decision is to finally determine the question of issue estoppel and prevent the appellant from using the findings of fact made by Mosley J. in his action against the Attorney General. The moving party submits that the order is not final, because it is still open to the appellant to prove his case by calling evidence at his trial, without relying on the findings of Mosley J. That submission, however, overlooks the nature of the hearing conducted by Mosley J., which involved hearing evidence that the appellant may never be in a position to call or to even access. Depriving the appellant of the ability to use the findings of fact by Mosley J. could deprive the appellant of substantive rights.

[5] The final nature of the order in this case is demonstrated in the position of the Attorney General that the question of issue estoppel is now *res judicata*. According to the Attorney General, it is not open to the appellant to relitigate the use of Mosley J.'s findings at the trial. A hallmark of an order dismissing a motion for summary judgment is that findings are not *res judicata*: see, for example, *Leone v. University of Toronto Outing Club*, 2007 ONCA 323 at para. 2:

> An order dismissing a motion for summary judgment brought under Rule 20 is not a final order in that it determines only that there are genuine issues for trial. Consequently, any apparent findings of fact made by this motion judge in the course of his reasons for dismissing the motion for summary judgment do not support a *res judicata* or issue estoppel claim in the subsequent proceedings: see *V.K. Mason Construction Ltd. v. Canadian General Insurance Group Limited* (1998), 1998 CanLII 14615 (ON CA), 42 O.R. (3d) 618 (C.A.).

[6] Where, however, the order is *res judicata*, the order may be final: see *Stoiantsis v. Spirou*, 2008 ONCA 553 at para. 26:

> Further support for this conclusion is found by resort to the doctrine of *res judicata.* To determine whether an order is final or interlocutory, courts often consider whether the issue can be said to be *res judicata*: see *S.(R.) v. H.(R.)* (2000), 2000 CanLII 17038 (ON CA), 52 O.R. (3d) 152 at paras. 19-21 (C.A.). Even though some orders only partially resolve issues between the parties, if the resolution of the particular question would give rise to an argument of *res judicata*, then the order is final despite other issues remaining outstanding.

[7] In this case, the appellant singled out for resolution the question of use of issue estoppel. A finding that issue estoppel is not available is a final determination of that issue of law. The decision of the motion judge has arguably deprived the appellant of a substantive right that could have been entirely determinative of the Attorney General's liability: see *Stoiantsis v. Spirou* at para. 25. The decision of Taggart J.A. in *Peerless Carpet Corp. v. Desjarlias,* [1987] B.C.J. No. 1555 is somewhat analogous to this case, although in *Peerless Carpet* the defendant was attempting to use issue estoppel in the more usual way, as a shield rather than a sword. As Taggart J.A. said, at p. 3 (Q.L.):

> As I view the order of Mr. Justice Davies now under appeal, it does finally dispose of the rights of the parties insofar as they are based upon the applicability of the doctrine of *res judicata*. As I see it, neither the plaintiff nor the defendants in the trial proceedings which are now in the Supreme Court, can raise the question of *res judicata*. The trial judge would be bound to give effect to the judgment of Mr. Justice Davies on that issue. The rights of the parties based on the single issue of *res judicata* have finally been disposed of.

[8] Accordingly, the motion to quash is dismissed. The appellant is entitled to his costs of the motion fixed at $5,000, inclusive of disbursements and all applicable taxes.

Signed: "M. Rosenberg J.A."
"E. A. Cronk J.A."
"David Watt J.A."

Tab 249

CanLII

Khalil et al. v. United Investment Services Ltd. et al., 1975 CanLII 490 (ON SC)

Source:	Superior Court of Justice
Date:	1975-06-25
Other citation:	11 OR (2d) 707
Citation:	Khalil et al. v. United Investment Services Ltd. et al., 1975 CanLII 490 (ON SC), <https://canlii.ca/t/g1czd>, retrieved on 2026-01-18

Khalil et al. v. United Investment Services Ltd. et al.

(1976), 11 O.R. (2d) 707

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT
WELLS, C.J.H.C., HUGHES
and ZUBER, JJ.
25TH JUNE 1975

Practice -- Order -- Final or interlocutory order for purposes of seeking leave to appeal -- Order dismissing application, inter alia, for leave to issue third and fourth party notices -- Rules 167 to 172 -- Judicature Act, R.S.O. 1970, c. 228.

An order of the Master which, inter alia, dismisses an application for leave to issue third and fourth party notices with leave to renew the application on better material is a final order and an appeal lies directly from the order of the Master to the Divisional Court.

APPEAL from an order of the Master dismissing an application, inter alia, for leave to issue third and fourth party notices with leave to renew the application on better material.

[Binkley v. Matera; Redgrave, Third Party, 1972 CanLII 718 (ON CA), [1973] 1 O.R. 386; Genier v. Commercial Credit Corp. Ltd. et al.; Knight et al., Third Parties (1975), 10 O.R. (2d) 493, folld; Self v. City of Toronto (1908), 12 O.W.R. 705; Hendrickson v. Kallio, 1932 CanLII 123 (ON CA), [1932] O.R. 675, [1932] 4 D.L.R. 580; Osolsky v. Schwartz (1929), 37 O.W.N. 121; Ainsworth v. Bickersteth et al., 1947 CanLII 122 (ON CA), [1947] O.R. 525, [1947] 3 D.L.R. 517; Menary v.

Menary, 1942 CanLII 362 (BC SC), [1942] O.W.N. 417, [1942] 3 D.L.R. 746; Frederick et al. v. Aviation & General Ins. Co. Ltd., 1966 CanLII 271 (ON CA), [1966] 2 O.R. 356, refd to]

John J. Fitzpatrick, Q.C., and Paul Simon, for the appellants, United Financial Management Corporation and United Investment Services Limited -- Services de Placement Unis Ltee and Canadian Surety Company.

W.R. Herridge, Q.C., for respondent, Davidson & Company.

James P. Dube, for respondent, John Fitzgerald.

Meredith Fleming, Q.C., for respondents, Frederick Roy Hazlett and Jean Hamilton Hazlett.

Julia Ryan, for respondent, Gordon Ernest Eddolls.

Michael E. Royce, for respondent, Robert Henry Cowan.

R. D. Preston, for respondent, William R. Williamson.

R.F.L. Rose, for respondents, George B. Boynton and Ruth M. Boynton, Hubert Thauvette and Carl Boynton.

Kevin R. Aalto, for respondents, United Investment Services Limited.

The judgment of the Court was delivered by

WELLS, C.J.H.C.:-- This is an appeal from a motion originally brought before the Master on Wednesday, July 31, 1974, and concerned some 10 actions which arose from the same set of circumstances between the parties because of a claim for damages due to the fall in price of certain stocks and was handled by a variety of solicitors. The notice of motion asks for certain amendments to the pleadings as follows:

> (a) granting leave to amend the Third Party Notices listed in actions Nos. 2, 3 and 4 in the style of cause herein or;
>
> (b) in the alternative, granting leave to discontinue the Third Party actions and issue new Third Party Notices in the form annexed to the affidavit of John Ronald Miller, filed, and marked as Exhibit "B" therein;
>
> (c) granting leave to issue a Third Party Notice in action numbered 1 in the style of cause herein in the form annexed to the affidavit of John Ronald Miller, filed, and marked as Exhibit "B" therein;
>
> (d) granting leave to the Canadian Surety Company to issue a Fourth Party Notice in action No. 5 in the style of cause herein, the form of the said Fourth Party Notice to be substantially the same as the Third Party Notice annexed to the affidavit of John Ronald Miller, filed, and marked as Exhibit "B" therein;
>
> (e) granting leave to issue the said Third and Fourth Party Notices plus Third Party Notices in the actions numbered 6, 7, 8, 9 and 10 in the style of cause herein in the form for service outside the jurisdiction upon the proposed Third and Fourth Parties Ronald Gilbert Johnston, Peter Noel Hickey, Gordon Ernest Eddols and P. N. Hickey Ltd. or;

(f) in the alternative, an Order that service upon the solicitors of those parties who reside outside the jurisdiction shall be good and sufficient service and;

(g) extending the time for service of the said Third and Fourth Party Notices.

There appear to be in all some 12 firms of solicitors involved.

During the course of the proceedings the following parties, through their solicitors, filed statements indicating that they did not propose to take any position on the appeal except that no costs should be awarded against them and they ought not to be prejudiced by delay:

Chester M. Hooper, Frank White Jr., and Don-Bel Holdings Limited;

George E. Boynton and Ruth M. Boynton, Hubert Thauvette and Cecile Thauvette and Carl D. Boynton;

Ronald Gilbert Johnston and Gilbert Johnston Limited;

Herbert V. Fisher;

Kenneth Lloyd Carson and Richard Stanley Calder;

United Investment Services Limited.

The balance of the cases, however, were included in the notice of motion which was before the Master. It is to be noted that when he reached his decision to dismiss this application the Master gave leave to renew it on better material within 30 days. Counsel involved in these cases did not take advantage of this and elected to appeal to the Divisional Court from the Master's order.

The argument in the first instance, is whether we have jurisdiction to hear the matter because our jurisdiction is limited by s. 17, cl. (f) [rep. & sub. 1972, c. 48, s. 1] of the Judicature Act, R.S.O. 1970, c. 228, which reads as follows:

> (f) all appeals from final judgments or orders of the master, local judge, local master, or other officer of the Supreme Court, except final judgments or orders made by a local judge under the Divorce Act (Canada).

The question therefore arises here as to whether the decision of the Master was a final or interlocutory one. Interlocutory judgments have to be appealed on leave and the time had long gone past and no effort made to obtain it.

The necessity for an appeal to us is considerably heightened in this case by the fact that an insurance company has come in and made various claims over other firms and in some cases leave was sought to issue third or fourth party notices. The matter is very complicated, but all the applicants for third or fourth party notices, some of which have been issued and then withdrawn, were involved in the motion before the Master. There is no precise description of exactly what was wanted by each litigant be they plaintiff or defendant in the main action. In consequence it is almost impossible from examining the material submitted to us to come to any conclusion as to which of the third party notices comes under what Rule. While I think the matter has to be returned to the Master the material should be put in proper order and for each action it should be clearly designated what is desired.

Rule 167 of the Rules of Practice deals with third party procedure. The parties at the moment are all out of time as far as time-limits governing the matter are concerned. On the other hand the point involved is one that should be decided by a Court and I express no opinion as to the merits of the

various claims made. The third party procedure which has been refused, however, has considerable importance because any claims that arise out of this action should be dealt with by the same Court that hears the claims against the defendants.

The Rules dealing with the matter seem to stretch from Rule 167 to Rule 172. It is all very well to state, as apparently the Master believed, that no statutory limitation was involved and consequently they were free to issue separate writs for their claims. This is highly undesirable with the mass of litigation precipitated by these actions, unless the whole matter can be sorted out by one Court and the rights of any parties against each other dealt with on a proper basis.

I will therefore in a preliminary way decide whether this action of the Master in dismissing all the claims, and the failure of the parties to take advantage of his offer to deal with the matter anew if it were properly presented to him, was an interlocutory order or a final one. It was final in so far as the procedures which would have involved other claims between the parties was denied them by the Master's order.

If all the proper material and the rights of the various persons was sorted out by all the solicitors involved in the action, the prospect of having 12 or 13 actions to be heard by different Courts will create havoc and do more damage to the plaintiff's claim.

Consequently we are of the opinion that this matter should be dealt with, if possible, in such a way that the Judge hearing it can dispose of the claims of all of the parties that are involved. I therefore propose to limit myself as to whether the application to the Master and his subsequent order was interlocutory or final.

The respondents in this case rely very highly on the decision of the Court of Appeal in the case of Self v. City of Toronto (1908), 12 O.W.R. 705. Judgment was given by the late Chief Justice Moss. In Williston and Rolls, Law of Civil Procedure (1970), vol. 2, at p. 1035 in the footnote, this case is mentioned but the editors question whether it is still good law. In the short reasons given by Moss, C.J.O., the essence of the judgment was that this was not a case for third party procedure. The Chief Justice made the observation at p. 706, that "Nothing which affects the ultimate rights of the parties is involved." He was obviously concerned with earlier judgments on the subject from Lord Alverstone and Lord Esher. While these judgments were ones of authority they related to the ultimate disposition of the action and the distinction was that any order that did not produce that result was interlocutory.

In Hendrickson v. Kallio, 1932 CanLII 123 (ON CA), [1932] O.R. 675, [1932] 4 D.L.R. 580, Middleton, J.A., referred to amendments made to the Judicature Act, which at the time of giving his judgment he found in R.S.O. 1927, c. 88, s. 24. Later on he states as follows [at pp. 677-8]:

> The amendment of 1927 was manifestly intended to get rid of the difficulty which arose by reason of the reference to the practice before 1881 which was in a state of great confusion and extraordinary difficulty, and also to bring the practice in relation to appeals from all interlocutory orders into harmony. This statutory provision was supplemented by the provisions of the present rule 493, which only defines the cases in which leave should be given and does not contain the former description of an appealable order as one which finally disposes of the question involved in the action.
>
> The argument here is that the report of the referee does not finally determine the rights of the parties in such a sense as to make it final. It is a mere step in the cause and there must be a motion for judgment based upon the report which will finally determine the rights.

This was a case which would eventually be referred to a Master and Middleton, J.A., discussed the result and came to the conclusion that the order in question was not an interlocutory one. He went on to note that there are two distinct lines of cases concerning the matter and alluded first to

various decisions which follow the rules laid down by Lord Alverstone and Lord Esher, at p. 680, as follows:

> This is laid down in the case of Shubrook v. Tufnell (1882), 9 Q.B.D. 621. This case was preferred to the earlier decision in Bozson v. Altrincham Urban District Council, [1903] 1 K.B. 547, a decision of the Earl of Harlsbury, L.C., Lord Alverston, C.J., and Sir F.H. Jeune. Lord Alverstone puts the point shortly:
>
> "It seems to me that the real test for determining this question ought to be this. Does the judgment or order as made finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not it is then, in my opinion, an interlocutory order."
>
> In the more recent case of Isaacs & Sons v. Salbstein, [1916] 2 K.B. 139, this decision is followed, although there had been in the meantime dicta preferring the opposite view.
>
> Bank of Minnesota v. Page (1887), 14 O.A.R. 347, a decision of our own Court of Appeal strongly supports this view, and definitely declines to follow the earlier English cases which it is pointed out are not applicable here as relating merely to procedure with reference to appeals and not dealing with the question of a right of appeal.
>
> For these reasons I am of opinion that there is an appeal as of right for the judgment in question determines the merits of the action and the real rights of the parties, nor do I think that the mistake of the appellant in unnecessarily and improperly applying for leave to appeal amounts to a waiver of the right to appeal without leave which he possessed.

The Court of Appeal again had to deal with the question of whether an order was final or interlocutory in the case of Osolsky v. Schwartz (1929), 37 O.W.N. 121. In this case goods were sold to the defendant at the plaintiff's warehouse in Toronto for $622.90 with a down payment of $50. The goods were delivered to the carrier by the plaintiff and shipped to the defendant at Halifax at the defendant's expense. The defendant alleged that the goods were defective on delivery and wrote to the plaintiff complaining of this. The plaintiff had drawn on the defendant, and, when the draft was presented to the defendant, payment was refused. The defendant held the goods and the plaintiff sued for the price. An ex parte order was made by Judge Tytler of the County Court of the County of York allowing the plaintiff to issue a writ of summons for service out of the jurisdiction. The writ was issued and service was made. The defendant's Toronto solicitor, without entering an appearance, moved to set aside the order, on the ground that it was made on inadequate material. The plaintiff filed a supplementary affidavit upon which the defendant's solicitor cross-examined and the defendant's solicitor filed the cross- examination and the defendant's affidavit in reply. An exhibit to the defendant's affidavit was the receipt for $50 containing the words "balance sight draft". There was conflict in the affidavits as to the place of payment. Senior County Court Judge Denton held that the order permitting the issue of the writ for service outside the jurisdiction and the service thereof were irregular, and set aside both the order authorizing the issue of the writ and the service thereof. The plaintiff appealed from that order to the Appellate Division. The appeal came on for hearing before Latchford, C.J., and Riddell, Masten, Orde and Fisher, JJ.A. Counsel for the defendant, respondent, took the preliminary objection that the order was not appealable, being interlocutory in its nature. The plaintiff's counsel argued that the effect of the order was to deprive the plaintiff of his entire cause of action, inasmuch as the order authorizing the issue of the writ for service out of the jurisdiction had been set aside and no further steps could be taken in the action while the order of Judge Denton stood, and therefore it was final in its nature. It was argued by the defendant's counsel that no cause of action arose in Ontario, and therefore the writ should not be allowed to issue. Latchford, C.J., in delivering the judgment of the Court at the close of the argument, said that the order appealed from was not, in his opinion, merely interlocutory. It was final in its nature and therefore the appeal lay

[p. 122]. The majority of the Court upheld this point of view and by its judgment, set aside the order allowing the writ to issue pursuant to Rule 25(2), and finally disposed of the rights of the parties in the Courts of this Province. The appeal was allowed with costs in the cause to the plaintiff and in effect restored the order of Judge Tytler. Orde, J.A., while not expressly dissenting, was in doubt whether the Court had the right to make the order it did.

A further case which affects the matters at issue is that of Ainsworth v. Bickersteth et al., 1947 CanLII 122 (ON CA), [1947] O.R. 525, [1947] 3 D.L.R. 517. At pp. 530-1, quoting Middleton, J.A., in the Hendrickson v. Kallio case, supra, Henderson, J.A., comments as follows:

> "I am clearly of opinion that the order in question is not an interlocutory order within the meaning of this statutory provision. The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits of the case remain to be determined."
>
> Mr. Justice Middleton then proceeds to discuss the cases and says that two distinct lines of cases are relied upon as leading to the contrary conclusion, and, after discussing the cases, he proceeds to say:
>
> "If the decision 'given in one way will finally dispose of the matter in dispute, was given the other way to allow the action to go on, then it is not final but interlocutory', so said Lord Esher, at page 67. This principle was adopted without qualification in Salaman v. Warner, [1891] 1 Q.B. 734.
>
> "An entirely inconsistent view is taken in another series of cases. There it is said that the order actually made is alone to be looked at, and if it finally disposes of the rights of the parties, then it is final and not interlocutory, and it is quite immaterial that the refusal of the order would have been interlocutory, because if the order sought had been refused, the action would have had to proceed further."

The learned Judge then proceeded to quote the passages from Hendrickson v. Kallio given above.

Henderson, J.A., also discussed the case of Menary v. Menary, 1942 CanLII 362 (BC SC), [1942] O.W.N. 417, [1942] 3 D.L.R. 746, as follows [at pp. 531-2]:

> In the case of Menary v. Menary, 1942 CanLII 362 (BC SC), [1942] O.W.N. 417, [1942] 3 D.L.R. 746, a motion to quash an appeal from an order for the custody of a child, as being an interlocutory order, at the conclusion of the argument the Chief Justice of Ontario delivered the oral judgment of the Court as follows: He said that the Court was of opinion that the order sought to be appealed from was not interlocutory, in the sense of leaving the parties to return and do something more. It finally determined rights to custody of the child at the time it was made, and if the applicant's argument were to prevail, there could never be a final order in such cases.
>
> Similarly, it has been held in Ontario that a judgment for alimony is a final judgment, although either party has a right to vary such order at any time.
>
> A consideration of these authorities makes it appear that the Courts in England have deemed it in the public interest to treat an order dismissing an action as frivolous and vexatious as interlocutory and not final in order to discourage these actions and independently of what one would ordinarily understand by the words "interlocutory" and "final". This view has not been adopted in our Courts, and the reasoning of Mr. Justice Middleton in Hendrickson v. Kallio, supra, proceeds upon quite different lines. I am not prepared to disregard the decisions in our

> Courts and I therefore conclude that the order appealed from is final and not interlocutory and that there is therefore an appeal as of right.
>
> The motion to quash will, therefore, be dismissed with costs to the plaintiff in the cause.

In the case of Frederick et al. v. Aviation & General Ins. Co. Ltd., 1966 CanLII 271 (ON CA), [1966] 2 O.R. 356, a judgment of the Court of Appeal, the judgment of the Court was delivered by Schroeder, J.A. An action was instituted by the plaintiffs pursuant to the provisions of what was then s. 95(10) of the Insurance Act, R.S.O. 1960, c. 190. A judgment had been obtained against the Ottawa Aero Services Limited. Attempts to collect had been fruitless and it was returned by the sheriff nulla bona. The plaintiffs sought an order quashing the appeal of the defendant from the order of Wilson, J., pronounced on January 21, 1966, whereby he allowed an appeal from the order of the Senior Master, adding Ottawa Aero Services Limited as a defendant. It was said that this order was interlocutory and that the defendant had failed to obtain leave to appeal in accordance with Rule 499 of the Rules of Practice and Procedure. I quote from Mr. Justice Schroeder's judgment at pp. 361-2, as follows:

> It is no doubt correct in one sense to say that as between the plaintiff and the appellant the order refusing to add Ottawa Aero Services Ltd. is interlocutory, for none of the issues in the action between those parties is thereby determined. The central issue is that raised between the appellant and its insured, Ottawa Aero Services Ltd. The appellants allege that in the peculiar circumstances of this case they have a right to bring their insured into the action as a party to enable them to make full answer and defence to the plaintiffs' claim founded upon a statutory right of subrogation. In my view this is an issue which the appellant had a right to raise and, by reason of the provisions of s. 95 of the Insurance Act, the issues affecting the rights of all parties are identical. It is my conclusion that the order of Wilson, J., deprived the appellant of a substantive right and finally determined that issue subject to any right of appeal which the appellant may have.
>
> I have not overlooked the principles enunciated in Hendrickson v. Kallio, 1932 CanLII 123 (ON CA), [1932] O.R. 675, [1932] 4 D.L.R. 580, and Roblin v. Drake, 1938 CanLII 54 (ON CA), [1938] O.R. 711, [1938] 4 D.L.R. 758. Those cases involved no question between one of the parties and a stranger to the action as in the present case. If the order in appeal stands, the appellant will have lost a substantial right, namely, the right to make full answer and defence within the established procedural rules against a claim asserted by persons occupying a position analogous to that of persons deriving their rights under an assignment from the assured and the right to have all questions in issue determined in one action in accordance with the provisions of s. 15, para. 8, of the Judicature Act. The order is, therefore, final rather than interlocutory and is appealable without leave.

In many respects it is analogous to the case at bar.

In the more recent case of Binkley v. Matera; Redgrave, Third Party, 1972 CanLII 718 (ON CA), [1973] 1 O.R. 386, the Court of Appeal, by a majority judgment, ruled that the refusal of a County Court Judge to extend the time for service of a third party notice was a final order and therefore an appeal from such an order was directly to the Court of Appeal. In Genier v. Commercial Credit Corp. Ltd. et al.; Knight et al., Third Parties, Pennell, J., in an unreported judgment dated April 1, 1975 [since reported 10 O.R. (2d) 493], gave extended reasons for holding that he had no jurisdiction to hear an appeal from the Master striking out a third-party notice because the Master's order was final and the appeal lay to the Divisional Court.

In view of these decisions we have therefore come to the conclusion that this order was in its nature a final order rather than an interlocutory one and in consequence was appealable to this Court. If it stands, the plaintiffs will have lost their rights to have all their claims dealt with in the one action and have all questions in issue determined in such a proceeding.

We would therefore direct that the order of the Master be set aside and that the matter be referred back to him for further consideration. Upon that consideration it is important that the material should disclose the rights of each litigant and what they want. The Master should be able to look at this and decide what he should do with each action of the group. In view of the fact that the proceedings from it and the appeal in consequence became necessary because of the actions of various counsel involved in the case, we have come to the conclusion that there be no order for costs of the appeal or for the first application. The application should be completed within 35 days from the issue of this judgment and if an application is not made before that time, on proper material, then the Master's order should stand in its place.

Order accordingly.

Tab 250

CanLII

Denison Mines Ltd. v. Ontario Hydro, 2001 CanLII 5681 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2001-10-05
File number:	m27255; c35227
Other citations:	56 OR (3d) 181 — 108 ACWS (3d) 941 — 150 OAC 387 — 15 CPC (5th) 210 — [2001] OJ No 3870 (QL)
Citation:	Denison Mines Ltd. v. Ontario Hydro, 2001 CanLII 5681 (ON CA), <https://canlii.ca/t/1f8z5>, retrieved on 2026-01-18

Denison Mines Ltd. v. Ontario Hydro
[Indexed as: Denison Mines Ltd. v. Ontario Hydro]

56 O.R. (3d) 181
[2001] O.J. No. 3870
Docket Nos. M27255 and C35227

Court of Appeal for Ontario
Morden, Austin and Borins JJ.A.
October 5, 2001

Appeal -- Leave to appeal -- As general rule no appeal lies from order granting or refusing leave to appeal -- Exception to that general rule exists where submitted that judge refusing leave to appeal mistakenly declined jurisdiction.

Appeal -- Jurisdiction -- Final or interlocutory order -- Orders that finally determine issues raised in application are final orders -- Rule 14.01(3) of Rules of Civil Procedure does not apply to application for leave to appeal as appeal not "proceeding" within meaning of rule 14.01 -- Order refusing leave to appeal under s. 45 of Arbitration Act is final -- Arbitration Act, 1991, S.O. 1991, c. 17 -- Ontario Rules of Civil Procedure, rule 14.01(3).

Arbitration -- Appeal -- Order refusing leave to appeal under s. 45 of Arbitration Act is final and not interlocutory -- Appeal from order lies to Court of Appeal -- Arbitration Act, 1991, S.O. 1991, c. 17.

An application by the appellant under s. 45(1) of the Arbitration Act, 1991 for leave to appeal an arbitration award was dismissed. The appellant appealed the order dismissing its application. The respondent brought a motion to quash the appeal on the ground that, because the order in question was an interlocutory one, the Court of Appeal did not have jurisdiction.

Held, the motion should be dismissed.

As a general rule, no appeal lies from an order granting or refusing leave to appeal. However, there is an exception to that general rule where it is submitted that the judge refusing leave to appeal mistakenly declined jurisdiction. That exception applied in this case, as the appellant argued that the application judge erred in concluding that the parties had contracted out of a right of appeal, and mistakenly declined jurisdiction. The parties did not argue the merits of the application before the application judge.

Orders that finally determine the issues raised in an application are final orders. Rule 14.01(3) of the Ontario Rules of Civil Procedure, which provides that where leave to commence a proceeding is required it shall be obtained by motion, does not apply to appeals as an appeal is not a "proceeding" within the meaning of rule 14.01(3).

If that conclusion was wrong and the order in question should be considered to have been made on motion, an order refusing leave to appeal under s. 45 of the Arbitration Act, 1991 is final, not interlocutory. Accordingly, it did not make a difference whether the matter was put before the Superior Court by way of application or motion.

MOTION to quash an appeal from an order dismissing an application under s. 45(1) of the Arbitration Act, 1991, S.O. 1991, c. 17 for leave to appeal an arbitration award.

Hendrickson v. Kallio, 1932 CanLII 123 (ON CA), [1932] O.R. 675, [1932] 4 D.L.R. 580 (C.A.), apld Milton (Town) v. Kalmoni Establishments Inc. (1996), 1996 CanLII 1534 (ON CA), 31 O.R. (3d) 157, 4 C.P.C. (4th) 45 (C.A.), consd Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce (1996), 1996 CanLII 413 (ON CA), 29 O.R. (3d) 612, 135 D.L.R. (4th) 471, 49 C.P.C. (3d) 262 (C.A.), distd Other cases referred to Automatic Systems Inc. v. Bracknell Corp. (1994), 1994 CanLII 1871 (ON CA), 18 O.R. (3d) 257, 113 D.L.R. (4th) 449, 12 B.L.R. (2d) 132, 27 C.P.C. (3d) 56 (C.A.), revg (1993), 1993 CanLII 5569 (ON SC), 110 D.L.R. (4th) 390, 12 B.L.R. (2d) 113 (Ont. Gen. Div.); Automatic Systems Inc v. E.S. Fox Ltd., [1994] O.J. No. 193 (C.A.); Buck Bros. Ltd. v. Frontenac Builders Ltd. (1994), 1994 CanLII 2403 (ON CA), 19 O.R. (3d) 97, 117 D.L.R. (4th) 373, 34 C.P.C. (3d) 76 (C.A.); Canadian Express Ltd. v. Blair (1991), 1991 CanLII 7172 (ON SC), 6 O.R. (3d) 212, 5 C.P.C. (3d) 161 (Div. Ct.); Canadian Utilities Ltd. v. Deputy Minister of National Revenue, 1963 CanLII 88 (SCC), [1964] S.C.R. 57, 41 D.L.R. (2d) 429, 63 D.T.C. 1285; Ernewein v. Canada (Minister of Employment and Immigration) (1979), 1979 CanLII 185 (SCC), [1980] 1 S.C.R. 639, 103 D.L.R. (3d) 1, 30 N.R. 316, 14 C.P.C. 264; Industrial Acceptance Corp. v. Canada Permanent Trust Co., 1931 CanLII 67 (SCC), [1931] S.C.R. 652, [1932] 1 D.L.R. 287, 13 C.B.R. 144; Kay v. Briggs (1889), 22 Q.B.D. 343, 58 L.J.Q.B. 182, 60 L.T. 775, 37 W.R. 291, 5 T.L.R. 256 (C.A.); Khalil v. United Investment Services Ltd. (1975), 1975 CanLII 490 (ON SC), 11 O.R. (2d) 707 (Div. Ct.); Lane v. Esdaile, [1891] A.C. 210, 64 L.T. 666, 40 W.R. 65, 60 L.J. Ch. 644 (H.L.); Leo Alarie and Sons Ltd. v. Ontario (Minister of Natural Resources) (2000), 2000 CanLII 4866 (ON CA), 48 O.R. (3d) 204, 185 D.L.R. (4th) 211 (C.A.); MacDonald v. Montreal (City), 1986 CanLII 65 (SCC), [1986] 1 S.C.R. 460, 27 D.L.R. (4th) 321, 67 N.R. 1, 25 C.C.C. (3d) 481; MacKay v. Queen Elizabeth Hospital (1989), 68 O.R. (2d) 92, 40 C.P.C. (2d) 307 (Div. Ct.), affg (1989), 1989 CanLII 4085 (ON SC), 68 O.R. (2d) 90, 32 O.A.C. 253, 32 C.P.C. (2d) 259 (H.C.J.); Osolsky v. Schwartz (1929), 37 O.W.N. 121 (C.A.); Primex Investments Ltd. v. Northwest Sports Enterprises Ltd. (1995), 1995 CanLII 2383 (BC CA), 23 B.C.L.R. (3d) 251, 46 C.P.C. (3d) 385 (C.A.); Standard Industries Ltd. v. Ontario Region No. 13 (Assessment Commissioner) (1993), 15 C.P.C. (3d) 19 (Ont. Div. Ct.) Statutes referred to

Tab 251

CanLII

David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co., 2004 CanLII 19916 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2004-01-30
File number:	M30682; C40447
Citation:	David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co., 2004 CanLII 19916 (ON CA), <https://canlii.ca/t/1g9tr>, retrieved on 2026-01-18

DATE: 20040130
DOCKET: M30682 (C40447)

COURT OF APPEAL FOR ONTARIO

RE: **DAVID POLOWIN REAL ESTATE LTD. (Plaintiff) (Respondent) (Moving Party)– and – THE DOMINION OF CANADA GENERAL INSURANCE COMPANY (Defendant) (Appellant) (Responding Party)**

BEFORE: **WEILER, MOLDAVER and ARMSTRONG JJ.A.**

COUNSEL: ***Michael McGowan***, ***M. Paul Downs*** **and** ***Gabrielle Pop-Lazic*** **for the moving party**

John A. Campion **and** ***Paul J. Martin*** **for the responding party**

HEARD: **January 8, 2004**

RELEASED ORALLY: January 8, 2004

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003.

DOCKET: M30683 (C40500 & C40910)

AND RE: BOYD JOHNSTON (Plaintiff) (Appellant) (Moving Party)
– and – FEDERATION INSURANCE COMPANY OF CANADA (Defendant) (Respondent) (Responding Party)

BEFORE: WEILER, MOLDAVER and ARMSTRONG JJ.A.

COUNSEL: ***Michael McGowan***
***M. Paul Downs* and**
Gabrielle Pop-Lazic
for the moving party

Alan L. W. D'Silva
and *Bradley M. Davis*
for the responding party

HEARD: January 8, 2004

RELEASED ORALLY: January 8, 2004

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003, and the cross-appeal of the order of Justice Haines dated October 21, 2003.

DOCKET: M30685 (C40499 & C40911)

AND RE: SHARON FARQUHAR (Plaintiff) (Respondent) (Moving Party)
– and – LIBERTY MUTUAL INSURANCE COMPANY (Defendant) (Appellant) (Responding Party)

BEFORE: WEILER, MOLDAVER and ARMSTRONG JJ.A.

COUNSEL: ***Michael McGowan***
***M. Paul Downs* and**
Gabrielle Pop-Lazic
for the moving party

Alan L. W. D'Silva
and *Bradley M. Davis*
for the responding party

HEARD: January 8, 2004

RELEASED ORALLY: January 8, 2004

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003, and the cross-appeal of the order of Justice Haines dated October 21, 2003.

DOCKET: M30686 (C40501)

AND RE: **SANDY BIG CANOE (Plaintiff) (Respondent) (Moving Party) – and – THE ECONOMICAL INSURANCE GROUP (Defendant) (Appellant) (Responding Party)**

BEFORE: **WEILER, MOLDAVER and ARMSTRONG JJ.A.**

COUNSEL: ***Michael McGowan***
M. Paul Downs **and**
Gabrielle Pop-Lazic
for the moving party

Alan L. W. D'Silva
and ***Bradley M. Davis***
for the responding party

HEARD: January 8, 2004

RELEASED ORALLY: January 8, 2004

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003.

DOCKET: M30687 (C40475)

AND RE: **A. GORDON SHAW (Plaintiff) (Respondent) (Moving Party) – and – ZURICH CANADA (Defendant) (Appellant) (Responding Party)**

BEFORE: **WEILER, MOLDAVER and ARMSTRONG JJ.A.**

COUNSEL: ***Michael McGowan***
M. Paul Downs **and**
Gabrielle Pop-Lazic
for the moving party

Lisa La Horey
for the responding party

HEARD: **January 8, 2004**

RELEASED ORALLY: **January 8, 2004**

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003.

DOCKET: M30688 (C40489)

AND RE: **ROBERT WOODS, Executor of the Estate of WAYNE ROBERT WOODS (Plaintiff) (Respondent) (Moving Party)**
– and – ING HALIFAX INSURANCE COMPANY (Defendant) (Appellant) (Responding Party)

BEFORE: **WEILER, MOLDAVER and ARMSTRONG JJ.A.**

COUNSEL: *Michael McGowan*
M. Paul Downs **and**
Gabrielle Pop-Lazic
for the moving party

Paul J. Martin
and *Annie M.K. Finn*
for the responding party

HEARD: **January 8, 2004**

RELEASED ORALLY: **January 8, 2004**

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003.

DOCKET: M30689 (C40490)

AND RE: **LAURIER DUCLOS (Plaintiff) (Respondent) (Moving Party)**
– and – THE WAWANESA MUTUAL INSURANCE COMPANY (Defendant) (Appellant) (Responding Party)

BEFORE: **WEILER, MOLDAVER and ARMSTRONG JJ.A.**

COUNSEL: *Michael McGowan*
M. Paul Downs **and**
Gabrielle Pop-Lazic

for the moving party

Paul J. Martin
and *Annie M.K. Finn*
for the responding party

HEARD: **January 8, 2004**

RELEASED ORALLY: **January 8, 2004**

On motion to quash the appeal of the order of Justice Roland J. Haines of the Superior Court of Justice dated July 14, 2003.

E N D O R S E M E N T

[1] The plaintiffs in the class action sought to raise three issues on these motions: 1) Whether the orders in question were final or interlocutory; 2) whether a respondent can cross appeal from an interlocutory order to the Court of Appeal; 3) whether the appeals were devoid of merit.

[2] In accordance with the recent practice direction of this court we declined to hear the third issue as that is now to be heard at the time scheduled for the appeal itself.

[3] With respect to whether the orders in question are final or interlocutory, the notices of motion asked the court to deal with a question of law, namely that the claims disclose no cause of action. They were rule 20 and rule 21 motions that were heard together. The court dismissed the motions. The operative part of the order reads:

> This Court Orders and adjudges that in interpreting the *Insurance Act,* R.S.O. c. I.8 and the regulations made thereto, this Court is bound by the decision in the *McNaughton* case and the motion is therefore dismissed.

[4] The plaintiffs submit that because the order only refers to the decision in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2000), 2000 CanLII 22409 (ON SC), 50 O.R. (3d) 300 the order is not a final order. We disagree. The order of the motions judge indicates that the court was bound by *McNaughton* in the interpretation of the *Insurance Act.* His reasons, to which this court is entitled to have regard in order to ascertain the scope of the decision, support this conclusion.

[5] The orders are also not just a declaration that the principle of *stare decisis* applies because there is an order dismissing the motions. As stated in *S (R) v. H. (R)* (2000), 2000 CanLII 17038 (ON CA), 52 O.R. (3d) 152 (C.A.) 159- 160:

> …an order dismissing a motion for summary judgment on a question of law, where the only genuine issue is the question of law (as provided for in rule 20.04(4))should probably be regarded as giving rise to a *res judicata* and, hence, a final order.

[6] The effect of the order of the motions judge was to preclude the defendants from contesting that they were not entitled to deduct the deductible portion of an insurance policy and claim salvage in the cases before him. Thus, the orders are final.

[7] Accordingly the motion to quash on that basis is dismissed.

[8] In the circumstances it is not necessary to deal with the second issue.

[9] The Court will entertain written submissions with respect to costs in the event that counsel cannot agree on them.

"Karen M. Weiler J.A."
"M.J. Moldaver J.A."
"Robert P. Armstrong J.A."

Tab 252

CanLII

Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLII), [2001] 2 SCR 460

Source:	Supreme Court of Canada
Date:	2001-07-12
File number:	27118
Other citations:	54 OR (3d) 214 — 201 DLR (4th) 193 — 272 NR 1 — 106 ACWS (3d) 460 — 149 OAC 1 — AZ-50098520 — 10 CCEL (3d) 1 — 34 Admin LR (3d) 163 — 7 CPC (5th) 199 — [2001] CarswellOnt 2434 — JE 2001-1439 — [2001] SCJ No 46 (QL) — [2001] ACS no 46
Citation:	Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 (CanLII), [2001] 2 SCR 460, <https://canlii.ca/t/5207>, retrieved on 2026-01-18
Most recent unfavourable mention	Beaulieu v. Deputy Head (Department of Veterans Affairs), 2025 FPSLREB 105 (CanLII) [...] [68] **Despite its position that the Danyluk** test has been met, the employer also submits that the Board should not exercise its discretion to hear the grievances for the following reasons: [...]

Danyluk *v.* Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, 2001 SCC 44

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue,

Donald J. Hawthorne,
William I. Welsh and Joseph McBride Watson *Respondents*

Indexed as: Danyluk *v.* Ainsworth Technologies Inc.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for ontario

Administrative law – Issue estoppel – Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions – Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions – Employment standards officer dismissing employee's complaint – Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel – Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel – Whether preconditions to application of issue estoppel satisfied – If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA

proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her $2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply

in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a matter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth $300,000 has simply never been properly considered and adjudicated.

Considered: *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 1994 CanLII 608 (ON CA), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 1978 CanLII 1424 (ON CA), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 1894 CanLII 72 (SCC), 22 S.C.R. 553; *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594; *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333; *R. v. Sarson*, 1996 CanLII 200 (SCC), [1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 1981 CanLII 786 (BC CA), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* (1995), 1995 CanLII 17974 (AB CA), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* (2000), 2000 CanLII 16945 (ON CA), 194 D.L.R. (4th) 326; *Hamelin v. Davis* (1996), 1996 CanLII 8356 (BC CA), 18 B.C.L.R. (3d) 112; *Thrasyvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706; *McIntosh v. Parent*, 1924 CanLII 401 (ON CA), [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 1998 CanLII 6467 (BC CA), 50 B.C.L.R. (3d) 1; *Schweneke v. Ontario* (2000), 2000 CanLII 5655 (ON CA), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 1999 NSCA 77 (CanLII), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, 1964 CanLII 45 (SCC), [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado v. Pratt & Whitney Canada Inc.* (1995), 1995 CanLII 7282 (ON SC), 12 C.C.E.L. (2d) 132; *Randhawa v. Everest & Jennings Canadian Ltd.* (1996), 1996 CanLII 8157 (ON SC), 22 C.C.E.L. (2d) 19; *Heynen v. Frito-Lay Canada Ltd.* (1997), 1997 CanLII 12338 (ON SC), 32 C.C.E.L. (2d) 183; *Perez v. GE Capital Technology Management Services Canada Inc.* (1999), 1999 CanLII 14864 (ON SC), 47 C.C.E.L. (2d) 145; *Munyal v. Sears Canada Inc.* (1997), 1997 CanLII 12328 (ON SC), 29 C.C.E.L. (2d) 58; *Alderman v. North Shore Studio Management Ltd.*, 1997 CanLII 2053 (BC SC), [1997] 5 W.W.R. 535; *R. v. Nat Bell Liquors Ltd.*, 1922 CanLII 488 (UK JCPC), [1922] 2 A.C. 128; *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Poucher v. Wilkins* (1915), 1915 CanLII 514 (ON CA), 33 O.L.R. 125; *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321; *Saskatoon Credit Union Ltd. v. Central Park Ent. Ltd.* (1988), 1988 CanLII 2941 (BC SC), 22 B.C.L.R. (2d) 89; *General Motors of Canada Ltd. v. Naken*, 1983 CanLII 19 (SCC), [1983] 1 S.C.R. 72; *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41; *Susan Shoe Industries*

Tab 253

CanLII

Penner v. Niagara (Regional Police Services Board), 2013 SCC 19 (CanLII), [2013] 2 SCR 125

Source:	Supreme Court of Canada
Date:	2013-04-05
File number:	33959
Other citations:	356 DLR (4th) 595 — 442 NR 140 — 226 ACWS (3d) 139 — 304 OAC 106 — [2013] EXP 1164 — 32 CPC (7th) 223 — 49 Admin LR (5th) 1 — EYB 2013-220248 — JE 2013-639 — [2013] SCJ No 19 (QL) — [2013] ACS no 19
Citation:	Penner v. Niagara (Regional Police Services Board), 2013 SCC 19 (CanLII), [2013] 2 SCR 125, <https://canlii.ca/t/fwx06>, retrieved on 2026-01-18
Most recent unfavourable mention	Claybourn v. Toronto Police Services Board, 2013 HRTO 1298 (CanLII) [...] provision in British Columbia's Human Rights Code as conferring only a very narrow discretion to hear the application that had been filed before the BCHRT. In my view, the reasoning behind the majority's decision, to the extent that it is still in force after **Penner , is not applicable** to s. 45.1 of the Ontario Code. [...]

SUPREME COURT OF CANADA

CITATION: Penner *v.* Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125

DATE: 20130405
DOCKET: 33959

BETWEEN:

Wayne Penner
Appellant
and
Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow
Respondents
- and -
Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 72)	Cromwell and Karakatsanis JJ. (McLachlin C.J. and Fish J. concurring)
DISSENTING REASONS: (paras. 73 to 127)	LeBel and Abella JJ. (Rothstein J. concurring)

Penner *v.* Niagara (Regional Police Services Board), 2013 SCC 19, [2013] 2 S.C.R. 125

Wayne Penner *Appellant*

v.

Regional Municipality of Niagara Regional Police Services Board, Gary E. Nicholls, Nathan Parker, Paul Koscinski and Roy Federkow *Respondents*

and

Attorney General of Ontario, Urban Alliance on Race Relations, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association, Canadian Police Association and Canadian Civil Liberties Association *Interveners*

Indexed as: Penner *v.* Niagara (Regional Police Services Board)

2013 SCC 19

File No.: 33959.

2012: January 11; 2013: April 5.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil procedure — Issue estoppel — Administrative law — Police disciplinary proceedings — Complaint alleging police misconduct brought under Police Services Act, R.S.O. 1990, c. P.15 ("PSA") — Civil action for damages arising from same incident also commenced — PSA hearing officer finding no misconduct and dismissing complaint — Motion judge and Court of Appeal exercising discretion to apply issue estoppel to bar civil claims on basis of hearing officer's decision — Whether public policy rule precluding applicability of issue estoppel to police disciplinary hearings should be created — Whether unfairness arises from application of issue estoppel in this case.

P was arrested for disruptive behaviour in an Ontario courtroom. He filed a complaint against two police officers under the *Police Services Act* ("*PSA*"), alleging unlawful arrest and unnecessary use of force. He also started a civil action claiming damages arising out of the same incident. The hearing officer appointed by the Chief of Police under the *PSA* found the police officers not guilty of misconduct and dismissed the complaint. That decision was reversed on appeal by the Ontario Civilian Commission on Police Services on the basis that the arrest was unlawful. On further appeal, the Ontario Divisional Court concluded that the officers had legal authority to make the arrest and restored the hearing officer's decision. The police respondents then successfully moved in the Superior Court of Justice to have many of the claims in the civil

action struck on the basis of issue estoppel. While finding several factors weighed against the application of issue estoppel, the Ontario Court of Appeal concluded that applying the doctrine would not work an injustice in this case and dismissed P's appeal.

Held (LeBel, Abella and Rothstein JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Fish, Cromwell and Karakatsanis JJ.: It is neither necessary nor desirable to create a rule of public policy excluding police disciplinary hearings from the application of issue estoppel. The doctrine of issue estoppel allows for the exercise of discretion to ensure that no injustice results; it calls for a case-by-case review of the circumstances to determine whether its application would be unfair or unjust even where, as here, the preconditions for its application have been met. There is no reason to depart from that approach. However, in the circumstances of this case, it was unfair to P to apply issue estoppel to bar his civil action on the basis of the hearing officer's decision. The Court of Appeal erred in its analysis of the significant differences between the purpose and scope of the two proceedings, and failed to consider the reasonable expectations of the parties about the impact of the proceedings on their broader legal rights.

The legal framework governing the exercise of the discretion not to apply issue estoppel is set out in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. This framework has not been overtaken by this Court's subsequent jurisprudence. While finality is important both to the parties and to the judicial system, unfairness in applying issue estoppel may nonetheless arise. First, the prior proceedings may have been unfair. Second, even where the prior proceedings were conducted fairly, it may be unfair to use the results of that process to preclude the subsequent claim, for example, where there is a significant difference between the purposes, processes or stakes involved in the two proceedings. The text and purpose of the legislative scheme shape the parties' reasonable expectations in relation to the scope and effect of the administrative proceedings. They guide how and to what extent the parties participate in the process. Where the legislative scheme contemplates multiple proceedings and the purposes of those proceedings are widely divergent, the application of the doctrine might not only upset the

parties' legitimate and reasonable expectations but may also undermine the efficacy and policy goals of the administrative proceedings, by either encouraging more formality and protraction or discouraging access to the administrative proceedings altogether. These considerations are also relevant to weighing the procedural safeguards available to the parties. A decision whether to take advantage of those procedural protections available in the prior proceeding cannot be divorced from the party's reasonable expectations about what is at stake in those proceedings or the fundamentally different purposes between them. The connections between the relevant considerations must be viewed as a whole.

In this case, the disciplinary hearing was itself fair and P participated in a meaningful way; however, the Court of Appeal failed to fully analyze the fairness of using the results of that process to preclude P's civil action. Nothing in the legislative text gives rise to an expectation that the disciplinary hearing would be conclusive of P's legal rights in his civil action: the standards of proof required, and the purposes of the two proceedings, are significantly different; and, unlike a civil action, the disciplinary process provides no remedy or costs for the complainant. Another important policy consideration arises in this case: the risk of adding to the complexity and length of administrative proceedings by attaching undue weight to their results through applying issue estoppel. P could have participated more fully by hiring counsel, however that would also have meant that the officers would effectively have been forced to face two prosecutors rather than one. This would enhance neither the efficacy nor the fairness to the officers in a disciplinary hearing and potential complainants may not come forward with public complaints in order to avoid prejudicing their civil actions. These are important considerations and the Court of Appeal did not take them into account in assessing the weight of other factors, such as P's status as a party and the procedural protections afforded by the administrative process. Finally, the application of issue estoppel had the effect of using the decision of the Chief of Police's designate to exonerate the Chief in the civil claim and is therefore a serious affront to basic principles of fairness.

Per LeBel, Abella and Rothstein JJ. (dissenting): The doctrine of issue estoppel seeks to protect the finality of litigation by precluding the relitigation of issues that have been conclusively determined in a prior proceeding. The finality of litigation is a fundamental principle

assuring the fairness and efficacy of the justice system in Canada. The doctrine of issue estoppel seeks to protect the reasonable expectation of litigants that they can rely on the outcome of a decision made by an authoritative adjudicator, regardless of whether that decision was made in the context of a court or an administrative proceeding. In applying issue estoppel in the context of administrative adjudicative bodies, differences in the process or procedures used by the administrative tribunal, including procedures that do not mirror traditional court procedures, should not be used as an excuse to override the principle of finality. The purposes and procedures may vary, but the principle of finality should be maintained.

The applicable approach to issue estoppel in the context of prior administrative proceedings was most recently articulated by this Court in 2011 in *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422. This is the precedent that governs the application of the doctrine in this case. The key relevant aspect of this precedent is that it moved away from the approach to issue estoppel taken in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, which had held that a different and far wider discretion should apply in the context of administrative tribunals than the "very limited" discretion applied to courts.

The twin principles which underlie the doctrine of issue estoppel — that there should be an end to litigation and that the same party shall not be harassed twice for the same cause — are core principles which focus on achieving fairness and preventing injustice by preserving the finality of litigation. The ultimate goal of issue estoppel is to protect the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. As the Court said in *Figliola*, this is the case whether we are dealing with courts or administrative tribunals. An approach that fails to safeguard the finality of litigation undermines these principles and risks uniquely transforming issue estoppel in the case of administrative tribunals into a free-floating inquiry. This revives the *Danyluk* approach that the Court refused to apply in *Figliola*.

This Court's recent affirmation of the principle of finality underlying issue estoppel in *Figliola* is also crucial to preserving the principles underlying our modern approach to administrative law. The Court's residual discretion to refuse to apply issue estoppel should not be used to impose a particular model of adjudication in a manner inconsistent with the principles of deference that lie at the core of administrative law. Where an adjudicative tribunal has the authority to make a decision, it would run counter to the principles of deference to uniquely broaden the court's discretion in a way that would, in most cases, permit an unsuccessful party to circumvent judicial review and turn instead to the courts for a re-adjudication of the merits.

Under the principles set out in *Figliola*, issue estoppel should apply. The difference between the standard of proof required to establish misconduct under the *PSA* and that required in a civil trial is irrelevant in this case. The hearing officer made unequivocal findings that there was virtually no evidence to support P's claims. That means that there is simply no evidence to support P's claims whatever standard of proof is applied. P should not be allowed to circumvent the clear findings of the hearing officer and put the parties through a duplicative proceeding which would inevitably yield the same result.

The disciplinary hearing conducted by the hearing officer was conducted in accordance with the requirements prescribed by the statute and principles of procedural fairness. The hearing officer's decision was made in circumstances in which P knew the case he had to meet, had a full opportunity to meet it, and lost. Had he won, the hearing officer's decision would have been no less binding and the application of issue estoppel would have assisted him in a subsequent civil action for damages by relieving him of having to prove liability.

Preventing the courts from applying issue estoppel in the context of these disciplinary proceedings means that decisions would not be final or binding and would be open to relitigation and potentially inconsistent results. This would undermine public confidence in the reliability of the complaints process and in the integrity of the administrative decision-making process more broadly.

Nor does the method used to appoint an adjudicator in this case provide a basis for exercising the discretion in a way that precludes the application of issue estoppel. The Chief of Police designated an outside prosecutor and an independent adjudicator. Similar methods of appointment are quite common in other parts of the law and are not seen as an obstacle to independent adjudication. Tenure is not the sole marker and condition of adjudicative independence.

Cases Cited

By Cromwell and Karakatsanis JJ.

Applied: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; **referred to:** *Parker v. Niagara Regional Police Service* (2008), 2008 CanLII 729 (ON SCDC), 232 O.A.C. 317; *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Sharma v. Waterloo Regional Police Service* (2006), 2006 CanLII 24342 (ON SCDC), 213 O.A.C. 371; *Minott v. O'Shanter Development Co.* (1999), 1999 CanLII 3686 (ON CA), 42 O.R. (3d) 321; *Schweneke v. Ontario* (2000), 2000 CanLII 5655 (ON CA), 47 O.R. (3d) 97; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 1998 CanLII 6467 (BC CA), 50 B.C.L.R. (3d) 1; *Burchill v. Yukon (Commissioner)*, 2002 YKCA 4 (CanLII); *Porter v. York (Regional Municipality) Police*, [2001] O.J. No. 5970 (QL).

By LeBel and Abella JJ. (dissenting)

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52, [2011] 3 S.C.R. 422; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*,

Tab 254

CanLII

Smith Estate v. National Money Mart Company, 2008 ONCA 746 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2008-11-03
File number:	C49114; C49116
Other citations:	92 OR (3d) 641 — 303 DLR (4th) 175 — 170 ACWS (3d) 452 — 243 OAC 173 — 61 CPC (6th) 72 — [2008] OJ No 4327 (QL)
Citation:	Smith Estate v. National Money Mart Company, 2008 ONCA 746 (CanLII), <https://canlii.ca/t/21cmf>, retrieved on 2026-01-18

Kenneth Smith, Estate Trustee of the Last Will and Testament of Margaret Smith, deceased, et al. v. National Money Mart Co. et al.
[Indexed as: Smith Estate v. National Money Mart Co.]

92 O.R. (3d) 641

Court of Appeal for Ontario,
Winkler C.J.O., Sharpe, Gillese, Blair and MacFarland JJ.A.
November 3, 2008

Judgments and orders -- Issue estoppel -- Plaintiffs bringing class action against defendant payday loan providers alleging that they charged criminal interest rate -- Defendants moving unsuccessfully to stay action on basis of arbitration clause in some loan agreements -- Court of Appeal dismissing defendants' appeal and leave to appeal to Supreme Court of Canada denied -- Defendants subsequently renewing motion for stay on basis that two decisions of Supreme Court of Canada had changed law in Ontario and that they were entitled to benefit of that change -- Motion judge properly dismissing motion -- Doctrine of issue estoppel applying -- Litigant having no automatic or presumptive right to relitigate issue on account of change in law -- Granting stay at this late stage of proceedings would be fundamentally unjust to plaintiffs.

The defendants were in the business of providing "payday" loans. In 2001, the defendants began inserting a class action waiver into their payday loan agreements whereby the borrower purportedly waived the right to bring a court action with respect to the loan and was required to submit any dispute to binding arbitration. The plaintiffs brought a class action against the defendants alleging that they charged a criminal interest-rate. The defendants moved unsuccessfully to stay the claim pursuant to s. 7(1) of the Arbitration Act, 1991, S.O. 1991, c. 17. An appeal from that decision was dismissed in 2005. The Court of Appeal agreed with the motion judge that the issue of whether to stay the action on account of the arbitration clause should be dealt with at the certification hearing. The Supreme Court of Canada refused the defendants' request for leave to appeal. The case proceeded to a certification hearing, and the action was certified as a class proceeding. The defendants again moved for a stay under the Arbitration Act and added a request for decertification, arguing that two 2007 decisions of the Supreme Court of Canada had changed the law in Ontario and that they were entitled to the benefit of that change. The motion was dismissed. The motion judge held that the two Supreme Court decisions were distinguishable and inapplicable in Ontario; that provisions of the Consumer Protection Act, 2002, S.O. 2002, c. 30, Sch. A allowing the plaintiffs to pursue their claim in court despite the arbitration clauses applied retroactively; and that the stay should be refused pursuant to s. 7(2)5 of the Arbitration Act. In the alternative, he held that the defendants were estopped from renewing their stay motion under the doctrine of issue estoppel. The defendants appealed.

Held, the appeal should be dismissed.

The appeal could and should be resolved solely on the basis of issue estoppel. For the purposes of the appeal, it was assumed without deciding that the two Supreme Court of Canada decisions changed the law of Ontario and that ss. 7 and 8 of the Consumer Protection Act, 2002 did not have retroactive effect. The preconditions at the first stage of the test for issue estoppel were met. The same question was decided when the Court of Appeal held that the defendants were not [page642] entitled to a stay and that the issue of whether the dispute should be resolved by way of arbitration or class proceedings was a matter to be decided at the "preferable procedure" stage of the certification hearing. The decision on that issue was final. The parties or their privies were the same. At the second stage of the test, it was clear that issue estoppel ought to be applied. A litigant has no automatic or presumptive right to relitigate an issue on account of a change in the law. The matter rests upon the discretion of the court to ensure that the finality principle is applied in a manner consistent with the interests of justice. In this case, the defendants' loss of the benefit of the purported change in the law was clearly outweighed by the adverse consequences to the plaintiffs of revisiting the stay issue at this late stage in the proceedings. A stay would almost certainly defeat the claims subject to arbitration clauses, not on the merits but for reasons of practicality. Enforcing the arbitration clauses would not lead to arbitration but would immunize the defendants from any claims. Even if the claims subject to arbitration clauses were stayed, the defendants would almost certainly still have to defend a reconstituted class action by the class of borrowers who did not sign similar agreements or who signed agreements after the Consumer Protection Act, 2002 provisions came into force. The motion judge did not err in exercising his discretion in favour of applying issue estoppel in the circumstances of this case.

APPEAL from the order of Perell J., [2008] O.J. No. 2248, 2008 CanLII 27479 (S.C.J.) dismissing a motion for a stay of class action.

Cases referred to Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46, 2001 SCC 44, 201 D.L.R. (4th) 193, 272 N.R. 1, J.E. 2001-1439, 149 O.A.C. 1, 34 Admin. L.R. (3d) 163, 10 C.C.E.L. (3d) 1, [2001] CLLC Â210-033, 7 C.P.C. (5th) 199, 106 A.C.W.S. (3d) 460, apld Hockin v. Bank of British Columbia, 1995 CanLII 6268 (BC CA), [1995] B.C.J. No. 688, 123 D.L.R. (4th) 538, 57 B.C.A.C. 255, 3 B.C.L.R. (3d) 193, 10 C.C.E.L. (2d) 157, 54 A.C.W.S. (3d) 784 (C.A.) [Leave to appeal to S.C.C. refused [1995] S.C.C.A. No. 256], distd Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, 2007

Tab 255

CanLII

Penney v. The Co-operators General Insurance Company, 2022 ONSC 3874 (CanLII)

Source:	Divisional Court
Date:	2022-07-06
File number:	DC-21-440
Other citations:	25 CCLI (6th) 305 — 94 MVR (7th) 281
Citation:	Penney v. The Co-operators General Insurance Company, 2022 ONSC 3874 (CanLII), <https://canlii.ca/t/jq3g2>, retrieved on 2026-01-18
Most recent unfavourable mention	Kahissay v. Intact Insurance, 2022 ONSC 6357 (CanLII) [...] (b) Taylor is correct and **Penney is incorrect** and, in any event, where there are two competing lines of authority in this court, the issue is not fit for decision by a single judge on a R.2.1 review and it should be placed before a panel of this court. [...]

CITATION: Penney v. The Co-operators General Insurance Company, 2022 ONSC 3874
DIVISIONAL COURT FILE NO.: DC-21-440
DATE: 20220706

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Varpio and Trimble JJ.

BETWEEN:	)	
	)	
SARAH PENNEY	)	*Ashu Ismail* for the Appellant
	)	
Appellant	)	
	)	
– and –	)	
	)	

Engineering Limited, 2017 ONSC 909 at para. 3 (Div. Ct.), Coughlin v. Director, Ontario Disability Support Program, 2021 ONSC 1236 (Div. Ct.).

[14] I note that s. 11(1) refers to an appeal of "its" decision to the LAT. This suggests that an appeal may be brought with respect to a final decision. However, it is noteworthy that in *Sazant*, the Divisional Court held that the wording "any decision" in appeals from the Criminal Injuries Compensation Board should be interpreted as meaning a final decision (*Sazant v. R.M. and C.I.C.B.*, 2010 ONSC 4273 at para. 37).

[15] That brings me to some recent cases in the Divisional Court where the Court has stated that while there is normally no right to appeal an interlocutory decision of the LAT, the Court has discretion to hear an interlocutory appeal. None of these cases refers to *Stockfish*, or to the limits of the Court's jurisdiction pursuant to s. 11(1) because of the express language of the provision. With respect to my colleagues who sat on these cases, it appears to me that they have imported principles applying in judicial review applications to the interpretation of the appeal provision in the *LAT Act*. I would not follow them, as I believe they erred in failing to give effect to the wording of s. 11(1) and the longstanding jurisprudence, and they have not justified their approach in departing from the language and jurisprudence.

[16] Before I review these cases, it is important to draw a distinction between appeals and judicial reviews. As I said earlier, an appeal is a creature of statute, and the appellate body's jurisdiction is limited by the legislation. Judicial review, in contrast, is a common law remedy. Relief is discretionary, and the courts have developed a doctrine of prematurity whereby they refuse to review interlocutory decisions of administrative tribunals unless there are exceptional circumstances (see, for example, *Sazant* at paras. 40-42).

[17] I now turn to the recent cases involving LAT appeals. In *Security National Insurance Company v. Kumar*, 2018 ONSC 3556, this Court heard an appeal of an interlocutory order where both parties agreed that the appeal was not premature, because the preliminary issue was essentially the only issue in dispute between the parties. In finding that the "court does, at least on occasion, hear appeals from tribunals on specific preliminary issues that do not constitute final determination on the merits", the Court relied on the following cases (at para. 8): *Certas Direct Insurance Company v. Gonsalves*, 2011 ONSC 3986; *Security National Insurance Company v. Hodges*, 2014 ONSC 3627 and *Guarantee Company of North America v. Dong Do,* 2015 ONSC 1891.

[18] It is important to note that these three cases were applications for judicial review from decisions of the Financial Services Commission of Ontario ("FSCO"), not appeals to the Divisional Court. Prior to April 1, 2016, automobile accident benefit disputes were adjudicated at FSCO, where there was no statutory right of appeal, only judicial review. These judicial reviews of FSCO decisions do not address or assist in determining whether an interlocutory decision may be appealed under s. 11(1) of the *LAT Act.* Only *Certas* discusses the doctrine of prematurity, doing so in the context of judicial review of an interlocutory decision.

[19] The next case to consider is *Taylor v. Aviva Insurance Canada Inc.*, 2018 ONSC 4472. In that case, the Divisional Court considered whether an appeal and a request for reconsideration before the LAT could proceed at the same time. The Court was not asked to determine whether it had the jurisdiction to hear an interlocutory appeal pursuant to s. 11(1). However, the Court stated at para. 19:

> This court is reluctant to hear appeals from interim or interlocutory orders of administrative decision makers for the same reason that it is reluctant to hear judicial review proceedings before the administrative decision-making process has ended. Such appeals fragment the administrative proceeding and increase costs. Accordingly, courts have interpreted language that grants an appeal from a

Tab 256

CanLII

Johannson v Saskatchewan Government Insurance, 2019 SKCA 52 (CanLII)

Source:	Court of Appeal for Saskatchewan
Date:	2019-06-13
File number:	CACV3007
Other citation:	93 CCLI (5th) 228
Citation:	Johannson v Saskatchewan Government Insurance, 2019 SKCA 52 (CanLII), <https://canlii.ca/t/j0zm8>, retrieved on 2026-01-18

Court of Appeal for Saskatchewan
Docket: CACV3007

Citation: *Johannson v Saskatchewan Government Insurance*, 2019 SKCA 52
Date: 2019-06-13

Between:

Hope Johannson

Appellant
(Appellant)

And

Saskatchewan Government Insurance

Respondent
(Respondent)

---

[22] The standard of review is correctness: see *Montgrand v Saskatchewan Government Insurance*, 2017 SKCA 2, 406 DLR (4th) 546.

[23] Since appeals from the Commission are available only on questions of law, findings of fact are not, of themselves, appealable to this Court. In *P.S.S. Professional Salon Services Inc. v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149, [2008] 5 WWR 440 [*Hitchings*] (leave to appeal to the SCC denied, 2008 CanLII 32715), Cameron J.A. explained the basis for an argument that an error of fact can, in rare instances, be grounded in an error of law:

> [62] This ties in with the notion that "an unreasonable finding of fact" falls to be categorized as an error of law for the purposes of judicial review in the classical sense, and with the associated notion that when errors of law are open to judicial review unhindered by a privative clause then "unreasonable errors of fact", though no others, are subject to review: *Blanchard* v. *Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476 at 494–95. It also ties in with the further notion that a tribunal "errs in law" if it ignores relevant evidence or evidence it is required to consider: *Woolaston* v. *Minister of Manpower and Immigration*, 1972 CanLII 3 (SCC), [1973] S.C.R. 102; *Canada (Director of Investigation and Research, Competition Act)* v. *Southam*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 at para. 41: "If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law".

[24] Justice Cameron distinguished between a challenge to the sufficiency or weight of evidence supporting a finding of fact (which does not give rise to a question of law) and an error in principle made in the course of the fact-finding exercise (which can give rise to a question of law), stating as follows:

> [70] Having regard for all of this, it becomes apparent that even though the right of appeal is confined to a question of law, and even though the appeal comes down to the tribunal's findings of fact, the appellant's case gives rise to a question of law and rests, therefore, on a tenable ground. It is not as though the question is whether the tribunal's findings of fact are unreasonable or unsupported by the evidence in the sense of the sufficiency and weight of the evidence. Rather, the question is whether the findings of fact are unreasonable in the sense the tribunal erred in principle by disregarding, overlooking, or mischaracterizing evidence material to its findings of fact. That then leads me to the issue regarding the standard of review.

[25] Shortly after *Hitchings*, in *Murphy v Saskatchewan Government Insurance*, 2008 SKCA 57, [2008] 7 WWR 401 [*Murphy*], Klebuc C.J.S. summarized examples of when an error of law may be made in the course of the finding of a fact:

> [5] Since the right of appeal is confined to a question of law, neither the right of appeal nor the jurisdiction of the Court extends to a finding of fact. However, a finding of fact may be grounded in an error of law, as will be the case, for example, when a finding: (a) is based on no evidence; (b) is made on the basis of irrelevant evidence or in disregard of relevant evidence; or, (c) is based on an irrational inference of fact. See: *P.S.S. Professional Salon Services Inc. v. Saskatchewan Human Rights Commission et al.*, 2007 SKCA 149, (2007), 302 Sask. R. 161 at paras. 60–65 (application for leave to appeal to S.C.C. filed February 13, 2008). The right of appeal, of course, extends to such errors of law.

Tab 257

CanLII

Elkins v. Van Wissen, 2023 ONCA 789 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2023-11-28
File number:	COA-23-CV-0098
Other citation:	168 OR (3d) 756
Citation:	Elkins v. Van Wissen, 2023 ONCA 789 (CanLII), <https://canlii.ca/t/k1dgk>, retrieved on 2026-01-18

COURT OF APPEAL FOR ONTARIO

CITATION: Elkins v. Van Wissen, 2023 ONCA 789
DATE: 20231128
DOCKET: COA-23-CV-0098

Gillese, Benotto and Copeland JJ.A.

BETWEEN

Marilyn Elkins and Joseph Fraser

Tenants/Appellants (Appellants)

and

Grace Van Wissen, John Van Wissen, Margaret Van Wissen, Embleton Homes Inc., Paramjit Singh Chahal, Surinderpal Singh Kohli, Malwinder Saini, Embleton Homes[1] and Sukhwinder Singh

Landlords/Respondents (Respondents)

Ryan Hardy, for the appellant Marilyn Elkins

No one appearing for the appellant Joseph Fraser

Alexander Dos Reis, for the respondent John Van Wissen (via videoconference)

(3) Failure to grapple with the issues and the evidence

[67] An administrative decision maker's reasons must "meaningfully account for the central issues and concerns raised by the parties" and be responsive to the parties' submissions: *Vavilov,* at para. 127. The Board reasons do neither. Consequently, they prevent meaningful appellate review and constitute an error of law: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 28; *Hanna & Hamilton Construction Co. Ltd. v. Robertson,* 2021 ONCA 660, at para. 6.

[68] In this case, among other things, the T5 Application presented the Board with two issues for resolution: (1) did the Vendor Landlords give the s. 49 Termination Notice in bad faith? and (2) did the Purchasers, in good faith, require possession of the Residence for residential occupation? The Board reasons make no mention of the second issue nor the evidence relating to it. Clearly, appellate review was prevented on that issue and, for that reason alone, the Board erred in law.

[69] In addition, however, the Board reasons on the first issue are so deficient as to constitute legal error. The Board made no attempt to grapple with the body of evidence adduced, or the Tenants' submissions on whether the Vendor Landlords gave the s. 49 Termination Notice in bad faith. Instead, the Board simply recited the Vendor Landlords' assertion that when they gave the Tenants the s. 49 Termination Notice, there was no reason to believe it was not the purchasers' intention to have a family member reside in the Residence.

[70] Even on the improperly narrow view of the test for bad faith used by the Board, it failed to address the evidence adduced on this issue. That evidence includes: (1) the Vendor Landlords' receipt of the Form 160, in which one of the Original Purchasers stated that he was a real estate salesperson as well as one of the Original Purchasers, and stated, "Being a partner, we are buying this property as a future development"; and, (2) the Original Purchasers' bald assertion that they intended the Residence for personal use.

[71] Had the Board approached the first issue correctly, it would have considered the relevant circumstances both before and after serving the s. 49 Termination Notice. In addition to the two evidentiary considerations noted above, the Board would have had to consider that: prior to closing, the Vendor Landlords and/or their lawyer knew title to the Property was to be taken in the name of a corporation and a corporation cannot personally occupy residential premises; the Residence remained vacant for five months after closing; it was then occupied for only about 25 days by one of the Original Purchasers' sons; and, thereafter, the Residence was rented out for a higher price than that which the Tenants had paid.

[72] The failure of the Board to address the evidence on the central issue of the Vendor Landlords' bad faith prevents appellate review and constitutes an error of law.

C. Result

[73] Because the Board failed to make the factual findings necessary to fairly resolve the Tenants' T5 Application, this court is not in a position to decide it. Accordingly, I would remit it to the Board for a redetermination in accordance with these reasons.

Issue #2 The Divisional Court erred by failing to address the Purchasers' potential liability

A. The Standard of Review

[74] To determine what standard of review this court is to apply when deciding Issue 2, we must consider the statutory provision which led to that issue coming before this court: *Vavilov*, at para. 33. In this case, s. 6(1)(a) of the *CJA* is the relevant provision, as the Tenants obtained leave to appeal the Divisional Court order pursuant to it.

Tab 258

CanLII

K.D. v. Peel Children's Aid Society, 2017 ONSC 7392 (CanLII)

Source:	Divisional Court
Date:	2017-12-07
File number:	435/16
Citation:	K.D. v. Peel Children's Aid Society, 2017 ONSC 7392 (CanLII), <https://canlii.ca/t/hp5t2>, retrieved on 2026-01-18

CITATION: K.D. v. Peel Children's Aid Society, 2017 ONSC 7392
DIVISIONAL COURT FILE NO.: 435/16
DATE: 20171207

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: K.D., Applicant (Moving Party)

AND:

THE CHILDREN'S AID SOCIETY OF THE REGION OF PEEL, Respondent

BEFORE: L.A. PATTILLO J.

COUNSEL: *K.D.*, in person

Carole Jenkins, for the Respondent

HEARD at Toronto: December 5, 2017

ENDORSEMENT

[1] In March 2013, the Respondent, The Children's Aid Society of the Region of Peel, placed two children who were Crown Wards (the "Children") with K.D. and his wife. K.D. and his wife subsequently legally adopted the Children in August, 2015. Since June 2013, K.D. and his wife have been in an ongoing dispute with the Respondent over obtaining full and accurate information about the Children.

[2] On September 9, 2016, K.D. commenced an application for judicial review in respect of a purported decision of the Respondent on March 11, 2016 concerning a request that K.D. made to the Respondent pursuant to Ont. Reg. 464/07 for information concerning the Children (the "Application")

[3] The Respondent takes issue with K.D.'s characterization that the decision was on March 11, 2016. The Respondent's position is that the decision was on April 18, 2016 when it submits that it provided the information requested pursuant to Ont. Reg. 464/07.

[4] The issues in the Application are the extent of disclosure required under Ont. Reg. 464/07 and whether, in providing the information, the Respondent complied with Ont. Reg. 464/07.

The Issues

[5] K.D. brings this motion for the following relief:

1) Requiring the Respondent to file a proper response to K.D.'s Request to Admit;

2) Requiring the Respondent to file a complete Record of Proceeding;

3) Permitting K.D. to file an affidavit in support of the Application; and

4) Permitting K.D. to file a factum of up to 45 pages in length.

[6] At the outset of the motion, K.D. raised a further issue concerning the propriety of paragraph 17 in the Respondent's affidavit in response to the motion. After brief submissions, I concluded that the paragraph was improper and not relevant to the issues on the motion and ordered it struck. I struck the paragraph in the Respondent's motion record and noted my order in the margin beside it.

Discussion

a. Request to Admit

[7] On June 14, 2017, K.D. served a Request to Admit in the Application on the Respondent (the "Request"). The Request contains 137 paragraphs. The paragraphs deal with numerous issues including the steps that the Respondent did or did not take in respect of the Children after they were placed in foster care and before they were placed for adoption with K.D. and his wife; issues arising from and after the disclosure meeting with K.D. and his wife that was held on November 4, 2012; failure to disclose specific information about the Children and their birth parents; failure to request and/or provide medical, development and therapeutic records about the Children; redacting hospital records to delete the names of physicians and received dates.

[8] The Respondent provided its Response to the Request on July 4, 2017. The Respondent admitted the truth of the facts in 15 paragraphs and refused to admit the facts in the remainder of the Request with reasons. In particular, for 102 of the paragraphs, the Respondent refused to admit on the ground that the facts sought to be admitted were not relevant to the Application.

[9] K.D. seeks an order requiring the Respondent to either admit or refuse to admit all of the paragraphs that the Respondent refused to admit as not being relevant. He submits that the Respondent's "not relevant" response is not a proper response for two reasons: first, any question of relevancy should be determined at the hearing of the Application and second, given the allegation in the Notice of Application that the Respondent abused its powers in rendering the decision, the paragraphs are relevant.

[10] While compliance with rule 51.03(3)(b) may be reviewed on an interlocutory basis, the substance of the response ought to be decided by the application or trial judge. See: *Glover (Litigation Guardian of) v. Gorski*, 2013 ONSC 6578 (S.C.J.) at paras. 22-23. Nor is there anything in the rules or case law that requires the party served with a request to admit to respond regardless of relevance and then have the issue of relevance determined at the hearing or trial. Indeed, such a requirement would defeat the purpose of a request to admit.

[11] Given the issues in the Application together with the paragraphs in issue in the Request, I consider the response of "not relevant" is a proper reason for the refusals as required by rule 51.03(3)(b). The response is not a *pro forma* response, notwithstanding its repetition. The response identifies each paragraph in the Request to which it applies. Further, I do not consider that an allegation that the Respondent abused its powers in making the decision resolves the question of relevance. That is a question for the Court hearing the Application, as and when it is required to deal with the Request.

[12] For the above reasons, K.D.'s request for an order requiring the Respondent to file a proper response to the Request is denied.

b. Record of Proceedings

[13] The Respondent filed a Record of Proceeding dated June 27, 2017 and a Supplementary Record of Proceeding dated September 25, 2017 which contained additional documents which through oversight were not included in the initial Record of Proceeding.

[14] Section 10 of the *Judicial Review Procedure Act*, R.S.O. 1990. C.J. 1, Schedule B requires that when served with an application for judicial review of a decision made in the exercise or purported exercise of a statutory power, the person making the decision must file "the record of proceedings in which the decision was made."

[15] The Respondent has filed an affidavit which states, among other things, that the Supplementary Record of Proceeding "contains the documents upon which Peel CAS relied in answering the request…"

[16] In his factum, K.D. raises a number of reasons why the Supplementary Record of Proceedings was improper. Before me, he submitted that the Supplementary Record of Proceedings is improper in that it does not include a number of Ministry documents, primarily in the 2007 time period, dealing with the production of information in adoptions and obtained by K.D. from a Freedom of Information request; does not include the training materials that the Respondent uses to train the decision makers and contains a document that sets out a policy concerning adoption disclosure which is dated after the decision in issue. K.D. also takes issue with the late delivery of the Record of Proceedings and Supplementary Record of Proceedings by the Respondent.

[17] The documents which K.D. says should be included were not relied upon by the Respondent in reaching the decision complained of. They should not be included. Further, although the adoption policy document has a date after the decision in issue, the Respondent submits that it was included as the policy reflects, for the most part, the practice in place at the time of the decision. I would not exclude it. Nor do I consider that the late delivery of both the Record and Supplementary Record has any relevance to the sufficiency of the Record.

[18] Based on the evidence and the issues on the Application, I am satisfied that the Supplementary Record of Proceedings is complete.

c. Affidavit Evidence

[19] K.D.'s request for permission to file an affidavit in the Application arises because he is a lawyer and is concerned given the rules of professional conduct which provide that a lawyer cannot appear on his or her own affidavit unless permitted to do so. As K.D. is appearing on his own behalf in this Application and clearly is the person most intimately involved, I have no problem with him filing his own affidavit and appearing on the Application. Accordingly, I grant K.D. the permission he seeks.

d. Factum

[20] K.D. requests because the Application raises several complex issues, he be allowed to file a factum of up to 45 pages in length as opposed to the permitted 30 page maximum. K.D. also submits that as a result of a speech impediment which makes him difficult to understand, he feels he can better communicate through written argument.

[21] In my view, the issues are not that complex or K.D.'s speech impediment that severe that a 45 page factum is necessary. The issues can be more than adequately summarized within the Court's prescribed limit of 30 pages.

Conclusion

[22] Except in respect of permission to file his own affidavit, K.D.'s motion is therefore dismissed for the above reasons.

[23] Rule 68.04(1)(a) of the Rules of Civil Procedure requires that the Application must be perfected within 30 days of the filing of the Record. The Supplementary Record was filed on September 25, 2016. K.D. advises that he can perfect the Application within 30 days. Accordingly, I order that the Application be perfected within 30 days of the date of this endorsement.

[24] The Respondent only opposed the issues of the sufficiency of both its Response to the Request and the Record. It was successful on those issues and is therefore entitled to its costs of the motion which I fix at $3,000 all inclusive. In my view, that amount is fair and reasonable given the issues and the fact that I struck paragraph 17 of the responding affidavit.

L.A. PATTILLO J.

Date of Release: December 7, 2017

Tab 259

Tab 260

4079

T-1588-87

Southam Inc., Julian Beltrame and **Canadian Newspapers Company Limited** (*Applicants*)

v.

Minister of Employment and Immigration (Benoit Bouchard), Chief of Adjudicators for Quebec and the Atlantic Region (Michel Meunier), Attorney-General of Canada and Department of Employment and Immigration (*Respondents*)

INDEXED AS: SOUTHAM INC. v. CANADA (MINISTER OF EMPLOYMENT AND IMMIGRATION)

Trial Division, Rouleau J.—Ottawa, July 27, 1987.

Constitutional law — Charter of Rights — Fundamental freedoms — Freedom of the press — Applications for prohibition to prevent conduct of detention review hearings under Immigration Act 1976 until applicants granted access or right to be heard or for mandamus directing respondent to consider merits of excluding applicants in each case — Charter s. 2(b) guaranteeing freedom of press — Freedom of press including access to judicial proceedings — Detention review hearings of judicial or quasi-judicial nature according to tests in Minister of National Revenue v. Coopers and Lybrand, and part of administration of justice — Understanding of operations of such tribunals necessary for legitimacy of authority and achieved by public access — Right of access limited when conflicts with competing rights — Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 2(b) — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 29(3) (as am. by S.C. 1985, c. 26, s. 112), 104(6), 119.

Immigration — Practice — Detention review hearings of judicial or quasi-judicial nature according to criteria in Minister of National Revenue v. Coopers and Lybrand — Charter, s. 2(b) guarantee of freedom of press including access to judicial proceedings — Prohibition and mandamus ordered to prevent adjudicators from conducting hearings in absence of applicants unless right of access limited in particular case by competing right — Applicants to have right to make submissions if objections to public access raised — Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 2(b) — Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 29(3) (as am. by S.C. 1985, c. 26, s. 112), 104(6), 119.

Practice — Commencement of proceedings — Applications for declarations under Charter s. 24(1) for public access to

T-1588-87

Southam Inc., Julian Beltrame et **Canadian Newspapers Company Limited** (*requérants*)

c.

Ministre de l'Emploi et de l'Immigration (Benoît Bouchard), l'arbitre en chef pour le Québec et la région de l'Atlantique (Michel Meunier), le procureur général du Canada et **le ministère de l'Emploi et de l'Immigration** (*intimés*)

RÉPERTORIÉ: SOUTHAM INC. c. CANADA (MINISTRE DE L'EMPLOI ET DE L'IMMIGRATION)

Division de première instance, juge Rouleau—Ottawa, 27 juillet 1987.

Droit constitutionnel — Charte des droits — Libertés fondamentales — Liberté de la presse — Demandes d'un bref de prohibition visant à empêcher de procéder à des audiences de révision des motifs de détention selon la Loi sur l'immigration de 1976 à moins que les requérants puissent y assister ou aient le droit d'être entendus, ou d'un bref de mandamus enjoignant à l'intimé d'examiner dans chaque cas le bien-fondé des motifs justifiant l'exclusion des requérants — L'art. 2b) de la Charte garantit la liberté de la presse — La liberté de la presse comprend le droit d'assister aux procédures judiciaires — Les audiences portant sur la révision des motifs de détention sont de nature judiciaire ou quasi judiciaire selon les critères énoncés dans l'arrêt Ministre du Revenu national c. Coopers and Lybrand et font partie de l'administration de la justice — Il faut comprendre le mode de fonctionnement de ces tribunaux pour croire à la légitimité de leur autorité, ce qui ne peut se faire que si le public y a accès — Ce droit d'accès est restreint lorsqu'il y a conflit avec des droits opposés — Charte canadienne des droits et libertés, qui constitue la Partie I de la Loi constitutionnelle de 1982, annexe B, Loi de 1982 sur le Canada, 1982, chap. 11 (R.-U.), art. 2b) — Loi sur l'immigration de 1976, S.C. 1976-77, chap. 52, art. 29(3) (mod. par S.C. 1985, chap. 26, art. 112), 104(6), 119.

Immigration — Pratique — Les audiences portant sur la révision des motifs de détention sont de nature judiciaire ou quasi judiciaire selon les critères dans l'arrêt Ministre du Revenu national c. Coopers and Lybrand — La liberté de la presse garantie par l'art. 2b) de la Charte comprend le droit d'assister aux procédures judiciaires — Des brefs de prohibition et de mandamus sont accordés afin d'empêcher les arbitres de tenir des audiences en l'absence des requérants à moins que le droit d'accès ne soit restreint dans un cas particulier par un droit concurrent — Les requérants ont le droit de présenter des observations si des objections à l'accès du public sont soulevées — Charte canadienne des droits et libertés, qui constitue la Partie I de la Loi constitutionnelle de 1982, annexe B, Loi de 1982 sur le Canada, 1982, chap. 11 (R.-U.), art. 2b) — Loi sur l'immigration de 1976, S.C. 1976-77, chap. 52, art. 29(3) (mod. par S.C. 1985, chap. 26, art. 112), 104(6), 119.

Pratique — Introduction des procédures — Demandes de jugements déclaratoires fondées sur l'art. 24(1) de la Charte

1987 CanLII 9001 (FC)

4080

detention review hearings under Immigration Act, 1976, or for right to make submissions on issue of access — Applications by originating motion — Applications dismissed — Declarations may be sought by action only unless respondent expressly consents — Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.), s. 24(1).

The Chief of Adjudicators ordered that the media not be allowed access to certain immigration detention review hearings unless the particular migrant consented. The applicants moved for declarations pursuant to the Charter, subsection 24(1) directing that the Chief of Adjudicators conduct the hearings in public, or allow the applicants to make submissions on a case-by-case basis in support of its application to have access to and report on the proceedings; prohibition to prevent the conduct of the hearings until the applicants are granted the right to be present or the right to be heard before being excluded; and *mandamus* directing the respondent to consider in each case the merits of excluding the applicants.

Held, the application for *mandamus* and prohibition should be allowed.

The applications for declarations under the Charter, subsection 24(1) cannot be allowed because the applicants proceeded by means of an originating motion. Declarations may be sought only by way of an action unless the respondent expressly consents, and not merely acquiesces with no objection. The respondent did not expressly consent to this form of proceedings.

The *Immigration Act, 1976* is silent with respect to public access to detention review hearings. Where the enabling legislation is silent on a point of procedure, a statutory decision-maker is the master of his own proceedings and may determine the procedure to be followed. However, paragraph 2(b) of the Charter guarantees the freedom of "expression, including freedom of the press and other media of communication." Freedom of the press encompasses a right of access to judicial proceedings. The hearings in question involved a statutory body rather than a court and it had to be determined if they are judicial or quasi-judicial and by implication subject to accessibility. The four tests set out by Dickson J. (as he then was) in *Minister of National Revenue v. Coopers and Lybrand* to determine if a proceeding is judicial or quasi-judicial were met by the detention review hearings. It is not unreasonable to extend to proceedings of such decision-makers the application of the principle of public accessibility. Statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained and this can only be done if their proceedings are open to the public. The applicants have a *prima facie* right of access to the

afin de permettre au public d'assister aux audiences portant sur la révision des motifs de détention conformément à la Loi sur l'immigration de 1976 ou de faire reconnaître le droit de présenter des observations sur la question de l'accès — Demandes formulées par voie de requête introductive d'instance — Demandes rejetées — Les jugements déclaratoires ne peuvent être obtenus qu'au moyen d'une action sauf si l'intimé y consent de façon expresse — Charte canadienne des droits et libertés, qui constitue la Partie I de la Loi constitutionnelle de 1982, annexe B, Loi de 1982 sur le Canada, 1982, chap. 11 (R.-U.), art. 24(1).

L'arbitre en chef a interdit aux médias d'assister à certaines audiences portant sur la révision des motifs de détention à moins que le migrant concerné n'y consente. Les requérants cherchent à obtenir des jugements déclaratoires fondés sur le paragraphe 24(1) de la Charte, enjoignant à l'arbitre en chef de tenir les audiences en public ou de leur accorder le droit de présenter leurs observations selon chaque cas d'espèce, à l'appui de leur requête visant à obtenir l'autorisation d'assister aux procédures et d'en faire rapport; ils sollicitent en outre un bref de prohibition empêchant la tenue des audiences jusqu'à ce qu'ils aient le droit d'y assister ou d'être entendus avant d'en être exclus, ainsi qu'un bref de *mandamus* enjoignant à l'intimé d'examiner dans chaque cas le bien-fondé de l'exclusion des requérants.

Jugement les demandes de *mandamus* et de prohibition devraient être accueillies.

Les demandes de jugements déclaratoires fondées sur le paragraphe 24(1) de la Charte ne peuvent être accueillies car les requérants ont procédé par voie de requête introductive d'instance. Les jugements déclaratoires ne peuvent être obtenus qu'au moyen d'une action sauf si l'intimé y consent de façon expresse, et non simplement en ne soulevant pas d'objection. L'intimé n'a pas formellement consenti à ce genre de procédures.

La *Loi sur l'immigration de 1976* ne se prononce pas sur le problème de l'accès du public aux audiences portant sur la révision des motifs de détention. Lorsque la loi habilitante est silencieuse sur une question de procédure, le responsable de la décision en vertu de la loi est maître de ses propres procédures, et il peut établir celle qui doit être appliquée. Toutefois, l'alinéa 2b) de la Charte garantit à chacun la liberté «d'expression, y compris la liberté de la presse et des autres moyens de communication». La liberté de la presse englobe le droit d'assister aux procédures judiciaires. Les audiences en question mettent en cause un organisme créé par la loi plutôt qu'un tribunal et il faut établir si elles sont de nature judiciaire ou quasi judiciaire et par voie de conséquence, si elles sont visées par le principe de l'accessibilité. Les audiences portant sur la révision des motifs de détention satisfont aux quatre critères établis par le juge Dickson [tel était alors son titre] dans l'arrêt *Ministre du Revenu national c. Coopers and Lybrand* pour déterminer si une procédure est judiciaire ou quasi judiciaire. Il est raisonnable d'étendre la portée du principe de l'accessibilité du public aux mesures prises par les décideurs en question. Les tribunaux créés par la loi et qui exercent des fonctions judiciaires ou quasi judiciaires donnant lieu à des procédures contradictoires qui entraînent des décisions quant aux droits des parties, participent vraiment à «l'administration de la justice». La crédibilité

1987 CanLII 9001 (FC)

detention review proceedings which may, however, be limited when it conflicts with competing rights or interests.

CASES JUDICIALLY CONSIDERED

APPLIED:

Minister of National Revenue v. Coopers and Lybrand, [1979] 1 S.C.R. 495.

CONSIDERED:

Re Southam Inc. and The Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.).

REFERRED TO:

Wilson v. Minister of Justice, [1985] 1 F.C. 586 (C.A.); *Lussier v. Collin*, [1985] 1 F.C. 124 (C.A.); *Groupe des éleveurs de volailles de l'est de l'Ontario v. Canadian Chicken Marketing Agency*, [1985] 1 F.C. 280 (T.D.); *Pacific Salmon Industries Inc. v. The Queen*, [1985] 1 F.C. 504 (T.D.); *Millward v. Public Service Commission*, [1974] 2 F.C. 530 (T.D.); *St-Louis v. Treasury Board*, [1983] 2 F.C. 232 (C.A.); *Re Southam Inc. and The Queen* (1986), 26 D.L.R. (4th) 479 (Ont. C.A.); aff'g (1985), 14 D.L.R. (4th) 683 (Ont. H.C.).

COUNSEL:

Richard G. Dearden and *Alan D. Reid, Q.C.* for applicants.
Brian R. Evernden for respondents.
P. M. Jacobsen for intervenor (applicant).

SOLICITORS:

Gowling and Henderson, Ottawa, for applicants.
Deputy Attorney General of Canada for respondents.
Paterson, MacDougall, Toronto, for intervenor (applicant).

The following are the reasons for order delivered orally in English by

ROULEAU J.: The applicants seek, by way of originating motion, a number of orders. In essence their motion concerns freedom of the press and the public's right of access to immigration detention

accordée à ces tribunaux exige qu'on ait confiance dans leur intégrité et qu'on comprenne leur mode de fonctionnement, ce qui ne saurait s'accomplir que dans la mesure où le public aura accès à leurs séances. Les requérants ont un droit d'accès *prima facie* aux procédures de révision des motifs de la détention, lequel droit peut toutefois être restreint lorsqu'il entre en concurrence avec d'autres droits ou intérêts opposés.

JURISPRUDENCE

DÉCISION APPLIQUÉE:

Ministre du Revenu national c. Coopers and Lybrand, [1979] 1 R.C.S. 495.

DÉCISION EXAMINÉE:

Re Southam Inc. and The Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (C.A. Ont.).

DÉCISIONS CITÉES:

Wilson c. Ministre de la Justice, [1985] 1 C.F. 586 (C.A.); *Lussier c. Collin*, [1985] 1 C.F. 124 (C.A.); *Groupe des éleveurs de volailles de l'est de l'Ontario c. Office canadien de commercialisation des poulets*, [1985] 1 C.F. 280 (1re inst.); *Pacific Salmon Industries Inc. c. La Reine*, [1985] 1 C.F. 504 (1re inst.); *Millward c. Commission de la Fonction publique*, [1974] 2 C.F. 530 (1re inst.); *St-Louis c. Conseil du Trésor*, [1983] 2 C.F. 232 (C.A.); *Re Southam Inc. and The Queen* (1986), 26 D.L.R. (4th) 479 (C.A. Ont.); confirmant (1985), 14 D.L.R. (4th) 683 (H.C. Ont.).

AVOCATS:

Richard G. Dearden et *Alan D. Reid*, c.r., pour les requérants.
Brian R. Evernden pour les intimés.
P. M. Jacobsen pour l'intervenante (requérante).

PROCUREURS:

Gowling and Henderson, Ottawa, pour les requérants.
Le sous-procureur général du Canada pour les intimés.
Paterson, MacDougall, Toronto, pour l'intervenante (requérante).

Ce qui suit est la version française des motifs de l'ordonnance prononcés à l'audience par

LE JUGE ROULEAU: Les requérants cherchent à obtenir par voie de requête introductive d'instance un certain nombre d'ordonnances. Leur requête porte essentiellement sur la liberté de la presse

1987 CanLII 9001 (FC)

Tab 261

CanLII

Germain v. Automobile Injury Appeal Commission, 2009 SKQB 106 (CanLII)

Source:	Court of Queen's Bench for Saskatchewan
Date:	2009-03-18
File number:	Q.B.G. No. 148/2006
Other citations:	[2009] 7 WWR 509 — 333 Sask R 116 — 189 CRR (2d) 1
Citation:	Germain v. Automobile Injury Appeal Commission, 2009 SKQB 106 (CanLII), <https://canlii.ca/t/22wls>, retrieved on 2026-01-19

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2009 SKQB 106**

Date: **2009 03 18**
Docket: Q.B.G. No. 148/2006
Judicial Centre: Regina

BETWEEN:

ELAINE GERMAIN

PLAINTIFF

- and -

AUTOMOBILE INJURY APPEAL COMMISSION
AND ANNE PHILLIPS AS CHAIRMAN AND
BEVERLY CLEVELAND AND JOY DOBKO
AS MEMBERS

DEFENDANTS

Counsel:

Elaine Germain — appearing on her own behalf assisted by Gordon J. K. Neill, Q.C.

Charita N. Ohashi and Richard James Fyfe — for the defendants

> judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".
>
> ... The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. ...
>
> ... The authorities have held that subject to a few well-recognized exceptions, as in the case of infants, mentally disordered persons or secret processes, all judicial proceedings must be held in public. The editor of *Halsbury's* 4th Edition states the rule in these terms:
>
> > In general, all cases, both civil and criminal, must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impractical by the presence of the public, the court may sit in camera [Vol. 10, para. 705, at p. 316].
>
> At every stage the rule should be one of public accessibility and concomitant judicial accountability ...
>
> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. ...

[104] These dicta are still the law in Canada and in my view apply to adjudicative tribunals which although not courts, have a quasi-judicial function. The Commission is such a tribunal because it makes decisions based on Germain's legal rights under the *AAIA*. Germain's claim to privacy regarding publication on the net cannot withstand the force of the open courts principle. She has the onus of demonstrating limitations on public accessability and I agree with the Commission in this case that she has not proven societal values of superordinate importance nor any other exceptional circumstance which would warrant a limit. She has not met this onus.

[105] There is no violation of any principles of fundamental justice in this case. The Commission's new Net Policy in my view properly balances Germain's concerns regarding identity theft with the open courts principle.

[106] Based on the reasons outlined above, the Commission is not prohibited from publishing its decisions online on the basis of the *Charter*.

CONCLUSION

[107] Nothing in the *AAIA* and its regulations, *HIPA, FOIPP* or the *Charter* prevent the Commission from publishing its decision regarding Germain's claim on the web or otherwise. The claim of Germain is dismissed.

Tab 262

CanLII

R. v. Teskey, 2007 SCC 25 (CanLII), [2007] 2 SCR 267

Source:	Supreme Court of Canada
Date:	2007-06-07
File number:	31544
Other citations:	280 DLR (4th) 486 — 364 NR 164 — [2007] 8 WWR 385 — 404 WAC 361 — 412 AR 361 — 74 Alta LR (4th) 1 — 220 CCC (3d) 1 — 47 CR (6th) 78 — 73 WCB (2d) 457 — EYB 2007-120453 — JE 2007-1147 — [2007] SCJ No 25 (QL) — [2007] ACS no 25
Citation:	R. v. Teskey, 2007 SCC 25 (CanLII), [2007] 2 SCR 267, <https://canlii.ca/t/1rq5q>, retrieved on 2026-01-18
Most recent unfavourable mention	CZ v RB, 2019 ABCA 445 (CanLII) [...] [38] Contrary to the mother's arguments, this case **is distinguishable from Teskey** . [...]

••••••••••••
•••

SUPREME COURT OF CANADA

CITATION: R. *v.* Teskey, [2007] 2 S.C.R. 267, 2007 SCC 25

DATE: 20070607
DOCKET: 31544

BETWEEN:

Leo Matthew Teskey
Appellant
and
Her Majesty The Queen
Respondent

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 24) Charron J. (McLachlin C.J. and Binnie, LeBel, Fish and Rothstein JJ. concurring)

DISSENTING REASONS: (paras. 25 to 52) Abella J. (Bastarache and Deschamps JJ. concurring)

---

r. *v.* teskey

Leo Matthew Teskey *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Teskey

Neutral citation: 2007 SCC 25.

File No.: 31544.

2007: February 22; 2007: June 7.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal of alberta

Criminal law — Trial — Judgments — Trial judge delivering extensive written reasons 11 months after guilty verdicts rendered — Whether Court of Appeal erred in considering written

reasons when deciding accused's appeal from convictions — Whether reasonable person would apprehend that trial judge's written reasons did not reflect real basis for convictions.

The accused was charged with aggravated assault, break and enter, and possession of stolen property. The evidence given during the five-day trial was complex, almost entirely circumstantial and contained some contradictions. The trial judge reserved his decision and, four months later, after repeated adjournments, convicted the accused on all charges, in each case essentially saying only that the Crown had proved all the essential elements of the offence beyond a reasonable doubt. The trial judge also mentioned his intention to issue written reasons, which were eventually delivered, more than 11 months after the verdicts and long after the accused's notice of appeal had been filed. The Court of Appeal found that the oral reasons did not pass the test of sufficiency, but a majority applied the presumption of regularity, considered the extensive written reasons and upheld the convictions. The dissenting judge would not have considered the written reasons. The accused appealed to this Court as of right and the only issue was whether the Court of Appeal should have considered the trial judge's written reasons.

Held (Bastarache, Deschamps and Abella JJ. dissenting): The appeal should be allowed, the convictions set aside and a new trial ordered.

Per McLachlin C.J. and Binnie, LeBel, Fish, **Charron** and Rothstein JJ.: Although not precluded from announcing a verdict with "reasons to follow", a trial judge in all cases should be mindful of the importance that justice not only be done but also that it appear to be done. Reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning. The necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. Since trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality, the reasons are presumed to reflect the reasoning

underlying the decision. Fairness and impartiality must not only be subjectively present but must also be objectively demonstrated to the informed and reasonable observer. While the presumption can be displaced, the onus is on the appellant to present cogent evidence showing that, in all the circumstances, a reasonable person would apprehend that the reasons constitute an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to it. Here, the written reasons should not have been considered by the Court of Appeal. While the written reasons do not appear to have been crafted to answer points raised in the appeal, in the particular circumstances of this case, a reasonable person would apprehend that these reasons, delivered more than 11 months after the verdict was rendered, did not reflect the real basis for the convictions. Without this requisite link, the written reasons provide no opportunity for meaningful appellate review of the correctness of the decision. However, the delay in rendering reasons, in and of itself, does not give rise to this apprehension. In this case, it is the combination of several factors that constitutes cogent evidence sufficient to rebut the presumption of integrity and impartiality. [2] [17-23]

Per Bastarache, Deschamps and **Abella** JJ. (dissenting): The presumption of judicial integrity acknowledges that judges are bound by their judicial oaths and will carry out the duties they have sworn to uphold. This includes not only a presumption of impartiality, but also of legal knowledge. The presumption of integrity is rebuttable only by cogent evidence. The threshold for displacing the presumption is high: it must be demonstrated that a reasonably informed person would be satisfied that there was a real likelihood that the trial judge had not complied with the judicial oath of office in the manner and timing of the issuance of the reasons. The presumption is not to insulate decisions from judicial review but to ensure that inappropriate assumptions, such as bias, are not idiosyncratically factored into the review. [28-29] [34] [40]

A delay, either in reaching a result or in explaining it, would not lead a reasonably informed observer to conclude that the judge had disregarded the oath of office and would not, without more, represent an error of law justifying ignoring either the result or the reasons. Issuing the reasons after a verdict does not mean that the verdict was not thought through before it was

delivered. Reasons explain what a judge has decided to do and should be accepted as being honest reflections of that decision, whether delivered with or after the result, unless their content reflects the absence of judicial integrity. Inordinate delay may result in critical comment by a reviewing court but should not result in a refusal even to consider the reasons. Such an approach would do a greater disservice to the public perception of the integrity of the system than an undesirable delay. Here, given the complexity of the case, the time taken to reach the verdicts and to articulate reasons for judgment, even when considered with the other surrounding factors identified by the majority, did not represent the level of cogency necessary to displace the presumption of integrity. The reasons were responsive to the facts and issues at trial and were entitled to be reviewed on their merits. [40] [44] [46] [47] [50] [51]

Cases Cited

By Charron J.

Referred to: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26; *Crocker v. Sipus* (1992), 1992 CanLII 7466 (ON CA), 57 O.A.C. 310; *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484.

By Abella J. (dissenting)

R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26; *Robbie the Pict v. Her Majesty's Advocate*, [2003] ScotHC 12; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, 2003 SCC 45; *R. v. Elrick*, [1983] O.J. No. 515 (QL); *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 1994 NSCA 130 (CanLII), 133 N.S.R. (2d) 50; *R. v. Lin*, [1995] B.C.J. No. 982 (QL); *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484; *R. v. Burns*, 1994 CanLII 127 (SCC), [1994] 1 S.C.R. 656.

Tab 263

CanLII

Law Society of Ontario v. Harrison, 2024 ONLSTA 1 (CanLII)

Source:	Law Society Tribunal
Date:	2024-01-24
File number:	23A-015
Citation:	Law Society of Ontario v. Harrison, 2024 ONLSTA 1 (CanLII), <https://canlii.ca/t/k2gb7>, retrieved on 2026-01-18

LAW SOCIETY TRIBUNAL
APPEAL DIVISION

Citation: *Law Society of Ontario v. Harrison*, 2024 ONLSTA 1
Date: January 24, 2024
Tribunal File No.: 23A-015

BETWEEN:

Danielle Shannon Harrison

Appellant

- and -

Law Society of Ontario

Respondent in appeal

Before: Raj Anand (chair), Geneviève Painchaud, Frederika M. Rotter, Andrew Spurgeon, Tanya Walker

Heard: October 27 and November 20, 2023, by videoconference

Appearances:
Nader Hasan and Ryan Atkins, for the appellant
Louise Hurteau and Elizabeth Glasbergen, for the respondent in appeal

[54] Rule 11.9 reads:

> 11.9 (1) A panel shall not permit cross-examination that is repetitive, abusive or otherwise inappropriate.
>
> (2) A panel may reasonably limit further examination or cross-examination of a witness where it is satisfied the examination or cross-examination has been sufficient to disclose fully and fairly all matters relevant to the issues in the proceeding.

[55] A few minutes later, the Lawyer's counsel asked, "what it is that I'm alleged to have done, a repetitive, abusive or otherwise inappropriate…." The chair responded, "Ending it because of its excessive length."

[56] Rule 11.9 was not applicable here. Clearly a panel has discretion to place reasonable limits on cross-examination as part of its hearing management function. The Tribunal must act in appropriate circumstances to protect an important public interest in fair and expeditious proceedings.

[57] The exercise of a hearing panel's authority to govern its own process in this way is obviously fact-specific, and the two subsections quoted above reflect some of the relevant circumstances that can trigger a ruling to curtail cross-examination. The appeal panel expanded on these factors in *Fuhgeh*:[15]

> In *Bahimanga* [2019 ONLSTA 25] the appeal panel held that a panel is entitled to assess a fair time allotment for particular aspects of the hearing, having regard to the outstanding issues, the length of the proceeding, options for streamlining evidence and other factors. Considering how the panel conducted the hearing as a whole, we find that there was no unfairness in the case management approach taken by the panel.

[58] In this case, the nature of the proceeding was such that Ms. Harrison was entitled to a high level of procedural fairness and natural justice. A proceeding of this nature would almost certainly have potential implications for a licensee's reputation and livelihood. As the Divisional Court recently stated in the context of a conduct proceeding:

> Given the nature of the tribunals involved, and the implications for the lawyers subject to the discipline process, a high level of procedural fairness and natural justice is required. Failure to comply with such standards would result in the decisions being set aside.[16]

[59] The hearing process also must consider the public interest and the imperative of promoting public confidence in the regulation of the legal professions.

[60] Faced with a clear and repeated objection to the proposed time limits, the hearing panel was duty-bound, in this case, to engage in a proper balancing of these countervailing factors, and to properly apply them to the witnesses and the specific case that was being presented.

[61] The panel made this error because of its exclusive focus on a one-day time limit to hear the case. There never was a one-day time limit, although that might be a reasonable estimate, and indeed one day is the starting point for the balancing process in a typical interlocutory suspension case. The hearing panel however never left that starting point. It never considered the pros and cons of a firm one-day time limit, and the adverse impacts and relative prejudice that would accrue to each side in the presentation of its case. Its reasons show that there was no consideration of options such as:

- recesses during the day;
- additional time during that hearing day;
- the availability of another hearing day in short order;
- a concrete enumeration of issues that the parties had not had a full opportunity to present;
- the degree to which cross-examination time had been wasted; and
- the possibility of written evidence or submissions, or any other compromise or alternative that would lessen the impact of the arbitrarily imposed time limit.

[62] We conclude that for these reasons, the hearing panel breached the natural justice and procedural fairness rights of the appellant.

MINORITY REASONS ON GROUND 3

[63] Raj Anand and Frederika M. Rotter:– These are the reasons of the minority on the third ground of appeal.

The *Teskey* issue

[64] In the weeks following the brief oral decision granting the Law Society's motion for a suspension, the appellant's counsel made several attempts to obtain the panel's written reasons. When they were released on June 2, 2023, Ms. Harrison saw (as she stated in her appeal factum) that the reasons "bore an uncanny resemblance to the factum the Law Society had filed with the hearing panel before any responding written evidence, and any oral evidence at all, had been adduced." The appellant's factum contained a chart showing that the reasons included a great deal of "cut and paste" from the Law Society's written statement of the case.

[65] Based on these facts, the appellant submitted that the hearing panel's decision falls within the *Teskey* principle and should be set aside. In *Teskey,* the Supreme Court of Canada quashed a conviction that had been announced with reasons to follow because of the 11-month delay between the decision and the release of the reasons. There was a reasonable apprehension that the reasons amounted to an after the fact justification for the ruling, rather than an articulation of the reasoning that actually led to the result.

[66] Here the appellant pointed to the 18 pages of single-spaced reasons, based on a written record of over 3,000 pages plus an oral hearing, after an oral bottom-line ruling delivered nine minutes after the conclusion of the hearing. Ms. Harrison argues that the hearing panel could not have, in nine minutes, performed the analysis that ultimately took 18 pages to express in writing. She argues that the best evidence of this is the extent to which the reasons simply adopt and often copy the Law Society's original factum.

[67] In our view, this case bears little resemblance to *Teskey*. There the reasons were requested and promised several times. After completing the trial, the judge adjourned the case about six times over three months, then delivered an oral judgment, and then gave written reasons 11 months later, many months after the accused had delivered his notice of appeal. In these circumstances, the majority of the Supreme Court held that the reasons "were entirely crafted after the announcement of the verdict", dealt with issues that had been raised on appeal, and created an appearance that the trial judge was "advocating a particular result."[17]

[68] The court was nevertheless at pains to stress the salutary nature of an immediate decision, with reasons to follow, in many circumstances.[18] In Ms. Harrison's case, the

Tab 264

CanLII

Little Start Child Care Inc. v. Director, Child Care and Early Years Act, 2014, 2021 CanLII 21001 (ON LAT)

Source:	Ontario Licence Appeal Tribunal
Date:	2021-03-15
File number:	12508/CCEYA
Citation:	Little Start Child Care Inc. v. Director, Child Care and Early Years Act, 2014, 2021 CanLII 21001 (ON LAT), <https://canlii.ca/t/jdtbn>, retrieved on 2026-01-18

Citation: Little Start Child Care Inc. v. Director, Child Care and Early Years Act, **2014, 2021 ONLAT CCEYA 12508**

Date: 2021-03-15
File:12508/CCEYA

Appeal from a proposal of the Director, *Child Care and Early Years Act, 2014,* S.O. 2014, Chapter 11, Schedule 1, to refuse to renew a licence.

Between:

Little Start Child Care Inc.

Appellant

-and-

Director, *Child Care and Early Years Act, 2014*

Respondent

REASONS FOR DECISION & ORDER

ADJUDICATOR: Jennifer Friedland, Member

APPEARANCES:

For the Appellant: Jay Naster, Counsel

case from a legal perspective. It is a case that turns on its facts. Nonetheless, it is the first decision of the Tribunal under the CCEYA (previously, the *Day Nurseries Act*[7] regulated the daycare industry) and thus the decision may have broader application.

Conclusion on the issue of mootness & jurisdiction

[30] I am not persuaded that the doctrine of mootness applies to a decision that has already been made, but even if I am wrong about this, I find that the *Borowski* factors are either neutral or favourable to the proceedings continuing. Moreover, I find that in the unique circumstances of this case there are added considerations relevant to whether the proceedings should continue, namely the issue of fairness to the parties and the integrity of the Tribunal's process.

[31] I agree with the appellant's submissions that an adjudicator may announce a decision with reasons to follow. As affirmed by the Supreme Court of Canada in the context of a civil case:

> The needs of justice in a given case may be better served by an announcement of the disposition of the matter as soon as the deliberation process is completed but before full written reasons can be made available to the parties.[8]

[32] I find that it would subvert the Tribunal's process for the Director to be able to circumvent the release of my reasons by renewing the appellant's licence in advance of the order it knew was coming and then claiming that the whole of the proceedings are now moot.

[33] The Director submits that the decision to renew the licence was not made merely to "action" the pending order; rather, it resulted from the Director's duty to continually reassess its NOP and deciding now that it should be withdrawn. However, no affidavit evidence was provided in support of why this decision would suddenly now be made in light of over a year of litigation in which it pursued the opposite outcome. In such circumstances, I prefer the more obvious inference – that the Director did in fact wish to prevent the release of reasons that it anticipated would be adverse to its position.

[34] Absent the appellant's agreement to forego my reasons for decision, I am going to exercise my discretion to maintain jurisdiction over the proceedings and issue them. To do otherwise would, in my opinion, undermine the integrity of the Tribunal and breach the appellant's right to procedural fairness.

[35] I find that it would also be an abuse of process were the Director able to circumvent the appellant's claim for costs by withdrawing its proposal and declaring the appeal moot. While I agree with the Director that there is no entitlement to costs at the Tribunal and that costs are only awarded in limited circumstances, the issue now is not the merits of the claim but whether the Tribunal has jurisdiction to hear it. In this regard, I note that the appellant sought costs at the end of the hearing, and the parties agreed to a process by which submissions would only be made *after my decision was released*, assuming either party still found it advisable to bring such a claim. It was further agreed that I would set out the timeframe for the delivery of such submissions in my final order.

[36] Given the process agreed to by the parties during the hearing, combined with the Tribunal's authority to control its process, I find that it would be unfair to deny the

Tab 265

CanLII

C.B. Powell Limited v. Canada (Border Services Agency), 2010 FCA 61 (CanLII)

Source:	Federal Court of Appeal
Date:	2010-02-23
File number:	A-245-09
Other citations:	[2011] 2 FCR 332 — 400 NR 367 — 185 ACWS (3d) 914 — AZ-50613379 — [2011] EXP 3678 — [2010] CarswellNat 391 — [2010] FCJ No 274 (QL)
Citation:	C.B. Powell Limited v. Canada (Border Services Agency), 2010 FCA 61 (CanLII), <https://canlii.ca/t/289v5>, retrieved on 2026-01-18
Acknowledgements:	The official copies of the Federal Courts Reports' decisions are available on the website of the Office of the Commissioner for Federal Judicial Affairs Canada.

[2011] 2 F.C.R. 332

A-245-09

2010 FCA 61

The President of the Canada Border Services Agency and the Attorney General of Canada (*Appellants*)

v.

C.B. Powell Limited (*Respondent*)

INDEXED AS: C.B. POWELL LIMITED V. CANADA (BORDER SERVICES AGENCY)

Federal Court of Appeal, Nadon, Evans and Stratas JJ.A.—Montréal, February 2; Ottawa, February 23, 2010.

Customs and Excise — Customs Act — Appeal from Federal Court decision allowing judicial review seeking declaration that lack of jurisdiction ruling by President of Canadian Border Services Agency a "decision" appealable to the Canadian International Trade Tribunal (C.I.T.T.) under Customs Act, s. 67(1) — Respondent submitting customs form, subsequently realizing that incorrect tariff treatment claimed — President declining to conduct re-determination under Act, s. 60(1) — Respondent not

appealing to C.I.T.T. but applying for judicial review before Federal Court — Federal Court finding President's refusal to exercise jurisdiction "decision" appealable to C.I.T.T. — Whether presence of jurisdictional issue exceptional circumstance allowing party to launch judicial review before administrative process completed — Adjudications, appeals under Customs Act not allowing courts to become involved — Jurisdictional issues not exceptional circumstance justifying court intervention — "Jurisdiction" label to justify judicial interference not appropriate herein — Determination of "jurisdiction" by President involving same questions of law, fact that President normally considers — Calling one ruling "jurisdictional", not the other result-oriented labelling — Respondent not entitled to bypass appeal to C.I.T.T. herein — Not for Federal Court, this Court, to interpret word "decision" in s. 67(1), but for C.I.T.T. — Mueller Canada Inc. v. Minister of National Revenue not supporting belief that only Federal Court can rule that "non-decision" or "jurisdictional decision" a "decision" under s. 67(1) or that only "decisions on the merits" can be appealed to C.I.T.T. — Rule against judicial interference with ongoing administrative processes applying herein — Appeal allowed.

This was an appeal from a Federal Court decision allowing an application for judicial review seeking a declaration to the effect that the ruling of the President of the Canadian Border Services Agency (CBSA) that he did not have jurisdiction was a "decision" that could be appealed to the Canadian International Trade Tribunal (C.I.T.T.) under subsection 67(1) of the Customs Act.

The respondent had submitted a customs form to the CBSA for imported goods. The CBSA did not go beyond the form and the value for duty of the goods were deemed to be determined by what had been entered. An audit of the form revealed a mistaken tariff classification number and the CBSA invited the respondent to examine the matter before issuing a re-determination under section 59 of the Act. The respondent accepted that the classification number it had entered was wrong, but discovered that it also should have claimed a different tariff treatment. The prescribed delay to correct the tariff treatment had passed, but the respondent nevertheless advised the CBSA of the mistake. In issuing its re-determination, the CBSA corrected the classification number, but left the tariff treatment unchanged. The President declined to conduct a re-determination of the tariff treatment because the CBSA had not determined tariff treatment earlier, and therefore there was nothing for him to re-determine under subsection 60(1) of the Act. Rather than pursuing an appeal before the C.I.T.T., the respondent proceeded to the Federal Court by way of judicial review. The Federal Court, citing *Mueller Canada Inc. v. Minister of National Revenue* (*Mueller*), declared that the President's negative decision could be appealed to the C.I.T.T.

At issue was whether the presence of a jurisdictional issue is an exceptional circumstance that allows a party to launch a judicial review before the administrative process has been completed.

Held, the appeal should be allowed.

Parliament established an administrative process of adjudications and appeals under the *Customs Act* that does not allow the courts, absent exceptional circumstances, to become involved before this process is completed. The presence of jurisdictional issues is not an exceptional circumstance justifying early recourse to courts. The use of the label "jurisdiction" to justify judicial interference with ongoing administrative process is not appropriate. The inappropriateness of this labelling approach is well-illustrated by the ruling of the President in this case. The President considered his "jurisdiction" by interpreting subsection 60(1), determining the nature of the respondent's request for a ruling, and deciding whether this request fell within the scope of subsection 60(1) as interpreted. These questions of law, of fact, and of mixed fact and law, respectively, are the same questions that the President normally considers when determining the nature of imported goods, what classifications are legally available, and what classifications ought to apply to these goods. Calling one ruling "jurisdictional" and not the other, when they are both the same type, is result-oriented labelling. Applying the "jurisdictional" label to the ruling of the President under subsection 60(1) in this case did not permit the respondent to proceed to the Federal Court, bypassing the remainder of the administrative process, namely the appeal to the C.I.T.T. under subsection 67(1). It is not for the Federal Court or this Court to interpret the word "decision" in subsection 67(1) and determine whether the C.I.T.T. can hear the respondent's appeal. That is the task of the C.I.T.T. when an appeal is brought to it under subsection 67(1). *Mueller* does not support the belief that only the Federal Court can rule that a "non-decision" or "jurisdictional decision" is a "decision" under subsection 67(1), or that only "decisions on the merits" can be appealed to the C.I.T.T. under subsection 67(1). It was not the task of the Federal Court in *Mueller* to interpret the word "decision". The normal rule against judicial interference with ongoing

Tab 266

CanLII

Metro Ontario Real Estate Limited v. Corporation of the City of Orillia, 2020 ONSC 7002 (CanLII)

Source:	Divisional Court
Date:	2020-11-18
File number:	19-691-JR
Citation:	Metro Ontario Real Estate Limited v. Corporation of the City of Orillia, 2020 ONSC 7002 (CanLII), <https://canlii.ca/t/jbns4>, retrieved on 2026-01-18

CITATION: Metro Ontario Real Estate Limited v. Corporation of the City of Orillia, 2020 ONSC 7002

DIVISIONAL COURT FILE NO.: 19-691-JR

DATE: 20201118

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Swinton, Pattillo and Bloom JJ.

BETWEEN:	)	
METRO ONTARIO REAL ESTATE LIMITED	)	*Shane Rayman and Conner Harris*, for the Applicant
Applicant	)	
– **and** –	)	
THE CORPORAION OF THE CITY OF ORILLIA	)	*Robert Wood*, for the Respondent
Respondent	)	

This application for judicial review is premature

[30] Judicial review is a discretionary remedy. There is a principle of administrative law that an application for judicial review is premature and relief should be denied if the applicant has an adequate alternative remedy to address the issues (*Volochay v. College of Massage Therapists of Ontario,* 2012 ONCA 541 at paras. 68, 70 and 73; *C.B. Powell Ltd. v. Canada (Agence des services frontaliers*), 2010 FCA 61 at paras. 30-33).

[31] Metro had an adequate alternative remedy to this application for judicial review. It could have proceeded to the HON and requested an adjournment on the basis that it had had inadequate time to prepare and to participate in the hearing because of the timing of the Notice of Grounds and the timing of the disclosure. No doubt the City would have argued that there was adequate notice, and there was no element of surprise given that the Downtown Tomorrow Plan had been adopted in 2012 and the parties had been in extensive negotiations over the years with respect to the Coldwater Street extension and the redevelopment plan for the downtown. It would then have been up to the Inquiry Officer to determine whether an adjournment was warranted in the interests of a fair hearing.

[32] Counsel stated that he did not think Metro would have been successful, citing *Bezic*, above. In that case, the Divisional Court dismissed an application for judicial review of a decision of an Inquiry Officer that denied an adjournment request.

[33] It is impossible to know if Metro would have been successful, had it requested an adjournment. That would have depended in part on the Inquiry Officer's review of the disclosure and a weighing of the competing interests, including the length of the proposed adjournment and the prejudice to both parties if an adjournment was granted or not. By withdrawing from the HON, Metro precluded a review by the Inquiry Officer, who would have been in a better position than this Court to assess whether there was need for an adjournment.

[34] By coming to this Court on judicial review rather than proceeding before the Inquiry Officer, Metro has ignored the statutory process in place under the Act. I agree with the submission of the City that Metro has, in effect, engaged in a collateral attack on that process. It is not entitled to a remedy in this Court.

[35] As there has been no breach of the duty of procedural fairness, and no attempt by Metro to use the remedy available to it under the Act, this ground of judicial review fails.

The Validity of the Expropriation

[36] Metro has sought also relief that would, if granted, put an end to the whole expropriation process. It seeks an order in the nature of *certiorari* to quash the Notice of Application for Approval in April, 2019 or an order quashing and/or striking approval by City Council of the expropriation of the interests of Metro, and a declaration that the expropriation is null and void. As I said above, Metro relies on a number of arguments: that a restrictive covenant is not an interest in land that can be expropriated; that the expropriation is an abuse of process because the City has not resorted to the dispute resolution provisions of the lease; and that the expropriation is an abuse of process because the City is not pursuing a proper public purpose, as it seeks to enhance the value of the land in a future sale by getting rid of the food covenant.

[37] The application is out of time with respect to the Notice of Application for Approval (see s. 43 of the Act). However, in any event, there is no decision respecting the expropriation of the restrictive covenants in the Notice of Application for Approval that is reviewable. The Notice is just that – a notice that the expropriating authority will seek approval for the proposed expropriation.

Tab 277

CanLII

Children's Lawyer for Ontario v. Goodis, 2005 CanLII 11786 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2005-04-18
File number:	C41313
Other citations:	75 OR (3d) 309 — 253 DLR (4th) 489 — 138 ACWS (3d) 778 — 196 OAC 350 — 17 RFL (6th) 32 — 29 Admin LR (4th) 86 — [2005] CarswellOnt 1419 — [2005] OJ No 1426 (QL)
Citation:	Children's Lawyer for Ontario v. Goodis, 2005 CanLII 11786 (ON CA), <https://canlii.ca/t/1k5l8>, retrieved on 2026-01-18

Children's Lawyer for Ontario v. Goodis, Senior Adjudicator, Information and Privacy Commissioner et al.
[Indexed as: Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)]

75 O.R. (3d) 309
[2005] O.J. No. 1426
Docket: C41313

Court of Appeal for Ontario,
McMurtry C.J.O., Goudge and Blair JJ.A.
April 18, 2005

Administrative law -- Freedom of information -- Privacy Commissioner finding that s. 19 of Freedom of Information and Protection of Privacy Act had no application to request for information by former client of Children's Lawyer for Ontario -- On application by Children's Lawyer for judicial review, Commissioner arguing that s. 19 did not apply on ground that was not advanced in her reasons -- Divisional Court not erring in granting Commissioner full standing in judicial review proceedings -- Section 9(2) of Judicial Review Procedure Act entitling administrative tribunal to be party to proceedings but leaving scope of its standing to court's discretion -- Context-specific analysis supporting full standing for Commissioner and fact that Commissioner was advancing new basis for decision not constituting basis for curtailing scope of

Commissioner's standing -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 19 -- Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 9(2).

Administrative law -- Judicial review -- Procedure -- Divisional Court not erring in granting Privacy Commissioner full standing in application for judicial review of Commissioner's decision -- Section 9(2) of Judicial Review Procedure Act entitling administrative tribunal to be party to proceedings but leaving scope of its standing to court's discretion -- Context-specific analysis supporting full standing for Commissioner and fact that Commissioner was advancing new basis for decision on judicial review not constituting basis for curtailing scope of Commissioner's standing -- Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, s. 19 -- Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 9(2).

The Children's Lawyer for Ontario (the "CLO") had acted for the requester in three different legal proceedings. When she reached majority, the requester asked for a copy of her "complete files". The CLO treated this as a request for information under the Freedom of Information and Protection of Privacy Act, ("FIPPA") and denied access to certain documents based on ss. 13 and 19 of FIPPA. The requester appealed to the Privacy Commissioner. The Commissioner allowed the [page310] appeal, holding that ss. 13 and 19 of FIPPA did not apply. The CLO applied for judicial review of that decision. The Commissioner opposed that application. In her factum, she argued that the second branch of s. 19 of FIPPA was not available to the CLO because the CLO was not acting as Crown counsel when she represented the requester in the various legal proceedings. This reason was not expressly set out in the Commissioner's original decision; in that decision, she had found that the second branch of s. 19 did not apply because it does not protect the CLO from a request from an individual she has represented. The CLO moved for an order that the Commissioner be denied standing, or at least prohibited from arguing that her decision was correct on a basis that was not given in her original decision. The Divisional Court dismissed the preliminary motion, finding that s. 9(2) of the Judicial Review Procedure Act gave the Commissioner the right to be a party to the judicial review application and that the court ought not exercise its discretion to limit the Commissioner's participation because the court would thereby deny itself legitimate and helpful submissions. The court then dismissed the judicial review application. The CLO appealed, challenging the role that the Commissioner was permitted to play in the Divisional Court.

Held, the appeal should be dismissed.

Section 9(2) of the Judicial Review Procedure Act entitles an administrative tribunal to be a party to the proceedings but leaves to the court's discretion the scope of its standing. Given the wide variety of administrative tribunals and types of decisions that are subjected to judicial review, the court should exercise this discretion paying attention to the context presented in the particular application. The two most significant considerations are the importance of having a fully informed adjudication of the issues before the court and the importance of maintaining tribunal impartiality. These two considerations will have to be weighed and balanced in almost every case where the scope of a tribunal's standing is in issue. Considerations which may be relevant in assessing the seriousness of the impartiality concern and the need for full argument are the nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to kno wledgeably respond to the attack on the tribunal's decision. The last of those factors will loom largest where the judicial review application would otherwise be completely unopposed.

In this case, the requester played no part in the proceedings from the beginning. If the Commissioner were denied standing, the CLO would have been the only party before the Divisional Court. As well, the statutory scheme administered by the Commissioner was specialized. With full standing, the Commissioner's expert familiarity with the statute provided an important assurance of a fully informed adjudication. The issues raised by the judicial review application were fundamentally ones of statutory interpretation. If the Commissioner were to

address the court on those issues, its ability to act impartially in future cases would not be adversely affected. The fact that in this case the Commissioner was defending her decision on a different basis than that offered in her reasons for decision did not warrant curtailing the scope of her standing. The "Crown counsel" argument was not inconsistent with the reason offered in the decision and could in fact be said to be implicit in it. Moreover, the CLO was required by s. 19 to positively establish that it was Crown counsel in order to take advantage of the protection offered by the second branch of s. 19. The CLO did not seek to do so before the Commissioner. The result was that the decision under review was simply silent on the question. Finally, if the Commissioner's standing were to preclude her from making this argument there would be no [page311] guarantee that the Divisional Court would hear it from anyone else, with a resulting risk to a fully informed adjudication. The Divisional Court did not err in exercising its discretion to refuse the CLO's attempt to preclude or limit the Commissioner's standing.

APPEAL from the judgment of the Divisional Court (O'Driscoll, Lane and Kozak JJ.) reported at (2003), 2003 CanLII 72347 (ON SCDC), 66 O.R. (3d) 692, [2003] O.J. No. 3522 (Div. Ct.) dismissing an application for a judicial review of a decision of the Privacy Commissioner.

Canadian Assn. of Industrial, Mechanical & Allied Workers, Local 14 v. Paccar of Canada Ltd., 1989 CanLII 49 (SCC), [1989] 2 S.C.R. 983, [1989] S.C.J. No. 107, 40 B.C.L.R. (2d) 1, 62 D.L.R. (4th) 437, 102 N.R. 1, [1989] 6 W.W.R. 673, 89 C.L.L.C. 14,050; Northwestern Utilities Ltd. v. Edmonton (City), 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684, 7 Alta. L.R. (2d) 370, 89 D.L.R. (3d) 161, 23 N.R. 564, consd Other cases referred B.C.G.E.U. v. British Columbia (Industrial Relations Council), 1988 CanLII 2812 (BC CA), [1988] B.C.J. No. 786, 26 B.C.L.R. (2d) 145 (C.A.); Consolidated-Bathurst Packaging Ltd. and International Woodworkers, Local 2-69 (Re), 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, [1990] S.C.J. No. 20, 73 O.R. (2d) 676n, 38 O.A.C. 321, 68 D.L.R. (4th) 524, 105 N.R. 161, 90 C.L.L.C. 14,007, affg (1986), 1986 CanLII 2498 (ON CA), 56 O.R. (2d) 513, [1986] O.J. No. 828, 15 O.A.C. 398, 31 D.L.R. (4th) 444, 86 C.L.L.C. 14,048 (C.A.), revg (1985), 1985 CanLII 2157 (ON SC), 51 O.R. (2d) 481, 10 O.A.C. 34, 20 D.L.R. (4th) 84, 85 C.L.L.C. 14,031 (Div. Ct.) (sub nom. I.W.A. v. Consolidated-Bathurst Pkg.); Ellis-Don Ltd. v. Ontario (Labour Relations Board), 2001 SCC 4 (CanLII), [2001] 1 S.C.R. 221, [2001] S.C.J. No. 5, 52 O.R. (3d) 160n, 194 D.L.R. (4th) 385, 265 N.R. 2, 66 C.L.R.B.R. (2d) 216, 2001 C.L.L.C. 220-028, 2001 SCC 4 (sub nom. Ellis-Don Ltd. v. I.B.E.W., Local 894); Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 1998 CanLII 7154 (ON CA), 41 O.R. (3d) 464, [1998] O.J. No. 3485 (C.A.); Pushpanathan v. Canada (Minister of Citizenship and Immigration), 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46, 160 D.L.R. (4th) 193, 226 N.R. 201; Tremblay v. Quebec (Commission des affaires sociales), 1992 CanLII 1135 (SCC), [1992] 1 S.C.R. 952, [1992] S.C.J. No. 20, 90 D.L.R. (4th) 609; United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction Ltd., [2002] N.B.J. No. 114, 2002 NBCA 27, 249 N.B.R. (2d) 93, 648 A.P.R. 93, 80 C.L.R.B.R. (2d) 107 (C.A) Statutes referred to Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31, ss. 13, 19 Judicial Review Procedure Act, R.S.O. 1990, c. J.1, s. 9(2) Authorities referred to Jacobs, L.A., and T.S. Kuttner, "Discovering What Tribunals Do: Tribunal Standing before the Courts" (2002) 81 Can. Bar Rev. 616 Mullan, D.J., Essentials of Canadian Law: Administrative Law (Toronto: Irwin Law, 2001)

Leslie M. McIntosh and Elaine Atkinson, for appellant.

Freya Kristjanson and Christopher D. Bredt, for respondent.

Mary M. Thomson and Christine Lonsdale, amicus curiae.
[page312]

The judgment of the court was delivered by

Tab 278

CanLII

Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44 (CanLII), [2015] 3 SCR 147

Source:	Supreme Court of Canada
Date:	2015-09-25
File number:	35506
Other citations:	AZ-51217312 — [2015] EXP 2737 — JE 2015-1505
Citation:	Ontario (Energy Board) v. Ontario Power Generation Inc., 2015 SCC 44 (CanLII), [2015] 3 SCR 147, <https://canlii.ca/t/glb07>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

CITATION: Ontario (Energy Board) *v.* Ontario Power Generation Inc., 2015 SCC 44, [2015] 2 S.C.R. 147

DATE: 20150925
DOCKET: 35506

BETWEEN:

Ontario Energy Board
Appellant
and
Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals
Respondents
- and -
Ontario Education Services Corporation
Intervener

CORAM: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

Reasons for Judgment: (paras. 1 to 121)	Rothstein J. (McLachlin C.J. and Cromwell, Moldaver, Kara katsanis and Gascon JJ. concurring)
Dissenting Reasons: (paras. 122 to 161)	Abella J.

Ontario (Energy Board) *v.* Ontario Power Generation Inc., 2015 SCC 44, [2015] 2 S.C.R. 147

Ontario Energy Board *Appellant*

v.

Ontario Power Generation Inc., Power Workers' Union, Canadian Union of Public Employees, Local 1000 and Society of Energy Professionals *Respondents*

and

Ontario Education Services Corporation *Intervener*

Indexed as: Ontario (Energy Board) *v.* Ontario Power Generation Inc.

2015 SCC 44

File No.: 35506.

2014: December 3; 2015: September 25.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.

Public utilities — Electricity — Rate-setting decision by utilities regulator — Utility seeking to recover incurred or committed compensation costs in utility rates set by Ontario Energy Board — Whether Board bound to apply particular prudence test in evaluating utility costs — Whether Board's decision to disallow $145 million in labour compensation costs related to utility's nuclear operations reasonable — Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, s. 78.1(5), (6).

Administrative law — Boards and tribunals — Appeals — Standing — Whether Ontario Energy Board acted improperly in pursuing appeal and in arguing in favour of reasonableness of its own decision — Whether Board attempted to use appeal to "bootstrap" its original decision by making additional arguments on appeal.

In Ontario, utility rates are regulated through a process by which a utility seeks approval from the Ontario Energy Board for costs the utility has incurred or expects to incur in a specified period of time. Where the Board approves of the costs, they are incorporated into utility rates such that the utility receives payment amounts to cover the approved expenditures. The Board disallowed certain payment amounts applied for by Ontario Power Generation ("OPG") as part of its rate application covering the 2011-2012 operating period. Specifically, the Board disallowed $145 million in labour compensation costs related to OPG's nuclear operations on the grounds that OPG's labour costs were out of step with those of comparable entities in the regulated power generation industry. A majority of the Ontario Divisional Court dismissed OPG's appeal and upheld the decision of the Board. The Court of Appeal set aside the decisions of the Divisional Court and the Board and remitted the matter to the Board for redetermination in accordance with its reasons.

The crux of OPG's argument here is that the Board is legally required to compensate OPG for all of its prudently committed or incurred costs. OPG asserts that prudence in this context has a particular methodological meaning that requires the Board to assess the reasonableness of OPG's decision to incur or commit to costs at the time the decisions to incur or commit to the costs

were made and that OPG ought to benefit from a presumption of prudence. The Board on the other hand argues that a particular prudence test methodology is not compelled by law, and that in any case the costs disallowed here were not committed nuclear compensation costs, but are better characterized as forecast costs.

OPG also raises concerns regarding the Board's role in acting as a party on appeal from its own decision, arguing that the Board's aggressive and adversarial defence of its decision was improper, and the Board attempted to use the appeal to bootstrap its original decision by making additional arguments on appeal. The Board argues that the structure of utilities regulation in Ontario makes it necessary and important for it to argue the merits of its decision on appeal.

Held (Abella J. dissenting): The appeal should be allowed. The decision of the Court of Appeal is set aside and the decision of the Board is reinstated.

Per McLachlin C.J. and Rothstein, Cromwell, Moldaver, Karakatsanis and Gascon JJ.: The first issue is the appropriateness of the Board's participation in the appeal. The concerns with regard to tribunal participation on appeal from the tribunal's own decision should not be read to establish a categorical ban. A discretionary approach provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis. Because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. Further, some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute. The following factors are relevant in informing the court's exercise of its discretion: statutory provisions addressing the structure, processes and role of the particular tribunal and the mandate of the tribunal, that is, whether the function of the tribunal is to adjudicate individual conflicts between parties or whether it serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest. The importance of fairness, real and perceived, weighs more heavily

against tribunal standing where the tribunal served an adjudicatory function in the proceeding. Tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality.

Consideration of these factors in the context of this case leads to the conclusion that it was not improper for the Board to participate in arguing in favour of the reasonableness of its decision on appeal. The Board was the only respondent in the initial review of its decision. It had no alternative but to step in if the decision was to be defended on the merits. Also, the Board was exercising a regulatory role by setting just and reasonable payment amounts to a utility. In this case, the Board's participation in the instant appeal was not improper.

The issue of tribunal "bootstrapping" is closely related to the question of when it is proper for a tribunal to act as a party on appeal or judicial review of its decision. The standing issue concerns the types of argument a tribunal may make, while the bootstrapping issue concerns the content of those arguments. A tribunal engages in bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. A tribunal may not defend its decision on a ground that it did not rely on in the decision under review. The principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, absent a power to vary its decision or rehear the matter, it cannot use judicial review as a chance to amend, vary, qualify or supplement its reasons. While a permissive stance towards new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. In this case, the Board did not impermissibly step beyond the bounds of its original decision in its arguments before the Court. The arguments raised by the Board on appeal do not amount to impermissible bootstrapping.

The merits issue concerns whether the appropriate methodology was followed by the Board in its disallowance of $145 million in labour compensation costs sought by OPG. The

just-and-reasonable approach to recovery of the cost of services provided by a utility captures the essential balance at the heart of utilities regulation: to encourage investment in a robust utility infrastructure and to protect consumer interests, utilities must be allowed, over the long run, to earn their cost of capital, no more, no less. In order to ensure the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services.

The *Ontario Energy Board Act, 1998* does not prescribe the methodology the Board must use to weigh utility and consumer interests when deciding what constitutes just and reasonable payment amounts to the utility. However, the *Ontario Energy Board Act, 1998* places the burden on the applicant utility to establish that payment amounts approved by the Board are just and reasonable. It would thus seem inconsistent with the statutory scheme to presume that utility decisions to incur costs were prudent. The Board has broad discretion to determine the methods it may use to examine costs — but it cannot shift the burden of proof contrary to the statutory scheme.

The issue is whether the Board was bound to use a no-hindsight, presumption of prudence test to determine whether labour compensation costs were just and reasonable. The prudent investment test, or prudence review, is a valid and widely accepted tool that regulators may use when assessing whether payments to a utility would be just and reasonable. However, there is no support in the statutory scheme for the notion that the Board should be required as a matter of law, under the *Ontario Energy Board Act, 1998* to apply the prudence test such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Where a statute requires only that the regulator set "just and reasonable" payments, as the *Ontario Energy Board Act, 1998* does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed

payment amounts. This is particularly so where, as here, the regulator has been given express discretion over the methodology to be used in setting payment amounts.

Where the regulator has discretion over its methodological approach, understanding whether the costs at issue are "forecast" or "committed" may be helpful in reviewing the reasonableness of a regulator's choice of methodology. Here, the labour compensation costs which led to the $145 million disallowance are best understood as partly committed costs and partly costs subject to management discretion. They are partly committed because they resulted from collective agreements entered into between OPG and two of its unions, and partly subject to management discretion because OPG retained some flexibility to manage total staffing levels in light of, among other things, projected attrition of the workforce. It is not reasonable to treat these costs as entirely forecast. However, the Board was not bound to apply a particular prudence test in evaluating these costs. It is not necessarily unreasonable, in light of the particular regulatory structure established by the *Ontario Energy Board Act, 1998*, for the Board to evaluate committed costs using a method other than a no-hindsight prudence review. Applying a presumption of prudence would have conflicted with the burden of proof in the *Ontario Energy Board Act, 1998* and would therefore not have been reasonable. The question of whether it was reasonable to assess a particular cost using hindsight should turn instead on the circumstances of that cost.

In this case, the nature of the disputed costs and the environment in which they arose provide a sufficient basis to find that the Board did not act unreasonably in not applying the prudent investment test in determining whether it would be just and reasonable to compensate OPG for these costs and disallowing them. Since the costs at issue are operating costs, there is little danger that a disallowance of these costs will have a chilling effect on OPG's willingness to incur operating costs in the future, because costs of the type disallowed here are an inescapable element of operating a utility. Further, the costs at issue arise in the context of an ongoing repeat-player relationship between OPG and its employees. Such a context supports the reasonableness of a regulator's decision to weigh all evidence it finds relevant in striking a just and reasonable balance between the utility and consumers, rather than confining itself to a no-hindsight approach. There is no dispute that collective agreements are "immutable" between employees and the utility. However,

if the legislature had intended for costs under collective agreements to also be inevitably imposed on consumers, it would not have seen fit to grant the Board oversight of utility compensation costs. The Board's decision in no way purports to force OPG to break its contractual commitments to unionized employees. It was not unreasonable for the Board to adopt a mixed approach that did not rely on quantifying the exact share of compensation costs that fell into the forecast and committed categories. Such an approach represents an exercise of the Board's methodological discretion in addressing a challenging issue where these costs did not fit easily into one category or the other.

The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run. Nevertheless, the disallowance was intended to send a clear signal that OPG must take responsibility for improving its performance. Such a signal may, in the short run, provide the necessary impetus for OPG to bring its compensation costs in line with what, in the Board's opinion, consumers should justly expect to pay for an efficiently provided service. Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the *Ontario Energy Board Act, 1998*.

Per Abella J. (dissenting): The Board's decision was unreasonable because the Board failed to apply the methodology set out for itself for evaluating just and reasonable payment amounts. It both ignored the legally binding nature of the collective agreements between Ontario Power Generation and the unions and failed to distinguish between committed compensation costs and those that were reducible.

The Board stated in its reasons that it would use two kinds of review in order to determine just and reasonable payment amounts. As to "forecast costs", that is, those over which a utility retains discretion and can still be reduced or avoided, the Board explained that it would review such costs using a wide range of evidence, and that the onus would be on the utility to demonstrate that its forecast costs were reasonable. A different approach, however, would be applied to those costs the company could not "take action to reduce". These costs, sometimes called "committed costs", represent binding commitments that leave a utility with no discretion about whether to make the payment. The Board explained that it would evaluate these costs using a

"prudence review". The application of a prudence review does not shield these costs from scrutiny, but it does include a presumption that the costs were prudently incurred.

Rather than apply the methodology it set out for itself, however, the Board assessed *all* compensation costs in Ontario Power Generation's collective agreements as adjustable forecast costs, without determining whether any of them were costs for which there is no opportunity for the company to take action to reduce. The Board's failure to separately assess the compensation costs committed as a result of the collective agreements from other compensation costs, ignored not only its own methodological template, but labour law as well.

The compensation costs for approximately 90 per cent of Ontario Power Generation's regulated workforce were established through legally binding collective agreements which obligated the utility to pay fixed levels of compensation, regulated staffing levels, and provided unionized employees with employment security. The obligations contained in these collective agreements were immutable and legally binding commitments. The agreements therefore did not just leave the utility with limited flexibility regarding overall compensation or staffing levels, they made it *illegal* for the utility to alter the compensation and staffing levels of 90 per cent of its regulated workforce in a manner that was inconsistent with its commitments under the agreements.

The Board, however, applying the methodology it said it would use for the utility's forecast costs, put the onus on Ontario Power Generation to prove the reasonableness of all its compensation costs and concluded that it had failed to provide compelling evidence or documentation or analysis to justify compensation levels. Had the Board used the approach it said it would use for costs the company had no opportunity to reduce, it would have used an after-the-fact prudence review, with a rebuttable presumption that the utility's expenditures were reasonable.

It may well be that Ontario Power Generation has the ability to manage some staffing levels through attrition or other mechanisms that did not breach the utility's commitments under its collective agreements, and that these costs may therefore properly be characterized as forecast

costs. But no factual findings were made by the Board about the extent of any such flexibility. There is in fact no evidence in the record, nor any evidence cited in the Board's decision, setting out what proportion of Ontario Power Generation's compensation costs were fixed and what proportion remained subject to the utility's discretion. Given that collective agreements are legally binding, it was unreasonable for the Board to assume that Ontario Power Generation could reduce the costs fixed by these contracts in the absence of any evidence to that effect.

Selecting a test which is more likely to confirm the Board's assumption that collectively-bargained costs are excessive, misconceives the point of the exercise, namely, to determine whether those costs were in fact excessive. Blaming collective bargaining for what are *assumed* to be excessive costs, imposes the appearance of an ideologically-driven conclusion on what is intended to be a principled methodology based on a distinction between committed and forecast costs, not between costs which are collectively bargained and those which are not. While the Board has wide discretion to fix payment amounts that are just and reasonable and, subject to certain limitations, to establish the methodology used to determine such amounts, once the Board establishes a methodology, it is, at the very least, required to faithfully apply it.

Absent methodological clarity and predictability, Ontario Power Generation would be unable to know how to determine what expenditures and investments to make and how to present them to the Board for review. Wandering sporadically from approach to approach, or failing to apply the methodology it declares itself to be following, creates uncertainty and leads, inevitably, to needlessly wasting public time and resources in constantly having to anticipate and respond to moving regulatory targets. Whether or not one can fault the Board for failing to use a particular methodology, what the Board can unquestionably be analytically faulted for, is evaluating all compensation costs fixed by collective agreements as being amenable to adjustment. Treating these compensation costs as reducible was unreasonable.

The appeal should accordingly be dismissed, the Board's decision set aside, and the matter remitted to the Board for reconsideration.

Cases Cited

Tab 279

CanLII

Taylor v. Pivotal Integrated HR Solutions, 2021 ONSC 7720 (CanLII)

Source:	Divisional Court
Date:	2021-11-26
File number:	381/20
Citation:	Taylor v. Pivotal Integrated HR Solutions, 2021 ONSC 7720 (CanLII), <https://canlii.ca/t/jkw29>, retrieved on 2026-01-18

CITATION: Taylor v. Pivotal Integrated HR Solutions, 2021 ONSC 7720
DIVISIONAL COURT FILE NO.: 381/20
DATE: 20211126

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Ryan Bell, Nishikawa, and Shore JJ.

BETWEEN:	)	
	)	
Paul Taylor	)	
	))	Applicant/Moving Party appearing on his o
Applicant/Moving Party	))	wn behalf
	))	
– and –	)	
	))))	*Andrew Lokan*, for the Respondent Workpla
Pivotal Integrated HR Solutions and Workp		ce Safety and Insurance Appeals Tribunal
lace Safety and Insurance Appeals Tribunal		
		No one appearing for the Respondent Pivota
Respondents		l Integrated HR Solutions
	)	
	)	
	)	**HEARD at Toronto by videoconference:**
		November 18, 2021

REASONS FOR DECISION

RYAN BELL J.

Overview

[1] The applicant, Paul Taylor, moves pursuant to s. 21(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to set aside the orders of Sachs J. made October 8, 2020. The motion judge made orders adding the Workplace Safety and Insurance Appeals Tribunal as a party to Mr. Taylor's judicial review application and dismissing the application for extreme delay.

[2] Mr. Taylor asserts that the motion judge's orders should be set aside because,

i. s. 9(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 infringes s. 96 of the *Constitution Act, 1867* and s. 7 of the *Canadian Charter of Rights and Freedoms*[1];

ii. the motion judge erred in law in adding the Tribunal as a party to the application;

iii. the "Divisional Court test" for dismissing an application for judicial review infringes ss. 7 and 15 of the *Charter*; and

iv. in dismissing Mr. Taylor's application on the basis of excessive delay, the motion judge erred in law and infringed ss. 7 and 15 of the *Charter*.

Procedural History

[3] In 1997, Mr. Taylor suffered two workplace injuries while employed by his former employer. Pivotal Integrated HR Solutions is the successor to Mr. Taylor's former employer.

[4] Mr. Taylor applied to the Workplace Safety and Insurance Board for benefits. Mr. Taylor challenged the benefits he was awarded within the Board system. He then sought to have those decisions reconsidered or amended, all of which were denied.

[5] In 2005, Mr. Taylor appealed to the Tribunal. In February 2008, the Tribunal allowed Mr. Taylor's appeal in part and granted him additional benefits. The 2008 Tribunal decision is the first Tribunal decision that Mr. Taylor seeks to judicially review in his application.

[6] In October 2012, Mr. Taylor filed a request for reconsideration of the 2008 Tribunal decision. The Tribunal dismissed Mr. Taylor's application for reconsideration in June 2013. The 2013 Tribunal decision is the second Tribunal decision that Mr. Taylor seeks to judicially review in his application.

[7] On July 11, 2013, Mr. Taylor filed an application in the Superior Court of Justice under Rule 14 of the *Rules of Civil Procedure* in which he sought to challenge the 2008 Tribunal decision and the Tribunal's 2013 reconsideration decision. After receiving notice of Mr. Taylor's application, counsel for the Tribunal wrote to Mr. Taylor to advise that his application was, in essence, an application for judicial review, which had to be pursued in Divisional Court. Mr. Taylor abandoned his Rule 14 application after receiving the letter from Tribunal counsel.

[8] Mr. Taylor then commenced an action in February 2014 in the Superior Court of Justice against the Board and the Tribunal. In his action, Mr. Taylor sought the same relief as in his Rule 14 application and included a claim for substantial damages, which he subsequently amended to include punitive damages.

[9] On February 22, 2017, Price J. granted the motion of the Board and the Tribunal to strike Mr. Taylor's claim. Justice Price found that the Superior Court of Justice did not have jurisdiction to engage in a judicial review of the Tribunal's decisions in the context of an action and that Mr. Taylor's claim disclosed no reasonable cause of action. Justice Price also found that Mr. Taylor had not provided a reasonable explanation for his four-year delay in seeking a reconsideration of the 2008 Tribunal decision.

[10] Mr. Taylor's appeal of Price J.'s decision was dismissed by the Court of Appeal for Ontario on February 6, 2018. Among other things, the Court of Appeal upheld the motion judge's finding with respect to jurisdiction. Mr. Taylor's application for leave to appeal to the Supreme Court of Canada was denied on April 16, 2020.

[11] In March 2020, Mr. Taylor commenced an application for judicial review before the Superior Court of Justice, returnable on March 24, 2020, in which he sought to challenge the Tribunal's decisions. The only named party to the application was the Tribunal. The application could not proceed on March 24 due to COVID-19. In June 2020, in response to correspondence from Mr. Taylor, counsel for the Tribunal wrote to Mr. Taylor, setting out the Tribunal's position that the matter should be brought in Divisional Court. Counsel for the Tribunal also advised that if Mr. Taylor did commence an application in Divisional Court, the Tribunal would seek to have it dismissed on a number of bases, including extreme delay.

[12] On June 26, 2020, Mr. Taylor advised the Tribunal that he was abandoning his application in the Superior Court of Justice on the basis that the Tribunal "is not a legal party" and that he would be filing a "corrected notice." Counsel for the Tribunal responded that any corrected notice should be in Divisional Court and that, pursuant to s. 9 of the *JRPA*, the Tribunal should be named as a respondent.

[13] The present application for judicial review was commenced by Mr. Taylor on August 14, 2020. The only named respondent on the application was Pivotal.

The Court's jurisdiction and standard of review

[14] A panel of the Divisional Court has the authority to hear a motion to set aside the order of a single judge of the court pursuant to s. 21(5) of the *Courts of Justice Act*. The panel hearing a motion under s. 21(5) does not hear the motion to set aside *de novo*. Rather, the standard of review applicable on a s. 21(5) motion is correctness on a question of law and a palpable and overriding error with respect to an error of fact: *The Law Society of Upper Canada v. Piersanti*, 2018 ONSC 640 (Div. Ct.), at para. 9; *Canadian National Railway Company v. Teamsters Canada Railway Conference*, 2019 ONSC 3644 (Div. Ct.), at para. 9.

Analysis

Section 9(2) of the JRPA does not infringe s. 96 of the Constitution Act, 1867 and does not violate s. 7 of the Charter

[15] Section 9(2) of the *JRPA* provides:

> For the purposes of an application for judicial review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power may be a party to the application.

[16] Mr. Taylor argues that s. 9(2) of the *JRPA* infringes s. 96 of the *Constitution Act, 1867* "for matters involving workers' compensation." Mr. Taylor advances four reasons in support of his submission. First, he argues that there is a difference between "administrative functioning"

administrative boards, commissions, and tribunals, and administrative boards, commissions, and tribunals that are quasi-judicial in nature. Second, Mr. Taylor argues that the Tribunal has "misused" s. 9(2) to "circumvent the Court's inherent jurisdiction under s. 96." Third, he argues that there would be "unjust opposition" to applications for judicial review in matters of workers' compensation. Fourth, Mr. Taylor submits that the Tribunal does not provide the reviewing court with valuable insight.

[17] Mr. Taylor's arguments are without merit. Section 96 requires that tribunal proceedings be subject to the supervisory jurisdiction of the courts. As the Supreme Court of Canada summarized in *Canada (Min. Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 24, Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers. Where the legislature has created an administrative decision-maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature intended the decision-maker to be able to fulfill its mandate and to interpret the law applicable to all issues that come before it. Privative clauses may oust judicial review on questions of law and on other questions not touching jurisdiction. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield administrative decision-making from curial scrutiny entirely: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 31; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090.

[18] Section 9(2) of the *JRPA* does not affect this court's supervisory jurisdiction. It does not shield administrative tribunals such as the Tribunal from curial scrutiny entirely; rather, s. 9(2) permits tribunals to bring relevant matters to the attention of the court.

[19] Allowing an administrative tribunal such as the Tribunal to participate on an application for judicial review does not give rise to "unjust opposition" as Mr. Taylor contends. To the contrary, the presence of the administrative tribunal as a party may help to ensure that the court hears both sides of a dispute where there is no other well-informed party standing in opposition to the party challenging the tribunal decision: *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, at para. 54.

[20] Once a tribunal is a party, the court still has discretion as to the scope of participation to be accorded to the tribunal during the hearing. This involves balancing the need for fully informed adjudication against the importance of maintaining tribunal impartiality: *Hydro Ottawa v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2019 ONSC 4898 (Div. Ct.), at para. 6. This court is under no obligation to accept the submissions of a tribunal that appears before it.

[21] Nor does s. 9(2) of the *JRPA* violate Mr. Taylor's right to a fair and unbiased hearing. Mr. Taylor cites the low "rate of success" in other cases challenging Tribunal decisions before this court and essentially asks us to infer bias or lack of fairness on this basis. I draw no such inference. The Tribunal has the benefit of a strongly worded privative clause, one that the Court of Appeal has described as "the toughest privative clause known to Ontario law": *Rodrigues v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 719, at para. 22.

[22] In addition, there is nothing in s. 9(2) of the *JRPA* that violates procedural fairness, nor is the provision arbitrary or overbroad within the meaning of the s. 7 *Charter* jurisprudence. Section 9(2) does not limit the ability of the court to control its own processes by determining what it does and does not wish to hear from a tribunal: see *Hydro Ottawa*, at para. 7. Section 9(2)'s silence as to the precise limits of the tribunal's participation "necessarily leaves this issue to the court's discretion, as part of its task of ensuring that its procedures serve the interests of justice": *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2005 CanLII 11786 (ON CA), at para. 27.

The motion judge did not err in adding the Tribunal as a respondent to the application

[23] In exercising her discretion to add the Tribunal as a party to the application, the motion judge correctly applied the *JRPA* and properly considered whether the court hearing the application would benefit from the Tribunal's presence as an adversarial party. As the Supreme Court of Canada stated in *Ontario (Energy Board)*, at para. 54,

> Some cases may arise in which there is simply no other party to stand in opposition to the party challenging the tribunal decision. Our judicial review processes are designed to function best when both sides of a dispute are argued vigorously before the reviewing court. In a situation where no other well-informed party stands opposed, the presence of a tribunal as an adversarial party may help the court ensure it has heard the best of both sides of a dispute.

[24] Based on s. 9(2), the definitions of "statutory power" and "statutory power of decision" in s. 1 of the *JRPA*, and the nature of the 2008 and 2013 Tribunal decisions, the motion judge found, correctly, that the Tribunal may be added as a party. As the motion judge found, the Tribunal's decisions, which Mr. Taylor seeks to challenge on his application, are an exercise of the Tribunal's power to make a decision under the *Workplace Safety and Insurance Act* to determine Mr. Taylor's eligibility for benefits. The Tribunal's decisions are "the exercise...of a statutory power" and, under s. 9(2), "the person who is authorized to exercise the power may be a party to the application." Section 9(2) gives the administrative tribunal the right to be a party to the proceeding if the tribunal chooses to do so: *Ontario (Children's Lawyer)*, at para. 26.

[25] The motion judge properly considered that there was no other party who had appeared to oppose Mr. Taylor's application and that, even if the named respondent had appeared, it would not be "well-informed." The motion judge also considered that neither the Attorney General for Ontario nor the Attorney General for Canada had suggested that they would participate in the application. The motion judge noted that the Tribunal had been an active participant throughout these proceedings and found that its presence as an adversarial party "will ensure that the court can deal with this dispute in a fair and informed manner."

[26] The motion judge did not err in her ruling adding the Tribunal as a party to the application.

The Divisional Court's test does not violate ss. 7 or 15 of the Charter

[27] Judicial review is a discretionary remedy which can be denied on the basis of excessive delay, regardless of the merits of the case: *Ransom v. Ontario*, 2010 ONSC 3156 (Div. Ct.), at para. 4, aff'd 2010 ONSC 5594 (Div. Ct.). In exercising its discretion to dismiss an application for delay, the court will consider the following factors:

i. the length of the delay;

ii. the reasonableness of any explanation offered for the delay; and

iii. any presumed or actual prejudice suffered by the respondent as a result of that delay: *Becker v. Workplace Safety and Insurance Appeals Tribunal*, 2012 ONSC 6946 (Div. Ct.), at para. 4.

[28] Mr. Taylor submits that this test violates the security of the person, contrary to s. 7 of the *Charter*, because it violates an individual's right to a fair and unbiased hearing. Respectfully, the test does not infringe s. 7 of the *Charter*. There is no unfairness in the court considering and balancing the length of the delay, the explanation for the delay, and any presumed or actual prejudice to the respondent in exercising its discretion to dismiss an application for delay.

[29] Mr. Taylor relies on *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 for the proposition that state-imposed physical and psychological harms that are greater than ordinary stress or anxiety may breach s. 7 of the *Charter*. In my view, *Blencoe* does not assist Mr. Taylor. As the Supreme Court of Canada made clear at paras. 57-59, the court's first task is to determine which alleged harms are state-imposed, and to separate those state-imposed harms from those caused by other factors such as the stressful nature of litigation. I agree with the Tribunal that whatever harms Mr. Taylor alleges from the loss of his right to a judicial review on the merits are the result of his own conduct.

[30] Nor does the Divisional Court's test infringe s. 15 of the *Charter*. To prove a *prima facie* violation of s. 15(1) of the *Charter*, a claimant must demonstrate that the impugned law or state action a) on its face or in its impact, creates a distinction based on enumerated or analogous grounds, and b) imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage: *Fraser v. Canada (A.G.)*, 2020 SCC 28, at para. 27.

[31] Mr. Taylor has not established a *prima facie* violation of s. 15(1). First, the Divisional Court's test does not create a distinction based on enumerated or analogous grounds, either on its face or in its impact. It is a flexible test, that allows the court to take into account any reasonable explanation for the delay, including the impact of disabilities and whether or not a litigant is self-represented.

[32] Second, a flexible test that permits the court, in its discretion, to dismiss an application for judicial review – itself a discretionary remedy – on the basis of excessive delay does not impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. It does not stigmatize any group on the basis of disability and it does not perpetuate any prejudice against injured workers.

The motion judge did not err in dismissing the application for excessive delay

[33] In dismissing the application for excessive delay, the motion judge applied the correct test and legal principles. In concluding that the delay in this case has been "extraordinary", the motion judge considered that Mr. Taylor delayed 12 and a half years following the Tribunal's 2008 decision before commencing this application. She also noted Mr. Taylor's delay of more than four years before applying for a reconsideration of the 2008 Tribunal decision and that it had been more than seven years since the Tribunal issued its 2013 reconsideration decision.

[34] The motion judge considered, and ultimately rejected, Mr. Taylor's explanations for his delay. She agreed with Price J. that there was no reasonable explanation for the more than four-year period before Mr. Taylor filed his reconsideration application before the Tribunal. She found that Mr. Taylor's assertions about going to the Human Rights Commission and requesting a different hearing panel were not established on the record before her. She found that, contrary to Mr. Taylor's submissions, he was provided with accurate advice from the Tribunal's counsel, on more than one occasion, about the legal avenue he should pursue. The motion judge concluded that although Mr. Taylor was entitled to ignore the advice he received and to seek to litigate his concerns in inappropriate forums, he could not rely on his choices to excuse his delay in proceeding to judicially review the Tribunal's decisions in a proper manner.

[35] On the issue of prejudice to the Tribunal, the motion judge observed, correctly, that when a delay reaches the magnitude of the delay in the present case, prejudice can be presumed. In his judicial review application, Mr. Taylor relies, in part, on alleged procedural defects in the Tribunal's 2008 decision. As the motion judge observed, it is difficult for any body to effectively respond to allegations regarding the conduct of a hearing that occurred more than 12 years ago. The motion judge found that the Tribunal's interest in timeliness and finality would be severely prejudiced if its decisions continued to be challenged a dozen years after they were made.

[36] The motion judge did not err in concluding that the delay in this case was excessive, that there was no reasonable explanation for the delay, and that the Tribunal would suffer prejudice if the application was allowed to proceed. Her findings were supported by the record before her.

[37] Finally, contrary to Mr. Taylor's submission, the motion judge did not fail to accommodate Mr. Taylor as a self-represented litigant. As the motion judge correctly observed at para. 39 of her reasons, "[w]hile some allowance can be made to accommodate the known difficulties that self-represented people encounter, that allowance cannot be made at the expense of the proper functioning of the administration of justice." To the motion judge's observation I would add, "[s]elf-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures": Canadian Judicial Council's *Statement of Principles on Self-represented Litigants*, at p. 5.

Disposition

[38] For these reasons, I would dismiss Mr. Taylor's motion. With respect to costs, the Tribunal seeks costs in the amount of $1,000. This amount is reasonable. It is ordered that Mr. Taylor shall pay the Tribunal its costs fixed in the amount of $1,000, all inclusive.

Ryan Bell J.

I agree Nishikawa J.

I agree Shore J.

Released: November 26, 2021

CITATION: Taylor v. Pivotal Integrated HR Solutions, 2021 ONSC 7720
DIVISIONAL COURT FILE NO.: 381/20
DATE: 20211126

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Ryan Bell, Nishikawa, and Shore JJ.

BETWEEN:

Paul Taylor

Applicant/Moving Party

– and –

Pivotal Integrated HR Solutions and Workplace Safety a nd Insurance Appeals Tribunal

Respondents

REASONS FOR DECISION

Ryan Bell J.

Released: November 26, 2021

---

[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Tab 280

CanLII

Henthorne v. British Columbia Ferry Services Inc., 2011 BCCA 476 (CanLII)

Source:	Court of Appeal for British Columbia
Date:	2011-11-24
File number:	CA038984
Other citations:	344 DLR (4th) 292 — 24 BCLR (5th) 306 — 313 BCAC 124
Citation:	Henthorne v. British Columbia Ferry Services Inc., 2011 BCCA 476 (CanLII), <https://canlii.ca/t/fp0gg>, retrieved on 2026-01-18

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Henthorne v. British Columbia Ferry Servic es Inc.,* 2011 BCCA 476

Date: 20111124
Docket: CA038984

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; and the *Workers Compensation Act*, R.S.B.C. 1996, c. 492; and Decisions of the Workers' Compensation Appeal Tribunal rendered on March 11, 2010 (Decision No. WCAT-2010-00733), and June 10, 2010 (Decision No. WCAT-2010-01612)

Between:

Colin Henthorne

Appellant
(Petitioner)

And

British Columbia Ferry Services Inc. and Workers' Compensation Appeal Tribunal

Respondents
(Respondents)

arising from *Paccar.* But even if a more nuanced 'balancing' approach like that suggested in *Children's Lawyer* were to be mandated in British Columbia, that approach would not in my view militate in favour of permitting WCAT to make the submissions it has in the case at bar.

[42] As already noted, no jurisdictional error (in the narrow sense suggested by *Dunsmuir, supra,* at para. 59) or error in the choice of standard of review was advanced here; nor is there an allegation of a breach of the rules of natural justice. The appeal does not involve the construction of the *Workers Compensation Act* or Regulations. The dispute is essentially a private one between Mr. Henthorne and his former employer, in which a private remedy is sought. The employer, a large corporation, is well represented and has made extensive and helpful submissions. The Tribunal's reasons for reversing the decision of first instance dealt at length with the issues that subsequently became the focus of the judicial review. In these circumstances, there is little that the Tribunal could add, or has in fact added, to the proper adjudication of the appeal. As against this, the importance of fairness, real and perceived, weighs more heavily. To permit both the employer and the tribunal whose decision is being reviewed to be lined up against the appellant does not seem to me to be "just and efficient" (see *Orange Julius Canada Ltd. v. Surrey (City)* 1999 BCCA 430 (Chambers) at para. 7), particularly at a time when courts are being urged to ensure the speedy resolution of disputes.

[43] I would grant Mr. Henthorne's motion to strike the factum filed by WCAT.

[44] Before returning to the substantive appeal, I should note the comment at para. 60 of *Children's Lawyer, supra,* that the proper procedure for seeking to limit the standing of an administrative tribunal is for the applicant to file a notice of motion and for additional material then to be filed. The motion can then be heard at the same time as the main appeal. The Court observed that this approach should not unduly complicate judicial review proceedings. The difficulty, however, is that in each case the tribunal in question files the additional material it wishes, which the appellant must then respond to in writing, before the main appeal is heard. Thus there is no real savings in time and expense if the question of standing is ultimately decided against the tribunal. Further, once the court has read the material in preparation for the appeal, it will be the rare appellant who takes the trouble to make a motion to strike. Given this, I am of the view that the appellate court should not hesitate to make an appropriate costs order if *Northwestern Utilities* is still to have any practical effect.

The Main Question

[45] I turn finally to the substantive appeal. Mr. Dalziel submitted at the outset that although technically this is an appeal from the order of the chambers judge, the proceedings in this court are a "re-do" of the judicial review application below, albeit on only one ground instead of two. In this regard, he cited the following passage from *Dr. Q*

Tab 281

CanLII

United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd., 2002 NBCA 27 (CanLII)

Source:	Court of Appeal of New Brunswick
Date:	2002-03-28
File number:	124/01/CA
Other citations:	249 NBR (2d) 93 — 648 APR 93 — 39 Admin LR (3d) 1 — 80 CLRBR (2d) (2d) 107 — [2002] CarswellNB 105 — [2002] NBJ No 114 (QL)
Citation:	United Brotherhood of Carpenters and Joiners of America v. Bransen Construction Ltd., 2002 NBCA 27 (CanLII), <https://canlii.ca/t/4vfd>, retrieved on 2026-01-18

United Brotherhood of Carpenters and Joiners of America, Local 1386 v. Bransen Construction, 2002 NBCA 27

124/01/CA

IN THE COURT OF APPEAL OF NEW BRUNSWICK

Turnbull, Larlee and Robertson, JJ.A.

B E T W E E N:

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 1386	Joël Michaud, Esq. for the Appellant
(Respondent) APPELLANT	
- and -	
BRANSEN CONSTRUCTION LTD.	G. Robert Basque, Q.C. for the Respondent
(Applicant) RESPONDENT	
- and -	

> between the methodology of such a defence and the impermissible defence of the correctness of a decision. The mode of argument approved by the Court was one in which counsel for the tribunal explained how it had proceeded and that it had taken into account all the arguments that had been made as well as the authorities that had been presented. All this was with a view to demonstrating that it had not acted in a patently unreasonable fashion. That, of course, is all very well but patent unreasonableness is not just a matter of methodology; it involves an assessment of whether the substantive choice made by the tribunal came within the range of rationally permissible options possible on a reading of the relevant legislation. To move from an explanation of methodology to that kind of argument must, as a practical matter, make distinguishing between correctness arguments and patent unreasonableness arguments difficult to sustain in both written facta and oral submissions.

[31] Even if one were able to distinguish between the methodology to be used in arguing the reasonableness of a decision, as opposed to its correctness, practical problems arise. According to ***Paccar*** the tribunal may speak to the merits of the case only if the patent unreasonable standard applies. Yet the tribunal may not learn of the proper standard until after the reviewing court delivers its reasons. Moreover, even in cases where the parties agree that the review standard is patent unreasonableness, I have yet to see a written submission where the substantive issue is not addressed in terms of correctness and it makes no difference who authors the submission. Tribunals, like counsel, take no pride in arguing that a decision meets a minimal rationality test. Rationality is presumed. But where does all of this lead us?

[32] It seems to me that the true issue is whether the tribunal seeking intervener status has something to contribute, beyond that expected of the parties. If that can be established, the tribunal should be permitted to address the merits in its written submission. I say this for two reasons. First, the distinction between a tribunal that seeks to defend its jurisdiction in the narrow as opposed to broad sense is, with respect, tenuous. If a tribunal is entitled to defend its interpretation of jurisdictional provisions then why shouldn’t it be permitted to defend its

interpretation of non-jurisdictional provisions? In both instances the purpose underscoring the value of tribunal participation is the same: to enable the reviewing court to make an informed decision as to why one interpretation was or should be preferred to another. My second reason for permitting tribunals to address the merits of their decisions is that in ***Northwestern Utilities*** Justice Estey was driven to articulating a broad rule when a narrow one would have sufficed. Provided the tribunal is not seeking to bootstrap its decision, the tribunal cannot be accused of breaching the principle of impartiality. This leads me to the problem of bootstrapping.

[33] No tribunal should be permitted to bootstrap its decisions. If the tribunal fails to provide a rational explanation for its interpretative decision, why should it be given a second opportunity to do so? Those that fail to provide sufficient reasons to support their interpretative decisions run the risk of having the matter remitted to them for reconsideration, as was ordered in ***Northwestern Utilities.*** Another possibility is that the tribunal will have to live with the interpretative arguments presented by the parties. If the issue is decided against the tribunal, in future it must be content to direct its submissions to the legislature. All tribunals should be mindful of Justice Kerans' adroit observation in *Standards of Review Employed by Appellate Courts* (Edmonton, Alta: Jurilibert, 1994) at 17 and reproduced by Justice Iacobucci in ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1977] 1 S.C.R. 748 at para 62:

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated.

[34] Frankly, the only tribunals that fail to clothe their reasons with juristic respectability are those lacking legal expertise. These are the tribunals whose principal mandate is to make findings of fact. At the same time, I do not wish to leave the impression that all tribunal decisions must be fortified by extensive reasons. If the issue is one that had been adduced in an earlier decision, there is no need to reproduce legal reasoning found elsewhere.

[35] When it comes to the application of the principle of impartiality it is helpful to distinguish between a tribunal's written and oral submissions. In my experience, tribunals accept that the principle of impartiality limits their ability to engage fully in the adversarial process. Typically, a written submission is filed without objection from opposing counsel. Costs are neither sought by, nor awarded against, the intervener who qualifies as a friend of the court. Tribunal counsel rarely walk to the podium to argue in support of the tribunal's decision. If they do, it is to respond only to questions posed by the court. On occasion it may be necessary for the intervener to address briefly matters raised in argument. There is a reason why this is so. All counsel are acutely aware of the reality that a carefully crafted written submission virtually displaces the need for oral argument. In this way the appearance of impartiality is retained. The Board in this case so conducted itself.

[36] In summary, a tribunal seeking intervener status must persuade the court that: the case is of precedential significance; the tribunal can contribute to the proceedings in a way not reasonably expected of the parties; and the principle of impartiality can and will be respected. Written submissions that address the merits of the decision do not offend this principle, except those intended to bootstrap tribunal reasons that are materially deficient. Oral submissions that respond only to questions posed by the reviewing court, or are of brief duration, qualify as non-

aggressive participation that respect the principle of impartiality.

[37] In the present case, it is understandable that the Board would seek intervener status. The central issue involves the interpretation of ss. 13 and 40 of the ***Industrial Relations Act***. The interpretative issue involves a fundamental question: May the Board look only to the date of the application for certification to determine if there is a unit of employees that is appropriate for collective bargaining? The Board's written submissions on this issue were helpful and simply amplified that contained within its reasons for decision. This is not a case of bootstrapping. The Board's oral argument was succinct and did not qualify as "aggressive participation" of the kind contemplated by Justice Estey in ***Northwestern Utilities***. Hindsight reveals that without coaching from this Court, the Board in both its written and oral argument maintained an air of impartiality. In short, the Board had something to contribute, beyond that expected of the parties. That something was tied to the Board's specialized jurisdiction and expertise. I turn now to identifying the proper standard of review.

STANDARD OF REVIEW – JURISDICTIONAL ISSUE

[38] Bransen argues that the proper standard of review is correctness because the interpretative issue relates to the Board's jurisdiction. The argument goes as follows. The Board cannot proceed to determine the appropriateness of a bargaining unit until it has determined that a unit exists. Section 1 of the ***Industrial Relations Act*** defines unit to mean a group of employees. It is common ground that two or more employees are needed to constitute a group, otherwise the ***Act*** has no application. It is within this context that Bransen argues that the interpretative issue is jurisdictional in nature and, indeed, this Court so declared in ***Re Universal Constructors & Engineers Ltd. and Labour Relations Board of New Brunswick*** (1960), 1960 CanLII 373 (NB CA), 27 D.L.R. (2d) 423 (N.B.S.C.A.D.). The question that

Tab 282

CanLII

Galambos v. Perez, 2009 SCC 48 (CanLII), [2009] 3 SCR 247

Source:	Supreme Court of Canada
Date:	2009-10-23
File number:	32586
Other citations:	312 DLR (4th) 220 — 394 NR 209 — 182 ACWS (3d) 488 — [2009] 12 WWR 193 — 97 BCLR (4th) 1 — 276 BCAC 272 — 70 CCLT (3d) 167 — EYB 2009-165240 — JE 2009-1938 — [2009] SCJ No 48 (QL)
Citation:	Galambos v. Perez, 2009 SCC 48 (CanLII), [2009] 3 SCR 247, <https://canlii.ca/t/266b1>, retrieved on 2026-01-18

SUPREME COURT OF CANADA

CITATION: Galambos *v.* Perez, 2009 SCC 48, [2009] 3 S.C.R. 247

DATE: 20091023
DOCKET: 32586

BETWEEN:

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as "Galambos & Company" and the said Galambos & Company
Appellants
and
Estela Perez
Respondent

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 88) Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

Michael Z. Galambos and Michael Z. Galambos Law Corporation, both carrying on business as "Galambos & Company" and the said Galambos & Company

Appellants

v.

Estela Perez *Respondent*

Indexed as: Galambos *v.* Perez

Neutral citation: 2009 SCC 48.

File No.: 32586.

2009: April 15; 2009: October 23.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Fiduciary duty — Bookkeeper making unsolicited and voluntary cash advances to employer law firm which was experiencing financial difficulties — Law firm acting on bookkeeper's behalf in preparing two wills and in handling two mortgage transactions while she was working for it — Law firm going bankrupt and bookkeeper finding herself unsecured creditor — Whether duty of care under negligence principles or per se fiduciary

obligations arose within solicitor-client relationship — Whether ad hoc fiduciary duties arose from power dependency relationship existing between bookkeeper and lawyer — Whether in such relationships, fiduciary duties may arise simply on basis of reasonable expectations of weaker party and without any mutual understanding of both parties that one must act in interests of the other — Whether fiduciary duties may arise although fiduciary has no discretionary power to affect other party's legal or important practical interests.

P made voluntary sizeable advances of cash — some $200,000 in total — to her employer, a law firm founded by G, often without informing G beforehand. Although P was hired as the firm's part-time bookkeeper she effectively became the office manager, overseeing the firm's income, expenses and accounting and had unlimited signing authority on the firm's non-trust bank accounts. Initially, to resolve a cash flow problem, P obtained a personal loan and deposited $40,000 into the firm's bank account. G did not ask her to advance this money and he did not even know about the advance until several days later. G instructed P to reimburse herself with interest, an instruction she did not follow other than by repaying herself $15,000. As the firm's financial situation deteriorated, P made several more deposits of her own funds into the firm's account and covered some firm expenses with her personal credit card. The firm, during the time she worked for it, handled the preparation and execution of new wills for P and her husband as well as two mortgage transactions. The firm did not expect to be and was not paid for these services. When the firm was placed in receivership and G went bankrupt, P found herself an unsecured creditor. She recovered nothing. P then sued G and the defunct firm for negligence, breach of contract and breach of fiduciary duty.

The trial judge dismissed P's claims, finding that her rights were those of a creditor and nothing more. The Court of Appeal set aside that decision and granted P judgment for $200,000. The court concluded that P was entitled to equity's protection because there were *ad hoc* fiduciary duties owed to her by G and his law firm in relation to the cash advances, which they had breached. It held that: there was a power-dependency relationship between P and G; it is not necessary that there be any mutual understanding that G had relinquished his self-interest in favour

of P's for the duty to arise; P was vulnerable; and, the evidence overwhelmingly supported the conclusion that G took advantage of her trust.

Held: The appeal should be allowed and the trial judgment should be restored except that, if the parties cannot agree, the question as to whether P is entitled to a judgment in debt against the law firm and, if so, whether there is any impact on the costs ordered at trial or on appeal to the Court of Appeal flowing from that judgment, should be remanded to the Court of Appeal.

The Court of Appeal exceeded the limits of appellate review and unduly extended the scope of fiduciary obligations. Absent an error of law or a palpable and overriding error of fact, of which there is none, the trial judge's findings of fact and conclusion that a fiduciary duty did not exist must be upheld on appeal. In this case, the Court of Appeal retried the case on the basis of the written record and substituted its view of the facts and their significance for that of the trial judge. [3] [49] [53]

In holding that the relationship between P and G and his firm gave rise to an *ad hoc* fiduciary duty, the Court of Appeal erred in three respects. First, the conclusion that G was in a position of power and influence relative to P is directly at odds with the clear findings of fact at trial. The trial judge found that P was not vulnerable in terms of her relationship with G, that she probably had more knowledge of the state of G's financial affairs than he did, that she had not relinquished her decision-making power with respect to the loans and that G had no discretion over her interests that he was able to exercise unilaterally or otherwise. The trial judge specifically rejected P's contention that due to the power dynamics of their relationship she was simply unable to refuse requests for loans. There was no evidence accepted by the trial judge of any express requests for loans, which makes it illogical to conclude that P was unable to refuse requests when there were in fact none. [48] [51-55] [57]

Second, not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is fiduciary or not. It follows that there are not, and should not be, special rules for recognition of fiduciary duties in the case of power-dependency relationships. Here, the Court of Appeal erred when it held that, in the case of a power-dependency relationship, a fiduciary duty may arise even in the absence of a mutual understanding that one party would act only in the interests of the other provided there is proof of an expectation on the part of the plaintiff, which is reasonable in all of the circumstances, that the defendant would act in his or her best interests. The Court of Appeal found P to have such a reasonable expectation. While a mutual understanding may not always be necessary — a point that need not be decided here — it is fundamental to all *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her. The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty. The Court of Appeal's analysis went wrong when it found a fiduciary duty without finding an undertaking, express or implied, on the part of G that he would act in relation to the loans only in P's interests, and based its conclusion that a fiduciary duty existed on P's expectations alone. [63-64] [66] [74-75] [77] [80]

The third error arises by implication because the Court of Appeal appears to have accepted the proposition that a fiduciary duty may arise even though the fiduciary has no discretionary power to affect the other party's legal or important practical interests. The nature of this discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations by the beneficiary's entrusting the fiduciary with information or seeking advice in circumstances that confer a source of

power. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary's hands is not. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty. The findings of the trial judge that the evidence did not establish that P relinquished her decision-making power with respect to the loans to G, and that G had no discretionary power over P's interests that he was able to exercise unilaterally or otherwise, with which the Court of Appeal did not disagree, are fatal to P's claim that there was an *ad hoc* fiduciary duty on G's part to act solely in her interests in relation to these cash advances. [50] [84-86]

Moreover, given the limited nature of the retainers and the unusual nature of the advances, the trial judge did not err in finding that G and the law firm did not breach their duty of care arising from the solicitor-client relationship between them and P. There was no actual conflict of interest between the firm's duties to her in connection with the limited retainers and its interest in receiving the advances. Similarly, there could not be in these unusual facts any reasonable apprehension of conflict. Given the very limited nature of those retainers and the manner in which the advances were made — unsolicited and frequently without advance notice — there was no duty on the firm under negligence principles to give P advice about those advances or to insist that she obtain independent legal advice about them. [33]

With respect to P's contractual claims against the law firm, out of an abundance of caution and if the parties cannot agree, the question of whether a judgment in debt in P's favour against the firm should issue and, if so, its impact, if any, on the costs ordered at trial and on the appeal to the Court of Appeal should be remanded to the Court of Appeal. [46]

Cases Cited

Referred to: *Hodgkinson v. Simms*, 1994 CanLII 70 (SCC), [1994] 3 S.C.R. 377; *MacDonald Estate v. Martin*, 1990 CanLII 32 (SCC), [1990] 3 S.C.R. 1235; *Meadwell Enterprises*

Ltd. v. Clay and Co. (1983), 1982 CanLII 657 (BC SC), 44 B.C.L.R. 188; *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, 1989 CanLII 34 (SCC), [1989] 2 S.C.R. 574; *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226; *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191, aff'd (1996), 1996 CanLII 1907 (BC CA), 25 B.C.L.R. (3d) 220; *Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335; *Frame v. Smith*, 1987 CanLII 74 (SCC), [1987] 2 S.C.R. 99.

Statutes and Regulations Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 69.4.

Supreme Court Act, R.S.C. 1985, c. S-26, s. 46.1.

Authors Cited

American Law Institute. *Restatement (Third) of the Law Governing Lawyers*. St. Paul, Minn.: American Law Institute Publishers, 2000.

Finn, P. D. *Fiduciary Obligations*. Sydney: Law Book Co., 1977.

Grant, Stephen M., and Linda R. Rothstein. *Lawyers' Professional Liability*, 2nd ed. Toronto: Butterworths, 1998.

Jackson & Powell on Professional Liability, 6th ed. London: Sweet & Maxwell, 2007.

Law Society of British Columbia. *Professional Conduct Handbook*. The Society, 1993.

Scott, Austin W. "The Fiduciary Principle" (1949), 37 *Cal. L. Rev.* 539.

Smith, Lionel. "Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisors: *Hodgkinson* v. *Simms*" (1995), 74 *Can. Bar Rev.* 714.

Weinrib, Ernest J. "The Fiduciary Obligation" (1975), 25 *U.T.L.J.* 1.

APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Levine and Thackray JJ.A.), 2008 BCCA 91, 78 B.C.L.R. (4th) 268, 253 B.C.A.C. 149, 425 W.A.C. 149,

Tab 283

CanLII

Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd., 1980 CanLII 1877 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1980-08-19
Other citations:	29 OR (2d) 513 — 114 DLR (3d) 162 — 4 ACWS (2d) 397 — [1980] OJ No 3691 (QL)
Citation:	Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd., 1980 CanLII 1877 (ON CA), <https://canlii.ca/t/g14jm>, retrieved on 2026-01-18

Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.

29 O.R. (2d) 513
114 D.L.R. (3d) 162

ONTARIO
COURT OF APPEAL
HOULDEN, MORDEN AND GOODMAN JJ.A.
19TH AUGUST 1980.

* Leave to appeal to the Supreme Court of Canada refused, November 19, 1980. S.C.C. File No. 16262.

Labour relations -- Arbitration -- Judicial review -- Admissibility of affidavit evidence in support of application for judicial review of an arbitration award -- Judicial Review Procedure Act, 1971 (Ont.), c. 48, ss. 1(f), 2 -- Labour Relations Act, R.S.O. 1970, c. 232, s. 37(7)(c).

Administrative law -- Judicial review -- Arbitration -- Admissibility of affidavit evidence in support of application for judicial review of arbitration award -- Judicial Review Procedure Act, 1971 (Ont.), c. 48, ss. 1(f), 2 -- Labour Relations Act, R.S.O. 1970, c. 232, s. 37(7)(c).

Affidavit evidence as to what evidence was given before an arbitrator is admissible to augment the record on an application for judicial review of an arbitration award. Section 2(3) of the Judicial Review Procedure Act, 1971 (Ont.), c. 48, provides a statutory ground of judicial review when the findings of fact of a tribunal, made in the exercise of a statutory power of decision, are required to

be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support its findings. According to s. 37(7)(c) of the Labour Relations Act, R.S.O. 1970, c. 232, an arbitrator must base findings of fact on evidence admissible before him. Alternatively, absence of evidence may be characterized as jurisdictional error in a judicial tribunal. Such affidavit evidence can only be used to demonstrate complete absence of evidence on an essential point.

APPEAL from a judgment of the Divisional Court granting an application for judicial review of an arbitration award and quashing the award.

[Re Int'l Nickel Co. of Canada Ltd. and Rivando, 1956 CanLII 122 (ON CA), [1956] O.R. 379, 2 D.L.R. (2d) 700, folld; R. v. Nat Bell Liquors, Ltd. (1922), 1922 CanLII 488 (UK JCPC), 65 D.L.R. 1, 37 C.C.C. 129, [1922] 2 A.C. 128; R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union Local 419, 1968 CanLII 446 (ON CA), [1968] 2 O.R. 245, 68 D.L.R. (2d) 682, 68 C.L.L.C. 431; Re United Glass & Ceramic Workers of North America et al. and Pilkington Brothers (Canada) Ltd. et al. (1978), 1978 CanLII 1711 (ON SC), 21 O.R. (2d) 241, 89 D.L.R. (3d) 737; Port Arthur Shipbuilding Co. v. Arthurs et al., 1968 CanLII 29 (SCC), [1969] S.C.R. 85, 70 D.L.R. (2d) 693, 68 C.L.L.C. 586; R. v. Ontario Racing Com'n, Ex p. Taylor, 1970 CanLII 379 (ON CA), [1971] 1 O.R. 400, 15 D.L.R. (3d) 430; Re Martin, Simard and Desjardins and The Queen (1977), 1977 CanLII 1383 (ON CA), 20 O.R. (2d) 455, 87 D.L.R. (3d) 634, 41 C.C.C. (2d) 308; affd 1978 CanLII 30 (SCC), [1978] 2 S.C.R. 511, 87 D.L.R. (3d) 704, 41 C.C.C. (2d) 342; Douglas Aircraft Co. of Canada Ltd. v. McConnell et al., 1979 CanLII 51 (SCC), [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385, 29 N.R. 109, refd to]

J. C. Murray, for appellant.

R. W. Cosman, for respondents.

The judgment of the Court was delivered by

MORDEN, J.A.:-- The main issues in this appeal are the admissibility of affidavit evidence filed in support of an application for judicial review to quash, on the ground of absence of evidence, an arbitration award made under a collective agreement subject to the Labour Relations Act, R.S.O. 1970, c. 232, and whether, if such evidence is admissible, it showed that there was no evidence to support the award. As Mr. Justice Pennell, speaking for the Divisional Court, indicated, while this may appear to be a "small case" it is important to the law of judicial review and, of course, to the parties.

The following is a brief outline of the basic facts and of the proceedings which have brought the matter before this Court. The collective agreement contained an article which, in its essential terms, provided that:

> [a] violation of the following rules will result in discharge: ... Fighting -- On Company premises -- and/or unprovoked physical intimidation towards supervisory personnel.

The employer (the appellant in this Court) alleged that one of its employees, E. M. Judson (one of the respondents, the other being the union) on May 31, 1979, was involved in an incident with another employee, T. Vinnai, which amounted to fighting and discharged both of them. Mr. Judson filed a grievance which did not result in the matter being settled and it was, accordingly, submitted to arbitration. The hearing before the single arbitrator took place on August 27, 1979, and his award dismissing the grievance was rendered on August 29, 1979.

In his reasons for the award the arbitrator reviewed the evidence and the competing contentions of the parties. The company contended that during the incident between Mr. Judson and Mr. Vinnai, which had taken place in a test booth on the company premises shortly before the 7:00 a.m. shift,

Mr. Vinnai pushed Mr. Judson who responded by throwing the contents of his coffee cup at Mr. Vinnai's face. Mr. Vinnai responded in turn by striking Mr. Judson in the face. This, it was submitted, amounted to "fighting" within the meaning of this word in the collective agreement. The union contended that the evidence showed only that the initial jostling resulted in the spilling of some coffee on Mr. Vinnai's pants and that the weight of the evidence showed only the subsequent throwing of a small amount of coffee -- once again on Mr. Vinnai's pants. This, it submitted, did not amount to "fighting".

The arbitrator accepted the employer's contentions. At the conclusion of his reasons he said:

> Having considered the above, on the factual matter, it would appear to me that clearly a fight occurred in these circumstances. Thus, it seems that initially the grievor was responding in a manner which was disproportionate to any provocation when he threw coffee at Mr. Vinnai after he was jostled. In this regard, two facts stand out. Thus, first, he was aware that Mr. Vinnai had asked to move in and he had not responded because his mouth was full. Consequently, he would be aware that Mr. Vinnai had some reason to be perturbed. Secondly, although this is denied by the grievor, the weight of the evidence suggests that he did, in fact, throw the coffee in his face. There is really no dispute that he said this at the meeting where the incident was considered [with one D. Macaulay, the personnel supervisor, and others] and Mr. Vinnai has indicated this is the fact. Thus, the reasonable conclusion to draw from the foregoing is that he did so. Put another way, the throwing of hot coffee in a person's face after he has jostled a worker aside at the beginning of the shift when time is short, is not a normal and responsive action. Again, such an act clearly constitutes an assault. In my opinion, the following response of Mr. Vinnai, although not to be condoned in any way, clearly made the matter into a mutual "fight". In my opinion, no other description of these events would be appropriate.

(Emphasis added.)

The union and Mr. Judson moved before the Divisional Court for judicial review of the award on several grounds, the main one being that the arbitrator had "exceeded his jurisdiction by making findings of fact unsupported by or contrary to the evidence given". The particular finding which was challenged is that contained in the words which I have emphasized in the preceding paragraph.

The Divisional Court rejected all the grounds except the one to which I have specifically referred. The affidavits and the transcripts of the cross-examination thereon filed on the application before the Divisional Court showed, it is agreed between the parties, that there was no evidence before the arbitrator to support the conclusion that Mr. Judson admitted at the meeting where the incident was considered that he threw coffee in the face of Mr. Vinnai.

In his reasons Pennell, J., concluded:

> We regard a decision unsupported by evidence in an important particular as an error of law which is analogous to a denial of natural justice and which goes to jurisdiction. What decision the arbitrator would have reached had he not erred is unknown and unknowable. True it is that the record, which has been sent to the Court, does not disclose the error. We think that the relevant affidavit[s] should be made part of the record. We, therefore, order accordingly.
>
> We have said enough to indicate our conclusion that the award ought to be quashed and the grievance remitted for a further hearing.

The employer obtained leave to appeal to this Court from the order of the Divisional Court. Mr. Murray's submissions are that:

(1) the Divisional Court erred in receiving the affidavits and the transcripts of the cross-examination on them; and

(2) if this material was properly admitted, it showed that there was some evidence to support the arbitrator's finding that Mr. Judson was "fighting".

I now turn to these issues.

I. Was the affidavit material admissible before the Divisional Court?

I should make it clear at this point that the material filed with the Divisional Court was directed to showing what the evidence was that was given before the arbitrator and was not fresh evidence of what happened on May 31, 1979. As is usual, no verbatim record was made of what transpired before the arbitrator.

The appellant's submission is that absence of evidence can give rise to an error of law but not one of jurisdiction and, accordingly, unless the error appears "on the face of the record", i.e., the evidence is properly part of the record of the inferior tribunal, an application for judicial review based on the grounds for certiorari (the Judicial Review Procedure Act, 1971 (Ont.), c. 48, s. 2(1), para. 1) will not properly lie. Unless the alleged error is of a jurisdictional nature the record returned to the Court cannot be augmented by affidavit evidence. He relies principally upon R. v. Nat Bell Liquors, Ltd. (1922), 1922 CanLII 488 (UK JCPC), 65 D.L.R. 1, 37 C.C.C. 129, [1922] 2 A.C. 128. In my view, there are two, alternative, answers to this submission.

> (a) Section 2(3) of the Judicial Review Procedure Act, 1971. The first answer is based on s. 2(3) of the Judicial Review Procedure Act, 1971. It reads:

> 2(3) Where the findings of fact of a tribunal made in the exercise of a statutory power of decision are required by any statute or law to be based exclusively on evidence admissible before it and on facts of which it may take notice and there is no such evidence and there are no such facts to support findings of fact made by the tribunal in making a decision in the exercise of such power, the court may set aside the decision on an application for judicial review.

Mr. Murray submits that this provision does not apply because (1) it merely codifies the existing law with the result that the error (absence of evidence) still has to appear on the face of the record, and (2) the arbitrator's findings of fact are not required by any statute or law to be based exclusively upon evidence admissible before him and on facts of which he may take notice. He concedes that the arbitrator was exercising "a statutory power of decision".

I see no reason to characterize the kind of error referred to in s. 2(3) as either jurisdictional or non-jurisdictional. It is a statutory ground of judicial review, probably designed to overcome perceived defects in the common law (see Report of the Royal Commission -- Inquiry into Civil Rights (1968), vol. 1, at pp. 261-3 and 310-3), and should not be encumbered with common law limitations on the admissibility of evidence which relate to the ground of error of law on the face of the record. Further, by virtue of s. 2(1), para. 1 of the Judicial Review Procedure Act, 1971 an applicant for judicial review is entitled to the relief he could have obtained on an application for certiorari, which would include the right to relief based on error of law (including absence of evidence) appearing on the face of the record. It is reasonable, therefore, to regard s. 2(3) as accomplishing something more than this. Accordingly, if affidavit evidence is necessary to show that s. 2(3) is applicable it should be admissible.

Mr. Murray's second point is that s. 2(3) does not apply because the arbitrator's findings of fact are not required by any statute or law to be based exclusively on evidence admissible before him and on facts of which he may take notice. He refers to s. 37(7)(c) of the Labour Relations Act which empowers the arbitrator:

> (c) ... to accept such oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not;

In my view, it is implicit in the obviously judicial function of the arbitrator that he is required by law to base his findings of fact exclusively on evidence that is admissible before him. The law, of course, does not contemplate that arbitrators' decisions as to the existence of facts may be based on speculation and, with respect to the particular determination which the arbitrator in this case was required to make, there was no power to go outside the evidence and to base the decision in whole or in part on policy grounds: see, generally, Brown and Beatty, Canadian Labour Arbitration (1977), at pp. 24-8, 115 and 120-1.

Section 37(7)(c) of the Labour Relations Act enlarges the range of the evidence which may be accepted by an arbitrator over that which is admissible in Court of law but it clearly does not empower the arbitrator to act upon information and material not contained in the evidence before him. Indeed, s. 37(7)(c) appears to assume that the arbitrator is required to act on evidence accepted by him at a hearing. In R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union Local 419, 1968 CanLII 446 (ON CA), [1968] 2 O.R. 245 at p. 252, 68 D.L.R. (2d) 682 at p. 689, 68 C.L.L.C. 431, Jessup, J.A., said of this provision (then s. 34(7)(c) of R.S.O. 1960, c. 202): "However, that provision does not relieve a board from acting only on evidence having cogency in law." See also Re United Glass & Ceramic Workers of North America et al. and Pilkington Brothers (Canada) Ltd. et al. (1978), 1978 CanLII 1711 (ON SC), 21 O.R. (2d) 241, 89 D.L.R. (3d) 737.

Mr. Murray stressed that part of s. 2(3) which reads:
"required to be based exclusively ... and on facts of which it may take notice", and submitted that this did not apply to the arbitrator and, hence, the subsection was inapplicable. This particular part of s. 2(3), in my view, does apply to arbitrators of the kind with which we are concerned. It recognizes, in the administrative process, a legitimate way in which some facts may be found without evidence and which is, generally, but with some allowance being made for the expertise and experience of the tribunal, equivalent to the power of a Court to take judicial notice of facts which are common knowledge. However, even if this part of s. 2(3), for some reason, did not apply to arbitrators, in the sense that they are not empowered to take judicial or official notice of facts, I think that s. 2(3) would still be applicable by reason of the requirement that their findings be based exclusively on evidence admissible before them. The notice of facts limb of the requirement is really an extension, where applicable, of the preceding evidentiary requirement. The situation would be otherwise, of course, if a tribunal were not bound by the limitations of the judicial or official notice doctrine respecting the finding of facts. In such a case it would seem that the tribunal would also not be bound to act on evidence admissible before it -- and so s. 2(3) clearly would not be applicable.

I accept Mr. Murray's concession that the arbitrator exercises a "statutory power of decision" within the meaning of this term in s. 2(3). The term is defined in s. 1(f), the relevant part of which reads:

1. In this Act,

. . . . .

> (f) "statutory power of decision" means a power or right conferred by or under a statute to make a decision deciding or prescribing,
>
> > (i) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party ...

It appears to me that the reasoning in Re Int'l Nickel Co. of Canada Ltd. and Rivando, 1956 CanLII 122 (ON CA), [1956] O.R. 379, 2 D.L.R. (2d) 700 (adopted by the Supreme Court of Canada in Port Arthur Shipbuilding Co. v. Arthurs et al., 1968 CanLII 29 (SCC), [1969] S.C.R. 85 at p. 94, 70 D.L.R. (2d) 693 at p. 701, 68 C.L.L.C. 586), to the effect that an arbitrator appointed

under a collective agreement which is subject to the Labour Relations Act (Ontario) is a statutory arbitrator, is applicable by analogy to support the conclusion that the arbitrator is empowered under a statute to decide legal rights and duties.

> (b) Affidavits receivable on the basis of common law jurisdictional error. The alternative answer to Mr. Murray's submission that the affidavit material is not admissible is that, quite apart from s. 2(3) of the Judicial Review Procedure Act, 1971, I think that it now can be said, at least in this jurisdiction, that entire absence of evidence may properly be characterized as jurisdictional error in a judicial tribunal. No doubt the cases have gone both ways on the issue and Nat Bell has had a checkered history. None the less there are valid logical and policy grounds for regarding absence of evidence as jurisdictional error in a judicial tribunal: see D.W. Elliott, " 'No Evidence': A Ground of Judicial Review in Canadian Administrative Law", 37 Sask. L. Rev. 48 (1972), particularly at pp. 59-65; Wade, Administrative Law, 4th ed. (1977), at pp. 274-8; and Reid and David, Administrative Law and Practice, 2nd ed. (1978), at pp. 357-60, where the decisions going both ways are collected. A clear statement by this Court that it amounts to jurisdictional error is that of Gale, C.J.O., in R. v. Ontario Racing Com'n, Ex p. Taylor, 1970 CanLII 379 (ON CA), [1971] 1 O.R. 400 at p. 402, 15 D.L.R. (3d) 430 at p. 432:
>
> This being our view as to the proper interpretation of rule 128, there was therefore no evidence in this case on which the Commission could find that there was a failure to protect the horse from the administration of the drug, and, accordingly, the order was made without jurisdiction on the part of the Commission.

I see no value in canvassing contrary decisions because this Court, in the recent decision of Re Martin, Simard and Desjardins and The Queen (1977), 1977 CanLII 1383 (ON CA), 20 O.R. (2d) 455, 87 D.L.R. (3d) 634, 41 C.C.C. (2d) 308; affirmed 1978 CanLII 30 (SCC), [1978] 2 S.C.R. 511, 87 D.L.R. (3d) 704, 41 C.C.C. (2d) 342 (which was concerned with the availability of certiorari to quash a committal for trial), held, per Estey, C.J.O., at pp. 486-7 O.R., p. 666 D.L.R.:

> [W]e conclude that the learned Provincial Court Judge here acted within his jurisdiction, unless it can be said that he committed these respondents on the counts specified without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a different question from the question "whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially could convict". It remained, therefore, to examine the excerpts of evidence, as placed before this Court from the lengthy transcript taken at the preliminary hearing, in order to determine whether there was any evidence at all on which the committing tribunal was able to base its opinion to commit, as required by the terms of the Code already cited.

I refer also to the recent dictum, to the same effect, of the same learned Judge in Douglas Aircraft Co. of Canada Ltd. v. McConnell et al., 1979 CanLII 51 (SCC), [1980] 1 S.C.R. 245 at p. 277, 99 D.L.R. (3d) 385 at p. 407, 29 N.R. 109, a case concerned with Ontario labour arbitral jurisdiction.

Accordingly, I think that the Divisional Court, on this alternative ground, was right in receiving the evidence which, it was submitted by the respondents, showed that the arbitrator acted without jurisdiction.

II. Was there any evidence to support the arbitrator's finding?

As I have said, it is now common ground that there was no evidence to support the conclusion of the arbitrator respecting a statement made by Mr. Judson at the meeting with Mr. Macaulay, following the incident between himself and Mr. Vinnai. However, in my view, it cannot be said that there is no evidence supporting the arbitrator's finding that Mr. Judson threw coffee in Mr.

Vinnai's face. From the cross-examination of John Clarke, who had been the union representative at the hearing before the arbitrator, it appears that there was evidence at the hearing that Mr. Judson had thrown coffee at Mr. Vinnai. There was a dispute as to whether the evidence was that the coffee had been thrown in his face. Mr. Clarke denied that Mr. Vinnai gave evidence that the coffee was thrown in his face but said that Mr. Vinnai did testify before the arbitrator that when the remainder of the coffee was thrown towards him it got on his beard and shirt. Mr. Judson, on his cross- examination, said that he had admitted before the arbitrator that he had thrown coffee at Mr. Vinnai -- but "to the extent that it was not intentional". As far as the evidence before the arbitrator of what was stated before Mr. Macaulay is concerned, Mr. Judson said the evidence was that he admitted throwing coffee at Mr. Vinnai -- but not intentionally.

The affidavit sworn by Janice Baker who appeared as counsel on behalf of the employer before the arbitrator deposed that "Mr. Vinnai testified that the coffee thrown by the grievor hit him on his face and clothing". The notes which she made of Mr. Vinnai's evidence at the hearing include: "coffee hit me on face and clothing -- was thrown at me". She was not cross- examined on this part of her evidence.

There being evidence before the arbitrator capable of supporting his finding as to what, in fact, happened between Mr. Judson and Mr. Vinnai on May 31, 1979, the absence of evidence ground of attack is not, in my view, open to the appellant on either the application of s. 2(3) of the Judicial Review Procedure Act, 1971 or common law jurisdictional grounds. To treat the complete lack of evidence on the finding respecting what was admitted to Mr. Macaulay as a ground for quashing the award would be to go beyond the Court's limited supervisory function and to exercise one of an appellate nature. In this regard the following description by Lord Sumner in Nat Bell at p. 18 D.L.R., pp. 149-50 A.C., of that kind of absence of evidence which may amount to an error of law is instructive: "... complete absence of any testimony on a definite and essential point ...".

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

The foregoing indicates my disposition of the appellant's grounds of appeal. The respondents sought to support the Divisional Court's order on three additional grounds. Briefly, they are:

(1) The arbitrator asked himself the wrong question. The Divisional Court, reading the arbitrator's reasons as a whole, dealt with this point adversely to the respondents and I agree with its reasons on this point.

(2) The arbitrator wrongly interpreted "fighting". Again, I agree with the Divisional Court's reasons. It cannot be said that the arbitrator's interpretation is one that the word cannot reasonably bear.

(3) The arbitrator erred in rejecting the proposed evidence of one W. Robertson. This issue is not considered in the Divisional Court's reasons. At most, this error was one with respect to the admissibility of evidence only and cannot be characterized as jurisdictional in any sense -- as showing either the failure of the arbitrator to inquire into the subject-matter committed to him or a denial of natural justice. Further, I do not see how its admission could have had any bearing on the arbitrator's determination of the truth of what happened on May 31, 1979. To the extent that it could be said to be relevant to the employer's motive in discharging Mr. Judson its rejection could also be justified on the ground that no suggestion of improper motive was put to the employer's only witness during cross-examination by the union representative.

I would allow the appeal, with costs, set aside the order of the Divisional Court, and in its place make an order dismissing, without costs, the application for judicial review.

Appeal allowed; application for judicial review dismissed.

Tab 284

CanLII

Sticky Nuggz Inc. v. Alcohol and Gaming Commission of Ontario, 2020 ONSC 5916 (CanLII)

Source:	Divisional Court
Date:	2020-10-09
File number:	CVD-TO-8-20JR
Citation:	Sticky Nuggz Inc. v. Alcohol and Gaming Commission of Ontario, 2020 ONSC 5916 (CanLII), <https://canlii.ca/t/jb10k>, retrieved on 2026-01-18

CITATION: Sticky Nuggz Inc. v. Alcohol and Gaming Commission of Ontario, 2020 ONSC 5916
DIVISIONAL COURT FILE NO.: CVD-TO-8-20JR
DATE: 20201009

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Lederer, Penny JJ

IN THE MATTER OF the *Cannabis Licence Act, 2018*, S.O. 2018, c.12, Sched. 2, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER OF the *Judicial Review Procedure Act*, R. S.O. 1990, c.J.1, as amended, and the regulations thereunder, as amended;

AND IN THE MATTER OF the refusal to issue a retail sales authorization by the Registrar of the Alcohol and Gaming Commission of Ontario regarding STICKY NUGGZ INC.

BETWEEN:	)	
	)	
STICKY NUGGZ INC.	)	Matthew P. Maurer and Marco P. Falco, for t
	)	he Applicant
Applicant	)	
– and –	)	
	)	
	)	
ALCOHOL AND GAMING COMMISSIO	)	Sunil S. Mathai, Andrew Jin and Faye Kidm
N OF ONTARIO AND THE ATTORNEY G		an, for the Respondents

ENERAL OF ONTARIO	)	
	))	
Respondents	)	
	)	
	)	**HEARD (by videoconference):** August 31, 2020

REASONS FOR JUDGMENT

Penny J.:

[1] This is an application for judicial review of a decision by the Registrar of the Alcohol and Gaming Commission of Ontario, which declined to issue the Applicant a retail sales authorization to operate a retail cannabis store in Toronto.

[2] The basis for the rejection of the Applicant's application for a retail sales authorization was that the Applicant's proposed location is within 150 metres of a school. Under the legislative scheme, it is a fixed requirement that no retail sales authorization will be issued in respect of any proposed location of a retail cannabis store within 150 metres of a school.

[3] This application for judicial review attacks the AGCO's internal decision to use the "straight-line" or "as the crow flies" method to measure the 150 metre requirement, rather than an "on the street" or "as the wolf runs" method of measurement. The Applicant likewise attacks the use of this approach in the Registrar's evaluation and rejection of the Applicant's application for a retail sales authorization at the proposed location. The Applicant argues that its proposed location is more than 150 metres from any school using the "on the street" method and that the AGCO's adoption of a straight-line method of measurement is unreasonable.

[4] For the reasons that follow, the application for judicial review is dismissed.

Standard of Review

[5] The parties agree that the standard of review in this application is reasonableness. What is reasonable in the circumstances will depend on context including the governing statute, the evidence before the decision maker, the submissions of the parties, and past practices of the decision maker. Written decisions, when necessary, are not assessed against a standard of perfection, but must still meet the requisite standard of "justification, intelligibility and transparency", *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras. 91-93 and 106.

Regulatory Framework

[6] The AGCO is the provincial agency responsible for regulating private retail sales of recreational cannabis in Ontario. The legislative framework for the private retail sale of cannabis is set out in the *Cannabis Licence Act*, *2018,* S.O. 2018, c.12, Sched. 2 and the general regulation made under it, Ontario Regulation 468/18. The Registrar of the AGCO administers the *CLA* in the public interest and in accordance with the principles of honesty, integrity, and social responsibility.

[7] The establishment and operation of a cannabis retail store is highly regulated. A retail cannabis operator must, among other things, apply for and be issued two instruments under the *CLA*:

i) a Retail Operator Licence ("ROL") that attaches to an individual operator; and

ii) a Retail Sales Authorization ("RSA") that attaches to a specific cannabis retail store.

The School Distance Requirement

[8] At the heart of this application is the interpretation and application of the school distance requirement under the *CLA* and Regulation.

[9] The legislation sets out in detail many circumstances in which the Registrar must refuse to issue a ROL and a RSA. A threshold disqualifying criterion is the school distance requirement. Section 4(12) of the CLA prohibits the issuance of a RSA if the proposed store is located less than a distance specified by regulation from a public or private school as defined under the *Education Act:*

> "4(12) The Registrar shall refuse to issue a retail store authorization,
> (a) if the proposed cannabis retail store would be located less than the distance specified by or determined in accordance with the regulations from,
> (i) a school as defined in the *Education Act*…"

[10] Section 11(2) of the Regulation establishes 150 metres as the minimum "distance specified" in s. 4(12)(a):

> "11(2) For the purposes of clause 4(12)(a) of the Act, a proposed cannabis retail store may not be located less than 150 metres from a school or a private school, as determined in accordance with the following:
> 1. If the school or private school is the primary or only occupant of a building, 150 metres shall be measured from the property line of the property on which the school or private school is located.
> 2. If the school or private school is not the primary or only occupant of a building, 150 meters shall be measured from the boundary of any space occupied by the school or private school within the building."

[11] If a proposed location does not comply with the school distance requirement, under s. 4(10) of the *CLA* the Registrar must refuse to issue the RSA and may do so without further assessment of any of the other disqualifying criteria.

[12] In some cases, such as where the Registrar decides to suspend, revoke, or refuse to renew a RSA, the Registrar must issue a notice of proposal along with written reasons explaining the basis of the proposed action. The notice of proposal may be appealed to the Licence Appeal Tribunal, which can confirm or set aside the notice. Importantly for this case, however, the *CLA* does not provide any similar process for a decision refusing to *issue* an RSA. Under s. 4(14) of the *CLA* a decision of the Registrar to issue or refuse to issue a RSA is final.

[13] The school distance requirement is part of a clearly articulated government policy to keep cannabis away from children and limit youth access and exposure to cannabis products by creating distance buffers between schools and cannabis stores. The government has indicated in numerous public statements that it will take whatever steps are necessary to ensure that cannabis remains out of the hands of people under the age of 19. The school distance requirement is just one component of a larger regulatory framework that serves to limit youth access and exposure to cannabis.

[14] The AGCO requires prospective retailers to submit applications through the AGCO's public-facing online service delivery portal called "iAGCO". Since January 2019, the straight-line, or "as the crow flies," method for measuring the school distance requirement has been adopted by the Registrar and operationalized into the iAGCO portal for any RSA application.

[15] After entry of a proposed retail store's street address, the iAGCO portal automatically checks the proposed location against the school distance requirement. This is done by means of an automated "exclusion zone map" based on school location data provided to the AGCO by the Ministry of Education. Excluded zones are mapped out using a straight line on a horizontal plane to create a 150 metre zone around the property line of the parcel of land on which the school is located.

[16] If the location of a proposed store is within an exclusion zone, the iAGCO portal rejects it as being in an ineligible location and the application is "hard stopped". The applicant cannot continue to fill in or submit its application and the iAGCO portal will notify the applicant that its application is not eligible and state the reason why.

[17] Where a prospective applicant is hard stopped by the portal, it may request that AGCO staff conduct a manual review of the proposed location and the proximity to any school.

Background to the Applicant's Proposed Location and Application for a RSA

[18] On June 29, 2018, the government announced that cannabis retail stores would be privately owned and operated. It later announced that it would be switching from an open application system to a "lottery" system.

[19] The right to apply for one of the first 25 licenses in Ontario was awarded by way of a random lottery draw conducted in January, 2019. A second lottery was held in August, 2019 awarding 42 applicants the right to apply for retail store licenses and authorizations.

[20] In December, 2019 the Ontario Government announced that it would move to an open application system. ROL applications could be submitted beginning January 6, 2020. RSA applications would start being accepted on March 2, 2020.

[21] The Applicant's president, Mr. Bertucci, became aware in 2018 of the government's intent to grant licences to private retailers to sell cannabis. He also became aware, at around the same time, of the 150 metre school distance requirement. The Applicant applied unsuccessfully in the first lottery but did not participate in the second.

[22] Mr. Bertucci began looking for a suitable location and found his proposed location in the fall of 2018. He was aware that there was a school nearby and claims to have turned his mind to the school distance requirement and determined that the school was more than 150 metres from the proposed location. There is more than a little confusion, however, about how the Applicant formed the impression that its proposed location met the school distance requirement and how (and when) it obtained the measurement of the school distance requirement on which it now relies.

[23] In emails of February 26 and March 2, 2020, the Applicant represented to the AGCO that the distance from the school to its proposed location was 262 metres measured using a "measuring wheel". Mr. Bertucci was cross-examined. He admitted that the 262 metre measurement was not from a measuring wheel and, in fact, came from Google Maps (First Bertucci Examination Transcript at Q. 134-140). In answers to undertakings, the Applicant provided a text message purportedly showing a Google Earth measurement of 262 metres taken by an employee of the Applicant (Answers to Undertakings of Bertucci dated July 22, 2020 at R/F 1). The evidence of the Respondent, however, maintains that the Applicant's document is not a Google Earth measurement; rather it is a map image with a notation that the distance "to the property line of the [school] is 262 m" (Second Bertucci Examination Transcript at Q. 149-153). In the end, Mr. Bertucci stated that he did not know how the 262 metre measurement was made (Second Bertucci Examination Transcript at Q. 155).

[24] It also is not clear whether, at the time, Mr. Bertucci also determined that using the straight-line method, his proposed location was under 150 metres from the school. It is, in any event, common ground that, in fact, the proposed location is within 150 metres of a school using the straight-line method.

[25] Mr. Bertucci's evidence is also that he looked at other regulations to determine how distance is measured. He found a Toronto smoking by-law which used the term "radius" to establish the zone around the building in which smoking is prohibited. He also says he looked at a definition of "radius" in the Merriam Webster English Dictionary which defined that term as "a line segment extending from the centre of a circle or sphere to the circumference or bounding surface". By contrast, he said, one of the Merriam's definitions of "distance" was an "extent of space measured other than linearly". Based on this, Mr. Bertucci claims to have formed the "impression" that, because the *CLA* used the word "distance" rather than the word "radius", his "shortest distance on publicly available walkways" approach would be used to implement the school distance requirement rather than a straight line measurement. In cross-examination, however, Mr. Bertucci admitted that right *before* the definition in Merriam's of "distance" which he says he relied on, was a definition which read: "An extent of area or an advance along a route *measured in a straight line*" (emphasis added).

[26] Mr. Bertucci also claims to have relied on "common sense" and his experience as a contractor, although it is not clear, in either case, what relevance that had or the basis upon which those factors would support his "impression." In any event, in November 2018 the Applicant entered into a lease for its proposed location and shortly thereafter, commenced extensive renovations.

[27] After the Government announced in December 2019 that it would move to an open application system, the Applicant applied for a ROL on February 14, 2020. He also, for the first time, went to the iAGCO portal to create a draft application for a RSA. On February 26, 2020, the Applicant applied for a RSA through the portal but was "hard stopped". The Applicant received an online message through the portal that, "The Premises Physical Address is within a School Buffer Zone."

[28] This is when the Applicant, for the first time, contacted the AGCO by e-mail stating that the proposed location was 262 metres from the property line of the nearby school.

[29] The AGCO treated the Applicant's emails as a request for a manual review which was completed by an AGCO Eligibility Officer. To review the proposed location, the Eligibility Officer manually reviewed the AGCO's school exclusion zone map against the Applicant's proposed location. The exclusion zone map indicated that the buffer extending 150 metres from the property line of the school overlaid the Applicant's proposed location.

[30] The Eligibility Officer also reviewed the school and the proposed location using Google's Street View function to determine the closest point of the retail space and the closest point of the school's property line. Using the Google Maps distance calculator, the Eligibility Officer drew a straight line between these points, which measured at 120 metres, well within the 150 metre exclusion zone.

[31] On March 3, 2020, the Eligibility Officer informed the Applicant that its proposed location was ineligible. On March 3 and March 4, 2020, the Applicant requested that the AGCO reconsider its use of the straight-line method of measurement and also included a map that incorrectly stated that the distance measured by straight line was 186 metres. On March 5, 2020, the AGCO responded to the Applicant, outlining the method the AGCO uses to calculate distance to schools, the mechanics of the iAGCO portal's hard stop, and an overview of the steps taken during the manual review.

[32] On March 13, 2020, the Applicant requested a further reconsideration in a letter addressed to the Registrar. This letter and the material relied upon to conduct the manual review were provided to the Deputy Registrar. On March 25, 2020, the Deputy Registrar reaffirmed the result of the manual review. The Deputy Registrar rejected the Applicant's request to use a method of measurement other than the straight-line method.

The Issues

[33] The Applicant argues that the Registrar's Decision is unreasonable in four basic respects:

(1) the Decision suffers from a "fatal" lack of transparency;

(2) the Decision is inconsistent with principles of statutory interpretation, the scheme of the *CLA* and with common law interpretations of the meaning of "distance";

(3) the Registrar fettered its discretion when it made the decision not to issue the Applicant a RSA on the basis of an unpublicized, straight-line measurement for the school distance requirement; and

(4) the Decision fails to take into account the effect of the decision on the Applicant (having invested significant amounts of time and money into its proposed location).

Analysis

[34] Before turning to the Applicant's arguments, I will deal with a preliminary, evidentiary issue raised by the Respondent. The Respondent objects to the admission of evidence from Mr. Bertucci. The evidence explains the history of the matter from the Applicant's perspective and describes the "due diligence" efforts undertaken by the Applicant to satisfy itself that its proposed location complied with the school distance requirement.

[35] The Respondent argues that the Applicant's due diligence is irrelevant to the issues on the application for judicial review. The Respondent also submits that, as a general rule, affidavit evidence containing material that was not before the decision-maker is not admissible on judicial review unless it: a) provides non-argumentative background information; b) demonstrates that the decision-maker decided an essential point without any evidence; or, c) demonstrates the decision-maker breached the rules of natural justice.

[36] I would admit the evidence.

[37] This was a somewhat unusual process. There was no "hearing" before the Registrar in the normal sense of the word. The process was somewhat informal and took place, essentially by email, over a short period of time.

[38] Given the informal and abbreviated process that took place and having reviewed the affidavit, I do not find the Bertucci affidavit inadmissible on the application for judicial review. It provides background on the Applicant's perspective and on what the Applicant perceives as the issues. Its relevance, weight and utility can and will be addressed in the context of the merits of the Applicant's application.

1. Lack of Transparency

[39] The Applicant submits that reasonableness review is not a "rubber-stamp" or a means of sheltering administrative decision-makers from accountability. Reasonableness, as the Supreme Court of Canada held in *Vavilov* remains "a robust form of review" and is concerned with the existence of justification, transparency and intelligibility within the decision-making process. In

particular, the Applicant relies on a passage from *Vavilov* in which the Supreme Court said that it is unacceptable for a decision-maker to provide a party with formal reasons that fail to justify its decision and "expect that its decision [will] be upheld on the basis of internal records that were not available to that party", *Vavilov,* para. 95.

[40] In this case, the Applicant submits that the main flaw of the Decision is that the Registrar's method for determining the school distance requirement was never transparent to the Applicant, or to the general public, until after the Applicant had invested significant time and money in its proposed location. By not publicly disclosing that the school distance requirement would be determined using a straight-line measurement, coupled with the AGCO's disclosure of this method after the Applicant's application for a RSA had been rejected, the Registrar's Decision was "arbitrary and opaque". In the absence of the method of measurement being publicized, it was not reasonable to expect the Applicant to know that a straight-line approach would be employed.

[41] I do not accept this argument. The Applicant's submission that the Decision suffers from a "fatal lack of transparency" misunderstands the Supreme Court's requirement of transparency and overlooks the Applicant's own failure to take basic steps to exercise due diligence and ascertain the AGCO's method of measuring the school distance requirement.

[42] The concept of transparency as it is used in *Vavilov* refers to transparency of the reasons and the decision itself, not transparency of the regulator's internal institutional decision-making process. The issue of whether the AGCO publicly announced the straight-line method is irrelevant to the issue of whether the AGCO's interpretation of the *CLA* and Regulations is reasonable.

[43] It is, in any event, simply inaccurate for the Applicant to state that the AGCO failed to disclose its use of a straight-line method of measurement until March 2020. The straight-line method has been utilized in the iAGCO portal since January 14, 2019. In the Second Allocation Lottery FAQs published on July 23, 2019, prospective entrants to the Second Lottery were advised they could use the iAGCO portal to ensure their proposed location met the school distance requirement. The evidence is that individuals who contacted the AGCO about the school distance requirement were advised that the iAGCO portal could be used to check whether a proposed location satisfied this requirement and the method used to measure the 150 metre distance. Thus, the details of the AGCO's interpretation were always publicly available to anyone who explored the iAGCO portal. Any prospective retailer who wanted to know and was prepared to make reasonable, prudent enquiries could have learned of the AGCO's straight-line method of measurement as early as January 2019.

[44] The fact that the AGCO did not issue a stand-alone public announcement about the straight-line method does not mean that its interpretation of the school distance requirement was, as the Applicant argues, "arbitrary and opaque".

[45] On the record before the Court, it is clear that the Applicant failed to take simple, available steps to ascertain whether its proposed location satisfied the school distance requirement. Mr. Bertucci knew there was a school near his proposed location. He knew that the Merriam's dictionary definition of "distance" on which he says he relied included, as the *first* definition, "an extent of area or an advance along a route *measured in a straight line*" (emphasis added). In spite of this, Mr. Bertucci relied on his experience in the construction industry to form the "impression" that the AGCO would interpret "distance" in this case, as measured by "the body of path [sic?] travelled without obstruction". He never made any enquiry of any kind to the AGCO about this issue and did not review the iAGCO portal until long after he had had acquired and renovated the proposed location. This was an entirely unreasonable basis upon which to reach any conclusion in the circumstances.

[46] For these reasons, I would not give any effect to the Applicant's argument based on an alleged lack of transparency.

2. *Principles of Statutory Interpretation*

[47] The Applicant argues that the AGCO's interpretation of the school distance requirement is unreasonable and that the AGCO failed to consider the purposes for which the legislative scheme was enacted.

[48] The Applicant submits that while protecting youth is one objective of the *CLA*, another objective is combatting the illegal cannabis market. In selecting a straight-line approach in this case, the AGCO has effectively given primacy to one legislative objective (protecting youth) at the expense of another (combatting the illegal market). This is because the broader the limits of the excluded school zones, the fewer the number of eligible locations there are, which limits the number of retail stores and, therefore, undermines the objective of combatting the illegal market.

[49] The Applicant submits that the shortest publicly available route approach assists in combating the illegal market by expanding the number of eligible locations and allowing the Applicant's store to open, while having no adverse impact on the policy objective of protecting youth by virtue of the fact that it is impossible for youth to access the proposed location from the nearby school along the 150 metre straight-line drawn by the AGCO.

[50] The Applicant also argues that a straight-line measurement of distance has been rejected as "illogical" and "absurd" for the purpose of calculating a distance between two points to determine a taxpayer's eligibility for moving expenses under the *Income Tax Act*.

[51] In *Giannakopoulos v. Canada*, 1995 CanLII 3517 (Fed. C.A.), the Federal Court of Appeal reversed years of jurisprudence calculating distance for moving expenses under the *Income Tax Act* by way of a straight-line, "as the crow flies" measurement. The Court favoured a pragmatic, realistic approach in which distance is calculated using ordinary routes of public travel. This approach was echoed by the Tax Court of Canada in 2007 in *Nagy v. Canada*, [2007] T.C.J. No. 244 (T.D.). *Nagy* emphasizes a "common sense" approach to measurement under the *Income Tax Act* over one which promotes "mechanical irrationality".

[52] The Applicant's first argument misconstrues the nature of the exercise in a judicial review.

[53] The onus of proving unreasonableness falls upon the Applicant. Decision-makers will often be confronted with multiple possible solutions or choices, all of which would be consistent with the applicable law that guides their decision. The ultimate choice, however, rests with the decision-maker. Their decisions on such matters are entitled to the greatest deference.

[54] The use of non-specific language in the governing legislation suggests a legislative intention that the decision-maker has the authority to decide which interpretation best furthers the statutory mandate. It is not enough for a party seeking judicial review to establish that a competing interpretation is reasonable, or even that a competing interpretation may be preferable. An applicant is required to establish that the interpretation chosen by the decision-maker is unreasonable, *Pong Marketing and Promotions Inc. v. Ontario Media Development Corp.*, 2018 ONCA 555 at paras. 22 and 23.

[55] While the Applicant's proposed approach to the school distance requirement may be theoretically "feasible", that does not mean that the AGCO's chosen approach is unreasonable. Even if the Court were to accept the Applicant's contention that the Registrar's interpretation is "inferior," that would be still be insufficient to find that the Registrar's interpretation is unreasonable.

[56] Further, a reasonable interpretation of legislation may draw on industry knowledge and recognized practical limitations. In *Canada Post Corp. v. CUPW*, 2019 SCC 67, the Supreme Court of Canada upheld a decision-maker's interpretation of the *Canada Labour Code*. The

decision-maker's interpretation was that the Code did not require Canada Post to conduct annual safety inspections of all postal routes. The Court held, amongst other reasons, that the decision-maker's interpretation appropriately bore in mind the "practical limitations of a workplace spanning 72 million kilometres of postal routes."

[57] Given day to day experience with its own administrative scheme, a statutory decision-maker often has superior expertise, relative to the Court, in deciding how to balance competing concerns and priorities. This is especially so where the governing legislation presents multiple goals, in which case the decision-maker's decision regarding which goals to prioritize and how should be given the greatest deference.

[58] The AGCO is entitled to interpret the *CLA* and Regulation in a manner that bears in mind the "practical limitations" of its mandate. Those working day to day in the implementation of frequently complex administrative schemes (like the regulation of retail recreational cannabis sales) have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime, *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 49.

[59] As to the Applicant's second argument, relying on the interpretation of a distance-based requirement under the *Income Tax Act*, the tax cases themselves recognize that the interpretation of the words of an enactment must have regard to underlying legislative purpose. The deductibility of travel expenses for tax purposes arises out of a legislative purpose which is decidedly different from the purpose of the *CLA*. Under the *CLA*, legislative purpose is equally, if not better, served by straight-line measurement of the school distance requirement.

[60] The AGCO and the Registrar relied upon a reasonable interpretation and implementation of the school distance requirement when measured against both statutory and common law principles. The AGCO's approach to the school distance requirement is founded on a plain reading of the language of the *CLA* and Regulation in the context of the multiple policy objectives which underpin the legislative framework. It allows for consistency of application to the public at large and for efficient processing of retail store applications. It is at least *a* reasonable, if not the *most* reasonable, interpretation of the school distance requirement under the *CLA* and Regulations.

[61] I would give no effect to the Applicant's arguments on the issue of statutory interpretation.

3. Fettering of Discretion

[62] The Applicant argues that the AGCO's measurement of the school distance requirement on a straight-line basis constitutes an arbitrary exercise of discretion because the AGCO did not make the straight-line measurement method known to the public prior to the Applicant applying for the RSA.

[63] Fettering of discretion occurs when a decision-maker limits its exercise of discretion by some pre-determined or improper factor or consideration. Here, the school distance requirement is expressly mandated by the legislative framework. The issue is not the exercise of discretion but statutory interpretation - what does the school distance requirement of a minimum of 150 metres mean?

[64] The Applicant's "fettering" argument effectively relies upon the same grounds as the first two arguments, merely applied to a different legal label. For the reasons already articulated above, there is nothing arbitrary about the adoption, by the AGCO and the Registrar, of the straight-line method of measuring the school distance requirement. There was no fettering of discretion. The AGCO's and the Registrar's conclusions on the interpretation and practical application of the school distance requirement were reasonable.

[65] I would not give any effect to the Applicant's argument based on an alleged fettering of discretion.

4. Effect of the Decision on Applicant

[66] The Applicant argues that the Registrar was aware by March 3, 2020 that the Applicant had spent "hundreds of thousands of dollars securing and preparing" its proposed location. The Registrar was, therefore, aware of the effect the imposition of the straight-line measurement would have on the Applicant and its ability to operate a retail cannabis store at the proposed location. Yet the Decision makes no mention of, and ignores, the negative financial impact that the straight-line method would have on Applicant.

[67] Contrary to the Applicant's submission, there was no obligation on the AGCO or the Registrar to "grapple" with the impact the Decision would have on the Applicant in terms of time or financial investment. These are not relevant considerations within the statutory scheme; consideration of such factors would be extraneous and irrelevant to whether to grant a RSA on the basis of the school distance requirement and would run counter to the public protection purpose of the regulatory framework and objectives of the *CLA*.

[68] While the Applicant has perhaps suffered an adverse financial impact from the Decision at issue, this impact is the consequence of having made a financial commitment without appropriate due diligence. RSAs are not guaranteed by the Registrar and the statute provides no right or entitlement to a RSA. A RSA is granted to those that meet the eligibility and application requirements. The burden of ensuring those requirements are met, and the risk of not meeting them, are both borne by the Applicant.

[69] I would not give effect to the Applicant's argument that the Registrar's Decision and the AGCO's interpretation and application of the school distance requirement are unreasonable because they failed to consider the negative financial impact of the Decision on the Applicant.

Conclusion

[70] For all these reasons, the application for judicial review is dismissed.

Costs

[71] The Applicant submitted that an appropriate order for partial indemnity costs, regardless of who were to prevail, is $42,000. The AGCO sought $49,000. In my view, partial indemnity costs to the AGCO of $45,000 is an appropriate award in all of the circumstances, and it is so ordered.

_____
Penny J.

I agree _____
Swinton J.

I agree _____
Lederer J.

Released: October 9, 2020

CITATION: Sticky Nuggz Inc. v. Alcohol and Gaming Commission of Ontario, 2020 ONSC 5916
DIVISIONAL COURT FILE NO.: CVD-TO-8-20JR
DATE: 20201009

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Swinton, Lederer, Penny JJ

BETWEEN:

STICKY NUGGZ INC.

Applicant

– and –

ALCOHOL AND GAMING COMMISSION OF ONTARIO AND THE ATTORNEY GENERAL OF ONTARIO

Respondents

REASONS FOR JUDGMENT

Penny J.

Released: October 9, 2020

Tab 285

CanLII

Laiken v. Carey, 2011 ONSC 5892 (CanLII)

Source:	Superior Court of Justice
Date:	2011-10-12
File number:	CV-09-389964; 00-CV-187887CM4
Other citation:	[2011] OJ No 5376 (QL)
Citation:	Laiken v. Carey, 2011 ONSC 5892 (CanLII), <https://canlii.ca/t/fp3mp>, retrieved on 2026-01-18
Most recent unfavourable mention	Sabourin and Sun Group of Companies v. Laiken, 2013 ONCA 530 (CanLII) [...] APPEAL from the order of L.B. Roberts J., **2012 ONSC 7252 (S.C.J.) setting aside her earlier finding, [2011] O.J. No. 5376, 2011 ONSC 5892 (S.C.J.)** that the respondent was in contempt. [...]

CITATION: Laiken v. Carey; Sabourin v. Laiken, 2011 ONSC 5892
COURT FILE NOS.: CV-09-389964 and 00-CV-187887CM4
DATE: 20111012

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Judith Laiken, Plaintiff

AND:

Peter W.G. Carey, Stephen P. Ponesse and Brian Greenspan, Defendants

- AND –

Sabourin and Sun Group of Companies, Plaintiff

AND:

Judith Laiken, Defendant

BEFORE: Madam Justice L.B. Roberts

COUNSEL: Kevin Toyne, for the Plaintiff, Judith Laiken

Patrick Schindler, for the Defendant, Peter W.G. Carey

monies would have been in the possession and control of the receiver and dispersed to creditors with claims having priority over Ms. Laiken's judgment.

[53] Generally a lawyer holds no duty to the opposite party. In *Shuman v. Ontario New Home Warranty Program*[8], Madam Justice K. Swinton held that such claims cannot succeed:

"Moreover, as to the claims against [the opposing party's solicitors] in negligence, or breach of fiduciary duty, there is no legal authority to support the proposition that a solicitor for a party owes a duty of care to an opposing party. Therefore, there is no basis for a claim in negligence or fiduciary duty against these defendants (*Geo. Cluthe Manufacturing Co. v. ZTW Properties Inc*. …). …."

[54] This issue was also before the Court in *Brignolio v. Desmarais, Keenan & Robert*[9]. In his decision, Mr. Justice D. Lane held, at paragraph 17, that an action does not lie against an adverse party or his counsel based on a lawyer's breaches of ethical duties since such duties are owed to the Court and to the Law Society of Upper Canada, but not to the opposite party in litigation, and referenced the public policy rationale that protects a lawyer from such actions:

"If the policy of the court were otherwise, the same difficulties would arise as would arise in the case of negligence. There would be a temptation, which many would find irresistible, to re-litigate in actions against their opponent's counsel the issues which they have lost in the main litigation, or to attempt to handicap the other side by eliminating experienced and knowledgeable counsel from the case. The public policy in such instances is referred to by Lord Donaldson of Lymington M.R. in *Al-Kandari v. J.R. Brown & Co*. [1988] 1 All E.R. 833 at p. 835 (C.A.) cited in the *Cluthe* case … as follows:

> I would go rather further and say that, in the context of "hostile" litigation, public policy will usually require that a solicitor be protected from a claim in negligence by his client's opponent, since such claims could be used as a basis for endless re-litigation of disputes.

In my view, the same principles apply to allegations of breaches of ethical conduct."

[55] There are a few well established exceptions to the general rule that a lawyer owes no duty to opposing or third parties, including:

i. Where a lawyer gives an undertaking to the Court or the opposing or third parties and fails to perform it, the lawyer may be ordered to do that act or make good the loss flowing from the failure to perform the undertaking[10].

ii. Where a lawyer is implicated in intentional torts, including fraud, slander of title, false imprisonment, malicious prosecution, abuse of process and civil conspiracy, those intentional torts are not defeated by the rule that a lawyer owes no duty of care to the opposing party in litigation.[11]

[56] Further, there is no absolute bar to an action against a lawyer by an opposing or third party whom the lawyer has injured while the lawyer was acting outside the scope of his or her duty as a solicitor. A lawyer can be liable to an opposing or a third party where the lawyer commits an independent tortious act that causes foreseeable injury.[12]

[57] In the present case, Ms. Laiken squarely frames her action against Mr. Carey in negligence. She does not allege that he committed any intentional tort, voluntarily gave an

Tab 286

CanLII

Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 (CanLII)

Source:	Supreme Court of British Columbia
Date:	2010-08-23
File number:	S056026; S067300
Other citation:	[2010] BCJ No 1648 (QL)
Citation:	Le Soleil Hospitality Inc. v. Louie, 2010 BCSC 1183 (CanLII), <https://canlii.ca/t/2c4k8>, retrieved on 2026-01-18

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Le Soleil Hospitality Inc. v. Louie,* 2010 BCSC 1183

Date: 20100823
Docket: S056026
Registry: Vancouver

Between:

Le Soleil Hospitality Inc.
And Le Soleil Restaurant Inc.

Plaintiffs

And:

Andrew Louie, 668706 B.C. Ltd., 688571 B.C. Ltd., 708583 B.C. Ltd., 716642 B.C. Ltd., 716648 B.C. Ltd., 700439 B.C. Ltd., 587019 B.C. Ltd., And 585503 British Columbia Ltd.

Defendants

And:

567 Hornby Apartment Ltd.

Defendant by Counterclaim

- and -

Docket: S067300
Registry: Vancouver

Between:

[290] In *Halpern Investments Ltd. v. Sovereign General Insurance Company*, 2004 ABQB 865, Clark J. reviewed several cases in which the corporate veil was pierced because of fraud or other improper conduct. He went on to pierce the corporate veil to prevent an individual who was the guiding hand behind two corporate entities from benefiting from an admitted fraud; see also *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Limited* (1989), 1989 CanLII 230 (BC CA), 37 B.C.L.R. (2d) 258 (C.A.)

[291] The plaintiff is obliged to mitigate damages caused by a contractual breach when he or she learns of it by taking all reasonable steps to prevent further loss. Where such steps are undertaken, the plaintiff can recover for the loss and all reasonable expenses incurred in mitigation of that loss: *Asamera Oil Corp. Ltd*.

[292] Once the plaintiff has proven damages on a reasonable preponderance of credible evidence, the burden lies on the defendant to raise and establish a failure to mitigate. In order to discharge the burden and limit the award of damages, the defendant must lead adequate proof of the alleged failure to the same standard of proof required of the plaintiff: *Peerzan v. Cameron*, 1982 CarswellBC 2113 (S.C.) at ¶ 7; *Red Deer College v. Michaels*, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at 331; *Graham v. Rogers*, 2001 BCCA 432 at ¶ 85.

[293] The duty to mitigate does not require the plaintiff to act perfectly in response to the defendant's breaches of contract. Although the defendant is entitled to expect that only reasonable remedial costs will be expended, the court will not take an overly critical view taking into account the exigencies of the situation faced by the plaintiff: *Addco Drywall Ltd. v. White Rock Manor Joint Venture*, 1991 CarswellBC 831 (S.C.) at ¶ 105.

Application of Legal Principles to the Facts

[294] I agree with Hospitality's analysis regarding its Operational and Ownership Losses. In my view, Mr. Suddaby's calculations and underlying assumptions are logical, reasonable and fair. In particular, I am satisfied that the overall occupancy level of the 113-room Hotel skilfully operated by Mr. Somani would probably have been the same as that achieved for the 95-room Hotel throughout the relevant period. I am also satisfied that economies of scale of the sort Mr. Suddaby identified would have been enjoyed.

[295] I do not accept Mr. Instance's criticisms of Mr. Suddaby's Operational Loss analysis. Given the lead-time required for reservations and other absorption adjustments, the lack of increased profit after July 2008 is unsurprising and the summer downturn of 2008 is of negligible effect. In addition, Mr. Instance's own analysis suffered from several deficiencies. For example, it was unreasonable for him to assume that the Meeting Rooms would generate no revenue and the expense ratio per room would increase rather than decrease.

[296] I also accept Mr. Suddaby's Ownership Loss analysis and reject that of Mr. Instance. In my view, Mr. Instance's suggestion that property tax rates would likely have increased when the Louie Group Strata Lots were conveyed is inconsistent with the evidence and speculative at best. In addition, his view that Operational and Ownership Losses cannot both be properly claimed is untenable. If Hospitality did not choose to pay itself rent for the Louie Group Strata Lots, its operational profit would have increased by the same amount. Accordingly, from a loss perspective the result would be the same.

[297] In so far as the evidence of Mr. Instance conflicts with that of Mr. Suddaby, I prefer the evidence of Mr. Suddaby.

[298] I also am satisfied that the adjustments proposed by Hospitality are required to achieve full and fair compensation. I also find there is no basis for adjusting the damages awarded with respect to taxation. That is a matter for the parties.

[299] As to the breaches of Dr. Louie's covenant, again I generally agree with Hospitality's analysis. Dr. Louie acted personally, intentionally and in direct violation of his covenant by providing substantial funding for the Prohibited Actions. In so far as he also acted indirectly, through his companies, it is appropriate to pierce the corporate veil in order to prevent these entities from being used as a shield for such improper conduct.

[300] I do not accept that Hospitality's damages for Dr. Louie's breach of covenant were unforeseeable or remote, as submitted by the Louie Group Defendants. On the contrary, one of the central purposes of the LOI was to end the need for either party to engage in litigation that was adverse to Hospitality's interests. When the litigation storm continued, due in part to Dr. Louie's breaches of covenant, this contemplated purpose was defeated. The foreseeable result was that further legal fees were incurred.

[301] I also do not accept that the Prohibited Actions could well have proceeded in the absence of the impugned funding. I have found that the LSHS and Executive Actions would have ended by October 1, 2007 because the remaining LSOG defendants would have settled by then if the litigation had not been funded by Dr. Louie. I also find that the Peh Proceedings would not have been conducted and, at most, one-half of the fees incurred would have been required to conclude the Kasahara Proceedings if the Kasaharas alone had been paying their lawyer. In so far as it is necessary to do so, I resolve any uncertainty on these matters in favour of Hospitality based on the *Armory* principle.

[302] There is no basis in the evidence to support a finding that 25% of the fees incurred would have expended for "clean up" costs in the absence of Dr. Louie's breach of covenant. Accordingly, I decline to make such a finding in favour of the Louie Group Defendants.

[303] I do accept, however, that Hospitality is entitled to recover only those legal fees, disbursements and taxes that were reasonably incurred in responding to the Prohibited Actions: *Asamera Oil Corp. Ltd*. Although there is no suggestion in the evidence that any of the fees, disbursements or taxes actually incurred were unreasonable, a detailed analysis on this issue was not undertaken at trial. For this reason, I conclude this task should be performed by the Registrar.

[304] Taking into account the foregoing, I conclude that Hospitality is entitled to damages calculated as follows:

> Hotel Operations and Rental Income
>
> With respect to loss of net income for hotel operations from December 2005 to July 2008, the sum of $1,479,036; and
>
> With respect to the loss of net rental income for the Louie Group Strata Lots for the period December 25 to September 2008, the sum of $774,561;
>
> From which combined sum of $2,253,597 is to be deducted the sum of interest on the unpaid capital sum payable for the Louie Group Strata Lots,
>
> With pre-judgment interest payable on this adjusted sum calculated as though the lost income was received over time, monthly;
>
> With respect to loss of net rental income for the Louie Group Strata Lots from October 2008 to September 2009, an amount equal to the net rental income received by the Louie Group defendants during this period;
>
> Together with pre-judgment interest, less additional interest;
>
> With leave to make further submissions in writing or in person in the event agreement as to calculation is not reached.
>
> Support of Prohibited Actions
>
> With respect to the LSHS Action and the Executive Action: all legal fees and disbursements reasonably incurred by Hospitality from and after October 1, 2007, as assessed by the Registrar;
>
> With respect to the Kasahara Proceedings, 50% of all legal fees and disbursements reasonably incurred by Hospitality as assessed by the Registrar;
>
> With respect to the Peh Proceedings, all legal fees and disbursements reasonably incurred by Hospitality as assessed by the Registrar.

[305] I also award special costs against the Louie Group Defendants and 567 on a full indemnity basis, with joint and several liability for the special costs, on the basis outlined

below.

Should the damages and costs awarded be set off against the purchase price of the Louie Group Strata Lots?

[306] I have awarded damages and costs against the Louie Group Defendants in addition to ordering specific performance. Hospitality seeks a term of the order permitting damages and costs to set off against the purchase price of the Louie Group Strata Lots.

[307] The damages and costs awards are based on and arise out of the Louie Group Defendants' breaches of the LOI. It is, therefore, appropriate for Hospitality to pay the purchase price of the Louie Group Strata Lots less the amount due for damages and costs: *Eider*; *Tanu*.

THE 567 ACTION AND THE COUNTERCLAIM

Are the Alleged June Agreements authentic or fraudulent?

[308] I have concluded that Mr. Nomani created the Alleged June Agreements on November 7 and 8, 2005, not in June 2005 as he claimed. I have also concluded that Dr. Louie signed seven of them on November 8, 2005 at Mr. Visram's office and Jonathon Louie signed the eighth some time thereafter. As noted, this conclusion is based on the following factors:

i) Dr. Louie's revised testimony in which he admitted signing the Alleged June Agreements on November 8, 2005 at Mr. Visram's office;

ii) Dr. Louie's admission that he committed perjury on this issue and counselled his son, Jonathon, to do the same;

iii) Dr. Louie's decision to back out of the LOI almost immediately after it was concluded;

iv) Dr. Louie and Mr. Nomani's failure to disclose the Alleged June Agreements to the Court, Dr. Louie's counsel, opposing counsel or Hospitality prior to November 8, 2005, although they were obliged to do so or disclosure was in Dr. Louie's interest;

v) the forensic evidence regarding use of Mr. Nomani's computer on November 7 and 8, 2005, together with Mr. Nomani's inherently improbable explanation for that use; and

vi) Mr. Nomani's attempts to hide, alter and manufacture electronic documents related to the Alleged June Agreements.

[309] Hospitality submits that the Alleged June Agreements were created for the fraudulent purpose of asserting a pre-existing right to the Louie Group Strata Lots in order to defeat its rights under the LOI. According to Hospitality, immediately after the LOI was concluded Mr. Nomani persuaded Dr. Louie that he had made a bad deal and they could negotiate better terms. In furtherance of this goal, on November 7 and 8, 2005 Mr. Nomani created and Dr. Louie executed the Alleged June Agreements. Thereafter, both relied on them in various litigation contexts at great cost to Hospitality.

[310] Dr. Louie concedes that he signed the Alleged June Agreements on November 8, 2005, after the LOI was concluded. He also concedes that Mr. Nomani "lacks credibility" with respect to the Alleged June Agreements. He submits, however, that the alleged fraud was of no consequence because the RFRs were never exercised and Hospitality's priority status with respect to the Louie Group Strata Lots was never truly endangered. In essence, his position is that the alleged fraud was so poorly designed and executed that it caused no real damage.

[311] Mr. Nomani maintains that the Alleged June Agreements were created and executed in June, 2005. He vehemently denies committing any fraudulent act and accuses Hospitality of engaging in "a propaganda campaign to color the main facts and issues". He goes on to describe its theory as "circumstantial and anecdotal".

[312] Fraud is amongst the most serious forms of civil action: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1990 CanLII 819 (BC CA), [1990] B.C.J. No. 672 (C.A.). Sometimes called the tort of deceit or fraudulent misrepresentation, it may be committed in a wide variety of ways. Its essential elements are:

i) a false representation of fact by the defendant;

ii) made with knowledge of its falsity or, alternatively, recklessly as to its truth;

iii) made with the intention that the plaintiff would be deceived and act upon it, which occurred; and

iv) the plaintiff suffered damage as a result:

Derry v. Peek (1889), 14 App. Cas. 337 (H.L.); *Han v. Cho* 2009 BCSC 458 at ¶ 79; *BG Checo*.

[313] An intention to defraud may be established by direct or circumstantial evidence. In many cases, the court will analyse so-called "badges of fraud" to make the necessary determination. In the context of an allegedly fraudulent transfer of property, such badges or indicia may include:

i) the relationship between the parties to the transfer;

ii) the effect of the transfer on the assets of the debtor;

iii) evidence of haste in making the transfer;

iv) the timing of the transfer relative to claims against the debtor;

v) secrecy; and

vi) the effect of the transfer on the creditor:

Frimer v. Lercher, [1984] B.C.J. No. 728 at ¶ 12 (S.C.); *Wilson v. Gill* (1995), 1995 CanLII 1215 (BC SC), 33 C.B.R. (3d) 21 at ¶ 25 (B.C.S.C.).

[314] In a civil proceeding, fraud must be established on a balance of probabilities: *F.H. v. McDougall*, 2008 SCC 53 at ¶ 49.

[315] In this case, Dr. Louie and Mr. Nomani were determined to defeat the LOI within hours of its conclusion. They maintained their determination in the days that followed, despite receiving legal advice from Messrs. Epstein, Jakubec and Berger that the LOI was binding and enforceable. I conclude that, faced with this unwelcome advice, they decided to create the Alleged June Agreements for the fraudulent purpose of advancing their goal.

[316] For over three years, Dr. Louie and Mr. Nomani falsely represented that the Alleged June Agreements were created and signed in June 2005, before the LOI was concluded. Based on this false representation, they claimed that 567 had a pre-existing right to the Louie Group Strata Lots and, therefore, Hospitality's rights under the LOI were superseded. Their intention in so doing was to deceive Hospitality, persuade it to negotiate better terms for the Louie Group Strata Lots, and improve 567's position. They also intended to deceive the Court in an effort to prevail in the litigation.

[317] Hospitality did not accept that the Alleged June Agreements were authentic. In consequence, Dr. Louie and Mr. Nomani's fraudulent purpose was never fully achieved. Hospitality was obliged, however, to respond to the fraudulent misrepresentation, and did so by refuting the false claim and seeking to enforce its rights under the LOI. Although ultimately successful, Hospitality suffered considerable damage in connection with costs and delay incurred in the hotly contested litigation.

[318] I am satisfied the essential elements of fraud have been established. The Alleged June Agreements are fraudulent. Dr. Louie and Mr. Nomani are both parties to the fraud.

Did the Louie Group grant the RFRs to 567 in June 2005, or at all?

[319] Given the absence of independent evidence, I have been unable to make findings regarding the nature and terms of any verbal agreement that existed between the Louie Group Defendants and 567. That being so, 567 has failed to discharge the requisite onus of proof and I answer this question in the negative.

Is 567's claim moot or is it necessary to decide whether any instruments or agreements give priority to 567 over Hospitality's rights under the LOI? If such instruments or agreements have been established, did Hospitality induce Dr. Louie to breach them?

[320] I have concluded that no instruments or agreements giving priority to 567 over Hospitality's rights under the LOI have been established on the evidence. If I am wrong, however, and the evidence supports such a finding, it is prudent to go on and consider whether 567 is entitled to a declaration to this effect.

[321] Throughout the course of the trial, 567 maintained that the Alleged June Agreements were executed in June 2005, before the LOI was concluded. It also maintained that, in any event, they evidence the parties' verbal agreement with respect to the RFRs. At the trial's conclusion, Mr. Nomani announced that 567 no longer sought to rely upon the RFRs. Nevertheless, he asked me to declare that the RFRs give priority to 567 over Hospitality's rights under the LOI and Hospitality induced Dr. Louie to breach them.

[322] Courts generally decline to decide cases which raise merely hypothetical questions. Occasionally, however, a court may exercise its discretion to address an issue that is moot. For example, if an important question arises recurrently, but only briefly, the court may decide to answer it even though there is no longer a live controversy in the case: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 358-363.

[323] Although moot issues may be addressed in certain circumstances, the court's discretion will not be exercised if no practical purpose would be served by so doing. In particular, it has been repeatedly held that declaratory relief should not be granted where the declaration sought would be without practical effect: *Gardner v. City of Williams Lake*, 2005 BCSC 706 at ¶ 97-99; *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. 225 at ¶ 12 (B.C.C.A.).

[324] From the parties' perspective, no practical purpose would be served by granting the declaratory relief sought by 567. In addition, the existence or non-existence of the RFRs is not a matter of general importance. In the circumstances, I am satisfied the

claim is moot and no further analysis is appropriate or required: *Borowski*; *Gardner*; *Haldorson*.

[325] I am also satisfied that even if the evidence establishes a verbal agreement between Dr. Louie and 567, Hospitality did not induce Dr. Louie to breach it.

[326] The tort of inducing breach of contract is committed where the defendant induces a breach of contract between the plaintiff and a third party and, as a result, the plaintiff suffers damage: *Slade and Stewart Ltd. v. Haynes*, [1969] B.C.J. No. 439 at ¶ 10 (S.C.). The essential elements are:

i) the defendant had knowledge of the contract;

ii) the defendant intended to bring about, induce or procure the breach of the contract;

iii) the defendant persuaded or otherwise prevailed upon one party to a contract to break it, thereby causing loss to the plaintiff, the other contracting party or the defendant induces the contract breaker to enter into a contract with him or her that is inconsistent with the existing contract of the plaintiff; and

iv) the plaintiff suffers damages as a consequence of the defendant's conduct.

Fabbi v. Jones (1972), 1972 CanLII 127 (SCC), 28 D.L.R. (3d) 224 at 232 (S.C.C.); *Posluns v. Toronto Stock Exchange and Gardiner* (1964), 1964 CanLII 199 (ON SC), 46 D.L.R. (2d) 210 at 261 (Ont. H.C.); affirmed (1965), 1965 CanLII 32 (ON CA), 53 D.L.R. (2d) 193 (Ont. C.A.); affirmed (1968), 1968 CanLII 6 (SCC), 67 D.L.R. (2d) 165 (S.C.C.); G.H.L. Fridman, *The Law of Torts in Canada*, 2nd Edition (Toronto: Carswell, 2002) at pp. 794-5, 798-9.

[327] In this case, Hospitality knew there was an agreement of some sort in place between Dr. Louie, 567 and Mr. Nomani regarding the Louie Group Strata Lots. As noted, however, at the LOI negotiating session, when specifically asked about their arrangements, Dr. Louie assured its principals that they did not present an obstacle to settlement. He also remarked that Mr. Nomani may be upset by the settlement, but would have to move on.

[328] Hospitality was entitled to rely upon Dr. Louie's assurances, and did so. Given what he told its principals, I find that no intention to bring about, induce or procure a breach of the agreement between Dr. Louie, 567 and Mr. Nomani was formed by Hospitality. On the contrary, Hospitality took reasonable steps to ensure that the LOI would not interfere with any such arrangements that may have existed. It follows that Hospitality did not commit the tort of inducing breach of contract.

Did Mr. Nomani induce Dr. Louie to breach the LOI?

[329] Hospitality submits that, from October 21, 2005 to the time of trial, Mr. Nomani induced Dr. Louie to breach the LOI by refusing to follow through with its performance. His motive in so doing was to protect and enhance 567's position by maintaining its ability to operate a hotel within a hotel.

[330] According to Hospitality, within hours of the LOI's conclusion Mr. Nomani persuaded Dr. Louie that he had made a bad deal by following the advice of his lawyers. Dr. Louie was persuaded and, as a result, he decided to disavow the LOI. Thereafter, Mr. Nomani and Dr. Louie took the steps discussed in the conspiracy section below together. Those steps caused great loss to Hospitality.

[331] Mr. Nomani responds that Dr. Louie made his own decisions concerning the LOI's non-performance. Although he admits to being consulted, Mr. Nomani denies engaging in any acts of persuasion. On the contrary, Mr. Nomani claims that Dr. Louie decided on his own to send the Duress Fax and stop payment on the performance bond cheque immediately following the LOI negotiating session. Thereafter, according to Mr. Nomani, Dr. Louie acted independently, based on a sincere belief that the LOI was unfair and invalid.

[332] I do not accept Mr. Nomani's submission. Dr. Louie trusted him and relied heavily on his advice and persuasion in all matters related to the Louie Group Strata Lots. In my view, this reliance exemplifies Dr. Louie's admittedly poor business judgment and extraordinary naivety.

[333] From the outset, Mr. Nomani did all that he could to enhance his own position in connection with Hotel matters. For example, in 2003 and 2004 he acted as a consultant to both Dr. Louie and Hospitality concurrently and told Mr. Daroowala "If I can't make money from my friends, I have to make money from my friends' enemies". He also took sales commissions from LSOG owners, Mr. Franiek and Dr. Louie for agreements regarding LSOG units. I infer that this long-standing pattern of self-serving action was at the heart of his efforts to persuade Dr. Louie to disavow the LOI.

[334] As noted, the August Draft LOI included a term that Mr. Nomani would be paid $50,000 per annum and be allowed to maintain a Hotel office. Mr. Somani wisely refused to agree. For that reason, the LOI did not provide for Mr. Nomani's continued participation in Hotel operations. When he learned of its terms, Mr. Nomani immediately called Dr. Louie and prevailed upon him to change his mind.

[335] Dr. Louie was persuaded for two primary reasons: he was unsatisfied with the purchase price agreed upon and felt guilty for leaving Mr. Nomani out of the settlement. Mr. Nomani's intention in persuading him was to procure the breach of the LOI by

ensuring its non-performance. Although he no doubt hoped Dr. Louie could get a better price for his units, I conclude that Mr. Nomani's primary motive was to enhance his own commercial position.

[336] As discussed below, Mr. Nomani prevailed upon Dr. Louie to breach the LOI from October 21, 2005 onward. By November 7, 2005 he knew from the lawyers that it was probably valid. By December 27, 2006 he knew from the Court that it was undeniably so. As a result of Mr. Nomani's persuasive efforts, Hospitality suffered loss and damage. It follows that the essential elements of the tort of inducing breach of contract have been made out.

Did Mr. Nomani and Dr. Louie conspire to defeat the LOI?

[337] Hospitality submits that, from October 21, 2005 to the time of trial, Mr. Nomani conspired with Dr. Louie and the other Louie Group Defendants unlawfully to undermine the LOI and to injure Hospitality. According to Hospitality, together they pursued an aggressive "scorched earth" policy aimed at robbing Hospitality of its rights and thereby destroying it, regardless of the cost to anyone concerned.

[338] In summary, Hospitality says the agreement was reached when Mr. Nomani spoke with Dr. Louie during the morning court break on October 21, 2005 and Dr. Louie expressed his willingness to reverse the LOI. Thereafter, they worked together to achieve this goal, which they knew to be unlawful, by, amongst other things: drafting and sending the Duress Fax; arranging to stop payment of the performance bond cheque and returning the deposit; creating and relying upon the Alleged June Agreements; and raising and disbursing massive sums on litigation contrary to Hospitality's interests. They also worked together to hide many of their actions and, in so doing, repeatedly breached court orders and their litigation obligations. According to Hospitality, in conspiring to carry out these acts, Mr. Nomani and Dr. Louie intended to injure Hospitality and knew that injury would result, or acted for the predominant purpose of injuring Hospitality.

[339] The Louie Group Defendants and Mr. Nomani respond that their sole motivation was to protect their own commercial self-interest. In their submission, they did so within their legal rights, albeit with a measure of distrust and hostility borne of the soured business relationship with Hospitality. According to both, this attitude was understandable given Hospitality's substantial financial power, unreasonable conduct in connection with the disputed issues and aggressive pursuit of its own commercial self-interest. So, too, was their ultimately incorrect, but sincerely held, belief that the Louie Group Defendants should not be bound by the LOI because it was unfair.

[340] The Louie Group Defendants also emphasize that Dr. Louie was extremely busy with his medical practice. In their submission, he had no time or inclination to enter into nefarious agreements with Mr. Nomani regarding Hotel matters and did not do so.

Rather, he left everything to Mr. Nomani, who was his agent, and trusted that Mr. Nomani would act appropriately. At most, Dr. Louie had knowledge of some of his agent's actions and acquiesced; he did not agree. Accordingly, they say the tort of conspiracy has not been made out.

[341] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.*, [1993] B.C.J. No. 2958 (C.A.), McEachern C.J.B.C. described the essential elements of the tort of conspiracy. He stated at ¶ 5:

> 5 Accordingly, the following elements must be proved:
>
> 1. an agreement between two or more persons;
> 2. concerted action taken pursuant to the agreement;
> 3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
>
> (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
>
> 4. actual damage suffered by the plaintiff.

[342] There are two types of civil conspiracy in Canada: i) conspiracy to injure; and ii) conspiracy to use unlawful means. For the first type it is necessary to prove that the conspiracy was undertaken for the predominant purpose of injuring the plaintiff. For the second, regardless of the conspiracy's predominant purpose, it is necessary to prove that the defendants should have known that injury to the plaintiff would ensue: *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452 at 471-472.

[343] For both types of conspiracy an agreement between the defendant and one or more others must be established either directly or by inference. The agreement need not be contractual. Rather, the plaintiff must show that a defendant combined or conspired with others to carry out a common design or a means of achieving a common objective, which, when implemented, injured the plaintiff: *Golden Capital Securities Ltd. v. Rempel*, 2004 BCCA 565 at ¶ 47.

[344] As in all civil cases, the standard of proof for civil conspiracy is proof on a balance of probabilities: *F.H.* at ¶ 49. Once an agreement has been established the statements of one co-conspirator are admissible against all others if they were made while the conspiracy was ongoing in furtherance of the common object: Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Butterworth & Co., Toronto: 1974) at p. 149.

[345] A defendant who conspires with another to commit unlawful acts may be liable for the consequences even though some acts are instigated by a single co-conspirator. In particular, liability will be imposed if the defendant knew or should have known that such

acts were a probable consequence of the common objective being carried out: *Golden Capital Securities Ltd.* at ¶ 74.

[346] A range of unlawful actions have been held to support a finding of civil conspiracy. For example, in *Meehan v. Tremblett*, [1994] N.B.J. No. 502 (Q.B.) the court based a conspiracy finding on the preparation of a false incident report in an employment context. In addition, inducing breach of contract and fraud have both been found to constitute unlawful action in connection with findings of civil conspiracy: *Cotter v. Osborne*, 1909 CarswellMan 28 (C.A.); *Seaboard Owners Ltd. v. Cross*, 1949 CarswellBC 65 (S.C.); *Royal Bank v. Holoboff*, [1999] A.J. No. 380 (Q.B.).

[347] I conclude that Dr. Louie and Mr. Nomani entered into an agreement that Dr. Louie would disavow the LOI and refuse to follow through with its performance. The agreement was first reached on October 21, 2005 and maintained thereafter until Dr. Louie consented, mid-trial, to an order for specific performance. The agreement is established directly on Dr. Louie's and Mr. Nomani's own testimony. It is also established by inference from their conduct.

[348] Dr. Louie and Mr. Nomani shared a common objective in disavowing the LOI: to obtain a better price for the Louie Group Strata Lots, if possible, and to enhance 567's position. In furtherance of this objective, they took many concerted actions, some of which were unlawful. The most obvious such action was the creation, execution and reliance upon the fraudulent Alleged June Agreements. They also worked together to raise and disburse funds in breach of Dr. Louie's covenant and the May 2008 Injunction, and unlawfully hid this conduct by swearing false affidavits in connection with document production.

[349] Although Dr. Louie was not involved in the day-to-day minutiae of all of the foregoing, he was kept apprised by Mr. Nomani. Importantly, he did not merely acquiesce; he actively agreed. Dr. Louie personally signed the fraudulent Alleged June Agreements created by Mr. Nomani and perjured himself regarding the date of his signature. He also arranged for deposit of the funds raised through the Franiek Loans in the Scotiabank Trust Account knowing that Mr. Nomani would use them to pay legal fees for the Prohibited Actions.

[350] I reject Dr. Louie's submission that, as a matter of law, he and Mr. Nomani could not engage in a civil conspiracy because Mr. Nomani was employed as his agent. In summary, he argues that, in these circumstances, he was merely agreeing with an extension of himself, which cannot be done. No case authority was cited in support of this unusual proposition and, in my view, it is untenable. Regardless of the hierarchy created by a contractual or employment relationship, independent actors are capable of entering agreements with one another to take joint action. If the joint action is intended to cause damage or is unlawful, it may form the basis of a finding of civil conspiracy.

[351] I accept that Dr. Louie and Mr. Nomani may have believed the LOI was unfair and hoped it was invalid when they first agreed upon its disavowal. By November 7, 2005, however, they had received clear legal advice that the LOI was binding and enforceable. By December 27, 2006, Pitfield J. had confirmed that this was so. Nevertheless, Dr. Louie and Mr. Nomani remained determined to undermine the LOI, regardless of its validity, and attempted to do so at great cost to Hospitality.

[352] I also accept that Dr. Louie's and Mr. Nomani's predominant purpose throughout was to advance their own commercial self-interest. Although Dr. Louie felt very hostile toward Hospitality, his primary focus was always the effect of his actions upon himself. The same was true of Mr. Nomani. The injurious effect of their joint action upon Hospitality was, however, entirely foreseeable and in that sense intentional. In addition, regardless of their predominant purpose Dr. Louie and Mr. Nomani engaged in unlawful means to achieve their common objective.

[353] The unlawful means Dr. Louie and Mr. Nomani agreed upon and implemented in pursuit of their common objective included fraud, perjury and the breach of court orders. These acts predictably caused injury to Hospitality.

[354] Taking into account the foregoing, I conclude that the essential elements of civil conspiracy have been made out.

Should punitive damages be awarded and, if so, against whom and in what amount?

[355] Hospitality seeks punitive damages of at least $500,000 against the Louie Group Defendants, 567 and Mr. Nomani. In summary, it says their misconduct from and after October 21, 2005 amounted to a malicious, sustained, secretive attack on Hospitality's interests intended to cause it as much harm as possible and, in so doing, to abuse the process of the court. Misconduct of this magnitude and complexity is, in Hospitality's submission, virtually unprecedented in the courts of British Columbia and severe punishment is required. According to Hospitality, unless high punitive damages are awarded the objective of deterrence will not be adequately achieved.

[356] Hospitality submits that the defendants' egregious misconduct far exceeded Dr. Louie's failure to perform his obligation to sell the 30 Louie Group Strata Lots. Acting jointly, Dr. Louie and Mr. Nomani also immediately conspired to defeat the LOI. Thereafter they secretly supported litigation contrary to Hospitality's interests; breached injunctions; created the Alleged June Agreements; abused the Court's process by making false claims against Hospitality, commencing frivolous actions and filing CPLs in the Land Title Office; and manufactured and introduced false evidence throughout the course of the proceedings.

[357] In Hospitality's submission, some of these actionable wrongs will not be the subject of awards for compensatory damages. In combination, they dramatically increased the time, cost and difficulty associated with achieving a just resolution to the parties' dispute. Such misconduct must be soundly denounced.

[358] The Louie Group Defendants respond that the conduct complained of occurred in the context of a commercial relationship. Hospitality was far from vulnerable and, as might be expected, they pursued their own commercial interests aggressively. They submit that before Pitfield J. declared the LOI to be binding Dr. Louie believed it was invalid and, therefore, his actions were justifiable. Thereafter, his actions amounted to no more than vigorous pursuit of litigation. In the Louie Group Defendants' submission, such actions might properly result in substantial compensatory damages and a punitive costs award, but they do not justify an additional award of punitive damages.

[359] The Louie Group Defendants go on to say that their support of litigation contrary to the interests of Hospitality did not amount to an independent actionable wrong within the meaning of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at ¶ 36-40. They also say that the Alleged June Agreements were not "true" forgeries because a verbal agreement had been reached in June, 2005. In the alternative, the Louie Group Defendants submit that, if awarded, punitive damages should be in the range of $30,000 to $50,000.

[360] Mr. Nomani and 567 deny any wrongdoing whatsoever. Accordingly, they submit no award for punitive damages should be made.

[361] As noted, the primary objective of civil law is just compensation. In exceptional circumstances, however, punishment is also a legitimate, socially valuable goal. In such cases, the plaintiff acts as a public interest enforcer as well as a private interest claimant and the defendant is punished for conduct that offends the court's sense of decency: *Whiten*.

[362] An award of punitive damages is designed to punish, deter and denounce reprehensible misconduct that departs markedly from ordinary standards of decent behaviour. It can be made in any category of case where there is an independent actionable wrong: *Whiten* at ¶ 67-83; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at ¶ 196.

[363] Although available in principle in all categories of cases punitive damages are exceptionally rare in cases involving commercial contracts, even where there is fraud. In cases of fraudulent misconduct punitive damages will be awarded, however, if, but only if, compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation: *Performance Industries Inc. v. Sylvan Lake Golf & Tennis*

Club Ltd., 2002 SCC 19, at ¶ 77-92; *Insurance Corp. of British Columbia v. Husseinian*, 2008 BCSC 241, at ¶ 161-180.

[364] To be justified, a punitive damages award must be rationally connected to the facts and the law's objectives. It must also be imposed with restraint. The focus of analysis is the defendant's misconduct, not the loss of the plaintiff. The quantum awarded should be proportionate to the degree of misconduct, the harm caused, the plaintiff's vulnerability and any advantage wrongfully gained. Factors such as the punitive effect of the overall award and other penalties imposed should also be taken into account: *Whiten* at ¶ 67-76 and ¶ 94; *Husseinian* at ¶ 161-163.

[365] The degree of blameworthiness at issue may involve several elements. These include, amongst others: whether the misconduct was planned and deliberate; the defendant's motive and awareness that the misconduct was wrong; the period over which the misconduct persisted; attempts at concealment; and whether the interest violated was deeply personal to the plaintiff or irreplaceable: *Whiten* at ¶ 113; *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799 at ¶ 85.

[366] In *Husseinian*, Gerow J. awarded punitive damages ranging from $3,500 to $75,000 against several defendants who had defrauded their motor vehicle insurer. In so doing, she identified the financial means of the defendant, whether the defendant required the plaintiff to prove its claim, whether the defendant abused the court's process, whether there was planned and deliberate fraud, and whether there were multiple acts as relevant factors to be taken into account: *Husseinian* at ¶ 163.

[367] The Supreme Court of Canada recently considered awards of punitive damages imposed in cases involving commercial contracts in *Whiten* and *Performance Industries*. In *Whiten* a punitive damages award of $1,000,000 was upheld where an insurer acted exceptionally reprehensibly in denying a legitimate fire loss claim made by a policy holder. In contrast, in *Performance Industries*, a punitive damages award of $200,000 was set aside where one businessman attempted to gain a commercial advantage by relying on a written document that he knew misstated the oral agreement actually reached.

[368] The power imbalance between the plaintiff and defendant, and the plaintiff's consequent vulnerability, was a significant factor in the Supreme Court's analysis in *Whiten*. As Binnie J. noted, this factor is rarely present in cases involving commercial contracts. At ¶ 115, he stated:

> I add two cautionary notes on the issue of vulnerability. First, this factor militates against the award of punitive damages in most commercial situations, particularly where the cause of action is contractual and the problem for the court is to sort out the bargain the parties have made. Most participants enter the marketplace knowing it is fuelled by the aggressive pursuit of self-interest. Here, on the other hand, we are dealing with a homeowner's "peace of mind" contract.

[369] Binnie J. also commented on power imbalance and vulnerability as they relate to punitive damages at ¶ 88 in *Performance Industries*. He stated:

> This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that was "fraudulent, dishonest and deceitful". His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

[370] Each case is, of course, unique and fact specific. Some examples of punitive damages awarded in recent years, in addition to those awarded in *Whiten*, *Performance Industries*, and *Husseinian* include: *Evocation Publishing v. Hamilton*, 2002 BCSC 1797 - $200,000 against certain defendants, $300,000 against another; *Louis Vuitton Malletier S.A.* - $100,000 against certain defendants, $200,000 against another; *Golden Capital Sec. Ltd. v. Holmes et. al.*, 2003 BCSC 1265 - $200,000; *1 Ramjit Inc. v. 3 for 1 Pizza & Wings (Canada) Inc.*, 2004 CarswellOnt 6402 (Sup.Ct.) - $150,000; *Canavan v. Feldman*, 2004 CanLII 4787 (ON SC), 2004 CarswellOnt 3157 (Sup.Ct.) - $100,000; and *Taylor & Associates Ltd. v. Louis Bull Tribe No. 439*, 2006 ABQB 698 - $100,000.

[371] In this case, I find that Dr. Louie and Mr. Nomani behaved utterly outrageously. Their planned, deliberate, persistent fraud went far beyond the sort of "fast one" pulled in *Performance Industries*. Within hours of the LOI's conclusion, they conspired to undermine it. After they were told it was valid and enforceable, they created, executed and relied upon the fraudulent Alleged June Agreements in a variety of litigation contexts for a period of over three years. In so doing, they repeatedly abused the court process and required Hospitality to prove its claim.

[372] I reject the Louie Group Defendants' submission that the Alleged June Agreements were not "true" forgeries. They most assuredly were. Whatever the terms of the informal verbal agreement with 567 may have been, they were not reduced to writing and formally executed, as falsely represented by the Alleged June Agreements. Dr. Louie's lack of insight into his misconduct is reflected in this misguided submission. Mr. Nomani's lack of shame for his own is reflected in his persistent denials.

[373] I also reject the Louie Group Defendants' submission that their support of the Prohibited Actions did not amount to an independent actionable wrong. In addition to

breaching the LOI, Dr. Louie breached the May 2008 Injunction when he continued to fund the LSHS and Executive Actions.

[374] It is true that Hospitality was not a vulnerable adversary. Like Dr. Louie, it enjoys the benefit of very considerable means. It is also true that all concerned pursued their commercial interests with determination and a measure of aggression. The crucial difference is that Hospitality did so honestly. Dr. Louie and Mr. Nomani did not.

[375] Hospitality was able to prevail, in part, because it was not financially vulnerable. It expended vast amounts of money, time and energy in the litigation and was thus able to uncover much of the hidden truth. While most of its losses are recoverable in damages, it will never be fully compensated. For example, the impact of the competing hotel within a hotel operation cannot be fully measured and redressed; nor can the loss of time, energy and focus Hospitality suffered as the litigation storm raged on.

[376] It is important to remember that the LOI was not an ordinary commercial contract. It was a settlement agreement. Its purpose was to end potentially expensive, disruptive court proceedings and restore productive, predictable commercial peace. In my view, there was a real and substantial public, as well as private, cost associated with its ongoing violation. There is also public value in the role played by Hospitality in exposing such conduct and pressing for its denunciation, deterrence and punishment.

[377] The awards for compensatory damages and special costs are undeniably substantial. Standing alone, they will have a significant salutary effect. Nevertheless, such awards will not address fully all of Dr. Louie's and Mr. Nomani’s wrongful conduct, including, for example, their repeated disruption of proper Strata Corporation functioning and reliance upon the Alleged June Agreements in other litigation such as the First 567 Action and the Telephone Action. In addition, they will not express fully the Court’s condemnation of such a conscious, costly, fraudulent attempt to undermine a binding settlement.

[378] I conclude that this is one of the exceptionally rare commercial cases in which punitive damages are appropriate. Taking into account the case authorities and the need to exercise restraint, I award $100,000 in punitive damages against the Louie Group Defendants and $100,000 in punitive damages against 567 and Mr. Nomani. In making these awards, I exclude from my consideration their conduct in the litigation itself in order to avoid imposing a double penalty, given the special costs awarded below.

COSTS

Should special costs be awarded and, if so, against whom and in what amount?

[379] Hospitality seeks special costs against the Louie Group Defendants, 567 and Mr. Nomani in both actions, jointly and severally, on a full indemnity basis. In summary, it submits that their conduct during the litigation was extremely reprehensible. Hospitality emphasizes that the defendants repeatedly failed to produce relevant documents, breached court orders, swore false affidavits and committed acts of perjury in these proceedings. All of these acts were undertaken with deliberate dishonesty in furtherance of the conspiracy to defeat Hospitality's rights and with utter disregard for the authority of the Court.

[380] The Louie Group Defendants submit that special costs are unjustified in the Hospitality Action. In their submission, summary judgment was secured promptly on two important issues and assessment of damages was addressed appropriately at trial. In so far as the 567 Action focused on issues of conspiracy and fraud, they say special costs, if any, should be awarded solely in that action and divided proportionally between the defendants according to their relative degree of fault.

[381] Dr. Louie acknowledges that he is not faultless in his conduct of the litigation. He emphasizes, however, that he did not participate in Mr. Nomani's computer manipulations and eventually admitted his prior misleading testimony regarding the Alleged June Agreements. He submits that considerable trial time was spent addressing the computer manipulation issues and this was misconduct in which he did not actually participate. In addition, in his submission the Alleged June Agreements were ineffective and thus did not actually endanger Hospitality's position.

[382] In Dr. Louie's submission, his contribution to any reprehensible misconduct pales in comparison to that of Mr. Nomani. Accordingly, his proportionate share of any special costs awarded should be relatively modest.

[383] Special costs may be awarded where a party has engaged in reprehensible misconduct. Such misconduct includes scandalous or outrageous acts, as well as milder forms of misconduct deserving of rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (BC CA), [1994] B.C.J. No. 2486 (C.A.) at ¶ 17.

[384] As a general rule, the type of misconduct that justifies an award of special costs will relate to the course of the litigation and not to pre-litigation misconduct. This is so because reprehensible pre-litigation misconduct giving rise to a cause of action is typically addressed by an award of punitive damages. In some cases, however, reprehensible misconduct may have originated prior to litigation but continued throughout the litigation

process. In these circumstances, special costs may be ordered in addition to punitive damages without double punishment being imposed: *Golden Capital Sec. Ltd.* at ¶ 161-176.

[385] Perjury is reprehensible misconduct, as is fraud and conspiracy. Such misconduct cannot be condoned by the court. On the contrary, it should be denounced and deterred, both specifically and generally. For these reasons, acts of perjury, fraud and conspiracy often attract an award of special costs. Such awards may be made on the basis of full indemnity: *Fullerton v. Matsqui (District)*, 1992 CanLII 5985 (BC CA), [1992] B.C.J. No. 2969 (C.A.) at ¶ 17; *Insurance Corporation of British Columbia v. Phung*, 2003 BCSC 1619 at ¶ 8 & 11.

[386] Dr. Louie and Mr. Nomani both committed fraud and perjury. Although Dr. Louie eventually recanted, he did so for self-serving reasons in an attempt at damage control. Their conduct in relying upon the fraudulent Alleged June Agreements for over three years and perjuring themselves was reprehensible. Standing alone, this conduct would justify awards for special costs. It does not, however, stand alone.

[387] Dr. Louie and Mr. Nomani also failed repeatedly to produce relevant documents throughout the course of the litigation. They went on to swear false affidavits and breach court orders in this regard. Their purpose in so doing was to hide Dr. Louie's massive funding of the Prohibited Actions and their fraudulent conduct with respect to the Alleged June Agreements. But for Hospitality's extraordinary tenacity, they may have achieved at least a measure of success.

[388] Although I accept that Mr. Nomani was primarily responsible for the computer manipulations, he and Dr. Louie acted in general concert throughout the proceedings. In my view, there is no reason to distinguish between them from a costs perspective, particularly given Dr. Louie's key role as owner and financier. In addition, the Hospitality and 567 Actions were inextricably linked and the acts of perjury and fraud were relevant in both contexts. In all of the circumstances, I award special costs in both actions against the Louie Group Defendants, 567 and Mr. Nomani on a full indemnity basis, with joint and several liability for the special costs.

Should leave be granted to Hospitality to seek an order of costs payable by other parties?

[389] Hospitality seeks leave to apply for an order for costs against Mr. Hatch, Jonathon Louie and Mr. Franiek. In summary, Hospitality submits that Mr. Hatch's conduct in connection with 567's inadequate electronic document production justifies a costs award being sought against him personally, as does Jonathon Louie's perjury and Mr. Franiek's role in the conspiracy.

[390] I agree that 567's electronic document listing and production was woefully inadequate. I am, however, not satisfied that Mr. Hatch's contribution to that inadequacy, although unsettling, particularly in failing clearly to list the Louie Group.doc, was sufficient to justify a costs award against him personally. Given Jonathon Louie's role as a "puppet" for his father, and his potential exposure to other consequences for his perjury, I also decline to grant leave for a costs order to be sought against him.

[391] I am satisfied, however, that such leave should be granted with respect to Mr. Franiek. The evidence presented at trial supports the conclusion that he was an active, conscious participant in the secretive funding of litigation contrary to Hospitality's interests, in breach of the LOI. Accordingly, leave is granted to Hospitality to seek an order for costs against Mr. Franiek.

CONCLUSION

[392] The plaintiffs in the Hospitality Action are entitled to judgment and:

1. a declaration that Hospitality has validly exercised the Option to Purchase the Louie Group Strata Lots contained in para. 4 of the LOI;

2. an order for specific performance of the Option to Purchase by conveying the Louie Group Strata Lots to Hospitality in accordance with the terms of the LOI and doing all such further acts which are within their lawful power that may be reasonably required by Hospitality to permit the Louie Group Strata Lots to be transferred to Hospitality;

3. a declaration that the purchase price for the Louie Group Strata Lots contemplated in para. 4 of the LOI is $4,915,012.66;

4. an order for specific performance of the Lease Modification Agreement contemplated in para. 3 of the LOI in a form agreed by the parties, with liberty to apply to the Court on two clear days' notice to settle the terms if agreement is not reached; and

5. an order for damages calculated on the basis set out in these Reasons for Judgment.

[393] Damages and costs may be set off against the purchase price of the Louie Group Strata Lots.

[394] The plaintiff's claim in the 567 Action is dismissed.

[395] The plaintiffs by counterclaim in the 567 Action are entitled to judgment on the counterclaim and:

1. an award of $100,000 in punitive damages against the Louie Group Defendants; and

2. an award of $100,000 in punitive damages against 567 and Mr. Nomani.

[396] The plaintiffs in the Hospitality Action and the plaintiffs by counterclaim in the 567 Action are awarded special costs against the Louie Group Defendants, 567 and Mr. Nomani on a full indemnity basis, with joint and several liability for the special costs. Leave is granted to Hospitality to seek an order for costs against Mr. Franiek.

"DICKSON J."

APPENDIX 1

LETTER OF INTENT

Date: October 21, 2005

Between:

Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc.

And:

Andrew Louie

This Letter of intent sets out the general terms upon which Le Soleil Hospitality Inc., ("Hospitality") is prepared to lease from Dr. Andrew Louie, the companies that he owns or controls and 587019 B.C. Ltd., owned by Dr. Louie's children (the "Louie Group"), all the strata units owned by the Louie Group, except for strata lots 128 and 130, which are already subject to a lease (the "Strata Units") in the Le Soleil Hotel ("Hotel").

The parties to this Letter of Intent intend that the terms of this Letter of Intent be binding upon them and have agreed upon terms as follows:

1. **Lease of Strata Units**: The Strata Units will be leased under formal leases to be negotiated by counsel for the Louie Group and Hospitality and will contain the following terms:

   (a) the tenant will be Hospitality or its nominee (where applicable to the circumstances, references to Hospitality include its nominee);

   (b) each lease will be for an initial term of five (5) years, with two renewal options: the first for a five-year term and the second for a six-year term;

   (c) the renewal terms may be exercised by the tenant provided at the time of renewal Hospitality is in good standing in all material aspects with respect to the lease;

(d) except for the Strata Units known as units #202, #203 and #205 (the "Meeting Rooms") whose leases will commence starting on December 1, 2005, each lease will commence on the date that the landlord is able to make the vacant Strata Unit available to the tenant, which the Louie Group believes should be possible by January 15, 2006;

(e) each lease will be in a registerable form;

(f) each lease will be negotiated and signed by no later than November 3rd, 2005, notwithstanding that the commencement date may be after that date;

(g) except for fundamental breaches, any disputes under the lease will be resolved by commercial arbitration;

(h) if there are fundamental breaches of the lease, which will include:

(i) basing rental payments on fraudulent financial statements,

(ii) failing to pay rent which is not cured within a reasonable period set out in the lease, and

(iii) if the Strata Council at the Hotel misuses its authority through expenditures that are outside of the usual repair and maintenance requirements of a Strata Corporation or for the benefit of the operator of the Hotel, not the Strata owners, including the Louie Group, except where those out-of-the ordinary course expenditures are recommended by the Strata Corporation Property Manager, acting reasonably.

the landlord will be able to terminate the lease immediately on written notice. Upon receipt of such notice, the tenant will peaceably return possession of the Strata Unit to the landlord;

(i) the lease will contain a standard force majeur clause;

(j) the landlord will affirm the Common Area Leases for the Hotel;

(k) the landlord will not object to the placement of a internationally recognized franchise tag at the Hotel;

(l) the Lease will provide that Syed (Jewel) Nornani will not be directly involved in the dealings between Hospitality and the Louie Group.

(m) during the term of the leases of the Strata Units, the tenant shall have a right of first refusal to match any bona fide arm's length offers to purchase for which all subject conditions have been removed. In consideration of the grant of a right of first refusal, the tenant agrees to pay the purchase price in the contract plus an additional $2,000. The tenant shall have five (5) days from receipt of notice of the contract of purchase and sale to accept the offer, failing which the landlord will be free to complete the contract of purchase and sale with the third party;

(n) the landlord will assign its voting rights with respect to the Strata Corporation to the tenant, provided the tenant is in good standing in all material terms under the lease (failing which all voting rights are retained), for the following votes:

(i) for ordinary resolutions of the Strata Corporation;

(ii) for elections for Strata Council members; and

(iii) for special or extraordinary resolutions that relate to existing contracts of the Strata Corporation or the lease agreement.

The landlord does not assign its voting rights with respect to votes for special or extraordinary resolutions that relate to new contracts or non-lease related subject matters.

2. **Rent Payable under Lease**: Hospitality will pay monthly rent on the Strata Units as follows:

(a) based on each Strata Unit's entitlement for participating in the pool, the landlord's share of 31% of gross room revenue for the Hotel ("GRR") with respect to the first $5,500,000 in

annual GRR. For clarity, GRR does not include other non-room revenues of the Hotel derived from parking, telephone and mini-bar services;

(b) based on each Strata Unit's entitlement for participating in the pool, the landlord's share of 34% of GRR with respect to any GRR in excess of $5,500,000. Such payments at the 34% threshold will commence in the month after the GRR exceeds in annual $5,500,000;

(c) Hospitality will be retaining 2% of total GRR for an FF&E account held in a separate account for all participating Strata Owners, including the Louie Group. The pro rata shares payable to this FF&E account on account of the Strata Units will be deducted prior to the distribution of the rent payable in paragraphs (a) and (b);

(d) payments will be made by no later than 10th day of each month for the previous months' rent;

(e) any adjustments to the total annual rent paid will be calculated and paid in the month following the end of the 12 month period for each lease;

(f) in addition to the rent payable pursuant to paragraphs (a) and (b), with respect to the Meeting Rooms, there will be an additional rent paid in aggregate with respect to all of the Meeting Rooms in the amount of $2,500 per month; and

(g) in addition to the rent payable pursuant to paragraphs (a) and (b), in consideration for renting strata lot 121 (the "Penthouse Unit") at the same rate as the other Strata Units and in consideration for extending the lease of strata lots 128 and 130 as set out herein, Hospitality will cause Le Soleil Restaurant Inc. ("Restaurant") to pay an additional $5,000 per year (or portion thereof as the case may be) under that lease for any period that the Penthouse Unit remains leased to the tenant.

3. **Extension of Restaurant Lease**: Dr. Louie will cause 585503 British Columbia Ltd. ("585503") to enter into a lease modification agreement with Restaurant with the following terms and conditions:

(a) 585503 will grant Restaurant two additional renewal terms of five years each, such renewals to be at Restaurant's option provided that Restaurant is in good standing in all material terms under the terms of the restaurant lease;

(b) by December 31, 2006, 585503 will, with respect to the calculation of base rent payable in the second and third renewal terms, elect to either maintain the same rental arrangement currently in plans for any first renewal term or have rent in the second and third renewal terms negotiated between the parties, failing which the rent will be determined through commercial arbitration and subject to submissions as to the fair market rent for these strata lots;

(c) Restaurant will, for any year (or portion thereof) that the Penthouse Unit is owned by the Louie Group and remains a part of the Hotel rental pool, pay an additional sum of $5,000 per year (prorated to the number of days in the year that the Penthouse Unit is in the Hotel rental pool) under the restaurant lease, such sum to paid in equal quarterly instalments commencing on November 1, 2005. This sum will not be included as rent in the event of that commercial arbitration is required to set rent in either a second or third renewal term. As such, the amount payable by Restaurant under the lease will be any rent determined under arbitration will be that sum plus $5,000 per year;

(d) 585503 and Restaurant will resolve outstanding issues involving the Liquor Licence, specifically whether the existing licence should be transferred to Restaurant or 585503 and Restaurant will jointly complete an application for a Third Party Operator relationship;

(e) 585503 will take reasonable commercial steps to obtain a Non-disturbance Agreement from HSBC Bank Canada. The parties acknowledge that as Restaurant is registered in priority to the HSBC Mortgage the Non-disturbance agreement, while desired, is not necessary under the terms of the Lease; and

(f) upon resolution of paragraph (d) and (e), Restaurant will provide an Estoppel Certificate to 585503 in a form provided by solicitors for 585503 and confirming that the lease is in good standing and there are no extant claims of Restaurant.

4. **Option to Purchase**: The Louie Group will grant to Hospitality or its nominee (for clarity, references in this section to Hospitality includes its nominee) referred to jointly in this section an option to purchase all, but not less than all of the Strata Units, except for the Penthouse Unit, on the following terms:

(a) Hospitality may exercise its option to purchase all of the Strata Units except the Penthouse Unit but it may not exercise its option to purchase on the Penthouse Unit alone. For clarity, if Hospitality exercises its option to purchase the Penthouse Unit, it must exercise its option to purchase all of the Strata Units;

(b) the purchase price for each of the Strata Units available for purchase shall be the lesser of:

(i) $171,500, or

(ii) the average cost to the Louie Group of each of the Strata Units, excluding the Penthouse Unit, such calculation to include the purchase prices, any legal fees and disbursements incurred as a result of the purchase (including the costs of any foreclosure actions, share purchase agreements or corporate transfer arrangements), Land Title Office, Corporate Registry and filing agent fees, Property Transfer Tax paid, and any other fees or expenses reasonably incurred for the purpose of acquiring the Strata Units or the companies that own the Strata Units, but specifically excluding any finder's fees or real estate commissions;

(c) the purchase price for the Penthouse Unit will be $340,000;

(d) Hospitality must exercise its options by no later than December 15, 2005 and, if it exercises its options, it must pay to the Louie Group's solicitors a deposit in the amount of $200,000 (the "Deposit") by no later than December 15, 2005, such amount to be held in trust and credited to the purchase prices of the Strata Units on closing.

(e) The Deposit will be fully refundable if Hospitality pays the Deposit prior to December 15, 2005 but does not exercise its options. The Deposit will be non-refundable if Hospitality pays the Deposit, exercises the options but does not complete due to no fault of the vendor, for whatever reason, by the Closing Date set out herein;

(f) the Closing Date for any transfers will be no later than January 15, 2006;

(g) Hospitality will have the option of acquiring the Strata Units through a real estate purchase or, where the Strata Units are owned by a company, by way of a share purchase. In the event of a share purchase, Dr. Louie, as a condition in the share purchase agreement negotiated by counsel, will personally indemnify Hospitality with respect to any previous liabilities or claims against the corporation purchased; and

(h) The purchase price shall include all furniture and chattels belonging to the landlord and any outstanding issues regarding ownership shall be the subject of good faith negotiations.

5. **Dr. Louie's Covenants**: Hospitality has requested and Dr. Louie has agreed that, from the date of this Letter of Intent, Dr. Louie will cause the Louie Group to refrain from the date of this Letter of Intent:

(a) entering into lease arrangements with respect to the Strata Units;

(b) purchasing any other strata units at the Hotel; and

(c) supporting any litigation that is contrary to the interests of Hospitality or Restaurant in relation to the operations of the Hotel.

6. **Settle All Litigation or Existing Claims**: The parties will enter into a formal mutual release and consent dismissal order relating to all current litigation, as well as any and all claims each may have

against each other for matters existing prior to the date of this Letter of Intent, including all matters subject of Vancouver Registry No. S046317. Each of the parties will bear their own legal costs.

7. **Adjournment of Injunction Application**: The Plaintiffs in Vancouver Registry No. S046317 will adjourn generally all action relating to the injunction application and furtherance of the action as same pertains to any member of the Louie Group.

8. **Bond**: Hospitality/Restaurant and Dr. Louie will each pay to their respective solicitor's the sum of $10,000 by no later than October 21, 2005. The solicitors will hold these amounts in trust to secure the performance of the terms of this Letter of Intent until such time as formal lease agreements and a formal settlement agreement can be finalized and executed. If either Hospitality, Restaurant or both fail to abide by the terms of this Letter of Intent, the $10,000 will be forfeited to Dr. Louie. If Dr. Louie fails to abide by the terms of this Letter of Intent, the $10,000 will be forfeited to Hospitality/Restaurant.

9. **Further Assurances**: Each of the parties herein will execute or cause to be executed such further documents and instruments and do such acts and things as may be reasonably required by another party to carry out the intent and meaning of this Letter of Intent.

Agreed to this 21st day of October, 2005 by the undersigned:

Le Soleil Hospitality Inc. and Le Soleil Restaurant Inc.

Per:

"Sharookh Daroowala"

"Hanif Mawji"

"Andrew Louie"

Tab 287

CanLII

Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3

Source:	Supreme Court of Canada
Date:	1993-10-21
File number:	22227
Other citations:	108 DLR (4th) 193 — 160 NR 1 — 43 ACWS (3d) 410 — [1993] 8 WWR 513 — 56 WAC 161 — AZ-93111122 — 84 BCLR (2d) 1 — 49 RFL (3d) 117 — 34 BCAC 161 — 18 CRR (2d) 41 — [1993] CarswellBC 264 — EYB 1993-67111 — JE 93-1766 — [1993] SCJ No 112 (QL) — [1993] ACS no 112 — [1993] RDF 703
Citation:	Young v. Young, 1993 CanLII 34 (SCC), [1993] 4 SCR 3, <https://canlii.ca/t/1frwv>, retrieved on 2026-01-19
Most recent unfavourable mention	A.L.J. v P.N.A.J., 2017 BCSC 1738 (CanLII) [...] While I appreciate the **Young case is distinguishable** in a number of ways, it is nevertheless of assistance in that the Court addresses the fundamental importance of the best interests of the child in the context of religious upbringing and observance. [...]

Young *v.* Young, [1993] 4 S.C.R. 3

Irene Helen Young *Appellant*

v.

James Kam Chen Young *Respondent*

Tab 288

CanLII

Davies v. American Home Assurance Co., 2002 CanLII 15469 (ON SCDC)

Source:	Divisional Court
Date:	2002-10-18
File number:	98-CV-147813CM
Other citations:	217 DLR (4th) 157 — 165 OAC 111
Citation:	Davies v. American Home Assurance Co., 2002 CanLII 15469 (ON SCDC), <https://canlii.ca/t/7bhk>, retrieved on 2026-01-18

COURT FILE NO.: 98-CV-147813CM
DIVISIONAL COURT FILE NO.: 210/01
DATE: 20021018

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BLAIR R.S.J., KRUZICK J. and LINHARES de SOUSA J.

B E T W E E N:	)	
	)	
EDWARD DAVIES	)	Terrence J. Collier, for the Plaintiff (Res
	)	pondent)
	)	
	)	

Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	Elliott A. Zeitz, for the Defendant (Appellant)
	)	
	)	
Defendant (Appellant)	)	
	)	
	)	
	)	

COSTS ENDORSEMENT

Background

[1] On July 9, 2002, the Court released Reasons in this matter allowing the appeal and,

a) setting aside paragraph 3 of the order of the Motions Judge dated February 27, 2001 (requiring production of Mr. Regan's opinion letters);

b) setting aside paragraphs 2 and 3 of the order of the Motions Judge dated March 19, 2001 (requiring production of the claims file and all documents relating to the investigation details, as set out therein); and,

c) directing that the defendant insurer deliver a further and better affidavit of documents, in which all relevant documents are properly listed and any claims for privilege, and the grounds therefore, appropriately asserted with requisite particularity.

[2] The Defendant was also required to deliver proper supplementary affidavits of documents in the course of its continuing obligations for disclosure, raising therein any appropriate claims for privilege as it may be advised to do, and in a proper fashion.

[3] At the same time, the Court directed that if the parties were unable to agree with respect to costs, they were to submit brief written submissions in that regard. They have not been able to agree, and we have now reviewed the written submissions filed.

[4] We are all agreed that in the circumstances of this case there should be no order as to costs. This order applies to the costs of the appeal, of the application for leave to appeal before Hill J., and of the motion to quash before Chapnik J. Our brief reasons for arriving at this conclusion follow.

Reasons

[5] The appeal raised important issues involving solicitor-client privilege and litigation privilege, and the Defendant was substantially successful in having its position upheld on those issues. The appeal was pursued, however, because the Defendant insurer felt that the questions raised needed to be determined for reasons broader than the case at hand. It did not need to be pursued for reasons relating to the actual production ordered by the Motions Judge because the Plaintiff abandoned its request for production of the documents in question following the Defendant's successful motion for leave to appeal in June 2001.

[6] Moreover, although the Defendant was substantially successful on the issues raised in the appeal, the end result was that the Court ordered the Defendant to produce a further and better affidavit of documents – which was the alternative relief sought by the Plaintiff when the saga relating to this production issue began in the Fall of 2000. In the portion of our Reasons dealing with litigation privilege, we noted that "there was certainly some justification for the Motion Judge's concern about the frailties in the evidentiary basis for the litigation privilege claim" (at para. 36). In short, had the Defendant prepared its affidavit of documents with the particularity required by the Rules of Civil Procedure in the first place, it may be that these lengthy production proceedings could have been avoided, or at least narrowed. To put it another way, the Defendant was to a significant extent the author of its own misfortune in the proceedings.

[7] Proper compliance with the Rules requires a particularized Schedule B to an affidavit of documents and not mere boilerplate entries with respect to claims for solicitor-client privilege and/or litigation privilege. Although there was sufficient evidence before the Court in the combination of Schedule B and the affidavit materials to save the day for the Defendant on the production issue, the Defendant's affidavit of documents did not truly meet the requirements of the Rules.

[8] Accordingly, for these reasons, there will be no order as to costs on the appeal or on the motion for leave to appeal or on the motion to quash.

R.A. Blair, R.S.J.

E.R. Kruzick J.

M.T. Linhares de Sousa J.

M.T. Linhares de Sousa J.

Released: October 18, 2002

COURT FILE NO.: 98-CV-147813CM
DIVISIONAL COURT FILE NO.: 210/01
DATE: 20021018

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BLAIR R.S.J., KRUZICK J. and LINHARES de SOUSA J.

B E T W E E N:

EDWARD DAVIES

Plaintiff (Respondent)

- **and –**

AMERICAN HOME ASSURANCE COMPANY

Defendant (Appellant)

COSTS ENDORSEMENT

R.A. Blair, RSJ

Released: October 18, 2002

Tab 289

CanLII

Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 638 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2009-09-03
File number:	C47778
Other citations:	180 ACWS (3d) 399 — 77 CCLI (4th) 161 — [2009] OJ No 3638 (QL)
Citation:	Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 638 (CanLII), <https://canlii.ca/t/25fh9>, retrieved on 2026-01-19

CITATION: Sagl v. Chubb Insurance Company of Canada, 2009 ONCA 638
DATE: 20090903
DOCKET: C47778

COURT OF APPEAL FOR ONTARIO

Lang, Juriansz and Epstein JJ.A.

BETWEEN

Bridgette Sagl

Plaintiff (Respondent)

and

Cosburn, Griffiths & Brandham Insurance Brokers Limited, Chubb Insurance Company of Canada, Eamonn Kinsella and G.C. Carley & Co. Limited

Defendants (Appellant)

Peter H. Griffin and Jamie J.W. Spotswood, for the appellant

Barry A. Percival, Q.C., for the respondent

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice d ated September 4, 2007, with reasons reported at (2007), 2007 CanLII 36644 (ON SC), 54 C.C.L.I. (4th) 236.

ADDENDUM AND COSTS ENDORSEMENT

Epstein J.A.:

I. Supplementary Issues

[1] In reasons released May 8, 2009, the appeal by Chubb Insurance Company of Canada was allowed, the judgment below set aside and a new trial was ordered "restricted solely to the issue of the respondent, Bridgette Sagl's, proof of loss, specifically whether she is able to prove her loss in relation to her fine arts collection, and whether the insurance policy is void due to intentional misrepresentation in the proof of loss". Further, if appropriate, the new trial would include a consideration of the application of s. 129 of the *Insurance Act of Ontario*.

[2] The parties were invited to make written submissions as to costs. Counsel for Sagl and Chubb responded by making submissions regarding costs and the scope of the new trial.

[3] In my view, the reasons are clear that as far as Sagl's proof of loss is concerned, the new trial will be restricted to Sagl's proof of loss in relation to her fine arts collection. This restriction applies both to whether Sagl is able to prove her loss in relation to her fine arts

collection and whether the policy is void due to her intentional misrepresentation in the proof of loss as it relates to the fine arts collection.

[4] The punitive damage award made by the trial judge in the first trial has been set aside. The trial judge presiding over the second trial is entitled to consider Sagl's claim for punitive damages based on the findings of fact made in the second trial and the relevant findings of fact made by the trial judge in the first trial that have not been reversed by this court.

[5] As the reasons indicate, the trial judge is entitled to consider the application of s. 129 of the *Insurance Act* as may be appropriate.

[6] The trial judge presiding over the second trial will be entitled to rule on the costs of the first trial and the second trial, with one exception. That exception is the cost order made by the trial judge who presided over the first trial regarding the costs of Cosburn, Griffiths, & Brandham Insurance Brokers Limited ("CG&B"). The trial judge ordered Chubb to pay CG&B's costs on a partial indemnity basis. CG&B was specifically not brought into the appeal. The trial judge's costs award in its favour stands.

II. Costs of the Appeal

[7] On a partial indemnity scale, Chubb seeks a total of $108,657.38. Sagl submits she is entitled to her costs in the amount of $91,808.92; alternatively, that there be no order as to costs due to divided success. I do not accept that Sagl is entitled to costs. While Chubb was not successful on every issue, and only abandoned its appeal regarding arson in its factum, it was successful in obtaining an order for a new trial. In these circumstances, Chubb is entitled to costs.

[8] This appeal was argued over the course of a better part of a day. It involved the review of evidence following a lengthy trial and complex legal issues. Sagl's claim is large. Taking into account the result and the reasonable expectations of the parties, I would

fix Chubb's costs in this court on a partial indemnity scale in the amount of $50,000, inclusive of its disbursements of approximately $23,000 and Goods and Services Tax.

"G. Epstein J.A."

"I agree S.E. Lang J.A."

"I agree R.G. Juriansz J.A."

Tab 290

CanLII

McDougald Estate v. Gooderham, 2005 CanLII 21091 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2005-06-15
File number:	C40584
Other citations:	255 DLR (4th) 435 — 140 ACWS (3d) 220 — 199 OAC 203 — 17 ETR (3d) 36 — [2005] CarswellOnt 2407 — [2005] OJ No 2432 (QL)
Citation:	McDougald Estate v. Gooderham, 2005 CanLII 21091 (ON CA), <https://canlii.ca/t/1l0q1>, retrieved on 2026-01-19

DATE: 20050615
DOCKET: C40584

COURT OF APPEAL FOR ONTARIO

CRONK, GILLESE and MACFARLAND JJ.A.

B E T W E E N :	)	
THE CANADA TRUST COMPANY, in its capacity as an Executor and Trustee of the Estate of Hedley Maude McDougald, deceased	)	**Harry Underwood and Erica J. Baron for the respondent**
Applicant/Counter-Respondent (Respondent in Appeal)	)	
- and -	)	
EDWARD DOUGLAS GOODERHAM, EDWARD DOUGLAS GOODERHAM in his capacity as sole Executor and Trustee of the Estate of Cecil E. Hedstrom, DUNCAN GIBSON, ALEXANDER GIBSON, CECIL	)	**V. Ross Morrison and Stephen Lamont for the appellants**

[71] Ms. Patterson was living in Saskatchewan and preferred not to travel to Ontario unless it was absolutely essential. The application judge offered the appellants' counsel the opportunity to cross-examine Ms. Patterson by means of teleconference. He declined.

[72] Even if there is some issue as to the admissibility of the nursing notes, absent those notes the evidence of incapacity remains overwhelming. I would add that it appears that the application judge relied on the nursing notes only in concluding that the attorneys had a reasonable belief in Ms. McDougald's incapacity. The matter of the attorneys' belief was an alternative basis upon which the application judge held that s. 38(1) applied and, for the reasons already given, was unnecessary given her determination of actual incapacity.

[73] Accordingly, I would not give effect to this ground of appeal.

COSTS

[74] The appellants seek their costs from the estate, on a substantial indemnity basis, in any event of the outcome of the appeal. Alternatively, if unsuccessful on appeal, they seek an order that their costs be paid from the estate on a partial indemnity basis or that they bear their own costs.

[75] As support for their primary position, the appellants point to the fact that the traditional rule in estate litigation is that the estate bears the costs of all parties. They say that the traditional rule should apply because: the dispute could have been avoided had the will been drafted more clearly or had the attorneys handled Ms. McDougald's affairs in a consistent fashion; they played no role in the events giving rise to the dispute; the legal issues relating to the doctrine of ademption and the interpretation and application of the *Act* were not straightforward; and, if successful, all of the residuary beneficiaries will benefit financially, therefore it is just that all the residuary beneficiaries bear the costs of the litigation, which is the effect that the requested costs award would have.

[76] The respondent asks that costs follow the event.

[77] In my view, it is appropriate that the appellants pay costs to the respondent on a partial indemnity basis. In explaining why I have reached this conclusion, it is useful to begin by considering the basis upon which costs are awarded, at first instance, in estate litigation.

[78] The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 and *Spiers v. English,* [1907] P. 122. Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.

[79] Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or

other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.

[80] However, the traditional approach has been – in my view, correctly – displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation. Four cases usefully illustrate this modern approach.

[81] In *Re Lotzkar* (1985), 19 E.T.R. 135 (B.C. S.C.), a trust company was executor of an estate. It brought an application for power to lease a parcel of land; the power was not given to it by the terms of the will. Justice Spence acknowledged that an executor has an obligation to seek the advice and direction of the court where there is room for serious doubt or difference of opinion in respect to the interpretation of a will. He recognised that costs awards cannot be used to deter executors from fulfilling that obligation. However, he found the action of the executor in bringing an application in relation to a proposal that was improvident and opposed by a majority of the beneficiaries was "unnecessary and ill-advised". He ordered the executors to bear their own costs and pay the costs of the responding parties.

[82] In *Beaurone v. Beaurone* (1997), 31 O.T.C. 236 (Gen. Div.), a testator left a will in which she gave a small bequest to one of her sons, the plaintiff, and the balance of the estate to her other son. The plaintiff unsuccessfully challenged the will on the basis of incapacity. Justice McDermid stated that there was nothing incompatible between the need for a court to be satisfied that a testator had capacity and giving effect to Rule 49 offers. He ordered the defendant's costs payable out of the estate on a solicitor and client scale and the plaintiff to pay party and party costs to the estate, stating at paras. 6 and 7:

> In my opinion, it is often the case that wills are challenged in the expectation that there is little or nothing to lose by doing so, because at the end of the day, costs will be payable by the estate. The challenger, often a slighted relative who is denied the testator's largesse, has everything to gain and nothing to lose by trying to overturn the will.
>
> Here, the estate is small and the intention of the testatrix will be thwarted if the plaintiff's costs are paid from the estate. The worst that the plaintiff might expect under the traditional rules is that he would retain his $1,000 bequest and have his costs paid from the estate. He would thereby at least have the satisfaction of ensuring that if he were not to benefit from his mother's estate, neither would his brother. I believe that in such circumstances plaintiffs should be given reason to pause and reflect upon the consequences of unsuccessful litigation before commencing it.

[83] In *Re Marshall Estate* (1998), 50 O.T.C. 357 (Gen. Div.), Sutherland J. found that an attack on testamentary capacity was unreasonable, there were no reasonable grounds for persisting with the litigation and its continued pursuit was irresponsible. He ordered costs against the unsuccessful challenger on a solicitor and client basis.

[84] In *Gamble v. McCormick* (2002), 4 E.T.R. (3d) 209 (S.C.J.), Greer J. found that there was no reasonable basis to a husband's challenge to the validity of his late wife's will. At para. 13 of her reasons she states:

> The cost of the emotional wreckage caused by this trial to all parties, leaving what had been a warm, loving family unit in tatters, is incalculable. None of their lives will ever be the same again. Costs on a solicitor and client basis cannot heal those wounds. It can only pay for the monetary cost of what took place.

[85] The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

[86] I pass now to the question of what principles govern costs awards in estate litigation at the appellate level. Although the jurisprudence on point is limited, in my view, it is to the effect that at the appellate level, costs are normally ordered against an unsuccessful appellant. In *Re Fleck* (1924), 55 O.L.R. 441 (App. Div.), the appellate division of the Ontario Supreme Court ordered the unsuccessful appellant to pay costs, saying at p. 447:

> The appeal must be dismissed with costs. I should have been disposed, because the difficulty here is caused by the testator's language alone, to give costs out of the estate. But costs of an unsuccessful appeal do not come within the rule applied, for that reason, to the costs of the original application or action.

[87] *Re Haig* (1925), 57 O.L.R. 129 (App. Div.) was decided shortly thereafter. A majority of the court allowed the appeal and ordered that all parties be paid their costs out of the estate, with those of the executors payable on a full indemnity basis. Hodgins J.A. dissented. He would have dismissed the appeal and, relying on *Re Fleck*, ordered the appellants to pay costs.

[88] Justice Hodgins, writing for the court in *Re Smith* (1927), 61 O.L.R. 412 (App. Div.), allowed the appeal in an estate matter and ordered costs of the parties from the estate saying that, as the appellants had succeeded, the rule in *Re Fleck* did not apply.

[89] This court considered the matter of costs in estate litigation more recently in *Eady v. Waring* (1974), 1974 CanLII 492 (ON CA), 2 O.R. (2d) 627. As the court made no reference to any jurisprudence when deciding the matter of costs, it appears that it may not have had the benefit of the decisions reviewed above. Nonetheless, the court ordered costs against the unsuccessful appellant, saying at p. 643:

> The appeal should therefore be dismissed. The trial judge allowed the costs of all parties out of the estate of the testator. This was, I think, a perfectly proper order, because the executors had a duty to bring forward what purported to be the last will of the testator. I do not think their duty extended to appealing from the adverse finding against the will, particularly

> when one of the appellants was a son of a principal beneficiary, and had himself been a participant in the circumstances leading up to the execution of the will in respect of which probate has been refused.

[90] While the appellants argue that the decision in *Eady v. Waring* should be confined to circumstances in which the appellant has been personally active in a suspicious manner in the events leading up to the litigation, I do not read the reasons as being limited to such situations.

[91] In ordering the appellants to pay costs, I act on the principle that the same rules that govern costs in civil litigation at the appeal level apply to unsuccessful appellants in estate litigation. I see nothing in the circumstances of the parties to warrant departing from that principle.

[92] The appellants are two of the eight remaining residuary beneficiaries of the estate. They are entitled to a relatively small portion of the residue of the estate. None of the other residuary beneficiaries took a position in the application by the estate trustees, the appellants' counter-application or the appeal. The matters that concerned the appellants were thoroughly dealt with below. Arguably, such matters would have been fully explored and resolved by means of the application alone. Be that as it may, the application judge gave thoughtful, cogent reasons in granting the respondent's application and dismissing the appellants' counter-application. The application judge allowed the appellants their costs, payable out of the estate of the testator. To require the estate to bear the costs of the appeal for all parties would be to make all of the residuary beneficiaries pay for the application, the counter-application and the appeal when only the appellants embarked on such litigation and on the appeal. Application of the usual costs rule, however, results in the estate bearing only that portion of the respondent's costs not recovered from the appellants.

DISPOSITION

[93] Accordingly, I would dismiss the appeal with costs to the respondent fixed at $17,000, inclusive of GST and disbursements.

RELEASED: June 15, 2005 ("EAC")

"E. E. Gillese J.A."
"I agree E. A. Cronk J.A."
"I agree J. MacFarland J.A."

Tab 291

CanLII

Del Giudice v. Thompson, 2021 ONSC 6974 (CanLII)

Source:	Superior Court of Justice
Date:	2021-10-20
File number:	CV-19-00625030-00CP
Citation:	Del Giudice v. Thompson, 2021 ONSC 6974 (CanLII), <https://canlii.ca/t/jk09c>, retrieved on 2026-01-19

CITATION: Del Giudice v. Thompson, 2021 ONSC 6974
COURT FILE NO.: CV-19-00625030-00CP
DATE: 20211020

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
RINA DEL GIUDICE and DANIEL WOOD	)	
	)	*John A. Campion*, *R. Douglas Elliott*, *Glyn Hotz*, *Darrel N. Hotz*, *Hugh Scher,* and *Jeff Childs* for the Plaintiffs
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
PAIGE A. THOMPSON, CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK (CANADA BRANCH), CAPITAL ONE (SERVICES) CANADA INC., CAPITAL ONE, N.A., CAPITAL ONE BANK (USA), N.A., GITHUB, INC., AMAZON WEB SERVICES INC., AND AMAZON WEB SERVICES (CANADA) INC.	)	*Laura F. Cooper*, *Sarah J. Armstrong*, *Alex D. Cameron*, *Vera Toppings* and *Pavel Sergeyev* for the Defendants Capital One Financial Corporation, Capital One Bank (Canada Branch), Capital One (Services Canada Inc., Capital One, N.A., Capital One Bank (USA), N.A. *Scott Kugler*, *Brent J. Arnold*, *Elie Laskin* and *Kavi Sivasothy* for the Defendants Amazon Web Services Inc., and Amazon Web Services (Canada) Inc.
Defendants	)	

Proceeding under the *Class Proceedings Act, 1992*)) **HEARD:** In writing

PERELL, J.

REASONS FOR DECISION - COSTS

A. Introduction

[1] This is a costs decision in this proposed class action under the *Class Proceedings Act, 1992*.[1]

[2] The action has been dismissed as against the Defendants: (a) Capital One Financial Corporation, Capital One, N.A., Capital One Bank (USA), N.A., Capital One Bank (Canada Branch), Capital One Services Canada Inc., (collectively "Capital One"); and (b) Amazon Web Services Inc., and Amazon Web Services (Canada) Inc. (collectively "Amazon Web"). The action was discontinued as against the Defendant GitHub Inc.[2]

[3] In the action, it was alleged that on March 22 or 23, 2019, the Defendant Paige Thompson hacked the data base of personal information collected by Capital One from American and Canadian citizens. The Capital One data was stored on the computer servers of Amazon Web. Ms. Thompson misappropriated the data. She posted the data on the website of GitHub, which provides a forum for software developers to share information. As a consequence of this data breach, personal and confidential information of 106 million applicants for Capital One credit cards was exposed or became vulnerable to exposure to the public. It is estimated that approximately six million Canadians were affected.

[4] On August 6, 2019, Rina Del Giudice commenced a proposed Canadian class action with respect to the data breach. Subsequently, Daniel Wood became a co-Plaintiff.

[5] Class Counsel are a consortium: (a) Gardiner Roberts LLP; (b) Cambridge LLP; (c) Hotz Lawyers; and (d) Scher Law Professional Corporation. The consortium brands itself as "PDBL – Privacy and Data Breach Law Group." The lead counsel are John A. Campion and R. Douglas Elliott. On April 30, 2020, the consortium was granted carriage of the proposed class action.[3]

[6] In their original Statement of Claim, the Plaintiffs advanced a $10.9 billion data breach case against the Defendants. On August 27, 2020, the Plaintiffs delivered a Fresh as Amended Statement of Claim, in which they advanced a $240 billion data misappropriation and misuse case.

[7] On August 27, 2020, I directed that the certification motion have two phases. Phase I was to determine whether and the extent to which the Plaintiffs satisfied the cause of action criterion, the first of the five statutory criteria that must be satisfied for an action to be certified as a class proceeding. I scheduled five days of hearing in December 2021 for the four remaining certification criteria.

[8] There were three days of argument on June 7, 8, and 9, 2021 for Phase I.

[9] For Phase I, the Defendants asserted that none of the nineteen pleaded causes of action were certifiable. They submitted that the Plaintiffs had not properly pleaded any recognized causes of action. For several causes of action, the Defendants submitted that constituent elements were missing. They submitted other causes of action are not known to the law. The Defendants recognized that several of the pleaded causes of action were novel, but the Defendants submitted that these novelties should be struck because they go beyond the incremental development of the common law. The Defendants submitted that all of the causes of action should be struck without leave to amend.

[10] After the Phase I hearing, I concluded that the Plaintiffs' Fresh as Amended Statement of Claim should be struck out in its entirety without leave to deliver a Second Fresh as Amended

Statement of Claim. I struck the Plaintiffs' Fresh as Amended Statement of Claim in its entirety. I dismissed the action as against Capital One and Amazon Web.[4]

[11] Capital One incurred actual legal costs of approximately $900,000 in defending the action. It requests costs of $814,595.10, all inclusive, on a substantial indemnity basis or costs of $678,945.27, all inclusive, on a partial indemnity basis. The claim for costs does not include costs associated with the Plaintiffs' motion for an injunction and a related refusals motion.

[12] Amazon Web incurred actual legal costs of approximately $600,000. It requests costs of $549.849.04 on a substantial indemnity basis or costs of $458,207.53 on a partial indemnity basis.

[13] The Plaintiffs acknowledge that Capital One and Amazon are entitled to their costs - but only for a pleadings motion. The Plaintiffs submit that there is no basis for a costs award on a scale other than a partial indemnity basis.

[14] The Plaintiffs submit that the costs claimed by the Defendants are excessive and not within the reasonable expectations of a party bringing a s. 5(1)(a) motion, or a motion under rule 21.01(1)(b) of the *Rules of Civil Procedure*.[5]

[15] The Plaintiffs submit that having regard to the normative costs principles and also the principles and policies of the *Class Proceedings Act, 1992*, the appropriate awards of costs in the immediate case are $150,000, all inclusive, to Capital One and $75,000, all inclusive, to Amazon.

[16] For the reasons that follow, I grant the costs on a substantial indemnity basis. I award Capital One **$725,000**, all inclusive, and I award Amazon Web **$500,000**, all inclusive.

[17] In my Reasons for Decision on the certification motion, I describe in detail, the procedural history of this action. In those reasons, and in my Reasons for Decision with respect to several interlocutory motions including the associated costs decisions,[6] I describe in excruciating detail, some, but not all, of the unfortunate circumstances that in my opinion justify costs on a substantial indemnity basis. I incorporate those reasons for decision and make them part of the immediate decision.

B. The Scope of the Claim for Costs

[18] Capital One and Amazon One claim the costs of the action including the costs of the Phase I motion. The Plaintiffs submit, however, that the Defendants may only claim the costs associated with Phase I of the certification motion, which was a pleadings motion without evidence, cross-examinations, *etc.* and which motion was procedurally staged before the completion of pleadings, the delivery of responding materials for Phase 2 of the certification motion, cross-examinations, productions, examinations for discovery, *etc*.

[19] The Plaintiffs submit that the Defendants cannot claim costs extraneous to the Phase I motion.

[20] The Plaintiffs did not identify what portions of the Defendants' respective Bills of Costs were extraneous to Phase I of the certification motion. Rather, they submitted a Plaintiffs' Bill of Costs for what they would have claimed for costs had they been successful on Phase I of the certification motion. The Plaintiffs' Bill of Costs for Phase I certification motion reveals that the Plaintiffs actual costs for legal expenses exclusively for Phase I was $451,074.64, all inclusive. On a substantial indemnity basis, the Plaintiffs' costs claim for Phase I would have been $361,174.89, all inclusive. On a partial indemnity basis, the Plaintiffs' costs claim for Phase I would have been $271,275.14, all inclusive.

[21] The prime reason that I directed that there should be a bifurcated certification motion was to determine which of the nineteen causes of action pleaded called for the Defendants to plead and marshal evidence for a defence. Given the Defendants' position of challenging all of the causes of action and also raising jurisdictional challenges, I allocated three days of argument just for the cause of action criterion.

[22] I did not anticipate that none of the pleaded actions would fail to satisfy the cause of action criterion, and the purpose of the bifurcation motion was to reduce both sides' costs for the certification motion and to reduce both sides' exposure to costs for the certification motion. I thought it salutary not to require either party to incur the expense of putting together an evidentiary motion record until it was determined what causes of action would be going forward substantively or jurisdictionally.

[23] In the immediate case, had I not bifurcated the certification motion, and had I decided all the certification criterion at one hearing, the costs consequences for the unsuccessful Plaintiffs, who were shipwrecked on the cause of action criterion, would make the Defendants' present large claim for costs microscopic in comparison to what they could claim for having prepared an evidentiary motion record to defend nineteen causes of action and to argue the four additional certification criteria.

[24] The result of Phase I of the certification motion was that the Plaintiffs' proposed class action was dismissed in its entirety. It is trite, normal, and appropriate in these circumstances to award the successful defendants their costs for their success on the motion and for their success in having the action dismissed.

[25] No purpose would be served by bifurcating the costs assessment in the immediate case. No purpose would be served by determining just the costs of the motion and then determining by a separate subsequent costs assessment the Defendants' costs of the action, although it might be interesting to do so because it would almost certainly reveal that Class Counsel has invested millions of dollars in legal services for prosecuting this action, and that exercise of a separate assessment of the Defendants' costs would provide a better comparable for the Defendants' costs extraneous to the Phase I action.

[26] In any event, the Plaintiffs' objection to the scope of the claim for costs including costs extraneous to Phase I is a quibble precisely because the certification motion was bifurcated so that the bulk of the Defendants' work would be and was about attacking the Plaintiffs' pleading. In other words, there are not a great deal of costs for work extraneous to the Phase I motion.

[27] I, therefore, shall proceed to assess the Defendants' costs for their success in having the proposed class action dismissed which includes their work extraneous to the Phase I motion.

C. The Scale of Costs

[28] The Plaintiffs submit that there is no reason for this court to depart from the ordinary rule that costs are to be awarded on a partial indemnity basis. The Plaintiffs submit that there was simply no conduct on the part of the Plaintiffs or their Counsel that warrants a departure from the average costs awards noted for pleadings or certification motions in class proceedings.

[29] The Plaintiffs submit that they were entitled to amend their pleadings as their understanding of the case evolved over time and that they are entitled to advance every reasonable claim they have against the Defendants. The Plaintiffs submit that there is nothing in the Fresh as Amended Statement of Claim that would justify a departure from the normal partial indemnity costs award and that the Plaintiffs have a right to strategically frame their pleadings as they wish. [7]

[30] The Plaintiffs submit that in the circumstances of the immediate case, it was their counsel's solemn obligation to urge the Court to give access to justice for the vulnerable Ms. Del Giudice and to seek to modify the behaviour of Capital One, which had disregarded her right to privacy.

[31] The Plaintiffs submit that their lawyers did not make allegations of unprofessional and improper conduct against Capital One and its counsel but rather their lawyers raised the concern that there was a threat to the personal dignity of Ms. Del Giudice by the production of her data without prior Court consideration.

[32] The Plaintiffs submit that their lawyers had an unyielding duty to pursue their Plaintiffs' and the Class Members' case to the best of their ability and to protect their client's interest in the strongest possible terms. The Plaintiffs submit that believing themselves to be wronged, they had a right to litigate vigorously even if ultimately unsuccessful.[8] Thus, the Plaintiffs write in their costs submissions:

> Counsel have a duty to pursue their client's case to the best of their ability and to protect their client's interest in the strongest possible terms. This duty is not new. Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline against the charge of adultery brought against her by her husband, King George IV, addressed the House of Lords in this way:
>
> > [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[9]
>
> This expression of a lawyer's unyielding duty to pursue his client's case to the fullest extent "endures because it is essential to the integrity of the administration of justice."

[33] The Plaintiffs submit that neither the Plaintiffs nor their Counsel should be sanctioned for pursuing the action to protect the privacy interests of the Plaintiffs or putative Class Members against powerful defendants.

[34] Respectfully, I say that the Plaintiffs' submissions do not accord with the actual circumstances of the case that I have been case managing since its outset. There are ample justifications for awarding costs on a substantial indemnity basis in the immediate case.

[35] I begin by noting that contrary to the Plaintiffs' submission, their counsel did make allegations of unprofessional and improper conduct against Capital One and its counsel and against the counsel of Amazon Web both in correspondence and in open court (and also against counsel of GitHub, for that matter before the Phase I motion.).

[36] There is no doubt that the Plaintiffs' lawyers before and at the Phase I hearing submitted that the Defendants' lawyers had breached their professional obligations. In this regard, I repeat what I wrote in paragraphs 38-41 and 48-50 of my Reasons for Decision for the Phase I motion:

> 38. On June 9, 2021, after hearing some submissions from the parties, I treated the case management conference as a preliminary motion and Phase I got underway. There was an uproar about the Document Brief.
>
> 39. Ms. Armstrong told me that over the weekend, Mr. Campion had objected to her filing of the Document Brief as improper and as a breach of Ms. Del Giudice's privacy and of the *Rules of Civil Procedure*.[10] She denied impropriety, but said, however, that the brief had never been filed in the court file and that she had withdrawn the documents from https://ontariocourts.caselines.com, where the brief had been filed for the purposes of the hearing of Phase I. She said that she had offered to refile a redacted version of the documents, but Mr. Campion had declined this solution.
>
> 40. Mr. Campion submitted that the filing of the Document Brief was an abusive act meant to intimidate him personally and to intimidate and embarrass Ms. Del Giudice and to scare her from proceeding with her class action. He submitted that the filing of the Document Brief was a breach of privacy by Capital One's and Amazon Web's lawyers and another invasion of privacy by Capital One and Amazon Web. He said that the Defendants' lawyers had breached their duties as officers of the court by filing the documents without court approval and without the documents being under seal. He said the Defendants' lawyers had improperly attempted to convert a pleadings motion into a summary judgment motion. He said that he had not appreciated until the week before the motion, when he began his preparation for the argument, that Capital One and Amazon Web had filed Ms. Del Giudice's credit application that contained confidential information about her occupation, her income, and her SIN number. He said the Defendants knew and had acknowledged that this information was confidential personal information. He said that the documents should not have been

unilaterally filed without a sealing order and a direction from the court. He objected to the filing and unilateral use of the Document Brief. He asked the court to make a direction that the documents were not admissible. He said that the court should chastise the Defendants and their lawyers for their intimidating conduct and breaches of confidence. He said that he was entitled to cross-examine and have the authenticity of the documents and Ms. Del Giudice's signature proven. He said that he is entitled to have this case tried and that it would be egregiously unfair to allow the Defendants to turn a pleadings motion into a summary judgment motion based on contract documents that have never been proven and that were not referred to in the Plaintiffs' pleadings. He said that if the court directed that the documents were accepted, then he would proceed under protest. He said that, in any event, the filing of the documents was a fatal mistake by Capital One and Amazon Web because the filing was both an admission of wrongdoing and a demonstration that these Defendants had violated the privacy of Ms. Del Giudice once again. He said that while he objected to the filing of the contract documents, he would capitalize on their filing to show that his clients had numerous viable causes of action.

41. After hearing Mr. Campion's submissions, I did not call on Ms. Armstrong to reply, and I directed that the Document Brief could be used on the certification motion. After my direction, Mr. Campion said he would proceed under protest, and he asked that the Document Brief be sealed. Ms. Armstrong said that she would seek instructions, and later in the hearing, she advised that Capital One did not oppose a sealing Order.

…..

48. If there is something beyond obviousness, it is that Ms. Del Giudice's application form was incorporated by reference in her Fresh as Amended Statement of Claim. If Ms. Del Giudice had a right of privacy or confidentiality with respect to those documents, she waived it when she decided to be the champion for the other Capital One cardholders and sue for $240 billion. I do not believe that she or Mr. Campion were intimidated in the least by the filing of the Document Brief. If Ms. Del Giudice is genuinely scared to proceed, then she is not qualified to be a representative plaintiff notwithstanding her affidavit in the Certification Motion record that deposes her championing qualities. Ms. Del Giudice is suing to recover $240 billion, and she has experienced battle-hardened lawyers to protect her for the legal warfare that befits such a prize. For present purposes, I assume that she is up to the task and will not be intimidated.

49. Mr. Campion's submission that there was unprofessional or improper conduct by Ms. Armstrong or Mr. Kugler is without a scintilla of merit. The filing of the contract documents was not a breach of privacy. Capital One was filing documents that ought to and normally would have been filed by Class Counsel on a certification motion. Ms. Armstrong and Mr. Kugler were professional in providing a defence of their clients who were being sued for $240 billion and whose liability remains to be determined.

50. Save for the matter of redacting the SIN number and the amount of Ms. Del Giudice's income, there was nothing that would remotely justify a sealing order in the immediate case. I simply direct that Capital One file the Document Brief with personal information redacted.

[37] The Plaintiffs' reference in their costs submission to Henry Brougham, later Lord Chancellor, in his defence of Queen Caroline is not apt. In the immediate case, the Plaintiffs' lawyers are acting pursuant to a contingency fee retainer for clients suing for $240 billion in the Superior Court of Ontario. In the Trial of Queen Caroline, Lord Brougham was acting for a client in what was in effect a public trial in the House of Lords of the English Parliament. The aristocratic peers were debating the *Pains and Penalties Bill 1820*. The statute had been introduced at the urging of King George IV to strip Queen Caroline of the title of queen and to dissolve the royal marriage. In the immediate case, in the context of the certification motion, the indignity that Ms. Del Guidice's lawyers sought to protect her from suffering was that it would be revealed to the public what is her salary as a cook. The indignity that Lord Brougham sought to spare Queen Caroline was being dethroned and divorced. (The bill passed the House of Lords, but the statute was not submitted to the House of Commons because of Queen Caroline's popularity with the public.)

[38] Lord Brougham said what he said, but that's not the end of the story. Years later, at a dinner in the Inner Temple, Lord Brougham, repeated his remarks, after which Lord Chief Justice Alexander Cockburn rose to speak:

> My noble and learned friend Lord Brougham said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction – that the arms which he wields are to be the arms of the warrior and not of the assassin. It is his duty to strive to accomplish the interests of his clients *per fas* [by means of justice] not *per nefas* [by means of injustice]: it is his duty to the utmost of his power to seek to reconcile the interests he is bound to maintain, and the duty is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice.[11]

[39] In the immediate case, the Plaintiffs' submissions of their glorious cause and duties as advocates to fight the unbeatable foe, to right the unrightable wrong, to fight for the right without question or pause, to strive with their last ounce of courage and to be willing to march into Hell for that cause is to tilt at windmills.[12] The Defendants and the Defendants' lawyers never disputed the importance of protecting the Class Members' privacy and human dignity, and the Defendants' lawyers never suggested that the Plaintiffs or the Plaintiffs' lawyers were not entitled to vigorously prosecute Capital One and Amazon Web. It was Plaintiffs' lawyers that brought up the matter of the Defendants' lawyers acting unprofessionally. It was the Plaintiffs' lawyers who brought up the issue of the courageous advocate fighting the glorious fight as the justification for advancing the unsubstantiated proposition that the Defendants' lawyers had breached their professional responsibilities and had attempted to trick the court and abuse the Plaintiffs and their lawyers.

[40] If the Plaintiffs are entitled to vigorously prosecute, then the Defendants are just as much entitled to vigorously defend, but it was the Plaintiffs not the Defendants that brought up the matter of when the line of professionalism gets crossed. In the immediate case, all the Defendants did was put the Plaintiffs to the test of the cause of action criterion of s. 5(1) of the *Class Proceedings Act, 1992,* which, by the way, the Plaintiffs were obliged to do in any event, because even on a consent certification, the court must be satisfied that all of the criteria for certification are satisfied.[13]

[41] Similarly, the Plaintiffs' submissions about their entitlements to amend their pleadings as their understanding of the case evolved over time, to advance every reasonable claim they have against the Defendants, and to strategically frame their pleadings as they wish are to tilt at windmills that do not exist. Neither the Defendants nor the court got in the way of the Plaintiffs' rights to plead their action as they saw fit. Unfortunately, the Plaintiffs saw fit to plead in a way that did not satisfy the requirements of the *Rules of Civil Procedure* and the substantive law.

[42] The Plaintiffs' failure was an absolute failure, and it was a self-inflicted failure because: (a) their Fresh as Amended Statement of Claim egregiously contravened the rules of pleadings; (b) it was plain and obvious that the pleading failed to disclose any legally viable causes of action; and (c) the pleading improperly and inexplicably transformed a straightforward data breach case into a data misappropriation and misuse case that was largely unrelated to the facts that gave rise to the litigation.

[43] The Plaintiffs are largely responsible for the high litigation expense of the proceedings. They substantially expanded the scope of the action from the action that was described at the carriage fight motion. The Plaintiffs' litigation strategy and Class Counsel's conduct in implementing that strategy were an enormous investment in prosecuting the action and required Capital One and Amazon Web to respond with a commensurate investment in defending the action and in defending their counsel from unsubstantiated allegations of professional misconduct.

[44] The Defendants never suggested that the Plaintiffs' claim should be dismissed because the action was frivolous or vexatious. The Defendants, as defendants are entitled to do, submitted that the Plaintiffs had not complied with the technical rules of pleading and that the Plaintiffs had not demonstrated a reasonable cause of action. The Defendants' lawyers acted with professionalism and honourably.

[45] To be clear, I do not suggest that the Plaintiffs' lawyers acted dishonourably, and they certainly were entitled to passionately and vigorously advance the Plaintiffs' case, but I do say that there is no inevitable conflict between a lawyer's duty to resolutely advance his or her argument and his or her duty to treat the opponent and his or her lawyer with courtesy, dignity, and respect.

[46] In the immediate case, I alerted the Plaintiffs at the carriage motion that their pleadings would be challenged on technical grounds by the Defendants. It is inevitable and necessary in class actions that the Plaintiff satisfy the cause of action criterion for certification and the Plaintiffs' lawyers knew that their pleading was going to be tested at the certification motion. Plaintiffs' counsel ignored my alert. The Fresh as Amended Statement of Claim grossly violated the technical rules of pleading. The Plaintiffs failed to satisfy the substantive requirements of the cause of action requirements of the *Rules of Civil Procedure* and the *Class Proceedings Act, 1992*. The Plaintiffs' submission about unprofessional and improper conduct by the Defendants' lawyers was uncalled for and was without a scintilla of merit.

[47] Costs on a substantial indemnity scale or full indemnity scale are reserved for rare and exceptional cases, where the conduct of the party against whom costs is ordered is reprehensible or where there are other special circumstances that justify costs on the higher scale.[14] In my opinion, the case at bar is one of the rare and exceptional cases where costs on a substantial indemnity basis is warranted.

D. The Quantum of Costs

[48] I turn now to the matter of the quantum of the Defendants' award of costs.

[49] In *Pearson v. Inco Ltd.*,[15] at para. 13, the Court of Appeal established the following principles for fixing costs on a certification motion: (1) Ontario, unlike other class proceedings jurisdictions such as British Columbia, has not sought to interfere with the normal rule that costs will ordinarily follow the event; (2) the costs must reflect what is fair and reasonable; (3) the costs should, if possible, reflect costs awards made in closely comparable cases, recognizing that comparisons will rarely provide firm guidance; (4) a motion for certification is a vital step in the proceeding and the parties expect to devote substantial resources to prosecuting and defending the motion; (5) the costs expectations of the parties can be determined by the amount of costs that an unsuccessful party could reasonably expect to pay; (6) the complexity of the issues; (7) whether the case raises an issue of public importance; and (8) a fundamental object of the *Class Proceedings Act, 1992* is to provide enhanced access to justice.

[50] The court's discretion in awarding costs arises under the authority of s. 131 of the *Courts of Justice Act*[16] and is to be exercised by a consideration of the factors in rule 57.01(1) of the *Rules of Civil Procedure*.[17] The traditional discretionary principles developed for costs awards are codified in rule 57.01(1), which states:

> *Factors in Discretion*
>
> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

[51] In their costs submissions, the Plaintiffs submit that the costs claimed by the Defendants are excessive and not within the reasonable expectations of a party bringing a s. 5(1)(a) motion, or a motion under rule 21.01(1)(b) of the *Rules of Civil Procedure*. The Plaintiffs submit that the amount claimed for costs must be fair and reasonable for the unsuccessful party in the particular circumstances.

[52] Relying on several costs decisions of Justice Belobaba[18] and Justice Morgan[19] and two of my own costs decisions,[20] the Plaintiffs submit that costs awards tend to range between $100,000 and $300,000 on a partial indemnity basis. Based on this range of costs awards and the particular circumstances of the immediate case, the Plaintiffs submit that the appropriate awards of costs in the immediate case are $150,000, all inclusive, to Capital One and $75,000, all inclusive, to Amazon.

[53] I agree that a critical controlling principle for the awarding of costs is that the sum awarded reflect the fair and reasonable expectations of the unsuccessful litigant.[21] In *Boucher v. Public Accountants for the Province of Ontario*,[22] after a two-day hearing of a judicial review application, the motions judge fixed costs on a partial indemnity scale at $187,682.51, all inclusive. On appeal, the Court of Appeal reduced the aggregated award to $63,000, all inclusive. At para. 24 of his judgment, Justice Armstrong stated:

> 24. The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in *Zesta Engineering Ltd. v. Cloutier* (2002), 2002 CanLII 25577 (ON CA), 21 C.C.E.L. (3d) 161 (Ont. C.A.) at para. 4 where it said:
>
> > In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.
>
> See also *Stellarbridge Management Inc. v. Magna International (Canada) Inc.*, 2004 CanLII 9852 (ON CA), [2004] O.J. No. 2102 (C.A.) para. 97.

[54] In *Davies v. Clarington (Municipality)*[23] at para. 52, Justice Epstein stated that the overriding principle in awarding costs is reasonableness. She stated:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigant. In *Boucher* [*Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.)], this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding at para. 37, where Armstrong J.A. said: "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice."

[55] The assessment of reasonableness is discretionary and very much dependent upon the circumstances of each case. In some cases, it may be reasonable for the successful party to make exhaustive efforts and to commit enormous legal resources, and in those cases, it might be said that the unsuccessful party could reasonably expect to pay those costs. In other cases, however, the successful party may have been well served by giving his or her lawyer instructions to make exhaustive efforts, but it might be disproportionate and unreasonable to expect the unsuccessful party to pay those costs, even if he or she would have expected or anticipated that his or her foe would have marshalled those legal resources.

[56] The immediate case was one of those cases in which it was anticipated that each side would commit enormous legal resources to the certification motion. And they did. As noted above, the amount of the Plaintiffs' claim was ginormous and worthy of a massive allocation of legal resources both in prosecution and in defence. The Plaintiffs' evolving theory of the case was complex and designed to expand the legal universe of the law of privacy. The Books of Authorities comprised 4,353 pages of cases and legal articles. In addition, during argument, the Plaintiffs' lawyers made copious references to a 250-page academic text about big data and the information economy.[24] There were three days of argument. The amount claimed for costs in the immediate case is within the reasonable expectations of the Plaintiffs and commensurate with the nature of the case and the Phase I motion.

[57] Keeping the fairness and reasonableness factor in mind and the other principles that guide the court's discretion in awarding costs and having reviewed the Defendants' respective Bills of Costs, in my opinion, the appropriate award in the immediate case is **$725,000**, all inclusive, for Capital One on a substantial indemnity basis and **$500,000**, all inclusive, for Amazon Web, all inclusive.

[58] In arriving at the above awards, I considered the partial indemnity awards in my own other cases and extrapolated what the award might have been on a substantial indemnity basis. The exercise was interesting – for me, at least – but not particularly helpful, given that the immediate case is not comparable to any proposed class action.

[59] All class actions are unique, but this one has elements as rare as Astatine. In *Pearson v. Inco Ltd.*,[25] at para. 13, the Court of Appeal said that costs in class actions should, if possible, reflect costs awards made in closely comparable cases, recognizing that comparisons will rarely provide firm guidance. There was no closely comparable case to the immediate case.

[60] Although there are no closely comparable cases to the immediate case, for what it is worth, my analysis of my own costs awards is set out in the following chart. For what little it is worth, I discovered that the range of my costs awards on certification motions is from $10,000 to $1,350,000. My average (mean) award is $334,000. The medium of my awards (midpoint) is $215,000.

1. *Web Objective Inc. v. SociaLabra Inc.,* [2018] O.J. No. 1781 *$10*	Plaintiff awarded **$10,000**.
2. *Williams v. Toronto (City),* [2011] O.J. No. 2897	Plaintiff awarded **$18,649.**
3. *Boal v. International Capital Management Inc.* 2021 ONSC 2018	Defendant awarded **$35,000.**
4. *Persaud v. Talon International Inc.,* 2020 ONSC 4432	Plaintiff awarded **$36,000**
5. *Brigaitis v. IQT Ltd. (c.o.b. IQT Solutions),* [2014] O.J. No. 862	Plaintiff awarded **$50,000.**
6. *Bennett v. Lenovo (Canada) Inc.,* [2017] O.J. No. 6000	Plaintiff awarded **$60,000.**
7. *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp., 2008 CanLII 27822 (ON SC),* [2008] O.J. No. 2276	Defendant awarded **$63,707.**
8. *Coulson v. Citigroup Global Markets Canada Inc.,* [2010] O.J. No. 1787	Defendants awarded **$70,000.**
9. *Arenson v. Toronto (City),* [2012] O.J. No. 3664	Defendant awarded **$70,537.**
10. *Topacio v. Batac,* [2011] O.J. No. 1611	Plaintiff awarded **$80,906.**
11. *Topacio v. Batac,* [2011] O.J. No. 1611	Plaintiff awarded **$83,485.**
12. *Topacio v. Batac,* [2011] O.J. No. 1611	Plaintiff awarded **$90,360.**
13. *Lavier v. MyTravel Canada Holidays Inc., 2008 CanLII 44697 (ON SC),* [2008] O.J. No. 3377	Defendant awarded **$125,000.**
14. *Bernstein v. Peoples Trust Co.,* [2017] O.J. No. 1743	Plaintiff awarded **$146,493.**
15. *G.C. v. Jugenburg,* 2021 ONSC 5144 and 2021 ONSC 5213	Plaintiff awarded **$150,000.**
16. *Cavanaugh v. Grenville Christian College,* [2012] O.J. No. 3883	Defendant awarded **$150,825.**
17. *Cavanaugh v. Grenville Christian College,* [2012] O.J. No. 3883	Defendant awarded **$150,000.**
18. *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp., 2008 CanLII 27822 (ON SC),* [2008] O.J. No. 2276	Defendant awarded **$173,693.**
19. *Carter v Ford Motor Company of Canada,* 2021 ONSC 5586	Plaintiff awarded **$195,288**
20. *Boal v. International Capital Management Inc.* 2021 ONSC 2018	Defendant awarded **$212,068.**
21. *Lundy v. VIA Rail Canada Inc.,* [2015] O.J. No. 2782	Plaintiff awarded **$214,624**.
22. *Peters v. SNC-Lavalin Group Inc.,* 2021 ONSC 6161.	Defendant awarded **$285,000.**
23. *Wright v. Horizons ETFS Management (Canada) Inc.,* 2021 ONSC 4499	Plaintiff awarded **$290,704.**
24. *Lipson v. Cassels Brock & Blackwell,* [2013] O.J. No. 4667	Plaintiff awarded **$298,583**.
25. *Parker v. Pfizer Canada Inc.,* [2012] O.J. No. 3891	Plaintiff awarded **$300,000.**
26. *Peter v. Medtronic, Inc.,* [2010] O.J. No. 68	Plaintiff awarded **$300,000.**
27. *Harris v. Bayerische Motoren Werke Aktiengesellschaft,* 2020 ONSC 4220	Plaintiff awarded **$300,000**
28. *Boal v. International Capital Management Inc.* 2021 ONSC 2018	Defendant awarded **$300,000.**
29. *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp., 2010 ONSC 5390 (CanLII),* [2010] O.J. No. 4208	Plaintiff awarded **$308,683.**
30. *Hodge v. Neinstein, 2014 ONSC 6366 (CanLII),* [2014] O.J. No. 5204	Defendant awarded **$341,758.**
31. *Sondhi v. Deloitte Management Services LP,* [2018] O.J. No. 1224	Plaintiff awarded **$353,791.**

32. *McCracken v. Canadian National Railway Co.,* [2012] O.J. No. 5716	Defendant awarded **$450,000.**
33. *Cappelli v. Nobilis Health Corp.,* [2019] O.J. No. 2918	Defendant awarded **$537,696.**
34. *Mancinelli v. Royal Bank of Canada,* 2020 ONSC 3743	Plaintiff awarded **$700,000**.
35. *McCracken v. Canadian National Railway Co., 2010 ONSC 6026 (CanLII),* [2010] O.J. No. 4650	Plaintiff awarded **$740,650.**
36. *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.,* [2015] O.J. No. 5358	Plaintiffs awarded **$786,399**.
37. *Vester v. Boston Scientific Ltd., 2017 ONSC 2498 (CanLII),* [2017] O.J. No. 2079	Plaintiffs awarded **$875,000.**
38. *Das v. George Weston Ltd.,* [2017] O.J. No. 4858	Defendant awarded **$985,602.**
39. *Fehr v. Sun Life Assurance Co. of Canada,* [2017] O.J. No. 1749	Defendant awarded **$1,000,000**.
40. *Berg v. Canadian Hockey League,* [2017] O.J. No. 4659	Plaintiff awarded **$1,012,066**
41. *Das v. George Weston Ltd.,* [2017] O.J. No. 4858	Defendant awarded **$1,350,000.**

[61] As the above chart reveals, I have made some very substantial awards on a partial indemnity basis. I think that the immediate case falls into the type of case where a substantial award is appropriate. The intensity and intricacy of the argument in the immediate case was similar to *Das v. George Weston Ltd.,* where like the case at bar, I held that the plaintiffs had not pleaded a reasonable cause of action and where I awarded $1.0 million and $1.35 million in costs to the defendants respectively. The Court of Appeal upheld my decision and reduced the costs awards by 30% because of the public interest component of the case.[26]

[62] In the immediate case, as noted above, on a substantial indemnity basis, the Plaintiffs' costs claim for Phase I would have been $361,174.89. However, I am skeptical that that sum is a true reflection of the legal work that the Plaintiffs' lawyers actually did in preparation for Phase I, which work might not be chargeable for the certification motion.

[63] In this last regard, it may be noted that the Plaintiffs' lawyers would have expended a great deal of legal resources in formulating legal theories for the carriage fight, which legal resource would have been carried forward into the Fresh as Amended Statement of Claim and into Phase I. In contrast, the Defendants' legal battleship had to get up to speed to meet the already full speed ahead legal battleship of the Plaintiffs.

[64] In the immediate case, I note that on a partial indemnity basis, Capital One claimed costs of $678,945.27, all inclusive, and Amazon Web claimed costs of $458,207.53, all inclusive. In my opinion, those claims for costs on a partial indemnity basis were fair and reasonable and within the expectations of the Plaintiffs on a partial indemnity basis. That being the case, awards of costs of $725,000 and $500,000 on a substantial indemnity basis are fair and reasonable, and, if anything, an under-evaluation of the Defendants' entitlement.

E. Conclusion

[65] For the above reasons, I award Capital One **$725,000**, all inclusive, and I award Amazon Web **$500,000**, all inclusive, payable forthwith.

Perell, J.

Released: October 20, 2021

CITATION: Del Giudice v. Thompson, 2021ONSC 6974
COURT FILE NO.: CV-19-00625030-00CP
DATE: 20211020

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

RINA DEL GIUDICE and DANIEL WOOD
Plaintiffs

- and -

PAIGE A. THOMPSON, CAPITAL ONE FINANCI AL CORPORATION, CAPITAL ONE BANK (CANADA BRANCH), CAPI TAL ONE (SERVICES) CANADA INC., CAPITAL ONE, N.A., CAPITAL ONE BANK (USA), N.A., GI THUB, INC., AMAZON WEB SERVICES INC., AN D AMAZON WEB SERVICES (CANADA) INC.
Defendants

REASONS FOR DECISION - COSTS

PERELL J.

Released: October 20, 2021

---

[1] S.O. 1992, c. 6.
[2] *Del Giudice v. Thompson*, 2021 ONSC 3696 [GitHub discontinuance] and *Del Giudice v. Thompson*, 2021 ONSC 4024 [re GitHub settlement].
[3] *Del Giudice v. Thompson*, 2020 ONSC 2676 [carriage mtn].
[4] *Del Giudice v. Thompson*, 2021 ONSC 5379.
[5] R.R.O. 990, Reg. 194.
[6] *Del Giudice v. Thompson*, 2021 ONSC 2015; *Del Giudice v. Thompson*, 2021 ONSC 5187.
[7] *Pinon v. City of Ottawa*, 2021 6172 at para. 14 (Div. Ct.).
[8] *Kaymar Rehabilitation Inc. v Champlain Community Care Access Centre*, 2010 ONSC 6614; *Banque Indosuez v. Canadian Overseas Airlines Ltd*. (1990), 33 B.C.S.C.; aff'd (1992) CarswellBC 2212 (C.A.).
[9] *R. v Neil,* 2002 SCC 70 at para 12, quoting Trial of Queen Caroline (1821), by J. Nightingale, vol. II, The Defence, Part 1, at p. 8.
[10] R.R.O. 990, Reg. 194.
[11] George P Costigan Jr., "The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M Berryer on November 8, 1864" (1931) 19 Cal. L. Rev. 521 at p. 523.
[12] Leigh Mitch/Darion Joseph, "The Impossible Dream" lyrics from *Man of La Mancha*.
[13] *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 at para. 21 (S.C.J.).
[14] *Standard Condominium Corporation No. 1466 v. Weinstein*, 2021 ONSC 3526; *Whitfield v. Whitfield*, 2016 ONCA 720; *Best v. Lancaster*, 2015 ONSC 6269; *Said v. University of Ottawa*, 2014 ONSC 771; *3574423 Canada Inc. v. Baton Rouge Restaurants Inc.*, 2012 ONSC 296; *Toronto Kaymar Rehabilitation Inc. v. Champlain Community*

Care Access Centre, 2010 ONSC 6614; *1483677 Ontario Ltd. v. Crain*, 2010 ONSC 1353; *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, supp. reasons 2010 ONCA 479; *Davies v. Clarington (Municipality)* (2009), 2009 ONCA 722 (CanLII), 100 O.R. (3d) 66 (C.A.); *Standard Life Assurance Co. v. Elliott* (2007), 2007 CanLII 18579 (ON SC), 86 O.R. (3d) 221 (S.C.J.); *McBride Metal Fabricating Corp. v. H & W Sales Co.* (2002), 2002 CanLII 41899 (ON CA), 59 O.R. (3d) 97 (C.A.); *Alie v. Bertrand & Frère Construction Co*. (2000), 11 C.L.R. (3d) 149 (Ont. S.C.J.), aff'd (2001), 2001 CanLII 62748 (ON CA), 11 C.L.R. (3d) 12 (Ont. C.A.)

[15] (2006), 2006 CanLII 7666 (ON CA), 79 O.R. (3d) 427 (C.A.).

[16] R.S.O. 1990, c. C-43.

[17] R.R.O. 1990, Reg. 194.

[18] *Dugal v. Manulife Financial*, 2013 ONSC 6354 ($575,000); *Rosen v. BMO Nesbitt Burns Inc.* 2013 ONSC 6356 ($290,000); *Cristante v. DePuy Orthopaedics* 2013 ONSC 6351; ($175,000); *Kaplan v. Casino Rama*, 2019 ONSC 3310 ($160,000); *Sankar v. Bell Mobility* 2013 ONSC 6886 ($150,000); *Brown v. Canada (Attorney General)*, 2013 ONSC 5637 ($130,000); *Grossman v. Nissan Canada*, 2019 ONSC 7379 ($80,000).

[19] *Tataryn v. Diamond & Diamond*, 2021 ONSC 3573 ($200,000).

[20] *Carter v Ford Motor Company of Canada*, 2021 ONSC 5586; *Wright v. Horizons ETFS Management (Canada) Inc.,* 2021 ONSC 4499.

[21] *McGee v. London Life Insurance Co*., [2008] O.J. No. 5312 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.* (2005), 2005 CanLII 63806 (ON SC), 74 O.R. (3d) 728 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.* (2005), 74 O.R. (3d) 728 (S.C.J.); *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.); *Lee v. General Motors Co. of Canada*, [2004] O.J. No. 2245 (S.C.J.).

[22] (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.).

[23] (2009), 2009 ONCA 722 (CanLII), 100 O.R. (3d) 66 (C.A.).

[24] A. Agrawal, J. Gans, and A. Goldfarb, *Prediction Machines: The Simple Economics of Artificial Intelligence* (Harvard Business Review Press, Boston Massachusetts, 2018).

[25] (2006), 2006 CanLII 7666 (ON CA), 79 O.R. (3d) 427 (C.A.).

[26] *Das v. George Weston Ltd.,* 2018 ONCA 1053, leave to appeal to the S.C.C. ref'd [2019] S.C.C. No. 69. *Das v. George Weston Ltd.* was a negligence claim against Loblaws, which purchased goods from a clothing manufacturer in Bangladesh for sale in Canada. The Claim was for $1.85 billion, punitive damages of $150 million, special damages, pre and post-judgment interest, and costs on a substantial indemnity basis. The claim was brought on behalf of the in Bangladesh citizens who were the victims of the collapse of the Rana Plaza, an apartment building being used as a clothing factory. In the collapse, 1,130 people died, and 2,520 people were seriously injured. The case at bar is a claim for 240 billion by six million Canadian citizens who were the victims of a data breach with unknown financial injuries, if any. Making this comparison between the cases for the purposes of assessing costs just reveals the venality and low utility of the whole exercise.

Tab 292

CanLII

Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON CA)

Source:	Court of Appeal for Ontario
Date:	2004-06-22
File number:	C40044
Other citations:	71 OR (3d) 291 — 132 ACWS (3d) 15 — 188 OAC 201 — 48 CPC (5th) 56 — [2004] CarswellOnt 2521 — [2004] OJ No 2634 (QL)
Citation:	Boucher v. Public Accountants Council for the Province of Ontario, 2004 CanLII 14579 (ON CA), <https://canlii.ca/t/1hcgq>, retrieved on 2026-01-19

Boucher et al. v. Public Accountants Council for the Province of Ontario et al.
[Indexed as: Boucher v. Public Accountants Council for the Province of Ontario]

71 O.R. (3d) 291
[2004] O.J. No. 2634
2004 CanLII 14579
Docket No. C40044

Court of Appeal for Ontario,
Abella, Cronk and Armstrong JJ.A.
June 22, 2004

Civil procedure -- Costs -- Costs grid -- Partial indemnity costs -- Fixing costs of abandoned application -- Factors in assessing costs -- Court to consider result produced and whether result is fair and reasonable -- Overall objective of fixing costs is to fix amount that is fair and reasonable for unsuccessful party to pay in particular circumstances, rather than amount fixed by actual costs incurred by successful litigant -- Error in principle to grant award of costs on partial indemnity basis that is virtually same as award on substantial indemnity basis -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.09(3), 57.01(1), (3), (3.1).

In earlier proceedings, the appellants, who were Certified General Accountants, and two other parties sought to have the court appoint disinterested persons to hear their applications for public accounting licences. Central to these proceedings was the allegation that the Public Accountants

Council for the Province of Ontario ("PA Council") was controlled by the Institute of Chartered Accountants of Ontario ("CA Institute"), which was authorized by the Public Accountancy Act, R.S.O. 1990, P.37, to appoint 12 of the 15 members of the PA Council. Lax J. stayed the earlier proceedings on the basis that the court lacked jurisdiction to make the order requested. Lax J. fixed costs against the appellant in the amount of $97,563.

The appellants commenced the immediate application and alleged reasonable apprehension of bias against the PA Council in its review of applications for licences to practise public accounting by members of the Certified General Accounting Association of Ontario. By court order, the material for the application before Lax J. was used in the new application.

The respondents moved to have the application quashed; however, before the application was heard, it was abandoned. The respondents moved for costs pursuant to rule 37.09(3) on a substantial indemnity basis. Epstein J. fixed the costs on a partial indemnity basis, including disbursements and GST as follows: PA Council, $88,896.45; individual respondents, $60,033.96; and CA Institute, $38,752.10 for a total of $187,682.51. (This sum was only $14,528.86 less than the amount claimed on a substantial indemnity basis.)

The appellants appealed and raised the grounds that (1) costs should have been referred for assessment and not fixed; and (2) the costs, which were calculated in accordance with the costs grid, were excessive.

Held, the appeal should be allowed.

Epstein J. did not err in fixing costs rather than having costs referred to an assessment officer. There is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. If a judge is able to effect procedural and substantive justice in fixing costs, he or she ought to do so. There was no basis upon which to interfere with the motion judge's discretion not to refer the costs for assessment. [page292]

However, the costs award calculated in accordance with the costs grid was excessive. While it was appropriate to do the costs grid calculation, it was also necessary to consider the result produced and determine whether in all the circumstances the result is fair and reasonable. Subrule 57.01(3) lists a broad range of factors that the court may consider in exercising its discretion to award costs, and the fixing of costs is not simply a mechanical exercise. The fixing of costs does not begin or end with the calculation of hours times rates. The overall objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by the actual costs incurred by the successful litigant.

Awarding $187,682.51 was not fair and reasonable in the circumstances of this case; the costs were so excessive as to call for appellate interference. In deciding what is fair and reasonable, the expectation of the parties concerning the quantum of a costs award is a relevant factor. Consideration should be given to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the PA Council by the CA Institute. The fact that all parties were satisfied to have the same evidentiary record in both cases suggested that there was much in common between the two applications. Further, the respondents filed no evidence, conducted no cross-examination and advanced substantially the same arguments in support of the motions to quash. Finally, there was no proportionality between the costs claimed on a substantial indemnity scale and the costs awarded on a partial indemnity scale. The granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. These factors suggested that the amounts awarded on a partial indemnity basis should be significantly reduced. A fair and reasonable award, taking into

consideration all the factors discussed above, was as follows: PA Council, $30,000; individual respondents, $20,000; CA Institute, $13,000, for a total of $63,000, inclusive of disbursements and Goods and Services Tax.

APPEAL from an order of Epstein J. dated November 29, 2002, allowing costs for an abandoned application pursuant to rule 37.09(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

Cases referred to Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126, [2000] O.T.C. 694 (S.C.J.); Canadian Pacific Ltd. v. Matsqui Indian Band, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129, 85 F.T.R. 79n, 177 N.R. 325, [1995] S.C.J. No. 1; Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303, [2004] S.C.J. No. 72, 235 D.L.R. (4th) 193, 316 N.R. 265, 2004 SCC 9, 40 B.L.R. (3d) 1; Lawyers' Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921, [2002] O.T.C. 78, 17 C.P.C. (5th) 334 (S.C.J.); Murano v. Bank of Montreal (1998), 1998 CanLII 5633 (ON CA), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21, 41 B.L.R. (2d) 10, 22 C.P.C. (4th) 235, 5 C.B.R. (4th) 57 (C.A.); Stellarbridge Management Inc. v. Magna International (Canada) Inc. (2004), 2004 CanLII 9852 (ON CA), 71 O.R. (3d) 263, 187 O.A.C. 78, [2004] O.J. No. 2102 (C.A.); Toronto (City) v. First Ontario Realty Corp. (2002), 2002 CanLII 49482 (ON SC), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.); Wasserman, Arsenault Ltd. v. Sone, 2002 CanLII 45099 (ON CA), [2002] O.J. No. 3772, 164 O.A.C. 195, 38 C.B.R. (4th) 119 (C.A.); Zesta Engineering Ltd. v. Cloutier (2002), 2003 C.L.L.C. 210-010, 2002 CanLII 45084 (ON CA), 21 C.C.E.L. (3d) 164, [2002] O.J. No. 3738 (C.A.), supp. reasons (2002), 2002 CanLII 25577 (ON CA), 21 C.C.E.L. (3d) 161, [2002] O.J. No. 4495 (C.A.), revg 2001 CanLII 28294 (ON SC), [2001] O.J. No. 621, 2001 C.L.L.C. 210-024, 7 C.C.E.L. (3d) 53 (S.C.J.) [page293] Statutes referred to Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131 Public Accountancy Act, R.S.O. 1990, c. P.37 Public Officers Act, R.S.O. 1990, c. P.45 Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 37.09(3), 57.01, 58

David E. Wires, for appellants.

Michael D. Lipton, Q.C., for the Public Accountants Council for the Province of Ontario.

Cynthia Amsterdam, for Douglas J. Whyte, Alastair Skinner, Gilbert H. Riou, Ralph T. Neville, Ronald W. Mikula, Barry G. Blay, David H. Atkins, Jennifer L. Fisher, Jerald D. Whelan, Priscilla M. Randolph, Bryan D. Meyer and Thomas A. Hards.

Robert D. Peck, for The Institute of Chartered Accountants of Ontario.

The judgment of the court was delivered by

[1] ARMSTRONG J.A.: -- This case is another chapter in the long simmering dispute between the Certified General Accountants and the Chartered Accountants concerning the practice of public accounting in Ontario. At issue in this litigation was the control of the licensing granting authority, the Public Accountants Council for the Province of Ontario, by a majority of members who were Chartered Accountants.

[2] The appellants, who are Certified General Accountants, brought an application for judicial review against the Public Accountants Council. The appellants alleged reasonable apprehension of bias against the Council in its review of applications for licences to practise public accounting by members of the Certified General Accountants Association of Ontario.

[3] Before the appellants' application was heard it was abandoned. The respondents then moved to have their costs fixed by a judge of the Divisional Court on a substantial indemnity basis. After a

two-day hearing, Epstein J. fixed the respondents' costs, on a partial indemnity basis, at $187,682.51 inclusive of disbursements and Goods and Services Tax. The appellants now appeal from this costs order pursuant to leave granted by this court on May 22, 2003. [page294]

Background of the Proceedings

[4] The judicial review application had its genesis in the prior proceeding of Boucher v. Public Accountants Council for the Province of Ontario, [2000] O.J. No. 3126, [2000] O.T.C. 694 (S.C.J.) before Lax J. of the Superior Court. In the earlier proceeding, the appellants and two other parties sought to have the court appoint disinterested persons to hear the appellants' applications for public accounting licences. The appellants claimed that the court could do so under the Public Officers Act, R.S.O. 1990, c. P.45. The proceeding was stayed by Lax J. on the basis that the court lacked jurisdiction under the Public Officers Act to make the order requested.

[5] In granting the stay, Lax J. said [at paras. 17 and 37] in obiter dicta:

> The particulars of bias described by the applicants are sympathetic, compelling and disturbing. They are offensive to fundamental notions of fairness. They invoke a primordial judicial instinct to intervene and second-guess what appears to be a flawed legislative scheme and what is a flawed process. . . .
>
> . . . . .
>
> Professional discipline is not in issue here, but professional licensure by an apparently biased tribunal is. Although the Court lacks jurisdiction to grant the proposed remedy under section 16 of the Public Officers Act, there may be other creative ways for the applicants to have their concerns addressed.

[6] Lax J. suggested that the appellants had other specific courses of action available to them which they could pursue.

[7] The appellants then commenced their judicial review application, naming as parties the same respondents with the addition of the Institute of Chartered Accountants of Ontario who had been an intervenor before Lax J. In their application, the appellants sought a broad range of remedies, including a declaration that the Public Accountants Council is institutionally biased in its granting of licences to practise public accounting. Central to the appellant's allegations of reasonable apprehension of bias is the fact that the Public Accountancy Act, R.S.O. 1990, c. P.37 authorizes the Institute of Chartered Accountants of Ontario to appoint 12 of the 15 members of Council.

[8] At the request of the appellants, Lax J. made an order that the materials used in the application before her should be filed in the judicial review application in the Divisional Court. However, this judicial review application was not one of the courses of action suggested by Lax J.

[9] The respondents moved to quash or stay the judicial review application as being premature on the basis that the appellants' [page295] applications for licence before the Public Accountants Council had not yet been adjudicated on the merits.

[10] The appellants then brought a motion to consolidate the motions to quash with two pending statutory appeals arising from the Council's refusal to grant licences. The consolidation motion was dismissed.

[11] The motions to quash were scheduled to be heard on May 27, 28 and 29, 2002. On May 8, 2002, counsel for the appellants advised by letter that they had received instructions to withdraw the application for judicial review and agree to the dismissal of the motions to quash on a without costs basis. The respondents insisted on the payment of their costs of the application and the

motions to quash and advised that they would continue to prepare for the motions to quash pending resolution of the matter. The appellants served their notice of abandonment on May 17, 2002. The respondents then brought their motion to have their costs fixed.

[12] The motions judge fixed the costs of the application for judicial review and the motions to quash on a partial indemnity basis including disbursements and GST as follows:

Public Accountants Council of Ontario $ 88,896.45

Individual Respondents $ 60,033.96

Institute of Chartered Accountants of Ontario $ 38,752.10

Total $187,682.51

Grounds of Appeal

[13] The appellants raise the following grounds of appeal:

(i) the motions judge erred in fixing the costs of the abandoned application rather than referring them for assessment; and

(ii) the costs awarded are excessive in that they are approximately 178 per cent of the costs awarded in the proceedings before Lax J. that involved substantially the same parties and issues without deduction for any amount claimed.

Did the motions judge err in fixing costs?

[14] The appellants accept that the respondents are entitled to their costs of the abandoned application pursuant to rule 37.09(3) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, which provides: [page296]

> 37.09(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise.

However, the appellants submit that those costs ought not to be fixed by a judge in accordance with the costs grid established by rule 57.01(3). The appellants rely upon rule 57.01(3.1), which states:

> 57.01(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58.

Rule 58 sets out a code of procedure for the assessment of costs by an assessment officer.

[15] The motions judge concluded, correctly in my view, that there is now a presumption that costs shall be fixed by the court unless the court is satisfied that it has before it an exceptional case. The appellants submitted to the motions court and to this court that the case at bar is such a case. The motions judge, in deciding that this was not an exceptional case, said [at para. 52]:

> Only if the assessment process will be more suited to effect procedural and substantive justice should the Court refer the matter for assessment. There must be some element to the case that is out of the ordinary or unusual that would warrant deviating from the presumption that costs are to be fixed. Neither complex litigation nor significant amounts in legal fees will be enough for a case to be exceptional. The judge should be able to fix costs with a reasonable review of the work completed without having to scrutinize each and every docket. If that type

> of scrutinizing analysis is required, then perhaps, the matter would fall within the exception and be referred to assessment: BNY Financial Corp.-Canada v. National Automotive Warehousing Inc., [1999] O.J. No. 1273 (Commercial List, Gen. Div.) (BNY Financial).

[16] I agree with the motions judge that if a judge is able to effect procedural and substantive justice in fixing costs, she ought to do so. See Murano v. Bank of Montreal (1998), 1998 CanLII 5633 (ON CA), 41 O.R. (3d) 222, 163 D.L.R. (4th) 21 (C.A.) at p. 245 O.R., per Morden A.C.J.O.

[17] The appellants argued before us that an abandoned motion falls into the category of an exceptional case because the judge fixing the costs does not have the benefit of a hearing involving the presentation of evidence and legal argument. While there is no doubt that the judge who has heard a case is in the best position to determine a just costs award, it does not follow, that in the circumstances which exist here, the motions judge was obliged to decline the task.

[18] I also observe that rule 57.01(3.1) is discretionary. It provides that in an exceptional case, the trial judge may refer costs for assessment. It is not required that she do so. This is a somewhat complex case with several parties and a number of counsel, [page297] including one party with two senior counsel. Although another judge might have exercised his or her discretion under rule 57.01(3.1) differently, I see no basis upon which to interfere with the motions judge's discretion not to refer the costs for assessment.

Was the costs award excessive?

[19] The motions judge's decision is entitled to a high degree of deference. The standard of review for interfering with the exercise of the discretion by a judge of first instance was articulated by Lamer C.J.C. in Canadian Pacific Ltd. v. Matsqui Indian Band, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1, at p. 32 S.C.R.:

> This discretionary determination should not be taken lightly by reviewing courts. It was Joyal J.'s discretion to exercise, and unless he considered irrelevant factors, failed to consider relevant factors, or reached an unreasonable conclusion, then his decision should be respected. To quote Lord Diplock in Hadmor Productions Ltd. v. Hamilton, [1982] 1 All E.R. 1042, at p. 1046, an appellate court "must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently".

[20] In a more recent case, Arbour J. said in Hamilton v. Open Window Bakery Ltd., [2004] S.C.J. No. 72, 2004 SCC 9, at para. 27:

> A court should set aside a costs award on appeal only if the trial judge has made an error in principle or if the costs award is plainly wrong (Duong v. NN Life Insurance Co. of Canada (2001), 2001 CanLII 24151 (ON CA), 141 O.A.C. 307, at para. 14).

[21] The appellants point out that the costs awarded in these proceedings are approximately 178 per cent of the costs awarded in the proceedings before Lax J. that involved the same parties and similar issues. The respondents, on the other hand, argue that the proceedings before Lax J. were significantly different from the abandoned judicial review application. However, it is to be noted that the same record was used in the judicial review application. When pressed in argument, counsel for the respondents had some difficulty in explaining the extent to which the factual substrata of the two applications differed. At the heart of both applications is the assertion that the Public Accountants Council of Ontario is effectively controlled by the Institute of Chartered Accountants of Ontario.

[22] Counsel for the appellants submitted that there was much duplication of the work done by the three sets of counsel for the respondents. They also drew attention to the fact that the Public Accountants Council retained another senior counsel to prepare their factum, resulting in a duplication of services. We were [page298] assured by counsel for the respondents that the bills of costs submitted to the motions judge were appropriately adjusted to take into account such duplication.

[23] The respondents also submitted that the appellants were the authors of their own misfortune. The appellants said that they abandoned their application for judicial review because the Ontario Red Tape Commission recommended changes to the Public Accountancy Act; and a panel appointed under the Agreement on Internal Trade found that the Act offended provisions of the Agreement. The appellants claimed that the reports of these two bodies addressed the issues of concern to them, causing them to abandon their application for judicial review. However, the respondents observed that the report of the panel appointed under the Agreement on Internal Trade was released on October 5, 2001 and the Red Tape Commission report was released on December 10, 2001. It was several months later that the appellants abandoned their application. The respondents submit that the lion's share of the costs were generated in this period of delay, and particularly after February 2002, when the dates for the motion to quash were fixed for May 2002. Although this delay caused some concern to the motions judge, she concluded [at para. 67] that:

> In the circumstances of this case I do not find that the timing of the events that took place in the spring of 2002 leading up to the abandonment of the application was in bad faith or amounted to an abuse of the process of the court.

[24] The appellants submit that the motions judge accepted the bills of costs that were presented to her without any deductions. The bills were prepared in accordance with the calculation of hours times dollar rates provided by the costs grid. While it is appropriate to do the costs grid calculation, it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable. This approach was sanctioned by this court in Zesta Engineering Ltd. v. Cloutier, 2002 CanLII 25577 (ON CA), [2002] O.J. No. 4495, 21 C.C.E.L. (3d) 161 (C.A.) at para. 4 where it said:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

See also Stellarbridge Management Inc. v. Magna International (Canada) Inc. (2004), 2004 CanLII 9852 (ON CA), 71 O.R. (3d) 263, [2004] O.J. No. 2102 (C.A.) at para. 97.

[25] Zesta Engineering and Stellarbridge simply confirmed a well settled approach to the fixing of costs prior to the establishment of [page299] the costs grid as articulated by Morden A.C.J.O. in Murano v. Bank of Montreal at p. 249 O.R.:

> The short point is that the total amount to be awarded in a protracted proceeding of some complexity cannot be reasonably determined without some critical examination of the parts which comprise the proceeding. This does not mean, of course, that the award must necessarily equal the sum of the parts. An overall sense of what is reasonable may be factored in to determine the ultimate award. This overall sense, however, cannot be a properly informed one before the parts are critically examined.

[26] It is important to bear in mind that rule 57.01(3), which established the costs grid, provides:

> 57.01(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs.

Subrule (1) lists a broad range of factors that the court may consider in exercising its discretion to award costs under s. 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43. The express language of rule 57.01(3) makes it clear that the fixing of costs is not simply a mechanical exercise. In particular, the rule makes clear that the fixing of costs does not begin and end with a calculation of hours times rates. The introduction of a costs grid was not meant to produce that result, but rather to signal that this is one factor in the assessment process, together with the other factors in rule 57.01. Overall, as this court has said, the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant.

[27] In considering whether the amounts claimed in the bills of costs were appropriate, the motions judge said [at paras. 69-70]:

> Here there is another point of departure between the applicants and the respondents. The respondents take the position that they are entitled to claim reimbursement for all the time spent and disbursements incurred in responding to the application for judicial review and in preparing the motion to quash. Conversely, the applicants contend that the factual background and the issues raised in the judicial review and the motion to quash are the same, or at least nearly the same, as those fully argued before Lax J. As a result, the time necessary for the respondents to respond to the judicial review application and to prepare for the motion to quash was, [or] should have been, minimal. It follows that the costs fixed should similarly be minimal.
>
> While it is apparent that the various proceedings have centred on the same complaints about the same licensing regime, the issues in each proceeding have differed. For example, the relief claimed in the matter before Lax J. was different than that claimed in the judicial review application. This different perspective requires a different analysis and different research. In addition, the various proceedings were spread over time and each new matter necessitated new preparation even in respect to issues that were the same or similar as those raised in earlier challenges to the licensing system. [page300] In these circumstances I do not consider it appropriate effectively to give the applicants a credit for costs ordered and paid in earlier proceedings.
>
> I agree with what Nordheimer J. said in Basedo v. University Health Network, [2002] O.J. No. 597 (Sup. Ct.) that "it is not the role of the court to second-guess the time spent by counsel unless it is manifestly unreasonable in the sense that the total time spent is clearly excessive or the matter has been overly lawyered." As mentioned earlier, counsel for the respondents filed substantial material in support of the detailed bills of costs. In addition, they took me through the various entries, in a general fashion, to explain the nature of the work done and why it was necessary. I have conducted my own detailed review of the functions performed, time spent and amounts claimed. In my view, the amounts for fees and disbursements, on a partial indemnity basis, are appropriate.

[28] With respect, I disagree with the motions judge. The total amount of $187,682.51 was not a fair and reasonable sum to award in the circumstances of this case, even given the respondents' separate bills of costs, which produced totals of $88,896.45, $60,033.96, and $38,752.10. It is my view that the costs awards in this case are so excessive as to call for appellate interference.

[29] While I accept that the bills of costs accurately reflect the time spent by all of the lawyers in this matter, it is inconceivable to me that the total amounts claimed are justifiable. In this regard, I accept the submission of the appellants that:

(a) the record in this application was the same record filed in the earlier proceedings;

(b) the respondents filed no evidence;

(c) the respondents conducted no cross-examination of any witness;

(d) the notices of motion to stay filed by the respondents were substantially the same; and

(e) the arguments to be advanced on the return of the motions to quash were substantially the same.

[30] In addition, I note that the amount claimed on a substantial indemnity scale, including disbursements and Goods and Services Tax, was in total only $14,528.86 more than the total partial indemnity award. In the result, the respondents received an award which is tantamount to a substantial indemnity award. This is significant in view of the fact that the motions judge expressly rejected the respondents' submission that they be awarded their costs on a substantial indemnity basis. [page301]

[31] The similarity of the amounts claimed on a substantial indemnity basis and on a partial indemnity basis appears to arise because the hourly rates applied were not significantly different on either scale.

[32] The Public Accountants Council employed four lawyers. One of the two senior counsel on the file charged three different hourly rates on a substantial indemnity basis -- $350, $385 and $425. On a partial indemnity basis, he claimed $350 per hour. The time spent by the other senior counsel was listed at a rate of $300 per hour on both a substantial indemnity scale and on a partial indemnity scale. In addition, one of the two junior counsel charged the same rate on both a substantial indemnity basis and on a partial indemnity basis. The second junior counsel docketed only 17 hours and the difference between the two rates produced a total differential of only $295.

[33] Counsel for the Institute of Chartered Accountants charged his time on the substantial indemnity scale at $400 per hour and at $350 per hour on the partial indemnity scale.

[34] There were three counsel for the individual respondents. The senior counsel charged hourly rates on a substantial indemnity basis of $330 and $350. Her partial indemnity rate was $300. For the first junior, the substantial indemnity rate was $230 and the partial indemnity rate was $225. The second junior had minimal time on the file and her time was claimed at rates of $85 on a substantial indemnity basis and $60 on a partial indemnity basis.

[35] In Wasserman, Arsenault Ltd. v. Sone, 2002 CanLII 45099 (ON CA), [2002] O.J. No. 3772, 164 O.A.C. 195 (C.A.), at para. 4, this court referred to a judgment of the Superior Court in Lawyers' Professional Indemnity Co. v. Geto Investments Ltd., [2002] O.J. No. 921, 17 C.P.C. (5th) 334 (S.C.J.), where Nordheimer J. observed at para. 16:

> As a further direct consequence of the application of the indemnity principle, when deciding on the appropriate hourly rates when fixing costs on a partial indemnity basis, the court should set those rates at a level that is proportionate to the actual rate being charged to the client in order to ensure that the court does not, inadvertently, fix an amount for costs that would be the equivalent of costs on a substantial indemnity basis when the court is, in fact, intending to make an award on a partial indemnity basis.

[36] In my view, the granting of an award of costs said to be on a partial indemnity basis that is virtually the same as an award on a substantial indemnity basis constitutes an error in principle in the exercise of the motions judge's discretion, particularly when the judge rejected a claim for a substantial indemnity award. This court took a similar view in Stellarbridge at para. 96. [page302]

[37] The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the Rules of Civil Procedure, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as

a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties.

[38] In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor. See Toronto (City) v. First Ontario Realty Corp. (2002), 2002 CanLII 49482 (ON SC), 59 O.R. (3d) 568, [2002] O.J. No. 2519 (S.C.J.) at p. 574 O.R. I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

[39] Turning to what the quantum should be in this case, I would give consideration to the fact that the costs in the earlier proceeding were fixed in the amount of $97,563 by Lax J. While I accept, as the motions judge did, that there were differences between the two proceedings, the foundation upon which the two applications were prosecuted was based on the control of the Public Accountants Council of Ontario by the Chartered Accountants. The fact that all parties were satisfied to have the same evidentiary record in both cases suggests that there was much in common between the two applications.

[40] No doubt there was much more work to be done in respect of the second application. However, having expended partial indemnity costs of nearly $100,000 in response to the first application, I am confident that counsel were not starting tabula rasa when served with the application for judicial review. They would have been fully informed of the licensing application procedure, the make up and operation of the Public Accountants Council, the statutory regime and the issues that divided the Institute of Chartered Accountants for Ontario and the Certified General Accountants of Ontario. I simply cannot accept that counsel for the respondents did not take advantage of the work already done on the first application to better inform themselves in their approach to the second.

[41] I also take into account the other factors referred to in para. 29 above, i.e., the respondents filed no evidence; conducted no cross-examination; and advanced substantially the same arguments in support of the motions to quash. [page303]

[42] Finally, I consider that there is no proportionality between the costs claimed on a substantial indemnity scale and a partial indemnity scale.

[43] These factors suggest that the amounts claimed on a partial indemnity basis call for a significant reduction. The appellants submitted that the award to each of the three groupings of respondents should be $2,500 for a total of $7,500. I do not accept that submission.

[44] In my view, a fair and reasonable award, taking into consideration all the factors discussed above, would be:

Public Accountants Council of Ontario $ 30,000.00

Individual Respondents $ 20,000.00

Institute of Chartered Accountants of Ontario $ 13,000.00

Total $ 63,000.00

These figures are inclusive of disbursements and Goods and Services Tax.

Disposition

[45] In the result, I would allow the appeal, set aside the costs award of the motions judge and in its place substitute the award set out in para. 44 above.

[46] I would also order that the appellants are entitled to their costs of the motion for leave to appeal and the appeal, fixed on a partial indemnity basis in the total amount of $12,000, including disbursements and Goods and Services Tax.

Order accordingly.

Tab 293

CanLII

Fletcher v. Manitoba Public Insurance Co., 1990 CanLII 59 (SCC), [1990] 3 SCR 191

Source:	Supreme Court of Canada
Date:	1990-11-22
File number:	21491
Other citations:	75 OR (2d) 373 — 116 NR 1 — 74 DLR (4th) 636 — 23 ACWS (3d) 1248 — 44 OAC 81 — AZ-90111117 — 71 Man R (2d) 81 — 1 CCLI (2d) 1 — [1990] RRA 1053 — 5 CCLT (2d) 1 — EYB 1990-67585 — JE 90-1652 — [1990] SCJ No 121 (QL) — [1990] ILR 2672 — 30 MVR (2d) 260
Citation:	Fletcher v. Manitoba Public Insurance Co., 1990 CanLII 59 (SCC), [1990] 3 SCR 191, <https://canlii.ca/t/1fsqh>, retrieved on 2026-01-19
Most recent unfavourable mention	Blair, et al v The Standard Ins. Brokers, et al, 2017 ONSC 1793 (CanLII) [...] **Fletcher is therefore distinguishable** from the present case. [...]

Fletcher *v.* Manitoba Public Insurance Co., [1990] 3 S.C.R. 191

Thomas John Fletcher and
Cheryl Elizabeth Fletcher *Appellants*

v.

Manitoba Public Insurance Company *Respondent*

indexed as: fletcher *v.* manitoba public insurance co.

File No.: 21491.

1990: June 1; 1990: November 22.

Present: Lamer C.J.* and Wilson, Sopinka, Cory and McLachlin JJ.

on appeal from the court of appeal for ontario

Insurance -- Automobile insurance -- Duty of insurer -- Compulsory public automobile insurance plan -- Appellants not having underinsured motorist coverage -- Whether government-owned insurer obliged to inform its customers about all types of coverage available to them.

Torts -- Negligence -- Duty of care -- Compulsory public automobile insurance plan -- Appellants not having underinsured motorist coverage -- Whether government insurer obliged to inform its customers about all types of coverage available to them -- If so, whether insurer liable for failing to fulfil its duty.

Appeal -- Powers of appellate court -- Whether Court of Appeal erred in departing from trial judge's findings of fact.

Costs -- Whether trial judge erred in awarding appellants costs on a solicitor and client basis.

Both appellants suffered severe injuries as a result of an automobile accident caused by the driver of the other vehicle. That driver did not carry sufficient insurance to cover the appellants' losses. The appellants claimed for the shortfall against the respondent, a government-owned insurance company, whose primary function was to administer a mandatory public automobile insurance scheme within the Province of Manitoba. Under the "Autopac" scheme the owner of a motor vehicle must purchase insurance which provides minimum collision and public liability coverage. In addition, "underinsured

motorist coverage" (UMC) is available upon the payment of a slightly higher premium. At the time of the accident the appellants were insured by the respondent under an Autopac policy which did not provide UMC.

The trial judge found that the respondent failed in its duty to inform the appellant of the full range of coverage available to him and in particular UMC and awarded damages to the appellant to the extent of the shortfall. The Court of Appeal (Blair J.A. dissenting) reversed that decision.

The issues in this appeal are (1) whether the court of appeal erred in departing from the trial judge's findings of fact; (2) whether a government-owned insurer selling compulsory insurance directly to vehicle owners has a duty to advise its customers of the existence, nature and extent of underinsured motorist coverage; (3) if so, whether the respondent fulfilled it in this case; (4) if the insurer did not fulfil its duty, whether it is liable for the appellants' loss; and (5) whether the trial judge erred in awarding the appellants their costs on a solicitor and client basis.

Held: The appeal should be allowed.

It was not open to the Court of Appeal to depart from the trial judge's findings of fact absent evidence of palpable and overriding error. The trial judge is in the best position to assess the credibility of testimony and his assessment of the witnesses' credibility should not be interfered with.

Reasonable reliance by a person on information provided by someone else can ground a duty of care in tort that binds the provider of the information. The sale of automobile insurance is a business in the course of which information is routinely provided to prospective customers with the expectation that they rely on it. As Autopac insurance is compulsory for all owners of motor vehicles, customers are likely to rely on the government insurer as their source of information about the kinds of additional coverage available and the nature of the protection afforded. The respondent knew or ought to have known that purchasers of insurance constitute a class of persons that may reasonably be expected to rely on the information communicated to them by its employees. It therefore owed its customers a duty of care to inform them of all available coverages, their purpose and their cost. While the duty is

not as onerous as that imposed on private agents and brokers, the public insurer has the responsibility of seeing that its customers receive the information required to make intelligent decisions as to how much risk they are prepared to bear. The respondent's communication was insufficiently clear to discharge its duty of care. The initial information was inadequate and the information given with the renewal form was confusing. The purchaser was never in a position to make an informed choice about this optional coverage.

Whether a duty of care could also arise in contract was adverted to but not decided.

The trial judge's award of costs on a solicitor and client basis should stand. Prior to trial, the appellants filed an offer to settle which was not accepted by the respondent. One of the terms of that offer was that the appellants "shall have the right to structure all or part" of the sum. The respondent did not met its burden of showing that that offer was less favourable than the judgment award.

Cases Cited

Applied: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465; **distinguished**: *Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada* (1977), 1977 CanLII 1182 (ON CA), 17 O.R. (2d) 529; **referred to**: *Wigle v. Allstate Insurance Co. of Canada* (1984), 1984 CanLII 45 (ON CA), 49 O.R. (2d) 101; *The Sir Robert Peel* (1880), 4 Asp. M.L.C. 321; *Clarke v. Edinburgh Tramways Co.*, [1919] S.C. 35; *Hontestroom (S.S.) v. Sagaporack (S.S.)*, [1927] A.C. 37; *Prudential Trust Co. v. Forseth*, 1959 CanLII 48 (SCC), [1960] S.C.R. 210; *Stein v. The Ship "Kathy K"*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802; *Lewis v. Todd and McClure*, 1980 CanLII 20 (SCC), [1980] 2 S.C.R. 694; *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459; *Nova Mink Ltd. v. Trans-Canada Airlines,* 1951 CanLII 325 (NS CA), [1951] 2 D.L.R. 241; *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562; *Haig v. Bamford*, 1976 CanLII 6 (SCC), [1977] 1 S.C.R. 466; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, 1986 CanLII 51 (SCC), [1986] 1 S.C.R. 228; *Kamloops (City of) v. Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2; *Mutual Life & Citizens' Assurance Co. v. Evatt*, [1971] 1 All E.R. 150; *Cherry Ltd. v. Allied Insurance Brokers Ltd.*, [1978] 1 Lloyd's Rep. 274; *General Accident Fire and Life Assurance Corp. v. Peter William Tanter (The*

"*Zephyr*"), [1985] 2 Lloyd's Rep. 529; *Banque Financière de la Cité SA v. Westgate Insurance Co.*, [1989] 2 All E.R. 952; *Pare v. Occidental Life Insurance Co. of California* (1986), 1986 CanLII 7805 (BC SC), 23 C.C.L.I. 288; *Bell v. Tinmouth* (1988), 1988 CanLII 3220 (BC CA), 34 C.C.L.I. 179; *Norlympia Seafoods Ltd. v. Dale & Co.*, [1983] I.L.R. 6475; *Woodside v. Gibraltar General Insurance Co.* (1988), 1988 CanLII 4650 (ON SC), 34 C.C.L.I. 150; *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.* (1983), 1983 CanLII 5487 (ON SC), 1 C.C.L.I. 34, conf. on appeal (1984), 4 C.C.L.I. xxxvii; *Sjodin v. Insurance Corporation of British Columbia*, [1987] I.L.R. 8319; *Indemnity Insurance Co. v. Excel Cleaning Service*, 1954 CanLII 9 (SCC), [1954] S.C.R. 169; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888; *Scott v. Wawanesa Mutual Insurance Co.*, 1989 CanLII 105 (SCC), [1989] 1 S.C.R. 1445; *Jacuzzi Canada Ltd. v. A. Mantella & Sons Ltd.* (1988), 31 C.P.C. (2d) 195.

Statutes and Regulations Cited

Insurance Act, R.S.M. 1987, c. I40.

Manitoba Public Insurance Corporation Act, R.S.M. 1987, c. P215, s. 48.

Rules of Civil Procedure, O. Reg. 560/84, Rule 49.10(1).

Authors Cited

Brown, Craig and Julio Menezes. *Insurance Law in Canada.* Toronto: Carswells, 1982.

Continuing Legal Education Society of British Columbia. *Insurance Law -- 1985*. Material prepared for a Continuing Legal Education Seminar held in Vancouver, B.C. on April 13, 1985. Vancouver: Continuing Legal Education Society of British Columbia, 1985.

MacGillivary, Evan James. *MacGillivary & Parkington on Insurance Law Relating to All Risks Other than Marine*, 8th ed. By Michael Parkington, et al. London: Sweet and Maxwell, 1988.

Snow, H. "Liability of Insurance Agents for Failure to Obtain Effective Coverage: *Fine's Flowers Ltd. v. General Accident Assurance Co.*" (1979), 9 *Man. L.J.* 165.

APPEAL from a judgment of the Ontario Court of Appeal (1989), 1989 CanLII 10444 (ON SC), 68 O.R. (2d) 193, 32 O.A.C. 81, 36 C.C.L.I. 157, [1989] I.L.R. 9391, reversing the judgment of

McKeown J. (1987), 1987 CanLII 4382 (ON SC), 60 O.R. (2d) 629, 26 C.C.L.I. 236, [1987] C.I.L.R. 8608, awarding damages to the appellants against the respondent. Appeal allowed.

Earl A. Cherniak, *Q.C*, and *Peter W. Kryworuk*, for the appellants.

Donald H. Rogers, *Q.C.*, and *David Stratas*, for the respondent.

//Wilson J.//

The judgment of the Court was delivered by

WILSON J. -- This appeal raises questions concerning the responsibility of a government insurer to inform its customers about the types of automobile coverage open to them and the extent of such an insurer's liability should it fail to do so. The issue is particularly topical in Canada at the present time since several provinces have instituted compulsory public automobile insurance plans which have largely replaced the previous system of private insurance.

The appellants in this case were involved in a serious motor vehicle accident. The person responsible for the accident had inadequate insurance to cover the damages. When the appellants attempted to recover the shortfall from their own insurer, they were informed that they did not have "underinsured motorist coverage" (UMC), a special form of coverage which would have protected them against this type of loss. It was in this context that the question arose as to whether and to what extent the respondent insurer was duty-bound to inform the appellants about all the types of coverage which were available to them. The facts are important.

The Facts

Both appellants suffered severe injuries as a result of an automobile accident in the Province of Ontario and the appellant Cheryl Fletcher was rendered a paraplegic. The driver of the other vehicle, a Mr. Jean Piché, was found totally responsible for the collision and the appellants' damages were

assessed at $1,387,090. The insurance available to indemnify Piché, however, was $500,000, leaving a shortfall of $887,090.

At the time of the accident the appellants were insured by the respondent, a government-owned insurance company. The Manitoba Public Insurance Company (MPIC) is a Crown corporation that was created by the *Manitoba Public Insurance Corporation Act*, R.S.M. 1987, c. P215 (the "Act"). Its primary function is to administer a mandatory public automobile insurance scheme within the province, which is widely known as "Autopac". MPIC sells insurance coverage of two basic types. The first type, which is not relevant to this appeal, provides coverage for all drivers automatically upon paying the fee for a Manitoba driver's licence. Relevant to this appeal is the second type of coverage which, pursuant to s. 48 of the Act, must be purchased by the owner of a vehicle when he or she registers that vehicle. This compulsory motor vehicle insurance provides minimum collision and public liability coverage. MPIC also offers two additional forms of coverage that are available upon payment of a slightly higher premium: UMC and P.L./P.D. (public liability and property damage), each of which is available up to a limit of $2,000,000. The public insurance scheme for automobiles in Manitoba is therefore quite straightforward: a prescribed minimum compulsory level of coverage for all automobile owners and two optional forms of coverage that are available for a higher premium.

Both the compulsory and additional forms of coverage may be purchased either from MPIC offices directly or through private insurance agents. There is no difference in price in either case. The UMC coverage that MPIC offered first became available on March 1, 1982 at a cost of $15 per year. Although private insurance companies were allowed to sell the additional forms of coverage, only one company in Manitoba was doing so when the appellants purchased their policy in 1982 and 1983.

At the time of their accident the appellants were insured under an Autopac policy which provided third party limits of $2,000,000. The policy did not provide UMC.

The appellants sued the respondent for damages in the Supreme Court of Ontario alleging breach of contract, misrepresentation, negligence and breach of duty. At trial, John Fletcher submitted that he had relied upon the expertise of MPIC's employees who served him when he obtained the compulsory

insurance policy. He said that he had asked for the maximum available coverage and had assumed that he got it. But in the application for insurance and on the insurance certificate there was no mention of UMC. Counsel for MPIC placed a great deal of emphasis on a one page flyer consisting of two columns of small print which specified that UMC was available and which was sent to the appellants along with a renewal certificate for the policy several months after Mr. Fletcher had purchased the insurance. Mr. Fletcher testified that although the flyer included a brief reference to UMC, he believed that because the words "NOT APPLIC." had been typed in the box designated on the renewal certificate for UMC, this meant that the coverage offered was not applicable to him since he already had the maximum available coverage.

The trial judge found for the appellants in negligence and in contract and awarded them damages against the respondent in the amount of the shortfall. The respondent appealed and the Court of Appeal allowed the appeal and dismissed the appellants' action.

The Courts Below

Supreme Court of Ontario (McKeown J.) (1987), 1987 CanLII 4382 (ON SC), 60 O.R. (2d) 629

The trial judge found that when Mr. Fletcher first purchased his automobile insurance he was entitled to rely upon the respondent to explain to him the various forms of coverage that were available. He was not required to become his own insurance expert. Had the respondent not been prepared to do this it should have told its customers that they should consult a private insurance agent in order to obtain advice on insurance coverage.

The trial judge went on to find that the respondent did not inform Mr. Fletcher that UMC was available. He also found that had UMC been offered to Mr. Fletcher he would have purchased it. By failing to ensure both that the appellants were aware of the availability of UMC and that MPIC's employees were properly trained and instructed in order to be able to advise the appellants of UMC's availability and purpose, MPIC breached its duty to the appellants. When Mr. Fletcher dealt with the respondent he had a contractual right to rely on the offeror to advise him of the full range of coverage

offered. But the duty was not only contractual; it sounded in negligence as well. McKeown J. therefore held that the respondent breached its duty to provide Mr. Fletcher with UMC when he requested maximum coverage, coverage which the respondent ought to have known included UMC. If it was not going to provide UMC, it had a duty to make clear to Mr. Fletcher that such coverage was available but was not being provided.

In McKeown J.'s view, Mr. Fletcher was a credible witness. McKeown J. accepted his testimony to the effect that he believed that "NOT APPLIC." on the renewal form meant UMC was not applicable to him since he already had the maximum available coverage. The trial judge found this interpretation to be reasonable.

Ontario Court of Appeal (1989), 1989 CanLII 10444 (ON SC), 68 O.R. (2d) 193

Finlayson J.A.

Finlayson J.A. was of the view, that much of Mr. Fletcher's evidence was self-serving and subjective. He felt that it did not support a finding that Mr. Fletcher had not been offered UMC but merely a finding that Mr. Fletcher had not read the written material designed to draw such coverage to his attention and that he had no recollection of having been told about the availability of UMC by the respondent's employees. Finlayson J.A. did not believe Mr. Fletcher's statement that he had relied upon the expertise of the respondent's employees to advise him of the coverage.

Finlayson J.A. was also of the view, at p. 198, that it would be "stretching the duty of an insurer to impose on it an affirmative obligation to ensure that each of its customers is in fact aware of the different types of insurance coverage available." The flyer received by the appellants made it clear that UMC was available and it was not the respondent's fault that the appellants failed to read it. He stated, at p. 198, that in circumstances where insurance is being sold directly to the public "it is difficult to envisage the formation of a relationship requiring the provision of unsolicited advice every time a customer comes to the counter". There was, in his view, no duty imposed upon the respondent to do any more than what was in fact done to inform the appellant of the availability of UMC.

Blair J.A. (dissenting)

Blair J.A. found no reason to interfere with the trial judge's conclusion that Mr. Fletcher's interpretation of the renewal application form was a reasonable one. He found the "NOT APPLIC." language in the UMC space on the form ambiguous and misleading. The confusion created by the renewal application form was, in his view, "compounded rather than clarified by the flyer enclosed with it".

Blair J.A. was also of the view that the evidence at trial supported McKeown J.'s conclusion both that UMC had not been mentioned to Mr. Fletcher when he attended the respondent's office to renew his coverage and that he would have purchased it had he been made aware of its availability. Moreover, little had been done by the respondent to inform the public about the existence of this type of protection. Whether customers were to be informed about the availability of UMC was left to the discretion of MPIC's employees.

Since McKeown J. had had "the inestimable benefit" of having seen and heard the testimony of all the witnesses, and since there were no manifestly unreasonable or overriding errors in the conclusions he had drawn from the evidence, Blair J.A. concluded that it was not open to the appeal court to interfere with the trial judge's findings.

Blair J.A. had no doubt that had Mr. Fletcher obtained the insurance policy through an independent agent, that agent would have been liable to him in tort. He stressed that the fact that all motor vehicle owners in Manitoba were required to obtain their prescribed minimum insurance from MPIC imposed upon it a strict duty "to inform the public adequately of its available additional coverage". He said, at p. 211:

> Autopac ... enjoyed an almost complete monopoly in automobile insurance. It seems not too much to hold that no less can be properly expected from a publicly owned corporation, established to provide compulsory insurance to all motor vehicle owners as an essential public service, than from private insurance agents in adequately informing owners of the policy options available to them. This is particularly true where the same premium is payable whether the insurance is sold directly or through an independent agent. The law

must respond in a practical way to the new reality of the sale of motor vehicle insurance compulsorily and directly by a governmental agency.

He therefore agreed with the trial judge that the respondent had failed in its duty to inform Mr. Fletcher of the availability of UMC when he purchased his insurance. In Blair J.A.'s view, the respondent was directly, and not merely vicariously, liable for its negligence in failing to do so.

He declined to rule on the arguments in support of a contractual basis for the duty owed by MPIC. "Whether and to what extent the decision of this court in *Wigle v. Allstate Ins. Co. of Canada* (1984), 1984 CanLII 45 (ON CA), 49 O.R. (2d) 101 ... and other cases on the doctrine of reasonable expectations apply to dealings between direct insurers and their insureds can be left to another day."

Morden J.A. (concurring in the result with Finlayson J.A.)

Morden J.A. agreed with Finlayson J.A. that the appeal should be allowed. He stated that he was prepared to assume the correctness of the trial judge's finding that the respondent had a duty to advise the appellants about UMC. He did not think, however, that the evidence supported McKeown J.'s conclusion that the respondent had breached that duty. Morden J.A. noted that it was clear from the evidence that, if the appellant had read the flyer when he received it, he would have found out what UMC was, that it was available, and that he did not have it. In his mind Fletcher's failure to read the flyer was the decisive factor that defeated the appellants' claim.

The Issues

This appeal raises five issues:

1. Did the Ontario Court of Appeal err in departing from the trial judge's findings of fact?

2. Does a government-owned insurer selling compulsory insurance directly to owners of motor vehicles in the province of Manitoba have a duty to advise its customers of the existence,

nature and extent of underinsured motorist coverage?

3.If such an insurer has such a duty, did it fulfil it in this case?

4.If the insurer did not fulfil its duty, is it liable for the appellants' loss?

5.Did the trial judge err in awarding the appellants their costs on a solicitor and client basis?

Analysis

1.*Did the Ontario Court of Appeal err in departing from the trial judge's findings of fact*?

It is essential that one have a clear picture of the facts in this appeal. In my view, we must therefore deal with a preliminary issue: in what circumstances is it appropriate for an appellate court to depart from a trial judge's findings of fact?

In *The Sir Robert Peel* (1880), 4 Asp. M.L.C. 321, James L.J. said at p. 322:

> The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression.

In *Clarke v. Edinburgh Tramways Co.*, [1919] S.C. (H.L.) 35, Lord Shaw confirmed that primacy must be given to the trial judge's findings of fact. He said, at pp. 35-36:

> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an

> appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I -- who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case -- in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Lord Sumner approved of this approach in *Hontestroom (S.S.) v. Sagaporack (S.S.)*, [1927] A.C. 37 (H.L.), where he said at p. 47:

> None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. [Emphasis added.]

This proposition has been repeatedly endorsed in Canada: see, for example, *Prudential Trust Co. v. Forseth*, 1959 CanLII 48 (SCC), [1960] S.C.R. 210, at p. 217, *per* Martland J. Recent cases have gone on to refine the principle set out in *The Sir Robert Peel* and *The S.S. Hontestroom*. In particular, Ritchie J. provided a thorough history of the principle's evolution in *Stein v. The Ship "Kathy K"*, 1975 CanLII 146 (SCC), [1976] 2 S.C.R. 802, at pp. 806-8 and concluded:

> These authorities are not to be taken as meaning that the findings of fact made at trial are immutable, but rather that they are not to be reversed unless it can be established that the learned trial judge made some palpable and overriding error which affected his assessment of the facts. While the Court of Appeal is seized with the duty of re-examining the evidence in order to be satisfied that no such error occurred, it is not, in my view, a part of its function to substitute its assessment of the balance of probability for the findings of the judge who presided at the trial. [Emphasis added.]

And in *Lewis v. Todd and McClure*, 1980 CanLII 20 (SCC), [1980] 2 S.C.R. 694, Dickson J. (as he then was) reiterated that a trial judge's findings of fact should not be interfered with unless he or she had made a "palpable and overriding error". He stated at p. 700:

> It is trite law that an appellate court should not readily interfere with the findings of a trial judge, for reasons so often adumbrated but resting largely upon the advantage which a judge at trial enjoys over an appellate court, in having seen and heard the witnesses in the atmosphere of the arena.

These authorities, in my view, make crystal clear the test for determining when it is appropriate for an appellate court to depart from a trial judge's findings of fact: appellate courts should only interfere where the trial judge has made a "palpable and overriding error which affected his assessment of the facts." The very structure of our judicial system requires this deference to the trier of fact. Substantial resources are allocated to the process of adducing evidence at first instance and we entrust the crucial task of sorting through and weighing that evidence to the person best placed to accomplish it. As this Court and the House of Lords have repeatedly emphasized, it is the trial judge who is in the best position to assess the credibility of testimony. An appellate court should not depart from the trial judge's conclusions concerning the evidence "merely on the result of their own comparisons and criticisms of the witnesses": see Lord Sumner in *The S.S. Hontestroom*, *supra*, at p. 47.

In the appeal now before us Finlayson J.A. departed from the trial judge's findings of fact on at least two counts. He did not accept McKeown J.'s finding that Mr. Fletcher had relied on the respondent's employees for information and advice. Nor did he accept McKeown J.'s finding that had Fletcher been offered UMC, he would have purchased it. Yet at no point did Finlayson J.A. apply the test that this Court set out in "*Kathy K*", *supra*, and *Lewis v. Todd and McClure*, *supra*. No attempt was made to spell out whether and in what respects the trial judge's findings of fact constituted "palpable and overriding errors". Instead, Finlayson J.A. explained his decision to depart from the trial judge's findings of fact by observing that the trial judge had "stretched the evidence in favour of Fletcher". He refused to give much credence to the testimony of Fletcher, calling it "self-serving" and "entirely subjective", and concluded by observing that he did not propose to give much weight to the trial judge's findings of fact.

With respect, I do not think that it was open to the Court of Appeal to depart from the trial judge's findings of fact absent evidence of a palpable and overriding error. An appellate court should not substitute its views about the facts for those of the trial judge without carefully applying the strict test which has been developed over the years by the highest courts in England and Canada. Absent some

manifest and palpable error, the trial judge's assessment of the witnesses' credibility must be allowed to stand.

In the case at bar, the witnesses' testimony and credibility were carefully considered by the trial judge. John Fletcher testified in chief that, "I was there to purchase insurance. I relied upon their expertise to advise me." McKeown J. was of the view, at p. 632, that Mr. Fletcher was "a very careful and honest and credible witness [who] answered all questions in a straightforward manner" and he therefore found that Mr. Fletcher had relied upon the respondent's employees for advice.

Mr. Fletcher also testified that if he had been advised about the availability of UMC, he would have purchased it for additional safety. McKeown J. commented, at p. 632, that "This is credible since the cost was only $15. He had always followed his insurance broker's advice in Ontario, and [his former insurance broker] said that he was an insurance conscious person." In summarizing his findings McKeown J. said: "I find that if John Fletcher had been offered underinsured motorist coverage he would have purchased the coverage."

McKeown J.'s findings were based on an appreciation of the appellant's state of mind when he purchased the insurance and it was for the trial judge to assess the evidence with respect to that state of mind. As Bowen L.J. observed in *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459, at p. 483:

> ... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

McKeown J.'s findings of fact must stand. There is no reason to believe that he made a "palpable and overriding error". He concluded, as he was entitled to do, that Mr. Fletcher was an extremely credible witness. On that basis he found that Mr. Fletcher relied on the respondent's employees for information and advice and that he would have purchased UMC had it been offered. These findings are entirely reasonable and it is no more open to this Court than it was to the Court of Appeal to depart from them.

2. Did the respondent, a government-owned insurer selling compulsory insurance directly to owners of motor vehicles in the province of Manitoba, have a duty to advise its customers of the existence, nature and extent of underinsured motorist coverage?

The appellants submit that the respondent owed them a duty to inform them of the availability of UMC. They argue that this duty sounds in both tort and contract, that there was a breach of this duty, and that they are entitled to damages in the amount of their loss.

A determination as to whether a duty is owed in either tort or contract in the circumstances of this case and, if so, the scope of that duty will have several important implications for publicly owned and operated insurance plans. For example, decisions about the type of training given to employees who deal directly with customers will almost certainly have to be made with an eye to the content of the duty imposed by law on such insurers. If the law requires them not only to advise customers of the different options available but also to explain the nature of the protection these options provide, then insurers will have to make sure that their employees are equipped to do this. If the content of the duty is even greater and the insurer is obliged to advise the customer whether he or she should acquire such additional coverage, even more extensive employee training may be required.

I propose to consider first whether a duty sounds in tort and thereafter, if necessary, whether it sounds also in contract.

(A) Tort

(a) *Is there a duty of care*?

The question raised by this appeal is whether MPIC owes a duty of care in the provision of information to its customers about optional forms of insurance coverage. To answer this question we must focus on the relationship between insurer and insured. In other words, we need to consider whether there is anything about the context in which customers purchase a policy from the public insurer which might be thought to give rise to a duty to provide information and to advise them of

their options. I begin by reviewing the principles of law applicable to determine whether a duty of care exists and then turn to consider the application of those principles in the context of this appeal.

In *Nova Mink Ltd. v. Trans-Canada Airlines*, 1951 CanLII 325 (NS CA), [1951] 2 D.L.R. 241, a mink ranch operator sued an airline for damages when the noise created by one of their pilots flying low over the operator's ranch caused the female mink to eat the young. MacDonald J. found that the defendant airline had no duty to the plaintiff because the pilot did not know and could not reasonably have foreseen that there were mink farms in the area. MacDonald J. approached the case by first posing himself the question at pp. 253-54:

> Does the evidence establish that the defendant was under a legal duty to use care to avoid injury to the plaintiff's business as a mink ranch operator?

He then explained at p. 254 how this question is to be answered:

> The common law yields the conclusion that there is such a duty only where the circumstances of time, place, and person would create in the mind of a reasonable man in those circumstances such a probability of harm resulting to other persons as to require him to take care to avert that probable result.

He continued at p. 256:

> Many attempts have been made to generalize the circumstances which create a legal duty of care.... What is common ... is the idea of *a relationship between parties attended by a foreseeable risk of harm* .... That relationship may arise out of circumstance of physical proximity; but it is not that circumstance *per se* which gives rise to duty but the probability of harm inhering in the relationship of parties, spatial or otherwise. If such a relationship does exist in fact, or in contemplation, and is fraught with the likelihood of harm to another in that relationship, the basis of duty exists; and it is immaterial that the locus or date of the occurrence of the apprehended harm be unknown. [Emphasis in original.]

MacDonald J. in *Nova Mink Ltd.* was applying the classic formulation in Lord Atkin's famous dictum in *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562, at p. 580:

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances .... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

> Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

English and Canadian courts have applied Lord Atkin's "neighbour principle" to many types of relationships, including those involving the communication of information. There is now ample authority for the proposition that reasonable reliance by a person on information provided by someone else can ground a duty of care at common law that binds the provider of the information. For example, in *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465, the House of Lords considered the liability of bankers who had negligently provided references concerning the solvency of one of their clients to the plaintiff company. The plaintiff company relied on these references and subsequently suffered significant losses when the client went into liquidation. The Law Lords held that in certain cases involving the provision of information or advice by one person to another, despite the absence of any contract between them, a special relationship can arise so as to impose on the provider of the information a duty of care towards the person who received it. Lord Morris of Borth-y-Gest said at pp. 502-3:

> My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise. [Emphasis added.]

Courts in England and Canada have applied the *Hedley Byrne* principle to other relationships of proximity where it was foreseeable that one party would reasonably rely on the information or advice given by the other: see, for example, *Haig v. Bamford,* 1976 CanLII 6 (SCC), [1977] 1 S.C.R. 466 (chartered accountants/investors), *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, 1986 CanLII 51 (SCC), [1986] 1 S.C.R. 228 (courier company/client), and *Kamloops (City of) v. Nielsen,* 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2 (municipal building inspectors/homeowners).

In *Mutual Life & Citizens' Assurance Co. v. Evatt*, [1971] 1 All E.R. 150, Lord Diplock discussed at p. 154 the type of circumstances which give rise to a relationship of reliance and a concomitant duty to take care:

> In *Hedley Byrne* itself and in the previous English cases on negligent statements which were analysed in the speeches, with the notable exceptions of *Fish v. Kelly*, (1864) 17 CBNS 194, *Derry v. Peek*, (1889) 14 App Cas 337, [1886-90] All ER Rep I, and *Low v. Bouverie*, [1891] 3 Ch 82, [1891-94] All ER Rep 348, the relationship possessed the characteristics (1) that the maker of the statement had made it in the ordinary course of his business or profession and (2) that the subject-matter of the statement called for the exercise of some qualification, skill or competence not possessed by the ordinary reasonable man, to which the maker of the statement was known by the recipient to lay claim by reason of his engaging in that business or profession.

The editors of *MacGillivary & Parkington on Insurance Law* (8th ed. 1988), commenting on the evolution of the *Hedley Byrne* principle, state at p. 231:

> Although the grounds and scope of the duty to take care in the making of statements cannot be said to be definitively settled, there is no doubt that the duty would apply to parties in negotiations for a policy of insurance.

Indeed, English and Canadian courts have not hesitated to apply the *Hedley Byrne* principle to the relationship between insurance agents and their clients: see, for example, *Cherry Ltd. v. Allied Insurance Brokers Ltd.*, [1978] 1 Lloyd's Rep. 274 (Q.B.), *General Accident Fire and Life Assurance Corp. v. Peter William Tanter (The "Zephyr")*, [1985] 2 Lloyd's Rep. 529 (Eng. C.A.), *Banque Financière de la Cité SA v. Westgate Ins. Co.*, [1989] 2 All E.R. 952 (Eng. C.A.), *Pare v. Occidental Life Insurance Co. of California* (1986), 1986 CanLII 7805 (BC SC), 23 C.C.L.I. 288 (B.C.S.C.), *Bell v. Tinmouth* (1988), 1988 CanLII 3220 (BC CA), 34 C.C.L.I. 179 (B.C.C.A.), *Norlympia Seafoods Ltd. v. Dale & Co.*, [1983] I.L.R. 6475 (B.C.S.C.) and *Woodside v. Gibraltar General Insurance Co.* (1988), 1988 CanLII 4650 (ON SC), 34 C.C.L.I. 150 (Ont. S.C.) (appeal pending).

At issue in *Banque Financière*, *supra*, was the liability of the defendant insurer for the actions of its agent who had negligently failed to disclose to the plaintiff banks the deception being practised by one of the banks' debtors. Slade L.J. stated at p. 1007:

> Can a mere failure to speak ever give rise to liability in negligence under *Hedley Byrne* principles? In our view it can, but subject to the all-important proviso that there has been on the facts a voluntary assumption of responsibility in the relevant sense and reliance on that assumption. These features may be much more difficult to infer in a case of mere silence than in a case of misrepresentation. But that they can be inferred is shown by a recent decision of this court in *Al-Kandari v J R Brown & Co. (a firm)* [1988] 1 All E.R. 833, [1988] QB 665....
>
> In many cases where a misrepresentation has been made to another person, particularly by a professional man acting in the course of his profession, the assumption of responsibility may be readily inferred.
>
> We can see no sufficient reason on principle or authority why a failure to speak should not be capable of giving rise to liability in negligence under *Hedley Byrne* principles, provided that the two essential conditions are satisfied.

Norlympia Seafoods Ltd., *supra*, concerned the duty of care of an insurance broker who, while arranging insurance for the maiden voyage of a large fish processing barge, mistakenly advised the owners of the barge that certain forms of coverage were in place. The barge ran aground and suffered extensive damage to the hull and machinery. These losses were not covered by insurance. Although McLachlin J. (as she then was) was of the view that the relationship between the parties was properly analysed on the basis of contract, she added at p. 6491:

> ... it may be noted that application of recognized tort principles would also establish the liability of Dale & Company. On the principles established in *Hedley Byrne* ... the defendant is liable for failure to properly inform the plaintiffs of material facts and for misrepresentation of material facts.

These cases support the proposition that individuals or corporations whose business involves the provision of information or advice to others owe a duty of care in communicating that information or advice to those whom they know will reasonably rely on it. As Slade L.J. said, at p. 1007, where the information is provided in the course of doing business, the "assumption of responsibility may be readily inferred."

In my view, the sale of automobile insurance is a business in the course of which information is routinely provided to prospective customers in the expectation that they will rely on it and who do in fact reasonably rely on it. It follows, therefore, that the principle in *Hedley Byrne* applies and that MPIC will owe a duty of care to its customers if: (i) such customers rely on the information, (ii) their

reliance is reasonable, and (iii) MPIC knew or ought to have known that they would rely on the information.

(i) Was there reliance?

McKeown J. found that the appellant Mr. Fletcher relied upon the expertise of MPIC's employees to inform him of available coverages. This is not surprising. It is only natural that customers will rely on the information that public insurers provide to them in order to make decisions about how much risk they are willing to bear. Moreover, I note that in the appeal before us Autopac insurance is compulsory for all owners of motor vehicles. Accordingly, they are likely to rely on the government insurer as their source of information about the kinds of additional coverage available and the nature of the protection it affords.

(ii) Was the reliance reasonable?

In my view, customer reliance is entirely reasonable in the circumstances. Few people approaching MPIC's counter will have any great familiarity with the compulsory insurance requirement of the law or with the specific types of optional additional coverage available and the protection they provide. They expect the employee serving them to tell them about the risks against which they must insure and those against which they may insure and what it will cost to do so.

(iii) Was the reliance expected?

In *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, *supra*, Estey J. made it clear that, before a court can impose a duty of care on the defendant, a plaintiff has to establish not only that there was reasonable reliance by him or her but that the defendant was aware of that reliance. On the latter criterion Estey J. followed *Haig v. Bamford*, *supra*, in which Dickson J. (as he then was) elaborated on the requirement that the defendant "know" that the plaintiff will rely on him. Dickson J. held at pp. 476-77 that it was not necessary that the defendant be aware of any specific plaintiff who was relying on him. The

defendant's liability was grounded rather in his knowledge that a limited class of persons (to which class the plaintiff belonged) would use and rely upon his statement.

It is clear in this case that MPIC knew or ought to have known that purchasers of insurance constitute a class of persons that may reasonably be expected to rely on the information communicated to them by its employees. A public insurer cannot assume that customers are knowledgeable about the various optional coverages and that they will therefore know exactly what to ask for when they arrive at the counter. At the very least, customers need some clear information about available options in order to make an informed choice about the amount and type of insurance they should buy. In the case at bar, two top executives of the respondent stated on examination for discovery that MPIC purported to provide the same service to the public with respect to selling the Autopac insurance that private brokers do and that the public would have no good reason to suspect that the calibre of the advice they received from the Autopac agents would be any less competent. It is evident that these executives were well aware that customers would rely on the information their employees provided. Such anticipated reliance brings the customer within the scope of those persons directly affected by the insurer's acts or omissions. It makes him or her a "neighbour", to use Lord Atkin's phrase. I conclude therefore that MPIC owed a duty of care to its customers to inform them of all available coverages, their purpose and their cost.

(b) *What is the scope of the duty*?

The appellants submit that MPIC's duty of care should be the same as that of a private insurance agent or broker in Manitoba. The respondent, on the other hand, argues that, if there is a duty at all, it is merely the duty owed by a seller to a buyer in a transaction between two parties dealing at arm's length. In my view, the scope of the duty owed by MPIC lies somewhere between these two positions.

(i) The duty on private agents and brokers

Fine's Flowers Ltd. v. General Accident Assurance Co. of Canada (1977), 1977 CanLII 1182 (ON CA), 17 O.R. (2d) 529 (C.A.), is the leading Canadian case concerning the duty of care owed by private insurance agents and brokers. Mr. Fine had an extensive horticultural business. He asked his insurance agent, through whom he had purchased insurance for more than 20 years, to obtain "full coverage" for his business. The agent obtained coverage under a policy which covered a number of risks. However, it did not cover damage resulting from breakdown of the heating system due to normal wear and tear of the pumps. A pump failure subsequently occurred and extensive damage was caused to the plaintiff's plants and flowers.

The outcome of the case turned on whether the plaintiff's loss fell within the scope of the duty owed by the insurance agent. The majority discussed the agent's duty at p. 538:

> The main ground of appeal from the judgment of the learned trial Judge is that he put far too broad and sweeping a duty on insurance agents. They are not insurers. It is not part of their duty to know everything about their clients' businesses so as to be in a position to anticipate every conceivable form of loss to which they might be subject. The agent's duty, counsel submits, is "to exercise a reasonable degree of skill and care to obtain policies in the terms bargained for and to service those policies as circumstances might require".
>
> I take no issue with counsel's statement of the scope of the insurance agent's duty except to add that the agent also has a duty to advise his principal if he is unable to obtain the policies bargained for so that his principal may take such further steps to protect himself as he deems desirable. The operative words, however, in counsel's definition of the scope of the agent's duty, are "policies in the terms bargained for".
>
> In many instances, an insurance agent will be asked to obtain a specific type of coverage and his duty in those circumstances will be to use a reasonable degree of skill and care in doing so or, if he is unable to do so, "to inform the principal promptly in order to prevent him from suffering loss through relying upon the successful completion of the transaction by the agent".
>
> But there are other cases, and in my view this is one of them, in which the client gives no such specific instructions but rather relies upon his agent to see that he is protected and, if the agent agrees to do business with him on those terms, then he cannot afterwards, when an uninsured loss arises, shrug off the responsibility he has assumed. [Emphasis added.]

Thus, the agent would have discharged his duty in *Fine's Flowers* if he had informed the plaintiff that certain types of losses were not covered by the policy he had arranged and had advised the plaintiff to purchase additional coverage for the pumps if he really wanted "full coverage". Estey C.J.O. (as he then was) stressed that the agent owed a positive duty to warn the client. He put the standard for determining the agent's liability in negligence as follows at p. 533:

> It was the duty of the defendant agent to either procure such [requested] coverage, or draw to the attention of the plaintiff his failure or inability to do so and the consequent gap in coverage. Having done neither, the defendant agent is liable in negligence,...

In my view, *Fine's Flowers* stands for the proposition that private insurance agents owe a duty to their customers to provide not only information about available coverage, but also advice about which forms of coverage they require in order to meet their needs. I note that Professor Snow has summarized the effect of *Fine's Flowers* in "Liability of Insurance Agents for Failure to Obtain Effective Coverage: *Fine's Flowers Ltd. v. General Accident Assurance Co.*" (1979), 9 *Man. L.J.* 165, in the following terms, at p. 169:

> The implication of this case and many others like it in recent years seems clear. Consumers who place their faith in insurance agents holding themselves out as competent and find their faith misplaced, will frequently be able to find recourse against the agent. ... [T]he extent of the duty owed by an insurance agent, both in placing insurance and in indicating to the insured which risks are covered and which are not, as set out in this case, is a fairly stringent one for the agent. Moreover, given the general situation of the principal relying very heavily on the expertise of the agent, it does not seem to be an unreasonable burden for an insurance agent to bear. [Emphasis added.]

The duty of care owed by an insurance agent was further elaborated in *G.K.N. Keller Canada Ltd. v. Hartford Fire Insurance Co.* (1983), 1983 CanLII 5487 (ON SC), 1 C.C.L.I. 34 (Ont. H.C.) (conf. on appeal (1984), 4 C.C.L.I. xxxvii (Ont. C.A.)). It was held in that case that where the customer adequately describes the nature of his or her business to the agent, the onus is then on the agent to review the insurance needs of the customer and provide the full coverage requested. Should an uninsured loss occur, the agent will be liable unless he or she has pointed out the gaps in coverage to the customer and advised him or her how to protect against those gaps.

It is clear that within the insurance industry, as also within the courts, private insurance agents and brokers are viewed as more than mere salespeople. The Continuing Legal Education Society of British Columbia's 1985 Seminar on Insurance Law focused on the services they provide, (at p. 6.1.03):

> The services of a competent agent or broker will include, in addition to advice on insurance, and the brokering or placing of insurance on behalf of the client, an active interest and

involvement in loss prevention and a claims supervisory service to assist your client in the satisfactory settlement of the claims.

In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized, concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.

(ii) The duty on public insurers

What then is the scope of MPIC's duty? Is it, as the appellant submits, as onerous as that imposed on private agents and brokers? I think not. I think it is a duty to inform customers of the available range of coverage. Given that automobile accidents often produce tragic consequences that may be irreversible and virtually incapable of compensation in monetary terms, customers must have all the information they need in order to make an informed choice about the level of coverage appropriate for them. Where an additional optional form of coverage such as UMC is offered precisely because it is foreseeable to the insurer that there may be instances where the standard coverage is inadequate, it is right and proper that the insurer be under a duty to make the existence of such optional coverage known to the customer. Selling insurance is not, as the respondent suggests, like selling groceries, and the law should not treat them alike. The purchase of insurance is predicated on decisions made about assessing and bearing risks. Members of the public need to have all relevant information available to them in an explicit and readily comprehensible manner if they are to make intelligent decisions about how much risk they are prepared to bear. The public insurer has the responsibility of seeing to it that that information is provided to them in a reasonably intelligible fashion.

By the same token, however, there are a number of reasons why the public insurer's duty is less onerous than that of the private agent or broker. The institutional setting in which the public insurance

is sold affords considerably less scope for privacy and individualized attention than that provided by a private agency. As the trial judge noted, an MPIC employee may serve as many as 60 people a day. Further, the employees who serve the customers do not hold themselves out as specialists in risk assessment and insurance advice. The service they provide is more sales and clerical than that provided by an insurance agent. Indeed, I note that the employees of MPIC are specifically exempted from the requirement set out in the *Insurance Act*, R.S.M. 1987, c. I40, that persons selling insurance be qualified and licensed as agents. This is not to say that the average customer should be taken to know about this statutory exemption. But one must nonetheless be sensitive to the role that the legislature envisaged that MPIC's salespeople would play. In my opinion, MPIC's employees were not intended to sit down with their customers and inquire into their personal, family and business affairs so as to provide individualized insurance advice.

The respondent submitted that, since MPIC is a public body, it should be granted the immunity traditionally accorded to public authorities from actions based on an authority's failure to act. The respondent states that the rationale behind this rule is that to expose public authorities to liability in these circumstances would "result in great hardship" and seriously impede their efforts to fulfil their administrative functions. On this reasoning, no positive duty to inform customers about coverage options should be imposed on the public insurer because it would be "overly onerous and therefore unreasonable" for MPIC to warn the hundreds of thousands of drivers in the province of Manitoba that for certain accidents their coverage might be inadequate. In my view this submission is without merit. The options that are available are simple and straightforward. It is not asking too much of the employee to have him or her tell the customer that they exist. I agree with Blair J.A. who stated:

> Autopac's duty was limited to ensuring that the necessary information, upon which applicants could make their decisions, was placed before them. The duty did not extend to advising or persuading them to take the optional coverage nor did Fletcher's counsel contend that it did.

(B) Contract

It was argued at trial that MPIC was under a contractual duty to provide the appellants with timely and accurate information about the additional forms of coverage that were available. The learned trial

judge stated at p. 638: "When Mr. Fletcher dealt with M.P.I.C. he had a contractual right, as does anyone contracting for service, to rely on the offerer to advise him of the range of coverage offered. The duty is not only a contractual duty but sounds in negligence."

Since I have concluded that public insurers such as MPIC have a duty in tort to inform their customers of the additional forms of coverage available to them, it is not strictly necessary for the disposition of this appeal to determine whether such a duty can also be grounded in contract.

The appellants did not develop a detailed contractual analysis before this Court. They relied on the decision in *Fine's Flowers*, *supra*, to support their contention that MPIC owed them a duty in both tort and contract. I note, however, that in that case there was an ongoing contractual agreement binding on the broker that required him to keep the plaintiff covered for all foreseeable, insurable and normal risks associated with its horticultural business. While there may be an argument that would support a finding of contractual duty in the circumstances of the present case, the decision in *Fine's Flowers* is clearly distinguishable.

I note that Blair J.A. suggested that a contractual analysis rooted in the doctrine of reasonable expectations might be persuasive but did not think it necessary to reach a conclusion on this aspect of the case. Since this Court has not had the benefit of counsel's submissions on this point, I agree that the question of whether public insurers owe a duty in contract is best left for another day.

3. *If such an insurer has such a duty, did it fulfil it in this case*?

Having concluded on the basis of the above analysis that public insurers are under a duty to inform their customers of the full range of coverage available to them, did MPIC fulfil its duty in this case?

The trial judge made two significant findings. He found first that MPIC had made minimal efforts to inform the Manitoba public generally about the availability of UMC. He found second that it had not made sufficient efforts to inform the appellants of the existence and availability of UMC. A

majority of the Court of Appeal held that MPIC's efforts were sufficient to discharge the duty they owed to the appellants.

With respect to informing the public at large, McKeown J. had the benefit of extensive testimony at trial about the comparative success of various public insurance companies' information campaigns about underinsured motorist insurance. In particular, the effort to educate the public in Manitoba was contrasted with that in British Columbia, a matter that had come under scrutiny in *Sjodin v. Insurance Corporation of British Columbia*, [1987] I.L.R. 8319. The trial judge found that MPIC had not set up a public education program similar to the one established by the Insurance Corporation of British Columbia (I.C.B.C.). No large scale advertising campaign was launched in Manitoba to explain the new UMC option which became available for the first time in Manitoba in March of 1982. Furthermore, MPIC's employees did not ask customers as a matter of course whether they wanted UMC. The trial judge noted that the extensive public education program had been successful in B.C. as evidenced by the relatively high acceptance rate (97 per cent of eligible B.C. drivers purchased it) compared to Manitoba. In *Sjodin* this evidence was viewed as crucial to the court's finding that I.C.B.C. had <u>not</u> failed in its duty to inform the plaintiff.

The trial judge also found that MPIC's efforts to inform Mr. Fletcher were inadequate. The evidence at trial shows (at p. 632) that when Mr. Fletcher initially went to the offices in Winnipeg in September of 1982, he explained to the agent who served him that he was a new resident of Manitoba and that in order to ensure "additional safety for both him and his wife" he wanted to purchase "the maximum coverage". The respondent's employee, a Mr. Lanthier, offered him additional P.L./P.D. coverage, and he purchased the maximum amount available, $2,000,000. But at no time was he informed of the existence, cost or purpose of UMC. As noted, the trial judge found as a fact that if Fletcher had been told about UMC, he would have purchased it, since it was relatively inexpensive and since he had done so with his previous insurer in Ontario. On the subsequent renewal certificates sent to him in 1983 there was a separate box for UMC in which was marked "NOT APPLIC." That made good sense to Fletcher since he had purchased and was paying for "the maximum coverage" available.

McKeown J. was of the view that these forms only compounded the wrong caused by the initial omission to tell customers about UMC. Their effect was to mislead Fletcher. Here was someone who had explicitly requested the maximum available coverage and whose (mistaken) belief that he was insured against all insurable risks was subsequently confirmed by the renewal form which appeared to indicate that he had no need of UMC. MPIC's general duty is to inform the public about the UMC option. Its specific duty when faced with a client like Fletcher who explicitly requests maximum coverage is either to provide the coverage requested or, if it is not providing it, to inform him clearly and unequivocally that he does not have the maximum and that there is a gap in his coverage. The trial judge concluded that absent such unequivocal notice from MPIC Fletcher's honest interpretation of the renewal form was reasonable.

The crucial point of difference between the trial judge's conclusion and that reached by the Court of Appeal concerned the flyer that was mailed out with Mr. Fletcher's renewal form in which brief mention was made of the existence of UMC. The passage pertaining to UMC consisted of nine lines of small print in the space of one inch at the very bottom of the left hand column of the one-page flyer. The trial judge found that the flyer was misleading when read together with Mr. Fletcher's renewal form. He accepted that the appellant, had he read the flyer, would reasonably have understood it to mean that UMC was not applicable to him since he had already obtained what he thought was the maximum coverage. He concluded that the appellant had been misled.

The majority of the Court of Appeal did not think that the combination of the renewal form and the flyer was misleading and therefore held that MPIC had fulfilled its duty to inform Fletcher. Morden J.A. reached this conclusion with virtually no consideration of the box in the renewal marked "NOT APPLIC." In his view, the flyer alone was sufficiently clear to have removed any doubts that Fletcher might have had about UMC. Finlayson J.A. also found the flyer to be straightforward but went on to assess the effect of the renewal form. He said at p. 199:

> To compound matters, when he made the crucial renewal application, he took no exception to the fact that the box opposite "underinsured motorist protection" was marked "not applic.". The trial judge interpreted Fletcher's evidence that this meant "not applicable to him" in the sense that "this coverage is not available". However, we must look at it from M.P.I.C.'s point of view as well. Fletcher had not purchased this coverage previously and so, when M.P.I.C. calculated his insurance premium, this cost was not included.

> In my opinion, the application for renewal, particularly when read with the enclosed flyer, was not ambiguous. It was very clear.

I note that the appellants did not argue that the flyer, standing alone, was unclear or ambiguous in its description of UMC. Their submission was that the renewal form when read with the flyer was ambiguous and misleading or at least was not sufficiently clear and unequivocal to "cure" MPIC's antecedent omission to inform Fletcher of the availability of UMC when he first purchased his Autopac policy.

The insurer's duty is to provide sufficient timely, clear and accurate information to its customers about the various options so that they can make informed choices about what level of risk beyond that required by law they want to insure themselves against. At issue in this appeal, then, is the question whether MPIC's communication was clear enough.

In cases where wording in an insurance contract is unclear or ambiguous Canadian and English courts have consistently applied the *contra proferentem* rule of construction: see, for example, *Indemnity Insurance Co. v. Excel Cleaning Service*, 1954 CanLII 9 (SCC), [1954] S.C.R. 169, *per* Estey J. at pp. 179-80. In *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888, Estey J. explained the rule at p. 899:

> Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract.

Professors Brown and Menezes state at p. 138 of *Insurance Law in Canada* (1982) that the "basis for the rule is that the burden of an irreducible ambiguity should fall on the drafter."

In *Scott v. Wawanesa Mutual Insurance Co.*, 1989 CanLII 105 (SCC), [1989] 1 S.C.R. 1445, La Forest J. approved of the approach to the interpretation of insurance contracts set out in *Consolidated-Bathurst* and stressed that the words employed should be given their ordinary meaning, "such as the

average policy holder of ordinary intelligence, as well as the insurer, would attach to [them]" (at p. 1455). He continued at pp. 1458-59:

> Policies of insurance are prepared by the insurers and in doing so they not unnaturally are minded to protect their own interests. To avoid the consequent injustices that may ensue to an insured, courts have long insisted that any ambiguity be resolved in favour of the insured.

Given the rationale that underlies the doctrine of *contra proferentem*, it is just as appropriate to apply it to the renewal form sent to the holder of the insurance policy as to the contract itself. The renewal form is an integral part of the process of buying insurance coverage and is the one document most likely to be read by the insured. If it contains words or terms which, when given their ordinary meaning, still produce ambiguity in the mind of the policyholder, that ambiguity must be resolved in favour of the policyholder.

In my view, MPIC's communication was insufficiently clear to discharge its duty of care. Its initial failure to inform Fletcher of the availability of UMC is conduct that clearly falls below the standard of care that MPIC owed to its customers. MPIC contends that since no harm had yet occurred it was able to "cure" this omission after the fact by means of a written notice to the appellants. But since MPIC chose to communicate by mail it was incumbent upon it to make sure the written materials it sent out were cast in the clearest of terms. All manner of customers would have received the renewal form and flyer, some more conversant in insurance than Mr. Fletcher and some less. The flyer contained nothing in particular to draw the attention of the average customer to the small print that mentioned the UMC option and these few lines simply did not convey with sufficient clarity or seriousness the availability, importance and relatively low cost of UMC. The renewal form that Mr. Fletcher received was ambiguous as regards UMC. In my opinion, the words "NOT APPLIC." are very confusing in the context in which they appear. I agree with the appellants that something like "NOT COVERED" would have been a much more appropriate way of making clear that this form of coverage was available to them and that they did not have it. The ambiguity must be resolved in favour of the appellants.

Since Mr. Fletcher went to the MPIC offices to pay for his renewal in person, it is possible that MPIC could have "cured" its initial omission to inform him about UMC at that time. However, the

trial judge found that he was not told about UMC on that occasion either. There was a single poster placed at the end of a long busy counter advertising the availability of UMC. McKeown J. found that it was unlikely that Fletcher would have seen it and accepted his evidence that he did not see it. I see no reason to disturb these findings of the trial judge. These half-measures were plainly inadequate to fulfil the duty that MPIC owed to the appellants.

I conclude therefore that MPIC failed in its duty to the appellants. MPIC's acts or omissions deprived Mr. Fletcher of the relevant information initially and, given that he was subsequently misled by the renewal form and flyer, he was never in a position to make an informed choice about this optional coverage.

4.*If the insurer did not fulfil its duty, is it liable for the appellants' loss*?

The respondent submits that even if it had provided more information in its flyer, Mr. Fletcher would not have purchased UMC since he failed to read the flyer. Therefore, MPIC argues that it should not be held liable for the appellants' loss since its acts or omissions did not cause that loss. Mr. Fletcher was the author of his own misfortune.

This argument is without merit. The finding that MPIC did not discharge its duty to inform the appellants does not hinge solely on the adequacy or inadequacy of the flyer. Rather, it rests on the combined effect of MPIC's initial omission to tell Mr. Fletcher about UMC when he first bought his coverage, the misleading renewal form and flyer, and MPIC's failure to mention UMC when he paid for his renewal in person. Faced with this combination of acts and omissions by the respondent, the appellants cannot be viewed as the authors of their own misfortune.

The trial judge found that Mr. Fletcher would have purchased UMC had he been told of its availability. Had MPIC not breached its duty, the Fletchers would have been covered against loss caused by an underinsured motorist up to a limit of $2,000,000. The shortfall between the underinsured motorist's insurance and the appellants' loss was $887,090. I therefore find that the

respondent's breach of duty caused the appellants' loss and hold it liable for damages in the amount of the shortfall.

5. *Did the trial judge err in awarding the appellants their costs on a solicitor and client basis*?

On March 9, 1987, some two months before trial, the appellants duly filed an "Offer to Settle" for the amount of $650,000 plus prejudgment interest. That offer was not accepted by MPIC. One of the terms of the offer was that the appellants "shall have the right to structure all or part" of the sum. McKeown J. awarded costs to the appellants on a solicitor and client basis because of MPIC's refusal to settle on these terms.

Rule 49.10(1) of the Ontario *Rules of Civil Procedure*, O. Reg. 560/84, confers an entitlement to solicitor and client costs on a plaintiff who has made an offer to settle which turns out to be the same as or less favourable than the judgment obtained and that offer is rejected by the defendant. The purpose of this rule is to induce settlements and avoid trials and to provide predictability with respect to costs: see *Jacuzzi Canada Ltd. v. A. Mantella & Sons Ltd.* (1988), 31 C.P.C. (2d) 195 (H.C.).

MPIC argues that because the offer to settle was not a lump sum but a structured settlement it is not possible to determine whether the offer is more or less favourable than the judgment and so the rule cannot apply. In the alternative, the respondent maintains that the offer was less favourable because the administrative costs involved in a structured settlement might be significant. Both of these arguments ignore the fact that there are standard and generally accepted actuarial principles by means of which the present value of future sums payable can be calculated. Even assuming the truth of MPIC's contention that the "valuation of a structured settlement is extremely complex" for which highly specialized accountants would be required, I cannot accept that it would cost more than the difference between the offer and the damage award ($237,090) to arrive at the value of a structured settlement. The onus is clearly on the respondent to show that the offer was in fact less favourable than the judgment award. It has not met this burden. I therefore see no reason to interfere with the order of the trial judge as to costs.

Disposition

I would allow the appeal and restore the order of the trial judge as to both damages and costs.

Appeal allowed with costs.

Solicitors for the appellants: Lerner & Associates, London.

Solicitors for the respondent: Osler, Hoskin and Harcourt, Toronto.

---

* Chief Justice at the time of judgment.

Tab 294

CanLII

Iannarella v. Corbett et al, 2012 ONSC 6536 (CanLII)

Source:	Superior Court of Justice
Date:	2012-11-19
File number:	09 CV 372221
Other citation:	[2012] OJ No 5636 (QL)
Citation:	Iannarella v. Corbett et al, 2012 ONSC 6536 (CanLII), <https://canlii.ca/t/ftzng>, retrieved on 2026-01-19

CITATION: Iannarella v. Corbett et al, 2012 ONSC 6536
COURT FILE NO.: # 09 CV 372221
DATE: 2012/11/19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: ANDREA IANNARELLA and GIUSEPPINA IANNARELLA
Plaintiffs

\- and -

STEVE CORBETT and ST. LAWRENCE CEMENT INC.
Defendants

BEFORE: Justice Moore

COUNSEL: Joseph Villeneuve, for the Plaintiffs

Martin Forget and Sarah Merredew, for the Defendants

DATE HEARD: 16 November 2012

E N D O R S E M E N T

[1] The issue remaining in this matter is costs. The plaintiffs' claims were dismissed following a jury trial which continued over four weeks in the Spring of 2012. Thereafter, the court received written submissions on costs issues and, by Endorsement issued on 18 June 2012, fixed the costs payable by Giuseppina Iannarella at zero and reserved a decision on Andrea Iannarella's costs liability to permit him time to provide evidence of his ability to pay a costs award, he having submitted that he could not afford to.

[2] Specifically, the plaintiffs submitted that a significant costs award will only result in undue hardship to the plaintiffs who are both reaching retirement age at a time where the economy is unstable and this militates against the award of costs in the unique circumstances of this particular case.

[3] The plaintiffs relied upon cases in which the ability to pay costs was weighed among the factors to be considered in awarding costs.[1] As the evidence at trial regarding Mr. Iannarella's financial ability to pay any costs award was scant, I borrowed from the words of Lane J.[2] in concluding that there may be matters unknown to me which ought to influence my decisions in fixing costs and invited further evidence.

[4] In response, Mr. Iannarella submitted a brief of information and documents in support of his assertion of impecuniosity.

[5] The defendants countered by filing a brief that included affidavit evidence from a registered real estate sales representative who opined that the plaintiffs' appear to have equity in their home of between $490,000 and $535,000.

[6] The defendants correctly submit that the plaintiffs have not provided sworn affidavit evidence showing their impecuniosity or demonstrating Mr. Iannarella's claimed inability to pay an award of costs.

[7] Arguing by analogy to cases involving impecuniosity in motions for security for costs, the defendants submit that the onus is on the party claiming to be impecunious to substantiate the claim by way of evidence and the failure to adduce adequate evidence will be fatal to that position,

[8] In *Shuter,*[3] Master Haberman noted that:

> … in *Uribe v. Sanchez* [2006] O.J. No. 2370, the court held that as the plaintiffs financial capabilities are solely within his knowledge, it is incumbent on him to "provide evidence **with supporting documentation as to his income, expenses, assets and liabilities**" (emphasis added), and that assets should be described with particularity. Here, the master cited Quinn J's decision in *Morton v. HMQ Canada* 2005 CanLII 6052 (ON SC), 75 O.R. (3rd) 63, where the learned judge stated that "the financial evidence of the plaintiff must be set out with robust particularity", leaving "no one answered questions." He went on to list what should be included:
>
> > *full financial disclosure is required and should include the following: the amount and source of all income; a description of all assets (including value); a list of all liabilities and other significant expenses; and indication of the extent of the ability of the plaintiffs to borrow funds; and details of any assets disposed of or encumbered since the action arose.*
>
> It appears from these passages that there is a high evidentiary threshold that must be met before a court can find that a plaintiff is impecunious and

> that this threshold can only be reached by tendering complete and accurate disclosure of the plaintiffs income, assets, expenses, liabilities and forwarding ability with full supporting documentation for each category where available or an explanation where not available. At the very least, this would require an individual plaintiff to submit his most recent tax return, complete banking records and records attesting to income and expenses…

[9] Quite apart from the my concern that the unsworn information before me at best paints an incomplete picture of Mr. Iannarella's financial position, I am not persuaded that he has met a reasonable onus of establishing that he is financially unable to pay an award of costs. Nor has he established the size of award that he would be able to pay.

[10] Accordingly, costs are fixed without further consideration of impecuniosity as a factor of relevance in this case.

[11] In *Agius,*[4] Ricchetti J. well summarized this court's concerns in fixing costs:

> Fixing costs is not merely a mechanical exercise in reviewing the receiving party's Costs Outline. In *Anderson v, St. Jude Medical Inc.* (2006), 2006 CanLII 85158 (ON SCDC), 264 D.L.R. (4th) 557, the Divisional Court set out several principles to be considered in making an award of costs:
>
> 1. the discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in rule 57.01(1): *Boucher, Moon,* 2004 CanLII 39005 (ON CA), [2004] O.J. No. 4651, and *Coldmatic Refrigeration of Canada Ltd. v. Leveltek Processing LLC* (2005), 2005 CanLII 1042 (ON CA), 75 O.R. (3d) 638 (C.A.).
>
> 2. A consideration of experience, rates charged and hours spent is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: *Boucher.* The quantum should reflect an amount court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: *Zesta Engineering Ltd. v. Cloutier* (2002), 119 A.C.W.S. (3d) 341 (Ont.C.A.), at para. 4.
>
> 3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: rule 57.01(1)(0.b).
>
> 4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantial results": *Murano v. Bank of Montréal* (1998), 1998 CanLII 5633 (ON CA), 41 O.R. (3d) 222 (C.A.), at p. 249.
>
> 5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: *Boucher.*
>
> The Court of Appeal has identified the overriding principle to be that the amount of costs awarded be reasonable in the circumstances. In *Davies v.*

Clarington (Municipality) (2009), 2009 ONCA 722 (CanLII), 100 O.R. (3d) 66 Epstein J.A. stated at paras. 52:

> As can be seen, the overriding principle is reasonableness. If the judge fails to consider the reasonableness of the costs award, then the result can be contrary to the fundamental objective of access to justice. Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than any exact measure of the actual costs of the successful litigants. In *Boucher [Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.)], this court emphasized the importance of fixing costs in an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceedings at para. 37, where Armstrong J.A. Said "[t]he failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice.

[12] I also adopt the reasoning and conclusions of Perell J. in the *Doe* case.[5] At paragraphs 10 and 11, he addressed the purpose of awards of costs in circumstances such as those that present in the instant case as follows:

> [10] The court's discretion to award costs is designed to further three fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to encourage settlements; and (3) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII), [2003] 3 S.C.R. 371; *Fong v. Chan* (1999) 48 O.R. (3d) 330 (C.A.); *Fellowes, McNeil v. Kansa General International Insurance Co.* 1997 CanLII 12208 (ON SC), (1997), 37 O.R. (3d) 464.
>
> [11] Costs are designed as to be a tool to administer justice and to control access to justice. In *British Columbia (Minister of Forests) v. Okanagan Indian Band, supra*, LeBel J. for a majority of the Supreme Court of Canada stated in para. 26:
>
> Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

[13] Before this trial began, I directed counsel to exchange costs demands current to the commencement of the trial and to include demands for fees (on a partial indemnity basis) and disbursements, with supporting particulars. I then met with counsel for the purpose of conducting a trial management conference. At that time, I learned that both liability and damages were in issue and I again directed counsel to exchange costs demands, in order that the parties may have current and relatively precise information about the size and shape of their opponents' expectations for fee, disbursements and tax components of costs, in the event that the opponents were ultimately entitled to recover costs.

[14] In my view, requiring parties to exchange costs demands provides an important opportunity for parties to make an informed business decision on whether to court the cost and uncertainty of outcome that a trial necessarily presents. In the words of Armstrong J.A. in *Boucher*, there are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation.[6]

[15] I did not require counsel to file their respective costs demands with the court before or during trial but I was assured that counsel did indeed exchange their demands with particulars. It is asserted in the Costs Submissions of the Defendants that plaintiff counsel advised his fees were over $60,000 by the time of the pre-trial and his disbursements were $32,687.19. To that point, the defendants had incurred $51,188.50 in fees and $8,155.90 in disbursements. The fees incurred by plaintiffs and defendants appear to have been of similar magnitude.

[16] There is no demonstrated access to justice issue here. There is no suggestion in this case that plaintiffs' counsel or other capable counsel would not have taken the case on or have seen it through to the time of the trial management conference or indeed through the trial.

[17] Mr. Iannarella had the benefit of the advice of counsel throughout and, armed with that advice and whatever input he may have received from the pre-trial judge and assisted by the information gleaned from the costs demands he received from the defendants, he was well able to make informed decisions upon the risks and rewards he faced when he decided to require that the trial go forward. He invited the jury to assess and award his damages in amounts totaling between $571,000 and $706,000.

[18] Mr. Iannarella was offered a substantial sum of money to settle before trial; he made no counter offer and the result was a long and complex trial which resulted in damages assessments well below his requests of the jury on almost every head of damages at issue and resulted in his action being dismissed. He now faces an award of costs against him but asks for relief from the financial consequences that the defendants' demands might produce.

[19] From the defendants' perspective, Mr. Iannarella full well knew, or ought to have known, the potential financial consequences of requiring a trial to the finish on all issues; he took his shot, miscalculated and missed the intended target. The defendants offered an alternative but it was rejected outright. Court and jury time was necessarily engaged over parts of four weeks. Did Mr. Iannarella act reasonably? They think not and I agree. I cannot liken this case to the *Walsh*[7] case in that other plaintiffs with better cases than Mr. Iannarella's need not fear a burdensome costs award if they act reasonably in assessing their chances of success at trial relative to a settlement alternative presented to them.

[20] In my view, the defendants are entitled to their costs on a partial indemnity basis to the time of their offer to settle on 12 March 2012. I see no reason to award a bonus to the defendants by increasing the scale of costs applicable to the date of that offer.

[21] Applying the logic of Carthy J.A. in *Strasser*[8] and that of judges in subsequent cases[9], I choose to exercise my jurisdiction to award substantial indemnity costs from 13 March 2012

onward, as the defendants' offer was reasonable and it encouraged and allowed Mr. Iannarella to settle his claims and avoid the trial. Given my findings on credibility and on the accuracy and completeness deficiencies in the plaintiffs' case that were plentiful, glaring and substantial,[10] Mr. Iannarella should not have courted the consequences that befell him at this trial.

[22] In determining a fair amount to award the defendants for costs up to the time of their settlement offer of 12 March 2012, I am alert to the factors I have referred to above. I am content that the time spent as claimed by counsel was actually spent and that the rates claimed for the respective timekeepers are reasonable, in keeping with their positions and experience in the Forget law firm.

[23] The plaintiffs assert that changes in the staff assigned to this matter within the Forget firm may have lead to duplication of effort that should not be visited upon the plaintiffs. I agree with that concern, in principle, but cannot and will not undertake a line by line analysis of the defendants' costs outline to quantify any potential overlap. I note that substantially all of the docketed lawyers' time on the file was docketed by Mr. Forget, who had carriage of the matter from the outset, and by his associate, Ms. Merredew. A modest discount is incorporated into my award to reflect this concern.

[24] I am not persuaded that the cost of the attendance of junior counsel at the pre-trial should be borne by Mr. Iannarella. There is no suggestion that Ms. Merredew's attendance there was reasonable or necessary and the counsel fee claim will be discounted to reflect that.

[25] This was a complicated personal injury case from a medical perspective. Eleven experts were called to testify at trial. The jury heard from twenty five witnesses in all over the course of four weeks. As noted above, Mr. Iannarella asked the jury to award many hundreds of thousands of dollars in damages. The defendants had no choice to marshal the evidence necessary to meet his claims and to defend on every issue.

[26] I am satisfied that defence counsel did nothing to unnecessarily lengthen the litigation or the trial. Mr. Iannarella's testimony was suspect and cried out for close scrutiny throughout the preparation for trial and trial phases of the matter. That the defendants enjoyed the success they did at trial is a testament to the hard work necessarily undertaken by counsel. Mr. Iannarella should reasonably have expected nothing less.

[27] Stepping back from my consideration of particular factors and considering the overall reasonableness of the defendants' claims for fee items of costs on a partial indemnity basis to the date of the offer on 12 March 2012, I award $50,000.00.

[28] Turning now to the assessment of substantial indemnity fees, in the interval between the offer and the start of the trial, it was reasonable and necessary that the defendants prepare as they did for the trial. That both Mr. Forget and Ms. Merredew prepared to assume carriage of the defence in the event one of them was unavailable for any reason was appropriate and would allow of the trial continuing on schedule regardless.

[29] I am not persuaded however that Ms. Merredew's presence as junior counsel at trial was necessary after the first day of trial. She did not participate in the examination or cross examination of witnesses or otherwise as counsel at trial. She did not step in when Mr. Forget could not appear on one trial day and the trial was adjourned to await his return. The counsel fee for trial claim will be reduced accordingly.

[30] Considering the many factors informing the exercise of my discretion and considering the overall fairness of the award of substantial indemnity costs for the interval between 13 March 2012 and 18 March 2012 and at trial, the former are fixed and awarded at $30,000.00 and counsel fee at trial is fixed and awarded at $100,000.00.

[31] All awards of Fee items of costs have been made without reference to applicable HST but I award HST at 13% in addition to those awards. By my calculations, fee item awards attract HST of $23,400.

[32] The defendants' claim for Disbursements totals $53,001.07, plus applicable taxes. Mr. Iannarella contests only some of these claims. The question for me is what portion of the contested claims are fair and reasonable?

[33] He contests the entirety of the claim for photocopy expenses on the basis that it should be absorbed by counsel as part of his firm's overhead. I disagree and allow that claim in its entirety.

[34] As for the cost of Dr. Axelrod's attendance as an expert witness at trial, this plaintiff asserts that this cost is prohibitive at $7,500.00. It is higher by at least one third than any of the costs incurred by the plaintiffs to bring their witnesses to trial. That alone, however is not the test.

[35] I consider Dr. Axelrod to have been a necessary and very important witness. He saw and examined Mr. Iannarella on two occasions and wrote reports in 2010 and 2011. His evidence was important for his description of the nature and extent of the shoulder injury complained of and the course of recovery following surgical repair. It also went to the accuracy and completeness of Mr. Iannarella's evidence as a witness before the jury, to Mr. Iannarella's ability to speak English to his credibility and to his ability to return to work.

[36] Dr. Axelrod is an orthopedic surgeon with a particular focus on upper limb injuries. He made an important contribution to the case and his evidence was certainly relevant to the issues. I believe his evidence was crucial to the outcome of the case. Its cost was not disproportional to the economic value of the case. It was not duplicated by the evidence of other witnesses. It was by no means overkill and it was of considerable assistance to the court.

[37] This said, however, I am left to wonder how Dr. Axelrod arrived at the amount of the fee he charged the defendants. Accordingly, I will reduce it to $5,000.00, an amount approximately equal to the fee charge Mr. Iannarella by Dr. Cantarutti.

[38] Mr. Iannarella contests the disbursements claimed for Drs. Soon-Shiong and Bhargava but in comparing the amount of these claims to those incurred by Mr. Iannarella and in considering the value of the evidence of these experts and the overall fairness of these disbursement claims I am content to allow them to stand

[39] I am not moved to accept the submission that the disbursement incurred for surveillance should be reduced. Mr. Iannarella's credibility and his evidence of his functional capacities and limitations was measured in a significant fashion by reference to the surveillance evidence. It was very relevant and important evidence. That disbursement claim is allowed in full.

[40] Mr. Iannarella's concern over the cost claimed for an interpreter that he did not ask the defendants to retain and did not use is fair. That claim of $923.54 is disallowed. So too are his submissions that the disbursements claimed for Hotel, Transportation and court interview room (which he totals at $3,715.42) are unreasonable; those items are disallowed.

[41] The disbursement claims are otherwise fair, reasonable and allowed. As such, by my calculations, the defendants' disbursements are fixed and awarded at $51,554.18, including HST less GST exempt items.

[42] In the result, Fee items of costs are awarded in the total sum of $180,000.00 plus HST thereon of $23,400. Disbursements are awarded in the sum of $51,554.18, inclusive of relevant taxes.

MOORE J.

DATE: 19 November 2012

---

[1] *Courst of Justice Act,* R.S.O. 1990, c.43, Section 131 and the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 57.01

[2] *Walsh v. 1124660 Ontario Inc.,* 2007 CanLII 4789 (ONSC) at para. 41

[3] *Shuter v. Toronto Dominion Bank,* 2007 CanLII 37475 (ON SC), [2007] O.J. No. 3435, at paras. 75 and 76

[4] *Agius v. Home Depot Holdings Inc.* 2011 ONSC 5272 (CanLII), [2011] O.J. No. 4424, at paras. 11 and 12.

[5] *John Doe v. Her majesty the Queen In Right of Ontario and Attorney General of Canada,* 2007 CanLII 50279 (ON SC)

[6] *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (O.C.A.) , at para. 37.

[7] *Walsh v. 1124660 Ontario Inc.,*2007 CanLII 27588 (ONSC), at para. 25.

[8] *S & A Strasser Ltd. v. Richmond Hill (Town),* 1990 CanLII 6856 (ON CA), [1990] O.J. No. 2321 (C.A.)

[9] *Tilker v. Canada Life Casualty Insurance Corp.,* 2002 CanLII 2714 (ON SC), [2002] O.J. 2873; *Ragimov v. Bercznyski,* [2001] O.J. No. 472; *Coldmatic Refrigeration of Canada Ltd. v. Kenaidan Contracting Ltd.,* [2005] O.J. No. 6195; *3726843 Canada Inc. v. 879115 Ontario Ltd.,* [2005 O.J. No. 2305; and *Barr v. Zahavy* (2011), O.J. No. 5381.

[10] Per Grace J in *Barr, Supra, para 9.*

Tab 295

CITATION: Issa v. Aiello, 2025 ONSC 5173
COURT FILE NO.: CV-22-89338
DATE: 20250910

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Rita Issa, Applicant

AND

Antoinette Aiello, Gisella Aiello, Francesco Aiello and Luigi Aiello, Respondents

BEFORE: Justice R. Ryan Bell

COUNSEL: Michael Rappaport, for the Applicant

Matthew Jarrett, for the Respondent Antonietta Aiello[1]

HEARD: In writing

COSTS ENDORSEMENT

[1] In this application for directions, Rita Issa sought a declaration setting aside Luisa Aiello's July 8, 2016 will and other associated relief. Rita alleged the 2016 Will was invalid because Luisa, Rita's mother, lacked testamentary capacity, was subject to undue influence, and did not approve or have knowledge of the contents of the will. Rita also maintained the 2016 Will was not duly executed in accordance with the requirements of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

[2] In Reasons for Judgment released July 9, 2025, I dismissed Rita's application with costs to Rita's sister, the respondent Antonietta Aiello: *Issa v. Aiello*, 2025 ONSC 4055. I found the 2016 Will was duly executed and there was no evidence to support any of Rita's allegations: *Issa*, at paras. 19-27, 33-35, 36-42, 43-44.

[3] Antonietta seeks her costs of the application on a substantial indemnity basis in the amount of $70,000, apparently rounded up from the substantial indemnity costs of $68,683.91 reflected in her Bill of Costs. Rita did not provide any submissions as to costs.

[4] I conclude this is a case for substantial indemnity costs for two reasons. First, Antonietta made several offers to settle the application. In her r. 49 offer to settle made February 17, 2023, Antonietta offered to settle the application and Rita's action on the basis that both would be withdrawn, Antonietta would be paid costs in the amount of $10,000, and Rita would renounce

[1] Antonietta Aiello's name is misspelled in the title of proceedings.

2025 ONSC 5173 (CanLII)

any claim to Luisa's estate. In her June 27, 2024 offer, Antonietta proposed that the application be abandoned, with Antonietta's costs to be assessed or payable in the fixed amount of $20,000. In the result, Antonietta was the successful party – the application was dismissed, with costs to Antonietta.

[5] Second, Rita made unfounded allegations of fraud and undue influence. She provided nothing to support her assertion that Antonietta financially exploited Luisa: *Issa*, at paras. 39-40. There was no evidence to support her claim that Antonietta defrauded Luisa's estate by registering a reverse mortgage on the Palsen Street property: *Issa*, at paras. 41-42. And Rita baldly asserted that Mr. Chiarello's July 8, 2016 affidavit was fabricated, but she did not even bother to cross-examine him: *Issa*, at para. 44.

[6] Alleging fraud and undue influence with no relevant evidence constitutes reprehensible litigation behaviour: *Fanelli v. Fanelli-Bruno*, 2023 ONSC 6501, at para. 48, citing *Young v. Young*, 1993 CanLII 34 (SCC). Rita engaged in reprehensible litigation behaviour and costs on the substantial indemnity scale are appropriate.

[7] As to the quantum of costs, there is no basis to "round up" the costs claimed. I find the hourly rates of Antonietta's counsel are reasonable having regard to their years of experience. There appears to have been some overlap in certain tasks performed by senior and more junior counsel. Otherwise, I find the time incurred by counsel was reasonable, particularly having regard to the serious and scandalous allegations made by Rita. This matter involved numerous court attendances, including case conferences and scheduled hearing dates. Some of the delays resulted from Rita's litigation conduct: for example, the hearing did not proceed in December 2023 as scheduled due to Rita's late delivery of the affidavit of Ross Talarico. The materials filed were voluminous. Antonietta conducted cross-examinations. Facta were prepared and reviewed.

[8] The costs claimed by Antonietta include costs associated with an attendance before Rees J. on May 11, 2023. At that time, Justice Rees stayed Rita's claim and ordered that cross-examinations on the application take place. Justice Rees fixed Antonietta's costs at $2,000, without prejudice to the parties making submissions to the application judge as to whether costs should be awarded in respect of the May 11, 2023 attendance. Antonietta is entitled to her costs associated with the May 11, 2023 attendance before Rees J., but only in the previously fixed amount of $2,000.

[9] Having regard to all the above, I award Antonietta substantial indemnity costs in the amount of $55,000, all inclusive. This amount is to be paid by Rita within 60 days.

Justice R. Ryan Bell

Date: September 10, 2025

2025 ONSC 5173 (CanLII)

CITATION: Issa v. Aiello, 2025 ONSC 5173
COURT FILE NO.: CV-22-89338
DATE: 20250910

2025 ONSC 5173 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: Rita Issa, Applicant

AND

Antoinette Aiello, Gisella Aiello, Francesco Aiello and Luigi Aiello, Respondents

BEFORE: Justice R. Ryan Bell

COUNSEL: Michael Rappaport, for the Applicant

Matthew Jarrett, for the Respondent Antonietta Aiello

COSTS ENDORSEMENT

Ryan Bell J.

Released: September 10, 2025

Tab 296

CanLII

Pye v. Di Trapani et. el., 2024 ONSC 2265 (CanLII)

Source:	Superior Court of Justice
Date:	2024-09-06
File number:	CV-16-58529
Citation:	Pye v. Di Trapani et. el., 2024 ONSC 2265 (CanLII), <https://canlii.ca/t/k6ngw>, retrieved on 2026-01-19

CITATION: Pye v. Di Trapani et. el., 2024 ONSC 2265
COURT FILE NO.: CV-16-58529
DATE: 2024-09-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
William “Bill” Pye	M. Smitiuch, Esq., S. Snider, Esq. and P. LeDonne for the Plaintiff
Plaintiff	
- and -	
Carmela Di Trapani and Vincenzo Di Trapani	D. Wong, Esq. and S. Ullal for the Defendants
Defendants	
	HEARD: March 8, 2024

REASONS FOR JUDGMENT

SKARICA, J: (Orally)

[1] This is a matter of William Bill Pye and Carmella Di Trapani and Vincenzo Di Trapani. These are my reasons for costs and judgment interests ruling.

OVERVIEW

[2] A Hamilton jury on October 12th, 2023, awarded the plaintiff an award of over one million dollars in damages for serious injuries suffered by the plaintiff from the motor vehicle accident collision that occurred on July 2nd, 2016. The jury award exceeded both the plaintiff's and the defendant's offer to settle. The plaintiff seeks an order for costs and prejudgment interest, which I will refer to as PJI on occasion, and post-judgment interest.

ISSUES

[3] (1) What is the appropriate costs amount to be awarded to the winning litigant, the plaintiff?

[4] (2) What is an appropriate amount of PJI?

[5] (3) What is an appropriate amount of post-judgment interest?

FACTS

[6] I believe a chronology of events best outlines the relevant facts which are as follows.

THE ACCIDENT

[7] (1) July 2nd, 2016, the plaintiff, William Bill Pye, suffered serious injuries when Ms. Di Trapani drove her vehicle into an intersection when it was not safe to do so. Mr. Pye was operating a motorcycle and was unable to avoid colliding with the defendant's motor vehicle and suffered very serious physical injuries.

OFFERS TO SETTLE AND TRIAL PROCEEDINGS

[8] (2) August 16, 2019, a failed mediation takes place. The plaintiff at that time had a lawyer named Brad Duby. May 6th, 2020, Notice of Change of a Lawyer was delivered. The plaintiff's new lawyer is Smitiuch Law Firm.

[9] (3) May 14th, 2020, the defendant makes a first Rule 49 Offer to Settle as follows:

> $150,000.00 for general damages, for pain and suffering; $30,000.00 for all income claims past and future; $30,000.00 for future care costs; and $15,000.00 for housekeeping. That's a total of $225,000.00, plus there was an offer to pay

plaintiff's costs and disbursements on a partial indemnity basis. That offer, obviously, was not accepted.

[10] (4) June 21, 2021, a pretrial conference was heard before Justice Sheard. No offers were made. The matter was eventually adjourned to the jury list of September 13th, 2021 and then to the jury -- and then to the jury list of September 19th, 2022.

[11] (5) July 5th, 2022, the defendant makes a second Rule 49 Offer to Settle. The defendant offers $350,000.00 inclusive of pre-judgment interest for all damages plus costs on a partial indemnity scale.

[12] (6) September 19th, 2022, the trial is adjourned to February 13th, 2023. The plaintiff requests an adjournment which the defendant consents to. The plaintiff had another trial booked at that time for a 90 year old client.

[13] (7) February 2nd, 2023, the plaintiff makes a Rule 49 offer to settle for $799,000.00 for all claims, and interest, plus costs and accessible disbursements.

[14] (8) February 13th, 2023, the trial is adjourned a second time at the request of the plaintiff counsel as one of the plaintiff's experts was not available due to medical issues. That was a future care expert. And the defendant's counsel did not oppose the adjournment and the trial was adjourned to September 2023 sittings. That is September 11th, 2023.

[15] (9) August 30th, 2023, the defendant makes a third Offer to Settle, offering $500,000.00 inclusive of prejudgment interest for all damages, an offer to pay $150,000.00 for costs and disbursements on a partial indemnity scale.

[16] (10) September 18th, 2023, the trial proceeds and takes, approximately, 4 weeks.

[17] (11) October 12th, 2023, the jury awards the plaintiff an award exceeding one million dollars, as follows (and this is detailed at paragraph 55 of the defendant's submissions):

STATEMENT OF CLAIM

[18] The plaintiff sought two million dollars and was awarded by the jury $1,072,440.42. In general damages the plaintiff sought $450,000.00. The defendant asked for $200,000.00. The jury granted $350,000.00.

PAST LOSS OF INCOME

[19] The plaintiff asked for $66,000.00 which was agreed to by the defendant and the jury awarded that amount, $66,000.00.

FUTURE LOSS OF INCOME

[20] The plaintiff asked for zero to $252,000.00 leaving it to the jury. The jury decided zero dollars which was the defendant's position.

PAST ATTENDANT CARE

[21] The plaintiff took no real -- did not provide a real number. The defendant asked for zero dollars. The jury provided zero dollars.

FUTURE COST OF CARE – MEDICAL EXPENSES

[22] The plaintiff asked for $1,139,000.00. No number was suggested by the defence. $525,000.00 was awarded by the jury.

FUTURE HOUSEKEEPING AND HOME MAINTENANCE EXPENSES

[23] The plaintiff asked for $125,00.00. Again, the defendant did not suggest a number. The jury awarded a $105,000.00.

[24] Special damages out-of-pocket expenses were agreed to by both counsel and the jury awarded the amount suggested, $26,490.42. As well as outlined at paragraph 56 of the defendant's submissions, the plaintiff's claim also included a claim for home renovations at a cost of $438,000.00. Following a motion at the outset of trial, the defence was successful in having the claim for home renovations removed.

[25] Mr. Pye's award exceeds all the Offers to Settle and he's entitled to a costs award as the successful litigant. Mr. Pye asked for (and as outlined at paragraph one of the plaintiff's costs submissions,):

> "Mr. Pye asked that he be awarded partial indemnity cost for work performed up to and including February 1, 2023 and substantial indemnity costs on route from that date in accordance with the plaintiff's bill of costs, which is filed at Tab 2 of the plaintiff's submissions. This is on the basis of his Rule 49, Offer to Settle in the amount of $799,000.00 for damages and interest plus costs and disbursements made on February 2nd, 2023 which is more than doubled by the damages award made at trial."

[26] It was actually more than double the defendant's offer, but in any event, the real issue here for me to decide is what is an appropriate amount for costs for the successful plaintiff?

THE LAW REGARDING COSTS

[27] The principles of costs awards. Justice Turnbull in *Teglas v. City of Brantford et al*, 2021 ONSC 997 succinctly summarizes the relevant principles at paragraphs 4-6 of that judgment:

PARAGRAPH 4

Section 131(1) of the *Courts of Justice Act* provides that the cost of and incidental to a proceeding are in the discretion of the Court and the Court can decide by who and to what extent the costs should be paid. As with any discretion it should be exercised fairly and reasonably.

PARAGRAPH 5

Rule 57.01(1) sets out the general principles which may be applied by the Court in exercising its discretion under section 131(1) of the *Courts of Justice Act*. The preamble to the Rule invites the Court to consider the results of the proceeding and any written offer to settle, as well as the following factors:

(0.a,) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer.

(0.b,) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to this step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues: the conduct of any party that tended to shorten or length unnecessarily the duration of the proceeding;

(e) whether any step in the proceeding was;

(i) improper, vexatious, or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(a) a party's denial of or refusal to admit anything that should have been admitted;

(b) whether it is appropriate to award any costs or more, than one set of costs where a party commenced separate proceedings for claims that should have been made in one proceeding in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer and,

(c) any other matter or relevant to the question of costs.

PARAGRAPH 6

The costs rules are designed to advance several purposes in the administration of justice. One is to indemnify successful litigants. That purpose is evident and leads to the second purpose; namely, to facilitate access to justice. Costs rules are also designed to discourage frivolous claims and defences. I find that this was not a frivolous claim despite the fact that the defence position of absolute denial of liability was sustained. The overall objective is to fix an amount that is fair and reasonable, bearing in mind the broad range of factors articulated in Rule 57.01(1). The Ontario Court of Appeal has held the failure of a judge assessing costs to consider the "overriding principle of reasonableness" can result in a denial of access to justice.

[28] Regarding offers to settle Rule 49.10 sets out the consequences of a failure to accept the plaintiff's offer:

> 49.10 (1) Where an offer to settle;
>
> (a) is made by a plaintiff at least seven days before the commencement of the hearing;
>
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
>
> (c) is not accepted by the defendant, and the plaintiff obtains the judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date unless the Court orders otherwise.

[29] It is obvious that the plaintiff received a judgment that is more favourable than his offer to settle and accordingly pursuant to Rule 49 he is entitled to partial indemnity costs to the date of the offer to settle, February 1, 2023, and substantial indemnity costs from that date onwards unless the Court orders otherwise. In considering the phrase "unless the Court orders otherwise", I take into account the following considerations:

> (1) in reviewing a claim for costs, the Court need not undertake a line-by-line analysis of hours claimed or second guess amounts claimed unless it is clearly excessive or overreaching. A trial judge must consider what is reasonable in the circumstances and after taking into account all the relevant factors, should award costs in a more global fashion. See *TMS Lighting v. KGS Transport*, 2014 ONSC 7148 at paragraph 15, *R. v. Fazio and Cusumano*, reported at 2005 CANLII 33782 ONSC at paragraph 8; and *Ramcharran v. State Farm Mutual Automobile Insurance Company* reported at 2023 ONSC 3698 at paragraph 50.
>
> (2) Relative expenditures by adversaries on opposite sides of a motion is a relevant consideration where there is an allegation of excess in a particular matter but that is not conclusive. See *TMS Lighting* at paragraph 57.
>
> (3) Substantial and partial indemnity rights are, approximately, 90 per cent and 60 per cent, respectively, of a full amount billed. See *Rolling Meadows v. 2560262 Ontario Inc.* reported at 2018 ONSC 6455 at paragraph 15.
>
> (4) There's no requirement to apply out of date grid rates rather than the 55 to 60 per cent of a reasonable actual rate. See *Bain v. UBS Securities Canada Inc.*, 2018 ONCA 190 at paragraph 32.

(5) A plaintiff is entitled to incur legal expenses commensurate with the amount in issue. See *Tri-Associates Insurance Agency Limited v Douglas*, [1986] OJ No. 557 at page 1.

(6) The principle of proportionality, indemnity, and access to justice may allow a costs award to exceed the damage settlement if that costs amount is reasonable on the totality of the circumstances. See *Block v. Brown, et al* at 2022 ONSC 3199 at paragraph 90.

(7) In the present case the defendant did not make an offer that was a "near miss". I am not to impose a rule arbitrarily limiting the amount of costs to some proportion of the recovery where there has been a nominal offer. Rule 49 is designed to encourage settlement by attaching costs consequences for failure to make or to accept reasonable offers. See *Corbett v. Odorico*, 2016 ONSC 2961 at paragraph 19.

(8) Costs premium can be awarded to successful plaintiffs where the evidence involves a detailed understanding of complex scientific material. See *Maria Berendsen et al v. Her Majesty the Queen in Right of Ontario*, 2008 CanLII 35263 at paragraph 24 and *Teglas* at paragraph 8.

(9) Proportionality has become an ever increasingly important factor in assessing costs. Costs awards should reflect more what the Court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant. See *Bombardier Inc. v. AS Estonian Air*, 2013 ONSC 4209, and *Ramcharran* at paragraph 50.

(10) A Court can assess and reduce a costs award to the successful litigant where adjournments required the opposite party to redo work necessary to prepare for trial. See *Teglas* at paragraphs 18 to 19.

(11) A Court can disallow disbursements which are either unnecessary or excessive. See *Ramcharran v. State Farm Mutual Automobile Insurance Company* at paragraph 52, *Noori v. Liu*, 2021 ONSC 3445 at paragraph 55, and *McCurdy et al v. Maille et al.*, 2024 ONSC 1222 at paragraph 55.

(12) It is accepted principle that a plaintiff requires more time to present a case than the defendant. See *Ramcharran* at paragraph 48.

THE LEGAL PRINCIPLES OF PREJUDGEMENT INTEREST

[30] In *Maria Berendsen et al v. The Queen*, Justice Seppi held at paragraph 1 that a Court has the discretion pursuant to section 131 of the *Courts of Justice Act*, (CJA), to allow

prejudgment interest for periods other than that prescribed in section 128 and at a higher or lower rate, having regard to factors listed in section 130(2) of the CJA.

[31] In *Debora v. Debora*, 2006 CanLII 40663 (ON CA), [2006] OJ No. 4826, ONCA the Court of Appeal held at paragraph 93 as follows;

> The wording of section 130 is very broad and in addition to enabling the trial judge to consider the circumstances of the case, specifically, allows the trial judge to take into account Mr. Debora's conduct in lengthening unnecessarily the duration of the proceeding by his persistent refusal to make full disclosure of his income and assets. As Cronk J.A. notes in *Somers v. Fournier*... Armak concerns an older version of the prejudgment interest provision, and section 130(2)(f) grants the trial judge the jurisdiction to consider a litigant's conduct during the proceedings when determining whether to exercise her discretion to vary the rate of prejudgment interest.

[32] Section 128(1) and (2) and section 130(1) and (2) of the *Courts of Justice Act* indicate as follows:

> PREJUDGMENT INTEREST
>
> 128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate calculated from the date of the cause of action arose to the date of the order.
>
> EXCEPTION FOR NON-PECUNIARY LOSS ON PERSONAL INJURY
>
> (2) Despite subsection 1, the rate of interest on damages for non-pecuniary lost in an action for personal injury shall be the rate determined by the rules of Court made under clause 66 (2) (w).
>
> DISCRETION OF THE COURT
>
> 130 (1) The Court may, where it considers it just to do so, in respect of the whole or any part of the amount, on which interest is payable under section 128 or 129
>
> (a) disallow interest under either section;
>
> (b) allow interest at a rate higher or lower than that provided in either section;
>
> (c) allow interest for a period other than that provided in either section.
>
> IDEM
>
> (2) For the purpose of subsection one, the Court shall take into account,

(a) changes in market interest rates;

(b) the circumstances of the case;

(c) the fact that an advance payment was made;

(d) the circumstances of medical disclosure by the plaintiff;

(e) the amount claimed and the amount recovered in the proceeding;

(f) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding; and

(g) any other relevant consideration.

[33] In *Somers v. Fournier*, 2002 CanLII 45001 (ON CA), 214 DLR (4th), 611, (2002 ONCA) Cronk J.A. held as follows at paragraph 23 - 24;

PARAGRAPH 23

Modern theories of pre-judgement interest related to compensatory, rather than punitive, goals. Awards of pre-judgment interest are designed to recognize the impact of inflation and to provide relief to a successful litigant against the declining value of money between the date of entitlement to damages and the time when damages were awarded.

PARAGRAPH 24

The Court refers to Graham v. Rourke where this is stated at paragraph 24 of the Court of Appeal decision:

> Pre-judgment interest cannot, however, become a means of punishing or rewarding a party to the proceedings. Rather prejudgment interest must be viewed as part of the compensatory package provided to the person wronged.

[34] In *Cobb v. Long Estate*, 2015 ONSC 6799 Justice Belch held as follows at paragraph 24:

This motor vehicle collision occurred seven years ago and the plaintiff has been without compensation from the defendant tort insurer for this entire period of time. There has been no interim payment from the defendant. I exercise my discretion and order prejudgment interest to be paid at the rate of three per cent. I have taken into account the factors set out in section 130(2) of the *Courts of Justice Act*. I have considered the overall circumstances of the case. Pre-judgment interest is to compensate for the loss of use of money. And it is not to be used as a means of punishing or rewarding a party. Having been the trial judge during the civil jury trial which lasted in excess of four weeks, I'm of the view that I'm in a position to take into account and balance the various factors set out in the section. I am satisfied that the rate of three per cent is entirely just and reasonable after taking all the considerations into account.

[35] That decision was rendered November 13th, 2015.

REGARDING PRE-JUDGMENT INTEREST

[36] The Court of Appeal affirmed the *Cobb's* decision. See *Cobb v. Long Estate*, 2017 ONCA 717. The Court of Appeal explained how prejudgment interest works in motor vehicle cases at paragraph 68 through to 73.

> PARAGRAPH 68
>
> To understand the effect of s. 258.3(8.1) to accident cases to which it applies, one must read it in the context of the statutory regime for prejudgment interest. One begins with section 128(1) of the *Courts of Justice Act*, which creates an entitlement to prejudgment interest and refers to default rate.

[37] The Court refers to that section which I've already read.

> PARAGRAPH 69
>
> For the purpose of section 128, section 127.1 defines "prejudgment interest rate" as "the bank rate at the end of the first day of last month of the quarter proceeding the quarter in which the proceeding was commenced". However, section 128(2) creates an exception from this default rate of prejudgment interest for damages for non-pecuniary loss arising from personal injuries.

[38] Then again, I've read 128(2) already previously.

> PARAGRAPH 70
>
> The relevant rule of Court to which section 128(2) refers to is Rule 53.10 of the *Rules of Civil Procedure*, which provides:
>
> > 53.10 The prejudgment interest rate on damages for non- pecuniary losses in an action for personal injury is five per cent per year.
>
> PARAGRAPH 71
>
> Therefore, section 128 of the *Courts of Justice Act* contemplates two default rates of prejudgment interest. One for damages for non-pecuniary loss and personal injury actions, and one called "the prejudgment interest rate", for all other money awards for which section 128 makes prejudgment interest available. The plaintiffs commenced their action on December 8th, 2009 so the applicable prejudgment interest rate is section 128(1) is .5 per cent.
>
> PARAGRAPH 72
>
> I have referred to the regime of prejudgment interest rates in section 128(1) and (2) as one of "default" rates because section 130 of the *Courts of Justice Act* gives the

Court discretion to reduce or increase the prescribed rate of interest or to disallow interest otherwise payable under section 128.

[39] The Court then outlines section 130 of the *Courts of Justice Act* which I have already read.

PARAGRAPH 73

Therefore, paragraph 73, the Court concludes:

Therefore the effect of section 258.3(8.1) of the *Insurance Act* is that, in an action for damages arising out of a motor vehicle accident the prejudgment interest rate on nonpecuniary damages will now be the rate provided for in section 127 and 128(1) of the *Courts of Justice Act*, subject to the overriding discretion of the Court in section 130 of the same statute to increase or reduce the rate, the changed interest period, or to allow interest altogether.

APPLICATION OF LAW TO FACTS OF THIS CASE

[40] Complexity Rule 57.01(1) subsection (c) indicates that complexity of the proceedings is a relevant factor in assessing the cost award. In my opinion the issue of liability was relatively simple in this case. However, the damage assessments and medical evidence given by the medical experts involved complex issues. There were issues regarding the impact of pre-existing injuries, especially with regard to the plaintiff's serious right shoulder injury. There was conflicting expert evidence regarding voiding and erectile dysfunction. There were extensive medical reports and diagnosis that needed to be described and explained. Both parties called as witnesses a number of medical experts to deal with these complex issues.

ADJOURNMENTS

[41] The defendant points out that this trial was adjourned twice at the behest of the plaintiff, which adjournments were acceded to by the defendant. The first adjournment occurred during the September 2022 sittings wherein the parties attended trial readiness court and plaintiff's counsel advised that he had another trial with a 90-year-old plaintiff. The defendants consented to an adjournment to the February 2023 sittings. The plaintiff's counsel contacted the defence's -- defendant's counsel on the Friday evening before the second trial date, that is before the Monday second trial date to advise that their future care expert, Ms. Deena Rogozinsky was not available for trial due to medical issues. It was agreed that a new expert would now have to be retained and a new report would have to be served.

[42] All counsel attended the first day of the trial sittings where an adjournment was granted for the second time and the matter was adjourned further. I find that these adjournment requests by the plaintiff were entirely reasonable and a second adjournment was entirely out of the control of both parties. Unlike *Teglas*, there is no specific evidence that any extra costs were incurred by the defendant. No, details were provided that any work was done that had to be done again. There was no evidence regarding duplication of effort attributable to the two adjournments. No details were provided as to the costs expense regarding work done that had to be reviewed or reanalyzed due to the adjournment. See *Teglas* at paragraphs 18 through 19. Accordingly, there will be no deductions from the plaintiff's cost award due to these two adjournments.

ADDITIONAL COUNSEL AT TRIAL PRIOR COUNSEL

[43] Michael Smitiuch was the lead counsel at trial with, approximately, 25 years of experience. Mr. Smitiuch was assisted by Shawn Snider, year of call 2019 and Philip LeDonne year of call 2022. The defendant contends that the $550.00 hourly rate of these two counsel is too high. Mr. Smitiuch indicates that Mr. LeDonne has computer and tech skills that were essential to the proper and efficient conduct of the trial. Mr. LeDonne marshalled the witnesses and examined the witnesses. The same could be said of Mr. Snider. It is clear that all three counsel worked efficiently as a highly skilled team during/throughout the trial. The result was that that the trial was conducted efficiently with no down time, a rare event. There was a constant flow of witnesses and in my, approximately, 45 years -- 40 years of litigation I've never seen a long trial run more smoothly.

[44] Credit must be given to the defendant counsel as well. Accordingly, given the results of extreme efficiency conducted by the plaintiff's team of lawyers, I find that the cost claims are reasonable in the circumstances, pursuant to the indemnity principle outlined in Rule 57.01(1) (o.a).

[45] Regarding prior counsel, Brad Duby, 2001 call, now deceased. Mr. Duby retained the plaintiff's experts and he conducted the mediation in August 2019. Mr. Duby's bill of, approximately, $31,594.80 plus prejudgment interest, I find to be reasonable. And the plaintiff is directed to pay Mr. Duby's bill to his estate as I understand Mr. Duby's account has yet to be paid.

DISBURSEMENTS

[46] The defendant submits at paragraphs 79 and 80 of his submissions that it contests a number of disbursements claimed by the plaintiff. The plaintiff concedes that its line 19 entry, in its index of disbursement regarding the ARCG invoice, it should be deducted. That invoice indicates a balance due for a total of $2,750.00. Accordingly, $2,750.00 will be deducted from the plaintiff costs awarded.

[47] I find that the remaining disbursements to be reasonable and necessary to conduct the plaintiff's litigation. The disbursements incurred by the plaintiff contributed to advance his case and were necessary to assist the jury's understanding regarding the nature and extent of the plaintiff's numerous injuries and damage claims and to contradict the defendant's claims to the contrary. There was no issue raised regarding duplication of experts or evidence at trial. Counsel for both parties released some witnesses to make the trial more efficient. I agree that Mr. Pye's disbursements are reasonable and fair and appropriate given the quantum of damages sought and awarded. See *Hamfler v. Mink*, 2011 CanLII 86201 (ON SC) paragraph 13.

[48] Briefly some of the defendant's objections to disbursements are simply nitpicking. For example, the trial photo boards were extremely helpful in outlining the exact nature of the plaintiff's injuries. I don't agree that photocopying and postage expenses are necessarily part of a law firm's overhead expenses. The police take a contrary view in requiring compensation for such items in Wagg Applications. Further, given the complicated nature of issues involving injuries, it is entirely reasonable to order copies of the trial transcript regarding crucial points of evidence. I agree with Justice Edwards' comments at paragraphs 11 and 12 in *Hamfler v. Mink* regarding these type of expenses. Respectfully, I disagree with comments to the contrary in *McCurdy et al v. Maille et al,* 2024 ONSC at paragraph 55 and *Noori v. Liu*, 2021 ONSC 3445 at paragraph 55.

[49] I note that in Liu $7,671.70 was claimed for transcripts. The amount claimed by the plaintiff in this proceeding is a far more reasonable $1,819.70. Accordingly, in the result, the plaintiff is awarded its disbursement's claim of $168,071.45 minus $2,750.00 for a total award of $165,321.45 for its disbursements.

PROPORTIONALITY

[50] The costs award claimed is almost equal to the damage award. Is that reasonable, appropriate, and fair, in these circumstances? See *McCurdy and Maille*, 2024 ONSC 1222 at paragraph 17 and *Block v. Brown* at paragraphs 83 and 87. The defendant relies on *Ramcharran* at paragraphs 41 through to 55 where the damaged award was, approximately, $417,000.00. The plaintiff sought $394,629.15 in costs. The costs award was dramatically reduced to, approximately, $179,000.00, inclusive of costs, HST, and disbursements.

[51] In *McCurdy et al. v. Maille et al.*, 2024 ONSC 1222, the plaintiff received a net award of, approximately, $1.75 million inclusive of prejudgment interest. See paragraph one. The plaintiff claimed costs of $650,330.50 plus disbursements of $57,472.07. See paragraphs seven and eight of that case.

[52] The Court awarded costs of $375,000.00 plus HST of $48,750.00 plus disbursements of $55,000.00 for a grand total of $478,750.00 all inclusive. See paragraph 67.

[53] The plaintiff relies on *Barry v. Anantharajah*, 2024 ONSC 1267 (CanLII), wherein the plaintiff, after a three week jury trial was awarded $16,160.50 in damage. See paragraph 14 of that case. It was held that the plaintiff was more successful than the defendant at trial. See paragraph 17. The plaintiff asked for costs of, approximately, $400,000.00 but was awarded $300,000.00 inclusive of costs, disbursements, and HST. See paragraphs 33 and 34.

[54] I believe that the law is accurately set out in *Block v. Brown et al*, 2022 ONSC 3199 where Justice Shaw indicates as follows:

> PARAGRAPH 79
>
> The issue of proportionality is at the heart of this dispute regarding costs. The defendant's assert that the fees sought by the plaintiff are disproportionate to the amount recovered, (which according to paragraph two was $25,000.00). As I've already noted the plaintiff is seeking costs of over four times the amount of that settlement.
>
> PARAGRAPH 80
>
> Proportionality is clearly a factor although it's not the sole factor to consider when assessing costs. In *Bonaiuto v. Pilot Insurance Company* the plaintiff recovered $5,000.00 after a jury trial for theft and damage of her car. At paragraph seven, Harvison Young, J. found that while costs must be fair and reasonable, the mere fact that costs exceeded the damages does not render an award inappropriate. She awarded the plaintiff costs of $75,932.00 which is 15 times the amount of the recovery at trial. In that case the defendant's unsuccessful theory was that the plaintiff committed fraud.
>
> PARAGRAPH 81
>
> I agree with the comments of McCarthy, J. at paragraph 15 in *Accurate General Contracting Limited v. Tarasco*, 2015 ONSC 5980, that proportionality should not be "routinely invoked to save litigants from the real costs of the proceedings in circumstances where those litigants have put forward an unmeritorious defence to a legitimate claim or have caused proceedings to become unduly prolonged or complicated". This decision has been adopted or approved in several other costs decisions.
>
> PARAGRAPH 82
>
> I note in these reasons I have made no finding that the defendants advanced an unmeritorious defence or unduly protracted or complicated the matter other than the

late acknowledgement that liability was not an issue.

PARAGRAPH 83

While proportionality is a factor to consider, an award of costs must ultimately be one that is fair and reasonable, having regard to all the circumstances.

PARAGRAPH 86

In a recent decision*, Gilbank v. Cooper and English*, Trimble, J. awarded costs of $45,000.00 to the plaintiff following a nine day trial in which he awarded the plaintiff $54,365.00 less $4,500.00 that went to the defendants for their claim. Justice Trimble set out in detail the legal principles to consider when assessing costs. He noted at paragraph 19, that when considering the principle of proportionality, the overarching consideration is determining whether the costs incurred were justified in all the circumstances. Furthermore, a costs award may be appropriate even if it exceeds a damages award.

PARAGRAPH 87

At paragraph 20, Trimble, J. noted that an undue focus on proportionality ignores the principles of indemnity and access to justice. Ultimately, an award of costs must be fair and appropriate.

PARAGRAPH 88

My role as a judge is not to sit as an assessment officer assessing costs. I will not engage in a line-by-line assessment of the Bill of Costs submitted. Rather I will look at the matter in its entirety and determine what is a reasonable amount to the unsuccessful party to pay. I've also considered the principles of proportionality but not to the exclusion of the principles of indemnity and access to justice. When I consider the totality of the factors set out herein, costs should be fixed on a partial indemnity basis in the amount of $50,000.00 plus HST of $6,500.00 and disbursements of $36,623.00 plus HST of $3,657.45 for a total of $96,780.93. Those costs shall be paid by the defendants to the plaintiff forthwith.

PARAGRAPH 90

While this cost award exceeds the damage settlement, it is an appropriate amount given the totality of the circumstances.

CONCLUSION

[55] Accordingly, I find that a potential costs award that more or less equals the damages award can be awarded provided it's fair, reasonable and appropriate in all the circumstances.

PRINCIPLES OF INDEMNITY, RULE 57.01(1) AND ACCESS TO JUSTICE

[56] The defendant claims that since it had partial successes at trial relating to future loss of income, past attendant care, contributory negligence and home renovations, that there should be an additional reduction in costs due to the result of, as they put it, as the defendant put it, "split success", see paragraphs 56 through 66 of the defendant's submission.

[57] In short, the defendant says it should get credit for winning some minor skirmishes before dramatically losing the war. And I note that the jury award was, approximately, double the last offer to settle made by the defendant; the jury awarded, approximately, double that amount. The defendant submission is directly contrary to the Rule 49.10 directive requiring the losing party to pay partial indemnity costs up to the date of the plaintiff's offer to settle and substantial indemnity, thereafter, if the judgment is more favourable than the terms of the offer to settle as is the case in this litigation.

[58] Regarding Mr. Smitiuch's billing for a $925.00 full indemnity counsel fee in particular, and the plaintiff's total costs in general, Rule 57.01(1)(i) allows me to consider any other matter relevant to the greater question of costs. At tab four of the defendant's submission, Mr. Wong in his Bill of Costs notes that his call to the bar was 1999. Pretty close to Mr. Smitiuch's call. He charges -- that is Mr. Wong, charges $350.00 per hour. Frankly, given Mr. Wong's experience and talent level, I consider that $350.00 amount to be woefully inadequate given much larger fees I have seen billed by less experienced counsel for many years now.

[59] Rule 57.01(1) allows for consideration to be given to experience of counsel. In my opinion, effectiveness of counsel is far more important than mere experience. For some reason this does not appear to be discussed in any great detail in the cases provided to me. Usually, for example, references to counsel's effectiveness are briefly summarized in cases such as "it was hard fought". That phrase was used in *Sanson v. Paterson* and *Sanson v. Security National Insurance*, 2022 ONSC, unreported, where -- there are two files with long numbers, I don't need to repeat them, but that comment "the matter was hard fought", was -- appears at paragraph 13 and I note the plaintiff's counsel was Mr. Smitiuch in that case.

[60] In my opinion, advocacy is an art form. In order to be a true artist in advocacy, what is required is a total commitment in both effort and passion towards the trial proceedings being conducted. To effectively and convincingly conduct a trial, whether criminal or civil, long hours of dedicated effort are demanded of accomplished counsel. This is no nine to five job. Intelligence, experience and a dogged work ethic are essential tools of the

effective and, ultimately, the very few great advocates. In my opinion true greatness is achieved when a court room spectator sees the artform in action and comments, “it looks easy, I could do it”. You could say that watching Mr. Smitiuch’s performance.

[61] Given the commitment and skills demanded of a truly accomplished and great -- in rare cases of a great advocate, ... a commanding performance conducted by an artist in advocacy is a rare and precious item. In my 12 years of presiding over hundreds, maybe even close to a thousand proceedings on the bench, I have seen truly excellent advocacy on only a very few occasions. Mr. Smitiuch’s conduct in this trial qualifies as one of those very rare jewels of advocacy that it is a wonderful treat to behold. Mr. Smitiuch’s cross examinations were concise and penetrating. His submissions were succinct and persuasive. His presentation of Mr. Pye’s case was brilliant, especially so, as Mr. Pye presented as a miserable old man, as accurately described by his ex-girlfriend, Sue Duncan.

[62] A lost art rediscovered by Mr. Smitiuch and displayed on more than one occasion, is the ability and instinct to know when to forcefully press a point, bold as a lion and when to retreat in a losing fight in order to gain credibility and higher ground on the next battle to come. There are no dead horses flogged by Mr. Smitiuch in litigation. Being a top litigator is a very lonely experience. I’m not saying I’m a top litigator but I know what it’s like. It entails long hours in the office, when everyone else has gone home. Maintaining normal family relationships is virtually impossible given the time and focus required to excel at the top of the profession. Many interpersonal sacrifices are a significant cost, that is demanded of all dedicated litigators.

[63] In my opinion, Mr. Smitiuch is an advocate who is as excellent as any I’ve encountered in the 40 years of trial litigation I’ve conducted, both as a judge and as a lawyer. It is no coincidence that the jury awarded miserable, unlikeable, old Mr. Pye an award well in excess of the settlement offers.

[64] In order to retain excellent counsel, such as this in a serious case, most litigants would gladly pay $925.00 an hour in order to guarantee outstanding superior representation, especially since we are talking Canadian dollars.

CONCLUSION AS TO COSTS

[65] For all the reasons outlined, I find that the plaintiff’s costs claims are reasonable, fair, and appropriate in all the circumstances of this case. Accordingly, there will be an order for costs as follows;

> Partial indemnity costs from the commencement of this action up to an including February 1st, 2023, directed to Smitiuch Injury Law in the amount of $218,925.00. HST on total costs out of partial indemnity rate directed to Smitiuch Injury Law in the amount of $28,460.25.

(c) substantial indemnity cost from and after February 2nd, 2023, directed to Smitiuch Injury Law in the amount of $516,060.00.

(d) HST on total cost at a substantial indemnity rate, directed to Smitiuch Injury Law in the amount of $67,087.80.

(e) disbursement in the amount of $168,071.45 minus $2,750.00 inclusive of tax directed to Smitiuch Injury Law. Total disbursements inclusive of tax are fixed at $165,321.45.

[66] Total costs inclusive of costs, tax, and disbursements, therefore, are fixed at $998,604.50 minus $2,750.00 equaling total cost tax disbursements fixed at $995,854.50 directed to Smitiuch Injury Law.

PREJUDGMENT INTEREST

[67] As reviewed earlier the Court has an overriding discretion pursuant to section 130 of the *Courts of Justice Act* to increase or reduce the rate of prejudgment interest, to change the interest period or disallow interest altogether notwithstanding the provisions of section 127 and 128(1) of the *Courts of Justice Act*. See *R. v. Maria Berendsen* at paragraph 1 and *Cobb v. Long Estate* at paragraph 73. And that's the Court of Appeal decision.

[68] The defendant submits at paragraphs 84 to 86 of its submissions that the prejudgment interest for general damages claimed is governed by section 128(1) of the *CJA,* that's the *Courts of Justice Act* and submits the prejudgment interest should be 0.8 per cent per year from July 2nd, 2016 and should be suspended from September 20, 2022 due to the adjournment request brought by the plaintiff.

[69] The plaintiff submits that I should exercise my discretion under section 130 of the *CJA* and that's the *Courts of Justice Act* and increase the prejudgment interest rate to five per cent. I agree that from 2016 to September/October 2023, both interest rates and inflation increased dramatically. In 2016 the inflation rate was 1.43 per cent. In 2022 inflation reached 6.8 per cent. As outlined in Exhibit 1, Canada Interest Rate chart from 2014 to 2022, interest rates were relatively flat and well under two per cent or even one per cent for some time. However, in 2022, interest rates moved rapidly upward and reached five per cent in 2023.

[70] Section 130(2) of the *Courts of Justice Act* allows me to consider a variety of factors including changes in market interest rates. During the time period of this litigation, interest fluctuated between just under one per cent to five per cent. I note that in *Cobb v. Long Estate*, this is the Superior Court decision at paragraph 24, the Court ordered on November 13th, 2015 prejudgment interest rate at a rate of three per cent, stating that three per cent was entirely just and reasonable after taking section 130(2) factors into account. In late 2015, according to Exhibit 1, Canada Interest Rate chart, market interest rates were around

one per cent but the Court ordered three per cent. The *Cobb* decision was appealed to the Court of Appeal and the Court of Appeal maintained the prejudgment interest rate at three per cent. See paragraphs 76, 77, and 130 of the Court of Appeal judgment.

[71] Given the factors outlined in section 130(2) of the *Courts of Justice Act* and the fluctuating market interest rates as detailed in Exhibit 1, Canada Interest Rate, and the increases in the inflation rate as set out by the plaintiff in its submissions, I find a fair and reasonable prejudgment interest rate to be three per cent. As outlined in Tab 2 of the plaintiff's submission the period to be considered is July 2nd, 2016 to October 12th, 2023 for general and special damages and July 2nd, 2016 to September 18th, 2023 for past loss of income.

[72] Counsel are agreed that at three per cent prejudgment rate an award of prejudgment interest should be fixed at a total of $84,933.00, which consists of $72,618.00 for general damages, prejudgment interest; $6,819.00 past loss of income, prejudgment interest of $5,496.00 prejudgment interest for special damages, for an overall total of $84,933.00 for prejudgment interest.

POST JUDGMENT INTEREST

[73] Post judgement interest is calculated at seven per cent from October 12th, 2023, until February 13th, 2024, when the judgment was paid by the defendant for a total of $23,770.00 for post judgment interest.

[74] Accordingly, the final order as to cost and interest is as follows; the defendant, accordingly, is ordered to pay forthwith, the following amounts to Smitiuch Injury Law;

(1) Costs fixed at $995,854.50.

(2) Prejudgment interest fixed at $84,933.00.

(3) Post judgment interest fixed at $23,770.00

[75] The overall total, therefore, to be paid is $1,104,557.50.

[76] Now, I've made the endorsement accordingly and attached paragraph 24 of the plaintiff's submissions which outlines the details of the partial and substantial indemnity costs. So, I'll put that into the record, Madam Registrar and I've made copies for both counsel.

[77] Thank you very much counsel.

Skarica J.

Released: September 6, 2024

CITATION: Pye v. Di Trapani et. al., 2024 ONSC 2265
COURT FILE NO.: CV-16-58529
DATE: 2024-09-06

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

William “Bill” Pye

Plaintiff

- **and –**

Carmela Di Trapani and Vincenzo Di Trapani

Defendants

REASONS FOR JUDGMENT (ORALLY)

Skarica, J

Released: September 6, 2024

Tab 297

CanLII

Laczko v. Alexander, 2012 ONCA 872 (CanLII)

Source:	Court of Appeal for Ontario
Date:	2012-12-11
File number:	M41762
Citation:	Laczko v. Alexander, 2012 ONCA 872 (CanLII), <https://canlii.ca/t/h4c2v>, retrieved on 2026-01-19

COURT OF APPEAL FOR ONTARIO

CITATION: Laczko v. Alexander, 2012 ONCA 872
DATE: 20121211
DOCKET: M41762

Weiler J.A. (In Chambers)

BETWEEN

Janos Laczko

Plaintiff (Responding Party)

and

Edwin Alexander and Mercedes Property Management Ltd.

Defendants (Moving Parties)

William G. Scott, for the moving parties

Richard A. Wellenreiter, for the responding party

Heard: November 13, 2012

On a motion to extend the time to appeal the order of Justice Jane A. Milanetti of the Superior Court of Justice, dated May 22, 2012.

COSTS ENDORSEMENT

[1] The applicant's motion to extend the time to appeal the order striking his statement of defence was heard November 13, 2012, with reasons dismissing the motion released on November 20, 2012. At that time, I indicated that the respondent was entitled to his costs with submissions as to costs to be made in writing. The time for providing submissions now having passed, this is my endorsement on costs.

[2] Laczko seeks costs on a substantial indemnity basis. The court's discretion to award costs is governed by s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and by r. 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. It is well established that costs should be awarded on a partial indemnity basis unless justice can only be done by complete or substantial indemnification: see *Foulis v. Robinson* (1978), 1978 CanLII 1307 (ON CA), 21 O.R. (2d) 769 (C.A.). As a general rule, justice will only require substantial indemnification where there has been "reprehensible, scandalous or outrageous conduct on the part of one of the parties": *Young v. Young,* 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134. Alexander's unjustified failure to comply with his disclosure obligations was no doubt worthy of rebuke; "reprehensible," "scandalous," or "outrageous," it was not. I would, therefore, decline to award costs on a substantial indemnity basis.

[3] Having regard to the result achieved, the complexity of the motion, and the general principles set out in r. 57.01(1), I order that costs be awarded on a partial indemnity basis, fixed in the amount of $ 7,044.36, inclusive of disbursements and applicable taxes.

"K.M. Weiler J.A."

Tab 298

CJC CCM
Canadian Judicial Council
Conseil canadien de la magistrature

Judges Act, R.S.C., 1985, c. J-1
Canadian Judicial Council Inquiries and Investigations By-laws,
SOR/2015-203

REPORT OF THE REVIEW PANEL CONSTITUTED BY THE CANADIAN JUDICIAL COUNCIL REGARDING THE HONOURABLE D.E. SPIRO

I. Overview

[1] In reasons dated 5 January 2021, Associate Chief Justice K.G. Nielsen, as Vice-Chair of the Judicial Conduct Committee of the Canadian Judicial Council ("CJC") referred a complaint concerning Justice D.E. Spiro of the Tax Court of Canada to a Judicial Conduct Review Panel (the "Panel"). The Panel was constituted under the CJC's *Inquiries and Investigations By-Laws 2015* ("By-Laws").

[2] The referral was based on a number of distinct complaints concerning the alleged conduct of the judge in respect of the potential appointment of Dr. Valentina Azarova to the position of Director of the University of Toronto Faculty of Law's International Human Rights Program ("IHRP").

[3] The task of the Panel is to determine whether an Inquiry Committee is to be constituted to inquire into the conduct of the judge. By s. 2(4) of the By-Laws, the Panel may do so:

> only if it determines that the matter might be serious enough to warrant the removal of the judge.

[4] The test for removal of a judge from office is properly a stringent one. It has been articulated in a number of cases. The Supreme Court of Canada's formulation of the test in *Therrien (Re)*, 2001 SCC 35 at para. 147, is often cited:

> before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

[5] Based on the record before the Panel, which we detail below, we cannot conclude that the judge's conduct in this matter "might be serious enough to warrant" his removal from office.

[6] The judge, as we will relate, has properly recognized the mistakes he has made in this matter. These errors are serious but in the end do not, in our view, warrant the imposition of the ultimate penalty for judicial misconduct.

[7] These are our reasons for so concluding.

II. Detailed Background

[8] Before turning to the background, it is important to discuss the process undertaken by a Judicial Conduct Review Panel under the By-Laws. It begins with the consideration of a complaint or allegation concerning the conduct of a federally appointed judge by the Chairperson or Vice-Chairperson of the CJC's Judicial Conduct Committee.

[9] By s. 2(1) of the By-Laws, they may constitute a Judicial Conduct Review Panel if they determine that the complaint or allegation "on its face might be serious enough to warrant the removal of a judge".

[10] The Chairperson or Vice-Chairperson is primarily concerned with a facial inquiry based on the complaint before them. It is informed by the particulars of the complaint or allegation and any response received from the judge and their Chief Justice. But it is not a reflection of any fact-finding by the Chairperson or Vice-Chairperson. That individual is concerned with determining only if "on its face" the matter "might be" serious enough to warrant removal of the judge.

[11] The Judicial Conduct Review Panel in turn is also concerned with the threshold that the matter "might be serious enough" to warrant removal of a judge. However, under s. 2(4) of the By-Laws, the Judicial Conduct Review Panel may only direct an inquiry committee if it so "determines".

[12] The Chairperson or Vice-Chairperson is concerned with reviewing the matter "on its face"; the Judicial Conduct Review Panel must go further and make a determination that the matter "might be" serious enough to warrant removal.

[13] This suggests a more searching inquiry by the Judicial Conduct Review Panel into the matter. However, even here the Judicial Conduct Review Panel is constrained by the record placed before it. It does not hold a hearing, witnesses are not examined or cross-examined before it; it may not undertake investigations or gather new information: *In the Matter of the Honourable Gérard Dugré of the Superior Court of Québec*, CJC File 18-0318, 30 August 2019; *In the Matter of the Honourable F.J.C. Newbould*, CJC File 2015-203, 8 February 2017.

[14] The Judicial Conduct Review Panel does not make findings of fact. That said, in making a determination as to whether the matter might be serious enough to warrant the removal of the judge, it is necessary for the panel to weigh the evidence in the record before it to see if the case as presented reaches the "might be" threshold. How high a probability is "might be"? That is not stated anywhere but it surely reflects a threshold higher than "slim to none" but short of "on a balance of probabilities". The "might be" threshold must reflect the very significant seriousness of the remedy of removal; the "crime" must fit the "punishment".

[15] In addition to the various complaints we have received, we have reviewed submissions from the judge and a brief from his legal counsel and a submission from the judge's Chief Justice (the latter is very favourable to the judge). The judge has also put before us the *Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law*, 15 March 2021, prepared by the Honourable Thomas A. Cromwell C.C. ("Cromwell Report"). The Panel specifically avoided reviewing the Cromwell Report and media articles concerning it until it was formally tendered to us by counsel for the judge.

[16] It is instructive to now relate the background of the matter in the context of the essential complaints received by the CJC.

The Essential Complaints

[17] The various complaints received by the CJC were largely based on newspaper and media accounts surrounding the alleged withdrawal of an offer to appoint Dr. Azarova as Director of the IHRP. It was essentially said that the judge improperly interfered in the appointment process. In the words of one complainant:

> An offer of employment in the Faculty's International Human Rights Programme was made to Dr. Valentina Azarova and she accepted that offer in August. I understand that she was the unanimous choice of the academic members of the search committee.
>
> The offer was later rescinded by Dean Iacobucci. I have been told that between the acceptance of the offer and its withdrawal, a sitting judge in the Tax Court made personal contact with the Faculty in respect of the wisdom of that offer.
>
> The committee Chair was, I believe, advised that the Judge contacted the Faculty to express concern about Dr. Azarova's academic research on the operation of international law in the context of Israel's occupation of the Palestinian Territories. Shortly thereafter, Dr. Azarova's offer was rescinded.

[18] This complainant further submitted:

> The reports further allege that the interference may have been motivated by a judge's disapproval of Dr. Azarova's research on Israeli occupation of Palestinian lands. If that were so, it would be very troubling. It would put the integrity and impartiality of the Court in jeopardy. Any party or lawyer before it who is Palestinian, Arab, or Muslim could reasonably fear bias.

[19] These sentiments are reflective of the concerns expressed by other complainants.

The University of Toronto Appointment Process

[20] The facts surrounding this process are somewhat complicated and detailed. Here we will endeavour to restrict our recital to the essential facts on the record before us necessary to give context for the determination we must make. A very comprehensive review of the process can be found in the Cromwell Report.

[21] In the summer of 2020 the Faculty of Law was in a search to fill the Director's position. The search committee had by late summer focussed on a preferred candidate – Dr. Valentina Azarova.

[22] Dr. Azarova is not a Canadian citizen herself although her spouse is. She currently lives and works in Germany and her ability to work for the University either remotely from Germany in the last quarter in 2020 and in person in Canada as of January 2021 became a central issue in the appointment process.

[23] We will restrict the background details to the involvement of the judge.

[24] The judge was a former student of the Faculty of Law. After graduation he has maintained a close relationship with the Faculty and has undertaken very significant fundraising efforts on behalf of the Faculty. By all accounts he is a very engaged alumnus and he has done much good work in supporting the law school financially and professionally. This financial support, both personally and through the judge's larger family, has been very significant. One could surmise that it was this background as distinct from the judge's judicial position that prompted the approach to him that we detail below.

[25] In this context through his work on funding campaigns, he became friends with Chantelle Courtney, the Assistant Vice-President Divisional Relations, Division of University Enhancement. Justice Spiro maintained contact from time to time with Ms. Courtney and on 30 August 2020 she emailed the judge asking for a social “catch up”.

[26] Prior to his appointment to the bench, Justice Spiro was on the Board of Directors of the Centre for Israel and Jewish Affairs (“CIJA”). According to its website CIJA is the “advocacy agent of Jewish federations across Canada” dedicated to “protecting Jewish life in Canada”. One of its priorities is “educating Canadians about the important role Israel plays in Jewish life”. The Vice-President, University and Local Partner Services for CIJA is Ms. Judy Zelikovitz. She of course came to know the judge through his work as a Director of CIJA.

[27] Rumours were apparently surfacing in at least Israel that Dr. Azarova was imminently to be appointed as Director of the IHRP. Dr. Azarova’s professional work and scholarly writing is felt by some in the larger community to be that of a “major anti-Israeli activist”. This possibility prompted Professor Gerald M. Steinberg, the President Institute for NGO Research (centred in Jerusalem) to start an email thread with a number of CIJA officials in Toronto including Ms. Zelikovitz.

[28] Professor Steinberg’s first email to, among others, Ms. Zelikovitz was sent on 2 September 2020 at 1:24 p.m. (we presume if it matters that these are Toronto times).

[29] Professor Steinberg noted his view that Dr. Azarova was “anti-Israel” whose academic work “is almost entirely focussed on promoting the Palestinian narrative, the Israel “apartheid” theme, war crimes, etc.” Professor Steinberg suggested a course of action in this email:

> If someone could quietly find out the current status and confirm Azarova’s pending appointment, that would be very helpful.
>
> The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising.
>
> I am preparing a short briefing sheet and would be happy to talk about this.

[30] At 1:44 p.m. on 2 September 2020, Ms. Zelikovitz emailed two other recipients of the Steinberg initiating email inquiring:

> Is this something we can ask David Spiro about?

[31] At 10:41 a.m. the next day, one of the recipients of the Steinberg email and the Zelikovitz email responded:

> I think you can approach him. He is friends with the Dean, Ed Iacobucci. I a [*sic*] copying him on this, as I don't think his reaching out to Ed compromises his judicial position. If I am wrong, David will so advise.

[32] Because the entire email thread was included in Justice Spiro's brief filed with the Panel by his counsel and because each email, including that culminating in the "cc: David Spiro" of 3 September 2020, included Professor Steinberg's original subject line "re: U of T pending appointment of major anti-Israeli activist to important law school position", we assume that Justice Spiro received the entire thread including Professor Steinberg's originating email outlining his proposed strategy for dealing with the matter – "The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising."

[33] We also assume that Ms. Zelikovitz provided the judge with the memo Professor Steinberg promised in his originating email describing the objections to Dr. Azarova's appointment. A draft of what we would assume to be that memorandum is attached as the last page to Appendix "A" to the judge's brief filed with the Panel. It very critically reviews Dr. Azarova's professional background in some depth and it states:

> Dr. Azarova's career is clearly devoted to anti-Israel advocacy, and the evidence indicates that she will use the position to promote her political agendas and a discriminatory focus on Israel, while ignoring other human rights concerns.

[34] Coincidentally, Ms. Courtney and the judge had arranged their "telephone catch-up" for 4 September 2020. That call was made and the parties apparently chatted about various matters affecting the faculty.

[35] According to Justice Spiro in his written response to the complaints dated 26 October 2020, he turned the conversation to the Azarova matter. In his words:

> I did not tell Ms. Courtney, or anyone else at the University, that the candidate, Dr. Valentina Azarova, should not be appointed. I expressed no opinion, political or otherwise, on the merits of her scholarship or the political positions she had advocated. I did express the hope that sufficient due diligence would be done in advance of any such appointment to enable the University of Toronto and the Faculty of Law to respond effectively if and when criticism arose as a result of the candidate's appointment. I mentioned the matter to Ms. Courtney, at the end of a personal telephone conversation that she had scheduled with me, because I cared deeply about the University and its law school.

[36] Justice Spiro continued later in his response:

> At no time during our conversation did I express any personal complaint, concern, disapproval, or displeasure in respect of Dr. Azarova's scholarship. My only concern was that the University and Faculty of Law should be prepared for what I had been told by Ms. Zelikovitz would likely be an adverse and highly public reaction.
>
> To the extent that I described to Ms. Courtney the sources of such a reaction, it is possible that she understood me as expressing my own personal views. In retrospect, I should have made it clear to Ms. Courtney that I was not expressing my own personal views in describing the reaction that I feared might ensue.

[37] We consider this distinction between giving voice to a concern that a pending appointment might cause adverse publicity for the faculty, and active lobbying against the appointment based on a personal disapproval of the candidate, is of some importance. The former characterization suggests loyalty to the faculty and love of the institution as a motivation, the latter rather goes beyond that and suggests one immersing oneself in the political, social and cultural controversy. In drawing the distinction, we do not mean to suggest that while the latter characterization would clearly not be acceptable conduct, the former is. We will return to this point below.

[38] We have not had the benefit of any input from Chantelle Courtney. Mr. Cromwell did. We reproduce this substantial portion of the Cromwell Report (at p. 32) (the AVP is Ms. Courtney, the Alumnus is the judge):

> As was previously mentioned, towards the end of the conversation on the stewardship call with the AVP, the Alumnus raised the appointment of a new IHRP Director. Their respective recollections of the conversation are consistent on the essential points.
>
> The Alumnus asked the AVP whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered that the Alumnus indicated that as a judge he could not become involved but that he wanted to alert the University that if the appointment were made it would be controversial and could cause reputational harm to the University and particularly to the Faculty of Law. He wanted to ensure that the University did the necessary due diligence.

> It is unclear to me exactly what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred to the Preferred Candidate's published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern.

[39] Justice Spiro did not have any contact with Dean Iacobucci. He specifically declined to approach the Dean. Justice Spiro at the same time as the Courtney conversation was speaking with another professor in the faculty with whom he had a close relationship. Justice Spiro raised the potential Azarova appointment and forwarded the Steinberg memorandum to this professor. This professor apparently did nothing with the information.

[40] Ms. Courtney learned that the Azarova appointment had not been finalized and so advised Justice Spiro. This appears to be the sum total of the judge's involvement in the matter. For her part, Ms. Courtney relayed the information from the judge to the dean of the faculty. The Cromwell Report suggests that the dean became more actively involved in the process thereafter.

[41] Of his conduct, the judge at his first opportunity in his letter to the CJC of 26 October 2020 acknowledged his mistakes and expressed his remorse. He said:

> I begin by acknowledging that I raised a controversial matter with an official of the University of Toronto on September 4, 2020 in respect of an appointment, or prospective appointment, at the Faculty of Law. In doing so, I made a mistake. I deeply regret that mistake.
>
> My contact with that official led to unintended consequences including raising a question about my absolute commitment to impartiality toward all litigants and counsel who appear before me in the Tax Court of Canada. I deeply regret that as well.

[42] On 6 September 2020 Dean Iacobucci advised the search committee that Dr. Azarova's appointment would not go ahead.

[43] The Cromwell Report concluded that on the basis of the materials Mr. Cromwell had reviewed and considered, he could not draw the inference that Justice Spiro's inquiry "factored into the decision to terminate the Preferred Candidate's candidacy" (p. 47).

[44] We said earlier that the distinction between actively campaigning against Dr. Azarova's appointment and on the contrary expressing concern that the appointment might subject the faculty to adverse criticism and publicity was of some importance. In confirming that the latter

characterization is the appropriate one on the facts here, the Cromwell Report is again useful. Mr. Cromwell stated (at p. 48) (the "Alumnus" is the judge, the "professor" is Professor Steinberg and the "Organization" is the CIJA):

> Based on my view, it appears that the nature of the Alumnus' inquiry has been misunderstood in much of the public discussion. It has at various points been described as an "objection" to the candidacy, as "external interference", as a "complaint" about the candidacy, as "outside political pressure", as an "attempt to block the appointment."
>
> Those descriptions adequately convey the intent of the professor's approach to the Organization that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.
>
> This would hardly be news to anyone who had taken a moment or two to look on the Internet. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evidence "as soon as [the Preferred Candidate's] name was announced.

III. Analysis

[45] The complaints can be viewed as having at least two aspects. First it is felt to be serious misconduct for a judge to actively join with campaigners whose strategy is to prevent the appointment of a person to an influential position who is actively promoting interests at variance with those of the campaigners.

[46] Second, to the extent that joining such a campaign reflects on the personal beliefs of the judge, it encourages the view that the judge could not in the exercise of their judicial duties free themselves from the bias such personal views, it is argued, suggest.

[47] Dealing first with the issue of perceived bias, and to be specific it would be seen to be a bias against Palestinian, Arab or Muslim interests, nothing in the career of David Spiro or his work supports such a suggestion. The supporting letters we have received from persons of undoubted reputation and credibility speak of the judge as a highly ethical man of moderate views, of empathy for people of all backgrounds.

[48] One esteemed commentator said this of Justice Spiro:

> I watched with admiration as his career developed and was delighted by his appointment to the Court. I knew he would be an excellent judge. He is a person of complete integrity with a powerful commitment to fairness. He is principled, thoughtful and committed to justice – just the sort of person we want on the bench. In the more than 30 years I have

> known David, I have never heard a single ill-word about him in any context. He is widely respected and admired for his quiet, modest and principled approach to life.

[49] The finding of bias in the context of judging depends on this test:

> … what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly
>
> *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394.

[50] In our view right thinking persons apprised of the conduct of Justice Spiro over his career and extending even to this affair – apprised in accurate terms, as opposed to the "facts" suggested in earlier media coverage of this matter, could not conclude that the case for the judge being biased as suggested has been made out. This is important because s. 65(2)(d) of the *Judges Act*, R.S.C. 1985, c. J-1, is forward looking. The subsection reads:

> (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> …
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> …
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[51] It will be seen that a judge's current predicament may have a forward looking disability associated with it: where it has placed the judge in a position "incompatible with due execution of that office". It is here where a current perception of bias may effectively prevent the judge from functioning in the future. Indeed that is a concern expressed by a number of the complainants. How can a Palestinian, Arab or Muslim have faith that the judge would deal with their issues free of bias?

[52] But that fear, we conclude, is based on misinformation and speculation that in fact is inaccurate as we have discussed. The conduct of Justice Spiro is not as originally characterized in the record before us.

[53] It is true that Justice Spiro held the position before his appointment as a Director of CIJA but most, if not all, appointees to judicial office have backgrounds that include similar associations or active community, religious or cultural involvement. How could it be otherwise?

[54] All judges carry the burdens of their past on appointment to office. We take a serious oath to effectively subordinate our personal views to the rule of law.

[55] *Yukon Francophone School Board Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, was a case involving French language education rights. The trial judge was involved as a governor of a philanthropic francophone community organization in Alberta. The Supreme Court of Canada did not view this fact by itself as contributing to a reasonable apprehension of bias:

> [61] Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

[56] The following observations by the court are apposite here:

> [33] Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. Bora Laskin noted that the strength of the common law lies in part in the fact that
>
> > the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so.
>
> ("The Common Law is Alive and Well — And, Well?" (1975), 9 *L. Soc'y Gaz.* 92, at p. 99)
>
> [34] The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", they are not required to abandon who they are or what they know: *S. (R.D.)*, at para. 29, per L'Heureux-Dubé and McLachlin JJ.; see also *S. (R.D.)*, at para. 119, per Cory J. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities. As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

> None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.
>
> ("Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217)

[57] In our view, the future fear of bias concern is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee in this matter.

[58] Turning to the first aspect, the spectre of misconduct associated with actively taking part in a campaign whose strategy was to prevent the appointment of Dr. Azarova, it is based on the inaccurate premise that Justice Spiro did so and indeed did so in direct contact with Dean Iacobucci. That did not occur on the record before us, a record again made much stronger and definitive with the addition of the Cromwell Report.

[59] What instead we have is an active, generous alumnus who has historically and admirably supported his law school, expressing concern that a potential faculty appointment will subject the institution to unwanted controversy and harsh publicity. It was, however, a serious mistake for the judge to pursue this course and he has admitted that in the strongest possible terms. In our view, however, it does not represent misconduct justifying the constitution of an Inquiry Committee.

[60] The CJC has provided guidance for Judicial Conduct Review Panels in *Judicial Conduct: A Reference Guide for Chief Justices*.

[61] In declining to send a matter to an Inquiry Committee, the Guide suggests (at 16):

> Panels have also considered absence of bad faith as a key factor. Other relevant factors have included: an expression of confidence on the part of the judge's Chief Justice; a long and distinguished career; the absence of any similar conduct in the past.

[62] All of these factors favour the judge before us. In our view, it cannot be said on the record before us that, in the language of *Therrien*, the judge's conduct was:

> … so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office…

[63] More to the point, in the words of s. 2(4) of the By-Laws, we cannot conclude:

> that the matter might be serious enough to warrant the removal of the judge.

[64] We believe that the judge's acknowledgment of his mistakes and his sincere expression of remorse mean that further remedial action by the CJC or his Chief Justice is not required. We so advise the Vice-Chairperson.

Dated this 13th day of April, 2021

Original signed

_____

The Honourable R.J. Bauman, Chief Justice of British Columbia

Original signed

_____

The Honourable M.D. Popescul, Chief Justice of the Court of Queen's Bench for Saskatchewan

Original signed

_____

L'honorable Manon Savard, Juge en chef du Québec

Original signed

_____

L'honorable Denis Jacques, Cour supérieure du Québec

Original signed

_____

Dr. Jennifer N. Davis, Ph.D.

Tab 299

CJC CCM
Canadian Judicial Council
Conseil canadien de la magistrature

DECISION OF THE REVIEW PANEL
IN THE MATTER OF:
THE HONOURABLE ANDREW J. GOODMAN
OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO
CJC Files: 24-0799 and 24-0818

Review Panel Members:
The Honourable Shane I. Perlmutter
The Honourable John S. Little
Mr. Curtis Kleisinger

Background

[1] On August 12, 2024, just before the scheduled sentence appeal of Mr. Peter Khill, the Honourable Andrew Goodman of the Superior Court of Justice of Ontario wrote to the Associate Chief Justice of the Ontario Court of Appeal. Justice Goodman explained that in imposing sentence on Mr. Khill on June 6, 2023, Justice Goodman used the wrong version of his reasons, which, in "a momentary lapse of judgment", led to him reading out a custodial sentence of eight years for Mr. Khill's conviction for manslaughter when he had intended to impose a sentence of six years. As Justice Goodman explained in his letter, following the delivery of his sentencing decision and after consulting judicial colleagues, he concluded that he was *functus officio,* having formally finalized the judicial task at hand. In other words, Justice Goodman believed that his jurisdiction over the matter was exhausted, such that, until his August 12, 2024 letter (14 months after the pronouncement of sentence), he took no steps to address his error as to the length of sentence imposed.

[2] Two separate complaints were submitted to the Canadian Judicial Council (CJC). In addition to complaining about Justice Goodman reading the wrong version of his sentencing decision, the complainants allege that Justice Goodman was aware of his error but failed to make it known for more than a year. One of the two complaints also alleges that it was improper for Justice Goodman to have consulted with judicial colleagues about how to address his error as this "reeks of some type of conspiracy to obstruct justice by all of the parties". This complainant requests that these judicial colleagues also be disciplined.

[3] Following a review of these complaints and after having received the related and responding comments of Justice Goodman and the Honourable Geoffrey Morawetz, the Chief Justice of the Superior Court of Justice, pursuant to s. 7.11(b) of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (*Review Procedures (2023)*), the Chair of the Judicial Conduct Committee, as the reviewing member in this matter, referred these complaints to a Review Panel to be established by the Council under s. 8.1(1) of the *Review Procedures (2023)*.

Review Panel Role

[4] The role of the Review Panel is set out in section 8.9 of the *Review Procedures (2023)*, which provides:

> 8.9(1) In accordance with s. 101 of the Act, where a review panel determines that the judge's removal from office could be justified, it shall refer the complaint to the Council for the establishment of a full hearing panel.
>
> (2) In accordance with s. 102 of the Act, where the review panel determines that the judge's removal from office could not be justified, it may either dismiss the complaint or take one of the following actions if it considers it appropriate to do so in the circumstances:
>
> (a) issue a private or public expression of concern;

(b) issue a private or public warning;

(c) issue a private or public reprimand;

(d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;

(e) order the judge to take specific measures, including attending counselling or a continuing education course;

(f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);

(g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

8.9(3) In the case of an action under paragraphs 102(a), (b) and (c) and for greater certainty, the ranking of severity for these three actions, from the least severe to the most severe, is as follows: - an expression of concern; - a warning; - a reprimand;

Record

[5] For the purpose of making its decision, the Review Panel reviewed the initial complaints file communicated by the Chair of the Conduct Committee, which included the two complaints, comments received by Justice Goodman, and comments from Chief Justice Morawetz. On April 21, 2025, Justice Goodman's counsel provided his response to the Review Panel. As well, on May 2, 2025, Chief Justice Morawetz provided additional comments.

[6] While not part of the record, we note that on February 27, 2025, the Ontario Court of Appeal rendered its decision in *R. v. Khill*, 2025 ONCA 146, in which it imposed the six-year custodial sentence that Justice Goodman had intended to impose. In doing so (and having received Justice Goodman's August 12, 2024 letter), the Court of Appeal decision included the following:

> **134** The appellant and the respondent accept that the trial judge intended to impose a sentence of six years' imprisonment, and that his letter does not suggest that he had changed his mind about the appropriate sentence after the fact. In these circumstances, the trial judge would not have been *functus officio*, neither in the moment when he realized his mistake, nor "in the immediate wake of that sentencing" when he consulted with his colleagues. The parties take this position notwithstanding the trial judge's delay, which they variously describe as "most unfortunate" and "extreme and concerning".
>
> **135** We agree with these characterizations of the delay in this case. We also agree with the parties' submissions that the trial judge was not *functus officio*. He could have, and should have, corrected his mistake, either in the moment or shortly afterwards. The trial judge attributes his inaction to the advice he received from judicial colleagues. That he was "dissuaded" from taking further action at the time suggests that he considered his initial instincts were correct and, but for the advice of his colleagues, he would have acted differently.
>
> **136** Consultation among colleagues is an important, necessary, and rewarding facet of judicial life. The advice or guidance of a trusted judicial colleague can be a lifeline for a judge who is grappling with a thorny legal issue, or for a judge who needs a sounding board while navigating

> difficult terrain on the path to achieving justice for the parties. There is nothing inappropriate about this type of consultation. But for a trial judge, it can be no more than that - it is a consultation, not a collaboration. At the end of the day, it is the presiding judge who decides the case, and it is that judge who must "own" their decision.
>
> **137** It was the responsibility of the trial judge, and his alone, to determine whether he was *functus officio*, and whether any further action was required. It was not the responsibility of his judicial colleagues. Unlike the trial judge, his colleagues have no voice in these proceedings.
>
> **138** Whether or not the trial judge believed he was *functus officio*, doing nothing was not a reasonable option in the circumstances, especially when he imposed a penitentiary sentence that was 1/3 (i.e., two years) longer than the one he had intended to impose. He should have promptly requested that the parties attend before him, in open court, to address the matter.
>
> **139** Had he done so, counsel would have been able to provide assistance to the trial judge on whether he was in fact *functus officio*. They could have brought the authorities discussed above to the trial judge's attention. The submissions of counsel may have caused the trial judge to see things in a different light and correct his mistake at that time. But even if the trial judge was not convinced that he could make the correction, addressing the situation with counsel in open court would have resulted in the creation of a proper record for this court to review; instead, we are left to resolve the issue based on a letter from the trial judge written over a year after the sentence was imposed.
>
> **140** Fundamentally, there is considerable intrinsic value in airing such matters in open court. It permits the parties and the public to know what has happened, and to witness first-hand the steps being taken to rectify a judicial error. This type of openness and accountability enhances the integrity of the administration of justice; inaction does not.

[7] While the complaints at hand are to now be read in light of the foregoing comments by the Court of Appeal, the task of this Review Panel is not to revisit the critical comments of the Court of Appeal, which are grounded in legal principles. Rather, the considerations for this Review Panel are grounded in principles of judicial conduct. In other words, even if there may be in this case obvious overlap in the commentary of the Court of Appeal and this Review Panel's normative discussion as to what Justice Goodman should have done given his judicial role and the ethical and legal responsibilities that accompany it, this Review Panel will not in any further detail address the Court of Appeal's disposition in the *Khill* matter.

Justice Goodman's Position

[8] With respect to the complaint about misreading the sentence, Justice Goodman indicates that he misspoke and has apologized unreservedly for his mistake. With respect to the allegation that Justice Goodman's delay in correcting the sentence was not just inappropriate conduct but, in fact, judicial misconduct, it is Justice Goodman's position that because he considered himself to be *functus officio*, he was prevented from correcting the error in the period immediately following sentencing. As such, he proceeded on the basis that the only time at which his error could be corrected was when the appeal was about to be heard. Justice Goodman submits that, while his error did not result in Mr. Khill serving any additional time in custody since he was on release pending the appeal, he understands the criticism of the length of time it took him to figure out a formal way to address the error. He sincerely apologizes for any negative impact his delay

caused. Justice Goodman's counsel submits on his behalf that had it not been for Justice Goodman's decision to disclose his error, whether the Court of Appeal would have reduced Mr. Khill's sentence is open to question. Lastly, it is Justice Goodman's position that the consultation undertaken by him with other colleagues was part of the candid exchange of ideas and expertise that is often invaluable in judicial decision-making.

Applicable Test

[9] The test to be applied in determining whether the judge's removal from office could be justified was set out in the *Report to the Canadian Judicial Council of the Inquiry Committee in Marshall*, August 27, 1990, at p. 27 (see also, *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11). That test (the *Marshall* test) can be expressed in the form of the following question:

> Is the conduct alleged so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office?

[10] The Review Panel notes that it does not make ultimate findings of fact and is constrained by its role and the nature of the record placed before it. What the Review Panel will and must do is weigh the available evidence to determine whether the conduct meets the "judge's removal from office could be justified" standard in subsection 8.9(1) of the *Review Procedures (2023)*.

Ethical Principles for Judges

[11] It is well accepted that the CJC's publication *Ethical Principles for Judges* is not a code of conduct and that it ought not to be used as such. That important publication and the principles and commentaries contained therein are, however, a highly useful reference point for, among other things, identifying how and where a judge's conduct may fall short of a necessarily applicable ethical principle formulated and endorsed so as to ensure a requisite respect and public confidence. That ongoing respect and public confidence is not only necessary for any individual judge, but also for the institution of the judiciary itself whose independence is so inextricably tied to a public belief that a judge's conduct will be ethical and judicious. Indeed, a consideration of the applicable principles will often identify or assist in recognizing what informs judiciousness and what might be the most judicious choice. In examining the alleged conduct in the context of the present complaints, of particular relevance are the principles discussed below taken from the *Ethical Principles for Judges*:

> 2.A.1 Public confidence in the judiciary is essential to an effective judicial system and, ultimately, the rule of law. Within that system, judges hold positions of significant trust, confidence and responsibility. Conduct, in and out of court, that exhibits integrity ensures public respect for and confidence in the individual judge and, more significantly, contributes to public confidence in the judiciary and the judicial system as a whole. Judges should therefore act with a high degree of decorum, propriety and humanity.
>
> 3.A.1 Diligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.

> 3.A.2 Judges should exhibit diligence and competence in the performance of all their judicial duties, including adjudication, case management, pre-trial or settlement conferences and participation in court administration.

[12] Even though the *Ethical Principles for Judges* and its commentaries are not a code of conduct, as mentioned, the above principles and commentary underscore both the practical and theoretical importance of what is discussed in the Analysis section of these reasons.

Analysis

Delivery of the Wrong Sentence

[13] The referral from the Chair of the Judicial Conduct Committee raises for consideration Justice Goodman's alleged lack of diligence in the performance of judicial duties by not rendering a sentencing judgment in a careful and attentive way. Justice Goodman had prepared several drafts of his decision and inadvertently read the wrong one at the sentencing hearing. Justice Goodman has unreservedly apologized for his mistake. As pointed out by Justice Goodman's counsel, judges are human and make mistakes like anyone else. The Review Panel accepts that this error (as admitted by Justice Goodman), in light of Justice Goodman's apology, does not irreparably compromise his ability to discharge his duties of office and thus does not suggest that his removal from office could be justified.

Consulting Judicial Colleagues

[14] One of the two complaints raises the question of whether it was appropriate for Justice Goodman to consult his judicial colleagues about how he could rectify the error he committed in delivering the wrong sentence. It was this consultation that Justice Goodman, in part, attributes to his delay in disclosing his error (which delay is further discussed below).

[15] The Ontario Court of Appeal addressed the question of consultation among judicial colleagues in their comments quoted above from paragraphs 136 and 137 of *Khill*. As discussed by the Ontario Court of Appeal, there is nothing inappropriate about consultation among judicial colleagues. Such judicial colleagues can provide useful and valuable advice and guidance or simply act as a trusted sounding board when a judge is considering the path towards achieving justice for the parties. However, as expressly stated by the Ontario Court of Appeal, "[a]t the end of the day, it is the presiding judge who decides the case, and it is that judge who must 'own' their decision". Here, Justice Goodman has always been clear that it was his decision *alone* not to act at the time he realized his error in the length of the sentence he delivered.

[16] The Review Panel has nothing further to add to the comments and conclusions of the Court of Appeal on the appropriateness of consultation among judicial colleagues other than to suggest that the transparency expected of a federally appointed judge (in his reply to these complaints Justice Goodman indicates his commitment to transparency) would generally require immediate reporting to his or her Chief Justice of circumstances like these which could potentially undermine public confidence (in both the judge and the court). Indeed, such prompt reporting

may have led to Justice Goodman quickly addressing this situation in the manner ultimately prescribed by the Court of Appeal (as detailed above).

In these circumstances, the Review Panel will not be pursuing this issue any further.

Delay in Correcting the Sentence

[17] The Review Panel shares the concerns of the Chair of the Judicial Conduct Committee, who, in his referral of this matter, noted that Justice Goodman minimizes the consequences of his mistaken sentence by indicating Mr. Khill was released on bail and, ultimately, he did correct his error by sending his August 12, 2024 letter to the Associate Chief Justice of the Ontario Court of Appeal. The submission of his counsel to the Review Panel indicates that Justice Goodman thought the lack of any immediate prejudice to Mr. Khill's liberty interest allowed him time to consider in a more deliberative manner the most appropriate way to ensure that Mr. Khill's appeal proceeded to a correct understanding of the sentence he intended. In their submissions, his counsel also notes that Justice Goodman apologizes for any negative impact this delay caused. Despite the above explanation by his counsel, the Review Panel remains concerned that Justice Goodman still fails to fully appreciate how the delay in correcting his error affects public confidence in the judiciary.

[18] As noted in the *Ethical Principles for Judges*, judges hold positions of significant trust. Conduct that exhibits integrity ensures public respect for, and confidence in, the judiciary and the judicial system as a whole. From the public's perspective, it may be reasonably expected that in order to ensure that justice was delivered, immediately upon realizing his mistake, Justice Goodman would have acted judiciously by taking prompt steps to correct it. By not doing so, others who may appear before Justice Goodman may be concerned about similar injudicious treatment should Justice Goodman again realize he has committed an error. They themselves may question whether Justice Goodman fully appreciates the need to act judiciously by acting promptly to address and correct any mistake.

[19] As indicated by the Ontario Court of Appeal, Justice Goodman could have, and should have, corrected his mistake, either in the moment or shortly afterwards. As noted by the Ontario Court of Appeal, whether he believed he was *functus officio*, doing nothing was not a reasonable option. A member of the public, who is aware of Justice Goodman's delayed efforts to correct his mistake in the case at hand, may properly question whether Justice Goodman appreciates the importance of openness and accountability in promptly identifying any error that may have been committed by him, not only for purposes of transparency, but also to rectify the error. Not doing so risks undermining the confidence of the public in the judiciary.

[20] Similarly, the Review Panel is concerned that Justice Goodman does not fully appreciate how his errors affected Mr. Khill and his counsel. While Justice Goodman suggests a lack of prejudice to Mr. Khill (as he was released on bail and ultimately the sentence imposed by the Court of Appeal reflects the sentence Justice Goodman intended to impose), Mr. Khill, his counsel, and Crown counsel would have been adversely affected by this delay. Mr. Khill, for a significant time, remained under the belief that he was sentenced to a substantially lengthier sentence. It may very well have been that if Justice Goodman's error as to the length of sentence had been immediately

corrected, there would not have been any appeal. Presumably, the need for the appeal would have come at some cost and certainly additional effort on the part of both Crown and defence counsel.

[21] This Review Panel wishes to be clear in stating that Justice Goodman's inaction in this case should not be rationalized or reduced to the inaction that follows from a mere legal misapprehension. Instead, Justice Goodman's inaction constitutes a serious ethical lapse and a failure as discussed in the Court of Appeal's decision (at paragraphs 134-140) to act in a manner that would have more reasonably and promptly provided the requisite notice and transparency to not only the parties, but also the broader public whose own understanding is critical to maintaining public confidence in the administration of justice.

This leads to the question of disposition.

[22] Albeit in a completely different factual situation, the Ontario Judicial Council (OJC) in *Re Zabel*, (OJC, September 11, 2017), at paragraph 41, adopted the following list of factors as identified in *Re Chisvin*, (OJC, November 26, 2012) as relevant to the assessment of the appropriate sanction for judicial misconduct:

i. Whether the misconduct is an isolated incident or evidenced a pattern of misconduct;

ii. The nature, extent and frequency of occurrence of the acts of misconduct;

iii. Whether the misconduct occurred in or out of the courtroom;

iv. Whether the misconduct occurred in the judge's official capacity or in his private life;

v. Whether the judge has acknowledged or recognized that the acts occurred;

vi. Whether the judge has evidenced an effort to change or modify his conduct;

vii. The length of service on the bench;

viii. Whether there have been prior complaints about this judge;

ix. The effect the misconduct has upon the integrity of and respect for the judiciary; and

x. The extent to which the judge exploited his position to satisfy his personal desires.

[23] We find it helpful to assess this complaint in light of certain of those factors applicable to the conduct that gave rise to the complaints.

[24] This was an isolated incident, which occurred in the courtroom. Justice Goodman has clearly acknowledged the incident and has offered an unreserved apology to this Panel, though not to those most directly affected. To our knowledge, he has no history of substantiated complaints. There was no exploitation for personal gain.

[25] Nowhere in his response to the complaint or in his counsel's submissions to this Panel does Justice Goodman explain what steps he might take to ensure that this type of conduct does not happen again. We are satisfied that the precise conduct, namely reading the wrong judgment, will not occur again. But Justice Goodman could and should have taken more proactive steps following his recognition of his mistake, such as consulting with legal counsel for the Court, consulting with the Crown and defence counsel, and consulting with his Chief Justice. His fear of embarrassment and personal angst are greatly outweighed by the consequences of his inaction or delayed action on the public's perception of the administration of justice.

[26] As to the effect of his conduct on the integrity of and respect for the judicial office, Justice Goodman's initial inaction and failure to act in a way more consistent with the "correcting" of an error undermines the openness and accountability that is required to assist in enhancing the integrity of the administration of justice. To that extent, his conduct reflects poorly on the integrity of and respect for the judicial office.

[27] Notwithstanding those serious concerns, Justice Goodman has had a long and distinguished legal and judicial career. Chief Justice Morawetz notes that since being appointed a judge 15 years ago, Justice Goodman has demonstrated his commitment to serving the public interest through his expertise in criminal law and going above and beyond by frequently presiding through non-sit and vacation weeks to ensure that cases are heard in a timely way.

[28] We accept as well Justice Goodman's counsel's submission that there is no evidence that at any time Justice Goodman was acting in bad faith, though that is just one factor for consideration for constituting a Hearing Panel. Albeit after an inappropriately lengthy delay, Justice Goodman, on his own accord, acted so as to identify his error for the Ontario Court of Appeal.

[29] Despite our obvious and stated concerns, the Review Panel has determined that Justice Goodman's removal from office cannot be justified. The Review Panel has come to that determination given that Justice Goodman's conduct is not so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role that public confidence would be sufficiently undermined to render him incapable of executing the judicial office.

[30] Ideally, judicial conduct proceedings are meant to be, where possible, when removal is not required, both remedial and restorative of public confidence.

[31] While the Review Panel has determined that Justice Goodman's removal from office cannot be justified, given the Review Panel's concerns about Justice Goodman's conduct as outlined above, the Review Panel considers it appropriate in the circumstances to take action under s. 8.9(2) of the *Review Procedures (2023)*.

[32] In the *Decision of the Review Panel in the Matter of: The Honourable Diana Piccoli of the Superior Court of Justice of Ontario CJC File 23-0399*, Chief Justice Wood, writing for the Review Panel, discussed some of what must be the relevant considerations in deciding whether an expression of concern, warning, or reprimand is appropriate (as an available action under s. 102 of

the *Judges Act*, R.S.C., 1985, c. J-1, as reflected in s. 8.9(2)(a), (b), and (c) of the *Review Procedures (2023)*):

> Subsections (a) to (c) of section 102 set out the alternative actions of an expression of concern, warning or reprimand. We find these are hierarchical in nature with an expression of concern being the least serious. In choosing the appropriate sanction we must consider the circumstances, including: a) The seriousness of the conduct, b) The need for deterrence, c) The amelioration of any harm to the administration of justice or the reputation of the judiciary, d) The self reporting and subsequent training in relation to ethical issues for judges, e) The reputation of Justice Piccoli in the legal community.

[33] It is the Review Panel's view that an expression of concern is to be considered as an appropriate action when it is less apparent that there has been an ethical lapse. That is not the case here.

[34] A warning may be appropriate where there is a concern about possible future ethical lapses.[1] With these reasons and the acknowledgements by Justice Goodman as described above, the Review Panel has no concern that in the future Justice Goodman will fall into a similar ethical lapse.

[35] However, the seriousness of this breach suggests on the part of this Review Panel a need for a denunciatory expression signaling a message that needs to be sent, not just to Justice Goodman, but to all members of the judiciary and the public at large.

[36] In the case at hand, the Review Panel considers it appropriate to issue a reprimand to Justice Goodman because of the Review Panel's view that Justice Goodman's delay in disclosing his error could only have adversely affected public confidence in the judiciary for the reasons set out above. In addition, as indicated, the Review Panel remains concerned that Justice Goodman's lack of apology to Mr. Khill and to Crown and defence counsel reveals that he does not fully appreciate how his conduct has adversely affected them. It is the Review Panel's view that this conduct is particularly serious and the amelioration of the reputation of the judiciary requires that the public see a clear and strong message of condemnation of Justice Goodman's injudicious conduct. In so doing, the Review Panel notes that in circumstances like those at hand a reprimand is the most severe sanction available short of a recommendation for removal. For these same reasons and for the purpose of transparency, the Review Panel has also determined that this be considered a public (rather than a private) reprimand.

[37] In addition, given the Review Panel's concern that Justice Goodman has still not fully addressed how his conduct has impacted Mr. Khill as well as Crown and defence counsel, in accordance with its jurisdiction under s. 8.9(2)(d) of the *Review Procedures (2023),* the Review

---

[1] This gradation of gravity and the respective distinct purposes of those measures were recently discussed in the power point presentation "Intermediate Discipline Sanctions for Judges: A Missed Opportunity to Develop Guidelines" and lecture of Professor Stephen G.A. Pitel of Western University in March 2025 (expected to be accessible in a forthcoming article).

Panel orders that Justice Goodman issue an apology in a form that addresses the foregoing concerns.

Conclusion

[38] In conclusion, the Review Panel has determined that Justice Goodman's removal from office cannot be justified. However, in accordance with its jurisdiction under subsections 8.9(2)(c) and (d) of the *Review Procedures (2023)*, by these reasons, the Review Panel now issues a public reprimand to Justice Goodman for his injudicious conduct and orders that within 30 days, he apologize to Crown counsel and counsel for Mr. Khill, with Mr. Khill's counsel to relay this apology to Mr. Khill in a manner they consider appropriate.

Dated this 23rd day of June, 2025

Original signed

_____

The Honourable Shane I. Perlmutter

Original signed

_____

The Honourable John S. Little

Original signed

_____

Mr. Curtis Kleisinger

Tab 300

DECISION OF THE REVIEW PANEL

IN THE MATTER OF:

THE HONOURABLE CHARLES C. CHANG
OF THE SUPERIOR COURT OF JUSTICE OF ONTARIO
CJC File 23-0488

Review Panel Members:
The Honourable Associate Chief Justice Kenneth G. Nielsen
The Honourable Justice Johanna Price
Ms. Julia Pavlenko

Background

[1] In a complaint filed with the Canadian Judicial Council (Council) on September 12, 2023, the complainant alleged that Justice Chang behaved inappropriately during a family law hearing. Justice Chang was seized of an urgent motion for temporary orders respecting decision-making responsibility, parenting time and the children's attendance at school and daycare.

[2] The complainant stated that Justice Chang was verbally abusive and intimidating during the hearing.

[3] Pursuant to s. 89 of the *Judges Act*, R.S.C., 1985, c. J-1 *(Act)*, the complaint was referred to a Screening Officer.

[4] Pursuant to section 91 of the *Act*, and further to the review of the complaint, the Screening Officer referred the complaint for the designation of a reviewing member.

[5] In accordance with section 93 of the *Act* and section 7.3 of the "*Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*" (*Review Procedures (2023)*), the reviewing member sought Justice Chang's submissions as well as those of the Honourable Geoffrey B. Morawetz, Chief Justice of the Superior Court of Justice of Ontario.

[6] Further to the review of Justice Chang's file, the reviewing member referred the complaint to the Council for the establishment of a review panel. The reviewing member did not believe the conduct of Justice Chang justified his removal from judicial office but did believe that an action under section 102 of the *Act* could be appropriate.

Ethical Principles for Judges

[7] The most current version of the Ethical Principles for Judges was adopted by Council in 2021 (*Ethical Principles 2021*).

[8] The relevant Ethical Principles in the present matter provide as follows:

> 2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavour to treat all participants in the judicial process with civility and respect.

> 2.C.3 The circumstances of some cases and the conduct of counsel and parties sometimes require judges to act with an appropriate measure of firmness and to emphasize decisiveness, promptness, the prevention of abuse of process or improper treatment of participants in the adjudicative process. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process.

[9] The *Ethical Principles 2021* are not a code of conduct. They provide aspirational guidance to federally appointed judges in relation to ethical issues.

Council's Judicial Complaint Review Procedure Legal Framework

[10] The conduct review process for federally appointed judges is set out in sections 79 to 140 of the *Act*. It is supplemented by the *Review Procedures (2023)*.

[11] The first stage of review for a complaint related to judicial conduct is carried out by a screening officer. The jurisdiction of a screening officer to dismiss a complaint is found in section 90(1) of the *Act*:

> **90 (1)** Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it
>
> > **(a)** is frivolous, vexatious or made for an improper purpose or is an abuse of process;
> >
> > **(b)** was not made for a reason referred to in paragraphs 80(a) to (d); or
> >
> > **(c)** does not meet the other screening criteria specified by the Council.

[12] Where the screening officer does not dismiss a complaint, it is referred to the second stage of the process and Council will designate a "reviewing member" who is a member of the Judicial Conduct Committee to review the complaint. The reviewing member is required to give the judge who is the subject of the complaint an opportunity to make written submissions. Section 94(1) of the *Act* sets out the jurisdiction of the reviewing member to dismiss the complaint:

> **94 (1)** The reviewing member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

[13] If the reviewing member does not dismiss the complaint, they shall refer it to the third stage of the process for the establishment of a review panel and provide the panel with their observations and any recommendation about how the complaint should be resolved.

[14] A review panel is established under section 98(1) of the *Act*. It is required to give the judge who is the subject of the complaint as well as their chief justice an opportunity to provide written submissions. Section 101 of the *Act* sets out the circumstances when a review panel shall refer the matter to Council for establishment of a full hearing panel:

> **101** The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.

[15] If the matter is not referred to a full hearing panel, the options available to the review panel are set out in section 102 of the *Act*:

> **102** If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances:
>
> **(a)** issue a private or public expression of concern;
>
> **(b)** issue a private or public warning;
>
> **(c)** issue a private or public reprimand;
>
> **(d)** order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;
>
> **(e)** order the judge to take specific measures, including attending counselling or a continuing education course;
>
> **(f)** take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);
>
> **(g)** with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

First Stage of the Judicial Conduct Review Process in this Matter

[16] On December 21, 2023, the screening officer appointed to review the complaint referred it to Council for designation of a reviewing member. The reasons for doing so stated in part that the conduct of Justice Chang could be interpreted as demonstrating disrespect for the parties, their counsel, and the hearing process. The screening officer referred to many interventions by Justice Chang that were of concern and could have been

interpreted as disrespectful or even involved yelling. The screening officer noted that the judge frequently interrupted counsel and raised his voice in an intimidating manner, as if he was asserting the power of his position over those in a subordinate position to him.

[17] Referring to the Ethical Principles 2.C.1 and 2.C.3, the screening officer concluded that Justice Chang repeatedly expressed his dissatisfaction with the fact that this was a "he said/she said" scenario with little or no neutral, external evidence to support the parties' assertions.

[18] As a result, the screening officer recommended that the complaint be referred to the Council for the designation of a reviewing member pursuant to section 91 of the *Judges Act*.

The Second Stage of the Judicial Conduct Review Process in this Matter

[19] As required by the *Act* and the *Review Procedures (2023)*, the reviewing member sought submissions from Justice Chang and the Chief Justice of the Superior Court of Justice of Ontario, the Honourable Geoffrey B. Morawetz. Justice Chang's counsel provided submissions on his behalf on April 12, 2024.

[20] Justice Chang's counsel submitted that the context of the hearing ought to be considered in assessing whether the comments identified by the screening officer as raising concerns amounted to judicial misconduct.

[21] Justice Chang's counsel submitted that this hearing was not a typical day in court as Justice Chang was informed that the Milton Courthouse, where the matter before Justice Chang was being heard, was to be closed indefinitely due to substance contamination in the building. Justice Chang's counsel wrote that Justice Chang was "very distressed" about this development as this was the second time in the recent past that the Milton Courthouse was subject to closure as a result of issues related to the physical plant.

[22] Referring to the comments identified by the screening officer as raising concerns, Justice Chang's counsel submitted that they were Justice Chang's colloquial and direct way of expressing the concerns he had as the judge dealing with an application that he considered to have been poorly prepared and ill-considered.

[23] Justice Chang expressed the view that parties less familiar with the day-to-day 'cut and thrust' of a judicial colloquy might interpret his 'firmness' as crossing the line into actual disrespect. While that was never Justice Chang's intent, he indicated that he has

reflected on this issue and sought out the assistance of a retired judicial colleague as a mentor on this area.

[24] Justice Chang's counsel submitted that, in the context of Principle 2.C.1, the comments were not made for the purpose or intent of intimidating or insulting counsel, nor were they intended to be uncivil when properly considered in the circumstances of the hearing. He explained that the identified comments were an effort by Justice Chang to engage the authority recognized by Principle 2.C.3 that recognizes the need for judges to have resort to "an appropriate level of firmness" in certain cases. Justice Chang's comments were made for the purpose of controlling and focusing the conduct and submissions of counsel in his courtroom in an urgent, contested application involving "extreme, extreme, extreme" allegations of abuse.

[25] In this regard, Justice Chang's counsel explained that Justice Chang would ask the reviewing member to consider whether the complaint could be dismissed pursuant to section 6.7(2) of the *Review Procedures (2023)* because, while the conduct is concerning, it does not rise to the level of judicial misconduct requiring discipline when the comments are considered in context.

[26] In his letter to the reviewing member, Justice Chang apologized to the complainant if she left the hearing feeling that she had been verbally abused and intimidated. Referring to the context of the hearing and indicating that counsel for both parties were not assisting the court, Justice Chang recognized that at times his words and tone were not appropriate. He wrote that he is mindful that all of a jurist's words during a court hearing not only impact participants, but may also affect the dignity and solemnity of the hearing itself and regretted that his approach may have caused any diminution of the public's respect for the court.

[27] The reviewing member considered the file and decided to refer the matter to a review panel.

[28] In relation to the closing of the Milton Courthouse, the reviewing member was of the opinion that while obviously causing a lot of rearrangement, reassignments and uncertainty, the closing of the courthouse cannot be given the emphasis that Justice Chang's counsel and Justice Chang put on this to justify the judge's interventions and tone in court. When called to preside over a case, a judge must be able to put aside the frustrations of the day, whether professional or personal, otherwise it becomes impossible to carry out their functions in compliance with Ethical Principle 2.C.1.

[29] In relation to the nature of the case to be decided, the reviewing member expressed that urgent family law matters can be a stressful situation for the parties involved and perhaps, at times, for the judges. However, these situations are not so unique and rare, especially in the family law context, that a judge is not able to deal with them, no doubt with a certain firmness, as recognized in Principle 2.C.3, but still with civility.

[30] In relation to the submission that there was lack of cooperation by counsel, the reviewing member stated that there is no doubt that without the cooperation of counsel, it becomes very difficult and frustrating for a judge to decide a matter, particularly in the family law context, as the decision can have serious consequences for the parties and their children. However, cases where there is limited proof and that contain "he says – she says" evidence are not so unique and rare that judges cannot get to the crux of the parties' submissions by asking them, in a firm but appropriate way, the questions that may assist them in their decision-making. Judges must also keep in mind that counsel work with what is being provided to them by the parties, which can be minimal in some circumstances.

[31] The submissions from Justice Chang, while recognizing that the tone was not always appropriate, do not refer to the audio recording, but only to the transcript. If the whole context of the hearing is to be considered, the audio recording cannot be ignored and all interventions by Justice Chang must also be considered together.

[32] The reviewing member stated that when listening to the audio recording, it becomes apparent that Justice Chang was impatient and that his tone was inappropriate, abusive and intimidating at times, even more so towards the end of the hearing. His interventions go beyond what is usually considered the exercise of proper firmness, as recognized in Principle 2.C.3. His interventions did not preserve the honour and dignity of both the individual proceedings and the administration of justice more generally, as indicated in Principle 2.C.1. The fact that Justice Chang's counsel submitted that Justice Chang's many interventions were not directed towards the complainant cannot serve as a justification of his overall behaviour. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process. Justice Chang's interventions did not have the effect of maintaining such a proper balance.

[33] The fact that Justice Chang indicated that he sought the assistance of a retired judicial colleague as a mentor is certainly a step in the right direction. What is not clear, however, is who he consulted and whether this was a one-time request for assistance or whether it is meant to be on-going for a certain time.

[34] The matter is not trivial, Justice Chang is at the beginning of his judicial career and the Council cannot simply hope that this won't happen again if Justice Chang faces yet

another urgent matter where counsel are ill-prepared, and if meaning is to be given to the Ethical Principles for Judges 2.C.1 and 2.C.3.

[35] The reviewing member recommended that the review panel use a remedy available under section 102 of the Act along with the encouragement to Justice Chang to get the proper mentoring from current or retired members of the court.

Third Stage of the Judicial Conduct Review Process: Review Panel

[36] As required by the section 99 of the *Act* and the *Review Procedures (2023)*, the review panel received all the materials provided to the reviewing member. In addition, we invited submissions from Chief Justice Morawetz and Justice Chang.

[37] In a letter dated May 28, 2024, Chief Justice Morawetz wrote that Justice Chang was known to be a very hard-working judge and always accepts all cases without complaint or hesitation, even last-minute assignments. That Justice Chang is well liked and respected by all his judicial colleagues. He added that Justice Chang has a strong sense of justice and common sense that he applies to all cases. By reputation, although he can be outspoken, he is always frank and clear to all parties and counsel — a quality appreciated by most counsel and indeed significantly praised by the Bar in Halton where he presides.

[38] Chief Justice Morawetz had no doubt that Justice Chang sincerely accepted the complaint as a lesson learned — a reminder that his commitment to fairness and access to justice must be tempered with patience and the dignity and solemnity of the court process.

[39] In a letter dated June 10, 2024, Justice Chang wrote that he accepted the reviewing member's evaluation of the circumstances and his assessment of the record and added that his original submissions were not intended to suggest that he did not accept those concerns identified by the reviewing member.

Decision of the Review Panel

[40] The review panel first considered whether the matter should be referred to Council for the establishment of a full hearing panel or, alternatively, dismissed.

[41] The criteria for recommending removal are onerous. They are encompassed in what is referred to as the *Marshall* test which can be found in many judicial conduct decisions, including *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11. It requires:

> Conduct which is so manifestly and profoundly destructive of the concept of the impartially, integrity and independence of the judicial role, that

> public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.

[42] The review panel agreed that removal from office is not justified in the circumstances. Therefore, the review panel concludes there was no basis to recommend appointment of a full hearing panel, which should only happen if it was determined that removal from office could be justified.

[43] The review panel also concluded the complaint should not be dismissed and agrees with and adopts the reviewing member's reasons explained above. The Council has an important role in maintaining the confidence of the public in the administration of justice. More specifically, the review panel believes that actions under section 102 of the Act are required:

- To remind Justice Chang of the importance of conducting himself in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. The words, vocabulary and tone of voice used in a hearing may have a detrimental impact on both the litigants and the confidence of the public in the administration of justice.

- To remind Justice Chang that maintaining civility and respect requires him to ensure a proper balance between upholding the right of the parties to be heard and ensuring the efficiency of the process. The nature of the case to be decided and what a judge may consider to be a lack of cooperation by counsel are no justification to brush aside principles of civility and respect.

- Justice Chang ought to have been aware that his behaviour during the hearing was contrary to the standards established in the *Ethical Principles 2021*.

[44] As stated by the reviewing member, this matter is not trivial. Justice Chang is at the beginning of his judicial career and the Council cannot simply hope that this will not happen again if Justice Chang faces yet another urgent matter with similar challenges, and if meaning is to be given to the *Ethical Principles 2021* 2.C.1 and 2.C.3.

[45] In choosing the appropriate action, we have considered the following circumstances:

1. The tone and interventions from Justice Chang at the hearing;

2. The need to reinforce the principles of respect and civility in court and in the administration of justice generally to foster public confidence;

3. The fact that Justice Chang recognizes that his tone and vocabulary were at times inappropriate;

4. The fact that Justice Chang wishes to apologize to the complainant;

5. The fact that Justice Chang agrees with the recommendation of the reviewing member;

6. The willingness of Justice Chang to receive coaching from a senior judge.

[46] We have considered all of the above and conclude that the removal of Justice Chang from office could not be justified. In the result, the complaint is not referred to the Council for the establishment of a full hearing panel pursuant to section 101 of the Act. However, we have determined that the complaint should not be dismissed. Pursuant to subsection 102(a) of the *Act*, the review panel will take an action of a private nature and also, pursuant to subsection 102(f), the review panel orders that Justice Chang engage in more coaching with a senior judge for a duration and frequency that is considered appropriate by his Chief Justice. We conclude that this outcome adequately reflects the nature of the misconduct as well as the role of the Council in maintaining the public confidence in the administration of the justice.

Dated this 4th day of September, 2024.

Original signed

The Honourable Associate Chief Justice Kenneth G. Nielsen

Original signed

The Honourable Justice Johanna Price

Original signed

Ms. Julia Pavlenko

Tab 301

CJC CCM
Canadian Judicial Council
Conseil canadien de la magistrature

DECISION OF THE REVIEW PANEL
IN THE MATTER OF:
THE HONOURABLE ARTHUR DOYLE
OF THE COURT OF KING'S BENCH OF NEW BRUNSWICK
CJC FILE 24-0144

Review Panel Members:
The Honourable Associate Chief Justice Rosalie McGrath
The Honourable Justice Bernette Ho
Mr. Curtis Kleisinger

Background

[1] Justice Arthur Doyle was appointed to the Court of King's Bench of New Brunswick in June of 2019 where he has presided as a judge in Saint John.

[2] On 2 February 2024, the Canadian Judicial Council (Council) received a complaint concerning Justice Doyle jointly submitted by Steven Filshie and Joan E. Zed. The complaint related to a settlement conference over which Justice Doyle presided on 21 December 2023. The conference was held in an attempt to settle a dispute over the estate of Joan Zed's late husband, Kevin Zed. Steven Filshie agreed to help Joan Zed in closing her late husband's estate. Joan Zed's brother-in-law, Peter Zed, Sr., who was a partner with Cox & Palmer in their Saint John office, filed a Caveat concerning the estate and then an Application for Letters of Probate. Peter Zed, Sr.'s son, Peter Zed, Jr., who was a partner with Cox & Palmer in Nova Scotia, also filed a Caveat.

[3] The complainants alleged that, unbeknownst to them at the time, Justice Doyle had worked in the same Cox & Palmer Saint John office as Peter Zed, Sr. and in the same areas of law for many years, until his 2019 judicial appointment. For the complainants, Justice Doyle's professional relationship with Peter Zed, Sr. was an obvious yet undisclosed conflict of interest. In addition, the complainants alleged that Justice Doyle implied that he did not know much about Peter Zed, Sr. and feigned ignorance that Peter Zed, Sr.'s son, Peter Zed, Jr., who also filed a Caveat, worked with Cox & Palmer in Nova Scotia. The complainants allege Justice Doyle "volunteered" to preside at the settlement conference, knowing that his former law partner was in jeopardy of being exposed for extensive wrongdoing; in their view, this is evidence of collusion with Peter Zed, Sr. to defeat justice.

[4] In the complainants' view, the conflict of interest they noted raised a reasonable apprehension of bias. It also ran contrary to case law holding that not only must justice be done, it must be seen to be done. In this instance, the complainants alleged that Justice Doyle's biased conduct undermined public confidence in the judiciary and the justice system.

Ethical Principles for Judges

[5] The latest version of the *Ethical Principles for Judges* was adopted by the Council in 2021. The Principles are not a code of conduct. They provide aspirational guidance to federally appointed judges in relation to ethical issues. With respect to impartiality and potential conflicts of interest, the *Ethical Principles* state the following:

5.A.2 Impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This dual aspect of impartiality is captured in the oft-repeated words that justice must not only be done, but manifestly be seen to be done. The test is whether a reasonable and informed person with knowledge of all relevant

circumstances, viewing the matter realistically and practically, would apprehend a lack of impartiality in the judge.

5.A.8 Judges have a responsibility to promote opportunities for all persons to understand the judicial process and to meaningfully present their case, whether or not they have legal representation. Self-represented persons may sometimes be uninformed about their rights and about the consequences of the options they choose. Judges should take appropriate and reasonable measures to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons. Such measures are consistent with impartiality provided that they are fair to other parties.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

CJC Complaint Review Procedure

[6] The conduct review process for federally appointed judges is set out in sections 79 to 140 of the *Judges Act*, R.S.C. 1985, c. J-1 (“the Act”). It is supplemented by the procedures adopted by the Council in June 2023, which are entitled *Canadian Judicial Council Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (*Review Procedures (2023)*).

[7] The first stage of review for a complaint related to judicial conduct is carried out by a screening officer. The jurisdiction of a screening officer to dismiss a complaint is found in section 90(1) of the Act: 90 (1). Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it (a) is frivolous, vexatious or made for an improper purpose or is an abuse of process; (b) was not made for a reason referred to in paragraphs 80(a) to (d); or (c) does not meet the other screening criteria specified by the Council.

[8] Where the screening officer does not dismiss a complaint, it is referred to the Council for the designation of a “reviewing member” who is a member of the Council. The reviewing member is required to give the judge who is the subject of the complaint an opportunity to make written submissions. Section 94(1) of the Act sets out the jurisdiction of the reviewing member to dismiss the complaint: 94 (1). The reviewing

member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.

[9] If the reviewing member does not dismiss the complaint, they shall refer it to the Council for the establishment of a review panel.

[10] After a review panel is established, section 97 of the Act requires the reviewing member to provide the panel with every document in their possession related to the complaint. They may also provide the panel with their observations about the complaint and any recommendations about how it should be resolved.

[11] A review panel is established under section 98(1) of the Act. It is required to give the judge who is the subject of the complaint as well as their chief justice an opportunity to provide written submissions. Section 101 of the Act sets out the circumstances when a review panel shall refer the matter to the Council for the establishment of a full hearing panel: 101. The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.

[12] If the matter is not referred to a full hearing panel, the options available to the review panel are set out in section 102 of the Act: 102. If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances: (a) issue a private or public expression of concern; (b) issue a private or public warning; (c) issue a private or public reprimand; (d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances; (e) order the judge to take specific measures, including attending counselling or a continuing education course; (f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e); (g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.

Decisions of the Screening Officer and Reviewing Member Concerning Justice Doyle

[13] On 20 March 2024, the screening officer appointed to review the complaint referred it to the Council for the designation of a reviewing member pursuant to section 91 of the Act. The screening officer concluded that it may have been incumbent upon Justice Doyle to declare his past professional relationship with one of the parties to the settlement conference in order to ensure that there were no reasonable grounds for a perception of bias.

[14] As required by the Act and the *Review Procedures (2023)*, the reviewing member sought submissions from Justice Doyle and the Chief Justice of the Court of King's Bench of New Brunswick, The Honourable Tracey DeWare.

[15] Chief Justice DeWare provided a letter dated 20 June 2024, in which she noted that it was difficult to find a judge to conduct the settlement conference. She was pleased that Justice Doyle was available and that the matter had been resolved. Chief Justice DeWare said she did not register any potential conflict at the time of the conference with Peter Zed, Sr. being a party. While in retrospect it would have been better for Justice Doyle to have disclosed his connection with Peter Zed, Sr., she is confident that Justice Doyle's intentions were solely to assist the parties in achieving a collaborative resolution to their issues. She is certain that Justice Doyle would be on the lookout for real and perceived conflicts of interest in the future.

[16] Justice Doyle provided a letter dated 21 June 2024, in which he stated that Peter Zed, Sr. became his law partner in January, 2013, while Peter Zed, Jr. became a partner in the Nova Scotia office of Cox & Palmer in 2017. He wrote that he did not work on any legal files together with Peter Zed, Sr., and they were not (and are not) close acquaintances. He did occasional legal work with Peter Zed, Jr., but again they never socialized. When he was appointed to the bench, Justice Doyle advised that he was told not to have dealings in his court with lawyers from his former law firm or former clients for a period of three years. He was also advised that he could never hear matters where his friends were counsel. He limited his contact with his "friends" to one person and identified them on his conflict list. When he agreed to conduct the settlement conference, he did so thinking about Peter Zed, Sr. as a former law partner appearing before him in general and not as a party to a dispute where a higher onus regarding disclosure may have been applicable, particularly where Ms. Zed was self-represented. Justice Doyle wrote that he did not believe he had a conflict of interest or any need to disclose his previous association with Peter Zed, Sr. or his son, Peter Zed, Jr., because they were not, and are not, close acquaintances, he never worked on legal matters with Peter Zed, Sr. and rarely did so with Peter Zed, Jr., and he had been a judge for four-and-a-half years when he presided over the settlement conference, well past the three-year ban on dealing with cases involving lawyers from his former law firm. While confident that he acted impartially, in retrospect Justice Doyle recognized the difference between Peter Zed, Sr. being a party and not simply counsel, said it was not his intention to conceal any relationship, and that he simply did not identify the potential conflict in the situation. He now recognizes, however, that the complainants could have perceived the situation differently.

[17] In a decision dated 28 August 2024, the reviewing member concluded that the conduct of Justice Doyle was not such as to justify removal from judicial office, but an action under section 102 of the Act would be appropriate. He referred the matter to a review panel, firstly, in reference to the following in the *Ethical Principles for Judges*:

> I.C. Judges exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the independence of the judiciary.

> V.A. Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.
>
> 5.C.2. The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person. As a result, judges should be attentive to both actual conflicts between their self-interest and their duty of impartial adjudication, and to circumstances in which a reasonable and informed person would reasonably apprehend a conflict.
>
> 5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome: a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.
>
> 5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

[18] The decision to refer the matter to a review panel was also based, in part, on the Report of the Review Panel Constituted by the Canadian Judicial Council Regarding the Honourable Kelly A. Gorman, dated 3 May 2023. The reviewing member found that the following ethical principles applied to both this case and the Gorman case:

> 1. Judges should strive to ensure that their conduct, both in and out of Court, maintains and enhances confidence in their impartiality and that of the judiciary.
> 2. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.
> 3. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.

In light of these principles, the reviewing member concluded that Justice Doyle should have disclosed his past connection with Peter Zed, Sr. and Peter Zed, Jr. as lawyers working in the same law firm prior to his judicial appointment. In doing so, this situation could have been prevented and would have enhanced confidence in the judiciary. This is particularly so given that one of the parties to the settlement conference was self-representing.

[19] The reviewing member's decision to refer this matter to a review panel was also based, in part, on Justice Doyle's comments to the Council. Justice Doyle wrote that he agreed to preside at the settlement conference thinking of Peter Zed, Sr. as a former law partner of his appearing in general, as opposed to a former law partner of his appearing in the specific capacity as a party to a dispute, in which a higher onus regarding disclosure may or may not have been applicable, particularly as Joan Zed was representing herself. The reviewing member found this reasoning to be flawed as Justice Doyle should have disclosed his past affiliation with the opposing party whether he viewed the opposing party as a former law partner appearing in general or as a party to a dispute. Furthermore, Justice Doyle wrote that he acted completely impartially in the context of the settlement conference, but recognized that the complainants could have perceived the situation differently. It is precisely because of his previous affiliation with one party that he should have raised that they had worked at the same firm even though they had no real close relationship.

[20] The reviewing member referred this matter to the Council for the establishment of a review panel pursuant to section 95 of the Act, and section 7.11 (b) of the *Review Procedures (2023).* In addition, and in accordance with section 97 of the Act, he observed that the complaint would not justify the removal of Justice Doyle from office. He recommended that the complaint should not be dismissed and an action of a private nature should be issued to Justice Doyle pursuant to section 102 of the Act.

Review Panel Procedure and Disposition

[21] As required by the Act and the *Review Procedures (2023)*, the review panel received all the materials provided to the reviewing member. In addition, we invited submissions from Chief Justice DeWare and Justice Doyle. Chief Justice DeWare and Justice Doyle both referred to their earlier submissions to the reviewing member.

[22] The review panel first considered whether the matter should be referred to the Council for the establishment of a full hearing panel or, alternatively, dismissed. We concluded there was no basis to recommend appointment of a full hearing panel, which should only happen if we were to determine that removal from office could be justified. The criteria for recommending removal are onerous. They are encompassed in what is referred to as the Marshall test, which can be found in many judicial conduct decisions, including *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11. It requires conduct which is so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.

[23] The review panel agreed there was no basis on which Justice Doyle's removal from office could be justified in the circumstances. He thought there was no need to disclose that Peter Zed, Sr. had worked at the same firm after considering that the three-year

window for not hearing from lawyers from his previous firm had passed. It was an honest mistake.

[24] The review panel did not accept that Justice Doyle intentionally concealed knowing Peter Zed, Sr. or that Justice Doyle reached any conclusion about whether Peter Zed, Sr. was engaged in wrongdoing. We concluded, nonetheless, that the complaint should not be dismissed. The factors which led us to this decision include:

- the *Ethical Principles for Judges* make it clear that impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This is a case where a reasonable and informed person with knowledge of all relevant circumstances could apprehend a lack of impartiality in Justice Doyle, given his past professional relationship with one of the parties;
- this was a situation where it was appropriate for a judge to make disclosure of a past working relationship, even if minor, and invite submissions from the parties. However, as the *Ethical Principles for Judges* makes clear, it was Justice Doyle who bore the burden of ensuring respect for the principle of judicial impartiality;
- the obligation on Justice Doyle to notify the parties that there was a previous working relationship was heightened by the fact that one of the parties was self-represented; and
- Justice Doyle was mistaken about the appearance of a conflict of interest at the settlement conference. It did not matter whether Peter Zed, Sr. was a party or counsel at the conference – the appearance of partiality would be present in either case. Disclosing the previous working relationship at the outset of the hearing was required and any appearance of partiality could not be addressed solely by acting in a strictly impartial fashion at the settlement conference.

[25] While this complaint should not be dismissed, we find that there are a number of factors that should mitigate any sanction imposed upon Justice Doyle. Those mitigating factors include:

- at no time did Justice Doyle have an intention to mislead. He did not think that there was a conflict of interest and that is why he did not disclose his previous professional relationship with Peter Zed, Sr.;
- Justice Doyle had every intention to conduct a fair proceeding for the benefit of all parties by helping them resolve their differences without the need for costly and time-consuming litigation;
- Justice Doyle acknowledges that while he did not identify the previous working relationship, the complainants could have perceived the situation differently. This realization should help Justice Doyle in the future; and
- the settlement conference took place outside of a large, urban centre. In such a setting, it can be difficult to find judges, counsel, and parties who have had no previous dealings with each other. Such circumstances may require participants

> who know each other to nevertheless engage in judicial proceedings more frequently than is the case in large cities.

[26] In choosing an appropriate sanction we must consider the circumstances, including: a) the seriousness of the conduct, b) the need for deterrence, c) the amelioration of any harm to the administration of justice or the reputation of the judiciary, d) the mitigating factors, and e) the reputation of Justice Doyle in the legal community.

[27] We have considered all the above and conclude that a private measure pursuant to section 102 of the *Judges Act* is the appropriate sanction. This recognizes the nature of the honest mistake on the part of Justice Doyle and the potential impact on public confidence in the impartiality of the judiciary, along with the mitigating circumstances described above.

Dated this 12th day of November 2024.

Original signed

_____
The Honourable Associate Chief Justice Rosalie McGrath

Original signed

_____
The Honourable Justice Bernette Ho

Original signed

_____
Mr. Curtis Kleisinger

Tab 302

CJC CCM
Canadian Judicial Council
Conseil canadien de la magistrature

DECISION OF THE REVIEW PANEL
IN THE MATTER OF
THE HONOURABLE MARC ST-PIERRE
OF THE SUPERIOR COURT OF QUÉBEC
FILE 24-0784

The text of this decision has been translated from the original decision in French.

Review Panel Members:
The Honourable Larry Landry
The Honourable Miriam Maisonville
Ms. Julia Pavlenko

Background

[1] Justice Marc St-Pierre was appointed to the Superior Court of Québec in June 2008 and sits in the Montréal region.

[2] On April 9, 2024, the Canadian Judicial Council (the Council) received a complaint about Justice St-Pierre from Me Mathieu Decelles, who works as counsel for the Société d'assurance automobile du Québec (SAAQ). The complainant had appeared as an individual before Justice St-Pierre in a judicial review case against the City of Montréal. Justice St-Pierre's decision, handed down in January 2022, went against him, and the Québec Court of Appeal refused him permission to appeal.

[3] On January 8, 2024, a colleague of the complainant, also counsel for the SAAQ, appeared before Justice St-Pierre in a judicial review case against the City of Montréal, a case completely independent of the first one. During the hearing, the colleague in question submitted as case law a decision in which the complainant had acted as counsel. Justice St-Pierre interrupted the colleague and made remarks about the complainant, which are the subject of the complaint lodged with the Council.

[4] The following is a free transcription by Mathieu Decelles of the exchange among Justice St-Pierre, counsel for the City of Montréal, and the complainant's colleague:
(from 46 minutes 25 seconds).

Justice St-Pierre to the parties:
"Hey, don't tell me, wait a second. Hmm (little laugh)."

Justice St-Pierre to counsel for the City of Montréal:
"You don't do zoning, do you?"

Counsel for the City of Montréal:
"No?"

Justice St-Pierre:
"Don't you know Mathieu Decelles?"

Counsel for the City of Montréal:
"Excuse me?"

Justice St-Pierre:
"Don't you know Mathieu Decelles?"

Counsel for the City of Montréal:
"No, I don't know him?"

SAAQ counsel:
"He is my colleague."

Justice St-Pierre:
“I know he’s your colleague, I know him well. You’ll talk to him about me, but don’t get too close because... you risk...”

SAAQ counsel:
“In all transparency I don’t know what you are referring to.”

Justice St-Pierre:
“It’s public, it’s a judgment of, it’s Decelles against the City of Montréal. A zoning issue, he wanted to modify his vehicle, his building.”

“And it took a long, long time, because every time that you know, I did what I’m doing with you, then he was always adding other things, Maître Decelles, he even had the investigation reopened, reamended, amended, he did everything, unfortunately for him he didn’t win.”

This transcription is faithful to the recording of the hearing to which we have listened.

[5] The complainant alleges that it is not a matter of commenting on a judgment rendered in connection with the hearing, but rather of commenting on a party itself, overstepping a judge’s duty of reserve and disrupting the professional calm that any lawyer is entitled to expect from the Court. The complainant further alleges that Justice Marc St-Pierre’s comments were directed personally against him, the complainant.

[6] The complainant alleges that the judge’s actions tainted his impartiality with regard to all cases in which the complainant would be a party, both personally and professionally as a lawyer, since Justice St-Pierre had himself made personal comments about him in another case.

[7] The complainant alleges that these comments call into question Justice St-Pierre’s judicial impartiality and neutrality, especially with regard to the complainant, and that the personalization of Justice Marc St-Pierre’s comments during the hearing on January 8, 2024, in no way meets the standards of judicial conduct for a judge.

Council procedure for review of complaints

[8] Before addressing the allegation made against Justice St-Pierre, an overview of the review process and the principles of judicial ethics is necessary to understand the framework of this process, the mandate and powers of the review panel, and the foundations of the judicial conduct considered by the review panel.

[9] The conduct review process for federally appointed judges is set out in sections 79 to 140 of the *Judges Act*, R.S.C., 1985, c. J-1 (the “*Act*”). It is supplemented by the procedures adopted by the Council in 2023 and recently amended in 2025, which are entitled *Canadian Judicial Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* (“*Review Procedures (2025)*”).

[10] The first step in investigating a complaint about a judge's conduct is carried out by a screening officer. The screening officer's authority to dismiss a complaint is set out in subsection 90(1) of the *Act*:

> *90(1) Subject to subsection (2), a screening officer may dismiss a complaint if they are of the opinion that it (a) is frivolous, vexatious or made for an improper purpose or is an abuse of process; (b) was not made for a reason referred to in paragraphs 80(a) to (d); or (c) does not meet the other screening criteria specified by the Council.*

[11] When the screening officer decides that the complaint should proceed, it is referred to the Council for the designation of a "reviewing member," who is a member of the Council. The reviewing member shall give the judge who is the subject of the complaint an opportunity to provide written observations. Section 94(1) of the *Act* defines the reviewing member's authority to dismiss a complaint:

> *94(1) The reviewing member shall dismiss the complaint if they are of the opinion that it should be dismissed for any reason set out in paragraphs 90(1)(a) to (c) or that it is wholly without merit.*

[12] If the complaint is not dismissed, the reviewing member shall refer it to the Council for the establishment of a review panel. A review panel is made up of three people: a member of the Council, a puisne judge (who is not a member of the Council) and a lay person.

[13] Once the review panel has been established, section 97 of the *Act* requires the reviewing member to provide it with the documents in their possession relating to the complaint. The reviewing member may also provide their observations about the complaint and their recommendations about how it should be resolved.

[14] A review panel is established under subsection 98(1) of the *Act*. This panel is required to give the judge who is the subject of the complaint, as well as their chief justice, an opportunity to provide written submissions. The review panel shall make its decision only on the basis of the substance of the complaint, the information provided to it by the reviewing member, the written submissions provided by the judge in question and the chief justice and any other document that it considers relevant (section 100 of the *Act*).

[15] In examining a complaint, a review panel takes into account the *Ethical Principles for Judges* developed by the Council. Each ethical principle is structured around a statement that expresses a fundamental value or theme of judicial ethics. The principles set out the elements that follow from the statement and describe ideal conduct for a judge, but they are not a code of conduct. The principles are followed by commentaries that serve to explain them and put them into context. For the purposes of this case, the review panel considered the following principles and comments:

V. Judges are impartial and appear to be impartial in the performance of their judicial duties.

V.B. Judges avoid conduct which could reasonably cause others to question their impartiality.

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudgment or intemperate and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.

II.C. Judges treat everyone with civility and respect in the performance of their judicial duties.

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavor to treat all participants in the judicial process with civility and respect.

[16] Finally, under sections 101 and 102 of the *Act*, the review panel may either refer the complaint to the Council, dismiss it or take certain measures set out in the Act. Sections 101 and 102 read as follows:

> *101 The review panel shall refer the complaint to the Council for the establishment of a full hearing panel if it determines that the judge's removal from office could be justified.*
>
> *102 If the review panel does not refer the complaint to the Council under section 101, it may dismiss the complaint or take one or more of the following actions if it considers it appropriate to do so in the circumstances:*
>
> *a) issue a private or public expression of concern;*
> *b) issue a private or public warning;*
> *c) issue a private or public reprimand;*
> *d) order the judge to apologize, either privately or publicly, by whatever means the panel considers appropriate in the circumstances;*
> *e) order the judge to take specific measures, including attending counselling or a continuing education;*
> *f) take any action that the panel considers to be equivalent to any of the actions referred to in paragraphs (a) to (e);*
> *g) with the consent of the judge, take any other action that the panel considers appropriate in the circumstances.*

Decisions of the screening officer and reviewing member concerning Justice St-Pierre

[17] On October 29, 2024, the screening officer appointed to examine the complaint referred it to the Council for the appointment of a reviewing member, in accordance with section 91 of the *Act*. The screening officer concluded that the complaint could not be dismissed.

[18] As required by the *Act* and the *Review Procedures (2023)* in effect at the time, the reviewing member asked Justice St-Pierre and the Chief Justice of the Superior Court of Québec, the Honourable Marie-Anne Paquette, to provide written comments.

[19] Chief Justice Paquette responded by e-mail dated January 7, 2025, in which she noted that Justice St-Pierre had acknowledged that his comments were inappropriate in the circumstances. In addition, she noted that Justice St-Pierre had demonstrated a genuine and concrete commitment to doing whatever was necessary to ensure that such an incident did not reoccur, hence his commitment to attend a bias training seminar in the near future.

[20] Justice St-Pierre provided a letter dated January 7, 2025, in which he acknowledged that he had failed in his duty of reserve and that he was sorry for this. He asked the Council to convey his apologies to the complainant. He wrote that his reflections following the communication of the complaint had given him a new awareness of the impact and reception of a magistrate's comments on the bench. He assured the Council that he would retain the conclusions and lessons in the performance of his duties. In addition, he wrote that he had registered for a seminar on cognitive bias and prejudice organized by the Canadian Institute for the Administration of Justice on February 27, 2025, which could help him to be more circumspect.

[21] Although the reviewing member agreed with Justice St-Pierre that his conduct fell short of the high standards set out in the *Ethical Principles for Judges*, these standards articulate an ideal, and failure to meet them does not, in all cases, constitute misconduct. In a decision dated January 20, 2025, the reviewing member concluded that he would dismiss this complaint if it were within his power to do so, or, if the complaint were accepted, he would suggest that a measure under section 102 of the *Act* be adopted.

Procedure and decision of the review panel

[22] As required by the *Act* and the *Review Procedures (2023)*, the review panel received all the documents relating to the complaint in the reviewing member's possession. We also invited Chief Justice Paquette and Justice St-Pierre to share their observations with us.

[23] In his letter, Justice St-Pierre referred to the observations made to the attention of the reviewing member in his letter of January 7, 2025. This letter reflects his perception of events. Furthermore, in his letter of March 31, 2025, Justice St-Pierre noted that he had nothing new to add other than that he had read the decision of the reviewing member and had taken due note of its contents. Justice St-Pierre also noted that on February 27, 2025, he took the training referred to in his response of January 7, 2025, namely the seminar on cognitive bias and prejudice, and that this training was useful in pursuing and deepening his reflection on people's reactions to his remarks in the courtroom.

[24] In her e-mail, the Chief Justice emphasized that she had nothing to add to what she had already stated in her e-mail of January 7, 2025.

[25] The review panel examined Justice St-Pierre's comments in light of the *Ethical Principles for Judges*. We agree with the reviewing member that the principles are not a code of conduct. They are recommendations intended (i) to describe the exemplary conduct that judges strive to

observe; (ii) to help judges resolve the thorny ethical and professional issues they face; and (iii) to help members of the public better understand the judicial function.

[26] The *Ethical Principles for Judges* represent an ideal, offering guidance rather than prescribing a code of conduct. Every judge should endeavour to treat those who appear before them with civility and respect.

[27] There is no doubt that Justice St-Pierre's comments did not meet the high ethical standards set out in the *Ethical Principles for Judges*. The crucial question, however, is whether the judge's behaviour rises to the level of misconduct found in section 80 of the *Judges Act*. Taken in isolation, it may. Justice St-Pierre himself seems to recognize this possibility. Nevertheless, any assessment of the impugned conduct must, in our view, take into account the entire context, including the judge's response to the complaint. In this case, Justice St-Pierre has acknowledged that his comments fell short of the ethical standards expected of judges and offered his sincere apologies.

[28] The review panel first considered whether the matter should be referred to the Council for the establishment of a full hearing panel or, alternatively, dismissed.

[29] We concluded there was no basis to recommend the appointment of a full hearing panel, which should only happen if we were to determine that removal from office could be justified. The criteria for recommending removal are onerous. They are encompassed in what is referred to as the *Marshall* test which can be found in many judicial conduct decisions, including *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11. It requires:

> *Conduct which is so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office.*

[30] The review panel agreed there was no possible basis on which Justice St-Pierre's removal from office could be justified in these circumstances.

[31] We also concluded that the complaint should not be dismissed. The factors which led us to this decision include:

- Justice St-Pierre's words are contrary to the standards set out in the *Ethical Principles for Judges*, particularly those concerning courtesy and respect;
- Justice St-Pierre acknowledged that he had breached his duty of reserve;
- Justice St-Pierre sincerely apologized for having breached his duty of reserve;
- He took action to ensure that this discrepancy would not reoccur when he attended a seminar on bias;
- Nevertheless, we reiterate the importance of courtesy and respect. A judge must also preserve honour and dignity in each matter and in the administration of justice in general.

[32] The review panel believes that action under section 102 of the *Act* is necessary for the following reasons:

- the need for deterrence;
- the amelioration of any harm to the administration of justice or the reputation of the judiciary.

[33] Section 102 sets out the various measures that the panel can take. Some may be public, others private. To choose the appropriate sanction, we must take into account the circumstances, including:

a) the seriousness of the conduct;

b) the need for deterrence;

c) the amelioration of any harm to the administration of justice or the reputation of the judiciary;

d) Justice St-Pierre's apology and subsequent training on bias;

e) Justice St-Pierre's reputation in the legal community.

[34] We have examined all the above elements and have concluded that two private actions under section 102 are appropriate.

[35] We conclude that the imposition of these measures adequately reflects the impact of Justice St-Pierre's remarks and is appropriate in this case, in light of the mitigating circumstances raised in Justice St-Pierre's favour.

Dated this 27th day of May, 2025.

Original signed

_____

The Honourable Larry Landry

Original signed

_____

The Honourable Miriam Maisonville

Original signed

_____

Ms. Julia Pavlenko

Tab 303

4372

Ethical Principles for Judges

Principes de déontologie judiciaire

CJC
CCM
Canadian Judicial Council
Conseil canadien de la magistrature

Foreword

As the Canadian Judicial Council marks its 50th anniversary of service to Canadians, it is timely that we have revised and modernized *Ethical Principles for Judges*. From their first publication in 1998, these principles have laid out the ethical frame of reference to which all judges aspire: judicial independence, integrity and respect, diligence and competence, equality and impartiality.

Canada is fortunate to be served by a highly competent and skilled judiciary. Judges can face ethical questions as we go about our personal and professional lives. While the 1998 document served us well, and indeed was the model on which other judicial systems around the world relied, we understand that ethical considerations evolve and need to keep pace with society's expectations.

When I was appointed Chief Justice of Canada, I was pleased to learn that the Canadian Judicial Council had embarked on a public consultation exercise to hear firsthand from Canadians and our valued partners, what they expect of our judges. From those extensive consultations, and the tireless work of the Council's Judicial Independence and Appointment Process Committee, co-chaired by Chief Justice Martel D. Popescul and Chief Justice Deborah K. Smith, a new and refreshed document emerged.

Préface

L'édition revue et actualisée des *Principes de déontologie* judiciaire arrive à point nommé, alors que le Conseil canadien de la magistrature célèbre 50 ans de service à la population canadienne. Depuis la parution de la première édition en 1998, ces principes constituent le cadre de référence déontologique auquel tous les juges aspirent : l'indépendance judiciaire, l'intégrité et le respect, la diligence et la compétence, l'égalité et l'impartialité.

Le Canada a la chance d'être servi par une magistrature hautement compétente et qualifiée. Les juges sont parfois confrontés à des questions déontologiques dans leur vie personnelle et professionnelle. Bien que l'édition de 1998 nous ait bien servi, et qu'elle ait été prise pour modèle par d'autres systèmes judiciaires du monde entier, nous comprenons que les considérations d'ordre déontologique évoluent et qu'elles doivent s'adapter aux attentes de la société.

Lorsque j'ai été nommé juge en chef du Canada, j'ai été heureux d'apprendre que le Conseil canadien de la magistrature avait amorcé un processus de consultation publique pour entendre directement ce que la population canadienne et nos partenaires estimés attendent de nos juges. À la suite de ces vastes consultations et du travail inlassable du Comité sur l'indépendance judiciaire et le processus de nomination du Conseil, coprésidé par le juge en chef Martel D. Popescul et la juge en chef Deborah K. Smith, un nouveau document actualisé a pris forme. Je sais que le comité a examiné attentivement tous les commentaires qu'il a reçus, et je remercie personnellement toutes les personnes qui ont fait connaître leurs points de vue.

I know that the Committee carefully considered every comment received and I personally extend my thanks to every person who provided his or her views.

The revised *Ethical Principles* build on the original publication, and explore new and emerging issues relevant to our modern times: case management and settlement conferences, social media, interacting with self-represented litigants, professional development and the post-judicial role. While these principles are intended to assist judges with the ethical and professional questions they may confront, they are also written to provide the public with a better understanding of the judicial role.

I am proud of this document and proud of the dedication of those who developed it. It is my sincere hope that *Ethical Principles* will be consulted regularly by judges for years to come.

Sincerely,

The Right Honourable
Richard Wagner, P.C.

Chief Justice of Canada and
Chairperson of the Canadian
Judicial Council

Cette version révisée des *Principes de déontologie judiciaire* s'appuie sur l'édition originale et traite de questions nouvelles et naissantes qui ont rapport à nos temps modernes : la gestion des instances et les conférences de règlement, les médias sociaux, l'interaction avec les parties non représentées par un avocat, le perfectionnement professionnel, et le rôle des juges après leur départ de la magistrature. Ces principes visent à aider les juges à trouver réponse aux questions déontologiques et professionnelles qui peuvent se poser à la magistrature, mais ils sont aussi rédigés pour permettre au public de mieux comprendre le rôle des juges.

Je suis fier de ce document et fier du dévouement des personnes qui y ont travaillé. J'espère sincèrement que les juges consulteront régulièrement les *Principes de déontologie judiciaire* dans les années à venir.

Je vous offre mes meilleures salutations.

Le très honorable
Richard Wagner, c.p.

Juge en chef du Canada et
Président du Conseil canadien
de la magistrature

Table of Contents

Introduction 6

Purpose 6

Context 8

1 **Judicial Independence** 13

Statement & Principles 13

Commentary 14

2 **Integrity and Respect** 18

Statement & Principles 18

Commentary 19

3 **Diligence and Competence** 27

Statement & Principles 28

Commentary 28

4 **Equality** 33

Statement & Principles 34

Commentary 34

5 **Impartiality** 38

Statement & Principles 38

Commentary 39

6 **Index** 59

Table des matières

Introduction 6

Objet 6

Contexte 8

1 **Indépendance de la magistrature** 13

Énoncé et Principes 13

Commentaires 14

2 **Intégrité et respect** 18

Énoncé et Principes 18

Commentaires 19

3 **Diligence et compétence** 27

Énoncé et Principes 28

Commentaires 28

4 **Égalité** 33

Énoncé et Principes 34

Commentaires 34

5 **Impartialité** 38

Énoncé et Principes 38

Commentaires 39

6 **Index** 59

Introduction

Introduction

Purpose

1. *Ethical Principles for Judges [Ethical Principles]* provides ethical guidance for federally appointed judges. In doing so, it expresses a vision of what it means to be a judge. Taken together, the principles of independence, integrity and respect, diligence and competence, equality and impartiality define the judicial role. *Ethical Principles* was drafted with confidence that it would be read by judges and the public as an expression of the judiciary's highest ethical aspirations in the service of justice and the rule of law.

2. An independent and impartial judiciary is the right of all and constitutes a fundamental pillar of democratic governance, the rule of law and justice in Canada. Everyone needs and deserves impartial, competent, and respectful judges. All members of the judiciary commit to perform their role in such a manner so as to maintain the confidence of the public. The guidance that follows describes the high ethical standards that all judges strive to maintain in their professional and personal lives. While the overarching principles that guide the judiciary are largely immutable, evolving expectations of the public, societal developments and new understandings of issues relevant to the judiciary will serve to constantly inform the interpretation of *Ethical Principles* in the future.

Objet

1. Les *Principes de déontologie judiciaire [Principes de déontologie]* offrent des conseils d'ordre déontologique aux juges de nomination fédérale. Ce faisant, ils expriment une vision de ce que cela représente que d'être un juge. Le rôle des juges est défini par les principes d'indépendance, d'intégrité et de respect, de diligence et de compétence, d'égalité et d'impartialité. Les Principes de déontologie se veulent l'expression des idéaux d'ordre déontologique les plus élevés auxquels aspirent les juges, au service de la justice et de la primauté du droit; c'est l'intention que devraient y lire les juges et le public.

2. Piliers fondamentaux de la gouvernance démocratique, de la primauté du droit et de la justice, l'indépendance et l'impartialité de la magistrature sont des droits reconnus à chacun. Toute personne doit et mérite d'être entendue par des juges impartiaux, compétents et respectueux. Tous les membres de la magistrature s'engagent à exercer leur charge de manière à préserver la confiance du public. Les recommandations qui suivent exposent les normes d'ordre déontologique élevées que les juges s'efforcent d'observer dans leurs fonctions professionnelles et dans leur vie personnelle. Si les grands principes qui guident les juges demeurent largement immuables, en revanche les attentes du public, la société elle-même et notre compréhension des questions qui touchent la fonction judiciaire évoluent, et cette évolution éclairera de façon constante l'interprétation des *Principes de déontologie* à l'avenir.

3. A judge must be and be seen to be free to decide honestly and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference from anyone. Nothing in *Ethical Principles* can or is intended to limit or restrict this judicial independence in any manner. Judges have the duty to uphold and defend judicial independence, not as a privilege of judicial office but as the constitutionally guaranteed right of everyone to have their disputes heard and decided in a fair way by impartial and independent judges.

4. The ethical principles articulated in this document are aspirational. They are not intended to be a code of conduct that sets minimum standards. They are advisory in nature and are designed to (i) describe exemplary behaviour which all judges strive to maintain; (ii) assist judges with the difficult ethical and professional issues that confront them; and (iii) help members of the public better understand the judicial role. The guidance provided in *Ethical Principles* does not preclude reasonable disagreements about their application in particular cases or imply that any departure from them necessarily warrants disapproval. The ethical principles are intended to be applied in light of all of the relevant circumstances and consistently with the requirements of judicial independence and the law. They should not be viewed as an exhaustive expression of the ethical considerations that judges may face in their professional or personal lives.

3. Les juges doivent être libres et paraître libres de juger avec intégrité et impartialité sur le seul fondement du droit et de la preuve présentée, sans pressions ni influences extérieures et sans crainte d'ingérence de la part de qui que ce soit. Les *Principes de déontologie* ne sauraient limiter ou restreindre en aucune façon cette indépendance de la magistrature et ils ne visent pas à le faire. Les juges sont tenus de soutenir et de défendre l'indépendance de la magistrature, non parce qu'elle constitue un privilège rattaché à leur charge, mais parce que la Constitution garantit à quiconque le droit de voir son litige entendu et tranché de façon équitable par des juges impartiaux et indépendants.

4. Les principes d'ordre déontologique exposés dans ce document articulent un idéal à atteindre. Ils ne constituent pas un code de conduite imposant des normes minimales à suivre. Ce sont des recommandations ayant pour objectif (i) de décrire la conduite exemplaire que les juges s'efforcent d'observer; (ii) d'aider les juges à résoudre les épineuses questions d'ordre déontologique et professionnel auxquelles ils sont confrontés; et (iii) d'aider les membres du public à mieux comprendre la fonction judiciaire. Il n'est pas exclu que les recommandations énoncées dans les *Principes de déontologie* puissent faire l'objet d'interprétations divergentes raisonnables quant à leur application dans un cas donné; de plus, le fait d'énoncer ces recommandations n'implique pas qu'il y aurait nécessairement matière à réprobation si on s'en écartait. Les principes de déontologie doivent être appliqués au regard de toutes les circonstances pertinentes ainsi qu'en conformité avec le principe de l'indépendance de la magistrature et avec le droit. On ne saurait y voir l'énumération complète des questions éthiques auxquelles les juges peuvent faire face dans l'exercice de leurs fonctions ou dans leur vie personnelle.

Context

5. The Canadian Judicial Council [the CJC] has been attentive to judicial ethics for decades. It published *Commentaries on Judicial Conduct* in 1991. This was followed by *Ethical Principles for Judges [Ethical Principles 1998]*. It provided ethical guidance to judges aligned with a set of central principles and better informed the public about the high ideals which judges embrace and toward which they strive. While drawing heavily on existing resources, *Ethical Principles 1998* was the most comprehensive treatment of the subject at that time in Canada. Further, it was uniquely the work of Canadian judges. An extensive process of consultation within the judiciary and beyond ensured that *Ethical Principles 1998* was the subject of painstaking examination and vigorous debate. The intention was that Canadian judges would accept *Ethical Principles 1998* as reflective of their high ethical aspirations and would find it worthy of respect and deserving of careful consideration when facing ethical issues

Contexte

5. Le Conseil canadien de la magistrature [le Conseil] s'intéresse aux questions de déontologie judiciaire depuis des décennies. En 1991, il a publié des *Commentaires sur la conduite des juges*. Puis, a suivi les *Principes de déontologie judiciaire [Principes de déontologie de 1998]* qui a proposé un ensemble de principes fondamentaux pour guider les juges sur des questions d'ordre déontologique et mieux renseigner le public sur les normes élevées auxquelles les juges adhèrent et qu'ils s'efforcent d'observer. Les *Principes de déontologie de 1998*, qui puisaient abondamment aux sources existantes, représentaient néanmoins l'exposé le plus complet en cette matière jamais publié au Canada. De plus, ils étaient entièrement le fruit du travail de juges canadiens. De vastes consultations menées auprès de la magistrature et du public avaient permis de soumettre les *Principes de déontologie de 1998* à un examen minutieux et à un débat vigoureux. Cette démarche avait pour but d'assurer que les juges du Canada verraient dans les *Principes de déontologie de 1998* le reflet de leurs aspirations élevées en matière de déontologie, qu'ils les considéreraient comme un document digne de respect et leur accorderaient une attention soutenue lorsqu'ils seraient confrontés à des questions d'ordre déontologique.

6. Over the past twenty years *Ethical Principles 1998* has provided valuable ethical guidance to federally appointed judges in a broad range of complex circumstances. It has become a crucial resource in the training provided to judges upon appointment, and forms part of ongoing discussions in professional development settings throughout a judge's career. In addition, the publication of *Ethical Principles 1998* coincided with the establishment of an Advisory Committee on Judicial Ethics [Advisory Committee] to which specific ethical questions have been submitted by judges. The Advisory Committee continues to respond to these queries with advisory opinions that contribute to the ongoing review and elaboration of the subjects dealt with in *Ethical Principles 1998*. These opinions may also identify new issues that this version of *Ethical Principles* does not directly address. The Advisory Committee continues to ensure that help is readily available to judges looking for guidance.

6. Depuis deux décennies, les *Principes de déontologie de 1998* ont fourni aux juges de nomination fédérale des conseils précieux en matière déontologique dans un éventail de situations complexes. Les *Principes de déontologie* sont au cœur de la formation offerte aux juges à la suite de leur nomination, et ils sont examinés et discutés dans les programmes de perfectionnement professionnel auxquels participent les juges tout au long de leur carrière. Par ailleurs, la publication des *Principes de déontologie de 1998* a coïncidé avec la création d'un comité consultatif sur la déontologie judiciaire [le Comité consultatif] auquel les juges soumettent depuis des questions précises touchant la déontologie. Les avis que le Comité consultatif fournit en réponse à ces demandes contribuent à l'examen et à l'approfondissement continus des questions traitées dans les *Principes de déontologie de 1998*. Ils peuvent également contribuer à mettre en lumière des problèmes qui ne sont pas abordés directement dans la présente version des *Principes de déontologie*. Le Comité consultatif continue de veiller à ce que les juges qui recherchent des conseils puissent aisément recevoir de l'aide.

7. A document of this nature can never be viewed as the "final word" on such an important and complex subject. After more than twenty years from its initial publication, *Ethical Principles 1998* needed modernization to address significant societal changes, changes in the role of the judiciary, and the social context in which judges serve. In 2016, the revision of *Ethical Principles 1998* was commenced by the Judicial Independence and Appointment Process Committee of the CJC [Independence Committee], with input from Chief Justices and puisne judges from across Canada. As was done in 1998, broad consultations were conducted within the judiciary and beyond to ensure that *Ethical Principles* is responsive to the needs of judges and takes community expectations into account. The consultations included an on-line survey of issues relevant to judicial ethics and a series of meetings and dialogue with organizations representing the judiciary and other interested parties. Once a draft document was prepared it was made public and judges, judges' organizations, other professional organizations and members of the public were invited to provide comments and feedback. Throughout the project, the Independence Committee reviewed every submission and every proposed amendment, and incorporated into the final version of *Ethical Principles* many of the proposals and suggestions submitted to it.

7. De par sa nature, un document comme celui-ci ne saurait prétendre apporter une réponse définitive sur un sujet aussi important et complexe. Plus de vingt ans après leur publication, les *Principes de déontologie de 1998* étaient mûrs pour une mise à jour qui permette de traiter d'enjeux importants soulevés par l'évolution de la société, de la fonction judiciaire et du contexte social dans lequel les juges s'acquittent de leur charge. À partir de 2016, le Comité sur l'indépendance judiciaire et le processus de nomination du Conseil [Comité sur l'indépendance] s'est attelé à la tâche de réviser les *Principes de déontologie de 1998*, avec l'apport des juges en chef et des juges puînés de partout au Canada. Comme ce fut le cas en 1998, de vastes consultations ont été menées au sein de la magistrature et auprès du public afin que les *Principes de déontologie* répondent aux besoins des juges et tiennent compte des attentes du public. Ces consultations ont compris, entre autres, un sondage en ligne sur des questions de déontologie judiciaire, de même qu'une série de rencontres et d'échanges avec des organisations représentant la magistrature et d'autres parties intéressées. L'ébauche rédigée à la suite de ces consultations a été rendue publique, et les juges, les associations qui les représentent, des organismes professionnels et les membres du public ont été invités à présenter des commentaires. Tout au long du projet, le Comité sur l'indépendance s'est penché sur chacun des commentaires reçus et chacune des modifications proposées et a intégré dans la version définitive des *Principes de déontologie* bon nombre des propositions et suggestions qui lui avaient été soumises.

8. Today, judges' work includes case management, settlement conferences, judicial mediation, and frequent interaction with self-represented litigants. These responsibilities invite further consideration with respect to ethical guidance. In the same manner, the digital age, the phenomenon of social media, the importance of professional development for judges and the transition to post-judicial roles all raise ethical issues that were not fully considered twenty years ago. Judges are expected to be alert to the history, experience and circumstances of Canada's Indigenous peoples, and to the diversity of cultures and communities that make up this country. In this spirit, the judiciary is now more actively involved with the wider public, both to enhance public confidence and to expand its own knowledge of the diversity of human experiences in Canada today.

9. The format of *Ethical Principles 1998* is preserved. Each chapter is organized hierarchically, beginning with a Statement, followed by a set of Principles and then a series of Commentaries aligned with each Principle. At the highest level of abstraction, each Statement expresses a fundamental value or theme of judicial ethics. The Principles identify components of each Statement and articulate behaviours that would constitute the highest aspirations of an ethical judge with respect to that Principle. With occasional exceptions, the Statements and Principles are stated in 'declarative' language – essentially statements of what an ethical judge does or how an ethical judge acts, consistent with the goal of describing the attributes of an ethical judge. The Commentaries associated with each Principle provide explanations, context and further elucidation of the Principles, almost always in aspirational language, often using concrete examples.

8. De nos jours, les responsabilités des juges s'étendent à la gestion des instances ainsi qu'aux conférences de règlement et aux séances de médiation judiciaires. De plus, il arrive fréquemment que les juges doivent interagir avec des parties non représentées. Ces responsabilités appellent une nouvelle réflexion sur le soutien à apporter en matière déontologique. Parallèlement, d'autres phénomènes soulèvent des enjeux déontologiques qui n'avaient pas été pleinement considérés il y a vingt ans : l'arrivée de l'ère numérique, l'émergence des médias sociaux, l'importance du perfectionnement professionnel des juges et le passage de certains de ceux-ci à une autre carrière après leur départ de la magistrature. On attend des juges qu'ils soient sensibles et au fait de l'histoire, du vécu et de la réalité des peuples autochtones au Canada, ainsi que de la diversité des cultures et des communautés qui composent le pays. C'est dans cet esprit que la magistrature joue un rôle plus actif qu'auparavant auprès du public, aussi bien pour soutenir la confiance que le public accorde à la magistrature que pour approfondir sa connaissance de la diversité des expériences humaines au Canada.

9. L'organisation générale des matières établie dans les *Principes de déontologie de 1998* a été préservée. Structuré de façon hiérarchique, chaque chapitre commence par un Énoncé, suivi par des Principes auxquels succèdent une série de Commentaires liés à chacun des Principes. L'Énoncé exprime une valeur ou un thème fondamental de la déontologie judiciaire, à un niveau élevé d'abstraction. Les Principes exposent les éléments qui découlent de l'Énoncé et décrivent la conduite idéale vers laquelle tendrait le juge éthique au regard de ceux-ci. En règle générale, les Énoncés et les Principes sont rédigés de manière déclarative, énonçant essentiellement ce que fait un juge éthique ou comment il agit, l'objectif étant de décrire la conduite exemplaire d'un juge éthique. Quant aux Commentaires, ils servent à expliquer les Principes et à les mettre en contexte, presque toujours sous la forme de recommandations, et présentent souvent des exemples concrets.

10. When an ethical issue arises for a judge more than one principle may be relevant. The approach taken in *Ethical Principles* is to discuss the aspects of each Principle discretely, recognizing that multiple Principles and chapters of *Ethical Principles* may need to be considered in obtaining comprehensive guidance in the resolution of the ethical issue. The comprehensive Index, as well as links within electronic versions of *Ethical Principles*, will enable the reader to identify and access associated Principles and Commentaries.

11. The language adopted in this edition of *Ethical Principles* provides greater consistency of meaning between the English and French versions. *Ethical Principles* was co-drafted in English and French and each version is equally authoritative. As well, the document is written in gender-neutral language. Whenever pronouns are used, they are intended to be inclusive of all genders.

12. This edition of *Ethical Principles* also addresses circumstances associated with judges contemplating or undertaking post-judicial legal careers. In particular, it discusses unique ethical issues that may arise in the transition to post-judicial legal careers and those that continue after judges leave office. This guidance is provided to present and former judges for their benefit and with a view to maintaining public confidence in the judiciary.

10. Lorsqu'un juge fait face à une question d'ordre déontologique, il se peut que plus d'un principe entre en jeu. L'approche retenue dans les *Principes de déontologie* consiste à aborder de façon distincte les différents aspects de chaque principe; il est donc possible qu'il faille considérer plusieurs principes et consulter plus d'un chapitre des *Principes de déontologie* pour obtenir des conseils sur l'ensemble des éléments permettant de résoudre une question. L'index détaillé et les hyperliens insérés dans les versions électroniques des *Principes de déontologie* permettront au lecteur de repérer les principes pertinents et les commentaires qui s'y rapportent, et d'y accéder facilement.

11. La présente édition des *Principes de déontologie* assure une meilleure harmonisation des versions française et anglaise. Les *Principes de déontologie* ont fait l'objet d'une corédaction, et les versions anglaise et française ont la même valeur. De plus, le présent document est rédigé sans distinction de genre. L'utilisation d'un genre inclut tous les genres.

12. La présente édition des *Principes de déontologie* traite également de la situation des juges qui envisagent ou amorcent une nouvelle carrière après leur départ de la magistrature. Ainsi, elle examine certaines des questions particulières qui sont susceptibles de se poser sur le plan déontologique à l'occasion du passage à une nouvelle carrière, ainsi que les principes qui continuent de s'appliquer après le départ de la magistrature. Ces conseils s'adressent aussi bien aux juges en poste qu'aux anciens juges et visent à préserver la confiance du public envers la magistrature.

I. Judicial Independence

Statement

An independent judiciary is indispensable to impartial justice under law. Judges uphold and exemplify judicial independence in both its individual and institutional aspects.

Principles

A. Judges exercise their judicial functions independently and free of extraneous influence.

B. Judges firmly reject improper attempts to influence their decisions in any matter before the court.

C. Judges exhibit and promote high standards of judicial conduct so as to reinforce public confidence in the independence of the judiciary.

D. Judges encourage and uphold arrangements and safeguards to maintain and enhance the institutional and administrative independence of the judiciary.

I. Indépendance de la magistrature

Énoncé

L'indépendance de la magistrature est indispensable à l'exercice d'une justice impartiale sous un régime de droit. Les juges soutiennent l'indépendance de la magistrature et l'incarnent tant dans ses éléments individuels qu'institutionnels.

Principes

A. Les juges exercent leurs fonctions judiciaires de façon indépendante, à l'abri de toute influence extérieure.

B. Dans les affaires dont la cour est saisie, les juges repoussent fermement toute tentative inappropriée visant à influencer leur décision.

C. Les juges observent des normes élevées de conduite judiciaire et en favorisent l'application, afin de renforcer la confiance du public envers l'indépendance de la magistrature.

D. Les juges encouragent et soutiennent les mesures et les garanties qui visent à préserver et à accroître l'indépendance de la magistrature, tant sur le plan institutionnel qu'administratif.

Commentary

General

1.A.1 Judicial independence refers to the liberty and responsibility of judges to hear and decide cases that come before them in accordance with their conscience, without interference from others. The guarantee of judicial independence aims to make judges impervious to improper external intervention in the exercise of their functions. Judges are, and must reasonably be perceived to be, independent, both individually and institutionally. Judicial independence is not the private right of judges. It is the foundation of judicial impartiality and a constitutional right of all. The right to be tried by an independent and impartial tribunal is an integral principle of fundamental justice protected by the *Canadian Charter of Rights and Freedoms*.

1.A.2 Judges are called upon to resolve a wide array of disputes and generally to determine legal rights and obligations. Public confidence in the judiciary rests on the fact that their decisions are made according to law.

1.A.3 Judicial independence refers to a state of mind or attitude in the actual exercise of judicial functions. It also connotes a status or relationship with others, including the executive branch of government and other judges. Judicial independence is the foundation for impartial decision-making. The first qualification of a judge is the ability to make independent and impartial decisions. Judges apply the law without fear or favour and without regard to whether the decision is popular. This is a cornerstone of the rule of law, and it is secured through respect for the principle of judicial independence.

Commentaires

Général

1.A.1 L'indépendance judiciaire s'entend de la liberté et de la responsabilité du juge d'instruire et de trancher une affaire donnée selon sa conscience, sans l'intervention d'autres personnes. La garantie d'indépendance judiciaire vise à rendre les juges imperméables aux interventions extérieures indues dans l'exercice de leurs fonctions. Les juges sont indépendants et doivent être raisonnablement perçus comme tels, tant sur le plan individuel que sur le plan institutionnel. L'indépendance judiciaire n'est pas un droit qui appartient en propre à chaque juge. Elle constitue le fondement de l'impartialité judiciaire et est un droit constitutionnel qui appartient à chacun. Le droit d'être jugé par un tribunal indépendant et impartial est un principe essentiel de justice fondamentale garanti par la *Charte canadienne des droits et libertés de la personne*.

1.A.2 Il incombe aux juges de trancher une large gamme de litiges et, de manière générale, de déterminer les droits et obligations juridiques. La confiance du public envers la magistrature s'appuie sur le fait que les décisions des juges sont rendues en fonction du droit.

1.A.3 L'indépendance judiciaire désigne un état d'esprit ou une attitude dans l'exercice concret des fonctions judiciaires. Elle connote aussi un statut ou une relation à l'égard d'autrui, y compris le pouvoir exécutif et les autres juges. L'indépendance judiciaire est le fondement permettant la prise de décisions impartiales. La qualité première du juge réside dans sa capacité de rendre des décisions de manière indépendante et impartiale. Les juges appliquent la loi, sans crainte de représailles ni favoritisme, et indépendamment de l'accueil, favorable ou non, de leur décision. C'est là une des pierres angulaires de la primauté du droit, garantie par le respect du principe d'indépendance de la magistrature.

1.A.4 Judicial independence is fundamental to ensuring that decisions are made without external influence and to maintaining individual and public confidence in the administration of justice. Preserving the constituent elements of judicial independence is critical to the public's perception of the impartiality of judges. In that sense, judicial independence is an important means to a fundamental end. Judicial independence ensures that judges are impartial in fact, and also that they are perceived to be so.

1.A.5 Judges protect judicial independence not for their own benefit but for the benefits of all Canadians. Solely self-interested claims for judicial independence risk undermining public confidence in the judiciary.

1.A.6 Informing the public with respect to the role of the judiciary and judicial independence is an important judicial function. It is in the public interest for judges to take advantage of appropriate opportunities to enhance the public's understanding of the fundamental importance of judicial independence.

Avoiding and Rejecting Improper Influence

1.B.1 Judges should avoid all communications with anyone external to a case that might raise reasonable concerns about judicial independence. Judges must firmly reject improper attempts to influence their decisions. Communications intended to influence a specific judicial decision can only be received within the judicial process.

1.A.4 L'indépendance de la magistrature est fondamentale afin d'assurer que les décisions sont rendues sans influence extérieure et de soutenir la confiance individuelle et collective dans l'administration de la justice. Le maintien des conditions de l'indépendance de la magistrature est essentiel à la perception qu'a le public de l'impartialité des juges. En ce sens, l'indépendance de la magistrature constitue un moyen crucial d'atteindre cet objectif fondamental. L'indépendance de la magistrature garantit l'impartialité objective des juges et fait en sorte qu'ils soient perçus comme des personnes impartiales.

1.A.5 Les jugent protègent l'indépendance de la magistrature dans l'intérêt de tous, et non par intérêt personnel. Revendiquer la protection de l'indépendance de la magistrature par pur intérêt personnel risquerait de miner la confiance du public à l'endroit des juges.

1.A.6 L'une des fonctions importantes des juges consiste à renseigner le public sur le rôle de la magistrature et sur son indépendance. Il est dans l'intérêt public que les juges profitent d'occasions appropriées pour aider le public à mieux comprendre l'importance fondamentale de l'indépendance de la magistrature.

Éviter et repousser les tentatives d'influence indue

1.B.1 Les juges devraient éviter toute communication – avec quiconque est étranger à l'affaire dont ils sont saisis – qui pourrait soulever des craintes raisonnables en ce qui concerne l'indépendance de la magistrature. Les juges doivent fermement repousser toute tentative inappropriée d'influencer leurs décisions. Les communications ayant pour objet d'influencer une décision dans une affaire donnée doivent s'inscrire dans le cadre du processus judiciaire.

1.B.2 Attempts to influence judges may come from many sources, including social media. Judges should be cautious in their communications on social media relating to matters that could come before the court. Also, their social media activities should be undertaken in ways that avoid compromising public confidence in the judiciary.

Public Confidence

1.C.1 Judicial independence and judicial ethics are interrelated. Judges should exemplify and promote high standards of judicial conduct as one element of assuring the independence of the judiciary. In turn, the independence and integrity of the judiciary preserves public confidence in the rule of law and acceptance of court decisions. Unethical conduct by judges erodes that confidence. Thus, judges share a collective responsibility to promote and observe high standards of conduct.

Institutional and Administrative Independence

1.D.1 Judicial independence is secured by institutional and operational structures that protect judges and courts from external influence so that judicial decisions are made according to law in a fair process. For example, judges have security of tenure and their remuneration is set through an independent process so that neither fear of sanction nor hope of reward stands in the way of rendering justice. For the same reasons, judges also have immunity from liability in relation to their decisions.

1.B.2 Les tentatives d'influencer les juges peuvent provenir de plusieurs sources, y compris les médias sociaux. Les juges devraient se garder de diffuser dans les médias sociaux des communications qui concernent des affaires dont la cour pourrait être saisie. De plus, l'activité des juges dans les médias sociaux ne devrait pas avoir pour effet d'affaiblir la confiance du public à l'endroit de la magistrature.

Confiance du public

1.C.1 L'indépendance judiciaire et le respect des principes déontologiques sont interdépendants. Les juges devraient observer des normes de conduite élevées contribuant à assurer l'indépendance de la magistrature et en favoriser l'application. En retour, l'indépendance et l'intégrité des juges préservent la confiance du public dans la primauté du droit et l'acceptation par celui-ci des décisions des tribunaux. Une conduite contraire à l'éthique de la part d'un juge mine cette confiance. C'est pourquoi les juges ont la responsabilité collective de favoriser et d'observer des normes de conduite élevées.

Indépendance institutionnelle et administrative

1.D.1 L'indépendance de la magistrature est garantie par des structures institutionnelles et opérationnelles qui protègent les juges et les tribunaux contre toute influence extérieure afin qu'ils puissent rendre leurs décisions judiciaires conformément au droit, dans le cadre d'un processus équitable. Ainsi, afin d'assurer que ni la crainte d'une sanction ni l'espoir d'un gain ne puissent nuire à l'application juste du droit, les juges sont inamovibles et leur rémunération est déterminée dans le cadre d'un processus indépendant. Pour les mêmes raisons, les juges jouissent d'une immunité contre les poursuites à l'égard des décisions qu'ils rendent.

1.D.2 In keeping with the principle of judicial independence, professional development for judges is organized, designed and delivered under the authority of the judiciary.

1.D.3 At an institutional level, courts require sufficient autonomy to guarantee that the administration of justice is free from any political or other improper influence.

1.D.4 The judiciary should remain vigilant with respect to any initiative that may have the effect of undermining its institutional or administrative independence. That said, not every proposed change in the administrative arrangements affecting the judiciary constitutes a threat to judicial independence.

1.D.2 Afin de préserver le principe de l'indépendance de la magistrature, les programmes de perfectionnement professionnel destinés aux juges sont organisés, élaborés et prodigués sous l'égide de la magistrature.

1.D.3 Au niveau institutionnel, les tribunaux ont besoin d'une autonomie suffisante pour garantir que l'administration de la justice est libre de toute influence indue, notamment politique.

1.D.4 La magistrature devrait rester à l'affût de toute tentative susceptible de miner son indépendance institutionnelle ou administrative. Cela dit, ce ne sont pas tous les changements qu'on propose d'apporter aux dispositions administratives affectant les juges qui constituent une menace pour l'indépendance judiciaire.

II. Integrity and Respect

Statement

Judges conduct themselves respectfully and with integrity so as to sustain and enhance public confidence in the judiciary.

Principles

A. Judges comply with the law and conduct themselves both inside and outside the courtroom in a manner that is above reproach in the view of reasonable and informed persons.

B. Judges are discreet and do not use or disclose confidential information acquired in their judicial capacity for any purpose not related to judicial duties.

C. Judges treat everyone with civility and respect in the performance of their judicial duties.

D. Judges foster access to justice for all. Judges carry out their duties with appropriate consideration for all the parties, whether or not they are represented, and ensure that they are treated fairly and respectfully, so as to provide them with reasonable access to court processes.

E. Judges avoid all forms of harassment and abuse of authority or status.

F. Judges do not allow their status or the prestige of judicial office to be used to advance a private interest.

G. Judges encourage and support the observance of *Ethical Principles* by their judicial colleagues.

II. Intégrité et respect

Énoncé

Les juges font preuve, dans leur conduite, de respect et d'intégrité de façon à soutenir et à renforcer la confiance du public à l'endroit de la magistrature.

Principes

A. Les juges se conforment au droit et adoptent, tant à l'intérieur qu'à l'extérieur de la salle d'audience, une conduite irréprochable aux yeux d'une personne raisonnable et bien renseignée.

B. Les juges font preuve de discrétion et n'utilisent ni ne divulguent les renseignements confidentiels acquis dans l'exercice de leurs fonctions judiciaires, si ce n'est pour une fin liée à ces fonctions.

C. Les juges traitent toutes les personnes avec courtoisie et respect dans l'exercice de leurs fonctions judiciaires.

D. Les juges favorisent l'accès à la justice. Dans l'exercice de leurs fonctions, les juges accordent la considération appropriée à toutes les parties, représentées et non représentées, et veillent à ce qu'elles soient traitées avec équité et respect, afin de leur assurer un accès raisonnable aux processus judiciaires.

E. Les juges évitent toute forme de harcèlement et d'abus d'autorité ou de statut.

F. Les juges ne permettent pas que leur statut ou le prestige de la fonction judiciaire soit utilisé au profit d'un intérêt privé.

G. Les juges encouragent et soutiennent le respect des *Principes de déontologie* par leurs collègues de la magistrature.

Commentary

General

2.A.1 Public confidence in the judiciary is essential to an effective judicial system and, ultimately, the rule of law. Within that system, judges hold positions of significant trust, confidence and responsibility. Conduct, in and out of court, that exhibits integrity ensures public respect for and confidence in the individual judge and, more significantly, contributes to public confidence in the judiciary and the judicial system as a whole. Judges should therefore act with a high degree of decorum, propriety and humanity.

2.A.2 Public expectations of the integrity of judges are understandably high. Behaviour considered acceptable if exhibited by some members of the public may not be appropriate for members of the judiciary. Judges should therefore be mindful of the ways in which their conduct would be perceived by reasonable and informed members of the community and whether that perception is likely to lessen respect for the judge or the judiciary as a whole. Behaviour that would diminish that respect in the minds of such persons should be avoided.

Behaviour in Private Life

2.A.3. Public expectations of judges are not limited to the actions of judges in their judicial capacities. Judges should exhibit respect for the law and act with integrity in their private lives and should avoid the appearance of impropriety.

Commentaires

Général

2.A.1 La confiance du public à l'endroit de la magistrature est essentielle au bon fonctionnement du système de justice et, en définitive, à la primauté du droit. Les juges occupent une position de grande confiance et de responsabilité au sein de ce système. Les juges qui adoptent, en salle d'audience ou ailleurs, une conduite empreinte d'intégrité s'assurent du respect et de la confiance du public et, surtout, contribuent à soutenir la confiance du public à l'endroit de la magistrature et du système de justice tout entier. Les juges devraient en conséquence se conduire avec décorum, décence et humanité.

2.A.2 Les attentes du public à l'égard de l'intégrité des juges sont bien entendu élevées. Les comportements qu'on jugerait acceptables pour un membre du public pourraient ne pas convenir à un membre de la magistrature. Les juges devraient donc être conscients de la perception que des personnes raisonnables et bien renseignées pourraient avoir de leur conduite et de la possibilité que cette perception diminue le respect dont jouissent les juges individuellement et la magistrature dans son ensemble. Tout comportement qui porterait atteinte à ce respect dans l'esprit de ces personnes est à proscrire.

Le comportement dans la vie privée

2.A.3 Les attentes du public à l'endroit des juges ne se limitent pas aux actes que ces derniers posent dans l'exercice de leur charge. Les juges devraient faire montre de leur respect pour la loi, agir avec intégrité dans leur vie personnelle et éviter toute apparence d'inconduite.

2.A.4 After appointment, judges are not required to withdraw from the world. They may lead a normal life in the community, while retaining a sense of the dignity of judicial office and realizing that the public expects virtually irreproachable conduct from judges.

2.A.5 A judge's conduct, in and out of court, may be the subject of public scrutiny and comment. At the same time, judges have private lives and are entitled to enjoy, as much as possible, the rights and freedoms generally available to all. Nevertheless, judges accept some restrictions on their activities — even activities that would not elicit adverse notice if carried out by other members of the community. For example, judges should exercise caution in their use of social media. Judges should strive to strike a balance between the expectations of judicial office and their personal lives. In finding this balance, judges should be guided by these *Ethical Principles*.

2.A.4 Les juges ne sont pas tenus de se tenir à l'écart du monde après leur nomination. Ils peuvent participer à la vie de leur collectivité, tout en gardant à l'esprit la dignité rattachée à leur charge et le fait que le public s'attend à une conduite quasi irréprochable de la part des juges.

2.A.5 La conduite des juges, en salle d'audience ou ailleurs, peut être soumise à l'examen attentif et à la critique du public. Par ailleurs, les juges ont aussi une vie privée et jouissent, dans toute la mesure du possible, des mêmes droits et libertés que ceux qui sont conférés aux autres personnes de manière générale. Néanmoins, les juges acceptent certaines restrictions à l'égard de leurs activités — même celles qui ne susciteraient aucune critique si elles étaient le fait d'autres membres de la collectivité. Par exemple, les juges devraient utiliser les médias sociaux avec prudence. Ils devraient s'efforcer de maintenir l'équilibre entre les attentes associées à leur charge et la conduite de leur vie personnelle. *Les Principes de déontologie* peuvent les guider à cet égard.

Confidentiality and Discretion[1]

2.B.1 Judges are entrusted with preserving confidentiality. The performance of judicial duties necessarily entails that judges receive or come into possession of confidential information. While justice is, in principle, transparent, open and public, some of the facts, documents, records and circumstances of a dispute may be subject to confidentiality orders, including the identity of one or more parties. Judges should not use or reveal confidential information except where, in the performance of their judicial duties, such disclosure is necessary, or done in accordance with relevant rules on archiving and disclosure. When judges work as a group, their internal discussions remain confidential.

2.B.2 Judges should be discreet when discussing their work, including in contexts in which what they say may be inadvertently overheard by others.

2.B.3 Confidentiality and discretion extend past a judge's departure from judicial office.

Civility and Respect

2.C.1 A hallmark of judicial proceedings is that all participants, including judges, will conduct themselves in a manner that preserves the honour and dignity of both the individual proceedings and the administration of justice more generally. Judges should endeavor to treat all participants in the judicial process with civility and respect.

1 *Canadian Judicial Council, Use of Personal Information in Judgments and Recommended Protocol (2005)*

Confidentialité et discrétion[1]

2.B.1 Les juges sont les gardiens de la confidentialité. L'exercice des fonctions judiciaires a pour conséquence que les juges, inévitablement, reçoivent des renseignements de nature confidentielle ou entrent en possession de tels renseignements. Même si, en principe, la justice est publique, ouverte et transparente, certains faits, documents, dossiers ou circonstances entourant un litige, y compris l'identité d'une ou de plusieurs parties, peuvent être assujettis à des ordonnances de confidentialité. Les juges ne devraient jamais utiliser ou révéler des renseignements de nature confidentielle, sauf lorsque cela est nécessaire dans l'exercice de leurs fonctions judiciaires, ou conformément aux règles applicables qui régissent l'archivage et la divulgation. Lorsqu'ils travaillent en groupe, leurs discussions demeurent confidentielles.

2.B.2 Les juges devraient faire preuve de discrétion lorsqu'ils discutent de leur travail, y compris dans des contextes où leurs propos peuvent être entendus par inadvertance.

2.B.3 La confidentialité et la discrétion demeurent importantes pour les juges même après leur départ de la magistrature.

Courtoisie et respect

2.C.1 L'une des caractéristiques du processus judiciaire est que toutes les personnes qui y participent, y compris les juges, se comportent de manière à préserver l'honneur et la dignité tant des instances individuelles que de l'administration de la justice en général. Les juges devraient s'efforcer de traiter chaque personne qui intervient dans le processus judiciaire avec courtoisie et respect.

1 *Conseil canadien de la magistrature, L'usage de renseignements personnels dans les jugements et protocole recommandé (2005)*

2.C.2 The commitment of judges to civility and respect is not limited to judicial proceedings. Judges should attempt, in all of their engagements with others, including their judicial colleagues, to act in accordance with these values. By showing dignified consideration for others, judges enhance public respect for and confidence in the judiciary as an institution.

2.C.3 The circumstances of some cases and the conduct of counsel and parties sometimes require judges to act with an appropriate measure of firmness and to emphasize decisiveness, promptness, the prevention of abuse of process or improper treatment of participants in the adjudicative process. Maintaining civility and respect requires judges to ensure a proper balance between upholding the right of parties to be heard and ensuring the efficiency of the process.

2.C.4 It is often necessary for judges in the adjudication process to make findings of credibility and to rule on the propriety of a person's conduct. That being said, in court proceedings or in their judgments, judges should not make inappropriate remarks about a person's conduct or motives. Furthermore, judges should not make comments about persons who are not before the court unless, in the judge's opinion, it is necessary for the proper disposition of the case.

2.C.5 Judges should be alert to the possibility that ill-considered, comical or facetious remarks, often made spontaneously and intended to be humorous, may give offence or diminish the dignity of the proceedings.

2.C.2 Cet engagement des juges envers la courtoisie et le respect ne se limite pas au processus judiciaire. Les juges devraient s'efforcer de respecter ces valeurs dans tous leurs rapports avec autrui, y compris les autres membres de la magistrature. Les juges contribuent au respect de la magistrature et à la confiance que le public lui accorde en tant qu'institution en se comportant de manière digne et respectueuse avec autrui.

2.C.3 Les aspects particuliers d'une affaire et la conduite des avocats et des parties peut parfois obliger les juges à utiliser une certaine fermeté et à privilégier l'efficacité dans la prise de décision, la célérité ainsi que la prévention des abus de procédure et des comportements répréhensibles envers les participants au processus judiciaire. Le maintien d'une attitude courtoise et respectueuse exige des juges qu'ils préservent un juste équilibre entre le droit des parties d'être entendues et l'efficacité du processus.

2.C.4 Il arrive souvent aux juges de devoir se prononcer sur la crédibilité ou la conduite de certaines personnes pour trancher un litige. Cela étant, les juges devraient s'abstenir, au cours du processus judiciaire ou dans leurs jugements, de formuler des commentaires inappropriés concernant la conduite d'une personne ou ses motivations. Les juges devraient aussi s'abstenir de formuler des commentaires concernant des personnes qui ne comparaissent pas devant le tribunal, à moins que cela ne soit nécessaire au règlement de l'affaire du point de vue du juge.

2.C.5 Les juges devraient être sensibles au fait que les commentaires inconsidérés, humoristiques ou facétieux, qui sont souvent formulés spontanément et se veulent drôles, peuvent être offensants et miner la dignité des procédures.

2.C.6 It is a delicate question whether and in what circumstances a judge should report, or cause to be reported, a lawyer's conduct to the lawyer's professional governing body. Taking such action may affect the ability of the judge to continue in the proceeding in which that lawyer is appearing, given that the judge's view of the lawyer's conduct may give rise to a reasonable apprehension of bias against the lawyer or the lawyer's client. On the other hand, a judge is in a special position to observe lawyers' conduct before the court. Judges should remain alert to the lawyer's legal and ethical duty of resolute advocacy on behalf of a client and commitment to the client's cause. A judge should take, or cause to be taken, appropriate action where the judge becomes aware of misconduct by a lawyer or incompetence that seriously compromises the interests of justice. Where a judge intends to take action, the judge should follow court protocols and consider whether the interests of justice require that such action await the end of the proceeding or whether the circumstances require earlier action.

Access to Justice and Self-Represented Litigants[2]

2.D.1 Judges have a responsibility to promote and foster access to justice. In fulfilling their role, judges should be aware of the different ways in which disputes can be resolved fairly and efficiently.

2.C.6 La question de savoir si les juges devraient signaler ou faire signaler certains agissements d'un avocat à l'ordre professionnel de celui-ci, et dans quelles circonstances ils devraient le faire, est délicate. Les juges qui prennent ce genre de mesures risquent de ne plus être aptes à entendre la cause dans laquelle agit l'avocat dénoncé, puisque l'opinion exprimée sur la conduite de l'avocat peut susciter une crainte raisonnable quant à l'existence d'un parti pris contre l'avocat ou son client. Il reste que les juges occupent une position privilégiée pour observer la conduite des avocats devant le tribunal. Les juges devraient demeurer attentifs au fait que les avocats ont une obligation déontologique et légale de représenter leur client avec vigueur et de se dévouer à sa cause. Lorsque des juges sont témoins de l'inconduite d'un avocat ou d'une incompétence qui porte gravement atteinte à l'intérêt de la justice, ils devraient prendre ou faire prendre les mesures qui s'imposent conformément aux protocoles en vigueur dans leur cour s'il en est. Avant de prendre de telles mesures, les juges devraient déterminer si l'intérêt de la justice commande d'attendre la fin de l'audience ou si des circonstances spéciales justifient une action immédiate.

L'accès à la justice et les parties non représentées[2]

2.D.1 Les juges ont la responsabilité de promouvoir et de favoriser l'accès à la justice. Ce rôle impose aux juges d'être sensibles aux différents processus qui permettent une résolution juste et efficace des différends.

2 *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)*

2 *Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)*

2.D.2 Passive neutrality and treating everyone in the same manner may not always be appropriate. Parties often appear before the court as self-represented litigants. Judges should provide information and reasonable assistance, proactively where appropriate, on procedural and evidentiary rules, while being alert not to compromise judicial impartiality and the fairness of the proceeding.

Conduct Towards Others

2.E.1 The conduct of judges towards others is an important aspect of their commitment to integrity and respect. Judges should be attentive to the ways in which offensive remarks, or conduct, or inappropriate behaviour may adversely affect or intimidate others, particularly those in subordinate positions to the judge. A judge's conduct in this respect affects their individual reputation and that of the judiciary as a whole.

2.E.2 A common concern in the modern workplace is the possibility that authority may be used in inappropriate ways. The workplace of the judiciary is no exception. Judges refrain from any form of harassment in the workplace. It is also important for judges to avoid relationships with others with whom they work or associate that could be reasonably perceived as the judge taking advantage of their position or authority.

2.D.2 Il se pourrait que la neutralité passive et le traitement identique de toutes les parties ne soit pas toujours approprié. Il arrive souvent que des parties agissent devant les tribunaux sans être représentées. Les juges devraient informer les parties non représentées et leur fournir une aide raisonnable, de manière proactive lorsque les circonstances s'y prêtent, en ce qui concerne les règles de preuve et de procédure, tout en se gardant de compromettre leur impartialité et l'équité des procédures.

Comportement à l'égard d'autrui

2.E.1 La conduite des juges à l'égard d'autrui est un aspect important de leur engagement envers l'intégrité et le respect. Les juges devraient se montrer sensibles aux propos désobligeants et aux comportements offensants ou inappropriés qui pourraient atteindre ou intimider les personnes qu'ils côtoient, en particulier celles sur lesquelles s'exerce leur autorité. La conduite des juges à cet égard est susceptible d'affecter tant leur réputation individuelle que celle de la magistrature dans son ensemble.

2.E.2 La possibilité que l'autorité soit utilisée à des fins inappropriées est souvent source de préoccupation dans les milieux de travail contemporains. Le milieu de travail où exercent les juges ne fait pas exception. Les juges s'abstiennent de toute forme de harcèlement au travail. Il est également important que les juges évitent les relations avec les personnes avec lesquelles ils travaillent ou qu'ils côtoient, lorsqu'une telle relation pourrait être raisonnablement perçue comme un abus de fonction ou d'autorité.

Use of Status or Authority

2.F.1 Judges should not use their status or authority, or the status of their office, to seek, for themselves or others, an advantage or benefit to which they would not otherwise be entitled.

Fundraising

2.F.2 Judges should not allow the prestige of judicial office to be used in aid of fundraising for particular causes, however worthy. They should not solicit funds (except from judicial colleagues or from family members) or lend the prestige of their judicial office to such solicitations.

Letters of Reference

2.F.3 Judges may be called upon to provide letters of reference. It is important that the prestige of judicial office not be used to advance another person's private interests or create an impression that certain persons stand in a particular position of influence or favour with the judge. Factors for the judge to consider include whether: (i) providing the reference will not compromise the integrity of judicial office; (ii) it is the judge's personal knowledge of the individual that is called for; and (iii) the judge has an important perspective about the individual to contribute such that it would be unfair to the individual were the judge to refuse. Judges should keep in mind that letters of reference may be made public. Such letters may also be rendered inappropriate or inaccurate by a subsequent change in circumstances, thereby having the potential to reflect adversely on the judge or the judiciary. Judges may assist judicial appointment advisory committees on a confidential basis.

Statut et pouvoir judiciaire

2.F.1 Les juges ne devraient pas utiliser leur statut ou leur pouvoir, ou le prestige de leur fonction, pour rechercher un avantage ou un bénéfice, pour eux-mêmes ou pour autrui, qui ne pourrait être obtenu autrement.

Collecte de fonds

2.F.2 Les juges ne devraient pas permettre que le prestige de la fonction judiciaire contribue à la collecte de fonds pour des causes particulières, si méritoires soient-elles. Ils ne devraient pas recueillir de dons (sauf auprès de collègues juges ou auprès de membres de leur famille), ni associer le prestige de leur fonction à de telles collectes.

Lettres de recommandation

2.F.3 On demande parfois aux juges de fournir des lettres de recommandation. Il est important que le prestige de la fonction judiciaire ne serve pas à promouvoir les intérêts privés d'un tiers ou à donner l'impression que certaines personnes jouissent auprès d'eux d'une influence ou de faveurs particulières. Les facteurs que les juges devraient prendre en considération comprennent, notamment, les suivants : (i) le fait de fournir la recommandation ne mettra pas en péril l'intégrité de la fonction judiciaire; (ii) c'est à leur connaissance de la personne concernée que l'on fait appel; et (iii) lorsqu'ils ont un point de vue important à exprimer sur la personne concernée, un refus de leur part ne serait pas équitable envers cette personne. Les juges devraient garder à l'esprit que les lettres de recommandation peuvent être rendues publiques, que leur contenu peut devenir mal adapté ou inexact par suite d'un changement de circonstances et qu'elles sont donc susceptibles de nuire à leur image ou à celle de la magistrature. Les juges peuvent aider les comités consultatifs sur la nomination des juges de manière confidentielle.

Collegial Support

2.G.1 Judges should encourage and support their judicial colleagues' observance of ethical principles. Judges may become aware of circumstances that indicate a strong likelihood of unethical conduct by a judicial colleague. In such instances, judges should act in a manner that best ensures that action is taken to preserve public confidence in the administration of justice. Depending on the circumstances, such action may include communication with the Chief Justice of the court.

Soutien collégial

2.G.1 Les juges devraient encourager leurs collègues de la magistrature à respecter les principes de déontologie et les appuyer dans cette démarche. Il peut arriver que des juges soient informés de circonstances signalant une forte probabilité que la conduite d'un juge comporte des lacunes d'ordre déontologique. Dans ces cas, les juges devraient agir de manière à s'assurer que des mesures sont prises pour préserver la confiance du public dans l'administration de la justice. Selon la situation, de telles mesures pourraient inclure la divulgation du problème au juge en chef de la cour.

III. Diligence and Competence

Statement

Judges perform their duties with diligence and competence.

Principles

A. Judges devote themselves to their judicial duties, broadly defined, which include presiding in court and making decisions, as well as those duties essential to court operations and to the administration of justice. Judges do not engage in activities incompatible with the diligent discharge of judicial duties.

B. Judges perform all judicial duties, including the delivery of reserved judgments, with punctuality and reasonable promptness, having due regard to the urgency of the matter and other special circumstances.

C. Judges maintain and enhance their knowledge, skills, sensitivity to social context and the personal qualities necessary to perform their judicial duties.

D. Judges strive to maintain their wellness to optimize the performance of judicial duties.

III. Diligence et compétence

Énoncé

Les juges exercent leurs fonctions avec diligence et compétence.

Principes

A. Les juges se consacrent à leurs fonctions judiciaires, entendues au sens large, lesquelles englobent le fait de présider les audiences et de rendre des décisions, ainsi que celles qui sont essentielles au bon fonctionnement de leur tribunal et de l'administration de la justice. Les juges s'abstiennent de toute activité incompatible avec l'exercice diligent de leurs fonctions judiciaires.

B. Les juges exercent toutes leurs fonctions judiciaires, et rendent les jugements mis en délibéré, de façon ponctuelle et avec une célérité raisonnable, compte tenu des circonstances propres à chaque affaire, y compris leur caractère urgent.

C. Les juges maintiennent et améliorent les connaissances, les compétences, la sensibilité au contexte social et les qualités personnelles qui sont nécessaires à l'exercice de leurs fonctions judiciaires.

D. Les juges s'efforcent de se maintenir en bonne santé afin d'exercer leurs fonctions judiciaires de manière optimale.

Commentary

General

3.A.1 Diligence is concerned with the performance of judicial duties in a skillful, careful, attentive and timely way.

3.A.2 Judges should exhibit diligence and competence in the performance of all their judicial duties, including adjudication, case management, pre-trial or settlement conferences and participation in court administration.

3.A.3 Section 55 of the *Judges Act*[3] provides that: "No judge shall, either directly or indirectly, for himself or herself or others, engage in any occupation or business other than his or her judicial duties, but every judge shall devote himself or herself exclusively to those judicial duties". Subject to the limitations imposed by the *Judges Act* and guided by these *Ethical Principles*, judges may participate in other activities that do not detract from the performance of judicial duties or compromise their independence or impartiality.

3.A.4 Upon appointment, judges should withdraw expeditiously from professional, commercial and business activities.

3.A.5 Generally speaking, a judge is entitled to have 'passive' investments that do not constitute 'carrying on business', provided that little active management is required and there is no interference with the diligent performance of judicial duties. For these reasons, judges should undertake a careful examination of their investments.

3 *Judges Act*, RSC 1985, c J-1

Commentaires

Général

3.A.1 On entend par diligence le fait d'exercer ses fonctions judiciaires de manière compétente, prudente et attentive, de même qu'avec une célérité raisonnable.

3.A.2 Les juges devraient faire preuve de diligence et de compétence dans l'exercice de toutes leurs fonctions judiciaires, y compris les fonctions décisionnelles, la gestion d'instance, les conférences préparatoires ou de règlement et la participation à l'administration de la justice.

3.A.3 L'article 55 de la *Loi sur les juges*[3] prévoit que « Les juges se consacrent à leurs fonctions judiciaires à l'exclusion de toute autre activité, qu'elle soit exercée directement ou indirectement, pour leur compte ou celui d'autrui ». Sous réserve des restrictions imposées par la *Loi sur les juges* et des recommandations formulées dans les *Principes de déontologie*, les juges peuvent participer à d'autres activités qui ne nuisent pas à l'exercice de leurs fonctions judiciaires ou mettent en péril leur indépendance ou impartialité.

3.A.4 Après leur nomination, les juges devraient se retirer rapidement de leurs activités commerciales et professionnelles, ainsi que de leur intérêts d'affaires.

3.A.5 De manière générale, les juges peuvent avoir des placements « passifs » qui ne constituent pas la « poursuite d'une entreprise », exigent peu de gestion active et ne les empêchent pas d'exercer leurs fonctions judiciaires avec diligence. Pour cette raison, les juges devraient effectuer une analyse serrée de leurs placements.

3 *Loi sur les juges*, L.R.C. (1985), ch. J-1

3.A.6 On occasion, judges are asked by governments to serve on commissions, inquiries or in other public roles. In considering such a request, in addition to the limitations imposed by the *Judges Act* and the guidance provided by *Ethical Principles*, judges should consider all implications and discuss the matter with their Chief Justice to ensure that acceptance of an appointment will not unduly interfere with the effective functioning of the court. The terms of reference and other conditions such as time and resources should be examined carefully so as to assess their compatibility with the judicial function.[4]

3.A.7 Judges are uniquely placed to make a variety of contributions to the administration of justice. Subject to the limitations imposed by judicial office, judges are encouraged, for example, to take part in legal education programs for students, lawyers and judges, and in activities to make the law and the legal process more understandable and accessible to the public, such as giving lectures, participating in moot courts or through legal writing.

Timeliness

3.B.1 Judges should perform all assigned judicial duties in a timely manner.

3.A.6 Il arrive que les gouvernements demandent à des juges d'exercer des fonctions publiques, notamment au sein d'une commission ou à l'occasion d'une enquête. Avant de répondre à une telle demande, outre les restrictions imposées par la *Loi sur les juges* et les recommandations formulées dans les *Principes de déontologie*, les juges devraient prendre en considération l'ensemble des conséquences et en discuter avec leur juge en chef afin de s'assurer que l'acceptation de la charge proposée ne nuira pas indûment au bon fonctionnement du tribunal. Le mandat et d'autres facteurs tels que la durée et les ressources devraient entrer en ligne de compte lorsqu'il s'agit d'évaluer la compatibilité de la charge proposée avec les fonctions judiciaires.[4]

3.A.7 Les juges sont particulièrement bien placés pour contribuer de diverses manières à l'administration de la justice. Sous réserve des restrictions qui leur sont imposées par leur charge, les juges sont encouragés, par exemple, à prendre part à des programmes de formation juridique à l'intention des étudiants, des avocats et des juges, et à participer à des activités destinées à mieux faire comprendre le droit et la procédure judiciaire au grand public, notamment en donnant des conférences, en participant à un tribunal-école ou en rédigeant des articles ou des livres de droit.

Célérité

3.B.1 Les juges devraient exercer toutes les fonctions judiciaires qui leur sont assignées avec une célérité raisonnable.

4 Canadian Judicial Council Protocol on the Appointment of Judges to Commissions of Inquiry (2010)

4 *Conseil canadien de la magistrature, Protocole sur la nomination de juges à des commissions d'enquête (2010)*

3.B.2 The preparation of judgments is frequently difficult and time consuming. Judges are expected to produce their decisions and reasons for judgment as soon as reasonably possible, having regard to the urgency of the matter and the length or complexity of the case. In this respect, the CJC has resolved that reserved judgments should be delivered within a maximum of six months after hearings, except in special circumstances.[5] Judges must also comply with legal requirements associated with timeliness of judgments applicable in their jurisdiction.

3.B.3 While judges strive to be diligent in the performance of their judicial duties, their ability to do so may be affected by various factors, including illness, exceptionally heavy burdens of work or the inadequacy of resources supporting their work.

Professional Development[6]

3.C.1 A well-educated and informed judiciary that adheres to high standards of competence is essential to preserving public confidence.

3.C.2 Judges should have and maintain knowledge of the law. Knowledge extends not only to substantive and procedural law but also to an understanding of the impact of the law on those it affects.

3.B.2 L'élaboration d'un jugement est souvent longue et ardue. Les juges sont censés prononcer leurs jugements et les motifs qui les accompagnent dès qu'il est raisonnablement possible de le faire, compte tenu de l'urgence de l'affaire, de sa longueur ou de sa complexité. En cette matière, le Conseil a, par voie de résolution, exprimé l'avis que, sauf s'il existe des circonstances particulières, les juges qui ont mis une affaire en délibéré devraient rendre leur jugement dans les six mois qui suivent l'audience.[5] Les juges doivent aussi respecter les délais imposés par la loi dans leur juridiction, le cas échéant.

3.B.3 Bien que les juges s'efforcent d'agir avec diligence dans l'exercice de leurs fonctions judiciaires, il peut leur être difficile de le faire en raison de différents facteurs, comme la maladie, une charge de travail exceptionnellement lourde ou l'insuffisance des ressources qui appuient leur travail.

Perfectionnement professionnel[6]

3.C.1 Afin de préserver la confiance du public à l'endroit de la magistrature, il est essentiel que les juges adhèrent à des normes élevées en matière de formation et de compétence.

3.C.2 Les juges devraient connaître le droit et se tenir à jour à cet égard. Cette connaissance s'étend non seulement aux règles de fond et de procédure, mais également à leur compréhension de l'impact qu'elles ont sur les personnes touchées.

5 *Canadian Judicial Council Resolution on Reserved Judgments (1985)*
6 *Canadian Judicial Council Professional Development Policies and Guidelines (2018)*

5 *Résolution du Conseil canadien de la magistrature sur les jugements pris en délibéré (1985)*
6 *Conseil canadien de la magistrature, Politiques et lignes directrices sur le perfectionnement professionnel (2018)*

3.C.3 Judges are responsible for maintaining and enhancing their knowledge, skills and personal qualities necessary for effective judging. This important element of judicial diligence and competence involves participation in continuing professional development.

3.C.4 Professional development describes formal and informal learning activities that include education, training and private study. It also covers education on social context issues affecting the administration of justice. Social context encompasses knowledge and understanding of the realities of the lives of those who appear in court. This includes the history, heritage and laws related to Indigenous peoples, as well as matters of gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background.

3.C.5 Judges should develop and maintain proficiency with technology relevant to the nature and performance of their judicial duties.

3.C.6 As part of a judge's commitment to continuing professional development, judges should engage in self-assessment and self-development, taking responsibility for their standard of knowledge, skill and the development of personal qualities related to judicial duties.

3.C.3 Il incombe aux juges de maintenir et d'accroître les connaissances, les compétences et les qualités personnelles qui leur sont nécessaires pour bien juger. Cet important volet de la diligence et de la compétence des juges implique la participation à des programmes de perfectionnement professionnel continu.

3.C.4 Le perfectionnement professionnel s'entend des activités d'apprentissage, formelles ou informelles, qui visent l'amélioration des connaissances et des compétences et les études personnelles. Il s'étend aussi à la formation touchant le contexte social pertinent à l'administration de la justice, ce qui comprend la connaissance et la compréhension de la réalité vécue par les personnes qui comparaissent devant le tribunal, y compris l'histoire et le patrimoine des peuples autochtones, le droit relatif aux peuples autochtones, ainsi que les questions liées au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge et à l'origine socio-économique.

3.C.5 Les juges devraient développer et maintenir les habiletés technologiques qui ont rapport à la nature et à l'exercice de leurs fonctions judiciaires.

3.C.6 En lien avec leur engagement envers le perfectionnement professionnel continu, les juges devraient évaluer leur niveau de connaissances et de compétences et les qualités individuelles qui leur permettent de s'acquitter de leurs fonctions judiciaires et s'engager dans un processus continu de perfectionnement professionnel.

3.C.7 To support judges' commitments to their continuing professional development, the CJC and National Judicial Institute, as well as other organizations, have developed relevant, comprehensive, quality educational programs. Judges should participate in these programs in their continuing commitment to acquire, maintain and strengthen their judicial knowledge and skills.

3.C.8 Consistent with their judicial duties, judges are encouraged to take advantage of opportunities to engage with and learn from the wider public, including communities with which the judge has little or no life experience.

Wellness

3.D.1 While judges should exhibit diligence in the performance of their judicial duties, the importance of judges' responsibilities to their families is also recognized.

3.D.2 Judges should set aside sufficient time and make a commitment to the maintenance of physical and mental wellness, and take advantage of judicial assistance programs as appropriate.[7]

3.C.7 Pour soutenir les juges dans cette démarche de perfectionnement professionnel continu, le Conseil et l'Institut national de la magistrature, de même que d'autres organismes, ont élaboré des programmes de formation pertinents, exhaustifs et de qualité. Les juges devraient participer à ces programmes afin de maintenir et d'améliorer leurs connaissances et leurs compétences judiciaires et d'en acquérir de nouvelles.

3.C.8 Lorsque cela est compatible avec leurs fonctions judiciaires, les juges sont encouragés à profiter des occasions de s'intéresser à la collectivité, notamment d'apprendre à mieux connaître les personnes issues de communautés dont l'expérience diffère de la leur.

Bien-être

3.D.1 Bien que les juges soient tenus de faire preuve de diligence dans l'exercice de leurs fonctions judiciaires, l'on reconnaît par ailleurs l'importance des responsabilités familiales des membres de la magistrature.

3.D.2 Les juges devraient réserver suffisamment de temps au maintien de leur bonne santé physique et mentale et se prévaloir, au besoin, des programmes d'aide qui leur sont offerts.[7]

7 *Judges Counselling Program – Confidential Assistance for Judges and their Families*

7 *Programme de counselling destiné aux juges – Soutien confidentiel aux juges et à leurs familles*

IV. Equality

Statement

Judges conduct themselves and the proceedings before them to ensure equality according to law.

Principles

A. Judges carry out their duties with respect for all persons, including parties, counsel, witnesses, court personnel and judicial colleagues, without discrimination or prejudice.

B. Judges refrain from discriminatory behaviour. They disassociate themselves from and disapprove of offensive or discriminatory comments or conduct by court staff, counsel or any other person involved in judicial proceedings.

C. Judges are sensitive to and are not influenced by attitudes based on stereotype, myth or prejudice. They make meaningful efforts to recognize and dissociate themselves from such attitudes.

D. Judges do not belong to any organization that engages in or countenances any form of discrimination that contravenes the law.

IV. Égalité

Énoncé

Les juges adoptent une conduite propre à assurer à tous un traitement égal conformément à la loi et ils conduisent les instances dont ils sont saisis dans ce même esprit.

Principes

A. Les juges exercent leurs fonctions en faisant preuve de respect à l'endroit de toutes les personnes, sans discrimination ni préjugés, qu'il s'agisse des parties, des avocats, des témoins, de membres du personnel de la cour ou d'autres juges.

B. Les juges s'abstiennent de comportements discriminatoires. Ils se dissocient de la conduite ou des propos offensants ou discriminatoires que pourraient avoir les membres du personnel de la cour, les avocats ou les autres personnes participant à une instance judiciaire et expriment leur désapprobation à cet égard.

C. Les juges sont sensibles aux attitudes fondées sur des stéréotypes, des mythes ou des préjugés et ne se laissent pas influencer par celles-ci. Les juges font des efforts concrets pour reconnaître ces attitudes et s'en dissocier.

D. Les juges n'adhérent à aucun organisme qui pratique ou approuve une forme quelconque de discrimination prohibée par la loi.

Commentary

General

4.A.1 The Constitution and a variety of statutes guarantee equality before and under the law and equal protection and benefit of the law without discrimination. The law's commitment to substantive equality seeks to protect members of the community from both direct discrimination and from the impact of laws and policies that, though neutral on their face, produce adverse effects, or adverse impact, discrimination. This approach to equality seeks to acknowledge the equal worth and dignity of all persons and to ensure that discrimination is prevented and rectified as it affects individuals or groups experiencing disadvantage in our society, often on a systemic or structural basis. The law's strong societal commitment places concern for equality at the core of justice according to law.

4.A.2 Equality, according to law, is fundamental to justice and is strongly linked to judicial impartiality and to public confidence in the administration of justice. Accordingly, judges should ensure that their commitment to equality is unwavering and that their conduct is such that any reasonable and informed member of the public would have confidence in the judge's respect for and commitment to equality.

Commentaires

Général

4.A.1 La Constitution et de nombreuses lois garantissent l'égalité devant la loi et sous le régime de la loi, de même que l'égalité en matière de protection et de bénéfice de la loi, sans discrimination. Cet engagement du législateur envers l'égalité réelle vise à protéger les membres de la collectivité contre la discrimination directe et contre les lois et les politiques qui, en apparence neutres, entraînent de la discrimination par suite d'un effet préjudiciable. Cette approche vise à reconnaître une même valeur à tous les êtres humains et la dignité de toutes les personnes, de manière à prévenir la discrimination, souvent systémique ou structurelle, dont sont victimes les personnes ou les groupes défavorisés de notre société et à y remédier. Cet engagement ferme pris par le législateur au nom de la société place l'égalité au cœur de la justice sous le régime de la loi.

4.A.2 Fondamentale pour la justice, l'égalité sous le régime de la loi est aussi étroitement liée à l'impartialité judiciaire et à la confiance du public dans l'administration de la justice. Par conséquent, les juges devraient être inébranlables dans leur engagement envers l'égalité et s'assurer que leur conduite est telle qu'une personne raisonnable et bien renseignée y verrait la manifestation de leur respect pour le principe d'égalité et leur engagement à l'égard de celui-ci.

Equality in Proceedings

4.B.1 Judges should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted as showing insensitivity to or disrespect for anyone. Examples include inappropriate comments based on stereotypes linked to gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socio-economic background, or other conduct that may create the impression that persons before the court will not be afforded equal consideration and respect. Inappropriate statements by judges, in or out of court, have the potential to call into question their commitment to equality and their ability to be impartial.

4.B.2 Judges should avoid engaging in activities on social media that could reasonably reflect negatively on their commitment to equality.

4.B.3 In proceedings before them, judges should intervene when confronted with discriminatory comments or behaviour. The principle of equality does not, however, require that proper advocacy or admissible testimony be curtailed where, for example, matters of gender, race or other similar factors are properly before the court. The adversarial system gives the parties and their counsel considerable leeway, and the relevance and importance of evidence may be difficult to assess accurately as it is being presented. Judges are expected to listen impartially, but, when necessary, should assert control over the proceeding and act with appropriate firmness to maintain an atmosphere of dignity, equality and order in the courtroom. Judges should be alive to the issues before the court and, where appropriate, seek clarification and provide balanced rulings on the relevance of a given line of questioning.

L'égalité dans le processus judiciaire

4.B.1 Les juges devraient éviter les observations, les expressions, les gestes ou les comportements qui pourraient être raisonnablement interprétés comme un manque de sensibilité ou de respect à l'égard d'une autre personne. En sont des exemples les remarques inappropriées fondées sur des stéréotypes liés au genre, à la race, à l'origine ethnique, à la religion, à la culture, à l'orientation sexuelle, à l'identité ou à l'expression de genre, aux différences de capacités physiques ou mentales, à l'âge, et à l'origine socio-économique, et toute autre conduite qui pourrait laisser entendre que des personnes comparaissant devant le tribunal ne seront pas traitées de façon égale et respectueuse. Les commentaires inappropriés formulés par les juges, en salle d'audience ou ailleurs, peuvent soulever un doute quant à leur engagement envers l'égalité, ou quant à leur impartialité.

4.B.2 Les juges devraient éviter d'avoir, sur les réseaux sociaux, des activités qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

4.B.3 Dans le cadre des affaires dont ils sont saisis, les juges devraient intervenir lorsqu'ils font face à des propos ou à une conduite discriminatoires. Le principe d'égalité n'implique pas, cependant, que l'on doive interdire la défense légitime d'idées, ou empêcher la présentation de témoignages par ailleurs admissibles, lorsque, par exemple, des questions de genre, de race ou d'autres facteurs semblables sont légitimement soulevés devant la cour. Le système contradictoire donne beaucoup de latitude aux parties et à leurs avocats, et il peut être difficile d'évaluer avec justesse la pertinence et l'importance de la preuve au moment de sa présentation. Les juges sont censés écouter le débat en toute impartialité, mais devraient, si nécessaire, le contrôler fermement et faire preuve de toute la rigueur voulue pour maintenir un climat de dignité, d'égalité et d'ordre dans la salle d'audience. Les juges devraient être sensibles aux questions qui sont devant le tribunal et, lorsque cela est utile, obtenir des précisions sur la pertinence des questions posées par les avocats et rendre des décisions équilibrées sur celles-ci.

4.B.4 Judges should not permit court staff or others subject to their authority or control to engage in conduct that may: show disrespect toward others; constitute discrimination; or reasonably reflect negatively on their commitment to equality.

Avoidance of Stereotypes

4.C.1 Judges do not make assumptions based on general characterizations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics. Stereotypes are simplistic mental short cuts that generate misleading perceptions and cause mistakes and errors in fact and in law.

4.C.2 Reliance on stereotypes may arise for different reasons, often unintentionally. Judges may not properly appreciate that their reasoning is linked to stereotypical thinking. A judge may be unfamiliar with cultural traditions that would, if known, provide a greater understanding of a party's or a witness's appearance, mannerisms or behaviour.

4.C.3 Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. They should take up opportunities to engage with cultures and communities that are different from their own life experiences to expand their knowledge and understanding. In doing this, judges should take care that these efforts enhance and do not detract from their independence and impartiality. In addition, judges should take advantage of educational opportunities and self-study that will assist them in this regard.

4.B.4 Les juges ne devraient pas laisser le personnel de la cour ou d'autres personnes agissant sous leur autorité ou leur contrôle manquer de respect à autrui, ou adopter des comportements qui peuvent constituer de la discrimination ou qui sont raisonnablement susceptibles de discréditer leur engagement envers le principe d'égalité.

La prévention des stéréotypes

4.C.1 Les juges s'abstiennent de formuler des hypothèses fondées sur des caractérisations générales et d'accoler des étiquettes susceptibles d'encourager la formulation d'hypothèses stéréotypées au sujet du comportement ou des caractéristiques de certaines personnes. Les stéréotypes sont des raccourcis dans le raisonnement qui nourrissent des perceptions trompeuses et conduisent à des erreurs de fait ou de droit.

4.C.2 Le recours aux stéréotypes peut résulter d'un ensemble de causes et n'est souvent pas intentionnel. Il est possible que des juges ne soient pas conscients que leur raisonnement est relié à un stéréotype. Il peut aussi arriver que des juges ne connaissent pas certaines traditions culturelles qui, s'ils les connaissaient, leur permettraient de mieux comprendre la façon de se présenter, d'agir et de se comporter d'une partie ou d'un témoin.

4.C.3 Les juges devraient être sensibilisés au fait que les hypothèses peuvent reposer sur des stéréotypes et prendre les moyens appropriés pour demeurer au fait des changements d'attitudes et de valeurs. Ils devraient s'intéresser aux cultures et aux communautés qui diffèrent de celles qu'ils côtoient de par leur expérience de vie, afin d'élargir leurs connaissances et leur compréhension. Toutefois, les juges devraient s'assurer que les efforts déployés en ce sens renforcent leur indépendance et leur impartialité plutôt que de leur nuire. De plus, les juges devraient profiter des activités de formation et des lectures qui permettent d'en apprendre plus sur ces questions.

Association with Discriminatory Organizations

4.D.1 Judges should conduct their personal lives honourably and in ways that would not reasonably be perceived as an endorsement of any invidious form of discrimination. Judges should avoid associations with organizations that engage in or countenance discrimination contrary to law. A judge's membership in such an organization has the potential to call into question the judge's commitment to equality and may erode public confidence in the judiciary. Judges should also be sensitive to the fact that some organizations' activities, policies and public positions, though not unlawful, may still be offensive to legitimate expectations of equality.

4.D.2 Neither the practice of religion nor membership in a religious organization is inconsistent with *Ethical Principles*.

Association avec des organismes ayant des pratiques discriminatoires

4.D.1 Les juges devraient se conduire de manière honorable dans leur vie personnelle et faire en sorte que leur comportement ne puisse donner à raisonnablement penser qu'ils appuient une quelconque forme de discrimination préjudiciable. Par conséquent, les juges devraient éviter toute association avec un organisme qui pratique ou approuve une forme de discrimination prohibée par la loi. L'adhésion à un tel organisme est susceptible de remettre en cause l'engagement des juges envers le principe d'égalité et de miner la confiance du public à l'endroit de la magistrature. Les juges devraient aussi être sensibles au fait que l'activité et les politiques de certains organismes ainsi que les opinions qu'ils expriment, quoique licites, peuvent porter atteinte aux attentes légitimes en matière d'égalité.

4.D.2 Ni la pratique d'une religion, ni l'appartenance à un organisme religieux ne sont incompatibles avec les *Principes de déontologie*.

V. Impartiality

Statement

Judges are impartial and appear to be impartial in the performance of their judicial duties.

Principles

A. Judges ensure that their conduct at all times maintains and enhances confidence in their impartiality and that of the judiciary.

B. Judges avoid conduct which could reasonably cause others to question their impartiality.

C. Judges conduct their affairs so as to avoid real or apparent conflicts of interest between their private interests and their judicial duties.

D. While preserving their impartiality, judges make meaningful efforts to inform and educate the public and the legal profession regarding the law, judicial independence, and the role of judges and the courts in the administration of justice.

E. Judges contemplating retirement and former judges avoid conduct that is likely to bring the judicial office into disrepute or put at risk public expectations of judicial independence, integrity and impartiality.

V. Impartialité

Énoncé

Les juges sont impartiaux et donnent l'apparence d'impartialité dans l'exercice de leurs fonctions judiciaires.

Principes

A. Les juges veillent en toutes circonstances à ce que leur conduite entretienne et accroisse la confiance dans leur impartialité et celle de la magistrature en général.

B. Les juges évitent les comportements pouvant raisonnablement amener autrui à mettre en doute leur impartialité.

C. Les juges mènent leurs affaires de manière à éviter tout conflit réel ou apparent entre leurs intérêts personnels et leurs fonctions judiciaires.

D. Tout en veillant à préserver leur impartialité, les juges s'efforcent d'éduquer le public et la profession juridique et de les informer sur le droit, l'indépendance judiciaire et le rôle des juges et des tribunaux dans l'administration de la justice.

E. Les juges qui songent à quitter ou qui ont quitté la magistrature évitent toute conduite susceptible de jeter le discrédit sur la fonction judiciaire ou de miner les attentes du public quant à l'indépendance, à l'intégrité et à l'impartialité de la magistrature.

Commentary

General

5.A.1 For centuries, adjudication by impartial and independent judges has been recognized as fundamental to the rule of law. Impartiality is a fundamental qualification of a judge and a core attribute of the judiciary.

5.A.2 Impartiality requires not only the absence of bias and prejudgment, but also the absence of any appearance of partiality. This dual aspect of impartiality is captured in the oft-repeated words that justice must not only be done, but manifestly be seen to be done. The test is whether a reasonable and informed person with knowledge of all relevant circumstances, viewing the matter realistically and practically, would apprehend a lack of impartiality in the judge.

5.A.3 While there is a close association between the judge's ethical and legal duties of impartiality, *Ethical Principles* is not intended to deal with the law relating to judicial disqualification or recusal.

Judicial Duties

5.A.4 Judges have a fundamental obligation to be and to appear to be impartial. This obligation of impartiality does not presuppose that judges are free of life experiences, sympathies or opinions. Rather, it requires judges to be sensitive to their own biases and to consider different points of view with an open mind. Judges should interact with all parties fairly and even-handedly.

Commentaires

Général

5.A.1 Depuis des siècles, on reconnaît que la décision des litiges par des juges impartiaux et indépendants est essentielle à la primauté du droit. L'impartialité est l'une des qualités fondamentales des juges et un attribut central de la fonction judiciaire.

5.A.2 L'impartialité requiert non seulement l'absence de préjugés et de partis pris, mais également l'absence d'apparence de partialité. Ces deux volets de l'impartialité sont bien résumés dans la maxime selon laquelle non seulement justice doit être rendue, mais encore elle doit paraître avoir été rendue. Le critère applicable consiste à se demander si une personne raisonnable et bien renseignée, qui serait au courant de toutes les circonstances pertinentes et étudierait la question de façon réaliste et pratique, craindrait que le juge ne soit pas impartial.

5.A.3 Bien qu'il existe des liens étroits entre les devoirs éthiques et juridiques des juges en matière d'impartialité, les *Principes de déontologie* ne sont pas destinés à traiter du droit relatif à la récusation des juges.

Fonctions judiciaires

5.A.4 Les juges ont l'obligation fondamentale d'être et de paraître impartiaux. L'obligation d'impartialité ne présuppose pas que les juges n'ont aucune expérience personnelle, sympathie ou opinion. Elle exige plutôt que les juges soient conscients de leurs propres préjugés et accueillent différents points de vue en gardant un esprit ouvert. Les juges devraient traiter toutes les parties avec équité et sur un pied d'égalité.

5.A.5 Judges should avoid using words or conduct, in and out of court, that might give rise to a reasonable perception of bias. The expectations of litigants are high. Disappointed litigants will sometimes perceive bias when neither actual bias nor a reasonable apprehension of bias exists. A judge's remarks or tone may diminish the judge's perceived impartiality. An unjustified reprimand of counsel, an improper remark about a litigant or a witness or a statement evidencing prejudgment or intemperate and impatient behaviour may undermine the appearance of impartiality. Casual conversations or familiarity with counsel or participants in the proceedings may be perceived by others as a form of exclusion. Therefore, judges should ensure that their comments or conduct do not provide reasonable grounds for a perception of bias.

5.A.6 While judges may wish to signal support for causes or viewpoints through words or in the wearing or display of symbols of support, even if they seem innocuous, such communications may be interpreted as reflecting a lack of impartiality or the use of the position of the judge to make a political or other statement. For these reasons, judges should avoid statements or visible symbols of support, particularly in the context of court proceedings.

5.A.7 Judges should ensure that proceedings are conducted in an orderly and efficient manner and that the court process is not abused. An appropriate measure of firmness may be necessary to achieve this end. In the presence of challenging or vexatious litigants, judges should be firm, decisive and at the same time respectful to ensure that litigants' rights are protected.

5.A.5 Les juges devraient éviter de s'exprimer ou de se comporter, en salle d'audience ou ailleurs, de manière à susciter une perception raisonnable de partialité. Les attentes des parties sont élevées. Il peut arriver qu'une partie déçue perçoive l'existence d'un préjugé malgré l'absence de partialité réelle ou de crainte raisonnable de partialité. Des remarques formulées par les juges ou le ton employé pour exprimer celles-ci peuvent miner la perception d'impartialité des juges. Les remontrances injustifiées faites aux avocats, les remarques déplacées au sujet des parties ou des témoins, les déclarations manifestant un parti pris et les comportements immodérés et impatients peuvent saper l'apparence d'impartialité. Les conversations ou comportements empreints de familiarité avec les avocats ou les participants à l'instance peuvent être perçus par d'autres comme une forme d'exclusion. Par conséquent, les juges devraient s'assurer que leurs commentaires ou leur conduite ne donnent pas prise à une perception raisonnable de partialité.

5.A.6 Bien que des juges puissent vouloir exprimer leur appui pour certaines causes ou points de vue, les paroles ou le port d'insignes marquant cet appui, même lorsqu'ils semblent inoffensifs, peuvent être interprétés comme un manque d'impartialité ou être vus comme un moyen d'utiliser la fonction judiciaire pour faire une déclaration politique ou autre. Pour cette raison, les juges devraient éviter de tenir des propos ou de porter des insignes visibles marquant leur appui, en particulier dans le cadre du processus judiciaire.

5.A.7 Les juges devraient veiller à ce que l'instance se déroule de manière ordonnée et efficace, tout en prévenant les abus de procédure. Une certaine fermeté peut s'imposer selon les circonstances. En présence d'une partie difficile ou quérulente, les juges devraient se comporter de manière ferme et décisive, sans renoncer au respect requis pour assurer la protection des droits des parties.

5.A.8 Judges have a responsibility to promote opportunities for all persons to understand the judicial process and to meaningfully present their case, whether or not they have legal representation. Self-represented persons may sometime be uninformed about their rights and about the consequences of the options they choose. Judges should take appropriate and reasonable measures to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.[8] Such measures are consistent with impartiality provided that they are fair to other parties.

5.A.9 Judges should be particularly attuned to the perception of bias that might arise in circumstances where one or more parties are self-represented. Appropriate assistance to a self-represented litigant may be perceived by the opposing, represented party as manifesting bias. Accommodations extended to self-represented litigants should not extend to the point where they become unfair to the other party. Clear and transparent communication with all parties is necessary to avoid unwarranted apprehension of bias.

5.A.8 Les juges ont la responsabilité de s'assurer que toute personne, qu'elle soit représentée ou non représentée, ait la possibilité de comprendre le processus judiciaire et de faire valoir sa position. Les personnes non représentées peuvent parfois être mal informées de leurs droits et des conséquences de leurs choix. Les juges devraient prendre des moyens appropriés et raisonnables afin d'établir un processus équitable et impartial et d'empêcher que les personnes non représentées ne soient pas injustement désavantagées.[8] De tels moyens se concilient avec l'impartialité pour autant qu'ils soient équitables envers toutes les parties.

5.A.9 Les juges devraient être particulièrement sensibles à la possibilité d'une perception de partialité dans les situations où l'une des parties ou plusieurs d'entre elles ne sont pas représentées. L'assistance congruente que les juges apportent à une partie non représentée peut être perçue par la partie adverse représentée par avocat comme la manifestation d'un parti pris. Les accommodements accordés aux parties non représentées ne devraient pas rendre le processus injuste pour les parties représentées. Il est nécessaire de communiquer de façon claire et transparente avec toutes les parties afin de dissiper les craintes injustifiées de partialité.

8 *Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons (2006)*

8 *Conseil canadien de la magistrature, Énoncé de principes concernant les plaideurs et les accusés non représentés par un avocat (2006)*

5.A.10 An expanding aspect of judicial responsibility for judges is their work in settlement conferences and the judicial mediation of disputes. Direct engagement with litigants and counsel in these non-adjudicative settings often takes judges outside the confines of their traditional roles and presents additional challenges in relation to impartiality. Given the variety of settings in which this work takes place, it is not possible to articulate bright line rules to provide guidance in every situation. However, there are values and boundaries which judges should respect in these settings. When engaging in non-adjudicative dispute resolution, judges should ensure that: (i) the process and outcomes are acceptable to the parties themselves; (ii) the outcomes are the subject of informed decision-making by the parties; (iii) the process is transparent to the parties; (iv) the outcomes are not coercive, unconscionable, or illegal; and (v) the legitimate interests of known non-involved third parties are considered. Transparency in this context means openness in the broadest sense and is not intended to discourage caucusing in appropriate circumstances.

Restraints

5.B.1 On appointment, judges do not surrender all of the rights and freedoms enjoyed by everyone else in Canada. Nevertheless, the office of the judge imposes restraints that are necessary to maintain public confidence in the impartiality and independence of the judiciary. In defining the appropriate degree of public involvement by a judge there are two fundamental considerations. The first is whether the involvement could reasonably undermine confidence in the judge's impartiality. The second is whether such involvement may expose the judge to criticism or be inconsistent with the dignity and integrity of judicial office.

5.A.10 Les responsabilités des juges s'étendent de plus en plus aux modes alternatifs de règlement des litiges et à la médiation judiciaire. Les interactions directes entre juges, parties et avocats inhérentes à ces processus non juridictionnels s'inscrivent souvent en dehors des cadres traditionnels de l'activité judiciaire et soulèvent des enjeux additionnels en matière d'impartialité. Comme ces cadres de travail varient grandement, il n'est pas possible d'établir des règles claires et précises susceptibles d'apporter des solutions à toutes les éventualités. Néanmoins, les juges devraient respecter certaines valeurs et limites dans ces situations et notamment s'assurer de ce qui suit : (i) le processus et les résultats qui en découleront sont acceptables pour les parties elles-mêmes; (ii) les parties ont consenti en toute connaissance de cause aux résultats; (iii) le processus est transparent pour les parties; (iv) les résultats ne sont pas coercitifs, iniques ou contraires à la loi; et (v) les intérêts légitimes des tiers connus qui ne sont pas parties au litige sont pris en compte. Dans ce contexte, la transparence s'entend d'une ouverture, au sens large, et n'est pas incompatible avec la possibilité de rencontres individuelles, le cas échéant.

Restrictions

5.B.1 Les juges ne renoncent pas, du fait de leur nomination, à l'ensemble des droits et libertés dont jouit chaque personne au Canada. Cependant, la charge de juge impose des contraintes qui sont nécessaires au maintien de la confiance du public dans l'impartialité et l'indépendance de la magistrature. Deux questions fondamentales entrent en ligne de compte lorsqu'il s'agit de déterminer le niveau d'intervention publique qui convient à un membre de la magistrature. La première consiste à savoir si l'intervention pourrait raisonnablement saper la confiance dans l'impartialité du juge et la deuxième, si cette intervention est susceptible d'exposer le juge aux critiques ou est par ailleurs incompatible avec la dignité et l'intégrité de la fonction judiciaire.

Political Activity

5.B.2 Judges must cease all partisan political activity upon the assumption of judicial office. Moreover, judges refrain from conduct that, in the mind of a reasonable and informed person, could give rise to the appearance that the judge is engaged in political activity. For this reason, judges must refrain from: (i) membership in political parties and political fundraising; (ii) attendance at political gatherings and political fundraising events; (iii) contributing financially or otherwise to political parties or campaigns; (iv) signing petitions to influence a political decision; and (v) taking part publicly in controversial political discussions, except in respect of matters directly affecting the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice.

5.B.3 Like partisan political activity, out of court statements by a judge concerning issues of public controversy may undermine impartiality. They are also likely to lead to public confusion about the nature of the relationship between the judiciary on the one hand and the executive and legislative branches of government on the other. Partisan actions and political statements by definition involve publicly choosing one side of a debate over another. In order to preserve their impartiality, judges should refrain from any political action or involvement. The perception of partiality will be reinforced if the judge's activities attract criticism and/or rebuttal. This in turn tends to undermine public confidence in the judiciary. Judges should not use the privileged platform of judicial office to enter the public arena because it puts at risk public confidence in the impartiality and the independence of the judiciary.

Activités politiques

5.B.2 Les juges doivent se retirer de toute activité politique de nature partisane dès leur entrée en fonction. De plus, les juges évitent toute conduite susceptible de donner à une personne raisonnable et bien renseignée l'impression qu'ils s'adonnent à une activité politique. Pour cette raison, les juges doivent éviter de faire ce qui suit : (i) adhérer à des partis politiques et à des campagnes de financement politique; (ii) participer à des rassemblements politiques ou à des activités de financement politique; (iii) verser des contributions financières à des partis ou à des campagnes politiques ou y contribuer d'autres manières; (iv) signer des pétitions visant à influencer une décision politique; et (v) intervenir publiquement dans des débats politiques, sauf sur des questions concernant directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des éléments fondamentaux de l'administration de la justice.

5.B.3 Tout comme les activités politiques de nature partisane, les propos hors du cadre judiciaire sur des questions soulevant une controverse publique peuvent miner l'image d'impartialité du juge. En outre, ils risquent de créer de la confusion auprès du public en ce qui concerne les rapports entre le pouvoir judiciaire, d'une part, et les pouvoirs exécutif et législatif, d'autre part. Par définition, les activités partisanes et les déclarations politiques impliquent une prise de position publique à l'égard d'une question particulière. Afin de préserver leur impartialité, les juges devraient éviter toute activité ou participation politique. La perception de partialité sera plus aiguë si les activités auxquelles s'adonnent les juges font l'objet de critiques ou de contestations. Ces réactions, à leur tour, tendront à miner la confiance du public à l'endroit de la magistrature. Les juges ne devraient pas utiliser le prestige associé à la fonction judiciaire comme levier dans l'arène publique, car, ce faisant, ils mettent en péril la confiance du public dans l'impartialité et l'indépendance de la magistrature.

5.B.4 Chief Justices and other judges with administrative responsibilities will necessarily have contact and interaction with the executive branch of government, including attorneys general, deputy attorneys general and court services officials. These engagements are appropriate provided that the interactions are not partisan in nature.

5.B.5 If a member of a judge's family is politically active, the judge should recognize that such activities of close family members may adversely affect the public perception of the judge's impartiality. In cases where such public perceptions may arise, a judge should consider whether recusal is the appropriate remedy in a given case.

Public Statements

5.B.6 There are limited circumstances in which judges may properly speak out, though with restraint, about a matter that is publicly controversial, namely, when the matter directly affects the operation of the courts, the independence of the judiciary or fundamental aspects of the administration of justice. Chief Justices have particular responsibilities in this regard. Judges should follow any protocol established by their Court on these matters.

5.B.7 If their personal integrity has been called into question in a public context, judges should seek guidance from their Chief Justice and, if appropriate, other trusted advisors.

5.B.4 Les juges en chef et les autres juges qui exercent des responsabilités administratives sont appelés à communiquer et à interagir avec des membres du pouvoir exécutif, dont les procureurs généraux, les sous-ministres ou sous-procureurs généraux et les administrateurs des tribunaux. Ces interactions sont appropriées, en autant qu'elles n'ont pas de dimension partisane.

5.B.5 Les juges devraient être conscients que les activités politiques d'un membre de leur famille immédiate peuvent compromettre leur image d'impartialité auprès du public. Dans les cas où la perception du public pourrait être compromise dans une affaire particulière dont ils sont saisis, les juges devraient considérer s'il y a lieu de se récuser.

Déclarations publiques

5.B.6 Il existe des circonstances où les juges, quoique avec retenue, peuvent exprimer publiquement leur avis sur un sujet controversé, notamment lorsque ce dernier concerne directement le fonctionnement des tribunaux, l'indépendance de la magistrature ou des aspects fondamentaux de l'administration de la justice. Les juges en chef ont une responsabilité particulière à cet égard. Les juges devraient se conformer aux protocoles établis par leur propre cour, le cas échéant.

5.B.7 Dans le cas où leur intégrité personnelle serait publiquement mise en doute, les juges devraient obtenir l'avis de leur juge en chef et, au besoin, d'autres conseillers dignes de confiance.

Judicial Promotion and Opportunities

5.B.8 Leadership positions in courts, opportunities for elevation to a higher court and other opportunities for judges arise from time to time. These decisions are ultimately made by the executive branch of government. Judges are entitled to seek these positions and advance their qualifications, but should exercise reserve in their communication of interest, or the communication of interest by others on their behalf, so as to avoid any conduct that would compromise their impartiality or undermine the integrity of the appointment process.

Public Engagement, Civic and Charitable Activity

5.B.9 Many judges wish to become or continue to be active in various forms of public service to their communities. This involvement benefits the community and judges but also carries risks.

5.B.10 On one hand, there are likely to be beneficial aspects of the judge being active in appropriate forms of public service. Judges administer the law on behalf of the community and are appointed to serve the public. Therefore, unnecessary isolation from the community does not promote wise or just judgments. In order to undertake their work with competence and diligence, and in ways that are consistent with judicial duties, judges are encouraged to take up opportunities to engage with and learn from the wider public, including communities with which they have little or no life experience.

Promotion et autres opportunités pour les juges

5.B.8 Il arrive que des juges soient pressentis pour des fonctions de leadership au sein d'une cour ou en vue de leur accession à une cour de juridiction supérieure, ou que d'autres occasions se présentent à eux. Les décisions finales en cette matière relèvent du pouvoir exécutif. Les juges sont en droit de soumettre leur candidature à ces postes et de faire valoir leurs compétences, mais devraient faire preuve de réserve lorsqu'il s'agit d'exprimer leur intérêt soit directement, soit par l'entremise d'une autre personne, afin d'éviter toute conduite qui mettrait en péril leur impartialité ou minerait l'intégrité du processus de nomination.

Participation à la vie publique et activités sociales ou communautaires

5.B.9 Nombre de juges souhaitent s'impliquer dans des activités sociales ou communautaires ou maintenir leur engagement à cet égard. Cet engagement est bénéfique tant pour la société que pour les juges, mais comporte également des risques.

5.B.10 D'une part, la participation des juges à diverses activités sociales ou communautaires appropriées est sans doute avantageuse. Les juges appliquent la loi au nom de la société et sont nommés pour servir la population. Par conséquent, leur isolement excessif du reste de la collectivité est peu propice à des décisions justes et judicieuses. Afin qu'ils exercent leurs fonctions avec compétence et diligence, dans le respect des devoirs de leur charge, les juges sont encouragés à saisir les occasions qui leur permettent d'interagir avec le public et de mieux comprendre leur société, y compris les groupes qu'ils connaissent peu ou pas de par leur expérience personnelle.

5.B.11 On the other hand, the judge's civic involvement may, in some cases, jeopardize the perception of impartiality. Judges should exercise caution when considering their involvement in community activities and be attentive to the limits that judicial appointment places upon their freedom to undertake these activities. Community involvement on the part of the judge should be assessed in light of the form of public service under consideration, the activities and goals of the organization, the role to be played by the judge within it, the risk that the organization may become engaged in litigation and any other relevant factor.

5.B.12 Generally speaking, judges should refrain from membership in or association with groups or organizations or participation in public discussion which, in the mind of a reasonable and informed person, would undermine confidence in a judge's impartiality with respect to issues that could come before the courts. In service to their communities, judges must not give legal or investment advice, and should avoid involvement in causes or organizations that are likely to be engaged in litigation. Judges should use even greater caution in considering whether to become officers or directors of community organizations.

5.B.13 While, in the past, Canadian judges have served in leadership positions with organizations such as universities and religious bodies, this service is potentially problematic. The risk that such organizations will become involved in litigation or be the subject of public controversy creates the possibility that the judge will be placed in an awkward position, both in relation to public confidence in the judge's impartiality and in the judiciary as a whole. While judges may consider accepting such positions, they should reflect on issues of perceived or actual conflict before doing so, all with a view to determining whether the role can be structured in such a way so as to avoid conflicts and appearances of conflict.

5.B.11 D'autre part, l'engagement social et communautaire des juges peut parfois compromettre leur image d'impartialité. Les juges devraient faire preuve de prudence lorsqu'ils envisagent de participer à des activités sociales ou communautaires et être sensibles au fait que l'accession à la magistrature leur impose des limites à cet égard. L'opportunité d'une participation devrait être appréciée en fonction du type de service public envisagé, des activités et objectifs de l'organisme, du rôle que le juge serait appelé à y jouer, du risque que l'organisme soit partie à un litige et de tout autre facteur pertinent.

5.B.12 En général, les juges devraient s'abstenir d'adhérer ou de s'associer à un groupement ou à un organisme, ou de participer à un débat public, lorsque, du point de vue d'une personne raisonnable et bien renseignée, cette adhésion ou cette participation serait susceptible de miner la confiance dans l'impartialité des juges relativement à des questions susceptibles d'être soumises aux tribunaux. Dans le cadre de leurs activités sociales ou communautaires, les juges doivent s'abstenir de donner des conseils juridiques ou des conseils en matière de placements et devraient éviter de participer à des causes ou à des organisations susceptibles d'être impliquées dans un litige. Les juges ne devraient envisager d'occuper des postes de dirigeant ou d'administrateur d'un organisme social ou communautaire qu'avec la plus grande prudence.

5.B.13 Bien que certains juges du Canada aient dans le passé occupé des fonctions de leadership au sein d'entités telles que des universités ou des organisations religieuses, l'exercice de telles fonctions peut soulever des difficultés. Il existe un risque que ces entités soient parties à un litige, ou qu'elles fassent l'objet d'une controverse publique, ce qui pourrait placer le juge dans une situation délicate du point de vue de la confiance du public, tant à l'égard de son impartialité qu'à l'endroit de la magistrature dans son ensemble. Avant d'accepter de telles fonctions, les juges devraient considérer les risques de conflit réel ou perçu et s'il est possible d'établir une structure permettant d'éviter les conflits et les apparences de conflit.

5.B.14 Involvement with a community organization that at one time was appropriate may become inappropriate. Judges should re-evaluate these associations in light of changing circumstances.

Social Media

5.B.15 Social media activities are subject to the overarching principles that guide judicial behaviour. Judges should be aware of how their activities on social media may reflect on themselves and upon the judiciary and should be attentive to the potential implications for their ability to perform their judicial role. Judges should also be attentive to and may wish to inform family members of the ways in which their social media activities could reflect adversely on the judge.

5.B.16 Communication by social media is more public and more permanent than many other forms of communication. It enables messages to be re-transmitted beyond the originators' control and without their consent. Comments or images intended for a limited audience can be shared, almost instantaneously, with a vast audience and may create an adverse reaction far beyond what one may have considered possible. Social media can also create greater opportunities for inappropriate communications to judges from others.

5.B.14 La participation à un organisme social ou communautaire qui est jugée appropriée à un moment donné peut cesser de l'être par la suite. Les juges devraient réévaluer leurs associations en fonction des changements de circonstances.

Médias sociaux

5.B.15 Les communications dans les médias sociaux sont assujetties aux principes fondamentaux qui guident la conduite des juges. Les juges devraient être conscients du fait que ces communications peuvent ternir leur réputation et celle de la magistrature et se répercuter sur leur capacité d'exercer leurs fonctions judiciaires. Par ailleurs, les juges devraient être conscients que les communications des membres de leur famille pourraient également se répercuter défavorablement sur eux; il pourrait y avoir lieu de les en informer.

5.B.16 Les communications affichées dans les médias sociaux peuvent rarement être effacées et n'ont pas vraiment de caractère privé. Elles peuvent facilement être disséminées sans le consentement de leur auteur et échapper à son contrôle. Les commentaires et les images destinés à être partagés dans un cercle fermé peuvent être rediffusés, parfois instantanément, à un vaste auditoire et provoquer une réaction défavorable qui dépasse largement ce qu'on aurait imaginé. Les médias sociaux ouvrent aussi des avenues additionnelles permettant à un membre du public de transmettre des communications inappropriées à un membre de la magistrature.

5.B.17 Judges' communications and associations with others are commonly used as a basis for claims of lack of impartiality. Judges should be vigilant in minimizing reasonable apprehensions of bias arising from these communications and associations. This is all the more important, and difficult, in the age of social media. Judges who choose to use social media should exercise great caution in their communications and associations within these networks, including expressions of support or disapproval. This includes judges informing themselves about the functioning, and the application, of security and privacy settings appropriate to their use of social media.

5.B.18 In a digital world, out-of-court information is much more accessible and the acquisition of such information by a judge is more readily discoverable. Accordingly, judges should be vigilant to avoid inappropriately acquiring or receiving out-of-court information related to the parties, witnesses or issues under consideration in matters before them. Fairness issues may need to be considered by the judge should this happen.

Gifts and Remuneration

5.B.19 Judges must not accept gifts from litigants, lawyers, law firms or any other person in contexts that give rise to a reasonable apprehension of bias. This does not prevent judges from accepting gifts of nominal value in appreciation for having spoken at or contributed to events or conferences, or have their reasonable expenses reimbursed. Such gifts are acceptable, provided that they do not represent remuneration and their acceptance would not create, in the mind of a reasonable and informed person, a perception of partiality.

5.B.17 Les allégations touchant le manque d'impartialité sont souvent fondées sur des propos des juges ou sur le fait qu'ils entretiennent des rapports avec certaines personnes. Les juges devraient éviter que de telles communications ou de tels rapports donnent prise à une crainte raisonnable quant à leur impartialité. Les médias sociaux compliquent les choses à cet égard. Les juges qui choisissent d'y être présents devraient faire preuve d'une grande prudence dans leurs communications, y compris en ce qui concerne l'usage de symboles d'approbation ou de désaccord. Ils devraient également se renseigner sur le fonctionnement et l'application des paramètres de sécurité et de protection de la vie privée convenant à leur utilisation des médias sociaux.

5.B.18 À l'ère numérique, il est beaucoup plus facile d'accéder à des renseignements extrajudiciaires et de laisser des traces en le faisant. Par conséquent, les juges devraient veiller à éviter d'obtenir ou de recevoir de façon inappropriée des renseignements extrajudiciaires relatifs aux parties, aux témoins ou aux questions dont ils sont saisis. Une telle situation, si elle survenait, pourrait soulever des questions d'équité que le juge pourrait devoir prendre en considération.

Cadeaux et rémunération

5.B.19 Les juges ne doivent pas accepter de cadeaux de la part des parties à un litige, d'avocats ou de leur cabinet ou de toute autre personne lorsque cela est susceptible de susciter une crainte raisonnable de partialité. Cela ne signifie pas qu'il est interdit aux juges d'accepter des cadeaux de valeur symbolique pour leur contribution à la tenue d'événements ou de conférences ou d'obtenir le remboursement de frais raisonnables. De tels cadeaux sont acceptables, en autant qu'ils ne constituent pas une rémunération et que le fait de les accepter ne susciterait pas chez une personne raisonnable et bien renseignée une perception de partialité.

Speeches and Conferences

5.B.20 It is common for judges to be asked to speak in public. Judges' public engagement aimed at educating others is a benefit to the judiciary and the public they serve. Judges are encouraged to attend events as speakers, both to contribute their knowledge and to undertake their own professional development. However, speaking in public carries risks to the public perception of the judge's impartiality and must be approached with care. Judges should give careful consideration to a range of factors when deciding whether to accept a speaking invitation and, if so, what the judge may properly address in a speech. These include: (i) the organization inviting the judge to speak; (ii) the anticipated audience; (iii) the topic or general theme to be addressed in the speech; (iv) the degree to which the topic relates to matters concerning the judiciary or the courts; (v) whether the topic or the judge's remarks relates to a matter of public policy or public controversy; vi) the likelihood that the speech will be reported on, recorded or made available to a broader public; and (vii) the value of the judge's remarks in informing or educating the intended audience. If judges have any doubts regarding the appropriateness of accepting a speaking engagement they should seek the advice of their Chief Justice.

Attendance at Events

5.B.21 Judges may attend social or public events, or conferences provided that such attendance does not compromise their impartiality and the nature of the event, or host, does not raise other concerns related to *Ethical Principles*.

Discours et participation à des conférences

5.B.20 Il est fréquent que des juges soient invités à prendre la parole en public. La participation des juges à des programmes éducatifs est bénéfique, tant pour la magistrature que pour le public qu'elle sert. Il est souhaitable que les juges donnent des conférences et contribuent par ce moyen à l'avancement des connaissances et à leur propre perfectionnement professionnel. Cependant, la prise de parole en public peut nuire à la perception d'impartialité des juges et devrait être abordée prudemment. Avant d'accepter une invitation à prononcer une conférence, et d'en déterminer le contenu, les juges devraient analyser avec soin un certain nombre d'éléments, dont les suivants : (i) la provenance de l'invitation, (ii) l'auditoire envisagé, (iii) le sujet ou le thème à aborder, (iv) le rapport plus ou moins étroit entre le sujet à aborder et les questions qui touchent la magistrature ou les tribunaux, (v) le rapport entre le sujet à aborder ou l'allocution du juge et des questions de politique publique ou des enjeux controversés, (vi) la probabilité que le discours soit cité dans les médias, enregistré ou autrement mis à la disposition du public et (vii) l'intérêt des propos du juge du point de vue de l'information ou de l'éducation du public. En cas de doute quant à l'opportunité d'accepter une invitation, les juges devraient consulter leur juge en chef.

Présence à des événements

5.B.21 Les juges peuvent participer à des événements sociaux ou publics ou à des congrès ou colloques, pourvu que leur présence ne mette pas en péril leur impartialité, ou que la nature de l'événement ou l'identité de l'hôte ne soulève pas de crainte au regard des *Principes de déontologie*.

5.B.22 Judges may participate in social programs at conferences provided that they are generally available to attendees or speakers and the sponsorship, nature and extent of social programs would not create, in the view of a reasonable and informed person, a perception of lack of impartiality.

5.B.23 Attendance by a judge at conferences and social events sponsored by businesses or organizations is potentially problematic. Where invited, the judge should consider the organization hosting the event, whether the invitation has also been extended to community leaders, the purpose for which the judge was invited and the potential for adverse public perception as a result of the attendance.

5.B.24 When judges are invited to attend social events associated with the law or the legal profession, or hosted by law firms, they should consider the nature of the social event, its sponsorship, the other invitees and attendees at the event, the purpose for which the judge has been invited, the existence of a previous personal relationship with the host and attendees, as well as the benefit to the judge, the judiciary and the legal profession as a result of the judge's attendance. Judges should avoid attendance at such events if a purpose of the event is to advance a commercial interest, to showcase the host's relationship with the judge, or if clients are in attendance.

5.B.22 Les juges peuvent participer au volet social de congrès ou de colloques, en autant que ces activités soient normalement accessibles aux participants ou aux conférenciers et que le commanditaire, la nature et l'étendue de ces activités sociales soient tels qu'ils ne puissent susciter chez une personne raisonnable et bien renseignée la perception d'un manque d'impartialité.

5.B.23 La participation des juges à des congrès ou colloques ou à des activités sociales qui sont commandités par des entreprises ou des organismes peut soulever des difficultés. Lorsqu'ils sont invités, les juges devraient prendre en compte la nature de l'organisme hôte, le fait que d'autres personnes en vue au sein de la collectivité ont aussi été invitées, l'intention derrière l'invitation faite aux juges et la possibilité que le public perçoive défavorablement la présence de juges à un tel événement.

5.B.24 La participation des juges à des activités sociales liées au droit ou à la profession juridique ou organisées par un cabinet d'avocats devrait aussi être évaluée en fonction de la nature de l'événement, de l'identité des commanditaires, de l'identité des autres participants ou invités, de l'intention derrière l'invitation faite aux juges, de l'existence de liens personnels antérieurs entre le juge et les hôtes ou autres invités, et du bénéfice qui résulterait de la présence du juge d'un point de vue personnel, du point de vue de la magistrature ou de celui de la profession juridique. Les juges devraient s'abstenir de participer à de telles activités si leur objet est lié à des fins commerciales, si l'événement vise à souligner l'existence d'une relation entre le juge et l'hôte ou si des clients de l'hôte sont présents.

Conflicts of Interest

5.C.1 The discussion of conflicts of interest in *Ethical Principles* is not intended to state the law relating to judicial disqualification or recusal. It is intended to provide guidance to judges as they identify and assess the circumstances in which their personal interests may be reasonably viewed by others as conflicting with their judicial duties. In assessing their ethical duties in this context, judges should remain conscious of the demands of the sound administration of justice and their duty to hear the cases assigned to them.

5.C.2 The potential for a conflict of interest arises when the personal interest of the judge (or of those close to the judge) conflicts with the judge's duty to adjudicate impartially. Judicial impartiality is concerned with impartiality in fact and in the perception of a reasonable and informed person. As a result, judges should be attentive to both actual conflicts between their self-interest and their duty of impartial adjudication, and to circumstances in which a reasonable and informed person would reasonably apprehend a conflict.

5.C.3 Conflicts of interest may arise from: a pecuniary or non-pecuniary interest in the outcome; a close family, personal or professional relationship with a litigant, counsel or witness; or the judge having expressed views evidencing bias regarding a litigant or an issue that is before the court.

Conflits d'intérêts

5.C.1 Les *Principes de déontologie* n'ont pas pour objet de traiter du droit relatif à la récusation des juges. Dans le présent document, la discussion des conflits d'intérêts vise à offrir aux juges des pistes de réflexion qui leur permettent d'identifier et d'évaluer les circonstances où leurs intérêts personnels pourraient raisonnablement être vus par d'autres comme entrant en conflit avec leurs fonctions judiciaires. Lorsqu'ils évaluent leurs obligations déontologiques dans ce cadre, les juges devraient garder à l'esprit les exigences d'une saine administration de la justice et leur devoir d'entendre les affaires qui leur sont confiées.

5.C.2 Il y a risque de conflit d'intérêts lorsque l'intérêt personnel du juge (ou de ses proches) s'oppose à son devoir de rendre la justice avec impartialité. L'impartialité judiciaire s'entend à la fois de l'impartialité réelle et de l'impartialité apparente, selon la perception d'une personne raisonnable et bien renseignée. Par conséquent, les juges doivent être sensibles non seulement aux conflits réels entre leur intérêt personnel et leur devoir de rendre la justice de manière impartiale, mais également aux situations dans lesquelles une personne raisonnable et bien renseignée éprouverait une crainte raisonnable de conflit d'intérêts.

5.C.3 Un conflit d'intérêts peut survenir lorsque les juges ont un intérêt patrimonial ou extrapatrimonial dans l'issue d'un procès; une relation de parenté, une amitié proche ou une relation professionnelle avec une partie, un avocat ou un témoin; ou lorsque les juges expriment des opinions manifestant de la partialité à l'égard d'une partie ou d'un enjeu débattu devant le tribunal.

5.C.4 Upon appointment, judges must immediately cease practicing law, and should divest themselves and remain divested of their interests in commercial and business activities. Severance of all association with the judge's legal practice should be done as quickly as possible, ideally in an immediate and final way.

5.C.5 Generally speaking, judges are entitled to manage 'passive' investments that do not constitute 'carrying on business', provided that the investment is truly passive with little active management required. Nevertheless, judges should not participate in a case in which they have a financial, property or other interest that could be affected by its outcome or in which their interest would give rise to a potential apprehension of lack of impartiality by a reasonable and informed person. This is true whether the interest is itself the subject matter of the controversy or where the outcome of the case could materially affect the value of any interest or property owned by the judge, the judge's family or close associates. There is no conflict where the judge's financial or property interest is limited to one shared by citizens generally. Owning an insurance policy, having a bank account, using a credit card or owning securities in a widely held enterprise would not, in normal circumstances, constitute a conflict of interest, unless the outcome of the proceedings before the judge could substantially affect such holdings.

5.C.4 Dès leur nomination, les juges doivent immédiatement cesser de pratiquer le droit et devraient se départir, de façon définitive, de leurs intérêts dans toute activité commerciale ou d'affaires. Les liens existant avec leur cabinet devraient être rompus aussi rapidement que possible, idéalement de manière immédiate et définitive.

5.C.5 De manière générale, les juges peuvent détenir des placements « passifs » qui ne constituent pas « la poursuite d'une entreprise », en autant qu'il s'agisse de placements véritablement passifs exigeant peu ou pas de gestion active. Néanmoins, les juges ne devraient pas présider de procès qui mettent en jeu leur propre intérêt pécuniaire ou autre ou leur patrimoine ou dans lesquels leur intérêt pourrait susciter chez une personne raisonnable et bien renseignée la crainte qu'ils pourraient ne pas juger de façon impartiale. Ce principe s'applique aussi bien dans le cas où l'intérêt lui-même est l'objet du litige que dans celui où l'issue du procès pourrait avoir une incidence importante sur la valeur de tout intérêt ou bien appartenant au juge, à sa famille ou à des proches. Il n'y a généralement pas de conflit d'intérêts lorsque l'intérêt financier ou patrimonial du juge est équivalent à celui de la population en général. Ainsi, dans des circonstances normales, ne constituerait pas un conflit d'intérêts le fait de détenir une police d'assurance, d'avoir un compte bancaire, d'utiliser une carte de crédit ou de détenir des titres d'une société inscrite en bourse, à moins que le résultat du litige devant le juge ne puisse affecter substantiellement la valeur de ces intérêts.

Acting as Executors

5.C.6 Judges should not normally act as an executor or fiduciary, unless it concerns the affairs of a close friend or relative and is unlikely to become contentious. Even in that case, judges should not be remunerated for that role and should not act if the executorship may interfere with the performance of judicial duties.

Judges' Former Legal Practice

5.C.7 Judges should be sensitive to the existence of relationships which, to a reasonable and informed person, would give rise to reasonable apprehension of lack of impartiality. In particular, judges will face this issue in relation to cases involving former clients, members of the judge's former law firm or lawyers from the government department or legal aid office in which the judge practiced before appointment. Each case is unique and the apprehension of bias should be assessed in light of all the circumstances. The following general guidelines may be helpful: (i) judges who were involved in private practice should not sit on any case in which the judge or, to their knowledge, the judge's former firm was directly involved in any capacity before the judge was appointed to office; (ii) judges who practised law in government service or legal aid should not sit on cases in which they had any involvement prior to their appointment; (iii) judges should not sit on a matter in which the judge's former law firm is involved until after a 'cooling off period', often established by local law or tradition, of between two and five years; and, (iv) judges should not sit on a matter in which the judge's former law firm is involved for at least as long as there continues to be a financial relationship between the judge and the law firm.

Agir comme liquidateur

5.C.6 De manière générale, les juges ne devraient pas agir comme liquidateur d'une succession ou comme fiduciaire ou fondé de pouvoir, si ce n'est pour le bénéfice d'un ami proche ou d'un membre de leur famille, et à la condition qu'il soit peu probable que la situation devienne litigieuse. Même dans ce cas, les juges ne devraient pas être rémunérés pour cette tâche, laquelle ne devrait pas être acceptée si elle est susceptible de nuire à l'exercice des fonctions judiciaires.

Activités professionnelles antérieures

5.C.7 Les juges devraient être sensibles à l'existence de relations susceptibles de susciter, chez une personne raisonnable et bien renseignée, une crainte raisonnable quant à leur impartialité. Les juges devront parfois se demander s'il convient d'entendre des affaires qui impliquent d'anciens clients, des membres de leur ancien cabinet ou des avocats du ministère ou du bureau d'aide juridique dans lequel ils ont exercé avant leur accession à la magistrature. Chaque cas est unique et la crainte de partialité devrait être appréciée en fonction de toutes les circonstances. Les recommandations suivantes pourraient s'avérer utiles : (i) les juges qui exerçaient en pratique privée ne devraient pas entendre les litiges dans lesquels ils agissaient ou, à leur connaissance, leur ancien cabinet agissait à quelque titre que ce soit, avant leur accession à la magistrature; (ii) les juges qui exerçaient au sein de la fonction publique ou à l'aide juridique ne devraient pas entendre les litiges dans lesquels ils agissaient à quelque titre que ce soit avant leur accession à la magistrature; (iii) les juges ne devraient pas entendre les autres dossiers menés par leur ancien cabinet avant l'expiration d'une certaine période, souvent établie par la loi ou les usages locaux, de deux à cinq ans à compter de leur nomination, et (iv) les juges ne devraient pas entendre les dossiers menés par leur ancien cabinet au moins aussi longtemps que perdurent leurs relations financières avec celui-ci.

Personal Relationships

5.C.8 Frequently judges are faced with situations where the lawyer appearing before the judge is from a law firm where a close friend or member of the judge's immediate family is a partner, associate or employee. It would be inappropriate for a judge to hear a case involving a close friend or family member. Generally speaking, it would not be problematic for a judge to sit on a case involving a lawyer from a firm in which the close friend or family member is a member or employee, provided that the friend or family member has not been involved in the matter. However, there may be circumstances where it would be inappropriate for a judge to hear such a case. For example, where the law firm is very small (such that there is a greater risk of the perception of lack of impartiality) or where the law firm stands to gain or lose significantly by the outcome, such that the judge's decision would result in a monetary or reputational gain or loss to the close family member or friend or former colleague.

Judges in Financial Difficulty

5.C.9 Judges who are in financial difficulty should be particularly vigilant for conflicts of interest, both actual and perceived. Problems arise where judges in these circumstances preside over matters involving their creditors. Serious questions arise if any aspect of the judge's financial difficulties becomes contentious and the possibility of the judge appearing before a judicial colleague as a party or a witness could arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the circumstances.

Relations personnelles

5.C.8 Il arrive fréquemment que les juges entendent des affaires où l'une des parties est représentée par un cabinet au sein duquel un ami proche ou un membre de leur famille immédiate pratique le droit ou est employé. Il serait inapproprié que des juges entendent des affaires impliquant des membres de leur famille immédiate ou des amis proches. De manière générale, il n'est pas inapproprié qu'un juge entende une affaire où l'une des parties est représentée par un avocat appartenant au même cabinet qu'un ami proche ou un membre de leur famille, pour autant que cette personne n'ait pas participé au dossier. Néanmoins, cette situation pourrait devenir problématique dans certaines circonstances, comme lorsque le cabinet est très petit (accroissant le risque que le juge soit perçu comme manquant d'impartialité) ou lorsque l'enjeu du litige est susceptible de profiter ou de nuire grandement au cabinet, de telle sorte que la décision du juge puisse entraîner un gain ou une perte pécuniaire pour le membre de la famille immédiate, l'ami ou l'ancien collègue ou être favorable ou défavorable à sa réputation.

Les juges en difficulté financière

5.C.9 Les juges qui éprouvent des difficultés financières devraient prendre particulièrement garde aux conflits d'intérêts, tant réels qu'apparents. Des problèmes surviennent lorsque des juges, dans de telles circonstances, président des procès dont l'objet concerne un de leurs créanciers. De graves questions se poseront si un aspect ou un autre des difficultés financières du juge devient litigieux et qu'il est possible que le juge soit forcé de comparaître devant un collègue à titre de partie ou de témoin. Il est difficile de systématiser les conséquences réelles des difficultés financières des juges sur leur capacité d'accomplir quotidiennement leur tâche; ces conséquences varieront selon les circonstances.

Disclosure and Consent

5.C.10 In certain situations, it may be appropriate for a judge to make disclosure of a potential conflict and invite submissions from the parties. However, judges, not the parties or their counsel, bear the burden of ensuring respect for the principle of judicial impartiality. Neither disclosure of a conflict of interest nor the consent of the parties necessarily justifies judges ignoring circumstances which reasonably call into question their ability to hear a case and decide impartially.

Extraordinary Circumstances: Interests of Justice

5.C.11 Extraordinary or urgent circumstances may require judges to weigh the requirements of judicial impartiality against the risk of injustice.

5.C.12 Circumstances which might cause only minor inconvenience to a large court might nonetheless have a significant practical impact on a smaller court. Judges should organize their private affairs to minimize the potential for such conflicts.

Divulgation et consentement

5.C.10 Il peut être approprié pour un juge de divulguer l'existence d'une situation de conflit d'intérêts potentiel et d'inviter les parties à faire des représentations à ce sujet. C'est effectivement aux juges, plutôt qu'aux parties ou à leurs avocats, qu'il incombe de faire respecter le principe d'impartialité. Ni la divulgation du conflit d'intérêts ni le consentement des parties ne permettent forcément aux juges d'ignorer les circonstances dans lesquelles une personne raisonnable pourrait craindre que l'affaire ne puisse être entendue ou jugée de manière impartiale.

Circonstances extraordinaires : intérêt de la justice

5.C.11 Des circonstances extraordinaires ou urgentes peuvent exiger que les juges cherchent un équilibre entre le principe l'impartialité judiciaire et la nécessité d'éviter une injustice.

5.C.12 Les circonstances qui pourraient n'entraîner que de légers inconvénients pour une juridiction de grande taille pourraient avoir de graves répercussions pour un tribunal de moindre envergure. Les juges devraient organiser leurs affaires personnelles de manière à atténuer le risque que surviennent de tels conflits.

Public Education Activities

5.D.1 Judges possess significant knowledge of the law and the legal system. For this reason, they should make reasonable efforts to become engaged in informing and educating the public regarding the rule of law and the role of judges and courts in the administration of justice. Chief Justices have particular responsibilities and opportunities in relation to such public engagement, including public communications on behalf of their courts.

5.D.2 Subject to the limitations imposed by s. 55 of the *Judges Act* and these *Ethical Principles*, judicial participation in law reform or other scholarly or educational activities are not discouraged, provided that such involvement does not include participation in campaigns in support of, or the championing of, law reform initiatives.

Éducation du public

5.D.1 Les juges connaissent à fond le droit et le système de justice. Pour cette raison, ils devraient s'efforcer dans la mesure du possible d'informer et de renseigner le public sur la primauté du droit et le rôle des juges et des tribunaux dans l'administration de la justice. À cet égard, les juges en chef ont une responsabilité accrue, y compris pour ce qui concerne les communications qui émanent de leur cour.

5.D.2 Sous réserve des restrictions imposées par l'article 55 de la *Loi sur les juges* et par les *Principes de déontologie*, la participation des juges à des travaux de réforme du droit et à d'autres activités de recherche ou d'éducation n'est pas découragée, pour autant qu'elle n'inclue pas la contribution à des campagnes de soutien à des initiatives de réforme du droit ou la promotion de telles initiatives.

Post-Judicial Careers[9]

5.E.1 Judges may choose to move on to another career after leaving the bench. This raises several ethical considerations. One issue relates to the situation of judges prior to departure from judicial office. There may well be circumstances in which planning for one's post-judicial career undermines the perception of impartiality a judge should maintain. Discussions, negotiations or proposals of employment with a law firm, a prospective employer who is a litigant before the judge or a party in a case where the judge has delivered a judgment, may create the impression of a conflict of interest. The same concern exists where a judge is soliciting such opportunities. Whether the overture comes from the judge or the prospective employer, there is a risk that the judge's self-interest and duty would appear to conflict in the eyes of a reasonable and informed person. Accordingly, judges should refrain from engaging in such conversations before their judicial term has come to an end.

9 *Canadian Judicial Council Position on Former Judges Returning to Practice (2017)*

Carrière post-judiciaire[9]

5.E.1 Il est possible que des juges amorcent une nouvelle carrière après avoir quitté la magistrature. Cette situation soulève plusieurs enjeux éthiques. Un premier type de préoccupation concerne la situation des juges pendant la période qui précède leur départ de la magistrature. Les gestes posés par les juges dans la planification de leur carrière post-judiciaire peuvent, dans certaines circonstances, porter atteinte à l'apparence d'impartialité qu'ils devraient maintenir. Les discussions ou négociations relatives à un emploi avec un cabinet d'avocats ou un autre employeur éventuel qui est partie à une affaire en cours ou à un litige tranché par le juge pourraient susciter une apparence de conflit d'intérêts. La même inquiétude s'attache aux expressions d'intérêt ou propositions qui pourraient être faites par les juges auprès d'employeurs éventuels. Que les invitations discrètes émanent des juges ou de l'employeur éventuel, une personne raisonnable et bien renseignée pourrait y voir un conflit entre l'intérêt personnel du juge et son devoir. Par conséquent, les juges devraient éviter de participer à de telles conversations avant que leurs fonctions judiciaires n'aient pris fin.

9 *Conseil canadien de la magistrature, Position sur les anciens juges qui reprennent l'exercice du droit après avoir quitté la magistrature (2017)*

5.E.2 The situation of the judge upon leaving judicial office also introduces ethical considerations. Where former judges are professionally active, their conduct can have an impact on the public's perception of the judiciary as a whole. Accordingly, former judges should be attentive to the ways in which their post-judicial actions or activities could undermine public confidence in the judiciary. Former judges are able to return to the legal profession, but there are limits to the types of activities in which they can engage, consistent with the preservation of the principle of impartiality. A former judge could act as an arbitrator, mediator or commissioner. However, former judges should not appear as counsel before a court or tribunal in Canada. Appearance as counsel is broader than physical appearance. While it is appropriate for former judges to review or draft legal arguments and pleadings, to provide advice to counsel and parties, a former judge should not stand, speak or appear as counsel in court or before a tribunal or sign legal documents that are or may be the subject of proceedings before a court or tribunal. This constraint may be subject to exceptions where a judge has left the judiciary after a very short time.

5.E.3 Former judges should exercise appropriate caution in accepting retainers and providing legal advice in high profile or politically contentious matters where it can be anticipated that a client may make use of the judge's former status to advance the client's interests.

5.E.4 Former judges should not disclose the confidential discussions among judges – for example, the deliberations of an appellate court – or discuss anything that gives the appearance of relying on confidential information or judicial confidences.

5.E.2 La situation des juges qui quittent la magistrature soulève également des considérations éthiques. La conduite des juges qui retournent à la vie professionnelle peut affecter la perception qu'a le public de la magistrature dans son ensemble. Les anciens juges devraient être sensibles au fait que leurs activités ou actions pourraient miner la confiance du public à l'endroit de la magistrature. Les juges peuvent réintégrer la profession juridique à l'issue de leur carrière judiciaire, mais certaines restrictions s'appliquent aux types d'activités qui s'ouvrent à eux afin que soit préservé le principe d'impartialité. Les anciens juges peuvent exercer des fonctions d'arbitre, de médiateur ou de commissaire. Néanmoins, ils ne devraient pas comparaître en tant qu'avocat devant une cour ou un tribunal au Canada. La comparution en tant qu'avocat va au-delà de la comparution en personne. Bien qu'il soit approprié pour un ancien juge de rédiger ou de réviser des documents juridiques ou des actes de procédure, ou de donner des conseils aux avocats et aux parties, ils ne devraient pas plaider devant une cour de justice ou un tribunal, ni apposer leur signature sur un document juridique dont l'objet est ou pourrait être lié à une instance. Il est possible que des exceptions à ce principe soient admises à l'égard de juges qui ont quitté la magistrature très peu de temps après leur nomination.

5.E.3 Les anciens juges devraient faire preuve de la prudence requise avant d'accepter un mandat et de donner des conseils juridiques lorsque le client est susceptible d'utiliser l'ancien statut du juge comme levier pour faire avancer ses intérêts dans un dossier controversé sur le terrain politique ou une affaire qui attire beaucoup d'attention sur la scène publique.

5.E.4 D'autre part, les anciens juges ne devraient pas révéler la teneur des discussions confidentielles auxquelles ils ont participé – en tant que membre d'une formation d'une cour d'appel, par exemple – ou révéler quoi que ce soit qui puisse donner à croire qu'ils s'appuient sur des informations confidentielles ou liées au secret judiciaire.

INDEX

B

Bias. *See* Impartiality

Business

- "carrying on business", 28, 52
- activities, 28, 52
- practising law, 52
- securities, 52
- sponsored events, 50

C

Career, 57-58

Chief Justice

- communication with, 26, 29
- guidance, advice, 29, 44, 49
- role, responsibility, 44, 56

Civility, 21-23

Collegial support, 26

Commissioner, 58

Commissions, 29

Community. *See also* Public service

- charitable activities, 45-47
- civic and public engagement, 46
- expectations, 10
- involvement, 42, 45-47
- leadership, 46
- living in the, 20
- membership in organizations, 46-47

Competence, 27-32.
See also Incompetence

INDEX

A

Activités

- commerciales, 28
- liées au droit, à la profession juridique, cabinet d'avocats, 50
- sociales, 50

Affiliations, appartenances, 37

Attentes du public, 19-20, 38

Autochtone, 11, 31

Avocats

- inconduite, 23
- signaler, 23

B

Bourse, 52. *Voir aussi* Financière

C

Cadeaux, 48

Campagnes de financement politique, 43

Carrière post-judiciaire, *Voir* Juges, départ de la magistrature

Collecte de fonds, 25

Collectivité, *Voir aussi* Service public

- intervention, 42
- fonctions de leadership, 46
- occuper des postes d'un organisme,
- participation, 45-47
- participer à la vie de leur collectivité, 20

Commentaires

- humoristiques, facétieux, 22
- inappropriés, 22

Conduct, *See also* Misconduct
- appearance of impropriety, 19
- by court staff, counsel or others, 33, 36
- civility, respect, 18, 21-23
- code of, 7
- discrimination, 33-37
- impartiality, 38-58
- lawyer, 23
- other judges, 18, 26
- personal life, 37
- prejudice, 33
- towards others, 24

Confidentiality, 21
- advisory committees, 25
- discussions among judges, 58
- information, 18, 21

Conflict of interest, 51-52
- disclosure of, 55
- financial difficulties, 54
- former legal practice, 53
- lawyer, law firm, 51, 54
- litigant, 51
- non-pecuniary interest, 51
- personal, private, 38, 51
- post-judicial careers, 57-58
- pecuniary interest, 51
- witness, 51

Constitution, 34

Constitutional right, 7, 14

Continuing education. *See* Professional development

Commissaire, 58

Commissions, 29

Communautaires, 46
- activités sociales, 45-47

Compétence, 27-32. *Voir aussi* Incompétence

Comportement
- à l'égard d'autrui, 24
- apparence d'inconduite, 19
- collègues de la magistrature, 26

Conduite, *Voir aussi* Inconduite
- apparence d'inconduite, 19
- avocat, 23
- code de, 7
- collègues de la magistrature, 18
- courtoisie, respect, 18, 21-23
- discriminatoires, 33-37
- impartialité, 38-58
- personnel de la cour ou d'autres personnes, 33, 36
- préjugés, 33
- prohibée par la loi, 33, 37
- vie personnelle, 37

Conférences préparatoires ou de règlement, 28, 42

Conférences, participation, 29, 49

Confiance du public dans la magistrature, 12, 14, 16, 19, 22, 30, 46
- égalité, 34
- miner, 15-17, 37, 42, 43, 46, 58
- restrictions, 42

Court
- administration, 28
- autonomy, 16-17
- decisions, 16
- internal discussions, 21
- leadership positions, 45
- moot, 29
- protocol, 23, 44
- staff, 33, 36

Court process
- accessing, 18, 23-24
- orderly and efficient, 40

Courtesy
- appropriate, 18
- dignified, 22
- equality and respect, 35

D

Digital world, 47-48

Diligence, 27-32

Discretion, 21

Discrimination, 33-37. *See also* Conduct contrary to law, 33, 37

Disqualification, 39, 51

E

Education. *See also* Professional development
- legal, 29
- public, 56
- self study, 36

Confidentialité, 21
- comités consultatifs, 25
- discussions, 58
- informations, 18, 21
- paramètres de sécurité, médias sociaux, 48
- renseignements, 18, 21

Conflit d'intérêts, 51-52
- activités professionnelles antérieures, 53
- avocat, cabinet, 51, 54
- carrière post-judiciaire, 57-58
- difficultés financières, 54
- divulgation, 55
- patrimoniale ou ex-patrimoniale, 51
- personnels, 38, 51
- témoin, 51
- une partie, 51

Constitution, 34
- droit constitutionnel, 7, 14

Contexte social, 10, 27, 31. *Voir aussi* Perfectionnement professionnel

Cour
- membres du personnel, 33, 36
- protocole, 23, 44

Courtoisie, 21-23
- appropriée, 18
- digne, 22
- égalité et respect, 35

Equality, 33-37

abilities, mental and physical, 31, 35

age, 31, 35

constitution, 34

culture, 11, 31, 35

discriminatory conduct, organizations, 37

ethnicity, 31

gender, gender identity, gender expression, 31, 35

in proceedings, 35-36

insensitivity, 35

race, 31, 35

religion, 31, 35

sexual orientation, 31, 35

socio-economic background, 31, 35

stereotypes, 35-36

substantive, 34

supervisory authority, 36

Ethical Principles 1998, 8-11

Ethical Principles for Judges

Advisory Committee on Judicial Ethics, 9

English and French versions, 12

history, 8-10

scope, 11

Events

conferences, 49

gifts, 48

law, law firm, legal profession, 50

political, 43-44

public, 49-50

D

Diligence, 27-32

Discrétion, 21

Discrimination, 33-37. *Voir aussi* Conduite prohibée par la loi, 33, 37

E

Éducation, *Voir* Perfectionnement professionnel

Éducation du public, 56

Égalité, 33-37

âge, 31, 35

agissant sous leur autorité, 36

capacités, mentale et physique, 31, 35

conduite, 37

constitution, 34

culture, 11, 31, 35

dans le processus judiciaire, 35-36

genre, expression de genre, identité de genre, 31, 35

manque de sensibilité, 35

organismes ayant des pratiques discriminatoires, 37

orientation sexuelle, 31, 35

origine ethnique, 31

origines socio-économiques, 31, 35

race, 31, 35

religion, 31, 35

stéréotypes, 35-36

substantiel, 34

Enquêtes, 29

remuneration, 48

social, 50

speaking, 49

sponsored, 50

Executor, 53

F

Financial

contributions, political activities, 43

difficulty, 54

holdings, 52

interests, 51-52

relationship with law firm, legal practice, 53

Fundraising, 25

political, 43

G

Gifts, 48

H

Harassment, 18, 24

Holdings, 52. *See also* Financial holdings

I

Impartiality, 38-58. *See also* Conflict of interest

attendance at events, 49

business activities, 28

decision making, 14

equality, 33-35

Entreprise

activités, 28, 52

hôte, 50

«poursuite d'une entreprise», 28, 52

pratiquer le droit, 52

titres, 52

Études personnelles, 31, 36

Événements

cadeaux, 48

politiques, 43-44

publics, 49-50

rémunération, 48

sponsorisés, 50

F

Finances

bourse, 52

contributions, campagnes politiques, 43

difficulté financière, 54

intérêts, 51-52

relations – ancien cabinet, 53

Formation, 9, 31. *Voir aussi* Perfectionnement professionnel

juridique, 9, 29

Formation continue, *Voir* Perfectionnement professionnel

H

Harcèlement, 18, 24

extraordinary circumstances, 55

judicial duties, 39-42

judicial independence, 7, 14

lack of, 39–40, 48, 50, 53-54

out of court statements, 43

perception of partiality, 39-41, 43, 48, 51

public perception, 15, 20, 22, 38, 44, 46, 50

public statements, 44

rule of law, 14, 16, 39

safeguards, 13

self-represented litigants, 24

stereotypes, 36

Incompetence, 23

Independence

institutional and administrative, 16-17

judicial, 13-17

Indigenous peoples, 11, 31

Influence

abuse of judicial status, 18, 24-25, 58

external, extraneous, 13, 15-17

improper, 15-17

political, 17, 43

stereotypes, 33

Inquiries, 29

Integrity, 18-26

appointment process, 45

judicial office, 25, 42

of the judiciary, 16, 19, 24

personal, 44

I

Impartialité, 38-58. *Voir aussi* Conflit d'intérêts

activités commerciales, 28

circonstances extraordinaires, 55

égalité, 33-35

déclarations publiques, 44

fonctions judiciaires, 39-42

garanties, 13

indépendance judiciaire, 7, 14

manque de, 39-40, 48, 50, 53-54

participation à des événements, 49

parties non représentées, 24

perception de partialité, 39–41, 43, 48, 51

perception du public, 15, 20, 22, 38, 44, 46, 60

prise de décision impartiales, 14

primauté du droit, 14, 16, 39

propos hors du cadre judiciaire, 43

stéréotypes, 36

Incompétence, 23

Inconduite, *Voir aussi* Conduite

autres personnes, 33, 36

avocats, 23

collègues de la magistrature, 26

juges, 16

Indépendance

de la magistrature, 13

institutionnelle et administrative, 16-17

judiciaire, 13-17

Investments
diligence, 28
impartiality, 46, 52
passive, 28, 52
securities, 52

J

Judges
advantage, 24
appointment, 20, 28, 42, 52
2010 Protocol of the CJC on the Appointment of Federally Appointed Judges to Commissions of Inquiry, 29
advisory committee, 25
inquiry, commission, 29
prior to, 53
authority, 36
abuse of, 18, 25
inappropriate use of, 18, 24-25
communication
clear and transparent, 41
confidential discussions, 58
controversial, 43-44, 49
discreet, 21
of cause or viewpoint, 40
of interest, 45
on social media, 16, 47-48
to avoid, 15
with Chief Justice, 26, 29, 44
with public, by Chief Justice, 56
conduct, 13, 16, 18-19, 38

Influence
abus d'autorité ou de statut, 18, 24-25, 58
extérieure, 13, 15-17
inappropriée, 15-17
politique, 17, 43
stéréotypes, 33
Intégrité, 18-26
fonction judiciaire, 25, 42
de la magistrature, 16, 19, 24
personnelle, 44
processus de nomination, 45
Intérêts personnels, 38
Intérêts privés, d'un tiers, 25
Intimité, vie privée, 19-20
Investissement, titres, 52

J

Juge en chef
avis, conseils, 29, 44, 49
divulgation au, 26, 29
rôle, responsabilité, 44, 56
Juges
autorité, 36
abus d', 18
utilisation inappropriée, 18, 24
avantage, 24
bien-être, 27, 32
célérité et fermeté, 22, 29-30
communication
à éviter, 15

decisiveness, 22, 30

departure from office

- abuse of judicial status, 58
- appearing before courts or tribunals, 58
- confidentiality, 21, 58
- constraints, 58
- maintaining public expectations, 38
- planning for, 38, 57
- post-judicial careers, 57-58
- retirement, 38, 58

firmness, 35, 40

function, 13-15, 29

illness, 30

independence. *See* Independence

judicial assistance programs, 32

knowledge of law, 30-31

promptness, 22, 27, 29-30

promotion, 45

public statements, 44

recusal, 39, 44

reputation, 24

role, 5, 19, 23

- changes in, 10
- disputes, 42
- executor, 53
- informing public of, 15, 38, 56
- public, 29

security of tenure, 16

status, abuse of, 18, 58

claire et transparente, 41

controversée, 43-44, 49

d'intérêt, 45

discrétion, 21

discussions confidentielles, 58

le juge en chef, 26

le public, par le juge en chef, 56

médias sociaux, 16, 47-48

point de vue, 40

conduite, 13, 16, 18-19, 38

connaissance du droit, 30-31

départ de la magistrature

- attentes du public, 38
- carrière post-judiciaire, 57-58
- comparution devant une cour de justice ou un tribunal, 58
- confidentialité, 21
- contraintes, 58
- planification, 38, 57
- retraite, 38, 58
- songent à quitter, 38
- utilisation de l'ancien statut du juge, 58

fermement, fermeté, 35, 40

indépendance. *Voir* Indépendance

maladie, 30

mandat assurer, 16

nomination, 20, 28, 42, 52

- antéieur à la, 53
- comités consultatifs, 25
- commissions, enquêtes, 29
  - *Protocole sur la nomination des juges à des commissions d'enquête (2010)*, 29

timely, timeliness, 27, 29-30

CJC Resolution on Reserved Judgments September 1985, 30

wellness, 27, 32

Judges Act, 28-29, 56

limitations imposed by, 29, 56

Judgments 22, 27, 30, 45, 57

Justice

access to, 23-24

administration of, 29, 43, 51

fundamental, 14

L

Lawyers

misconduct, 23

reporting lawyer, 23

Lectures, 29

Letters of reference, 25

Litigants

efficiency of process, 22

self-represented, 11, 23-24

access to justice, 18, 24

CJC Statement of Principles on Self-Represented Litigants and Accused Persons, 23, 41

preventing unfair disadvantage, 41

vexatious, 40

M

Misconduct. *See also* Conduct

judges, 16

ponctualité, célérité raisonnable, 22, 27, 29-30

Résolution sur les jugements pris en délibéré (1985), 30

programmes d'aide, 32

promotion, 45

récusation, 39, 44

réputation, 24

rôle, 6, 13-15, 19, 23, 29

changements de, 10

éduquer le public, 15, 38

fonctions publiques, 29

liquidateur, 53

médiation judiciaire, 42

renseigner le public, 15, 38, 56

statut, abus de, 18, 58

Jugements, 22, 27, 30, 45, 57

Justice

accès à la, 23-24

administration de la, 29, 43, 51

fondamentale, 14

L

Lettres de recommandation, 25

Liquidateur, 53

Loi sur les juges, 28-29, 56

restrictions imposées par la, 29, 56

M

Médias sociaux, 16, 35, 47-48

affaiblir la confiance du public, 16, 35, 47

appréhension de partialité, 48

lawyers, 23

other judges, 26

others, 33, 36

Moot courts, 29

O

Out-of-court information, 48

Organizations, discriminatory, 37

P

Political

activity, 43-44

contentious matter, 58

gatherings, 43

influence, 17, 42

statement, 40

Post-judicial careers. *See* Judges, departure from office

Privacy

communications, 58

private life, 19-20

social media settings, 48

Private interests, 38

of another person, 25

Private practice, 53

Private study, 31

Professional development, 11, 17, 30-32

CJC Professional Development Policies and Guidelines, 30

communities, 11, 32, 36

conferences, 49

communications inappropriées, 47

influence indue, 16

paramètres de sécurité, 48

utiliser avec prudence, 20

O

Organismes, discriminatoires, 37

P

Parties

efficacité du processus, 22

non représentées, 11

Énoncé de principes concernant les plaideurs et les accusés non représentées (2010), 23, 41

accès à la justice, 18, 24

ne soient pas injustement désavantagées, 41

quérulentes, 40

Perfectionnement professionnel, 11, 17, 30-32

auto-évaluation, 31

collectivité, 32

communautés, 11, 32, 36, 46

conférences, programmes éducatifs, 49

Conseil et Institut national de la magistrature, 32

culture et contexte social, 31-32, 36, 45

événements publics, 49

peuples autochtones, 11, 31

Politiques et lignes directrices sur le perfectionnement professionnel (2018), 30

Peuples autochtones, 11, 31

culture and social context, 31-32, 36, 46

Indigenous peoples, 11, 31

National Judicial Institute, 32

public events, 49

self-assessment, 31

speeches, 49

Promptness, 22, 27

Public confidence

equality, 34

eroding, undermining, 15-17, 37, 42-43, 46, 58

in judiciary, 12, 14, 16, 19, 22, 30, 46

restraints, 42

Public expectations, 19-20, 38

Public service, 45-47

Public statements, 44

Publicly controversial matter, 44, 49

Q

Qualifications, of a judge, 14, 39

R

Religious affiliation, 37

Remarks

affecting impartiality, 40

comical, humorous, 22

inappropriate, 22, 35

offensive, 24, 33, 35

speaking engagements, 49

Retirement. *See* Judges, departure from office

Placements

diligence, 28

impartialité, 46, 52

passifs, 28, 52

Politique

déclaration, 40

événements, 43-44

influence, 17, 42

sujet controversé, 44, 48

Ponctualité, célérité raisonnable, 29-30

Pratique privée, 53

Principes de déontologie de 1998, 8-11

Principes de déontologie judiciaire

cadre, 11

comité consultatif sur la déontologie judiciaire, 9

histoire, 8-10

versions française et anglaise, 12

Processus judiciaire

accès au, 18, 23-24

ordonné et efficace, 40

Propos offensants, désobligeants, 24, 33

Public, attentes du, 10

Q

Qualités fondamentales des juges, 14, 39

S

Settlement conferences, 28, 42

Social context, 10, 27, 31. *See also* Professional development

Social media, 16, 35, 47-48

- apprehension of bias, 48
- compromising public confidence, 16, 35, 47
- exercising caution, 20
- improper influence, 16
- inappropriate communication, 47
- privacy settings, 48

T

Technology, 31. *See also* Social media

Timely, timeliness, 27, 29-30

Training, 9, 31. *See also* Professional development

Tribunal, 58

W

Witness, appearance or behaviour of, 36

R

Rassemblements politiques, 43

Récusation, 39, 51

Remarques

- commentaires, propos, 35
- discours et participation à des conférences, 49
- inappropriées, 35
- miner la perception d'impartialité, 40

Renseignements extrajudiciaires, 48

Retraite, *Voir* Juges, départ de la magistrature

S

Service public, 45-47

Soutien collégial, 26

Sujets controversé, 44

T

Technologie, 31. *Voir aussi* Médias sociaux

Témoin, façon de se présenter ou de se comporter, 36

Tribunal, 58

- administration de la justice, 28
- autonomie, 16-17
- décisions, 16
- discussions, 21
- fonctions de leadership, 45
- tribunal-école, 29

4442

4443

Tab 304

Model Definition of Judicial Information

September 2020

Prepared by Martin Felsky, PhD, JD, for the Canadian Judicial Council

TABLE OF CONTENTS

TABLE OF CONTENTS 2
BACKGROUND AND PURPOSE 3
TABLE OF KEY DEFINITIONS 6
MODEL DEFINITIONS 8
ANNEX 1A: JUDICIAL OFFICERS 10
ANNEX 1B: JUDICIAL AGENTS 10
ANNEX 3: ADJUDICATIVE INFORMATION 11
ANNEX 4: ADMINISTRATIVE INFORMATION 11
ANNEX 5: PERSONAL INFORMATION OF JUDICIAL OFFICERS 13
ANNEX 6: REFERENCES 14

BACKGROUND AND PURPOSE

The purpose of this document is to propose a single model for identifying, defining and classifying the terms "Judicial Information" and "Judicial Users" which could be recommended for use by all courts in Canada. Such definitions are required for claiming control over information, whether in the hands of the court, the judiciary, or third parties; protecting the security of sensitive information (in accordance with the *Blueprint*[1]); safeguarding the independent oversight of judicial administration; migrating to the cloud (as contemplated in the *Cloud Guidelines*), and developing a retention schedule. In fact, the establishment of a common definition and framework for identification and classification is necessary to allow the courts to react and respond to the evolution of technology, court operations and the practice of law.

This work is a companion to the *Background Report* presented to the Council's Technology Committee on February 16, 2020. Past efforts at defining Judicial Information have tended to emphasize the distinctions between Judicial Information and Court Information. Using a broad constitutional model, it seemed simple (and appropriate) to assign the governance of Court Information to the Executive Branch (as the body legally responsible for the administration of justice) and the governance of a distinct yet smaller collection of so-called Judicial Information to the judiciary. The definition of Judicial Information as proposed in the 2013 *Framework* was adopted in the *Blueprint* and in some courts.

It is important to note that while the *Framework* helped isolate "Judicial Information" from the broader category of "Court Information," it did not purport to limit the judiciary's policy-making role in that regard. On the contrary.

Council's focus on Judicial Information as a data source distinct from Court Information helped many courts to develop policies protecting the core of judicial independence, deliberative secrecy and personal privacy. The *Blueprint* (and the subsequent *Cloud Guidelines*) assigned special status to information derived from the adjudicative process, to data about judicial education, productivity and discipline; and to the personal information of judges.

Figure 1 below is taken from the *Framework*. It shows the interrelationships of key terms as defined in 2013. Note that the heading refers to "Court Information":

[1] All references are listed in Annex 6.

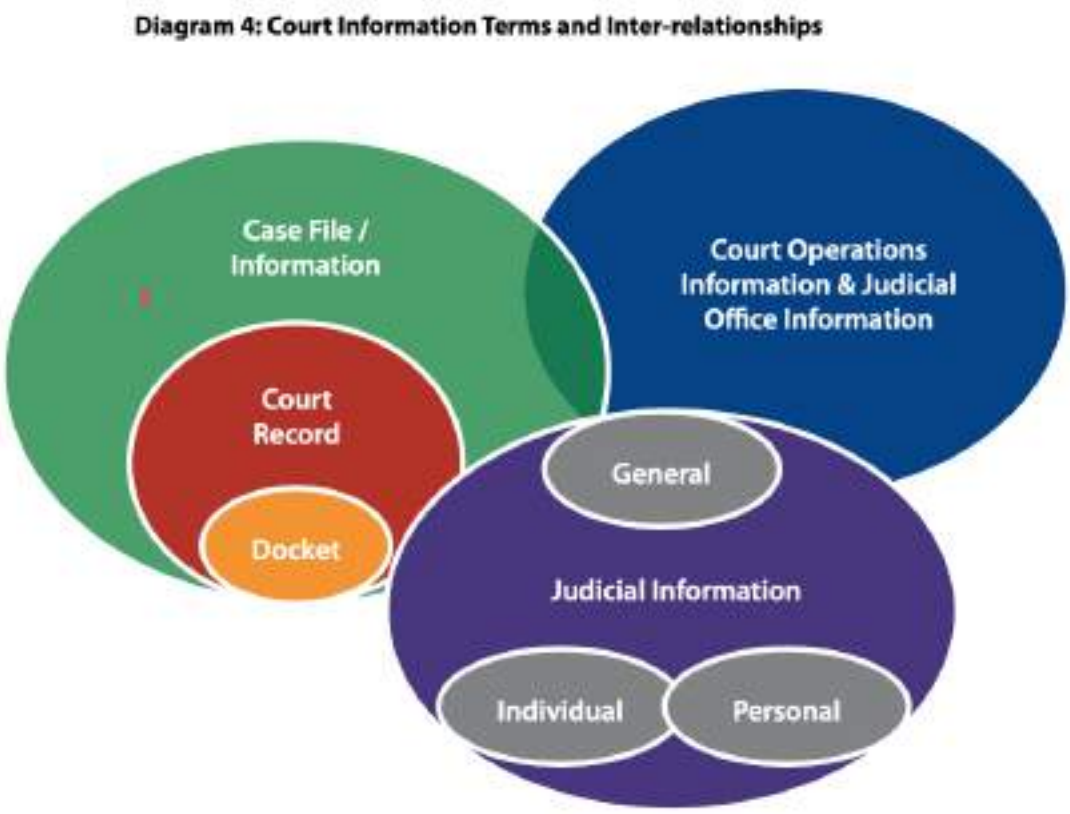


Figure 1 – Diagram of Court Information from the Framework, 2013

Contrary to the narrower focus that has been historically applied, the *Framework* was intended to apply to all Court Information. While Judicial Information is a special category of Court Information that may demand enhanced measures to protect judicial independence, the judiciary should not consider itself limited to policy-making in that regard alone.

Given the broad and comprehensive scope of the *Framework*, and its detailed proposed definitions, why is further work required of Council now? The main reason is that the landscape has changed. Technology moves quickly, bureaucracy moves slowly. 2013 seems a lifetime ago. For example:

1. Many Canadian judges have had their office productivity tools and data (email, word processing, calendar) moved to the cloud, and most others are in transition or in the planning stages of such a move; for the Council, this is the key driver for a reassessment of what constitutes Judicial Information.

2. Some courts have implemented electronic case management and e-filing systems, and more are in development. This represents a significant change in the form and accessibility of Court and Judicial Information.
3. Concerns about the erosion of judicial independence in some jurisdictions continue to prompt more innovative thinking in respect of information and technology governance.
4. New technologies such as analytics and artificial intelligence are driving more sophisticated requests for bulk access to Court and Judicial Information.
5. Despite the availability of the *Framework* as a guide to policy development in the area, there is growing recognition that few courts have actually developed robust information governance policies.
6. The sudden restrictions imposed on courts in light of COVID-19 has been a wake-up call for the urgent need for policies and procedures in respect of virtual hearings and e-filing solutions.
7. As policies are developed, inconsistent approaches to the definition of key terms add unnecessary cost and complexity.

The benefits of a model definition are therefore clear:

1. Lowering the risks of moving sensitive information to the cloud and managing online case management systems.
2. Developing clearer scopes for agreements such as MOUs in relation to information governance, the sharing of roles and responsibilities and the opportunity to co-operate more meaningfully with the executive branch.
3. The ability of courts to consistently and appropriately respond to novel requests for bulk access to court information, balancing the open courts principle against legitimate needs for confidentiality, privacy and integrity.
4. Improving the decision-making process and reducing risk and liability, on a solid foundation of information governance policies.
5. Smoothing the transition from in-person to virtual proceedings to maximize access to justice and the efficiency of court administration.
6. Increased standardization and consistency in how information is governed across all courts and jurisdictions to enhance public trust in the system, reduce conflicts and lower costs.

TABLE OF KEY DEFINITIONS

The definitions table illustrates the complex, interwoven relationships among the different types of information in a court. This is one of the important distinctions between the pre-computer days and today. Before courts used digital information systems, all court information was in the form of a “document” or “record.” These were physical items that were filed in manila folders and lodged in steel filing cabinets. Today we are dealing with invisible data, often not in the form of a document or file but in the form of a database entry, an embedded object or a hypertext link. A judge’s case notes are clearly “Judicial Information” but how do we isolate them when they are embedded in a PDF file or comprise text in a field in a database of an online case management system?

The table shows that some Court Operations, Administrative and Adjudicative Judicial Information may be found within the Case File and Court Record. For example, a draft judgment is Adjudicative Information, but when finalized it forms part of the Court Record. Some Registry Office Information about a particular proceeding could find its way into the Case File. The model below provides flexibility, is consistent with the constitutional premise of the administration of justice, and at the same time shows how the judiciary must be involved in developing governance policies over a broad swathe of Information.

<table>
<tr><td colspan="4">COURT INFORMATION / INFORMATION JUDICIAIRE
Information that is received, collected, stored, used or produced by a court in relation to its mission.</td></tr>
<tr><td>Court Operations Information</td><td colspan="3">Judicial Information
Renseignements de la magistrature</td></tr>
<tr><td rowspan="2">Information related to the supervision, management and direction of matters necessary for the operation of the Court or other matters assigned to the Executive by law or agreement.</td><td>ADJUDICATIVE
Information related to the exercise of a judicial function.</td><td>ADMINISTRATIVE
The supervision, management and direction of matters necessary for carrying out judicial functions, including:

• The scheduling, preparation, assignment, and adjudication of proceedings;
• The education, performance, conduct and discipline of Judicial Users;
• The governance of Court information and technology; and
• All other matters assigned to the judiciary by law or agreement.</td><td>PERSONAL
Personal Information of Judicial Officers</td></tr>
<tr><td colspan="2">Case file / Dossier judiciaire
A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.</td><td></td></tr>
<tr><td colspan="3">Court Record / Documents judiciaires[2]
Information and other tangible items filed in proceedings and the information about those proceedings stored by the court.

Framework: “This term refers to the “Official” Court Record. It is the portion of the Case File that will be made accessible to the public, subject to privacy constraints regarding, for example, disclosure of personal information etc. The Court Record should be preserved indefinitely whereas the rest of the Case File is usually destroyed after a defined period of time.”</td><td></td></tr>
</table>

[2] In Quebec, “Documents d’activité des tribunaux” (synonymous with “Documents judiciaires”) is translated as “Court Records (plural).” This is a broad category that includes the “Dossier judiciaire”, or Case file. In the *Framework*, which is followed here, the Court Record (singular) is a part of the broader Case File. There does not appear to be a corresponding term in Quebec for the narrower concept of Court Record.

MODEL DEFINITIONS

These proposed definitions derive from a number of sources, including the *Framework*, the references cited in Annex 6, and documents referred to in the *Background Report*.

Term	Definition
Case File / *Dossier judiciaire*	A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.
Court Information / *Information judiciaire*	Court Information is Information that is received, collected, stored, used or produced by a court in relation to its mission.
Court Operations Information[3]	Information related to the supervision, management and direction of matters necessary for the operation of the Court or other matters assigned to the Executive by law or agreement (such as a Memorandum of Understanding). In Quebec, Case Management Tools (*Outils de gestion des causes*) and Court Monitoring Tools (*Outils de suivi des affaires judiciaires*) are included as subsets of the broad category of Court Records (*Documents d'activité des tribunaux*) and are probably best included under Court Operations Information.
Court Record / *Document judiciaire*	Information and other tangible items filed in proceedings and the information about those proceedings stored by the court. Refers to the "Official" recorded Information of a proceeding. It is the portion of the Case File that is made accessible to the public, subject to privacy constraints regarding, for example, disclosure of personal Information.
Information	Information includes recorded information in any medium or format, regardless of how it has been created. This includes information generated by human or other means.
Judicial Administration /	The supervision, management and direction of matters necessary for carrying out judicial functions, including:

[3] For the *Framework* definition and examples see *Framework* p. 66.

Term	Definition
Administration judiciaire	1. the scheduling, preparation, assignment and adjudication of court events; 2. the education, performance, conduct and discipline of Judicial Users; 3. the governance of Court Information and technology, and 4. all other matters assigned to the judiciary by law or agreement (such as a Memorandum of Understanding).
Judicial Information / *Renseignements de la magistrature*[4]	Irrespective of who created it or how it was created, Judicial Information includes: 1. Personal Information of Judicial Officers (Annex 5); 2. Information related to the exercise of a judicial function ("Adjudicative Information," Annex 3), and 3. Information related to Judicial Administration ("Administrative Information," Annex 4).
Judicial Agent / *Agente ou agent judiciaire*	A Judicial Agent is a Judicial User who supports a Judicial Officer and may include court staff such as executive officers, lawyers, paralegals, law clerks, JITSOs, law students, articling students, judicial clerks, administrative assistants, as well as independent consultants working under retainer or contract. (See Annex 1B: Judicial Agents.)
Judicial Officer / Officière ou officier judiciaire	A Judicial Officer is a Judicial User acting in a judicial or quasi-judicial capacity, and includes judges, deputy judges, masters, justices of the peace, registrars, prothonotaries or anyone else authorized to act in an adjudicative role. (See Annex 1A: Judicial Officers.)
Judicial User / *Utilisateur ou utilisatrice judiciaire*	A Judicial User performs or supports judicial functions and may be authorized to access Judicial Information at various levels of permissions, depending on their role.

Annexes 1-5 list particular examples gathered from courts across the country: these lists are meant to be illustrative, not exhaustive, and may be modified to suit different purposes.

[4] While "*Information Judiciaire*" has been used for "Judicial Information" in the past, in French it means "Court Information." To avoid confusion, it is proposed that "Judicial Information" be translated as "*Renseignements de la magistrature*."

ANNEX 1A: JUDICIAL OFFICERS

- Assessment or taxation officers
- Associate Chief Judge / Justice
- Chief Judge / Justice
- [Puisne] Judge / Justice (including Supernumerary / Retired)
- Magistrate
- Master
- Prothonotary, Deputy Prothonotary
- Registrar, Deputy Registrar
- Senior Regional Judge / Justice
- Other judicial or quasi-judicial decision makers

ANNEX 1B: JUDICIAL AGENTS

- Administrative Assistant
- Bailiff
- Conciliator / Mediator
- Court Clerk
- Court Reporter
- Counsel
- Executive Officer
- External counsel, consultants and advisers
- JITSO (Judicial Information Technology Security Officer)
- Law Clerk
- Legal Counsel, Legal Officer
- Paralegal
- Public Relations Officer
- Publications Director
- Scheduling / ROTA Manager
- Sheriff
- Social media manager
- Supervisor of Court Administration
- Supervisor of Judicial Support
- Other

ANNEX 3: ADJUDICATIVE INFORMATION

Corresponding *Framework* definition:[5] *Individual Judicial Information* includes work product, research material and professional development information of staff Lawyers, Law Clerks and Judicial Officers.

- Bench books
- Bench memos or research memos prepared for a Judicial Officer
- Case planning conferences
- Communications and correspondence
- Condensed books and transcript
- Court clerk log notes
- Court Rules and Court Forms (blank)
- Court digital audio recordings and minute sheets
- Draft transcripts
- Judicial activities external to the court
- Jury charges
- Orders, endorsements, rulings, decisions, judgments and reasons for judgment
- Publication bans
- Recordings, notes or transcripts
- Reports - medical, psychiatric, financial
- Research material
- Settlement conferences
- Transcripts
- Trial management conferences
- Weekly Lists (Redacted or un-redacted)
- Working notes and annotations
- Other

ANNEX 4: ADMINISTRATIVE INFORMATION

Corresponding *Framework* definition: *General Judicial Information* includes information used by Chief Justices, committee materials, statistics, research material, and court-wide professional development information.

- Activity workload statistics

[5] The three categories of "Judicial Information" here (Adjudicative, Administrative and Personal) correspond broadly to the *Framework's* categories of "Individual, General and Personal respectively. For each category the original *Framework* definition is provided for cross-reference purposes. The new terminology is intended to make the distinctions clearer while maintaining the broad outline of the *Framework*'s approach.

- *Ad hoc* appointments
- Appointment of various officials and representatives
- Attendance at educational programs
- Audio and video conferencing setup and configuration
- Blank electronic forms or templates
- Business intelligence
- Case management and tracking data
- Committee management
- Committee materials
- Communications with governments and other justice system stakeholders
- Conduct and discipline management
- Conference management
- Contracting and tender administration
- Court reporting
- Court-wide professional development information
- Courthouse telephone lists
- Education and training content and management
- E-filing systems information
- Emergency contact lists
- Administrative activities external to the court
- Financial resources management
- Governance management
- Human resources management
- Information and records management
- Information produced by the Executive Office
- Inventory management
- Judicial administration research material
- Language, translation and interpretation management
- Office of the Chief Judge / Justice information
- Policies, policy development and procedures
- Professional development information of Judicial Users
- Publication and public/media relations management
- Reporting and approving judicial leaves of absence
- Research, library and knowledge management
- Scheduling information (ROTA) (e.g. court events, sittings, orders, hearings, conferences, appearances)
- Standards setting e.g. for decision publication format
- Statistics
- Technology management
- Webcasting and televising of proceedings
- Other

ANNEX 5: PERSONAL INFORMATION OF JUDICIAL OFFICERS

Corresponding *Framework* definition: *Personal Judicial Information* includes information produced by, on behalf of, or relating to a Judicial Officer that does not directly relate to the function or role of the Judicial Officer and is not associated with a Case.[6]

- Audit logs containing summaries of computer system activities
- Conduct, discipline information
- Contact lists
- Educational program attendance record
- Expense claims and reimbursements
- File access log and user audit trail
- Judicial administration work product
- Judicial education program content
- Judicom messages, posts and other information
- Location tracking / security swipe card
- Personal account information
- Personal communications including email, voice mail, text messages etc.
- Personal calendar
- Personal notes, research or working papers
- Private or personal affairs and social interactions
- Scheduling of a Judicial Officer within a court calendar
- Social media drafts and posts
- Software applications or other electronic repositories
- Statistics showing a Judicial Officer's individual activity or workload
- Travel and location information
- Website browsing and search history
- Workload and performance information
- Other

[6] [Footnote 38, *Framework*:] The Administration of Justice Committee's Definitions Working Group concluded that it was not useful to venture a detailed definition of Personal Judicial Information beyond this. In each jurisdiction, it will be necessary to provide precise guidance to technologists in relation to Judicial Internet browsing history logs, email repositories, contact lists, calendars, text messages and voice mail when considering candidate information for this category.

ANNEX 6: REFERENCES

1. *"Judicial Information": Definitions and Templates.* A Background Report to the Canadian Judicial Council Technology Subcommittee, February 18, 2020.
2. Canadian Judicial Council, *Blueprint for the Security of Judicial Information*, Fifth Edition 2018.
3. Canadian Judicial Council, *Guidelines for Migration of Judicial Information to a Cloud Service Provider,* September 2019.
4. Canadian Judicial Council, *Management Policy Framework to Accommodate the Digital Environment*, 2013.
5. *Métalexique de l'information judiciaire dans le cadre du projet de gouvernance et de gestion de l'information judiciaire* (Québec) v.0.9.
6. Precedents received by Council from Nova Scotia.
7. Supreme Court of British Columbia *Court Record Access Policy.*
8. British Columbia Court of Appeal *Operational Records Classification System.*

Tab 305

Model Policy for the Classification of Court Information

First edition, September 2022

Prepared by Martin Felsky, PhD, JD – Special Advisor to the CJC on Information Technology

TABLE OF CONTENTS

TABLE OF CONTENTS **2**

BACKGROUND **4**

CLASSIFICATION IS ONLY PART OF ACCESS CONTROL 5

CHALLENGES **5**

JUDICIAL INDEPENDENCE **6**

POLICY STATEMENT **7**

1. PURPOSE 7
Commentary *7*
2. SCOPE 7
3. GLOSSARY 8
4. ROLES AND RESPONSIBILITIES 9
5. TRANSITION 10
Commentary *10*
6. INFORMATION ASSET REGISTER 10
Commentary *10*
7. RISK ASSESSMENT 12
Commentary *12*
8. CLASSIFICATION OF INFORMATION ASSETS 13
Public *13*
Confidential *13*
Restricted *13*
Secret *14*
Commentary *14*
9. INFORMATION ALREADY CLASSIFIED 15
Commentary *15*
10. DOWNGRADING CLASSIFICATIONS 15
Commentary *16*
11. LABELING CLASSIFIED INFORMATION – BANNERS 16
Commentary *16*
12. LABELING CLASSIFIED INFORMATION – BLOCK 17
Commentary *17*
13. HANDLING CLASSIFIED ASSETS 18

APPENDIX 1: CLASSIFICATION GUIDE 19

TABLE 1: MAP OF RISK AND ACCESS 19
TABLE 2: SAMPLE CONTROLS 20
TABLE 3: MARKING CLASSIFIED INFORMATION 22
TABLE 4: EXAMPLES OF CLASSIFIED COURT INFORMATION 23

BACKGROUND

This Model Policy follows upon the Council's earlier initiatives concerning court information. All courts, and the Council, recognized that the modern concept of "court information" was no longer merely a matter of official or administrative court records acquired or created intermittently, with limited bespoke content, and with practical obscurity arising from its documentary character and its ease of destruction.

A decade on, it is even more obvious and pressing that courts must recognize that "court information" is a far more encompassing concept and is far more accessible and far more durable than it once was. Accordingly, and in addition to its other responsibilities as to court information, each court needs to create, maintain, and review a systematic approach to the protection of sensitive court information throughout its life cycle. This Model Policy proposes a framework for courts to consider in that effort, and elaborates on policy 16 from the Council's *Blueprint for the Security of Court Information*:[1]

Policy 16a: Courts should adopt a classification scheme so that sensitive court information may be designated for special protection. Classification schemes as adopted should be consistent across all courts to ensure a common understanding of asset sensitivity and protection requirements.

Policy 16b: Classified information may be made available to a person only when the originator establishes that the person has a valid "need to know," appropriate personnel security controls are in place, and the access is necessary to the accomplishment of official court duties.

Classification is a perpetual balancing act that must protect sensitive information without unduly restricting access. The purpose of classification is to ensure that the risk of harm from a security or privacy breach is kept at a level acceptable to the court, corresponding to the court's risk tolerance, through proper designation, labeling and handling of sensitive information.

[1] *Blueprint for the Security of Court Information* (6th edition, CJC 2021). In French: *Plan directeur pour la sécurité de l'information judiciaire*. Henceforth, Blueprint.

CLASSIFICATION IS ONLY PART OF ACCESS CONTROL

The classification of an information asset guides holders with respect to its safe handling and dissemination, but classification is not the only safeguard that limits access. Classified information should be made available to a person only when the originator establishes that the person has a valid “need to know,” such that access is necessary to the accomplishment of their official court duties.

There are other potential restrictions on accessing classified information, including personnel security clearances, and non-disclosure agreements.

CHALLENGES

The protection of sensitive information relies largely upon its originators - judicial officers, court officials and staff - to make the right classification decisions with respect to every email or file they draft or receive. This responsibility can be overwhelming, especially in light of the volume of digital information courts handle, and the velocity at which it moves.

The act of classifying information is not just a one-time activity. Security classifications are dynamic and must be revisited periodically, as the court’s risk profile changes; as its system capabilities or architecture changes, or as the nature of the information assets themselves changes over time.

Remote work, virtual hearings and cloud computing are now a routine part of court operations, expanding the scope of cyber threats well beyond the premises of the courthouse.

Courts should address these issues by promoting a modern approach to classification. Until artificial intelligence can be trusted to make reliable security classification decisions on our behalf, there are steps available to take the burden of classification, but not control, away from members of the court. Hybrid solutions are available that combine automated and manual classification processes. Systems that parse information can be configured in various ways to suggest appropriate classifications based on the content or context of the information.

For example, Microsoft 365 provides a resource tagging feature with sensitivity labels that can be pre-configured by the court. This makes it easier for users to apply (or simply confirm) labels as they prepare emails and documents.[2]

Data loss prevention (DLP) systems are automated programs that can act as a backstop for classification lapses. They work by parsing outgoing communications and blocking unauthorized communications or warning senders.[3]

Ultimately, the goal of a modern classification scheme should be to establish the groundwork for fully automatic, artificially intelligent classification software.

JUDICIAL INDEPENDENCE

The judiciary is conferred with institutional and individual independence, which adds an important layer of cooperation to court information governance. The judiciary and executive, or other non-judicial administrators, involved with facilities management, human resources, infrastructure, or supply, administer Canadian courts jointly. At the same time, any form of court business intelligence that the court finds appropriate to its mandate or capacity, falls into the category of judicial administration. Chief Justices are looking at matters like judgment delay, load balancing, judicial education, judicial conduct, wellness, public outreach, and many other issues that are common to courts but not covered by business processes like "human resources." Thus, while court information is subject to broad-based legislation[4] and established government policies, it is also subject to individually negotiated MOUs, judicial discretion and the court's jurisdiction over its process and its records.

[2] See Azure Information Protection

[3] DLP systems must always be configured with the principles of judicial independence in mind, but judicial officers should not be exempt from the court's classification rules and security controls.

[4] Examples of relevant legislation include Official Secrets, Archives and Public Records, *Criminal Code* and Provincial Offences, Judicature acts, Evidence, Electronic Commerce and Privacy, Freedom of Information or Access to Information.

This document should not be read to alter the distinction between court information that is exclusively owned and controlled by the court, and any court information which by its nature can be delegated to or acquired by the executive branch directly or indirectly.

POLICY STATEMENT

1. PURPOSE

This policy establishes a formal process for classifying information assets to ensure that the baseline security controls used to protect court information are proportional to the risks of unauthorized access. It sets out clearly defined classification levels that can be efficiently and consistently applied to all court information assets.

COMMENTARY

Ultimately, the classification of court information is designed to prevent harm to individuals (including loss of life); to the court or other organizations; to financial markets, or to the justice system. It protects privacy, legal privileges, and judicial deliberative secrecy, or any type of sensitive information.

A classification scheme ensures clear lines of accountability for proper securing of court information. It helps prioritize budget allocations for security measures, makes it easier to comply with laws, court orders, non-disclosure agreements, licensing, and other obligations. It is an important means of identifying information that can be safely migrated to a cloud service provider or shared with justice partners.

2. SCOPE

This policy applies to all court information assets, wherever those assets may be located and in whatever format or medium they may be transmitted or stored.

Court information that contains personally identifiable information (for example about litigants, witnesses, judges, and staff) is to be classified accordingly.

Personal papers unrelated to the business of the court are private and do not form part of the court's information assets.

3. GLOSSARY

Case File

A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.[5]

Court Record

Information and other tangible items filed in proceedings and the information about those proceedings stored by the court.[6]

Information asset

"An information asset is a body of information, defined and managed as a single unit so it can be understood, shared, protected, and exploited efficiently. Information assets have recognizable and manageable value, risk, content, and lifecycles."[7]

Information assets include physical information assets (such as paper documents, film, photographic prints) or digital assets stored electronically. An information asset can be a hardcopy document or a box of documents, a spreadsheet, or the contents of a shared network drive; a database, an operating system, an e-filing system, or a PDF file uploaded to such a system; a Case File, a Court Record, an email or an entire email account.

Depending on the context, some courts may wish to categorize non-documentary physical evidentiary objects (for example forensic samples) as information assets.

[5] See Canadian Judicial Council, *Model Definition of Judicial Information* (2020).
[6] See footnote 9.
[7] UK National Archives factsheet.

Custodian

The individual or business unit responsible for maintaining communications and technology systems used for court information.

Provider

External individual or organization that submitted or transferred information assets to the court.

4. ROLES AND RESPONSIBILITIES

Information controller

The information controller has legal control of information assets. This control is divorced from the concept of physical custody or possession.[8] Information controllers (or data owners) define the overarching information policies governing access, use, and retention of information assets.

Controllers are responsible for determining the classification of court information assets in their control and are authorized to approve access or downgrading requests. Controllers may require additional security controls on an *ad hoc* basis or strengthen information handling protocols as needed.

Originator

An originator is an individual or business unit of the court that authors or receives court information. Originators are responsible for considering and applying classification labels to the assets they create or receive, in accordance with this policy and other directions of the court.

[8] It is important to bear in mind the distinctions made in the 2013 CJC report: *Court Information Management Policy Framework to Accommodate the Digital Environment*, at page 6: "In a paper based world possession of a court file is synonymous with control over that file. It was easy for the judiciary to control Case Files in such an environment because an original paper file could only reside in one physical location at a time and those with possession of the physical file could easily control the ways in which information within it could be accessed.
In the digital domain however, it is quite possible to have possession of information without control and conversely, it is possible to have control of information without physical possession."

Judicial Information Technology Security Officer (JITSO)

The JITSO (or other qualified court-appointed officer) is responsible for the administration of this policy. The JITSO periodically updates the Information Asset Register (Policy 6) and ensures compliance through regular review and audit functions. Training on the handling of classified information must be provided regularly to all users.

Users

Anyone with access to court information is a user. Users must attend training and adhere to all policies and procedures relating to the handling of classified court information.

5. TRANSITION

This policy is effective upon its approval by the court.

COMMENTARY

This policy may be implemented progressively, on a day-forward basis. Existing assets can be classified over time, in priority based on the length of their retention period.

6. INFORMATION ASSET REGISTER

The court must prepare and update an Information Asset Register (IAR) that lists, briefly describes, and categorizes all court information assets.

COMMENTARY

The IAR is the first step to gaining control over court information. Key elements to consider recording for each asset category include:

1. Brief description including the purpose and use of the assets
2. Date range
3. Controller (with contact information)
4. Custodian (with contact information)
5. Users, including internal and external sharing relationships

6. Location – cloud, on premise, database, repository, domain
7. Form – paper, electronic, or other format or medium
8. Sensitivities - for example, copyright, private, privileged, confidential
9. Should this be a designated asset?[9]

Current thinking in the information governance profession is that larger, more inclusive categories make more sense for digital information, which is dynamic and often stored in unstructured repositories rather than filed in discrete folders. The more detailed or granular the IAR – for example a listing by document title, the more assets need to be listed and tracked individually.

While the establishment of high-level groupings simplifies the process of assigning classifications, some assets will require classification on a granular level. For example, a single field or record in a database, or particular form or file may contain information requiring classification that differs from its assigned group. Creative design may be required to assign classifications on a granular level, for example within a database, where certain groups of records or fields in the same database may require different classifications. These designs are constrained by the security features and controls built into each system.

Assets can be grouped in various ways. How depends on the court's mandate, size, and technology environment. Typically, the following methods are used:

- ***Content***, which groups information by meaning or purpose
- ***Context***, which groups information by business unit, function, system or platform
- ***User***, which groups information by individual, position or role in the court.

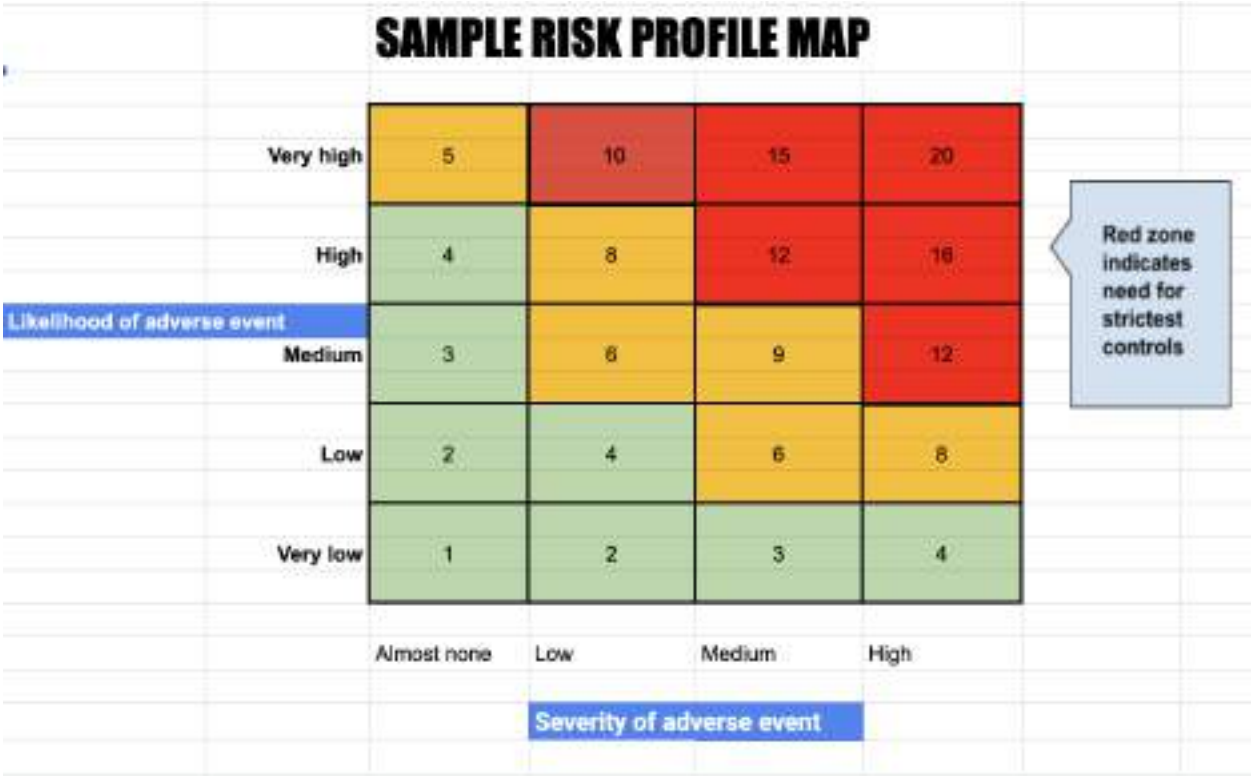
[9] The IAR forms the basis not only for decisions about classification but is also the foundation of a threat and risk assessment, the retention and disposition of court information, and business continuity procedures. The designation of assets in this listing is relevant to retention issues. See Canadian Judicial Council, *Model Policy for the Retention of Court Information* (2022).

7. RISK ASSESSMENT

The court must plan, conduct, and consider the results of a threat and risk assessment (TRA) in order to determine appropriate classifications for each information asset grouping in the IAR.[10]

COMMENTARY

The TRA helps the court assess the degree of harm that could reasonably be expected to result from unauthorized disclosure. A simplified schematic is shown below. Identified risks are assessed in terms of their likelihood and harm. The resulting chart provides decision makers with a basis for determining the court's risk profile, proportionate security controls and classification designations. The TRA report also identifies residual risks which need to be addressed to achieve a level of risk acceptable to the court.



[10] See Blueprint Policy 3b.

8. CLASSIFICATION OF INFORMATION ASSETS

All court information must be classified according to the sensitivity of its content and the risks associated with unauthorized disclosure and access.

Information that is copied, extracted, printed, or otherwise derived from classified information inherits the same classification as the source information.

The following classifications are to be used:

PUBLIC

Applies to information that, if compromised, would pose little or no risk to an individual, the court, or another organization. Information may be made public, as release would have no anticipated adverse impact, or is required by law. For example: Records of Proceedings, Annual Reports, Hearing Lists and Court Dockets.

CONFIDENTIAL[11]

Applies to information that, if compromised, could cause injury to an individual, the court, or another organization.[12] Internal and external access is limited to individuals or organizations with a valid need to know. For example: internal policies and directives; routine email, case conference briefs and case conference memoranda.

RESTRICTED

Applies to information that, if compromised, could cause serious injury to an individual, the court, or another organization.[13] Internal access is limited. External access is subject to order of the court, legislation, court policy, court rules, and court-approved security clearance and NDA. Access and actions to be logged. For example: draft judgments and judicial notes; rulings, endorsements and draft jury charges; documents and orders subject to a publication ban, and

[11] This departs from the suggestion in the Blueprint, in which the designation "Official" was proposed. However, as the word "official" could be used to designate certain types of court records for purposes other than security, the term "Confidential" is preferred here.
[12] Corresponds to Canada Protected A.
[13] Corresponds to Canada Protected B.

digital recordings of a closed or sealed proceeding. Restricted court information would be subject to more stringent treatment than Confidential, including special markings, encryption, and storage on designated devices. All such information should be clearly and conspicuously labeled "RESTRICTED."

SECRET

Applies to information that, if compromised, could cause extremely grave injury to an individual, the court, or another organization.[14] Access is restricted to designated, cleared individuals with a need to know, a non-disclosure agreement, or upon order of the court. All access and actions to be logged. For example: government intelligence, sealed Case Files, and information concerning informers. All such information should be clearly and conspicuously labeled "SECRET." (Original source markings should also be left in place.)

COMMENTARY

Each court information asset must be assigned a classification based on the level appropriate to the most sensitive information in its category. Information assets should be classified to the lowest possible level, but as high as necessary. This dynamic represents the critical balance to be achieved between the harm that could be done by unauthorized access and the advantages of accessibility to the court, to parties or the public.

Over-classification leads to increased maintenance costs, restricts legitimate access, and may encourage some users to evade security controls.

Descriptive words like "Confidential" and "Secret" are more meaningful and thus preferred to abstract language such as "Protected A" or "Level 3". Irrespective of their labels, though, the four-level court information classification scheme in this policy aligns with Canadian federal and provincial government classification schemes, reducing confusion for those court staff regularly working with both government and court information. In specialized courts, more classification levels may be required to fine-tune the handling of sensitive data received from providers such as foreign governments.

[14] Corresponds to Canada Protected C.

One way to clarify the differences among the three secure classifications is to train users that disclosure of Secret information would cause about ten times as much damage as disclosure of Restricted information, and disclosure of Restricted information would cause about ten times as much damage as disclosure of Confidential information.[15]

Originators should be aware that the compilation of low-level classified information could in rare cases lead to the compilation requiring a higher classification. This is due to the possibility that the compilation reveals a relationship or a trend that should be classified at a higher level than its components.

9. INFORMATION ALREADY CLASSIFIED

Information that has been classified elsewhere must be classified by the court at a level corresponding to the provider's and handled in accordance with the provider's controls to the extent they are more stringent than the court's.

Information received from external organizations must be protected in accordance with any relevant legislative or regulatory requirements, including any international agreements and obligations.

COMMENTARY

When the court receives information that has been classified by a provider, the court should follow the rules applicable to that classification.

10. DOWNGRADING CLASSIFICATIONS

Information controllers may downgrade information in their control.

Originators (or their successors) may downgrade their own information assets.

Users may not downgrade a court information asset without the approval of its originator or the controller.

[15] See Quist, *Security Classification of Information*, volume 2, chapter 7.

COMMENTARY

Asset classifications may be upgraded or downgraded as necessary, with the proper authority. Over time, classifications of a document or other asset may be modified depending on an expired time frame, a certain event, or a routine re-evaluation.

11. LABELING CLASSIFIED INFORMATION – BANNERS

All assets (including copies and printouts) must be labeled with a banner indicating their classification level.

The banner consists of the name (or abbreviation) of the court and the classification level in UPPER CASE. For example:

Sample Classification Banner (options)	
Canadian Judicial Council – CONFIDENTIAL	CJC – CONFIDENTIAL

At the time of original classification, the banner must be clearly and conspicuously displayed on the face and every page of the asset, for example in headers and footers, or if the information is not susceptible to such marking, the classification designation must be clearly associated with its subject in a manner suited to its form. Where it is impractical to apply any marking, users must be made aware of the classification designation and any special handling required.

If portions of a document have different classifications, each portion shall be appropriately labeled to indicate its level of classification.

COMMENTARY

The classification banner is the primary mechanism by which the sensitivity of an information asset is displayed. A key aspect of a classification label is that it is like a passport - an important piece of identification that must accompany it on its travels. Whatever method is used to apply a label, it should be conspicuous, legible, and persistent.

Where classifications are pre-determined, they can be added to document templates. For emails, the classification should be marked in the subject line and optionally in the body of the email. Email signatures can also contain classification marking, which works well when policies are applied by user or user group. Preferably, email systems should be configured to compel users to select a classification before sending, for example in a drop-down menu.

12. LABELING CLASSIFIED INFORMATION – BLOCK

In addition to the banner, classified assets may be marked with an optional information block. The purpose is to provide users with more information about the status of the asset. The block should be displayed on the face of every classified document, or otherwise in a conspicuous manner suited to the form of the asset.

The sample below shows the type of information a block would contain:

Classified by: Hon. Moreau, C.J. *Reason*: Sealed evidence *Declassification*: On order of the court *Additional dissemination restrictions*: None

COMMENTARY

By providing the name of the classifying authority (controller or originator), users know who to contact in the event a reclassification is proposed. Providing a reason for the classification is useful for audit and compliance purposes. If a declassification date or event can be determined when the asset is created, this helps users with making decisions about dissemination. Additional restrictions can be useful in various circumstances, for example when handling assets classified by providers who require more than the established controls.[16]

[16] Access to court information is not determined by classification alone. Rather, access rights are determined by a combination of classification-based controls, individual security screening or clearance, and the individual's function or assigned work, which determines their need to know.

13. HANDLING CLASSIFIED ASSETS

All court information must be handled in accordance with its classification and the procedures set out in the sample Classification Guide. (See Annex 1.)

Where classified court information is transferred to a third party, the court must ensure that the third party's security policies and procedures are sufficiently robust to respect the required classification controls.

APPENDIX 1: CLASSIFICATION GUIDE

The tables below are examples intended as guidance and are neither definitive nor comprehensive. The list of select references below can be consulted if more approaches or examples are needed.

TABLE 1: MAP OF RISK AND ACCESS

Classification	Risk level	Risk Description	Access
Public	Almost none	Applies to information or assets that, if compromised, would pose little or no risk to an individual, the court, or another organization.	Information may be made public.
Confidential	Low	Applies to information or assets that, if compromised, could cause injury to an individual, the court, or another organization.[17]	Information may be shared internally, and to third parties with a valid need to know.
Restricted	Medium	Applies to information or assets that, if compromised, could cause serious injury to an individual, the court, or another organization.[18]	Internal access is limited. External access subject to court-approved security clearance and NDA. Access and actions to be logged.
Secret	High	Applies to information or assets that, if compromised, could cause extremely grave injury to an individual, the court, or another organization.[19]	Access restricted to designated, cleared individuals with a need to know, and NDA. All access and actions to be logged.

[17] Corresponds to federal Protected A. See https://www.tpsgc-pwgsc.gc.ca/esc-src/protection-safeguarding/niveaux-levels-eng.html.
[18] Corresponds to federal Protected B. See https://www.tpsgc-pwgsc.gc.ca/esc-src/protection-safeguarding/niveaux-levels-eng.html.
[19] Corresponds to federal Protected C. See https://www.tpsgc-pwgsc.gc.ca/esc-src/protection-safeguarding/niveaux-levels-eng.html.

TABLE 2: SAMPLE CONTROLS

Classification	At rest (storage)	In transit	Destruction
Public	May be stored on removable devices and public cloud service	No special controls.	No special deletion requirements.
Confidential	• All baseline Blueprint[20] security policies in place. • On premises, must be stored on the court's network with folder-based access controls (and backed up). • May be stored on a court-approved public cloud service. • May be stored on removable devices only if encrypted with court-approved tools. • Technical controls at this level will be based on assured, commercially available products and services, without need for any customization. • Information at rest will be protected at rest by default. Data must only be transmitted via a secure network. • Data traversing an untrusted (insecure) network must incorporate industry standard cryptography.	Only use approved court email, text and other communication platforms.	Information should be purged using industry standard tools.
Restricted	• Enhanced Blueprint[21] security policies in place. • May be stored on a court-approved public cloud service. • Access requires multi-factor authentication • May be stored on removable devices only if encrypted with court-approved tools.	Information must be encrypted with court-approved tools.	Information should be purged using industry standard tools.
Secret	• Requires the highest level of security controls reasonably available. • All access to be logged and tracked (subject to the Monitoring Guidelines).[22]	Not to be transmitted by email or any means over public networks.	Information must be irretrievably purged; storage devices may need to be physically

[20] Courts should have reference to the Blueprint for details on access control, physical security, and other controls.
[21] Courts should have reference to the Blueprint for details on access control, physical security, and other controls.
[22] Reproduced in the Blueprint.

4480

Classification	At rest (storage)	In transit	Destruction
	• May not be stored on removable devices. • Not suitable for hosting on a public cloud service. • Data stores should be disconnected from the public internet. • Electronic files and/or data must be stored on a court shared directory or stationary device (i.e., desktop computer or server) with controlled physical access and role based logical access controls. • Electronic files and/or data must be encrypted when stored on portable or insecure devices. • Confidential or sensitive information shared with third parties must use file-based encryption. • Portable or insecure devices must be stored in a secure location when not in use.	Exchanged only via appropriately secured mechanisms. This will involve use of appropriately accredited shared services with high-grade encryption. Information will only be shared with designated users.	destroyed. Data and media must be degaussed (magnetically wiped) or rendered unreadable by other means. Devices may be physically destroyed.

TABLE 3: MARKING CLASSIFIED INFORMATION

The days of the rubber stamp are numbered, so to speak, as are the days of manila envelopes and wax seals. Digital information is not always in the form of a word-processed document to which headers and footers can be readily applied. This table provides some sample methods of marking digital information. Any method used must be appropriate to the format of the asset and must make it clear to the end-user that the information has been classified.

Format	Marking
Email or text message	Insert label banner in subject line. If not possible, insert at the top of the body of the email or signature block.
Text or image file	Insert label in metadata, on all images, or in available in header, footer or watermark.
Database	Insert label in header, footer or watermark of reports generated, and in metadata for each record, field or report.
Audio	Insert audible classification information at the beginning of the file.
Video	Insert audible classification information at the beginning of the file. Insert visible classification label on every frame.

TABLE 4: EXAMPLES OF CLASSIFIED COURT INFORMATION

Please note that these listings are drawn from several public and internal resources as examples only and are neither definitive nor comprehensive. They are simply representative of the type of information that might appear on a court's classification framework.

Classification	Examples
Public	• Case listing history • Pleadings • Orders and reasons for judgment • Trial transcripts • List of judicial districts • Annual reports • Forms, rules and practice directions or notes • Names of judges and dates of appointment
Confidential	• Internal policies and directives • Scheduling of judicial officers and hearings • Professional development information • Staff meeting records (other than judicial administration) • Jury charges • Routine email and other communications • Court Record / Case File not subject to a sealing order
Restricted	• Draft judgments, rulings, endorsements • Final court judgments if subject to a publication ban • Digital recording of a closed proceeding • Research memoranda, judicial notes • Outstanding warrants, pardons • Agendas, note and minutes of meetings regarding judicial administration • Personnel administration information • Information concerning judges • Information obtained with judicial authorization (sealed documents, child/youth protection)

Classification	Examples
Secret	• Certain draft judgments • Personnel information of judicial officers • Applications for warrant for search and seizure, electronic surveillance, and corresponding documentation • Information concerning informers • Psychiatric assessments • Personal information of judges • Privileged documents • Information related to national security

Tab 306

Model Policy for the Retention of Court Information

First edition, September 2022

FOR CONSULTATION PURPOSES ONLY

Prepared by Martin Felsky, PhD, JD – Special Advisor to the CJC on Information Technology

TABLE OF CONTENT

BACKGROUND **4**

ACKNOWLEDGMENT **4**

CURRENT STATE OF RECORDS MANAGEMENT **5**

DIGITAL IS DIFFERENT **5**

COURTS ARE DIFFERENT **6**

THE COURT RECORD 6

OPEN COURTS 7

INDEPENDENCE 7

LEGACY 8

RECORDS MANAGEMENT IN TRANSITION **8**

GLOSSARY **8**

POLICY STATEMENTS **10**

POLICY 1 – PURPOSE 10

Commentary: *10*

POLICY 2 – JURISDICTION 11

Commentary: *11*

POLICY 3 – SCOPE 12

Commentary: *12*

POLICY 4 – COMING INTO EFFECT 12

Commentary: *12*

POLICY 5 – INFORMATION ASSET REGISTER (IAR) 13

Commentary: *13*

POLICY 6 – DESIGNATED ASSET 14

Commentary: *14*

POLICY 7 – ASSET APPRAISAL 14

Commentary: *15*

POLICY 8 – RETENTION SCHEDULE 17
Commentary: *17*
POLICY – 9 TRIGGERS 18
Commentary: *18*
POLICY 10 – RETENTION BY DIGITIZATION 18
Commentary: *18*
POLICY 11 – DIGITAL VERSION AUTHORITATIVE 19
Commentary: *19*
POLICY 12 – LONG-TERM PRESERVATION 19
Commentary: *20*
POLICY 13 – DISPOSITION 20
POLICY 14 – CONFIDENTIALITY 20
POLICY 15 – DISPOSITION BY TRANSFER 21
Commentary: *21*
POLICY 16 – DESTRUCTION 21
Commentary: *21*
POLICY 17 – LEGAL HOLD 22
Commentary: *22*
POLICY 18 – SENIOR COURT OFFICAL 22
Commentary: *23*

BACKGROUND

This Model Policy follows upon the Council's 2013 initiatives concerning court information including the Blueprint for the Security of Court Information. All courts, and the Council, recognized that the modern concept of "court information" was no longer merely a matter of official or administrative court records acquired or created intermittently, with limited bespoke content, and with practical obscurity arising from its documentary character and its ease of destruction.

A decade on, it is even more obvious and pressing that courts must recognize that "court information" is a far more encompassing concept and is far more accessible and far more durable than it once was. Accordingly, and in addition to its other responsibilities as to court information, each court needs to create, maintain, and review a systematic approach to the audit and regulation of the life cycle of court Information. This Model Policy proposes a framework for courts to consider in that effort.

Using the Council's Model Definition of Judicial Information[1] as a guide, this Model Policy is aimed at the life cycle of court information and should not be read to alter the Blueprint for the Security of Court Information,[2] nor alter the distinction between court information that is exclusively owned and controlled by the court, and any court information which by its nature can be delegated to or acquired by the executive branch directly or indirectly.

ACKNOWLEDGMENT

The author would like to thank members of the CJC Technology Subcommittee for their valuable feedback on an earlier version of this Model Policy.

[1] *Model Definition of Judicial Information* (CJC, 2020). In French: *Définition modèle des renseignements de la magistrature*.
[2] *Blueprint for the Security of Court Information* (6th edition, CJC 2021). In French: *Plan directeur pour la sécurité de l'information judiciaire*.

CURRENT STATE OF RECORDS MANAGEMENT

For any organization, implementing a records retention and disposition policy is not easy. Conventional practices based on paper collections often do not work, because the burden of identifying and retaining records worth keeping falls on individual employees. Making these decisions is time-consuming, complicated, and thus often neglected. Enforcement is almost impossible, as business heads have more important concerns than document retention. Retention schedules are granular, can run to hundreds of pages, and are stale dated as soon as they are published.

For these reasons, many courts are in the same position as any other organization: records at the end of their life cycle are treated in an unregulated fashion. By some estimates only 20% of records are disposed of in accordance with their applicable retention schedules.[3]

DIGITAL IS DIFFERENT

The conventional approach to records management does not translate to email and other electronic forms of communication such as text messaging, where billions of bits of data are stored in dynamic databases. Digital information can be structured or unstructured and exist in many different formats. Transactional records, which used to be compiled in a single file folder are now distributed in email threads, word processing files, SharePoint sites, online court registries and e-filing applications. The fact that many applications, including essential communications tools, were not designed with retention needs in mind adds to the challenge. Users must apply policies and schedules manually after the fact, unless the software is designed, configured, and deployed with the appropriate features in place.[4]

---

[3] Stephens, *Records Management: Making the Transition from Paper to Electronic* (ARMA, 2007).
[4] Over time, more software will include retention management features if customers demand it. For example, see the Microsoft 365 Purview feature set designed for records retention management.

Digital information may not require warehouse space, but it does require disk space. While the price per terabyte has been decreasing over time, the rate of data volume growth outpaces any savings, especially in cloud hosting services. Holding too much information slows down information access and retrieval, increases the risk of a security or privacy breach. As one expert wryly points out, keeping everything online "turns data management into waste management".[5]

On the other hand, in contrast with paper, digital information can be cost-effectively researched, analyzed and reused. Advocates of information mining argue that it is no longer necessary to enforce a complex matrix of varying retention periods.

COURTS ARE DIFFERENT

Managing retention and disposition in courts is more challenging than in most other organizations for several reasons, some of which are outlined below.

THE COURT RECORD

Courts are not like other organizations. First, "courts of record" are required to preserve the record of proceedings, generally to ensure than an appeal court can effectively perform its review function and other courts can follow precedent.[6] Second, the Court Record is considered a "source of truth'" in the sense that unlike records of other persons or organizations, information upon which the court has acted to make a determination thereby receives an imprimatur of reliability and accuracy. When a court finds a fact in a record of a proceeding to be true on the balance of probabilities, it is generally taken to be true thereafter.

---

[5] Stephens, *supra*.
[6] "The term "record" and other expressions such as "court of record', "on the record", "for the record" are used regularly and frequently in legal parlance and have been for years without, in my opinion, a clear consistent understanding of what those expressions mean." *R. v. H. (K.), Re*, 1985 CanLII 3577 (ON CJ). Per Nevins, Prov. Ct. J.

OPEN COURTS

As public bodies, and in accordance with the open courts principle, courts have a responsibility to ensure that a record of their activities is permanently and publicly accessible.

At the same time, courts are guardians of the copious records submitted by third parties (voluntarily or otherwise), including members of the public and justice partners, some of which are provided conditionally and may be subject to being returned at the end of a proceeding.[7] A great deal of this information routinely contains personal, sensitive, confidential, and privileged information.

INDEPENDENCE

The judiciary is conferred with institutional and individual independence, which adds an important layer of delicate governance and cooperation. The judiciary and executive branch, or other non-judicial administrators, involved with facilities management, human resources, infrastructure or supply, administer Canadian courts jointly. At the same time, any form of court business intelligence that the court finds appropriate to its mandate or capacity, falls into the category of judicial administration. Chief Justices are looking at matters like judgment delay, load balancing, judicial education, judicial conduct, wellness, public outreach and many other issues that are common to courts but not covered by business processes like "human resources." Thus, while court information is subject to broad-based legislation[8] and established government policies, it is also subject to individually negotiated Memoranda of Understandings, judicial discretion and the court's jurisdiction over its process and its records.

---

[7] Different courts have rules respecting access or control of specific documents: see, for example, *MediaQMI inc. v. Kamel*, 2021 SCC 23 (CanLII).

[8] Examples of relevant legislation include Official Secrets, Archives and Public Records, *Criminal Code* and Provincial Offences, Judicature acts, Evidence, Electronic Commerce and Privacy, Freedom of Information or Access to Information.

LEGACY

Courts have long histories, and truckloads of physical records including paper are stored in courthouse basements and suburban warehouses. Costs of storage are high, and the corresponding public benefits hard to quantify.

As courts steadily transform their operations from paper to digital, they are now faced with the novel complications of long-term, cost-effective secure data storage in the cloud.

The purpose of this Model Policy is to assist courts in addressing these challenges, by proposing an innovative, practicable approach to retention and disposition. For some courts this may help in the development of new policy, while for others it may contribute to existing policy amendments.

RECORDS MANAGEMENT IN TRANSITION

Records and information management is amid a decades-long transition from paper to digital. The challenge for all organizations including courts is to manage this transition without compromising the principles and values underlying sound information governance practices.

GLOSSARY

Case File

A Case File contains the Information that relates directly to a single court proceeding or to a number of related court proceedings that have all been assigned the same case file number. It includes the Information that comprises the Court Record and any other Information that has been captured or placed in the Case File.[9]

[9] See Canadian Judicial Council, *Model Definition of Judicial Information* (2020).

Court Record

Information and other tangible items filed in proceedings and the information about those proceedings stored by the court.[10]

Information asset

"An information asset is a body of information, defined and managed as a single unit so it can be understood, shared, protected and exploited efficiently. Information assets have recognizable and manageable value, risk, content and lifecycles."[11]

Information assets include physical information assets (such as paper documents, film, photographic prints) or digital assets stored electronically. An information asset can be a hardcopy document or a box of documents, a spreadsheet, or the contents of a shared network drive; a database, an operating system, an e-filing system or a PDF file uploaded to such a system; a Case File, a Court Record, an email or an entire email account.

Depending on the context, some courts may wish to categorize non-documentary physical evidentiary objects (for example forensic samples) as information assets.

Record

Elsewhere used interchangeably with information asset, in this policy record is used to denote an individual physical document or digital file, including those in the Court Record. Many leading information governance authorities refer to "records", though the broader, more modern and more technology-friendly term "information asset" is emerging. All records are information assets, but not all information assets are records.[12]

Though the definition of record can be expanded to include digital assets, it originates and resonates in the concept of recorded information as a physical object.

---

[10] The use of the terms "Judicial Information" and "Judicial Officer" also conform to the Model Definition paper. See footnote 9.
[11] UK National Archives factsheet.
[12] The conventional definition is provided by way of *ISO 15489 Information and documentation—Records management*, which defines "record" as "Information created, received and maintained as evidence and information by an organisation or person, in pursuance of legal obligations or in the transaction of business."

POLICY STATEMENTS

POLICY 1 – PURPOSE

The purpose of this policy is to ensure that court information assets are systematically preserved for as long as needed, but no longer.

COMMENTARY:

The manner in which the court receives, controls, maintains and disposes of its records is not just a part of the institutional characteristics of the court but is a crucial part of the court's reputation for integrity, accuracy, consistency and reliability in the delivery of equal justice under the rule of law. The systems created must be accessible, intelligible, coherent, explicable, predictable and accountable.

A systematic approach may also:

1. Improve access for practical uses throughout the information life cycle.
2. Minimize time wasted in searching for information.
3. Minimize the risks and costs associated with over-retention.
4. Provide a public rationale for the destruction of information assets that might otherwise be criticized as arbitrary.
5. Guide members of the court who may ask - I am allowed to delete this email? Do we need to keep these duplicate submissions?
6. Ensure compliance with applicable legislation, regulations, rules, court orders, and best practices.
7. Ease the burdens associated with conventional records retention programs by proposing a modern strategy.
8. Ensure that courts robustly address the retention and disposition of digital information, as traditional paper-based practices are not suitable.

9. Reduce unnecessary duplication of records.
10. Improve public access to information of historical value.
11. Preserve the court's legacy.
12. Ensure that confidential or private court information is not inadvertently made public when transferred to a public archive.
13. Eliminate the cost and risk of storing information for longer than is justified.
14. Address capacity limits on the storage of old, low-value paper records.

POLICY 2 – JURISDICTION

The court has jurisdiction over its own information.

COMMENTARY:

The court is sole owner of and is responsible for court information throughout its life cycle. That responsibility includes maintaining continuity, accuracy, and accessibility of the information throughout the retention period.

The information controller has legal control of information assets. This control is divorced from the concept of physical custody or possession.[13] Information controllers (or data owners), define the overarching information policies governing access, use, and retention of information assets.

[13] It is important to bear in mind the distinctions made in the 2013 CJC report: *Court Information Management Policy Framework to Accommodate the Digital Environment*, at page 6: "In a paper based world, possession of a court file is synonymous with control over that file. It was easy for the judiciary to control Case Files in such an environment because an original court file could only reside in one physical location at a time and those with possession of the physical file could easily control the ways in which information within it could be accessed.
In the digital domain however, it is quite possible to have possession of information without control and conversely, it is possible to have control of information without physical possession."

POLICY 3 – SCOPE

This policy applies to all court information assets, wherever those assets may be located and in whatever format or medium they may be transmitted or stored.

Information assets of the court do not include personal information of judicial officers, court officials or staff, which is to be segregated and clearly identified as personal.[14]

COMMENTARY:

This policy is designed to apply to all court information assets irrespective of their format, as the principles of retention and disposition should apply consistently to information based on its context, meaning, purpose, and value.

POLICY 4 – COMING INTO EFFECT

This policy is effective upon its approval by the court.

All information assets must be reviewed prior to [date] and any assets existing beyond the period indicated in the retention schedule must be destroyed within a period to be determined by the court.

COMMENTARY:

Given that the retention periods for many information assets in the custody of courts have already expired, the court must establish a timetable for clearing the backlog, so it is in compliance with its own newly established schedules.

[14] "[Personal papers … are unrelated to an organization's mission, goals, objectives, or business operations or to an employee's assigned duties. They are information-bearing objects of a private nature. … These items are the personal property of their creators and are consequently excluded from records management authority." Saffady, *Records and Information Management Fundamentals of Professional Practice* (4th edition, 2021) at p. 6.

POLICY 5 – INFORMATION ASSET REGISTER (IAR)

The court must prepare and update an Information Asset Register (IAR) that lists, briefly describes, and categorizes at a high level, all court information assets.

COMMENTARY:

The IAR forms the basis not only for decisions about retention scheduling but is also the foundation of a threat and risk assessment, the security classification of court information, and business continuity procedures. It is the first step to gaining control over court information.

The descriptive elements of the IAR should be determined in accordance with the volume of information in the court, and the state of the court's transition from paper to digital. Key elements to consider for each asset would include:

1. Relevant category
2. Brief description including the asset's purpose and use
3. Date range
4. Controller (with contact information)
5. Custodian (with contact information)
6. Users, including internal and external sharing relationships
7. Location – cloud, on premise, database, repository
8. Form – paper, digital, other medium
9. Should this be a designated asset? See Designated Asset policy here.
10. Information Sensitivity - for example, copyright, privacy, confidentiality

Current thinking in the information governance profession is that larger, more inclusive groupings, with longer retention periods, makes more sense for digital information, which is dynamic and often stored in unstructured repositories rather than filed in discrete folders. The more detailed or granular the IAR – for example a listing by document title, the more assets need to be listed and tracked individually.

The IAR therefore should be structured with the broadest possible categories of information, grouped by function, user group, purpose, or repository.

POLICY 6 – DESIGNATED ASSET

Where duplicate copies of information assets are stored in multiple environments such as email inboxes, shared folders on file servers, cloud databases, local hard drives or mobile devices, the court may designate one of these as authoritative (and subject to the court's retention schedule), in which case copies of the duplicate assets in the other repositories are considered transitory and may disposed of accordingly.[15]

COMMENTARY:

One of the features of digital information is the ease with which it is copied, distributed and otherwise shared. This places an unnecessary onus on individuals or business units to manage and retain duplicate information assets. For example, a court's e-filing database may be designated, in which case duplicate copies of e-filed material uploaded for a virtual hearing may be deleted when no longer needed, assuming the files have not been annotated or the content otherwise altered.

POLICY 7 – ASSET APPRAISAL

To determine appropriate retention periods, the court must appraise its information assets using methods that are cogent, cost effective, and appropriate for the court's circumstances.

The ability to properly appraise information assets will be much assisted where the structure under which the court receives, controls, maintains and disposes of its records involves systems for auditing the records regularly when in place to ensure the records are being properly preserved, verified and secured.

[15] Transitory records are "records of convenience" which may be deleted when they are no longer needed by the user. There is no fixed retention period for transitory records.

Similarly, the ability to appraise information assets will be much improved if the court has a full and integrated scheme for court business intelligence derived from the records and their handling by the court.[16]

When appraising information assets, the court will consider factors including:

1) Applicable laws and orders
2) The operational needs of the court
3) The impact on the administration of justice
4) The legacy of the court
5) The needs of parties and justice partners
6) The public interest

COMMENTARY:

There are three main appraisal methodologies in use. The conventional method is a file-by-file review, now considered obsolete and impracticable given the volume and nature of digital information assets.

A more modern approach is "macro appraisal." This method is consistent with a high-level IAR and involves an understanding of the court's mission, its history, and its structure. For some courts, a functional methodology may be more fitting. Like the macro approach, it focusses on the organization, but at a business unit, activity, or transactional level (i.e., the level at which most records are created). This analysis provides a better context for the asset, through which its meaning and value can be ascertained.

The main aspect of this approach is to analyze and understand the functional context in which the records were created – a functional analysis. Kelvin Smith, in his book *Public Sector Records Management*, summarizes the importance of appraisal thus:

> *Records appraisal must not be an ad hoc exercise. It should not be undertaken in a hurry when the quantity of records has outgrown the storage space available or*

[16] Audit and court business intelligence regimes are beyond the scope of this policy and hence not elaborated upon here, but such regimes are of considerable value to an effective and secure court operation.

> *when an organisation has to move to new accommodation. If it is done in such an unplanned, non-systematic manner, the wholesale, uncritical destruction of records may take place. Similarly it is often the case that records are examined item-by-item in order to separate current, semi-current records and non-current records – a very time-consuming exercise. Some of the non-current records may then be offered to an archival institution for appraisal to determine whether any of the records have historical value. The archival institution then has to review these records without the necessary contextual information about their origins or purpose. All of these scenarios are extremely wasteful of resources.*[17]

Assets of Historical Value

The decision to designate assets as historical is often subjective. Differences of opinion may arise when stakeholders are consulted. In the recent Federal Court notice, the preamble explains that "The great majority of Court records are never consulted after being sent to the Court's archives." This may be, as implied, because they are not of much historical value after all. On the other hand, mountains of paper records are difficult to find, time consuming to review, and very difficult to compile into meaningful statistics. Digital archives provide a much better opportunity for future researchers, and courts cannot today anticipate easily how and what data will be used a hundred years from today.

The International Criminal Court assesses historical value based on the asset's "use in the future for the purposes of supporting any sort of legal dispute or reconstructing the general history of the development and governance of the Court and its legacy."[18] The court may consider information shedding light on the development or organization of the court, or its impact on the community, as having historical interest.

[17] Smith, *supra* at p. 110.
[18] International Criminal Court, *Records retention and disposal policy* (2015).

POLICY 8 – RETENTION SCHEDULE

All court information assets are subject to a retention period as defined by the court for each category of asset.

A retention schedule setting out these periods must be published on the court's website. The court may retain any information asset after the expiry of its designated retention period should the court find it necessary to do so.

COMMENTARY:

Retention schedules must be carefully crafted by professionals in consultation with court staff, court officials, legal counsel and the judiciary. If the court's information assets are broadly defined in the IAR, then the number of different retention periods is accordingly minimized. Lengthy, complicated registers are difficult to update, complicated to explain, and therefore at risk of non-compliance. Drastic simplification is the key to compliance.[19]

Default guidance is provided in some courts. For example, the International Criminal Court provides:

1. Transitory assets must be destroyed in two years
2. Operational assets must be destroyed ten years from the date of last active use
3. Legacy assets – those of historical value – are retained permanently.

The Federal Court recently provided its guidance in an effort to reduce the cost of permanent retention:[20]

1. Court information that was ***not*** adjudicated on the merits – destroyed in seven years (with some enumerated exceptions)
2. Court information that ***was*** adjudicated on the merits – destroyed in fifteen years (with one exception)

[19] A reduction of 80% in the number of categories of information assets is not unexpected, according to some experts. For example see Kahn, "*The Incredibly Compelling Case to Rethink Records Retention in 2018 and Beyond*" (Business Law Today, American Bar Association 2018).
[20] Document Retention Schedule pursuant to Rule 23.1 of the Federal Courts Rules (2021).

POLICY – 9 TRIGGERS

Where trigger event dates cannot be tracked automatically, the court should set a reasonable retention date based on the time the asset is received, created, or last accessed.

COMMENTARY:

Trigger dates based on the expiration, termination, or completion of a process, such as the final determination of a matter and the expiry of any period for review or appeal, may be necessary but can complicate the calculation of retention periods if they cannot be tracked automatically.[21] Manual tracking is difficult and leads to non-compliance.

POLICY 10 – RETENTION BY DIGITIZATION

Requirements for retention of information assets in paper form are satisfied by retention of a reliable digitized or microfilmed copy.

COMMENTARY:

Digitization of high-value information assets is highly recommended, as it can serve to reduce long-term costs of paper storage; provide a critical backup and offers an opportunity to readily encrypt sensitive information that would otherwise be difficult to protect from unauthorized access.

Digitization of paper records, if used as a method of retention, requires attention to the quality control process to ensure that the digital version is reliable and that contextual information about the hard copy is maintained as metadata after the paper is destroyed.

Local standards may be adopted if available, such as the Digitization Standard from Service Alberta. A Canadian standard, CAN/CGSB-72.11-93, was withdrawn but contains many useful guidelines for preserving the integrity of digitized records. It has been replaced by the less

[21] Analysis of the matter type may be required to properly document the applicable trigger date. For example, in some courts the trigger for child support cases is tied to the age of the minor involved – that is, their period of dependency.

detailed CGSB 72.34-2017, Electronic Records as Documentary Evidence, and in French Enregistrements électroniques utilisés à titre de preuves documentaires. Other resources include those from Library and Archives Canada and ISO, the International Organization for Standardization.

POLICY 11 – DIGITAL VERSION AUTHORITATIVE

Unless legislation or a court order provides otherwise, digital forms of information assets are authoritative.

COMMENTARY:

Paper documents that have corresponding electronic files, for example computer printouts, are transitory records that may be destroyed when no longer needed for active use.

Paper records can be destroyed when their retention period has been reached or if they have been digitized to an appropriate standard of quality.[22]

POLICY 12 – LONG-TERM PRESERVATION

The court must take proper steps to ensure the preservation of its information assets in all forms, where the assets are scheduled for long term or permanent retention.

If there are known issues with asset integrity during a migration, and these issues cannot be mitigated, they should be carefully documented. Data migration must be planned and tested in such a way as to ensure the integrity of all content and metadata.[23]

[22] For guidance see Library and Archives Canada, *Destruction of Source Records following Digitization*.
[23] ARMA International TR22-2016 defines "metadata" as "The structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage information resources."

COMMENTARY:

Significant volumes of data will need to be meaningfully preserved by courts beyond the typical lifecycle of the technology used to store them. Systems become obsolete quickly, and the pace of change increases over time. Many courts today are undergoing a major platform replacement as they move information from local servers to the cloud. Custom-built case management systems developed fifteen or more years ago are being replaced with commercial off-the-shelf solutions. If a court is required to keep certain assets for, say, fifteen years, it will most likely need to be migrated, converted, or otherwise refreshed at least once.[24] Conversion to archival formats such PDF/A are partial solutions, as original metadata can be lost, and these formats are only suitable for certain types of document-based assets.[25]

POLICY 13 – DISPOSITION

At the end of their retention periods, the court must promptly dispose of information assets either by secure destruction, by transfer to a storage or archive facility, or by returning them to the parties from whom they were received.

POLICY 14 – CONFIDENTIALITY

Arrangements for the conversion, retention or disposal of Court Information that are sealed or otherwise deemed confidential must preserve the level of protection and non-access required by law.

---

[24] MoReq 2010 (Modular Requirements for Records Systems) at p. 23 suggests that typically, organizations refresh their technologies every 3-5 years.

[25] There are several useful references for long-term preservation, including ISO/TR 18492:2005, Long-term preservation of electronic document-based information; ISO 19005 series.), Storing Data For The Next 1000 Years (Tom's Hardware), and many others including for example the Minnesota State Archives.

POLICY 15 – DISPOSITION BY TRANSFER

Information assets scheduled for long-term or permanent preservation may be transferred to the custody of an approved third-party entity. The court must adopt effective transfer protocols for long-term accessibility and security of information assets.

COMMENTARY:

The court should follow professional guidelines such as Guidelines on File Formats for Transferring Information Resources of Enduring Value published by Library and Archives Canada.

POLICY 16 – DESTRUCTION

Information assets may only be deleted or destroyed in accordance with the approved retention schedule and procedures.

The court ensures that information assets scheduled for destruction are disposed of in a manner that protects sensitive information and renders it unrecoverable.

Where the destruction has been carried out by third parties, written certification of such destruction should be obtained.

The court must maintain a listing of all scheduled assets destroyed. Such listing must include the category of assets from the retention schedule, a brief description of the assets, the date range during which the assets were created, the date of destruction, and the method used to destroy the assets.

COMMENTARY:

The court may classify certain types of information or data, such as personal Judicial Information, draft documents, or other things, as being subject to discretionary deletion or removal by the Judicial Officer or senior court official involved.

Deletion or removal of any specific information may be reversible or irreversible, depending on the established policies of the court. Where information is deleted or removed, a record should

be kept as to the nature of the information, the policy justifying its deletion or removal, and the date of its deletion or removal unless those policies provide otherwise.

Some courts require that notification to the affected parties be provided, depending on the nature of the assets.[26]

POLICY 17 – LEGAL HOLD

Any information subject to a lawful information access request or likely to be subject to a legal proceeding should be retained until the matter is resolved, even if its retention period has expired.

COMMENTARY:

The routine destruction of information assets at the expiry of the retention period should be paused if there is a risk of non-compliance with a lawful request for such an asset. An investigation into judicial conduct, a lawsuit by or against a contractor or supplier, or a statutory access request are examples of triggers that may, in the opinion of the court, justify a legal hold.

POLICY 18 – SENIOR COURT OFFICAL

The court must appoint or designate a senior court official accountable to the court and responsible for implementing and enforcing this policy.

The retention-related duties of this senior official would include:

1. Implementing the policy
2. Developing the IAR and retention schedules, and updating them periodically
3. Training users and system administrators and advising the court on information governance issues

[26] For example, see Document Retention Schedule pursuant to Rule 23.1 of the Federal Courts Rules (2021).

4. Contributing to systems procurement activities to ensure that court systems are compatible with automated retention processes

COMMENTARY:

The senior court official handles the administrative tasks associated with the implementation of information governance policies, including retention and disposition.

Tab 307

CanLII

Quong v. Pong, 1925 CanLII 11 (ON CA)

Source:	Court of Appeal for Ontario
Date:	1925-03-06
Other citations:	56 OLR 616 — [1925] 2 DLR 1192
Citation:	Quong v. Pong, 1925 CanLII 11 (ON CA), <https://canlii.ca/t/1vnx9>, retrieved on 2026-02-17

Ontario Court of Appeals
Quong v. Pong
Date: 1925-03-06

E.F. Raney, for the appellants.

Norman Sommerville, K.C., for the defendant Pong, respondent.

M. Grant, for the defendant Thomson, respondent.

[1] By consent of counsel, the appeal was heard upon the merits of the action, treating the motion before MOWAT, J., as a motion for judgment.

[2] March 6. The judgment of the Court was read by MIDDLETON, J.A.:—The facts are simple. Thomson is the owner of premises on Spadina avenue, Toronto, occupied or used as a Chinese laundry. The plaintiff Lum Quong and the defendant Pong were members of a firm carrying on the laundry business. There was a third partner in the firm, but he does not appear to be a factor of importance. Thomson leased the premises to Pong in his own name for a term of three years, from the 1st March, 1916. The partnership was dissolved before the expiry of this lease, on the 19th June, 1918. Pong thereupon acquired a lease of the property in his own name for a period of five years commencing at the expiry of the first term. Litigation followed. The action was tried before the late Judge Winchester in the County Court of the County of York, and, among other things, he directed that Pong should assign the lease to Quong and his co-partner in consideration of $600 to be paid to him. The lease was accordingly assigned, and in and by the assignment it is provided that the assignees “may hold and enjoy the premises for the residue of the term granted

by such lease and for a renewal thereof (if any) for their own use and benefit without any interference of the assignor." Notwithstanding this, before the expiry of this second lease, which did not contain any provision for renewal, Pong procured from Thomson a further lease of the premises for six years from the 1st March, 1924, being the expiry of the second term, and the defendant Thomson is now proceeding to evict Quong with a view to Pong entering under this new lease. The plaintiffs are desirous of continuing the laundry business in the same premises and would suffer a substantial loss if Pong could obtain possession of the premises in question.

[3] The result of the rivalry between these parties has been to enure to the benefit of the landlord, for the new lease is at an increased rental, but the plaintiffs are willing to assume the burden of this new lease, and the landlord stands indifferent and is ready to accept either faction as tenant if protected from claims by the other.

[4] The learned Judge, as we understand it, took the view that there was nothing to prevent the defendant obtaining a lease in his own name for his own benefit, and that the plaintiffs, not having been provident enough to arrange for a renewal, and, in fact, having at one stage, long before their lease had expired, intimated that they would not pay an increased rental, had no rights in the premises.

[5] With this decision we cannot agree, as we think that when Pong received his $600 for an assignment of the current term and "for a renewal thereof (if any)" he precluded himself from entering into competition with the assignees in seeking a renewal of the lease. If it had not been for this provision the case would not have been brought within the provision of the equitable principle of *Keech v. Sandford* (1726), 2 W. & T.L.C., 8th ed., 706. In that well-known case a term had descended to an infant. The landlord refused to renew, not desiring to have an infant tenant. The trustee then took a renewal for his own benefit. He acted without fraud, but Lord Chancellor King said he "should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who may not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on refusal to renew to *cestui que use*."

[6] It is true that here there was not an express trust, but there was a trust implied, raised and created, by the act of the parties and by implication of law. When Pong, for good consideration, sold the right of renewal, he precluded himself from seeking to renew the lease for his own benefit.

[7] The parties well knew that there was not in strictness any right of renewal, and what was meant by this expression when used in the assignment was clearly the probability that the landlord would grant a new lease to the tenant in preference to a stranger.

[8] The principle is of wide and general application. As said by Parker, J., in *Griffith v. Owens,* [1907] 1 Ch. 195, at p. 205, “I see no reason why, if there existed on the part of the purchaser the necessary fiduciary relationship or duty, the principle of *Keech v. Sandford* should not be applied whether the lease were renewable of right or not renewable at all.”

[9] The same result is reached by a slightly different process of reasoning. Pong sold the renewal of the lease, having at that time no title to it. When a new lease was granted, that went to feed his title, and so he became a trustee for the plaintiffs.

[10] The appeal should be allowed and the plaintiffs should have judgment directing that the lease he assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee’s covenants contained in the new lease. Pong should be ordered to pay the costs of the action and of the appeal, both of the plaintiffs and of his co-defendant Thomson.

Judgment for the plaintiffs.

Tab 308

CanLII

Pong v. Quong, 1926 CanLII 6 (SCC), [1926] SCR 651

Source: Supreme Court of Canada
Date: 1926-10-05
Citation: Pong v. Quong, 1926 CanLII 6 (SCC), [1926] SCR 651, <https://canlii.ca/t/1ttk6>, retrieved on 2026-02-17

Supreme Court of Canada
Pong v. Quong, [1926] S.C.R. 651
Date: 1926-10-05

Jack Pong *(Defendant) Appellant;*

and

Lum Quong and Lum Chong *(Plaintiffs) Respondents.*

1926: October 5.

Present: Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Appeal to Supreme Court of Canada—Jurisdiction—Value of matter in controversy—Parties each claiming right to lease of premises used for laundry—Elements to be considered in estimating value.

On a motion to affirm jurisdiction in the Supreme Court of Canada to entertain an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, deciding which party was entitled to a certain lease of premises used for a laundry business, the Registrar affirmed jurisdiction, taking into account, in estimating the value of the matter in controversy, the exceptional value of the premises by reason of the existing privilege of running a laundry business thereon; and his order was affirmed by the court. In such a case the question to be considered, with regard to jurisdiction, is the value of the subject matter as between the parties.

MOTION by respondents by way of appeal from the Registrar's order affirming jurisdiction.

The Appellate Division of the Supreme Court of Ontario, reversing the order of Mowat J., had declared that the defendant Pong was trustee for the plaintiffs of a certain lease of premises used in the carrying on of a Chinese laundry, and ordered that the defendant

Pong assign the lease to the plaintiffs and that the plaintiffs should covenant in the assignment to indemnify the defendant against the lessee's covenants contained in the lease[1].

The defendant Pong appealed to the Supreme Court of Canada, and moved before the Registrar of that Court for an order affirming its jurisdiction to hear his appeal. The Registrar's decision, delivered 21st June, 1926, was as follows:

> The sole question for determination on this motion to affirm jurisdiction, is with respect to the elements which can be taken into consideration when estimating the value of a leasehold property in view of its commercial possibilities.
>
> In Toronto premises can not be used for the purpose of carrying on a Chinese laundry except with the approval of the ratepayers in the

[Page 652]

> neighbourhood. The premises in question have received that approval. A laundry business has been established there for many years. The premises therefore have an exceptional value for this special purpose. I have no doubt on the evidence, that without this privilege, the property would not have a leasehold value sufficient to give the court jurisdiction, but with the privilege, I think the amount in controversy is more than $2,000. I therefore affirm the jurisdiction of the court; costs in the cause.
>
> If I am wrong in the above expressed view, there is nothing to prevent the respondent, when the case comes to be heard on the merits, from moving to quash for want of jurisdiction. No order made by me can confer jurisdiction, if otherwise there is none.

The respondents moved by way of appeal from the Registrar's order affirming jurisdiction, on the ground that the sole question at issue was the right to possession of the premises under the lease in question, and that any rights conferred upon the occupant of the premises by virtue of a license from the city of Toronto to conduct a laundry business were not appurtenant to the said lease as between the parties to this appeal.

After argument, judgment was rendered dismissing the motion with costs, the Chief Justice stating that the members of the court were all agreed that the proper question to be considered was the value of the property as between the parties, and it was impossible to say that the Registrar had erred in his appreciation of the evidence.

Motion dismissed with costs.

Fraser Raney for the motion.

Norman Sommerville K.C. contra.

---

[1] (1925) 1925 CanLII 11 (ON CA), 56 Ont. L.R. 616.

4515

Tab 309

CanLII

Pong v. Quong, 1927 CanLII 2 (SCC), [1927] SCR 271

Source:	Supreme Court of Canada
Date:	1927-02-24
Other citation:	[1927] 3 DLR 129
Citation:	Pong v. Quong, 1927 CanLII 2 (SCC), [1927] SCR 271, <https://canlii.ca/t/1ttkf>, retrieved on 2026-02-17

Supreme Court of Canada
Pong v. Quong, [1927] S.C.R. 271
Date: 1927-02-24

Jack Pong *(Defendant) Appellant;*

and

Lum Quong and Lum Chong *(Plaintiffs) Respondents;*

and

Mrs. W.J. Thomson *(Defendant) Respondent.*

1927: February 23, 24.

Present: Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Trust—Procuring of new lease by former partner—Assignment thereof to those continuing the business on the premises—Covenants in assignment—Rights between the parties as to acquisition of further lease—Implied trust—Question of estoppel by res judicata—Effect of judgment in overholding tenants proceedings—Jurisdiction of judge in such proceedings—The Landlord and Tenant Act, R.S.O.,1914, c.155.

P. and others had, as partners, conducted a laundry business on leased premises. The partnership was dissolved, the others continuing the business on the premises. P. procured from the landlord a new lease dating from the expiry of the existing one. As a result of litigation, P., for a certain sum, assigned to the others the new lease, covenanting that the assignees might “hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.” The lease had no provision for renewal. Before its expiry P. procured from the landlord a further lease dated from the expiry of the

existing one. Plaintiffs, the aforesaid assignees or their successors in interest, sued for a declaration that P., the defendant, was a trustee of the lease for them, and for other relief.

Held, affirming judgment of the Appellate Division, Ont. (1925 CanLII 11 (ON CA), 56 Ont. L.R. 616) that P. held the lease as trustee for plaintiffs; his obtaining it was a breach of good faith and contravened an implied obligation with regard to renewals; the allusion to renewal in the assignment must be taken to refer to the reasonable expectation of the tenants in possession to obtain a renewal; *Griffith v. Owen* ([1907] 1 Ch. 195) applied.

Held further, that plaintiffs were not estopped by *res judicata* by reason of certain overholding tenants proceedings (under *The Landlord and Tenant Act,* R.S.O., 1914, c. 155) and judgment therein; in such proceedings the judge had no jurisdiction to adjudicate as to the relations between Pong and plaintiffs.

APPEAL by the defendant Pong from the judgment of the Appellate Division of the Supreme Court of Ontario[1] which (reversing order of Mowat J.) declared that said

[Page 272]

defendant was trustee for the plaintiffs of a certain lease, and ordered that he assign it to the plaintiffs.

The plaintiff Quong and the defendant Pong were members of a firm carrying on a laundry business on premises leased from the defendant Mrs. Thomson. Mrs. Thomson had leased the premises to Pong in his own name for a term of three years from 1st March, 1916. Before the expiry of this lease, the partnership was dissolved (in November, 1917). Pong, in June, 1918, acquired a lease of the property in his own name for a period of five years, commencing on 1st March, 1919 (at the expiry of the first term). Litigation followed. A judgment of Winchester Co. C.J. contained an alternative direction that Pong should assign the lease to Quong and his co-partner in consideration of $600 to be paid to him. The lease was accordingly assigned, and in the assignment it was provided that the assignees might

> hold and enjoy the said premises for the residue of the term granted by the said lease and every renewal thereof (if any) for their own use and benefit, without any interruption of the assignor.

The lease did not contain any provision for renewal. Before the expiry of the lease, Pong procured from Mrs. Thomson a further lease of the premises for six years from 1st March, 1924 (the date of expiry of the existing lease). The plaintiffs, Quong and his co-partner Chong (who was the successor in interest of Quong's former co-partner Lum Lin), remained in possession after 1st March, 1924, being willing to assume the burden of the new lease (which was at an increased rental), and claiming the right to the benefit of it. They continued to pay rent which was taken by Mrs. Thomson without prejudice. The latter took proceedings under the overholding tenants provisions of *The Landlord and Tenant Act,* R.S.O., 1914, c. 155. The proceedings came on before His Honour, Judge Denton, of the County Court of the County of York. It was apparently agreed that the

hearing should proceed on the basis of the assumption that rent from the plaintiffs had not been accepted by Mrs. Thomson; in other words, that, if Quong and Chong were not entitled to the benefit of the lease made to Pong, she should not be prejudiced in the proceedings by having taken rent from Quong and Chong. It appeared that the real dispute was between Pong on the one hand, and Quong

[Page 273]

and Chong on the other, as to the right to the lease. There was some discussion, and, apparently, misunderstanding, as to the question of jurisdiction, and consent in regard thereto, which is referred to in the judgment now reported.

His Honour, Judge Denton, held that the lease acquired by Pong was not a renewal, in any sense, of the former lease, and made an order for possession against the present plaintiffs. The latter appealed to the Appellate Division of the Supreme Court of Ontario, which dismissed the appeal without written reasons. See the reference to this appeal in the judgment now reported.

The plaintiffs then brought the present action in the Supreme Court of Ontario, claiming a declaration that the defendant Pong was a trustee for the plaintiffs of the lease, and that it should be assigned to them, and for an injunction restraining him from assigning the lease to any person other than the plaintiffs, and for an injunction restraining the defendant Mrs. Thomson from evicting them.

The plaintiffs' motion for an interlocutory injunction was dismissed by Mowat J. The plaintiffs appealed to the Appellate Division of the Supreme Court of Ontario. By consent of counsel, the motion was turned into a motion for judgment and the case was heard upon the merits. The Appellate Division allowed the appeal, holding that the defendant Pong was a trustee of the lease for the plaintiffs, and that the lease should be assigned by Pong to the plaintiffs, who should covenant to indemnify him against the lessee's covenants contained therein[2].

The defendant Pong appealed to the Supreme Court of Canada. His two main grounds of appeal were:[2] That plaintiffs were estopped by *res judicata* by reason of the overholding tenants proceedings above mentioned and the judgment of Denton Co. C.J. therein, sustained by the Appellate Division; and (2) That, on the merits, the Appellate Division was wrong in holding that Pong should be deemed a trustee of the lease for the plaintiffs.

Norman Sommerville K.C. for the appellant.

Fraser Raney for the plaintiffs, respondents.

No one appeared for the defendant (respondent) Mrs. Thomson.

[Page 274]

At the conclusion of the argument for the appellant, the Chief Justice orally delivered the judgment of the court as follows:

"It is not necessary to call on you, Mr. Raney.

"We have all had an opportunity of considering this case over night, and the position seems to us quite clear.

"The first ground of appeal is that the respondent is estopped from bringing this action by reason of the judgment given in the overholding tenancy proceedings by His Honour, Judge Denton, nominally affirmed on appeal. I say "nominally" for reasons presently to appear.

"Judge Denton's only jurisdiction under the overholding tenants provisions was to determine the right of the landlord to possession. He himself states that in order that he should proceed it was necessary that there must be an admission before him that the rent had not been paid. His jurisdiction was to determine whether or not the landlord was entitled to possession. It was apparently desired that he should deal with issues as to the relationship of Pong and Quong, and determine the rights between them. Mr. Raney consented in some sort of form to that being done, but it would appear that his consent was given on the understanding and basis that the judge should deal with the matter as one within his jurisdiction under the overholding tenants provisions. It is perfectly manifest that he had no jurisdiction to do so—no jurisdiction subject to appeal; that he could entertain such collateral matter only either as *persona designata* or as arbitrator. That being so, the Appellate Division, when the case came before it on appeal from Judge Denton, must have taken the view, as Mr. Raney states, and as the subsequent proceedings bear out, that the judge had assumed a jurisdiction he did not possess under the overholding tenants provisions, and that as to the relations between Pong and Quong the matter was *coram non judice.* Mr. Raney's consent had been given subject to a condition which could not be fulfilled; in other words, he consented upon the condition that he would retain an effective right of appeal. On the appeal in the present action, the Appellate Division must have taken the view that the former proceeding was not binding as to the obligations of Pong; that the only thing judici-

[Page 275]

ally determined by it was the landlord's right to possession, the order in this respect, assuming non-payment of rent, being within the jurisdiction of the judge who made it. Taking that view,—and they of course knew what had been their appreciation of the former proceeding—it was open to the Appellate Division to deal with the appeal from the judgment of Mowat J. in this action, as they did.

"The other branch of the appeal is directed to the merits. It is claimed by the plaintiffs that the lease obtained by Pong is held by him as trustee for them. The Appellate Division gave effect to that contention, and, in our opinion, upon the whole case, rightly gave effect to it. It is manifest to us that the transaction carried out by Pong was in breach of good faith and contravened his obligation with regard to renewals, which was implied in the whole arrangement between him and Quong. While there is no express right of renewal in the lease, the assignment of it does deal with renewal, and the allusion must be taken to refer to the reasonable expectation of the tenant in possession to obtain a renewal. The case is fairly within the principle stated by Mr. Justice Parker in *Griffith v. Owen*. That principle was properly applied in the judgment now appealed from. That judgment is affirmed, and the appeal is dismissed with costs."

Appeal dismissed with costs.

Solicitors for the appellant: Norman Sommerville & Co.

Solicitors for the respondents, plaintiffs: Raney & Raney.

Solicitors for the respondent, Mrs. Thomson: Grant & Grant.

---

[1] (1925) 1925 CanLII 11 (ON CA), 56 Ont. L.R. 616.
[2] (1925) 1925 CanLII 11 (ON CA), 56 Ont. L.R. 616.

Tab 310

CanLII

McLean v. Bradley, 1878 CanLII 22 (SCC), 2 SCR 535

Source: Supreme Court of Canada
Date: 1878-06-04
Citation: McLean v. Bradley, 1878 CanLII 22 (SCC), 2 SCR 535, <https://canlii.ca/t/ggx6j>, retrieved on 2026-02-17

Supreme Court of Canada
McLean *v.* Bradley (1878) 2 SCR 535
Date: 1878-06-04

Roderick McLean

Appellant

And

Benjamin Bradley

Respondent

1878: Feb. 6, 7; 1878: June 4.

Present:—Sir William Buell Richards, Knt., C.J,, and Ritchie, Strong, Taschereau, Fournier and Henry, J.J.

The Chief Justice was absent when judgment was delivered.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Absent and absconding debtors Act of Nova Scotia, Ch. 97, Rev. St. of N. S.—Attachment —Demurrer—Conversion by Sheriff—Corporation, sale by—Justification under Order of Court—Seal.

One *H.* instituted proceedings against the *L. C. M. Company*, the officers of which resided in the *United States*, but which did business in *Nova Scotia*, and, on the 25th May, 1872, caused a Writ of Attachment to be issued out of the Supreme Court at *Amherst*, under the absent and absconding debtors Act of *Nova Scotia*,[1] directed to the Appellant, the High Sheriff of the County of *Cumberland.* Under this Writ, the Appellant seized certain chattels, as being the chattels of the said Company. On the 12th November, 1872, an order was issued out of the said. Court, directing the Appellant to sell, and the Appellant did sell said chattels as being of a perishable

nature. On the 11th December, 1874, a discontinuance was filed in the said cause by *H.* On the 30th May, 1876, the Respondent commenced an action against the Appellant for the conversion of the chattels in question, contending that the Company, having failed in its operations and being desirous of winding up its affairs, and being indebted to him, had sold and conveyed to him the said chattels by a certain memorandum of sale, dated July 5th, 1867, "signed on behalf of the Company," by one "*Hawley*, agent." To this memorandum a seal was affixed which did not purport to be the seal of the Company. The Appellant pleaded to the Declaration, that he did not convert; goods not Plaintiff's; not possessed; and also a special plea of justification, setting forth the proceedings by *H.*, and that he had seized and sold the goods as the goods of the Company, in obedience to the attachment and order issued in said proceedings. The Respondent replied, setting up the discontinuance.

[Page 536]

The Appellant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale. He also demurred, on the ground that being bound to obey the order of the Court, he could not be affected by the discontinuance., At the trial a verdict of $500 damages was rendered for Respondent. The Appellant obtained a rule *nisi* to set aside verdict, and the rule and demurrer were argued together. The. Court below refused to set aside the verdict and gave judgment for Plaintiff on the demurrer.

Held,—That the appeal should be allowed; that the plea of justification showed a sufficient answer to the declaration; that the replication was bad, and that the verdict must be set aside and judgment be for the Defendant on the demurrer.

Ritchie, J., dissented, on the ground that the seizing under the attachment, and not the sale, constituted the conversion; that there was sufficient evidence to show that the chattels in question had been transferred by the Company to Respondent, and that under Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia,* the sale of the chattels did not require to be under the corporate seal of the Company.

Per *Strong*, J.: The sale, and not the seizure, was the conversion complained of, and to this the order of the Court was a sufficient answer. *Semble*, a mere taking of the goods of a third person under a *mesne* attachment against a Defendant to keep them *in medio* until the termination of the action is not a conversion.

Per *Henry*, J.: The order for sale would not have been a justification for the original levy on the goods, as well as for the sale, if they had been the property of the Respondent, but the evidence failed to show a sale by the Company to the Respondent. Such a sale would require to be under the corporate seal of the Company, and did not come within the meaning of Sec. 15, ch. 53 of the *Revised Statutes of Nova Scotia.*

This was an appeal to the Supreme Court of *Canada* from the judgment of the Supreme Court of *Nova Scotia*, giving judgment on demurrer in favour of the Plaintiff (Respondent), and discharging a rule *nisi*, granted to the Defendant (Appellant), to set aside the verdict for the Plaintiff.

The *Lawrence Coal Mining Company*, a body corporate,

[Page 537]

incorporated out of *Nova Scotia*, in the State of *Massachusetts*, in the *United States of America*, under the Joint Stock Companies Act of *Nova Scotia*, commenced coal mining operations in 1862 on a colliery property at or near river *Hebert*, in the County of *Cumberland*, in the Province of *Nova Scotia*, purchased from one *George Hibbard*, and continued to work the same until 1865, when the Company became hopelessly, insolvent. *Hibbard*, the former owner, who resided on the spot, continued from the outset to be a Director, and was the only resident Director in *Nova Scotia*, and was Managing Director from 1862 up to the spring of 1867, excepting only one season in 1864, and as such had charge of all the property of the Company. He also attended all the annual meetings of the Company held at *Boston.*

To enable the Company to carry on its operations, the Company, through *Hibbard* as Managing Director, obtained from *Bradley* a loan of $10,000, for which *Hibbard*, as Managing Director, gave a note or notes and a warrant to confess to *Bradley*, the Respondent, on which judgment was entered up by *Bradley* for $10,022.75, for principal and interest, on the 11th September, 1865. In 1866 the real and personal property was advertized for sale under Respondent's judgment, and the' real estate was sold to him for $3,975, leaving $6,025 still due; the personal property was not sold, and remained on the premises until July, 1867, when *Hawley*, as agent of the Company, transferred it to Respondent, who, in consideration of the transfer, gave up notes and claims for about $1,500. *Hawley*, at the same time, gave the following memorandum of sale (filed in the case as exhibit A):—

"River Hebert, Cumberland County,

"Nova Scotia, July 5th, 1867.

"Know all men by these presents, that *Benjamin*

[Page 538]

Bradley, of *Boston*, Commonwealth of *Massachusetts, United States of America*, has this day purchased through *T. R. Hawley*, authorized to sell the same, the following described property, with the exception of two horses previously sold by his representative, *Ezra C. Dillingham.*

"Signed on behalf of the Company by

"T. R. Hawley, Agent, (Seal).

"Signed in behalf of *Benjamin Bradley*, the purchaser, by

"Ezra C. Dillingham, (Seal)."

GEORGE MOFFAT, (Seal).

Witness: NATHAN J. HOEY, (Seal).,

His

JESSE E. HOEY, X (Seal).

Mark.

There was no seal to this document purporting to be the seal of the Company, nor had any resolution been passed by the shareholders authorizing a sale by *Hawley*, but at an adjourned meeting of the Company, held on the 26th February, 1866, it had been, on motion, voted that Messrs. *Hawley, W. G. Howe* and *Alden*, should be and were thereby authorized to sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms as in their judgment would be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of said Company, and if the amount of such sale exceeded the debts the balance to be paid *pro rata* among the stockholders.

From the date of the sale, *Bradley*, and others claiming under him as proprietors, employed an agent to take care of the property, and paid all taxes and expenses connected with it. The mem. of sale was delivered by *Hawley* to *Alden*, who acted as Secretary of the Company.

[Page 539]

No meetings of the Company were held subsequent to that of the 26th February, 1866, until December 30 and 31, 1874, when the Company, being still largely indebted to Respondent on his judgment, by a resolution unanimously adopted by the shareholders present, further resolved that all the interest of the Company in the mining lease of the Company be transferred to Respondent.

On the 25th May, 1872, *Hibbard*, who claimed $1,760 from the Company, brought an action against the Company, and caused a writ of attachment to be issued out of the Supreme Court at *Amherst*, under the absent or absconding debtors Act of *Nova Scotia*[2], directed to the Appellant, as High Sheriff of the County of *Cumberland*, requiring him to seize, and in obedience to the writ the Appellant did seize, certain chattels as being the chattels of the said Company.

On the 12th November, 1872, an order was issued out of the said Court, directing the Sheriff to sell the said chattels, as being of a perishable nature within the meaning of sec. 6, of the last mentioned Act; and they were sold by the Sheriff.

On the 11th December, 1874, a discontinuance of the cause "and all proceedings thereunder," was entered in the action brought by *Hibbard* against the Company.

4527On the 30th May, 1876, the Respondent, contending that the chattels in question were his property, commenced an action of trover against the Appellant, the Sheriff, for the conversion of the said chattels.

The Appellant pleaded to the declaration:—1st. That he did not convert. 2nd. That goods were not the property of the Plaintiff. 3rd. Not possessed. And 4th. A special plea of justification setting forth the proceedings by *Hibbard*, against the *Lawrence Coal Mining Company*,

[Page 540]

and that the Defendant, as Sheriff, under the said writ of attachment, and the said order made in such proceedings, seized and sold the chattels in question as and being the chattels of the Company.

The Plaintiff replied to the fourth plea, that after the proceedings aforesaid the said proceedings were discontinued.

The Defendant rejoined that the proceedings were not discontinued, and that the discontinuance was not filed till after the sale in the fourth plea mentioned.

He also demurred to the replication, on the ground that, being bound to act in obedience to the order of the Court, he could not be affected by a discontinuance of a suit under which property was sold.

The Plaintiff joined in demurrer.

The issues of fact were tried at *Amherst* on the 16th October, 1876, before the Chief Justice, Sir *William Young*, and a jury, when a verdict was rendered for the Respondent for five hundred dollars damages.

The Appellant obtained a rule *nisi* to set aside the verdict, and the said rule *nisi* and the demurrer were argued together.

The Court below, after argument, gave judgment refusing to set aside the verdict, and, on the 2nd April, 1877, a rule was made ordering that the rule *nisi* be discharged with costs, and that the Plaintiff have judgment of the demurrer with costs.

The Appellant, thereupon, appealed to the Supreme Court of *Canada.*

Mr. Gormully, for Appellant:—

The Respondent claims title to the chattels in question by a transfer or conveyance thereof from the *Lawrence Coal Mining Company.* If once admitted to be the property of the Company, they must so remain until divested. The principal question is whether

[Page 541]

there was an actual sale of the goods; whether exhibit A had the effect of transferring the chattels to *Bradley*; I contend it had not. That document must operate either as a contract or conveyance. If it operates as a contract, it must be regarded as a contract under seal, or as a simple contract. It is not binding on the Company, because it does not purport to bind them, and because the seal affixed is not the corporate seal of the Company, which was necessary, there having been evidence of the existence of one. Sec. 15, ch. 87, *Rev. Stat., N. S.*, 3rd series, only establishes as a rule of statute law what was formally a rule

of common law. It has been held that as to personalty a corporation could sell it, but whether they could do so, except under seal, is another question.

The Statute says: "Acts within the scope of their charter." This sale, purporting to convey all the property, and showing an intention to abandon the object for which the Company was incorporated, should have been under seal.

Hawley never was duly authorized. There never was a meeting respecting the sale, and no evidence of that concerted action which was necessary.

D'Arcy v. *The Tamar, Kit Hill and Callington Railway Co.*[3]; *Ridley* v. *Plymo Grinding Co.*[4]. There is no evidence that the Company delegated their power; and further, if they did delegate it, they had no right to do so. The last delegation of authority is to *Hawley, Howe* and *Alden*—and this was a power which must have been exercised by all three, and was not a power which could be delegated. The Respondent was bound to know what was being done. *Exparte Brown*[5].

The transaction was a fraudulent one as against the

[Page 542]

statute of *Elizabeth*[6], there was no change of possession, and this was a document which should have been registered under the statute.

The learned counsel then proceeded to argue that the learned judge who tried the action had improperly admitted evidence and had misdirected the jury; and that as to the demurrer, the Appellants fourth plea was good in law, and replication bad because it admits and does not sufficiently avoid the plea:

Mr. Halliburton, Q. C., for Respondent:—

The Company became indebted to *Bradley* for an advance of $10,000. In 1865, they find themselves insolvent. *Hibbard*, from whom the Company purchased their mine, was the only director resident in *Nova Scotia*, and was the only person up to this date who had any benefit from the Company. He attended all the meetings and was familiar with all that was done. In 1865, meetings were called, but nothing was done, and at last *Bradley* enters up judgment and issues execution. He unwisely allowed the matter to stand over to save Sheriffs' fees, and a conveyance became necessary from, the Company. Five days after the sale of the personal property, *Hibbard* renders an account, showing $25 due him. The Company set off against that the rent, and considered they had paid every body; they supposed all claims were paid both in *Canada* and the *United States.* The Company authorized *Hawley* to go to *Nova Scotia* to sell the property.

[RITCHIE, J.:—Will you show us from the evidence that he was authorized by the Company?]

There is no one at present claiming the property except *Bradley.* The Company did not claim it, nor any shareholder or director on behalf of the Company.

[THE CHIEF JUSTICE:—A question has been raised

[Page 543]

which seems important. This property was sold by order of the Court as perishable property. How can the Sheriff be held responsible for selling this specific property under

the order of the Court?]

I am prepared to show that the Sheriff, under the circumstances, was not justified in selling.

Where there is a seal, the seal must be presumed to be the seal of the Company. *Ontario Salt Co.* v. *Merchants Salt Co.* (*limited*)[7].

[RITCHIE, J.:—Where is the evidence that *Hawley* had any right to use the seal of the Company?]

It is to be presumed he had the right.

[RITCHIE, J.:—What evidence raises this presumption?]

The Company took this man's money, which was the consideration for the sale.

[RITCHIE, J.:—If you can show that this party was professing to act for the Company and entered into this sale, and afterwards the Company had known of the facts and received the money, you will have good evidence that the sale was the sale of the Company.]

In 1874 a general meeting of the Company was called, and it is to be presumed the Company ratified the action of Mr. *Hawley.* When proceedings have been manifestly illegal between a Company and an individual, and the Company choose to continue these dealings, that is a ratification by the Company of such dealings.

[HENRY, J.:—The difficulty seems to me to be that there were no meetings, and no Company.]

It is to be presumed all necessary by-laws were passed to continue the Company, and the meeting of 1874 was a ratification of what was done before.

The transfer purporting to be signed and sealed by *R. Hawley*, as their agent, was given to the Secretary of

[Page 544]

the Company, and was never repudiated by them, and *Bradley* continued thenceforth to be in undisputed possession of the property and paid taxes on it, and employed an agent to take charge of it.

Even though the Company could not contract directly except under seal, yet they could without the corporate seal appoint an agent, whose acts and contracts within the scope of his authority were binding on the Company. 3 *P. Wms.* 419. 1 *Fonb.*, 305; *Phil.* Ed., n. o. *Abbott's* Dig. of Law of Corporations[8].

The sale was not *ultra vires*, but was a lawful means of making the most of the assets of the Company to discharge its liabilities. *Featherstonehaugh* v. *Lee Moor Porcelain Clay Co.* ***[9]***; *Burrell* on assignments, 36.

The promises and engagements of a Company may as well be implied from its acts and the acts of its agent as if it were an individual. *Abbott's* Dig. of Law of Corporations[10].

In a case like the present the law presumes *omnia rite acta* and, unless the contrary appears, that all necessary by-laws and resolutions have been passed necessary for the validity or ratification of the acts performed by the Company's agent. *Field* on Corporations[11].

The Company, after notice to it of sale by *Hawley*, did, by their acquiescence for so many years in the possession of Respondent of the personal property sold to him, by their accepting therefor notes, &c., to the amount of $1,500, and by their unanimous vote in 1874 in further satisfaction of the balance due Respondent, that the lease of the mine should be transferred to him, ratify and confirm the sale of the personal property to Respondent by *Hawley*, as their agent; and it must be assumed that all necessary by-laws and resolutions had been passed and adopted to ratify and confirm the sale

[Page 545]

by *Hawley*, as agent of the Company. To enforce an executory contract against a corporation it may be necessary to show that it was by deed: but where the corporation has acted upon an *executed contract*, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. *Doe dem. Pennington* v. *Taniere**[12]*; *Wilson* v. *Miers**[13]*; *Royal British Bank* v. *Turquand**[14]*; *Renter* v. *Electric Tel. Co.**[15]*; *Australian Steam Navigation Co.* v. *Marzetti et al**[16]*; *Crook* v. *Corporation of Seaford**[17]*; *Buffalo and Lake Huron Railway Co.* v. *Whitehead* (in appeal)[18]; *Brewster* v. *The Canada Co.**[19]*; *Mayor of Stafford* v. *Till**[20]*; *Angel & Ames* on Corporations[21]; *Bigelow* on Estoppel[22].

If any question could be raised as to the power of the Company to sell, or the agency of *Hawley*, or as to the validity of the sale by him, or as to the ratification of such agency, or of such sale by the Company, it is settled by the provisions of the *Nova Scotian* Act respecting factors and agents. *Rev. Stat. Nova Scotia*, Fourth Series, App. 63, secs. 1—10.

The Respondent further contends that Appellant's plea of justification is bad in substance, for the following reasons:—

Because it appears by it that the attachment under the *Nova Scotian* Act respecting absent or absconding debtors, was issued against "a body corporate doing business in *Nova Scotia*," the said Act not extending to such a company, but only to companies "incorporated

[Page 546]

out of the Province and doing business by an agent within the Province." *Rev. Stat. Nova Scotia*, Fourth Series, ch. 97.

Because, even if sec. 6 of the said Act refers to such foreign companies doing business in *Nova Scotia*, it does not appear that the goods in question were exhibited to the Sheriff as the goods of the Company, nor does it appear that they were valued by two sworn appraisers, or that the amount of appraisement was endorsed on writ of attachment, or that the Sheriff levied on such part of the goods as would be sufficient to refund the sum so sworn to, &c.

Because, if sec. 7 is also applicable to such foreign companies, it does not appear that notice of such assessment was given to the agent of the Company, or that the three days were allowed him to find security; nor does it appear that the prothonotary had any

power to issue the order for sale in consequence of the absence of a judge. *Rex.* v. *Croke*[23].

Because the plea of justification does not show that the Sheriff has made a return of the writ of attachment, without which he cannot be allowed to justify in such a case. Rev. Stat. Third Series, ch. 40, s. 13. *Rowland* v. *Veale*[24]; *Cheaseley* v. *Barnes*[25]; *Freeman* v. *Bluett*[26]; *Williams* v. *Babbitt*[27]; also, American cases cited in 2 *Greenleaf* on Ev., 597.

And Respondent further contends:—That as it is only service of summons on the agent of a foreign company doing business in the Province by an agent, which the statute says "gives jurisdiction to the Court," and as it appears that the summons was served on the agent of Respondent, and not of the company, the Court had no jurisdiction, and the writ of attachment and order

[Page 547]

for sale, and all proceedings thereunder, were null and void; that a Court of law has in itself no inherent power or right to order perishable goods seized under attachment to be sold, *La Rochelle* v. *Piche et al*[28]; and that sec. 6 and 7 of Absent or Absconding Debtors Act does not extend to foreign companies doing business in the Province by an agent, and the Court has no power to order a sale of their property under the said Act, and that all proceedings for a sale of such property are therefore null and void. "When the Court has no jurisdiction of the cause, the whole proceeding is *coram non judice*, and actions will lie against the above mentioned parties without any regard to the precept or process, and in this case it is not necessary to obey one who is not judge of the cause." *Broom*, L. M. 90, *Taylor* v. *Clemson*[29]. *Factum a judice, quod ad officium jure non pertinet, ratum non est.* "A plea of justification by a constable acting under the warrant of a justice will accordingly be bad, if it does not show that the justice had jurisdiction over the subject matter upon which it is granted." *Taylor* v. *Clemson*[30]; *Broom's Prac.*[31]; *Broom*, L. M.[32].

As to evidence necessary in support of defence, see *Crocker* on Sheriffs[33].

Mr. Gormully in reply:—

RITCHIE, J.:—

This was an action brought against the Sheriff of the County of *Cumberland* for converting to his own use Plaintiff's goods. Defendant, as such Sheriff, levied on these goods under an attachment. There is a provision in the Act under which these goods were seized, giving

[Page 548]

power to the Court to order perishable goods to be sold[34]. The Court did in this case order the goods to be sold, and they were sold, and after such sale all the proceedings under the attachment appears to have been discontinued. If the Sheriff had properly taken the goods in the first instance, and if they were legally in his hands, and he sold them under the order of the Court, I think that order would protect him; but, in this case, in my opinion, the conversion of the goods took place when the Sheriff levied on them. The

evidence shows the goods originally belonged to the *St. Lawrence Coal Mining Company*, the officers of which were domiciled in *New York.* The Company appears to have failed in its operations, and all their property in *Nova Scotia* was disposed of, except that now in question, and all debts in that Province, except $28, appear to have been settled, leaving a large debt due to the Plaintiff, who had been connected with the Company, and for which he held the promissory notes of the Company. The Supreme Court of *Nova Scotia* held there was evidence of a sale of these goods; and there appears to me to have been ample evidence for the consideration of the jury of a *bonâ fide* sale, for a valuable consideration, by the officers of the Company to the Plaintiff, for the purpose of discharging the lawful indebtedness of the Company. I think this was within the legislative power given to incorporated companies under ch. 53, sec. 15, *N. S.* Acts, which makes acts performed within the scope of their charter, or acts creating them, valid, notwithstanding they may not be done under, or authenticated by, the seal of the Company, if such an authentication was needed, but which, I think, was, in this case, wholly unnecessary[35].

The Company having in the due course of its business

[Page 549]

become indebted to the Plaintiff, I can see no reason why it might not as well pay that liability by a sale and delivery of personal property to their creditor in discharge thereof, as by handing him the amount in money, or selling the property to third parties, and handing over the proceeds to the creditor.

With reference to the conversion, I think the very circumstance of Defendant's levying on the goods, and subsequently selling them, was a clear conversion. There was not, it is true, evidence that the goods were on the levy moved, but it is clear the Sheriff did levy on them, and it is equally clear that the Court ordered the goods, thus in his hands and under his control, to be sold, as being in his possession under the levy, and that they were so sold.

The definition of a conversion, as given by the editor of *Bacon's* abridgment "Trover" (B), is this:—

> The action being founded upon a conjunct right of property and possession, any act of the Defendant which negatives or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the Defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of Plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

I think when a Sheriff levies on property he does take possession of it, as against the party, and does convert it. If he exercises control in defiance of the party who had the

right, there is a conversion, and he may be sued for the conversion, and, as said by *Alderson*, B., in *Fouldes* v. *Willoughby*[36],

> For this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion.

[Page 550]

I think the Plaintiff's right of action did not commence at the time of the sale, but so soon as the Sheriff levied upon the goods, and so exercised a claim and dominion over them adverse to the Plaintiff and inconsistent with his general right of dominion.

Under these circumstances, I think the Plaintiff has made out his case, viz.: that the Company, by its officers, was competent to sell the goods in question, that there was evidence to establish the sale of the goods to the Plaintiff, and of a conversion by the Defendant. I state this with hesitancy, only because the views of my learned brethren are at variance with the conclusion at which I have arrived.

STRONG, J.:—

The conversion complained of by the declaration was the sale, not the seizure or taking of the goods. The 4th plea justifies the sale under the order of the Court, and avers that to have been the act complained of in the declaration. The Plaintiff is therefore confined to the sale as the conversion for which he sues. If he wanted to insist on the taking as constituting a conversion he should have new assigned. I should doubt, however, if a mere taking of the goods of a third person under a mesne attachment against a Defendant, to keep them *in medio* until the termination of the action, is a conversion. A conversion is defined to be a taking of chattels with an intent to deprive the Plaintiff of his property in them, or with an intent to destroy them or change their nature. Taking under a mesne attachment does not, like taking under a writ of *fieri facias* with intent to sell, imply any such intention. But, be that as it may, the conversion here must, on the pleadings, be taken to be the sale. Now, this sale was under an order of the Court, and was the act of the Court, not the act of the

[Page 551]

Sheriff. It was not the case of a writ of execution or attachment being placed in the Sheriff's hands against the goods of A, and a seizure under it of the goods of B, which the exigency of the writ did not warrant; but these specific goods being already in the Sheriff's hands, having been seized under the attachment, the Court orders them to be sold. The Sheriff is, therefore, protected by the order for sale. The issue, it is true, on this line of pleading, is narrowed to this: Was the discontinuance after or before the sale? It appears

that the sale took place on the 7th November, 1866, and that there was no discontinuance until December 11th, 1874. The issue on the rejoinder to the replication to the plea of justification ought, therefore, to have been found for the Defendant. But it was proper to consider, whether the plea did disclose a good justification, since there would be no use in granting a new trial if in point of law the Sheriff could not justify. As regards the other point argued, there can, in my judgment, be no doubt that the Company was one to which the Rev. Stats. p. 8, (4th Series), ch. 97, was applicable. I am, therefore, of opinion that the verdict ought to have been set aside with costs, and a new trial ordered.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

The points to be decided in this case are in an action of trover, brought by the Respondent against the Appellant, who, as Sheriff of the County of *Cumberland*, sold certain chattel property claimed by the Respondent to belong to him to recover its value.

To the charge of conversion in the Respondent's writ the Appellant pleaded:—

> 1st. That he did not convert to his own use the Plaintiff's goods, as in the writ alleged.

[Page 552]

> 2nd. That the goods were not the property of the Plaintiff.
>
> 3rd. That the Plaintiff was not possessed, nor was he entitled to the possession of the said goods.

And by a fourth plea, he justifies the taking of the goods, as and being the goods of the *Lawrence Coal Mining Company*, under a writ of attachment at the suit of one *George Hibbard*, against the said *Lawrence Coal Mining Company*, directed to him as Sheriff of the County of *Cumberland*; and the subsequent sale thereof under an order issued by the Supreme Court and signed by *A. S. Blenkhorn*, Esquire, Prothonotary of the said Court at *Amherst* in the said County of *Cumberland*, whereby he was ordered and required, amongst other things, as such Sheriff, as aforesaid, to put up and sell the said goods at public auction to respond the judgment which might be obtained. The Plaintiff replied to the latter plea:—

> That after the proceedings in the plea mentioned, taken by the said *George Hibbard*, the suit instituted by the said *George Hibbard* against the *Lawrence Coal Mining Company* was discontinued by him, and the attachment and all proceeding thereunder were thereby abandoned; which said discontinuance is on the fyles of this honorable court.

To that replication the Appellant rejoined, first, that the said cause was not discontinued, and second:—

That the said discontinuance was not filed until after the goods in said writ mentioned were sold under the order in his said plea mentioned, and the proceeds applied as therein mentioned.

On the trial of the issues of fact, leave was given to the Appellant to demur to the replication of the Respondent, which he did, and therein says that the Plaintiff's replication is bad in substance, inasmuch as the Sheriff is justified by his writ of attachment and order for sale, and was bound to execute it:—

That the act of the Plaintiff in the cause under which the attachment was made, in discontinuing the cause after the Sheriff had sold the property in question, cannot and does not affect his justification, as pleaded.

[Page 553]

Marginal note on the demurrer:—

Matter of law to be argued—that the Sheriff, being bound to act in obedience to the order of the Court, cannot be affected by a discontinuance of a suit under which property was sold.

Joinder in demurrer by Respondent. Under the charge of the learned Chief Justice of *Nova Scotia*, before whom the cause was tried in October, 1876, the jury found a verdict for the Plaintiff for $500, and a rule *nisi* was granted to set it aside on the following grounds:—

1st. That the verdict was against law and evidence.

2nd. That the learned Chief Justice misdirected the jury.

3rd. That evidence was improperly received.

4th. That evidence was improperly rejected, and

5th. That there was no sufficient evidence of the conversion of the goods.

This rule and the demurrer were argued before the whole Court at *Halifax*, and by a majority of the Court the rule *nisi* was discharged with costs, and a judgment on the demurrer given in favor of the Respondent.

In the majority judgment, the fourth plea is pronounced bad, and a doubt expressed as to the sufficiency of the replication to it. Hence the judgment on the demurrer. The appeal to this Court is from that judgment on all the points, both as to the facts and the law.

I will first deal with the demurrer. I would not question the correctness of the judgment if the fourth plea is defective, but I don't think it is.

To decide that point, we must first consider the nature of the position held by the Appellant when he received the order for the sale of the goods. He had previously levied on the

goods under the attachment, but had not removed them. Section 6, ch. 97 of the *Revised Statutes of Nova Scotia*, entitled: "Of suits against absent and absconding debtors," provides that:—

[Page 554]

Where the goods consist of stock, or are shown by affidavit to be of a perishable nature, and the agent shall not, within three days after notice of the appraisement, give security for their value, a judge, or a prothonotary of the county, in his absence, may, at his discretion, cause the same to be sold at public auction, and the proceeds thereof shall be retained by the Sheriff, or paid into Court, to respond the judgment.

The prothonotary of the county made an order under the provisions of that section, and directed to the Sheriff, to sell the said goods under the terms thereof.

On receipt of that order it was the Sheriff's duty to execute it. He could have been compelled by legal and summary means to do it, and would also be answerable to the Plaintiff in that suit for any resulting loss or damage to the goods, in case he eventually obtained judgment. So far, therefore, as the conversion *by the sale*, the order to sell the specific goods would be a complete justification and the plea to that extent is a sufficient answer.

If the plea admitted the goods were the property of the Plaintiff it would have been bad; but, on the contrary, it alleges them to have been, when levied upon, the goods of the *Lawrence Coal Mining Company*, and that, with the other allegations contained in it, forms a perfect answer to the writ; and, as a whole, is consequently a good plea The Respondent virtually says:— they were not the Plantiff's goods, but those of the *Lawrence Coal Mining Company*, and I, as Sheriff, levied upon them under the attachment, and subsequently sold them.

A special plea of justification is only necessary where goods of one party are taken out of the possession of another, and is only necessary as a justification for interfering with the possession. If goods are not taken out of the possession of the Plaintiff the right is tried by a simple denial of ownership. The justification in this case would only be necessary in case the goods in

[Page 555]

question, were, when taken, in contemplation of law, in the possession of the Respondent.

The replication to the plea is bad, for the simple reason that the Respondent could not, by any possibility, be affected by any subsequent act of the Plaintiff in regard to the

discontinuance of the suit. I think, therefore, the judgment on the demurrer must be in favor of the Appellant.

Under that ruling the judgment on the facts submitted to the jury should also be for him, if the order for sale would be a justification to the officer for the original levy on the goods, as well as for the sale, even had they been the property of the Respondent; but, as it is not, the result must be affected by the question as to the ownership of the goods when the levy was made. If, then, they were not the Respondent's, he cannot recover; but the whole case, as far as the rule *nisi* for a new trial goes, depends altogether on the settlement of that question. The property, as admitted by both parties, was that of the *Lawrence Coal Mining Company* up to the date of the transfer claimed by the Respondent. Did he, then, obtain the property in the goods by the document signed by "*J. W. Hawley*, agent." If not, he had no property in them. In determining that point we must see if, in the first place, *Hawley* had sufficient authority to divest the Company of the ownership. The alleged transfer is signed by him on the 5th of July, 1867. He, the Respondent, and others were appointed Directors of the Company on the 18th of January, 1865, *for one year* from that date. No subsequent appointment of Directors was ever made, and there is no provision to be found anywhere, as far as the evidence goes, as is sometimes the case in respect of public officers, that the Directors should hold office till others were appointed in their place. There may have been such a provision in the

[Page 556]

by-laws of the Company, but evidence of it is wanting. On the 18th of January, 1866, the Directors ceased to be so; and, as such, could not collectively or individually bind the Company. Resolutions of the stockholders were passed in April and December, 1865, authorizing certain Directors named, to sell on certain conditions the real and personal property of the Company; but *Hawley* was not one of them. On the 26th of February, 1866, at a meeting of the stockholders, a resolution was passed authorizing Messrs. *Hawley, W. G. Howe* and *Alden:*—

> To sell all the real and personal estate, and also the leasehold of the Company for such sum or sums, and on such terms, as in *their* judgment will be for the best interest of the Company, and pay the proceeds of such sale into the hands of the Treasurer for the benefit of the creditors of the said Company, and if the amount of such sale exceeds the debts, the balance to be paid *pro rata* among the stockholders.

No one will pretend for a moment that *Hawley* alone had power to make the sale to the Respondent, which the document signed by him purports to have been made. The delegated power by the Company was to *three*, and the *three* were to exercise *their judgment* in regard to it; and besides, none of them, nor the three together, had power to give any portion of the property *in payment of any particular debt.* It was to be sold for cash, and that paid into the hands of the Treasurer. The Respondent was himself a

Director; and was quite aware, no doubt, of the nature of the authority given to *Hawley, Howe* and *Alden*, and is concluded thereby. There is no evidence of any ratification of the sale by the Company. In fact, there was but one meeting of the Company after that of February, 1866, and that was in 1874, which appears to have been called for the purpose of authorizing a transfer of the lease of the mines to the Respondent, which was done; and that only.

[Page 557]

Some oral evidence was offered of the authority of *Hawley* to sell the personal property; but it was objected to and cannot be received for the obvious reason that no meeting had ever considered the subject. In the absence, then, of legitimate evidence, and when considering, too, that if any Directors existed at the time of the transfer, the Respondent was one, and could not become a purchaser through a sale by the Directors' he having with them a fiduciary authority to sell, if any such existed, I must say I can see no authority for the transfer to bind the Company, even if it had been made in the name of the Company and under its seal.

The instrument in question does not purport to be a transfer by the Company. It contains no words making a transfer. It only says baldly that the Respondent *has purchased* through *T. R. Hawley*, authorized to sell the same, the property mentioned in the schedule. A mere naked purchase, without evidence of any consideration given, or any delivery of the property, will not pass it. I cannot think the instrument of any more value than a letter to some person would have been, containing the same substance. It does not say who owned the property, or by whom he was authorized to sell it, and it is signed by "*T. R. Hawley*, agent." Agent of whom? It discloses no consideration or terms for the purchase. No consideration is shown either by, or *dehors*, the instrument by any one present at the alleged purchase. I will not say a *written* transfer was absolutely necessary, but I am of opinion the document *per se* is insufficient to make it. There is no other evidence of it; for neither of the parties to the transfer, *Hawley* and *Dillingham*, or any of the witnesses to it, or any other person present, was examined; and there is, therefore, no legal evidence of it. *Alden's* hearsay evidence upon this point, objected to at the trial, cannot be received.

The Respondent, in his evidence, says:—

[Page 558]

> *Alden, Dillingham, Hawley* and *Wentworth*, were all creditors of the Company, and were the four interested with me in the transfer of the personal property—

under his honorary obligation. Thus, then, was *Hawley* undertaking to act as the agent of the Company to convey, with the assistance of *Dillingham*, the property of the Company to the Respondent for his, *Hawley's, Dillingham's* and *Wentworth's* benefit. Surely the

Company, at any time, could repudiate such a transfer; and, if void, as against the Company, it must be so as against a creditor of the Company, as *Hibbard* appears to have been.

And, now, in conclusion, as to the seal. I have carefully examined all the authorities, and have had no difficulty in arriving at the conclusion that, in the absence of statutory enactment, the contract in question could only be valid under the seal of the Company.

By the registry of the articles of association in evidence, this Company was incorporated, not as a trading company, but:—

> For the special purpose of opening and working mines and veins, or deposits of coal and oils in the River *Hebert* Settlement, * * * and the exporting and making sale thereof, and of constructing and operating railways, tramways, or plank roads, necessary for transporting the said coal, when mined, to tide water, and for the purpose of constructing piers, docks and buildings necessary for carrying on said business, and of doing all other business which may be lawfully undertaken and connected therewith.

This is not, then, a "trading" Company, and therefore rules as to buying and selling stocks in trade will not apply to it.

The "selling" contemplated by this Company was to be of coal and oil, not the houses, buildings, or plant. The intention was to keep the latter as means to enable the Company to carry out the intentions of the charter.

The intention is clear and obvious, and I cannot strain words declaring, as do those of section 15, chap. 53 of the *Revised Statutes of Nova Scotia*, that:—

[Page 559]

> The acts of incorporated companies performed within the scope of their charters, or acts creating them, shall be valid, notwithstanding they may not be done under, or authenticated by the seal of such corporations,

to mean that a company may, without seal, sell and dispose of their whole property, and thereby wind up the company. Such a power is certainly, to my mind, not given by the section just quoted; for that section clearly has reference, as to this Company, to acts done "in the opening and working mines, &c." and the exporting and making sale of "coal and oil, &c." It, in fact, only applies to a *going* Company, and cannot be applied to the expiring flicker, or final sale of the houses, plant, &c., of a bankrupt company. For the reasons given, I think, the rule for the discharge of the rule *nisi* herein should itself be discharged and the said rule *nisi* made absolute with costs.

Appeal allowed with costs, and new trial ordered with costs in the Court below.

Solicitor for Appellant: Charles T. Townshend.

Solicitor for Respondent: W. Inglis Moffat.

---

[1] Ch. 97 Revised Statutes of Nova Scotia, 4th Series.
[2] Rev. Stat. *Nova Scotia*, 4th series, ch. 97.
[3] L. R. 2 Ex. 158.
[4] 2 Ex. 711.
[5] 19 Beay. 97.
[6] Twyne's case 1 Coke 80; 1 Sm. L. C. 1.
[7] 18 Grant 555; Rev. Stat. Nova Scotia, 3rd. series, ch. 87, s. 1.
[8] Pp. 5 and 6.
[9] 35 L. J. N. S. 84.
[10] 578, S. 96-8, 579 S. 100-5.
[11] P. 287 & 296.
[12] 12 Q. B. 998, 13 Jur. 119, 18 L. J. Q. B. 49.
[13] 10 C. B. N.S. 367.
[14] 6 E. & B. 331.
[15] 6 E. & B. 347.
[16] 24 L. J. Exch. 273.
[17] L. R. 6. ch. App. 554.
[18] 8 Grant 157.
[19] 4 Grant 443.
[20] 4 Bing. 75.
[21] P. 172.
[22] 477, 447 N. 2.
[23] 1 Cowp. 30.
[24] 1 Cowp. 20.
[25] 10 East 81.
[26] 1 Salk. 409, Ld. Ray. 633.
[27] 14 Gray 141.
[28] 1 L. C. Jur. 158.
[29] 2 Q. B. 1034.
[30] 2 Q. B. 1031.
[31] 667 et seq.
[32] 95, 96.
[33] P. 867.
[34] Sec. 6, ch. 97 Rev. Stats. N. S., 4th Series.
[35] 8 M. & W. 548.
[36] Ch. 97 Revised Statutes of Nova Scotia, 4th Series.

Tab 311

CanLII

Turigan v. Alberta, 1988 ABCA 333 (CanLII)

Source:	Court of Appeal of Alberta
Date:	1988-10-03
File number:	8703-0264-AC
Other citations:	53 DLR (4th) 321 — [1988] 6 WWR 673 — 62 Alta LR (2d) 1 — 90 AR 118 — 45 CCC (3d) 136 — 35 CPC (2d) 46
Citation:	Turigan v. Alberta, 1988 ABCA 333 (CanLII), <https://canlii.ca/t/2dmwx>, retrieved on 2026-02-17

In the Court of Appeal of Alberta

Citation: Turigan v. Alberta, 1988 ABCA 333

Date: 19881003
Docket: 8703-0264-AC
Registry: Edmonton

Between:

**Ricky William Turigan and Ricky William Turigan,
as Representative of the class of persons convicted under s. 238(3)
(rep. & sub. 1974-75-76, C93 s. 19(2) *Criminal Code*)**

Plaintiff
(Appellant)

- and -

Her Majesty the Queen in Right of the Province of Alberta

Defendant
(Respondent)

The Court:

The Honourable Mr. Justice Harradence

The Honourable Mr. Justice Stevenson
The Honourable Mr. Justice Foisy

Reasons for Judgment of The Honourable Mr. Justice Harradence
Reasons for Judgment of The Honourable Mr. Justice Stevenson
Concurred in by The Honourable Mr. Justice Foisy

APPEAL FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE F.R. MacNAUGHTON DATED THE 27th DAY OF JANUARY, 1987

COUNSEL:

R.A. McLennan, Esq., Q.C, for the Appellant

D.W. Kinloch, Esq., for the Respondent

REASONS FOR JUDGMENT
OF THE HONOURABLE MR. JUSTICE HARRADENCE

---

[1] This is an appeal from a decision on a preliminary point of law. A representative action had been commenced by the Appellant, Ricky William Turigan, on behalf of the class of persons convicted under Section 238(3) of the *Criminal Code* (rep. & sub. 1974-75-76, C. 93, s. 19(2)) against Her Majesty the Queen in Right of the Province of Alberta (the Crown), the Attorney General of Alberta, the Solicitor General for Alberta, and the Provincial Treasurer of Alberta. The statement of claim was struck out in respect to the latter three Defendants, leaving the Crown as the sole Defendant. The Appellant was granted leave pursuant to R. 220 of the *Alberta Rules of Court* for determination of a preliminary point of law. The agreed statement of facts for the R. 220 application was:

> "1. On or about the 15th day of April, A.D. 1980, the Plaintiff Ricky William Turigan was convicted under s. 238(3) (rep. & sub. 1974-75-76 C. 93 s.19(2)) Criminal Code, and fined Two Hundred and Fifty ($250.00) Dollars, which fine was paid by TURIGAN to the Defendant.
>
> 2. On February 3, A.D. 1981, the said s. 238(3) was declared to be ultra vires by the Supreme Court of Canada in R. v. Boggs (1981) 1981 CanLII 39 (SCC), 58 CCC (2d) 7 (S.C.C.).
>
> 3. The said fine has never been returned to TURIGAN nor has said conviction been removed from the Plaintiff's criminal record."

The question of law for determination was phrased in the following terms:

> "As a matter of law, is TURIGAN entitled to have his fine refunded by the Defendant?

The learned Judge in chambers, without providing reasons for judgment, answered this question in the negative. The same question is now before this Court.

[2] The basic issue that confronts us in this appeal involves the legal consequences attaching to a judicial pronouncement that a law is unconstitutional. What effect does the pronouncement have on rights and obligations that have arisen pursuant to that law? In the case at bar, is the Appellant entitled to the return of the fine paid as an incident of conviction under Section 238(3)? That law was declared to be unconstitutional by the Supreme Court in R. V. Boggs (1981) 1981 CanLII 39 (SCC), 1 S.C.R. 49.

[3] The direct result of a declaration of unconstitutionality is that the impugned legislation is rendered void *ab initio.* The legislation is, and always has been, invalid and of no force or effect. The United States Supreme Court, as noted by Professor Hogg at p. 345 of his text *Constitutional Law of Canada* (2 ed., 1985), has strayed from this principle by ruling that it possesses a discretion in certain cases to make the declaration of unconstitutionality prospective only. This discretion has been primarily exercised in relation to criminal statutes, where a retroactive ruling of unconstitutionality would result in the reopening of a significant number of convictions. The Supreme Court of Canada, however, has never adopted this doctrine of "prospective overruling". This is confirmed by the result in Reference Re Language Rights Under the Manitoba Act (1985) 1985 CanLII 33 (SCC), 19 D.L.R. (4th) 1. In that case, the Supreme Court was forced to grapple with the consequences flowing from its declaration that "All unilingually enacted Acts of the Manitoba Legislature are, and always have been, invalid and of no force and effect" (at p. 36). Rather than simply apply the doctrine of "prospective overruling" to overcome the legal chaos that would result from a wholesale declaration of unconstitutionality, the Supreme Court chose instead to preserve the rights, obligations and other effects that accrued through past reliance on Manitoba's unconstitutional laws. This was accomplished through the *de facto* doctrine, the *res judicata* doctrine, the doctrine of mistake of law, and where those doctrines were ineffective to preserve rights, obligations and other effects, a declaration that (at p. 29):

> "… in order to uphold the rule of law, these rights, obligations and other effects have and will continue to have, the same force and effect they would have had if they had arisen under valid enactments …"

In addition, it should be recalled that the Supreme Court temporarily validated Manitoba's laws to allow the Manitoba Legislature sufficient time to re-enact its laws in compliance with the requirements of the constitution thereby preventing a legal vacuum in that province.

[4] In the case at bar, the declaration by the Supreme Court in Boggs that Section 238(3) is unconstitutional has the effect of nullifying that section of the *Criminal Code.* Extreme circumstances similar to those in the Manitoba Language Reference are not present in this case. Legal chaos has not and will not result from the Supreme Court's declaration in Boggs. The rule of law, which was the Supreme Court's motivating force in the Manitoba Language Reference, is not threatened by the striking down of Section 238(3). Consequently, there is no need in the present case to take the exceptional steps

taken by the Supreme Court in the Manitoba Language Reference, in the result, all actions taken in pursuance of Section 238(3) have been done without legal authority.

[5] Therefore, the criminal court that convicted and fined the Appellant did so without legal authority. This result, the Appellant submits, entitles him to a return of the fine. Unfortunately, the solution is not that simple. There are three legal hurdles that must be cleared before the Appellant can successfully claim entitlement:

1. Mistake of Law - Honey paid under a mistake of law is generally not recoverable. There are exceptions however.

2. *Res Judicata* - Is the Appellant's action barred by reason that as between the Appellant and the Respondent Crown, s. 238(3) must be considered to be constitutionally valid?

3. The *De Facto* Doctrine - Although the criminal court had no legal authority to convict the Appellant, did s. 238(3) nevertheless give that court sufficient colour of authority to convict? If so, then the conviction (and fine) are protected from collateral attack.

For the reasons that follow, I am of the view that the Appellant is not entitled to the recovery of his fine.

1. Recovery of Money Paid Under a Mistake of Law

[6] The Appellant clearly paid the fine as a result of a mutual mistake of law. The mistake of law was in respect to the constitutional validity of Section 238(3) of the *Criminal Code*. If the mistake of law had not been made, the Appellant would not have been convicted, nor would he have paid the fine.

[7] No authority need be cited for the principle that money paid as a result of a mistake of law cannot be recovered in an action for monies had and received. This must be contrasted with money paid under a mistake of fact, which is recoverable. This distinction has been subjected to much criticism, on the basis that it is hard to differentiate mistakes of fact and law. In fact, Dickson, J. (as he then was) in Hydro Electric Commission of Township of Nepean v. Ontario Hydro (1982) 1982 CanLII 42 (SCC), 132 D.L.R. (3d) 193 (S.C.C.) recently called for the elimination of this distinction, preferring instead to rely on principles of unjust enrichment to determine entitlement to recovery of money. However. Dickson, J. (Laskin, C.J.C. concurring) was in dissent in Nepean. The majority judgment, written by Estey. J., Martland and Lamer, JJ. concurring, upheld the distinction. In the words of Estey, J. (at p. 243):

> "These authorities, both old and current, relating to the situation where mistake of law alone is present, are founded, in my respectful view, on good sense and practicality. Certainty in commerce and in public transactions such as we have here is an essential element of the well-being of the community. The narrower rule applicable to mistake of law as compared to that applicable to mistake of fact springs from the need for this security and the consequential freedom from

> disruptive undoing of past concluded transactions. Mistake of fact is, of course, limited to the parties and has no *in rem* consequences; hence the more generous view. In any event, nothing has been brought to light in the review of the law by the parties on this appeal to indicate any basis for the merging of the principles applicable to the categories of mistake, and indeed the wisdom embodied in the authorities augurs for the maintenance of this ancient distinction."

Consequently, I am bound by precedent to apply the principles relating to recovery of money paid under mistake of law.

[8] The Appellant submits that where the mistake of law is in respect to the constitutional validity of the legislation in question, the common law principles relating to recovery of money paid under mistake of law do not apply. In such cases, it is argued, the money that was paid to the government in reliance of the constitutionality of the legislation must be returned; to retain the funds would be to flout the constitution. The Appellant places the foundation for this proposition on the Supreme Court of Canada's judgment in Amax Potash v. Government of Saskatchewan 1976 CanLII 15 (SCC), [1976] 6 W.W.R. 61. Further reliance is placed in the British Columbia Court of Appeal's judgment in Air Canada v. The Queen in Right of British Columbia 1986 CanLII 1118 (BC CA), [1986] 5 W.W.R. 385. In my opinion, Amax Potash cannot be interpreted as supporting the proposition submitted by the Appellant. Consequently, inasmuch as the Air Canada decision interprets Amax Potash in a manner similar to that put forth by the Appellant, it cannot provide further support for the Appellant's proposition. I now propose to examine both of these cases.

[9] At issue in Amax Potash was the constitutionality of certain taxes imposed on Saskatchewan potash producers. Amax Potash was one of several potash producers who objected to the taxing provisions and therefore commenced an action to test their constitutionality. In their statement of claim, the potash producers asked for a declaration that all monies paid under the provisions, if found to be *ultra vires* the provincial Legislature, be returned. The Saskatchewan government, in its statement of defence, submitted that the taxing provisions were *intra vires* the provincial Legislature, and even if they were not, the statement of claim disclosed no cause of action because Section 5(7) of *The Proceedings Against The Crown Act,* R.S.S. 1965, c. 87 provided a complete defence. Section 5(7) purported to bar actions against the government for recovery of monies paid notwithstanding that the taxing provisions under which the monies were levied had been declared *ultra vires.* The potash producers applied for an interim preservation order in respect of monies paid to the government under the taxing provisions in dispute. The interlocutory application was refused at first instance in chambers. The refusal was upheld in the Saskatchewan Court of Appeal (reported [1976] 1 H.W.R. 569). On further appeal to the Supreme Court, leave was granted to challenge the constitutionality of Section 5(7) of *The Proceedings Against The Crown Act* itself. Although the Supreme Court upheld the refusal of the interim preservation order, the Court did declare Section 5(7) to be *ultra vires* the Province of Saskatchewan.

[10] In finding Section 5(7) to be constitutionally offensive. Dickson. J. (as he then was), writing for a unanimous Court, was repulsed by the notion that a legislature could insulate itself from the effect of its own *ultra vires* actions merely by legislatively extending Crown immunity. The gist of Dickson. J.'s reasoning can be found in the following paragraph (at p. 73):

> "Section 5(7) of The Proceedings against the Crown Act, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under the B.N.A. Act. It also brings into question the right of a province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution. Since it is manifest that if either the federal Parliament or a provincial legislature can tax beyond the limit of its powers, and by prior or ex post facto legislation give itself immunity from such illegal act, it could readily place itself in the same position as if the act had been done within proper constitutional limits. To allow moneys collected under compulsion, pursuant to an ultra vires statute, to be retained would be tantamount to allowing the provincial legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens."

At p. 74, his Lordship summarizes the governing principle:

> "The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be ultra vires the legislature which enacted it, legislation which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be ultra vires because it relates to the same subject matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means, it cannot retain by unconstitutional means."

[11] It should be emphasized that the proceedings in Amax Potash were interlocutory. The Supreme Court did not rule on the constitutionality of the taxing provisions in dispute. It therefore did not decide whether the potash producers would be entitled to the return of taxes paid should the taxing provisions be found to be unconstitutional. The Court merely examined the constitutional propriety of the bar against recovery of those taxes contained in Section 5(7) of *The Proceedings Against the Crown Act*.

[12] However, the trial court as well as arguably a majority of the British Columbia Court of Appeal in the Ait Canada case, [1986] 5 W.W.R. at p. 385, interpreted the Amax Potash decision as deciding that any monies paid to government under legislation subsequently declared to be unconstitutional cannot be retained by the government. With respect, and for the reasons set out above as well as those that follow. I cannot agree.

[13] Air Canada concerned, *inter alia,* a British Columbia taxing statute that was found to be unconstitutional. The plaintiff airlines sued for judgment against the defendant government claiming the return of the taxes paid under the unconstitutional taxing scheme. There existed two statutory bars against recovery similar in effect to the one in Amax Potash that was found to be *ultra vires.* Both the trial court and the Court of Appeal quickly disposed of the statutory bars by applying the governing principle in Amax Potash.

The courts were then left with the question of whether the plaintiff airlines were entitled to the return of their funds.

[14] The trial judge gave judgment to the plaintiffs. In his opinion (reported at 1984 CanLII 686 (BC SC), [1984] 3 W.W.R. 353), the decision in Amax Potash "foreclosed" all argument on mistake of law as a bar to recovery. In other words, the trial judge accepted the argument that the appellant in the case at bar submitted, namely that the government must return all monies paid under unconstitutional legislation for to retain the money would be to disregard the constitution.

[15] In the Court of Appeal, three judgments were delivered with three separate conclusions as to the issue of entitlement to the return of taxes. Hinkson, J.A. concluded that the plaintiffs were entitled to repayment, not on the basis of common law principles relating to payments under mistake of law which if applied precluded recovery, but rather on his interpretation of the Amax Potash case. In his opinion, a government cannot assert any claim to monies paid under unconstitutional legislation, whether that claim is based on a statutory bar to recovery (as was the case in Amax Potash) or based on a common law doctrine such as mistake of law. To uphold a claim would be tantamount to disregarding the "paramount concern" mentioned by Dickson, J. in Amax Potash, namely the preservation of the Constitution.

[16] Esson, J.A. came to the opposite conclusion. In his view, Amax Potash should not be interpreted as widely as was done by both the trial judge and Hinkson, J.A. Amax Potash merely declared offensive attempts by the legislature to protect itself from the consequences of unconstitutional legislation. The case did not go so far as to remove the application of general principles of law relating to the recovery of money paid under a mistake of law. After applying those principles to the facts before him, Esson, J.A. concluded that the plaintiffs were not entitled to repayment.

[17] The third judgment was delivered by Lambert, J.A. He agreed with Esson, J.A. that on a strict reading of Amax Potash, it does not establish the proposition that government must return monies levied under unconstitutional legislation. However, this did not prevent Lambert, J.A. from accepting the proposition. In his opinion, there must be an exception to the general mistake of law bar, where the mistake of law in question was the constitutionality of a taxing statute, "otherwise the Constitution would be flouted in the result" (at p. 409). His Lordship reasoned further that even if no such exception existed, money paid under an unconstitutional taxing statute should be considered to be money paid under practical compulsion, which is a recognized exception to the mistake of law bar.

[18] In my view, and with respect to those who disagree, the judgment of Esson, J.A. is to be preferred in regard to the effect that the Amax Potash decision had on the common law principles relating to recovery of money paid under mistake of law. In my view, Dickson, J. in Amax Potash did not decide that money paid to a government under

unconstitutional legislation must in all cases be returned. That issue was not before him. What was before his Lordship was the constitutional propriety of attempts by government to insulate itself from repayment by extending Crown immunity from suit to cover actions for the recovery of taxes paid under unconstitutional taxing statutes. Dickson, J. does not remove the applicability of the general common law principles respecting payments made under mistake of law.

[19] In the result, the issue of entitlement to repayment of funds paid under unconstitutional legislation is still governed by the common law principles relating to recovery of money paid under mistake of law. Furthermore, no new exception to the mistake of law bar is created by the Amax Potash decision. With the greatest respect, I am unable to agree with the reasoning of Lambert, J.A. that the Constitution would be flouted if government was able to retain the monies through application of the mistake of law doctrine. In such cases, it is not the violation of the constitution which is providing the basis for the government's defence. Rather, it is the application of principles of fairness and equity that have evolved through the centuries which courts have seen fit to apply in situations where one person has paid another while operating under a mistake of law.

[20] I am supported in my conclusion by the Supreme Court's judgment in the Manitoba Language Reference case, *supra.* In that case it should be recalled that the Supreme Court had declared all of Manitoba's statutes and regulations to be unconstitutional and therefore of no force or effect because of the provincial Legislature's failure to enact the legislation in both English and French. This created a problem for the Supreme Court in that rights, obligations and other effects that had arisen under the invalid legislation could be challenged on the ground that the legislation was unconstitutional. Legal chaos would result. As a partial solution, the Supreme Court relied on the doctrine of mistake of law to provide some relief from the aforementioned consequences. As was stated by the Court (at p. 29):

> "It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. … The doctrine of mistake of law might, in some circumstances, preclude recovery of moneys paid under invalid laws …"

From this it can be inferred that the Supreme Court was of the view that the principles relating to recovery of money paid under a mistake of law govern even where the mistake of law in question is the constitutional validity of the particular legislation in issue.

[21] Finally, it should be noted that leave has been granted by the Supreme Court in the Air Canada case: [1987] 1 W.W.R. lxviii.

[22] Consequently, the fact that Section 238(3) of the *Criminal Code* was declared to be unconstitutional does not by itself entitle the Appellant to the return of his fine. Reference must be made to the principles governing recovery of money paid under mistake of law. What, then, are these principles? The Supreme Court of Canada recently

had the opportunity to examine this subject in Nepean, *supra.* In Nepean, the plaintiff municipality (Nepean) had commenced an action for the repayment of certain surcharges which it argued were beyond the legislative jurisdiction of Ontario Hydro to levy. The Supreme Court concluded that Ontario Hydro did exceed its jurisdiction, therefore the payments were made by Nepean under a mutual mistake of law. As a result, the recovery by Nepean of those payments was governed by the principles relating to recovery of money paid under mistake of law.

[23] After thoroughly canvassing the authorities and tracing the historical development of the doctrine of payment under mistake of law, Estey, J., writing for the majority, summarized the present state of the law in the following terms (at p. 242):

> "Mistake of law 'without more' and without 'something more in addition' (in the words of Lord Denning in *Kiriri, supra,* at p. 204) may be an allusion to the need to find compulsion or illegality to introduce a right of recovery on the happening of mutual mistake of law. In compulsion, recovery is allowed as the payment is not made voluntarily and there is no reason to suppose, only because of the fact of payment, that the plaintiff had surrendered his right to recover his moneys paid under practical compulsion. In the case of illegal transactions, the concept of *in pari delicto* is introduced to determine entitlement to recovery. In the absence of either of these elements, the 'something more in addition to a mistake of law' is missing, and the rule applicable on mutual mistake of law operates to deny recovery."

The following principles regarding recovery of monies paid under mistake of law can be extracted from the majority judgment in Nepean:

1. The general rule is that "without more", money paid under a mistake of law is not recoverable.

2. "Something more" has been found to exist where:

   i. the money was paid under compulsion; or

   ii. the money was paid in the context of an illegal transaction and the parties were not *in pari delicto.*

Under either of these two branches, the money is recoverable notwithstanding that it may in addition have been paid under a mistake of law.

3. Under the first branch of recovery, the compulsion need only be "practical" compulsion. Estey, J. refers to Eadie v. Township of Brantford (1967) 1967 CanLII 13 (SCC), 63 D.L.R. (2d) 561 (S.C.C.), where at p. 571 Mr. Justice Spence discussed the concept of "practical" compulsion:

> "It was submitted by counsel for the respondent that in order to justify the plaintiff demanding repayment of money paid under mutual mistake in law upon the basis that he was under compulsion to do so, the plaintiff must have been faced with a situation where there was no other alternative available to him. I am of the opinion that the bar to the plaintiff's recovery is not so stringent and that a practical compulsion is alone necessary. In each of the three cases in this Court approving *Haskell v. Horner,* which I have cited above, there were other courses available to the plaintiffs but those other courses were time consuming and impractical."

to establish compulsion, payment need not be the only choice; recovery is permitted where payment was compelled by practical considerations.

4. With respect to the second branch of recovery, Estey, J. held that it does not extend to situations where the illegality in question was an excess of jurisdiction by a statutory entity. The transaction must be one that is "contrary to public policy or prohibited by statute" (at p. 239) if entitlement to recovery is to be established under this branch of recovery.

[24] It is appropriate to note at this juncture that what the Appellant was essentially arguing for in respect to his reliance on the Amax Potash and Air Canada decisions was the establishment of a third branch of recovery. In other words, "something more" than the mistake of law exists where the payment was made to a government entity in pursuance of unconstitutional legislation. For the reasons set out above, I reject this line of argument.

[25] Applying these principles to the case at bar, the Appellant cannot recover his fine paid as a result of the mistake as to the constitutional validity of Section 238(3) unless he is able to establish entitlement under either of the two branches of recovery mentioned above. Clearly the second branch of recovery is inapplicable. The transaction with which we are concerned is not contrary to public policy or prohibited by statute. It is illegal only in the sense that the criminal court exceeded its jurisdiction by convicting the Appellant under a section of the *Criminal Code* that was unconstitutional. Consequently, the nature of illegality required by the second branch of recovery is not present in this case.

[26] However, in my view the Appellant is not barred from recovering the fine on the basis of the first branch of recovery. There is no doubt in my mind that the Appellant was under practical compulsion to pay the fine. Why? Because the consequence of not paying the fine was imprisonment. Therefore, while payment may not have been the only option open to the Appellant, it was the only practical choice. After all, what can be more compelling than the threat of imprisonment if the fine is not paid? Consequently. I have no difficulty in finding that the Appellant paid the fine under practical compulsion.

[27] In the result, the mistake of law hurdle has been cleared. I now turn to the second hurdle, that being the doctrine of *res judicata.*

2. Res Judicata

[28] The Respondent Crown submits that the Appellant is barred from recovering the fine by the doctrine of *res judicata:*

> "It is respectfully submitted that as between the Crown and the Appellant the matter is res judicata. In a court proceeding between the same parties (the Crown and the Appellant), Turigan was judicially required to pay. He did not appeal. The matter as between Turigan and the Crown is now final and conclusive.
>
> Res judicata applies when an issue is decided, expressly or implicitly, in court proceedings between the same parties (that is, the issue is either argued or could

have been argued in earlier proceedings).

…

> In the case at bar, Turigan either (i) could have, but did not, raise the defence of ultra vires at his trial or (ii) raised the defence unsuccessfully, but failed to appeal. His conviction could not have followed but for section 238(3) having been recognized as valid by the Court; therefore res judicata applies."

[29] The Crown's argument is essentially that as between the Appellant and the Crown, the Appellant is bound by the decision of the criminal court that Section 238(3) is constitutional. As a consequence, the Appellant is prohibited from coming to court to seek relief from the Crown on a claim which for its viability is dependent upon a result contrary to that decided by the criminal court.

[30] Technically speaking, this plea would more accurately be described as issue estoppel. As noted in *Halsbury's Laws of England* (4th ed.), vol. 16, para. 1528 and 1529, *res judicata* relates to situations where the second suit is based on essentially the same cause of action as the first suit. In the case at bar the cause of action in the proceedings now before this Court cannot be said to have also been before the criminal court. In fact it is difficult to conceptualize a criminal proceeding as having a distinct cause of action, other than I suppose the guilt or innocence of the accused, and in that regard the pleas of *autrefois acquit* and *autrefois convict* stem from the doctrine of *res judicata.* Consequently, the plea of *res judicata* is not strictly appropriate.

[31] In my view, the proper plea is issue estoppel which evolved from *res judicata.* The *vires* of Section 238(3) was at issue in the prior criminal proceedings, and is again at issue in the present proceedings. *Halsbury's, op. cit.* at para 1530, describes this form of estoppel in the following terms:

> "A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the same question was decided in both proceedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

This Court had the opportunity to examine the doctrine of issue estoppel in R. v. Duhamel (No. 2) (1981) 1981 ABCA 295 (CanLII), 64 C.C.C. (2d) 538. At issue in Duhamel (No. 2) was whether a finding by one trial judge as to the voluntariness of a confession was binding on a second trial judge before whom the confession was again sought to be admitted. Mr. Justice Moir, writing for the Court, acknowledged (at p. 541) that issue

estoppel originated from the principle of "estoppel *per rem judicatam*". His Lordship proceeded to accept and apply the six *probanda* set out by Spencer Bower and Turner in their text, *Res Judicata,* (2nd ed., 1969), at para. 19 as the "constituent elements of estoppel *per rem judicatam*" (at p. 542). The party attempting to set up the estoppel has the burden of establishing:

> "(i) that the alleged judicial decision was what in law is deemed such;
>
> (ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;
>
> (iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
>
> (iv) that the judicial decision was final;
>
> (v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
>
> (vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*".

[32] Can the Crown Respondent in the case at bar establish all six *probanda?* The first, second and fourth requirements are not at issue in this case. Furthermore, the sixth requirement, namely that the same parties must be involved, cannot be disputed. That leaves us with the third and fifth requirements for consideration.

[33] Dealing first with the fifth requirement,

> that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;

The question with which we are concerned is the constitutionality of Section 238(3) of the *Criminal Code*. The Crown Respondent argues that the Appellant's claim is dependent upon a determination that the Appellant paid the fine pursuant to conviction for an offence that was *ultra vires* Parliament. There can be no argument that Section 238(3) is *ultra vires.* However, what is argued by the Respondent is that as between it and the Appellant, Section 238(3) must be considered to be *intra vires,* because the criminal court could not have convicted without first deciding, either expressly or by necessary implication, that Section 238(3) was *intra vires.* Therefore, the Respondent continues, the Appellant's claim must fail, because it depends on an opposite determination to a question that was fundamental to the earlier criminal proceedings.

[34] In my view, the two proceedings do involve the same question. We were not told whether the Appellant raised the issue of constitutionality in the criminal proceedings. However, this is not critical. It is settled law that to establish an issue estoppel, it is not necessary to show that the issue was one that was expressly determined in the previous judicial proceedings, so long as the issue must necessarily have been determined and

determined in a particular way by the court to have reached the decision it pronounced. This principle of issue estoppel by implication is formulated by Spencer Bower and Turner in the following terms (at para. 193):

> "Where the decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, even though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms: but, beyond these limits, there can be no such thing as a *res judicata* by implication."

This same principle has been formulated in a slightly different context in the leading case of Hoystead v. Taxation Commissioner 1925 CanLII 607 (UK JCPC), [1926] A.C. 155 (P.C.):

> "… the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

These principles apply even where the previous judgment was given by default: Spencer Bower and Turner, para. 196; *Halsbury's,* vol. 16, para. 1533. Presumably, then, they should also apply where the defendant in the previous criminal proceeding entered a guilty plea.

[35] In the case at bar, the question of constitutionality was clearly an issue fundamental to the decision by the criminal court to convict the accused. Regardless of whether or not the constitutionality of Section 238(3) was actually raised by the Appellant in the criminal proceedings, the criminal court must have either expressly or impliedly (perhaps through reliance on the presumption of constitutionality) ruled that Section 238(3) was constitutional, otherwise it would not have had the jurisdiction to convict the Appellant. Consequently, the same issue of constitutionality which is now before this Court, was decided against the Appellant in the previous criminal proceedings. In the result, the fifth requirement for issue estoppel is established.

[36] That leaves us with only the third of the six *probanda* for consideration. To recall, the third requirement is "that the judicial tribunal pronouncing had jurisdiction in that behalf". As noted by Spencer Bower and Turner, at paras. 113 and 114:

> "113 Competent jurisdiction is an essential condition of every valid *res judicata,* which means that, in order that a judicial decision relied upon, whether as a bar, or as the foundation of an action, may conclusively bind the parties, or (in the case of *in rem* decisions) the world, it must appear that the judicial tribunal pronouncing the decision had jurisdiction over the cause or matter, and over the parties, sufficient to warrant it in so doing.

> 114 A tribunal may exceed its jurisdiction either by embarking upon an inquiry outside its province, or, while confining its inquiry within the proper limits, by making an order in excess of its powers. In either case the result will be to nullify the decision as a *res judicata:* in the former case, by the effect of the events we have mentioned upon the declaratory part of the decision, and, in the second, by their effect upon its jussive or prohibitory provisions."

See also *Halsbury's, op. cit.,* para. 1554, where it is stated that:

> "1554. Lack of jurisdiction. In order that estoppel by record may arise out of a judgment the court which pronounced the judgment must have had jurisdiction to do so: the lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise."

The lack or excess of jurisdiction is said to deprive the decision of the court of any "conclusive effect".

[37] It is for this reason that the Respondent's plea of issue estoppel must fail. The section under which the Appellant was convicted and ordered to pay the fine was subsequently declared to be *ultra vires* Parliament. As a result, the section was void *ab initio,* and not merely voidable. The section never had any force or effect. Consequently, the criminal court exceeded its jurisdiction by convicting the Appellant under that section. Canadian courts have no inherent jurisdiction, apart from their contempt jurisdiction, to order criminal sanction. Our courts can only convict for those offences validly created by statute. In the result, the decision by the criminal court to convict the Appellant for an offence that never existed is a nullity. Consequently, the conviction cannot form the basis for *res judicata.*

[38] However, it may be argued that even though the criminal court had no jurisdiction to convict under s. 238(3), it nevertheless had jurisdiction to enter into a determination as to the constitutionality of that section; therefore, while the conviction may be a nullity, the Court's decision that the section was constitutional is not and may still form the basis for a plea of issue estoppel. The flaw in this argument is that the constitutionality of a provision under the *Criminal Code* is a jurisdictional question. Although I have not been referred to any authority directly on point, the constitutionality of the charging section must be an issue going to the criminal court's jurisdiction, for if that Court finds that the section is unconstitutional, the proceedings are terminated; the Court has no jurisdiction to proceed any further. In my view, this is a clear indication that the constitutionality of a charging section is a jurisdictional question.

[39] It is a well-established principle of law that a tribunal cannot give itself jurisdiction by a wrong decision on a question of law. In short, a court only has jurisdiction to decide a jurisdictional question correctly; it exceeds its jurisdiction by deciding the question incorrectly.

[40] Consequently, while the criminal Court in the case at bar did have jurisdiction to enter into a determination as to the constitutionality of s. 238(3), it exceeded its

jurisdiction by incorrectly deciding the issue. In the result, its decision on that issue cannot raise an issue estoppel.

[41] The requirement that the court whose decision is relied upon as forming the *res judicata* have jurisdiction to make that decision has long been recognized. For instance, in Toronto Railway Company v. Corporation of the City of Toronto [1904] A.C. 809 (P.C.), the plaintiff railway had decided to challenge the defendant municipality's decision to tax its railway cars as realty. Both the Court of Revision (the court of first instance), and the Court of Appeal of Ontario held against the plaintiff. The following year, the plaintiff decided to challenge the assessment again and met with the same results in the Court of Revision and Court of Appeal. However, on appeal to the Privy Council, the decision was reversed. The City argued *res judicata.* The Privy Council rejected their plea, holding that both lower courts exceeded their jurisdiction by deciding that the railway cars were realty. Like the criminal Court in the case at bar, both of the lower Courts' jurisdictions were statutorily defined; their jurisdictions did not include the power to determine whether railway cars were assessable as realty. The Supreme Court of Canada applied the same reasoning in Pong v. Quong 1927 CanLII 2 (SCC), [1927] S.C.R. 271 in rejecting a plea of *res judicata,* as did the High Court of Australia in O'Keefe v. Williams (1907) 5 C.L.R. 217.

[42] Normally it would not be necessary to cite strong authority to support a principle as basic as the requirement that a court whose decision is relied upon for the plea of *res judicata* have jurisdiction to make that decision. However, in my view, such recitation is made necessary in this case by the judgment of the Supreme Court in the Manitoba Language Reference case referred to earlier. The Court, in order to preserve legal rights, obligations and other effects that had arisen pursuant to Manitoba legislation which had been declared to be *ultra vires,* turned to the doctrine of *res judicata* (at p. 29):

> "It should be noted that there are other doctrines which might provide relief from the consequences of the invalidity of Manitoba's laws. For example, *res judicata* would preclude the reopening of cases decided by the courts on the basis of invalid laws."

The Supreme Court cited no authority for this proposition. In my view, the Supreme Court did not intend to effect a fundamental change in the law of *res judicata.* This is evidenced by the complete absence of analysis and precedent in their judgment in respect to *res judicata.* Furthermore, it is possible to reconcile the Supreme Court's statement with the above mentioned authorities. This is accomplished by recognizing that not all laws upon which a court bases its decision relate to that court's jurisdiction over the matter in question. In some cases the court will have had jurisdiction to decide the matter, even though legislation (not pertaining to the court's jurisdiction) which affected the outcome is subsequently declared to be *ultra vires.* In my view, it is this type of situation to which the Supreme Court is referring in its statement quoted above. In such cases, even though the court decided the matter on the basis of an invalid law, *res judicata* applies to prevent the reopening of the court's decision because the court did not exceed its jurisdiction by

deciding the matter. This must be contrasted with those situations where the impugned legislation relates to the very jurisdiction of the court to decide the matter. The Supreme Court, in my view, did not intend to extend their above quoted comment to this latter situation. Consequently, the Manitoba Language Reference case has not obviated the requirement that the decision upon which the plea of *res judicata* is based must have been decided by a court with jurisdiction to make that decision.

[43] It should be pointed out that the Supreme Court in Wigman v. The Queen (1987) 1985 CanLII 1 (SCC), 33 C.C.C. (3d) 97 refers to the comments it made in the Manitoba Language Reference concerning the scope of the doctrine of *res judicata.* The accused in Wigman had been charged with attempted murder. The trial judge's charge to the jury in regard to the requisite intent for attempted murder was based on Lajoie v. The Queen (1973) 1973 CanLII 146 (SCC), 10 C.C.C. (2d) 313 (S.C.C.) which expressed the applicable law as of the date of the trial. The accused was convicted. An appeal to the British Columbia Court of Appeal proved unsuccessful. However, the accused was granted leave to appeal to the Supreme Court. Subsequent to granting leave, the Supreme Court in R. v. Ancio (1984) 1984 CanLII 69 (SCC), 10 C.C.C. (3d) 385 held that Lajoie should no longer be followed. As a consequence, one of the issues facing the Supreme Court in Wigman was whether the accused could rely on the overruling of Lajoie subsequent to his trial and conviction. At p. 104 the Supreme Court states:

> "The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the 'wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process'. Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata:* a matter once finally judicially decided cannot be relitigated. Thus a person convicted under *Lajoie* will not be able to reopen his or her case, unless, of course, the conviction is not final. In the *Reference re Language Rights under Manitoba Act, 1870* (1985), 1985 CanLII 33 (SCC), 19 D.L.R. (4th) 1 at pp. 28-9, [1985] 1 S.C.R. 721 at p. 757, [1985] 4 W.W.R. 385 at pp. 414-5, the court observed that *res judicata* would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The *res judicata* principle would apply with at least as much force to cases decided on the basis of subsequently overruled case-law."

In my view, this pronouncement does not add to what was stated by the Supreme Court in the Manitoba Language Reference regarding the scope of *res judicata.* The subsequent overruling of Lajoie by the Supreme Court did not vitiate the jurisdiction of the trial judge in Wigman. As was the case in the Manitoba Language Reference, the Supreme Court in Wigman does not purport to extend the scope of *res judicata* to situations where the judge exceeded his jurisdiction by deciding the matter in issue.

[44] In the result, the Respondent's plea of issue estoppel cannot succeed. The criminal Court exceeded its jurisdiction by deciding (either expressly or implicitly) that s.

238(3) was *intra vires,* and had no jurisdiction to convict under that section. Consequently, there is nothing upon which the Respondent Crown can base its plea of issue estoppel.

[45] This leaves us with the final hurdle for consideration.

3. The De Facto Doctrine

[46] It is argued on behalf of the Respondent Crown that both the conviction and fine paid by the Appellant, although arising under unconstitutional legislation, are protected from collateral attack by the *de facto* doctrine. The premise underlying this argument is that although the criminal Court had no *de jure* authority to convict and order the payment of a fine pursuant thereto, it nevertheless had *de facto* authority by reason of the colour of authority imparted upon the criminal Court by s. 238(3). The Manitoba Language Reference, *supra,* and Bilodeau v. A.-G. Manitoba (1986) 27 D.L.R. (4th) 39 (S.C.C.) are cited in support of this argument.

[47] In my view, the Supreme Court has extended the scope of the *de facto* doctrine through its decisions in the Manitoba Language Reference and Bilodeau. Therefore, it may prove illuminative to set out the state of the law prior to the rendering of those two decisions before examining how the doctrine has been extended.

[48] The *de facto* doctrine has been defined in the following terms by Judge Albert Constantineau in his treatise entitled *The De Facto Doctrine* (1910) at p. 3:

> "The de facto doctrine is a rule or principle of law which, in the first place, justifies the recognition of the authority of governments established and maintained by persons who have usurped the sovereign authority of the State, and assert themselves by force and arms against the lawful government; secondly, which recognizes the existence of, and protects from collateral attack, public or private bodies corporate, which, though irregularly or illegally organized, yet, under color of law, openly exercise the powers and functions of regularly created bodies; and thirdly, which imparts validity to the official acts of persons who, under color of right or authority, hold office under the aforementioned governments or bodies, or exercise lawfully existing offices of whatever nature, in which the public or third persons are interested, where the performance of such official acts is for the benefit of the public or third persons, and not for their own personal advantage. The doctrine is grounded upon considerations of public policy, justice, and necessity, and is designed to protect and shield from injury the community at large or private individuals, who, innocently or through coercion, submit to, acknowledge, or invoke the authority assumed by the governments, corporate bodies, or officers, above mentioned."

This definition was quoted with approval by the Supreme Court in the Manitoba Language Reference (at p. 27). It is the third branch of this definition with which we are concerned, namely, the imparting of "validity to the official acts of persons who, under colour of right or authority … exercise lawfully existing offices of whatever nature …". Professor Wade, in his text *Administrative* Law (4th ed., 1977), at p. 287, describes this branch of the *de facto* doctrine in similar terms:

> "In one class of cases there is a long-standing doctrine that collateral challenge is not to be allowed: where there is some unknown flaw in the appointment or authority of some officer or judge. The acts of the officer or judge may be held to be valid in law even though his own appointment is invalid and in truth he has no legal power at all. The logic of annulling all his acts has to yield to the desirability of upholding them where he has acted in the office under a general supposition of his competence to do so. In such a case he is called an officer or judge de facto, as opposed to an officer or judge de jure."

A similar definition can be found in *de Smith's Judicial Review of Administrative Action* (4th ed., 1980) at p. 153:

> "In a few cases [the courts] have gone so far as to accord full legal recognition, in the public interest, to decisions by *de facto* officers, who because of the informality of their appointment, were not strictly entitled to exercise any jurisdiction at all."

The *de facto* doctrine has experienced its most widespread usage in the United States. *Corpus Juris Secundum* defines the doctrine in the following terms (48A C.J.S., s. 2, Judges):

> "A judge de facto is one acting with color of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes. He differs, on the one hand, from a mere usurper of an office who undertakes to act without any color of right; and, on the other, from an officer de jure who is in all respects legally appointed and qualified to exercise the office."

[49] What should be discerned from the above quoted definitions is that the *de facto* doctrine was originally intended to prevent the decisions and actions of public officials from being collaterally attacked on the ground that the official did not have proper legal title to the office he purported to hold and exercise. The scope of the doctrine was limited to preventing collateral attack on the basis of irregularity of appointment to office. As will be illustrated *infra,* the case law prior to the Manitoba Language Reference supports this characterization of the *de facto* doctrine.

[50] As acknowledged by the Supreme Court in the Manitoba Language Reference (at p. 27), the rationale underlying the *de facto* doctrine is premised on the preservation of the rule of law. The House of Lords attributed the doctrine to the same theoretical underpinnings:

> "With regard to the competence of the vestrymen, who were vestrymen *de facto,* but not vestrymen *de jure,* to make the rate, your Lordships will see at once the importance of that objection, when you consider how many public officers and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by the officers, taking the law into their own hands."

Scadding v. Lorant (1851) 3 H.L.C. 418 at 447, 10 E.R. 164 at 175.

[51] Constantineau, *op. cit.,* sets out three prerequisites that must be established to constitute one a *de facto* officer:

> "Three things are essential to constitute one an officer de facto, viz: -
>
> 1. The office held by him must have a de jure existence, or at least one recognized by law;
>
> 2. He must be in the actual possession thereof; and
>
> 3. His holding must be under color of title or authority.
>
> Without the existence and concurrence of these three elements, no person can be regarded as an officer de facto. Indeed, whatever color of title one may have, and whatever may be his possession, if the office be one not recognized by law, he can never acquire the status of an officer. On the other hand, however strong and well founded may be a person's claim to a lawfully existing office, yet if he be deprived of the actual possession thereof, he may be an officer de jure, but he cannot be an officer de facto. Finally, the bare possession of a de jure office, without color of title or authority, will only constitute the occupant a usurper."

The same three prerequisites exist in American jurisprudence: see *Corpus Juris Secundum, op. cit.*

[52] The rationale underlying the prerequisite that the office have a *de jure* existence before the possessor of that office can be given *de facto* recognition was succinctly stated by Mr. Justice Field of the United States Supreme Court in Norton v. Shelby County (1886) 118 U.S. 425, 6 Sup. Ct. 1121, 30 L.Ed. 178 as follows:

> "The idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can only exist by force of law."

It follows from this requirement that the office cannot be one created by unconstitutional legislation in that an office established under an unconstitutional statute cannot be said to enjoy a *de jure* existence. This proposition is well supported by the authorities: see Constantineau, *op. cit.,* pp. 51 *et seq.* However, it should not be confused with appointment under unconstitutional legislation to a *de jure* office; in this case the officer may possess *de facto* authority. In other words, although unconstitutional legislation cannot create a *de jure* office, it does not prevent an officer who has been appointed to a *de jure* office under unconstitutional legislation from being an officer *de facto.* This stems from the fact that the *de facto* doctrine was originally designed to prevent collateral attacks based on a defect in appointment or title, and not defects as to the constitution of the office itself.

[53] The *de facto* doctrine has long been recognized by Canadian courts. A case typical of situations where the doctrine has traditionally been applied is O'Neil v. A.-G. Canada (1896) 1896 CanLII 58 (SCC), 26 S.C.R. 122. The *Criminal Code* had authorized "the chief constable or deputy chief constable" to apply for a warrant to seize gaming equipment. In O'Neil, the warrant had been applied for by the son of the chief constable,

the chief constable having appointed his son to act as his deputy in his absence. A police magistrate declared that the money that had been seized pursuant to the warrant forfeited to the Crown. The plaintiff sought the return of this money, *inter alia,* on the ground that the son had not been duly sworn into office as deputy chief constable thereby invalidating the search warrant. The Supreme Court of Canada held that even if the son had not been properly sworn in as deputy, he held the office *de facto,* given that he had performed the functions of a deputy constable for several years. The Supreme Court described the *de facto* doctrine in the following terms (at p. 130):

> "The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired. Further, this rule has been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. Further, it has been held to apply even to judicial officers and *a fortiori* to those appointed for the performance of mere ministerial duties such as a head constable. And particularly it has been held to apply to officers who have failed to qualify themselves by taking an oath of office prescribed by law."

[54] Further illustration of the classic application of the *de facto* doctrine can be seen in the case of R. v. Cyr [1917] 2 W.W.R. 1185 (Alta. S.C.T.D.). In Cyr, the defendant sought to quash her conviction on the ground that the convicting magistrate was a woman. Women, it was argued, were not capable of holding judicial office. Scott, J. (as he then was) held that (at p. 1187):

> "While I entertain serious doubt whether a woman is qualified to be appointed to that office, I am of opinion that the legality of such an appointment cannot be questioned or inquired into on this application."

His Lordship proceeded to examine the authorities regarding the *de facto* doctrine, and concluded that the conviction could not be collaterally attacked on the regularity of the magistrate's appointment.

[55] It is readily apparent that the *de facto* doctrine as explained and illustrated above would not serve to preclude the Appellant from recovering his fine. The defect with which we are concerned is not one going to the validity of title or regularity of appointment to office. The convicting judge was presumably properly appointed to that office; he was an officer *de jure.* The defect which had been subjected to challenge in these proceedings is that the convicting judge exercised powers which went beyond the jurisdiction of his office. In other words, what we are faced with is an exercise of power in excess of jurisdiction by a *de jure* officer. Traditionally, the *de facto* doctrine did not prevent collateral attacks on this basis. This limitation on the *de facto* doctrine is recognized by the authors of *Corpus Juris Secundum, op. cit.,* where at s. 63 they state:

> "The rule that the official acts of de facto judges are valid as against third persons cannot be applied to an attempted exercise of judicial power by an officer de jure

> who claims the right so to act by virtue of his office, when in fact no such power is vested therein."

This is precisely the situation we face in the case at bar: the *de jure* convicting judge, in convicting the Appellant and ordering him to pay a fine pursuant to s. 238(3) of the *Criminal Code,* exercised a power that was not vested within his judicial office, given that s. 238(3) was declared to be of no force or effect *ab initio* by the Supreme Court in Boggs. The *de facto* doctrine did not preclude a collateral challenge on this basis.

[56] This limitation on the scope of the *de facto* doctrine can be viewed in a slightly different context. It is possible to conceptualize the power to convict under s. 238(3) as an office separate and apart from the office of the convicting judge. It can then be argued that although the convicting judge was never legally appointed to hold that "s. 238(3) office", he was nevertheless a *de facto* possessor of that office. Under this reasoning, the actions of the convicting judge in performing his duties as a *de facto* officer of the s. 238(3) office would not be subject to collateral challenge. However, it should be recalled that one of the prerequisites for application of the *de facto* doctrine was that the office have a *de jure* existence, and that an office could not have a *de jure* existence if attempted to be created under unconstitutional legislation. Given that the "s. 238(3) office" was created under unconstitutional legislation, it had no *de jure* existence. In the result, this reasoning collapses; the convicting judge cannot be said to be a *de facto* officer of the s. 238(3) office.

[57] Therefore, the *de facto* doctrine, as traditionally understood and applied, would not preclude the Appellant from challenging the validity of his conviction under s. 238(3) and hence recovering his fine. However, the *de facto* doctrine has undergone a significant revision in light of the Supreme Court's recent decisions in the Manitoba Language Reference, *supra* and Bilodeau, *supra.* As a result of this revision, I am bound to conclude that while the convicting judge did not possess *de jure* authority to convict, he nevertheless had *de facto* authority, thereby prohibiting collateral attack on this basis.

[58] The Manitoba Language Reference was referred to earlier in these Reasons. One should recall that the Supreme Court in that case was faced with the task of preventing legal chaos from erupting as a result of their finding that all of Manitoba's laws were invalid *ab initio.* The Supreme Court examined the *de facto* doctrine in this context. After reviewing some of the authorities on this subject, the Supreme Court (at p. 28) stated that:

> "There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority. This is consistent with the rationale for the doctrine, *viz.,* that the members of the public with whom the officer dealt relied upon his ostensible status."

No mention is made of the first of Constantineau's three prerequisites, namely that the office have a *de jure* existence. Perhaps one could argue that an official has no colour of

authority if the office he occupies has no *de jure* existence. However, as is subsequently made clear by the Supreme Court, the office need no longer have a *de jure* existence for the *de facto* doctrine to apply: it is sufficient that the office enjoy *de facto* recognition. The Supreme Court summarized the effect of the *de facto* doctrine in the following terms (at p. 28):

> "Thus, the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public and private bodies corporate, courts, judges, persons exercising statutory powers and public officials. Such rights, obligations and other effects are, and will always be, enforceable and unassailable."

[59] The conclusion that one is forced to draw from the statements of the Supreme Court above quoted is that a public official can be given colour of authority by unconstitutional legislation, even though such legislation is said to have had no force or effect *ab initio.* This colour of authority can relate to both the existence of the office, as well as the powers associated with that office. Consequently, in the Manitoba Language Reference, even though the office and powers which the public officials purported to hold and exercise arose under unconstitutional legislation, the actions of the public officials were enforceable and unassailable because the unconstitutional legislation imparted colour of authority, not only to the official's actions, but also to the existence of the office itself.

[60] It is clear that the *de facto* doctrine, as interpreted by the Supreme Court, now applies to preclude collateral challenge to the actions of public officials on the basis that the power which the official purported to exercise was unconstitutional. I confess to difficulty in rationalizing this decision with the approach taken by the Supreme Court in Amax Potash v. Saskatchewan, *supra.* It should be recalled that the Supreme Court in Amax Potash found offensive any attempt by a government to legislatively immunize itself from the effects of unconstitutional legislation. It would now appear that the *de facto* doctrine immunizes all acts done pursuant to unconstitutional legislation from collateral attack. Nevertheless, this extension of the *de facto* doctrine is confirmed by the Supreme Court's judgment in Bilodeau *supra.*

[61] Bilodeau arose out of the aftermath that followed the Supreme Court's decision in the Manitoba Language Reference. Bilodeau had been charged with speeding contrary to the *Highway Traffic Act,* R.S.M. 1970, c. H-60 and was issued a court summons under the *Summary Convictions Act,* R.S.M. 1970, c. S-230. Bilodeau had raised the invalidity of the two statutes as a defence at his trial, but did not succeed in persuading the trial judge. As a result, he was convicted. His conviction was confirmed on appeal to the Manitoba Court of Appeal. Subsequent to the Court of Appeal's decision, the Supreme Court rendered judgment in the Manitoba Language Reference, which in effect ruled that the two above mentioned statutes were invalid because they were not enacted in both English and French. Therefore, when Bilodeau appealed his conviction to

the Supreme Court, that Court was faced with the question of whether his conviction could be upheld in light of the invalidity of the laws under which he was convicted.

[62] The conviction was challenged on three grounds: first, that the summons was invalid because it was issued under the *Summary Convictions Act,* which was itself invalid; secondly, that the summons itself was printed in English only and for that reason was invalid; and thirdly, that the conviction under the *Highway Traffic Act* was invalid because that *Act* was enacted in English only. The first and third grounds are of interest in the case at bar.

[63] With respect to the validity of the summons, the Supreme Court held that even though the *Act* under which the summons was issued was invalid, the summons itself was protected from challenge by the *de facto* doctrine. The operation of the *de facto* doctrine was summarized as follows (at p. 43):

> "… the rights, obligations and other effects which have arisen under this Act will be forever enforceable if they arose out of, *inter alia,* reliance 'upon the acts of those administering the invalid laws' under colour of authority. Actions performed pursuant to invalid Acts by courts and judges, acting upon colour of authority, will be saved by the *de facto* doctrine. Thus in the present case, the *de facto* doctrine will preclude any challenge to the effectiveness or enforceability of the summons on the ground that it was issued pursuant to an invalid Act, since the summons was clearly issued under colour of the authority of the *Summary Convictions Act.*"

[64] As for the validity of the conviction under the *Highway Traffic Act,* the Supreme Court held that the *de facto* doctrine would not preserve the conviction because the *de facto* doctrine only prohibited collateral attacks against the acts of public officials acting under *de facto* authority. Whereas the challenge to the validity of the issuance of the summons was collateral, the attack on the conviction was direct; Bilodeau had raised the validity of the *Highway Traffic Act* both at trial and on appeal from his conviction. As stated by Dickson, C.J.C., for the majority (at p. 45):

> "I do not believe that a trial judge can be said to be acting under colour of authority when the very ground for the defence is the invalidity of his authority and when his or her decision on this point is appealed. If a person is convicted under a statute which, on appeal from conviction, is deemed invalid, the conviction cannot be saved by invoking *de facto* authority on the part of the judge."

Although the *de facto* doctrine did not protect the conviction, the Supreme Court held that the declaration made by the Supreme Court in the Manitoba Language Reference temporarily validating all rights, obligations and other effects arising under Manitoba's invalid laws (to uphold the rule of law) preserved the conviction entered against Bilodeau under the invalid *Highway Traffic Act.*

[65] From the foregoing analysis, the following can be concluded:

1. The *de facto* doctrine is no longer restricted to situations involving defects in the public official's title to office or regularity of appointment. The *de facto* doctrine may apply to preserve the acts of *de jure* officials acting outside their jurisdiction as well as the acts

of persons whose office has no *de jure* existence where those acts are done with colour of authority.

2. Unconstitutional legislation, although it is said to be of no force or effect *ab initio,* has sufficient force and effect to impart colour of authority to public officials holding office or exercising powers created under that legislation.

3. The *de facto* doctrine does not apply to direct challenges to an official's authority. It only precludes collateral challenges where the official acted under colour of authority.

[66] In the result, the Appellant's claim cannot succeed. Although the Appellant was convicted and paid a fine pursuant thereto under an unconstitutional law, that law nevertheless gave the convicting judge sufficient colour of authority to protect his decision from collateral impeachment. To rephrase, although the convicting judge had no *de jure* authority to convict, s. 238(3) gave him *de facto* authority. Consequently, the Appellant's claim, which amounts to a collateral attack on the conviction, must fail.

4. Conclusion

"As a Matter of Law, is Turiaan Entitled to Have His Fine Refunded by the Defendant?"

[67] This preliminary question of law must be answered in the negative. Although the mistake of law and *res judicata* doctrines do not bar the recovery proceedings, the Appellant is barred from collaterally challenging the authority of the convicting judge by virtue of the *de facto* doctrine.

[68] Accordingly, the appeal is dismissed. Given the uniqueness and importance of the legal principles herein discussed, I would not award costs.

DATED at Edmonton, Alberta
this 3rd day of October,
1988.

REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE STEVENSON

---

[69] I have read the draft judgment of my brother Harradence and agree that the appellant is not entitled, as a matter of law, to the refund of his fine. However, I do so on the basis that the original conviction is not open to collateral impeachment in these proceedings and is a bar to the recovery.

[70] The original conviction constitutes an estoppel per rem *judicatem.* The elements of such an estoppel were adopted by Moir, J.A. in Duhamel (No. 2) (1981), 1981 ABCA 295 (CanLII), 64 C.C.C. (2d) 538 from Spencer-Bower and Turner, *Res* Judicata, (second ed., 1969), para. 19. In my opinion all of the necessary elements are present.

[71] The argument is advanced that the convicting judge lacked jurisdiction because he convicted under a law that was later held to be *ultra vires.* The validity of that law was impliedly in issue in that original proceeding and the court in pronouncing its judgment necessarily concluded that the law was valid even if the issue was not expressly raised. A party cannot re-litigate a claim which might have been raised in an earlier proceeding: 17 Halsbury (4th) para. 1533.

[72] As Spencer-Bower and Turner note, at pp.14 and 15, the correctness of a decision does not, of itself, go to jurisdiction: a competent tribunal has "… jurisdiction to decide wrongly, as well as rightly." The convicting judge made an error in the exercise of his jurisdiction in accepting the validity of the impugned section of the Code.

[73] In the *Manitoba Language Reference,* 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721 at 757 the court noted that "… res judicata would preclude the re-opening of cases decided by the courts on the basis of invalid laws." That proposition is affirmed in Wigman (1987), 1985 CanLII 1 (SCC), 33 C.C.C. (3d) 97 where the court, at 104, says the earlier case "… observed that res judicata would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws." The point is also made in *Bilodeau v. A.G. Manitoba,* [1986] 1 S.C.R. 449.

[74] I derive no assistance from *Toronto Railway v. Corporation of City of Toronto,* [1904] A.C. 809 (P.C.); *Pong v. Quong*, 1927 CanLII 2 (SCC), [1927] S.C.R. 271, or *O'Keefe v. Williams* (1907), 5 C.L.R. 217. In *Toronto Railway,* the Privy Council held that an earlier decision, apparently deciding an issue and thus said to be *res judicata,* was not a bar because the tribunal, and the court which exercised a statutory appeal from it, lacked jurisdiction to decide that issue. In Pong it was argued that an earlier judgment decided an issue, but the Supreme Court held that the judge in the earlier case lacked jurisdiction to decide the issue. Similarly, in O'Keefe, the court held that the first tribunal lacked jurisdiction to decide the question in issue. The issue here is the constitutionality of the charging section, which the convicting judge unquestionably had jurisdiction to decide.

[75] I disagree with, and know no authority, for the proposition that the constitutionality of a provision of the *Criminal Code* is a jurisdictional question. Indeed, the proposition is contrary to the well recognized principle I quoted from *Spencer-Bower and Turner* that a competent tribunal has jurisdiction to decide wrongly as well as rightly.

[76] Reference was made to *Neely v. U.S.A.* (1976), 41 A.L.R. Fed. 331. That was an action for the return of fines paid under unconstitutional convictions. The decision that such an action lies is based on U.S. legislation, the Tucker Act, which (quoting from the headnote) "… provides authority for a district court to order the return of fines and costs based upon unconstitutional convictions." Moreover, the action there sought to "vacate, annul and set aside judgments and sentences of conviction" (p.340). That relief, which I doubt is available in civil proceedings in Canada, is not, in any event, sought. The conviction at bar has not been impeached by any proper proceedings to that end.

[77] The appellant is seeking to re-litigate an issue open to him in the earlier proceedings and is precluded from so doing as long as that conviction stands. I would, therefore, dismiss the appeal, with costs.

DATED at EDMONTON, Alberta,
this 3rd DAY OF October,
1988.

Tab 312

RULE 77CIVIL CASE MANAGEMENT

APPLICATION AND INTERPRETATION

Scope

77.01 (1) This Rule applies to actions and applications,

(a) commenced in a county named in the Schedule to this rule on or after the date specified in the Schedule for the county;

(b) commenced in The Municipality of Metropolitan Toronto or the City of Toronto before July 3, 2001 and randomly assigned to case management by the registrar, acting under the direction of the regional senior judge; and

(c) commenced in the City of Toronto on or after July 3, 2001 and assigned to case management by the registrar, acting under the direction of the regional senior judge. O. Reg. 555/96, s. 2; O. Reg. 442/97, s. 4; O. Reg. 113/01, s. 5 (1).

Ordering Proceeding into Case Management

(1.1) This Rule also applies to an action or application that is brought under case management by an order under subrule 77.11 (1.1). O. Reg. 570/98, s. 16 (1).

Assignment Under Rule 78.12

(1.2) This Rule also applies to an action that is assigned, under rule 78.12, to case management in accordance with this Rule. O. Reg. 198/05, s. 6 (1).

Revocation

(1.3) Subrule (1.2) is revoked on May 6, 2008. O. Reg. 198/05, s. 6 (1).

Exception

(2) This Rule does not apply to,

(a) Revoked: O. Reg. 198/05, s. 6 (2).

(b) Revoked: O. Reg. 198/05, s. 6 (2).

(c) actions or applications placed on the Commercial List established by practice direction in the Toronto Region;

(d) actions or applications under Rules 74 and 75;

(d.0.1) applications for the removal or replacement of personal representatives under the *Trustee Act*;

(d.0.2) applications under Part V of the *Succession Law Reform Act*;

(d.0.3) applications for guardianship of property or persons under the *Substitute Decisions Act, 1992*;

(d.0.4) Revoked: O. Reg. 198/05, s. 6 (2).

(d.0.5) Revoked: O. Reg. 198/05, s. 6 (2).

(d.1) actions under Rule 64 (Mortgage Actions);

(d.2) actions under Rule 76;

(e) actions or applications under the *Construction Lien Act*, except trust claims;

(f) actions or applications under the *Bankruptcy and Insolvency Act* (Canada); and

(g) actions or applications certified as class proceedings under the *Class Proceedings Act, 1992*.
O. Reg. 555/96, s. 2; O. Reg. 118/97, s. 5; O. Reg. 570/98, s. 16 (2); O. Reg. 113/01, s. 5 (2); O. Reg. 457/01, s. 10; O. Reg. 206/02, s. 21 (1); O. Reg. 198/05, s. 6 (2).

Class Proceedings Act, 1992

(2.1) This Rule applies to an action or application commenced under the *Class Proceedings Act, 1992* only if certification as a class proceeding has been denied. O. Reg. 570/98, s. 16 (3).

Conflict with Other Rules

(3) In the event of conflict between a provision of Rules 1 to 76 and a provision of this Rule, the latter prevails. O. Reg. 555/96, s. 2.

Time

(4) In a proceeding to which this Rule applies, a time prescribed in any of Rules 1 to 76 or in this Rule may be extended or abridged only by order of a case management judge or case management master. O. Reg. 570/98, s. 16 (4).

Place of Hearing of Motions

(5) Unless the court orders otherwise, all motions shall be heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02. O. Reg. 14/04, s. 41.

SCHEDULE

Regional Municipality of Ottawa-Carleton	January 2, 1997
(known as City of Ottawa on and after January 1, 2001)	
County of Essex	December 31, 2002

O. Reg. 206/02, s. 21 (2).

PURPOSE

77.02 The purpose of this Rule is to establish a case management system throughout Ontario that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding. O. Reg. 555/96, s. 2.

DEFINITIONS

77.03 In rules 77.03 to 77.17,

"case management judge" means the judge or a member of a team of judges assigned to manage a proceeding; ("juge responsable de la gestion de la cause")

"case management master" means a person appointed by the Lieutenant Governor in Council under section 86.1 of the *Courts of Justice Act*; ("protonotaire responsable de la gestion de la cause")

"defence" includes a notice of intent to defend, a statement of defence, a notice of appearance and a notice of motion in response to a proceeding; ("défense")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant; ("demandeur")

"timetable" means a schedule for the completion of one or more steps required to advance the proceeding (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by,

(a) an order of a case management judge or case management master, or

(b) a written agreement of the parties that is not contrary to an order; ("calendrier")

"track" means either the fast track or the standard track provided by this Rule. ("voie") O. Reg. 555/96, s. 2; O. Reg. 118/97, s. 6; O. Reg. 113/01, s. 6; O. Reg. 457/01, s. 11.

CASE MANAGEMENT MASTER

77.04 (1) A case management master has,

(a) the power to hear motions that are within the jurisdiction of a master under subrule 37.02 (2); and

(b) case management powers and duties provided by this Rule. O. Reg. 555/96, s. 2.

(2) Under the direction of the case management judge, a case management master may manage any proceeding to which this Rule applies. O. Reg. 555/96, s. 2.

OTHER MATTERS

File Number for Third and Subsequent Party Claims

77.05 (1) Third and subsequent party claims shall be given the same file number as the main action, followed by a suffix letter. O. Reg. 555/96, s. 2.

Format of Documents

(2) The forms prescribed in this Rule and notices, certificates and orders referred to in it may be single spaced and need not have a backsheet. O. Reg. 555/96, s. 2; O. Reg. 118/97, s. 7.

COMMENCEMENT OF PROCEEDING

77.06 (1) Revoked: O. Reg. 457/01, s. 12.

(2) Revoked: O. Reg. 627/98, s. 8.

(3) Revoked: O. Reg. 284/01, s. 26.

(4) Revoked: O. Reg. 284/01, s. 26.

(4.1) Revoked: O. Reg. 284/01, s. 26.

Choice of Track

(5) On filing Form 14F (Information for court use), the plaintiff shall choose the fast track or the standard track for the proceeding. O. Reg. 555/96, s. 2; O. Reg. 206/02, s. 22.

(6) In choosing a track, the plaintiff shall have regard to all relevant considerations, including,

(a) the complexity of the issues of fact or law;

(b) the likely expense to the parties;

(c) the importance to the public of the issues of fact or law;

(d) the number of parties or prospective parties;

(e) the amount of intervention by the case management judge that the proceeding is likely to require; and

(f) the time required for proper discovery, if applicable, and preparation for trial or hearing. O. Reg. 555/96, s. 2.

Track Chosen by Plaintiff

(7) The proceeding shall proceed on the track chosen by the plaintiff unless the court orders otherwise. O. Reg. 555/96, s. 2.

(8) Revoked: O. Reg. 284/01, s. 26.

(9) Revoked: O. Reg. 284/01, s. 26.

(10) Revoked: O. Reg. 284/01, s. 26.

CHANGE OF TRACK

77.07 (1) A case management judge or case management master may order that a proceeding be transferred from one track to the other. O. Reg. 555/96, s. 2.

(2) A party who seeks an order under subrule (1) shall move for the order,

(a) in the case of an action, before the close of pleadings;

(b) in the case of an application, on or before the tenth day after the first affidavit has been filed by a respondent. O. Reg. 555/96, s. 2.

(3) On a motion under subrule (1), a case management judge or case management master shall have regard to the matters set out in subrule 77.06 (6). O. Reg. 555/96, s. 2.

DISMISSAL BY REGISTRAR

77.08 (1) Where no defence has been filed and the proceeding has not been disposed of by final order or judgment, the registrar shall, 180 days after the date of issue of the originating process, make an order dismissing the proceeding as abandoned. O. Reg. 118/97, s. 9.

(2) The dismissal of an action as abandoned has the same effect as a dismissal for delay under rule 24.05. O. Reg. 653/00, s. 10.

DEFENCE OF PROCEEDING

77.09 (1) Revoked: O. Reg. 457/01, s. 13.

Assignment to Case Management

(2) On the filing of a defence, the proceeding shall be assigned to a case management judge or team for management in accordance with rules 77.10 to 77.17. O. Reg. 284/01, s. 27.

ASSIGNMENT OF PARTICULAR JUDGE

On Consent of Parties

77.09.1 (1) A regional senior judge or a judge designated by him or her may, with the written consent of all parties, assign one or more proceedings to a judge, or in exceptional circumstances to two or more judges, for management in accordance with rules 77.10 to 77.17. O. Reg. 113/01, s. 7.

On Motion — Action

(2) In an action, on the filing of the last defence or on the expiration of the time for filing defences, a regional senior judge or a judge designated by him or her may, on a party's motion, assign the action to a judge, or in exceptional circumstances to two or more judges, for management in accordance with rules 77.10 to 77.17. O. Reg. 113/01, s. 7.

On Motion — Application

(3) In an application, on the filing of the last notice of appearance or on the expiration of the time for filing notices of appearance, a regional senior judge or a judge designated by him or her may, on a party's motion, assign the application to a judge, or in exceptional circumstances to two or more judges, for management in accordance with rules 77.10 to 77.17. O. Reg. 113/01, s. 7.

Multiple Proceedings

(4) Two or more actions or applications may be assigned together under subrule (2) or (3). O. Reg. 113/01, s. 7.

Criteria

(5) In considering whether to assign a proceeding in accordance with this rule, the regional senior judge or designated judge shall have regard to all the relevant circumstances, including,

(a) the purpose of case management;

(b) the complexity of the issues of fact or law;

(c) the importance to the public of the issues of fact or law;

(d) the number and kind of the parties or prospective parties, and whether they are represented;

(e) the number of proceedings involving the same or similar parties or causes of action;

(f) the amount of intervention by the case management judge that the proceeding is likely to require;

(g) the time required for discovery, if applicable, and for preparation for trial or hearing;

(h) the number of expert witnesses and other witnesses;

(i) the time required for the trial or hearing; and

(j) any other factors that the judge considers relevant or that are raised by a party. O. Reg. 113/01, s. 7; O. Reg. 132/04, s. 20.

Assistance by Case Management Master

(6) A judge or group of judges to whom a proceeding is assigned under this rule may assign a case management master or, in exceptional circumstances, two or more case management masters, to assist in managing the proceeding. O. Reg. 113/01, s. 7.

TIMETABLES AND COMPLIANCE WITH TIME REQUIREMENTS

Time Requirement Established by Rules

77.10 (1) If a party fails to comply with a time requirement established by these rules, a case management judge or case management master may convene a case conference and at the case conference may,

(a) establish or amend a timetable and order the party to comply with it; and

(b) order the party to pay costs. O. Reg. 113/01, s. 8.

Duty of Plaintiff

(2) In a proceeding to which this Rule applies, the plaintiff shall file a timetable or request a case conference to establish a timetable,

(a) if an order is made under rule 24.1.05 (exemption from mediation), within 30 days after the order is made;

(b) if a mediation session is held but the proceeding is not settled, within 30 days after the mediator's report is given to the parties under subrule 24.1.15 (1);

(c) in any other case, within 180 days after the proceeding is commenced. O. Reg. 206/02, s. 23.

Duty of Case Management Judge or Case Management Master

(3) If the plaintiff fails to comply with subrule (2), a case management judge or case management master shall convene a case conference to establish a timetable. O. Reg. 113/01, s. 8.

Limited Application

(4) Subrules (2) and (3) do not apply to proceedings,

(a) commenced before July 3, 2001 in the City of Toronto;

(b) commenced on or after January 1, 2001 in the City of Ottawa, as established by the *City of Ottawa Act, 1999*;

(c) commenced before January 1, 2001 in The Regional Municipality of Ottawa-Carleton. O. Reg. 113/01, s. 8.

Contents of Timetable

(5) A timetable established under this rule shall,

(a) provide for the completion of examinations for discovery and any incidental motions at least 10 days before the settlement conference under rule 77.14; or

(b) include an explanation of the non-compliance with clause (a). O. Reg. 113/01, s. 8.

Case Conference to Review Timetable

(6) A case management judge or case management master may convene a case conference to review a timetable established under this rule. O. Reg. 113/01, s. 8.

Non-Compliance with Timetable

(7) If a party fails to comply with a time requirement set out in a timetable established under this rule, a case management judge or case management master may,

(a) strike out any document filed by the party;

(b) dismiss the party's proceeding or strike out the party's defence;

(c) amend the timetable and order the party to comply with it;

(d) order the party to pay costs; and

(e) make any other order that is just. O. Reg. 113/01, s. 8.

CASE MANAGEMENT POWERS

Powers Generally

77.11 (1) A case management judge or case management master may,

(a) extend or abridge a time prescribed by an order or the rules;

(b) transfer a proceeding from one track to the other;

(c) adjourn a case conference;

(d) set aside an order made by the registrar; and

(e) make orders, impose terms, give directions and award costs as necessary to carry out the purpose of this Rule. O. Reg. 555/96, s. 2; O. Reg. 113/01, s. 9.

Transfer to Case Management

(1.1) A case management judge or case management master may order that this Rule apply to any proceeding that is not already under case management, except a proceeding mentioned in subrule 77.01 (2), and may include any necessary directions in the order, including a direction that proceedings under this Rule be governed by a common timetable. O. Reg. 570/98, s. 18.

(1.2) An order under subrule (1.1) may be made only on notice to the affected parties. O. Reg. 570/98, s. 18.

Exception

(1.3) For greater certainty, subrule (1.1) does not apply to an action that is governed by Rule 78. O. Reg. 198/05, s. 7.

Revocation

(1.4) Subrule (1.3) is revoked on May 6, 2008. O. Reg. 198/05, s. 7.

Powers on Own Initiative

(2) The case management judge or case management master may, on his or her own initiative, require a hearing, case conference or conference call to deal with any matter arising in connection with case management, including a failure to comply with the rules. O. Reg. 555/96, s. 2.

To Whom Made

77.12 (1) A motion may be made only to a case management judge or case management master. O. Reg. 570/98, s. 19 (1).

Moving Party's Case Management Motion Form

(2) The moving party shall serve a case management motion form (Form 77C) in accordance with rule 37.07 and shall submit it to the court before the motion is heard. O. Reg. 570/98, s. 19 (1).

Procedure

(2.1) Depending on the practical requirements of the situation, the motion may be made,

(a) with or without supporting material or a motion record;

(b) by attendance, in writing, by fax or under rule 1.08 (telephone and video conferences). O. Reg. 570/98, s. 19 (1); O. Reg. 113/01, s. 10.

Responding Party's Case Management Motion Form

(2.2) The responding party may serve and submit a case management motion form but is not required to do so. O. Reg. 570/98, s. 19 (1).

Confirmation — Opposed Motion

(3) On an opposed motion that is to be argued other than in writing, the moving party's solicitor shall confirm to the registrar by fax or notice in writing, by 2 p.m. the day before the hearing date, that the motion is to proceed as scheduled, failing which the motion shall not proceed on that date. O. Reg. 555/96, s. 2.

Note: On July 1, 2008, subrule (3) is amended by striking out "solicitor" and substituting "lawyer". See: O. Reg. 575/07, ss. 1, 39 (1).

Costs on Motions

(4) The case management judge or case management master shall, at the conclusion of each motion, address the issue of costs and, where appropriate, fix the costs and order them payable forthwith. O. Reg. 555/96, s. 2.

Motions Dealt With by Registrar

(5) The registrar shall make an order granting the relief sought on the following motions:

1. A motion for an order on consent, where the consent of all parties is filed, the consent states that no party affected by the order is under disability and the order is for,

   i. amendment of a pleading, notice of application or notice of motion,

   ii. addition, deletion or substitution of a party, where the consent of the party is filed,

   iii. removal of a solicitor as solicitor of record,

Note: On July 1, 2008, subparagraph iii is revoked and the following substituted:

iii. removal of a lawyer as lawyer of record,

See: O. Reg. 575/07, ss. 35, 39 (1).

iv. setting aside the noting of a party in default,

v. setting aside a default judgment,

vi. discharge of a certificate of pending litigation,

vii. security for costs in a specified amount,

viii. re-attendance of a witness to answer questions on an examination,

ix. fulfilment of undertakings given on an examination, or

x. dismissal of a proceeding with or without costs.

2. A motion where no responding material is filed, the notice of motion or the case management motion form states that no party affected by the order is under disability and the order is for relief set out in paragraph 1. O. Reg. 555/96, s. 2; O. Reg. 570/98, s. 19 (2).

Disposition of Motion

(6) The case management judge, case management master or registrar shall record the disposition of the motion on the case management motion form. O. Reg. 570/98, s. 19 (3).

(7) No formal order need be prepared, signed or entered unless,

(a) the case management judge, case management master or registrar directs otherwise;

(b) an appeal is made to a judge; or

(c) an appeal or a motion for leave to appeal is made to an appellate court. O. Reg. 570/98, s. 19 (3).

CASE CONFERENCE

How Convened

77.13 (1) A case management judge or a case management master may convene a case conference at any time, on his or her own initiative or at a party's request. O. Reg. 555/96, s. 2.

Parties' Attendance

(2) A case management judge or case management master may direct that the parties, or a representative of the parties responsible for making decisions regarding the proceeding and instructing the solicitor, attend the conference personally. O. Reg. 555/96, s. 2.

Note: On July 1, 2008, subrule (2) is amended by striking out "solicitor" and substituting "lawyer". See: O. Reg. 575/07, ss. 1, 39 (1).

Matters to be Dealt With

(3) At the conference, a case management judge or case management master may,

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) create a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable. O. Reg. 555/96, s. 2; O. Reg. 570/98, s. 20 (1).

Counsel

(4) Counsel attending the conference shall have authority to deal with the matters referred to in subrule (3) and shall be fully acquainted with the facts and legal issues. O. Reg. 555/96, s. 2.

Note: On July 1, 2008, subrule (4) is amended by striking out "Counsel" and substituting "The lawyers". See: O. Reg. 575/07, ss. 4, 39 (1).

Powers of Judge

(5) At the conference, a case management judge may, where appropriate, in addition to exercising the powers conferred by subrule 77.11 (1),

(a) make a procedural order;

(b) on consent of the parties, make an order for interlocutory relief;

(c) on consent of the parties, refer any issue for alternative dispute resolution;

(d) convene a settlement conference;

(e) convene a hearing; and

(f) give directions. O. Reg. 113/01, s. 11 (1).

Powers of Case Management Master

(6) At the conference, a case management master may, where appropriate, in addition to exercising the powers conferred by subrule 77.11 (1),

(a) make a procedural order;

(b) on consent of the parties, make an order within the jurisdiction of a case management master;

(c) on consent of the parties, refer any issue for alternative dispute resolution; and

(d) convene a settlement conference. O. Reg. 113/01, s. 11 (1).

(7) Revoked: O. Reg. 284/01, s. 28.

(8) Revoked: O. Reg. 113/01, s. 11 (2).

SETTLEMENT CONFERENCES

Scheduled Automatically by Registrar

77.14 (1) The registrar shall, on at least 45 days notice to the parties, schedule a settlement conference to take place,

(a) if the proceeding is on the fast track, not later than 150 days after the first defence is filed;

(b) if the proceeding is on the standard track, not later than 240 days after the first defence is filed. O. Reg. 555/96, s. 2; O. Reg. 570/98, s. 21 (1).

Steps to be Completed Before Conference

(2) All examinations, production of documents and motions arising out of examinations and production of documents shall be completed before the settlement conference date. O. Reg. 555/96, s. 2.

Parties' Attendance At Settlement Conference

(3) A case management judge or case management master may direct the parties, or a representative of a party responsible for making decisions in the proceeding and instructing the solicitor, to attend all or part of a settlement conference personally with their counsel. O. Reg. 555/96, s. 2.

Note: On July 1, 2008, subrule (3) is amended by striking out "solicitor" and substituting "lawyer". See: O. Reg. 575/07, ss. 1, 39 (1).

Note: On July 1, 2008, subrule (3) is amended by striking out "counsel" and substituting "lawyers". See: O. Reg. 575/07, ss. 4, 39 (1).

Settlement Conference Brief

(4) The plaintiff shall deliver not later than 10 days before the settlement conference a settlement conference brief, containing all material the plaintiff considers necessary for the settlement conference, and shall certify that subrule (2) has been complied with. O. Reg. 555/96, s. 2; O. Reg. 284/01, s. 29 (1).

Other Parties To Deliver Briefs

(5) Every other party shall deliver a settlement conference brief containing any other material the party considers necessary for the settlement conference not later than five days before the conference. O. Reg. 555/96, s. 2; O. Reg. 284/01, s. 29 (2).

Contents of Brief

(6) A settlement conference brief shall contain,

(a) a concise summary of the facts, including the agreed upon facts and admissions;

(b) where necessary, a concise summary of the issues and the law to be relied upon by each party;

(c) a list of witnesses and a summary of each witness's evidence;

(d) the relevant portions only of transcripts, experts' reports and other evidence that may be adduced at trial; and

(e) the party's pleadings, including any demand or order for particulars of a pleading and the particulars delivered in response. O. Reg. 555/96, s. 2; O. Reg. 570/98, s. 21 (2).

Trial Date

(7) At the conference, a case management judge or case management master shall assign a trial or hearing date, or refer the parties to a judge responsible for the assignment of a trial or hearing date. O. Reg. 555/96, s. 2; O. Reg. 118/97, s. 11.

Trial Record

(8) A trial or application record shall be served and filed in accordance with rule 48.02 or subrule 38.09 (1) no later than seven days before the trial or hearing date. O. Reg. 555/96, s. 2.

(9) Revoked: O. Reg. 284/01, s. 29 (3).

Settlement Conference Judge Not to Preside at Hearing

(10) A judge who conducts a settlement conference shall not preside at the trial of the action or the hearing of the application. O. Reg. 555/96, s. 2.

Exception, Toronto Actions

(11) Subrules (1) to (10) do not apply to actions commenced in the City of Toronto, which shall, instead, be set down for trial under Rule 48. O. Reg. 198/05, s. 8.

Revocation

(12) Subrule (11) is revoked on May 6, 2008. O. Reg. 198/05, s. 8.

TRIAL MANAGEMENT CONFERENCE

When Conference to be Held

77.15 (1) A trial management conference may be held on or following the setting of a trial date, at the request of one of the parties or on the initiative of the trial judge, case management judge or case management master. O. Reg. 555/96, s. 2.

Filing of Form

(2) A trial management conference form (Form 77D) shall be filed by the plaintiff and the defendant no later than 14 days before the trial or four days before the trial management conference, whichever is earlier. O. Reg. 118/97, s. 12.

Powers of Judge or Master

(3) At the trial management conference, the trial judge, case management judge or case management master may in addition to exercising the powers conferred by subrule 77.11 (1),

(a) canvass with the parties the names of the witnesses intended to be called and the substance of their testimony;

(b) explore whether admissions can be made that will facilitate proof of non-contentious matters;

(c) explore alternative methods of presentation of evidence, such as the filing of affidavits or reports;

(d) explore with counsel expeditious means for the presentation of evidence; and

Note: On July 1, 2008, clause (d) is amended by striking out "counsel" and substituting "the lawyers". See: O. Reg. 575/07, ss. 4, 39 (1).

(e) give directions that will facilitate the orderly and expeditious conduct of the trial. O. Reg. 555/96, s. 2; O. Reg. 113/01, s. 12.

(4) Revoked: O. Reg. 284/01, s. 30.

CASE MANAGEMENT ADVISORY COMMITTEE

77.16 The Chief Justice of the Superior Court of Justice shall appoint an advisory committee composed of such members of the bench, the bar, the Ministry of the Attorney General and the public as

are necessary to monitor the operation of this Rule and, where appropriate, to make recommendations for improvement. O. Reg. 555/96, s. 2; O. Reg. 292/99, s. 3.

TRANSITION

77.17 Despite Rule 77.01, the following transitional provisions apply:

1. Where a proceeding has been commenced in a county before the date set out in the Schedule to rule 77.01 for the county and where no defence has been filed as of that date, rule 77.08 applies to the proceeding and the 180-day period described in rule 77.08 begins to run on that date.

2. Where a proceeding has been commenced in a county before the date set out in the Schedule to rule 77.01 for the county and a defence has been filed before that date, the proceeding shall be dismissed by the registrar unless the parties have fixed a date for a settlement conference within 365 days from that date. O. Reg. 206/02, s. 24.

RULE 78 TORONTO CIVIL CASE MANAGEMENT PILOT PROJECT

APPLICATION AND INTERPRETATION

Scope

78.01 (1) This Rule applies to actions commenced in the City of Toronto on or after December 31, 2004. O. Reg. 198/05, s. 9.

Exception

(2) This Rule does not apply to,

(a) actions placed on the Commercial List established by practice direction in the Toronto Region;

(b) actions under Rules 74 and 75 (Estates);

(c) actions under Rule 64 (Mortgage Actions);

(d) actions under Rule 76 (Simplified Procedure);

(e) actions under the *Construction Lien Act*, except trust claims;

(f) actions under the *Bankruptcy and Insolvency Act* (Canada); and

(g) actions certified as class proceedings under the *Class Proceedings Act, 1992*. O. Reg. 198/05, s. 9.

Class Proceedings Act, 1992

(3) This Rule applies to an action commenced under the *Class Proceedings Act, 1992* only if certification as a class proceeding has been denied. O. Reg. 198/05, s. 9.

Conflict with Other Rules

(4) In the event of conflict between a provision of Rules 1 to 77 and a provision of this Rule, this Rule prevails. O. Reg. 198/05, s. 9.

PURPOSE

78.02 The purpose of this Rule is to establish a pilot project under which the parties will have the greater responsibility for managing actions commenced in the City of Toronto and moving them to trial or other resolution, and the court will provide partial or full case management for such actions only where a need for the court's intervention is demonstrated. O. Reg. 198/05, s. 9.

DEFINITIONS

78.03 In rules 78.03 to 78.12,

"case management master" means a person appointed by the Lieutenant Governor in Council under section 86.1 of the *Courts of Justice Act*; ("protonotaire responsable de la gestion de la cause")

"timetable" means a schedule for the completion of one or more steps required to advance the action (including delivery of affidavits of documents, examinations under oath, where available, or motions), established by,

(a) an order of a judge or case management master, or

(b) a written agreement of the parties that is not contrary to an order. ("calendrier") O. Reg. 198/05, s. 9.

CASE MANAGEMENT POWERS

Generally

78.04 (1) A judge or case management master may,

(a) extend or abridge a time prescribed by an order or the rules;

(b) adjourn a case conference;

(c) set aside an order made by the registrar;

(d) amend a timetable made under Rule 77 or under this Rule;

(e) make orders, impose terms, give directions and award costs as necessary to carry out the purpose of this Rule. O. Reg. 198/05, s. 9.

Case Management Master

(2) A case management master has power,

(a) to hear motions that are within the jurisdiction of a master under subrule 37.02 (2);

(b) to preside and make orders at a status hearing under rule 48.14; and

(c) to preside and make orders at a pre-trial conference that are within the jurisdiction of a case management master. O. Reg. 198/05, s. 9.

OTHER MATTERS

File Number for Third and Subsequent Party Claims

78.05 (1) Third and subsequent party claims shall be given the same file number as the main action, followed by a suffix letter. O. Reg. 198/05, s. 9.

Format of Documents

(2) The form prescribed in this Rule and notices, certificates and orders referred to in it may be single spaced and need not have a backsheet. O. Reg. 198/05, s. 9.

DISMISSAL BY REGISTRAR

Dismissing Action as Abandoned

78.06 (1) The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

1. More than two years have passed since the date the originating process was issued.
2. No statement of defence has been filed.
3. The action has not been disposed of by final order or judgment.
4. The action has not been set down for trial or summary trial.
5. The registrar has given 45 days notice that the action will be dismissed as abandoned. O. Reg. 198/05, s. 9.

Service on Parties

(2) The registrar shall serve a copy of the order made under subrule (1) on the parties. O. Reg. 198/05, s. 9.

Effect on Subsequent Action

(3) The dismissal of an action as abandoned has the same effect as a dismissal for delay under rule 24.05. O. Reg. 198/05, s. 9.

POWERS OF COURT ON MOTION TO DISMISS FOR DELAY

78.07 If a defendant moves to have an action dismissed for delay and the court is satisfied that the action should proceed, the court may,

(a) establish a timetable (Form 78A) for the action;

(b) order a case conference in accordance with rule 78.09, but only if it is impractical to establish a timetable; or

(c) make such other order as is just. O. Reg. 198/05, s. 9.

STATUS HEARING

Effect of Filing Timetable

78.08 (1) If a status hearing has been requested under subrule 48.14 (5) and a party files the documents described in subrule (2) at least seven days before the date of the hearing, the hearing shall be held in writing and without the attendance of the parties, despite anything in rule 48.14, unless the court orders otherwise. O. Reg. 198/05, s. 9.

(2) The documents mentioned in subrule (1) are:

1. A timetable (Form 78A), signed by all the parties.
2. A draft order establishing the timetable. O. Reg. 198/05, s. 9.

(3) The timetable shall,

(a) identify the steps to be completed before the action will be ready to be set down for trial;

(b) show the date or dates by which the steps will be completed; and

(c) show a date, which shall be no more than 12 months after the date of the status hearing, before which the action shall be set down for trial. O. Reg. 198/05, s. 9.

Case Conference

(4) If no documents described in subrule (2) are filed and the presiding judge or case management master at the status hearing under rule 48.14 is satisfied that the action should proceed, he or she may,

(a) make an order under clause 48.14 (8) (a);

(b) order a case conference in accordance with rule 78.09, but only if it is impractical to establish a timetable; or

(c) make such other order as is just. O. Reg. 198/05, s. 9.

CASE CONFERENCE

Powers of Judge and Case Management Master

78.09 At a case conference convened under clause 78.07 (b), clause 78.08 (4) (b), clause 78.10 (3) (b) or clause 78.12 (6) (a), a judge or case management master may,

(a) create a timetable for the action;

(b) review and, if necessary, amend an existing timetable;

(c) require written reports as to compliance with any directions that are given;

(d) on consent of the parties, make an order for interlocutory relief; and

(e) make an order under rule 78.12 (assignment to case management under Rule 77). O. Reg. 198/05, s. 9.

PRE-TRIAL CONFERENCE

Notice

78.10 (1) After an action is set down for trial, the registrar shall give the parties 90 days notice to appear before a judge or case management master for a pre-trial conference under Rule 50. O. Reg. 198/05, s. 9.

Materials to be Filed

(2) At least five days before the pre-trial conference, each party shall file with proof of service a pre-trial conference brief containing concise statements, without argument, of the following matters:

1. The nature of the case.

2. The issues raised and the party's position.

3. The names of the witnesses that the party is likely to call at the trial.

4. The steps that need to be completed before the action is ready for trial. O. Reg. 198/05, s. 9.

Decision of Judge or Case Management Master

(3) If the action is not settled at the pre-trial conference, the judge or case management master may,

(a) establish a timetable and, subject to the direction of the regional senior judge, set a peremptory date for trial;

(b) order a case conference in accordance with rule 78.09, but only if it is impractical to establish a timetable; or

(c) make such other order as is just. O. Reg. 198/05, s. 9.

(4) If the judge or case management master has set a date for trial under subrule (3), he or she shall complete a pre-trial conference report,

(a) stating what steps need to be completed before the action is ready for trial and how much time is needed to complete those steps;

(b) stating the anticipated length of the trial; and

(c) setting out any other matter relevant to scheduling the trial. O. Reg. 198/05, s. 9.

(5) A copy of the pre-trial conference report shall be placed with the trial record. O. Reg. 198/05, s. 9.

Certificate

(6) The following persons shall certify, on the copy of the pre-trial conference report that is to be placed with the trial record, that they understand the contents of the report and acknowledge the obligation to be ready to proceed on the date fixed for the trial:

1. Each lawyer who represents a party.

2. Each party who is not represented by a lawyer. O. Reg. 198/05, s. 9.

Duty of Lawyer

(7) Each lawyer who represents a party shall, in addition to giving the certificate described in subrule (6), undertake to the court to advise the party of,

(a) the contents of the pre-trial conference report; and

(b) the obligation to be ready to proceed on the date fixed for the trial. O. Reg. 198/05, s. 9.

TIMETABLE

Amendment

78.11 (1) A timetable that is established under this Rule by order of a judge or case management master may be amended by the parties, by a written agreement, unless the order expressly prohibits amendment. O. Reg. 198/05, s. 9.

(2) An agreement to amend a timetable established under rule 78.08 shall not amend the date before which the action shall be set down for trial. O. Reg. 198/05, s. 9.

Non-Compliance

(3) If a party fails to comply with a timetable that is established under this Rule, the court may, on any other party's motion,

(a) stay the party's action;

(b) dismiss the party's action or strike out the party's defence; or

(c) make such other order as is just. O. Reg. 198/05, s. 9.

ASSIGNMENT TO CASE MANAGEMENT UNDER RULE 77

On Consent of Parties

78.12 (1) If all the parties consent in writing, a judge or case management master may, on a party's motion, assign one or more actions to case management in accordance with Rule 77. O. Reg. 198/05, s. 9.

(2) A motion under subrule (1) shall be made in writing, without a supporting affidavit, and the moving party shall file,

(a) the written consent of the parties; and

(b) a bound and tabbed copy of all the pleadings. O. Reg. 198/05, s. 9.

Obstruction

(3) The judge or case management master may, on a party's motion or on his or her own initiative, assign one or more actions to case management in accordance with Rule 77 if a party has taken steps that amount to chronic and substantial obstruction of the action, in the case of a single action, or of one or more actions, in the case of two or more. O. Reg. 198/05, s. 9.

Criteria

(4) In considering whether to assign an action to case management under subrule (1) or (3), the judge or case management master shall have regard to all the relevant circumstances, including the criteria set out in subrule 77.09.1 (5). O. Reg. 198/05, s. 9.

Effect of Assignment

(5) When an action is assigned to case management in accordance with Rule 77 under subrule (1) or (3), that Rule applies to the action with necessary modifications, and the judge or case management master may include any necessary directions in the order. O. Reg. 198/05, s. 9.

Case Conference or Other Order

(6) On a motion under subrule (1) or (3), the judge or case management master may,

(a) if the action is not being assigned to case management in accordance with Rule 77, order a case conference in accordance with rule 78.09, but only if it is impractical to establish a timetable; or

(b) make such other order as is just. O. Reg. 198/05, s. 9.

ADVISORY COMMITTEE

78.13 The regional senior judge for the Toronto Region shall appoint an advisory committee composed of such members of the bench, the bar and the public and such employees of the Ministry of the Attorney General as are necessary to monitor and evaluate the operation of this Rule. O. Reg. 198/05, s. 9.

Tab 313

O. Reg. 170/14: RULES OF CIVIL PROCEDURE

Filed August 19, 2014 under Courts of Justice Act, R.S.O. 1990, c. C.43

Download Word Print

This is the English version of a bilingual regulation.

ONTARIO REGULATION 170/14

made under the

COURTS OF JUSTICE ACT

Made: July 23, 2014

Approved: August 14, 2014

Filed: August 19, 2014

Published on e-Laws: August 20, 2014

Printed in *The Ontario Gazette*: September 6, 2014

AMENDING REG. 194 OF R.R.O. 1990
(RULES OF CIVIL PROCEDURE)

1. Subrule 12.06 (4) of Regulation 194 of the Revised Regulations of Ontario, 1990 is amended by striking out "(6)".

2. Subrule 14.08 (3) of the Regulation is revoked.

3. Clause 16.01 (4) (b) of the Regulation is amended by striking out "or" at the end of subclause (i), by adding "or" at the end of subclause (ii) and by adding the following subclauses:

(iii) by use of an electronic document exchange of which the party or person is a member or subscriber, but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day, and

(iv) if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the party or person in accordance with subrule 16.06.1 (1), but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day.

4. Subrule 16.03 (6) of the Regulation is amended by striking out "Ministry of Consumer and Commercial Relations" and substituting "Ministry of Government and Consumer Services".

5. (1) Subrule 16.05 (1) of the Regulation is amen adding the following clause:

Fr

(c.1) by use of an electronic document exchange of which the lawyer is a member or subscriber, but, where service is made under this clause between 4 p.m. and midnight, it is deemed to have been made on the following day;

(2) Clause 16.05 (1) (d) of the Regulation is amended by striking out "subrules (3), (3.1) and (3.2)" and substituting "subrules (3) and (3.2)".

(3) Clause 16.05 (1) (f) of the Regulation is revoked and the following substituted:

(f) if the parties consent or the court orders under subrule 16.06.1 (2), by e-mailing a copy to the lawyer's office in accordance with subrule 16.06.1 (1), but, where service is made under this clause between 4 p.m. and midnight, it is deemed to have been made on the following day.

(4) Subrule 16.05 (3.1) of the Regulation is revoked.

(5) Subrule 16.05 (4) of the Regulation is revoked.

6. Rule 16 of the Regulation is amended by adding the following rule:

SERVICE BY E-MAIL

Required Information

16.06.1 (1) The e-mail message to which a document served under subclause 16.01 (4) (b) (iv) or clause 16.05 (1) (f) is attached shall include,

(a) the sender's name, address, telephone number, fax number, if any, and e-mail address;

(b) the date and time of transmission; and

(c) the name and telephone number of a person to contact in the event of a transmission problem.

Order for Service by E-mail

(2) If parties do not consent to the service of a document by e-mail, the court may, on motion, make an order directing that the document be served by e-mail, on such terms as are just.

Fr

7. (1) Rule 16.09 of the Regulation is amended by adding the following subrule:

Electronic Document Exchange

(4.1) Service of a document under subclause 16.01 (4) (b) (iii) or clause 16.05 (1) (c.1) (electronic document exchange) may be proved by a record of service generated by the electronic document exchange that identifies the document that was served and indicates,

(a) the total number of pages served;

(b) the name of the person who served the document and, if the person served the document on behalf of a party, the name of the party and the nature of the relationship between the person and the party;

(c) the name of the person on whom the document was served; and

(d) the date on and time at which the document was served through the electronic document exchange.

(2) Subrule 16.09 (6) of the Regulation is amended by striking out "under clause 16.05 (1) (f)" in the portion before clause (a) and substituting "under subclause 16.01 (4) (b) (iv) or clause 16.05 (1) (f)".

(3) Clause 16.09 (6) (a) of the Regulation is revoked and the following substituted:

(a) served the document by e-mailing a copy in accordance with subrule 16.06.1 (1), and specifying whether it was on consent of the parties or under an order;

8. Subrule 24.1.13 (2) of the Regulation is amended by striking out "rule 77.08" in the portion before clause (a) and substituting "rule 50.13".

9. Clauses 37.11 (1) (c) and (d) of the Regulation are revoked and the following substituted:

(c) the motion is to be heard by telephone conference or video conference;

(d) the motion is made in the course of a pre-trial conference or case conference; or

10. Rules 48.14 and 48.15 of the Regulation are revoked and the following substituted:

DISMISSAL OF ACTION FOR DELAY

Fr

48.14 (1) Unless the court orders otherwise, the registrar shall dismiss an action for delay in either of the following circumstances, subject to subrules (4) to (8):

1. The action has not been set down for trial or terminated by any means by the later of the fifth anniversary of the commencement of the action and January 1, 2017.

2. The action was struck off a trial list and has not been restored to a trial list or otherwise terminated by any means by the later of the second anniversary of being struck off and January 1, 2017.

Order to be Served

(2) The registrar shall serve an order made under subrule (1) (Form 48D) on the parties.

Order to Client

(3) A lawyer who is served with an order made under subrule (1) shall promptly give a copy of the order to his or her client.

Timetable

(4) Subrule (1) does not apply if, at least 30 days before the expiry of the applicable period referred to in that subrule, a party files the following documents:

1. A timetable, signed by all the parties, that,

   i. identifies the steps to be completed before the action may be set down for trial or restored to a trial list, as the case may be,

   ii. shows the date or dates by which the steps will be completed, and

   iii. shows a date, which shall be no more than two years after the day the applicable period referred to in subrule (1) expires, before which the action shall be set down for trial or restored to a trial list.

2. A draft order establishing the timetable.

Status Hearing

(5) If the parties do not consent to a timetable under subrule (4), any party may, before the expiry of the applicable period referred to in subrule (1), bring a motion for a status hearing.

(6) For the purposes of subrule (5), the hearing of the motion shall be convened as a status hearing.

Fr

(7) At a status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and the court may,

 (a) dismiss the action for delay; or

(b) if the court is satisfied that the action should proceed,

(i) set deadlines for the completion of the remaining steps necessary to have the action set down for trial or restored to a trial list, as the case may be, and order that it be set down for trial or restored to a trial list within a specified time,

(ii) adjourn the status hearing on such terms as are just,

(iii) if Rule 77 may apply to the action, assign the action for case management under that Rule, subject to the direction of the regional senior judge, or

(iv) make such other order as is just.

Party Under Disability

(8) Subrule (1) does not apply if, at the time the registrar would otherwise be required under that subrule to dismiss an action for delay, the plaintiff is under a disability.

Effect of Dismissal

(9) Rules 24.03 to 24.05 (effect of dismissal for delay) apply to an action dismissed under subrule (1).

Setting Aside

(10) The dismissal of an action under subrule (1) may be set aside under rule 37.14.

Transition

(11) Subject to subrule (12), every status notice served under this rule, as it read immediately before January 1, 2015, ceases to have effect on that date, if the action was not dismissed before that date.

(12) If a status hearing in relation to a status notice was scheduled but not held before January 1, 2015, this rule, as it read immediately before that date, continues to apply to the matter.

(13) Every notice that an action will be dismissed as abandoned that was given by the registrar under rule 48.15, as it read immediately before January 1, 2015, ceases to have effect on that date, if the action was not dismissed before that date.

11. The heading to Rule 50 of the Regulation is revoked and the following substituted:

Fr

RULE 50 CONFERENCES

12. (1) Subrule 50.02 (1) of the Regulation is amended by striking out "under this Rule" at the end.

(2) Clause 50.02 (2) (a) of the Regulation is amended by striking out "under this Rule".

(3) Rule 50.02 of the Regulation is amended by adding the following subrule:

(3) In addition to the pre-trial conference required to be held under this rule, a judge may at any time, on his or her own initiative or at a party's request, direct that a pre-trial conference be held before a judge or case management master.

13. Rule 50.03 of the Regulation is revoked and the following substituted:

PRE-TRIAL CONFERENCES FOR APPLICATIONS

50.03 In an application, a judge may at any time, on his or her own initiative or at a party's request, direct that a pre-trial conference be held before a judge or case management master.

14. Rule 50.05 of the Regulation is amended by adding the following subrule:

Duty of Lawyers

(3) Every lawyer attending the pre-trial conference shall ensure that he or she has the authority to deal with the matters referred to in rule 50.06 and that he or she is fully acquainted with the facts and legal issues in the proceeding.

15. Clause 50.07 (1) (b) of the Regulation is revoked and the following substituted:

(b) order a case conference under rule 50.13 if it is impractical to establish a timetable; and

16. Rule 50 of the Regulation is amended by adding the following rule:

CASE CONFERENCES FOR ACTIONS AND APPLICATIONS

50.13 (1) A judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or case management master.

Fr

Attendance

(2) The lawyers for the parties shall appear at the case conference and, unless the judge or case management master orders otherwise, the parties shall participate,

(a) by personal attendance; or

(b) under rule 1.08 (telephone and video conferences), if personal attendance would require undue amounts of travel time or expense.

(3) A party who requires another person's approval before agreeing to a settlement shall, before the case conference, arrange to have ready telephone access to the other person throughout the case conference, whether it takes place during or after regular business hours.

(4) Every lawyer attending the case conference shall ensure that he or she has the authority to deal with the matters referred to in subrule (5) and that he or she is fully acquainted with the facts and legal issues in the proceeding.

Matters to be Dealt With

(5) At the case conference, the judge or case management master may,

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable.

Powers

(6) At the case conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,

(a) make a procedural order;

(b) convene a pre-trial conference;

(c) give directions; and

(d) in the case of a judge,

(i) make an order for interlocutory relief, or

(ii) convene a hearing.

Fr

17. Subrule 53.03 (1) of the Regulation is amended by striking out "not less than 90 days before the pre-trial conference required under Rule 50" and substituting "not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2)".

18. Clause 58.05 (1) (b) of the Regulation is amended by striking out "a court reporter" and substituting "an authorized court transcriptionist".

19. Clause 60.19 (2) (b) of the Regulation is amended by striking out "court reporter" and substituting "authorized court transcriptionist".

20. Subrule 61.05 (7) of the Regulation is amended by striking out "the court reporter" and substituting "the authorized court transcriptionist".

21. (1) Subclause 61.09 (3) (a) (iv) of the Regulation is amended by striking out "the court reporter" and substituting "the authorized court transcriptionist".

(2) Subclause 61.09 (3) (b) (iv) of the Regulation is amended by striking out "the court reporter" and substituting "the authorized court transcriptionist".

22. (1) Subrule 62.02 (1) of the Regulation is amended by striking out "the Act" and substituting "the *Courts of Justice Act*".

(2) Subrules 62.02 (2) and (3) of the Regulation are revoked and the following substituted:

Motion in Writing

(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers.

Notice of Motion

(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifica Fr the notice of motion for leave.

(3) Subrules 62.02 (5), (6), (6.1) and (6.2) of the Regulation are revoked and the following substituted:

Procedures

(5) Subrules 61.03.1 (4) to (19) (procedure on motion for leave to appeal) apply, with the following and any other necessary modifications, to the motion for leave to appeal:

1. References in the subrules to the Court of Appeal shall be read as references to the Divisional Court.

2. For the purposes of subrule 61.03.1 (6), only one copy of each of the motion record, factum, any transcripts and any book of authorities is required to be filed.

3. For the purposes of subrule 61.03.1 (10), only one copy of each of the factum, any motion record and any book of authorities is required to be filed.

23. Rule 77.08 of the Regulation is revoked and the following substituted:

CASE CONFERENCE

77.08 A judge or case management master may at any time, on his or her own initiative or at a party's request, convene a case conference under rule 50.13.

24. (1) The Table of Forms to the Regulation is amended by striking out,

14A	**Statement of Claim (General)**	**July 1, 2007**
14B	**Statement of Claim (Mortgage Action — Foreclosure)**	**July 1, 2007**
14C	**Notice of Action**	**July 1, 2007**

and substituting the following:

Fr

14A	Statement of Claim (General)	June 9, 2014

14B	Statement of Claim (Mortgage Action — Foreclosure)	June 9, 2014
14C	Notice of Action	June 9, 2014

(2) The Table of Forms to the Regulation is amended by striking out the following:

48C.1	**Status Notice: Action Not on a Trial List**	**July 30, 2009**
48C.2	**Status Notice: Action Struck from Trial List**	**November 1, 2008**

. . . . .

48E	**Notice that Action will be Dismissed**	**July 30, 2009**
48F	**Order Dismissing Action as Abandoned**	**July 30, 2009**

25. Item 22 of Part II of Tariff A to the Regulation is amended by striking out "court reporter" and substituting "authorized court transcriptionist".

Commencement

26. (1) Subject to subsection (2), this Regulation comes into force on the later of January 1, 2015 and the day it is filed.

(2) Sections 4, 9, 18, 19, 20, 21 and 25 and this section come into force on the day this Regulation is filed.

Fr

Civil Rules Committee:
le Comité des règles en matière civile :

John Kromkamp
Senior Legal Officer / Avocat Principal
Court of Appeal for Ontario / Cour d'Appel de l'Ontario

Date made: July 23, 2014.
Pris le : 23 juillet 2014.

I approve this Regulation.
J'approuve le présent règlement.

La procureure générale,

Madeleine Meilleur
Attorney General

Date approved: August 14, 2014.
Approuvé le : 14 août 2014.

Fr

RULE 77.08 IN 2013 PRIOR TO REG 170/14

(see: https://www.canlii.org/en/on/laws/regu/rro-1990-reg-194/102968/rro-1990-reg-194.html#versions)

CASE CONFERENCE

How Convened

77.08 (1) A judge or case management master may at any time convene a case conference, on his or her own initiative or at a party's request. O. Reg. 438/08, s. 64.

Attendance

(2) The judge or case management master may direct that the parties, or a representative of the parties responsible for making decisions regarding the proceeding and instructing the lawyer, attend the conference personally or be available by telephone. O. Reg. 438/08, s. 64.

Matters to be Dealt With

(3) At the conference, the judge or case management master may,

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable. O. Reg. 438/08, s. 64.

Lawyers

(4) The lawyers attending the conference shall have the authority to deal with the matters referred to in subrule (3) and shall be fully acquainted with the facts and legal issues in the proceeding. O. Reg. 438/08, s. 64.

Powers

(5) At the conference, the judge or case management master may, if notice has been given and it is appropriate to do so or on consent of the parties,

(a) make a procedural order;

(b) convene a pre-trial conference;

(c) give directions; and

(d) in the case of a judge,

(i) make an order for interlocutory relief, or

(i) convene a hearing. O. Reg. 438/08, s. 64.

TRANSITION

Definition

77.09 (1) In this rule,

"former case management rules" means one or both of Rule 77 and Rule 78, as they read immediately before January 1, 2010. O. Reg. 438/08, s. 64.

Proceedings Under Former Case Management Rules

(2) Despite anything to the contrary in this Rule, every proceeding to which the former case management rules applied immediately before January 1, 2010 shall, on and after that day, continue under this Rule. O. Reg. 438/08, s. 64.

Power to Make Orders, Give Directions

(3) A judge or case management master may make orders or give directions that are necessary to address any procedural issues that arise in a proceeding as a result of the transition from the application of the former case management rules to the proceeding to the application of this Rule. O. Reg. 438/08, s. 64.

Existing Orders, Directions, Timetables

(4) All orders, directions and timetables in a proceeding described in subrule (2) that are in force immediately before January 1, 2010 shall remain in force on and after that day, unless a judge or case management master orders otherwise. O. Reg. 438/08, s. 64.

RULE 78 Revoked: R.R.O. 1990, Reg. 194, r. 78.14 (as amended by O. Reg. 198/05, s. 9; O. Reg. 438/05, s. 65).

R.R.O. 1990, TABLE OF FORMS

TABLE OF FORMS